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PROHIBITION OF ANTI-COMPETITIVE PRACTICES IN THE REGULATED PUBLIC UTILITIES UNDER THE RWANDAN LAW

Thesis submitted to the School of Law in partial fulfillment of the requirements for the award of Master's Degree in Business Law (L.L.M)

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DECLARATION

I, Augustin KARAMUKA, solemnly declare that, to the best of my knowledge, the research work presented in this thesis is original. Where the work of other individuals was consulted, references were made and indicated in the bibliography. It has never been submitted anywhere for any award in any University.

DEDICATION

To my Heavenly Almighty God;

To my Lovely wife Dr. Grace Mutembayire, my daughters Ishimwe K. Roxana & Inkindi K. Laurita, my son Karamuka David Roy, my mother and my sisters.

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Great thanks to all those who, directly or indirectly contributed to the success of this thesis. May God continue to protect and bless them.

ACCRONYMS AND ABREVIATIONS

CCK : Communications Commission of Kenya

EAC : East Africa Community

EACO : East African Communications Organization

EALA : East African Legislative Assembly

EREA : Energy Regulators Association for East Africa

EWSA : Energy, Water and Sanitation Authority

Ibidem : In the same place

ICT : Information, Communication and Technology

Idem : Same author, same book, different page

IGTVS : International Gateway Traffic Verification System

ISP : Internet Service Provider

ITU : International Telecommunications Union

MoU : Memorandum of Understanding

No : Number

O.G : Official Gazette

Op.cit : *Opere citato*(in the work cited)

QoS : Quality of Service

P : Page

RURA : Rwanda Utilities Regulatory Authority

SMS : Short Message Service

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GENERAL INTRODUCTION

I. Presentation of the topic

In any economic regulation initiative, creation of an enabling environment in which enterprises can operate is one of the major concerns of the Government. Along with the Government effort to build a competitive climate of work, firms tend generally to behave independently in a way that they result sometimes on anti-competitive practices or other market failures and impede development of competition.

Although this independent decision making by operators promote efficient allocation of society's scarce resources, increase consumer welfare, and gives rise to dynamic efficiency in the form of innovation, technological change, and progress in the economy as a whole[1], intervention of an empowered regulatory Authority is with great importance. In public governance indeed, this concept of regulation is an important aspect in which standards and rules are set to guide the operation of private business, promoting competition and guarantying consumer welfare.

Since in a liberalized economy like in Rwanda, anti-competitive practices and other undesirable business practices can emerge and act as a hindrance to development and economic growth[2], reasons to regulate the market and prohibit such behaviours are justified.

A part from the need of maintaining the established balance between fair competition and consumer protection, another reason to regulate such a market is motivated by the fact that prohibiting anti-competitive practices in the regulated public sectors attracts most of investors that the sectors need completion parameters to accomplish their objective.

Anti-competitive practices in any form of existence are to be eradicated. They can present under the form of anti-competitive agreements, abuse of dominant position, and anti-competitive

[1] S. NKELEBE, *The Role of Competition Policy and Law in Economic Development and Consumer*, Fair Competition Commission, Tanzania, 2012, p.4

[2] Ministry of Trade and Industry**,** *Rwanda Competition and Consumer Protection Policy*, Kigali, 2010, p.3

mergers and acquisitions or concentrations[3]. Therefore, a fundamental premise of business practices in that economic activity requires good rules that are transparent and accessible to all.

It is in this framework that Rwanda has put in place in 2010 a policy on competition and consumer protection[4]. To implement this policy, laws have been enacted among them the Law nº 36/2012 of 21/09/2012 relating to competition and consumer protection[5].

In the regulated public utilities, the Law nº 09/2013 of 01/2013 establishing Rwanda Utilities Regulatory Authority (RURA) and determining its mission, powers organization and functioning has also been put in place[6]. Regulated public utilities are the following: ICTs namely telecommunications, information technology, broadcasting and converging electronic technologies including the internet and any other audiovisual information and communication technology; postal services; renewable (or energy that comes from natural resources and cannot be exhausted) [7]and non-renewable energy[8], industrial gases , pipelines and storage facilities ; water; sanitation; transportation of persons and goods; and other public utilities, if considered necessary[9].

The Regulatory Authority has been empowered to regulate the market and find responses to all forms of Market failures using the regulatory tools, including the law establishing it. In effect, the Law prohibits anti-competitive practices in the regulated utilities[10].

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[3] S. NKELEBE, *Op.cit.*, p.9.

[4]The policy has been published by the Ministry of Trade and Industry in July 2010.

[5] *O.G* nº 46 of 12/11/2012.

[6] *O.G* nº 14 bis of 08/04/2013.

[7]X, What Does Renewable Energy Mean?, http://www.ask.com/question/what-does-renewable-energy-mean, accessed on 22 May, 2014.

[8] Further to article 2 of the Law nº 21/2011 of 23/06/2011 governing electricity in Rwanda, renewable energies are defined as inexhaustible natural power source including solar, wind, water, geothermal, biomass, etc. Non renewable energies do not come from natural resources and are exhausted such as hydropower energy.

[9] Article 2 of the Law nº 09/2013 of 01/03/2013 establishing Rwanda Utilities Regulatory Authority.

[10] Article 43 of the same Law.

However, regulating such a broad market of goods and services on one hand and exercising powers towards stronger and empowered operators in business on the other hand is not an easy issue. Thus, the role of the regulatory Authority has to be significant to find solutions to all market failures and take appropriate measures to prohibit anti-competitive practices in the regulated utilities. Hence, building effective regulatory structures is not simply an issue of the technical design of the most appropriate regulatory instruments; it is also concerned with the enforcement of existing policy and law. Our research shows how the Regulatory Authority plays the leading role in designing and enforcing rules governing the regulated utilities**.**

After addressing powers the regulatory authority has over utilities such as those related to investigating and terminating anti-competitive practices, the researcher seeks to understand how the Regulatory Authority enforces laws and regulations in the regulated utilities and how sanctions may be imposed in case of violation of such laws and regulations. Considering also the legal issues involved in prohibition of anti competitive practices in the regulated public utilities to sustain an effective regulation and attract investment in the regulated sectors, further projections for Rwanda to improve competition within the EAC region are necessary to be identified.

II. Choice and interest of the topic

Anti-competitive practices have been an issue to prohibit in the regulated public utilities so as to control efficiently the market and promote investment within the sectors.

In fact, the choice of the topic "Prohibition of anti-competitive practices in the regulated public utilities under the Rwandan Law" was motivated by the fact that a fair competition is an essential condition to have an effective and sustainable regulation industry.

Therefore, a good policy as well as a legal and regulatory framework prohibiting anti-competitive practices is appropriate tools to do so but enforcement measures are also quite important.

In addition, inspections conducted to the operators together with administrative measures and sanctions have to play their role to efficiently prohibit anti-competitive practices.

III. Research questions

Anti competitive behaviour in the regulated public utilities present obstacles in the regulated public utilities as they impede development of competition and investment by operators.

In this framework, a national regulatory authority has been vested with powers to prohibit such practices that are revealed in the competition of regulated sectors.

In as far as anti competitive practices in the regulated public utilities are concerned; some questions are formulated as follows:

a) At which extend anti-competitive practices in the regulated services are related to?

b) What are the appropriate measures taken to efficiently prohibit anti-competitive practices in the regulated public utilities in Rwanda?

c) How can such measures be harmonized at the EAC level to prohibit such practices and promote investment in the region towards regulated sectors?

IV. Hypotheses

The regulation of public utilities has as an imperative objective of promoting services provided by operators that are in competition.

If these services are not well regulated, there would be a risk of unfair competition by potential service providers of regulated sectors. Unfair competition is a term applied to all dishonest or fraudulent rivalry in trade and commerce[11] and should be avoided for the major reason of not

[11] P. BIZIMANA, *The Legal Consideration of Comparative Advertisement in Rwandan Law*, Kigali, 2012, p.21, unpublished.

deceiving the public[12]. With effective regulation, there will be promotion of fair competition and people will enjoy economies of scale with national and foreign competitive expansion as well as consumer protection.

However, regulating public utilities services requires having a policy and adequate legal and regulatory tools to prohibit all forms of anti-competitive practices.

In that sense, we think that prohibiting anti-competitive practices through an effective regulation would not be totally achieved if strong enforcement measures are not taken. In this regards, legal and regulatory framework set for this purpose would be extended by enforcement measures in the EAC member states.

V. Research objectives

In treating this subject, we hope to achieve the following objectives:

- identify different possibilities of anti-competitive practices that can affect normal conditions in the regulated public services,
- identify the efficiency, effectiveness and applicability of the authority in charge of regulation of public utilities in prohibiting anti-competitive practices,
- showing and justify the need of harmonization of public utilities within the EAC member states.

VI. Techniques and research methods

To successfully complete our study, we have opted to use some techniques and methods of work.

Concerning techniques, the documentary system helped us along with our research (use of the documents, books, articles and journals, revues, archives,..)

[12] *Ibidem.*

Also, the interview conducted to some service providers on cases related to anti-competitive practices helped to enrich this work.

Concerning the methods, the exegetical method has been used to make an assessment of relevant legislations from which anti-competitive practices have constituted a serious problem in the regulated public utilities and how to overcome these practices.

VII. Delimitation of the subject and subdivision of the work

Undertake such a discussion on this subject requires making an analysis of the law governing the regulation of public utilities in Rwanda. Anti- competitive practices are seen as branch of competition law under the private law and the practices constitute sometimes serious barriers to an effective regulation, banning ipso facto the required fair competition in the regulated services.

The main focus is oriented to Rwanda that instituted a national regulatory authority with mandate to control several utilities at once over the region.

This work is divided into three chapters with the general introduction, conclusion and recommendations. The first chapter deals with anti- competitive practices in the regulated public utilities while the second chapter addresses powers and measures taken by the Regulatory Authority to prohibit anti-competitive practices in the regulated public utilities. The third chapter concerns the need of harmonization within the EAC region to combat anti-competitive practices in the regulated services.

CHAPTER I. ANTI- COMPETITIVE PRACTICES IN THE REGULATED PUBLIC UTILITIES

This chapter aims at outlining the relationship between effective regulation and competition among service providers concerned by public utilities. When service providers are processing and offering goods and services, external factors such as anti-competitive practices occur to affect the market economy and impede the economic development as well. These practices are anti-competitive agreements, abuse of dominance and anti-competitive mergers and acquisitions[13].

In the regulated public utilities, any specified type of anti-competitive practice can happen with the aim to prevent or restrict the competition in a given public utility sector operating in Rwanda[14].

However, the Regulatory Authority shall be in charge of supervision and regulation of these anti-competitive practices[15].

I.1. GENERAL CONSIDERATIONS ON EFFECTIVE REGULATION AND COMPETITION

After addressing the results of an effective regulation and competition such as economic growth, consumer protection, social welfare and good governance, anti-competitive practices that can affect regulated services will be developed for a better understanding of the importance of their prohibition in these services.

[13] S. NKELEBE, *op.cit,* p.9

[14] See Article 43, paragraph one of the Law establishing the Regulatory Authority.

[15] *Ibidem.*

I.1.1 Effective regulation, competition and their benefits

In the regulated public utilities, there are reasons for ensuring an effective regulation. These reasons are easily understood by the fact that regulation has among other mission to provide economic incentives that promote investment and improve sector performance and control market power with more services, better quality, better prices for customers and lower prices. Indeed, an effective regulation is the one that is credible, legitimate and transparent in a way that it attracts fair business climate among competitors[16].

Firstly, investors must be confident that the regulatory process is credible and it will honor its obligations and these obligations are met in a timely- cost-effective manner. Secondly, consumers must be convinced that the regulatory process will protect them from monopoly powers whether from high prices or poor service or both**.** Thirdly, both the investors, consumers and the other authorities must know and understand the "terms of the deal"[17].

In the world market economy, a great stimulant of an effective regulation and development is competition but the latter must be conducted in a fair manner. Introducing therefore competition into the public utility industries leads to an enhanced efficiency and greater innovation as well as benefits for consumers[18]. Thus, competition in the market economy is a driving force of innovation in the economy while the opium of innovation is monopoly in the market[19]. In addition, effective regulation achieves the social welfare goals set down by the government for the regulatory authority.

In developing countries like Rwanda, the social welfare objectives of regulation are likely to be not simply concerned with the pursuit of economic efficiency but with wider goals to promote

[16] I. MUHIZI, "Regulation and Strategies", *workshop*, Kigali, 2013, p.2.

[17] *Ibidem.*

[18] Liberalisation and competition intervention in regulated sectors, Restructuring Public Utilities for Competition, Seehttp://www.oecd.org/regreform/sectors/restructuringpublicutilitiesforcompetition.htm**,** *accessed* on 14/04/2014

[19] S. NKELEBE, *Op.cit*, p.22

sustainable development and poverty reduction[20]. Effective regulation achieves the social welfare goals at minimum economic costs.

Another important aspect of an effective regulation is good governance. A well-functioning regulatory system is one that balances accountability, transparency, consistency and independency. In fact, inconsistent regulatory decisions undermine public confidence in a regulatory system and leads to uncertainty for investors, which raise the cost of capital and may seriously damage the willingness to invest.[21] Thus, the capacity of the state to provide strong regulatory institutions will be an important determinant of how well markets perform[22]. An economy with a developed institutional capacity is more likely to be able to design and implement effective regulation, which should contribute to improved economic growth.[23]

I.1.2 Institutional framework for the regulated public utilities

It has been previously mentioned that competition is a key driver in the well functioning of the regulated public utilities sectors.

As Public Utilities can be understood as all natural persons, enterprises or organizations such as companies which provide the regulated services in the market[24], each public utility under the Regulatory Authority's control plays therefore an important role in bringing the economic development to the country and to the improved welfare of the populations. However, such an economic development, investment, social welfare and consumer protection cannot happen in the absence of clear policy and laws that allow fair competition among service providers. Indeed, the first task of government is to create an organizational framework of the economy that ensures effective and fair competition, which means the possibility of market access. This framework seeks to encourage competitive structures that are the condition for progress, and establish rules governing the relationship between economic subjects. Competition plays therefore its role of

[20] J. HUSSEIN &Al., *The Impact of Regulation on Economic Growth in Developing Countries: a Cross-Country* A*nalysis***,** University of Bradford, UK, Final Version, 2006, p.6.
[21] *Ibidem.*

[22] *Ibidem.*

[23] *Ibidem.*

[24] RURA, "The Frequently Asked Questions(FAQ*)",* available at www.rura.rw, accessed 15/04/2014.

authorizing and regulating the economy.[25] Arguing on the importance of promoting a fair competition, certain academicians say that competition policy and laws are the economic constitution of a country[26]. In this framework, the Law no 09/2013 of 01/03/2013 establishing Rwanda Utilities Regulatory Authority(RURA) and determining its mission, powers, organization and functioning has been enacted to promote fair competition in Rwanda. Essentially, the role of the Regulatory Authority in ensuring effective regulation and promoting competition in the regulated public utilities is the following[27]:

- Licensing new entrants in the regulated sectors market,
- Providing and enforcing guidelines and regulation to implement the national policy,
- Restraining the power of dominant suppliers,
- Enforce the rule of infrastructure sharing and networks interconnection among licensed operators(or licensees) for network utilities,
- Designing incentives required to attract private investors.

It is from these reasons that the Regulatory Authority as an independent Multi sectoral Regulator, aims essentially at improving quality of service, promoting a level playing field in utility service provision and contributing to the development of regulated sectors by fostering a conducive environment for investments[28]. Regulatory activities have to be achieved to facilitate access to utility services in the regulated sectors through an enabling regulatory environment as a catalyst for the Rwanda's socio-economic development[29].

It is from this background that the Regulatory Authority has been established specifically for the market regulation, which means the Government intervention in the market place in a market economy[30].

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[25] A .M.NGAGI, *Competition Law and Consumer Protection*, LL.M Course Notes, 2012, p.15, Unpublished.

[26] S. NKELEBE, *Op.cit.*, p. 23.

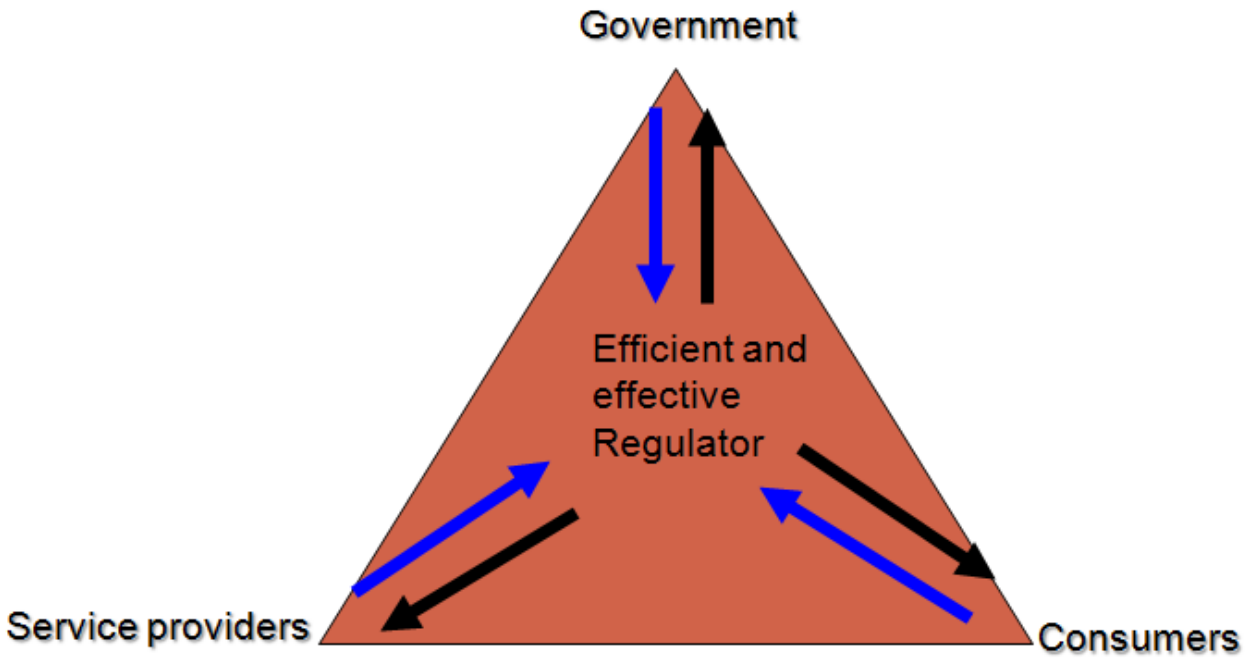
[28] See RURA, *Annual report 2011-212*, Kigali, p.1.

[29] *Ibidem.*

[30] RURA, " The Frequently Asked Questions*"*, available at www.rura.rw,accessed 16/04/2014.

I.1.3 Relationship between stakeholders in the regulatory system

In their daily activities, governments, service providers and consumers are always in a relationship. The Regulatory Authority acts as umpire to mitigate forces between these three key participants in the market. The attributes of the umpire are independent decision making, accountability, transparency and due process[31]. According to some Experts, the following diagram depicts the relationship[32]:



Looking at the above triangle, we may understand that each stakeholder in the relationship needs an efficient and effective regulator to achieve its objectives. The Government needs its policies effectively and quickly implemented while service providers are focusing on delivering goods and services with considerable interests. Also, interests of consumers are highly considered and protected.

[31] S.NKELEBE, *Op.cit*, 20

[32] *Idem*, p.21.

See also I. MUHIZI, *Op.cit*, p.13

Definitely, even though regulation is a fundamental function of the Government, it must be done with a high degree of responsibility and sense of purpose, in full knowledge that the principal beneficiary of regulation is the consumer, who the Government is there to protect in the first place[33].

1.1.4 Brief overview on the recent developments made in the regulated public utilities

Before treating matters related to anti-competitive practices in the regulated services, we considered important to brief our readers the developments made in the regulated sectors so as to know which impacts can be caused by the existence of the practices. The following are the investment and developments as shown recently in the regulated public utilities[34].

I.1.4.1. ICT Sector

In ICT sector, it is to be noted that now, an individual third telecom license has been granted to Airtel Rwanda Ltd while another license was granted to Rwanda Tower Ltd for provision of Network facilities. The Regulatory Authority has registered also success in operationalizing the International Gateway Traffic Verification System (IGTVS) Project which allows the Regulatory Authority to get real information on international traffic volume, reduce telecom fraud and monitor the international inbound voice quality of services. In addition, the Regulatory Authority deployed the Quality of Service (QoS) Monitoring Tools at the selected internet customers in Rwanda to measure the QoS of Broadband Internet provided by ISPs.

I.1.4.2. Energy Sector

In Energy Sector, the enactment of the Law No 21/2011 governing electricity in Rwanda[35] came to bridge the vacuum of the legal and regulatory framework that hampered the energy sector regulation for a long period. To this, outstanding efforts have been deployed to increase access to

[33] *Idem*, p.19

[34] RURA, *Annual report*, *Op.cit*.,p.5.

[35] See *O.G* nº Special of 12/07/2011.

electricity. The electricity generation industry registered a good number of small power projects which were mainly developed under the Public Private Partnership Framework and those projects generate considerable energy. Also, the long-awaited grid code was developed and other regulations that may attract investors in the sector have been developed such as Petroleum Storage Facilities Regulations, Liquefied Petroleum Gas Regulations as well as the Rwanda Renewable Energy Feed in Tariffs[36].

I.1.4.3. Water and Sanitation Sector

In Water & Sanitation sector, regular audits and inspections were conducted to water treatment facilities throughout the country. In a bid to address regulatory challenges relating to prevailing weak sanitation legal and regulatory framework, RURA introduced a number of regulatory tools to streamline the service delivery in the subsector; the guidelines on minimum service level for water service provision have been put in place along with guidelines on minimum requirement for solid waste management and on licensing side, considerable sanitation service providers have been licensed. Since there is no legal framework on water and sanitation sector, regulations on minimum requirements for water services as well as regulations on water and sanitation sub-sector have been availed to enable operators to perform their businesses.

I.1.4.4. Transport Sector

In the transport sector, there has been a significant increase in the number of companies and cooperatives which integrated the market. This is attributed to consistent sensitization programs conducted by the Regulatory Authority encouraging transport operators to work as companies or cooperatives. The Regulatory Authority also kept the momentum in checking whether licensed operators met the minimum standards in providing transport services. There are successes registered by efficiently monitoring and setting public transport tariffs due to fuel price fluctuations that occurred time to time in recent years. The transport sector in Rwanda is however suffering from lack of legal framework. Nevertheless, the Regulatory Authority has put in place regulations and guidelines to help regulate this industry[37]. Some concerns are still being

[36] These guidelines are available at the Regulatory Authority's website: www.rura.rw, accessed on 22 May 2014.

[37] Regulations and guidelines in transport sector also available at the Regulatory Authority's website.

observed in the air transport subsector regulation whereby there is so far no clear legal demarcation between players intervening in this sector and the Regulatory Authority. There should be consultations to tackle pending issues on this matter. Even though not exhaustive, these investments and many others contributed to attracting significant operators the regulated public utilities, thus increasing access and affordability of services.

I.2 ANTI-COMPETITIVE PRACTICES IN THE REGULATED PUBLIC UTILITIES

In order to ensure effective competition in each utility sector and protect users from abuses of monopoly positions over the market, regulation of a good number of public utilities has been given to the Regulatory Authority. Indeed, the regulator's main mission consists of protecting users and operators interests by taking measures likely to guarantee effective, sound and fair competition in the regulated sectors within the framework of applicable laws and regulations[38].

However, while fulfilling its daily functions, hindrance of anti-competitive practices may come and disturb the regulated market economy. It is from this reason that the Regulator has been vested powers over all regulated public utilities to promote competition and consequently to eradicate anti-competitive practices. Obviously, some sectors such as ICT and Energy are governed by specific laws while other sectors are regulated using the Law establishing the Regulatory Authority and various enacted regulations. In general, anti-competitive practices that can affect the regulated business are anti-competitive agreements, abuse of dominance and anti-competitive mergers and acquisitions.

I.2.1 Anti-competitive agreements

Agreements means a dialogue between enterprises with autonomy of decision in order to obtain a gain that is not the result of natural play of supply and demand, and thus operates directly or indirectly increase or artificially depressed the price of commodities or goods or on public or

[38] See article 4(4) of the Law establishing the Regulatory Authority.

private[39]. An agreement is therefore anti-competitive if it is deemed to unfairly distort free and effective competition in markets, such as collusion, restrictive trading agreements, predatory pricing, and markets allocation/customer allocation.[40] These agreements can also include the following:

- Price-fixing: occur when competing businesses make an agreement that has the purpose or effect of fixing, controlling or maintaining the price of goods or services.

- Collective boycott: concerted refusal by a group of competitors to deal with one or more customers or supplier, or with competitor who is not part of the club.

- Bid ringing: is where two or more competitors agree not to compete with each other for particular tenders, allowing one of the participants in the agreement to win the tender.

- Output restrictions: can occur in the form of production or sales quota arrangements which involve an agreement between competitors to limit the volume of particular goods or services available on the market. They have the effect of inflating prices in the market.

- Market allocation or sharing: where a bunch of players/operators in the market divide the market among themselves which can be territorial or based on other aspects such as customers as business and individual.

Though the list is not exhaustive, anti-competitive agreements may further include import cartels, tie-in-arrangements, exclusive dealing arrangements, and resale price maintenance.[41] In Rwanda, anti-competitive agreements can apply in the regulated public utilities. In fact, according to Article 43 establishing the Regulatory Authority, anti-competitive practices are either any agreement by providers of public utility services, decisions by associations of public utility services

[39] A. NGAGI, *Op.cit*, p.16, unpublished.

[40] S.NKELEBE, *Op.cit*, p.9

[41] *Idem*, p. 11.

providers, or concerted practices which aim to prevent or to restrict the competition in a given public utility sector operating in the country. With regards to this provision, anti-competitive practice will be considered as any agreements, decisions or practices that apply on the following situation:

"1º directly or indirectly determine purchasing or selling prices or any other direct or indirect trading agreement;

2º determine maximum tariffs or control markets or technical development;

3º control the selling of shares, stock markets or sources of suppliers;

4º apply different conditions to equivalent transactions with other providers of public utilities, hence placing those providers at a competitive disadvantage;

5º includes in any agreement additional obligations which have no connection with the subject matter of such agreements."

In ICT sector and according to the Law no 44/2011 of 30/11/2001 governing telecommunications,[42] agreements for the sharing of facilities must be negotiated directly between telecommunications network and utility operators.

To this category of anti-competitive practices, the Regulatory Board must determine the agreement terms in the following manner:[43]

1° request each party to present its views either in person or in writing;

2° respect the interests of both parties when reaching a decision;

3° apply similar decisions to similar situations without discrimination between telecommunications operators.

In Energy Sector, liberalization and regulation of electricity is a principal objective of the Country with respect for the conditions of fair and loyal competition and for rights of users and

[42] See O.G nº 23 bis of 1/12/2001.

[43] See Article 48 of the Law nº 44/2011 of 30/11/2001 governing telecommunications in Rwanda.

operators.[44] In this spirit, Article 33, point 1 of Electricity Law, tariffs and tariff setting methodology must take it into account among others to be as transparent as possible, accommodate the need for system integrity and reflect justified incurred costs, by minimizing risks in the sector of electricity transmission business and by ensuring competition while avoiding subsidies to the grid users.

Though other regulated sectors do not have specific laws governing them, matters referred to anti-competitive agreements within them are detected and handled using regulations. However, the Ministerial Order nº 8/DC/04 of 07/06/2004 on additional and specific types of agreements, decisions, practices and codes of conduct considered to be anti-competitive or an abuse of a dominant position addresses the following agreements, decisions and practices to be anti-competitive and this apply for all regulated sectors[45]. According to Article 3 of this Ministerial Order, the following agreements, decisions, practices and codes of contact are anti-competitive:
(i) Refusal to make available to other authorised operators, within a reasonable period of time, technical information on essential installations and any relevant commercial information which they need to supply of the required office supplies ;
(ii) Use of information obtained from competitors for unfair competition purposes;
(iii) Agreement between two or more parties on conditions for submitting a competitive bid with a view of sharing the market at the detriment of other competitors ;
(iv) Measures which may harm the quality of services offered by competing operators ;
(v) Cross-subsidies of an anti-competitive nature ;
(vi) Putting together operations whose effect is among others :

- to noticeably restrain the possibilities for choice of suppliers and/or consumers ;
- to limit access to supply sources or to market opportunities ; or
- to create entry barriers by forbidding distributors in particular, from engaging in parallel importing.

[44] See Law nº 21/2011 of 23/06/2011 governing electricity in Rwanda, O.G nº Special of 12/07/2011

[45] Available at the Regulatory Authority's website, www.rura.rw, accesses on 23 May, 2014.

Anti-competitive agreements avoidance can be explained by frequent telecom operator requests to obtain a promotion knowing that the same promotion has been issued to another operator during that period. In such a case, the Regulator assume that the requester has used information obtained from its competitors, and it doesn't issue the foregoing promotion to the second operator. In addition, even though not applied on regulated public utilities, cases of anti-competitive agreements or cartels have been detected in market system. In Romania indeed, the courts have demonstrated their willingness and ability to review the interpretation of economic evidence adduced by the Court of Commerce in antitrust cases. In 2007, the Higher Court has quashed the Commercial Court' s infringement decision on cartel case in relation to the fine imposed on one of the alleged cartelists for the failure to prove its participation in the anti-competitive agreement. It was noted that there was failure to verify the plaintiff's argument that parallel price increases were motivated by objective economic factors rather than participation in the cartel. The Court also noted that the fact that market shares of the competitors remained stable or that the company newly acquired by the plaintiff has also increased its prices could not be viewed as proof of anti- competitive behavior in the absence of the plaintiff's adherence to an express or tacit agreement[46]. Even though the Higher Court decision does not contain the Court's own appreciation of the economic evidence adduced by the Commercial Court, it is noteworthy for the Court 's assessment of the credibility of the Commercial Court's finding based on the interpretation of that economic evidence.

I.2.2 Abuse of dominance

Abuse of a dominant position occurs when a dominant firm in a market, or a dominant group of firms, engages in conduct that is intended to eliminate or discipline a competitor or to deter future entry by new competitors, with the result that competition is prevented or lessened substantially.[47]

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[46] Marco Botta, Alexandr Svetlicinii, The Right of Fair Trial in Competition Law Proceedings, http://www.ascola-conference-2014.wz.uw.edu.pl/conference_papers/botta_svetlicinii.pdf, centre for antitrust and regulatory studies, acceseed on 15 May, 2014. See also ECJ case law , 5 March 2007, e- Competitions Bulletin March 2007, Art. N° 14009.

[47] Competition Bureau of Canada, "Abuse of dominance", http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00511.html, accessed on 17 May, 2014.

I.2.2.1 Notions on abuse of dominance

Dominance is the power to hinder effective competition. According to some imminent lawyers[48] indeed, it assumes that the considered enterprise occupies a prominent place in the market afforded to him including the importance of market share it holds in it and that of competing firm, possibly as per its status. The following three elements are needed to form dominance:

- A company or a group of companies able to occupy such a position,
- A contract likely to be dominated,
- Domination of this market (monopoly, legal monopoly, apparent concentration on economic power).

A dominant position is therefore a situation of a company that exerts a major influence, sometimes abusive, in the control of a corporation or of the market.[49] It is constituted by practices by a dominant firm in a market that extract excess profits from users and/or exclude potential competitors. Abuse of dominant position shall be considered as anti-competitive practice in the regulated public utilities in Rwanda and shall therefore be prohibited. In fact, the Regulatory Authority may designate any regulated service provider as the one which holds a dominant position in the market.[50]

I.2.2.2 Practices related to abuse of dominant position

According to the Law establishing the Regulatory Authority, any practices by one or more organizations having a dominant position in a public utility sector in Rwanda shall be prohibited if it amounts to an abuse of the dominant position.[51] Consequently, the following practices are related to abuse of dominant position:

[48] A. NGAGI, *Op.cit.*, p.20, unpublished.

[49] See Article 3, point 10 of the Law no 36/2012 of 21/09/2012 relating to competition and consumer protection, O.G n° 46 of 12/11/2012

[50] See Article 41, paragraph one of the Law establishing the Regulatory Authority.

[51] See article 44 of the Law establishing the Regulatory Authority.

1º to determine directly or indirectly unfair purchasing or selling prices or any other unfair trading conditions;
2º to limit markets or technical development and in a manner which adversely affects users;
3º to apply different conditions to similar trade agreements with other trading parties thereby placing them at a competitive disadvantage;
4 to terminate an established business practice or trading agreement without any valid reasons.

Dominant position shall be subject to the controls set out in the law relating to the concerned sector of public utility.[52]

In ICT matters for example, it is stated that public telecommunications operators requiring interconnection with dominant organizations are entitled to rely solely upon the reference interconnection offer and related requirements. Other facilities and services may be negotiated with the dominant organization on an individual basis. Subject to some measures to be taken, dominant organizations must modify their standard of interconnection offers to take into account commercial and technological changes and the introduction of new facilities and services. Not only that, the Regulatory Board must ensure that any differentials in charges, terms and conditions offered by a public telecommunications operator do not result in distortion of competition; and ensure that all dominant organizations operate a cost accounting system to enable them to identify the costs associated with interconnection[53].

In addition, the Ministerial Order no 8/DC/04 of 07/06/2004 on additional and specific types of agreements, decisions, practices and codes of conduct considered to be anti-competitive or an abuse of a dominant position addresses some agreements, decisions and practices that are anti-competitive and this apply to all regulated public utilities. Indeed, according to Article 4 of this Ministerial Order, the following practices constitute abuse of dominance in the regulated sectors:

(i) setting unreasonably or abnormally high prices;

[52] See article article 41, paragraph 2 of the Law establishing the Regulatory Authority

[53] See article 41 of the Law governing telecommunications in Rwanda

(ii) conditioning the conclusion of contracts on the acceptance, by the other party, of minimum services, or of additional services which, by their nature or in terms of usual business practices, are not related to the purpose of such contracts ;
(iii) refusing to sell, or to avail required requested access, without reasonable justification, as well as withholding product stocks held on the business premises or in any other place whether declared or not ;
(iv) terminating a business relationship on the sole grounds that the other party refuses to submit to unjustified commercial terms;
(v) to impose an obligation on a minimum resale price ;
(vi) to require a supplier or client not to have dealings with a competitor ;

(vii) to sell a product or service at a price lower than its cost price, where such practice has had, is having or may have, the effect of restricting competition in a market.

In all situations, abuse of dominance exists in the following situations:[54]

- By directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions(charging too much or too little- predatory pricing);

- By limiting production, markets or technical development(which makes easier few firms to enter the market);

- By applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at competitive disadvantages(price discrimination);

- By making the conclusion of contracts subject to acceptance by the other parties or supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contract (allow dominant firm 5to extend its dominance);

- Abuse of intellectual property monopoly.

[54] S.NKELEBE, *Op.cit.*, p.12

In sum, abuse of dominance conduct refers to the conduct of an enterprise that holds sufficient market power in a particular relevant market, such that it can operate independently of market forces and the competitive constraints imposed by its competitors. In keeping with the objective to promote free markets and the freedom of trade and business of enterprises and individuals, the law does not prohibit any enterprise from actually holding a position of dominance or having substantial market power. However, what is sought to be restricted by the law is the abuse of such market power or dominance, which would have a detrimental effect not only on competitors, but most importantly, the consumer.[55] That is why in Rwanda, practical cases have been shown in the following pages whereby big transport operators were sanctioned for the purposes of using brokers or increasing fixed tariffs, with the first objective of protecting consumers.[56]

In Romania again, there was a case to assess the establishing of a dominant position on the relevant market and verifying the "excessiveness" of the prices applied by that undertaking under the allegations of abuse of dominant position. Then, the producer of the chipboard products used in the manufacture of furniture has increased its prices up to 50% following an acquisition of a competitor that has led to the consolidation of the dominant position on the relevant market. The CC has sanctioned the undertaking for the abuse of dominant position in the form of applying "excessive prices" and imposed the fine in the amount of 3% of the undertaking's annual turnover.[57]

In Kenya, sanctioned unfair and abusive trading practices were evaluated at 2 cases in 2010, 1 in 2011 and 3 in 2012.[58] That is why we can confirm that it is true to say that it is not dominance or monopoly that competition law prohibits, but rather the abuse of that dominance by engaging in certain anti-competitive practices. Opportunity to gain greater market share and revenue is a key

[55] C. Shroff, "abuse of dominance", http://globalcompetitionreview.com/reviews/60/sections/chapters/2342/india-abuse-dominance, accessed on 15th May 2014.

[56] See Infra under Chapter 2 of this work.

[57] Judgment No. 3055 dated 09.06.2010, case 3147/2/2005.

[58] CCK Annual Report 2010-2011, p.66.

incentive to innovation, and competition law seeks to ensure that market share is gained or preserved through legitimate business practices[59].

I.2.3. Other possible anti-competitive practices in the regulated public utilities

Unlike other anti-competitive practices in the market, effective regulation can be harmed by agreements, decisions, practices, codes of conduct that are purely anti-competitive and by abuse of dominant position. Considering that investment in the regulated sectors is in considerable growth in Rwanda and in the region, the Regulatory Authority has to be with a vigilant eye to detect any other possible anti-competitive practice. With the developments made, regulated entities can need for example to merge with possibilities to behave anti-competitively. Therefore, without being exhaustive, mergers and acquisitions can harm regulated public utilities. Merger is a unification of companies and possibly, different service providers may have a need to merge. Merger applies to sufficient buying of shares in a company which amounts to have a say in policy formulation of a firm[60]. Anti-competitive mergers are a result of combining of two firms (usually when one purchases the other) to create a monopoly or dominant position[61]. According to the Article 295 of Law nº 07/2009 of 27/04/2009 relating to companies indeed, it is stated that: "Two or more companies may amalgamate[62] and continue as one company, which may be one of the amalgamating companies or may be a new company"[63].

Normally, competition regimes prohibit mergers and/or acquisitions of companies which create or strengthen a dominant position in the market. Mergers and acquisitions control refers to the procedure of reviewing mergers and acquisitions. It is a process when the parties are prevented from closing the deal until they have received merger clearance. The process is more effective in preventing anti-competitive concentrations since it is almost impossible to unravel a merger once

[59] ITU, Standardization Bureau, *Understanding Patents, Competition and Standardization in an Interconnected World,* Switzerland, Geneva, 2014. P.41.

[60] S.NKELEBE, *Op.cit,* p.18

[61] *Ibidem*

[62] Merger is synonym of amalgamation in Rwandan legal system.

[63] O.G nº 17 bis of 27/04/2009

it has been implemented for example because key employees have been made redundant, assets have been sold and information has been exchanged. Worldwide, nations have adopted a regime providing for merger control. Merger control regimes are adopted to prevent anti-competitive consequences of concentrations (as mergers/takeovers).[64]

Definitely, mergers and acquisitions may lead to a reduction in output and result in higher prices and thus in a welfare loss to consumers, that is why they should be attentively controlled. Most of the time, Special rules also apply to mergers involving credit institutions where there is a risk to the stability of the financial system.[65]

To sum up, anti-competitive practices are barriers to the economic development while public utility services are at the central point of investment and trade improvement. It is therefore essential that a stronger and effective Regulator be there to arbitrate all unnecessary situations that may occur in regulatory industry. It is in this framework that the following Chapter deals with powers of the Regulatory Authority and measures it can take, if necessary, to prohibit anti-competitive practices.

[64] *Idem*. p.19

[65] William Fry, the Irish merger control regime, available at www.**will**iamfry.ie/.../LEGAL--5098070-v1-, *accessed on 15 May 2014.*

CHAPTER II. POWERS OF THE REGULATORY AUTHORITY AND MEASURES TAKEN TO PROHIBIT ANTI-COMPETITIVE PRACTICES IN THE REGULATED SERVICES

In exploring this page on powers and measures taken by the Regulatory Authority in prohibiting anti-competitive practices, we emphasize on its mandate as quite substantial in the regulatory industry. Subsequently, it becomes important to discuss on powers the Regulatory Authority has been vested to achieve its functions. This chapter also deals with measures taken by the Regulatory Authority to efficiently prohibit anti-competitive practices as one of the challengeable legal issues in regulatory system.

II.1 POWERS OF THE REGULATORY AUTHORITY OVER THE REGULATED UTILITIES

It has been said above that the Regulatory Authority has among other missions to promote competition among service providers[66] while implementing the government policy. Thus, it has full and exclusive authority in tariff setting, issuing licenses to market participants, monitoring licensed entities and penalizing them in case of non-compliance and establishing quality of service standards.[67] Most of those powers are general because of their public interest character, but others have special considerations.[68]

II.1.1 General Powers of the Regulatory Authority

The Regulatory Authority has general powers over the regulated public services. These powers are provided by Article 6 of the Law establishing the Regulatory Authority.

[66] See article 4(4, 11) of the Law establishing the Regulatory Authority.

[67] G.GULEN&Al., *Improving Regulatory Agency Efficiency and Effectiveness,* USA, 2010, p.14.

[68] *Ibidem.*

II.1.1.1 Powers in issuing licenses

It has been outlined above that among other regulator's role in promoting competition, licensing new entrants in the regulated sectors market is quite important.

The Regulatory Authority shall issue permits, authorizations and licenses required for regulated sectors, in accordance with the relevant governing laws and regulations[69] and shall monitor and ensure compliance by regulated network or service providers in line with their licenses, permits and concession obligations. In fact, issuing licenses to market participants operating in the regulated marketplace can be one of other functions of regulatory Authorities to evaluate even their performance based on how well they meet their responsibilities. Indeed, all licensees are entitled to perform the activities related to their scope of application. If the Licensee doesn't perform its license's obligations, the Regulatory Authority can apply any measure given to him by the Law or Regulations. In the licensing powers indeed, the Regulatory Authority can take any decision that is related to granting, suspension and withdrawal of a license, authorization or permit[70]. Even though examples of sanctioned licensees due to the non license compliance are many, one of the convincing case is related to Comium Rwanda Ltd to which a license was withdrawn and revoked due to failure to start the implementation of its license obligations. Despite numerous enforcement letters issued by the Regulatory Authority's management and subsequent enforcement notice issued by the Regulatory Board on the 09th September 2010, Comium Rwanda Ltd explained wrongly that the non compliance was due to the global economic crisis and change of technology, something which would not be acceptable and convincing. A decision withdrawing and revoking the ISP license of Comium Rwanda Ltd was issued on 09June 2011[71]. Another similar case is related to the Board Decision issued to Star Africa Media Ltd on 09/07/2011 revoking its license[72] because it failed to implement its license

[69] See article 4(9) of the Law establishing the Regulatory Authority

[70] See article 20(3) of the same Law.

[71] See Board Decision no 10/Leg-RURA/2011 of 09 June, 2011 revoking the ISP and radio communication License of Comium Rwanda Ltd, available at the Regulatory Authority's website.

[72] Board Decision no 09/LEG-RURA/2011 revoking the ISP and radio communication license of Star Africa Media Ltd, available at the Regulatory Authority's website.

obligations despite also numerous enforcement letters issued by RURA's management and subsequent enforcement notice issued by the Regulatory Board on 09th September 2010.

II.1.1.2 Powers in setting tariffs and charges

Economic regulation aims at preventing or tackling market failure. This is achieved with rules that proscribe and punish market distorting behaviour and allow regulators to fix tariffs for regulated services, thus preventing service providers from taking advantage of natural monopolies[73].

In Rwanda, the Regulatory Authority shall carry out regular reviews of tariffs and charges required by providers of regulated services[74]. In making any decision, setting tariffs and charges or establishing the method of regulating such tariffs and charges, the Regulatory Authority shall take into account the following:[75]

1º the costs of producing and supplying the goods or services;
2º the return on assets in the regulated sector;
3º any relevant benchmarks including international benchmarks for prices, costs and return on assets in comparable sectors;
4º the fundamental elements for determination of tariffs;
5º the consumer's and the investor's interests;
6º the desire to promote competitive tariffs and attract more customers without distorting market growth and profitability;
7º the reason to establish maximum tariffs and charges and ways of carrying out regular reviews of tariffs and charges;
8º any other reasons specified in the relevant sector legislation.

[73] V.VIJAY, *Regulatory Management and Reform in India*, Background Paper for OECD, 2008, p.7.

[74] See Article 7 of the Law establishing the Regulatory Authority.

[75] *Ibidem*

An example can be given in the transport sector when the Regulatory Authority needs to fix tariffs and charges. In effect, with the help of transport operators, the Regulatory Authority collects information on all components of the cost of transport service for each of the regulated mode and the distances (in kilometers) of each of the routes used by public transport vehicles. A meeting between transport operators, passenger association representatives and RURA officials convenes to determine the average cost of transport per kilometer per mode[76].

After getting the unit cost of transport per mode, a certain profit margin of (10% in the last times) is added to get the fare per kilometer per mode of transport. It is from this fare per kilometer per mode that the fare per person per mode is determined and then published[77].

It should be noted that the fare that is fixed by RURA is a fare cap which implies that transport operators can slightly reduce the fare if they are able to operate below the calculated average cost of transport service. It is also noted that this system of fixing the transport fare allows the operators to compete on the quality of service offered to passengers since the operators operate on a fixed fare. It also encourages them to reduce their operating costs so as to maximize profits[78]. Also, the Regulatory Authority shall have the powers to determine at any time tariffs, charges related to networks interconnection or infrastructure shared by public utilities providers[79].

In as far as anti-competitive practices are concerned, regulatory supervision shall apply in particular to any agreements, decisions or practices which determine maximum tariffs or control markets or technical development[80]. Prior to setting tariff, and prices, there is a stakeholder consultation and concern on the market entry in order to eliminate any distortion in the use of choice of transport modes and promote consumers[81].

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[76] See FAQ, www.rura.rw, accessed on 25 May, 2015.

[77] *Ibidem.*

[78] *Ibidem.*

[79] See the article 20 of the Law establishing the Regulatory Authority.

[80] See article 43(2) of the Law establishing the Regulatory Authority.

[81] Sumatra, *Harmonization of Road Transport, Legal and Institutional Frameworks*, Tanzania, 2011, p.9.

II.1.1.3 Powers in requiring information

Powers to require any regulated public utility service operator to provide information about its activities has been given to the Regulatory Authority[82]. The information may include the following:

1° matters related to financial, technical scientific, marketing, commercial, file related to legal issues and products information, irrespective of their importance;

2° information which is possessed by the regulated service provider which can be accessed or easily obtained by it.

Failure to provide the information on time or providing wrong information shall be punishable by law[83].

Experiences borrowed from Ghana and Jamaica[84] have shown that accessing information is quite important for regulators. Indeed, regulatory capture is a more complex phenomenon which includes issues to do with access to information and knowledge, ethics, politics and power relations among government, regulatory bodies and the regulated industry rather than a narrow focus on material support[85]. Indeed, in every economic regulation industry, providing required information is one of the leading principles of the system. It helps to achieve the regulatory objectives which are in line with the need to create a shared commitment between government, business and other stakeholders to work together to reduce regulatory costs through simplification. Consequently, regulated service providers need to participate as full partners, providing accurate information on regulatory issues such as costs, benefits and other required and useful information.

[82] See Article 8 of the Law establishing the Regulatory Authority.

[83] *Ibidem*

[84] Like in Rwanda, Ghana and Jamaica are among few countries in the world own multi-sectoral regulatory bodies.

[85] D.O.PHILIP, *Regulation in a flux: The Development of Regulatory Institutions for Public Utilities in Ghana and Jamaica*, Jamaica, 2011, p.7

As we can see, the powers of the Regulatory Authorities are directly derived from their functions, which include the functions of enforcing market rules, licensing and fixing prices of access to the network. Economic regulators also perform risk management by using inspection and control to make sure that prudential ratios for financial institutions are being respected and avoid any rupture of service or ensure universal service provision[86].

II.1.2 Special Powers of the Regulatory Authority

Powers in inspection and enforcement have to be considered as special or particular powers as they may lead to another lever, which is a sanction or another serious measure to be taken by the regulator or any other relevant authority. Other important powers the Regulatory Authority has are powers in dispute resolution and settlements.

II.1.2.1 Powers in inspection and enforcement

The Regulatory Authority has powers to carry out investigations including inspections at service delivery sites of the regulated service providers in the purpose of ensuring compliance with their obligations[87]. For instance, while fulfilling its mission, the Regulator shall have powers to monitor activities and practices that are revealed in the competition of regulated sectors[88].

During that monitoring, RURA shall focus on the following:
1° promoting effective competition within each public utility sector in the interest of potential users of goods and services of each public utility;
2° investigating and terminating any anti-competitive practices;

[86]OECD, *Designing Independent and Accountable Regulatory Authorities for High Quality Regulation*, U.K, 2005, p.35.

[87] See Article 6(1) of the Law establishing the Regulatory Authority.

[88] Article 42 of the Law establishing the Regulatory Authority.

3° imposing sanctions in case of anti-competitive practices;
4° informing the Supervising Organ of RURA in writing and with supporting evidence of any anti-competitive practices;
5° notifying the Supervising Organ of RURA of any measures taken and sanctions applied[89].

It is therefore understood that in exercising the foregoing powers, if any agreement, decisions or concerted practices with the aim to prevent or to restrict the competition in a given public utility sector operating in the country happen, the regulator will look for an appropriate action to take. Such powers in inspection and enforcement are emphasized by judicial police powers[90]. In fact, it is stated that some employees of the Regulatory Authority shall be vested with the judicial police powers as well as powers to powers to represent it before courts. However, the judicial and representation powers vested to some officials from the Regulatory Authority are given to them upon enactment of a Ministerial Order issued by the Minister of Justice.

In Tanzania for example, the Transport regulatory Authority(Sumatra) enforces the laws and ensures compliance with the regulations governing service provision and this is done via inspection, licensing and permitting procedures with follow-up enforcement (penalties and fines) either directly or through the police force[91].

In whatever case, the Regulatory Authority shall have access to any commercial premises of any natural person or legal entity, at any time, in accordance with the law, either with or without notice, to inspect and obtain any necessary information. In the regulated public utilities, powers of the Regulatory Authority are to be applied to promote competition in the businesses, protect consumers and to foster investment as well. The Regulatory Authority has in its mandate to ensure promotion among competitors and also be vigilant towards any practice that can be anti-competitive. Thus, powers in inspection and enforcement help in combating conducts or

[89] According to Article 11 of the Law establishing the Regulatory Authority, the Supervising Organ of the latter is the Prime Minister's Office.

[90] Article 9, paragraph one of the law establishing the Regulatory Authority.

[91] Sumatra Regulations, *Op.cit*, p.13

practices that are abusive. In such a way, natural persons and organizations may be refused a license for the reason that the Regulatory Board reasonably believes that competition can be adversely affected[92].

In Telecommunication matters for example[93], the Regulatory Board must ensure the following:

1° ensure that any differentials in charges, terms and conditions offered by a public telecommunications operator do not result in distortion of competition;

2° ensure that all public telecommunications operators apply the same charges terms and conditions to their own subsidiary or affiliated companies as they offer to other public telecommunications operators;

3° ensure that all dominant organizations operate a cost accounting system to enable them to identify the costs associated with interconnection;

4° ensure that users throughout the Republic benefit from the interconnection of networks and the stimulation of a competitive market;

5° assist in the resolution of disputes by conciliation between public telecommunications operators concerning actual or proposed interconnection agreements, at the request of one or both operators;

6° ensure that when providing copies of interconnection agreements to the public, no commercially sensitive information concerning the businesses of the public telecommunications operators, not including interconnection charges and general terms and other requirements, is disclosed.

If conciliation cannot be achieved by both parties, the Board will make a decision in accordance with the law governing telecommunication[94]. In this endeavour, the Regulatory Authority

[92] Article 8, point 3 of the law governing telecommunications.

[93] Article 41 of the Law governing Telecommunication.

[94] *Ibidem.*

confers rights and obligations on transacting parties and provides for due process to resolve disputes and obtain relief from anti-competitive practices.[95]

In the framework of inspection and enforcement also, the Presidential Order no 04/01 of 15/03/2004 determining specific duties of the Regulatory Board in telecommunication matters is in accordance with the aforementioned regulatory powers[96]. In effect, according to Article 3 of this Presidential Order, among other tasks the Regulatory Board shall perform in respect of monitoring and enforcing the obligations of natural persons and organisations undertaking telecommunications activities within, to or from the territory of the Republic is to monitor the behaviour of operators and of terminal equipment suppliers, in particular those designated as dominant organisations, with a view to preventing or halting anti-competitive activities and to better process and resolve complaints concerning anti-competitive behaviour in the sector.

Despite telecommunication matters, inspection and enforcement is also applied in other regulated sectors. But finally, powers of inspection are essential tools to fight anticompetitive practices. In particular, inspections are an important way to gather documentary and other evidence about alleged anticompetitive practices which is kept in business premises and/or non-business premises and thus detect infringements of competition law[97].

II.1.2.2 Powers in dispute resolution

It has been raised above that among other powers the Regulatory Authority has, one is related to the power to facilitate the settlement of disputes related to regulated services. A part from powers in inspection and enforcement, powers in dispute resolution is also an important regulatory power that merits a certain attention.

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[95] Hassan Q. & George L., *The effects of anti-competitive business practices on developing countries and their development prospects,* United Nations, UNCTAD, New York and Geneva, 2008, p.138.

[96] The Presidential Order is available on the Regulatory Authority's website: www.rura.rw

[97] European Competition Network, *Recommendation on investigative powers, enforcement measures and sanctions in the context of inspections and requests for information*, Sweden, Stockholm, 2014,p.2.

According to some authors indeed, the power of the Regulation Authorities to settle disputes between firms operating in the regulated sector, especially regarding network access, is quite new and more unusual than their powers to adopt general rules or to impose sanctions[98]. In fact, this power has not been given to all regulators, for example the financial regulators. In usual circumstances, this power given to the Regulator is similar to the judicial or the courts' function. It is therefore useful and a new step in Rwanda, that the legal and regulatory system has organised the control of this civil power to be also exercised by the Regulatory Authority. This dispute settlement power are quite natural, because the evolution of the regulatory systems has transformed the Regulators, usually administrative bodies, into a sort of court, with a strict due process, as a natural consequence of the power of sanction[99]. The reasons for giving to the Regulatory Authority civil powers are based on the efficiency of the concentration of power in the Regulator's hands, its technical competence to understand the dispute, its celerity to settle.

In most cases, the most important aspect is not really the end of the dispute, but the organisation of the access. This civil power is the core of the regulatory system, because a concrete access to the network in the regulated sectors such as telecommunications, energy, transports, etc., which is an essential facility, for every service provider , is the core of the economic regulation.

In Rwanda, powers on dispute resolution are provided to the Regulatory Authority[100]. Thus, the Regulatory Board shall take decisions on any disputes referred to it, and/or conciliate, upon request of parties in dispute[101]. In fact, 181 complaints in telecommunication sector were registered and handled in 2011. They were related to SIM swap related robbery, poor quality of service for mobile (poor signal, blocked calls, dropped calls, speech quality), noise and damages inflicted by power generators from different sites of MTN, disconnection, low speed of internet, etc. In response to these complaints, on 1st March 2012 RURA issued an enforcement notice to

[98] OECD, *Op.cit*, p.56.
[99] *Ibidem.*
[100] Article 47 of the Law establishing the Regulatory Authority
[101] Article 20(5,6) of the same Law.

MTN Rwanda Ltd for non compliance with its license obligations relating to quality of service[102].

In Water and Sanitation Sector, nineteen (19) complaints were received and handled. They were mainly related to water shortage, malfunctioning of water meters, and operators misleading information provided to the Regulatory Authority[103]. In Transport Sector, 366 complaints were received and handled. The complaints were related to the non-compliance with the tariff set by the Regulatory Authority, luggage losses, and poor customer care, non compliance to assigned routes, cutting the assigned route half way, and overcharging passengers during peak hours[104].

In Kenya, The Communication Commission of Kenya resolved consumer complaints and enquiries filed by consumers of ICT services and other stakeholders in order to improve customer service delivery and protect consumers. Thus, the Commission received a total of 475 complaints. Of these, 29 percent related to unauthorized subscriptions or charges. Mobile Number Portability (MNP) accounted for 19 percent, Service interruptions 10 percent, Billing 9 percent, and Quality of service – voice and data 8 percent. Other notable complaints were on Fraudulent Calls and SMS (4 percent), Service provision delays/failures/termination (6 percent) and criminal use of service or facilities (3 percent)[105].

In general, all the above regulatory powers can be attributed to one of the following categories[106]:

- Advisory power : power to give unbinding advice to line ministries or other agencies that are responsible for policy development and/or regulation of the industry on how to set the broad policies for and/or to regulate the industry;
- Supervisory power: power to monitor compliance with guidelines and standards, to sanction the regulated and to enforce sanctions to ensure compliance;

[102] RURA Annual Report, *Op.cit*, p.19.

[103] *Idem*, p.45

[104] *Idem*, p.53.

[105] CCK Annual Report 2011-2012, p.69.

[106] OECD, *Op.cit*, p.90.

- Licensing, pricing, administrative powers: power to issue and revoke licences, set prices, review and approve contracts between regulated companies;
- Adjudicatory powers: power to review regulations and decisions and to hear and resolve any disputes pertaining to the functioning of the regulated industry;
- Rule-making powers: power to create rules and regulations pertaining to the functioning of the regulated industry.

Thus, variety of these powers shows that unbundling, regulatory activities, monitoring and strengthening of end-user rights are complementary actions to enhance competition. Hence, they must be adapted to specific situations and their effect must be monitored to achieve the desired results[107]. Despite the above powers, the Regulatory Authority has also certain measures he can apply if necessary.

II.2 MEASURES TAKEN BY THE REGULATORY AUTHORITY

Within the applicable laws and regulations, the Regulatory Authority has among other missions to protect users and service providers by taking measures likely to guarantee effective, sound and fair competition in the regulated sectors. In exercising such powers, the Regulatory Authority takes at some extent, measures that are under its capacity. Thus, measures related to denunciation of inspected anti-competitive service providers and related measures will be analyzed in the next pages.

II.2.1 Denunciation and notice to anti-competitive service providers

In the previous pages, the role of the Regulatory Authority in investigation and enforcement has been considered even capital among others. In this spirit, any natural person or legal entity may submit a complaint to RURA to denounce an anti- competitive practice of one or more public utility providers[108]. Then, the Regulatory Authority must investigate the complaint filed to

[107] International Trade Centre, *A Guide For Developing Economy Exporters*, Geneva 10, Switzerland, 2012, P. 27.

[108] See Article 45 of the Law establishing the Regulatory Authority.

it and shall also give a written notice to the service provider of a public utility, requesting him or her to provide information relating to the complaint filed to it[109].

Article 46 of the Law establishing the Regulatory Authority specifies that the notice shall include the following:

1° the receipt of a complaint alleged being anti-competitive practice which it intends to investigate;
2° the nature of the complaint;
3° the reasons for suspicion of anti-competitive practice ;
4° the information required from the service provider in order to investigate the complaint;
5° to take provisional measures if it is necessary in order to remedy the anti- competitive practices.

The regulated organization shall provide the information accordingly within seven (7) working days of the receipt of the request by Regulatory Authority[110].

Concerning denunciation and notice to prohibit anti-competitive practices in the regulated public services[111], an example can be given on the contract between Internet Service Providers (ISPs) and Hotels that was revised because it contained abusive provisions. In fact, the Regulatory Authority took provisional measures to review the contract and the latter was discussed with all Internet Service Providers (ISPs) operating in Rwanda so that an agreed model can apply to all. All licensees operating in internet service provision such as MTN Rwanda, Broadband System Corporation (BSC), New Artel, ISPA Ltd, Altech Stream Rwanda Ltd, etc. have been notified to submit to the Regulatory Authority the contracts they had with hoteliers after an inspection

[109] *Ibidem.*

[110] Article 46 of the Law establishing the Regulatory Authority.

[111] As per article 46 referred above, denunciation and notice are disciplinary sanctions aiming at redressing the concerned service provider to its obligations with regards to consumers.

conducted in their premises[112]. Therefore, a contract model without abusive or anti-competitive provisions has been drafted by the Regulatory Authority and shared to all service providers to be applicable. Terms of contract and payment model have been reviewed accordingly in a satisfactory manner to all parties in the contract. Also, other aspects have been improved to remove abuses. In terms of network availability guarantee for example, it has been added that the service provider guarantees that the client will enjoy a very maximum availability.**[113]** The service Provider is fully staffed from 7am to 7 pm, Monday through Friday to assist with any service problem that may occur to the client during business hours. After hours, weekend, and holiday support calls are directed to Service Provider system operations and monitoring staff, 7 days a week, 365 days a year, including holidays. In addition, other duties such as use of service equipment, liabilities, maintenance and installation, force majeure, dispute resolution, confidentiality, validity of the contract as well as other contractual documents have been reviewed and performed**[114]**. Before CCK (Communications Commission of Kenya) undertook such a review on similar contract, number of complaints related to internet service provision was increasing[115]. In effect, the number of complaints received due to lack of confidentiality or privacy breaches on internet usage were 4 in 2009 and 2010 and 6 at the end of 2011. Also, internet service provisioning delays, failures and/or abusive termination were evaluated at 12 cases in 2009 and 2010, 24 in 2011, and 29 cases in 2012[116].

II.2.2 Measures related to sanctions

After investigating on the complaint, the Regulatory Authority may find investigation valid. In such a case, Article 47 of the Law establishing the Regulatory Authority allows the latter to take the following measures:

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[112] See the Regulatory Notice Ref. 697/RURA/DG/013 of 25 February 2013 addressed to all ISPs on Internet subscriber contract revision.

[113] The network availability cannot be less than ninety-eight per cent (98%) and for each accumulative hour of network unavailability that falls below the 98% guarantee, the client shall be credited with an amount equal to the pro rata charge for each hour of downtime.

[114] Contract available on the Regulatory Authority website: www.rura.rw.

[115] CCK Annual Report, 2011-2012, p.67.

[116] *Ibidem*.

1° to issue a prohibition notice requiring a natural person or legal entity to cease any activity which is contrary to the provisions of this Law ;

2° to impose an administrative fine against that natural person or legal entity in respect with the act committed in accordance with this Law;

3° to declare any anti-competitive agreement or decision null and void.

The natural person or legal entity not satisfied by the decision made by the Regulatory Authority may file a case to the competent court[117].

As a recall, administrative fines are given to a person or organization that fails to provide information or provide it inadequately. Indeed, the Regulatory Authority may impose to any natural person or legal entity which fails to provide information requested within the time limit specified by this Law, a daily administrative fine of two hundred thousand (200,000) to two million (2,000,000) Rwandan francs[118]. The Regulator may also impose to any natural person or legal entity that provides wrong information a daily administrative fine of five hundred thousand (500,000) to five million (5,000,000) Rwandan francs[119].

In case the service providers of the regulated services behave anti-competitively, measures are taken by the Regulatory Board. In fact, Article 49 relates to the sanctions for anti-competitive practices and abuse of the dominant position. According to this article, any natural person or legal entity that shows an anti-competitive practices and the abuse of his/her dominant position shall be subject to an administrative fine determined by the Regulatory Board, but such fine shall not exceed ten percent (10%) of turnover of the natural person or legal entity wherever they operated when the faults are committed.

[117] See also Article 47 in fine of the Law establishing the Regulatory Authority.

[118] See Article 48 of the Law establishing the Regulatory Authority.

[119] *Ibidem.*

This sanction is emphasized to be applied in the telecommunication matters whereby public telecommunications operators can not restrict access to public networks or public telecommunications services except for the reasons like catastrophic conditions, etc[120], and public telecommunications operators make every endeavour to maintain the highest level of service on the public networks.

As we may recall, the Regulatory Authority does not have powers to take sanctions in the sense to substitute itself into a court of law. Indeed, the measures it takes are under its capacity and control knowing that the Regulatory Authority does not have judicial powers.

It is in this perspective for example that the law nº 18/2010 of 12/05/2010 relating to electronic messages, electronic signatures and electronic transactions provides more offenses of that kind[121] in telecommunication matters while appropriate criminal sanctions are issued in accordance with the Organic Law n° 01/2012 of 02/05/2012 instituting the penal code[122]. Therefore, public telecommunications operators cannot discriminate between users when maintaining the integrity of public networks and public telecommunications services. In case that any service provider fails in this matter the Regulatory Board which is a competent organ for monitoring compliance with this provision shall take some measures that may also result in the imposition of sanctions. According to the Article 59 of the Telecommunication Law, in such an event, the Regulatory Board issues an enforcement notice to a public telecommunications operator, specifying the sanctions to be applied. The operator failing to comply with the action required in the enforcement notice, incurs a fine of between 1,000,000 and 5,000,000 Rwanda Francs for each day on which the operator fails to take the required action. Here, we may note that despite for anti-competitive cases, these sanctions have been also issued to failed service providers due to for example lack of quality services, problems related to the network services, etc.

[120] See article 23 of the law governing Telecommunications.

[121] See Chapter IX Of that Law, *O.G.* n° 20 of 17/05/2010

[122] See Chapter X of the Law, *O. G.* nº Special of 14 June 2012. See for example Chapter X on offences against privacy whereby offences against communication, breach of professional secrecy and other similar incriminations are provided.

Even though the Regulatory powers on sanctions are somehow limited, we appreciate the Rwandan law maker who thought to build a regulatory institution that is able to apply its appropriate measures for the public interest. Indeed, the Regulatory Authority has to be administratively and financially autonomous and the Regulatory Board has always to act in an independent, transparent and objective manner, and without discrimination when carrying out its activities[123]. Indeed, measures including sanctions are also with capital interest for the goals of fostering competition create the desire to reasonably reward innovation and technical contributions standard development[124].

Measures related to enforcement and sanctions are also applied in the domain of promoting services provision, in telecommunication matters and this shows in a very good way how anti-competitive practices are prohibited in the regulatory system.

Further to Regulations issued by the Regulatory Board on 06th May 2011 on Promotions by Telecommunication Operators, the Regulator reserves the right to cancel any promotion that is deemed to be anti-competitive[125]. In fact, according to its section 11, it is stated that:

a) The Authority reserves the right to issue an immediate order for the cancellation of any promotion prior to the commencement of the promotion which order of cancellation may be based on but not limited to the following:
i. Anti competitive behavior;
ii. Lottery and gambling related promotions;
iii. An act against public order.
b) The Agency shall communicate to the licensee the reasons for the order of the cancellation of the promotion.
Even though cases under this application are many, an example can be given for the case whereby the telecommunication company, Tigo had made a launch of a promotion on SMS Love Quiz lastly in February 2014 and the Regulatory Authority cancelled that promotion for the

[123] See Article 21 of the law establishing the Regulatory Authority, last paragraph.

[124] ITU, Standardization Bureau, *Op.cit*, 64.

[125] RURA, "Regulations on Telecommunication Promotions", available at :www.rura.rw, accessed on 27 May 2014.

reasons that it was unlawful and could cause abusive impacts to the consumers. A part from telecommunications matters where issues related to anti-competitive practices are well addressed due to a well set legal framework, such impediments recognized in other sectors are also sanctioned in accordance with the powers the Regulatory Authority has in its daily mission.

In energy sector, an inspection was conducted across the country to monitor quality supply and services in October 2012. An inspection and monitoring report has addressed some issues that mainly consumers had complaints on the electricity services disconnection because the contract they signed with EWSA contained abusive clauses. Indeed, the disconnection from electricity services had no issue related to water services as electricity and water are two separated services. After addressing many observations to the electricity service provider (EWSA) to change the behaviour, the Regulatory Authority addressed a notice[126] to stop the practice of disconnecting the electricity services of its customers when they have water related problems and vice-versa, acts considered as abusive to the customers. However, the Regulatory Authority faces a serious problem in regulating energy and water services because they are provided like in monopolist system where these services are given by almost one service provider, EWSA considering that Independent Power Producers(IPPs)[127] and Water Service Providers are evaluated in a few number, with lower capacity. Currently, only few IPPs have been issued and reviewed provisional licenses. These are Rwanda Mountain Tea, REFAD Rwanda, STADT WERKE MANZ AG Company and SOGEMR operating respectively in Nyabihu, Nyamagabe, Gasabo and Gakenke districts[128]. In any way, it should be noted that the above measure addressed to energy and Water services operator marked a point because from since, no one single complaint was addressed again by the complainants. In the transport sector also, the Regulatory Board has issued Regulation No 005/Trans-RURA/2011 of 26/08/2011 on road transport of persons[129]. In accordance with the Law establishing the Regulatory Authority and these Regulations on Road Transport, the Regulatory Authority had yet taken some measures against transport operators due

[126] See the Regulatory Authority's notice of 08/06/2012.

[127] RURA Annual Report, 2011-2012, Kigali, p. 36.

[128] *Ibidem.*

[129] Available at the Regulatory Authority's website:www/rura.rw

to abusive practices such as violation of attributed routes, usage of brokers to mislead clients, improper conduct or misuse of customer services, or other anti-competitive practices. In terms of anti-competitive practices, the following are some cases of transport operators that have been sanctioned (2012- 2014) to illustrate the situation.

Recent sanctioned cases of anti-competitive practises in Transport sector.

No	Operator	Reasons	Sanction
1.	African Tours	Violation of route	Fine of 200,000 Rwf
2.	Camel Tours and Travel Agency	Violation of route and use on non licensed vehicle	Fine of 450, 000 Rwf
3.	RFTC	Increasing tariffs and using brokers	Fine of 130, 000Rwf
4.	Yahoo Car Express	Route violation	Fine of 200,000 Rwf
5.	YANKURIJE Ratifat	Increasing tariff	Fine of 40,000 Rwf
6.	SOTRA Tours	Using brokers	200,000 Rwf
7.	STELLA Express	Using brokers	200, 000 Rwf
8.	International Express	Using brokers	200, 000 Rwf
9.	Horizon Coaches	Unlicensed and using brokers	450, 000 Rwf
10.	Volcano Express	Using brokers	200, 000 Rwf
11.	Virunga	Using brokers	200, 000 RWF
12.	KBS	Using brokers	200, 000 Rwf

In reality, Regulators are in theory rule enforcers and are applying sanctions for non compliance with rules relating to their areas of competence and authorisations for the issue of licences and permits[130]. For their accountability therefore, they have capacity to impose sanctions and correct the decisions of service providers that deviate from their mandate. In summary, powers and measures to be applied by the Regulatory Authority are related to the promotion of economic and regulatory of the country. As Rwanda has become a member of East African Community, it is therefore important that the following Chapter shows how partner states should perform harmonization of policies, laws and regulations in the regulated public utilities.

[130] OECD, *Op.cit*, p.73

CHAPTER III. HARMONIZATION OF LEGAL AND REGULATORY FRAMEWORK OF PUBLIC UTILITY SERVICES IN EAST AFRICAN COMMUNITY

In a bid to build global and integrated economies in every sector and facilitate infrastructure's developments among them, efforts have been made to build East African Community, with current observable achievements in various domains. The East African Community (EAC) is a regional economic community comprising five states namely the Republic of Burundi, the Republic of Kenya, the Republic of Rwanda, the United Republic of Tanzania and the Republic of Uganda, known as the "Partner States"[131]. According to Article 5 of the Treaty establishing East African Community[132] which emphasizes on the objectives of the Community, it is provided that the entry point of the integration process is the Customs Union, which means that harmonization of policies and strategies relating to the development of the community is imperative[133]. The following pages address the need of legal and institutional framework; the current situation in the regulated public utilities, and put forward how fairness and freedom of competition can be observed in limiting at the same time anti-competitive practices.

III. 1. LEGAL AND INSTITUTIONAL FRAMEWORK

The Treaty establishing the East African Community has given to each regulated public utility its important place in the development of the Community. This is with great appreciation because as raised above, regulated public utilities attract most of investors that some parameters are required to efficiently accomplish their objectives. Partner States have therefore an obligation to harmonize their policies and laws to enable services work effectively across the Community. In the regulated services, harmonization should also respect effective regulation, competition and consumer protection and other regulatory principles. That is why a well set legal, regulatory and institutional framework is required to enable concerned services to operate properly.

[131] UNCTAD, *Harmonizing Cyber Laws and Regulations: theEexperience of East Africa,* U.S, 2013, p.2

[132] Reference is made to the Treaty of 1999, as amended respectively in 2006 and 2007.

[133] See Article 71, e of the East African Treaty.

III.1.1 Telecommunication services and establishment of EACO

Further to Article 5 of the Treaty as mentioned above with regards to the fundamental objectives of the community, usage of ICTs and telecommunications remain with a highly appreciated importance. Indeed, Article 99 of the EAC Treaty is related to ICT and Telecommunication sector.

Partner States shall adopt common telecommunications policies to be developed within the Community in collaboration with other relevant international organisations, and other related organisations and shall harmonise and apply non-discriminatory tariffs among themselves and where possible, agree on preferential tariff treatment applicable within the Community[134].

Without listing exhaustively other obligations to be performed by partner states, another technical assignment of the Community to be highlighted is to facilitate a conducive environment to promote private sector investors in the telecommunication equipment within the Community[135] and adopt a common frequency management and monitoring scheme, assign mutually agreed upon frequencies for cross-border mobile radio communications and issue operating licences agreed upon[136].

Today, many initiatives have been done to harmonize ICT policies and laws. For instance, in 2008, a project in charge of Harmonization of ICT Policies in Sub-Saharan Africa(HIPSSA), which was a project initiated by the International Telecommunication Union (ITU) in collaboration with the European Union(EU) was conducted to develop and promote legal and regulatory harmonized telecommunications/ICT frameworks and to strengthen human resources and institutional capacities[137].

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[134] Article 99 of the Treaty.

[135] *Ibidem.*

[136] *Ibidem.*

[137] International Telecommunication Union, *Harmonization of ICT policies in Sub-Sahara Africa*, Geneva, 2010, p.7

Even though the assessment of the current level of harmonization of ICT/telecommunications was conducted through the different Sub-Saharan regional organizations, results for East African Region have been also addressed, among them the proposals of establishment of the East Africa Regulatory, Postal and Telecommunications Organization (EARPTO), that became later the East African Communications Organization (EACO)[138]. At its establishment, EACO had the following objectives[139]:

- harmonize and promote the development of postal and telecommunication services and regulatory matters and devise ways and means to achieve fast, reliable, secure, economic and efficient services within the Community;
- ensure the provision of tariff structure and settlement of accounts;
- promote the development and application of information and communications technologies (ICT);
- promote the development of technical facilities and their most efficient utilization with a
- view to improving the efficiency for telecommunications and postal services, increasing their usefulness and making them generally available to the public.

Similarly, the competences of EACO in pursuit of the above objectives are the following[140]:

- harmonize policies and legislation in the communications sector (e.g. managing competition and licensing requirements in the region);
- serve as a consultative organization for settlement of postal and telecommunications matters which are regional in nature.

Currently, the Council has adopted EACO for the foregoing objectives in East African Community, and a Ccommittee to coordinate the development of amongst others the communications sectors of the Member States has been established. EACO is operational since 2010 and its headquarters are based in Rwanda, in the same building with the Regulatory Authority. It has a constitution governing it and its personnel. It convenes regularly meetings,

[138] *Ibidem.*

[139] *Idem*, p.33.

[140] *Ibidem.*

including among them those related to harmonization issues. According to its Constitution[141], EACO shall have among other responsibilities to strengthen and promote cooperation in the development and provision of postal, telecommunications and broadcasting services in the East African Community. It shall be duly registered in accordance with the law of the host country of its headquarters, provided that the operations of EACO shall be governed by the provisions of the Constitution[142]. EACO shall also have legal personality with the capacity to amongst others enter into contracts, acquire, own and/or dispose of movable or immovable property and sue or be sued in its name. However, the objectives of the EACO shall remain to harmonise ICT policy and regulatory frameworks in the region; promote the development of broadcasting, postal and telecommunications/ICT services and regulatory matters; and devise ways and means to achieve fast, reliable, secure, affordable and efficient communications services within the Community. In doing so, the EACO shall focus on ICT and telecommunication goals such as network development and regional inter-connectivity, harmonization of tariff structures and settlement of accounts, policy advise on issues relating to the communications sector, regional projects and programmes, the security of broadcasting, postal and telecommunication/ ICT networks, research and technological development, harmonizing policies and legislation in the communications sector, promoting the development and sharing of local content from the East African Region, etc. Postal Services are also to be harmonised like in other regulated sectors. According to the Treaty, the Partner States shall harmonise their policies on postal services and promote close co-operation between their postal administrations and devise ways and means to achieve fast, reliable, secure, economic and efficient services among themselves[143].

At the 20th EACO Congress held in 2013 in Nairobi, Kenya[144], it was observed that differences between countries are enormous even if there are also ways to converge. In fact, among other

[141] See Constitution of the East African Communications Organizations, available at www.rura.rw, accessed on 24 May, 2014.

[142] See article 2 of the Constitution of EACO, 2010.

[143] See article 98 of the Treaty establishing the East African Community.

[144] See Report of the Assembly of Regulators of the 20th EACO Congress held at Kenyatta International Conference, Nairobi, Kenya, from 24th – 28th June, 2013, available at www.eaco.int, accessed on 25 May, 2014.

matters on the agenda, there was an issue on the unification of the license and the digital migration. The following were the recommendation of the congress:

- Establishment of an enabling and desirable legal and regulatory framework that takes into account convergence;
- Determining the license categories and their description within the converged/unified framework;
- Setting a timeframe for migration for partner states;
- Provide regulatory incentives for migration;
- Reviewing the framework in tandem with sector developments.

We appreciate these initiatives and think that these points will be performed if Partner States perform first of all their respective internal policies and laws. In as far as competition is concerned, however, the licensee should not engage in any activity, whether by act or omission which have, or are intended to or likely to have, the effect of abusive or unfairly preventing, restricting or distorting competition in the respective member states jurisdictions[145].

III.1.2 Energy, water and related services and the establishment of EREA

Energy services are important sector to be developed by developing countries like East African Community Partner States**.** The Partner States shall adopt policies and mechanisms to promote the efficient exploitation, development, joint research and utilisation of various energy resources available within the region[146]. Therefore, the Partner States shall act and promote efficiently the development in energy sector and exchange or share jointly the required information on the exploration, exploitation, development and utilisation of available energy resources as well as the development of integrated policy on rural electrification[147].

[145] See also annex IV of the 20th EACO Report, available at www.eaco.int, accessed on 25 May, 2014.

[146] Article 101 of the Treaty establishing the Community.

[147] *Ibidem.*

Also, the development of inter-Partner State electrical grid inter-connections, the construction of oil and gas pipelines, and all such other measures to supply affordable energy to the East African people taking cognisance of the protection of the environment are a mandate of partner states to build and harmonize stronger and competitive energy systems[148]. To this, the Energy Regulators Association of East Africa (EREA) has been established to govern the sector and harmonize policies and laws in that matter. In fact, EREA has been fully established in 2013 among partner states to serve as consultative and collaborative body of energy regulators and to support the energy sector for the benefit of East Africa[149]. A constitution governing the Association has been put in place on 16, December 2013. Among other objectives of the Association as provided by the Constitution[150], the important one is related to facilitating the harmonization of National Regulatory Institutions' (NRI) policies tariff structures and legislations in the member states in order to standardize NRI's practices and procedures based on sound researched data and information.

Beside other technical duties to be performed by the Association, EREA is also in charge of harmonizing the coordination and implementation of regional projects in the energy sector, and promoting the independence of utility regulation in the member states and the principles of good governance in the energy sector. As an institutional framework established to perform and strengthen its objectives for the benefit of member states in energy sector, EREA shall duly help in the development of harmonized regulatory regime for the member states[151].

Currently, EREA is operational with the following organs: the General Assembly, the Executive Council, the Secretariat, the portfolio committee, and may further institute other organs and offices that the Executive Council may deem necessary. Several meetings to implement and speed up its objectives have been conducted. For example, further to the meeting held 16, December 2013 in Dar Es Salaam, Tanzania which came up with 23 resolutions, resolution no 11

[148] *Ibidem.*

[149] EREA started by a Memorandum of Understanding(MoU) signed by energy regulators of the committee's member states on 29th May, 2009.

[150] See Article 3 of the Constitution, 2013.

[151] See Article 4(a) of the Constitution.

is related to harmonization of laws, policies, processes and procedures in regulation within the East African region. According to this resolution indeed[152], the ad hoc portfolio committee should have a specific mandate which should be in line with EREA ultime objective of fostering harmonization of laws, policies and procedures in regulations within the East African Region. EREA is urgently needed to be operational that it has been decided recently that a total budget of EREA Secretariat should be set at USD 80,000 for year 2014/15, membership subscription fee of USD 20,000 per member should be revised to cater for the EREA Secretariat for the 2014/15, the draft Cross Border Electrification Policy, 2014 should be adopted and approved, and recruitment of a Program Officer by 1st January 2015, at a cost not exceeding USD 3,000 per month to assist in running the EREA Secretariat activities should be done[153].

In water and environmental services, irrigation and improvement of water catchment management is organized by the article 109 of the Treaty establishing the Community. Also, further to article 111 of the Treaty, partner states have an obligation to jointly develop and adopt water resources conservation and management policies that ensure sustenance and preservation of ecosystems. In this line, Partner States shall also undertake to co-operate in the management of the environment and agree, among other things, to take measures to control trans-boundary air, land and water pollution arising from developmental activities[154]. In addition, partner states shall adopt common environmental standards for the control of atmospheric, terrestrial and water pollution arising from urban and industrial development activities and shall harmonise their policies and regulations for the sustainable and integrated management of shared natural resources and ecosystems[155].

[152] Resolutions, reports and other EREA's documents are not yet published. EREA is to be officially staffed from the starting month of the year 2015 and the heads offices are proposed to be established in Dar –Es-Salaam, Tanzania.

[153] See Resolutions nº 6, 7, 15 and 19 of the 7th Executive Council of Energy Regulators Association (EXCO) of East Africa (EREA) held at Lake Kivu Serena Hotel, Rubavu, Rwanda on 17 July, 2014.

[154] See also Article 111 of the Treaty.

[155] See Article 112 of the Treaty.

III.1.3 Transport services

In order to promote the achievement of the objectives of the Community as set out in Article 5 of this Treaty, the Partner States undertake to evolve co-ordinated, harmonised and complementary transport and communications policies; improve and expand the existing transport and communication links; and establish new ones as a means of furthering the physical cohesion of the Partner States[156].

If EAC should develop harmonised standards and regulatory laws, rules, procedures and practices so as to promote businesses, provide security and protection to transport systems to ensure the smooth movement of goods and persons within the Community, harmonization of the transport sector shall be done in all aspects, be it road transport, railway and rail transport, civil aviation and civil Air Transport, maritime transport and ports, inland waterways transport, freight booking centres, freight forwarders, customs clearing agents and shipping agents[157]**,** etc.

However, because of the urgent necessity of free movement of goods and services within the Community, organization and harmonization in road transport is a prerequisite. Thus, harmonisation of the road transport sector in EAC member states requires first of all harmonisation of the existing legal and institutional framework. The first step in establishing a harmonised framework is to review the road transport policies and see how they fit in with other aspects concerning road infrastructure and road transport services[158]. Currently, there is a move from the existing transport policies and regulations to a new set of harmonised standards and regulations, something that requires a thorough investigation and analysis of legal and organisational issues to ensure that expected benefits are not undermined by unexpected barriers[159]. When we talk about road transport legal framework in terms of efficient regulation,

[156] See Article 89 of the Treaty

[157] See Articles 90-98 of the Treaty.

[158] Sumatra, Op.cit, p.6.

[159] *Ibidem.*

some possible broad areas in which legislation is needed are road infrastructure, road traffic, vehicle and driver licensing, and road transport licensing & management[160]. In road Infrastructure for example, important issues to be covered include the functional classification of various roadway types, acquisition and management of right of way, responsibility for construction and maintenance, and responsibility for financing. Vehicle sizes and weights and to what extent these are based on economic criteria and encourage efficient use of roads[161].

Another important issue concerns establishing clear responsibilities for administering driver and vehicle licensing/inspection. To allow the possibility of private involvement in vehicle inspection and administrative processes, the legal framework should allow this to be determined, consistent with government policy. Much of the detail of this legislation would have to be included in secondary legislation, especially regarding the conditions for vehicle inspections and the vehicle design and equipment standards[162]. A minimum requirement for harmonizing the latter is usually minimum standards for safety/environmental features such as lamps, brakes, horn, signal lights, wipers, mirrors, windows, tires, exhaust systems, seat belts etc., which are the basis for the roadworthiness inspections, including the trainings of the drivers to become more efficient in their carrier[163].

In road transport operator licensing, important issues that this will be taken into consideration include the extent to which quantity rather than quality controls are used as the basis for licensing, and if tariff and fare controls are required. The conditions for licence issuing should make the reasons for refusal, suspension and make revocation of licences clear and a distinction between enforcement of licence requirements (by a licensing or a regulatory authority) and of general road traffic laws (by the traffic police) would normally be made[164]. To this, it is to be noted that the EAC Council of Ministers introduced in November 2012 two bills in the East African Legislative Assembly (EALA) namely the EAC One stop Boarder Post Bill and the EAC

[160] *Ibidem.*

[161] *Idem,* p.7.

[162] *Idem,* p.8.

[163] *Ibidem.*

[164] *Ibidem.*

Vehicle Control Bill, 2012[165]. A session was conducted in Kigali in March 2013 by the Committee on Communications, Trade and Investments to hold public hearing workshops in the EAC partner states to get public opinion, views and inputs from various stakeholders before the bills are finally passed by the Assembly to be applicable within the Community. It was therefore recommended that among other things the Community should do to overcome the existing transport challenges that frustrate the core business objective of the community is that each partner state should put in place independent rules and regulations on control vehicle loads, as this will also reduce road maintenance.

III.2. HARMONIZATION IN THE REGULATED PUBLIC SERVICES WITH RESPECT OF COMPETITION

In our research, fairness and freedom of competition in the regulated public utilities have been shown as quite substantial. In effect, Article 5 of the EAC Treaty provides that EAC shall follow a four step approach to integrating its economies starting with a Customs Union, a Common Market, a Monetary Union and ultimately a Political Federation. The EAC entered into a Customs Union in 2005 and started the implementation of the Common Market Protocol in July 2010. As a direct result of the Customs Union, competition in the EAC has intensified and subsequently, the necessity of regulating competition in the EAC in order to ensure that the socio-economic expectations placed in the Customs Union and Common Market are realized.

In common market economy as well as in the regulated public utilities, as competition intensifies, and more players enter the market, firms or operators have a natural tendency to conspire, scheme, collude, and form cartels in order to fix prices, allocate markets and make it

[165] The One stop Boarder Post Bill aims at providing for the establishment and implementation of one stop border posts in the community in order to facilitate trade through efficient movement of goods and the people within the community. The EAC vehicle Load Control Bill aims at making provisions for the control of the vehicle loads, harmonized enforcement and to make institutional arrangements for the regional trunk road network within the community.

difficult for other companies or organizations to enter the market[166]. From this, the need to regulate competition to ensure that firms and service providers do not abuse of their powers is with much consideration within the region.

III.2.1 Need of competition and consumer protection in regulated services

Harmonizing policies and laws is a mandate for EAC Partner States. Thus, putting in place regional law in competition and undertaking enforcement mechanism could help protect businesses from the vagaries and greed of companies in the region, as well as considering freer and fairer competition culture in the EAC[167]. The EAC Competition Policy & Law was adopted by the Council in 2004, and the Heads of State assented the EAC Competition Act in 2006. The objective of the EAC Competition policy & law is to maintain and promote competition and fair trade as well as ensure consumer welfare. It is therefore true when it was stated that since the commencement of Customs Union, EAC has increased trade amongst the Partner States signifying a positive effect on the EAC, and surely more competitiveness among businesses from Partner States[168]. Thus, the law applies to all economic activities and sectors having cross border effect. In terms of competition, East African Partner States should have set strong policies and laws that help them to enter the competitive market be it in Africa or in the world. Nevertheless, looking at the current legal and regulatory framework in the region, it is that competition to be observed in the regulated services has been an issue that did not given required attention in the harmonization process. As the EAC Competition Act excludes specific regulated sectors which are governed by their own jurisdictions, at least separate considerations could be given to the utility sectors while harmonizing sessions or commissions, at least in every sector. This should be mentioned in each law or in each regulation regarding harmonization, taking also into consideration fair competition, consumer protection and prohibition of anti-competitive practices. In effect, the aim of economic regulation should be the same in all sectors: to facilitate

[166] East African Community Secretariat, *Should EAC regulate Competition?, Planning and Infrastructure Department Report*, Arusha, Tanzania, 2010, p.1.

[167] *Ibidem.*

[168] U.T. KAMANA, *The assessment of the implementation process of the East African Competition Act,* Thesis, Kigali, 2011, p.21.

fair competition among players or, where natural monopolies exist, to ensure fair pricing and service levels. Greater competition means stronger growth, which in turn means a faster-growing economy and more wealth to share[169].

Since regionalization and creation of the necessary environment for economic growth and development in East Africa is imperative, enabling tools are necessary to be put in place so as to regulate absolutely competition[170]. Also, regional economy needs to be more industrial and manufacturing economies in order to achieve its objective and become globally competitive. Likely, the East African Community's integrative objective is to be achieved through creating an environment that promotes domestic, cross-border and foreign investment, adoption of common policies and programs and the adoption of common positions with regards to international agenda.

Competition policy as a tool for preventing non-tariff barriers to trade and promoting competition is a vital tool for enhancing economic and market efficiency and thus creating an enabling environment for achieving the integration objectives. On the international level also, enhanced cooperation with the foreign competition authorities will be required if the East African Community is to legitimately effect its extraterritorial jurisdiction[171]. In that competitive situation, firms or service providers try to gain consumers' attention through offering the most favourable terms in comparison to others. A high level of competition therefore exists if there are many products or services made easily available by a large number of firms, at reasonable prices and good quality[172].

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[169] J.U. VESSA & Al., *Measuring the success of telecom regulation: a balanced scare card approach*, Finland, 2004, p.2

[170] U.T. KAMANA, *Op.cit*, p.23.

[171] VINCENT A., "Competition Law and Regional Integration,"**,**

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406825, accessed on 20th June 2014.

[172] D. MALUNDA, "The State of Play Research with respect to Competition Regimes in Rwanda and Implication for East African Community Integration", Workshop, Kigali, 2014, p.3.

III.2.2 Need of prohibition of anti-competitive practices within EAC

The precedent pages outlined the need for competition and consumer protection for EAC Partner States in the harmonization and integration process**.** A part from that, policy and law harmonization should prohibit anti-competitive practices in the market. We may recall that all regulated public utilities have a cross-border character and their harmonization should be done in a way to avoid or prevent such practices. With a common market indeed, it is possible that some acts, agreements or practices indubitably affect some businesses. They should therefore be avoided. In the remaining pages, it will be shown how these anti-competitive practices should be avoided in EAC partner states and in their business systems.

III. 2.2.1 Anti-competitive agreements and cartels

It has been outlined that a big attention may be put to all economic activities and sectors having cross border effect to enable EAC member states achieving their objectives. It has also been addressed that some external facts such as anti-competitive agreements or cartels can affect any economic market and impinges the development.

As a recall, cartel is an agreement among competitors to avoid competition among them to maximize their revenue[173]. It is a formal or explicit agreement among competing firms or service providers. Producers and manufacturers agree formally to fix prices, marketing, and in some cases production[174]. Cartel members usually agree on such matters as prices, industry output, market shares, allocation of customers and territories, establishment of common sales agencies, and division of profits. The aim of such collusion is almost always to increase profits by reducing competition. There is block entry into a relevant market by non-members of the cartel, fix prices and sales conditions and share markets. Cartels damage government project tendering procedures, because they may cause rigging of bids as cartel members take turns among themselves to win bids[175]. Anti-competitive agreements, including cartels, which fix or determine prices (or limit or control

[173] *Idem,* p.4.

[174] *Ibidem.*

[175] *Ibidem.*

production, supply, technical development, etc, customer allocation, bid rigging or collusive bidding[176]. Tie in tie-, exclusive supply/distribution refusal to deal, resale price maintenance are against fair competition to the market and are barriers to be banned in the market.

III. 2.2.2 Abuse of dominance

A part from anti-competitive agreements or cartels that are prohibited under the EAC Competition Act, 2006, other numerous anti-competitive practices including abuse of dominance are also prohibited. Abuses of dominant power occur when a single firm is able to impose restraints on its suppliers or its distributors and customers, in order to increase its earnings. Dominance is defined as the power to hinder effective competition[177] and it assumes that the enterprise in question occupies a prominent place in the market afforded to him including the importance of the market share it holds in it and that of competing firms, possibly, as its status[178].

Prohibition is therefore applied on abuse of dominance such as predatory pricing, denying market access, use dominance in one market to enter other relevant market, exploitative discriminatory price/condition; refusal to deal, tying arrangements, foreclosing customers and competitors from access to sources of supply, dominance determined by several factors such as market share, share of competitors, entry barriers, size and resource of competitors, etc.

III.2.2.3 Mergers and Acquisitions

Mergers or acquisition can be anti-competitive if they result in increasing the concentration of market power to the point that they create dominant firms or monopolies[179]**.**All illegal mergers and acquisitions should be avoided. In fact, to avoid anti-competitive mergers and acquisitions**,** a person intending to execute a merger or an acquisition shall notify the Authority of such merger

[176] *Ibidem.*

[177] A..NGAGI, *Opcit*., p.17, unpublished.

[178] *Ibidem*.

[179] D. MALUNDA, *Op.cit*, p.4

or acquisition and no merger and acquisition shall come into effect before its notification has been approved by the Authority[180]. Thus, merger or acquisition must be notified and authorized to come into effect[181] and it shall not come into effect before its notification to the Authority and Authority has given its approval. In the regulated public utilities, mergers or acquisition is a crucial issue because of their cross-bordering character.

In telecommunication sector for example, it has been observed that ICT revolution and market liberalization have had a considerable impact on the postal and courier industry. This has resulted in the reduction of postal monopolies, increased competition in this market segment and enabled postal operators to take advantage of more competitive and liberalised international postal services to establish mergers, alliances and joint ventures with their fellow operators and with the private sector. These joint efforts, if properly structured, can utilize the combined strengths of one or more players to produce a comprehensive service that is greater than the sum of its parts. It is noted that access to outside expertise[182].

Merger or acquisition should be done when it fulfills an overriding public interest. The Authority shall have powers to gather information, investigate and compel evidence, including search and seizure of documents, hold hearings, issue legally binding decisions, impose sanctions and remedies, etc. Under the perception of regulated services, national policies and laws will face a serious problem while harmonizing. In fact, if it is required for any organization or entity which wants to make any merger and acquisition to make a request to the Competent Authority, it seems that the Rwandan law maker has forgotten to address issues related to mergers and acquisition in the regulated services. Subsequently, a company aiming at merging with another one operating the same business will have difficulty to fulfill their requirements. While the national law on Competition and Consumer protection is quite complete when companies need to make mergers and acquisition[183], the Law establishing the Regulatory Authority accuses the foregoing gaps on that matter. Even though the Regulatory Authority have powers to take any

[180] See Section 11 and 12 of the EAC Competition Act, 2006.

[181] A.NGAGI, *Op.cit*, p.37, Unpublished.

[182] CCK Annual report 2011-2012, p.7.

[183] See Article 17 0f the Law no 36/2012 of 21/09/2012 relating to competition and consumer protection, O.G no 46 of 12/11/2012.

decision pertaining to the regulation of public utilities, particularly any decisions relating to the granting, suspension and withdrawal of a license, authorization or permit[184], there are ways to challenge the Authority's competences in administrating mergers and acquisitions.

We therefore advise the Rwandan Law maker to thing on that gap and modify the law accordingly.

III.2.2.3 Abuse of Intellectual Property rights.

Intellectual Property Rights used in a way that goes beyond the limits of its legal protection or restricting movement of goods or services between different geographical areas are prohibited because they are anti-competitive.

For EAC member states, harmonization of policies on commercialization of technologies and promotion and protection of intellectual property is a mandate[185]. In the regulated services, a firm would need to be committed to providing outstanding service and developing intellectual property such as software, rather than focusing on hardware and production activities. The underlying rationale for governments to grant intellectual property (IP) rights (such as patents, trademarks and copyrights) is that creations and ideas, once known, may otherwise be copied at little cost, leading to under-investment in intellectual goods and services. However, providing too much protection for IP can deter competition and limit choice for consumers[186].

On the EAC level, the Authority shall coordinate the enforcement of the IPRs violations and other acts related to counterfeit in the region[187]. It should also take remedies and punitive measures such as nullification of agreement or compensation of damage, review of intended

[184] Article 20, 3 of the Law establishing the Regulatory Authority.

[185] See Article 103 of EAC Treaty.

[186] Competition Policy Review Secretariat, "Competition Policy review, Report by Independent Committee of Inquiry", 2014, Australia, p.15.

[187] G. AFRIKA, "Competition Policy & Law, The case of EAC", www.eac.int, accessed on 25 June 2014.

merger or acquisition or its abandonment[188]. Therefore, consideration shall be given to the need to reform existing regimes of intellectual property rights, especially copyright, in order to maintain the protections of rights holders, while limiting the potential liabilities of intermediaries. The resolution of disputes arising from the operation of national domain name systems and trademark law shall also be considered.

[188] *Ibidem.*

GENERAL CONCLUSION

In this research entitled «Prohibition of anti-competitive practices in the regulated public utilities under the Rwandan Law", we talked first of all on anti-competitive practices in the regulated public utilities. On one hand, it was shown that goods results such as economic growth, investment, good governance, consumer protection as well as good welfare are obtained when effective regulation and fair competition are correlative or complementary. On another hand, it was stated that while the Regulatory Authority is fulfilling its daily functions, hindrance of anti-competitive practices may come and disturb the regulated market economy. These practices that can affect the regulated business are anti-competitive agreements or cartels agreements, abuse of dominance and anti-competitive mergers and acquisitions. In fact, effective regulation, i.e. the one which is credible, transparent and loyal is the stimulant of the development through enhanced efficiency and greater innovation. To achieve the social welfare goals set down by the government, the regulatory authority must have a clear policy and regulatory framework to be effective and impose fair competition in the service providers.

In Rwanda, it has been shown that the policy on competition and consumer protection is in place as well as laws to implement it. In the regulated public utilities, the Law nº09/2013 of 01/03/2013 establishing the Regulatory Authority aims at protecting and promoting consumers' interests and ensuring fair competition in all regulated sectors. Achieving this mission given to the Regulatory Authority while such external barriers come to affect and impede businesses in the world regulation seems to be frustrating. It is in this context that the Regulatory Authority has been vested with powers to be more efficient in its daily activities and overcome any barrier that can affect its functions. Indeed, the Regulatory Authority is more independent and is allowed to take some measures under its responsibilities.

For the purposes of public interest and the consumers protection, powers and measures taken by the Regulatory Authority are related to carrying out investigations including inspections for the compliance by the licensees, issuing directives to the regulated service providers, setting tariffs, requiring information, conducting inspection and enforcement, settling disputes as well as issuing and enforcing sanctions.

As regards the cross-bordering character of regulated public utilities and their importance in the East African Community, it has been imperative to put forward issues related to the need of their harmonization. In fact, the community has the fundamental objectives to strengthen its economic, social, cultural, political, technological and other ties for fast balanced and sustainable development within the Community[189]. In the way of helping to develop regulated sectors, partner states have done many things as shown in this work. Some issues are in process to be harmonized and institutional framework in the telecommunication and energy sector have been put in place. However, the harmonization process is not an easy issue that some gaps have already been found. Each member state is somehow so linked by its own culture, its history and its understanding that some issues that would be urgent to harmonize take long time to be finalized (unified licenses and licensing framework, load vehicle and sizes of vehicles, infrastructures adjustments, investments in the regulated sectors, rural electrification, ...).

In all circumstances for the regulatory system in East African Community, partner states should be aware that anti-competitive practices can happen so that measures can be taken to prohibit them. It is easier to find that abusive contract has been signed between operators, merger or acquisition has been formed or abusive intellectual property right has been owned or protected. We can affirm that results of this research show that Rwanda has set a good policy, build good legal and regulatory framework with regards to the regulation of public utilities. As per the Law establishing it, the Regulatory Authority has been vested powers through its Regulatory Board to enforce and achieve its functions.

However, some gaps were observed such as those related to lack of administrating mergers and acquisitions in the regulated sectors. At the regional level, harmonization process is ongoing with many difficulties in the regulated services. Indeed, the East African Competition Act does not expressly cover regulated public utilities. Due to their character of being always with more benefit to the population, regulated public utilities should have a particular attention in being organized by another or separate law or regulation where all regulatory issues should be

[189] As per article 5 of the East African Treaty as referred above.

addressed. This gap is observable through the organizations already in place whereby constitutions establishing them have forget to talk on issues like competition and consumer protection as well as prohibition of anti-competitive practices. East African partner states will indubitably have mandate to compete with similar organizations operating in the region and abroad to increase their interests as well as avoiding anti-competitive practices. Thus, practices like anti-competitive agreements or cartels, abuse of dominance, mergers and acquisitions and anti-competitive intellectual property rights can affect cross-bordering businesses as they can be a result of any act or practice, concerted or not, any conduct or prior contract to operate.

We therefore recommend that partner states should harmonize first of all national policies and laws accordingly taking into consideration the impact of these anti-competitive practices in the market. Also, Rwanda should revise or modify its law taking into consideration the importance of mergers and acquisitions in the regulated public utilities. Not doing so and maintaining the existing gap can give wrongly to another or presumed Competent Authority the room to administrate mergers and acquisitions even in the regulated services.

In as far as regulated services are concerned, partner states while harmonizing should not forget regulatory concerns such as competition, consumer protection and prohibition of anti-competitive practices. They should remember that they have an obligation to compete with other institutions that are similar to them. Indeed, it always remains true when it is said that "competition is better than regulation"[190]. In that endeavour, constitutions set for regional bodies such as EACO and EREA should be revised and include regulatory key principles such as promotion of competition and consumer protection, prohibition of anti-competitive practices, etc. East African harmonization sessions should have also on agenda these regulatory key issues. In the transport sector as it has been advised in several regional meetings, it is very important to create a regional institutional organization, like in ICT and in Energy, in line with the shared proposals for harmonization and improved measures[191].

[190] This is from a known Tanzanian Jargon to mean that Regulators themselves have also to compete.

[191] It has been proposed by the Traffic Acts of Uganda and Tanzania that such an organization should be created to carry out road safety research, training and data collection as well as other relevant matters.

Finally, based on the findings contained in this research, we are confident that we provided a helpful analysis on anti-competitive practices in the regulated public utilities by showing appropriate ways of prohibiting them in the regulated public utilities in Rwanda and in the region. In this regards therefore, we do not doubt that the stated problems have been addressed in effective manner. However, where this research has not exhausted all the issues related to the referred matter, lights have been brought to other researchers in this domain who are then called to criticize and complete issues that remained without satisfactory answers.

BIBLIOGRAPHY

I. LEGAL TEXTS

I.1. Rwandan texts

1. Organic Law n° 01/2012 of 02/05/2012 instituting the Penal Code, *O.G* nº Special of 14 June 2012.
2. Law nº 09/2013 of 01/03/2013 establishing Rwanda Utilities Regulatory Authority(RURA) and determining its mission, powers, organization and functioning, O.G nº 14 bis of 08/04/2013.
3. Law nº 36/2012 of 21/09/2012 relating to competition and consumer protection, O.G nº 46 of 12/11/2012.
4. Law nº 21/2011 of 23/06/2011 governing electricity in Rwanda, O.G nº Special of 12/07/2011
5. Law nº 18/2010 of 12/05/2010 relating to electronic messages, electronic signatures and electronic transactions, *O.G*. n° 20 of 17/05/2010
6. Law nº 07/2009 of 27/04/2009 relating to companies. O.G no nº 17 bis of 27/04/2009
7. Law nº 44/2011 of 30/11/2001 governing telecommunications, O.G nº 23 bis of 1/12/2001
8. Presidential Order nº 04/01 of 15/03/2004 determining specific duties of the Regulatory Board in telecommunication matters.
9. Ministerial Order nº 8/DC/04 of 07/06/2004 on additional and specific types of agreements, decisions, practices and codes of conduct considered to be anti-competitive or an abuse of a dominant position.
10. Regulations nº 005/Trans-RURA/2011 of 26/08/2011 on Road Transport.
11. Regulations nº 00/RURA/2011 of 06/05/2011 on Promotions by Telecommunication Operators.

I.2 Foreign Texts

1. Treaty for the establishment of East African Community signed on November 1999 in Arusha, Tanzania(as amended on 14th December,2006 and 20th August,2007).
2. East African Community Competition Act, 2006.
3. The Constitution of EACO, 2010
4. The Constitution of EREA, 2013

II. CASE LAW

Judgment No. 3055 dated 09.06.2010, case 3147/2/2005, Romania, Commercial Court.

III. THESIS

1. BIZIMANA P., The Legal Consideration of Comparative Advertisement in Rwandan Law, Thesis L.L.M, Kigali, National University of Rwanda, Faculty of Law, 2012, unpublished.
2. KAMANA U.T., The Assessment of the Implementation Process of the East African Competition Act, Thesis, Kigali, National University of Rwanda, Faculty of Law, 2011, unpublished.

IV. BOOKS

1. GULEN G. &Al., Improving Regulatory Agency Efficiency and Effectiveness, USA, 2010.
2. HASSAN Q.& LIPIMILA G., The Effects of Anti-competitive Business Practices on Developing Countries and their Development Prospects, United Nations, UNCTAD, New York and Geneva, 2008.
3. HUSSEIN J. &Al., The Impact of Regulation on Economic Growth in Developing Countries: a Cross-Country Analysis, University of Bradford, UK, Final Version, 2006.

4. PHILIP D.O., Regulation in a Flux: The Development of Regulatory Institutions for Public Utilities in Ghana and Jamaica, Jamaica, 2011, p.7.
5. VESSA J.U. & Al., Measuring the Success of Telecom Regulation: a Balanced Scare Card Approach, Finland, plus de 2004.
6. VIJAY V., Regulatory Management and Reform in India, Background Paper for OECD, 2008.

V. JOURNALS

1. East African Community Secretariat, Should EAC regulate Competition?, Planning and Infrastructure Department Report, Tanzania, Arusha, 2010.
2. European Competition Network, Recommendation on investigative powers, enforcement measures and sanctions in the context of inspections and requests for information, Sweden, 2012.
3. International Trade Centre, A Guide For Developing Economy Exporters, Geneva 10, Switzerland, 2012.
4. ITU, Harmonization of ICT policies in Sub-Sahara Africa, Geneva, 2010.
5. ITU, Standardization Bureau, Understanding Patents, Competition and Standardization in an interconnected world, Switzerland, Geneva, 2014.
6. MALUNDA D., The State of Play Research with respect to Competition Regimes in Rwanda and Implication for East African Community Integration, 2014.
7. MUHIZI I., Regulation and Strategies, workshop, Kigali,2013.
8. NKELEBE S., The role of competition policy and law in economic development and consumer, Fair Competition Commission, Tanzania, 2012.
9. OECD, Designing Independent and Accountable Regulatory Authorities for High Quality Regulation, U.K, 2005.
10. SUMATRA, Harmonization of road transport, legal and institutional frameworks, Tanzania, 2011.
11. UNCTAD, Harmonizing cyber laws and regulations: the experience of East Africa, U.S, 2013.

VI. COURSES

NGAGI A., Competition Law and Consumer Protection, LL.M Course Notes, 2012, P.15, unpublished.

VII. REPORTS

1. Communications Commission of Kenya, Annual report 2011-2012.
2. RURA Annual report, 2011-2012.

VIII. OTHER DOCUMENTS

1. Ministry of Trade and Industry**,** Rwanda Competition and Consumer Protection Policy, Kigali, 2010

IX. ELECTRONIC REFERENCES

1. Abuseofdominance,http://globalcompetitionreview.com/reviews/60/sections/206/chapters/2342/india-abuse-dominance, accessed on 15th May 2014.
2. Competition Bureau of Canada, "Abuse of dominance", http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00511.html, accessed on 17 May, 2014.
3. Shroff , C. "abuse of dominance", http://globalcompetitionreview.com/reviews/60/sections/chapters/2342/india-abuse-dominance, accessed on 15th May 2014
4. *Frequently Asked Questions(FAQ),* www.rura.rw, accessed 15/04/2014
5. G. AFRIKA, *Competition Policy & Law, The case of EAC*, www.eac.int, accessed on 25 June 2014
6. Marco Botta, Alexandr Svetlicinii, *The Right of Fair trial in Competition Law Proceedings*,http://www.ascola-conference-

2014.wz.uw.edu.pl/conference_papers/botta_svetlicinii.pdf, centre for antitrust and regulatory studies, acceseed on 15 May, 2014. See also ECJ case law , 5 March 2007, e-Competitions Bulletin March 2007, Art. N° 14009.

7. Liberalisation and competition intervention in regulated sectors, Restructuring Public UtilitiesforCompetition,http://www.oecd.org/regreform/sectors/restructuringpublicutilitiesforcompetition.htm, , *accessed* on 14/04/2014
8. X, What Does Renewable Energy Mean?, http://www.ask.com/question/what-does-renewable-energy-mean, accessed on 22 May, 2014.
9. Vincent Angwenyi, "Competition Law and Regional Integration,",http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406825, accessed on 20th June 2014.
10. William Fry, the Irish merger control regime, available at www.williamfry.ie/.../LEGAL--5098070-v1-, accessed on 15 May 2014.