

A legislative analysis of the legal
framework governing restrictive business
practices:

**A comparative study of the European Union and The
Gambia**

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Table of contents

- Acknowledgement4**
- Abbreviation5**
- Abstract6**
- 1. Introduction.....7**
 - 1.1 Background.....7
 - 1.2 Aim and research questions8
 - 1.3 Scope and constraints9
 - 1.4 Materials and Method10
 - 1.5 Structure.....13
- 2. The legal background of restrictive business practices14**
 - 2.1 Definition of restrictive business practices14
 - 2.2 Historical Overviews of restrictive business practices in the EU and The Gambia16
 - 2.2.1 The European Union 16
 - 2.2.2 The Gambia..... 19
 - 2.3 Summary and concluding remarks22
- 3. Outline of the legislative legal framework of Competition law in the EU and The Gambia24**
 - 3.1 Introduction24
 - 3.2 European Union legal framework.....24
 - 3.3 The Gambia legal framework25
 - 3.4 Summary and concluding remarks27
- 4. Analysis of restrictive business practices provisions28**
 - 4.1 Introduction28
 - 4.2 Restrictive business practices provisions28
 - 4.2.1 The European Union 28
 - 4.2.2 The Gambia..... 39
 - 4.3 Similarities and differences in the implementation mechanism46
 - 4.4 Legal Sanctions for Participating in restrictive business practices50
 - 4.4.1 Legal Sanctions in the EU 50
 - 4.4.2 Legal Sanctions in The Gambia 52
 - 4.5 Summary and concluding remarks54

5. Recommendations and Conclusion56
5.1 Lessons to derive from EU’s competition jurisprudence56
5.2 Strengthening competition policies in The Gambia by the EU57
5.3 Conclusion58
Annexes60
Annex 1- Information to research participant.....60
Annex 2- Interview Questionnaire61
Bibliography62
Cases72

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Abbreviation

CA	The Gambia Competition Act, 2007
CC	Competition Commission
EAGL	Euro African Group Ltd
EC	European Commission
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ECOWAS	Economic Community of West African States
EEC	European Economic Community
EU	European Union
EUMR	European Union Merger Regulation
GAMTEL	The Gambia Telecommunications Company
GCC	The Gambia Competition Commission
GCCPC	The Gambia Competition and Consumer Protection Commission
LPG	Liquefied Petroleum Gas
MOU	Memorandum of Understanding
NCA	National Competition Authorities
TFEU	Treaty of the Functioning of the European Union

Abstract

Competition policy is important for the promotion of fair competition, preventing abuse of market power and protecting consumer and business interests. It is thus an area that builds and moulds itself according to the fabric or structure of society and eventually evolves by habitually adjusting to the dynamics of government economies. Despite the different economic dynamics between the European Union and The Gambia, both jurisdictions have built their competition policies on the foundation to ensure consumer welfare and to preserve a free and fair competition environment. One of the objectives of competition policy is to allocate resources efficiently by incentivizing businesses or undertakings to innovate goods and services and to offer competitive prices. In this way, competitive markets will promote economic growth by stimulating innovation, increasing productivity and job opportunities. However, restrictive business practices can cause harm to consumers by limiting their market choices. In the EU, Article 101 and 102 of the TFEU prohibits such exploitative practices within its internal market and in The Gambia, Part six of its Competition Act 2007 deals with its restrictive business practices in its free market economy. Thus, this study aims to provide a comprehensive analysis of the legislative frameworks governing restrictive business practices in the EU and The Gambia. The objective is to examine the similarities and differences between the two jurisdictions, identify best practices and propose recommendations for improvement in the legal regimes. This will be achieved through the study of key aspects of anticompetitive laws of the EU and The Gambia, competition policies, and regulatory measures that address issues like market dominance, abuse of the market, price fixing and other restrictive business practices. Consequently, this paper will recommend improvements for The Gambia's Competition Commission to be at par with its counterpart i.e., the EU, whose institution is more advanced, stronger in terms of structure and fully funded functioning Competition Commission.

Keywords: European Union, Competition Commission, TFEU, The Gambia, Competition Act.

1. Introduction

1.1 Background

Any practices that limit and result to the distortion of competition in a market are usually referred to as ‘restrictive business practices.’ These practices may include agreements between businesses that limit competition, such as price-fixing, market sharing, and bid-rigging.¹ They may also include abuses of market power by dominant firms, through predatory pricing, exclusive dealing, and tying and bundling arrangements.² The history of restrictive business practices can be traced back to the late nineteenth century when industrialization led to the growth of large corporations and trusts that dominated many industries.³ These monopolistic practices were considered detrimental to the economy and led to the development of the Sherman Antitrust Act in the United States in 1890, which was designed to prevent the restraint of trade and the abuse of market power.⁴ Over time, other countries or communities have enacted similar laws and regulations to prevent restrictive business practices. These countries or communities include the European Union's (EU) Competition law, The Gambia Competition law, and China's Anti-Monopoly Law, to name a few.

In the EU, restrictive business practices are regulated by the European Commission (EC) under the Treaty on the Functioning of the European Union (TFEU). The EU has strict rules on antitrust and mergers to prevent undertakings from engaging in anticompetitive behaviour.⁵ Further, The Gambia has also implemented laws to promote fair competition and prevent restrictive business practices.⁶ The Gambia Competition Act, 2007 (CA), prohibits agreements between businesses that restrict competition, abuse of dominant market positions, and anticompetitive mergers and acquisitions.

Despite these laws, both the EU and The Gambia have experienced challenges in enforcing them. In the EU, some undertakings have been fined for engaging in anticompetitive behaviour,

¹The United Nations set of Principles and Rules On Competition, <https://unctad.org/system/files/official-document/tdrbpconf10r2.en.pdf>, [accessed 9 April 2023].

² Competition law - the basics, <https://www.pinsentmasons.com/out-law/guides/competition-law---the-basics>, [accessed 9 April 2023].

³<https://oxcat-ouplaw-com.ludwig.lub.lu.se/display/10.1093/law-ocl/9780199566563.001.0001/law-ocl-9780199566563-chapter-001#law-ocl-9780199566563-chapter-001-div1-2>, [accessed 9 April 2023].

⁴The Antitrust Laws | Federal Trade Commission, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws>, [accessed 9 April 2023].

⁵ Jones A., Sufrin B., Dunne N., *EU Competition Law: Text, Cases and Materials*, Oxford (7 edition), pp.75.

⁶ WT/TPR/S/365 • The Gambia - 6 - SUMMARY, https://www.wto.org/english/tratop_e/tpr_e/s365_sum_e.pdf, [accessed 13 April 2023].

but critics argue that the fines are not high enough to deter undertakings from continuing these practices.⁷ In The Gambia, there are concerns about the capacity of the competition authority to effectively enforce the CA.⁸ As a result, the issue of restrictive business practices remains a significant concern for regulators and policymakers in the EU and The Gambia as our area of concern.

1.2 Aim and research questions

This research seeks to compare the legal provisions that deal with competition law between the EU and The Gambia jurisdictions. The difference in the two economic and geographical dynamics are quite apparent⁹ between the two jurisdictions however, this investigation will be framed within the context of the growing EC and the current stagnant CC of The Gambia.

However, to adequately answer the main question stated below, it is important to establish how the competition policies in the EU and The Gambia evolved and the framework of their structural competition laws. Thus, this investigation formulates the following main question:

How can The Gambia Competition and Consumer Protection Commission (GCCPC) improve its institution by drawing inspiration and best practices from the European Union competition policies? If so, in what ways?

The importance of this question is to outline how The Gambia GCCPC could evolve from being a toothless bulldog to a powerful and fully functioning independent institute that could adequately protect consumers' interests and encourage innovation of goods and services and investment in The Gambia. It will also promote the enforceability mechanism available to the GCCPC and how best they can utilise them. Thus, this begs the next sub-question stated below:

How did competition law in the EU and The Gambia evolve over time to be where it is today?

This could serve as a starting point for The Gambia to endeavour to establish stronger competition policies such as legal reforms which, among other things, be made accessible to

⁷*Flogging the Wrong: EU Corporate Fines Violate the Fundamental Rights of Shareholders* | *Journal of European Competition Law & Practice*, Oxford Academic, volume 12, issue 4 April 2021, <https://academic.oup.com/jeclap/article/12/4/301/5909388>, [accessed 9 April 2023].

⁸*Gambia, The - Market Challenges*, <https://www.trade.gov/country-commercial-guides/gambia-market-challenges>, [accessed 9 April 2023].

⁹ Aydin U. and Bütte T., *Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits*, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4801&context=lcp>, [accessed 13 April 2023]

the public and also for the EU to outline their struggles and how they improved. This paper will look into the historical background of both jurisdictions to establish their respective evolution and growth.

Furthermore, to properly comprehend the problem that this paper aims to investigate, it is important to answer the second sub-question stated below:

What are the differences and similarities between the existing provisions of restrictive business practices between the two jurisdictions?

The approach to this sub-question would mainly be to analyse Articles 101 and 102 TFEU and the EU 1/2003 Regulation and The Gambia Competition Act 2007, Guidelines and Commission Procedural Rules.

1.3 Scope and constraints

This paper's primary focus and the problem that it intends to investigate, is a comparison of two dynamically different jurisdictions on competition law and how one can learn from the other. This paper will not indicate that the EU has a perfect competition law or institutions but rather, tries to pinpoint that The Gambia being a developing country with a population of about two million people, can gain and learn from its counterpart i.e., EU. The EU is more populated, highly funded and has well-developed institutions which have been in existence for many decades. The reason for conducting this comparison is because the EU and The Gambia have been development partners for many years by virtue of the Cotonou Agreement, 2000¹⁰ and as partners, they are obligated to assist each other to grow in areas that they lack resources or the expertise to do it for themselves. This paper will solely focus on restrictive business practices, their possible effects on markets and how to combat them, particularly with assistance from the EU.

This research will focus only on the EU (Union level) and not on national competition authorities, national legislations or case laws from its member states and The Gambia. Furthermore, this paper will compare and contrast the two jurisdictions on how they deal with restrictive business practices with their implications. This will touch on the meanings of the

¹⁰The European Union and The Gambia | EEAS Website, https://www.eeas.europa.eu/gambia/european-union-and-gambia_en?s=100 [accessed 9 May 2023]- The partnership between the EU and The Gambia is guided by the principles and objectives found in the Cotonou Agreement, which governs the relationship between the EU and African, Caribbean and Pacific (ACP) countries. The Agreement covers areas such as political dialogue, trade and development cooperation. *

legal provisions and their applicability but not on the procedural aspects employed by the respective commissions. The author will nonetheless touch on some of the powers vested on the respective CC such to power impose fines, conduct investigations, initiate hearings etc. to illustrate the extent to which the respective commissions can regulate competition in their respective jurisdictions.

1.4 Materials and Method

This investigation paper will employ mostly primary sources such as the TFEU and The Gambia CA as its main primary source of data. In addition, this research paper will also employ secondary sources from published articles, journals, newspapers, reports and online sources to gain an understanding of the interactions of distinguished academics in this subject area. To overcome the gap between written or public information, an empirical method in the form of an interview with a staff of the GCCPC will be conducted via telephone (WhatsApp) to attain direct information, especially when it comes to pinpointing recommendations on how to improve the GCCPC.¹¹ An old adage goes: ‘to hear from the horse’s mouth’¹² meaning to hear it from the person who has direct personal knowledge of the information sought. Commission investigation reports and case laws, will be taken into consideration and used as reference points.

Further, library qualitative research and desktop analysis and reviews will be used as sources of material. Relevant materials and information about restrictive business practices in the EU and The Gambia were gathered and this was done by inspecting the sources of legislation in both jurisdictions. These materials and methods adopted will assist to conduct an extensive comparison to identify and establish the difference and similarities between them and also to point out the gap in development between the two said jurisdictions. This is conducted through the utilization of the comparative method which would entail processing the information in parallel with the EU and The Gambia. The author chose to use this legal method because the goal is to answer the questions or problems about the existing competition laws.¹³

¹¹ Reference is made to Annexes on this paper which contains the format of the interview conducted. For reasons of integrity, the identify and other information about the interviewee is presented in a very minimalistic way. The ambition with the material from the interview is to get insight, to confirm this paper’s findings and also information which are otherwise impossible to obtain. *

¹²(Straight) from the Horse's Mouth - Cambridge English Dictionary,

<https://dictionary.cambridge.org/dictionary/english/straight-from-the-horse-s-mouth>, [accessed 9 April 2023].

¹³ Adams M., Husa J. Oderkerk M., *Comparative Law Methodology*, Volume 1, Edward Elgar Publishing Limited (2017), pp. xi.

This paper will use the comparative legal methodology of the EU as materials such as *Comparative Law Methodology Volume I* by Maurice Adams, Jaakko Husa and Marieke Oderkerk will be used as a guide. Furthermore, *The Introduction to Comparative Law* written by Konrad Zweigert and Hein Kötz¹⁴ will guide this paper in utilizing the EU comparative legal method despite the fact that the paper will be conducting a comparison of two legal systems¹⁵ but if any, there would not be much of a difference in the legal methods as the EU uses both civil and common law. In connection to The Gambia's comparative law method, since no data can be found, the Law of England (Application) Act, 1953¹⁶ will be used to apply the common law comparative legal method. The application of English law is prescribed in Section 2 of the Law of England (Application) Act, 1953 which states:

*'Subject to the provisions of this and any other Act, the common law, the doctrine of equity, and the statutes of general application¹⁷ in force in England on the first day of November, 1888, shall be in force in The Gambia.'*¹⁸

Furthermore, this provision is supported by Section 7 (d) of the 1997 Gambia Constitution which included common law and principles of equity as part of the laws of The Gambia. Thus, the common law comparative law method will be used in this paper as justified.

Zweigert and Kötz have introduced the author of this paper to the comparative law styles of Macrocomparison and Microcomparison. Macrocomparison compares the spirit and style of different legal systems, the methods of thought and procedures they use while Microcomparison has to do with specific legal institutions or problems that are with rules used to solve actual problems.¹⁹ It is argued that there is a flexible dividing line between the two and thus 'one must often do both at the same time, for often one has to study the procedures by which the rules are in fact applied in order to understand that a foreign system solves a particular problem in the way it does.'²⁰

In terms of data, finding information concerning restrictive business practices in the EU did not prove to be difficult. A plethora of materials is available regarding the subject area with many

¹⁴ Zweigert K., Kötz H., *An Introduction to Comparative Law*, Oxford University Press (3rd Edition), 1998.

¹⁵ *Ibid*, pp. 2.

¹⁶ Cap. 5:01, Volume 1, Laws of the Gambia, 2009- This is an Act that declares how the law of England shall be in force in The Gambia, to reform the common law so applied in certain aspects.

¹⁷ The Statutes of general application are explained as the laws that were generally applied to the British colonies at a particular date that regulated the manner which existed amongst people generally. It is thus still applicable when there is a lacuna or gaps in The Gambia's jurisprudence. *

¹⁸ Section 2, Laws of England (Application), Act, 1953, Cap. 5:01, Volume 1, Laws of the Gambia, 2009.

¹⁹ Zweigert K., Kötz H., *An Introduction to Comparative Law*, Oxford University Press (3rd Edition), 1998, pp.5.

²⁰ Zweigert K., Kötz H., *An Introduction to Comparative Law*, Oxford University Press (3rd edition), 1998, pp.5.

different scholars making different publications. The materials such as the *European Union Law* authored by Damian Chalmers, Gareth Davies and Giorgio Monti and David J. Gerber named *Competition Law and Antitrust: a global guide* came in handy. Other inspiring books are *EU competition law: Text, Cases and Materials* by Alison Jones, Brenda Sufrin and Niamh Dunne; *European Competition Law: A Practitioner's Guide* by Lennart Ritter and David W. Braun; and *European Competition Law: A case commentary* edited by Weijer VerLoren van Themaat and Berend Reuder tackled the said subject area extensively. The EC has also contributed significantly to its jurisprudence by making decisions and implementing policies and Commission guidance papers to improve the EU's internal market and combat anticompetitive business activities.

However, obtaining information about The Gambia was a daunting task. There is a knowledge gap and issues of restrictive business practices are under-researched. Information is not readily available from the relevant authorities and its CC is not resourceful or developed. Competition issues are rarely reported in the media due to the lack of knowledge of competition issues by journalists.²¹ The media's understanding of competition issues is also perceived to be very limited and this renders them ineffective in disseminating competition-related information.²² Hence, one must find ways to gather information. This author was nonetheless able to gather investigation reports conducted by the GCCPC and some online articles that touched on the subject area. The main source of data was the GCCPC webpage which contained limited published information on its investigative reports. However, for this research, the author was able to get access to other investigative reports conducted by the GCCPC that were not published on their webpage by the GCCPC. In addition, a Gambian author named Jawara Gaye²³ whose publication was found useful for this research. His article helped this paper to have a brief historical background on competition issues and policies regarding The Gambia.

Ultimately, the author of this paper is of the opinion that this paper can significantly contribute to the jurisprudence of The Gambia's competition law in many ways such as the GCCPC can use the comparison as a guide to look into its framework by filling in the gaps highlighted on

²¹ Cuts International, *A Time for Action: Analysis of Competition Law Regimes of Select West African Countries Volume I: The Gambia, Ghana and Nigeria*, pp.31.

²² *Ibid*, pp.31

²³ Cuts International, *Competition Regimes in the world- A civil society report-*

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this paper; it can be used a research reference point for other researchers interested on competition law in both the EU and The Gambia, among other reasons. Thus, the comparison between the two jurisdictions is conducted because the EU has the leading CC in the world with decades of experience in formulating competition policies and laws. This is something that The Gambia can tap into as its developing partner and still new into the business of regulating competition in its market. This paper could have chosen The Gambia and one of the EU member states to compare them but the author of this paper is of the opinion that even the member states implement and enforce EU laws, regulations or directives, although enforcement could defer. Nonetheless, focusing on the EU as a Union makes the comparison more fascinating and richer with information that its counterpart could utilise.

1.5 Structure

This paper is structured in five chapters. The first chapter of this research paper will explain the background information covering the introduction and information needed to understand this topic. The second chapter will deal with the legal background of restrictive business practices which will present the definition of restrictive business practices and a historical overview of restrictive business practices in the EU and The Gambia. The third chapter will give a brief outline of the legislative framework of Competition law in the EU and The Gambia which will contain an introduction and the legal frameworks of the two jurisdictions. This will be a short chapter which will be based on general knowledge of the author's comprehension of the legislative legal basis of the EU and The Gambia.

The fourth chapter will present the central part of this study which is the analysis of restrictive business practices provisions in the EU and The Gambia. This chapter will present a brief introduction and analysed provisions in part six of The Gambia Competition Act 2007, Articles 101 and 102 of the TFEU and cite caselaw. It will also address the differences and similarities between the two jurisdictions and the legal sanctions administered when there is a violation of the said provisions. The final chapter of this thesis will focus on the conclusion and recommendations but will also answer the research questions of whether it is necessary and important for The Gambia to adopt best practices from the EU or maintain the status quo due to financial, cultural or societal differences.

2. The legal background of restrictive business practices

2.1 Definition of restrictive business practices

A restrictive business practice can be defined as any action or behaviour undertaken by a company which, through acquisition and/or abuse of a dominant position of market power, limits access to markets or otherwise unduly restrains or distorts competition.²⁴ This leads or is likely to lead to adverse effects on international trade, particularly that of developing countries such as The Gambia.²⁵ It also refers to formal, informal, written or unwritten agreements or arrangements among businesses which have the same impact.²⁶ Such activities are used to achieve high profits at the expense of consumers.²⁷

EU competition policies are developed by Articles 101 and 102 of the TFEU both seeking to achieve the same aim which is the maintenance of effective competition.²⁸ Article 101 TFEU provides for the prohibition of anticompetitive agreements between two or more independent market operators²⁹ while Article 102 prohibits abusive behaviour by undertakings holding a dominant position in any given market.³⁰ Thus, in the EU, restrictive business practices refer to any activities or behaviours carried out by undertakings that restrict competition within the EU's single market.³¹ These practices are deemed illegal and can result in fines or other penalties for the offending businesses under Article 23.³² Examples of restrictive business practices that are prohibited under EU law include price-fixing agreements between competitors that aim to set prices at a certain level or limit price competition; market sharing agreements, where businesses agree to divide up markets or customers between them and avoid competing with each other; abuse of a dominant market position, where an undertaking with significant market power engages in practices that limit competition, such as predatory pricing or tying contracts and anticompetitive mergers and acquisitions, where undertakings merge or acquire other undertakings to gain market power and limit competition.³³ The EU has strict laws, policies and

²⁴Restrictive business practices | The Encyclopedia of World Problems, <http://encyclopedia.uia.org/en/problem/restrictive-business-practices>, [accessed 9 April 2023].

²⁵Grosse R., Restrictive business practices in international services industries: - examples from Latin America, https://unctad.org/system/files/official-document/iteit4v6n2a3_en.pdf, [accessed 9 April 2023].

²⁶ Article 101 and 102 Treaty of the Functioning of the European Union.

²⁷Restrictive business practices | The Encyclopedia of World Problems, <http://encyclopedia.uia.org/en/problem/restrictive-business-practices>, [accessed 9 April 2023].

²⁸ Jones A., Sufrin B., Dunne N., *EU Competition Law: Text, Cases and Materials*, Oxford Press (7 edition), pp.26.

²⁹ Antitrust, https://competition-policy.ec.europa.eu/antitrust_en, [accessed 5 April 2023].

³⁰ Ibid.

³¹ Jones A., Sufrin B., Dunne N., *EU Competition Law: Text, Cases and Materials*, Oxford Press (7 edition), pp.1.

³² Regulation 1/2003 on the implementation of the rules on competition.

³³ Regulation 139/2004, EU Merger Regulation.

regulations in place to prevent these types of restrictive business practices, as they can harm consumers, stifle innovation, and lead to higher prices and reduced choices for consumers.³⁴

According to The Gambia's CA, Section 2(1) provides two types of restrictive agreements. One is in relation to 'restrictive agreements subject to prohibition' which is said to mean 'a collusive agreement or a bid-rigging agreement' and the other interprets 'restrictive agreement subject to investigations' to mean an 'a horizontal agreement to which Section 29 applies or a vertical agreement to which section 30 applies.' What we can derive from these provisions is that restrictive business practices can be any activities or behaviours carried out by businesses that prevent, restrict or distort competition in any way that harms consumers or the economy.

Furthermore, the CA provides examples of restrictive business practices including price-fixing agreements between competitors that aim to set prices at a certain level or limit price competition;³⁵ market sharing agreements, where businesses agree to divide up markets or customers between them and avoid competing with each other; bid-rigging, where businesses collude to manipulate the outcome of a tender or procurement process³⁶ and abuse of a dominant market position, where a business with significant market power engages in practices that limit competition, such as predatory pricing or tying contracts.³⁷ The CA also prohibits mergers and acquisitions that significantly lessen competition in a particular market or sector.³⁸

To fully understand the two abovementioned definitions, the author of this paper is of the opinion that it is imperative to distinguish what a business means in the Gambian context and what an undertaking means in the EU perspective. From the EU's perspective, for an entity to be subject to community competition law, it must be classified as an undertaking. Although the EC Treaty frequently references the concept, it does not define it and has instead been clarified in caselaw, which gives it functional content.³⁹ It has been established that an entity engaged in economic activity is an undertaking for the purposes of Articles 81 EC to 86 EC, irrespective of its legal status and how it is financed as stated in *Fenin v Commission* by an opinion of the

³⁴Competition policy | Fact Sheets on the European Union, <https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy>, [accessed 5 April 2023].

See also 7. Describe the purpose of anti-trust laws. What do | Chegg.com, <https://www.chegg.com/homework-help/questions-and-answers/7-describe-purpose-anti-trust-laws-accomplish-8-list-characteristics-perfectly-competitive-q114698167>, [accessed 12 May 2023].

³⁵ Section 25 (b), The Gambia Competition Act, 2007.

³⁶ Ibid, Section 26.

³⁷ Ibid, Section 31.

³⁸ Ibid, Section 32.

³⁹ Berry E., Homewood J.M., & Bogusz B., *EU law: Text, Cases and Materials*, Oxford University Press 2013, pp. 462, para. 13.2.2.

Advocate General.⁴⁰ Undertakings, therefore, include partnerships, sole proprietorships and natural persons who engage in commercial activities.⁴¹ It has been widely interpreted to include any legal or natural person engaged in some form of economic or commercial activity.⁴² According to The Gambia's Single Window Business Registration Act, 2013, a business means or includes 'every form of trade, commerce, profession, calling or other activity carried on for the purpose of gain or profit.'⁴³ In addition, a company is said to mean under Section 2 of the Company Act, 2013 'a body corporate that is incorporated or continued under this Act.' These two words are used interchangeably in The Gambia. They are both registered and must operate for financial gains as opposed to the EU context of an undertaking.

Thus, the business activity undertaken does not necessarily need the objective of making a profit⁴⁴ but in The Gambia, a business's legal status is important as it is considered to be any entity that operates intending to gain profit and must be registered with the responsible authorities.

2.2 Historical Overviews of restrictive business practices in the EU and The Gambia

2.2.1 The European Union

The EU from the onset has used and regarded competition policies as a tool to protect and maintain its internal markets.⁴⁵ Robert Schuman⁴⁶, in 1950 launched a project of European integration in the area of coal and steel in order to create solidarity between France and Germany and other interested parties.⁴⁷ As a result, the creation of a common market for coal and steel triggered the need to create a public authority to regulate these markets, which were distorted by trade barriers, cartels and geographic price discrimination.⁴⁸ Subsequently, the

⁴⁰ C-205/03 P- Fenin v Commission, Opinion of Advocate General Póitres Maduro delivered on 10 November 2005-<https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=ecli:ECLI%3AEU%3AC%3A2005%3A666>, [accessed 8 June 2023].

⁴¹ Ritter L., Braun D. W., *European Competition Law: A Practitioner's Guide*, Kluwer Law International, (third edition), pp.44 & 45.

⁴² Berry.E., Homewood J.M., & Bogusz B., *EU law: Text, Cases and Materials*, Oxford University Press 2013, pp. 485.

⁴³ Section 2, The Gambia Company Act, 2013.

⁴⁴ Commission Notice on the notion of State aid as referred to in Article 107(1) of the TFEU, (2016/C 262/01), para. 2.1 (7), pp. 3, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719\(05\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719(05)), [accessed 14 May 2023].

⁴⁵ Ritter L., Braun.D. W., *European Competition Law: A Practitioner's Guide*, Kluwer Law International, (third edition), pp.8

⁴⁶ Robert Schuman was the French Minister in the 1950s.

⁴⁷ Warloutzet L., *The rise of European Competition Policy, 1950-1991: A cross-disciplinary survey of a contested policy sphere*, European University Institute, Robert Schuman Centre for Advanced Studies, EUI Working paper 2010/80, pp.7.

⁴⁸ J. Driscoll, *Early days in Schumania*, <https://www.jstor.org/stable/2097756>, pp.89, [accessed 13 May 2023].

Treaty of Paris was initiated for establishing the European Coal and Steel Community (ECSC)⁴⁹ which included antitrust provisions that had no real precedents in Europe.⁵⁰ The said provisions in the ECSC provided decision-making powers to a ‘High Authority’⁵¹ that would be independent of member state governments. The High Authority was given the competence to regulate a wide range of commercial practices and its power or mandate went beyond cartels as such restrictive and unjustified agreements between independent companies and covered mergers and other forms of potentially distortive commercial conduct.⁵²

Thus, Restrictive business practices have been a significant issue since the establishment of the European Economic Community (EEC).⁵³ Initially, the purpose of introducing competition law into the EEC Treaty was to complement the internal market rules by preventing businesses from partitioning the internal market and by encouraging competition across borders.⁵⁴ In the early days of the EEC, member states were allowed to maintain their national competition laws. However, as the community grew and integrated further, it became clear that a harmonized approach to competition policy was needed. This led to the adoption of the Treaty of Rome in 1957, which established the legal framework for the EU and included provisions on competition policy⁵⁵ and which laid the basis for EU competition law.⁵⁶

However, before the full functioning and strong implementations of what we now know as EU competition law, the Treaty of Rome competition policy provisions were debated upon both in terms of the nature of their content and of the vertical balance of powers.⁵⁷ Article 85 of the said Treaty (now Article 101 of the TFEU) could be interpreted either as an outright ban on cartels or it could be seen as establishing a more tolerant principle of abuse. Likewise,

⁴⁹ Ritter L., Braun D. W., *European Competition Law: A Practitioner’s Guide*, Kluwer Law International, (third edition), pp.3. See also Chalmers D., Davies G., Monti G., *European Union Law*, Cambridge University Press 2019 (4 edition) pp.12.

⁵⁰ The "Antitrust" Provisions of the European Common Market Treaty, <https://www.jstor.org/stable/25750105>, [accessed 13 May 2023]. See also Warlouzet L., *The rise of European Competition Policy, 1950-1991: A cross-disciplinary survey of a contested policy sphere*, European University Institute, Robert Schuman Centre for Advanced studies, EUI Working paper 2010/80, pp.7.

⁵¹ Warlouzet L., *The rise of European Competition Policy, 1950-1991: A cross-disciplinary survey of a contested policy sphere*, European University Institute, Robert Schuman Centre for Advanced Studies, EUI Working paper 2010/80, pp.7. See also EUR-Lex - 52003SC0467 - EN, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52003SC0467:EN:HTML>, [accessed 13 May 2023].

⁵² Shanahan F.M.S., *Regulating Competition: Cartel registers in the twentieth-century world*, Competition Policy in the ECC, pp.49.

⁵³ Leo Spier, *Restrictive Business Practices and Competition in the European Economic Community*, 1965, <https://www.jstor.org/stable/3478955>, [accessed 13 May 2023]. See also Chalmers D., Davies G., Monti G., *European Union Law*, Cambridge University Press 2019 (4 edition) pp.866.

⁵⁴ G. Marengo, ‘The Birth of Modern Competition Law in Europe’ in A. von Bogdandy, P. Mavroidis and Y. Meny (eds), *European Integration and International Coordination: Studies in Transnational Economic Law in Honour of C-D. Ehlermann* (The Hague, Kluwer, 2002) pp. 297-8.

⁵⁵ Chalmers D., Davies G., Monti G., *European Union Law*, Cambridge University Press 2019 (4 ed) pp.13.

⁵⁶ Jones A., Sufrin B., Dunne N., *EU Competition Law: Text, cases and materials*, Oxford 7 edition, pp.75.

⁵⁷ Warlouzet L., *The rise of European Competition Policy, 1950-1991: A cross-disciplinary survey of a contested policy sphere*, European University Institute, Robert Schuman Centre for Advanced Studies, EUI Working paper 2010/80, pp.9.

concerning abuse of dominance, there was significant uncertainty concerning the interpretation of Article 86 EEC (now Article 102 TFEU). Thus, based on the weak and unclear provisions and guidelines on the interpretation of the then provisions, it was impossible to consider the outcome of the Treaty of Rome negotiations as either successful or not⁵⁸ because everything depended on the interpretation of the Treaty provisions.

Thus, in the 1960s, the EEC began to take action against restrictive business practices. In 1962, the EC launched its first major antitrust investigation into the French glass industry, which resulted in fines for several companies.⁵⁹ This was followed by a series of high-profile cases by the European Court of Justice (ECJ) since the 1960s, including investigations into the oil and gas, telecommunications, and pharmaceutical industries issued rulings and set precedents that consolidated the Commission's powers.⁶⁰

Moreover, in the 1990s, the EU further strengthened its competition policy by introducing new regulations and guidelines and it has dramatically improved in multiple areas.⁶¹ The adoption of the Merger Regulation in 1990 gave the EC the power to scrutinize and block mergers and acquisitions that could harm competition in the EU.⁶² The EC also issued guidelines on vertical agreements, which are agreements between undertakings at different levels of the supply chain, such as between a manufacturer and a distributor. The economic restructuring that was taking place as a result of economic liberation, placed EU competition law at the heart of the Union's transformation to a neoliberal market economy.⁶³

In 2009, the entry of the Lisbon Treaty⁶⁴ did not make significant changes thus competition provisions remained stable and consistent. Under the new Treaty, the EU competition rules can now be found in Articles 101, 102, and 107 to 109.⁶⁵ Just as the previous Treaty, those regulations encompass agreements between undertakings, instances of dominant market abuse, that hinder competition.⁶⁶ Similarly, the substantive wording of Articles 101 and 102 TFEU is

⁵⁸ Ibid., pp.9.

⁵⁹ The EC fining policy for violations of competition law: An empirical review of the Commission decisional practice and the Community courts' judgments, https://www.coleurope.eu/sites/default/files/research-paper/gclc_wp_03-05_0.pdf, [accessed 6 April 2023].

⁶⁰ Chalmers D., Davies G., Monti G., *European Union Law*, Cambridge University Press 2019 (4 edition) pp.875.

⁶¹ Jones A., Sufirin B., Dunne N., *EU Competition Law: Text, Cases and Materials*, Oxford (7 edition), pp.1.

⁶² Chalmers D., Davies G., Monti G., *European Union Law*, Cambridge University Press 2019 (4 edition) pp.876.

⁶³ Ibid, pp.876.

⁶⁴ The Lisbon Treaty replaced the EEC Treaty. *

⁶⁵ Geradin D., Layne-Farrar A., Petit N., *EU Competition Law and Economics*, Oxford Competition Law, 2012, para. 1.59. These provisions replaced Articles 81, 82, and 87 to 89 EC.

⁶⁶ Jones A., Sufirin B., Dunne N., *EU Competition Law: Text, Cases and Materials*, Oxford (7 edition), pp.76. See also Geradin D., Layne-Farrar A., Petit N., *EU Competition Law and Economics*, Oxford Competition Law, 2012, para. 1.59.

almost identical to the wording of the competition rules of the EC Treaty. The only substantial change was that the ‘internal market’ replaced the ‘common market.’⁶⁷

The EU's approach to restrictive practices has drastically evolved over time to address new challenges and developments in the market. Through its enforcement actions, the EU has sought to promote competition and protect consumers and businesses from anticompetitive behaviour.⁶⁸ Today, the need for EU competition law as a means of securing economic welfare is widely accepted and the rules are enforced robustly by the EC.⁶⁹

2.2.2 The Gambia

Following many other developing countries attaining independence from their respective former colonisers, The Gambia obtained its independence from the British in 1965 and like many other developing countries embarked on a series of economic reforms⁷⁰ ranging from fairly slack national planning arrangements to price controls, credit and foreign exchange.⁷¹ Over time, these have given way to greater decentralised and market-oriented policies.⁷² Notwithstanding these economic developments, The Gambia was yet to have legislation relating to competition laws.⁷³ The legislation that existed were laws governed by trade and customs regulations.⁷⁴ The former President of The Gambia, had a Vision 2020 development strategy which outlined The Gambia’s government’s development mission statement as thus:

‘to transform The Gambia into a financial centre, a tourist paradise, a trading, export-oriented, agricultural and manufacturing nation, thriving on free market policies and a vibrant private sector, sustained by a well-educated, trained, skilled, healthy, self-reliant and enterprising population, and guaranteeing a well-balanced eco-system and a decent standard of living for one and all, under a system of government based on the consent of the citizenry.’⁷⁵

⁶⁷ Geradin D., Layne-Farrar A., Petit N., *EU Competition Law and Economics*, Oxford Competition Law, 2012, para. 1.59.

⁶⁸ Whish R., Bailey D., *Competition law*, Oxford University Press, (9 edition) 2018, pp. 52. See also Communication from the Commission- A pro-active Competition Policy for a Competitive Europe, EUR-Lex - 52004DC0293 - EN, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52004DC0293&from=EN>, [accessed 13 May 2023].

⁶⁹ Chalmers D., Davies G., Monti G., *European Union Law*, Cambridge University Press 2019 (4 edition) pp.866.

⁷⁰ Abbott F., Flynn S., Correa C., Berger J., & Nyak N., *Using Competition law to promote access to health technologies: A guidebook for low and middle-income countries*, United Nations Development Programme (UNDP), May 2014, pp.135.

⁷¹ Gaye J., Cuts International, *Competition Regimes in the world- A civil society report*, The Gambia, <https://competitionregimes.com/pdf/Africa/44-The%20Gambia.pdf>, pp. 235.

⁷² BTI 2022 Gambia Country Report, <https://bti-project.org/en/reports/country-report/GMB>, [accessed 13 May 2023].

⁷³ Gaye J., Cuts International, *Competition Regimes in the world- A civil society report*, The Gambia, <https://competitionregimes.com/pdf/Africa/44-The%20Gambia.pdf>, pp. 235.

⁷⁴ Concept note for the amendment of the Competition Act 2007 and the Consumer Protection Act, 2014, GCCPC, pp.1.

⁷⁵ Vision 2020, http://nsagm.weebly.com/uploads/1/2/0/3/12030125/vision_2020.pdf, [accessed 6 April 2023].

The above mission statement states a commitment to a market-oriented economic development agenda. Therefore, by implementing progressive laws, the aim was to establish The Gambia as a hub for trade and investment, creating an appealing business climate and offering incentives for commercial endeavours. The objective was to become an attractive destination for foreign investors, stimulate and enhance the production and trading of goods and services, streamline and support investments in The Gambia, as well as provide guidance to the government regarding investment policies and related concerns.⁷⁶

Furthermore, among other things, the need to introduce a competition law was eminent and The Gambia's development partners⁷⁷ recommended it as a sign of commitment towards a free market economy as envisaged in the Vision 2020 strategy document. The Gambia is considered a very liberal economy as it relates to setting up and conducting a business.⁷⁸ Competitive markets are responsive to changing needs and opportunities while competition stimulates businesses to look for more innovative and efficient ways of satisfying the needs and interests of consumers.⁷⁹

Thus, the government's desire to promote economic reforms has prompted it to take issues of competition regulation and consumer welfare concerns seriously.⁸⁰ Due to the lack of competition law, businesses have been alleged to have, in the past, taken advantage of the absence of competition law by engaging in anticompetitive practices.⁸¹ There have been instances of agreements between importers and distributors that operate in a vertical arrangement.⁸² The market for rice, cooking oil and sugar⁸³ gives clear examples of this kind of practice as they are essential goods for consumers.⁸⁴ Tying is also common, e.g., a wholesaler

⁷⁶Gaye J., Cuts International, Competition Regimes in the world- A civil society report, The Gambia, <https://competitionregimes.com/pdf/Africa/44-The%20Gambia.pdf>, pp. 236.

⁷⁷ Trade policies and practices by measure, The Gambia, WT/TPR/S/233, pp.42- (First attempts to draft a Competition Bill were made in 2001, with assistance from the Commonwealth Secretariat. See WTO (2004)).

⁷⁸The Changing Business Landscape from Colonial Period to Date - The Chronicle Gambia, <https://www.chronicle.gm/the-changing-business-landscape-from-independence-to-date/>, [accessed 13 April 2023].

⁷⁹Gaye J., Cuts International, Competition Regimes in the world- A civil society report, The Gambia, <https://competitionregimes.com/pdf/Africa/44-The%20Gambia.pdf>, pp. 236.

⁸⁰BTI 2022 Gambia Country Report, <https://bti-project.org/en/reports/country-report/GMB>, [accessed 13 May 2023]. See also Cuts International, A Time for Action: Analysis of Competition Law Regimes of Select West African Countries Volume I: The Gambia, Ghana and Nigeria, pp.49.

⁸¹ Cuts International, A Time for Action: Analysis of Competition Law Regimes of Select West African Countries Volume I: The Gambia, Ghana and Nigeria, pp.31.

⁸² Ibid.

⁸³ Essential Commodities Act, 2015-These are some of the goods considered essential commodities by virtue of the Essential Commodities Act. *

⁸⁴ Cuts International, A Time for Action: Analysis of Competition Law Regimes of Select West African Countries Volume I: The Gambia, Ghana and Nigeria, pp.31.

interested in sugar have to buy rice from the importers. This would also serve as the requirement to access specific goods through credit arrangements while paying for other goods in advance.⁸⁵

Based on the foregoing, a draft cabinet paper was forwarded to the then Gambia's cabinet proposing a Competition law for The Gambia which was eventually approved in July 2002.⁸⁶ The implementation of the said policy was through the Competition Bill 2003 and the main objective of the said proposed Bill is:

*'To foster competitive markets and competitive business conduct in The Gambia by establishing a Competition Commission and a competitive regime that will control anticompetitive arrangements, monopoly situations and mergers with the aim of improving the well-being of consumers and the efficiency of businesses in The Gambia.'*⁸⁷

Based on the above, the objects and reasons of the said Bill presented to the National Assembly are stated as:

*'In the long-term economic development blueprint, Vision 2020, the Government set out its market-oriented programme of development and emphasized its commitment to a vibrant private sector and the introduction of a Competition Bill. Competition is one of the main engines of economic development. The adoption of this Bill will give confidence to those wishing to invest in The Gambia, by helping to provide a more predictable business environment.'*⁸⁸

This object and reason were approved and the said Bill was subsequently passed by the National Assembly in September 2007. The long title of the said Act is reproduced as follows:

'An Act to promote competition in the supply of goods and services by establishing a Commission, by prohibiting collusive agreements and bid-rigging, by providing for investigation and control of other types of restrictive agreements and of monopoly and

⁸⁵Strengthening Constituencies for Effective Competition Regime in The Gambia Key Research Findings and Key Issues: Omar Ousman Jobe (Policy & Budget Analyst, - ppt download, <https://slideplayer.com/slide/10832925/>, [accessed 12 May 2023]. See also Cuts International, A Time for Action: Analysis of Competition Law Regimes of Select West African Countries Volume I: The Gambia, Ghana and Nigeria, pp.31.

⁸⁶Gaye J., Cuts International, Competition Regimes in the world- A civil society report, The Gambia, <https://competitionregimes.com/pdf/Africa/44-The%20Gambia.pdf>, pp. 236.

⁸⁷ Ibid, pp. 236.

⁸⁸ The Competition Act 2007.

*merger situations, by promoting understanding of the benefits of competition and to provide for other matters connected therewith.*⁸⁹

The Act thus prohibits restrictive business practices in the form of collusive agreements and bid-rigging agreements on the grounds that they are inherently anticompetitive. The established CC⁹⁰ in the said Act is mandated to demonstrate that the parties in default or implicated have infringed a provision but do not need to show that they have anticompetitive effects. The said Commission can thus initiate investigations⁹¹ on the suspicion that a business is party to a prohibited practice.⁹²

Based on the historical background of the emergence of restrictive business practices in The Gambia, the CA promotes the free functioning of markets and the removal of government restraint on competition. The said Act addressed anticompetitive practices through restrictive agreements between businesses, misuse of market power and merger control.⁹³ It is worth noting that some businesses operating in The Gambia have accepted and adopted the Competition law imposed on them and they do not regard it as a threat⁹⁴ but this is just a handful of them in the urban areas as most local businesses in the rural areas lack the awareness of the existence of the competition law.⁹⁵ The former Minister of Trade stated at an ECOWAS meeting in 2014 that ‘simply having a competition regime cannot produce or ensure competition in the market unless this is facilitated by government policies and enforcement.’⁹⁶

2.3 Summary and concluding remarks

Restrictive business practices are behaviours or activities by undertakings or enterprises that limit competition. These practices have adverse effects on international trade and economic development, especially in developing countries such as The Gambia. These behaviours include

⁸⁹Competition Act 2007. See also <https://sesricdiag.blob.core.windows.net/sesric-site-blob/imgs/news/2487-Day%202-Country-Experience-The-Gambia.pdf>, [accessed 12 May 2023].

⁹⁰ Section 6, The Gambia Competition Act 2007.

⁹¹ Ibid, Section 15.

⁹²Gaye J., Cuts International, Competition Regimes in the world- A civil society report, The Gambia, <https://competitionregimes.com/pdf/Africa/44-The%20Gambia.pdf>, pp. 236.

⁹³Competition in Africa Report 2022, https://insightplus.bakermckenzie.com/bm/attachment_dw.action?attkey=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQJsWJiCH2WAUuVQjpl3o%2BQdjuJ7MHju&nav=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQbuwypnpZjc4%3D&attdocparam=pB7HEsg%2FZ312Bk8OIuOIH1c%2BY4beLEAe%2BUn%2FAIAAopc%3D&fromContentView=1, [accessed 13 April 2023], pp.121.

⁹⁴ Gaye J., Cuts International, Competition Regimes in the world- A civil society report, The Gambia, <https://competitionregimes.com/pdf/Africa/44-The%20Gambia.pdf>, pp. 236.

⁹⁵ Cuts International, A Time for Action: Analysis of Competition Law Regimes of Select West African Countries Volume I: The Gambia, Ghana and Nigeria, pp.31

⁹⁶ Gambia – African Antitrust & Competition Law, <https://africanantitrust.com/tag/gambia/>, [accessed 13 April 2023].

informal or formal agreements among businesses that have negative impact and aim to generate high profits at the expense of consumers.

Restrictive business practices in the EU refer to activities that restrict competition within the single market and are considered illegal. The EU has strict laws, policies and regulations in place to prevent these practices, as they harm consumers, hinder innovation and lead to higher prices and reduced choices for consumers. The Gambia's CA defines two types of restrictive agreements: collusive agreements or bid-rigging agreements, and horizontal or vertical agreements subject to investigation. These agreements refer to activities or behaviours that prevent, restrict or distort competition, harming consumers and the economy. The said Act provides examples of restrictive business practices, including price-fixing agreements, bid-rigging and abuse of dominant market positions. It also makes provisions for mergers that significantly reduce competition in a particular market.

3. Outline of the legislative legal framework of Competition law in the EU and The Gambia

3.1 Introduction

The author of this paper is of the view that before delving into the provisions of Articles 101 and 102 of the TFEU and part six of the Competition Act 2007 properly, it is imminent to briefly highlight the legislative legal framework of competition law in the EU which consists of several regulations and directives but also concerning The Gambia which has CA and other supporting guidelines related to competition law. The EU and The Gambia have a similar principle that ‘the fact that an agreement restricts competition does not mean it is automatically prohibited unless it is a hardcore cartel.’⁹⁷ Thus, competition rules play a significant role in any economy because they ensure that companies can operate on a level playing field and provide a greater variety of products and services to consumers at competitive prices and conditions.⁹⁸

3.2 European Union legal framework

The TFEU establishes the legal basis or framework for EU competition law and prohibits anticompetitive agreements and abuse of dominant market position as previously stated in this text. The proper operation of the EU Single Market relies heavily on the essentiality of fair competition under equitable conditions.⁹⁹ Based on this, competition policy encompasses various types of anticompetitive actions undertaken by undertakings, the potential threats to competition arising from mergers between undertakings, and the actions of public authorities within EU Member States that could hinder or distort competition, such as the provision of state aid or subsidies.¹⁰⁰

The EC has been authorised by the TFEU to enforce EU competition law,¹⁰¹ investigate potential violations, and impose fines on undertakings found to have violated the TFEU. The EC is further empowered to order companies to cease anticompetitive practices and to take

⁹⁷ Competition law - the basics, <https://www.pinsentmasons.com/out-law/guides/competition-law---the-basics>, [accessed 10 April 2023].

⁹⁸ Enforcement of EU competition policy, https://www.eca.europa.eu/lists/ecadocuments/bp_competition/bp_competition_en.pdf, [accessed 10 April 2023].

⁹⁹Themaat W.V.V., Reuder B., *European Competition Law, A Case Commentary*, published Edward Elgar Publishing Limited 2014, pp. 36, para. 4.26. See also *Background paper: Enforcement of EU competition policy* | European Court of Auditors, <https://www.eca.europa.eu/es/publications?did=46728>, [accessed 24 May 2023].

¹⁰⁰ Enforcement of EU competition policy, https://www.eca.europa.eu/lists/ecadocuments/bp_competition/bp_competition_en.pdf, [accessed 10 April 2023]

¹⁰¹ Jones A., Suftrin B., Dunne N., *EU Competition Law: Text, Cases and Materials*, Oxford Press (7 edition), pp.78.

other measures necessary to restore competition to affected markets.¹⁰² Such empowerment bestowed on the EC is under Regulation 1/2003. The said Regulation replaced Regulation 17/62¹⁰³ when the Commission submitted to the Council a proposed Regulation reforming the competition enforcement system which was approved and came into force on 1 May 2004.¹⁰⁴ The EU also has Directive 2014/104/EU which provides for compensation for victims of anticompetitive practices. The Merger Regulation¹⁰⁵ provides for the control of mergers and acquisitions¹⁰⁶ that may significantly impede competition in the EU. The State Aid rules which ensure that public funding does not distort competition within the EU also form part of the EU legal framework on competition law.

Thus, the TFEU and its related regulations and directives provide a comprehensive legal framework for promoting competition within the EU and ensuring that undertakings do not engage in anticompetitive behaviour that harms consumers and undermines the functioning of the EU's internal market.

3.3 The Gambia legal framework

The legal framework of competition law in The Gambia is fairly new and less developed compared to the EU. The main legislation regulating or governing competition law is the CA. The said Act established The Gambia CC and provides for the control of restrictive business practices, abuse of dominant market positions and merger control. It also prohibits agreements restricting competition and sets out the procedure for investigations and enforcement of competition law in The Gambia.

In addition, the CA provides for the relevant authority to 'make regulations generally for the better carrying into effect of the provisions'¹⁰⁷ of the Act. When the selected interviewee for this paper was asked whether such Regulations had been issued, it was stated that the said Regulations are not issued by the responsible Ministry to date.

¹⁰²Enforcement of EU competition policy,

https://www.eca.europa.eu/lists/ecadocuments/bp_competition/bp_competition_en.pdf, [accessed 10 April 2023].

¹⁰³ Jones A., Sufrin B., Dunne N., *EU Competition Law: Text, Cases and Materials*, Oxford (7 edition), pp.75.

¹⁰⁴ Enforcement of EU Competition policy,

https://www.eca.europa.eu/lists/ecadocuments/bp_competition/bp_competition_en.pdf, [accessed 10 April 2023].

¹⁰⁵ Council Regulation (EC) No. 139/2004.

¹⁰⁶ Jones A., Sufrin B., Dunne N., *EU Competition Law: Text, Cases and Materials*, Oxford (7 edition), pp.76.

¹⁰⁷ Section 61, The Gambia Competition Act, 2007- These regulations can contain different provisions for different circumstances, as well as incidental and transitional provisions as deemed necessary by the Secretary of State. However, the Secretary of State is required to consult the Commission before making any such regulations, except in cases where the Commission has not yet been appointed. *

Even though The Gambia's competition law jurisprudence is still developing, it has managed to enact other relevant legislation that is related to competition law such as the Consumer Protection Act 2014 (which provides for consumer protection), and the Gambia Public Procurement Act 2022 (which governs public procurement and aims to ensure fair competition among bidders). These legal bases assist the responsible competition authorities to combat restrictive business practices in The Gambia. For instance, the CC is also responsible for administering the Consumer Protection Act, hence its name Gambia Competition and Consumer Protection Commission (GCCPC), but under the Competition Commission Act, it is known as The Gambia Competition Commission (GCC) but the functioning CC wears two hats, thus the used name GCCPC administering both Acts concurrently.

By virtue of Section 18 (1)(a) of the CA,¹⁰⁸ the GCCPC has issued the Competition Commission (Economic and Legal Analysis of Cases) Guidelines, 2008 to explain the economic and legal analysis to be used by the GCCPC in determining cases excluding merger cases.¹⁰⁹ In addition, it is important to mention that there also exists the Competition Commission Procedural Rules, 2008, although the procedural mandate of the GCCPC is not entirely an area of focus of this paper. Nonetheless, the powers conferred on the GCCPC are proscribed under Section 18(1)(b) of the CA. The scope and purpose of these rules are for GCCPC to specify the various procedures that it intends to follow when carrying out its functions under the CA¹¹⁰ such as the handling of complaints; the conduct of investigations and hearings, basis on which penalties and remedies will be determined.¹¹¹ In brief, these are the legal frameworks that aim to fight restricted business practices to prevent abuse of dominance or exploitative practices in a market. They aim to protect consumer welfare and encourage innovation.

It is worth noting that according to the interviewee when asked whether 'there are official proposals to amend the existing CA', it was answered that there are policies in place to amend the CA.' They are currently working on the amendment of the CA and the Consumer Protection Act and they have established a committee consisting of relevant stakeholders and have drafted a report containing the proposed amendments. The proposed amendments contain amongst other things, the issue of abuse of dominance as they are not currently finable offences and other directives can be issued which are not deterrent. It was further stated that this proposal on the issue of abuse of dominance is to be resolved by tapping into the EU's policies on this issue.

¹⁰⁸ This is the section which conferred the GCCPC the power to issue such guidelines.

¹⁰⁹ Section 3 of the Competition Commission (Economic and Legal Analysis of Cases) Guidelines, 2008.

¹¹⁰ Section 3 (1) of the Competition Commission Procedural Rules, 2008.

¹¹¹ *Ibid*, Section 3 (2).

The interviewer was further given an insight that steps have been taken to seek funding from international development partners for the implementation of the proposed amendment project.

The interviewee gave an insight into the relationship that the EU has had with The Gambia as a development partner over the years. The interviewee has stated that acknowledging how advanced EU competition law is, they are aware of the existence of the EC and its functions. The interviewee further reiterated that it is a practice for the GCCPC to conduct their investigations mandated on them by Section 15 of the CA using EU methods and caselaws in order to assist and guide them with more input on similar situations that they might be facing so they can exercise their duties effectively. The GCCPC thus, consider EU best practices in their legal framework for the efficient functionality of their commission.

3.4 Summary and concluding remarks

It is this author's opinion that understanding the legislative framework of competition law is essential before discussing the provisions of Articles 101 and 102 of the TFEU and the CA. Both the EU and The Gambia share the principle that not all agreements that restrict competition are automatically prohibited unless they constitute hardcore cartels. Competition rules are crucial for maintaining fair competition, enabling undertakings to operate on an equal footing and offer a wide range of products and services to consumers at competitive prices.

In the EU, the TFEU serves as the legal foundation for competition law. It prohibits anticompetitive agreements and the abuse of dominant market positions, ensuring fair competition within the EU Single Market. Competition policy encompasses various forms of anticompetitive behaviour by undertakings, risks associated with mergers, and actions by public authorities that may distort competition. The EC is entrusted with enforcing EU competition law, investigating potential violations, and imposing fines on companies found to have infringed the TFEU. The TFEU, along with its related regulations and directives, establishes a comprehensive legal framework for promoting competition in the EU. Its goal is to prevent undertakings from engaging in anticompetitive behaviour that harms consumers and undermines the functioning of the EU's internal market.

4. Analysis of restrictive business practices provisions

4.1 Introduction

The EU and The Gambia have similarities and differences when it comes to restrictive business practices in their respective jurisdictions. As previously mentioned, in the EU, these provisions are primarily governed by Articles 101 and 102 of the TFEU and its regulatory body is the EC which is responsible for enforcing these said provisions and investigating suspected cases of restrictive business activities. If an undertaking is found to have violated EU competition law, it can be fined by virtue of the existing Regulation 1/2003. While in The Gambia, the CA governs restrictive business practices and the GCCPC is responsible for enforcing the said Act and investigating suspected violations by issuing fine or directives to the offender.

As aforementioned, the two jurisdictions also have some differences in terms of their provisions on restrictive business practices. For instance, the EU anticompetitive provisions apply to all twenty-seven member states while the CA only applies within the jurisdiction of The Gambia. In addition, enforcement mechanisms of the EU and The Gambia differ as well. The EC has the power to investigate suspected violations of competition law and impose fines whilst in The Gambia, although the GCCPC can investigate and impose fines, it may also refer cases to the conventional courts for further action due to lack of capacity. The EU has a separate regulatory framework for reviewing mergers and acquisitions that may substantially lessen competition, while the CA includes provisions on the same topic but within the general framework of restrictive business practices.¹¹²

Thus, the EU and The Gambia have similar goals in regulating restrictive business practices, however, there are some differences in terms of the scope of application, enforcement mechanisms, fines, and the regulatory framework for reviewing mergers and acquisitions.

4.2 Restrictive business practices provisions

4.2.1 The European Union

Article 101 of the TFEU is one of the main provisions addressing forms of anticompetitive practices. It provides for the ban of agreements between undertakings, decisions by associations

¹¹² International Regulation of Restrictive Business Practices Engaged in by Transnational Enterprises: A Prognosis, <https://www.jstor.org/stable/40705074>, [accessed 12 May 2023].

and concerted practices which affect trade and have their object or effect on the prevention, restriction and distortion of competition within the internal market. Thus, Article 101 deals with cartels, horizontal and vertical agreements used by undertakings.

To digest this provision, it can be divided into three parts. The first part sets out the scope of the prohibition, which applies to all agreements between undertakings that may affect trade between EU member states. This includes agreements between undertakings operating in different EU countries, as well as agreements between undertakings operating within a single member state that may affect trade between member states.¹¹³ The second part of Article 101 sets out the types of agreements that are prohibited. This includes agreements between undertakings that directly or indirectly fix prices, limit production, share markets or customers, or engage in any other form of collusive behaviour that may prevent, restrict, or distort competition within the EU's internal market.¹¹⁴ The third part of Article 101 provides for exemptions to the prohibition on agreements that restrict competition. These exemptions encompass agreements that contribute to enhancing the production or distribution of goods, foster technical or economic advancements, or ensure that consumers receive a fair portion of the resulting advantages.¹¹⁵

Article 101 of the TFEU prohibits anticompetitive agreements between undertakings and concerted practices that may affect trade within the EU internal market and that have as their object or effect the prevention, restriction, or distortion of competition within the EU's internal market.¹¹⁶ The Court of Justice in *Société Technique Minière v Maschinenbau Ulm GmbH*¹¹⁷

¹¹³ Meeßen G. The EU treaties and the Charter of fundamental rights: A Commentary, edited by Kellerbauer M., Klamert M., & Tomkin J., Oxford University Press, 2019, pp. 1003, https://books.google.se/books?id=uAuXDwAAQBAJ&printsec=frontcover&hl=sv&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false, [accessed 24 April 2023]. See also Exemption of certain air transport agreements from EU competition rules, <https://eur-lex.europa.eu/EN/legal-content/summary/exemption-of-certain-air-transport-agreements-from-eu-competition-rules.html>, [accessed 12 May 2023].

¹¹⁴ Competition law - Agreements and concerted practices: Understanding Competition Law, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284396/oft401.pdf, pp. 14, [accessed 24 April 2023]. See also Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC, <https://eur-lex.europa.eu/EN/legal-content/summary/guidelines-on-the-application-of-article-101-3-tfeu-formerly-article-81-3-tec.html#:~:text=Article%20101%20of%20the%20Treaty,prevent%2C%20restrict%20or%20distort%20competition>, [accessed 18 May 2023].

¹¹⁵ Meeßen G. The EU treaties and the Charter of fundamental rights: A Commentary, edited by Kellerbauer M., Klamert M., & Tomkin J., Oxford University Press, 2019, pp. 1003, https://books.google.se/books?id=uAuXDwAAQBAJ&printsec=frontcover&hl=sv&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false, [accessed 24 April 2023]. See also Application of competition law: Exemptions and exceptions UNCTAD/DITC/CLP/Misc.25, https://unctad.org/system/files/official-document/ditcclpmisc25_en.pdf, [accessed 12 May 2023].

¹¹⁶ Berry E., Homewood J.M., & Bogusz B., *EU law: Text, Cases and Materials*, Oxford University Press 2013, pp. 472, para. 13.2.9. See also The European Commission Updates an Important 'Safe Harbor' Protecting Commercial Arrangements from Competition Law Challenges | Insights | Greenberg Traurig LLP, <https://www.gtlaw.com/en/insights/2014/8/the-european-commission-updates-an-important-safe-harbor-protecting-commerc>, [accessed 12 May 2023].

¹¹⁷ Case 56/65.

and *Etablissements Consten SA and Grundig-Verkaufs GmbH v Commission*¹¹⁸ stated that with regards to restrictions, such as price-fixing or market sharing, it will be unnecessary to establish any actual effect on the market because the mere existence of such a restriction is sufficient to determine a violation.¹¹⁹ Thus, to see whether an agreement has the effect of restricting competition, an agreement should be appraised in its legal and economic context.¹²⁰

The said article prohibits agreements between two or more undertakings that aim to prevent or restrict competition. Such agreements are considered illegal and void ab initio.¹²¹ It also prohibits concerted practices,¹²² which are defined as coordinated behaviour between two or more firms that substitutes practical cooperation for the risks of competition.¹²³ In addition to the prohibition on anticompetitive agreements, Article 101 TFEU also prohibits any abuse of a dominant market position by a single undertaking within the EU's internal market.¹²⁴ The provision aims to prevent dominant firms from abusing their market power to the detriment of consumers, competitors, and the market as a whole.¹²⁵ The prohibition of anticompetitive agreements and abuse of dominance is essential for the functioning of a competitive internal market within the EU.¹²⁶ It helps to promote innovation, efficiency and consumer welfare and ensures that businesses compete on a level playing field.

With regards to Article 101(2), an agreement or decision is considered void when prohibited¹²⁷ but it can be possible to sever or remove the prohibited clause from the agreement or decision and only those clauses will be considered void.¹²⁸ In *Société Technique Minière v Maschinenbau Ulm GmbH*,¹²⁹ the ECJ ruled that only those provisions that have the object or effect of restricting competition are void. However, in *Consten and Grundig*,¹³⁰ the ECJ

¹¹⁸ Case 56 and 58/64. See also Themaat W.V.V., Reuder B., *European Competition Law, A Case Commentary*, published Edward Elgar Publishing Limited 2014.

¹¹⁹ Berry E., Homewood J.M., & Bogusz B., *EU law: Text, Cases and Materials*, Oxford University Press 2013, pp. 473, para. 13.2.9.

¹²⁰ Korah V., *An introductory guide to EC competition law and practice*, Hart publishing, (9 edition) 2007, pp.77.

¹²¹ Article 101(2) TFEU.

¹²² Berry E., Homewood J.M., & Bogusz B., *EU law: Text, cases and materials*, Oxford University Press 2013, pp. 464, para. 13.2.5.

¹²³ Concerted practices - Concurrences, <https://www.concurrences.com/en/dictionary/Concerted-Practice>, [accessed 24 April 2023].

¹²⁴ Craig P., Búrca D. Gráinne, *EU Law: Text, Cases and Materials*, (7 edition), UK Version, Oxford University Press (2020), pp. 1076.

¹²⁵ Competition policy | Fact Sheets on the European Union, <https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy>, [accessed 27 April 2023].

¹²⁶ Competition policy | Fact Sheets on the European Union, <https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy>, [accessed 24 April 2023].

¹²⁷ Korah V., *An introductory guide to EC competition law and practice*, Hart publishing, 9 Edition, (2007), pp.91.

¹²⁸ Berry E., Homewood J.M., & Bogusz B., *EU law: Text, Cases and Materials*, Oxford University Press 2013, pp. 486.

¹²⁹ Case 56/65 [1966] ECR 235, pp. 250. See also Themaat W.V.V., Reuder B., *European Competition Law, A Case Commentary*, published Edward Elgar Publishing Limited 2014.

¹³⁰ Case 56 and 58/64, [1966] ECR 299.

quashed the decision for not specifying how much of the agreement was contrary to Article 81 (now 101).¹³¹ This provision promotes fair competition in the internal market.

Nonetheless, Article 101(3) TFEU provides for the exemptions which can be applied both to individual agreements which are not covered by any of the block exemptions (Regulations exempting certain groups of agreements) and to particular types of agreements which have been covered by a block exemption.¹³² For instance, if an agreement was made within Article 101(1), it can gain exemption under Article 103, provided that certain conditions are fulfilled.¹³³ The four conditions state that: it must improve the production or distribution of goods or promote technical or economic progress; consumers must receive a fair share of the resulting benefits; it must contain only restrictions that are indispensable to the attainment of the agreement's objectives; and it cannot lead to the elimination of competition in respect of a substantial part of the products in question.¹³⁴ These four conditions are thus cumulative and must be fulfilled before an exemption is granted¹³⁵ but if it does not infringe on Article 101(1), it does not apply.¹³⁶ The ECJ has deemed certain agreements or behaviours as illegal because of their object or purpose and thus effectively prohibits or declared such agreements or behaviours as illegal.¹³⁷ Thus, the burden of proof under Article 81(3) (now 101 (3)) is on the party alleging or claiming illegality or unfairness.¹³⁸ In *GlaxoSmithKline v Commission*,¹³⁹ the Court explained that if a good case is however made by the alleging party, the Commission must examine the arguments and the evidence, and may have to provide an explanation if it dismisses them.

Furthermore, the EU jurisprudence has established that for competition to be restrictive, no-obligation needs to be accepted as illustrated in *Kali und Salz/Kali Chemie v Commission*,¹⁴⁰ the ECJ treated an option to require Kali und Salz to buy any potash not required by Kali Chemie was giving up its distribution network for the product and its declining sources of supply would not warrant the expense of re-establishing one. It was therefore clear that it would

¹³¹ Korah V., *An introductory guide to EC competition law and practice*, Hart Publishing, (9 edition) 2007, pp.91.

¹³² Berry E., Homewood J.M., & Bogusz B., *EU law: Text, cases and materials*, Oxford University Press 2013, pp. 478, para. 13.4.1.

¹³³ Craig P., Búrca D. Gráinne, *EU Law: Text, Cases and Materials*, UK Version, Oxford University Press (7 edition), 2020, pp. 1098.

¹³⁴ *Ibid*, pp. 1098.

¹³⁵ Case T-213/00 CMA CGM (n 52) [226].

¹³⁶ Korah V., *An introductory guide to EC competition law and practice*, Hart Publishing, (9 edition) 2007, pp.87.

¹³⁷ Craig P., Búrca D. Gráinne, *EU Law: Text, Cases and Materials*, UK Version, Oxford University Press (7 edition) 2020, pp. 1096.

¹³⁸ Regulation 1/2003, Article 2.

¹³⁹ T-168/01 [2006] 5 CMLR 1623, para.236.

¹⁴⁰ Case 19 & 20/74, [1975] ECR 499, paras.8-9.

exercise its option and the option restricted competition contrary to Article 101 (1).¹⁴¹ This is considered a de facto restriction¹⁴² which, in short, simply refers to a situation where a particular business practice or behaviour, while not explicitly prohibited by law, has the effect of restricting competition in a specific market.¹⁴³ This can occur when a dominant player in a market engages in conduct that, while not illegal on its face, has the effect of limiting the ability of other firms to compete effectively.

In addition, Article 102 of the TFEU also plays a pivotal role in EU competition law as it prevents an abusive dominant position in its internal market.¹⁴⁴ This provision is concerned with unilateral¹⁴⁵ exploitative and exclusionary abuses of dominant position by one or more undertakings,¹⁴⁶ thereby distorting competition in a specific market because monopoly power can lead to higher prices and lower output or options for consumers than under normal competitive conditions. It is thus safe to state that whilst Article 101 is concerned with distortion to the competition which is the product of collaboration between or amongst undertakings, Article 102 is more concerned with the unilateral conduct of single undertakings which alone enjoy such market power that they are not bound by the discipline of competitive forces which ought to mark the play of the market.¹⁴⁷ However, in order not to misconstrue this provision, it does not prohibit market power per se but rather, it proscribes the abuse of market power. Thus, undertakings are encouraged to participate by competing in a market, with the most efficient players being successful. As provided in *Intel Corp*,¹⁴⁸ ‘it would therefore be odd if the winner were legally penalised, since it may be more efficient than the competitor.’

Based on the abovementioned Article, several stages should be analysed and it is the definition of the relevant market since it is a pre-condition for deciding whether a firm is dominant within a specific market; to determine whether it has abused its dominant position; and whether there are any available defences. The said Article on the face of it does not expressly address

¹⁴¹ Korah V., *An introductory guide to EC competition law and practice*, Hart Publishing, (9 edition) 2007, pp.88.

¹⁴² *Ibid*, pp.88.

¹⁴³ The effects of anti-competitive business practices on developing countries and their development prospects, https://unctad.org/system/files/official-document/ditccplp20082_en.pdf, [accessed 12 May 2023].

¹⁴⁴ Article 102 TFEU.

¹⁴⁵ Meeßen G. *The EU treaties and the Charter of fundamental rights: A Commentary*, edited by Kellerbauer M., Klamert M., & Tomkin J., Oxford University Press, (2019), pp. 1039, https://books.google.se/books?id=uAuXDwAAQBAJ&printsec=frontcover&hl=sv&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false, [accessed 27 April 2023].

¹⁴⁶ Craig P., Búrca D. Gráinne, *EU Law: Text, Cases and Materials, UK Version*, Oxford University Press (7 edition) 2020, pp. 1126.

¹⁴⁷ Lane R., *EC Competition law*, Pearson Education Limited 2000, pp. 137.

¹⁴⁸ Case C-413/14 P *Intel Corp v European Commission* EU: C: 2017:632, (133). See also Lane R., *EC Competition law*, Pearson Education Limited 2000.

monopoly as such but rather undertakings abusing their dominant position.¹⁴⁹ In this regard, abuse of a dominant position, therefore, has two consecutive components: market dominance (which is not prohibited) and abusive exploitation of that dominance (which is prohibited).¹⁵⁰

Further, as with Article 101, it does not necessarily mean that the abuse must have affected trade, rather, it is sufficient to establish only that the conduct is capable of having such an effect¹⁵¹ as stated by the ECJ in *Höfner v Macrotron*.¹⁵² Such ideology was also stated by the Commission's guidance paper¹⁵³ on its enforcement priorities in applying the said Article which provides that a large market share is indicative of a dominant position whilst other factors such as countervailing buyer power and trade barriers must also be taken into consideration. A dominant is a position of a market power in which an undertaking is not constrained in its conduct by competitive forces.

Thus, as previously stated, to effectively determine whether an undertaking occupies a dominant position, it is pivotal to identify the relevant market and to assess the market strength of an undertaking alleged to be dominant.¹⁵⁴ Moreover, the relevant market is 'defined essentially by identification of a product/service market and a geographic market.'¹⁵⁵ It is important to mention that the concept of dominance was defined by the ECJ in the case of *United Brands Company*¹⁵⁶ and subsequently later elaborated and expanded in the case of *Hoffmann-La Roche*.¹⁵⁷ Thus, the dominance of power has been defined under EU community law as a:

'position of economic strengths enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power

¹⁴⁹ Case 322/81 *Michelin v Commission* [1983] ECR 3461. See also Craig P., Búrca D. Gráinne, *EU Law: Text, Cases and Materials*, UK Version, Oxford University Press (7 edition) 2020.

¹⁵⁰ Lane R., *EC Competition law*, Pearson Education Limited 2000, pp.139.

¹⁵¹ Case C-41/90 *Höfner v Macrotron* [1991] ECR I-1979. See also Themaat W.V.V., Reuder B., *European Competition Law*, A Case Commentary, published Edward Elgar Publishing Limited 2014.

¹⁵² Case C-41/90 *Höfner v Macrotron* [1991] ECR I-1979. See also Craig P., Búrca D. Gráinne, *EU Law: Text, Cases and Materials*, UK Version, Oxford University Press (7 edition) 2020.

¹⁵³ Guidance on the Commission's enforcement in applying Article 82 of the EC Treaty to abusive exclusionary conducts by dominant undertakings, 2009.

¹⁵⁴ Lane R., *EC Competition law*, Pearson Education Limited 2000, pp.142.

¹⁵⁵ Case T-66, 77 & 78/89 *Società Italiano Vetro v Commission* (Flat glass) [1992] ECR II-1403 at 1463.

¹⁵⁶ Case 27/76 *United Brands Company v Commission* [1978], ECR 207.

¹⁵⁷ Case C- 85/76, *Hoffmann-La Roche &Co. AG v. Commission* [1979] ECR 461.

*to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.*¹⁵⁸

Moreover, the ECJ has further focused on the external characteristic of bananas which was an issue. It highlighted the taste, lack of seeds, soft texture, lack of non-season production and easy handling in order to enable it to distinguish bananas from other fruits.¹⁵⁹ Furthermore, the price of bananas is not affected or influenced by other fruits to a certain extent. Thus, the ECJ held that bananas have a separate market from other fruits. A similar decision was also made regarding tyres when the court held that the usage of the product and specialised distribution of the network was required to determine that the tyres for lorries and buses have their single market.¹⁶⁰

The concept of the geographic market revolves around the similarity of the market.¹⁶¹ It refers to the specific geographical area or region where competition occurs or is present. It is not necessary for the competitive conditions to be completely identical; it is enough that they are similar or reasonably homogeneous. However, territories with significantly different competitive conditions cannot be considered part of the same market.¹⁶² Thus, a significant factor that determines the geographical market is the real possibility of consumers finding an alternative product with a different economic dependence upon it.

Despite the restriction of abuse of a dominant position in a market, dominance cannot and should not also deprive an undertaking of the right or obligation to compete in the marketplace. They also have the right to take all the necessary measures to protect their commercial interests if it is threatened.¹⁶³ Whilst the language of Article 102 suggests that there must be a cause and effect between the dominant position and its abusive exploitation, it provides no directions or guidance as to where in the market abuse occurs. Although abuse mostly often occurs directly

¹⁵⁸Dominant position under Article 102 TFEU | Legal Guidance | LexisNexis, <https://www.lexisnexis.co.uk/legal/guidance/dominant-position-competition-law>, [accessed 28 April 2023]. See also [https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC0224\(01\):EN:H TML](https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC0224(01):EN:H TML), [accessed 12 May 2023].

¹⁵⁹ Case 27/76 United Brands Company v Commission [1978], ECR 207, pp. 31-32.

¹⁶⁰ Case C-322/81 NV Nederlandsche banden Inidustrie Michelin v Commission [1983].

¹⁶¹ Lane R., *EC Competition law*, Pearson Education Limited 2000, pp.144.

¹⁶² Case 27/76 United Brands v Commission [1978] ECR 207; Case T-83/91 Tetra Pak v Commission [1994] ECR II-755; Case T-229/94 Deutsche Bahn v Commission [1997] ECR II-1689. See also Dominant position under Article 102 TFEU | Legal Guidance | LexisNexis, <https://www.lexisnexis.co.uk/legal/guidance/dominant-position-competition-law>, [accessed 12 May 2023].

¹⁶³ Case 27/76 United Brands v Commission [1978] ECR 207. See also Chalmers D., Davies G., Monti G., *European Union Law*, Cambridge University Press 2019 (4 edition).

in the product market in which the undertaking is considered dominant, it need not do so to be caught by Article 102.

However, abusive behaviour in which a dominant undertaking might incline unfair prices, limitation of production, keep prices artificially high, and discriminatory dealing are the subjects of the examples stated in Article 102, although not exhaustive.¹⁶⁴ In addition, abusive conduct may be of the nature of exploitative abuse, simple exploitative of consumers in the relevant specialised ‘exclusionary’ abuse, the use of dominance to distort, prevent or hinder competition from other undertakings. It is unnecessary to show that abuse affects the structure of competition or that it produces financial or competitive advantage to the dominant undertaking, prejudice to the interests of the consumer being sufficient.¹⁶⁵ Thus, the concept of abuse is objective in the sense that the conduct of a dominant undertaking may be abusive even in the absence of any fault.¹⁶⁶

Whilst it is paramount to keep in mind that the innovation with which dominant undertakings may seek to entrench their market position and see off existing or prospective competition is virtually limitless, so the *Michelin* and *Hoffman-La Roche* tests of ‘special responsibility not to allow their conduct to impair genuine undistorted competition on the common market’¹⁶⁷ and behaviour that through the use of methods different from those governing normal competition, obstructs the maintenance of existing competition levels or hinders the growth of competition¹⁶⁸ continue to be widely recognised as reliable and common examples of abusive conduct.

As previously mentioned, pricing is a common example of abusive conduct. This is because pricing lies at the heart of competition and it is the medium through which it is normally waged.¹⁶⁹ Hence, Article 102(a) expressly provides that abuse may consist in ‘directly or indirectly imposing unfair purchase or selling prices’ but supracompetitive prices are not the only such abuse.¹⁷⁰ Any conduct or attempt to artificially increase prices by reducing output would fall under Article 102(b) of limiting production to the prejudice or detriment of

¹⁶⁴ Case 6/72 Europemballage & Continental Can v Commission [1973] ECR 215.

¹⁶⁵ Decision 2000/12 (Comité Française d’Organisation de la Coupe du Monde) OJ 2000 L5/55.

¹⁶⁶ Case T-65/89 BPB Industries v Commission [1993] ECR II-389.

¹⁶⁷ Case 322/81 *Michelin v Commission* [1983] ECR 3461. See also Themaat W.V.V., Reuder B., *European Competition Law*, A Case Commentary, published Edward Elgar Publishing Limited 2014.

¹⁶⁸ Case C- 85/76, *Hoffmann-La Roche & Co. AG v. Commission* [1979] ECR 461. See also Kokkoris L., *Research handbook on the Law and Economics of Competition Enforcement*, Edward Elgar Publishing Limited, 2022, https://books.google.se/books?id=jqKCEAAAQBAJ&printsec=frontcover&hl=sv&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false, [accessed 12 May 2023].

¹⁶⁹ Lane R., *EC Competition law*, Pearson Education Limited 2000, pp.151.

¹⁷⁰ Abusively High prices, *Competition Law and Economic Analysis*, https://www.cresse.info/wp-content/uploads/2020/02/2017_sps4_pr1_Frederic-Jenny.pdf, [accessed 12 May 2023].

consumers. Thus, charging a price which is considered excessive because it has no reasonable relation to the economic value of the product supplied is abuse.

In addition to pricing, a dominant undertaking might sacrifice to sustain losses in the short term by charging prices lower than its production cost of goods or services to drive lesser, more vulnerable, competitors from the market.¹⁷¹ These are called predatory pricing. In the earlier mentioned case of *AKZO*,¹⁷² the ECJ was very elaborate in providing a definition of predatory pricing as prices set lower than average variable cost. This definition was further reaffirmed in *Tetra Pak v Commission*¹⁷³ in which the court explained that predatory pricing is always considered as abusive conduct for it had ‘no conceivable economic purpose other than elimination of a competitor.’¹⁷⁴

Furthermore, pricing has a broad variety of areas that could potentially be considered abusive conduct. For instance, producers charge different prices for the same product or services as a normal course of business but it is most dangerous when a dominant undertaking applies dissimilar situations to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.¹⁷⁵ This, by all intent and purposes, falls under the rubric of Article 102(c), which is known as ‘discriminatory pricing.’ The ECJ has stated that any artificial price differences and price discrimination based on the nationality of the buyer is abusive conduct unless it can be justified that they got into consideration the variation in the conditions of marketing and intensity of competition.¹⁷⁶ Moreover, an attempt to further seal off the home area by offering lower prices in border areas where imports might be more attractive to buyers is also abusive as is a policy of ‘export rebates.’¹⁷⁷ This is where rebates are offered by a rail carrier so as to distort freight movement to its advantage.¹⁷⁸ As a result, a selective offering of lower prices to buyers who purchase or might purchase from other producers in order to

¹⁷¹ Case C- 85/76, *Hoffmann-La Roche & Co. AG v. Commission* [1979] ECR 461. See also...

¹⁷² Case 62/86 *AKZO v Commission* [1991] ECR I-5951. See also Meeßen G. *The EU treaties and the Charter of fundamental rights: A Commentary*, edited by Kellerbauer M., Klamert M., & Tomkin J., Oxford University Press, (2019).

¹⁷³ Case C-333/94P *Tetra Pak v Commission* [1996] ECR I-5951.

¹⁷⁴ *EU Law: Pricing & Competition Law - Inheritance Tax - Cyprus*, <https://www.mondaq.com/cyprus/Tax/14152/EU-Law-Pricing-Competition-Law>, [accessed 12 May 2023].

¹⁷⁵ EU Court clarifies analysis required to determine if discriminatory pricing is an abuse of dominance | Bryan Cave Leighton Paisner, <https://www.bclplaw.com/en-US/events-insights-news/eu-court-clarifies-analysis-required-to-determine-if-discriminatory-pricing-is-an-abuse-of-dominance.html>, [accessed 12 May 2023]. See also EUR-Lex - 12008E102 - EN, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12008E102>, [accessed 19 May 2023].

¹⁷⁶ Case 27/76 *United Brands v Commission* [1978] ECR 207; Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)* [1994] ECR II-755. See also Chalmers D., Davies G., Monti G., *European Union Law*, Cambridge University Press (4 edition) 2019.

¹⁷⁷ *EU Law: Pricing & Competition Law - Inheritance Tax - Cyprus*, <https://www.mondaq.com/cyprus/Tax/14152/EU-Law-Pricing-Competition-Law>, [accessed 12 May 2023].

¹⁷⁸ Case T-Deutsche Bahn v Commission [1997] ECR II-1689, upheld on appeal as Case C-436/97P *Deutsche Bahn v Commission* [1999] ECR I-2387.

dissuade them from so doing is unfair both to the suppliers and other buyers to whom the offer is not made, and so it is abusive.¹⁷⁹

Another abusive conduct is ‘refusal to deal or supply’. It is a term used in competition law and upheld in caselaw to describe a situation where a dominant undertaking refuses to supply goods or services to a potential customer or competitor without any legitimate reason¹⁸⁰ as there exists a presumption or judicial notice is taken that an undertaking whose business is to sell goods and services will do so whenever a willing buyer presents it with the opportunity. This practice is considered anticompetitive conduct as it can harm competition in the relevant market by preventing potential competitors from entering the market or from competing on an equal footing with the dominant undertaking.¹⁸¹ As previously stated in this chapter, a dominant undertaking has the special responsibility to ensure that its conduct does not distort competition in the relevant market.¹⁸² Refusal to deal can be subject to scrutiny and intervention by competition authorities to prevent or remedy any resulting harm to competition.

The ECJ has accepted that the abusive nature of a dominant undertaking’s conduct could be established based on its mechanism and abstract features, for example, the tying of two different products.¹⁸³ Thus, tying and bundling are practices that can raise antitrust concerns under competition law pursuant to Article 102 TFEU. Tying occurs when an undertaking conditions the sale of one product or service (the ‘tying product’) on the purchase of another product or service (the ‘tied product’).¹⁸⁴ The practice can be anticompetitive if it forecloses competition in the market for the tied product or if it leverages market power from the tying product to gain an unfair advantage in the market for the tied product.¹⁸⁵ Bundling, on the other hand, involves the sale of two or more products or services as a package. Bundling can be pro-competitive if it leads to cost savings or efficiencies, but it can also be anticompetitive if it forecloses competition in the market for one or more of the bundled products or if it leverages market

¹⁷⁹ Case 62/86 AKZO v Commission [1991] ECR I-3359; Case T-228/97 Irish Sugar v Commission [1999] ECR II-2969.

¹⁸⁰ Cases T-69, 70 & 76/89 RTE, BBC & ITP v Commission [1991] ECR II-485, 535 AND 575, upheld on appeal as Cases C-241 & 242/91P RTE & ITP v Commission [1995] ECR I-743. See also Lane R., *EC Competition law*, Pearson Education Limited 2000.

¹⁸¹ Lane R., *EC Competition law*, Pearson Education Limited 2000, pp.158.

¹⁸² EC Competition Law: Article 82 and Abuse of Dominant Position - Inheritance Tax - Cyprus, <https://www.mondaq.com/cyprus/inheritance-tax/13479/ec-competition-law-article-82-and-abuse-of-dominant-position>, [accessed 12 May 2023].

¹⁸³ Meeßen G., *The EU treaties and the Charter of fundamental rights: A Commentary*, edited by Kellerbauer M., Klamert M., & Tomkin J., Oxford University Press, (2019), pp. 1048, https://books.google.se/books?id=uAuXDwAAQBAJ&printsec=frontcover&hl=sv&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false, [accessed 29 April 2023].

¹⁸⁴ Case T-30/89 Hilti v Commission [1991] ECR II-1439, upheld on appeal as Case C-53/92P Hilti v Commission [1994] ECR-I 667.

¹⁸⁵ Lane R., *EC Competition law*, Pearson Education Limited 2000, pp.159.

power to gain an unfair advantage. Although the presence of such bundling is not always apparent.

In the EU, tying practices are evaluated under Article 102 of the TFEU. Article 102 prohibits abuse of a dominant position in the market; thus, competition law regulates tying and bundling practices to ensure that they do not harm competition or consumer welfare. For example, if an undertaking has a dominant position in one market (the tying market) and uses tying to leverage that position to foreclose competition in another market (the tied market), it can harm competition by making it difficult for rivals to enter or expand in the tied market. In general, tying and bundling will be evaluated under a rule of reason analysis, which considers the pro-competitive benefits and anticompetitive harms of the practices. The analysis will depend on factors such as the market structure, the market shares of the firms involved, the availability of substitutes, and the ability of rivals to compete. If a tying practice is found to be anticompetitive, the company may be subject to fines or other remedies under competition law but particularly under Regulation 1/2003. However, tying or bundling may be permissible if there are legitimate business justifications, such as enhancing product efficiency or offering consumers a discount for purchasing products or services together.¹⁸⁶

In addition, the EC will consider whether the practice leads to efficiencies that outweigh any anticompetitive effects or if it forecloses competition in the market for the tied product. Foreclosure can occur when the practice makes it difficult for competitors to sell their products in the market for the tied product.¹⁸⁷ If a tying or bundling practice is found to be anticompetitive, the EC may require the firm to stop the practice or impose fines or penalties. As in the case of *Tetra Pak*,¹⁸⁸ where the undertaking had abused its dominant position in the market for aseptic packaging systems by engaging in tying the sale of aseptic packaging material to the use of Tetra Pak filling machines. The Commission required Tetra Pak to cease the anticompetitive conduct and imposed a fine on them.¹⁸⁹ In some cases, the EC may require an undertaking to divest assets or take other measures to restore competition. The EC has nonetheless issued guidelines to guide on how this provision should be applied to tying practices

¹⁸⁶ Lane R., *EC Competition law*, Pearson Education Limited 2000, pp.159.

¹⁸⁷ *Ibid*, pp.160.

¹⁸⁸ Case 92/163/EEC.

¹⁸⁹ Case 92/163/EEC Commission Decision (*Tetra Pak II*). See also Meeßen G. *The EU treaties and the Charter of fundamental rights: A Commentary*, edited by Kellerbauer M., Klamert M., & Tomkin J., Oxford University Press, (2019).

but these guidelines are not exhaustive, and the EC will evaluate tying and bundling practices on a case-by-case basis to determine whether they violate EU competition law.

An abuse of a dominant position may also consist of a dominant undertaking acquiring or merging with a competitor to distort competition. Although there is nothing in the EC Treaty specifically addressing mergers, the EC has expressed mergers fall within the ambit of Article 102. They fall under the rubric of the said Article only insofar as an undertaking which is already dominant abuses that dominance by acquiring a competitor in the market in which it is dominant.¹⁹⁰ Thus, mergers and acquisitions refer to the processes of combining two or more undertakings to create a larger entity, or the acquisition of one undertaking by another.

Mergers and acquisitions can be motivated by a variety of factors, including strategic, financial, and operational considerations. Undertakings may pursue mergers and acquisitions to gain access to new markets or technologies, increase market share, achieve economies of scale, or improve their financial performance. Mergers and acquisitions can have a significant impact on competition in the relevant markets and may raise concerns under antitrust or competition law. CC may scrutinize mergers and acquisitions to assess their potential effects on competition and may require the merging parties to take certain measures to mitigate any potential harm to competition. The EU Merger Regulation (EUMR) 139/2004 is the legal framework that governs the review and approval of mergers and acquisitions under EU competition law. The regulation sets out the procedures and criteria that competition authorities use to assess whether a proposed merger or acquisition is likely to have anticompetitive effects in a market.

4.2.2 The Gambia

As already established, the CA is the legal framework governing competition law. Part six of the said Act headed 'restrictive business practices' outlines what is considered distortive to competition in The Gambia's market.¹⁹¹ The GCCPC is mandated under section 15 (I) of the CA, to advise on any action taken or proposed to be taken by the State or any public body that may adversely affect competition in the supply of goods and services.¹⁹² In addition, the GCCPC has defined what a relevant market is in a report/study on the competitiveness of

¹⁹⁰ Lane R., *EC Competition law*, Pearson Education Limited 2000, pp.258.

¹⁹¹ Trade policies and practices by measure, The Gambia, WT/TPR/S/233, pp.18.

¹⁹² *Ibid*, pp.18.

‘Hajj’¹⁹³ operations. It states that the relevant market is a defined set of products or services which could compete with other products and a defined geographical area within which competition occurs. The relevant market combines the product market and the geographic market.¹⁹⁴

Furthermore, Section 25 prohibits a provision in an agreement as collusive and it defines collusive agreement to mean any horizontal agreement and if it has an object or effect preventing, restricting or distorting competition by fixing the selling or purchase price of goods and services or sharing markets or sources of supply. It further provides exemptions when an agreement is not considered collusive which is when the only parties in an agreement are inter-connected bodies.¹⁹⁵

A study conducted by the GCCPC on Liquefied Petroleum Gas (LPG) found that Section 24(2)(b) and (c) of the Petroleum Products Act 2016 contradict and conflict with the provision in Section 25 of the CA. It stated that competition will not be promoted and maintained if the State is involved in determining the price at which petroleum products in certain categories will be sold.¹⁹⁶ They further stated that although the Petroleum Products Act 2016 has liberalised the market and it aspires to encourage and protect competition in the market which will lead to the enhancement of consumer welfare, it has nonetheless recommended that the price regulation be removed since the market is liberalised.¹⁹⁷ In addition, in 2017, the GCCPC conducted a study on the Banking sector of The Gambia and how come to find out that banks have been engaging in concerted practices when it stated that ‘some of the fees, charges and interest rates, particularly for retail customers, are strikingly similar and uncompetitive.’¹⁹⁸ The study revealed that 83% of commercial banks benchmark their fees, charges and interest rates with those of their competitors. They tend to increase or decrease their fees, charges and rates based

¹⁹³ Hajj market study, <https://gcc.gm/wp-content/uploads/2018/05/FINAL-HAJJ-REPORTprinting.pdf>, [accessed 12 May 2023].

The Hajj is the pilgrimage to the Muslim Holy Land of Mecca, Saudi Arabia. It plays a very crucial role in the religious life of the Gambian population which is over 90% Muslim. This act is done because Islam requires its followers to perform this pilgrimage at least once in a lifetime if economic and physical conditions permit, every able-bodied adult Gambian Muslim aspires to go on the Hajj someday. *

¹⁹⁴ Hajj Market study report 2000-2012, pp. 5. See also Definition of the relevant market, <https://eur-lex.europa.eu/EN/legal-content/summary/definition-of-relevant-market.html#:~:text=The%20relevant%20market%20combines%20the,prices%20and%20their%20intended%20use.>, [accessed 12 May 2023].

¹⁹⁵ Section 25(3), The Gambia Competition Act 2007.

¹⁹⁶ Liquefied Petroleum Gas (LPG) market study, 2016, pp. 16, <https://gcc.gm/wp-content/uploads/2018/05/GAMBIA-LPG-ACF-STUDY-FINAL-DRAFT.pdf>, [accessed 30 April 2023].

¹⁹⁷ Ibid, pp.18.

¹⁹⁸ Report on the Banking Sector study, 2017, pp. 9, <https://gcc.gm/wp-content/uploads/2018/05/GCCPC-Banking-Report-Study-B-2-print.pdf>, [accessed 30 April 2023].

on their findings and not solely on their cost structure. This means consumers are at risk of being charged very high prices,¹⁹⁹ as banks, regardless of cost structure, are charging similar fees, charges and interest rates. These smacks of concerted practices within the sector contravene Section 25 of the CA, calling for further examination.

Though the CA does not specifically speak to the issue of exclusivity as stipulated in the agreements between Western Union and MoneyGram²⁰⁰ and their respective agents in The Gambia, it does prohibit restrictive agreements such as collusions (section 25) and bid-rigging (Section 26). Although the exclusivity clause does not fall under any of the two prohibitions, it has an element of tying.²⁰¹ Section 50 (1) of the CA applies to the matter as the exclusivity clause in the agreements of Western Union and MoneyGram with their agents/representatives has the object or effect of preventing, restricting or distorting competition.²⁰²

The investigation further revealed that Western Union²⁰³ and MoneyGram are the dominant providers of money transfer services in the country, which could be attributed to the fact that they operate worldwide and have a long-standing in the money transfer business. During the period that the GCCPC conducted its investigations, Western Union and MoneyGram had 283 and 62 outlets²⁰⁴ across the country respectively. Jointly, they enjoy 96.4% of the total market share²⁰⁵ which indicates the existence of monopoly in this market as per section 31 (1) (b) of the CA. Market share is stated to mean the ‘proportion of the sales relative to other firms.’²⁰⁶ The GCCPC thus recommended that the activities of Western Union and MoneyGram be closely monitored to ensure that they do not use their dominant position to distort competition.²⁰⁷

In addition, a study on rice and sugar importation in The Gambia focused on the anticompetitive areas of barriers to entry into the importation of sugar and rice market and abuse of monopoly

¹⁹⁹ Trade policies and practices by measure, The Gambia, WT/TPR/S/233, pp.18.

²⁰⁰ These are money exchange/transfer offices that send and receive money worldwide.

²⁰¹ Investigation Report to Competition Commission,

https://www.ftc.gov/system/files/documents/public_events/316871/gambiaamadouceesay.docx, [accessed 12 May 2023].

²⁰² Exclusive contracts agreements in the money transfer services in The Gambia- investigation report to competition commission, pp. 5.

²⁰³ Western Union is the pioneer in the transferring of money globally, and the first to establish outlets for providing such services in the country.

²⁰⁴ Ibid, pp.6.

²⁰⁵ Exclusive contracts agreements in the money transfer services in The Gambia- investigation report to competition commission, pp.6.

²⁰⁶ Onion investigation report of 2020, pp.3

²⁰⁷ Exclusive contracts agreements in the money transfer services in The Gambia- investigation report to competition commission, pp. 6.

position.²⁰⁸ The study revealed that anticompetitive practices such as price fixing and tying existed in the sugar and rice importation market as three dominant importers were charging excessive pricing²⁰⁹ of sugar and rice.²¹⁰ It is important to highlight that rice and sugar hold utmost importance as essential commodities in The Gambia, as they are consumed by nearly every household on a daily basis.²¹¹ Therefore, changes in the price of these commodities, no matter how small, affect these consumers. During the Onion investigation report of 2020 carried out by the GCCPC, it defined competition distortion to mean ‘lack of free and open competition in a market.’²¹² This means that The Gambia operates a free market economy, any restriction on trade would potentially distort competition.

Moreover, in April 2012, the GCCPC reported on the investigation of violations of the CA by Medical Insurance Underwriters in The Gambia by virtue of Section 15 CA in order to promote competition in the supply of goods and services. The GCCPC thus found that six members of The Gambia’s Medical Insurance Association were engaged in price-fixing and market sharing by signing a Memorandum of Understanding (MoU). In addition, they were also found to be engaged and involved in cartel activities. A cartel activity is said to be an arrangement between competing businesses to engage in collusion with the aim of raising prices and collective profits.²¹³ This restrained any form of competition in the medical insurance underwriting business and consequently appropriated any benefits that would have otherwise accrued to the insuring public from free and unfettered competition in the market²¹⁴ thus violating Sections 25 and 26 respectively. Furthermore, collusion between the six involved parties is a deliberate act of cartelisation of the medical insurance business which has the object or effect of preventing, restricting or distorting competition by limiting consumer choices, providing low-quality services and compelling consumers to pay excessive prices for medical insurance.

Nonetheless, although the said MoU contains prohibited provisions, Section 27 of the CA has provided that:

²⁰⁸ Rice and sugar market study report, pp. 2. See also <https://gcc.gm/wp-content/uploads/2018/07/RICE-SUGAR-MARKET-STUDY.pdf>, [accessed 12 May 2023].

²⁰⁹ Economy watch: Price control mechanism: Who is responsible?, Ousman Kargo, July 2013, The Point newspaper.

²¹⁰ Rice and sugar market study report, pp. 2. See also <https://gcc.gm/wp-content/uploads/2018/07/RICE-SUGAR-MARKET-STUDY.pdf>, [12 May 2023].

²¹¹ Rice & sugar market study report, <https://gcc.gm/wp-content/uploads/2018/07/RICE-SUGAR-MARKET-STUDY.pdf>, [accessed 12 May 2023].

²¹² Onion investigation report of 2020, pp.3

²¹³ Economy watch: Price control mechanism: Who is responsible?, Ousman Kargo, July 2013, The Point newspaper.

²¹⁴ Report on the investigation of violations of the CA by Medical Insurance Underwriters in The Gambia, April 2012, pp.4.

‘if an agreement containing provisions by virtue of which it is a collusive agreement or a bid-rigging agreement also contains other provisions that do not fall within the provisions of Section 25(1) and 26(1), those other provisions are not prohibited...’²¹⁵

This means that only the provisions that are anticompetitive are in violation and the rest of the other provisions can continue to be in effect ²¹⁶ (similar to the provision of Article 101(2) TFEU). In addition, collusive agreements tend to create cartels which attempt to create monopoly situations in what should be a competitive industry with participants restraining the amount they produce in order to keep supply and thus process high at the expense of consumers.²¹⁷

Moreover, Sections 29 and 30 CA restrict horizontal and vertical agreements respectively. It provides that a horizontal agreement that is collusive is subject to investigation by the GCCPC if the parties to the agreement supply together 30% or more or acquire 30% or more of goods and services of any description.²¹⁸ And when the GCCPC has reasonable grounds to believe that the agreement has the object or effect of preventing, restricting or distorting competition. On the other hand, Section 30 explicitly stated that a vertical agreement is subject to an investigation by the GCCPC if one or more parties involved in an agreement are in a monopoly position.

This was illustrated by a study conducted by the GCCPC in The Gambia’s Tourism market when the GCCPC found that anticompetitive practices were conducted in the Tourism industry in the form of exclusivity contracts by tour operators and some hotels. This contradicted both Sections 30 and 31 of CA respectively. Based on the above, this distorts competition because the tour operator-driven destination, depends mostly on foreign-based tour operators, to bring tourists to the country, which gives them enormous power and domination over the local accommodation providers, such that their hands are forced into exclusivity contracts which are not favourable to them.²¹⁹ This behaviour also creates a barrier of entry for prospective competitors by squeezing out smaller tour operators from the market²²⁰ and potential local tour operator competitors will eventually have to withdraw from the market. This will enable the big tour operators to create enough market power to control and dictate key elements of the

²¹⁵ Section 27, The Gambia Competition Act, 2007.

²¹⁶ Ibid, Section 27.

²¹⁷ Economy watch: Price control mechanism: Who is responsible?, Ousman Kargo, July 2013, The Point newspaper.

²¹⁸ Section 29, The Gambia Competition Act, 2007.

²¹⁹ Study on The Gambia Tourism Market, pp.2.

²²⁰ Ibid, pp.2.

market and abuse their dominance.²²¹ There is no doubt that the exclusivity agreements between hotels and certain entities are having a negative impact on competition in the tourism industry. These agreements are effectively limiting and distorting the supply of tourists to the industry.

Monopoly situations are also dealt with by the CA under Section 31 as it can be considered anticompetitive behaviour. It considers an enterprise to be a monopoly if one enterprise possesses, acquires or supplies 30% or more of the goods or services in a market or if 70% or more of goods or services are supplied or acquired by three or fewer enterprises.²²² The GCCPC thus has the mandate to investigate an enterprise if it is of the reasonable belief that monopoly situations exist and that such conduct has the object or effect of preventing, restricting or distorting competition.²²³ The GCCPC exercised its power by conducting an investigation into the Cement market in February 2017, where it found that a monopoly situation existed in the cement market by *Galp Energia*²²⁴ which enjoyed a market share of 89%.²²⁵ Furthermore, the GCCPC also found *Trust Bank Ltd* in violation of Section 31 as it exercised a monopoly power in 2012.²²⁶ These are anticompetitive behaviours which are not permissible by the CA.

The LPG investigation report revealed that *Euro African Group Ltd (EAGL)* controlled 94% of the LPG market. This implied that EAGL is in a monopoly situation as per Section 31 of the CA and that its conducted prevented, restricted or distorted competition.²²⁷ The investigation further revealed that EAGL has been engaged in predatory pricing in 2017.²²⁸ Predatory pricing by a company in a monopoly position is in contravention of Section 31 because it constitutes an abuse of dominance.²²⁹

Although tying is not dealt with by the CA, it is nonetheless provided for by Section 11 (2)(c) of the Consumer Protection Act, 2014 which is an Act to protect consumers from unfair and misleading market conduct. This Act also falls under the purview of the GCCPC. The said Section prohibits enterprises from requiring consumers to purchase, hire or avail goods or

²²¹ Study on The Gambia Tourism Market, pp.2.

²²² Section 31 (1), The Gambia Competition Act, 2007.

²²³ Ibid.

²²⁴ Note that Galp Energia is now known as ATLAS in The Gambia.*

²²⁵ Cement market investigation 2018 report, pp.8, <https://gcc.gm/wp-content/uploads/2018/05/CEMENT-MARKET-STUDY.pdf>, [accessed 12 May 2023].

²²⁶ Report on the Banking Sector study, 2017, pp.5, <https://gcc.gm/wp-content/uploads/2018/05/GCCPC-Banking-Report-Study-B-2-print.pdf>, [accessed 30 April 2023].

²²⁷ The Gambia Government White Paper on the report of the Commission of Inquiry on the financial activities of the former President and close associates, <https://gainako.com/the-janneh-commission/>, [accessed 2 May 2023], pp. 36.

²²⁸ Liquefied Petroleum Gas (LPG) investigation report, 2018, pp.1, <https://gcc.gm/wp-content/uploads/2018/05/GAMBIA-LPG-ACF-STUDY-FINAL-DRAFT.pdf>, [accessed 30 April 2023].

²²⁹ Ibid, pp.11 and Rice and sugar study report, pp.15, <https://gcc.gm/wp-content/uploads/2018/05/GAMBIA-LPG-ACF-STUDY-FINAL-DRAFT.pdf>, [accessed 30 April 2023].

services as a condition when a consumer is seeking to purchase, hire or avail other products.²³⁰ Thus, tying behaviours can make insurance companies inefficient and expensive because of the monopoly that they enjoy which is made possible by the banks which also violates Section 31 of the CA.²³¹ The GCCPC in its Money transfer investigation also found Western Union and MoneyGram in violation of Section 31(1)(b) of the CA as they jointly enjoyed 96.4% of the market share.²³²

Notwithstanding, not all monopolies are considered illegal. The Gambia Telecommunications Company (GAMTEL) for instance is a legal monopoly as a state-owned enterprise which has been in existence since 1984²³³ dealing with national and international telecommunications services from cable and wireless. Nonetheless, the government of The Gambia has taken significant steps to further liberalize the telecom sector, breaking the monopoly over the international voice gateway in 2019 and also restructuring GAMTEL on the wholesale of the fibre-optic backbone network.²³⁴ According to the case of *United States of America v Real Property located Potomac, Maryland*,²³⁵ the United States District Court found that The Gambia's former President²³⁶ interfered and granted exclusive monopoly rights over all petroleum imports into The Gambia which violated the CA. The Competition Commission (Economic and Legal Analysis of Cases) Guidelines, 2008 explicitly states that 'Competition law cannot create Competition where other laws or government regulations prevent it.'²³⁷

In addition to restrictive business practices prohibited in The Gambia, mergers are also of concern to the GCCPC. By virtue of Section 32 of the CA, a merger situation is subject to investigation if one of the parties to a merger situation is registered in The Gambia and either both of the parties supply or acquire goods or services to supply together 30% or more of all those goods and services or one of the parties alone acquire or supplies before the merger 30% or more of goods and services.²³⁸ Moreover, the GCCPC has the authority to initiate an

²³⁰ Section 11 (2)(c), The Gambia Consumer Protection Act, 2014.

²³¹ Liquefied Petroleum Gas (LPG) investigation report, 2018, pp.8, <https://gcc.gm/wp-content/uploads/2018/05/GAMBIA-LPG-ACF-STUDY-FINAL-DRAFT.pdf>, [accessed 30 April 2023].

²³² Exclusive contract agreements in the Money Transfer services in The Gambia Investigation Report, pp.6.

²³³ Competition Regimes in the World-A civil society report by Cuts International, Authored by Adama Cham in 2012, pp. 4.

²³⁴ Republic of The Gambia, Overcoming a no-growth legacy: Systematic country diagnostic, World Bank Group, May 2020, pp.96.

²³⁵ *United States of America v Real Property located in Potomac, Maryland*, commonly known as 9908 Bencross drive, Potomac, MD 20854 and all appurtenances, improvements and attachments located thereon, and any property traceable thereto, Case 8:20-cv-02071, 2020.

²³⁶ Yahya Jammeh, the former president of The Gambia was the owner of the real property stated as defendant in the above case.

²³⁷ Section 4(2), The Competition Commission (Economic and Legal Analysis of Cases) Guidelines, 2008.

²³⁸ Section 32, The Gambia Competition Act 2007.

investigation if there are valid reasons ²³⁹ to believe that the establishment of a merger has led to, or is likely to lead to, a significant reduction in competition within any market.²⁴⁰ Although Section 33 of the Act has prescribed the provision of merger regulations, they are still not in existence.

Section 31 provides the criteria for determining the share of supply of an enterprise to establish if it satisfies certain requirements. For instance, if an enterprise is a subsidiary of a group or is connected to other enterprises within a group, the group's share as a whole is to be used for that purpose. The criteria for determining if goods or services are of a separate description will depend on the circumstances of each case and will be decided by the GCCPC. In addition, it further explains that the criteria for determining whether the share of supply or acquisition mentioned in the abovementioned sections are met will depend on the specific circumstances and will be decided by the GCCPC. If the GCCPC determines that the criteria have been met and initiates an investigation,²⁴¹ it will then decide whether the goods or services used in calculating the share of supply or acquisition also constitute the relevant market for assessing the effects on competition. Alternatively, it may substitute an alternative definition of the market.²⁴²

4.3 Similarities and differences in the implementation mechanism

The competition law implementation mechanisms of the legal frameworks in the EU and The Gambia share some similarities. Firstly, both legal frameworks prohibit anticompetitive agreements, abuse of dominant market positions, and mergers that significantly impede competition. In the EU, these prohibitions are set out in Articles 101 and 102 of the TFEU, while in The Gambia, they are provided for in Part six of the CA as discussed above.

Secondly, both legal frameworks established CC to enforce their competition laws. In the EU, the EC is responsible for enforcing competition law at the EU level, although it is worth noting that EU member states also have their individual National Competition Authorities (NCA) which enforce and implement EU competition laws in their respective countries.²⁴³ For

²³⁹Trade policies and practices by measure, The Gambia, WT/TPR/S/233, pp.43.

²⁴⁰Section 32 (c), The Gambia Competition Act, 2007.

²⁴¹ Ibid, Section 15.

²⁴² Ibid, Section 34.

²⁴³Competition co-operation and enforcement, <https://www.oecd.org/daf/competition/competition-inventory-european-competition-network.pdf>, [accessed 19 May 2023].

example, the NCA in Sweden is called ‘Konkurrensverket’.²⁴⁴ However, in The Gambia, the GCCPC is the body responsible for enforcing the CA within its jurisdiction.²⁴⁵

Thirdly, both legal frameworks provide for the investigation of alleged violations of competition law. In the EU, the EC has the power to conduct investigations into suspected anticompetitive practices, including the power to conduct dawn raids and seize evidence.²⁴⁶ Similarly, in The Gambia, the CC can investigate alleged violations of the CA, including conducting inspections and obtaining information.²⁴⁷

Fourthly, both legal frameworks provide for remedies when competition law is violated, which would be discussed later in this chapter. In the EU, the EC can order undertakings to cease anticompetitive practices, impose fines, and even order the divestiture of assets in certain cases. Similarly, in The Gambia, the GCCPC can impose fines and require enterprises to take corrective measures to restore competition in the market.²⁴⁸

Another similarity that exists in both jurisdictions is that the burden of proof lies on the complainant to prove the allegation of infringement by the undertaking or enterprise.²⁴⁹ Further, both legal frameworks provide for the appeals process for decisions made by the CCs. In the EU, undertakings can appeal decisions of the EC to the EU courts. Similarly, in The Gambia, companies can appeal decisions of the GCCPC to the High Court.²⁵⁰

Despite the similarities stated above, there are also several differences in the competition law implementation mechanism of the legal frameworks in the EU and The Gambia. The EU competition law framework has a supranational dimension, which means that it applies across all EU Member States. In contrast, The Gambia's competition law framework is limited to the jurisdiction of The Gambia. Moreover, in terms of scope, the EU competition law framework is broader than The Gambia's competition law framework. The Gambia's competition law framework is limited to anticompetitive agreements, abuse of dominance, and mergers with limited muscle to flex. This means that despite the fact that the EU accepts merger

²⁴⁴ Swedish Competition Authority, <https://www.konkurrensverket.se/en/>, [accessed 19 May 2023].

²⁴⁵ Section 6, The Gambia Competition Act, 2007.

²⁴⁶ Chalmers D., Davies G., Monti G., *European Union Law*, Cambridge University Press 2019 (4 edition) pp.883-6.

²⁴⁷ Section 39, The Gambia Competition Act, 2007.

²⁴⁸ *Ibid*, Section 55.

²⁴⁹ Section 3(6), The Gambia Competition Commission Procedural Rules, 2008. See also Article 2 of the Council Regulations 1/2003.

²⁵⁰ Section 58, The Gambia Competition Act, 2007.

notifications,²⁵¹ The Gambia does not, due to the lack of a Merger Regulation to be issued pursuant to the CA.²⁵² The lack of the GCCPC not accepting merger notifications was also confirmed by the interviewee by stating the above said reasons.

Furthermore, the enforcement mechanisms for competition law in the EU and The Gambia differ. In the EU, competition law is enforced by the EC. Although when it comes to cases within its member state level, NCA enforce and implement their respective competition laws as the example of Sweden was earlier mentioned.²⁵³ In contrast, in The Gambia, the GCCPC is the sole body responsible for enforcing the CA. The penalties for violations of competition law in the EU and The Gambia also differ. In the EU, the penalties for violating competition law can be substantial, including fines of up to 10% of a company's global turnover, divestiture of assets, and injunctive relief. In The Gambia, the penalties for violating competition law are less severe, with fines being the primary form of punishment.

Moreover, the EC is mandated by Article 299 of the TFEU to enforce its decisions. This Article empowers the EC to take appropriate measures to ensure that the EU treaties and the provisions of EU law are implemented effectively. In the situation of The Gambia, Section 15 (g) of the CA gives the GCCPC the mandate to ‘monitor compliance with a penalty or remedy and take any steps requires to enforce compliance.’ This is however not the same in practice. The author of this paper has posed the question of ‘in practice, are the commission’s recommendations enforceable?’ and the interviewee stated that the GCCPC recommendations are not enforceable in practice. The recommendations are rather treated as ‘policy advise to the government’ and publish the issued advice as mandated by the CA. ²⁵⁴ They also conduct follow-up meetings with the relevant parties and inform the relevant stakeholders about the advice so that it will appear transparent and other players in the market will be aware of the advice in order to deter them from committing the same offence.

The appeals process for decisions made by competition authorities also differs between the EU and The Gambia. In the EU, undertakings that are involved in a competition case before the EC

²⁵¹ Article 4 of the EU Merger Regulation- This article specifies that a concentration with a "Community dimension" must be notified to the European Commission prior to its implementation.

²⁵² Section 33, The Gambia Competition Act, 2007. See also McKenzie B., An Overview of Competition and Antitrust regulations in Africa, August 2019, pp.47.

²⁵³ Competition co-operation and enforcement, <https://www.oecd.org/daf/competition/competition-inventory-european-competition-network.pdf>, [accessed 19 May 2023].

²⁵⁴ Section 15 (e), The Gambia Competition Act, 2007.

can appeal decisions made by the EC to the EU courts.²⁵⁵ In contrast, in The Gambia, enterprises can appeal decisions made by the GCCPC to the High Court and finally, the resources available for enforcing competition law in the EU and The Gambia differ. The EC have greater resources, including larger budgets and more staff, to enforce competition law compared to the GCCPC in The Gambia which has not more than thirty staff.

The EU has a centralized system for reviewing mergers that meet certain thresholds. The EU merger control system is based on the principle of ‘one-stop-shop’, which means that mergers with an EU dimension are assessed by the EC rather than by individual Member State NCA. Under Article 4 of the EUMR, mergers and acquisitions that meet certain turnover thresholds must be notified to the EC before they can be implemented.²⁵⁶ The EUMR applies to mergers and acquisitions that have an EU dimension, meaning that they meet certain turnover thresholds both in the EU as a whole and in at least two EU member states. Unfortunately, The Gambia does not exercise merger notifications and this has been confirmed by the interviewee.²⁵⁷ The GCCPC has mentioned that they are not receiving or dealing with mergers until the said Merger Regulation provided for under Section 33 of the CA is into effect. However, certain merger issues are governed by the Company’s Act, 2013.²⁵⁸

Nevertheless, the interviewee gave insight information that the Merger Regulations is part of their agenda as part of the amendment of the CA and all the necessary groundwork has commenced. The interviewee further reiterated that the Merger regulation was not initially prioritised due to the nature and small size of The Gambia’s economy then. Now, due to the growing economy, they have deemed it necessary to have a Merger Regulation as they have noticed merger acts in the petroleum sector and the banking sector. Further, the interviewee is of the opinion that the existence of the Merger regulation would also be another source of income to the GCCPC as a percentage of the merger fees will be retained when reviewing

²⁵⁵ If parties involved in a competition case wish to appeal the decision of a national competition authority, the exact process may vary depending on the member state involved. Generally, member states have established specialized courts or tribunals to handle appeals related to competition law. In Sweden, parties seeking to appeal decisions of the national competition authority, the Swedish Competition Authority (Konkurrensverket), have recourse to the Patent and Market Court (Patent- och marknadsdomstolen). The Patent and Market Court is a specialized court that handles cases related to intellectual property rights, marketing, and competition law.* Reference is made to this Swedish latest case for context purposes- Fem år med Patent- och marknadsöverdomstolen: Konkurrensrättsliga avgöranden 2016–2021 | SvJT, <https://svjt.se/svjt/2021/1027>, [accessed 19 May 2023].

²⁵⁶ EU Merger Regulation.

²⁵⁷ Mckenzie B., An Overview of Competition and Antitrust regulations in Africa, August 2019, pp.47.

²⁵⁸ Ibid.

submitted applications as the GCCPC is also trying to diversify its source of income and not to only rely on government subventions.

Despite the fact that the aforementioned Guidelines do not cover the analysis of merger cases, the Government of The Gambia's intention has been that the merger control part of the Act should not be brought into active use until the Commission has gained experience in performing its other functions under the CA. The GCCPC will therefore wait until the Secretary of State makes regulations on merger control under Section 33 of the Act. Meanwhile, if a merger creates or enhances a monopoly situation under Section 31 of the CA, the GCCPC may be able to tackle any adverse effects by initiating an investigation under that Section.²⁵⁹

Another major difference between the two jurisdictions is the difference in market share. While there is not specific threshold percentage for market share that automatically establishes an abuse of dominance, the EU has generally considered undertakings with a market share around 40%²⁶⁰ or higher as having potential dominant position.²⁶¹ While in The Gambia, the CA explicitly states that a monopoly exist in relation to the supply of goods or services if either one of the enterprises supplies or acquires 30% or more of those goods or services or if three or fewer enterprises supply or acquire 70% or more of those goods or services.²⁶²

As a result, while there are similarities in the competition law implementation mechanism of the legal frameworks in the EU and The Gambia, there are also significant differences in terms of jurisdiction, scope, enforcement, penalties, appeals, and resources as pointed out above.

4.4 Legal Sanctions for Participating in restrictive business practices

4.4.1 Legal Sanctions in the EU

The EC can impose fines on undertakings that engage in anticompetitive behaviour under Article 101 TFEU. The fines can be as high as 10% of an undertaking's global turnover for each

²⁵⁹ Section 3(3), Competition Commission (Economic and Legal Analysis of Cases) Guidelines, 2008.

²⁶⁰ In the case of United Brands, the undertaking was found in a dominant position despite having a 45% market share, the percentage was twice as large as its competitors. In the Michelin I case, Michelin had a market share of 57-65% and that convinced the ECJ that Michelin was indeed dominant in the tyre market.*

²⁶¹ European Commission Competition Policy, https://competition-policy.ec.europa.eu/antitrust/procedures/article-102-investigations_en, [accessed 15 May 2023]. See also Dominant position under Article 102 TFEU,

<https://www.lexisnexis.co.uk/legal/guidance/dominant-position-competition-law>, [accessed 15 May 2023]. See also Case C-85/76, Hoffmann-La Roche & Co. AG v. Commission[1979], ECLI:EU:C:1979:36, para 41.

²⁶² Section 31, The Gambia Competition Act, 2007.

year of the infringement. The actual amount of the fine depends on several factors, including the gravity and duration of the infringement, the market share of the firm, and any mitigating or aggravating circumstances.²⁶³ Furthermore, the EC can issue injunctions prohibiting undertakings from engaging in a certain behaviour or requiring them to take certain actions to remedy the harm caused by their conduct. Failure to comply with an injunction can result in further legal sanctions.

Undertakings that engage in anticompetitive behaviour may also face claims for damages from their customers or competitors who have suffered harm as a result of the infringement.²⁶⁴ Moreover, undertakings that engage in anticompetitive behaviour may be disqualified from participating in public tenders for a certain period. When it comes to cartels, the EU has the Leniency Programme guideline of 2006 which allows undertakings to come clean and report first any cartel activities.²⁶⁵ This encourages undertakings to disclose restrictive practices in exchange for lesser penalties or fines.

As previously mentioned, Regulation 1/2003²⁶⁶ gave the EC the power to impose fines²⁶⁷ when there is an infringement of Article 102 TFEU and to order the dominant undertaking to cease and desist from unlawful activity. In addition, where necessary, it can order a dominant undertaking to adopt positive measures or steps to bring an infringement to an end. It is also possible for the EC to order the divestiture of an undertaking's assets or to break an undertaking up.²⁶⁸ This could take place provided that it is reasonable, necessary and proportionate to bring the infringement to an end and that there is no equally effective behavioural remedy or that such remedy would be more burdensome.²⁶⁹ In *ARA Foreclosure*²⁷⁰ for instance, the EC imposed a structural remedy with the ARA's consent to ensure that infringement could not be repeated.

²⁶³ Antitrust: Commission fines cargo train operators € 49 million for cartel, https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5376, [accessed 2 May 2023].

²⁶⁴ Chalmers D., Davies G., Monti G., *European Union Law*, Cambridge University Press 2019 (4 edition) pp.911.

²⁶⁵ Chalmers D., Davies G., Monti G., *European Union Law*, Cambridge University Press 2019 (4 edition) pp.891.

²⁶⁶This Regulation establishes a decentralised enforcement mechanism for EU competition law, granting powers and responsibilities to both the European Commission and national competition authorities of EU member states. It empowered the national competition authorities to investigate and take action against anticompetitive behaviour including the ability to impose sanctions and remedies. However, it's important to note that the precise powers and procedures for imposing sanctions may vary across member states due to national law and administrative practices. While Regulation 1/2003 sets out the general framework for enforcement, the specific implementation and enforcement measures are largely within the jurisdiction of each member state.*

²⁶⁷ Article 23, Regulation 1/2003.

²⁶⁸ *Ibid*, Article 7.

²⁶⁹ Whish R., Bailey D., *Competition law*, Oxford University Press, (9 edition) 2018, pp. 220-221.

²⁷⁰ Commission decision, 20 September 2016, para.132-148.

4.4.2 Legal Sanctions in The Gambia

In The Gambia, participating in restrictive business practices is a violation of the CA, which can lead to legal sanctions. Penalties for restrictive agreements subject to prohibition are proscribed by Section 49 of the CA. This provision only applies if the GCCPC determines that an enterprise is a party to a restrictive agreement subject to prohibition²⁷¹ by issuing directions to the enterprise to ensure that they cease from being a party to the restrictive agreement.²⁷² The Section also provides that any enterprise that is found to have engaged in anticompetitive conduct may be ordered to pay a fine of up to 10% of their turnover during the period of the breach of the prohibition up to a maximum period of three years.²⁷³ In addition, the said Section empowers the GCCPC to seek an order from the High Court to enforce the orders against the enterprise concerned.²⁷⁴

Further, Section 50 of the CA allows the GCCPC to issue directions in writing to an enterprise that it determines, after an investigation, to be engaged in restrictive business practices or a monopolistic situation. The GCCPC may issue directions to remedy or prevent the adverse effects on competition, or the detrimental effects on consumers that may result from such practices. The direction may include requirements such as amending or terminating agreements, changing or ceasing certain practices or conduct, providing access to facilities or divesting itself of assets or enterprises. In determining the remedial measures required, the GCCPC must consider the extent to which any offsetting benefits are present in the case. The Section aims to provide the GCCPC with effective tools to address anticompetitive practices and promote a competitive market in The Gambia.²⁷⁵

Section 51 of the CA outlines the powers of the GCCPC in the case of a merger situation that results in a substantial lessening of competition within a market for goods or services. If the GCCPC determines, after investigation that an enterprise is a party to such a merger situation, it may give the enterprise directions to remedy, mitigate or prevent the lessening of competition in the market. For a prospective merger, a direction may require the enterprise to desist from completion or implementation of the merger in a particular market, divest specified assets within a specified period before the merger is completed or implemented, or adopt or desist

²⁷¹ Section 49 (1), The Gambia Competition Act, 2007.

²⁷² Ibid, Section 49 (2).

²⁷³ Ibid, Section 49 (7).

²⁷⁴ Ibid, Section 49 (11).

²⁷⁵ Section 50, The Gambia Competition Act, 2007.

from conduct, including conduct concerning prices, specified in the ‘direction as a condition of proceeding with the merger.’²⁷⁶ For a completed merger, a direction may require the enterprise to divest itself of specified assets within a specified period or adopt or desist from conduct specified in the direction as a condition of maintaining or proceeding with the merger. The Secretary of State may prescribe a time limit for the GCCPC to decide whether to investigate of a merger situation.

Moreover, Section 52 of the CA applies when the GCCPC suspects that an enterprise is a party to a restrictive agreement subject to prohibition and believes there is a risk of serious or irreparable damage to a particular person.²⁷⁷ It also applies when the GCCPC is investigating a monopoly or merger situation, and there is prima facie evidence that competition is being prevented, restricted, distorted, or substantially lessened. In such cases, the GCCPC may give directions to prevent serious or irreparable damage to a particular person or category of persons, protect the public interest, or prevent pre-emptive action by the enterprise. The enterprise must be allowed to make representations before the direction is given, and the direction must be in writing.

Section 53 allows an enterprise to offer an undertaking to the GCCPC to address any concern that has arisen or is likely to arise during an investigation in respect of a restrictive agreement subject to investigation, a monopoly or a merger situation.²⁷⁸ The GCCPC may determine a case on the basis of an undertaking if it considers that the undertaking satisfactorily addresses all the concerns it has. An undertaking²⁷⁹ accepted by the GCCPC shall be published in the form of a decision and shall have effect as if it were a direction. Notwithstanding, GCCPC is responsible for monitoring compliance with directions and undertakings and can agree to vary or terminate a direction or accept a variation to an undertaking if there has been a material change of circumstances.²⁸⁰ In addition, if the GCCPC determines that an enterprise has failed to comply with a direction or undertaking without reasonable excuse, it may apply to the High

²⁷⁶ Competition Act No. 4 of 5 October 2007, <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/gm/gm003en.html>, [accessed 19 May 2023].

²⁷⁷ Section 52, The Gambia Competition Act, 2007.

²⁷⁸ Ibid, Section 53.

²⁷⁹ An undertaking in this context means a promise given by one party to the Court or competent authority, frequently of mandatory nature and relating to an obligation to the other party in proceedings. Undertakings are legally binding promises which carry severe consequences if breached, * FAQ: What is an Undertaking? - Foskett Marr Gadsby & Head, <https://foskettmarr.co.uk/faq-what-is-an-undertaking/#:~:text=An%20undertaking%20is%20E2%80%9Ca%20promise.carry%20severe%20consequences%20if%20Breached>, [accessed 22 May 2023].

²⁸⁰ Section 54, The Gambia Competition Act, 2007.

Court for an order to make good the default within a specified time and it may order the enterprise to bear the costs of the application.²⁸¹

According to the interviewee when posed the question of whether the GCCPC has imposed any financial penalties on an entity that had engaged in restrictive business practices, the interviewee provides that since the establishment of the GCCPC, there has been a case which was against The Gambia Medical Insurance. Most of the other penalties were directives to other sectors such as the Money transfer in terms of cartels as previously mentioned. The interviewee is however of the view that when the proposed amendments are finalised and enacted, it will assist the GCCPC to issue more fines to offenders which would also be a good source of income as all fines would be retained by the GCCPC.

In addition, when the interviewee was posed the follow-up question to describe any case where an enterprise refuses or fails to comply with the CA, the answer provided was that in some sectors they have conducted hearings before imposing penalties²⁸² concerning players failing to provide information that was requested by the GCCPC. Based on the said players' representation, they were not fined but rather given the opportunity to provide the requested information which they complied with.²⁸³ It was further explained that it is a finable offence when a party to a hearing provides false or misleading information during an investigation.²⁸⁴

4.5 Summary and concluding remarks

The author has established that the EU and The Gambia have similarities and differences in their approaches to regulating restrictive business practices. Both jurisdictions prohibit agreements that restrict competition and abuse of dominant market position. They have regulatory bodies, the EC in the EU and the GCCPC in The Gambia, responsible for enforcing these provisions and imposing fines on violators.

However, there are differences between the two jurisdictions as well. The EU's anticompetitive provisions apply to all member states, while The Gambia's CA applies only within its

²⁸¹ Ibid, Section 55.

²⁸² Section 47, The Gambia Competition Act, 2007- This section provides that the Commission cannot impose a penalty or give a direction without holding a hearing. However, if the enterprise chooses not to attend a hearing requested by the Commission or fails to attend a hearing when required to do so, the Commission may still impose a penalty or make a direction. *

²⁸³ Ibid.

²⁸⁴ Ibid.

jurisdiction. The enforcement mechanisms also differ, with the EC having the power to investigate violations and impose fines, while the GCCPC can also investigate violations and impose fines, it may refer cases to conventional courts since the enforcement mechanisms are not readily available. The EU has a separate framework for reviewing mergers and acquisitions that may harm competition. At the same time, The Gambia includes provisions on mergers within the general framework of restrictive business practices but not even implemented.

The competition law implementation mechanisms in the EU and The Gambia both prohibit anticompetitive agreements, abuse of dominant market positions, and mergers that hinder competition. They establish CCs to enforce the laws and investigate violations. Remedies for violations include fines and corrective measures in both frameworks. The burden of proof lies on the complainant, and there is an appeals process for decisions made by the CCs.

It can be derived that the Act aims to promote and maintain competition in The Gambia's market and prevent practices that distort competition, limit consumer choices, and lead to higher prices. The GCCPC plays a crucial role in enforcing the Act and conducting investigations into potential violations. Thus, the EU and The Gambia share the goal of regulating restrictive business practices, but there are differences in the scope of application, enforcement mechanisms, fines, and the regulatory framework for reviewing mergers and acquisitions.

5. Recommendations and Conclusion

5.1 Lessons to derive from EU's competition jurisprudence

As illustrated above, The Gambia could learn several lessons from the EU competition jurisprudence in order to improve its own jurisprudence in promoting fair competition, preventing restrictive business practices and establishing firm policies for the protection of the growing market of The Gambia. The EU's competition jurisprudence is not advocated to be perfect in this paper however, compared to The Gambia's system, it demonstrates the importance of having a well-developed competition law framework in place to promote market efficiency, innovation, and consumer welfare. The Gambia could thus benefit from adopting a similar approach to promote fair competition in its free trade market.

Moreover, EU's competition law explicitly prohibits restrictive business practices such as cartels, price-fixing, bid-rigging, abuse of dominant position, and mergers that would significantly reduce competition in its internal market. The Gambia could benefit for instance, in incorporating the proposed amendments to the CA to include a rigid implementation mechanism as the EU. The interviewee mentioned that the proposed amendments would not only promote and encourage competition in The Gambia but will also contribute to the coffers of the GCCPC which means more resources at their disposal to implement and exercise their functions and mandate effectively and efficiently. This would strengthen the competition policies in The Gambia and it will deter habitual offenders from violating the CA as they will be aware that GCCPC is no longer a toothless bulldog. However, this proposed reform can be achieved through EU support in the form of funding and human resources.

In addition, the EU's competition law relies on the CC to enforce the law and investigate restrictive business practices within the Union. The Gambia already has a similar competition authority but lacks the adequate resources, independence, and expertise to enforce competition law effectively. Nonetheless, when certain offences such as abuse of dominant position and cartels behaviours are finable, this would resolve GCCPC's issue of lack of resources and human power to enforce and implement its decisions and directives.

Further, as previously stated, the EU's competition law is closely linked with international cooperation, particularly with other CCs around the world such as The Gambia due to the

Cotonou Agreement. The Gambia could benefit by tapping on the EU's resources as its development partner to provide competition law experts and resources in order to improve its GCCPC. Establishing and utilising this route would promote fair competition in The Gambia. Moreover, it is part of the EU's competition law to balance the need for economic growth with the need for fair competition. The Gambia could benefit from adopting a similar approach to ensure that economic growth is not achieved at the expense of fair competition despite its small size and economy. The reason for stating this is because, despite the nature of its economy, The Gambia is considered one of the tourist and investment havens in Africa and attracts the attention of many foreign investors. So, if it continues to operate under its current dispensation, there is a high tendency for market exploitation on its free trade market, infringement of the existing competition laws and scare away potential foreign investors.

5.2 Strengthening competition policies in The Gambia by the EU

The EU as a development partner of The Gambia, can play a crucial role in strengthening The Gambia's competition policies. To illustrate further, based on the gaps in The Gambia's competition policies/laws highlighted above, The EU could provide technical assistance to The Gambia in the form of expert advice, training, and capacity building to help develop and implement competition policies and enforce its competition law.

Moreover, the EU could share its best practices and experiences in competition policy development and implementation, as well as provide guidance on how to tackle specific competition issues that The Gambia may face. The EU could further support the development of the institutional framework for competition policy in The Gambia. This includes providing financial and technical assistance to the established CC and strengthening its capacity to enforce competition law. Due to the availability of technical and financial resources, the EU could help raise public awareness in The Gambia about the benefits of competition policy and how it can promote economic growth, innovation, and consumer welfare. This could involve supporting public education and outreach programs, as well as engaging with the media to promote competition policy issues.

Additional ways in which the EU could assist in strengthening the competition policies in The Gambia could be that the EU fosters regional cooperation among CCs in Africa, to help promote a common understanding of competition policy and enforcement practices.

By providing support in these areas, the EU could help strengthen the competition policies and promote fair competition in The Gambia. This, in turn, could help create a more competitive and dynamic market, which would benefit consumers and promote economic growth.

5.3 Conclusion

To conclude, the economic dynamics between the two compared jurisdictions have been established throughout this paper. The author has asserted that it is not the intention to argue that the EU's competition mechanisms are flawless but rather, the author believes that when The Gambia taps into the knowledge, experience, external funds and skills of the EU on competition law and policies, it could contribute to the proposed laws and policy reforms to strengthen and upgrade its competitive market.

It is however important to understand that development partners assist each other to fill in gaps in various ways. As a result, the author is of the view that The Gambia can learn valuable lessons from the competition jurisprudence of the EU to enhance its own approach to promoting fair competition and preventing restrictive business practices. While acknowledging that the EU's competition jurisprudence is not without flaws, it demonstrates the significance of having a well-developed competition law framework to foster market efficiency, innovation, and consumer welfare. The Gambia could benefit from adopting a similar approach to ensure fair competition.

The EU's competition law explicitly prohibits practices that distort competition within its internal market. The Gambia could benefit from implementing approaches to prevent such practices and promote competition and innovation. Proposed amendments to the CA mentioned by the interviewee, for example, could positively contribute to promoting competition in The Gambia and strengthen the enforcement capabilities of the GCCPC.

Furthermore, The Gambia lacks the necessary resources, independence (the GCCPC relies on government subventions), and expertise to effectively enforce competition law with its thirty staff to implement competition laws in the entire country. For instance, by imposing fines for offences like abuse of dominant position and cartel behaviour, the GCCPC's resource and manpower constraints could be alleviated, enabling it to enforce decisions and directives more efficiently.

Furthermore, The Gambia could leverage the EU's resources to access competition law experts and other resources, thereby improving its competition framework. This collaboration would promote fair competition in The Gambia. Additionally, adopting an approach that balances economic growth with fair competition, as practised by the EU, would be beneficial for The Gambia. Therefore, adopting measures to prevent such exploitation and uphold fair competition is crucial in this author's view.

The EU has the potential to significantly contribute to strengthening The Gambia's competition policies through providing technical assistance to help develop and implement competition policies and enforce competition law in The Gambia. Sharing best practices and experiences in competition policy development and implementation, as well as providing guidance on specific competition issues, can be valuable support from the EU.

Additionally, the EU can assist in the development of the institutional framework for competition policy by providing financial assistance to the GCCPC and enhancing its enforcement capacity. The EU, with its technical and financial resources, can help raise public awareness in The Gambia about the benefits of competition policy, economic growth, innovation, and consumer welfare. This can involve supporting public education programs, outreach initiatives, and engaging with the media to promote competition policy issues.

Thus, The Gambia can strengthen its competition policies and foster fair competition by adopting EU's competition best practices and changing its current status quo to a better system. This, in turn, can create a more competitive and dynamic market, benefiting consumers and promoting economic growth.

Annexes

Annex 1- Information to research participant

I would like to invite you to take part in an interview concerning the institution that you work for. As we have discussed via telephone, this research is solely for academic purposes and your identity will be concealed as per your request. Your name will not form part of the final paper and all the information regarding the interview answers will be safely kept in a computer without internet or radio access. It is important to remind you this interview is purely voluntary and you can withdraw from participating at any time.

As you may be aware, my name is Naffie Sissoho Bangura and I am a Master's student at Lund University in Sweden studying European and International Trade Law. You have been chosen to take part in this interview because of the institutional knowledge that you possess having worked for the GCCPC for more than a decade and holding a high position in that institution. I have decided to conduct this interview so that the readers will have a more comprehensive understanding of improving the restrictive business practices in The Gambia and the practical aspects from an insider perspective.

Annex 2- Interview Questionnaire

The interview questions formulated are semi-structured in order to give the interviewee room to elaborate on his or her answers. The following were the questions asked to the interviewee via mobile WhatsApp call to respond.

1. Are you aware of the existence of the EU Competition Commission? If so, briefly, what do you know about them?
2. In practice, are the Commission's recommendations enforceable?
3. Are there official proposals to amend the existing CA?
4. Please provide information in relation to any noteworthy penalties that were imposed on any entity engaged in prohibited practices such as price ridding, tying, or abuse of dominance (monopoly).
5. What recommendations do you think will help in the development of the GCCPC in prohibiting restrictive business practices effectively?
6. Has the Ministry responsible made any Regulations under Section 61 of the Competition Act 2007?
7. Has the Merger Regulation prescribed by Section 33 of the CA issued?
8. Why isn't the GCCPC accepting merger notifications?
9. Please describe whether there have been any cases in which the GCCPC fined any entities for failing to comply with the CA.

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