

PROTECTING CONSUMERS FROM MISLEADING ADVERTISEMENTS OF GOODS AND SERVICES IN COMESA REGION—SOME GAPS IN THE LAW

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ABSTRACT

COMESA, SADC and EAC have agreed the Tripartite Free Trade Area (TFTA). The newly agreed TFTA has twenty six (26) members from these three regional blocs. It is expected that the flow of goods and services across international borders in the free trade area (FTA) is likely to increase given the expanded market size. Likewise, aided by infrastructural improvement and technological advancement in the region, participation of natural and juristic consumers in international trade is likely to increase. This article assess the state of the national consumer protection laws in the region so as to establish whether or not they have provided adequate incentives for effective protection of consumer rights in the face of increasing cross-border commercial activity in the region. The study employs a doctrinal approach to evaluating legal rules. The main findings of the study were that (a) COMESA countries do not provide adequate remedies for breach of consumer rights (b) COMESA countries do not provide for disgorgement of proceeds/gains made from illegal activities (c) that consumer protection authorities in the region do not have power to commence civil actions for and on behalf of injured consumers, and (d) that regulatory authorities do not have power to act in support of foreign regulators in the region.

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I

1. INTRODUCTION

The object of this article is to evaluate the legal framework for the regulation of competition and protection of consumer rights in Zambia, Kenya and Zimbabwe so as to establish whether or not it has provided adequate incentives for effective protection of consumers and third parties against false and misleading statements in advertisement of goods and services. An argument is made that the unavailability of civil remedies under the Zambian competition and consumer protection law is likely to compromise realization of the broader regulatory goal of safeguarding and promoting competition and, protecting consumers against false or misleading representations, unfair trading practices and anti-competitive practices'. This view is rationalized by the fact that the civil remedies available under the common law only fall to parties to the contract to the exclusion of third parties. By contrast, modern commercial arrangement involve inter-connected chains of third parties which have dealings with the party to the contract and which are likely to suffer financial ruin as a result of the party to the external contract relying of the misrepresentation of the other party to the external contract. Further, although strangers to the external contract, these third parties may also enter further dealings with the other party—the party to the internal contract—on the strength of the misrepresentation so made. These third parties may also be in competition with other persons or enterprises—which may include the make of the false statement—in certain sphere of trade. An argument is also made that unless the regulatory framework is recalibrated, it will unable to achieve the said broader regulatory goal.

II

2. BACKGROUND TO THE PROBLEM

Most members of the Common Market for Eastern and Southern Africa (hereinafter 'COMESA') are also members of either Southern Africa Development Community (SADC) or the East African Community (EAC). The dual membership of COMESA countries has often been cited as the cause of confusion and hindrance to the growth of trade among the three regional trading blocs.² However, the United Nations Development Programme, is optimistic that COMESA countries' membership of the recently launched COMESA-SADC-EAC Tripartite Free Trade

² See, Lennox T Samamba, 'Legal Aspects of Cross-border Trade in Securities—The Case of Eastern and Southern Africa' (2018) 131-134 (forthcoming)

Area will further consolidate these economic communities, and expand their regional reach.³ An argument is made that the increasing regional reach of the economies of the members of the TFTA is likely to increase the flow of goods and services across international borders in the region; in response to the increasing market size, manufacturers of goods and service providers alike, are likely to intensify their advertisement of those goods and services; aided by technological advancements, their advertisements are likely to cross international borders although originally meant for a single jurisdiction. Similarly, multi-nationals are other large scale firms are likely to seek increase of their dominant positions and control. Thus, with liberalization of trade—resulting from the TFTA—survival competitive responses such as mergers and acquisitions, and cartels with an effect in two or more jurisdictions or the entire COMESA region are likely to be a common occurrence. An argument is also made that the national rules for the regulation of competition and protection of consumers are deep rooted in in-ward focused protectionist regulatory concepts and as such unsuited for the regulation of competition and ensuring consumer protection in international markets in the region.

Further, the traditional rules of the law of tort are curative looking to the injury suffered by the plaintiff consumer and as such unsuited for regulation of competition which looks to the potential effect as opposed to the actual effect. Similarly the traditional rules of the law of contract that may be applied to adverse effects on third parties of misleading statement largely depend, for their success, on the existence of a contractual relationship between the injured party and the maker of the statement which is not the essence of consumer protection.

2.1. STATEMENT OF THE PROBLEM

Against the background to the problem given above, the statement of the problem may be stated as follows:

Has the legal framework for the regulation of competition and protection of consumer rights provided adequate incentives for effective protection of consumers against false and misleading statements in advertisement of goods and services?

III

³United Nations Development Programme, *Zambia Human Development Report 2016* (United Nations Development Programme 2016) 55. See, Table 5.1 at 56 for declining and stalling levels of trade in the three economic trading blocs. Currently, the TFTA has twenty six (26 members)

3. METHODOLOGY

This research falls into the qualitative research category. It focuses on answering specific questions relating to the problem under investigation by using both primary and secondary data. The research is mainly underpinned by a doctrinal approach to evaluating legal rules. This method was used in analysing both primary and secondary data. Primary sources of data such as relevant legislation and case law touching on the subject/problem were used. Secondary sources such as journals and other written commentaries on primary sources were also used.

A checklist of documentary sources was used. The study employed non-probability sampling method in the selection of documents which were used in the analysis—purposive sampling. Both primary and secondary sources of data were used as aids to drawing inferences, making deductions and comparisons.

The main objective of the study is to answer the question whether or not legal framework for the regulation of competition and protection of consumers of goods and services has provided adequate incentives for effective regulation of competition and ensuring consumer protection. The study also sets out to flesh out some shortcoming in the regulatory framework currently in force and make necessary proposals for reform as a possible solution to those shortcomings.

The research questions used were:

- a) Does the regulatory framework provide for adequate safeguards and remedies for protection and redress for consumer rights violations?

IV

4. RESULTS

Question	Answer			
	Kenya	Zambia	Zimbabwe	Australia
1.Does the law provide for statutory civil remedies?	Yes	No	Yes	Yes
2.Does the law provide for disgorgement of gains from misleading advertisements?	No	No	No	Yes
3.Does the law provide for	No	No	No	Yes

recovery of loss by un-reliant third parties?				
4.Does the law empower the Consumer Protection Authority to intervene or commence civil actions on behalf of injured consumers?	No	No	No	Yes (intervention)
5.Does the law clothe the Authority with power to act in support of foreign regulators?	No	No	No	No

V

5. DISCUSSION

5.1. LEGAL CHARACTER OF ADVERTISEMENT OF GOODS AND SERVICES

On the legal character of advertisements in circulars, periodicals, newspapers, et cetera, Lord Parker in *Partridge vs Crittenden*⁴, observes:

“I think that if one is dealing with advertisements and circulars, unless indeed they come from manufacturers, there is business sense in their being construed as invitations to treat and not offers for sale.”⁵

Thus, where an advertisement of goods and services is run in any medium is should be construed as an invitation for offers from consumers of those goods and services and the seller or service provider reserves the right to accept or reject such offers. The offers of consumers are deemed to have been made on the strength of the advertisement. Consequently, where the terms of the advertisement turn out to be false, the maker of the advertisement is liable to make good the loss suffered by the consumer, who in relying on the advertisement, makes an offer.

5.1.2. CONSTRAINTS RELATING TO UNAVAILABILITY OF CIVIL REMEDIES UNDER THE ZAMBIAN COMPETITION AND CONSUMER PROTECTION ACT

⁴ [1968] 2 ALL ER 421

⁵ *ibid* 431-7

An argument is made that the unavailability of civil remedies under the Zambian competition and consumer protection law is likely to compromise realization of the broader regulatory goal of safeguarding and promoting competition and, protecting consumers against false or misleading statements, unfair trading practices and anti-competitive practices'.⁶ This view is rationalized by the fact that the civil remedies available under the common law only fall to parties to the contract to the exclusion of third parties. By contrast, modern commercial arrangement involve interconnected chains of third parties which have dealings with the party to the contract and which are likely to suffer financial ruin as a result of the party to the external contract relying of the misrepresentation of the other party to the external contract. This view seems to rationalize the provision of civil remedies in consumer protection legislation in other jurisdictions in the COMESA region.⁷ Further, although strangers to the external contract, these third parties may also enter further dealings with the other party—the party to the internal contract—on the strength of the misrepresentation so made. An argument is also made that unless the regulatory framework is recalibrated as proposed herein, it will unable to achieve its broader regulatory goal stated above.

By contrast, under the Kenyan legal framework, damages and other civil remedies are available to consumers for any loss suffered as a result of unfair practices.⁸ Similarly, in Zimbabwe, a consumer may obtain compensation for any loss they may have incurred as a result of unfair practices.⁹

5.1.3.CONSTRAINTS RELATING TO UNAVAILABILITY OF RIGHT OF ACTION TO THIRD PARTIES RELYING ON MISLEADING STATEMENT

Would a third party who places reliance on a false or misleading statement made by a party to a contract to the other party to the contract recover loss suffered as a result of such reliance? Or would a third party who without relying on a false or misleading statement suffers pecuniary loss or is pushed out of competition as a result of reliance by a party to a contract on a false or misleading statement made to that other person by a party to a contract recover loss from the person making the misrepresentation? The answer to these questions is definitely, 'no'—the

⁶ See, the Long Title of the Zambian Competition and Consumer Protection Act 2010

⁷ See, below

⁸ Kenyan Competition Act No. 46 of 2012, s 16(1)

⁹ Zimbabwean Consumer Contracts Act 8: 03, ss 5; 4(1)(v)

injured person would not recover under the Zambian legal framework, and other common law jurisdictions such as Kenya and Zimbabwe, on account of the following, namely:

- i) The common law doctrine of *privity of contract*—by which non-parties to a contract are generally precluded from enjoying any benefit or suffering a burden thereunder except by express conferment therein or consent—would operate to defeat the claim;¹⁰ and
- ii) Although on the facts of the scenario above, the effect of the offender’s conduct is to restrict or prevent competition—and as such anti-competitive—the Zambian Competition and Consumer Protection Act 2010 does not provide for a private right of action for civil recovery for person who suffer pecuniary loss as a result of relying on misleading statements or as a result of dealing with a person who places reliance on the statement.¹¹ What this piece of legislation does is impose criminal penalties for engaging in anti-competitive practices that do not consist in either horizontal or vertical agreements, either.¹² An argument is made that such a shortcoming in the regulatory framework is likely to incentivize misleading statement that have the effect of distorting, restricting or preventing competition and violating consumer rights.

As a possible solution to this shortcoming in the law, proposals are made for introduction of provisions tailored to the promotion of third party rights. For such purposes, it is proposed that a new section—section 47A—be introduced in the Competition and Consumer Protection Act 2010 in the following terms:

s. 47A.(1). Any person who suffers pecuniary loss as a result of a false or misleading statement shall have a right of action for recovery of loss or damage suffered as a result of reliance on the statement;

¹⁰*Dunlop Pneumatic Tyres Co. Ltd vs Selfridge & Co. Ltd* [1915] A.C 847, House of Lords, is authority for the position that a third party cannot, *ipso facto*, sue on a benefit contained in a contract to which they are not party except by way of assignment of property e.g. under a trust, or where a privy contracts as agent for the third party as far as that benefit is concerned: See Lord Chancellor Viscount Haldane’s Speech. As to the proprietary nature and assignability of the right of action and enforcement by third parties, *Loxton vs Moir* (1948) 18 CLR 360, at p. 379, and *Trident General Insurance Co. Ltd vs McNiece Bros Pty Ltd* (1988) 165 CLR 107, at p. 144, are authoritative.

¹¹ Similarly, the Kenyan Competition Act 2010 does not provide a private right of action: See, Part III thereof. Also, the Zimbabwean Competition Act 14: 28 does not provide a private right of action in this regard, either: See, Part IV.

¹² See, sections 9(1)(a)-(e)(2)(3) and 10(1)(2)(a)(b)(3) of the Zambian Competition and Consumer Protection Act 2010

(2) A third party who suffers pecuniary loss as a result of a false or misleading statement made to another person by the maker shall have a private right of action for civil recovery of loss or damage suffered.

Provided that loss that is not as a natural and direct consequence of dealings with the party relying on the misrepresentation shall not be recoverable.¹³

5.1.3.1. THIRD PARTY RECOVERY IN AUSTRALIA

Developed jurisdictions like Australia have overcome such shortcomings in the competition and consumer protection legal framework by making available to third parties a right of action in for recovery of loss occasioned by misleading statements which they have not relied on provided there is necessary causal link between the loss and the misleading conduct. Such matters are covered by sections 52 and 82 of the Australian Trade Practices Act of 1974 (the TPA). These provisions have been subject of judicial interpretation. Thus, in *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd*¹⁴ the question that fell for determination was whether section 82 of the TPA allowed a claim by a person who, although not himself not relying or misled by the representation, suffered injury as a direct result of a third party's reliance on the false or misleading representation. In *Jansen*, a trader lost business when his customers who were induced by the misleading conduct of a competitor to have dealings with that competitor. Lockhart J in held that the third party was entitled to recover loss or damage under s 82. He held further that recovery was not confined to persons who rely on the representations which constitute contraventions of the TPA.

Three years later in *Hayne v Top Slice Deli Pty Ltd*¹⁵, Einfeld J said of Lockhart's decision in *Jansen*:

At least in the area of misleading advertising, that conclusion must with respect be correct. It might also be the case that the reliance of a third person will be sufficient for causation in circumstances similar to the current case.¹⁶

¹³ Such a proviso is likely to array floodgate fears by acting as sieve. It is meant to give room to the courts for further refinement of the sieve by requiring 'proximity' or 'directness'—necessary to constitute causation at law—of the loss before it could be recovered.

¹⁴ [1992] 37 FCR 526

¹⁵ [1995] 17 ATPR (Digest, 53 151)

¹⁶ *ibidem*

In *Haynes* purchasers of a delicatessen brought a claim for lost profits in relation to misleading representations of profitability made by the vendor and its accountants. The misleading representation consisted in a misleading cash flow projection provided by the defendant's accountants to the purchaser's bank. Although the purchasers did not themselves rely on this document, they alleged that the cash flow had procured for the purchaser a successful result to their loan application. It was submitted that, but for the document, the purchasers would not have been able to successfully purchase the business and further that they would not have been to incur the trading losses. While accepting that causation could exist without reliance, Einfeld J cautioned that there was still a requirement of directness or proximity: He held:

Justice Lockhart's recognition that there is no absolute requirement of reliance on the part of the applicant was in no sense an abandonment of the considerations of proximity or directness that lie behind reliance and have made it a decisive factor in the majority of cases. His Honour clearly recognised that, although reliance by the applicant is not a necessary element of section 82, all applicants retain the onus of proving the requisite element of directness or proximity necessary to constitute causation at law.¹⁷

The Lumley vs Guy Tort, and the Tort of Intentionally Causing Loss by Unlawful Means— The Tort of Interfering with Business or Trade

Under English common law, the third party in *Jansen* could have also recovered loss by invoking the *Lumley vs Guy*¹⁸ tort since the misleading competitor knew the existence business relations between them and mislead customers. Under the *Lumley vs Guy* tort the misleading competitor could be held liable for procuring or inducing breach of contract by misleading statements. Absent any contract—where existing commercial relations fall short of the character of contract—the third party could also invoke the tort of Intentionally Causing Loss by Unlawful Means.¹⁹ Consequently, a third party would have recovered loss from the misleading competitor for intentionally interfering with business or trade. In *OBG vs Allan*, the wrongful act—assault or battery—directed at A and driving A away from C made B 's conduct tortious against C even

¹⁷ibidem 53 152

¹⁸[1853] 2 Bl. & Bl. 216

¹⁹*OBG vs Allan* [2007] UKHL 21

though C had no subsisting contract with A. Similarly, in *Tarleton vs M'Gawley*²⁰, the Master of a vessel known as the *Othello* was trading on the coast of West Africa, when potential customers put off from the shore to trade with their competition—of the vessel known as the *Bannister*. Incensed by the development, the Master of the *Othello* fired a gun at the customers heading to his competition and drove them away. The Master of the *Bannister* successfully brought an action for recovery of loss from the Master of the *Othello* for interfering with business or trade.

Limitations upon the Common Law Interference with Business or Contractual Relations Avenues

Although the principle of *Lumley v Gye* commonly appears under the heading of ‘inducing breach of contract’, it has been regarded as a wider principle covering violations of legal rights.²¹ In this light, in England, in *Quinn v Leathem*²², it has been held that:

[A] violation of legal rights committed knowingly is a cause of action, and... it is a violation of legal rights to interfere with contractual rights recognized by law if there is no sufficient justification.²³

Thus, knowledge of the contract is essential to success of an action by a third party. However, knowledge of the details of the underlying contract is not necessary.²⁴

Similarly, intentionally causing loss by unlawful means requires that A strikes at B with the intention of hurting C. Thus, it must be proved that in making the false or misleading statement or advertisement to B, A intended to cause loss to C, failing which there is no liability on the part of A.²⁵

The net position of the authorities cited above is that, absent knowledge of the contract between the third and the party to whom the tortious act is directed, and intention to cause loss to the third

²⁰(1793) 1 Peake NPC 270

²¹ W.V.H. Rogers (ed.), *Winfield and Jolowicz on Tort* (18th edn, Sweet and Maxwell 2010) 872

²² [1901] A.C. 495

²³ *ibid* 510. For affirmation of this position, see Lord Denning’s speech in *Emerald Construction v Lothian* [1966] 1 WLR 691, at 700

²⁴ *Emerald Construction case*

²⁵ W.V.H. Roger (2010) 878, paras 8-13, *op.cit*

party, the un-reliant third party cannot recover damages from the maker of the false or misleading advertisement or statement.

Proposals for Reform

An argument is made that a distinction needs to be made between tortious acts which have the effect of reducing or eliminating competition and those which merely infringe consumer rights. Whereas the requirement of proof of intention in consumer rights infringement cases is likely to array floodgate fears, such a requirement along with the requirement of knowledge of the contract should be dispensed with in cases where the false or misleading statement has the effect of reducing or altogether eliminating competition in the market. This view is rationalized by the position that effective enforcement of competition law increases competition in the market thereby enhancing consumer welfare.

The Bidirectional effect of Competition Law Enforcement and Consumer Protection

The protection of the interests of consumers is a central aspect of all modern competition laws as well as a direct aim of consumer protection laws.²⁶ However, despite being complementary in many ways, competition and consumer protection laws cover different issues and employ different methods to achieve their goals.²⁷ While consumer protection rules are built upon the premise that consumers are the weaker party to transactions and should be directly protected for this reason in their dealings with traders through certain consumer rights, competition law only indirectly protects the consumers' economic well-being by ensuring that the markets are subject to effective competition.²⁸

Competition law is traditionally conceived as regulation of the marketplace to ensure private conduct does not suppress free trade and competition.²⁹ The fundamental goal of competition law is preservation of competition, and optimization of consumer interests through competition.³⁰

²⁶Suhail N and Pinar A, 'The Interplay between Consumer Protection and Competition Law in India' (2017) 5(2) Journal of Antitrust Enforcement 197-215

²⁷ ibid

²⁸ ibid

²⁹ Max Huffman, 'Competition Law and Consumer Protection' (2016)

<www.biicl.org/files/4553_the_integration_of_competition_law_and_consumer_protection.pdf> accessed 17 April 2018

The Bi-directional effect of Competition Policy on International Trade

Empirical evidence shows a positive bi-directional effect of pro-competitive competition policy and increased international trade.³¹ Similarly, anti-competitive competition policy correlates with reduced international trade.³²

An argument is made that in face of current weak law, unless the proposals for reform made for introduction of the representative right of action and power to act in support of foreign regulators are simultaneously implemented, the internationalization of the regional market that comes from the just introduced TFTA is likely to incentivize unabated concentration of control and abuse of dominant position by multi-nationals. Such anti-competitive behaviour in the face of current weak laws is likely to present itself as a non-tariff barrier to trade by increasing entry costs for other firms.

5.2. CONSTRAINTS RELATING TO LACK OF PROVISIONS FOR DISGORGEMENT OF PROFITS OR AVOIDED LOSSES

A person who, or an enterprise which—

- a) falsely represents in that—
 - (i) any goods are of a particular standard, quality, value, grade, composition, style or model or have a particular history or previous use;
 - (ii) any services are of a particular standard, quality, value or grade;
 - (iii) any goods are new;
 - (iv) a particular person has agreed to acquire goods or services; or
 - (v) any goods or services have sponsorship, approval, affiliation, performance characteristics, accessories, uses or benefits that they do not have; or
- b) makes a false or misleading representation concerning—
 - i) the price of any goods or services;

³⁰ ibid

³¹Luniku, Rubin, 'the Effects Of Competition Policy Changes On International Trade And Export Flows: Canada Case Estimates' (2014). *Wayne State University Dissertations*. Paper 901 <http://digitalcommons.wayne.edu/oa_dissertations_paper901> accessed 17 April 2018. See, empirical studies cited at 10-25

³² ibid

- ii) the availability of facilities for the repair of any goods or of spare parts for goods;
- iii) the place of origin of any goods;
- iv) the need for any goods or services; or
- v) the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy;

is liable to pay the Commission a fine not exceeding ten per-cent of that person's or enterprise's annual turnover or one hundred and fifty thousand penalty units, whichever is higher.³³

Thus, a person who makes false or misleading statements in an advertisement for goods or services may incur liability to the said fine to the CCPC.³⁴ Let us assume that the offender's annual turn-over is K 500, 000. Ten per cent of this figure translates to K 50, 000. One hundred and fifty thousand penalty units translates to, K 45,000.³⁵ The offender would have to pay K 50, 000 to the CCPC since the turn-over avenue provides a higher penalty. Arguando, let us suppose that the offender has actually made a profit K 300, 000 in increased sales as a result of the false or misleading statements. Paying K 50, 000 to the CCPC saves them K 250, 000. An argument is made that provided the offenders are allowed, in one way or the other, to retain profits or losses avoided from false or misleading statements in advertisements—the fine being much lower than the fine—they are likely to continue violating the regulatory rules to the detriment of consumers.

Unavailability of Disgorgement of Illegal Gains in other Jurisdictions in the Region

Kenyan Consumer Protection Act and the Zimbabwean Consumer contracts Act do not provide for disgorgement of gains made by the maker of a misleading or false advertisement of goods or services.

Disgorgement Illegal Gains in Australia

³³ Section 47(a)(b) of the Competition and Consumer Protection Act No. 24 of 2010

³⁴ Such an advertisement may also amount to 'unfair trading practice' since (i) it misleads consumers, (ii) it compromises the standard of honesty and good faith which an enterprise can reasonably be expected to meet and thereby distorts, or is likely to distort, the purchasing decisions of consumers: See, section 45(a)(b) of the Competition and Consumer Protection Act 2010. As such, the offender is also liable to pay the Commission a fine not exceeding ten per-cent of that person's or enterprise's annual turnover or one hundred and fifty thousand penalty units, whichever is higher—a penalty equal to the one prescribed in respect of making false or misleading statements: section 46(1)(2) of the Competition and Consumer Protection Act 2010.

³⁵ 150, 000 penalty units multiplied by 0.30 (the multiplier): see Regulation 3 of the Fees and Fines (Fees and Penalty Units Value) Regulations of 2014 as amended by Statutory Instrument No. 41 of 2015; Regulations made under the Fees and Fines Act, Chapter 45 of the Laws of Zambia

In Australia, an entity which violates the provisions of the Competition and Consumer Act 2010 may agree with the Australian Competition and Consumer Commission (ACCC) on how to make good the injury occasioned by misconduct. Where the undertaking errant entity breaches the terms of the undertaking, the ACCC has power to press for compliance or order payment up to the amount of the financial benefit that could reasonably be attributed to the breach.³⁶

As a possible solution to this shortcoming in the regulatory framework, proposals are made for the introduction of section 47A which imposes disgorgement of profits or losses avoided by the offender. Thus, under this proposed arrangement, the offender would have been required to pay over the K 300, 000, profit to the CCPC. As a possible way of increasing deterrence, the offender may be required to pay twice the value of profits made or losses avoided as a result of the false or misleading statement in the advertisement of goods or services.

5.3.CONSTRAINTS RELATING TO LACK OF THE CCPC TO COMMENCE REPRESENTATIVE CIVIL ACTIONS FOR AND ON BEHALF OF CONSUMERS

The sort of power on the part of regulatory authority is particularly important in two cases, namely:

- (i) In the domestic economic context where consumers or a class of consumers who have suffered pecuniary loss as a result of unlawful advertisements may be unable or neglect to commence civil recovery actions on account of indigence or any other reason for that matter;
- (ii) In the cross-border economic context where the cost of cross-border litigation for injured foreign consumers may be prohibitive for individual and small and medium scale enterprises.

An argument is made that availability of such a power on the part of regulatory authorities in the region is likely to enhance consumer protection, increase consumer participation in the domestic and cross-border economy and contribute to the growth of local and cross-border trade in goods and services.As a possible way of enhancing consumer protection, proposals are made for the introduction of the power, on the part of regulatory authorities, to commence representative civil actions for and on behalf of consumers who have failed or neglected to commence civil recovery

³⁶ Section 87B of the Australian Competition and Consumer Act 2010

actions.³⁷ Such a power must also be complemented by a power to take over and prosecute proceedings for and on behalf of injured consumers.

Power of Intervention in Australia

Although the Australian Competition and Consumer Commission (ACCC) has no power to commence civil actions for and on behalf of injured consumers who have failed or neglected to commence recovery actions, it at least, has statutory power to intervene in private recovery actions commenced by injured consumers.³⁸ It is submitted that such a power is likely to increase the efficacy of the legal framework to ensure effective protection of consumer rights.

5.4.CONSTRAINTS RELATING TO THE NARROW SCOPE OF THE CCPS's POWER TO ACT IN SUPPORT OF FOREIGN REGULATORS IN THE COMESA REGION

The power of the CCPC to enforce competition and consumer protection law is delimited to 'anti-competitive practices' by Zambian entities which have adverse effects in foreign jurisdictions. Thus, where a foreign regulator has reasonable grounds to believe that anti-competitive practices in Zambia are damaging competition in its jurisdiction, it may request the CCPC to investigate and make an appropriate determination.³⁹

Quite clearly, from the literal tenor and spirit of section 8 of the Zambian Competition and Consumer Protection Act 2010, 'anti-competitive practice' does not include 'unfair trading practice'⁴⁰ or making of 'false or misleading statement'⁴¹. An argument is made that such narrow scope of the 'power to act in support of foreign regulator' on the part of the CCPC is likely to compromise consumer protection in Eastern and Southern Africa. As a possible solution to this

³⁷ Procedural sieving or floodgate caveats such as the requirement for leave of the High Court before a representative action could be commenced or a proceeding could be taken over and maintained by the CCPC are necessary to avoid abuse of the power and proliferation of frivolous and vexatious actions. Procedural Rules prescribing conditions for a *prima facie* case for leave will have to be made, also.

³⁸ Australian Competition and Consumer Act 2010, s 163A(3). In, *Bray v F. Hoffman-La Roche & Ors* [2002] FCA 243 (13 March 2002), which are private proceedings against various international vitamin manufacturers that the applicant alleged were engaged in price fixing and market sharing, the ACCC successfully intervened.

³⁹ Section 65(1)(2)(a)(b) of the Zambian Competition and Consumer Protection Act 2010

⁴⁰ The definition of 'unfair trading practice' does not include nor relate to 'anti-competitive practice': See, section 45(a)(b)(c) of the Zambian Competition and Consumer Protection Act 2010

⁴¹ The description of 'false or misleading representation' does not include nor relate to 'anti-competitive practice': see, categories of false or misleading representations under section 47 of the Competition and Consumer Protection Act 2010

shortcoming, proposals are made for extending such a power to violation of provisions of the Competition and Consumer Protection Act 2010 and regulations thereunder made.

5.4.1. CONSTRAINTS RELATING TO LACK OF POWER BY MOST FOREIGN REGULATORS TO ACT IN SUPPORT OF THE ZCCPC

For lack of space, only two jurisdictions—Zimbabwe and Kenya—will be considered under this subsection. In Zimbabwe, the Industry and Trade Competition Commission (ITCC) is established pursuant to section 4 of the Competition Act 1996.⁴² The ITCC has power to institute investigations into any restrictive practices, mergers or monopolistic practices.⁴³ However, perusal of Part IV of the Competition Act 1996 in its entirety, including the Second Schedule which spells out the powers of the ITCC, reveals that the investigative and regulatory powers of the ITCC cannot be exercised in support of a foreign regulator.

In Kenya, the Competition Authority (CA) is established pursuant to section 7(1) of the Competition Act No. 12 of 2010. The CA has power to institute inquiries and studies into factors affecting competition and consumer protection in Kenya.⁴⁴ The CA has also power to institute investigation into anti-competitive practices, mergers and monopolistic practices.⁴⁵ Further, the CA has power to enter upon premises of alleged offenders and conduct searches thereon.⁴⁶ Although the Kenyan Competition Act 2010 has extra-territorial application, its provisions can only be invoked to protect the Kenyan markets.⁴⁷ This construction is rationalised by the position that there is no express nor implied provision for exercise of the provisions of the Kenyan Competition Act 2010 in support of foreign regulators.

An argument is made that the lack of reciprocal provisions in key jurisdictions in the COMESA region is likely to compromise the enforcement of competition and consumer protection law given the ever-increasing participation of foreign entities in domestic markets in the region.

⁴² Chapter 14:28 of the Laws of Zimbabwe

⁴³ Section 28(1)(a)-(d) of the Zimbabwean Competition Act 1996

⁴⁴ See, section 18 of the Kenyan Competition Act 2010

⁴⁵ See, section 31 of the Kenyan Competition Act 2010

⁴⁶ See, section 32 of the Kenyan Competition Act 2010

⁴⁷ See, section 6 of the Kenyan Competition Act 2010

5.5. CONSTRAINTS RELATING TO LACK OF A CONSUMER COMPENSATION FUND

Under the Zambian legal framework, there is no provision for the establishment of a consumer compensation fund. This is also the case under the Kenyan and Zimbabwe legal frameworks. A Compensation Fund for Consumers (Consumer Compensation Fund, hereinafter ‘the CCF’), could prove useful in ensuring prompt and adequate compensation for consumers who suffer pecuniary and or physical damage as a result of false or misleading statements , or defective goods and services. This is more so given the snail’s pace of the wheels of our civil justice system where a simple case could take an average of five years to be concluded.⁴⁸ An argument is made that in a way, this would allow the consumer to transfer the psychological and emotional drag, stress, strain and suffering that litigants go through, to the CCF. Not only would such a regulatory feature enhance justice and protection for consumers but also save them time and money and enhance their health—their well-being.

Here is how the CCF could operate: The CCF should be established as a body corporate with perpetual succession and having a common seal and as such possessing capability to sue and be sued in its own name. Once the CCF pay out a successful claim for compensation, it will need to be subrogated to the rights of the claimant. Thus, the CCF will have to be clothed with the right of subrogation.

The CCF could possibly be funded by:

- (i) financial appropriations of the Zambian Parliament for that purpose;
- (ii) grants from foreign governments and institutions for that purpose;
- (iii) monies and interest realized through realization of subrogated rights;
- (iv) returns on investment of surplus funds of the CCF;
- (v) registration fees and license fees for advertisements and advertisement firms;

⁴⁸ Details of how the CCF could operate and fit into the existing institutional regulatory structure, and the possibility of a regional consumer compensation fund as a complement to the national compensation fund, are the subject of the sequel to this article. Due to lack of space and the reasons aforesaid, they will not be discussed here.

5.6.CONSTRAINTS RELATING TO LACK OF PROVISIONS ON REGULATION OF ADVERTISEMENT OF GOODS AND SERVICES

The Minister responsible for Commerce Trade and Industrial Development may, by statutory instrument, on the recommendation of the Commission, make regulations for the better carrying out of the provisions of this Competition and Consumer Protection Act 2010.⁴⁹ Therefore, Regulations that could be made include ‘regulations for the regulation of advertisements for goods and services and services’. Unfortunately, no such regulations have been made so far.

As a possible way of filling this void in the law, and enhancing consumer protection through effective regulation of advertisement of goods and services, proposals are made for promulgation of such regulations—Consumer Protection (Advertisement of Goods and Services) Regulations. Such regulations could contain the following ‘core provisions’, namely:

- (i) Imposition of the registration requirement whereby a licensee (a person licensed to make or cause to make advertisements for goods and services) will need to register advertisements they intend to make with the CCPC. Such a provision will ensure that the CCPC is aware of the content of the advertisement so that they could take corrective measure for purposes of protecting consumers. Such a measure could also save as a source of revenue for the CCPC;
- (ii) Criminalize breach of condition (i) above as a means of ensuring deterrence; Also, provide for a private right of action for civil recovery for injured consumers;
- (iii) Require that only licensed persons (persons satisfying prescribed licensing condition) make or cause to be made advertisements for goods and services. Preferably, professional advertising firms should be co-opted. The licensing requirements for advertisers will not only curb non-compliant advertisement and enhance consumer protection but also save as source of revenue for the CCPC;
- (iv) Criminalize breach of condition (iii) above as a means of ensuring compliance;
- (v) Prescribe a format for compliant advertisements for goods and service and require licensees to comply with the format. Such a format is likely to curb non-compliant advertisements; The prescribed format should enjoin licensees to ensure that:
 - The content of an advertisement of goods and services and the manner of its presentation is such that the advertisement is not likely to be misunderstood;

⁴⁹ See, section 87(1)(2)(a)-(k) of the Zambian Competition and Consumer Protection Act 2010

- An advertisement does not contain any statement, promise or unless the licensee issuing it has taken all reasonable steps to ensure that each such statement, promise is not misleading in the form or context in which it appears;
 - An advertisement for goods and services does not contain any statement, purporting to be a statement of fact that the licensee issuing it does not reasonably believe at the time, on the basis of evidence of which he has a record in his possession, to be true;
- (vi) Criminalize breach of condition (iv) above as a means of deterring breach of the condition. Also, provide for a private right of action for civil recovery of loss or damage occasioned by failure or neglect to comply with condition (iv) above;

VI

6. CONCLUSION

The general conclusion reached in this article is that the legal framework for regulation of competition and ensuring consumer protection has not provided adequate provisions for effective regulation of competitions and protection of consumer rights. In particular, the article has established that in the traditional rules of the law of torts and contract law are not suited for the regulation of competition and protection of consumer rights in international markets in the COMESA region. Recommendations have also been made for the recalibration of the legal framework so as to enhance its efficacy to ensure effective regulation of competition and protection of consumer rights in cross-border markets in the region.