Dissertation in Partial Fulfilment of the Requirements for the Master of Laws (LL.M) in International Trade and Investment Law in Africa

Topic

Towards an Effective Regulation of Competition in the Banking Industry in Ghana to Promote Stability, Efficiency and Economic Growth

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Acknowledgement

The grace, mercies and God's favour upon me deserve my gratitude and praise.

The financial assistance of ABSA Bank, Manya Krobo Rural Bank Ltd. and the Centre for Human Rights of the Faculty of Law is hereby acknowledged. To Dr. Femi Oluyeju for his support and guidance, thank you sir.

I also express my gratitude to Mr. Dennis Kweku Antwi, Mrs. Lisa Kwarteng- Antwi, Miss. Joan Tetteh, Mr. Michael Gyan- Nyarko, Mr. Edmund Ohipeni, Miss Patience Asare and the Board and Management of Manya Krobo Rural Bank Ltd.

God bless you all.

Dedication

To my father Mr. Lawrence Tetteh. Rest in Peace dad.

And to my mothers Veronica Mensah and Mary Tetteh.

Declaration

I, SAMUEL TERKPERTEY TETTEH declare that this is my original work I have prepared and it has never been submitted for any degree or examination in any university or higher institution of learning for publication in whole or part.

All the sources used have been indicated and acknowledged as references.

SIGNED

9th October, 2017

Abstract

International trade and investment cannot succeed without the banking or more generally, the financial sector which usually plays the role of financial intermediaries between banks, traders and investors. The financial sector therefore plays a very key role in the promotion of trade and investment which ultimately lead to sustainable economic growth, hence, the need to ensure that the financial sector is properly regulated against systemic risks and threats which usually result in scandals having a devastating effect on the economy. The banking sector in Ghana is one of the most vibrant banking sectors in the sub region boasting of a tremendous growth in the number of banks, especially foreign banks in the past decade due largely to the effective legal reforms and policy directives of the Bank of Ghana. The growth in the number of banks and the influx of banks from a more technologically advances jurisdictions presents competition and an effective and efficient means of banking supervision as well as a proper regulation of the relationship between banks. The recent increase in the minimum capital reserve for banks is likely to cause the merger and acquisition of banks in Ghana.

Notwithstanding the central bank's pre-emptive actions with policies and legal reforms to purge the banking sector of threats and systemic risks, there still remain serious gaps in the existing legal and institutional framework of banking supervision and regulation. One of such gaps is the non- existent of a comprehensive legal and institutional framework to regulate anti- competition practises such as price fixing, collusion and abuse of dominant positions and the proper regulation and monitoring of mergers and acquisitions such that monopolies are not created. This gap creates a threat to the efficient and effective operation of the banking sector and where it is not properly addressed, it may have a direct impact on economic growth and sustainable development.

A comprehensive legal and institutional framework on competition has proven to have direct impact on the country's economic growth and development. Properly regulated competition policy among banks promotes innovation, efficiency and financial inclusion without compromising the financial stability of the economy. The importance of a comprehensive legal policy on competition for the banking sector cannot be underestimated as it encourages market contestability through an effective regulation of entry of capitalised banks and the timely exit of those that are insolvent and ensure that the relationship between banks are properly regulated and supervised.

Notwithstanding alternative means proposed by scholars to promote economic growth, law has proven to be a great tool to be used for the socio- economic development of a country, especially developing countries. Law is the most effective and efficient means of establishing relevant institutions, applicable rules and regulations to stimulate economic development.

This study attempts to exploit the general legal provisions which affect banking supervision and regulation in Ghana and seek to highlight the systemic risks the existing legal and institutional framework pose to the banking sector. The study then proposes an effective and efficient solution to curb these threats by analysing the South African model law and institutional provisions on competition for the banking sector and proposes an adoption and modification of the model to suit the needs of Ghana to ensure an effective regulation of anti-competition practices in the banking industry in Ghana to promote stability, efficiency and economic growth.

CHAPTER ONE

INTRODUCTION

1.1 Background to study

International trade and investment expose exporters and importers to considerable risks where the trading partner is an unknown company or person living and operating outside the country where he intends to enforce or execute a contract. The importers' risk of non-delivery of the goods or services and the exporter's risk of not receiving payment for the delivery of the goods or services as well as the risk involved with damages in freight and even insurance are usually mitigated by banks through the creation of letters of credit and other instruments to guarantee payment, insurance and delivery of the said goods or services. Banks have over the years continued to play their role as financial intermediaries and have contributed tremendously to the global trade by assuming the risks of both exporters and importers of goods and services by acting as financial intermediaries and assuming the risks that would have originally been borne by the investor, the trader, the producer or the supplier of the product or services.

Banks play major roles in the promotion of international trade and investment through the financing of working capital requirements, financing of capital goods and the identification of potential markets through the identification of buyers and sellers and the facilitation of payments through the issue of import letters of credit. The relevance of banks in international trade and investment is also seen through the issue of pre and post shipment guarantee payment under Letters of Credits. The role of banks can be said to be key facilitators of international trade through the provision of liquidity for persons and businesses in international trade.

The 2008 global financial crisis exposed the frailties in the banking system and it reinforced the pivotal role banks play in international trade. The key roles performed by banks have now made it apparent that distress in the financial sector together with the rising costs of providing finance for trade can have adverse consequences on international trade[1]. Consequently, the safety, soundness and stability of the banking industry which depend primarily on the effective and efficient banking regulation and supervision must be ensured at all times. There is therefore the need for an effective and efficient banking regulation through the enactment

[1] F Niepmann &T Schmidt- Eisenlohr *International Trade, Risk, and the role of banks* 'Federal Reserve Bank of New York Staff Report' https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr633.pdf (accessed 2 September 2017).

of relevant legal provisions and an effective banking supervision to ensure compliance with the banking regulations and policies.

Ghana has experienced tremendous growth in the banking sector. Over the past decade, the number of registered commercial banks in the country has increased to thirty- three (33) in addition to four (4) investment banks with representative offices in Ghana as at December 2016[2]. There are in addition one hundred and forty-one (141) registered rural and community banks in operation as at April 2016[3], sixty- four (64) non-bank financial institutions and five hundred and sixty-four (564) micro-finance institutions in Ghana[4]. The commercial banks in Ghana alone operate a total of 1,341 branches across the country and employ 19,977 people. The number of banks, non- bank financial institutions and the specialized deposit taking institutions in the country sums up the competiveness of the financial sector and the need to have a sound and an effective regulation of the sector.

The key legal framework for banking supervision and regulation in Ghana are the Bank of Ghana Act 2002 (Act 612) and the Banks and Specialized Deposit- Taking Institutions Act, 2016 (Act 930). In addition, there are some other related legislation which also provide for the regulation of the financial sector such as the Financial Administration Act 2003 (Act 654), the Foreign Exchange Act 2006 (Act 723), the Internal Audit Agency Act 2003 (Act 658), Long- Term Savings Scheme Act 2004 (Act 679), the Payment Systems Act 2003 (Act 662), the Public Procurement Act 2003 (Act 663), the Venture Capital Trust Fund Act 2004 (Act 680), Anti- Money Laundering Act (Act 749), Anti Money Laundering Regulations 2008 (L.I 1925), the Borrowers and Lenders Act 2008 (Act 773), the ARB Apex Bank Limited Regulations 2006 (L.I. 1825), the Home Mortgage Finance Act 2008 (Act 770), the Credit Reporting Act 2007 (Act 726) and the Non- Bank Financial Institutions Act 2008 (Act 774). With this very high number of legislation and legal instruments, the financial sector can be described as the most regulated industry in Ghana. The Bank of Ghana, the central bank, has the core objective of maintaining stability in the general level of prices, ensure the efficient operation of the banking and credit systems in the country as well as supporting the

[2] Bank of Ghana 'Bank of Ghana Annual Report2016'https://bog.gov.gh/privatecontent/Publications/Annual_Reports/Annual%20Report%202016%20final%2024th%20June.pdf (accessed 18 September 2017).
[3] 'Bank of Ghana (n 2 above).
[4] 'Bank of Ghana (n 2 above).

economic policies of the government or any other authority[5]. The Bank of Ghana is tasked to achieve its core objective through the performance of the following functions;-

a. Formulation and implementation of policies aimed at achieving the objects of the Bank;
b. Promotion by monetary measures the stabilization of the value of the currency within and outside of Ghana;
c. Instituting measures which are likely to have a favourable effect on the balance of payments, state of public finances and the general development of the national economy;
d. Regulation, supervision and directing the banking and credit system and ensuring the smooth operation of the financial sector;
e. Promotion, regulation and supervision of payment and settlement systems;
f. Issuing and redemption of currency notes and coins;
g. Ensuring the effective maintenance and management of Ghana's external financial services;
h. Licensing, regulation, promotion and the supervise of non- banking financial institutions;
i. Acting as the banker and financial adviser to the government;
j. Promoting and maintaining relations with international banking and financial institutions; and
k. Doing all other things that are incidental or conducive to the efficient performance of its functions[6].

The Bank of Ghana is also entrusted with the overall supervisory and regulatory authority in all matters relating to deposit taking business[7]. In the performance of these functions, the Bank of Ghana is mandated to undertake the following-

a. Promote the safety and soundness of banks and specialized deposit- taking institutions;
b. Consider and propose reforms for enactments relating to deposit- taking;

[5] Bank of Ghana Act 612 of 2002 sec 3.
[6] (n 5 above) sec 4.
[7] Banks and Specialised Deposit- Taking Institutions Act 930 of 2016 sec 3(1).

c. Ensure the soundness and stability of the financial system and the protection of depositors in the country through the regulation and supervision of financial institutions;
d. Develop appropriate consumer protection measures to ensure that the interests of the clients of the banks and the specialized deposit taking institutions are adequately protected; and
e. Deal with unlawful or improper practices of banks and the specialized deposit taking institutions

The Bank of Ghana's financial sector restructuring and transformation over the past decade has resulted in the creation of one of the most vibrant financial services centres in the West African sub-region through the liberalization of the financial sector as well as the introduction of universal banking. The Bank of Ghana has continued to strengthen its regulatory and supervisory powers over the years to meet the increasingly changing and growing financial sector in order to mitigate the risks associated with the pace of expansion. These prudential regulations and supervision by the central bank has its target of ensuring a sound and efficient banking system with the interest of investors, depositors and customers of these institutions at heart. Banks in Ghana are now in good positions to play key roles as financial intermediaries due to the implementation of reforms to enhance the regulatory and the supervisory framework as well as the structures in place.

1.2 Problem statement

Notwithstanding the introduction of financial reforms and the enactment of laws, new monetary policies and the adoption of modern and effective banking supervision policies over the past decade, there still remain cross cutting challenges and risks and gaps in the existing regulatory and supervisory framework. One of such gaps is the non-existent of a comprehensive legal and institutional framework to regulate anti-competition practices such as price fixing, collusion and abuse of dominant positions and the proper regulation and monitoring of mergers and acquisitions such that monopolies are not created. This gap creates a threat to the efficient and effective operation of the banking sector and where it is not properly addressed, it may have a direct impact on economic growth and sustainable development. A comprehensive legal and institutional framework on competition has proven to have direct impact on the country's economic growth and development. Considering the rapid growth in the number of banks in the country couples with the expected mergers and

acquisitions in the sector due to the drastic hike in the minimum capital of banks, it is important to put in place or strengthen the relevant existing legislative and institutional framework to be able to deal with the new risks and threats that the banking sector may be exposed to since the efficient and effective regulation of competition in the banking sector is crucial to achieving stability, efficiency and general economic growth and sustainable development. The existing legislation which grants sole supervisory and regulatory powers to the Bank of Ghana has no express provisions on restricted practises and the central bank under the existing legislations have no legal basis to commence investigations to ascertain and punish banks for price fixing, collusion or other forms of anti- competition practises. Considering the rapid growth of the number of banks within a small but key sector and major contributor to the economic growth of the country, the need for the existence of a comprehensive legal framework for the investigation, determination and punishment of price fixing, collusion and anti-competitive acts cannot be overemphasised.

Price fixing, collusion and anti- competition practises by banks were first recorded in Ghana when the Colonial Bank, which was later reconstituted as Barclays Dominion, Colonial and Overseas (DCO) in 1925, entered British West Africa to end the monopoly that was enjoyed by the Bank of British West Africa since 1912. The two banks colluded and always ensured that they agreed on the same rates. This collusion happened at a time when there were only two banks for the whole of British West Africa which included the now Republics of Gambia, Sierra Leone, Ghana, Nigeria and the Anglophone part of Cameroun[8]. Therefore the possibility of collusion and price fixing among 33 commercial banks, 64 non-bank financial institutions and 141 rural banks in addition to 564 microfinance institutions in Ghana with a population which is estimated to be less than 30 million[9] people is very real. The fact that there are no comprehensive laws and specialised institution to enforce competition in the banking sector and the country as a whole makes the risk and threat of collusion extremely dangerous to the country's economic development. The rule against price fixing and collusion is the least controversial prohibition in competition law around the world and it is often subject to the harshest punishments[10]. However, in Ghana, there are no specific legal provisions, with respect to the investigation, determination and punishment for these offences and where there are limited provisions. It have been left in the hands of politicians,

[8] G Austin & CU Uche *Collusion and Competition in Colonial Economies: Banking in British West Africa, 1916- 1960.*
[9] http//www.worldbank.org/en/country/Ghana (accessed 11 April 2017).
[10] L Kaplow *Competition Policy and Price Fixing (2013)* 1.

administrative authorities, lawyers and even judges in whose bosom proper appreciation of the subject of competition law may not be found.

Ghana has made two failed attempts to enact a law on competition, the Trade Practices Draft Bill of 1993 and the Draft Competition and Fair Trade Practices Bill of 2004. There is no comprehensive law and policy to regulate and monitor the growing competition in Ghana's banking sector. Although the Bank of Ghana Act[11] and the Banks and Specialised Deposit-Taking Institutions Act[12] have given the Bank of Ghana the sole regulatory and supervisory powers over banks and non- banking financial institution as well as specialized deposit taking institution, there are no specific legal provision on the investigation, determination and punishment for collusion and price fixing by banks. In effect, the Bank of Ghana under the above mentioned laws does not have the legal mandate to investigate, determine and punish banks that engage in collusion and price fixing.

1.3 Significance of study and research objectives

The existence of proper legal provision on competition and proper supervision of banks in Ghana will not only enrich the country's jurisprudence, it will also serve as a tool for economic growth and development as well as create employment. The lack of proper mechanisms to ascertain the risk of price fixing, collusion and other anti- competition acts of banks and the non-existence of specialized institutions to handle this risk coupled with the rapid growth of the banking sector in Ghana poses a great threat to the country's economic development.

Banks are in constant competition with each other, whether directly or indirectly as they compete over products, prices, customers and even staff. In the regulation of this relationship, it is important to have in place an efficient and effective legislative framework that seeks to maintain a competitive environment for the benefit of consumers in having options to choose the best quality products at affordable prices. Properly regulated competition encourages banks to become more innovative and resourceful as they attempt to come up with the best products and services at the best prices possible to attract the best consumers and even the best employees. The fundamental principles of competition laws and policies seek largely to promote efficiency and financial inclusion without compromising the financial stability of the economy. There is the need for the bank regulator to promote

[11] (n 5 above).
[12] (n 7 above).

competition by enforcing policies that encourages the market contestability through the an effective regulation of entry of capitalised banks and the timely exit of those that are insolvent and ensure that the relationship between banks are properly regulated and supervised through the enactment of effective laws and policies.

The main objective of this study is to generally analyze the concept of competition and competition policy in the banking sector to highlight the purpose and main objectives of competition policy in the banking sector. The study shall also ascertain whether the existing legal framework governing the banking sector empowers the Bank of Ghana to investigate, ascertain and effectively punish acts of price fixing, collusion and other anti- competitive acts by banks in Ghana. The study shall also highlight the risks posed to the banking industry by the absence of a comprehensive law and policy on anti-competition and also bring to the fore the importance and benefits of a comprehensive legal provision on competition, especially for the banking sector in Ghana. The study would further propose the enactment of a Competition Act and the establishment of a Competitions Commission and Tribunal with special powers of supervising, investigating and punishing anti- competitive acts such as collusion, price fixing and other unfair competition practices as well as regulate changes in controls, mergers and acquisition of banks in Ghana.

1.4 **Research question(s)**

The main research question is whether the existing legal framework with respect to the regulation and supervision of banks empowers the Bank of Ghana to formulate competition policies, investigate, ascertain and punish acts of anti- competitive practices such as price fixing, collusion and other unfair competition acts by banks?

In addressing this question, the following sub- questions will also be addressed;

a. Whether the general provisions on competition, competition policy for the banking sector and the objectives of competition in the banking sector are relevant tools for economic development?

b. Whether the banking sector in consideration of the growing number of banks in Ghana require the existence of a comprehensive legal framework on competition to regulate to curb the risk of anti- competition acts by banks and promote stability, efficiency and economic growth?

c. Whether the existing legal framework for the banking sector empowers the central bank to formulate policies on competition for the banking sector and also commence an investigation to ascertain and punish acts of anti- competitive behaviour of banks?

d. Whether the South Africa legal framework on Competition serves as a good model for Ghana to follow in its enactment and implementation of competition laws in the banking industry in Ghana?

1.5 Preliminary literature review

In the absence of a comprehensive jurisprudence on competition, the market becomes sub-optimal for the lack of proper regulation on competitions and inv**e**stment is discouraged resulting in low value for money in the economy.[13] There are little or no writings on competition in Ghana. There have been very few personalities and authorities in Ghana that has taken time to exploit and address the issue of the enactment of a general legal provision on competition and the establishment of an authority to regulate and supervise competition in Ghana[14]. One of the few literatures on competition law in Ghana is that of the Consumer Utility and Trust Society (CUTS) Ghana. CUTS had conducted several studies and organized various stakeholder meetings involving the private sector and the responsible government agencies and ministries in a bid to create awareness for drastic measures to be adopted in the regulation of competition in the Ghanaian economy. CUTS had noted among others things that the increasing number of banks in the banking sector as well as the growing competition in the sector has caused the merger and acquisition of some major banks. It had also noted that there has been a drastic increase in the number of foreign owned banks in the sector. The renewed quest for institutions to comply with local content requirements across industries is also expected to provoke many mergers and acquisition activity with bigger foreign- owned enterprises which seeks partnerships with local and indigenous operations for them to continue to operate within the legal framework of their respective industries[15] including the banking sector. The mergers, acquisitions and changes in control of some of the major banks in the industry coupled with the drastic upsurge of the number of foreign controlled banks in the country had also caused some banks to rebrand and reposition themselves to compete in

[13] Dr E Spio- Garbrah 'Foreword'in Zakari A & AK Adomako *Competition Regime in Ghana: a need of the nation(2015).*
[14] S K Date- Bah 'Preface' in A Zakari & AK Adomako (n 13 above).
[15] A Zakari & AK Adomako (n 13 above) 25.

the banking industry. In the year 2015 alone, Ecobank Transnational Inc which is one of the biggest banks with respect to assets, capital and profits merged with Trust Bank Ltd[16] and has increased its dominance and control of the banking industry. Access Bank Ltd also merged with Intercontinental Bank. Bank of Africa has also acquired the 49% equity stake in the Amalgamated Bank which was originally held by a Nigerian investment holding company, Meeky Investments[17]. There has also been other acquisition by a Nigerian private equity firm in First Atlantic Bank which was initially a fully owned Ghanaian Bank. First Bank of Nigeria has also acquired Malaysian owned International Commercial Bank[18]. Recently, there has been a reported discussion ongoing for the merger of GCB Bank and the National Investment Bank and as at September 2017, GCB Bank which is the largest and most profitable bank in Ghana had acquired UT Bank and Capital bank.

There has been a report of Barclays Bank, which holds a significant share of the Ghana banking industry moving out of Africa. The exit of Barclays Bank will create the opportunity for its assets and liabilities to be acquired by one of the largest banks in the country and whichever bank acquires the assets and liabilities of Barclays Bank is likely to be the dominant force in the banking industry in Ghana. Although the bank of Ghana has been efficient over the years to ensure that the mergers and acquisitions of banks in the country are conducted within the confines of the law, it cannot be ascertained that the central bank has the right mechanisms and expertise to ascertain the impact such mergers may have on competition between such large banks and the smaller banks. There is no established legal framework for the central bank to test the impact of such mergers and acquisitions to ascertain its impact on the other banks in the industry. As part of the roles of the central bank, it is to promote the safety and soundness of banks and specialized deposit taking institutions as well as developing the appropriate consumer protection measures to ensure that the interests of the customers are protected[19]. Indeed, the central bank is authorized to deal with any unlawful or improper practices of banks and specialized deposit taking institutions[20]. These provisions presupposes that the Bank of Ghana has established provisions on certain acts which are considered improper, to which the law has empowered the central bank to deal with banks that contravene the said provisions. Although the primary legal document on the

[16] A Zakari & AK Adomako (n 13 above) 25.
[17] A Zakari & AK Adomako (n 13 above) 25.
[18] A Zakari & AK Adomako (n 13 above) 26.
[19] n 7 above sec 3(2)(a) & (e).
[20] n 7 above sec 3(2)(e).

operations of banks in Ghana has specific provisions on permissible activities[21] as well as instances where the central bank is permitted to revoke the license of a registered bank[22], there is no specific legal provision on certain restrictive practices such as price fixing, collusion as well as anti- competitive acts of banks. There is no specific provision in respect of the investigation and detection of the existence of anti- competition acts such as price fixing, collusion, horizontal agreements as well as abuse of dominance. There is also no specific legal provision for the punishment of such offences which has serious effects on the banking industry as well as the economy as a whole.

In South Africa, banks are not subjected to industry specific legal provisions on competition but rather to a general legal provision on competition for all companies and industries as provided in the Competitions Act[23] which has fundamental principles largely similar to the laws of very advanced jurisdictions such as Canada, the European Union and the United States. The Competition Act is formulated as a result of the apartheid and other discriminatory laws of the past which had resulted in the extensive concentration of ownership and control of companies within South Africa, unjust restrictions and unfair trade practises which restricted nationals from taking part in the trade and full participation of the economic growth of the country. The law is to make way and encourage greater ownership by the people of South Africa in the economic growth of the country through the creation of an efficient and competitive economic environment to the benefit of South Africans[24]. The competition allows the consumer access to freely select the quality and quantity of a variety of goods and services they desire and also provide a competitive environment for South African companies to compete effectively on the international market. The law seeks to curtail unfair trade practises which harm the economic growth and also regulate the transfer of ownership of companies as well as mergers and acquisitions[25]. The law has been designed to promote efficiency and adaptability for the general economic development of South Africa. The Competition Act establishes the Competition Commission with special functions to the investigation, control and evaluates restrictive practices, abuse of dominant position which is prohibited under the law as well as the regulation and approval of mergers within the banking industry. The Competition Act of South Africa grants the Competition Commission a concurrent jurisdiction with the central bank, the South African Reserve Bank and

[21] n 7 above sec 18.
[22] n 7 above sec 16.
[23] Competition Act 89 of 1998.
[24](n 23 above) Preamble.
[25] n 24 above.

establishes the Competition Tribunal to adjudicate misunderstandings and acts as appellate body to matters from the Competition Commission. The Competition Act also establishes Competition Appeal Court which is an appellate body to matters from the Competition Tribunal.

The Competition Commission has commenced legal action against eighteen (18)[26] banks in South Africa including three (3) of South Africa's largest banks for price fixing, collusion and other unfair trading activities contrary to the provisions of the Competition Act. The Commission commenced this legal action after completing its investigation of collusion and market allocation with respect to the trading of foreign currency and the South African rand. The Commission had discovered that the banks had between 2007 and 2013 been parties in a horizontal relationship and engaged in the fixing of bids, offers and bid offer spread as well as dividing markets by allocating customers and suppliers[27]. The Commission also found that the banks manipulated the prices through agreements and the creation of false and fictional bids through the use of platforms such as the Reuters currency trading platform and the Bloomberg instant messaging system chat room[28] contrary to the Section 4(1)(b)(i) of the Competition Act[29] as amended. The Commission has also established after its investigations that that contrary to Section 4(1)(b)(ii) of the Competition Act as amended, the banks being competitors in the foreign exchange market agreed and engaged each other in a concerted practice of assisting each other by allowing traders with large open risk position to complete his transaction before trading and also by holding their individual trades to reserve liquidity for each other instead of trading normally in the market. Citibank has admitted to committing the offences and has accordingly been directed to pay an administrative penalty of Sixty Nine Million Five Hundred Thousand Eight Hundred and Sixty Rand (ZAR 69,500,860) to the Competition Commission. The Competition Commission has in a referral notice dated February 15, 2017 referred the case against the other 17 banks to the Competition Tribunal. Where the banks are found by the Competition Tribunal to have contravened the Competition

[26] Bank of America Merill Lynch International Ltd, BNP Paribas, JP Morgan Chase & Co., JP Morgan Chase Bank N.A, Investec Ltd., Standard New York Securities Inc., HSBC Bank Plc., Standard Chartered Bank, Credit Suisse Group, Standard Bank of South Africa Ltd., Commerzbank AG, Australia and New Zealand Banking Group Ltd., Nomura International Plc., Macquarie Bank Ltd., Citibank Plc., ABSA Bank Ltd., Barclays Capital Inc., and Barclays Bank Ltd.
[27] *Competition Commission v Bank of America Merrill Lynch International Ltd and 17 Others* Case No. 2015Apr0147.
[28] n 27 above.
[29] n 23 above.

Act as amended, the banks shall each be liable to pay an administrative penalty not less than 10% of their annual turnover.

1.6 Research methodology

The research is a desktop and library- based and it relies on published materials as well as unpublished material. There is limited literature on the subject of competition law and policy in Ghana and so the primary source for the research is the legislative and institutional provisions on the supervisory and regulatory functions of the Bank of Ghana. The secondary source of information include information from the websites of the Bank of Ghana, the South African Reserve Bank, the Competition Commission and the Competition Tribunal, of which references was made accordingly. The research also makes relevant reference to internet publications, studies and research reports from firms such as Price Water House Coopers and the Consumer Utility and Trust Society (CUTS) Ghana.

1.7 Limitation of study

The issue of competition is a broad subject that this study cannot comprehensively discuss considering the limited space for the study. This study shall therefore focus on competition laws and policy for the banking sector in Ghana.

Secondly the paper shall focus on only the existing laws and regulations on banking operations and relationship between banks with respect to collusion and any form of banks collaboration with respect to pricing rates of facilities, currency pairings and any acts in relation to the determination of currency rates and products of banks. The study is limited to price fixing, collusion and unfair competition acts within the banking sector and does not extend to competition in the broad sense of covering other aspects of the economy.

The major limitation to this study is the unavailability of literature on the subject of competition in Ghana. The study would have benefitted from interviews and opinions from top officials of the Bank of Ghana, government officials in the Ministry of Trade and Industry, The Ministry of Finance and Economic Planning, the Ghana Investment Promotion Centre (GIPC) as well as scholars and top bank officials in Ghana. The inputs of these persons would have enriched this research with respect to the arguments for the enactment and the establishment of a comprehensive legislation and institutional framework for the regulation and supervision of competition law and policy in the banking sector. However, due

to time and resource constraints coupled with my current residence and place of research being South Africa, I am unable to obtain the inputs of these persons.

1.8 Outline of chapters

Chapter 1- Introduction

Chapter 1 shall provide the background to the study, the problem statement, significance of the study and research questions. It also discusses the research methodology, limitations of the study, literature review and an outline of the other chapters in this study.

Chapter 2- Competition and Competition Policy for the Banking Sector

Chapter 2 shall discuss the general principles of competition law and competition policy for the banking sector. The chapter shall also discuss the objectives of competition policies and shall also discuss the importance of competition policies in the banking sector in Ghana.

Chapter 3- General overview of the Banking Industry in Ghana

Chapter 3 will provide a general narrative on the evolution of the banking industry in Ghana. It will discuss the legislative reforms and policy reforms over the years and identify gaps in the existing legal framework which exposes the sector to certain risks. It will further ascertain whether the existing legal framework empowers the central bank to formulate regulations on competition as well as ascertain whether the legal framework empowers the Bank of Ghana to commence an investigation to ascertain anti- competitive acts of banks and punish same.

Chapter 4- Legal Analysis of the Governance of the Banking Sector in Ghana

Chapter 4 will discuss all the legislative and institutional provisions on banking supervision and regulation in Ghana and ascertain whether the existing legal framework empowers the central bank to formulate regulations/ policies on competition. The chapter shall also ascertain whether the legal framework empowers the Bank of Ghana to commence an investigation to ascertain anti- competitive acts of banks and punish same.

Chapter 5- Comparative Analysis: Lessons from South Africa

The chapter shall discuss in details the application of competition policy in the banking sector in South Africa. The chapter shall also analyze the competition laws and the role of the Competition Commission and the concurrent jurisdiction it has with the South African

Reserve Bank. The chapter shall further discuss the case of price fixing and collusion against 18 banks by the Competition Commission. In addition, the chapter shall further discuss how the legal and institutional framework in South Africa would suit Ghana is adopted and modified to suit the special case of Ghana's banking sector.

Chapter 6- Conclusion and Recommendations

The chapter would conclude that the best way to effectively regulate competition in the banking sector to promote efficiency, financial stability, and a general economic growth is to enact a comprehensive legal framework on competition which would state in express terms the prohibited practices and prescribe punishments for them accordingly. The study would also recommend the establishment of an authority with concurrent jurisdiction as the central bank to regulate and supervise banks in relation to competition issues. The study would further recommend that a special arm of the High Court be designated for competition disputes that may come from the Competition Commission. These recommendations shall be made by a comparative study of the South African model on competition.

CHAPTER TWO

COMPETITION AND COMPETITION POLICY IN THE BANKING SECTOR

2.1 Introduction

Development is a major concern for most African states. It has become evident over the past decades that law is a powerful tool for social order and it has been used to greatly influence the socio economic developments of many States in the world. It is evident that China has gradually emerged as a driving force in the world economic developments and its drastic transformation can be linked to its appreciation of the importance of law in its socio economic development[30]. Law and development has been defined in simple terms as the use of laws to bring about development in a country[31]. Therefore study has shown that law could be used to bring about economic development. The objective of this chapter is to argue that the enactment of laws on competition can be used to facilitate economic growth and development in Ghana.

2.2 Using the law for economic development

[30] MA Baderin 'Law and Development in Africa: Towards a New Approach' http://www.nials-nigeria.org/journals/Prof.%20Moshood%20Lecture.pdf (accessed 20 September 2017).
[31] TM Ocran 'Law in Aid of Development' (1978) *Ghana Publishing Corporation* 17.

In using the law to achieve socio-economic development, there are three main targets that the law should set to achieve. The law should be set to change and remove all barriers to development and introduce incentives which promote sustainable development. The law must also deregulate unfavourable laws and be a tool that induces private decision making[32] which are not state- dependent but rather promote private sector participation in development. For law to achieve these basic objectives there must be in place the relevant institutions, applicable rules and regulations and provisions on competition and anti-trust rules to ensure fairness. It is also important that the judicial system is effective and fair in its adjudication of disputes that may be presented before it in the enforcement of the laws on competition. Indeed, the major problems which face many African countries including Ghana is the issue of underdevelopment which takes its existence from low or poor economic growth, poor conditions of living of citizens and the lack of proper systems and institutional structure to stimulate economic development[33]. The enactment of laws on competition must be targeted at protecting the property rights of citizens and promoting innovation in the economy. The law must also promote transparency in public-private relationships by encouraging the free-flow of information between state agencies and private enterprises. The law must expressly provide for means by which private enterprises may obtain the state support or bailout in times of need or crisis without necessarily establishing a competitive advantage of one firm over the other. The law must also ensure equality among firms in competitive positions and encourage investments towards attaining the overall objective of promoting socio- economic development. The law must ultimately encourage innovation and focus on innovative means of reducing poverty and encouraging sustainable growth.[34] In the absence of comprehensive legal provision on competition, the banking sector is at risk of promoting inequality, abuse of dominance of major banks which would lead to price instability and collapse of smaller banks resulting in the lack of confidence in the banking sector. The existence of a comprehensive legislation on competition shall curb these threats and promote economic development since the banking sector plays a crucial role in any country's economic growth.

2.3 Competition Law

[32] DM Trubek 'Law and Development in the Twenty-first Century' (2009) Law and the New Developmental State (LANDS) Research Papers http://www.nials-nigeria.org/journals/Prof.%20Moshood%20Lecture.pdf (accessed 20 September 2017).
[33] E Nnadozie 'NEPAD, APRM and institutional change in Africa' and S.Adejumobi &A. Olukoshi 'The African Union and new strategies for development in Africa' Amherst Cambria Press 207.
[34] n 30 above.

Competition law has been defined as the set of policies and laws which guarantees competition in the market place to encourage economic growth and development[35]. Competition law seeks to provide the framework for competitive activites and protects or manages the process of competition between firms. It has been argued that competition among firms increases the probability of having a strong and an effective market since it encourages innovation, reduces cost of production and acts as an incentive for an efficient production. These factors make competition an incentive for economic growth. In its most effective means, competition creates a level of rivalry between firms to compete over customers, products and sometime employees. It has been argued that Competition Law began with the American Sherman Act, 1890[36]. However, it is believed that the concept may have even preceded the enactment of this legislation since it is on record that Sherman admitted not to be propounding a new legal theory but rather an application of an existing legal principle to the complexities of the United States[37].

2.4 Competition policy and regulations

Regulation has been defined as a rule having the force of law which is imposed by a higher authority such as a commission, central bank or authority in relation to matters and issues under the control of that body or authority[38]. However, regulations in the broader sense have other encompassing conditions such as technical standards and consumer protection issues which are not necessarily the primary objective of competition policies. However, regulations and competition policy complement each other in the creation and maintaining of competitive markets. Indeed, competition policies are generally applicable to all markets unless a particular sector is exempted from the application of the competition policy whereas regulations are usually drafted to be applicable to a particular sector and does not necessarily affect another sector[39]. With regards to the application of the laws, competition policies are generally applied ex- post basis, that is, after the occurrence of the act which is considered to be harmful to the market whereas regulations on the other hand operates exclusively on an ex- ante basis- before the occurrence of the act. With respect to remedies imposed,

[35] M Motta *Competition policy, theory and practise* (2004) 20.
[36] University of Parma 'Introduction to competition law http://old.unipr.it/arpa/defi/furse_ch01.pdf (accessed 20 September 2017).
[37] n 36 above.
[38] A Joaquin 'Competition v Regulation: where do the roles of sector specific and competition regulators begin and end?' file:///C:/Users/User/Downloads/SPEECH-10-121_EN%20(1).p (accessed 20 September 2017).
[39] Competition Commission South Africa 'Competition policy and sector specific regulation at the crossroads: The South African experience' http://www.compcom.co.za/wp-content/uploads/2016/07/1.-Competition-Policy-and-Sector-Specific-Regulation-at-the-Crossroads-The-South-African-Experience.pdf (accessed 20 September 2017).

competition authorities impose remedies to address specific behaviour or conduct of a market player in the economy to which the policy applies. These remedies for violations are generally structural in nature and are imposed specifically to correct or deter firms from engaging in acts considered to be anti- competitive or unlawful.

Competition policies have been applied differently to regulated industries in many jurisdictions. Some countries consider regulated industries as anti-trust immune and thus, do not apply competition policies to these industries at all. However other countries apply competition policies to all economic activities which may include those that are from regulated industries such as banking. Competition policy generally applies to sectors with compatible structural conditions whereas regulations applies to sectors specially designed in such a manner that competitive force would be capable of being enforced without many restrictions. Regulations are applicable to industries in transitory positions, such as state owned enterprises that used to enjoy some form of monopoly before the liberalization of the laws to allow other new or private entrants into the market to compete. Regulations are used to protect these new entrants who may not have the requisite capacity to compete with the already established enterprise in the sector[40].

The theoretical framework that deals with competition policies and regulations are also mutually exclusive. Competition policies can only be analyzed with the oligopoly theory which relies strictly on how firms respond to each other based on their interdependence. Regulations on the other hand focus on situations where there is a regulatory authority known as the principal, and the agent is the regulated firm. In this relationship, the regulator introduces relevant incentives that the firms would consider in their actions which would ultimately aid the regulator in attaining its objectives[41].

2.5 Competition trends in the banking sector

The liberalization and deregulation of the banking sector commenced in the 1970s culminated by the technological advances, the improvement of the capacity of computers, advanced management techniques and improvements in risk coverage. Financial globalization and the liberalization of international capital movements played key roles in these developments which led to the general reduction in transport cost and elimination of some barriers to trade. These liberalizations involved the lifting of interest rate controls and geographical restrictions

[40] M Motta (n 35 above) 17-18.
[41] M Motta (n 35 above) 18.

on banking.[42] However, the deregulation and liberalization of the banking sector are considered to be one of the factors contributing to the banking crisis after the stability prior to the 1970s. It has been advocated that the liberalization and the deregulations after the 1970s coupled with the adverse macro shocks, inadequate macro policies as well as external vulnerabilities caused the banking crisis that commenced in the 1970s. In some jurisdictions such as the United States of America, Japan and Spain, it has been found that regulatory failures contributed to the banking crisis. These factors notwithstanding, the financial liberalization and deregulation of the banking industry has greatly contributed to financial developments and economic growth across the world[43]. The advent of competition policy in the banking sector caused an even greater competition from outside the banking sector with the advent of financial deregulation and liberalization as banks faced direct competition from other players in the financial market. Competition was enhanced better with market integration in the wholesale and investment banking sectors in Europe over the period. The liberalization and deregulation of the banking sector also caused a rapid increase and expansion of financial intermediation causing financial assets of banks and other financial intermediaries to increase over the period[44]. Banking before the 2008 financial crisis had grown from the traditional deposit taking and granting of loans to more complex transactions such as asset management, insurance, consulting and underwriting of equity and debt issues as well as proprietary trading[45]. After the crisis, the banking terrain seems to have returned more to the traditional banking principles of deposit taking and granting of loans, but there still remain a major aspect of banking that retains its stake in the complex and specialized transaction.

Banks are prone to market failures due partly to certain external factors such as coordinate problems, excessive risk taking and market power. Therefore, most economies adopt the use of regulations to protect investors and competition policy to encourage fair competition and reduce the practice of anti- competitive acts which results in an unfair advantage to one firm and its customers and shareholders over the other. Competition policies in the banking sector has been used in many jurisdictions to reduce the risks banks take through capital requirements and has rather strengthened banks to use their own internal mechanisms to raise

[42] M Motta (n 35 above) 17-30.
[43] n 42 above.
[44] n 42 above.
[45] n 42 above.

capital and introduce stringent disclosure measures facilitated by the Basel II model to increase transparency and market discipline.

2.6 Competition policy and stability

Competition policy in the banking sector is a complex subject when considered with the need to maintain financial stability. Whereas much competition in the banking sector may be considered to be healthy, there are times where competition in the sector also contributes to instability in the sector. After the 2008 banking crisis, the issue of competition policy in the banking sector has been given a considerable attention over the world. There had been questions about whether competition policy rules and banking stability issues could be pursued together by the central banks or whether they are two distinct and conflicting issues that needs not be merged. Therefore, many had called upon central banks to rather pursue their core mandate of financial stability and ignore the issues of competition policy in the banking sector. Central banks were reluctant in dealing with competition issues in the banking sector over a period of time. However, after the 2007 bank crisis, much attention has been directed at the regulation of competition in the banking sector since it has not been discovered that contrary to earlier suspicions, competition policies are not aimed at destabilizing the financial markets but rather targets and encourages efficiency, innovation and increased productivity.

The banking crisis started in 2007 after some mortgage failures and became systemic after the collapse of the Lehman Brothers in September 2008. The collapse of the Lehman Brothers brought with it serious competition issues. State bailout and public commitments in Europe and the US shot up to 30% of GDP and there were great increase in market power in the sector which led to mergers and some acquisitions. These developments created distortions in the market and uneven share of the market and uneven playing field with respect to the cost of capital caused by the mergers that had taken place resulting in a weaker competitive environment and increased concentration in certain sectors[46]. The banking crisis subjected competition policies, banking regulation as well as prudential supervision into question as to whether or not competition policies are relevant to promote stability in the banking sector, a core objective of central banks. It has been proposed that competition policy need not be fine-tuned for the banking sector in economies where there is no direct conflict between competition and stability.

[46] n 42 above.

The importance of banks and the special role they plays in the general economic growth across the world cannot be underestimated. These special features of banks also expose them to systemic risks which can create major problems if it is not properly monitored and prevented from exploding. The fragility of the banking system in general is apparent even though it is the most regulated sector of many economies. Therefore an unregulated competitive banking system can result in very high risks and harmful effects to the economy. One of the most significant and highly controversial and potential moral hazard aspects of competition policies in the banking sector is the bailouts that governments and state institutions extend to failing or distressed banks. This is where some economics have questioned whether indeed there is some form of trade-off between competition policies in the banking sector and stability which is usually the core mandate of central banks.

2.7 Objectives of competition policy in the banking sector

The main objective of competition policies in every sector of the economy is to ensure that there is a level playing field for all players in the sector to ensure an efficient and effective competition for economic welfare. Competition policies are therefore designed to protect and ensure the proper functioning of demand and supply which are the market forces. In ensuring an efficient and effective competitive market, it is important that the competition policies guarantee easy access and exit of companies from the market and provide proper and adequate incentives for firms to compete on aspects such as price and product or service quality. It is also important to ensure that firms in dominant positions do not abuse their dominance of the market to the detriment of smaller companies and reduce effective competition in the sector. The purpose of competition policy in the banking sector is to correct market failure or an anticipated risk which is a threat to the sector[47]. The risk of monopoly, abuse of dominant position and the risk of price fixing, collusion and other anti-competitive practices are real threats to stability and to economic development.

One other objective of competition policies is for the protection of smaller companies. This objective is the core objective behind the anti-trust laws which were introduced in the United States of America in the 19th century due to the complaints filed by small scale farmers

[47] n 39 above.

against larger farms. The fundamental principle for the introduction of these provisions lies in the discriminatory legislation and treatment of the smaller firms as compared to the larger firms[48]. These favourable treatments and protection of smaller firms which are guaranteed by competition legislations in any country are not necessarily discriminatory and harmful to economic welfare since protection of small firms from abuse rather ensures a level playing field for all firms in the industry to operate. In this context, the competition policy would be targeted at protecting smaller banks from the domination and abuse by the bigger banks. This is justified in the sense that smaller banks are hurt by the lack of proper infrastructure and imperfect markets which put them in a disadvantaged position to compete. The policy therefore should target the guarantee of some form of protection to the smaller banks from the abuse of the bigger banks.

The promotion of market integration which is crucial to the European Union (EU) competition policy is another major objective for competition policies generally. However, some scholars have viewed this as a political objective which is not wholly consistent with the economic welfare objectives of competition policies such as the decision of the EU competition law to ban price discrimination across national borders[49]. The differential treatment which is promoted by this policy has no direct economic benefit and it is more political than economic.

Competition policies ensure fairness and equity and stability which are a means of fighting inflation. The fight against inflation has been cited as one of the core reasons for the introduction of controls over cartels[50]. However, such policies need to be checked by ensuring that firms are not colluding to increase prices. Competition laws further provide express provisions on the relationship between firms and their customers as well as their rivals in the market. It imposes restrictions on all other anti- competitive and unfair advantage or practices of other firms in a selfish manner to the detriment of all others

2.8 Conclusion

The chapter has discussed and revealed the importance and necessity of effective and efficient regulation of competition and other practises in the banking sector. The banking sector has been identified as an important and fragile sector which can significantly contribute to economic development and sustainable growth. However, the sector requires the

[48] n 35 above 22.
[49] (n 35 above) 23.
[50] (n 35 above) 24

implementation of an effective and efficient legal and institutional framework to safeguard it against systemic risks and threats. The evolution of competition law as a major tool for economic welfare has made competition policies in the banking sector a necessity. Banking is a major aspect of the economy which requires maximum protection and safety. The collapse of one bank has rippling effects on all other economic activity and growth in general. Competition policy in the banking sector is a necessary incentive for efficiency, fairness and innovation which in general contribute to the economic development of any nation. Competition policies in the banking sector do not create instability, but rather complements the regulators' efforts in ensuring stability and economic development and it serves as a means by which law could be used to promote sustainable economic development and growth.

CHAPTER THREE

THE BANKING INDUSTRY IN GHANA

3.1 Introduction

In the previous chapter, I have discussed the importance of competition policy and the need for an efficient and effective regulation of competition and other practises in the banking sector. I have argued in the previous chapter that the banking sector is an important but fragile sector which requires adequate protection and an effective regulation to ensure that it contributes significantly to economic development and sustainable growth of Ghana. I have argued that the evolution of competition law as a major tool for economic development has made competition policies in the banking sector a necessity since it is an incentive for efficiency, fairness and innovation which in general contribute to the economic development. I have also argued that competition policies in the banking sector do not create instability as propounded by some scholars, but rather compliment the regulators' efforts in ensuring stability and economic development and it serves as a means by which law could be used to promote sustainable economic development and growth.

In this chapter, I shall discuss the banking sector in Ghana as many countries including Ghana prioritized financial stability through the introduction of new policy directives and regulations which generally seeks to balance the policy and regulatory directives with economic growth due to the interest to safeguard financial stability. The Bank of Ghana has over the years introduced new reforms targeted at strengthening the supervisory and regulation powers of the central bank with policy directives aimed at economic growth and financial stability. This chapter shall also discuss the impact of the financial reforms and ascertains the systemic risk that still pertains in the banking sector. The study addresses the structure of banks and the role the banking sector plays in contributing to general economic growth. The study also adopts an analytical approach to identifying the key obstacles or gaps in the financial sector that affects economic growth in the country.

3.2 General overview of the banking sector

The origins of banking in Ghana dates back to the 19th Century where the Post Office Savings Bank (POSB) began operating in 1888 using the facilities of the existing post offices. This was followed by the British Bank of West Africa, now Standard Chartered Bank, in 1896. The British Bank of West Africa was followed by the Barclays Bank DCO, which is now Barclays Bank Ghana Ltd in 1917. These overseas banks had their operations dominated by the trade that existed between the Gold Coast (Ghana) and the United Kingdom. The first local bank to be set up in Ghana was the Co-Operative Bank which was established in 1935 by cooperative unions made up of farmers and the colonial government. These banks had their offices in the major mining and cocoa buying towns in the country. Access to credit facilities were quiet difficult since the existing banks rather preferred to grant these credit facilities to European, Levantine and Asian communities in their operations leaving the locals with no accessible credit facility[51]. The colonial government also set up the West African Currency Board to issue currency of various denominations to their colonies and protectorates in West Africa which then included the Gold Coast, Nigeria, the Gambia and Sierra Leone. The colonial government contracted the services of one Sir Cecil Trevor in 1951 to examine the banking industry in Ghana and propose the establishment of a national bank for commercial purposes. He recommended the establishment of a bank which should be partly owned by the colonial government and managed by locals and this led to the establishment of the Bank of the Gold Coast which began its operations in 1953[52].

Ghana exited the West African Currency Board after its independence in 1957 and split the Bank of the Gold Coast into two. The role of the Central Bank was assigned to the Bank of Ghana which was established after independence for that purpose and the commercial banking activities was assigned to the newly created Ghana Commercial Bank[53]. Subsequently, other banks such as the Ghana Investment Bank, the Agricultural Development Bank, the Merchant Bank, and the Social Security Bank were all incorporated as state owned companies to take charge of the specific industries assigned. This socialist approach was however reversed after 1983 in the Economic Recovery Programme which was undertaking by the government of Ghana with the assistance from the International Monetary Fund and the World Bank. Prior to the introduction of financial sector reforms, the banking sector comprised mainly state owned banks which had allocations and pricing of credit. There was

[51] MI Abdallah ' Financial sector regulatory and supervision http://www.ijecm.co.uk/wp-content/uploads/2015/05/3568.pdf (accessed 15 August 2017).
[52] (n 51 above) 3.
[53] (n 51 above) 3.

little or no competition in the banking sector and hence inefficient financial intermediation process due to lack of competition which resulted in the lack of innovation. In many cases, credit decisions were based primarily on political affiliations and not commercial consideration, which ultimately contributed to bank failures.

The Financial Sector Adjustment Programme (FINSAP) was introduced to enhance the effectiveness and soundness of the banking sector through the introduction of reforms of the regulatory framework and the restructuring of financial institutions in distress and the promotion of the non- bank financial institutions. The program was also aimed at improving deposit mobilization and promoting efficiency in the credit market[54]. The financial sector adjustment program resulted in the liberalization of the banking environment and the removal of bank interest rate ceiling and sect oral credit targets. There was strict compliance with the prudential guidelines and directives. The banking supervision functions and powers of the Bank of Ghana were enhanced[55]. This led to series of privatisation of state owned industries and the liberalization of trade and finance restrictions which had earlier been imposed making way for the enactment of banking laws to enable locally incorporated companies to also file for licenses to operate as banking institutions. The likes of Meridien (BIAO) Trust Bank, CAL Merchant Bank, Allied and Metropolitan and ECOBANK were granted licenses to operate. Today, the Bank of Ghana has continued to provide regulations for the banking sector and that has resulted in the rapid rise of the number of banks and non-banking financial institutions in Ghana[56].

It is fair to say that the financial sector reform has been greatly successful. The banking sector is currently fairly saturated with 33 commercial banks[57], 17 of which are foreign controlled in addition to 140 registered rural and community banks as at April 2016[58] and 71 non-bank financial institutions as at June 2017[59] as well as 555 registered micro-finance

[54] S Mensah 'Banking and capital markets, the evolution of Ghana's financial sector and future prospects' http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198753438.001.0001/acprof-9780198753438-chapter-8 (accessed 20 September, 2017).
[55] (n 54 above).
[56] (n 51 above).
[57]Bank of Ghana 'Licensed banks, representative offices and their registered offices in Ghana- 30 August 2017 https://www.bog.gov.gh/privatecontent/Banking_Supervision/LICENSED%20BANKS%20%20ADDRESSES_AUGUST%2030%202017.pdf (accessed 31 August, 2017).
[58]Bank of Ghana 'List of 140 licensed rural and community banks by region'https://www.bog.gov.gh/privatecontent/Banking_Supervision/REGIONAL%20DISTRIBUTION%20OF%20RURAL%20BANKS.pdf (accessed 31August 2017).
[59]Bank of Ghana 'List of specialised deposit-taking institutions/credit reference bureau as at 30th August 2017'https://www.bog.gov.gh/privatecontent/Banking_Supervision/LICENSED%20SDIs%20ADDRESSES%20%20AS%20AT%2030TH%20AUGUST%202017.pdf (accessed 31August, 2017).

institutions in Ghana. The branch network of the commercial banks alone stood at 1,377 as at April 2017, distributed across the ten (10) regions of the country[60]. The Bank of Ghana which is the central bank is the sole authority with banking regulation and supervision powers[61] and it has over the years conducted its functions effectively through the formulation of policies and directives.

The Bank of Ghana has introduced legislations and a revision of the supervisory practice to counter the increasing risks that comes with the growing complexities and technological upgrades in the banking sector. This calls for a more effective regulation and a stricter supervisory authority as well as common enforcement mechanism through shared cross-border regulatory and supervisory agencies. The Universal Banking License which was introduced in 2003 together with the refined Banks and Specialised Deposit- Taking Institutions Act which was passed in 2016 has boosted the investor confidence in the Ghana banking sector. The banking sector through the policy directions of the Bank of Ghana has seen tremendous transformation to meet the demands of the technological advancement and general changes in the global and domestic macroeconomics. There has been major structural and conduct deregulation. The Bank of Ghana has also adopted new prudential regulations coupled with impressive technological and financial innovations to meet the growing needs of the sector.

3.3 The banking sector and the economic strategy of Ghana

Ghana's medium term national development policy framework for the period 2010- 2013 provides the policy framework for its economic growth and development. This policy is the country's second medium term Private Sector Development Strategy which focuses primarily on developing the private sector and the banking sector to provide savings, payments and credits as well as risk management services to individuals and firms since these basic requirements are vital to the policy objective and developmental agenda of the country. The crucial role of the banking sector in the promotion of growth is not underestimated in the policy document which was developed for the attainment of economic growth and development by introducing financial sector policies for long term economic growth and by

[60] Bank of Ghana 'banking sector summary vol. 2.1 January 2017' https://www.bog.gov.gh/privatecontent/MPC_Press_Releases/Banking%20Sector%20Summary%20-%20January%202017.pdf (accessed 31August 2017).
[61] (n 7 above) 3(1) and (n 5 above) (1)(d).

enhancing access to the financial sector[62]. Recognizing the need for financial inclusion to ensure sustainable growth, the government in its policy statement targeted the improvement in quality and quantity of the provision of financial services as well as improvement of competition to ensure a strong and efficient financial institution. The policy identified the pressing needs of the financial sector to include the availability of credit at a lower cost to businesses and the extension of basic savings, credit and insurance to persons in remote areas. However, these policy directives in as much they focus on development failed to recognize the legislative and institutional needs of ensuring an effective and efficient regulation of competition even though it recognizes the importance of competition in promoting efficiency and innovation which leads to a reduction in cost and prices for economic growth.

Banks in Ghana play crucial roles through its financial intermediation and the reallocation of scarce resources from depositors to borrowers which include businesses and individuals. The banks role of financial intermediation can be satisfied when the needs and requests of both depositors and the borrowers could be satisfied at a lower cost. This means that there is likely to be competition among banks with respect to deposit mobilization and the grant of financial services which includes loans. The efficiency of the sector in this aspect can be properly ascertained where there is a legislative or institutional framework established to regulate and monitor the competition and other practices of the banks in maximizing their deposit mobilization and grant of loans. Competition policies and authorities are therefore required to ensure the efficiency of the banking sector in this regard.

3.4 Dealing with challenges in the economy

The important lesson from global financial crisis in 2008 and the U.S Federal Reserve tapering which followed in 2013 is that, it is important to pay attention to risks or threats to financial stability since the least exposure to the threats can result in very catastrophic situations and crisis which may affect the general economic growth of a country. Notwithstanding the global economic downturn, Ghana recorded a gross domestic product (GDP) growth of 3.89% in 2015. The services sector recorded the highest growth of 5.7%, and the agricultural and industry sectors recorded 2.4% and 1.2% respectively. The largest contributor to Ghana's GDP was the services sector with 54.4%, followed by the industry

[62] C Ackah & JP Asiamah 'Financial regulations in Ghana: Balancing inclusive growth with financial stability' https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9287.pdf (accessed 20 September 2017).

sector with 25.3% and the Agriculture sector with 20.3% as at December 2015[63]. The services sector in general recorded a growth of 5.7% in 2015 with the industry sector recording a growth rate of 1.2% by the end of 2015. Generally, Ghana's GDP has continued to decline from its high point of 9.3% growth in 2012 to 3.9% growth in 2015. And this has been attributed to the change in government expenditure from consumption to infrastructural investments and the recent energy crisis that hit the country due to the drying up of the Volta River.[64]

The Bank of Ghana in response to the challenges of the banks introduced a directive for commercial banks to maintain capital adequacy ratio of 13.0% before paying dividends for 2015. Also, banks with capital adequacy ratio less than 13.0% but more than 10% were required to limit dividend payments to 50.0% of distributable reserves until the capital adequacy ratio is raised to 13.0% in addition to the relevant transfers of statutory reserves. On the other hand, banks with less than 10.0% were not qualified to propose dividend until the capital levels have been enhanced to the expected levels and the bank's risk management systems have been improved[65]. The monetary policy rate which was 21.0% at the beginning of the year 2015 was revised to 26.0% by the end of the year. This increase in the policy rate resulted in some form of restricting and streamlining of the monetary conditions which contributed to easing the pressure of inflation on the economy. These policy issues affected liquidity in the banking system and the central bank was active in correcting these defects by issuing government securities in the second and third quarters of 2015[66].

The central bank introduced the e-bond trading system in September 2015 to be used as the primary execution platform for all fixed income trading in securities exchange known as the Ghana Fixed Income Market (GFIM). The GFIM is to be governed by representatives from the Central Bank (Bank of Ghana), the Ghana Stock Exchange (GSE), the Central Securities Depository Limited, the Ghana Association of Bankers, Association of Chartered Insurers (ACI) Ghana and licensed dealing members of the Ghana Stock Exchange (GSE) who have been mandated to exercise oversight responsibility. With the hope of improving marketability and liquidity for this arrangement, the government issued a 15 year US$ 1bn Eurobond in October 2015 at a 10.8% coupon rate with a guarantee of US$ 400m from the World Bank.

[63] 'Pricewaterhouse Coopers '2016 Ghana Banking Survey: How to win in an era of mobile money'(2016)' https://www.pwc.com/gh/en/assets/pdf/2016-banking-survey-report.pdf (assessed 31 August 2017).
[64] Bank of Ghana 'Statistical bulletin 2016' https://www.bog.gov.gh/statistics/statistical-bulletin (accessed 21 August 2017).
[65] n 63 above.
[66] n 63 above.

The proceeds are intended to be used to in the refinancing of existing debts which includes the 2007 Eurobond expected to mature in 2017[67].

Considering the advent of mobile money services, the central bank in an attempt to streamline and properly regulate the mobile money issues introduced new guidelines to E-Money in July 2015. This was intended to create a conducive environment for convenient, efficient and safe retail payment and money transfer mechanisms. The rules also applied to E-Money Issuers (EMIs) offering financial services outside the bank premises by using retail agents as alternative delivery channels[68]. The central bank embarked on the Basel II project for implementation in 2017 since regulation was intended to move from asset base to risk based to improve risk management and financial stability in the banking sector. The Basel II is an international business standard which requires financial institutions to maintain sufficient cash reserves to cover risks with respect to operational risks. This method introduces an advanced and a complicated model for calculating regulatory capital and it also requires banks that hold riskier assets to also hold adequate capital. The new model and standard requires detailed disclosures of the risks the banks assume as well as disclosure of how the risks are being managed by the banks. This standard further requires intense supervision, examination and intense scrutiny of the banks' operations by the central bank. Banks on the other hand would be required to maintain a strong internal control and risk management standards and procedures[69].

The Payment Systems Act[70] empowers the central bank to establish, operate and promote payment systems in Ghana. This law is to ensure that there is a gross settlement system for high value payments and settlements and also that there is an established automated clearing house ("ACH") for direct credits/credit transfers and direct debits. The central bank under this Act is also to ensure that there is a 3 day and same day cheque clearing mechanism as well as ATM interchange enabling cash withdrawal from any ATM with a valid debit card[71].

3.5 Prudential regulation

Banking regulation and supervision is the underlying determinant of the efficiency and effectiveness of the financial sector. There is a need for effective and an efficient means of banking regulation to ensure that the negative effects of bank failures with respect to loss of

[67] n 63 above.
[68] n 63 above.
[69] n 63 above.
[70] Payment Systems Act 662 of 2003.
[71] n 63 above .

confidence in the financial system is not encountered. The banking sector is one of the most heavily regulated sectors in the Ghana. Banking regulations refers to the laws, rules and directives that govern and guide the bank's behaviour. Banking supervision on the other hand refers to the oversight responsibility to ensure compliance with the laws, rules and directives that govern the behaviour of banks. The effective supervision and regulation of banks has been seen to ensuring stability and public confidence in the financial sector and it enables the central bank to manage systemic risks in the sector and provide adequate protection for depositors, shareholders and borrowers. Effective supervision and regulation are necessary for the survival of banks within the financial industry and the banking sector[72].

Banking regulation and supervision has been in existence since the colonial times through directives from the West African Currency Board and the Bank of Gold Coast. There were also compliance issues contained in the then Companies Ordinance. After independence in 1957, banking supervision and regulation was done through the Bank of Ghana Act of 1957, 1961-1969 as well as the Company Code of 1963 which granted the Bank of Ghana wide powers on banks' composition, information demand requirement, restrictions on credits as well as investments[73]. It was not until 1970 before the first banking law was enacted. The Banking Act of 1970, Act 339 consolidated all banking related laws and introduced the office of the Chief Examiner of Banks. With a detailed outline of permissible activities, the Chief Examiner had powers to ascertain compliance with the legal provisions. The law also had specific provisions for the maintenance of Reserve Funds, minimum capital requirements among others[74]. This was followed by the Banking Law of 1989, PNDCL 225 which also widened the powers of the Bank of Ghana to supervise and introduced new requirements relating to capital adequacy and minimum capital requirements. The law also introduced prudential lending guidelines as well as financial reporting procedures as a means to streamline the regulation and supervision of banks. Then the Financial Institutions (Non-Bank) Law, PNDCL 328 was enacted in 1993 to regulate Leasing companies, mortgage finance companies, finance houses, savings and loans companies, hire purchase companies as well as credit unions. This was intended to broaden the regulatory and supervisory powers of the Bank of Ghana and to streamline the financial sector. The Banking Act 2004, Act 673 introduced new licensing requirements for banks and the capital and reserve requirements

[72] MI Abdallah ' Financial sector regulatory and supervision (n 51 above).
[73] D Agbogah 'Improving supervision of financial services in Ghana, Bank of Ghana' https://www.icagh.com/file/Improving_Supervision_of_Financial_Services_in_Ghana_Final_By_Desmond_Agbogah.pdf (accessed 17 August, 2017).
[74] D Agbogah (n 73 above).

were also reviewed as well as liquidity, ownership and control provisions were introduced. This Act also broadened the supervisory powers of the Bank of Ghana. The Banking (Amendment) Act 2007, Act 738 further enhanced the licensing requirements and introduced remedial measures, information exchange agreements, priorities of deposit liabilities and directives on winding up. The Banks and Specialised Deposit Taking Institutions Act 2016, Act 930 amended and consolidated the laws relating to deposit- taking and provided for enhanced provisions relating to banks and deposit taking institutions. The new law provides for the consolidation of the supervision powers of the central bank and introduced cross-border supervision. The Act also introduces prompt corrective actions and the application of administrative sanctions. It further introduced the application of the Basel II Sensitivity Standards in banking supervision. Banking regulation usually takes the form of structural, conduct and prudential mechanisms. This involves the mechanisms put in place for entry into the sector by new banks and the protection of incumbent banks from unfair competition and other unfair trade practices. Structural regulation includes functional measures such as the classification of banks based on the core principles of its operation. It may also include the establishment of restrictions through minimum capital requirements or limitations on the kind of business the bank may transact. Conduct regulation deals with the regulation of strategic or operational policies or decisions of the bank in its core line of business and it includes the imposition of controls on interest rates, the volume of loans to be granted, the creation or expansion of branches among others.

Prudential regulation however places emphasis on the safeguard measures and the stability of banks and it seeks to protect consumer interests. Prudential regulation measures adopted by the Central Bank include the provision which requires the Central Bank to act as the bank or lender of last resort irrespective of ownership of the bank. The prudential regulations aim at ensuring a sound and efficient banking system in for the benefit of consumers and the economy. The prudential regulations introduced by the Bank of Ghana led to the creation of a microfinance office within the Banking Supervision department of the Bank of Ghana to regulate and supervise microfinance institutions. The bank of Ghana also introduced operating rules and guidelines on microfinance relating to their categorization into tiers, permissible activities, licensing requirements and the paid up minimum capital. The notice was to serve as a guide for the microfinance companies and also the general public.

The Bank of Ghana has adopted a risk-based approach to banking supervision which is done through the onsite examination and the offsite surveillance. The off-site surveillance involves

the examination of regular return, reports and data to the bank. Each bank is required to submit its prudential reports and data as well as board minutes to the Bank of Ghana on regular basis. The Bank of Ghana may also request for relevant documentation or report where it deems necessary in their off-site surveillance. The on-site examination involves personnel from the Bank of Ghana Supervision Department visiting the banking premises to examine the books and other regulatory requirements. The examination involves a total review of the bank's operations and the assessment is conducted against the prudential requirements as well as the statutory and regulatory requirements. Emphasis is placed on the Solvency, Liquidity, Earnings, Management and Sensitivity to Market (SLEMS) analysis.

The solvency examination ascertains the paid up capital and position of the bank's net worth as well as the adequacy ratio. Asset quality, risk absorption, capital at risk and the capital plan are all ascertained.

Liquidity requires the examination of the minimum cash reserve ratio, the availability of liquid assets to meet maturing obligations. It also ascertains the internal limits on key liquidity ratios, daily or monthly monitoring of liquidity position as well the conduct of liquidity stress test and results, liquidity contingency plan and action are also determined.

Earnings examine the key performance indicators of the bank which is pitched against the budget targets. It also examines earnings and its contribution to the net worth of the bank as well as the source of these earnings.

Management examines the adherence to the key policies of the bank by Management and the Board in the exercise of its oversight responsibilities. It also ascertains the compliance functions and the control mechanism in the bank as well as compliance with internal audit directives, risk management and financial analysis.

Sensitivity to Markets deals with the examination to determine the extent to which the monetary policies translate into the market operations and how the market reacts to these policies. It also considers the market risks in prices such as the interest rate, exchange rate, commodity and equity risks.

In addition to this, the Bank of Ghana has adopted other measures such as holding trilateral meetings with the Management of banks as well as its external auditors and introduced the electronic submission of returns. The Bank of Ghana also conducts joint studies with the industry to address issues such as base rate and other fiscal policies. The establishment of the

Banking Supervision Department as well as the Other Financial Institutions Department has aided in placing more emphasis on the core needs and detailed supervision of the banks. The introduction of the risked based supervision rather than the compliance based supervision has also helped in the determination of risks and the provision of solutions to avert these risks. There is an also established credit reference bureau through the Credit Reporting Act[75] which enables banks to reduce the risk of bad debts and loan defaults by ascertaining the credit worthiness of customers before granting a facility.

The Bank of Ghana is the lender of last resort to all banks notwithstanding domestic ownership or otherwise. Notwithstanding the stable conditions in the banking sector, the central bank has put up strategies to strengthen its supervisory functions to anticipate and deal with systemic risks. The central bank conducts mandatory stress tests on banks to identify risks even before they develop into crisis.

Recently, the Bank of Ghana in accordance with the law[76] announced an increase in the minimum paid up capital from GH¢120,000,000.00 to GH¢400,000,000.00 effective September 11, 2017[77]. This new directives were arrived as a result of the central bank's intentions to holistically reform the financial sector to strengthen and modernize the financial sector in order to support the economic plans and transformation agenda of the government of Ghana. The new directive also comes as a result of the revocation of the licenses of two banks and their subsequent take-over by GCB Bank.

Indeed it needs to be stressed that notwithstanding the very excellent pre-emptive policies the central bank is adapting to banking regulation and supervision through legislative reforms, the sector is still not fully immune to systemic risks and shocks and the rapid expansions and projected mergers and acquisitions in the sector would require a more robust, effective and efficient legal and institutional reforms to deal with the threats. The need for a comprehensive legislation and institutional framework for the enforcement and monitoring of competition in the sector cannot be more important.

3.6 Conclusion

[75] Credit Reporting Act 726 of 2007.
[76] n 7 above sec 28(1).
[77] Bank of Ghana 'New minimum paid up capital' Notice No. BG/GOC/SEC/2017/19 https://bog.gov.gh/privatecontent/Public_Notices/Notice%20on%20New%20Minimum%20Paid%20Up%20Capital.pdf (accessed 22 September 2017).

The Bank of Ghana through its policy reforms has created one of the most vibrant banking sectors in the West African sub- region. The liberalization of the banking sector and universal license which was introduced in 2003 rapidly influenced the increase in the number of banks and the influx of foreign banks into the country resulting in rapid growth in deposits. The increase in the number of banks increases competition in the sector and ensuring equity, fairness and the enactment of effective regulation on competition is a necessary requirement for sustainable economic growth. Indeed the competition in the sector would generate new innovative ideas and modern business practices and technological advancements which would effectively increase banks efficiency in the sector. This makes regulation and supervision more crucial and difficult in the banking sector. Threats such as price fixing, collusion and anti- competitive practices becomes even more apparent where there are no express legal provisions on competition and an established authority with powers to investigate, ascertain and punish instances of anti- competition practises.

In the next chapter, I shall analyse all the relevant legislation as well as the institutional framework governing the banking sector to determine whether the law adequately provide for the regulation and enforcement of competition laws in the banking sector.

CHAPTER FOUR

LEGAL ANALYSIS OF THE GOVERNANCE OF THE BANKING SECTOR

4.1 Introduction

In the previous chapter, I have discussed and ascertained that the Bank of Ghana through its policy reforms and liberalisation has made the banking sector vibrant in the West African sub- region and has resulted in the influx of banks and significant growth in the number of foreign banks over the past decade. It has been ascertained that increase in the number of banks increases competition in the sector. Therefore in ensuring equity, fairness and an effective regulation of competition practises among banks, it is important to have in place the relevant legal and institutional framework to deal with anti- competition practises.

The importance of a comprehensive legal framework on competition for the banking sector to enhance economic growth and development cannot be underestimated as has been discussed in this study. The banking sector in Ghana has grown tremendously over the past decade and has been projected to continue to expand in the coming years. The policies the central bank has put in place over the period has put banks in Ghana in a better position to efficiently play their role as financial intermediaries for the growing economy and contribute effectively to economic growth and development. This has also contributed to the tremendous growth of the number of banks and the influx of many foreign controlled banks in the country. The recent increase in the capital requirement of banks in Ghana from GH 120 million to GH 400 million will certainly cause many banks to merge and some banks would be taken over by the bigger banks. Competition will be tremendously enhanced and there is the need that the legal provisions are efficient and effective to cater for the systemic risks that the emerging growth in the number of banks, anticipated mergers and takeover of banks. The increasing number of banks and the anticipated mergers and acquisitions poses threats such as collusion, price fixing and other anti- competitive acts and it is important that the laws cater for them

adequately. This chapter shall analyze the existing legal framework to ascertain its capability to deal with the anti- competitive threats posed to the banking sector. The study shall also ascertain whether the central bank has powers to formulate competition policies for banks in Ghana and whether the existing legal framework empowers the central bank to commence investigations, ascertain and punish banks for anti- competition acts such as price fixing, collusion and abuse of dominant powers.

4.2 The legal instruments governing the banking sector

The Bank of Ghana is the sole authority with banking supervision and regulation powers in Ghana. Banking regulations includes the formulation of laws, rules and directives that govern and guide the banks' behaviour. Banking supervision on the other hand refers to the oversight responsibility to ensure compliance with the laws, rules and directives that govern the behaviour of banks. Effective supervision and regulation of banks enables the central bank to manage systemic risks in the sector and provide adequate protection for customers, investors and shareholders in the sector. Since effective supervision and regulation are necessary for the survival of banks within the financial industry and the banking sector[78] it is important that the central bank operate with all necessary laws, policies and regulations required. The key legal framework for banking supervision and regulation in Ghana are the Bank of Ghana Act 2002 (Act 612) and the Banks and Specialized Deposit- Taking Institutions Act, 2016 (Act 930).

In addition, there are other legislations which also provide for the regulation of the financial sector and impose additional responsibility on the Bank of Ghana. These include the Financial Administration Act 2003 (Act 654), the Foreign Exchange Act 2006 (Act 723), the Internal Audit Agency Act 2003 (Act 658), Long- Term Savings Scheme Act 2004 (Act 679), the Payment Systems Act 2003 (Act 662), the Public Procurement Act 2003 (Act 663), the Venture Capital Trust Fund Act 2004 (Act 680), Anti- Money Laundering Act (Act 749), Anti Money Laundering Regulations 2008 (L.I 1925), the Borrowers and Lenders Act 2008 (Act 773), the ARB Apex Bank Limited Regulations 2006 (L.I. 1825), the Home Mortgage Finance Act 2008 (Act 770), the Credit Reporting Act 2007 (Act 726) and the Non- Bank Financial Institutions Act 2008 (Act 774).

[78] MI Abdallah 'Financial sector regulatory and supervision (n 51 above).

4.2.1 The Bank of Ghana

The Bank of Ghana was established on 4th March, 1957 before the declaration of Ghana's independence on 6th March 1957. The Bank of Ghana traces its origin from the Bank of the Gold Coast which was established by the British Parliament prior to Ghana's independence through the Bank of Ghana Ordinance (No. 34) of 1957[79]. The Bank of Ghana had its core mandate as the authority to issue and redeems bank notes and coins, keep and use reserves and influence the credit situation with a view of maintaining monetary stability in Ghana and the external value of the Ghana Pound in addition to acting as banker and financial adviser to the government[80]. Over the years, the Bank of Ghana has undergone series of legislative reforms and new laws have been enacted to replace the old laws to meet the changes of the time. The Bank of Ghana Ordinance (No. 34) of 1957 was repealed by the Bank of Ghana Act 1963, Act 182. The Bank of Ghana Act 1963, Act 182 was amended by the Bank of Ghana (Amendment) Act 1965, Act 282. The Bank of Ghana Law, PNDCL 291 repealed the Bank of Ghana Act, Act 182 and the Bank of Ghana (Amendment) Act, Act 282. Currently, the law applicable to the operations of the central bank is the Bank of Ghana Act 2002, Act 612 which repealed and replaced the Bank of Ghana Law, PNDC Law 291. The Bank of Ghana has overall supervision and regulation powers in all matters relating to bank and non-bank financial institutions in Ghana. The purpose of the central bank has been broadened and enhanced to include the initiation of regulations and ensuring an effective supervision of banks for a sound, safe, effective and efficient banking sector to protect depositors and customers and also to ensure investor confidence to promote trade, investment and economic growth and development.

4.2.2 The Bank of Ghana Act[81]

The primary object of the central bank include among others the maintenance of stability in the general level of prices as well as provision of support to the general economic policies of the government and ensure economic growth. The Bank of Ghana is to perform these functions by effectively and efficiently operate the banking and credit systems without influence or interference from the government or any other authority[82]. The Bank of Ghana is tasked to formulate and implement monetary policies to enable it achieve its objects. The

[79] Bank of Ghana 'About us' https://www.bog.gov.gh/about-the-bank/about-us/130-bank-of-ghana (accessed 9August 2017).
[80] Bank of Ghana (n 79 above).
[81] n 5 above.
[82] n 5 above sec 3.

central bank is also tasked to stabilize the value of the Ghana cedi in and outside Ghana through monetary. It is the duty of the central bank to institute measures which will favourably influence the balance of payments, public finances and the general development of the economy. The central bank is also in charge of the regulation, supervision and direction of the banking and the credit systems as well as ensuring that the financial sector operate smoothly and effectively. The Bank of Ghana is also in charge of the promotion, regulation and supervision of payments and settlement systems in addition to its core function of issuing and redemption of currency notes and coins and ensuring an effective maintenance and management of Ghana's external financial services. The Bank of Ghana has the sole mandate to license, regulate, promote and supervise non- banking financial institutions and is the banker and financial adviser to the government. The Bank is given wide powers under the laws to do all things necessary in the performance of its functions[83].

Banking supervision is reserved for the Supervision Department of the central bank and they have powers to supervise and examine all banks in Ghana well as the preparation of other relevant statistical data[84] in addition to other tasks as may be imposed by law[85]. The supervision department may request for relevant information on the subject matter from any institution[86].

The central bank has powers to formulate and implement monetary policies to aid in price stability and support the economic policies of the government. However, there are no express provisions on the formulation of competition policies for the banking sector. Although the central bank has powers to regulate the banking system to ensure its smooth operation, the law did not mandate the central bank to investigate, ascertain and punish anti- competitive acts such as price fixing, collusion and abuse of dominant power. Indeed, there is no provision in the Bank of Ghana Act which expressly provide for anti- competitive practices. Although the law permits the Bank of Ghana to formulate bye- laws and other policies for the purposes of regulating the administration and performance of its core functions[87], there has been no comprehensive policy on competition in the banking sector. In addition, notwithstanding the special powers the central bank has to issue legislative instruments and

[83] n 5 above sec 4.
[84] n 5 above sec 55(a).
[85] n 5 above sec 55(b).
[86] n 5 above sec 56.
[87] n 5 above sec64.

other regulations for the performance of its core functions, the banking sector do not have a legal instrument on competition[88].

4.2.3 Banks and Specialised Deposit- Taking Institutions Act[89]

The Banks and Specialised Deposit- Taking Institutions Act amended and consolidated all laws relating to banking and deposit taking. It is the main legal document relating to the regulation of institutions which undertake the business of deposit taking and banking. The Act repealed the Banking Act 2004, Act 673 and the Banking Amendment Act 2007, Act 738. This Act[90] applies to banks, specialized deposit taking institutions; affiliates of banks and financial holding companies[91] but not applicable to credit unions[92].

This law grants the Bank of Ghana the overall supervisory and regulatory powers in all matters relating to banks and deposit taking institutions[93] in addition to ensuring the safety and soundness of banks and specialized deposit taking institutions[94] in Ghana. The Bank of Ghana is mandated to introduce and reform enactments relating to the banking and deposit taking business[95] and ensure that the financial market is sound and stable and depositors are protected[96] with the relevant consumer protection measures[97]. The law permits the Bank of Ghana to deal with all unlawful and improper practices of banks and other related specialized deposit taking institutions[98]. Indeed, one can conclude that the central bank per this provision has powers to punish acts of anti- competitive practices of banks. However, the law is not express on practices that it considers unlawful and improper, except that the central bank is given discretionary powers to determine. Since the law is uncertain about improper practices, one cannot state that acts of collusion, price fixing, abuse of dominant positions and other anti- competitive acts has been adequately provided for in the laws of Ghana.

In addition, the Bank of Ghana has the sole responsibility to license banks and specialized deposit- taking institutions[99] and grant approvals for the establishment of foreign banks

[88] n 5 above sec 66.
[89] n 7 above .
[90] n 7 above.
[91] n 7 above sec 1(1).
[92] n 7 above sec 1(2).
[93] n 7 above sec 3(1).
[94] n 7 above sec 3(2)(a).
[95] n 7 above, sec3(2)(b).
[96] n 7 above, sec 3(2)(c).
[97] n 7 above, sec 3(2)(d).
[98] n 7 above, sec 3(2)(e).
[99] n 7 above, sec 5(a).

representative offices[100] and the registration of financial holding companies[101]. The Bank of Ghana has the powers to revoke the license of any bank or specialized deposit-taking institution[102] where the Bank of Ghana is of the view that the bank or the specialized deposit-taking institution is engaged in unsafe or unsound practices[103]. The law does not state clearly what practice is considered unsafe or unsound and leaves the central bank with the discretion to determine practices that are unsafe or unsound. There are therefore no express provisions on forbidden acts of banks, but rather, the discretionary power is bestowed on the central bank for this determination in addition to powers to enlarge or restrict the permissible activities of banks and deposit-taking institutions[104].

The Bank of Ghana is responsible for the approval of mergers, acquisitions, amalgamations or reconstruction of all banks and specialized deposit taking institutions[105]. The law does not expressly provide the thresholds and the relevant requirements for mergers, takeover, acquisition, amalgamation or reconstruction. The Bank of Ghana is mandated as the main body in charge of ensuring that all requirements under the relevant legal provisions applicable to the transaction are duly complied with before approving or declining the requests. The central bank therefore has the sole discretion in determining and approving mergers and acquisitions. There is no express provision in the laws with regard to regulating mergers and acquisition in a way that would curtail abuse of dominant position and provide protection for smaller banks.

Although the law provides in detail permissible activities, it does not state clearly acts that are forbidden such as anti- competitive acts. There is also no express provision of requirements for approval of a merger, acquisition, takeover or amalgamation. The central bank is left with wide powers to determine permissible acts and approve mergers and acquisitions.

4.2.4 Non- Bank Financial Institutions Act[106]

The Non- Bank Financial Institutions Act provides for the Regulation of non- bank financial institutions such as companies engaged in leasing, money lending, money transfer services, mortgage finance, non- deposit taking micro-finance services, credit union operations and

[100] n 7 above sec 5(b).
[101] n 7 above, sec 5(c).
[102] n 7 above, sec16.
[103] n 7 above sec 16(1)(f).
[104] n 7 above, sec 18.
[105] n 7 above, sec 52.
[106] Non- Bank Financial Institutions Act 774 of 2008.

any others that the Bank of Ghana may grant permission.[107] There is no express provision on competition in this law. Mergers, amalgamations and sale of assets are subject to the approval of the central bank[108] and the central bank has discretionary powers to determine the conditions for the approval of the said merger, amalgamation or sale of assets. There are no express provisions on competition and restrictive activities.

4.3 Conclusion

In this chapter, it has been ascertained that although the existing legal framework grants powers to the Bank of Ghana to ensure that there is fair competition within the banking sector, there is no comprehensive law on Competition in Ghana. There is therefore no comprehensive legislative instrument which stipulates the forbidden activities of banks in Ghana, the law only provides for permissible activities[109] and does not clearly state restricted activities and anti- competition practices. Therefore, in event of suspected price fixing, collusion or any unfair trading activities by banks, the existing legal framework does not empower the central bank to commence investigation, ascertain and punish banks for these offences. There are no provisions on competition in the banking sector and the rapid growth, anticipated mergers and recent take-over in the banking sector has greatly contributed to competition. Therefore the threats of price fixing, collusion, abuse of dominant position and other anti- competition practices have become real and it is important that proper legislations are put in place to curtail these threats before they lead to crisis. From the above analysis, it has been determined that there are no existing legislative frameworks on competition in Ghana. There are no express provisions in the laws which empower the central bank to commence investigations into acts of collusion, price fixing and abuse of dominant position of banks. The central bank being given wide powers to determine acts and practices they consider as unsafe and unsound to the sector and accordingly apply remedial measures to them is not enough to curb the major threats the sector is exposed to without a comprehensive legislation on competition policy for the banking sector. In the next chapter, I shall discuss the legislative and institutional framework for the regulation of competition in the banking sector in South Africa and ascertain whether the South African legal and institutional framework on the regulation of competition in the banking sector could be adopted as a module and modified to suit the special needs of the banking sector in Ghana.

[107] n 106 above, First Schedule.
[108] n 106 above, sec 20.
[109] n 7 above, sec 18.

CHAPTER FIVE

REGULATION OF COMPETITION IN THE BANKING SECTOR: LESSONS FROM SOUTH AFRICA

5.1 Introduction

In this the previous chapter, I had discussed the relevant legislations governing banking supervision and regulation and ascertained that although the existing legal framework grants powers to the Bank of Ghana to ensure that there is fair competition within the banking sector, Ghana has no comprehensive legal and institutional framework on competition in the banking sector. I had also argued that the Bank of Ghana as the sole authority with supervision and regulatory powers may be in some form of conflict of interest where it also acts as the sole authority to approve mergers and acquisitions of banks. I also argued that the existing legal framework does not expressly provide for restricted activities and anti-competition practices establishing the legal basis for the central bank to investigate, ascertain and punish banks for suspected anti- competition practises such as price fixing, collusion and abuse of dominant positions.

The fundamental principles of South Africa's competition law are largely similar to the laws of very advanced jurisdictions such as Canada, the European Union and the United States. Competition in South Africa is generally guided by the Competitions Act which forbids anti-competitive acts such as price-fixing and collusion between competitors, and the abuse of dominance by larger companies. The law also provides for the control of mergers and acquisitions and requires that such mergers be examined and approved by the authorised agencies. The South African law on competitions in the banking sector is governed by the

Competitions Act[110] which has created the Competition Commission as an independent authority with concurrent jurisdiction as the South African Reserve Bank. There is also the Competition Tribunal and the Competition Appeal Court created by the Act adjudicates disputes on competition. The Act confers on the Competition Commission additional powers to prevent anti- competitive conducts which includes restrictive horizontal and vertical practices, abuse of dominant positions, and horizontal and vertical mergers. The Competition laws are general in its application for all the major and relevant sectors of the economy. The South African competition law can be differentiated from the others because it does not only place emphasis on solely competition issues but also seeks to address public interest issues and social objectives which include the promotion of small businesses in South Africa as well as the interests of employees and black economic empowerment.

5.2 The South African banking industry

The South African banking industry is made up of 15 branches of foreign banks[111], 30 foreign bank representatives[112] as well as 6 foreign controlled banks. There are 10 locally controlled banks[113] and 3 mutual banks [114] making up a total of 64 banks in addition to other non- bank financial institutions. The banking industry is supervised and regulated by the South African Reserve Bank which was established in 1921 under the Currency and Banking Act, 1920 (Act No. 31 of 1920)[115]. Over the years, the reserve bank had been governed by the South African Reserve Bank Act, 1989 (Act No. 90 of 1989) as amended which grants the central bank the sole authority to supervise and regulate banks in addition to its mandate of achieve and maintain price stability to promote sustainable economic growth in the country. The South African Reserve Bank has 19 departments including the Banking Supervision Department. In addition to the role of the central bank in the regulation and supervision of banks in South Africa, the Competition Act also imposed a concurrent jurisdiction on the Competition Commission with respect to banking regulation and supervision.

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[110] n 23 above.
[111]South African Reserve Bank 'South African registered banks and representative offices'https://www.resbank.co.za/RegulationAndSupervision/BankSupervision/Pages/SouthAfricanRegisteredBanksAndRepresentativeOffices.aspx (accessed 20 September 2017).
[112]n 111 above.
[113]n 111 above.
[114]n 111 above.
[115] South African Reserve Bank 'Background' https://www.resbank.co.za/AboutUs/History/Background/Pages/Background-Home.aspx (accessed 20 September 2017).

5.2.1 Structural reforms in the banking sector

The Banking sector in South Africa is undergoing structural reforms where there has been a proposal for the introduction of the Twin Peaks model in which the central bank focuses on prudential conduct. There is the Financial Services Board (FSB) which performs the task of market conduct regulation. The proposal for this model was part of the results of the Banking Inquiry recommendations which highlighted major defects in the banking regulations and supervision as well as the market conduct regulatory regime. The process for the adoption of the twin peak model has already commenced with the passing of the Financial Sector Regulation Act[116] which would establish the new prudential authority within the central bank. The new authority would be responsible for ensuring the safety and soundness of the financial sector which includes banks, insurance companies and financial conglomerates. The new law will also create a Market Conduct Authority (MCA) which would seek to protect customers of financial institutions, and to improve the services of financial service providers in the conduct of their business by ensuring that the integrity and efficiency of financial markets are protected through an effective financial consumer education[117].

5.3 The Competition Act 89 of 1998 as Amended

The Act was formulated as a result of the apartheid and other discriminatory laws which had created the extensive concentration of ownership and control of companies within South Africa, unjust restrictions and unfair trade practises which restricted nationals from taking part in the trade and full participation of the economic growth of the country. The law was intended to make way and encourage greater ownership by the people of South Africa in the economic growth of the country since an effective law on competition and the establishment of the proper structures would create an efficient and competitive economic environment to the benefit of South Africans[118]. The international integration and intentions to attract international investors in the South African economy also influenced the decision to abolish the old competitions law[119] and enact the current law in line with international standards. The

[116] Financial Sector Regulation Act 9 of 2017.
[117] Competition Commission South Africa '15 Years of Competition Enforcement- A People's Account http://compcom.co.za.www15.cpt4.host-h.net/wp-content/uploads/2014/09/15-Years-of-Competition-Enforcement.pdf (accessed 20 September 2017).
[118] n 23 above, Preamble.
[119] Maintenance and Promotion of Competition Act 96 of 1979.

attraction of the international standards was the main influence of the law as it was drawn from existing legislations in Australia, Canada and Germany[120].

5.3.1 Purpose of the Act

The competition law was intended to provide for markets in which the consumer would have access and freely select the quality and quantity of a variety of goods and services they desire and also to provide a competitive environment for South African companies to compete effectively on the international market. The law was to curtail unfair trade practises which harm the economic growth and regulate the transfer of ownership of companies as well as mergers and acquisitions and to generally give effect to the international law obligations of South Africa[121]. The Competition Act[122] is also to promote and maintain competition in order to promote the efficiency, adaptability and the development of the South African economy. The law provides consumers with competitive prices and product choices as well as employment for South Africans. The law provides protection for small and medium scale companies by guaranteeing equal opportunity and protection to participate in the economic growth of the country[123].

5.3.2 Application of the Act

The applies to all economic activities which are in South Africa or has an effect in the country with the exception of collective bargaining agreements as contained in Section 23 of the Constitution[124] and the Labour Relations Act[125]. The law does not apply to concerted conducts which are not created for commercial, socio- economic or any similar objectives[126]. The law also applies to industries or sectors of industries which are already under the control of another regulatory authority. The law creates a concurrent jurisdiction for any existing regulatory authority and that of the Competition Commission[127].

5.3.3 Restrictive Practises

[120] Consumer Unity & Trust Society(CUTS) 'Competition Policy & Law in South Africa- A key component in new economic governance' (2002) 15.
[121] n 23 above, Preamble.
[122] n 23 above
[123] n 23 above, sec 2.
[124] Constitution of the Republic of South Africa No. 108 of 1996 sec 23.
[125] Labour Relations Act 66 of 1995.
[126] n 23 above, sec 3(1)(e).
[127] n 23 above, sec 3(1A)(a).

The Competition Act prohibits agreements between firms or association of firms which has the effect of reducing competition unless the parties are able to prove that the benefits of such arrangements outweighs the effects of such arrangement. It also forbids the arrangement or agreement to directly or indirectly fix prices of products or goods or dividing markets through the allocation of customers, suppliers, territories or certain types of goods or services. Acts of collusive tendering are also forbidding under the existing competitions law[128]. This offence is detected where two or more firms or companies own significant interest in each other or share a common director or shareholder[129] unless it can be proven that the practise by the firms involved are normal commercial response to prevailing market conditions[130]. This provision excludes agreements between companies and its wholly owned subsidiaries or companies with single economic presence which may be similar in structure[131]. The law also forbids agreements between a company and its business partners, customers or both which is intended to avoid or reduce competition in the market unless the parties can establish that the benefits from such arrangements far exceed the effects on the market and the economy as a whole[132]. The setting minimum resale price maintenance on goods and services[133] are not allowed under the law although a supplier has the liberty to recommend a threshold price to the reseller of the good or services where the seller indicates that the threshold price recommendation is not binding and that price is quoted on the product as a recommended price against the actual stated price[134]. Where a firm commits any of these offences, investigations may be commenced by registering a complaint to the Competition Commission[135].

Abuse of dominance is also a prohibited activity[136] and it is dependent on the identification of dominance of a company based on its market share of least 45% or a share of between 35% and 45% where the company is unable to demonstrate that it has no such market power or a share of less than 35% but has market power[137]. Market power is the ability of a company to control the market prices of goods and services, reduce competition and operate

[128] n 23 above, sec 4(1).
[129] n 23 above, sec 4(2).
[130] n 23 above, sec 4(3).
[131] n 23 above, sec 4(5).
[132] n 23 above, sec 5(1).
[133] n 23 above, sec 5(2).
[134] n 23 above, sec 5(3).
[135] CUTS (n 120 above).
[136] n 23 above, sec 8.
[137] n 23 above, sec 7(c) .

independently of the behaviour of competitors or customers and suppliers[138]. It is also unlawful for a dominant firm to charge excessive prices[139] or refuse to give a competitor the use of an essential facility where it is economically prudent to do so or engage in exclusionary and anti- competitive acts[140] as contained in the law. Dominant firms are also prohibited from engaging in acts of price discrimination[141] unless it is justified under the provisions of the applicable law.

5.3.4 Mergers

Merger under the Act[142] is where one or more companies directly or indirectly obtains or takes control over all or part of a business of another company[143]. The law contemplates mergers in the form of purchasing or leasing of shares or the purchasing of an interest or assets of the other company[144]. Mergers could be achieved through the amalgamation of two or more firms. The law provides for a compulsory notification of mergers to the Competition Commission, however, a smaller merger as contained in the law does not require notification of the commission unless the commission so requires[145]. It is the duty of the Commission to determine whether the merger of companies is likely to substantially eliminate or reduce competition by assessing whether the merger is likely to cause a transfer of technology, efficiency or other competitive gains which would directly affect competition[146].

The Competition Commission has the powers to make an independent determination with respect to intermediate and large mergers based on the thresholds that the Minister for Trade and Industry in consultation with the Commission may determine[147]. The Commission's independent determination of small and intermediate mergers may be appealed to the Competition Tribunal. However, large mergers are to be brought before the Competition Tribunal after the Commission had completed its investigations and made its recommendations before the Tribunal. The Commission and the Tribunal in assessing the

[138] CUTS (n 120 above).
[139] n 23 above, sec 8(a).
[140] n 23 above, sec 8(d).
[141] n 23 above, sec 9.
[142] n 23 above.
[143] n 23 above, sec 12(1)(a).
[144] n 23 above, sec 12(1)(b).
[145] n 23 above, sec 1.
[146] n 23 above, sec 12A(1)(a).
[147] n 23 above, sec 11.

mergers of companies considers the actual and potential level of competition, the ease of entry into the market, the countervailing powers as well as the special characteristics of the market and the effectiveness or removal of the obvious competitor in the said market[148]. The Commission and Tribunal also assess the technological and efficiency gains that would subdue competition in the sector before approving mergers.

5.4 The Competition Commission

The Competition Commission is a statutory body created by the Competition Act[149] to promote and maintain competition in South Africa. The Commission is an independent authority but accountable to the Department of Economic Development[150]. The Commission is tasked to investigate, control and evaluate restrictive business practises as contained in the Competition Act together with investigations of abuse of dominant positions and mergers, acquisitions and changes in control. The performance of these key objects of the Commission is aimed at ensuring that there is an effective promotion and maintenance of competition in South Africa. The ultimate purpose of the Commission is to promote efficiency, adaptability of companies for the general development of the South African economy and provide consumers with competitive prices and product choices. The Commission in the performance of its core objectives aims to promote employment and advance social and economic welfare of its citizens as well as expanding the opportunity for South African participation in world markets and recognise the role of foreign competition. The Commission is also tasked to ensure that small and medium scale enterprises are given equitable opportunity and protection to participate in the economy to promote greater spread of ownership, particularly for persons historically disadvantaged by apartheid.

The core function of the Commission includes the implementation of measures to increase market transparency and develop public awareness of the provisions of the law. The

[148] CUTS (n 120 above).
[149] n 23 above, sec 19.
[150] Competition Commission South Africa 'Who are we?' http://www.compcom.co.za/who-are-we/ (accessed 6 September 2017).

Commission also has a duty to investigate and evaluate alleged anti- competitive conducts of companies and to conduct formal inquiry to ascertain the general competiveness of the South African markets. The Commission has powers to grant or refuse exemptions for the application of the law to certain companies who may seek exemption from the application of the law. The Commission also has powers to authorise with or without conditions its approval and recommendations for mergers of which it had received notice and negotiate and agree on consent orders and it is required to refer matters to the Competition Tribunal and appear before the Tribunal where required to justify its recommendations and also put forward its findings where necessary. As part of its core responsibilities, the Commission is required to negotiate agreements with regulatory authorities and co-ordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry to ensure consistency with the application of the laws on competition. In addition, the Commission has powers to participate in the proceedings of any other regulatory authority and provide advice or receive advice from these regulatory authorities. The Commission is tasked to review legislation and public regulations as well as reporting of the existence of any legal provision that encourages uncompetitive behaviour[151].

5.5 The Competition Commission and the South African Reserve Bank

The defining moment of the relationship between the Competition Commission and the South African Reserve Bank with respect to their jurisdiction in the banking sector goes back to November 1999 where the Reserve Bank received a proposed merger application between two of the four (4) major banks in the country, Nedcor and Standard Bank Investment Corporation. The existing legislation[152] required the Minister of Finance to make a decision on the merger after recommendations from the Registrar of Banks at the Reserve Bank and consultations with the Competition Commission. However, another provision in the existing law[153] did not require the consultation and recommendation of the Competition Commission with respect to the transfer of assets and liabilities from one bank to another. It only required the Minister to convey his approval through the Registrar of Banks. In this regard, the Minister of Finance only needed to ascertain whether the said merger or transfer of assets and liability from one bank to the other is not against public interest, the interest of the banks' depositors or that of the banks.

[151] n 23 above, sec 21.
[152] Banks Act 94 of 1990 sec 37.
[153] n 153 above, sec 54.

The Minister of Finance rejected the merger application because in his opinion, the highly concentrated banking sector in the country would be compounded further with the merger of the two bigger banks and their size after the merger would affect the central bank's ability to sustain and contain any systemic risk that the sector may be exposed to. The Minister also cited the potential social cost such as job losses which he considered as outweighing the efficiency gains of the merger as one of the key reasons for his rejection of the merger. The Competitions Commission and the Registrar of Banks had both recommended a rejection of the merger to the Minister of Finance on grounds of public interest. However, the need for the amendments of the existing legislation arose after the Supreme Court of Appeal had ruled that it is only the Registrar of Banks and the Minister of Finance who has the sole jurisdiction and authority over share acquisitions by banks and bank mergers. This ruling questioned the jurisdiction of the Competition Commission in cases of mergers and the acquisition of shares by banks. This exposed the gap that existed in the legislation, hence the need for an amendment of the laws to allow the Competition Commission to have concurrent jurisdiction with the Registrar of Banks in competition matters in the banking sector.

5.6 The Competition Commission and the banking sector

The impact of the Competition Commission in the banking sector in South Africa commenced in 2007 where the Commission commenced extensive investigations and banking inquiry into the operations of banks in response to concerns from the general public with respect to the high and escalating bank charges on transactions and the charges on payment systems. The core objectives of the banking inquiry were the increasing of transparency and competition in the banking sector, ascertainment of possible grounds for the initiation and investigation of complaints and the engagement with banks, the reserve bank and the national treasury to ascertain and implement relevant competition laws and general policies and also to be the primary source of guidance to the making of recommendations to the responsible minister on matters requiring legislative or regulatory reforms[154]. The Commission completed its investigations with the voluntary assistance from all the major banks in the country and it began its review of the findings and recommendations with the South African Reserve bank and the National Treasury. The review of the findings of the Commission led to several major banking reforms which are in conformity with the provisions of the Competition Act. With one of the main objectives of the Competition Act

[154] 'The Banking Inquiry Report' 9-10.

being the ability to provide consumers with alternative prices of goods and services, the Commission in its enquiry recommended reforms in the sector to provide consumers with the ability to compare prices of products and services of banks and be able to easily change service providers with little or minimum difficulty and expense. These recommendations were to be attained through the disclosure of certain minimum standard information and it has so far been implemented.

5.6.1 The case of price fixing, collusion and anti-competitive practises

The role of the Competition Commission in the affairs of banks was highlighted in 2017 where the Commission commenced legal action against eighteen (18)[155] banks in South Africa including three (3) of South Africa's largest banks for price fixing, collusion and other unfair trading activities contrary to the Competition Act. The Commission had been investigating a case of collusion and market allocation in the trading of foreign currency pairs involving the South African rand. The Commission had discovered that between 2007 and 2013, the banks being parties in a horizontal relationship engaged in fixing of bids, offers and bid offer spread and divided markets by allocating customers and suppliers[156]. The Commission found that the banks manipulated the prices through agreements to refrain from trading which led to the creation of false and fictional bids through the use of platforms such as the Reuters currency trading platform and the Bloomberg instant messaging system chat room[157]. The Commission alleged that contrary to the provisions of Section 4(1)(b)(i) of the Competition Act[158] as amended, the banks entered into an agreement and engaged in concerted practice to fix prices of bids and bid- offer spreads in respect of spot trades, forward trades and future trades by means of coordination of bids, offers and bid-offer spreads that they quote to customers who purchase the South African rand. The Commission also alleged that contrary to Section 4(1)(b)(ii) of the Competition Act as amended, the banks being competitors in the foreign exchange market agreed and engaged each other in a

[155] n 26 above.
[156] *Competition Commission vrs. Bank of America Merrill Lynch International Ltd and 17 Others; Case No. 2015Apr0147(Bank cases).*
[157] The Bank cases (n 156 above).
[158] n 23 above.

concerted practice of assisting each other by allowing traders with large open risk position to complete transactions before trading. The banks were also alleged to have colluded by holding their individual trades to reserve liquidity for each other instead of trading normally in the market[159].

Upon these allegations by the Commission, Citibank admitted to the allegations that between September 2007 and October 2013, it engaged in prohibited activities as alleged by the Commission contrary to the Competition Act as amended and stated that it had ceased engaging in such acts and agreed to cooperate with the Commission in prosecuting the other banks who were alleged to have been involved in the contravention of the Competitions Act as amended. Citibank has since agreed to settle the matter by paying an administrative penalty of Sixty Nine Million Five Hundred Thousand Eight Hundred and Sixty Rand (ZAR 69,500,860) to the Commission. The payment of the penalty and the execution of the Settlement Agreement was agreed to be the full and final settlement of the bank's contravention of the Competition Act as amended. This Agreement was executed in January 27, 2017 and filed at the Competition Tribunal on February 20, 2017. The Commission had in a referral notice dated February 15, 2017 referred the case against the other banks to the Competition Tribunal. Where the banks are found by the Competition Tribunal to have contravened the Competition Act as amended, the banks would be liable to pay administrative penalty not less than 10% of their annual turnover.

5.7 Concurrent jurisdiction of the Competition Commission and the South African Reserve Bank

After the passing of the Competition Act, the Banking Supervision Department of the South African Reserve Bank raised concerns about the jurisdiction of the Competition Commission, the conflict and the uncertainties the application of the laws on Competitions have with the core functions of the Supervision Department of the South African Reserve Bank. The Reserve Bank raised these concerns because in its view, concurrent jurisdiction with the Commission will negatively affect the stability of the banking sector and it regards stability issues as more important and critical than competition concerns. Indeed, the Banks Act[160] had provisions which were in conflict with the Competition Act but had anticipated the conflict that may exist and created additional provisions for consultation between the reserve bank

[159] section 23 above, sec 4(1)(b)(i) and (ii).
[160] n 152 above sec, 37(2)(b).

and any other regulatory or supervisory authority that may be created. However, the parties were not clear as to the proper interpretation of the legal provisions on consultation process prescribed by the Banks Act. The Reserve Bank also noted that the powers granted the Minister of Finance to restrict the jurisdiction of the Competition Commission in certain aspects[161] of its duties could be seen as a direct political interference of the affairs of the Commission which is directly in conflict with the independence of the central bank in its functions[162] and may conflict with stability issues where concurrent jurisdiction is granted.

Upon extensive consultations Section 37(2)(b) of the Banks Act which was in direct conflict with the Competition Commission with respect to jurisdiction has been amended to grant the Competition Commission concurrent jurisdiction with the Registrar of the South African Reserve Bank and the Minister of Finance with respect to issues pertaining to the acquisition of shares in banks as well as banking mergers and acquisitions. The Competition Commission already has jurisdiction with respect to the investigation and punishment of companies including banks engaging in any of the other restrictive practices contained in the Competitions Act[163].

5.8 The Competition Tribunal and Court of Appeal

The Competition Act established the Competition Tribunal[164] with nationwide jurisdiction to act as a juristic person and a Tribunal of record to adjudicate on any conduct prohibited by the Competition Act[165] and provide a remedy for the said prohibited acts. The Tribunal acts as an appellate body for the revision of decisions from the Competition Commission and has the powers to make any orders relating to the performance of its functions in relation to the powers conferred by the Competitions Act[166].

The Competition Act established the Competition Appeal Court[167] as intended by the South African Constitution[168]. The Competition Appeal Court is empowered with a nationwide jurisdiction to review decisions from the Competition Tribunal as an appellate body in

[161] n 23 above, sec 18(2)(b).
[162] Competition Commission 'Concurrent Jurisdiction in the banking sector- Turf war or constructive co-operation' http://www.compcom.co.za/wp-content/uploads/2014/09/Dec-01-Newsletter.pdf accessed 30 September, 2017.
[163] n 162 above.
[164] n 23 above, sec 26.
[165] n 23 above.
[166] n 23 above sec 27.
[167] n 23 above, sec 36.
[168] n 124 above, sec 166(e).

respect of the Tribunal's decisions except consent orders or any of the interim or interlocutory orders that may be made by the Tribunal in accordance with the Competitions Act[169]. The Competition Court of Appeal has powers to confirm, amend or even set aside decisions or orders of the Tribunal or remit a matter to the Tribunal for further hearing or investigation as it may consider appropriate.

5.9 Application of the South African Model for Ghana

The study has analysed the effectiveness of the South African competition policy as a model that can be adopted in Ghana. The Competition Act[170] is very comprehensive and encompasses a wide range of sectors in the economy. The enactment of a comprehensive legal framework on competition would cure the gap and the risk of anti- competition practises of banks. Indeed, the Bank of Ghana Act[171] and the Banks and Specialised Deposit Taking Act[172] empowers the Bank of Ghana to among others consider and propose reforms of enactments relating to deposit- taking business; develop appropriate consumer protection measures to ensure that the interests of clients of the banks and the specialised deposit taking institutions are adequately protected; promote the safety and the soundness of banks and specialised deposit taking institutions; deal with unlawful or improper practises of banks and specialised deposit- taking institutions[173].

The South African Model on competition can be modified to suit the needs of the country since the Bank of Ghana has the powers under the existing legislative framework to introduce reforms and new enactments to promote the safety and the soundness of the banking sector. The enactment of a Competition Act modelled on the South African Competition Act will be important for the economic development of Ghana and contribute significantly to the attainment of middle income status by the year 2020. The introduction of a comprehensive legal framework on competition and the establishment of a concurrent jurisdiction of an independent competition authority with the central bank would reduce the pressure on the

[169] n 124 above, sec 63.
[170] n 23 above.
[171] n5 above, sec 3, 4.
[172] n 7 above sec 3.
[173] n 7 above.

Bank of Ghana, reduce or eliminate completely the conflict of interest that is created with respect to the approval of mergers and acquisitions and properly manage the relationship between banks in their operation to ensure that the law is used to promote development and growth as well as provide the institutional framework for the proper checks and balances within the banking sector.

The South African model on competition and the creation of a specialised division of the High Court to adjudicate on competition cases would not be in conflict with the judicial, economic and political ambitions of the country. Competitions policies as discussed above is central to market operations and promotes innovation, creates wealth and reduce poverty. The role of competition laws in the sustainable economic growth and development of South Africa cannot be underestimated as discussed above since competition policies contributes directly to growth and sustainable development and it is important that Ghana adopts the appropriate measures and policies required for sustainable development. The market distortions in the banking sector as discussed above can be corrected with the enactment of a comprehensive legal and institutional framework on competition like the South African model as the study has shown the significant impact of the law on South Africa's banking sector. The banking sector in Ghana would benefit where the competition policies are comprehensive and effective to regulate anti- competition practise and in effect promote innovation, stability, efficiency and sustainable economic growth and development. The effectiveness of the competition laws in South Africa has been adequately discussed in this chapter and the adoption of this model by Ghana will be an important ingredient in the development of the banking sector and the economy as a whole.

5.10 Conclusion

From the above discussions, the South African Reserve Bank, the National Treasury and the Competition Commission are set apart at opposite ends of the economy. The South African Reserve Bank is seen to be directly in charge of the macro-economic stability as well as monetary policies. The Competition Commission on the other hand is concerned primarily with the regulation of micro- behaviour through the investigation, ascertaining and punishing of anti- competitive business practises to ensure that there is a legal framework and body promoting competition in the economy and facilitation of access. Notwithstanding their seemingly divergent interests and objectives, the general objectives and functions of the reserve bank is similar to that of the Competition Commission in the attainment of economic

growth through regulatory functions. The key objective of the reserve bank in ensuring financial stability cannot be attained without a sound functioning financial market which could only be attained through an effective control and regulation of competition. For the sound functioning financial market, the market players must be seen to abide by the relevant legal provisions such as effective provisions on restrictive practices and abuse of dominance. It has been pointed out that competition laws in the banking sector are relevant and it plays an important role in the general economic growth. The functions of the Competition Commission and the reserve bank of South Africa have been seen not to be in conflict but rather complementary to each other in their attainment of a common interest for the benefit of the economy. The existing legal framework in Ghana currently allows the introduction of legislative and institutional reforms to protect banks and its customers as well as ensure the soundness, safety and stability of the banking sector. There are no legal restrictions on the Bank of Ghana to commence the processes for the enactment of a comprehensive legislation and the establishment of an independent authority to effectively and efficiently regulate anti-competition practices of banks.

CHAPTER SIX

CONCLUSION AND RECOMMENDATION

6.1 Recap of the research problem

Ghana's banking sector is considered to be one of the most vibrant banking sectors in the West African sub- region due to legislative reforms and pre-emptive policy directives by the Bank of Ghana leading to the rapid growth of the number of banks in the country over the past decade. However, notwithstanding the introduction of financial reforms and the enactment of new laws, innovative monetary policies and the adoption of an effective means of banking supervision, there still remain cross cutting challenges and risks that the existing regulatory and supervisory framework exposes the banking sector to. The regulation of the relationship between banks and competition is a very important issue which has ultimate effect on financial stability and general economic growth and sustainable development. One of such major risks is price fixing and collusion among banks in Ghana. Ghana has no comprehensive legislative provision on the regulation of competition among banks. Considering the rapid growth of the number of banks within a small but very key sector and major contributor to the economic growth of the country, the need for the existence of a comprehensive legal framework for the investigation, determination and punishment of price fixing, collusion and anti-competitive acts cannot be underestimated.

Ghana as a country has made two failed attempts to enacting a law on competition and notwithstanding the wide powers given to the central bank to formulate and introduce the enactment of laws affecting the banking sector, it has failed to produce a comprehensive legal instrument on the regulation of competition in the banking sector. Considering the rapid growth in the number of banks over the past decade as well as the expected mergers and acquisitions in the sector due to the rapid increase in the minimum capital for banks, the

existence of a comprehensive legislation on competition is important for the efficient regulation of competition in the rapidly growing banking sector. The existing legal framework is therefore expected to provide the relevant supervisory and regulatory authority with powers to investigate, ascertain and punish instances of price fixing, collusion, abuse of dominant position and other anti- competition practises of banks. However, there is no comprehensive legal and institutional framework regulating competition in the banking sector and the existing legislation does not grant the central bank as the sole regulatory and supervisory authority with the legal mandate to effectively and efficiently investigate, ascertain and punish anti- competition acts of banks such as price fixing, collusion and abuse of dominant position.

6.2 Summary of findings

The study has revealed that the banking sector is an important and fragile sector which requires proper and an effective regulation to ensure that its contribution to the general economic growth is safeguarded. In this regard, there must be adequate legal and institutional provisions to safeguard the banking sector against systemic risks and threats. Competition law and policy in the banking sector has been highlighted as an important tool for economic growth and sustainable development. Notwithstanding doubts by some scholars that competition policies create instability in the banking sector, the study has revealed that competition policies in the banking sector rather complement the general objective of stability principles of central banks in promoting economic growth and does not necessarily create instability when implemented.

The banking sector in Ghana has grown significantly over the past decade due to the effective and efficient legislative reforms and policy directives of the bank of Ghana. The significant increase in the number of banks in the country with the influx of foreign banks increases competition in the sector. The study has also revealed that the recent increase in the minimum capital requirement would result in some mergers, acquisitions and take-overs in the sector. It is therefore important that the legal and institutional framework is adequate to cater for the new threats and risks such as price fixing, collusion, abuse of dominant position and other anti- competition practises of banks. The study has revealed that the existence of an effective legal and institutional framework on competition to deal with these threats is important to Ghana’s economic growth and sustainable development.

The study has also revealed that the existing legal and institutional framework in Ghana does not adequately provide for the regulation of anti- competition practises in the banking sector. Although the central bank has the powers to enact and reform laws, there are no laws or policies on competition in the banking sector in Ghana. The legislations grant the central bank wide powers to determine acts they consider harmful practises of banks. In addition, the central bank is the sole authority with both regulatory and supervisory powers and solely determines and approves mergers and acquisitions. There is no laid down procedure to determine the effects of mergers and acquisitions on the competition in the banking sector. This creates some form of conflict of interest and concentration of power in one authority which may lead to some level of abuse. The study has revealed that the sector also lacks a comprehensive legal and institutional framework on competition for the banking sector.

The study identified that South Africa has an effective and efficient legal and institutional framework on competition where the law has created a concurrent jurisdiction between the reserve bank and the competition authority. The study further revealed that the law on competition in the South African banking sector has expressly provided for restricted activities and made clear provisions for mergers. The competition authority in South Africa is also in charge of recommending approval of mergers and acquisitions, hence the reserve bank is not the sole authority to regulate and supervise banks with respect to anti- competition practices. The concurrent jurisdiction between the reserve bank and the independent competition authority has not created instability in the South African banking sector. The two authorities have rather worked quiet well together in the significant economic development and sustainable growth the country had enjoyed over the past decade. The study finds that it would be beneficial for Ghana to adopt and modify the South Africa legal and institutional provisions on competition and the regulation of anti- competition practises of banks to promote stability, efficiency, economic growth and sustainable development in the country's quest to becoming a middle income country by the year 2020.

6.3 Conclusions

The study set out to highlight the tremendous growth in the Ghana banking sector over the past decade due to the effective and efficient policy directives of the Bank of Ghana contributing to the vibrancy in the banking sector. The vibrancy and effective policies of the central bank has caused many foreign control banks to establish presence in the country and it is estimated that the growth may continue. The recent acquisition of UT Bank and Capital

Bank by GCB Bank as well as the drastic increase in the minimum capital requirement is expected to trigger many mergers and acquisitions within the banking sector. The central bank has so far been proactive with the necessary legislative reforms and policy directives to insulate the sector from shocks and systemic risks. However, notwithstanding the introduction of financial reforms and the enactment of laws, new monetary policies and the adoption of an effective means of banking supervision there still remain cross cutting challenges and risks that the existing regulatory and supervisory framework exposes the financial sector to. One of such major risks is the lack of a comprehensive legal framework on competition which exposes the banking sector to threats of price fixing, collusion and other anti- competitive practices. Considering the rapid growth of the number of banks, the need for the enactment and the establishment of a comprehensive legal and institutional framework for the investigation, determination and punishment anti competition practices such as price fixing, collusion and abuse of dominant positions cannot be underestimated.

The study ascertained that Ghana had made two failed attempts to enact a law on Competition, the Trade Practices Draft Bill of 1993 and the Draft Competition and Fair Trade Practices Bill of 2004. Although the two key legislations on the regulation and supervision of banks had given the Bank of Ghana the sole regulatory and supervisory powers over banks and non- banking financial institutions as well as specialized deposit taking institution, there are no specific legal provision on the investigation, determination and punishment for anti-competition practices such as collusion, price fixing and abuse of dominant positions. In effect, the study exposed the lack of proper legislative and institutional framework within the banking sector to investigate, determine and punish banks that engage in anti- competition practices and there is no law to regulate the growing competition in the banking sector in consideration of the rapid growth and anticipated mergers and acquisitions.

The study revealed that the existence of a comprehensive legal provision on competition and an efficient and effective supervision of banks with respect to anti- competition practices will not only enrich the country's jurisprudence but it will also serve as a tool for sustainable economic growth and development.

The study has revealed that the evolution of competition law as a major tool for economic welfare has made competition policies in the banking sector a necessity since banks form a major aspect of the economy which requires maximum protection and safety. It has been ascertained that the collapse of one bank has rippling effects on all other economic activities

and sustainable economic growth in general. Competition policy in the banking sector has been identified as a necessary incentive for efficiency, fairness and innovation which in general contribute to sustainable economic development of any nation. The study has also revealed that contrary to the opinion of some scholars, competition policies in the banking sector do not conflict price stability policies and create instability, but rather complements the regulators' efforts in ensuring stability and economic development. Therefore, there is the need to enact a comprehensive legal and institutional framework for the effective regulation of anti- competition practices in the banking sector to promote stability, efficiency and sustainable economic growth.

The study further engaged in an analysis of the South African legislations and the existing legal and institutional framework regarding the regulation of anti- competition practices in the banking sector, through which it was ascertained that the South Africa had a general law on competition known as the Competition Act which also applied to the banking sector. The Act had established the Competition Commission which had concurrent jurisdiction with the South African Reserve Bank with respect to the regulation and supervision of anti-competition practices of banks. The South African Competition Act had also set up the Competition Tribunal and the Competition Court of Appeal to adjudicate cases with respect to competitions in sectors of the economy to which the competition law is applicable which included the banking sector. It was found that the South African Reserve Bank, the National Treasury and the Competition Commission are set apart at opposite ends of the economy. Whereas the South African Reserve Bank and the National Treasury are directly in charge of the macro-economic stability as well as monetary policies, the Competition Commission on the other hand is concerned primarily with the regulation of micro- behaviour through the investigation, ascertaining and punishing of anti- competition business practises to ensure that the legal framework and body promoting competition is efficient and effective. The study ascertained that notwithstanding their seemingly divergent interests and objectives, the general objectives and functions of the Reserve Bank and the National Treasury is similar to that of the Competition Commission in the attainment of sustainable economic growth through regulatory functions. The study found that the key objective of the Reserve Bank in ensuring financial stability cannot be attained without a sound functioning financial market which could only be attained through an effective control and regulation of competition. It was also ascertained that the sound and effective functioning of the financial market required the market players abiding by the relevant legal provisions on restrictive practices and abuse

of dominance. Therefore the relevance of an effective regulation of anti- competition practices in the banking sector cannot be underestimated as it plays a significant role in the attainment of financial stability, efficiency in the banking sector as well as general contributions to sustainable economic growth and development.

6.4 Recommendations

In consideration of the importance and benefits of a comprehensive legislative and institutional framework on competition, the systemic risks the banking sector may be exposed to without a competition policy for the banking sector, I make my recommendations as follows;

1. That the Bank of Ghana in accordance with the section 3 of the Banks and Specialised Deposit- Taking Institutions Act 2016 (Act 930) and Section 3 and 4 of the Bank of Ghana Act (Act 612) commence the processes to enact a comprehensive legal framework on competition in the banking sector.
2. That the Bank of Ghana commence the processes to establish an independent authority to regulate, enforce and supervise competition policies in the banking sector in accordance with Section 3(5) and 3(6) of the Banks and Specialised- Deposit Taking Institutions Act 2016 (Act 930).
3. That the Bank of Ghana in consultation with the Chief Justice and in accordance with Article 139(3) of the 1992 Constitution facilitate the setting up of a special division of the High Court into adjudicate competition cases.

It is my believe that the implementation of these recommendations would not only improve on the jurisprudence of Ghana but rather contribute effectively to the safeguarding of the banking sector against systemic risks and threats of anti- competitive practices of banks and effectively regulate anti- competition practices in the banking industry in Ghana to promote stability, efficiency and economic growth

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