To what extent has the Fair Competition Act Number 8 of 2003 of the laws of Tanzania adopted the celebrated United States Rule of Reason and Ancillary Restraint Doctrines in anti-trust matters?

The Rule of Reason doctrine

The United States of America Rule of Reason (the "***Rule of Reason***") is a legal doctrine used to interpret the Sherman Antitrust Act of 1890 (the "***Sherman Act***"), which is one of the cornerstones of the United States antitrust legal regime. This legislation was the first Federal legislation that outlawed monopolistic business practices.

While some actions like price-fixing are considered illegal per se, other actions, such as possession of a monopoly, must be analyzed under the Rule of Reason and are only considered illegal when their effect is to unreasonably restrain trade. This doctrine was developed in ***Addyston Pipe and Steel Co. v. United States.***[1]

The Rule of Reason doctrine states that *a trade practice violates the Sherman Act only if the practice is an unreasonable restraint of trade, based on economic factors.*

In determining whether a restraint of trade is reasonable, a court would consider, among others, the following:-

- facts peculiar to this business,
- actual and probable effects of restraint (including the effect on competitors);
- history of the restraint;
- purpose of restraint;
- scope of the restraint;
- convenience to suppliers and consumers; and
- creation of new products

In essence, if the activity promotes competition, it may justify the anti-competitive aspects.

[1] *175 U.S. 211 (1899). The United States Supreme Court held that for a restraint of trade to be lawful, it must be ancillary to the main purpose of a lawful contract. A naked restraint on trade is unlawful.*

The Ancillary Restraint doctrine

The United States doctrine of Ancillary Restraint (the "***Ancillary Restraint***") was laid down by Justice William Howard Taft in the case of the ***United States versus Addison Pipe & Steel Company***[2], stating that actions in restraint of trade must be cast down **unless** *"ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the unjust use of those fruits by the other party."*

In general, an Ancillary Restraint is a restraint that promotes the procompetitive attributes and competitive success of a legitimate collaboration, including a Joint Venture. These are restrictions directly related and necessary to transactions, which are entered into by parties to a transaction (i.e. a merger, acquisition or joint venture), simultaneously or in close connection with the main agreement. However, such restraints are crucial for attaining the transaction's economic objectives.

Anti-Competitive Agreements under the Fair Competition Act Number 8 of 2003 of the laws of Tanzania (the "FCA")

An "***agreement***" is defined under Section 2 of the FCA, as *any agreement, arrangement or understanding between two or more persons, whether or not it is: (a) formal or in writing; or (b) intended to be enforceable by legal proceedings, and includes a decision of an association."*

An anti-competitive agreement is having an indispensable adverse effect on the competition practices in the market it generally includes an agreement to restrict the production or sales of the product, an agreement which is made to segregate or allocate the market, an agreement which is made to fix prices, an agreement which promotes the bid rigging, agreement which is based on the contingent clauses, an agreement which focuses on the exclusive supply/ distribution management or the agreement which speaks about the refusal of dealing etc.

Sections 8 and 9 of the FCA restrict certain trade practices in the form of anti-competitive agreements, such agreements may be horizontal or vertical.

For purposes of interpretation of these two sections, Section 8 of the FCA is construed to be a "**rule of reason"** while Section 9 of the FCA is construed to be an '**illegal per se prohibition**' in the sense that such conduct is prohibited per se irrespective of its effect on competition.

[2] *85 Fed. 271 [5th Cir., 1898]*

Section 8 (1) and (2) of the FCA fundamentally states that *"a person shall not make or give effect to an agreement if the object, effect or likely effect of the agreement is to appreciably prevent, restrict or distort competition."* **Section 8 (2) of the FCA** *"an agreement in contravention of this section is unenforceable agreement except to the extent the provisions of the agreement causing it to be in contravention of the section are severable from the other provisions of the agreement."*

On the other hand, **Section 9 (1) of the FCA** prohibits certain agreements irrespective of their effects on competition. It states that "*a person shall not make or give effect to an agreement if the object, effect or likely effect of the agreement is: (a) price fixing between competitors; (b) a collective boycott by competitors; or (c) collusive bidding or tendering."*

How the FCA has adopted the US Rule of Reason and Ancillary Restraint

The FCA has by large adopted the "**lenience**" of the doctrine of the Rule of Reason and the doctrine of Ancillary Restraint by moving away from the more severe approach known as the "***illegal per se***" approach.

Although **Section 8 (2), (3) and (4) of the FCA** does not use specifically the words "**Rule of Reason**" and "**Ancillary Restraint**", the drafting thereof is interpreted to adopt these two as follows: -

Section 8 (2) An agreement in contravention of this section is unenforceable ***except to the extent the provisions of the agreement causing it to be in contravention of the section are severable from the other provisions of the agreement****.*

*Section 8 (3) "…****unless proved otherwise****, it shall be presumed that an agreement does not have the object, effect or likely effect of appreciably preventing, restricting or distorting competition if none of the parties to the agreement has a dominant position in a market affected by the agreement and either (a) or (b) applies: (a) the combined shares of the parties to the agreement of each market affected by the agreement is 35 per cent or less, or (b) none of the parties to the agreement are competitors.*

Section 8 (4) "…for the purposes of this section, in determining whether the effect or likely effect of an agreement is to appreciably prevent, restrict or distort competition, the fact that similar agreements are widespread in a market affected by the agreement shall be taken into account."

The above mention subsections provide for an open door for which the Rule of Reason, or where applicable, the Ancillary Restraint doctrine, may be used to determine whether the effect of an anti-competitive agreement is to unreasonably restrain trade or competition.

There can be situations where an agreement may have features that both enhance and restrict competition. For instance, when a supplier wishes to break into a new market, the distributors may only be willing to risk marketing a new product if given certain protection. This is a restriction of competition, but the agreement may enhance competition since it is a new product. Thus, in dealing with these issues, a distinction between the Rule of Reason and per se rules must be made.

Section 12 of the FCA adopts both the **Rule of Reason** and **Ancillary Restraint** doctrines by empowering the Fair Competition Commission ("**FCC**") to provide exemptions likely where such agreement has the effect of appreciably preventing, restraining or distorting competition.

This section captures the following scenarios which may apply the Rule of Reason and Ancillary Restraint approaches: -

(a) either contravenes section 9 or has or is likely to have, the effect of appreciably preventing restraining or distorting competition; and (b) the agreement results or is likely to result in benefits to the public in one or more of the following ways: (i) by contributing to greater efficiency in production or distribution; (ii) by promoting technical or economic progress; (iii) by contributing to greater efficiency in the allocation of resources; or (iv) by protecting the environment; and the agreement: (v) prevents, restrains or distorts competition no more than is reasonably necessary to attain the benefits; and (vi) the benefits to the public resulting from the agreement outweigh the detriments caused by preventing, restraining or distorting competition.

Further, **Section 13 of the FCA** empowers the FCC to provide an exemption for mergers and acquisitions whose results are likely to benefit the public in ways highlighted under **Section 13 (1) (b) of the FCA**. This clause would also apply in a **Rule of Reason** and **Ancillary Restraint** scenarios.

The exemptions mentioned above empower the FCC to use the **Rule of Reason** and **Ancillary Restraint** to determine whether there is more economic benefit than harm if such an agreement or merger is exempted, hence subject to a Rule of Reason or Ancillary Restraint analysis.

Conclusion

The United States **Rule of Reason** and **Ancillary Restraint** are widely used and have been incorporated in many jurisdictions around the world. Much as it is evident that the FCA has adopted the Rule of Reason and Ancillary Restraint Doctrines, these adoptions are not enough, as they are subject to interpretation. The FCA should set out guidelines on the application of the **Rule of Reason** and **Ancillary Restraint** in

'Commission Notice' so that there is predictability in their application similar to what the European Commission ('EECC') and the Competition Commission of India ('CCCCII') have done.