SECURITIES REGULATION, ENFORCEMENT AND MARKET INTEGRATION IN THE DEVELOPMENT OF SUB-SAHARAN AFRICA'S CAPITAL MARKETS

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ABSTRACT

This thesis examines securities market development in sub-Saharan Africa, focusing on securities law, securities law enforcement and securities markets integration.

Adopting a primarily comparative methodology, the thesis examines the continued relevance of securities markets in sub-Saharan Africa; the way selected countries in the region regulate their markets and enforce compliance with securities law; and the potential of market integration to promote market development.

This thesis advances 4 main claims. First, empirical evidence supports the link between liquid securities markets and economic growth, independent of the level of banking development. In this sense, securities markets can act as good complements to banks in providing capital to the real economy. Second, at the minimum, there is an arguable preliminary case that rules of securities regulation can hinder market development in select countries in sub-Saharan Africa, by imposing high compliance costs and eligibility requirements, without commensurate benefits in greater liquidity or reduced cost of capital. Third, enforcement of securities regulation in sub-Saharan Africa is generally weak. Whilst public regulators often have formal powers, budgets and staff; actual enforcement activity is sometimes limited by inadequate market monitoring and reliance on criminal as opposed to administrative sanctions. Poor public enforcement, in turn, reinforces poor private enforcement, leading to reduced market participation, illiquidity, and ultimately market underdevelopment. Fourth, although increased market integration can go a long way in facilitating market development in the region, integration cannot be a short/medium term solution to market underdevelopment in sub-Saharan Africa, given the significant economic, political and socio-cultural barriers to integration initiatives in the region.

Ultimately, to develop their securities markets, policymakers in sub-Saharan Africa must focus their attention on making and credibly enforcing market-friendly rules of securities regulation. The thesis explores some ways this may be realistically accomplished.

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TABLE OF ABBREVIATIONS

AELP	-	African Exchanges Linkage Project
AfCFTA	-	African Continental Free Trade Agreement
AfDB	-	African Development Bank
ASEA	-	African Securities Exchanges Association
BRVM	-	Bourse Regionale des Valeurs Mobilieres
COSSE	-	Committee of SADC Stock Exchanges
CMA (K)	-	Capital Markets Authority of Kenya
DMA	-	Directorate of Market Abuse of South Africa
EAC	-	East African Community
ECOWAS	-	Economic Community of West African States
FSB	-	Financial Services Board of South Africa
FSCA (SA)	-	Financial Services Conduct Authority of South Africa
JSE	-	Johannesburg Stock Exchange
KSE	-	Nairobi Securities Exchange, Kenya
MJDS	-	Multi-Jurisdictional Disclosure System
MRSO	-	Mutual Recognition of Securities Offerings
NSE	-	Nigerian Stock Exchange
REC	-	Regional Economic Community
SADC	-	Southern African Development Community
SEC (N)	-	Securities and Exchange Commission of Nigeria
UN ECA	-	United Nations Economic Commission for Africa
WAEMU	-	West African Economic and Monetary Union

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CHAPTER 1 - INTRODUCTION

Although securities law[1] is now the subject of a large and distinguished body of scholarship, to the best of my knowledge, no legal studies have engaged in a systematic examination of securities law in sub-Saharan Africa as a whole. To the extent securities law in developing countries has been examined, the focus has largely been on countries in Latin America, Eastern Europe and Asia.[2] This is unsurprising. The dominance of the United States, Europe and Asia in the global economy rightly justify the deployment of significant academic resources to the examination of securities law in these jurisdictions. However, this has led to a sizeable gap in the existing body of knowledge, which the greater

[1] In this thesis, I use 'securities regulation' and 'securities law' broadly to include all rules (whether issued by the legislature, by regulators or by self-regulatory authorities) which market participants are obliged to comply with in order to enter or participate in the market; including issuer regulation (such as disclosure and governance standards), intermediary regulation (such as broker/dealer regulation, accounting and auditing regulation, and the regulation of investment advisors and other service providers) and market abuse regulation (prohibiting insider trading and market manipulation). For an overview of securities law and the affiliation strategies it deploys, see Luca Enriques and others, 'Corporate Law and Securities Markets' in Reineer Kraakman and others *The Anatomy of Corporate Law: A Comparative and Functional Approach* (OUP 2017). For a discussion of the goals of securities law, see John Armour and others, *Principles of Financial Regulation* (OUP 2016) 61-72. The focus of this thesis is on securities law, although given the overlap between securities law and corporate law, few occasional references are made to corporate law and corporate law scholarship.

[2] See for instance Celia Taylor, 'Capital Market Development in the Emerging Markets: Time to Teach an Old Dog Some New Tricks' (1997) 45 American Journal of Comparative Law 71 (examining capital market development in Eastern Europe); Bernard Black, Reineer Kraakman and Anna Tarassova, 'Russian Privatization and Corporate Governance: What Went Wrong' (2000) 52 Stanford Law Review 1731 (examining the development of securities markets in Russia and the failure of the mass privatization programme in the country); John Coffee Jr., 'Privatization and Corporate Governance: The Lessons from Securities Market Failures' (2000) 25 Journal of Corporation Law 1 (examining the experience of Poland and Czech Republic in facilitating securities markets development through mass privatization of public companies); John Coffee Jr, 'Starting from Scratch: The Legal and Institutional Steps to Viable Securities Markets in Transition Economies' (2001) 27 Review of Central and East European Law 7 (examining capital markets development in transition economies, using Macedonia as a case study); Bernard Black, 'The Role of Self-Regulation in Supporting Korea's Securities Markets' (2003) 3 Journal of Korean Law 17 (examining securities markets development and the role of self-regulation in the Korean market).

attention on emerging markets as new frontiers of growth in an increasingly interconnected global economy serves to expose. It is this gap that this thesis proposes to address.

This research is important for one crucial reason. Sub-Saharan Africa is one of the least developed regions in the world[3] and is in dire need of additional finance to propel its economic growth.[4] Given its level of underdevelopment and the evidence tying well-functioning markets to economic growth,[5] the development of strong securities markets in the region ought to support governmental strategies towards financing projects and companies, and ultimately, achieving inclusive economic growth. Nonetheless, most securities markets in sub-Saharan Africa remain underdeveloped, and high-quality legal scholarship specifically focusing on securities regulation in the region, virtually non-existent.

The motivation for the thesis is therefore straightforward: sub-Saharan Africa is one of the least developed regions of the world and presently faces a severe deficit in financing its development. Closing this deficit and providing funds required to spur economic growth requires the effective deployment of all available sources of finance, including the region's capital markets. This thesis therefore explores key issues in the development of securities markets in sub-Saharan Africa and makes several proposals for reforming securities markets in the region.

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3 According to the 2019 Global Competitiveness Report of the World Economic Forum, sub-Saharan Africa is the least competitive region in the world, and home to 26 of the 30 least competitive countries in the world.

4 On Africa's financing deficit, see n 11-19 below and accompanying text.

5 See generally, Chapter 2, section 2.2.

1.1. Statement of the Problem

Geographically, sub-Saharan Africa refers to the portion of the African continent wholly or partially beneath the Saharan desert.[6] Securities markets[7] are not new in this region. The first securities market in the region was established in 1887, in Johannesburg, South Africa.[8] Since then, many African states have established either independent securities markets within their states, or integrated markets across several states. Today, there are 24 securities markets serving 36 of the 48 countries in sub-Saharan Africa. Despite the age and growth of securities markets in the region, with the notable exception of the Johannesburg Stock Exchange (JSE) of South Africa, securities markets in sub-Saharan Africa are largely illiquid and underdeveloped.[9]

In broad terms, these challenges of illiquidity and underdevelopment have led to two core policy issues. First, they have sparked off debates on the relevance or otherwise of securities markets in sub-Saharan Africa. Some commentators argue against the rapid proliferation of securities markets in sub-Saharan Africa on the basis that it will be a 'costly irrelevance' to the real economy and should not be a top priority for African countries

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6 The United Nations Development Program places 46 countries in this region (all countries in Africa with the exclusion of Algeria, Djibouti, Egypt, Libya, Morocco, Somalia, Sudan, and Tunisia). For its part, the World Bank includes Sudan and Somalia to the list of sub-Saharan African countries, leading to 48 countries in its classification. I adopt the World Bank classification in this thesis as it is more geographically accurate and ensures consistency of data sources utilised in the thesis.

7 In this thesis, I use 'securities markets', 'public markets', 'stock exchanges' and 'capital markets' interchangeably to refer to markets available to the public for trading in equity securities of listed companies.

8 The oldest securities market in the African continent is the Alexandria Stock Exchange, established in Alexandria, Egypt in 1883.

9 See the discussion in the overview in section 1.2 below.

seeking to develop their financial systems.[10] Second, for commentators who consider capital market development to be useful in sub-Saharan Africa, this has led to the obvious question of how to develop the markets to make them viable complements to banks in financing the real economy.

These debates on the relevance of securities markets in sub-Saharan Africa, and the proper approach to developing well-functioning markets in the region have assumed renewed importance in modern times. Liberalization and globalization are driving an increasingly interconnected global economy. In this globalised world, investors in developed economies increasingly seek investment opportunities in developing countries and emerging markets either in pursuit of higher rates of return than exist in their domestic markets, or as a means of portfolio diversification.

In addition, it is now well established that sub-Saharan Africa suffers a severe financing deficit. A 2010 report by the World Bank and the Agence Française de Développement assessed the cost of addressing Africa's infrastructure needs alone to be around US$93 billion per annum. Even with efficiency gains captured and current means of financing properly deployed, this left a funding deficit of about US$31 billion per annum.[11] More recent estimates from the African Development Bank now suggest that

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10 For a strong argument against the proliferation of securities markets in sub-Saharan Africa, see Ajit Singh, 'Should Africa Promote Stock Market Capitalism?' (1999) 11 Journal of International Development 343, '[F]or the typical African economy, even if no harm is done to the real economy, a stock market will be at best a costly irrelevance, in the sense that it would only benefit a small number of urban corporations, if anyone at all'. For a more recent restatement of this argument, see Parmendra Sharma and Eduardo Roca, 'It is Time to Reexamine the Role of Stock Markets in Developing Economies' (2012) 13 Journal of Asia-Pacific Business 206 (arguing against capital markets in several developing countries (including African countries) because of failure of the market to stimulate economic growth as theory predicts). For a more detailed review of the arguments that securities markets are irrelevant in sub-Saharan Africa, see Chapter 2, Section 2.1.2.

11 Vivian Foster and Cecilia Briceño-Garmendia, *Africa's Infrastructure: A Time for Transformation* (World Bank, 2010).

Africa's infrastructure requires between US$130-170 billion per annum, with a current financing deficit of about US$68-108 billion per annum.[12] This deficit in public finance is mirrored by an equally severe deficit in finance to the private sector. Figure 1.1 reports World Bank figures on domestic credit to the private sector relative to GDP. For comparability, I report the figures for sub-Saharan Africa alongside those from other regions.

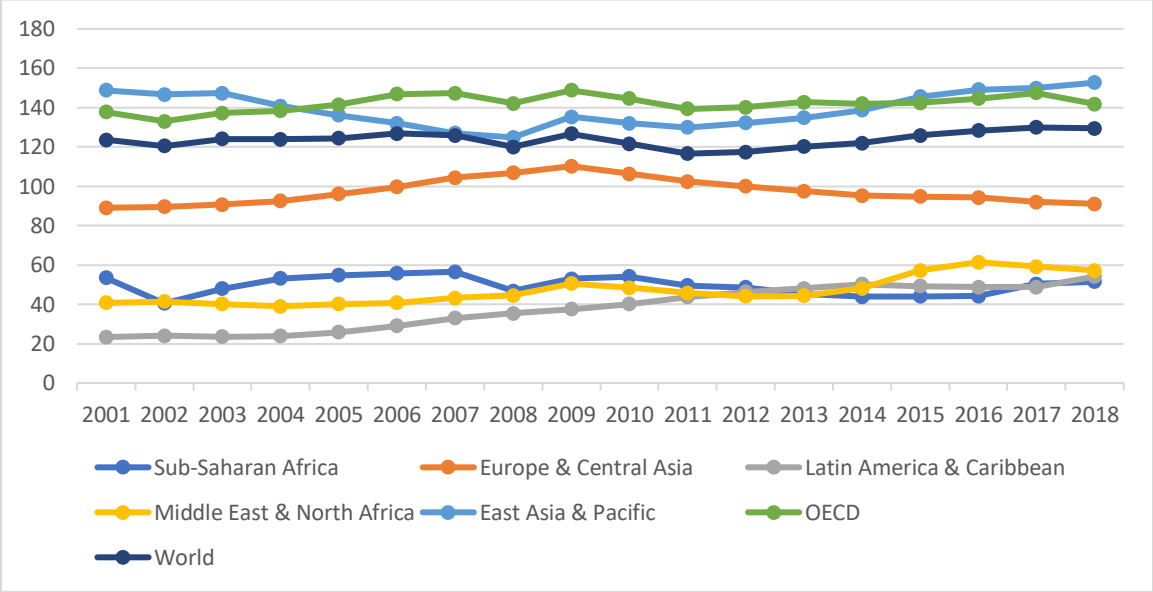

Figure 1.1 - Domestic Credit to the Private Sector (% of GDP), 2001-2018.[13]

At 51.4% in 2018, sub-Saharan Africa is the lowest ranked region in the indicator, marginally behind Latin America and the Caribbean (54.03%) and Middle East and North Africa (57.2%). This contrasts rather sharply with East Asia and the Pacific (152.6%),

12 Africa Development Bank, *African Economic Outlook, 2018* (The African Development Bank Group, Abidjan 2018).

13 Source: The World Bank. This indicator measures the amount of financial resources provided to the private sector by financial corporations (such as through bank loans, purchases of non-equity securities, trade credits and other account receivables).

OECD Member States (141.8%), Europe & Central Asia (91.1%) and the World average of 129.4%.

In much the same vein, although the financial sectors of most countries in sub-Saharan Africa are dominated by banks,[14] bank lending to the real economy has been fairly poor.[15] As at 2006, it was estimated that the ratio of liquid assets to total bank deposits in Uganda and Nigeria was in excess of 60%. As a former Deputy Governor of the Bank of Uganda notes,

> [i]n a nutshell, the financial system in Africa remains extremely inefficient. Banks maintain high levels of liquid assets in short-term government securities, central bank paper and cash and only a modest amount of funds are channelled to the private sector as credit.[16]

Unfortunately, the problem of banks retaining high levels of liquid assets in government securities rather than lending to the real economy is not simply a historical fact. On 3 July 2019, the Banking Supervision Department of the Central Bank of Nigeria issued regulatory measures to improve lending to Nigeria's real economy and directly address the practice of Nigerian banks purchasing treasury bills and other government securities instead of lending to the real economy. The measures require commercial banks in Nigeria to maintain a loan to deposit ratio of 60% failing which, their cash reserve requirements with the Central Bank will be increased by an amount equal to 50% of the

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14 See Marc Quintyn and Geneviève Verdier, 'Introduction and Overview' in Marc Quintyn and Geneviève Verdier (eds), *African Finance in the 21st Century* (International Monetary Fund 2010) 3.

15 The public debt and private equity markets in sub-Saharan Africa also face fairly serious challenges in providing finance to the private sector. For a comprehensive discussion on the private equity and public debt markets in Africa, see Kalu Ojah and Odongo Kodongo, 'Financial Markets Development in Africa: Reflections and the Way Forward' in Célestin Monga and Justin Yifu Lin (eds), *The Oxford Handbook of Africa and Economics: Volume 2* (OUP 2015).

16 See Louis Kasekende, 'Developing a Sound Banking System in Sub-Saharan African Countries' in Marc Quintyn and Geneviève Verdier (eds), *African Finance in the 21st Century* (IMF 2010) 70.

lending shortfall.[17] Figure 1.2 reports World Bank statistics on domestic credit to the private sector by banks in sub-Saharan Africa relative to GDP. For comparability, I also report the figures from other regions of the world, as well as the world average.

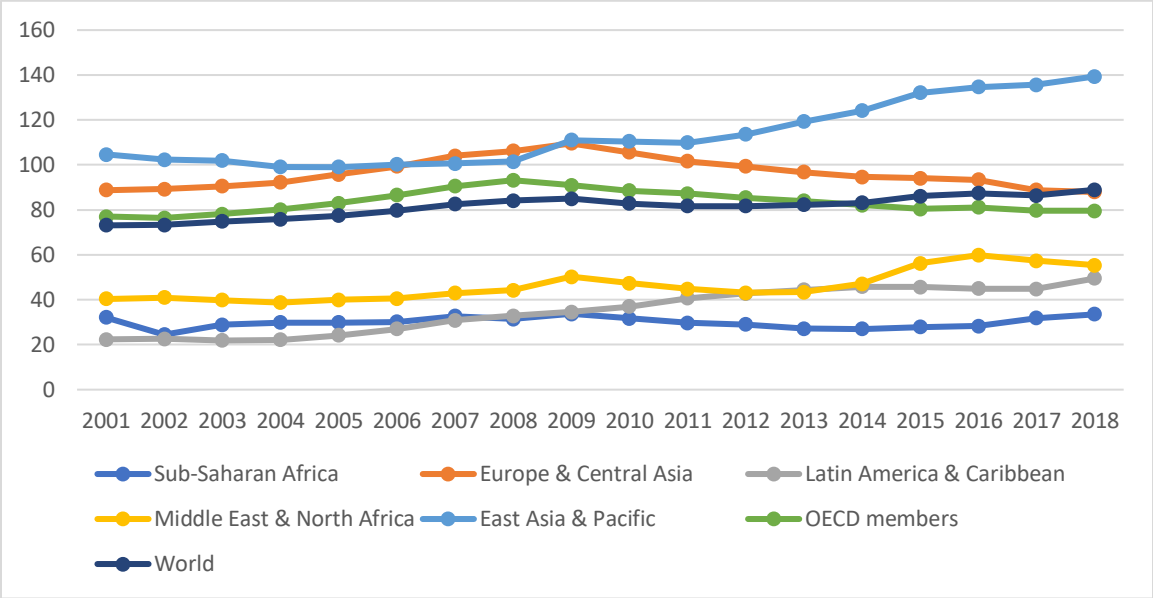

Figure 1.2 - Domestic Credit to the Private Sector by Banks (% of GDP), 2001-2018.[18]

As the chart demonstrates, banks in sub-Saharan Africa have lagged other regions of the world in providing credit to the private sector. Incidentally, the 2018 figure of 33.5% is the highest recorded for sub-Saharan Africa in the 21st century. However, it still trails all other regions in the world, and falls significantly behind the 2018 world average of 88.9% and the score of 139.3% achieved by the East Asia and Pacific region.

17 Central Bank of Nigeria Directive BSD/DIR/GEN/MDD01/045, '*Regulatory Measures to Improve Lending to the Real Sector of the Nigerian Economy'* dated 3 July 2019. At the time of writing, the loan to deposit ratio had been increased to 65%.

18 Source: The World Bank. This indicator measures the amount of financial resources provided to the private sector by deposit taking institutions (except the Central Bank) through loans, purchase of non-equity securities, trade credits and other account receivables.

Thus, the reality for sub-Saharan Africa is that the region must find ways to unlock the potential of its securities markets to make them good complements to banks in financing corporate and public investments as a spur to economic growth. As Irish economist Patrick Honohan put it, 'For money doctors, Africa is, or should be, a priority'.[19]

1.2. Overview of Securities Markets in Sub-Saharan Africa

The table below presents an overview of the 24 securities markets operating in sub-Saharan Africa.

Name	Country	Founded	Listed Companies [20]	Market Cap (% of GDP)[21]	Ownership	Trading System	Legal Origin
Central Africa							
BVMAC[22]	6 countries[23]	1994	4	Not available	State	Manual	Civil law
East Africa							
Dar-es-Salaam Stock Exchange	Tanzania	1996	27	2.9% (2001)	Demutualized	Electronic	Common Law
Nairobi Stock Exchange	Kenya	1954	63	34.03%	Demutualized	Electronic	Common Law
Rwanda Stock Exchange	Rwanda	2005	8	41.5%	Demutualized	Manual	Mixed
Uganda Stock Exchange	Uganda	1997	16	0.29%	Demutualized	Electronic	Common Law
Southern Africa							
BODIVA[24]	Angola	2014	0	0%	Demutualized	Manual	Civil Law

19 Patrick Honohan, 'Finance in Africa: A Diagnosis' in Marc Quintyn and Geneviève Verdier (eds), *African Finance in the 21st Century* (IMF 2010) 33.

20 As at March 2020.

21 As at 2017 except stated otherwise.

22 *Bourse des Valeurs Mobilieres de L'Afrique Centrale*.

23 The BVMAC serves Cameroon, Central African Republic, Chad, Congo, Equitorial Guinea and Gabon.

24 *Bolsa de Davida e Valores de Angola*.

Name	Country	Founded	Listed Companies [20]	Market Cap (% of GDP)[21]	Ownership	Trading System	Legal Origin
Botswana Stock Exchange	Botswana	1995	32	24.7%	Demutualized	Electronic	Common Law
BVM[25]	Mozambique	1999	10	34.03%	State	Manual	Civil Law
Eswatini Stock Exchange	Eswatini	1990	8	19.9%	State	Electronic	Mixed
Johannesburg Stock Exchange	South Africa[26]	1887	345	332.4%	Demutualized	Electronic	Mixed
Lusaka Securities Exchange	Zambia	1994	25	12.71%	Mutual	Electronic	Common Law
Malawi Stock Exchange	Malawi	1996	15	20.46%	State	Electronic	Common Law
Maseru Securities Market	Lesotho	2016	0	0%	State	Manual	Mixed
MERJ Exchange Limited	Seychelles	2011	31	0.17%	Demutualized	Electronic	Mixed
Namibian Stock Exchange	Namibia	1992	37	21.5%	Mutual	Electronic	Common Law
Stock Exchange of Mauritius	Mauritius	1988	93	89%	Demutualized	Electronic	Mixed
Zimbabwe Stock Exchange	Zimbabwe	1946	61	68.3%	Demutualized	Electronic	Common Law
West Africa							
BRVM[27]	8 countries[28]	1998	64	Not available	Demutualized	Electronic	Civil Law

25 *Bolsa de Valores de Mozambique*.

26 The South African securities regulator recently licensed four additional securities exchanges in South Africa: the Equity Express Securities Exchange, ZAR X, 4 Africa Exchange and A2X Exchange. Presently, these exchanges are trying to differentiate themselves in order to capture market share from the Johannesburg Stock Exchange (JSE) and appeal to niche segments of investors and issuers. I limit the discussions on South Africa in this thesis to only the JSE.

27 *Bourse Regionale des Valeur Mobilieres.*

28 The BRVM serves Benin, Burkina Faso, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal and Togo

Name	Country	Founded	Listed Companies [20]	Market Cap (% of GDP)[21]	Ownership	Trading System	Legal Origin
BVC[29]	Cape Verde	2005	4	40.2%	State	Electronic	Civil Law
Ghana Stock Exchange	Ghana	1990	37	28.56%	Mutual	Electronic	Common Law
Nigerian Stock Exchange	Nigeria	1960	165	19.9%	Mutual	Electronic	Common Law
Sierra Leone Stock Exchange	Sierra Leone	2009	Not available	Not available	State	Manual	Common Law
Others							
Khartoum Stock Exchange	Sudan[30]	1994	60	0.95%	State	Electronic	Mixed
Somali Stock Exchange	Somalia[31]	2011	4	Not available	State	Manual	Mixed

Table 1.1 - Overview of Securities Markets in sub-Saharan Africa[32]

Perhaps the most striking thing about securities markets in sub-Saharan Africa is their broad diversity. Securities markets in the region exhibit non-homogeneity across various indicators, including year of establishment, size, ownership structure, modes of operation and legal origins.

Year of Establishment. The 24 securities markets in the region were established at different times from 1887 to 2016. The four markets established before 1960 (Nigeria, Kenya, South Africa and Zimbabwe) are some of the largest and most well-developed in

29 *Bolsa de Valores de Cabo Verde*.

30 As noted above (n 1), Sudan is classified within sub-Saharan Africa by the World Bank (but not by the United Nations). Sudan formally applied to join the East African Community (EAC) in 2011 but its application was opposed by other EAC Partner States on the basis that the country did not share a border with any EAC Partner State, it had a history of alleged discrimination against black Africa, and hostility towards Uganda and South Sudan. Its application was formally rejected by the EAC in December 2011. Following the split between Sudan and South Sudan, Sudan is now geographically situated in Northern Africa.

31 Somalia formally applied for membership of the EAC in March 2012. However, the application is currently frozen due to instability in the country.

32 Sources: Stock Exchange Websites, African Securities Exchange Association Yearbook 2017 and the World Bank.

sub-Saharan Africa as well as within their sub-regions. Most markets in the region were established between 1960 and 2000. Many of these markets were the products of structural adjustment programs in Africa in the 1980s and 1990s when several African states sought to achieve private-sector led growth through liberalization of their economies and privatization of state-owned enterprises, often with the explicit support and assistance of the Bretton Wood Institutions. This period between 1960 and 2000 accounts for the rapid expansion in the number of stock exchanges in sub-Saharan Africa,[33] with 12 of the 24 securities markets established in the 1990s alone. Seven additional markets have been created in sub-Saharan Africa (five of which are in Southern Africa) since 2000.

Ownership. Of the 24 securities markets currently in operation, 11 have been demutualized, nine of the markets are owned and controlled (at least in part) by the state, reflecting the strong influence the government still has on many markets in the region,

[33] On the rapid expansion of stock exchanges in sub-Saharan Africa, see for instance Lemma Senbet and Isaac Otchere, 'African Stock Markets: Opportunities and Issues' in Marc Quintyn and Geneviève Verdier (eds), *African Finance in the 21st Century* (IMF 2010). See also Charles Pouncy, 'Stock Markets in Sub-Saharan Africa: Western Legal Institutions as a Component of the Neo-Colonial Project' (2002) 23 University of Pennsylvania Journal of International Economic Law 85, 99 'The recent trend towards the establishment of stock markets in [sub-Saharan Africa] does not appear to be a response to the real sector's need for capital. Instead, these markets are being established in response to an economic theory that disfavours the use of economic planning and parastatal business organizations as policy instruments for the promotion of economic development'. For a discussion on the influence of Bretton Wood Institutions on the establishment of securities markets in sub-Saharan Africa, see for instance Bruce Hearn and Jenifer Piesse, 'Barriers to the Development of Small Stock Markets: A Case Study of Swaziland and Mozambique' (2010) 22 Journal of International Development 1018. For arguments detailing the technocratic, symbolic and political reasons for the establishment of securities markets in many African states, see Todd Moss, *Adventure Capitalism: Globalization and the Political Economy of Stock Markets in Africa* (Palgrave Macmillan 2003) 40-67 (arguing that a mixture of technocratic, political and symbolic reasons, coupled with increased interest in 'emerging markets' came together to encourage the establishment of stock markets in sub-Saharan Africa, and that symbolism played a decisive role in the creation of some markets in the region). See also Jacqueline Irving *Regional Integration of Stock Exchanges in Eastern and Southern Africa: Progress and Prospects* (IMF 2005) (arguing that some states see domestic stock exchanges as symbols of national sovereignty).

while the remaining four are mutually owned but are currently in the process of demutualizing.

Modes of operations. As at December 2019, seven of the 24 stock exchanges operating in sub-Saharan Africa still operated open outcry trading systems,[34] and two of the remaining stock exchanges with automated trading systems only recently achieved trade automation.[35]

Legal Origins. Although all African states that were previously colonized adopted the legal system of their metropole state at independence,[36] today, it is impossible to neatly characterize each African state as falling within a strict civil/common law divide. For historical and political reasons, many states in sub-Saharan Africa have mixed legal systems, adopting either a blend of common and civil law (for example South Africa and Mauritius) or a blend of common/civil law and Islamic/customary law (for example Somalia and Sudan).

Most securities markets in sub-Saharan Africa suffer from the twin challenges of illiquidity and shallowness (both in absolute terms and relative to the size of their domestic economies). Illiquidity remains arguably the biggest problem facing capital markets in sub-Saharan Africa.[37] Most of the markets operating in the region are simply too illiquid to

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34 These are the stock exchanges in Mozambique, Lesotho, Angola, Rwanda, Sierra Leone, Somalia and the Bourse des Valeurs Mobilières de l'Afrique Centrale (BVMAC).

35 These are the stock exchanges in Eswatini and Malawi. Automation in both markets was completed in 2019.

36 On the influence of inherited systems of law on the legal systems in Africa, see Sandra Joireman, 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy' (2001) 39 Journal of Modern African Studies 571.

37 See for instance Moss (n 33) (noting the small size and illiquidity of African capital markets when compared to global standards); Lemma Senbet and Isaac Otchere, 'African Stock Markets:

contribute meaningfully to economic development in their domestic countries.[38] Some of the markets in the region record only a handful of trades a day[39] and even the larger markets of Kenya and Nigeria are very illiquid when compared to the South African market,[40] which, itself, is illiquid when compared to global markets.[41]

On market depth, as noted above,[42] two markets have not been able to attract a single equity issuer since their establishment and four others currently have ten issuers or less. Similarly, the BVMAC and Zimbabwe Stock Exchange have only had one IPO in the last ten years.[43] From the most recent available statistics, 12 markets have a market capitalization ratio of less than 25% and only three countries (i.e. Zimbabwe, Mauritius and South Africa, all in Southern Africa) have a market capitalization ratio of above 50%. From all indicators, South Africa is a significant outlier in the continent. As at 31 December 2018, the JSE was the 16th largest stock exchange in the world with a market capitalization

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Opportunities and Issues' in Marc Quintyn and Geneviève Verdier (eds), *African Finance in the 21st Century* (IMF 2010) (noting illiquidity as a problem in capital markets operating in Africa).

38 See for instance Kathryn Lavelle, 'Architecture of Equity Markets: The Abidjan Regional Bourse' (2001) 55 International Organization 717 (on liquidity of the stock exchange of Ivory Coast); Bruce Hearn and Jenifer Piesse, 'Barriers to the Development of Small Stock Markets: A Case Study of Swaziland and Mozambique' (2010) 22 Journal of International Development 1018 (noting some of the causes and effects of illiquidity in Swaziland and Mozambique).

39 See for instance Katrina Manson, 'Sierra Leone: A One-Stock Shop' (Financial Times, 24 April, 2012) <*https://www.ft.com/content/8fd8bb54-0c0f-3986-88df-708830231c2a*> accessed 3 August 2019 'The Sierra Leone Stock Exchange gives a new life to the notion of illiquid. Trading is open for "an hour or so". If there's "a lot of demand" sometimes it opens on Thursday too. Strong demand is anything above about six trades a day'.

40 See Figure 1.5 below on the total value of shares traded as a percentage of GDP in Kenya, Nigeria and South Africa.

41 Charles Okeahalam, 'Strategic Alliances and Mergers of Financial Exchanges: The Case of the SADC' (2005) 31 Journal of Southern African Studies 75. After comparing the Johannesburg Stock Exchange (JSE) with the New York Stock Exchange, NASDAQ and the London Stock Exchange, the author notes at page 85: '[a]lthough the JSE has much greater liquidity than the other SADC markets, in comparison to some of the major markets worldwide, it is still fairly illiquid'.

42 See Table 1.1 above.

43 PwC Africa Capital Markets Watch 2020.

of approximately US$1trillion.[44] The JSE accounted for approximately 97% of the market capitalization of all stock exchanges in Southern Africa as at December 2018.[45]

Markets in the region have also struggled to attract initial public offerings as shown in Figure 1.3.

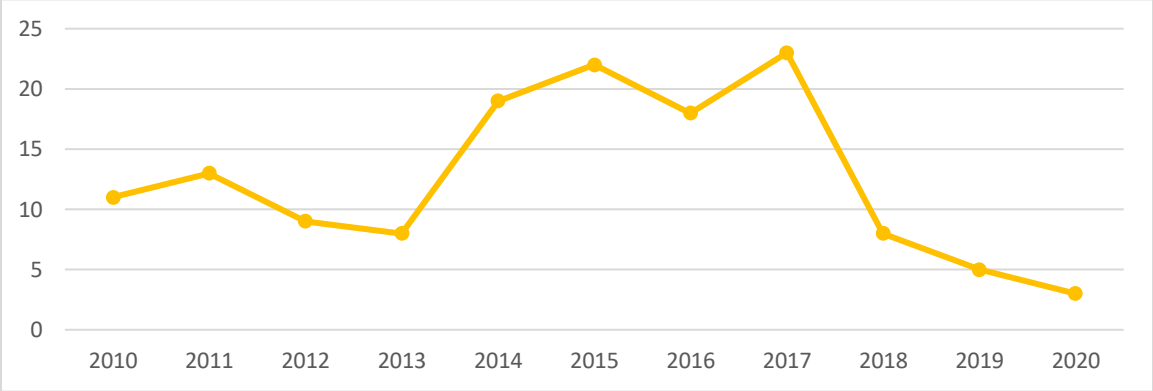

Figure 1.3 – IPOs in sub-Saharan Africa: 2010-2020[46]

1.3. Literature Review

Discussions on the development of securities markets in sub-Saharan Africa have largely been driven by economists and political scientists. To the extent legal scholars have engaged with securities markets development in sub-Saharan Africa, they have largely

44 Johannesburg Stock Exchange, Annual Report (2018) 4.

45 Palesa Shipalana and Mopeli Moshoeshoe, 'Bridging the Divide: Integrating SADC's Capital Markets' (South African Institute of International Affairs, Occasional Paper 295, 25 April 2019) <https://saiia.org.za/research/bridging-the-divide-integrating-sadcs-capital-markets/> accessed 5 November 2020.

46 Source: PwC Africa Capital Markets Watch 2019 and 2020. The chart reports data for both the main markets and the alternate markets. The movement in IPOs in sub-Saharan Africa is largely influenced by IPOs in South Africa, which accounts for most IPOs in the region. Thus, in 2014, 2015 and 2017 when the region had 19, 22 and 23 IPOs, South Africa accounted for 9, 12 and 12 IPOs respectively (approximately 50%).

been focused on specific countries or sub-regions.[47] Thus, to the best of my knowledge, no legal studies have engaged in a systematic examination of securities law in sub-Saharan Africa as a whole.

The economics literature examining securities market development in sub-Saharan Africa has given three broad sets of prescriptions: macroeconomic growth and stability, institutional development and market integration.

Macroeconomic factors. In 2007, Charles Yartey conducted a study into the macroeconomic and institutional determinants of securities markets development in Africa, using a panel dataset of 13 African countries from 1991 to 2001.[48] Yartey found that per capita income, investment and savings rate, financial intermediary development and stock market liquidity are important determinants of stock market development in Africa.[49] Yartey also found that institutional quality (measured as an index of corruption, law and order, bureaucratic quality, democratic accountability and government stability) and financial intermediary development (measured as domestic credit to the private sector as a percentage of GDP) are strong determinants of stock market development in Africa. Given

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47 See for example Jacob Gakeri, 'Financial Services Regulatory Modernization in East Africa: The Search for A New Paradigm for Kenya' (2011) 1 International Journal of Humanities and Social Science 161 and Jacob Gakeri, 'Enhancing Securities Markets in Sub-Saharan Africa: An Overview of the Legal and Institutional Arrangements in Kenya' (2015) 1 International Journal of Humanities and Social Science 134 (focusing on the development of securities markets in Kenya and East Africa); Boniface Chimpango, 'The Development of African Capital Markets: A Legal and Institutional Approach' (PhD Thesis, Nottingham Trent University 2014) (focusing on the institutional requirements for the development of securities markets in Southern Africa); Iwa Salami, *Financial Regulation in Africa: An Assessment of Financial Integration Arrangements in African Emerging and Frontier Market* (1st edn, Routledge, London 2012) (focusing on banking and securities markets integration across Africa).

48 Charles Yartey, 'Macroeconomic and Institutional Determinants of Stock Market Development in Africa' in John Okpara (ed), *Management and Economic Development in Africa: Theoretical and Applied Perspectives* (Adonis & Abbey Publishers 2007).

49 ibid 181.

that stock market development correlated with the amount of credit provided by banks relative to GDP and the institutional quality index measured the political risk profile of the countries, Yartey interpreted the results to mean that banks and stock markets act as complements rather than substitutes, and the resolution of political risk is crucial to encouraging investor confidence and propelling market development.[50]

In 2009, Andrianaivo and Yartey conducted a further examination on financial development in Africa.[51] On stock market development, the authors use a panel dataset of 18 countries between 1990 and 2006. Consistent with Yartey's earlier findings, they find that bank credit, stock market liquidity, gross domestic savings, GDP per capita and political risk are strong determinants of stock market development in Africa. These findings have remained consistent in the economics literature on the development of securities markets in Africa.[52]

Institutional development. The discussions on institutional factors have largely focused on political risk, securities law and the legal system, and enforcement and

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50 ibid. Yartey's findings have been re-echoed in later work. See for instance Charles Yartey and Charles Adjasi, *Stock Market Development in Sub-Saharan Africa: Critical Issues and Challenges* (IMF 2007) (finding that macroeconomic stability, banking sector development, institutional quality and shareholder protection are important determinants of stock market development in Africa).

51 Mihasonirina Andrianaivo and Charles Yartey, 'Understanding the Growth of African Financial Markets' (2010) 22 African Development Review 394.

52 In 2010, Yartey expanded on his earlier 2007 study by using a panel dataset of 42 emerging countries (including African countries) from 1990 to 2004 to examine the institutional and macroeconomic determinants of stock market development in emerging economies. This expanded study found results similar to the study on African countries, i.e., income levels, gross domestic investment, banking sector development, private capital flows, stock market liquidity and resolution of political risk are important determinants of stock market development. See Charles Yartey, 'The Institutional and Macroeconomic Determinants of Stock Market Development in Emerging Economies' (2010) 20 Applied Financial Economics 1615. See also Charles Yartey, *The Determinants of Stock Market Development in Emerging Economies: Is South Africa Different* (IMF 2008) (finding consistent results and that they apply equally to South Africa).

supervision. Because financial technology can also impact on a country's institutional environment, it is considered here under this heading.

Regarding political risk, Stephen Haber argues that securities markets are likely to remain underdeveloped if investments can be expropriated or stolen either by corporate managers or by politicians with the support of the political process.[53] Similarly, securities market development can be severely hampered if entrenched interest groups or influential political constituencies can effectively veto market enhancing reforms if these reforms negatively affect the rents they can extract from the status quo.[54] These entrenched interests and political constituencies can also limit the effectiveness of securities regulators seeking to enforce strict compliance with securities regulation. This makes it crucial to develop strategies that can achieve market development in the context of weak or dysfunctional institutional settings.

The discussions on securities law and the legal system as institutional factors in the development of securities markets in sub-Saharan Africa often segue into many of the debates in global securities law scholarship. Debates on the impact of securities law on market development typically focus on whether law matters to market development, the impact of securities cross-listing and the disruptive impact of technology on securities law and market development. However, given the dearth of legal scholarship on securities law

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53 See Stephen Haber, 'The Finance-Growth Nexus: Theory, Evidence, and Implications for Africa' in Marc Quintyn and Geneviève Verdier (eds), *African Finance in the 21st Century* (IMF 2010).

54 An extensive literature has developed on the relationship between politics and finance, in support of the thesis that political institutions are critical to financial development. See Marco Pagano and Paolo Volpin, 'The Political Economy of Finance' (2001) 17 Oxford Review of Economic Policy 502. For a detailed review of the literature on the political economy of financial development, see Stephen Haber and Enrico Perotti, 'The Political Economy of Finance' (2014) 9 Capitalism and Society 1.

in sub-Saharan Africa, the literature on these issues have again been driven by economists and global legal scholarship.

The seminal works of La Porta, Lopez-de-Silanes and Shleifer have been very influential in sub-Saharan Africa.[55] With specific reference to securities law, the authors find that securities law mandating disclosure and facilitating private enforcement through liability standards are crucial to securities market development.[56] The prescription that securities law matters to market development has sparked off debates in global securities law scholarship. Some commentators argue that securities law matters to market development as they ensure investors have sufficient information to make informed decisions, are not defrauded and have effective remedies in the event of a violation of their rights.[57] Other scholars have questioned the 'law matters' thesis showing that securities markets grew significantly in developed countries even when legal protections afforded to minority investors were still poor.[58]

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55 See Rafael Porta and others, 'Legal Determinants of External Finance' (1997) 52 Journal of Finance 1131; Rafael La Porta and others, 'Law and Finance' (1998) 106 Journal of Political Economy 1113; Rafael La Porta and others, 'Investor Protection and Corporate Valuation' (2002) 57 Journal of Finance 1147.

56 See Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'What Works in Securities Laws?' (2006) 61 Journal of Finance 1.

57 For the core reading on this, see Bernard Black, 'The Legal and Institutional Preconditions for Strong Securities Markets' (2000) 48 UCLA Law Review 781 (arguing that rules mandating disclosure and constraining value expropriation from minority shareholders are crucial to the development of well-functioning securities markets).

58 See Brian Cheffins, 'Does Law Matter? The Separation of Ownership and Control in the United Kingdom' (2001) 30 Journal of Legal Studies 459 (arguing that law played only a marginal role in the initial development of well-functioning securities markets in the UK, and that self-regulation through the London Stock Exchange and market intermediaries played a more active role); Eilís Ferran, *Building an EU Securities Market* (CUP 2004) (arguing that EU Law was a catalyst for changes to member states' securities law but not for securities market development). For additional literature on the development of securities markets in the absence of strong minority shareholder protection and the institutions that supported market development, see Chapter 3, section 3.1.2.

The 'law matters' school of thought has been very influential in sub-Saharan Africa. Thus, Yartey argues that shareholder protection is a key determinant of stock market development in Africa.[59] Similarly, Singh, Kpodar and Ghura examine financial development in Francophone Western and Central Africa, finding a gap in financial development between countries in these regions and the rest of sub-Saharan Africa and attributing the gap to differences in legal origins and institutional quality.[60]

The literature on securities law in sub-Saharan Africa has however raised the distinct possibility that securities law in some countries in the region may be in advance of their state of market development or may otherwise be too stringent in their specific market contexts.[61] This can be seen most clearly in a 1998 account by Professor Stuart Cohn of his time teaching securities law in Uganda.[62] The teaching engagement was under the auspices of the International Law Institute, with funding from the World Bank. Like many other markets in sub-Saharan Africa, the Uganda Stock Exchange was established in the 1990s following an ambitious privatization program, with the advice of the Bretton Wood institutions.[63] Prior to taking the course, Professor Cohn had reviewed Uganda's securities law, which he described as 'impressive' and 'sophisticated'. He assumed from this that the

59 See Yartey and Adjasi (n 50) 17-18.

60 See Raju Singh, Kangni Kpodar and Dhaneshwar Ghura, 'Financial Deepening in the CFA Franc Zone: The Role of Institutions' in Marc Quintyn and Geneviève Verdier (eds), *African Finance in the 21st Century* (IMF 2010)

61 As Patrick Honohan notes, 'The tendency, in particular, to adopt the full panoply of investor protections in securities markets may have resulted in entry costs that deterred many would-be issuers. A lighter and more pragmatic form of capital market regulation… could open the door to more listings and more capital being raised from institutional and wealthy investors that already predominate African markets'. See Honohan (n 19) 40.

62 Stuart Cohn, 'Teaching in a Developing Country: Mistakes Made and Lessons Learned in Uganda' (1998) 48 Journal of Legal Education 101.

63 ibid 102-103

country had developed markets and was informed that US securities law will be a useful comparator for comparative analyses. However, some checks prior to the commencement of the course revealed his assumptions as '*self-delusion extraordinaire*'. According to Professor Cohn:

> Nothing existed except the laws, a Capital Markets Authority that had no capital markets to regulate, and a stock exchange devoid of stock. Broker-dealers existed in name only, with nothing to trade and no experience in creating public issues… I had assumed that the statutes, regulations, and organizational structure reflected market realities and developments – an assumption based on US experience, where securities laws came well after the development of primary and secondary securities markets. I had never seen a different model and did not appreciate that sophisticated rules and institutions could be – and indeed had been – promulgated in an experiential vacuum.[64]

On this basis, Professor Cohn went ahead to make recommendations for scholars teaching in developing countries. The point on whether and how these 'sophisticated' rules divorced from market realities affect market development was not examined further. Thus, whilst scholars examining securities market development in sub-Saharan Africa often consider securities law to be important to market development, they have also raised the possibility of this law being either in advance of market realities or being too stringent and therefore deterring would-be issuers from coming to the market. The precise rules that potentially have this effect and the channels through which they potentially hinder market development has not come up for examination.

Similarly, global securities law scholarship has also examined the motives for and implications of securities cross-listing. The 'legal bonding hypothesis' predicts that firms will cross-list from jurisdictions with weak securities law and enforcement to countries

64 ibid 104.

with stronger securities law and enforcement to credibly commit to stronger minority investor protection and therefore improve the liquidity of their securities and reduce their cost of capital.[65] The alternate 'liquidity' hypothesis argues that firms will cross-list from countries with low levels of liquidity to countries with better liquidity.[66] To the best of my knowledge, only one previous study has examined cross-listing of African firms into global markets and only one previous study has examined the regional cross-listing of African firms within Africa. Emmanuel Ihejirika examines securities cross-listing by African firms into the US after the passage of the Sarbanes-Oxley Act, finding less cross-listing by African firms into the US than into the UK.[67] He concludes that both the compliance cost and strict governance standards imposed by Sarbanes-Oxley affect African firm's decisions to cross-list in or delist from the US.[68] Similarly, in 2009, Olatundun Adelagan conducted a study into regional cross-listing within sub-Saharan Africa.[69] Adelegan examined the impact of regional cross-listings on stock market depth using a panel dataset of 13 countries in sub-Saharan Africa from 1990 to 2007. She found that the value of stock traded on markets with regional cross-listings is much higher than that of countries without regional cross-listings and the growth of regional cross-listing

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65 See John Coffee Jr, 'Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications' (1998) 93 Northwestern University Law Review 641 (arguing that the easiest explanation for cross-listing into the US is that such listing is a form of bonding). See also John Coffee Jr, 'Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance' (2002) 102 Columbia Law Review 1757.

66 See Andrew Karolyi, 'Why Do Companies List Shares Abroad?: A Survey of the Evidence and its Managerial Implications' (1998) 7 Financial Markets, Institutions & Instruments 1; Craig Doidge, Andrew Karolyi and René Stulz, 'Why Are Foreign Firms Listed in the US Worth More?' (2004) 71 Journal of Financial Economics 205.

67 Emmanuel Ihejirika, *Barriers to Global Stock Listing Among African Companies: Is It Cost or Compliance*? (Lulu Publishing 2015).

68 ibid 139.

69 Olatundun Adelegan, *The Impact of the Regional Cross-Listing of stocks on Firm Value in Sub-Saharan Africa* (IMF 2009).

facilitated stock market development in those countries. She therefore concluded that regional cross-listing may help finance sub-Saharan Africa's corporate and developmental needs.[70] Given the dearth of legal scholarship on securities cross-listing in sub-Saharan Africa, to my knowledge, no previous legal studies have examined regional or trans-continental cross-listing. We therefore do not know whether securities cross-listing in sub-Saharan Africa is consistent with the bonding or liquidity hypothesis or what other patterns may exist in or explain the state of securities cross-listing in the region.

On technology, there is a recognition that the exponential growth in information and communication technology is disrupting global securities markets.[71] Amongst others, technology facilitates the speed of securities transactions, the automation of securities market participants, the growth of 'liquid' private markets and the mobilization of retail market participants. Sub-Saharan Africa has not been spared this disruption, driven primarily by an exponential growth in mobile phone ownership and the use of mobile phones to provide retail financial services.[72] The relevant literature has, however, focused on the impact of technology on the banking and payment systems, in recognition of the fact that technology has had a greater impact on banking and payments than on securities markets in sub-Saharan Africa.[73] No previous studies have therefore examined the role

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70 ibid 27.

71 See for instance Chris Brummer, 'Disruptive Technology and Securities Regulation' (2015) 84 Fordham Law Review 977. See also John Armour, Martin Bengtzen and Luca Enriques, 'Globalization' in Merritt Fox and others (eds), *Securities Market Issues for the 21st Century* (2018).

72 For a detailed consideration of these issues, see for instance see Jonathan Greenacre, 'The Regulation of Mobile Money' (DPhil Thesis, University of Oxford 2017). On the regulation of mobile money and other digital payments and financial services, see for instance Jonathan Greenacre, 'The Roadmap Approach to Regulating Digital Financial Services' (2015) 1 Journal of Financial Regulation 298.

73 For a detailed review of this, see Chapter 3, section 3.3.

Financial Technology (Fintech) plays in sub-Saharan Africa and its impact on the saliency of securities law in the region.

Finally, some commentators have examined enforcement and supervision. Although global scholarship on securities law enforcement posits that enforcement improves liquidity and can thereby foster market development,[74] there have been serious debates in the literature on whether public enforcement (i.e. enforcement by public securities regulators) or private enforcement (i.e. enforcement by private claimants and investors) is more amenable to market development. This debate was ignited by La Porta, Lopez-de-Silanes and Shleifer's 2006 paper on securities law.[75] The authors found little evidence that public enforcement benefits securities markets but strong evidence that laws mandating disclosure and facilitating private enforcement through liability regimes promote securities market development.[76] This prescription was supported by the World Bank, which, in recommending institutional changes to promote market development in developing countries, promoted rules on private enforcement as more important than public enforcement.[77] These prescriptions have been roundly criticised by legal scholars who have

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74 See for instance John Coffee Jr, 'Law and the Market: The Impact of Enforcement' (2007) 156 University of Pennsylvania Law Review 229. For a comprehensive review of the literature on enforcement of securities law, see Howell Jackson and Jeffery Zhang, 'Public and Private Enforcement of Securities Regulation' in Jeffrey Gordon and Wolf-Georg Ringe (eds) *The Oxford Handbook of Corporate Law and Governance* (OUP 2018).

75 La Porta, Lopez-de-Silanes and Shleifer, 'What Works in Securities Laws?' (n 55).

76 ibid 18 'Public enforcement plays, at best, a modest role in the development of stock markets. In contrast, the development of stock markets is strongly associated with extensive disclosure requirements and a relatively low burden of proof on investors seeking to recover damages'. See also Simeon Djankov and others, 'The Law and Economics of Self-Dealing' (2008) 88 Journal of Financial Economics 430.

77 The World Bank, 'Institutional Foundations for Financial Markets, <http://siteresources.worldbank.org/INTTOPACCFINSER/Resources/Institutional.pdf> accessed 26 January 2019, 'Stock market development is strongly correlated with private enforcement, but not much with public enforcement'.

argued that the methodology adopted in reaching these findings focused too heavily on the law on the books rather than other indicators of regulatory intensity.[78] Using a resource-based measure of enforcement (budget and staffing), Professors Jackson and Roe found that public enforcement performed at least as well as the measures of private enforcement found to be important to market development.[79] The literature on securities law enforcement in sub-Saharan Africa is patchy to say the least. To the extent considered in the literature, the focus has been on human capacity constraints of public regulators[80] and compliance culture.[81] No previous studies have therefore examined public and private enforcement in sub-Saharan Africa or the input (budget and staffing) and output (number of enforcement actions) within the region.

Market integration. Finally, the literature on securities market development in sub-Saharan Africa has considered market integration as a solution to the liquidity and scale problems facing several markets in sub-Saharan Africa.[82] Thus, Jacqueline Irving examines

78 See for instance Howell Jackson and Mark Roe, 'Public and Private Enforcement of Securities Laws: Resource-Based Evidence' (2009) 93 Journal of Financial Economics 207; Coffee Jr (n 74).

79 Jackson and Roe (n 78).

80 See Jacob Gakeri, 'Enhancing Securities Markets in Sub-Saharan Africa: An Overview of the Legal and Institutional Arrangements in Kenya' (2015) 1 International Journal of Humanities and Social Science 134, 160 'The [Capital Markets Authority of Kenya] has been attracting newly qualified and inexperienced professionals who leave after a short stint. Most importantly, the Authority has not established a reputation of professionalism, thoroughness and efficiency in discharging its mandate'. See also IMF, IOSCO Objectives and Principles of Securities Regulation: Detailed Assessment of Implementation, Nigeria (IMF 2013) 'Market participants do not perceive the [Nigerian Securities and Exchange Commission] as an attractive place to work for the most talented. The overall level of technical expertise in the key functions of the SEC is less than optimal. Its technological infrastructure appears to be insufficient to maintain efficient processes and support its statutory functions'.

81 Yartey (n 50) 25 'In Africa though, there are laws and rules for regulation and supervision. The real challenge is the shortage of experienced supervisors and the absence of a strong tradition favoring compliance with the rules and discouraging regulatory forbearance'.

82 For a detailed discussion on the case in favour of securities market integration in sub-Saharan Africa, see Chapter 6, section 6.1.

securities market integration in Eastern and Southern Africa and argues in favour of market integration in the two sub-regions and the adoption of the Johannesburg Stock Exchange as a regional trading hub.[83] This argument is echoed by Charles Okeahalam, who argues in favour of merging national exchanges in Southern Africa as a means of boosting the liquidity of domestic exchanges operating in the region.[84] Similar arguments have been given in the literature on the benefits of market integration.[85]

Two recent events have occurred in the drive towards market and economic integration in sub-Saharan Africa, which have not been picked up in the literature.

First, on 21 March 2018, the African Continental Free Trade Agreement (AfCFTA) was signed, creating one of the largest free trade areas in the world.[86] The AfCFTA has the potential to revolutionise cross-border trade and economic activity in sub-Saharan Africa, which can hold substantial promise for securities markets development in the region. The AfCFTA only came into effect for several countries (including Nigeria with Africa's largest economy) on 1 January 2021. Given how recently it came into effect, the discussion on its potential impact on securities market development has not been examined in previous studies.

Second, in 2018, the African Development Bank (AfDB) and the African Securities Exchanges Association (ASEA) launched the African Exchanges Linkage Program to link

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83 Jacqueline Irving, *Regional Integration of Stock Exchanges in Eastern and Southern Africa: Progress and Prospects* (IMF 2005).

84 Charles Okeahalam, 'Strategic Alliances and Mergers of Financial Exchanges: The Case of the SADC' (2005) 31 Journal of Southern African Studies 75.

85 See generally Chapter 6, section 6.1.

86 Kanzanira Thorington, 'African Continental Free Trade Area: A New Horizon for Trade in Africa' (*Council on Foreign Relations*, 10 June 2019) <https://www.cfr.org/blog/african-continental-free-trade-area-new-horizon-trade-africa>.

the trading infrastructure of seven African stock exchanges (i.e. the the exchanges in Morocco, Egypt, Kenya, Nigeria, Mauritius, South Africa and the BRVM). The AELP will grant sponsored access to brokers in each participating exchange to the trading and market infrastructure of other participating exchange. The AELP has the potential to be a game changer in tomorrow's African markets, given its pan-African reach, its backing by strong continental (as opposed to regional) institutions and its aim to turn the largest securities markets in sub-Saharan Africa into regional securities trading hubs to boost market liquidity. Again, given how recently the initiative was launched, to my knowledge, no previous legal studies have examined its potential impact on market development in the region.

The picture emerging from the literature is as follows: examination of securities market development in sub-Saharan Africa has largely been driven by economists and political scientists, while legal scholarship on securities markets in sub-Saharan Africa is thin. Many of the key issues that have been extensively debated in global securities law scholarship have therefore not come up for consideration in sub-Saharan Africa. To the best of my knowledge, there have been no prior legal studies examining securities cross-listing in sub-Saharan Africa, the role of Fintech in securities markets in the region and the extent to which it affects the saliency of securities law. Although the literature raises the possibility that securities law in some countries in the region may be in advance of their stage of market development or may otherwise deter potential issuers from listing, there has been no discussion on which rules of securities law have these potentially inhibiting effects. Similarly, the literature on market enforcement does not examine public and private enforcement in the region or permit an assessment of enforcement intensity by assessing

the inputs (budget and staffing) and output (enforcement activity) of regulators. Finally, whilst the discussion on market integration has been a lot more robust, it has not considered recent events that could have potentially significant effects on African securities markets of tomorrow.

Given the findings that banking sector development, macroeconomic stability and political institutions protecting property rights are important determinants of securities market development, a logical question to ask is why policymakers should devote scarce resources to reforming securities law rather than fostering the needed economic and political stability and institutional competence. At least two reasons can be given why securities law reform in sub-Saharan Africa is a worthy policy objective. First, consistent with the data examined above,[87] there is a clear recognition in the literature that despite decades of economic, political and banking sector reforms, access to finance and cost of finance remain two key limitations of business growth in sub-Saharan Africa.[88] Thus, in addition to wider reforms, policymakers in sub-Saharan Africa must deliberately engage with creative ways to directly improve access to finance. Second, securities law reform and macroeconomic and political reform are not necessarily mutually exclusive reform agendas and policymakers can usefully pursue both reform agendas simultaneously.

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87 See n 12-19 above and accompanying text.

88 Honohan (n 19) 33 (finding from a survey that African entrepreneurs identify cost of finance and access to finance as obstancles to business growth more regularly than entrepreneurs from other regions of the world). See also Arne Bigsten and others, 'Credit Constraints in Manufacturing Enterprises in Africa' (2003) 12 Journal of African Economies 104 (discussing the constraints to finance among small and large manufacturing firms in Africa). For a review of the literature on access to finance in sub-Saharan Africa, see Reyes Aterido, Thorsten Beck and Leonardo Iacovone, 'Access to Finance in Sub-Saharan Africa: Is There a Gender Gap?' (2013) 47 World Development 102.

1.4. Research Questions, Research Design and Methodology

1.4.1. Research Questions

This thesis will focus on the following questions:

1. Does the development of securities markets in sub-Saharan Africa matter, and to what extent do sub-Saharan African firms seek to bond themselves to better securities law or achieve greater liquidity through cross-listing?
2. What are the legal and institutional requirements needed to support well-functioning securities markets in sub-Saharan Africa and what role does financial technology play in securities markets in the region?
3. Do the formal rules of securities regulation hinder securities market development in sub-Saharan Africa?
4. How do countries in sub-Saharan Africa enforce securities law and what is the level of public and private securities law enforcement intensity in the region?
5. To what extent can the recent drive towards increased economic integration generally, and securities market integration specifically, address the problems of illiquidity and scale facing securities markets in sub-Saharan Africa?

1.4.2. Research Design and Methodology

To answer these questions, I adopt a multidisciplinary research methodology. I utilise developments in the law and economics and institutional economics literature to examine

the first two research questions in Chapters 2 and 3 of the thesis.[89] In addition, I use data from the stock exchanges and securities regulators to empirically assess the level of securities cross-listing within sub-Saharan Africa[90] and the intensity of supervision and enforcement.[91]

The thesis however adopts a primarily comparative approach. As outlined in the overview in Section 1.2 above, sub-Saharan Africa is made up of 48 countries, comprising 22 countries with independent stock exchanges, two integrated stock exchanges (covering 14 countries) and 12 countries without stock exchanges. Figure 1.4 provides a pictorial representation of securities markets landscape in sub-Saharan Africa.

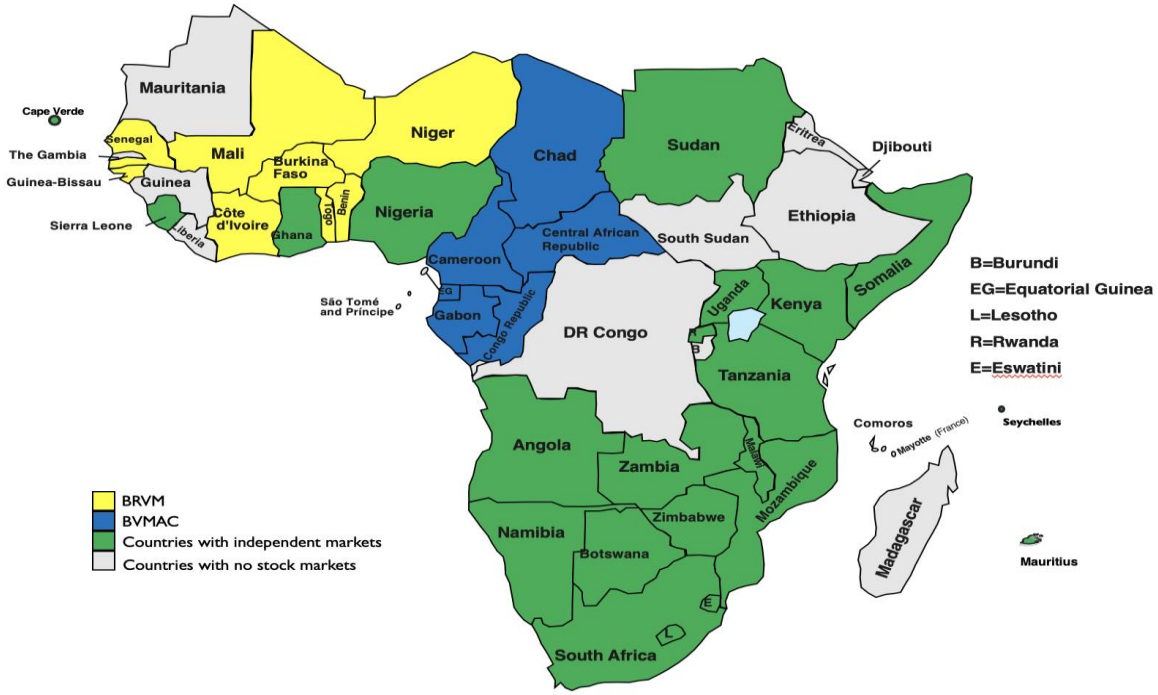

Figure 1.4 - Map Showing Securities Markets Operating in sub-Saharan Africa.

89 See generally, Chapter 2, section 2.1 and 2.2; and Chapter 3, section 3.1.

90 See generally, Chapter 2, sections 2.3.1 and 2.3.2.

91 See Chapter 5, section 5.3.2.

Given the large sample size, it was impossible to examine the securities regulation of all 24 stock exchanges in the region. The approach I therefore adopted was to select case studies. To ensure a robust analysis, I limited the sample size to three jurisdictions.

Three factors influenced the selection of the three countries for the comparative analysis. First, as a matter of pragmatism, data availability severely restricted the number of countries whose regulations could be effectively studied. There are a number of countries whose stock exchanges do not maintain up-to-date websites (e.g. Mozambique), or which do not have data in English (e.g. the BVMAC and Angola). This led to serious problems with data accessibility and (where data was available) data currency and comparability. This effectively ruled out all civil law jurisdictions (both French and Portuguese speaking) from the comparative analysis. Of the remaining jurisdictions, two additional factors shaped the selection of the case studies. First, given the diversity of sub-Saharan Africa, it was important to select jurisdictions that were representative of the geographical sub-regions within the region to take account of differences in practices in the different sub-regions. Since Central Africa (i.e. the BVMAC) had been excluded, I therefore selected one jurisdiction each from Eastern, Western and Southern Africa. Finally, I considered size and regional influence. On size, each jurisdiction selected was the largest stock exchange in its sub-region both in terms of market capitalization and number of listed companies. On regional influence, each jurisdiction selected had to be able to exert some level of influence on the economy and capital markets of countries in its sub-region both by the size of its domestic economy and the actual and potential level of cross-listing activity in its market. Taken together, the size and regional influence criteria meant that each jurisdiction had the potential to serve as a regional hub for securities listing

and trading in its sub-region.[92] One additional advantage of using the biggest and most influential country in each sub-region is that it is able to give a fair idea of how severe some of the problems facing the smaller markets might be.

Applying these criteria to the 24 securities markets presented in Table 1.1 revealed Kenya, Nigeria and Southern Africa as the largest securities markets in Eastern, Western and Southern Africa respectively.

Having selected the three jurisdictions for analysis, the next question to grapple with was how to select the comparative benchmark. Two options were possible: either compare the three jurisdictions against an external benchmark (i.e. a well-developed market outside of sub-Saharan Africa such as the UK, US, South Korea or Japan) or select an internal benchmark (i.e. an African country with a relatively well-developed market). Either option has its strengths and shortcomings. Thus, whilst an external benchmark will better enable conclusions to be drawn, and recommendations made on all three jurisdictions, theoretically, it is unclear what a suitable external benchmark should be, particularly given the different institutional contexts prevalent in the different countries. Furthermore, including an external benchmark will require examining securities regulation in four jurisdictions, which will be challenging considering the amount of ground this thesis sets out to cover. On the other hand, using an internal benchmark retains the focus on three jurisdictions in sub-Saharan Africa, although it means that conclusions can only be drawn on two jurisdictions which can then provide lessons for other jurisdictions in similar circumstances. This thesis adopts an internal comparison. Pragmatically, it provides the

[92] I discuss developing regional hubs for securities markets in sub-Saharan Africa in more detail in Chapter 6.

better chance at a focused analysis on the securities regulation of the selected jurisdictions. Theoretically, it provides a more defensible selection of a benchmark country and thus avoids the seemingly intractable problems facing the choice of a suitable external benchmark.

Which of Kenya, Nigeria and South Africa provides the most suitable benchmark for the analysis? Irrespective of how market development is measured, South Africa is a significant outlier in the African continent and far outperforms Kenya and Nigeria (and indeed every other country in the continent). Indeed, as of 2007, South Africa accounted for about 90% of the combined market capitalization of the entire African continent.[93] South Africa's exceptionalism over an extended period can be shown using three charts measuring indicators of market size and market liquidity:

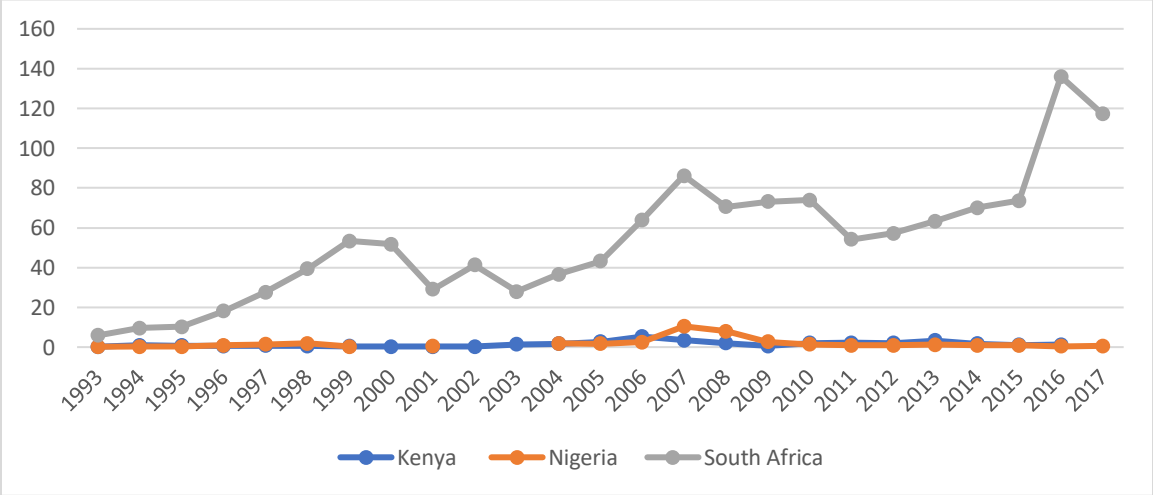

Figure 1.5 - Total value of shares traded (% of GDP) in Kenya, Nigeria and South Africa (1993-2017)[94]

93 Yartey and Adjasi (n 50).

94 Source: The World Bank.

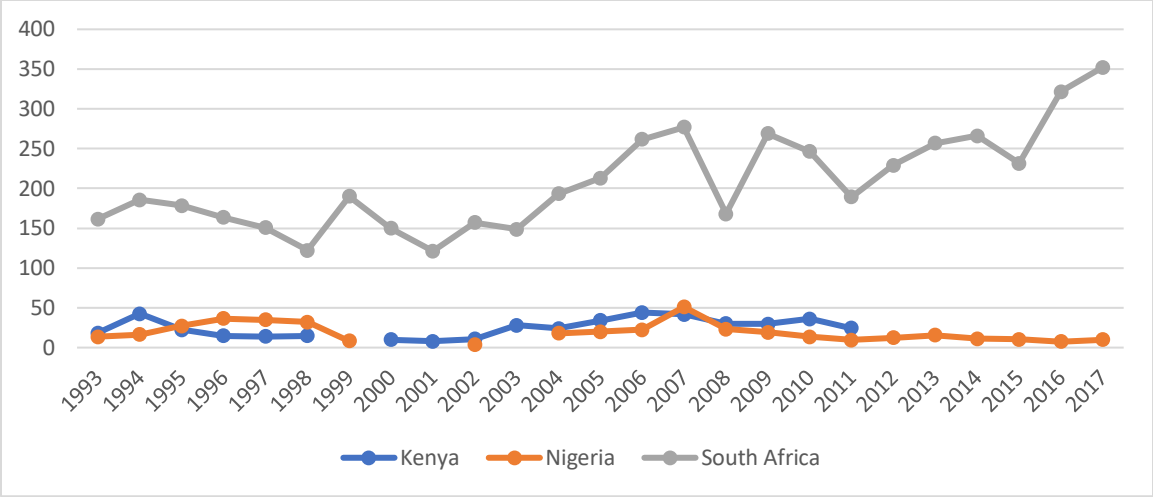

Figure 1.6 - Market Capitalization (% of GDP) in Kenya, Nigeria and South Africa (1993-2017)[95]

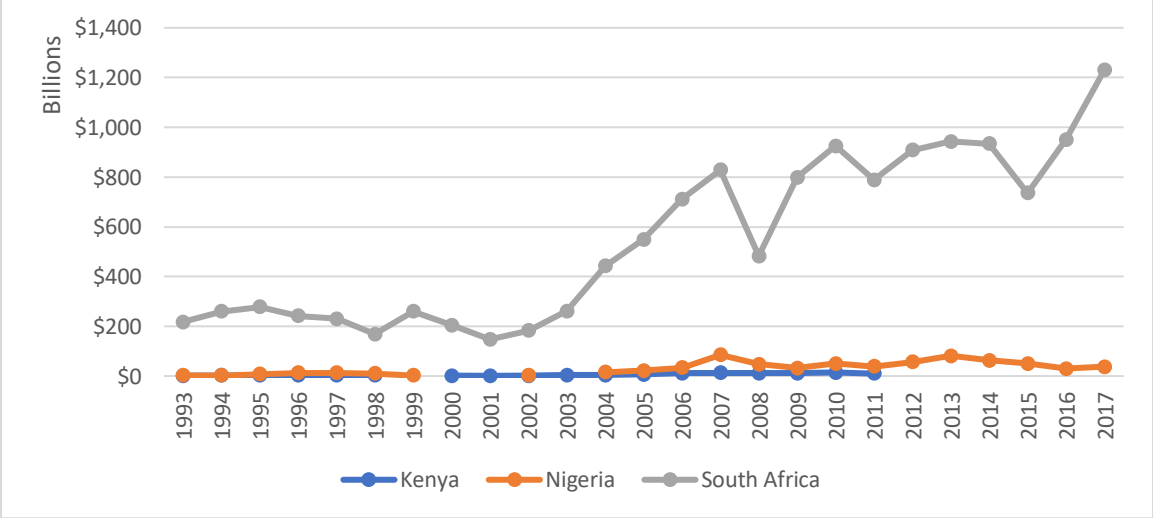

Figure 1.7 - Market Capitalization (US$) Kenya, Nigeria and South Africa (1993-2017)[96]

As the charts above reveal, viewed both in absolute terms and relative to the size of its economy, South Africa has always been an outlier and maintained a significantly larger

95 Source: The World Bank.

96 Source: The World Bank.

and more developed market than either Kenya or Nigeria. Similarly, South Africa has consistently been able to attract more IPOs than Kenya or Nigeria as shown in Figure 1.8.

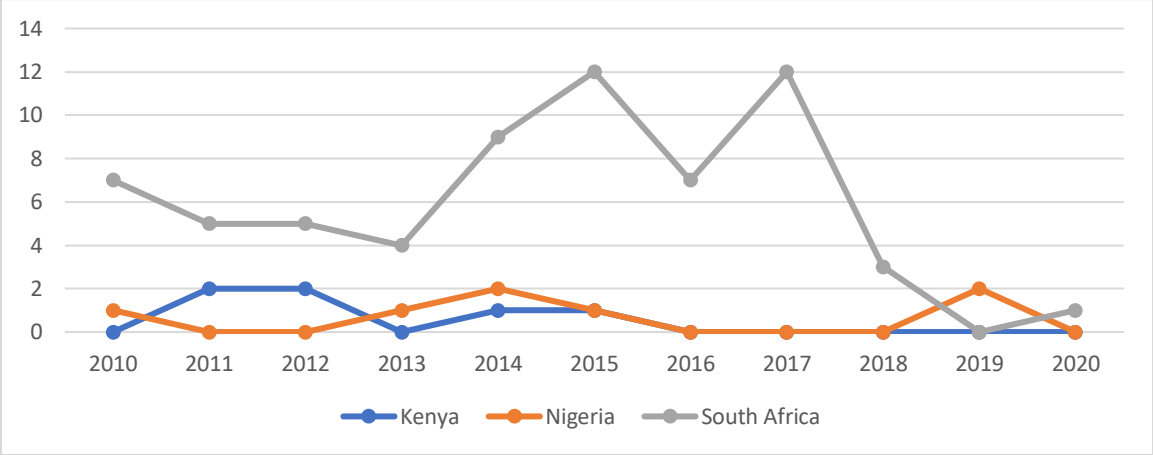

Figure 1.8 - Number of IPOs in Kenya, Nigeria and South Africa (2010-2020)[97]

However, as seen in Figure 1.9, the size of the JSE relative to the South African economy is striking from a global perspective. This makes it important to comment briefly on the circumstances leading to South Africa becoming an outlier and why South Africa can still be relied on as a comparative benchmark for sub-Saharan African countries.[98]

97 Source: PwC Africa Capital Markets Watch 2020. The chart reports data for both the main markets and the alternate markets.

98 See Figure 1.8 below.

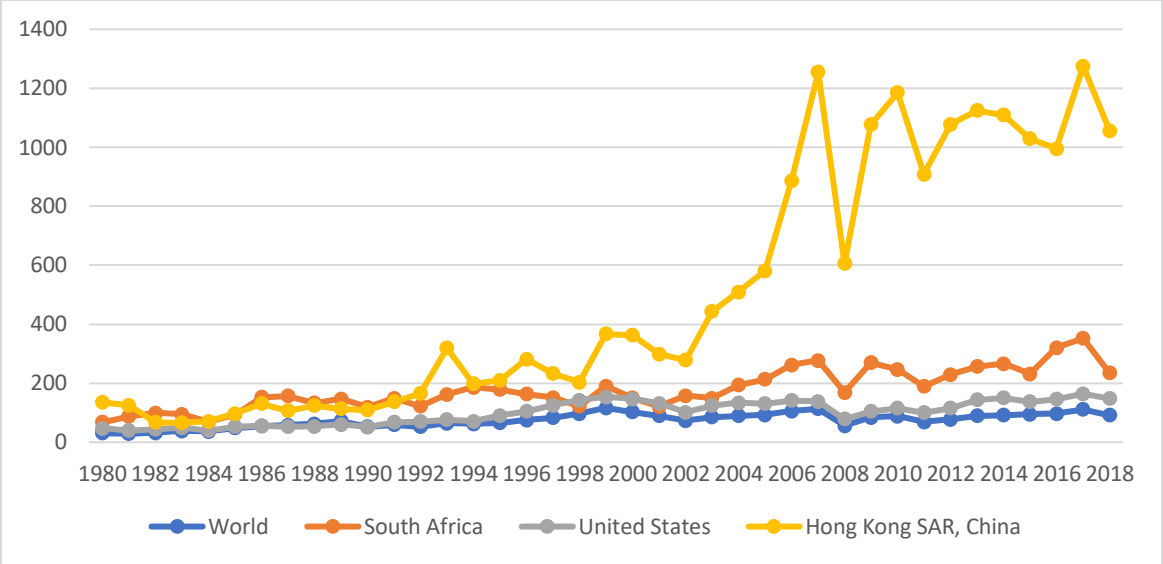

Figure 1.9 - Market Capitalization (% of GDP) - South Africa, United States, Hong Kong and World Average (1980-2018)[99]

As the chart reveals, South Africa has a market capitalization ratio that is significantly higher than the world average and that of the US. South Africa has had a market capitalization ratio of over 200% since 2005, rising to a peak of 352% in 2017. However, South Africa's market capitalization ratio has remained below that of Hong Kong, which has had a market capitalization ratio of over 600% since 2006, reaching a peak of 1274% in 2017.[100]

South Africa's outlying position can be traced to its unique history. Mineral mining has been a major component of the South African economy since the 1870s, producing an oligopolistic market in which less than 10 British, French and German groups had control of the country's 124 gold mines which in total produced over a quarter of the world's gold

99 Source: The World Bank.

100 ibid. Other global outliers include Switzerland (204% in 2018) and Saudi Arabia (whose market capitalization ratio rose dramatically from 63% in 2018 to 303% in 2019 following the listing of Saudi Aramco).

output.[101] This created very large mining companies which dominated the JSE for close to a century.[102] Following the imposition of economic sanctions on the apartheid regime in the 1980s and currency control restrictions imposed by the government, South Africa became increasingly isolated from the global economy. This limited further investments into the country, the cross-border expansion of large companies and the ability of these companies to repatriate capital and profits outside South Africa. As a result, cash-heavy big businesses in South Africa were forced to turn their attention to other sectors of the domestic economy and purchase significant stakes in other business sectors, leading to the growth of large, diversified conglomerate businesses[103] and the growth of the JSE's market capitalization relative to the size of the economy.[104] Thus, at the demise of apartheid and the attainment of independence in 1994, South Africa inherited a highly developed financial system for a middle income country and market participants who were experienced in deal making and finance.[105] Since then, South Africa's corporate growth and large stock market has been maintained by the growth of the services industry, a large consumer class creating a ready market for large consumer companies, relatively strong

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101 See Neo Chabane, Andrea Goldstein and Simon Roberts, 'The Changing Face and Strategies of Big Business in South Africa: More Than A Decade of Political Democracy' (2006) 15 Industrial and Corporate Change 549.

102 ibid. Indeed, as of 1985, Anglo American Corporation, the largest mining company in South Africa accounted for over 50% of the JSE's market capitalization, and the top 5 companies accounted for over 80%.

103 See Sam Ashman, Ben Fine and Susan Newman, 'Amnesty International? The Nature, Scale and Impact of Capital Flight from South Africa' (2011) 37 Journal of Southern African Studies 7; Sam Ashman, Ben Fine and Susan Newman, 'The Crisis in South Africa: Neoliberalism, Financialization and Uneven and Combined Development' (2011) 47 Socialist Register 174. For instance, Anglo American Corporation diversified into explosives and mining equipment, banking, steel, paper, chemicals, engineering and consumer goods (beer and furniture). See Chabane, Goldstein and Roberts (n 101) 551.

104 Indeed, South Africa's market capitalization ratio grew three-fold from 67% in 1980 at 185% at independence in 1994.

105 Ashman, Fine and Newman, 'The Crisis in South Africa' (n 103) 181.

institutions and the regional expansion of South African businesses outside of South Africa.[106]

Thus, the circumstances that led to South Africa developing a stock market that is multiple times the size of its domestic economy are unlikely to replicate themselves in other countries in sub-Saharan Africa barring sudden market events[107] or the long-term transformation of domestic markets into regional financial centres.[108] Consequently, other countries following a normal market development path can reasonably expect a more normal growth curve even if they are adopting South African securities law as a guide.[109] Therefore, South African securities law and enforcement can still serve as a useful comparative benchmark for Kenya and Nigeria as the country has been better able to continuously attract and sustain market participation[110] and the three countries have fairly similar levels of institutional development.[111]

Figure 1.10 shows the comparative analysis, which is primarily deployed in Chapters 4 and 5 of the thesis. In both chapters, where I obtained data in domestic currency

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106 See McKinsey & Company, 'Lions on the Move II: Realizing the Potential of Africa's Economies' (McKinsey Global Institute, September 2016), <https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Middle%20East%20and%20Africa/Realizing%20the%20potential%20of%20Africas%20economies/MGI-Lions-on-the-Move-2-Full-report-September-2016v2.pdf> accessed 27 March 2021.

107 For instance, as happed in Saudi Arabia with the listing of Saudi Aramco. See n 100 above.

108 For instance, as is the case in Switzerland and Hong Kong. See Figure 1.8 and n 100 above.

109 This is the case with the countries in the Southern African Development Community which have adopted the listing requirements of the Johannesburg Stock Exchange. See Chapter 6, section 6.3.2.

110 Figures 1.5, 1.7 and 1.8 above.

111 See the discussion on the prevailing political and institutional context in sub-Saharan Africa (Chapter 3, section 3.2.1). Overall, Mauritius and Rwanda are identified as the countries with the best institutions in sub-Saharan Africa and South Africa is frequently ranked as having a fairly similar level of institutional development as Kenya and Nigeria.

(i.e. South African Rand, Nigerian Naira or Kenyan Shilling), I convert the currency to US Dollar and round off to the nearest $1000 for ease of comparability.[112]

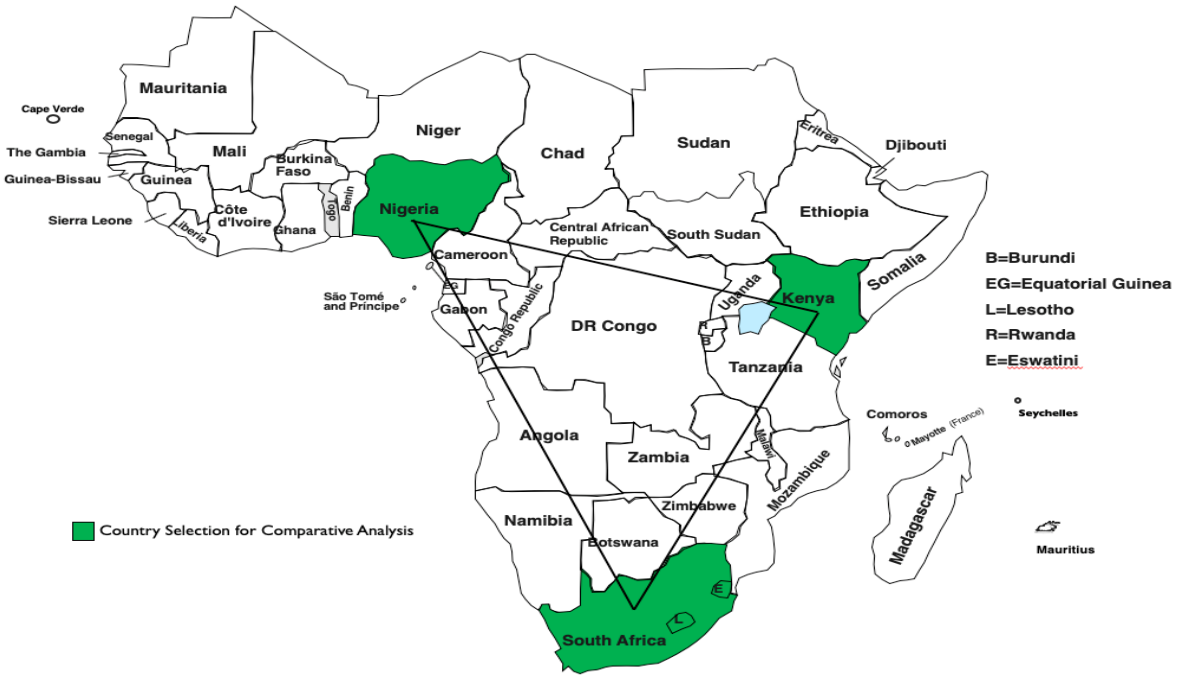

Figure 1.10 - Map showing the Selected Countries for the Comparative Analysis

Chapter 6 of the thesis calls for a different type of comparative analysis i.e. one involving regions instead of specific countries. In this Chapter, I examine East Africa, Southern Africa and West Africa as sub-regional blocks. Each of these sub-regions has a Regional Economic Community (REC)[113] championing moves towards greater economic and capital markets integration. The regional analysis is depicted in Figure 1.8

112 For all 3 countries, I use the exchange rate as at 31 December 2019 as published by the US Treasury Department. This translated to US$1 = ZAR14.056 (South Africa); US$1 = NGN361.00 (Nigeria); and US$1 = KES101.25 (Kenya). See <https://www.fiscal.treasury.gov/files/reports-statements/treasury-reporting-rates-exchange/ratesofexchangeasofdecember312019.pdf>.

113 These are the East African Community (EAC), the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC).

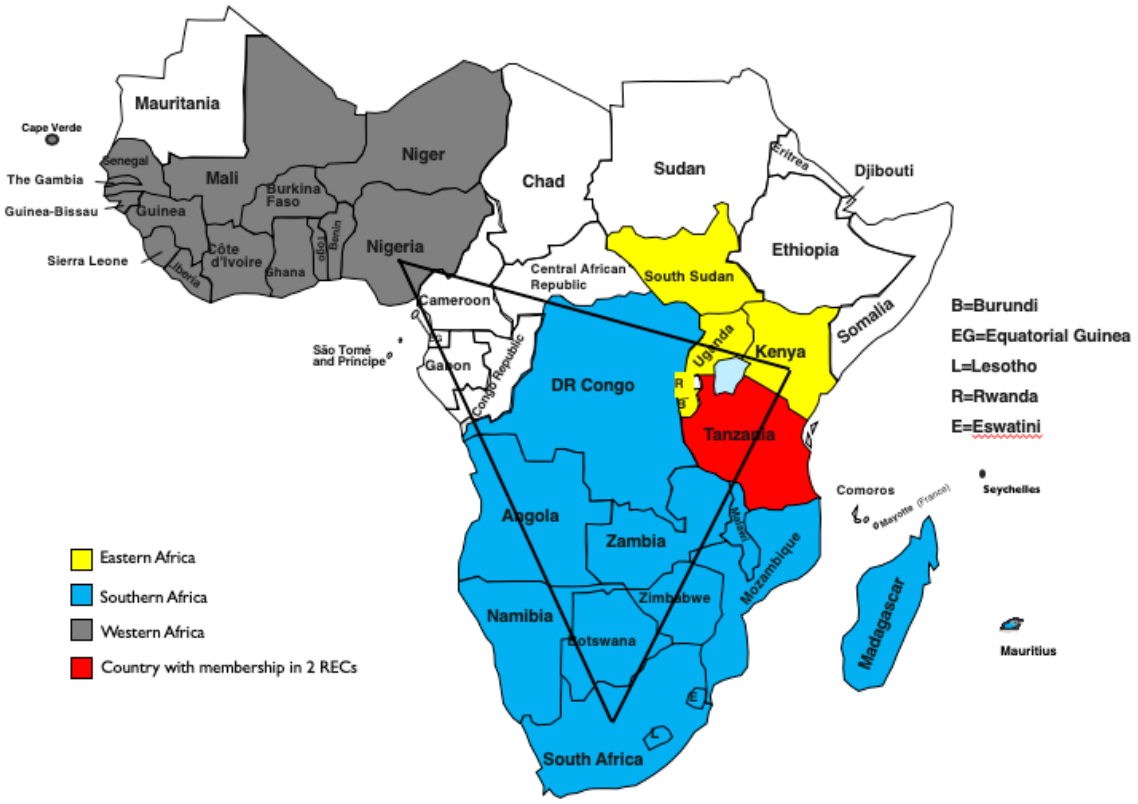

Figure 1.11 - Map showing the Regional Comparative Analysis

1.5. Contributions to the Literature

In the process of answering its five research questions, this research makes five significant contributions to our understanding of securities markets in sub-Saharan Africa.

First, the research argues that securities market development matters for sub-Saharan Africa and neither the bonding nor the liquidity hypothesis properly explain regional securities cross-listing in sub-Saharan Africa. In reaching these conclusions, the research significantly improves our understanding of securities cross-listing in sub-Saharan Africa. As set out in the literature review, the bonding hypothesis predicts that firms will cross-list from countries with weak securities law and enforcement to countries with stronger securities law and enforcement. The alternate liquidity hypothesis predicts that

firms will cross-list from countries with low liquidity to countries with higher liquidity.[114] There have been two prior studies on securities cross-listing in sub-Saharan Africa,[115] and neither of them has examined these hypotheses. By exploring the evidence of securities cross-listing within sub-Saharan Africa, this research finds patterns not previously picked up in the literature. First, unlike either theory predicts, there is more cross-listing activity from issuers in sub-Saharan African countries with more developed markets into countries with less developed stock markets (for example, issuers from South Africa cross-listing into Namibia, or issuers from Kenya cross-listing into Uganda). Second, there is a tendency for firms pursuing cross-listing to cross-list their securities into geographically and culturally proximate countries (mostly within their own sub-regions) in which they have operations. Third, the patterns of cross-listing mirror patterns of intra-regional trade, with sub-regions engaging in more intra-regional trade generally witnessing more securities cross-listing. The evidence confirms that firms in countries with no securities markets or with comparatively less developed markets are not raising capital by cross-listing either trans-continentally (i.e. into the US or UK) or regionally (into other countries in sub-Saharan Africa). The evidence also suggests that by improving trading relationships within the continent, one of the benefits of the AfCFTA may be to increase cross-listing activity, further improving market depth in the region.

Second, the research argues that rules mandating disclosure and constraining value expropriation are traditional institutions that are helpful in fostering market development in sub-Saharan Africa and given the role Fintech is playing in the region, these institutions

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114 See n 65-66 above and accompanying text.

115 See 67-70 above and accompanying text.

are likely to become more and not less salient. In reaching these conclusions, the research significantly improves our understanding of the role of Fintech in securities markets in sub-Saharan Africa. As noted in the literature review, prior studies on Fintech in sub-Saharan Africa have focused on the impact of Fintech on the banking and payment sectors and no prior studies have examined its role in securities markets in sub-Saharan Africa or its impact on the saliency of securities law in the region.[116] By examining Fintech solutions specifically deployed in securities markets in sub-Saharan Africa, this research argues that consistent with the documented explosion in mobile phone ownership in sub-Saharan Africa, Fintech solutions primarily aim to mobilize retail participation in securities markets by facilitating information dissemination and trading through mobile phones. Unlike markets in developed countries where Fintech solutions sometimes question the saliency of securities law, Fintech solutions deployed in sub-Saharan Africa make traditional rules of securities law more, not less, salient.

Third, the research calls for pragmatism in maintaining the balance between strict rules of securities regulation, and initial and ongoing compliance cost of issuers on the market. Whilst strict rules of disclosure and financial transparency are required for the proper functioning of securities markets, the reality is that compliance with these rules imposes fixed costs that can fall disproportionately on small-sized firms. Prior literature noted that 'sophisticated' and 'impressive' securities laws in sub-Saharan Africa may be divorced from market realities[117] and that securities law may raise entry cost and thus deter

116 See n 72-73 above and accompanying text.

117 Cohn (n 62) 102-104.

would-be issuers from entering the market.[118] However, given the dearth of legal scholarship on securities law in sub-Saharan Africa, this point has not been explored further and the precise rules that may have this effect and the channels through which these rules potentially hinder market development have not come up for examination. This thesis covers this gap in the literature by identifying certain listing eligibility requirements and disclosure rules as potentially having this effect. In the case of listing eligibility requirements, certain rules proxy issuer size for issuer quality. Given the constraints firms often face in accessing finance from banks and other domestic sources in sub-Saharan Africa, many firms may not be able to access finance to grow to a stage where they can pursue a public listing. With regards to disclosure obligations, rules mandating frequent disclosure can impose fixed compliance costs that are not sufficiently compensated by improved liquidity or reduced cost of capital. The research therefore expands on the literature on the potentially constraining effect of securities law in sub-Saharan Africa and advocates for a better balance between strict rules of securities regulation and initial and ongoing compliance cost.

Fourth, the research significantly improves our understanding of securities law enforcement in sub-Saharan Africa. Although prior studies have identified poor enforcement as one of the factors impeding the growth of securities markets in sub-Saharan Africa,[119] it was not clear what was wrong with enforcement and how to improve securities law enforcement in the region. By examining the formal powers of securities regulators, as well as the input (budget and staffing) and output (evidence of securities law enforcement

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118 See Honohan (n 19) 40.

119 See n 80-81 above and accompanying text.

actions) of securities regulators in Kenya, Nigeria and South Africa, this research finds that the problem with enforcement may not be an input problem but rather an output problem (i.e., regulatory powers, budget and staffing have not translated into effective enforcement on ground). Weak public enforcement is complemented by even weaker private enforcement. Consequently, although jurisdictions maintain stringent private liability rules and give wide-ranging powers to public regulators, supervision and enforcement remain weak, which in turn contributes to the persistence of undeveloped markets in sub-Saharan Africa.

Fifth, this research improves our understanding of the drive towards regional integration of securities markets in sub-Saharan Africa. A large body of literature has arisen in support of market integration as a strategy to develop securities markets operating in sub-Saharan Africa.[120] By situating this drive towards securities market integration within the broader economic and political integration agendas underway in the region, exploring the progress made and challenges faced with integration efforts in the region, and examining the impact of the AfCFTA and AELP to securities market integration, this research advances the claim that market integration cannot properly be viewed as a short/medium term solution to the problems of scale and illiquidity facing securities markets in the region. African states must therefore continue pursuing the integration agenda as a long-term strategy, but in the short/medium term, focus on deploying market enhancing rules of securities regulation and strengthening enforcement capability.

[120] See n 82-86 above and accompanying text. See also Chapter 6, section 6.1.

1.6 Research Limitations

As one commentator notes, 'no work on the geographical scale of sub-Saharan Africa, with its great diversity of financial and economic systems and disparate levels of development can pretend to be either comprehensive or free of error'.[121] This thesis is therefore subject to the following important limitations.

First, the comparative methodology adopted in this thesis has some limitations. It is extremely difficult, if not impossible, to draw firm conclusions on the impact of laws on the books on market development using a qualitative comparative methodology. Given that laws on the books are only one variable (albeit an important one)[122] in the several factors that affect market development, it is difficult to draw direct lines between laws on the books and market development as various other factors independent of the state of the law on the books undoubtedly influence market development. Thus, although a comparative analysis can identify useful instances where a country may be adopting restrictive rules when compared against better performing markets with similar institutional characteristics, it is unable to show a causal relationship between those rules and market underdevelopment. Therefore, the comparative analysis adopted in this thesis does not aim to reach firm conclusions on whether the formal rules of securities regulation actually hinder market development in sub-Saharan Africa. Rather, it develops the case (consistent with similar

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121 Andrew Lovegrove and others, *Financial Sector Integration in Two Regions of Sub-Saharan Africa: How Creating Scale in Financial Markets can Support Growth and Development* (Working Paper: Making Finance Work for Development, World Bank, 2007) 1.

122 Although, as argued in Section 5.1 of this thesis, credible enforcement is crucial to market development, there is a recognition that 'effective law enforcement is not a substitute for poor laws on the books'. See Katharina Pistor, Martin Raiser and Stanislaw Gelfer, 'Law and Finance in Transition Economies' (2000) 8 Econ of Transition 325, 356.

arguments in the literature)[123] that this is a real possibility, and draws out key issues and questions which can be examined and answered more conclusively in subsequent, country-specific, empirical work. I frame an agenda for future research in the final Chapter of this thesis.[124]

Second, given that the three jurisdictions examined are common law countries with independent markets, the thesis does not contribute to the literature on whether common law or civil law origins have impeded or strengthened market development or whether independent or integrated markets are better suited for sub-Saharan Africa.

Third, given the use of case studies and the adoption of South Africa as the comparative benchmark, the focus of the comparative analyses will be on how Kenyan and Nigerian securities laws and enforcement compare with that of South Africa. Although the lessons from these countries may be useful for other countries in the region, care must be taken in applying the conclusions reached to other markets.

Finally, this thesis limits its analysis only to the consideration of specific issues in securities regulation, enforcement and market integration. In doing so, the thesis does not make the claim that these are the only problems facing securities markets in sub-Saharan Africa[125] or that resolving these issues will necessarily lead to well-functioning markets in the region, at least in the short term. Rather, the thesis argues that the issues it considers are necessary (but insufficient) for the development of well-functioning markets in the

123 See n 61-64 above and accompanying text.

124 See Chapter 7, section 7.4.3.

125 For instance, the thesis does not examine corporate governance, intermediary regulation or the development of institutional investors, all of which are undoubtedly also helpful for securities market development in the region.

region. In this sense, the thesis attempts to lay a foundation on which reform agendas can be based and further research can be built.

1.7 Overview of Thesis

This thesis is structured as follows: Chapter 2 begins the substantive discussions in the thesis by engaging the first research question. This Chapter argues that development of securities markets in sub-Saharan Africa matters for two main reasons. First, there is empirical and historical evidence to support the proposition that liquid securities markets correlate with economic growth. Second, financing practice shows that cross-listing has not provided a suitable alternative source of long-term finance to sub-Saharan African firms, making the development of domestic markets and domestic regulation crucially important.

Chapter 3 engages the second research question and examines institutions and the role of financial technology. This Chapter identifies rules promoting timely and faithful disclosure and prohibiting market abuse, as well as the enforcement of those rules as traditional institutions that help to foster well-functioning equity markets. In addition, it discusses different paths states may take to develop their markets even in dysfunctional institutional settings, and argues that the traditional institutions supporting well-functioning markets are likely to remain salient in the foreseeable future in sub-Saharan Africa given the role Fintech is playing in the region.

Chapter 4 addresses the third research question by examining formal rules of securities regulation. Adopting the comparative analysis discussed above, this Chapter argues that rules of securities regulation potentially hinder securities markets development

in sub-Saharan Africa. They do so in three primary ways. First, by imposing high listing requirements that prospective issuers may struggle to meet given the state of financial development in the region. Second, by imposing stringent disclosure obligations that create initial and ongoing compliance costs which are not justified by improved liquidity or reduced cost of capital. Third, by relying on criminal sanctions in enforcing their market abuse regimes, which increase the standard of proof on regulators and reduce the ability of regulators to successfully conclude enforcement actions.

Chapter 5 addresses the fourth research question. Adopting the same methodology as in Chapter 4, this Chapter argues that supervision and enforcement in the select countries is largely ineffectual. Regarding public enforcement, it argues that the problem is not necessarily an input problem (i.e. poor budgets or low staffing). Rather, there appears to be an output problem (i.e. resources employed achieve sub-optimal outcomes). Poor public enforcement in turn reinforces poor private enforcement, which restrictive rules of court practice and procedure also negatively affect.

Chapter 6 engages the final research question. States and policymakers in sub-Saharan Africa have shown a renewed commitment towards economic and market integration as a means of addressing economic and market underdevelopment in the region. Whilst acknowledging the potentially positive impact market integration can have on securities markets in the region, this Chapter argues that for several economic, political and socio-cultural reasons, market integration is unlikely to have a transformational effect on securities markets in sub-Saharan Africa in the short to medium term. Policymakers must therefore continue to develop their domestic markets in the short-term, whilst pursuing broader long-term integration initiatives.

Chapter 7 concludes the thesis, providing a summary of the principal findings, recommendations for policymakers, as well as a suggested agenda for further research.

Unless otherwise stated, internet sources used in this thesis were last accessed on 5 November 2020.

CHAPTER 2 – DEVELOPING SECURITIES MARKETS IN SUB-SAHARAN AFRICA: DOES IT MATTER?

Economists and economic historians have long examined the impact of securities markets on the real economy.[1] In theory, securities markets can promote economic growth by, amongst others, mobilizing savings to the most efficient economic uses and providing firms with access to long-term capital. Properly regulated, these markets can be viable catalysts for economic growth in both developed and developing countries.

However, if securities markets promote economic growth by providing capital to firms, the same outcome may be achieved by firms raising capital by cross-listing. A firm cross-lists its securities when it has securities admitted to trading in a market outside of its domestic jurisdiction. Legal academics and economists identify various reasons for cross-listing including the search for lower cost of capital,[2] the need to signal the quality of the

1 Ross Levine, 'Stock Markets, Growth, and Tax Policy' (1991) 46 Journal of Finance 1445; Ross Levine, 'Financial Development and Economic Growth: Views and Agenda' (1997) 35 Journal of Economic Literature 688; Ross Levine and Sara Zervos, 'Stock Markets, Banks, and Economic Growth' (1998) 88 American Economic Review 537; Asli Demirgüç-Kunt and Vojislav Maksimovic, 'Law, Finance, and Firm Growth' (1998) 53 Journal of Finance 2107; Ross Levine, 'Napoleon, Bourses, and Growth: With a Focus on Latin America' in O Azfar, C Cadwell and Ann Arbor (eds), *Market Augmenting Government* (University of Michigan Press 2003).

2 René Stulz, 'Golbalization, Corporate Finance, and the Cost of Capital' (1999) 12 Journal of Applied Corporate Finance 8 (arguing that globalisation improves corporate governance and thereby lowers the cost of capital); Craig Doidge, Andrew Karolyi and René Stulz, 'Why Are Foreign Firms Listed in the US Worth More?' (2004) 71 Journal of Financial Economics 205 (arguing that a US listing benefits a foreign firm by reducing its cost of outside finance by providing it with cheaper equity finance and by providing access to the deeper US and Eurobond markets).

firm's projects,[3] or for firms to bond themselves to better corporate practices.[4] Cross-listing from this perspective has both economic and legal implications.

From an economic standpoint, of what benefit would domestic markets be, if issuers can cross-list their securities on foreign exchanges at minimal cost? Does cross-listing serve the same economic function as domestic markets, or do domestic markets themselves contribute to economic growth independent of the ability of firms to cross-list?

From a legal standpoint, is the examination of the domestic securities regulation of developing countries justifiable, since, by cross-listing, firms voluntarily subject themselves to the stricter securities laws of developed markets? Legal academics, led by Professor Coffee, have theorised that by cross-listing, foreign firms can voluntarily and credibly commit themselves to better disclosure and minority protection standards, and this bonding (the 'legal bonding hypothesis') better explains the increased valuation of firms that cross-list into the US.[5] In this way, firms from developing countries can effectively 'rent' US securities law. The bonding hypothesis has been criticised in the academic literature. Some commentators have argued that firms cross-list their securities into the US not to rent its securities laws, but to avoid strict public enforcement (the 'avoiding

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3 John Coffee Jr, 'Law and the Market: The Impact of Enforcement' (2007) 156 University of Pennsylvania Law Review 229 (hereafter '*The Impact of Enforcement*') (arguing that if a firm believes it has superior investments opportunities, it may cross-list into the US to signal this fact).

4 John Coffee Jr, 'Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications' (1998) 93 Northwestern University Law Review 641(hereafter '*The Future as History*') (arguing that the easiest explanation for cross-listing into the US is that such listing is a form of bonding). See also John Coffee Jr, 'Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance' (2002) 102 Columbia Law Review 1757 (hereafter "*Racing Towards the Top?*").

5 Coffee Jr, 'The Future as History' ibid; Coffee Jr, 'Racing Towards the Top?' ibid; Coffee Jr, 'The Impact of Enforcement (n 3).

hypothesis').[6] Others have argued that 'reputational bonding' (i.e. cross-listing into the US to increase reputational capital),[7] or cultural factors[8] better explain cross-listing.

Although these debates have been considered in relation to different regions in the world, there is a noticeable gap in the literature on cross-listing in sub-Saharan Africa. This Chapter addresses this gap and, in the process, contributes to the debate on the relationship between securities markets and economic growth. Its conclusions that securities markets contribute to economic growth and that cross-listing into developed markets has not provided a viable alternative source of capital to sub-Saharan African firms, justifies the development of domestic securities markets and the examination of domestic securities regulation in the region.

This rest of this Chapter is structured as follows: Section 1 provides a theoretical analysis of the relationship between securities markets and economic growth, discussing the economic debates on the relevance or irrelevance of securities markets to economic growth. Section 2 examines the empirical evidence on the relationship between securities markets and economic growth, in the process identifying the crucial feature of securities markets that make them catalysts of economic growth. Given that the intention in both sections is to provide a foundation on which this thesis is based, sections 1 and 2 are in the nature of an extended review of the relevant economic literature. Section 3 then engages the cross-listing debate as pertains to sub-Saharan Africa. Using data on cross-listing in the

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6 Amir Licht, 'Cross-Listing and Corporate Governance: Bonding or Avoiding' (2003) 4 Chicago Journal of International Law 141. See also n 90 and accompanying text.

7 Jordan Siegel, 'Can Foreign Firms Bond Themselves Effectively By Renting US Securities Laws?' (2005) 75 Journal of Financial Economics 319. See also n 91 and accompanying text.

8 Amir Licht, 'Legal Plug-ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform' (2004) 22 Berkeley Journal of International Law 195.

UK, the US and all 24 sub-Saharan African stock exchanges, I argue that cross-listing has not played a meaningful role in financing sub-Saharan African firms in countries without stock exchanges or with less developed exchanges. Section 4 concludes.

2.1 Securities Markets and Economic Growth: Theoretical Analysis

The literature on the link between securities markets and economic growth broadly divides the competing views into two hypotheses: the relevance hypothesis and the irrelevance hypothesis.[9] This Section discusses these hypotheses, identifying the key channel through which securities markets affect the wider economy. This Section discusses developing countries generally and sub-Saharan Africa specifically where necessary.

2.1.1 The Relevance Hypothesis

The relevance hypothesis posits that securities markets are relevant to economic development.[10] The key feature that makes markets relevant is liquidity.[11]

According to its proponents, securities markets improve the allocation of capital to more productive uses, thus enhancing the prospects for long-run growth.[12] A number of

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9 Ted Azarmi, Daniel Lazar and Joseph Jeyapaul, 'Is the Indian Stock Market a Casino?' (2011) 3 Journal of Business & Economics Research 63. A third thread of theoretical arguments can be gleaned from the available literature i.e. that in certain circumstances, securities markets can be detrimental to economic growth. See Asli Demirgüç-Kunt and Ross Levine, 'Stock Markets, Corporate Finance, and Economic Growth: An Overview' (1996) 10 World Bank Economic Review 223. On the potentially negative impact of securities markets on economic growth, see Joseph Stiglitz, 'Markets, Market Failures, and Development' (1989) 79 The American Economic Review 197; Ajit Singh, 'The Stock Market and Economic Development: Should Developing Countries Encourage Stock Markets?' (1993) 4 UNCTAD Review 1.

10 Azarmi, Lazar and Jeyapaul (n 9) 64, 'The alternate relevance hypothesis may be stated as follows: the stock market serves significant economic functions even in those economies in which there already exists a well-developed banking sector'.

11 Lemma Senbet and Isaac Otchere, 'African Stock Markets: Opportunities and Issues' in Marc Quintyn and Geneviève Verdier (eds), *African Finance in the 21st Century* (IMF 2010) 104.

12 Demirgüç-Kunt and Levine (n 9) 229.

valuable projects in the economy require long-term finance that either banks or founders are unwilling or unable to provide. In the absence of liquid securities markets, investors considering these projects risk their funds being tied down for longer than they may be comfortable with. Consequently, they either refuse to invest (so as to retain liquidity), invest with the possibility of prematurely withdrawing their capital, or demand a premium as a compensation for their loss of liquidity. In this respect, liquid capital markets encourage investors to invest since they can easily sell their securities to other investors. The investment, in turn, provides firms with capital for projects, which, at the margin, may otherwise have gone unfunded.[13]

In addition, securities markets enable investors to diversify their portfolios and hence diversify the risk of production shocks in particular firms.[14] This, in turn, improves the level of investment in the economy by encouraging both risk neutral and risk-averse investors to invest.

Furthermore, properly regulated securities markets improve the incentives for investors and intermediaries to acquire information about firms. Information is crucial to the determination of the expected future cash flow, and hence the pricing of securities. However, not all traders trade on an informed basis. In addition to informed traders, there are liquidity traders, momentum traders, and noise traders.[15] Of these, informed traders are

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13 See also Levine, 'Stock Markets, Growth, and Tax Policy' (n 1) 14 '[T]he stock market economy will grow faster than the non-stock market economy because stock markets eliminate the premature liquidation of firm capital'.

14 ibid 15.

15 John Armour and others, *Principles of Financial Regulation* (OUP 2016) 108-112. Informed traders trade on the basis of information and are the key players that ensure informationally efficient markets; liquidity traders trade to convert investments into cash to satisfy their liquidity needs; momentum traders follow the movement of stock prices rather than the flow of information; noise

key to ensuring informational efficiency as they stand to profit by exploiting discrepancies between share value and share price.[16] However, the crucial work of informed traders is likely to be hampered if they consistently lose out to better-informed insiders. Properly regulated markets, therefore, provide incentives for the acquisition of information about firms, which in turn improves the efficient allocation of resources in the economy.[17]

Securities markets and the disclosure typically required of listed firms also promote efficiency in the use of corporate assets and corporate governance.[18] In theory, the threat of a takeover against an inefficient firm ought to spur managers to manage their firms more efficiently. Liquid markets make this threat more potent by making it easier for outsiders to acquire control of the firm and replace management. First, disclosure makes a takeover less risky for potential acquirers and reduces the chance that an inaccurately high share price will deter a potential acquisition.[19] Second, where markets are liquid and

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traders trade on the basis of background noise rather than salient information. Other scholars have divided market participants into insiders, information traders, liquidity traders, noise traders and market makers. See Zohar Goshen and Gideon Parchomovsky, 'The Essential Role of Securities Regulation' (2005) 55 Duke Law Journal 711, 714; 722-726.

16 Goshen and Parchomovsky (n 15) 726, 'Insiders and information traders detect discrepancies between value and price based on the information they possess. They then trade to capture the value of their informational advantage. When they observe an undervaluation, they buy, thereby raising the price; conversely, when they spot overvaluation they sell, thereby causing the price to drop'.

17 Jeremy Greenwood and Boyan Jovanovic, 'Financial Development, Growth, and the Distribution of Income' (1990) 98 Journal of Political Economy 1076. Similar arguments have been used to justify securities regulation generally and mandatory disclosure specifically. See generally, Merritt Fox, 'Retaining Mandatory Securities Disclosure: Why Issuer Choice Is Not Investor Empowerment' (1999) Virginia Law Review 1335.

18 Securities markets and the mandatory disclosures required by them can play an important role in corporate governance directly through assisting shareholders in the effective exercise of their voting rights and enforcing manager's fiduciary duties, and indirectly through the market for corporate control. See Merritt Fox, 'Required Disclosure and Corporate Governance' (1999) 62 Law and Contemporary Problems 113; Merritt Fox, 'Civil Liability and Mandatory Disclosure' (2009) 109 Colum L Rev 237.

19 Fox, 'Retaining Mandatory Securities Disclosure: Why Issuer Choice Is Not Investor Empowerment' (n 17) 1364. See also Fox, 'Required Disclosure and Corporate Governance' (n 18) 120 (arguing that increased price accuracy as a result of disclosure will make a potential acquirer

shareholding is dispersed, a potential acquirer will find it easier to acquire sufficient control of inefficient firms. Even where shareholding is not sufficiently dispersed to enable a potential acquirer complete an acquisition, the acquirer may still be able to acquire a strong minority position and hold the firm's management to better corporate practices through shareholder activism and better use of the shareholder franchise.[20] As a result, securities markets facilitate the disciplining power of the market for corporate control and the 'market for corporate influence'.[21] These, in turn, improve the efficient use of corporate assets, with beneficial impacts on the economy.

2.1.2 The Irrelevance Hypothesis

The major claim of the irrelevance hypothesis is not necessarily that securities markets are never useful in fostering growth, but how comparatively useful they are given the country's stage of development. The irrelevance hypothesis therefore posits that in certain circumstances, the contribution of securities markets to economic growth will be negligible.[22]

In support of the irrelevance hypothesis, it has been argued that financing through retention of profits has been more important in financing industry than financing through

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less deterred from a potential value-maximising acquisition on account of inaccurately high share prices and that greater disclosure makes managers less tempted to implement negative net-present value projects or engage in empire building).

20 On minority activism in controlled companies, see Kobi Kastiel, 'Against All Odds: Hedge Fund Activism in Controlled Companies' (2016) 16 Columbia Business Law Review 60.

21 Brian Cheffins and John Armour, 'The Past, Present, and Future of Shareholder Activism by Hedge Funds' (2011) 37 Journal of Corporation Law 51.

22 Ajit Singh, 'Should Africa Promote Stock Market Capitalism?' (1999) 11 Journal of International Development 343 'For the typical African economy, even if no harm is done to the real economy, a stock market will be at best a costly irrelevance, in the sense that it would only benefit a small number of urban corporations, if anyone at all'.

securities markets[23] and the bank-dominated systems of France, Germany and Japan appear to have supported higher funding activity than the market systems of the UK or US.[24]

Professor Ajit Singh was one of the most vocal proponents of the irrelevance hypothesis, especially in the context of developing countries and Africa. Singh's core thesis was that African states should prioritise banking development over the establishment of securities markets given the state of their financial development. According to Singh, stock markets perform the key roles attributed to them by the relevance hypothesis through two key channels: the pricing process and the takeover mechanism.[25]

On the pricing process, Singh, differentiates between 'fundamental valuation efficiency' (i.e. whether the relative share prices reflect corporate fundamentals), and 'information arbitrage efficiency' (i.e. how quickly information is disseminated within the market). Singh argues that although stock prices may be efficient in the information arbitrage sense, they may be inefficient in the fundamental valuation sense, as markets, particularly in developing countries, may be dominated by noise traders and affected by 'whims, fads and contagion'.[26]

On the takeover mechanism and the disciplining effect of the market for corporate control, Singh argues that it is not only unprofitable firms that are taken over, and evidence suggests that the takeover selection process places more importance on the size of the firm than on its profitability.[27] Thus, a large but unproductive firm has a greater chance of

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23 Colin Mayer, 'New Issues in Corporate Finance' (1988) 32 European Economic Review 1167.

24 ibid 1176.

25 Singh (n 22) 349.

26 Singh (n 22) 351.

27 Singh (n 22) 351-352.

immunity from takeover than a small, productive firm. Consequently, securities markets are often unable to effectively perform the disciplining functions attributed to them.

Singh also criticises the role of pension funds and insurance companies, arguing that although in theory the long-term liabilities of these investors should discourage them from short-termism, in reality, they typically hold stocks for considerably shorter periods than ordinary investors.[28] Singh likewise questions the argument that stock markets promote savings, arguing that the savings rate of the US is considerably lower than that of the bank-based system of Japan and Germany and that US and UK firms appear to rely more on internal finance to fund their investment needs.[29] Given the underdevelopment of the banking system in most sub-Saharan Africa countries, Singh argues that establishing stock markets in the region rather than strengthening banking institutions is a 'perverse order of priorities' and 'particularly unjustified'.[30]

Whilst the relationship between securities markets and economic growth, therefore, remains an open theoretical debate, two features appear to drive the nature of the relationship between securities markets and growth: liquidity and shareholding structure. Thus, where markets are liquid, and shareholding is dispersed, it is more likely that capital will be better mobilised and managerial discipline imposed. Empirical evidence, however, suggests that only the US and the UK are characterised by firms with dispersed

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28 Singh (n 22) 351.

29 ibid.

30 See also, Singh, 'The Stock Market and Economic Development: Should Developing Countries Encourage Stock Markets?'(n 9) 361, When the banking systems are seriously inadequate, as is evidently the case in a large majority of [sub-Saharan African] economies, it suggests a perverse order of priorities to use scarce human and institutional resources for the establishment of stock markets rather than for the improvement of the banking systems'.

shareholding,[31] which considerably limits the disciplining power of securities markets in the rest of the world. On the other hand, where markets are illiquid or ownership is concentrated, securities markets will be unable to efficiently allocate resources or impose managerial discipline. Although investor myopia is unlikely to be a problem in countries with dominant shareholders, there is an increased risk of expropriation of minority shareholders who may then become reluctant to invest.

A further issue which appears to drive the debate on the relevance/irrelevance of securities markets is the extent to which securities markets and banks may be viewed as substitutes or complements. As seen above,[32] Singh argues strongly against developing securities markets in sub-Saharan Africa on the basis that the human and material resources spent developing markets would be better spent developing banking systems. This view of banks as substitutes to securities markets has not received wide support in the empirical literature.[33]

In addition, there are at least two strong arguments in favour of developing securities markets irrespective of the level of banking development. First, equity finance is

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31 Rafael Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'Corporate Ownership Around the World' (1999) 54 The Journal of Finance 471; Reinier Kraakman and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (OUP 2017) 25-26.

32 See n 30 above and accompanying text.

33 Ross Levine, 'Bank-Based or Market-Based Financial Systems: Which Is Better?' (2002) 11 Journal of Financial Intermediation 398; Aslı Demirgüç-Kunt and Vojislav Maksimovic, 'Funding Growth in Bank-Based and Market-Based Financial Systems: Evidence from Firm-Level Data' (2002) 65 Journal of Financial Economics 337 (finding no empirical support that firms grow faster in either bank-based or market based systems). For a recent discussion on this point in the African context, see Kalu Ojah and Odongo Kodongo, 'Financial Markets Development in Africa: Reflections and the Way Forward' in Célestin Monga and Justin Yifu Lin (eds), *The Oxford Handbook of Africa and Economics: Volume 2* (OUP 2015).

better at funding start-up firms or firms that do not rely heavily on physical assets[34] given that banks may find it difficult to finance firms without tangible collateral or may be particularly risk-averse.[35] Such firms can raise funds from venture capitalists or angel investors who can then exit their investments through IPOs. In this way, deep and liquid markets provide a channel for early investors to exit, thus facilitating the financing of firms that may find it difficult to secure bank financing.[36] Second, in the event of a crisis or a contraction in the ability of banks to finance the real economy, strong markets act as viable alternative sources of finance, and as catalysts for stabilization.[37]

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34 There is a recognition that sub-Saharan Africa's industrial structure is dominated by a large number of very small firms that rely more on 'soft assets' than on physical, tangible assets. See for instance Marcel Fafchamps, 'Industrial Structure and Microenterprises in Africa' (1994) 29 Journal of Developing Areas 1, 3 'The available evidence, however, usually confirms that sub-Saharan Africa is characterized by a dual industrial structure, with a very large number of microscopic firms on the one hand, a small number of large and "modern" enterprises on the other, but very few firms in between'. It is estimated that these small firms account for 70% of employment and contribute about 55% of GDP in sub-Saharan Africa. See African Development Bank, Organisation for Economic Co-Operation and Development, United Nations Development Programme and United Nations Economic Commission for Africa, *African Economic Outlook: Structural Transformation and Natural Resources* (2013). See also United Nations Economic Commission for Africa, 'Contribution to the 2015 United Nations Economic and Social Council Integration Submit' <https://www.un.org/en/ecosoc/integration/2015/pdf/eca.pdf>.

35 Bank risk-aversion may stem from the fact that banks suffer the downside of risky investments that are ultimately unsuccessful, but do not enjoy additional upsides from successfully executed projects. Thus, both during *ex-ante* project selection and *ex-post* monitoring, banks are likely to favour less risky projects that produce stable returns, than riskier projects with greater possible upside. There is a recognition that this can lead to allocative inefficiency. See Jonathan Macey and Geoffrey Miller, 'Corporate Governance and Commercial Banking: A Comparative Examination of Germany, Japan, and the United States' (1995) 48 Stanford Law Review 73.

36 Bernard Black and Ronald Gilson, 'Venture Capital and the Structure of Capital Markets: Banks Versus Stock Markets' (1998) 47 Journal of Financial Economics 243.

37 See European Commission, *Commission Staff Working Document: Economic Analysis Accompanying the Document: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan on Building a Capital Markets Union* (SWD(2015) 183 Final, 2015) 10: 'From a systemic point of view, higher dependence on bank lending makes the economy more vulnerable when bank lending tightens, as happened in the recent crisis. In times of economic downturns coinciding with financial crises, capital markets have the ability to act as more effective shock-absorbers'.

2.2 Securities Markets and Economic Growth: Empirical Evidence

Several empirical studies have examined the relationship between securities markets and economic growth. In this Section, I briefly examine these studies and their findings. First, I outline the general approach adopted in these studies and then set out some caveats to the discussions below.

The general methodology adopted by these studies is to create securities market indicators (usually size and liquidity as the independent variables) and macroeconomic indicators (usually GDP as the dependent variables) over a sufficiently long period of time and across several countries (in the case of cross-country regressions) to obtain a sufficiently large dataset. The size indicator typically used is the Market Capitalization Ratio (MCR – market capitalization divided by GDP) whilst two liquidity indicators are typically used: the Value Traded Ratio (VTR – the value of trades of domestic shares on domestic exchanges divided by GDP) and the Turnover Ratio (TR – the value of trades of domestic shares on domestic exchanges divided by market capitalization). Regression analyses are run to test for correlation and causal inferences.[38] Finally, robustness tests are then performed and conclusions drawn.

[38] Granger causality tests were used in many of the empirical studies discussed in this section. A variable is said to *Granger-cause* another variable if it can be shown that the first variable provides statistically significant information about the future value of the second variable. For Professor Granger's seminal work on this, see Clive Granger, 'Investigating Causal Relations by Econometric Models and Cross-Spectral Methods' (1969) 37 Econometrica 424. However, it should be noted that 'granger-causality' is no longer regarded as a convincing standard in the causal inference literature. On this, see Joshua David Angrist and Jörn-Steffen Pischke, *Matering Metrics: The Path from Cause to Effect* (Princeton University Press 2015). In particular, since granger-causality tests the predictive value of one set of variables on another, it has been criticised for only establishing 'predictive causality' instead of 'true causality'.

Before proceeding into the discussions that follow, it will be necessary to briefly comment on the methodology adopted in selecting the studies discussed in this Section. First, many of the empirical works examining the finance-growth nexus have examined the relationship between financial development and economic growth. Since I am concerned with the narrower point of securities markets, I exclude studies examining other aspects of the financial system (e.g. banking sector, financial liberalization and bond markets) from the discussions below.[39] On the literature examining the relationship between securities markets and economic growth, I divide the empirical methodology adopted into three: cross-country studies, time-series studies, and panel-data studies. For each, I include as many studies as I can find on accessible journals, and prioritise studies focusing on Africa either exclusively or as part of a dataset of developing countries. This approach has at least two advantages. First, it permits an assessment of the literature on the relationship between securities markets and economic growth as pertains to Africa. Second, it facilitates an examination of the relative strengths and weaknesses of the empirical methodology adopted in the literature. The primary limitation to this approach is that it does not purport to examine all literature examining the relationship between securities markets and economic growth in the region.[40]

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[39] Many of these studies however report a positive relationship between financial development and economic growth. See for instance Asli Demirgüç-Kunt and Vojislav Maksimovic, 'Stock Market Development and Financing Choices of Firms' (1996) 10 The World Bank Economic Review 341 (finding that firms in countries with better functioning banks and equity markets grow faster than predicted by individual firm characteristics). See also Raghuram Rajan and Luigi Zingales, 'Financial Dependence and Growth' (1998) 88 American Economic Review 559.

[40] For an overview of the available literature and additional studies, see James Ang, 'A Survey of Recent Developments in the Literature of Finance and Growth' (2008) 22 Journal of Economic Surveys 536.

2.2.1 Cross-Country Studies

Cross-country studies attempt to study the relationship between securities markets and economic growth across a number of countries by averaging out the variables for each country over the entire period of the study.[41] Perhaps the first study to adopt this methodology in examining the relationship between securities markets and growth was carried out by Atje and Jovanovich in 1993, using data from 39 countries from 1980 to 1988.[42] They found a significant correlation between liquidity (indicated by the VTR) and economic growth, concluding that if their study was correct, they were surprised more countries were not developing their stock markets as quickly as they could to speed up economic development.[43]

Levine and Zervos subsequently built on Atje and Jovanovic's work by increasing the number of countries, the number of years studied and the number of indicators examined.[44] Levine and Zervos found that liquidity (measured both by VTR and TR) is positively and significantly correlated with current and future rates of economic growth. Yet, market size and international integration were not robustly linked to growth.[45] Further,

41 ibid.

42 Raymond Atje and Boyan Jovanovic, 'Stock Markets and Development' (1993) 37 European Economic Review 632. Richard Harris subsequently re-assessed the earlier work of Atje and Jovanovic, concluding that the empirical evidence in support of the relevance hypothesis was weak. See Richard Harris, 'Stock Markets and Development: A Re-Assessment' (1997) 41 European Economic Review 139.

43 Atje and Jovanovic, (n 42) 636.

44 Levine and Zervos (n 1).

45 ibid 538.

they found no support for the proposition that liquidity or internationally integrated markets negatively affect savings or growth rates.[46]

In 2003, Levine carried out another study on developing countries.[47] Using data on 45 countries from 1976 to 1993, Levine examined whether 'a well-developed stock market - a market where it is relatively easy to trade ownership of the country's companies – helps that country grow faster'[48]. Levine found that there was a very strong relationship between liquidity and future long-run growth even after controlling for cross-country differences in inflation, fiscal policy, political stability, education, the efficiency of the legal system, exchange rate policy and openness to international trade.[49] On causality, Levine used a generalised method of moments (GMM) estimator to test for the relationship between growth, stock market indicators and indices of shareholder rights and the comprehensiveness and quality of company reports, finding that equity market development exerts a causal impact on economic growth.[50] However, Levine cautioned that the results do not necessarily establish that every country needs its own active securities markets, arguing that it is the ability to issue and trade securities easily that facilitates long-term growth, and not the geographical location of the market.[51]

Similar empirical studies have been carried out in relation to sub-Saharan Africa. Charles Yartey and Charles Adjasi examined the relationship between securities markets

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46 ibid.

47 Levine, 'Napoleon, Bourses, and Growth: With a Focus on Latin America' (n. 1).

48 ibid 51.

49 ibid 57.

50 Levine noted that the findings do not contradict the possibility of bidirectional causality. See Levine, ibid 76-77.

51 ibid 77.

and economic growth in 14 sub-Saharan African countries, testing individually for measures of market size and liquidity.[52] They found that market size (measured by the MCR) was not significantly correlated with economic growth, but liquidity (measured by the VTR) was strongly correlated with economic growth.

Although there is support for the relevance hypothesis from the cross-country studies, the empirical methodology adopted has been criticised for failing to adequately deal with potential endogeneity and reverse causation. As pointed out by Ang, averaging data over long periods of time may cover the important features of the growth path of the economy and introduce doubtful correlation between the averaged variables although the original series may not be so correlated.[53] This can lead to the size and sign of the regression results differing from those of the original series. In addition, since cross-country studies reflect a one-period static framework of averaged data, it is doubtful to what extent they can be said to represent long-term economic behaviour.[54] Finally, cross-country studies have been criticised for their inability to capture the history and peculiar complexities of individual countries, making their policy prescriptions to individual countries of little value.[55]

2.2.2 Time-Series Studies

Country-specific time-series empirical studies are able to avoid some of the methodological flaws of cross-country studies. Given that they use data for one particular country over a

52 Charles Yartey and Charles Adjasi, *Stock Market Development in Sub-Saharan Africa: Critical Issues and Challenges* (IMF 2007).

53 Ang (n 40) 553.

54 ibid.

55 ibid 554.

long period of time, they are able to better account for country-specific issues and better control for endogeneity. Below, I briefly examine a number of country-specific time-series studies across specific developing countries and sub-Saharan Africa.

In 2007, Agrawalla and Tuteja examined causality between securities market and economic growth in India using monthly data for the period April 1990 to December 2002.[56] They created a stock market development index computed as an arithmetic mean of the MCR, VTR and TR to test for the relationship between securities markets and economic growth. They found a stable long-run relationship between securities market development and economic growth in India. On causality, the authors found causality running from securities market development to economic growth.[57] Their findings are supported by the subsequent findings of Deb and Mukherjee who also found unidirectional causality from securities market development to economic growth in India.[58]

Time-series studies have been conducted to examine the relationship between securities markets and economic growth in specific African countries.[59] Thus, in 2013,

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56 Raman Agrawalla and SK Tuteja, 'Causality Between Stock Market Development and Economic Growth: A Case Study of India' (2007) 7 Journal of Management Research 158.

57 ibid 164.

58 Soumya Guha Deb and Jaydeep Mukherjee, 'Does Stock Market Development Cause Economic Growth? A Time-Series Analysis for Indian economy' (2008) 21 International Research Journal of Finance and Economics 142.

59 See Anthony Akinlo and Tajudeen Egbetunde, 'Financial Development and Economic Growth: The Experience of 10 Sub-Saharan African Countries Revisited' (2010) 2 The Review of Finance and Banking (finding correlation between financial development and economic growth in the Central African Republic, Congo, Gabon, Nigeria, Zambia, Kenya, Chad, South Africa, Sierra Leone and Swaziland and various levels of unidirectional and bidirectional Granger causality); Akinlo Enisan and Akinlo Olufisayo, 'Stock Market Development and Economic Growth: Evidence from Seven Sub-Sahara African Countries' (2009) 61 Journal of Economics and Business 162 (finding correlation between securities markets and economic growth in Egypt and South Africa, and various levels of unidirectional and bidirectional causality in Cote D'Ivoire, Kenya, Morocco, Nigeria and Zimbabwe).

Osamwonyi and Kasimu[60] conducted time-series studies to examine the correlation and direction of causality between stock market development and economic growth in Ghana, Kenya and Nigeria, using data from 1989 to 2009. They found bidirectional causality in the case of Kenya but failed to find evidence of Granger-causality in both Ghana and Nigeria.[61] They attribute the non-causal relationships to the nature of the stock markets and economies in these countries arguing that a plausible explanation of the result is that the industries that are major contributors to the GDP of these economies are not adequately represented in the securities markets.

Finally, a country-specific analysis of Mauritius found that securities market development positively affected growth in Mauritius both in the short-run and in the long-run.[62]

Although time-series studies are better able to account for country-specific issues, the availability and reliability of data has been identified as a key factor limiting their use, particularly in developing countries.[63] In addition, unavailability of data may limit the number of variables tested in the econometric model, leading to problems of model

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60 Ifuero Osamwonyi and Abudu Kasimu, 'Stock Market and Economic Growth in Ghana, Kenya and Nigeria' (2013) 4 International Journal of Financial Research 83.

61 ibid 93-94. The absence of evidence of Granger-causality in the case of Ghana is not supported by the later empirical study carried out by Michael Adusei who found evidence of unidirectional Granger-causality running from stock market development to economic growth in Ghana, but a negative, statistically significant long-run relationship between stock market development and economic growth in Ghana, leading to the conclusion that stock market development did not promote economic growth in Ghana. See Michael Adusei, 'Does Stock Market Development Promote Economic Growth in Ghana?' (2014) 6 International Journal of Economics and Finance 119. Adusei's findings may however be influenced by both the short time series examined (2006-2010) and the obvious fact that this period covered much of the global financial crisis which would have negatively affected the Ghanaian securities markets.

62 Baboo Nowbutsing and MP Odit, 'Stock Market Development and Economic Growth: The Case of Mauritius' (2009) 8 International Business & Economics Research Journal 77.

63 See Ang (n 40) 556.

misspecification and ultimately doubtful conclusions.[64] Furthermore, as with all econometric empirical studies, care must be taken in interpreting the causal inferences drawn in the studies.[65] Finally, given that time-series studies produce country-specific results, their findings cannot provide suitable policy prescriptions for countries that are not the subject of the particular study.

2.2.3 Panel Studies

Panel data studies combine cross-sectional and time-series methods in addressing the object of empirical examination. In this sense, unlike the cross-country studies that use averaged data at a static time-period, panel studies take time dimension into account and thus present data for multiple countries in which the characteristics of each country is observed at different points in time.[66]

One of the first and most influential panel studies examining the relationship between access to long-term finance and economic growth was conducted by Rajan and Zingales. Using industry-level data for 41 countries between 1980 and 1990, the authors show that industrial sectors that are more in need of external finance develop faster in countries with more developed financial markets.[67]

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64 ibid.

65 Unless all other potentially relevant factors that can change over time have been accounted for in the regression specification, it will be difficult to draw clear causal inferences from regression analyses. In addition, see Angrist and Pischke (n 38) on the limitation of the Granger causality tests used in many of the time-series tests discussed above.

66 See Ang (n 40) 561.

67 Rajan and Zingales (n 39). This finding is supported by the later work of Beck and Levine who empirically showed that industries that rely more on external finance tend to grow faster in countries with more advanced financial systems and more efficient legal systems but that having a bank-based or market-based financial system did not seem to matter much to economic growth. See Thorsten

In relation to Africa specifically, Ngare, Nyamongo, and Misati conducted a study to investigate the role of securities markets development on economic growth using data from 36 countries (18 of which had securities markets) from 1980 to 2010.[68] The authors found that African states with securities markets grew faster than states without securities markets, and higher liquidity (measured by TR) was correlated with higher GDP per capita growth. On causality, the authors' regressions showed evidence of unidirectional causality from liquidity (measured by TR) to economic growth.[69]

Similarly, Assefa and Mollick conducted a study to 'estimate the effect of financial openness on economic growth' for 15 African countries between 1995 and 2010.[70] The authors examined different measures of financial openness including capital account openness, trade openness, international financial openness and stock market capitalization using System Generalized Method of Moments and fixed effects model regressions. Their System Generalized Method of Moments regressions showed a 'positive and significant' association between stock market capitalization and economic growth,[71] whilst their fixed effects model showed a weak positive correlation between economic growth and financial and trade openness.[72] The authors concluded that their results provide support that flows

Beck and Ross Levine, 'Industry Growth and Capital Allocation: Does Having a Market- or Bank-Based System Matter?' (2002) 64 Journal of Financial Economics 147.

68 Everlyne Ngare, Esman Nyamongo and Roseline Misati, 'Stock Market Development and Economic Growth in Africa' (2014) 74 Journal of Economics and Business 24.

69 ibid 32. See also Charles Adjasi and Nicholas Biekpe, 'Stock Market Development and Economic Growth: The Case of Selected African Countries' (2006) 18 African Development Review 144 (examining the relationship between securities markets and economic growth using a panel of 14 African countries and finding a positive relationship between liquidity (measured by the value traded ratio) and economic growth).

70 Tibebe Assefa and André Mollick, 'Financial Development and Economic Growth in Africa' (2017) 18 Journal of African Business 320.

71 ibid 332.

72 ibid 329.

of portfolio capital and foreign direct investment have a positive effect on real GDP growth in the 15 African countries studied between 1995 and 2010,[73] and an implication of the paper is for African policymakers to open their equity markets to international investors.[74]

Depending on the estimation techniques used, panel studies may also be criticised for failing to properly deal with omitted variable problems and spurious results.[75]

To recap, although the theoretical debates present an ambiguous relationship between securities markets and economic growth, there is support in the empirical literature for the proposition that securities markets correlate with economic growth.[76] This is consistent with the historical evidence from developed and developing countries. Economic historians argue that the English industrial revolution was not caused by technological innovation since the innovation that characterised the era had already been invented. Rather, liquid financial markets permitted the injection of funds into projects which would have otherwise not been financed.[77] Economic historians have also found that regulatory reforms pertaining to limited liability and mandatory disclosure permitted the widespread use of Brazil's capital markets to mobilize capital for its textile industry,

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73 ibid 335.

74 ibid 336.

75 Omitted variable problems may arise where unobserved country-specific effects are included in the error term in the econometric model. In addition, it has been argued that holding country-specific effects constant in panel regressions may generate spurious aggregate relationships given that the reported relationship would be due to between-country differences rather than within-country differences. See Ang (n 40) 562.

76 See Stephen Haber, 'The Finance-Growth Nexus: Theory, Evidence, and Implications for Africa' in Marc Quintyn and Geneviève Verdier (eds), *African Finance in the 21st Century* (IMF 2010) 11, 15 'In sum, the question of the relationship between financial development and growth is now a settled matter. There is a broad consensus that finance plays a crucial role in the progress of growth, and that it does so through a variety of mechanisms'. Of course, as the discussions above show, the evidence on the relationship between securities markets and economic growth is not conclusive.

77 See Valerie Bencivenga, Bruce Smith and Ross Starr, 'Equity Markets, Transactions Costs, and Capital Accumulation: An Illustration' (1996) 10 The World Bank Economic Review 241.

resulting in a relaxation of capital constraints faced by firms, increased rate of investment, growth in firm size and accelerated productivity growth.[78]

Thus, there is empirical and historical evidence to support the theoretical claim that securities markets are associated with economic growth. Crucially, it is neither the existence nor the size of the market that leads to growth. Rather, it is the activity in, and liquidity of, the market that appears to be the strongest link between securities markets and growth.[79] In this way, liquid securities markets permit investors to easily exit their investments *ex post*, making them more willing to invest *ex ante*. By so doing, liquid securities markets facilitate the financing of firms or projects, which, on the margin, may have gone unfunded in the economy. However, these findings do not fully justify the development of domestic securities markets in light of the legal and economic debates on securities cross-listing. The next Section examines this issue.

2.3 Cross-Listing

Cross-listing refers to the admission to trading of the securities of an issuer in a market other than its own. The paradigm case of cross-listing is an issuer from a less-developed market (e.g. Kenya) issuing and trading its securities on a more developed market (e.g. the New York Stock Exchange (NYSE)).

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78 Stephen Haber, *The Efficiency Consequences of Institutional Change: Financial Market Regulation and Industrial Productivity Growth in Brazil, 1866-1934* (National Bureau of Economic Research 1996). See also Stephen Haber, 'Industrial Concentration and the Capital Markets: A Comparative Study of Brazil, Mexico, and the United States, 1830 (1991) 51 Journal of Economic History 559.

79 Senbet and Otchere (n 11), 108 'A stock market fails if the stock exchange is not conducive to exchange of stocks. Thus, the mere establishment of stock exchanges is of no value. Liquidity and information production are central to the functioning and development of the stock market'.

Why do issuers cross-list their securities? A number of explanations are possible. First, an issuer may cross-list to avoid market segmentation and gain access to more liquid markets,[80] thus improving the liquidity of its securities. Improved liquidity, in turn, ought to decrease the firm's cost of capital by reducing the bid-ask spread.[81] In addition, empirical evidence suggests that cross-listed firms have higher valuations than firms in their countries that do not cross-list.[82] There remains a debate in the literature on the reason for this 'cross-listing premium'.[83] Whilst some commentators argue that this premium is attributable to the reduction in the cost of capital resulting from expanding the pool of shareholders,[84] others have attributed this to lower controlling shareholder agency costs.[85]

The controlling shareholder agency cost hypothesis has featured prominently in legal literature, in part due to the influential work of John Coffee, who formulated the 'legal bonding hypothesis' to explain why foreign firms cross-list in the US.[86] Relying on empirical evidence that the typical non-US firm cross-listing into the US has controlling

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80 Andrew Karolyi, 'Why Do Companies List Shares Abroad?: A Survey of the Evidence and its Managerial Implications' (1998) 7 Financial Markets, Institutions & Instruments 1.

81 Stulz (n 2) 17.

82 Doidge, Karolyi and Stulz (n 2) (finding that foreign firms listed in the US on average have a 16.5% higher Tobin's Q than firms from the same country that do not cross-list). It is possible that the higher valuation may stem from increased visibility and analyst coverage, or from signalling in which case, better firms signal their business quality without improving their corporate governance. See Licht, 'Cross-Listing and Corporate Governance: Bonding or Avoiding' (n 6) 158. It is also possible that this premium is as a result of self-selection bias or reverse causality, where firms with better projects and thus higher valuations, pursue cross-listings. See Sarkissian and Schill (n 96) finding that the valuation premium is '*hardly a unique phenomenon*'.

83 See Doidge, Karolyi and Stulz (n 2) 5-8 for an overview of the competing hypotheses.

84 Darius Miller, 'The Market Reaction to International Cross-Listings: Evidence from Depositary Receipts' (1999) 51 Journal of Financial Economics 103.

85 Doidge, Karolyi and Stulz (n 2).

86 Coffee Jr, 'The Future as History' (n 4).

shareholders,[87] the legal bonding hypothesis argues that by cross-listing, the firm credibly commits itself to better disclosure and minority protection.[88] This attracts investors who would ordinarily have been reluctant to invest in those firms in the absence of minority protection or in the presence of a significant risk of expropriation. According to Coffee:

> It was once assumed that cross-listing was basically a means of integrating segmented markets and thus enabling the issuer to access trapped pools of liquidity. A newer interpretation is today emerging that cross-listing may also be a bonding mechanism by which firms incorporated in jurisdictions with weak protection of minority rights or poor enforcement mechanisms can voluntarily subject themselves to higher disclosure standards and stricter enforcement in order to attract investors who would otherwise be reluctant to invest (or who would discount such stocks to reflect the risk of minority expropriation). Although both explanations have some validity, the second, or "bonding" explanation has the greater predictive power for the future…[89]

Other competing hypotheses have been offered to explain cross-listing. Amir Licht has argued that cross-listing may be better understood as an 'avoiding' mechanism through which firms avoid strict public enforcement of securities law.[90] On his part, Jordan Siegel

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87 Porta, Lopez-de-Silanes and Shleifer (n 31).

88 Coffee Jr, 'Racing Towards the Top?' (n 4) 1780: 'Essentially, the bonding hypothesis posits that cross-listing on a US stock exchange (including Nasdaq) commits the listing firm to protect minority investor rights and to provide fuller disclosure'.

89 Coffee Jr, 'Racing Towards the Top?' (n 4) 1767.

90 Licht, 'Cross-Listing and Corporate Governance: Bonding or Avoiding' (n 6). Licht argues across several lines in justification of his avoiding hypothesis. In relation to corporate governance, Licht argues the SEC has adopted a 'hands-off' policy in relation to enforcement against foreign issuers, and foreign issuers can easily obtain exemptions from US corporate governance listing requirements. In relation to disclosure, Licht argues that the disclosure regime applicable to foreign issuers permits them to disclose substantially less information than that required of domestic US issuers. Licht also provides evidence from survey studies which found that managers of non-US firms listed in the US are 'single-minded' in the view that disclosure requirements are a major obstacle to cross-listing, arguing that if increased disclosure under US regulations plays a role in the cross-listing decision process, it is negative. Licht further reports migration studies showing that cross-listing is more common from firms with strong investor protection at home (as measured by La Porta's anti-director rights index) and was consistent with more insider dealing by Mexican cross-listed firms. The avoiding hypothesis has not gained significant traction in the literature and there is evidence that the SEC has increased enforcement activity against foreign issuers in the US.

argues that cross-listing may be a form of reputational bonding through which firms acquire stronger reputations which can then be effectively deployed in corporate events such as mergers and acquisitions.[91]

Regardless of the reason for cross-listing, two implications of cross-listing are immediately obvious, at least for sub-Saharan Africa. First, for states without securities markets, cross-listing provides firms with access to the liquid markets and well-capitalised investors absent in their domestic jurisdictions. On that basis, if liquid markets promote growth by financing projects, it is at least arguable that cross-listing can achieve the same outcome as domestic markets. Second, cross-listing has affected the legal debate on the convergence of corporate and securities law. Whilst there is a general consensus that securities law cannot be easily transplanted,[92] some commentators argue that in the absence of formal convergence of corporate law, cross-listing and regulatory competition for listing should predict functional convergence of securities laws around US federal securities law.[93] This does not necessarily lead to a Darwinian triumph of dispersed shareholding over concentrated shareholding, or of US securities law over the securities law of other jurisdictions. Rather, it leads to a separating equilibrium between high disclosure and low disclosure jurisdictions where dispersed and concentrated shareholdings co-exist. In this

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See John Armour, Martin Bengtzen and Luca Enriques, 'Globalization' in Merritt Fox and others (eds), *Securities Market Issues for the 21st Century* (2018).

91 Siegel's theory explains that building a reputational asset can help firms receive a privileged access to capital and allow many firms to observe rules they are not forced to follow. This can give firms greater visibility and an alternate currency (share swaps) to engage in mergers and takeovers. See Siegel (n 7); Amir Licht and others, 'What Makes the Bonding Stick? A Natural Experiment Involving the US Supreme Court and Cross-Listed Firms' (2013) Harvard Business School Working Paper 11-072 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1744905>.

92 Bernard S. Black, 'The Legal and Institutional Preconditions for Strong Securities Markets' (2000) 48 UCLA Law Review 781, 823.

93 Coffee Jr, 'Racing Towards the Top?' (n 4).

equilibrium, good quality issuers bond themselves to high disclosure jurisdictions, whilst controllers, intent on reaping private benefits of control issue securities in low disclosure jurisdictions.[94] Given the paucity of literature on cross-listing within sub-Saharan Africa,[95] the discussions below will represent an attempt to examine cross-listing from a sub-Saharan African perspective.

The remaining parts of this Section are structured as follows. In Part 1, I examine cross-listing of sub-Saharan Africa firms into developed markets. With specific reference to the US and the UK, my examination finds that although African firms are more likely to issue securities in the UK than in the US, overall, trans-continental cross-listing activity is low. In Part 2, I examine an issue that is relatively novel in extant literature: regional cross-listing within sub-Saharan Africa (for instance, a firm incorporated in South Africa cross-listing its securities in Namibia). The finding from this analysis is that significant cross-listing activity goes on within the region itself, strongly influenced by a trend towards sub-regionalism (i.e. firms within a sub-region of sub-Saharan Africa cross-listing within that sub-region). However, cross-listing has not played a meaningful role in financing sub-Saharan African firms in countries without domestic stock exchanges or with poorly developed domestic exchanges. Thus, if securities markets promote growth by providing long term equity finance to firms and projects that on the margin may have gone unfunded,

94 Coffee Jr, ibid. See also Coffee Jr, 'The Impact of Enforcement (n 3).

95 There have been discussions in the economics literature on cross-listing in sub-Saharan Africa. See Emmanuel Ihejirika, *Barriers to Global Stock Listing Among African Companies: Is It Cost or Compliance?* (Lulu Publishing 2015); Olatundun Adelegan, *The Impact of the Regional Cross-Listing of stocks on Firm Value in Sub-Saharan Africa* (IMF 2009). For a brief discussion on these studies, see the literature review in Chapter 1, section 1.3.

there is very thin evidence that sub-Saharan African firms are achieving this outcome through cross-listing.

2.3.1. Cross-Listing by Sub-Saharan African Firms into Developed Markets

In 2012, Sergei Sarkissian and Michael Schill conducted a study on cross-listing on formal stock exchanges around the world between 1985 and 2006.[96] In total, they found 2838 foreign listings from 69 home markets into 32 foreign markets for the 22-year duration. The data is set out in Table 1 of their published work.[97] In Table 1 (in the Appendix to this Chapter), I extract the data as pertains to Africa. For a complete picture, the table is not limited to sub-Saharan Africa but also includes cross-listing from North Africa (i.e. Egypt, Morocco and Tunisia).

A look at this table reveals several interesting points. First, no other African country aside South Africa had a firm with securities listed in the US. This does not mean that African firms are not raising capital or establishing a trading presence in the US. Indeed, between 1995 and 2009, African firms raised capital from the US through exempt Rule 144(a) issuances and launched over the counter Level 1 American Depositary Receipts (with no capital raise) a total of 170 times[98]. Hence, African firms raised capital from the US but tended to avoid its stock market. Second, the UK attracted more cross-listings (18)

96 Sergei Sarkissian and Michael Schill, 'The Nature of the Foreign Listing Premium: A Cross-Country Examination' (2012) 36 Journal of Banking & Finance 2494.

97 ibid 2496.

98 Ihejirika (n 95) 77–78. This comprised of 44 Rule 144a issuances and 126 over the counter Level 1 depositary receipts. Indeed, only 1 company (from South Africa) issued Level 3 depositary receipts during this period.

than the US (11). Figure 2.1 provides a pictorial representation of the trans-continental cross-listing destination of African firms.

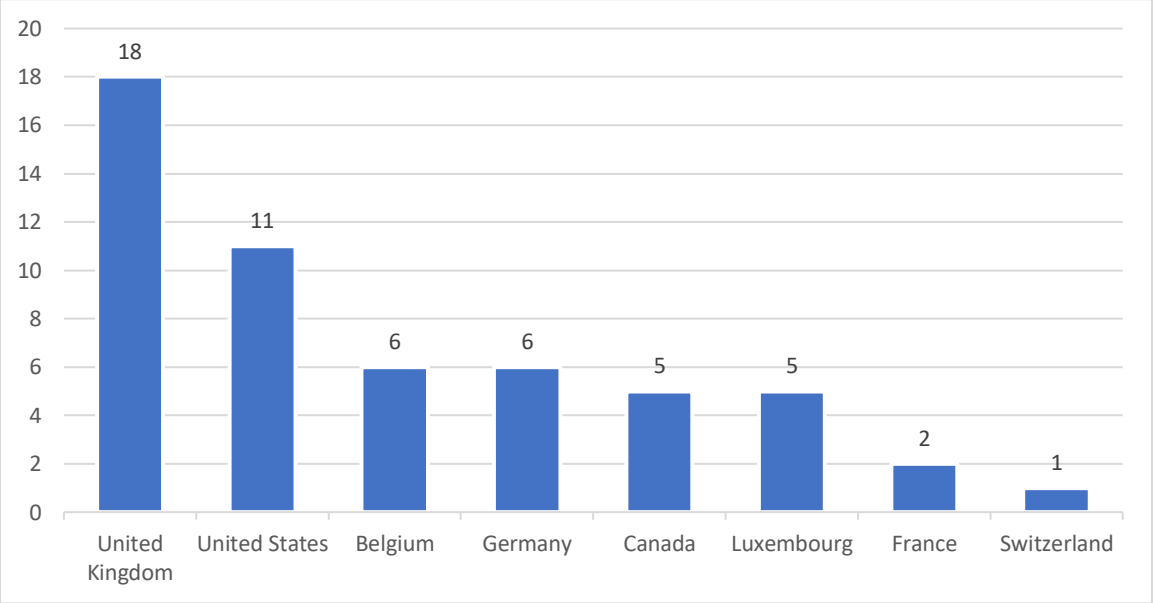

Figure 2.1 - Cross-Listing destination of African firms (1985-2006).[99]

Has this picture changed since 2006? To examine the current state of cross-listing into the UK and the US, I obtained data on African firms listed in either of these countries.[100] For the US, I obtained a comprehensive list of all African firms listed on NASDAQ, NYSE, and AMEX. For the UK, I obtained data from the website of the London

99 This chart excludes the two African firms cross-listed into South Africa. I deal with African firms cross-listing into South Africa in the discussion on regional cross-listing below.

100 I only provide updated data on the trans-continental cross-listing of African firms into the UK and the US. For reasons of practicality, I assume that that both countries remain the most likely markets where African firms would cross-list securities trans-continentally. This is based on historical ties to the UK through colonization and legal tradition; the dominance of the US market in the global economy; the leading position occupied by these countries already identified above (n 96-99 and accompanying text), and empirical evidence suggesting that both countries are the most important markets in the world for raising equity (see Brian Henderson, Narasimhan Jegadeesh and Michael Weisbach, 'World Markets For Raising New Capital' (2006) 82 Journal of Financial Economics 63). It is unlikely that the increased investments from Asia into Africa alters this analysis, and in any event, the examination of regional cross-listing below found no listed African firm, with a dual listing on an Asian exchange. Whilst this does not remove the possibility of African firms with sole listings in Asia, any such firms are likely to be few and statistically insignificant.

Stock Exchange (LSE). Data in all cases is current as of June 2020 and is contained in tables in the Appendix to this Chapter.

Table 2 presents data on African firms cross-listed in the US. Again, it is striking to observe that only South Africa currently has firms cross-listed in the US with a total of seven cross-listings. However, at least by African standards, some of these firms are large, with a total market capitalization of US$33.5 billion as at June 2020.[101] It is also noteworthy that the number of firms has reduced from 11 in Sarkissian and Schill's study to seven, consistent with the documented reduction in the size of the US market.[102]

Table 3 provides comparable data on African firms cross-listed in the UK. In contrast with the US where only South African firms are listed, there is greater diversity in the UK as pictorially represented in Figure 2.2.

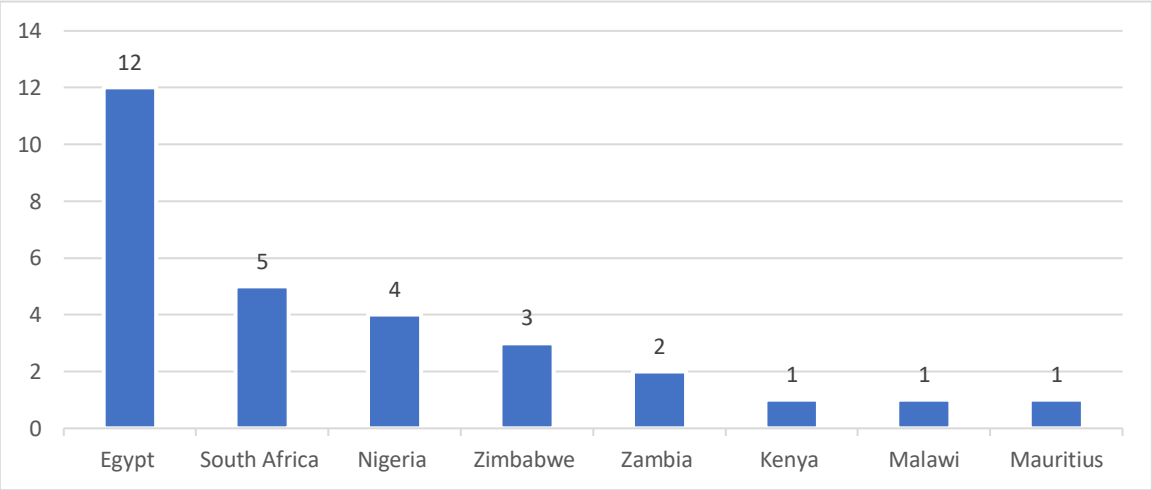

Figure 2.2 - Geographical distribution of the home country of African firms cross-listed in the UK (as of June 2020).

101 See https://www.nyse.com/listings/international-listings.

102 See Armour, Bengtzen and Enriques (n 90).

Of the 29 African firms cross-listed in the UK, 26 were eligible to raise capital.[103] In addition, the firms cross-listed in the UK are considerably smaller than their counterparts cross-listed in the US.[104]

The data examined so far leads to two important observations. First, only seven African firms are cross-listed in the US. This number has dropped since the Sarkissian and Schill survey. Both historically and presently, only South African firms have cross-listed securities in the US. Second, the UK has been more successful than the US in attracting cross-listing from African firms, and it has attracted a wider diversity than the US. It therefore appears that cross-listing into the UK is consistent with a motivation of seeking liquidity rather than bonding by these issuers.[105]

2.3.2 Regional Cross-Listing within Sub-Saharan Africa

Regional cross-listing of securities within sub-Saharan Africa is a point that has received limited coverage in the literature.[106] To examine the current state of cross-listing within

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103 See Column 6 of Table 3 in the appendix to this chapter. Eligibility requirements for the Main Market are set out in the Listing Rules of the Financial Conduct Authority whilst eligibility requirements for the Alternate Investment Market (AIM) are set out in the AIM Rules issued by the LSE. As of June 2020, trading in the shares of Diamond Bank Plc (Nigeria) and Hwange Colliery Company Limited (Zimbabwe) were suspended as the companies were undergoing merger negotiations and liquidation proceedings respectively. Stilfontein Gold Mining Company Limited (South Africa) had been liquidated. Thus, neither of the three companies would have been eligible to raise capital from the UK as of June 2020. The remaining 26 companies were duly incorporated and validly existing, had market capitalizations above the £700,000 threshold set out in Listing Rule 2.2.7 and met the other listing eligibility requirements.

104 Based on market capitalization calculations, as of February 2018, the mean market capitalization of African firms listed in the UK was £340.15million, with a median of £61.52million, whilst the mean was $4.18billion, with a median of $782.43million for firms cross-listed in the US.

105 See Doidge, Karolyi and Stulz (n 2).

106 To my knowledge, only one previous study has examined the state of regional cross-listing within Africa previously. See Olatundun Adelegan, *The Impact of the Regional Cross-Listing of stocks on Firm Value in Sub-Saharan Africa* (IMF 2009). For a discussion on this study, see Chapter 1, n 69-70 and accompanying text.

sub-Saharan Africa, I hand-collected a comprehensive list of all 1,105 firms listed in all 24 stock exchanges in the region. For each firm, I checked the annual reports, company filings and website to find (a) where the firm is incorporated; (b) where it has its securities listed; (c) where it carries out its operations; and (d) the industry of the company's business. I found a total of 48 regionally cross-listed firms with a total of 64 regional cross-listings.[107] The data is summarised in Table 4 in the appendix to this Chapter, and the destination of regional cross-listing is presented in Figure 2.3 below.

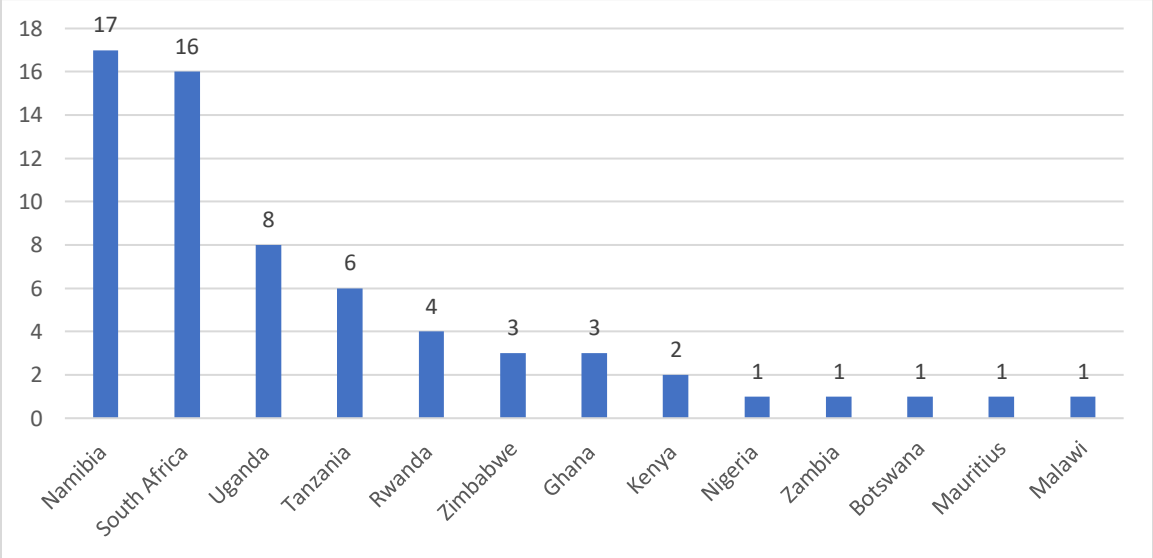

Figure 2.3 - Cross-listing destination of regionally cross-listed firms in sub-Saharan Africa.

Several interesting points arise from the data. First, the data suggests that there is a significant amount of cross-listing activity involving firms cross-listing regionally rather

[107] The websites of the stock exchanges in Angola, Cape Verde and the BVMAC were not in English, whilst the stock exchange of Sierra Leone did not have a website. I therefore ran robustness checks on each of these countries by specifically checking for any cross-listings into or from these countries when looking at all the firms in each of the other 20 countries. Any possible omissions are unlikely to be material to the arguments in this section, given that the results are likely to be under-inclusive rather than over-inclusive.

than trans-continentally (into the UK or the US). Indeed, there are as many sub-Saharan African firms cross-listed into Namibia as there are cross-listing into the UK.[108]

Second, there is a tendency for sub-Saharan African firms to pursue multiple regional cross-listings. Thus, there were 12 cases of multiple regional cross-listing, comprising eight firms with triple regional listings and four firms with quadruple regional listings. Thus, sub-Saharan African firms appear much more comfortable engaging in regional as opposed to trans-continental cross-listing.

Third, it is possible to identify a trend towards sub-regionalism in the cross-listing data. From the data in Table 4, sub-Saharan African firms are more likely to cross-list their securities within their sub-regions (East Africa, Southern Africa or West Africa) than to pursue regional cross-listings outside their sub-regions. On the evidence, there are only three sub-Saharan African firms regionally cross-listed outside their sub-regions.[109] Of the remaining 45 regional cross-listings, there are 34 sub-regional cross-listings within Southern Africa, nine within East Africa and two within West Africa. This finding further points to geographical and cultural proximity as likely factors shaping the cross-listing decision of sub-Saharan African firms. In addition, this pattern of sub-regional cross-listing mirrors patterns of regional trade in sub-Saharan Africa. Thus, Eastern and Southern Africa

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108 Both Namibia and the UK have 17 sub-Saharan African firms cross-listed on their exchanges, (i.e. the total of 29 sub-Saharan African firms cross-listed into the UK excluding the Egyptian firms). This contrasts with only 7 sub-Saharan African firms cross-listed in the US, all of which are from South Africa.

109 These are AngloGold Ashanti Limited (South Africa to Ghana); Flame Tree Group Holdings Limited (Mauritius to Kenya); and Oando Plc (Nigeria to South Africa).

with more intra-regional trade relations have more sub-regional cross-listing activity than Western Africa.[110]

Fourth, sub-Saharan African firms are more likely to cross-list into countries in which they have existing operations. On the evidence, 34 of the 48 regionally cross-listed firms (approximately 71%) are cross-listed into countries in which they have ongoing operations or a geographical footprint. Most of these firms are engaged in the financial services industry. Figure 2.4 presents a pictorial representation of the industry of operation of the 48 sub-Saharan African firms pursuing regional cross-listings.

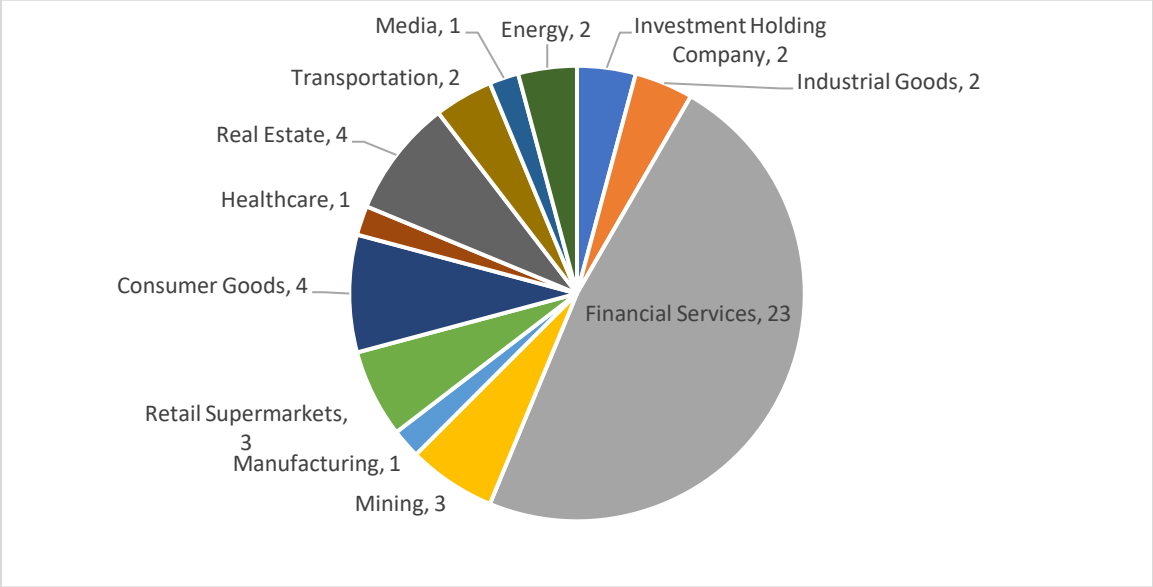

Figure 2.4 - Industry of Operation of Regionally Cross-Listed sub-Saharan African Firms

Fifth, contrary to the paradigm case of cross-listing globally, where firms from countries with less developed markets cross-list into countries with more developed markets to either improve the liquidity of their securities or bond themselves to better standards of investor protection and disclosure, in sub-Saharan Africa there is more cross-

[110] See generally Chapter 6. With specific reference to regional trade, see Chapter 6, Section 6.4.2.2.

listing activity from firms in countries with relatively more developed markets into countries with less developed markets. Thus, within Southern Africa, there are more firms from South Africa (which has the most developed market in the sub-region) cross-listing regionally into smaller neighbouring markets (primarily Namibia).[111] Similarly, there are more firms from Kenya (with the most developed market in Eastern Africa) cross-listing regionally into smaller neighbouring markets (primarily Uganda).[112]

Finally, the data suggests that cross-listing has not played a meaningful role in financing sub-Saharan African firms in countries without stock exchanges or with comparatively poorly developed exchanges. On the evidence, no firm from an African country without a stock market has securities listed into the US or the UK. Similarly, Trust Bank Limited (incorporated in The Gambia and listed in Ghana) is the only firm from a sub-Saharan African country without a stock market to be listed regionally. Thus, if securities markets promote growth by providing long term equity finance to firms and projects that on the margin may have gone unfunded, there is very thin evidence that sub-Saharan African firms in countries with no markets or with poorly developed markets are achieving this outcome through cross-listing. I return to regional cross-listing in Chapter 6.[113]

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111 South Africa is the largest exporter of cross-listings in Southern Africa and indeed in sub-Saharan Africa, with 17 South African firms cross-listing into other markets within the region. 15 of these 17 South African firms are cross-listed into Namibia.

112 Eight of the nine firms pursuing regional cross-listing within Eastern Africa are incorporated, operating and listed in Kenya. All eight of these firms are cross-listed into Uganda.

113 See Chapter 6, section 6.3.1 and 6.3.3.

2.3.3. Implications of the Cross-Listing Data on the Debates on Securities Regulation in Sub-Saharan Africa

2.3.3.1. Reason for Cross-Listing into the US

Global debates on the reasons for and implications of cross-listing are largely US-centric and have primarily focused on cross-listing into the US.[114] However, the data examined so far shows that the more relevant question in the context of sub-Saharan Africa is not: 'why do firms cross-list into the US'? Rather, it is: 'Why don't firms cross-list into the US'? On this, at least three reasons can be given.

First, most firms from the region are relatively small.[115] For these issuers, the US may not be an attractive destination because of significantly high cross-listing costs. There is empirical evidence in the African context in support of the proposition that costs are a barrier to firms cross-listing into the US.[116]

Second, the risk of liability under US federal securities law poses a barrier, particularly to the typically small African firm raising a fairly small amount of capital. Increased enforcement activity of the SEC against foreign firms listed in the US,[117] and the

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114 See notes 80-91 and 93-94 and accompanying text.

115 For an interesting discussion on the nature of and constraints faced by firms in sub-Saharan Africa, see Christopher Malikane, 'The Theory of the Firm in the African Context' in Célestin Monga and Justin Yifu Lin (eds), *The Oxford Handbook of Africa and Economics: Volume 1* (OUP 2015). See also n 34 above on the prevalence of small firms in sub-Saharan Africa.

116 Ihejirika (n 95).

117 See Armour, Bengtzen and Enriques, (n 90) (noting increased public enforcement against foreign issuers).

prospect of securities class action by US investors may pose a barrier to cross-listing in the US.[118]

Finally, the level of cross-listing into South Africa, Namibia and the UK as contrasted with the US may mean that cultural factors play a role in the cross-listing decision of African firms generally.[119] Familiarity with the English legal system and company law (on which the company laws of many African states are based), geographical proximity to neighbouring markets into which many firms in sub-Saharan Africa are cross-listed, and unfamiliarity with the American legal system and its entrepreneurial approach to class action litigation are arguably significant factors shaping the cross-listing decision of African firms.

Taken together, managers of African firms pursuing cross-listings outside Africa do not appear to be making their cross-listing decisions in order to benefit from the premium for cross-listing in the US.[120] The patterns of cross-listing outside Africa seem to provide more support for the liquidity rather than the bonding hypothesis.[121] The patterns of regional cross-listing, in turn, suggest that cultural and geographical factors may play a role in the cross-listing decision of African firms. Nonetheless, the pattern of trans-continental cross-listing may still be consistent with the bonding hypothesis if the seven

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118 See Erica Gorga, 'Is US Law Enforcement Stronger than That of a Developing Country: The Case of Securities Fraud by Brazilian Corporations and Lessons for the Private and Public Enforcement Debate' (2015) 54 Columbia Journal of Transnational Law 603.

119 Licht, 'Legal Plug-ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform' (n 8).

120 Indeed, a recent body of empirical evidence suggests that the cross-listing premium is not unique to listings in the US (see Sarkissian and Schill (n 96)) and crucially, that sub-Saharan African firms cross-listing regionally also benefit from the cross-listing premium (see Adelegan (n 95)).

121 See n 100-105 above and accompanying text.

firms cross-listed into the US have better than average corporate governance arrangements. I frame an agenda to examine this in the concluding chapter of this thesis.

2.3.3.2 Potential Synergy of Product and Capital Markets

Do cross-listing sub-Saharan African firms do so to create a synergy between their products and capital markets? Professors Armour and Enriques have argued (in the context of reward crowdfunding) that managers of firms can use fund raising activity to test future demand and possible uptake of their products, thereby raising capital only as a by-product of the expansion of their product markets.[122] In this way, retail investors can effectively 'crowdfund' firms whose products they consider to be salient by purchasing their illiquid securities. To what extent can a similar reasoning explain the patterns of regional cross-listing in sub-Saharan Africa?

To examine this, I obtained shareholding information on the 48 regionally cross-listed firms in sub-Saharan Africa[123] with the goal of understanding the extent to which those firms' securities were held by retail investors in the countries into which they were cross-listed. The firms reported their shareholding information in different ways. Most firms gave breakdowns based on aggregate numbers of shareholders holding certain numbers of shares,[124] while only a few gave additional breakdowns of retail and institutional shareholders or a geographical analysis of the countries of domicile of the

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122 John Armour and Luca Enriques, 'The Promise and Perils of Crowdfunding: Between Corporate Finance and Consumer Contracts' (2018) 81 The Modern Law Review 51.

123 A high-level snapshot of the salient shareholding information for each company is set out in Column 7 of Table 4 in the appendix to this Chapter. Details of shareholding were obtained from the most recently published annual reports of the companies.

124 For example, number of shareholders holding over 1 million shares and the total percentage of the company's stock held by those shareholders.

shareholders. In most situations, few shareholders holding significant numbers of shares (usually 1 million shares or more) together had controlling interests in those firms.[125] Whilst some firms had significant numbers of retail investors,[126] retail investors typically held minor stakes in the firms.[127] Only a few of these gave a geographical breakdown of their shareholding by country or region of domicile of the shareholder.[128] In most cases where shareholding geography was disclosed, there was substantially more investment from the US, UK, Europe, Canada and China than from other countries or regions of the world (including the African countries in which the firm's securities were cross-listed).[129]

Given the concentration of ownership in the hands of a few shareholders holding significant stakes in the firms, the minor stakes held by individuals and retail investors, and the minority interests held by foreign retail investors and individuals, the evidence suggests

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125 This was the case in 26 of the 47 firms for which shareholding information was available. In these cases, shareholders holding over 1 million shares in the company often controlled very significant stakes in the company (see for instance Universal Partners Limited where 40 shareholders holding over 1 million shares each together own 98.8% of the company's stock).

126 14 firms had over 10,000 retail investors. In addition, Sanlam Limited had over 400,000 shareholders and Ecobank Transnational Incorporated had over 760,000 shareholders.

127 13 firms disclosed the percentage of their shares held by retail investors. Retail investors held less than 10% of the shares in 10 of these 13 companies. In the other three companies (i.e. 4Sight Holdings Limited, Choppies Enterprises Limited and Sanlam Limited) retail investors held 67.82%, 11.03% and 13.06% respectively.

128 10 firms provided a breakdown of the geography of their shareholders.

129 For instance, shareholders from South Africa, US, Canada, UK and Europe own 93.4% of the shareholding in Barlowood Limited (incorporated in South Africa and cross-listed in Namibia); shareholders in South Africa, UK, US, Canada, Europe and Asia own 88.3% of the shares in Investec Limited (incorporated in South Africa and cross-listed into Namibia and Botswana); shareholders in South Africa, US, UK and Europe own 97.4% of the shares in Truworths International Limited (incorporated in South Africa and cross-listed into Namibia). Where disclosed, foreign retail investors typically held extremely small stakes in companies (see for instance Kenya Airways (foreign individuals – 0.10%), KCB Group Plc (individuals within the East African Community – 0.09%; foreign individuals – 1.81%); Standard Bank Group Limited (investors from Namibia – 1.2%).

that firms do not appear to be establishing a synergy between their products and capital markets.

2.4 Conclusion

In conclusion, the literature on the effects of securities markets on economic growth and the data about cross-listing support two main conclusions.

First, whilst the literature is not conclusive, there is some support in the empirical literature for a link between securities markets and economic growth. Although this does not support a proposition that all sub-Saharan African countries without domestic securities markets should have (or could sustain) independent markets, it means that policymakers in these jurisdictions can seriously consider the extent to which they can rely on existing regional structures as a source of equity finance for their firms.[130]

Second, financing practice suggests that securities cross-listing has not played a meaningful role in providing finance to firms in sub-Saharan African countries that either do not have domestic securities markets or that only have poorly developed domestic markets. This makes the development of domestic securities markets crucially important.

[130] See Chapter 6 for a comprehensive discussion on securities market integration in sub-Saharan Africa, as well as the existing structures for cross-border securities listing and trading in the different Regional Economic Communities in the region.

CHAPTER 3 – DEVELOPING SECURITIES MARKETS IN SUB-SAHARAN AFRICA: INSTITUTIONS AND FINANCIAL TECHNOLOGY

In this Chapter, I examine institutions and financial technology, two key drivers of securities market development in sub-Saharan Africa. My goal in doing so is more modest than it may appear. I do not intend to reinvent the wheel or to create a new theoretical model explaining the preconditions for securities market development.[1] Rather, I apply advances in institutional economics, political science and legal scholarship to examine the legal institutions that are helpful in fostering securities market development in sub-Saharan Africa, and the impact of financial technology on securities markets in the region. I then apply the learnings from this examination, using 3 sub-Saharan African countries as case studies in Chapters 4 and 5 of this thesis.

An examination of this nature is important for at least two reasons. First, by helping policymakers understand the institutions supporting market development, the analysis aids market reform agendas by identifying key areas where policymakers' time and resources can be productively deployed. Second, the analysis suggests that, although at a broad level of generality the institutions supporting well-functioning markets are similar, there are often no universally correct answers to the numerous questions facing policymakers

[1] Apart from the fact that this has already been well-debated in the literature, there are strong reasons to doubt that any universally applicable theory on the development of securities markets can be postulated. Markets operate in an environment strongly influenced by legal, political, economic, cultural and behavioural factors and are shaped by the credibility of public and private institutions and other external stakeholders whose interests are often misaligned. Thus, barring statements of broad principle, the reality is that what works in one country may fail completely in another.

seeking to develop their securities markets. Institutions that work in one jurisdiction may be largely ineffective in another. Consequently, transplanting specific institutions is unlikely to produce desired outcomes if the transplanted institutions do not fit properly within the mix of institutions regulating that market.[2] What ultimately matters is not the mere presence of an institution, but its effectiveness in the specific circumstances of that country.

This Chapter proceeds in four sections. I begin in Section 1 with an institutional analysis, utilising the New Institutional Economics framework.[3] I use the framework in this analysis for two reasons. First, it permits a simple but realistic examination of the constraints facing individuals and organisations, thus facilitating the creation and deployment of effective reform strategies.[4] Second, it demonstrates the importance of reform agendas being properly situtated in the institutional context prevailing in a given society.[5] I adopt the definition of institutions as '*humanly devised constraints that structure*

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2 For a brief discussion on legal transplants, see n 33 below.

3 The term 'New Institutional Economics' was coined by Nobel Laureate Oliver Williamson. See Oliver Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications: A Study in the Economics of Internal Organization* (New York: Free Press 1975). In broad outline, the framework examines how economic behaviour is affected by the prevailing institutional environment and how these 'rules of the game' and their associated enforcement mechanisms affect production and transaction cost. The framework argues that production and exchange largely depend on the institutions prevailing in the society. Where these institutions facilitate low-cost production and transacting, there will be more specialization and ultimately greater economic productivity. See Ronald Coase, 'The New Institutional Economics' (1998) 88 American Economic Review 72.

4 On this, see Boniface Chimpango, 'The Development of African Capital Markets: A Legal and Institutional Approach' (PhD Thesis, Nottingham Trent University 2014). Chimpango distinguishes between the New Institutional Economics framework and other theories of legal change including the law and development schools (which examine how to use law to effect social development), legal transplantation (which seeks to achieve legal reform through adaptation of legal rules used in other countries and classical economic theory (which emphasises the use of market mechanisms in reaching efficient outcomes).

5 Thus, by distinguishing institutions into formal constraints, informal constraints and enforcement mechanisms, it is possible to see how strong laws on the books may not work effectively if not backed by effective enforcement. It is also possible to see how social norms can positively or negatively affect formal rules.

political, economic and social interactions' and the classification of institutions into formal constraints, informal constraints and enforcement mechanisms.[6] Applying this to securities markets provides a simple framework to enable policymakers in sub-Saharan Africa to understand the proper place of law as an institution constraining the conduct of market participants. This analysis will pursue three main claims. First, as a formal constraint, securities law lays down the formal rules guiding the conduct of market players. Consistent with the key findings in the literature, securities law must provide for rules on disclosure and rules constraining self-dealing.[7] Second, law creates the public enforcement organisations supporting market development (such as courts, securities regulators, and public prosecutors) and supports the effectiveness of private and quasi-public enforcement organisations (such as stock exchanges and other self-regulatory organisations).[8] Third, due to its influence on both the formal constraints and the enforcement processes, law influences the informal constraints and social norms motivating market participants.[9] The crucial thing to bear in mind is that law is but one item in a mix of institutions regulating well-functioning markets. I therefore advocate for a realistic assessment of the place of law

6 Douglass North, *Institutions, Institutional Change and Economic Performance* (CUP 1990); Douglass North, 'Institutions' (1991) 5 Journal of Economic Perspectives 97.

7 Bernard Black, 'The Legal and Institutional Preconditions for Strong Securities Markets' (2000) 48 UCLA Law Review 781.

8 On the role of law in creating and supporting effective enforcement institutions, see for instance John Coffee Jr, 'Starting From Scratch: The Legal and Institutional Steps to Viable Securities Markets in Transition Economies' (2001) 27 Review of Central and East European Law 7; John Coffee Jr, 'The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control' (2001) 111 Yale Law Journal 1.

9 On this, see Melvin Eisenberg, 'Corporate Law and Social Norms' (1999) 99 Columbia Law Review 1253; Margaret Blair and Lynn Stout, 'Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law' (2001) 149 University of Pennsylvania Law Review 1735; Lynn Stout, 'Trust Behavior: The Essential Foundation of Securities Markets' (2009) UCLA Law and Economics Research Paper No 09-15 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1442023>.

in facilitating market development. I do not pursue a claim that good securities law alone can transform underdeveloped markets.

With this simple understanding in mind, Section 2 turns to the political economy of securities market development in sub-Saharan Africa. I provide recent statistics and charts from the World Economic Forum's Global Competitiveness Index and the World Bank's Ease of Doing Business Index on the prevalent institutional frameworks in sub-Saharan Africa. These provide a useful tool to visualise the severe institutional limitations securities markets in sub-Saharan Africa operate under. How do policymakers develop markets in this prevailing institutional context? Of course, policymakers can readily transplant rules and regulatory architecture from other jurisdictions. However, these transplanted institutions are unlikely to mesh well with other prevalent domestic institutions. Policymakers must therefore focus on domestic solutions to the development of their domestic markets, and can choose from a menu of options developed by political scientists and law and development scholars in reforming domestic institutions.

Section 3 turns to the impact of Financial Technology (Fintech) on securities markets in sub-Saharan Africa. Fintech is fundamentally disrupting today's securities markets. In developed countries, Fintech and the rise of institutional investors have led to increasingly larger amounts of funds being raised in private placements and other exempt offerings and sold in liquid 'private' markets (dark pools and electronic communication networks). Disruptive innovation of this sort democratises the role of traditional market participants and often calls for a rethink of how to properly regulate today's markets. I begin this section by briefly discussing Fintech disruption in developed markets (particularly in the US). Automation, robotics, machine learning, artificial intelligence and

algorithmic trading are fundamentally changing the market players participating in these markets and thus raising debates on the proper approach to regulating market intermediaries. Taken together, Fintech is disrupting the microstructure of developed markets, and forcing policymakers to consider more innovative regulatory approaches to keep up with market innovation.[10] Next, I consider the role Fintech plays in the financial sector in sub-Saharan Africa and its impact on securities regulation in the region. I begin by presenting statistics from the UN's International Telecommunications Union (ITU) on mobile, internet and broadband penetration in sub-Saharan Africa. I thereafter reflect on how the growth in ICT in sub-Saharan Africa is influencing and likely to influence securities markets in sub-Saharan Africa. Here, I make two main claims. First, although the data clearly reveals an enormous growth in ICT development, sub-Saharan Africa still lags substantially behind the rest of the world in technological deployment. Consequently, the sort of disruption experienced in developed countries is unlikely to be the norm in sub-Saharan Africa in the foreseeable future. Second, Fintech in securities markets in sub-Saharan Africa plays a different role than it plays in the securities markets of more developed countries globally: in that region, it has primarily been employed in the service of financial inclusion goals by providing financial products to retail market participants. Given its role in galvanising retail participation, Fintech is likely to make the traditional institutions of securities regulation more and not less salient in sub-Saharan Africa.

Section 4 concludes and charts the path for the rest of the thesis.

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[10] On this, see generally, Chris Brummer, 'Stock Exchanges and the New Markets for Securities Laws' (2008) 75 The University of Chicago Law Review 1435; Chris Brummer, 'Disruptive Technology and Securities Regulation' (2015) 84 Fordham Law Review 977; John Armour, Martin Bengtzen and Luca Enriques, 'Globalization' in Merritt Fox and others (eds), *Securities Market Issues for the 21st Century* (2018).

3.1 Securities Markets as Institutions

The modern understanding of 'institutions' has been greatly influenced by the pioneering work of Nobel Laureate Douglass North.[11] North viewed institutions, as the 'humanly devised constraints that structure political, economic and social interaction'[12] These constraints structure incentives in human exchange, and shape the way different societies evolve through time.[13] Through the constraints they place on organisations and economic agents, they influence transaction and production costs and thus the feasibility and profitability of economic activity.[14] Institutions consist of formal constraints (rules produced or recognised by the political order, including statutes and legislation, political and economic rules, and contract),[15] informal constraints (extensions, elaborations and modifications of formal rules; socially sanctioned norms of behaviour; and standards of conduct)[16] and enforcement mechanisms.[17]

Why do institutions matter? Institutions affect economic performance,[18] and there is strong historical and empirical evidence in support of the theoretical proposition that

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11 Of course, Professor North was not the first contributor to the literature on institutional economics. For a review of early literature on institutional economics, see Walter Neale, 'Evolutionary Economics I: Foundations of Institutional Thought' (1987) 21 Journal of Economic Issues 1177-1206; Malcolm Rutherford, 'Understanding Institutional Economics: 1918-1929' (2000) 22 Journal of the History of Economic Thought 277.

12 North, 'Institutions' (n 6); North, *Institutions, Institutional Change and Economic Performance* (n 6).

13 North, *Institutions, Institutional Change and Economic Performance,* (n 6) 3.

14 North, 'Institutions' (n 2) 97.

15 North, *Institutions, Institutional Change and Economic Performance* (n 6) 46-53.

16 ibid 40.

17 ibid 54-60.

18 ibid (n 6) 5-6 'Institutions affect the performance of the economy by their effect on the costs of exchange and production, together with the technology deployed, they determine the transaction and transformation (production) costs that make up total cost'.

differences in institutions are a fundamental cause of differences in economic development.[19] Thus, institutions mould societies for better or for worse. The agenda for policymakers is therefore to develop or strengthen growth supporting institutions whilst insulating the economic or market system from the effects of growth-stifling institutions.

But there is another key reason institutional development is important: markets are themselves institutions.[20] Unlike the analytical construct of the 'perfectly competitive market', real-world markets require at least basic rules to operate,[21] and are created, reformed and sustained by economic actors (individuals, firms, and governments).[22] Thus, if markets are institutions, then the process of market development is itself a process of institutional development.

Securities markets, like other markets, are also essentially institutions, created, reformed and sustained by economic actors.[23] As such, securities markets development

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19 For the seminal work on the importance of institutions to economic development, see Daron Acemoglu, Simon Johnson and James Robinson, 'Institutions as a Fundamental Cause of Long-Run Growth' in Philippe Aghion and Steven N. Durlauf (eds), *Handbook of Economic Growth*, vol 1B (Elsevier B.V. 2005). See also Dani Rodrik, Arvind Subramanian and Francesco Trebbi, 'Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development' (2004) 9 Journal of Economic Growth 131. For arguments showing developmental breakthroughs in the absence of sophisticated institutions, see Steven Fish, 'Penury Traps and Prosperity Tales: Why Some Countries Escape Poverty While Others Do Not' in Carol Lancaster and Nicolas van de Walle (eds), *The Oxford Handbook of the Politics of Development* (OUP 2018).

20 For a summary of the argument that markets are institutions, see Steven Kent Vogel, *Marketcraft: How Governments Make Markets* (OUP 2018).

21 ibid 3 (noting that all types of markets, including primitive marketplaces required some basic rules such as locations and hours of operations). See also Douglass North, *Structure and Change in Economic History* (W.W. Norton 1981) 34-37 (discussing the various formal and informal institutions at play in a simple purchase of oranges from a vendor).

22 Vogel, (n 20) 3-4 (arguing that if markets are institutions, then people must create them and arguing for the key role of states in the process of '*crafting*' markets).

23 Katharina Pistor, 'A Legal Theory of Finance' (2013) 41 Journal of Comparative Economics 315, 321 'Financial markets do not exist outside rules but are constituted by them. It is possible to distinguish different rules and rule makers, such as private and public ones. This has led some to argue that actors can opt out of the legal system and constitute their own system. This system, however, is also rule-bound'.

essentially involves the development of institutions,[24] and sub-Saharan African states seeking to develop their markets must therefore look to develop the institutions supporting well-functioning securities markets. It is to these institutions, our attention must now turn.

3.1.1 Formal Constraints Supporting Well-Functioning Markets

As stated above,[25] formal constraints are the products of or are explicitly recognised by the extant political order. In the context of the securities markets, these constraints are provided for by formal rules of securities regulation.

What formal rules of securities regulation are most amenable to market development? Several scholars have proffered answers to this question.[26] A hugely influential contribution to the scholarship on this point was a seminal paper by Professor Bernard Black.[27] Professor Black argues that in order to develop its securities markets, a country's laws and institutions must give minority shareholders good information about the value of the issuer's business, and confidence that the company's insiders will not

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24 For a recent review of the literature on the importance of institutions to the growth of finance, see John Armour and Caroline Schmidt, 'Building Enforcement Capacity for Brazilian Corporate and Securities Law' in R. Huang and N. Houson (eds), *Public and Private Enforcement: China and the World* (CUP 2017).

25 See n 15 above and accompanying text.

26 See for instance Coffee Jr, 'Starting From Scratch: The Legal and Institutional Steps to Viable Securities Markets in Transition Economies' (n 8) (discussing legal and institutional steps to well-functioning securities markets, with Macedonia as a case study); Robert Ahdieh, 'Making Markets: Network Effects and the Role of Law in the Creation of Strong Securities Markets' (2002) 76 Southern California Law Review 277 (arguing that law promotes market development by addressing network inefficiencies and coordinating expectations among different securities market participants); Bernard Black, 'The Role of Self-Regulation in Supporting Korea's Securities Markets' (2003) 3 Journal of Korean Law 17 (discussing the importance of self-regulation in promoting strong markets in Korea). Zohar Goshen and Gideon Parchomovsky, 'The Essential Role of Securities Regulation' (2005) 55 Duke Law Journal 711 (arguing that the essential role of securities regulation is to facilitate the work of information traders i.e. traders who specialise in gathering and analysing general market and firm-specific information).

27 Black, 'The Legal and Institutional Preconditions for Strong Securities Markets' (n 7).

expropriate the value of their investments (either through self-dealing transactions, squeeze-out mergers, or market transactions such as insider trading).[28] As Professor Coffee notes, securities law traditionally addresses the first of these concerns whilst corporate law addresses the second.[29] However, both must be addressed for investors to comfortably invest or trade at prices that are not severely discounted to account for expropriation risk. Professor Black's conjectures have received empirical support in the literature.[30]

Two important points must be remembered here. First, securities law remains only one institution in a mix of institutions supporting well-functioning markets,[31] and is subject to well-known limitations.[32] In addition, rules of securities regulation that work for one country may fail spectacularly in another, demonstrating the need to be cautious in

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28 On this basis, Professor Black then develops a list of 25 key institutions and enforcement actors that are necessary, but insufficient, for the development of strong securities markets. See ibid 786-803.

29 Coffee Jr, 'Starting From Scratch: The Legal and Institutional Steps to Viable Securities Markets in Transition Economies' 'Starting from Scratch' (n 8) 21.

30 Professor Black's conjectures have received empirical support in the literature. See for instance Vladimir Atanasov and others, 'How Does Law Affect Finance? An Examination of Equity Tunneling in Bulgaria' (2010) 96 Journal of Financial Economics 155 (conducting an experiment on Bulgaria following changes to Bulgarian securities law in 2002 which increased protections against dilutive offerings and freeze-out mergers, and finding that following the changes in law, dilutive offerings and below-market freeze-out mergers ended and the freeze-out mergers that continue are at a premium to market value). See also Utpal Bhattacharya and Hazem Daouk, 'The World Price of Insider Trading' (2002) 57 Journal of Finance 75 (finding that the enforcement of insider trading laws has a statistically significant effect on the cost of capital); Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'What Works in Securities Laws?' (2006) 61 Journal of Finance 1 (finding that extensive disclosure requirements are associated with larger stock markets). For counter-arguments on the role of law in fostering market development, see note 39 below and accompanying text.

31 Black, 'The Legal and Institutional Preconditions for Strong Securities Markets', (n 7), 785 (arguing that formal rules of securities regulation are only one item in a mix of institutions governing well-functioning markets). Indeed, securities regulation itself relies on the presence of other institutions and players (including the rule of law, honest and efficient courts, the acceptance of property rights and market mechanisms) in the absence of which it may not qualify as a "good" institution.

32 Armour and others, *Principles of Financial Regulation* (OUP 2016) (discussing the limitations of financial regulation, including the political economy in which financial regulation is written and enforced).

transplanting formal rules from one jurisdiction into another.[33] We must therefore understand the formal constraints of securities law as a helpful but insufficient requirement

[33] The main thrust of the legal transplants theory is that law does not always reflect the particular society in which it operates but is often borrowed from other societies. In this sense, societies seeking to promulgate rules do not always have to make new rules but can 'transplant' existing rules from other societies. The legal transplants theory was developed and popularised by Professor Alan Watson (see Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993; Alan Watson, 'The Birth of Legal Transplants' (2012) 41 Georgioa Journal of International & Comparative Law 605). The theory grew in popularity and has been used in formulating securities regulation following mass privatisation of state enterprises and the creation of securities markets in many developing countries (see for instance John Coffee, 'Privatization and Corporate Governance: The Lessons from Securities Market Failures' (1999) 25 Journal of Corporation Law 1 (recounting the experience of the Czech Republic and Poland); Bernard Black, Reinier Kraakman and Anna Tarassova, 'Russian Privitization and Corporate Governance: What Went Wrong' (1999) 52 Stanford Law Review 1731 (on the experience in Russia)), including in Africa (see for instance Stuart Cohn, 'Teaching in a Developing Country: Mistakes Made and Lessons Learned in Uganda' (1998) 48 Journal of Legal Education 101 (discussing the prevalence of stringent US-styled rules governing severely underdeveloped securities markets in Uganda). Some commentators still see legal transplantation as a viable tool in developing securities law in sub-Saharan African countries (see for instance Okiemute Akpomudje, 'Legal Regulation of the Capital Market in Nigeria: Analysis and Prospects for Reform' (Ph.D Thesis, Lancaster University 2017) (advocating for the use of legal transplantation in developing securities law in Nigeria). Legal transplantation has however come under severe criticism given the experience of many countries that experimented with it in the period of liberalisation and privatization, and the recognition that transplanted rules may not sit well with the other domestic institutions. See for instance Black, 'The Legal and Institutional Preconditions for Strong Securities Markets' (n 7) 823 'American securities laws can't be simply copied and transplanted wholesale to another country. They won't mesh with other local institutions, will likely conflict with other local laws, will be far more complex than needed, and will in some respects be weaker than needed'. For more recent discussions on legal transplantation and failures of transplanted institutions, see Ahmad A Alshorbagy, 'On the Failure of a Legal Transplant: The Case of Egyptian Takeover Law' (2012) 22 Indiana International & Comparative Law Review 237; Michele Graziadei, 'Comparative Law, Transplants, and Receptions' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019).

for well-functioning securities markets[34] and remain realistic in our understanding of what these formal constraints can achieve in the real world.[35]

Second, the identification of information disclosure and rules constraining expropriation as necessary requirements for well-functioning markets says little about how these rules should be deployed in practice in a particular country. For instance, even if initial and ongoing disclosure should be provided by issuers as a condition for entering and remaining on the market,[36] it says little about the content of that disclosure or the frequency that should be required of issuers. These are decisions which policymakers would ultimately be required to take. Given that breaches of formal constraints potentially result in enforcement action, they impose compliance costs on the entities subject to them.[37] Therefore, in making decisions on securities regulation, policymakers must achieve a careful balance between achieving the goals they seek to attain and the cost implications on the subject of the regulation, realising that if the cost of participating in the market

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34 See for instance, Coffee Jr, 'Starting From Scratch: The Legal and Institutional Steps to Viable Securities Markets in Transition Economies' (n 8) 16 'The bottom line must then be bluntly stated: to obtain access to external finance, Macedonia will probably need to improve the quality of either or both its corporate and securities laws. To be sure, while such improvement may be a necessary condition to the development of a viable securities market, it is not a sufficient condition, and macroeconomic and political stability may represent even more important conditions and barriers'. See also Black, 'The Legal and Institutional Preconditions for Strong Securities Markets' (n 7) 813 (arguing for the critical role played by enforcement and the fact that rules on paper are necessary but insufficient to constrain self-dealing).

35 Coffee Jr, 'Starting From Scratch: The Legal and Institutional Steps to Viable Securities Markets in Transition Economies', (n 8) 32 (concluding in the context of Macedonia that the quest for sound corporate and securities law can be usefully pursued as a virtue for its own sake and probably not in the belief that the country will have deep and liquid securities markets in the near future).

36 I discuss the importance of issuer disclosure in more detail in the next Chapter. See Chapter 4, section 4.2.2.

37 For example, whilst half-yearly or quarterly disclosure provides investors with less frequent information than, say, monthly disclosure, it is clear that requiring monthly ongoing disclosure would be prohibitively costly both in terms of the actual cost of complying with this requirement, and the opportunity cost of loss of management time and resources which could have been more productively deployed.

outweighs its benefits, potential participants may have little incentive to enter the market in the first place.

3.1.2 Informal Constraints Supporting Well-Functioning Markets

As stated above,[38] informal constraints are constraints imposed on individuals and organisations outside of the formal constraints provided for or recognised by the political order. These include socially sanctioned norms of behaviour, extensions and elaborations of formal constraints over a period of time as a result of repeated exchange and use, and internally enforced standards of conduct.

Informal constraints can play a key role in securities market development. In fact, they played crucial roles in the development of securities markets in the US and the UK. In both countries, stock exchanges existed for centuries before the introduction of formal rules of securities regulation mandating disclosure and prohibiting market abuse.[39] Stock exchanges, underwriters and other actors with significant reputational capital imposed strong listing requirements, required disclosure and enforced standards of honesty, which made investors place trust in the market and thus participate.

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38 See n 16 above and accompanying text.

39 For the core reading on this subject, see Brian Cheffins, 'Does Law Matter? The Separation of Ownership and Control in the United Kingdom' (2001) 30 Journal of Legal Studies 459 (arguing that law played only a marginal role in the initial development of well-functioning securities markets in the UK, and that self-regulation through the London Stock Exchange and market intermediaries played a more active role); Coffee Jr, 'The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control' (n. 8) (discussing the key role of self-regulation, independent auditors, underwriters and outside directors in the development of strong securities markets in the US). See also John Coffee Jr, 'Dispersed Ownership: The Theories, the Evidence, and the Enduring Tension between "Lumpers" and "Split-ters"' in Dennis Mueller (ed), *The Oxford Handbook of Capitalism* (OUP 2012).

A few things must be remembered regarding the role of informal constraints in developing securities markets. First, as the experience in the US and the UK suggests, given that they are sometimes extensions or elaborations of formal constraints, informal constraints are crucial to institutional development. They can impose standards beyond the requirements of formal law (and punish breaches of these standards) and as a result create higher social standards. They can also reduce compliance cost given that spontaneous compliance is cheaper than "structured" or process-oriented compliance or the use of enforcement mechanisms. In addition, provided one of the prevalent social norms is obedience to the law, informal institutions and social norms can reinforce the effectiveness of formal institutions. Conversely, informal institutions can limit the effectiveness of formal constraints if these formal constraints are imposed without taking the informal institutions into account, or if the prevalent social norm incentivises infidelity to law.[40] Thus, the prevalent social norms, the culture of honesty, and the standards of conduct members of society hold themselves to strongly influence the institutional mix in a society, the effectiveness of its formal constraints and hence the quality of its institutions.[41]

Second, although markets may exist and operate without meaningful formal constraints, the more society moves from relational to impersonal, 'arms-length' contracting, and ultimately markets, the more it relies on formal constraints.[42] In this

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40 See Black, 'The Legal and Institutional Preconditions for Strong Securities Markets' (n 7).

41 For interesting discussions on the impact of culture on corporate governance and the need for law reform to be compatible with the prevalent culture of the individual jurisdiction, see Amir Licht, Chanan Goldschmidt and Shalom Schwartz, 'Culture, Law, and Corporate Governance' (2005) 25 International Review of Law and Economics 229; Amir Licht, Chanan Goldschmidt and Shalom Schwartz, 'Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance' (2007) 35 Journal of Comparative Economics 659.

42 See Pistor (n 23) 321 '*The more a financial system moves from relational finance to entities and ultimately markets, the more it depends on a formal legal system with the capacity to authoritatively*

situation, some of the previously informal constraints imposed by market participants may then be assimilated into formal rules of securities regulation.

3.1.3 Enforcement Mechanisms

Enforcement mechanisms form another key component in the analysis of institutions. By themselves, neither formal nor informal institutions would serve useful purposes if adherence to them is not enforced. The ability to develop effective, low-cost enforcement is thus important to institutional and economic growth.[43]

Several market actors and organisations support a credible enforcement program. These include an honest and efficient judiciary; a sophisticated, well-staffed and funded securities regulator; sophisticated securities lawyers and market intermediaries; the media; prosecutors; amongst others.[44] Invariably, what is important in the enforcement of securities regulation is not the existence of enforcement institutions but their credibility and effectiveness.[45] A securities regulator that lacks the funds, technology or staff to effectively regulate its market is unlikely to instil the level of trust required to encourage market participation. The same is largely true if the country has a corrupt or inefficient

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vindicate the rights and obligations of contractual parties or to lend its coercive powers to the enforcement of such claims'.

43 North, *Institutions, Institutional Change and Economic Performance* (n 6) 54 (noting weak enforcement as a key reason for underdevelopment in Third World countries).

44 For a comprehensive discussion of the organisations supporting enforcement in securities markets, see Black, 'The Legal and Institutional Preconditions for Strong Securities Markets' (n 7). For an interesting discussion of the role of the media in promoting enforcement of corporate law, see Alexander Dyck, Natalya Volchkova and Luigi Zingales, 'The Corporate Governance Role of the Media: Evidence from Russia' (2008) 63 Journal of Finance 1093.

45 See for instance, John Coffee Jr, 'Law and the Market: The Impact of Enforcement' (2007) 156 University of Pennsylvania Law Review 229 (discussing the intensity of enforcement in the US and linking this to the reduced cost of capital and cross-listing premium experienced by foreign firms cross-listing their securities into the US).

judiciary. Developing a sound enforcement program in the context of weak judicial and public institutions is thus very difficult.[46] I return to enforcement in more detail in Chapter 5 of this thesis.

3.1.4. The Place of Securities Law as an Institution in Supporting Market Development

Viewing law as an institution permits a simple, realistic, yet effective assessment of its place in supporting market development. As discussed above, good law is a helpful, though insufficient institution supporting market development. Nonetheless, it remains an important one, given its effect on other institutions, the cost it imposes both on market participants and on the legal system, and the coercive power it wields in mandating standards of conduct.

Taken as an institution, therefore, securities law plays three major roles in the mix of institutions supporting market development. First, securities law lays down the formal rules constraining market participants. In so doing, it provides minimum standards of conduct, the violation of which can attract intervention from the coercive power of the state. Second, law plays a key role in effective enforcement. It creates the public enforcement organisations supporting market development (such as courts, securities regulators and public prosecutors) and supports the effectiveness of private and quasi-public enforcement organisations (such as self-regulatory organisations like stock exchanges) by providing avenues for the resolution of disputes and providing state backing

[46] See for instance Armour and Schmidt (n 24) (discussing the development of enforcement capacity in the context of weak judicial and public institutions in Brazil).

to privately ordered enforcement mechanisms. Third, given its influence on both formal constraints and enforcement, law can influence the informal constraints and social norms motivating market participants. It must be pointed out that its ability to do this crucially depends on the prevailing compliance culture in the particular country, and the credibility of sanctions imposed for breach. In particular, imposing high legal standards of conduct in a society with a strong culture of compliance may motivate people in that society to informally adopt even higher standards of conduct to effectively signal their honesty and compliance. The opposite may be the case in a society with a low culture of compliance, as these standards may simply be ignored or market participants may find creative ways to evade them. Ultimately, securities law can either be a growth-supporting or growth stifling institution. In the proper context, it can facilitate capital raising activity and promote market development. In the wrong context, it can increase the cost of raising capital and provide an avenue for rent extraction by corrupt politicians and bureaucrats.

3.2. The Political Economy of Securities Market Development in Sub-Saharan Africa

3.2.1. Prevailing Political and Institutional Context

The reality is that securities regulation is not insulated from the process by which it is made and is influenced by the political economy of the society in which it is written and enforced.[47] This makes it crucial to examine the political economy of securities market development.

[47] See Armour and others (n 32) 553-576.

Perhaps the starting point in this analysis is the recognition that different constituencies play different roles in making and enforcing securities regulation, and these constituencies do not necessarily have incentives or objectives aligned with society's.[48]

[48] The constituencies that may have roles to play in securities regulation include elected politicians, unelected regulators, the securities industry (including investment banks, and firms of brokers, auditors and lawyers) and investors. Politicians may have perverse incentives that may not always be conducive to securities market growth (for instance, they may be influenced by controlling shareholders of large firms and the securities industry in performing their law-making functions, they may use their power over the financial system to fuel short term booms at the expense of long-term financial health or relax rules aimed at curtailing expropriation of minority shareholders). Similarly, unelected regulators may use their positions to seek re-appointment, enhance their career prospects or consolidate on their power base. The securities industry can use its financial, relationship and human capital to influence policymakers and shape policy debates on issues relating to the industry which may be to their benefit but to the detriment of other constituencies or broader social welfare (for instance, the securities industry can lobby for less stringent liability rules for violations of securities regulation on the premise that stringent liability rules may chill the activities of market intermediaries; of course, the flipside to this is that more lenient rules may reduce the incentives for these market intermediaries to diligently perform their functions ex-ante). The investor class will include controlling and minority shareholders, retail and institutional investors and domestic and foreign investors. We can fairly expect that the interests within the investor constituency are unlikely to be homogenous, and their ability to influence the policy space to be unequal. Thus, controlling shareholders are likely to be better organised and have the incentives (and possibly the financial means) to influence policymakers to continue extracting rents and private benefits of control, for instance through campaign donations. Both retail and minority investors are often unable to shape the policy space directly (for instance as a result of collective action and free rider problems, and the fact that they often do not have as much information or resources as the policymakers or controlling shareholders) and may only have the means to shape securities law and policy through the electoral process (i.e. voting in political candidates who share their views and who can then appoint regulators to carry them out). Foreign investors are also often unable to directly influence the policy space, but sometimes can wield considerable influence either through their trading activity (such as the bulk sale of the securities in a company, leading to a reduction in its share price) or through effective use of domestic and international media (see for instance Dyck, Volchkova and Zingales (n 44)). For a comprehensive discussion of the political economy of financial regulation, and the interests and incentives of the different participants and policymakers, see Armour and others (n 32) 553-576. For a discussion on the impact of 'political salience' (i.e. the importance of an issue to an average voter relative to other political issues) on the content and evolution of corporate governance and how media and political attention on issues of corporate governance lead to the formulation or change of corporate governance rules in different countries, see Pepper Culpepper, *Quiet Politics and Business Power: Corporate Control in Europe and Japan* (CUP 2011). For a discussion on the political economy of financial development and the influence of competing interest groups in the development of financial systems, financial structure and the access to finance, see Raghuram Rajan and Luigi Zingales, 'The Great Reversals: The Politics of Financial Development in the 20th Century' (2003) 69 Journal of Financial Economics 5; Stephen Haber and Enrico Perotti, 'The Political Economy of Finance' (2014) 9 Capitalism and Society 1. For a discussion of these issues in relation to Africa, see Stephen Haber, 'The Finance-Growth Nexus: Theory, Evidence, and Implications for Africa' in Marc Quintyn and Geneviève Verdier (eds), *African Finance in the 21st Century* (IMF 2010) 16-23.

This leads to the distinct possibility of regulatory failures even in countries with strong institutions.[49]

If regulatory failures are possible even in strong institutional environments, we may fairly expect that regulatory failures will be even more probable in countries with weak institutional environments, including many countries in sub-Saharan Africa. Consider Nigeria for example. Elections into political office in Nigeria are routinely marred by violence, voter apathy and outright electoral fraud.[50] Consequently, given that the electoral process seldom acts as an effective constraint on elected officers, these officers often lack the incentives to govern effectively, or promote growth-enabling regulation. This is also likelier to be the case with securities regulation, given that the securities market accounts for only a small percentage of Nigeria's GDP (and indeed that of many other countries in sub-Saharan Africa).[51] Similarly, elected officers who are not properly constrained by the political process may appoint unelected officials who do not have the skills or competence

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49 These regulatory failures may be the outcome of regulatory capture (where the regulated industry influences the incentives of policymakers in service of the industry's self-interest); regulatory sine-curves (where regulation is influenced by recurrent events of booms and busts which lead to episodic occurrences of stringent and lax regulation); regulatory forbearance (where regulators fail to take timely action against regulated entities) and regulatory arbitrage (where regulated entities try to use the regulatory system to obtain the friendliest regulatory environment). These regulatory failures are not always socially harmful, but their existence increases the need to promulgate rules of securities regulation sensitive to their potentially harmful effects. See Armour and others (n 32) 560-566. For interesting suggestions on improving the internal governance of financial regulators, see for instance Luca Enriques and Gérard Hertig, 'Improving the Governance of Financial Supervisors' (2011) 12 European Business Organization Law Review 357.

50 For recent literature on Nigerian elections and the petitions routinely made to court to challenge the declared results of the elections, see F.O. Osadolor, 'Constitutional Grounds for Questioning Elections in Nigeria: An Overview' (2019) 12 Journal of Politics & Law 167. The challenge of electoral fraud may not be unique to Nigeria. Indeed, an entire academic journal exists which is solely dedicated to academic work studying elections in Africa (see the Journal of African Elections, available at https://journals.co.za/content/journal/eisa_jae).

51 As at 2017, Nigeria's market capitalization to GDP ratio was 19.9%. This ratio was less than 10% in many other African countries, including Sudan, Seychelles, Lesotho, Angola and Uganda. Thus, even where the political process is effective, securities market development may sometimes not be at the top of the priority list of elected officers.

to properly discharge their functions, often in order to repay political favours. These unelected officials, in turn, may exploit their delegated discretion to seek re-appointment, expand their power bases or procure additional financial gain. Indeed, issues of this nature led to the suspension (in November 2017) and ultimate resignation (in January 2020) of the Director-General of the Nigerian Securities and Exchange Commission.[52]

Given the limitations of the political process discussed above, and the informational asymmetry and collective action problems they will face, retail and minority shareholders are unlikely to be able to exert sufficient pressure on the political process to change this paradigm, and the extent to which foreign investors can effectively advocate for needed reforms will necessarily be limited given their non-involvement in the political process.[53] On the other hand, extant managers, controlling shareholders and the financial industry can organise themselves better and deploy required financial, relationship and human capital to influence policy decisions in their favour. The consequence is that developing effective rules of securities regulation and building enforcement capability in Nigeria may be very difficult, given the country's fairly weak political and institutional environment.

Does the Nigerian example fairly represent the experience of other countries in sub-Saharan Africa? Assessing the institutional context prevailing in a region as diverse as sub-

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52 The Director General of the Nigerian SEC was suspended by the then Minister of Finance for allegedly approving the sum of N104 million (approximately US$300,000) to himself as severance pay for being a former commissioner of the same SEC. The Director General was thereafter criminally charged in court by the Nigerian Independent Corrupt Practices Commission on allegations of corruption, self-gratification and abuse office, leading to his ultimate resignation on 9 January 2020. The criminal charges have since been struck out by the court.

53 The limitation of foreign investors in the political process and the impact this is likely to have on corporate and securities law ('*the political deficit of foreigners*') has been identified in the literature. For a recent discussion on this, see Mariana Pargendler, 'The Grip of Nationalism on Corporate Law' (2020) 95 Indiana Law Journal 533.

Saharan Africa is, of course, challenging. Although it is widely acknowledged that institutional quality in sub-Saharan Africa lags behind other regions in the world,[54] there are vast cross-country differences in the levels of institutional development. Thus, broad generalisations on institutional dysfunction in sub-Saharan Africa are unhelpful as they fail to identify cross-country differences and specific areas where institutions are performing well or need development.

In recent times, the World Bank (through the *Ease of Doing Business Report*) and the World Economic Forum (through the *Global Competitiveness Report*)[55] have made concerted efforts to assess the existing institutional, business and political structures across most states in the world. Although the Reports necessarily have their methodological

54 For literature on institutional quality and institutional dysfunction in Africa, see Daron Acemoglu, Simon Johnson and James Robinson, 'An African Success Story: Botswana' in Dani Rodrik (ed), *In Search of Prosperity: Analytic Narratives on Economic Growth* (Princeton University Press 2003); Paul Collier, *The Bottom Billion: Why The Poorest Countries Are Failing and What Can Be Done About It* (OUP 2007) (demonstrating the problem of institutional dysfunction and recognising Africa (with some exceptions) as the core of the problem).

55 In the remainder of this Section, I refer to both as the 'Reports'.

flaws,[56] and may be manipulated (thus failing to achieve their desired functions)[57] they still provide a very useful snapshot of prevailing institutional frameworks. This provides a broad (even if imperfect) birds-eye view of specific indicators of institutional quality across individual states and the sub-Saharan Africa region as a whole, and to make rough comparisons of institutional quality with other states and regions.

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56 In both cases, most indicators are assessed using questionnaires. Scores are then assigned based on the presence or absence of the specific indicator, or the extent of its effectiveness based on respondent's answers. Of course, this qualitative empirical approach has significant benefits as it provides standardized questions which can be assessed in different countries to present useful cross-country comparisons. Furthermore, by examining several issues across different indicators, the surveys provide useful information to readers and policymakers on the specific areas of strengths and weaknesses in a country's institutional framework rather than generalized statements on its level of institutional quality. Despite this, the Reports have their limitations. First, movements in a country's scores in either of the Reports may sometimes mask largely unchanged situations on ground. In addition, in some instances, the Reports adopt indicators which are not strictly relevant to the issue being considered. Thus, for instance, in the Ease of Doing Business Report's assessment on contract enforcement (which assesses whether each economy has 'adopted a series of good practices that promote quality and efficiency in the court system'), countries are scored, amongst others, based on whether a specialized court dedicated solely to hearing commercial cases is in place and whether a small claims court and/or fast track procedure for small claims is in place. In other instances, benchmark features of an 'ideal' institutional framework are provided, and states are then scored based on whether formal rules of law provide for these benchmarks. Thus, for example, the 'Promoting Minority Investors' indicator forms part of the Ease of Doing Business Report. This indicator broadly relies on the director liability index in Simeon Djankov and others, 'The Law and Economics of Self-Dealing' (2008) 88 Journal of Financial Economics 430, which considers the extent to which formal law protects minority shareholders in potential self-dealing transactions through, amongst others, independent reviews, shareholder approval etc. The key limitation with this approach is that, as Professors Conac, Enriques and Gelter have argued it may 'provide a distorted picture of the effectiveness of other corporate laws, because it might fail to account for legal strategies and enforcement tools that, while unknown to the US corporate governance regime, allow countries to tackle self-dealing differently, but no less effectively than the US, or, in other words, to achieve functional as opposed to formal convergence'. See Pierre-Henri Conac, Luca Enriques and Martin Gelter, 'Constraining Dominant Shareholders' Self-Dealing: The Legal Framework in France, Germany, and Italy' (2007) 4 European Company and Financial Law Review 491. For a recent discussion (and references to additional academic papers) on the methodology of these studies, see Luca Enriques and Matteo Gargantini, 'Form and Function in Doing Business Rankings: Is Investor Protection in Italy Still So Bad' (2016) 1 University of Bologna Law Review 1.

57 Today, these Reports may be viewed by policymakers more as targets than as measures of performance on the items examined, The Reports are therefore likely to fail Goodhart's Law (named after Charles Goodhart, a British economist). Goodhart's Law broadly stipulates that when a measure becomes a target, it stops being a good measure. Applying this to the Reports, policymakers may make superficial changes to items being ranked by the Reports, thus achieving targets of moving certain places on the Reports, but without concrete evidence of development or reform.

How do sub-Saharan African states perform in the Reports? Whilst even the best performing states in sub-Saharan Africa often lag developed economies on various indicators, significant variances can be seen between states and across several indicators. Figure 3.1 below reports the regional scores on the "institutions"[58] pillar in the 2019 Global Competitiveness Report. Figure 3.2 reports on the performance of selected countries in sub-Saharan Africa on the same index. Figure 3.3 thereafter reports regional scores on the ease of doing business in the 2020 Ease of Doing Business Index, and Figure 3.4 reports on the performance of selected countries in sub-Saharan Africa on the same index.

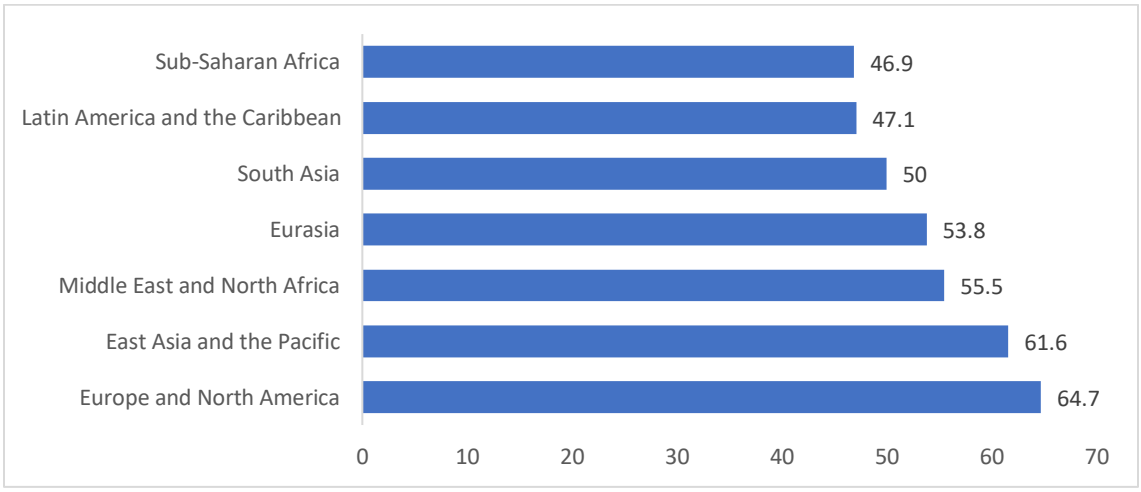

Figure 3.1 - Aggregate Scores of Regions on the "Institutions" Pillar of the 2019 Global Competitiveness Index[59]

58 The "institutions" pillar in the Global Competitiveness Index Report is a composite indicator measuring security, property rights, social capital, checks and balances, transparency and ethics, public sector performance, the future orientation of government and corporate governance.

59 Scores obtained from the 2019 Global Competitiveness Index Report.

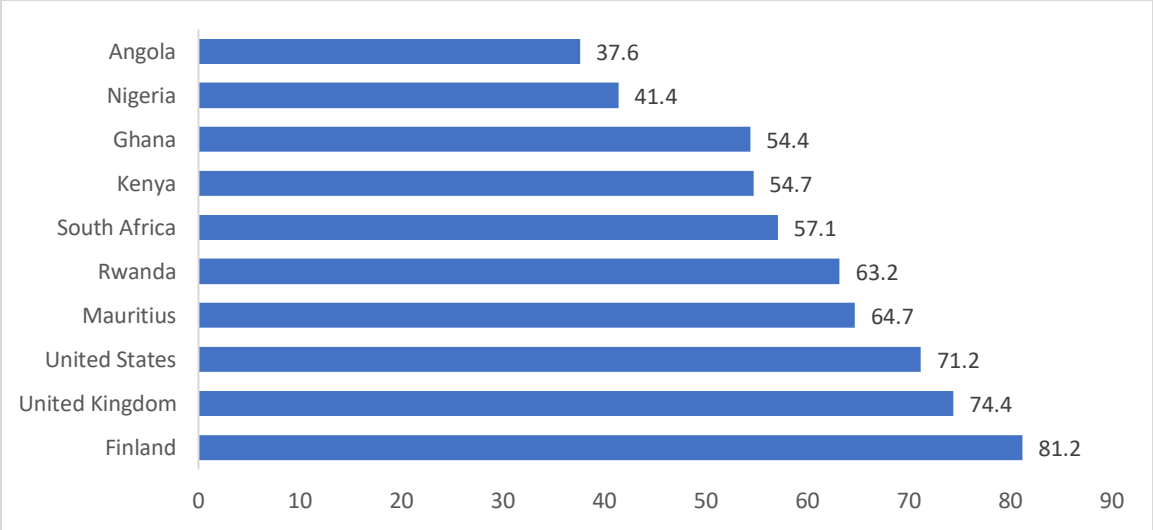

Figure 3.2 - Scores of Selected Sub-Saharan African Countries and other Comparators on the "Institutions" Pillars of the 2019 Global Competitiveness Index[60]

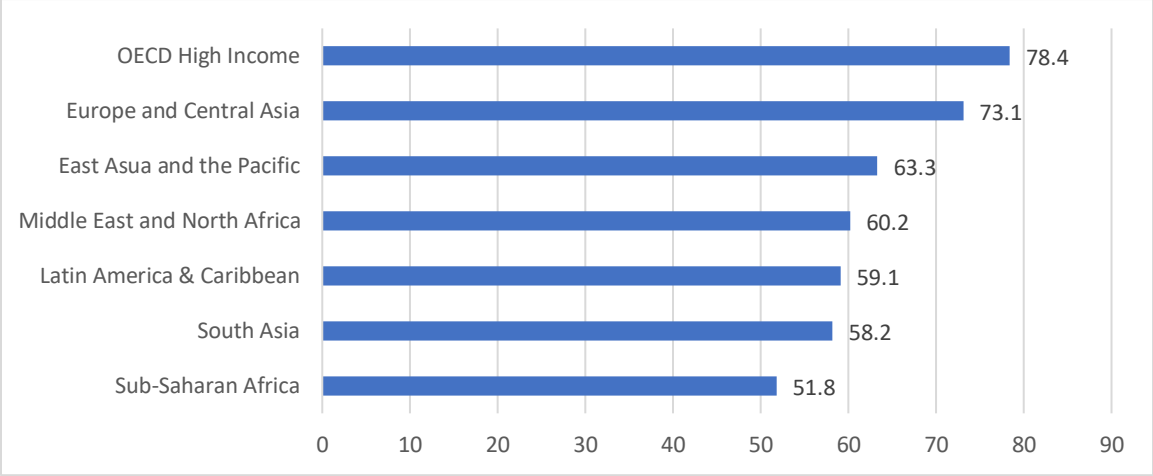

Figure 3.3 - Aggregate Scores of Regions in the 2020 Ease of Doing Business Index[61]

60 Scores obtained from the 2019 Global Competitiveness Report I select the best (Mauritius) and least performing (Angola) country in sub-Saharan Africa with a functioning stock exchange. Comparator countries are the best performing country in the indicator (Finland), the United States and the United Kingdom.

61 Scores obtained from the 2020 Ease of Doing Business Index.

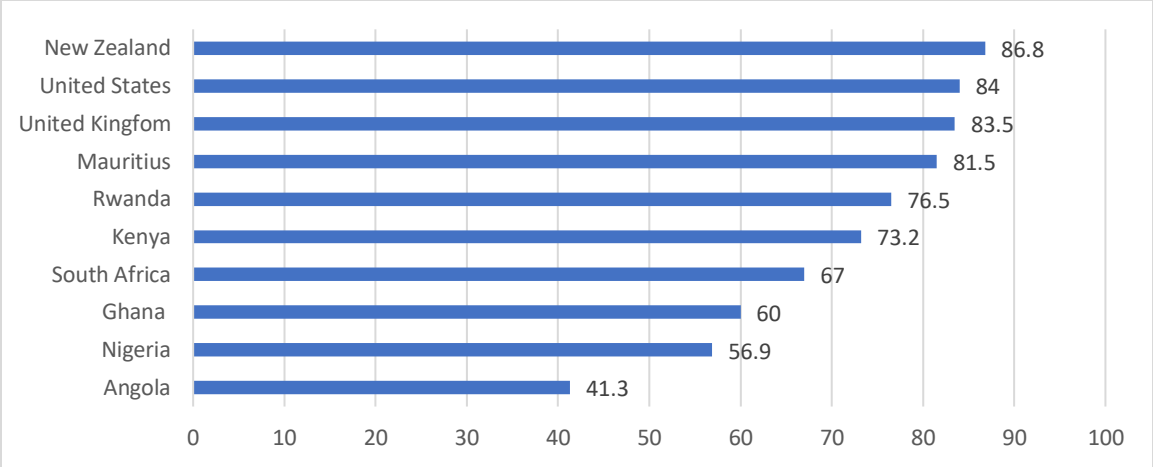

Figure 3.4 - Scores of Selected Sub-Saharan African Countries and other Comparators in the 2020 Ease of Doing Business Index[62]

As can be seen from the charts above, sub-Saharan Africa as a region lags other regions of the world in both rankings. However, the regional score masks wide cross-country differences. Thus, regarding the institutions pillar in the Global Competitiveness Report, Angola and Nigeria both rank significantly behind Ghana, Kenya and South Africa. On the other hand, Mauritius with a score of 64.7 ranks better than many developed countries, including Portugal (64.5), Italy (58.6) and China (56.8). Similarly, Mauritius ranks close to the United States and United Kingdom in the Ease of Doing Business Report, and again outperforms developed countries like Italy (72.9), Portugal (76.5) and China (77.9).

A similar result can be seen when considering formal enforcement institutions supporting well-functioning markets. Figures 3.5 and 3.6 report on judicial independence[63]

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62 Scores obtained from the 2020 Ease of Doing Business Index I select the best (Mauritius) and least performing (Angola) country in sub-Saharan Africa with a functioning stock exchange. Comparator countries are the best performing country in the indicator (New Zealand), the United States and the United Kingdom.

63 The 'Judicial Independence' indicator in the Global Competitiveness Report is computed by survey responses to the question '*In your country, how independent is the judicial system from influences of the government, individuals or companies'?*

and the efficiency of the legal framework in settling disputes[64] in the 2019 Global Competitiveness Report. Figure 3.7 reports on the 'Enforcing Contracts'[65] indicator in the 2020 Ease of Doing Business Index.

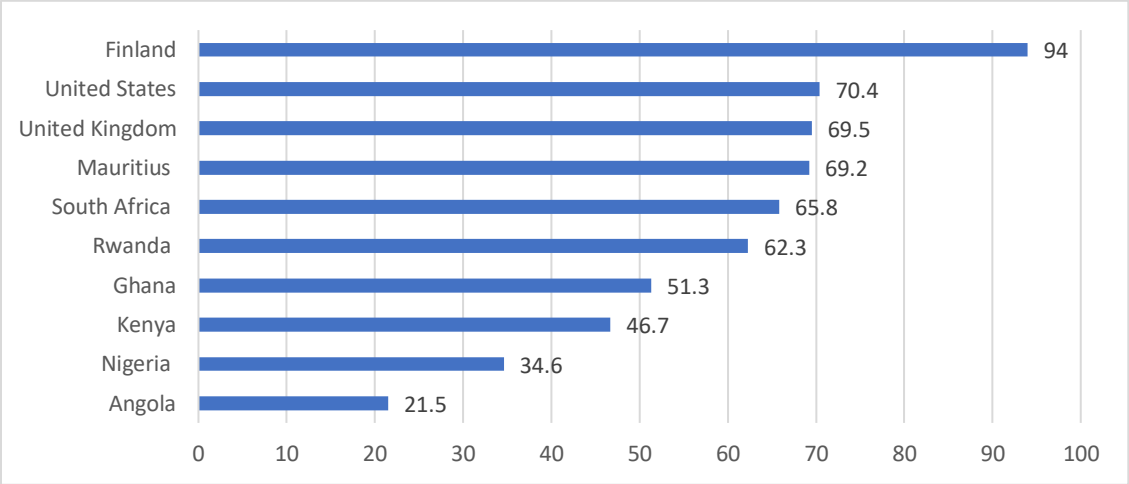

Figure 3.5 - Scores of Selected Sub-Saharan African Countries and other Comparators on the "Judicial Independence" Pillar of the 2019 Global Competitiveness Index[66]

64 The 'Efficiency of Legal Framework in Settling Disputes' indicator in the Global Competitiveness Report is computed by survey responses in answer to the question 'In your country, how efficient are the legal and judicial systems for companies in settling disputes'.

65 The 'Enforcing Contracts' indicator in the Ease of Doing Business Index is computed on the basis of responses to a case study of a contractual dispute between the buyer and seller of a product under a sales agreement. Scores are then assigned on the various phases of the dispute from filing and service of the court processes to judgment and eventual enforcement.

66 Scores obtained from the 2019 Global Competitiveness Report 2019. I select the best (Mauritius) and least performing (Angola) country in sub-Saharan Africa with a functioning stock exchange. Comparator countries are the best performing country in the indicator (Finland), the United States and the United Kingdom.

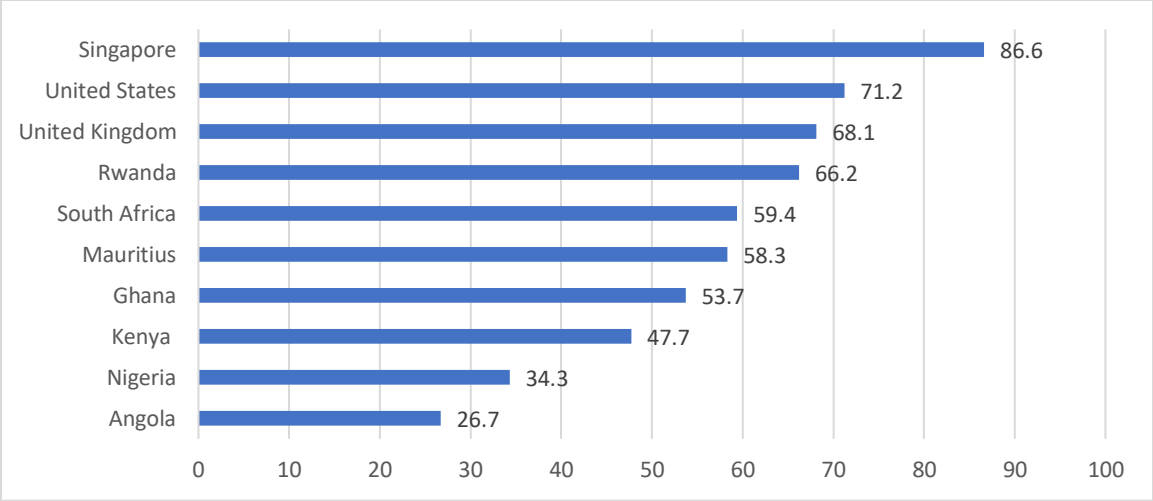

Figure 3.6 - Scores of Selected Sub-Saharan African Countries and other Comparators on the "Efficiency of Legal Framework in Settling Disputes" Pillar of the 2019 Global Competitiveness Index[67]

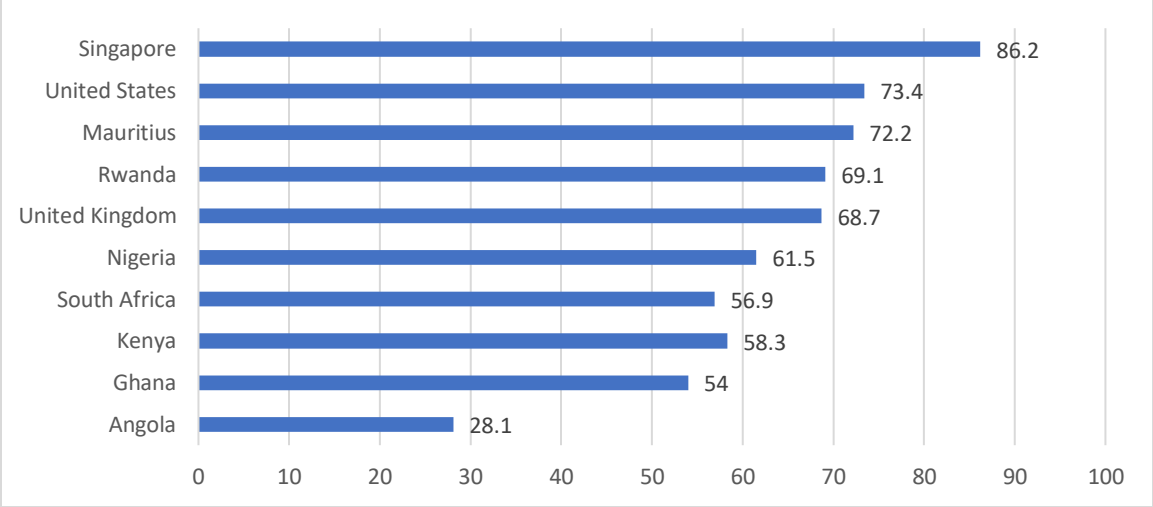

Figure 3.7 - Scores of Selected Sub-Saharan African Countries and other Comparators on the "Enforcing Contracts" Indicator of the 2020 Ease of Doing Business Index[68]

67 Scores obtained from the 2019 Global Competitiveness Report, 2019. I select the best (Rwanda) and least performing (Angola) country in sub-Saharan Africa with a functioning stock exchange. Comparator countries are the best performing country in the indicator (Singapore), the United States and the United Kingdom.

68 Scores obtained from the 2020 Ease of Doing Business Index I select the best (Mauritius) and least performing (Angola) country in sub-Saharan Africa with a functioning stock exchange. Comparator countries are the best performing country in the indicator (Singapore), the United States and the United Kingdom.

Again, the scores reveal a wide disparity in the judicial environment in different countries in sub-Saharan Africa. The best performing countries (Mauritius and Rwanda) lag the developed countries in the Global Competitiveness Report although the difference between them is often smaller than might otherwise have been expected (Mauritius lags the United Kingdom by just 0.3 points in the judicial independence indicator; whilst Rwanda lags the United Kingdom by less than 2 points in the efficiency of the legal system indicator). Similarly, the difference between the best performing and least performing sub-Saharan African countries on both indicators in the Global Competitiveness Report is significant (for example, Nigeria is at least 30 points lower than the best performing country on both indicators). A somewhat different story arises when we consider the Ease of Doing Business Index. Here, Nigeria scores significantly better than it did under the Global Competitiveness Report, and Mauritius and Rwanda are scored better than the United Kingdom.[69]

Similar results can also be seen when considering the protection of property rights[70] and corruption[71] in the Global Competitiveness Report.[72] Thus, although the Reports can

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69 Although both the 'enforcing contracts' indicator on the Ease of Doing Business Report and the 'Efficiency of the Legal Framework in Settling Disputes' indicator on the Global Competitiveness Report essentially measure the same thing (i.e. how easy it is to resolve a commercial dispute using the judicial process), the difference in performance on the indicators reflects the methodological difference adopted in assessing the indicators (see notes 64 and 65 above), further requiring readers to be cautious in drawing inferences from the scores.

70 The 'Property Rights' indicator in the Global Competitiveness Report is computed by survey responses to the question 'In your country, to what extent are property rights, including financial assets, protected'?

71 The 'Corruption' indicator in the Global Competitiveness Report is based on the scores in Transparency International's Corruption Perception Index.

72 In both cases, wide cross-country differences can be seen between countries in sub-Saharan Africa with functioning stock exchanges. Thus, Angola and Nigeria score 37.4 and 44.0 respectively in the Property Rights indicator, and thus fall far behind Rwanda (66.1) and Mauritius (71.9) on the index. Similarly, Angola (19.0) and Nigeria (27.0) fall far behind and Rwanda (56.0) and Botswana (61.0) in the Corruption indicator.

only provide an indication of prevailing institutional and business contexts, and a lot of care has to be taken in interpreting their results;[73] the picture that emerges is that vast cross-country differences in institutional quality seem to exist in the region. Whilst some countries appear to have good institutions supporting well-functioning markets, securities markets in many other countries in Sub-Saharan Africa operate amid potentially severe institutional limitations. This has serious implications for the discussions on institutional and market development in sub-Saharan Africa. It shows that generalisations on prevailing institutional contexts in sub-Saharan Africa are unlikely to take enough account of the individual circumstances of specific countries. Given the vastly different institutional contexts securities markets in the region are likely to operate under, there cannot be a single 'foolproof blueprint' for the development of markets in the region and policymakers may have to take different approaches to market development in their specific countries.

3.2.2. Market Development in the Context of Weak Institutions

How do policymakers develop securities markets operating in weak or dysfunctional institutional environments? As Professor Mariana Mota Prado has argued, although we know that institutions matter for development, our knowledge of how to reform them is limited.[74] Of course, one option open to policymakers is to transplant rules and enforcement institutions from other jurisdictions into their local environments. But as we have seen

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73 This is especially true about corruption given that it is the perception of corruption (as opposed to corruption itself) that is measured in Transparency International Index and reported in the Global Competitiveness Report. In addition, some countries that appear to be doing well in the rankings still have fairly underdeveloped securities markets (for instance Rwanda). Here, the problem may be one of scale (i.e. however strong the institutional environment may be, the scale of economic activity in the country is simply too small to support a deep, vibrant securities market). I discuss this scale issue in more detail in Chapter 6.

74 Mariana Mota Prado, 'Institutional Bypass: An Alternative for Development Reform' (2011) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1815442>.

above,[75] legal transplants are unlikely to be successful if they fail to sufficiently take local situations into account or are not properly adapted to existing informal institutions.[76]

Policymakers must therefore engage directly with their domestic circumstances and adopt reform and development strategies tailored to their specific domestic contexts. Barring sudden, exogenous shocks, policymakers would need to either gradually reform the existing weak institutions or seek to bypass them altogether. Advances in law and development and political science scholarship have provided two key options and examples to policymakers on how this may be achieved, which I review below.[77] The important thing to bear in mind about these methods of institutional reform is that there is no universally superior method of reforming weak or dysfunctional institutions.[78] Indeed, different reform strategies are likely to succeed or fail depending on the circumstances in which they are deployed, and the competence, skills, incentives and motivation of the entity or organisation pursuing the reform agenda. Thus, it would be futile to recommend any one reform strategy as best suited to sub-Saharan Africa or to any of its constituent states. Rather, it would seem more useful to understand the reform strategies, the ways they can

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75 See n 33-35 above.

76 See also Mariana Mota Prado (n 74), 'The rejection of the idea that there are foolproof blueprints for institutional reform, and the ever-growing literature on the failure of legal transplants, has lent support to the idea that formal institutions need to be adapted to informal institutions in order to be functional'.

77 Professors Prado and Trebilcock have identified institutional bypasses as an additional path to gradual institutional change. Institutional bypasses seek to achieve institutional development by side-stepping existing weak institutions. They do this by creating an entirely new institution that operates simultaneously, and hence provides an alternative to, and competes with the existing, dominant institution. See Mariana Mota Prado and Michael Trebilcock, *Institutional Bypasses: A Strategy to Promote Reform for Development* (CUP 2019). For earlier formulations of the concept, see Prado (n 74); Mariana Mota Prado and Ana Carolina da Matta Chasin, 'How Innovative was the Poupatempo Experience in Brazil? Institutional Bypass As a New Form of Institutional Change' (2011) 5 Brazilian Political Science Review 11.

78 ibid.

be employed in the development of securities markets and the circumstances in which their deployment is likely to be successful.

3.2.2.1. Incremental Reform of Existing Institutions: Institutional Layering

Institutional layering is one of four types of incremental institutional change presented in the seminal work of Professors Mahoney and Thelen.[79] According to them, institutional layering occurs when 'new rules are attached to existing ones, thereby changing the ways in which the original rules structure behaviour'.[80] Unlike other reform strategies which may seek to introduce new institutional frameworks or rules, layering essentially involves additions and amendments to already existing institutional frameworks.[81]

Institutional layering occurs in a vast majority of situations and is thus one of the most popular strategies for reforming weak institutions.[82] By not introducing completely new institutional frameworks, it conserves regulatory resources, and also maintains a stable institutional environment that changes gradually, but potentially significantly over time.

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79 James Mahoney and Kathleen Thelen, 'A Theory of Gradual Institutional Change' in James Mahoney and Kathleen Thelen (eds), *Explaining Institutional Change: Ambiguity, Agency, and Power* (CUP 2010) 15-16. The others are institutional displacement (which features the removal of existing rules and the introduction of new ones); institutional drift (which features the changed effect of existing rules due to changes in the external environment); and institutional conversion (which occurs when rules remain the same but are interpreted or applied in new ways). For the original formulation of the concepts, see Wolfgang Streeck and Kathleen Thelen, 'Introduction: Institutional Change in Advanced Political Economies' in Wolfgang Streeck and Kathleen Thelen (eds), *Beyond Continuity: Institutional Change in Advanced Political Economies* (OUP 2005).

80 See Mahoney and Thelen (n 79). See also Kathleen Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States and Japan* (CUP 2004) (defining institutional layering as the 'grafting of new elements onto an otherwise stable institutional framework').

81 Mahoney and Thelen (n 79).

82 For a review of the use of the concept, see Jeroen van der Heijden, 'Institutional Layering: A Review of the Use of the Concept' (2011) 31 Politics 9.

How can institutional layering be deployed in developing securities markets operating in weak institutional environments? Professors Armour and Schmidt have provided one of the clearest uses of institutional layering in the securities industry by exploring its use in strengthening securities law enforcement in Brazil.[83] Here, backlogs of lawsuits led to significant inefficiencies in the Brazilian judicial system, and therefore inability to effectively enforce corporate and securities regulation. In response, commercial parties, the stock exchange and regulators championed arbitration (through the *Novo Mercado* Arbitration Chamber);[84] the resolution of corporate and securities disputes in a separate, specialised business law chambers of the existing state courts; the ability of the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários*) to launch separate administrative proceedings (*processo administrativo*) in specialist tribunals operating outside of the regular court system; and the creation of a Mergers and Acquisitions Committee (*Comitê de Aquisições e Fusões*) to protect minority shareholders in mergers and business restructuring transactions.[85] There is evidence that enforcement and regulatory capability has improved in Brazil following some of these reforms.[86]

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83 Armour and Schmidt (n 24).

84 The *Novo Mercado* is a special listing segment opened by the São Paolo Stock Exchange in December 2000 to public companies willing to commit themselves to more stringent standards of corporate governance. The *Novo Mercado* listing agreement requires that all disputes between the company, shareholders, senior managers and fiscal council members and the Stock Exchange to be submitted to the Chamber of Arbitration. See Armour and Schmidt (n 24).

85 The Committee was established by the Brazilian Securities and Exchange Commission, the São Paulo Stock Exchange, the Brazilian Financial Market Association, the Brazilian Institute of Corporate Governance and the Association of Capital Markets Investors. The Committee commenced operations in 2014.

86 On this, see for instance Eugenios Cárdenas, 'Globalization of Securities Enforcement: A Shift Toward Enhanced Regulatory Intensity in Brazil's Capital Market?' (2012) 37 Brooklyn Journal of International Law 807 (noting a transformation in regulatory and enforcement activity in Brazil following legal and institutional reforms in Brazilian capital markets regulation but also noting that arbitration has not been used frequently in the Novo Mercado). For case studies on the use of the

Institutional layering is likely to work well as a reform strategy in developing securities markets where certain aspects of the regulatory system function well, but other areas need direct, tailored intervention. In this way, the layers add to, amend, or revise the identified weaknesses, whilst maintaining overall stability in the institutional environment.

3.2.2.2. Creation of Alternative Rules within the Same Governance Structure: Regulatory Dualism

Regulatory dualism entails the creation of alternative rules or regulatory regimes within the same institutional structure, thus providing users of the regulatory system with a choice between the existing weak institutional regime and the new, reformed regime. The key points to bear in mind with regulatory dualism is that unlike layering, it does not attempt to reform the existing regime. Rather, it maintains the old regime in place but creates a new regime to cater to users who might otherwise be disillusioned with the status quo. By so doing, regulatory dualism mitigates potential resistance to reforms by entrenched interests that may be extracting rents or otherwise benefiting from the inefficiencies of the existing regulatory system.

Professors Hansmann, Gilson and Pargendler have explored the use of regulatory dualism as a strategy to develop securities markets operating in weak institutional environments, also using the Brazilian securities market as a case study.[87] Here, entrenched interests and political opposition to more stringent norms of corporate governance

processo administrative in Brazil, see Erica Gorga, 'Is US Law Enforcement Stronger than that of a Developing Country: The Case of Securities Fraud by Brazilian Corporations and Lessons for the Private and Public Enforcement Debate' (2015) 54 Columbia Journal of Transnational Law 603.

87 Ronald Gilson, Henry Hansmann and Mariana Pargendler, 'Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union' (2010) 63 Stanford Law Review 475.

frustrated better investor protection and the proper development of the São Paulo Stock Exchange. In response, rather than directly challenging these entrenched interests and proceeding with the reform of existing institutions, the São Paulo Stock Exchange created a New Market in 2000 (*Novo Mercado*) as a voluntary premium segment where companies that wished to credibly commit to more stringent norms of corporate governance and thus obtain better valuations and cheaper cost of capital could list their securities.[88] By utilising this strategy, regulators were able to overcome political barriers and opposition to reform, whilst providing users with a choice to opt into a regulatory regime that better suited their demands.

There is evidence that the Novo Mercado has been largely successful in Brazil. Prior to its launch, in the 1990s, there were very few initial public offerings and a substantial decline in trading activity.[89] IPO activity surged between 2004 and 2008,[90] driven by public offerings in the Novo Mercado and the next most stringent listing segment of the stock exchange.[91] Empirical evidence suggests that firms migrating to or getting a

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88 ibid 482-494. As the authors note, the Novo Mercado is not the only example of regulatory dualism in corporate and securities law, as the existing system of corporate law chartering in the United States and the EU choice of corporate law regime are also examples of regulatory dualism. See ibid 502-507 and 512-519.

89 See Bernard Black, Antonio Gledson de Carvalho and Érica Gorga, 'Corporate Governance in Brazil' (2010) 11 Emerging Markets Review 21, 25 (noting that between 1995 and 2003, there were only 6 initial public offerings by Brazilian firms, and the number of public companies reduced from 599 in 1998 to 390 in 2004. See also Bernard Black, Antonio Gledson de Carvalho and Érica Gorga, 'The Corporate Governance of Privately Controlled Brazilian Firms' (2009) 7 Brazilian Review of Finance 385.

90 See Black, Gledson de Carvalho and Gorga, 'The Corporate Governance of Privately Controlled Brazilian Firms' (ibid) 393 (noting a total of 110 IPOs in Brazil between 2004 and 2008). See also Armour and Schmidt (n 24).

91 ibid (noting that 78 of the 110 IPOs were on the Novo Mercado and Level 2 segment, and 16 older firms upgraded to meet the Level 2 or Novo Mercado requirements). The Level 2 segment is like the Novo Mercado but allows issuers to issue non-voting shares.

premium listing were associated with positive abnormal return to shareholders and significant increase in the trading volume of non-voting shares.[92]

Regulatory dualism is therefore likely to work well in circumstances where entrenched interests and political opposition make it difficult to reform existing institutions, and it is either costly or undesirable to establish wholly new institutional frameworks. In this way, regulatory dualism has the potential to be effective in both developing and developed economies, and even in other areas of institutional development outside of the securities industry.

3.3. Securities Markets Development in Sub-Saharan Africa: The Impact of Financial Technology

Apart from institutions, technology also plays a significant role in development and economic performance.[93] Whilst institutions are constrictive in nature, technology is permissive, and it allows economic agents to perform functions they previously may not have been able to accomplish (or may have only been able to accomplish at greater cost). Technological innovation is playing a pervasive role in our broader economic and social life, as well as in today's securities markets, leading to astounding innovation and disruption of the traditional market structures. This presents a challenge to traditional regulatory systems and calls to question the capacity of regulators to effectively regulate markets, which are in a constant state of flux.

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92 See Antonio Gledson de Carvalho and George Pennacchi, 'Can A Stock Exchange Improve Corporate Behavior? Evidence from Firms' Migration to Premium Listings in Brazil' (2012) 18 Journal of Corporate Finance 883.

93 See for instance n 18 above (noting that it is the combination of institutions and technology that affects economic performance by the effect on the cost of exchange and production.

In this Section, I examine the impact of Fintech on the securities markets in sub-Saharan Africa. My goal in doing this is to explore to what extent Fintech can be realistically considered to be disrupting the traditional institutions supporting securities markets in the region. In other words, do the traditional institutions supporting well-functioning markets remain salient in sub-Saharan Africa, given the exponential growth in Fintech?

My primary claim in this Section is that whilst Fintech has had a tremendous impact on securities markets in the developed world, and on the banking and payments industry in sub-Saharan Africa, it has played a different role in the securities markets in sub-Saharan Africa. In the instances where it has had a direct impact on sub-Saharan Africa's securities markets, Fintech has supported the expansion of financial products to retail investors, quickened the speed of market transactions and supported broader financial inclusion goals. Whilst these may be desirable objectives, they raise important retail investor protection concerns. This means that in the short to medium term, the traditional institutions supporting well-functioning markets (disclosure rules, prohibition of self-dealing transactions and effective enforcement) are likely to be more (and not less) salient in sub-Saharan Africa.

This Section is divided into three Parts. In the first, I briefly reflect on the global Fintech revolution and the impact of Fintech on securities markets in developed economies. The discussion in this section is necessarily brief, and largely focuses on securities markets in the US (and to a lesser extent, the UK). In the second, I examine the growth of information and financial technology in sub-Saharan Africa. In the final Part, I then assess the role and impact of Fintech on securities markets operating in sub-Saharan Africa.

Consistent with the objectives of this thesis, my focus in this Section is on the securities markets and not on the banking or payment sectors of the financial industry. I however make references to the banking and payments sectors as appropriate.

3.3.1. The Global Fintech Revolution

Together with institutionalisation (i.e. the shift in market participation from individual investors to institutional investors) and liberalisation (i.e. the reduction in barriers to the free flow of capital across borders), 'technologization' (i.e. the increasing use of technology to perform securities markets functions) is a secular trend shaping today's securities industry.[94] Advances in information and communication technology (ICT) enable information and capital to move seamlessly across borders; and developments in technology, including robotics, automation, artificial intelligence and machine learning have reshaped the market participants who often perform market transactions, and the speed with which such transactions can now be effected.

Today, developments in big data analytics have significantly improved the ability of professional investors to quickly identify and take advantage of price discrepancies that human actors would be unable to assess.[95] Similarly, investment advice can now be given by robots (through so-called '*robo-advisors*'), trades can be effected by non-human actors (through *algorithmic trading*) and these algorithms can facilitate market making functions by taking advantage of inter-market price arbitrage (through high-frequency trading).[96]

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94 On the secular trends shaping global securities market evolution, see for instance Armour, Bengtzen and Enriques (n 10) 388-396.

95 Armour, Bengtzen and Enriques (n 10) 395.

96 ibid.

The explosive growth of technology in the financial sector has, to a large extent, been driven by the growth of mobile and internet penetration globally. Figure 3.8 reports global bandwidth usage as at 2019; Figure 3.9 reports global internet penetration between 2005 and 2019, and Figure 3.10 reports internet penetration by region and development status in 2019.[97]

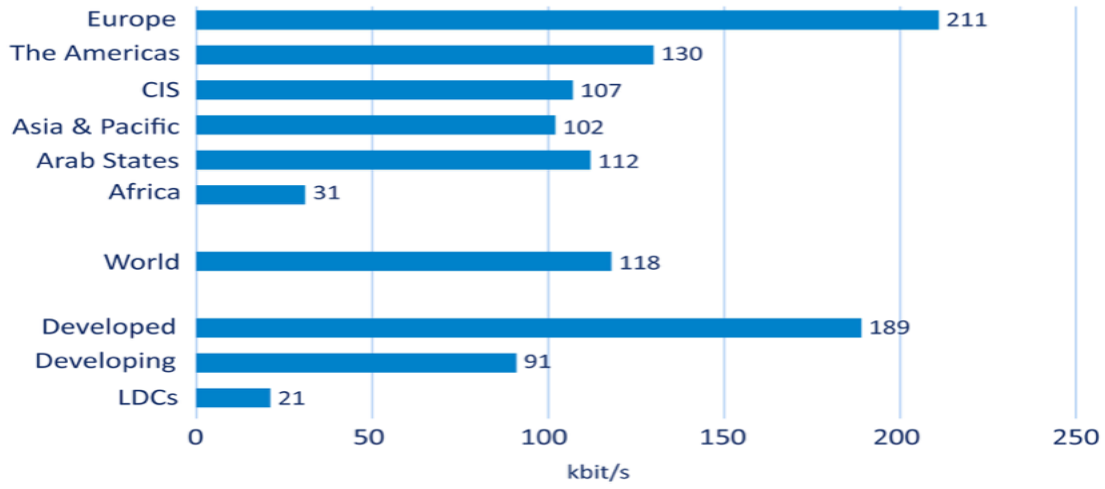

Figure 3.8 - International Bandwidth Usage per Internet User (kbit/s), by region (2019)[98]

97 See ibid 393-394 for earlier charts assessing the level of connectivity and internet penetration as at 2015.

98 Chart taken from the International Telecommunication Union (ITU) Facts and Figures 2019. CIS refers to the Commonwealth of Independent States and LDCs refer to the world's Least Developed Countries.

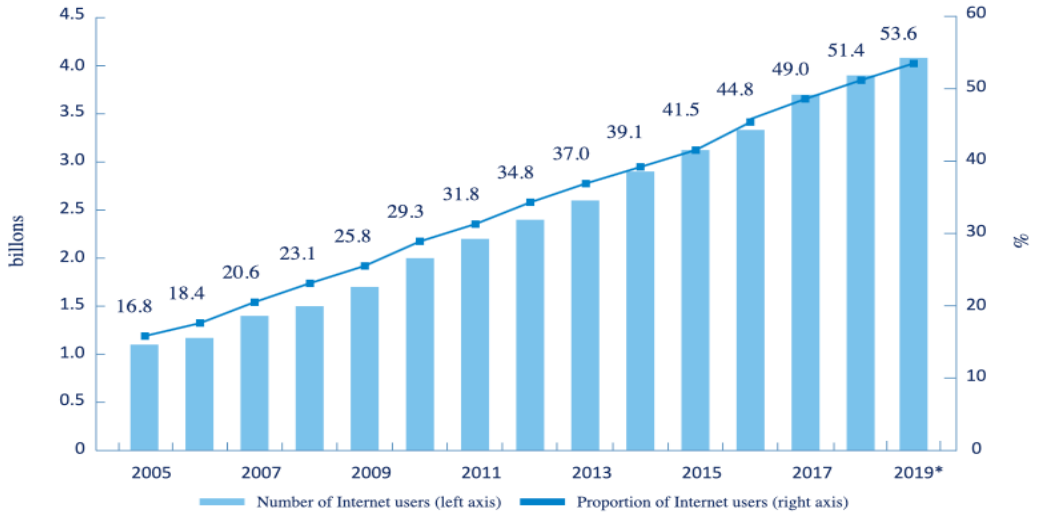

Figure 3.9 - Percentage of Individuals Using the Internet, 2005 - 2019[99]

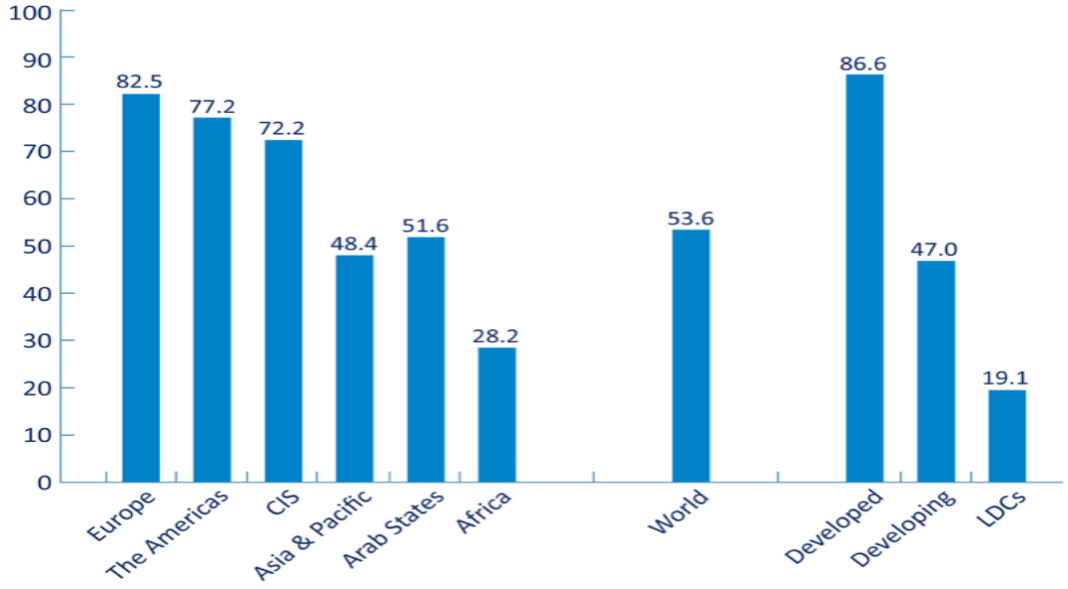

Figure 3.10 - Percentage of Individuals Using the Internet, by Region and Development Status, 2019[100]

99 Chart taken from the ITU Facts and Figures 2019.

100 Chart taken from ITU Facts and Figures 2019.

Although both the availability of internet access and the strength of connectivity differ significantly across regions of the world and across income distributions,[101] internet penetration around the world is improving rapidly. Indeed, the ITU estimates that between 2005 and 2019, the number of internet users grew on average by 10 percent annually.[102]

Driven by the growth of ICT, and often, unintentionally, by the impact of regulation, Fintech is disrupting securities markets in developed markets (particularly the US) in two principal ways.[103] First, it has led to the exponential growth of automation in the securities markets.[104] Today, computerised trading has virtually replaced traditional floor traders, market makers and specialists.[105] Similarly, to an ever-increasing degree, computers and algorithms now execute trades, collect market data and make independent trading decisions based on pre-defined objectives.[106] Second, Fintech has led to the growth of 'private' capital markets, that are creating new alternatives to traditional securities trading and issuance. These 'private' capital markets include electronic communication networks (ECNs) (which facilitate direct trading between sellers and buyers of securities

101 In both cases, Africa trails other regions of the world, and LDCs trail far behind developing and developed countries.

102 ITU Facts and Figures 2019.

103 For early discussions on the impact of technology on the securities markets, see for instance John Coffee Jr, 'Brave New World? The Impact (s) of the Internet on Modern Securities Regulation' (1997) 52 Business Law 1195; Brummer, 'Stock Exchanges and the New Markets for Securities Laws' (n 10).

104 See Brummer, 'Disruptive Technology and Securities Regulation', (n 10) 999 – 1020.

105 ibid 1001, 'Traders with terminals and the right market-surveillance software could beat longstanding incumbents and insiders… to the punch on trades from hundreds of miles away'.

106 ibid 1001-1003.

without the intervention of market makers),[107] secondary trading platforms for privately placed securities,[108] and crowdfunding and crowd-investing platforms.[109]

Taken together, these disruptions present novel issues for global securities regulators, and have significant implications for the future practice of securities regulation. As Professor Brummer argues, the effect of these innovations is to disintermediate public companies, leading to a rethink of the need to publicly issue securities (at least as a means of raising capital); increased competition between stock exchanges and alternative trading

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107 See for instance, Chris Brummer, ibid 1005 (discussing the growth of the Island Instinet and Archipelago ECNs which provide platforms for subscribers to trade in securities).

108 Pursuant to Rule 506 of Regulation D under the US Securities Act, US companies are permitted to issue an unlimited number of securities to "accredited investors" (i.e., investors with a net worth of over US$1 million or annual income of over US$ 200,000), without registering the securities with the SEC, as long as they did not market the offering to the public. However, securities issued pursuant to a private placement are necessarily less liquid than publicly issued securities given that there is no readily available market for these securities. This leads to the imposition of an "illiquidity premium" (i.e., a compensation to an investor in a private placement for the illiquidity risk the investor would face in investing in the securities) and as such made private placements costlier. In 1994, the US SEC passed Rule 144A which permitted securities acquired pursuant to Regulation D to be sold to qualified institutional buyers (QIBs) with no minimum holding period and minimal disclosure. This created an opportunity for private players to facilitate trading in these privately placed securities, thereby improving the liquidity of the securities and promoting additional investments from venture-capitalists into start-up businesses. See Brummer, 'Disruptive Technology and Securities Regulation' (n 10) 1013-1015 (discussing the impact of secondary market liquidity of privately placed securities on the listing decision of firms, and the impact of the Jump-Start Our Business Start-ups Act (JOBS Act) on resale of privately placed securities).

109 Crowdfunding essentially involves raising capital from many individuals, each of whom contributes a small sum to the ultimate amount. Crowdfunding can be equity-based (where the funder is given equity in the underlying company in exchange for funds), rewards-based (where the funder is given advanced units of the company's goods or services), donation-based (where the funder does not receive any financial rewards save the satisfaction of having contributed funds to promote a cause the funder is passionate about), loan-based (where the funder is repaid the amount contributed and interest at the end of a pre-determined period), or a hybrid of two or more of these types. The growth of technology (and the permissive or restrictive impact of regulation) has facilitated the growth of crowdfunding as an alternative to public offerings and venture-capital finance. Fairly permissive rules have led to the growth of equity crowdfunding in the United Kingdom, whilst restrictive rules have slowed its growth in the United States. For a thorough discussion on crowdfunding in the UK and the US, see John Armour and Luca Enriques, 'The Promise and Perils of Crowdfunding: Between Corporate Finance and Consumer Contracts' (2018) 81 The Modern Law Review 51; John Armour and Luca Enriques, 'Individual Investors' Access to Crowdinvesting: Two Regulatory Models' in Douglas Cumming and Lars Hornuf (eds), *The Economics of Crowdfunding* (Springer 2018).

venues as providers of liquidity; and the shift from traditional broker-dealers and floor specialists to financial intermediaries that provide both liquidity services and venues for securities trading.[110] This has led to calls for more nimble, agile securities regulation able to keep pace with the amount of disruption taking place in the market.

Having briefly sketched the impact of financial technology on global securities markets, the question that necessarily follows is: How is Fintech affecting securities markets in sub-Saharan Africa? The next two parts of this Section examine this issue. I start first by considering the growth of ICT in sub-Saharan Africa as this lays the foundation for the impact of Fintech on sub-Saharan Africa's securities markets.

3.3.2. The Growth of Information Technology in Sub-Saharan Africa

Consistent with the global picture presented above,[111] sub-Saharan Africa has also witnessed significant growth in mobile connectivity and internet penetration. Indeed, sub-Saharan Africa is perhaps the greatest beneficiary of ICT developments in the past decades and is projected to remain the fastest growing region in the world in terms of ICT deployment and adoption.[112] Mobile technologies, in turn, have had a transformational impact on sub-Saharan African economies. Estimates suggest that mobile technology accounted for 8.6% of GDP, 3.5 million direct and indirect jobs, US$15.6 billion in governmental tax revenue, and US$144 billion in economic value add in 2018 alone.[113]

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110 Brummer, 'Disruptive Technology and Securities Regulation' (n 10) 1020-1031.

111 See Figure 3.9 above and accompanying text.

112 See GSM Association, *The Mobile Economy: Sub-Saharan Africa* (2019) <https://www.gsmaintelligence.com/research/?file=36b5ca079193fa82332d09063d3595b5&download>.

113 ibid 3.

Information technology is projected to maintain its transformational impact in sub-Saharan Africa as digital inclusion is improved, speed and reliability of service strengthened, and the cost of providing digital services reduced.

At the core of this digital transformation is mobile subscription (driven by exponential growth in mobile phone ownership) as opposed to fixed lines; and the growth of mobile internet as opposed to broadband. Figure 3.11 reports statistics from the International Telecommunication Union (ITU) on the global growth of mobile and fixed cellular and broadband connections.

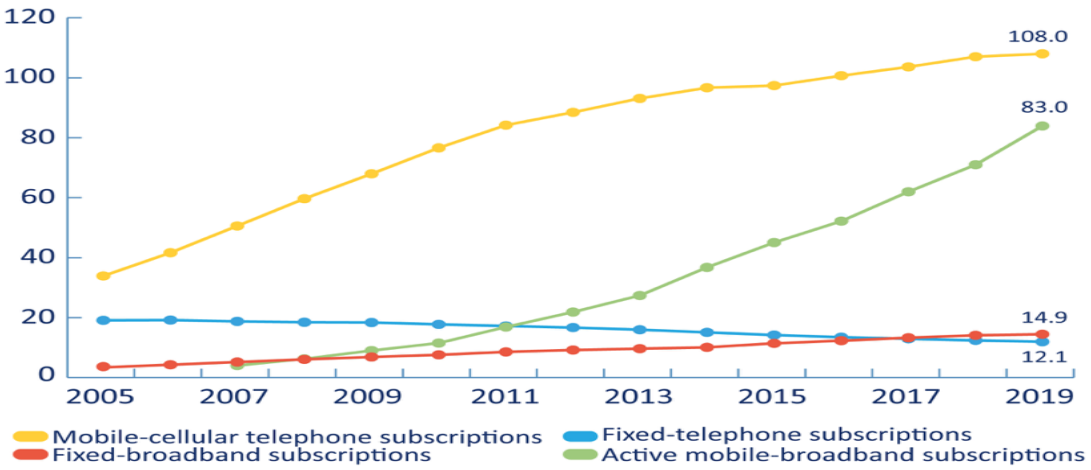

Figure 3.11 - Evolution of Mobile and Fixed Subscriptions, 2005-2019[114]

As the chart reveals, mobile cellular and broadband penetration far outstrips fixed telephone and broadband subscriptions globally. However, this masks significant cross-regional differences in mobile and fixed subscriptions around the world. Figures 3.12 and 3.13 below present snapshots from the ITU on mobile and fixed connections by region

[114] Chart taken from the ITU Facts and Figures 2019.

around the world in 2019. Figure 3.14 reports data from the World Bank/ITU on mobile and fixed connections in sub-Saharan Africa over time.

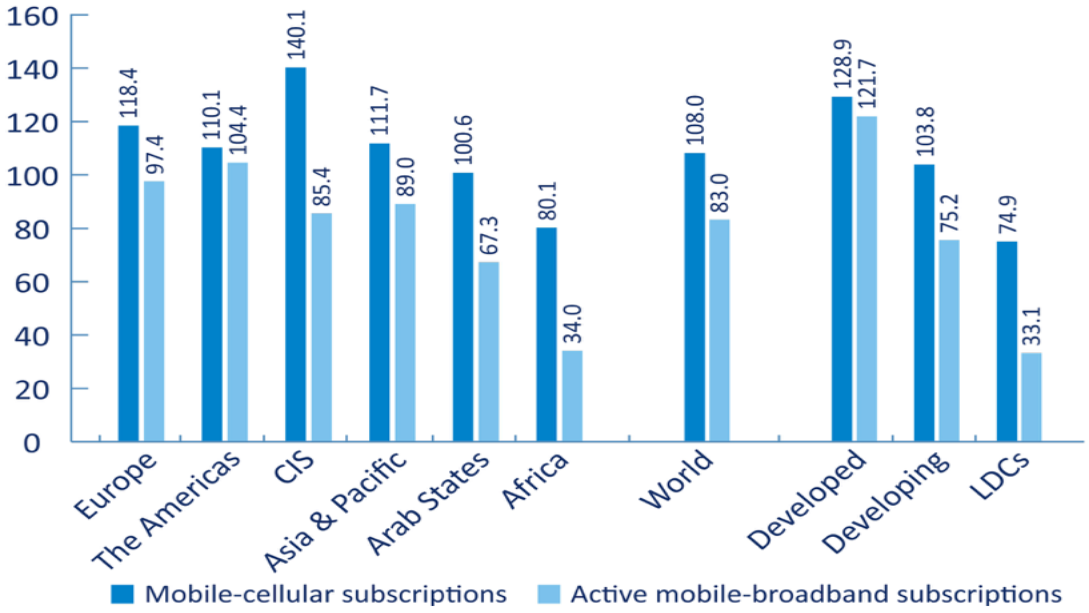

Figure 3.12 - Mobile-Cellular and Mobile-Broadband Subscriptions per 100 inhabitants, 2019[115]

115 Chart taken from the ITU Facts and Figures 2019. CIS refers to the Commonwealth of Independent States and LDCs refer to the world's Least Developed Countries.

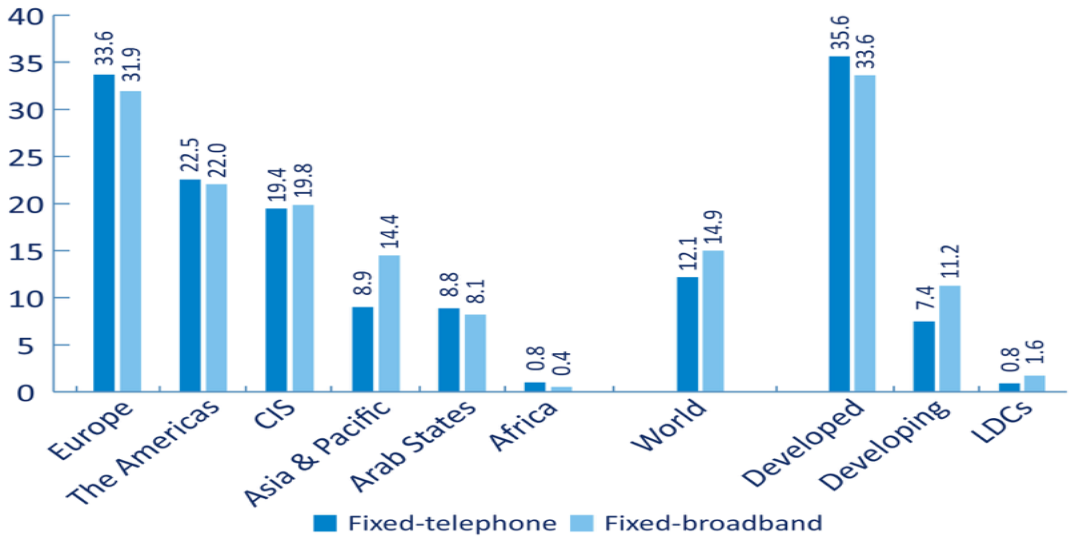

Figure 3.13 - Fixed-Telephone and Fixed-Broadband Subscriptions per 100 inhabitants, 2019[116]

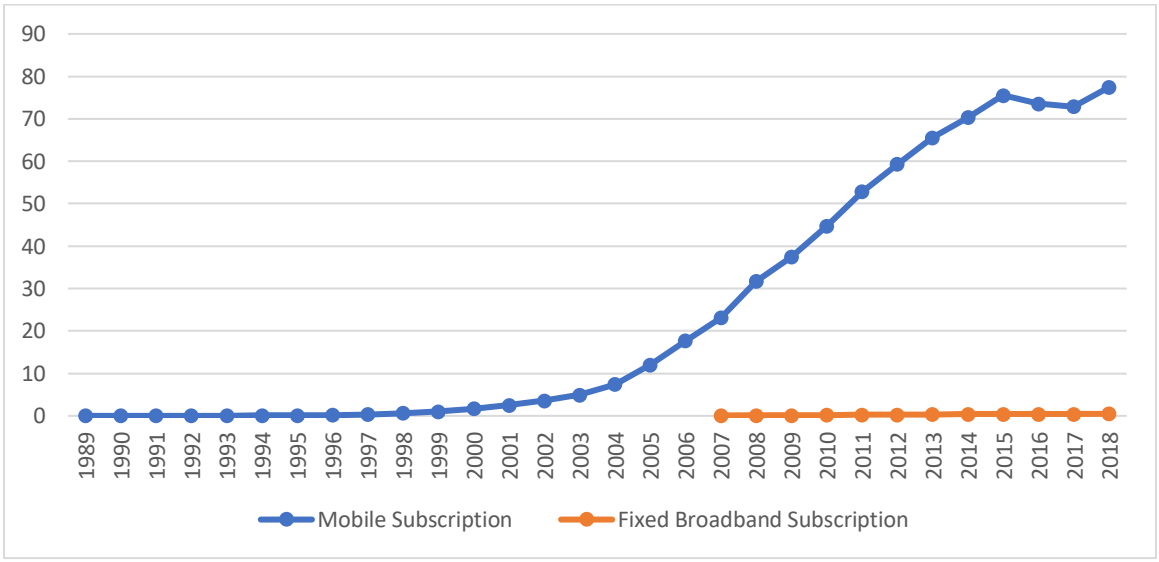

Figure 3.14 - Mobile Cellular Subscriptions (per 100 inhabitants) – Sub-Saharan Africa (1989 – 2018)[117]

As seen from Figure 3.12, although Africa still trails other regions of the world in mobile cellular and broadband penetration, the continent currently has a decent level of

116 Chart taken from the ITU Facts and Figures 2019.

117 Source: World Bank/ITU, World Telecommunication/ICT Development Report and Database.

mobile penetration. As explained above,[118] mobile penetration in the continent is projected to increase, and to grow faster than other regions in the world.

However, sub-Saharan Africa has significant problems with fixed connections (Figures 3.13 and 3.14). Fixed broadband connection has practically remained flat (growing from 0.09 to 0.47 between 2007 and 2018). Today, not up to 1 in 100 people living in the region has access to a fixed telephone or a fixed broadband connection. As the ITU reports, differences in fixed penetration strongly correlate with regional income levels, reflecting the price and availability of fixed connections.[119] On this score, sub-Saharan Africa performs in the same range as the world's LDCs, and tails behind other regions in the world (Figure 3.13).

Fixed connection is however not the only problem facing digital adoption in sub-Saharan Africa. Despite strong mobile cellular and internet penetration in sub-Saharan Africa, connection speed remains a significant challenge. At a time when some countries have commenced deploying Fifth Generation (5G) mobile internet, 2G internet was the leading mobile technology in sub-Saharan Africa in 2019.[120]At present, sub-Saharan Africa lags other regions of the world in 4G adoption, accounting for only 7% of total connections, compared to the global average of 44%.[121] Consequently, mobile internet speed in sub-Saharan Africa trails behind that in many other regions around the world.[122]

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118 See notes 112 and 113 above and accompanying text.

119 ITU Facts and Figures 2019.

120 GSM Association, *The Mobile Economy: Sub-Saharan Africa (2019).*

121 ibid.

122 In the first quarter of 2017, the average mobile internet speed in Nigeria was 3.9 Megabits per second (Mbps); South Africa (6.9 Mbps) and Kenya (13.7 Mbps). This contrasts with other developed

In addition to low fixed connections and slow connection speeds, mobile broadband in Africa is more expensive than in any other region of the world,[123] further accentuating the problem of low internet penetration.

The implication of all the above is that whilst significant digital transformation is underway in sub-Saharan Africa, there are still enormous challenges to overcome. In the absence of fixed telephone or broadband internet, mobile subscription has grown exponentially.[124] However, connection speed remains a problem, and even where internet is available, it is often prohibitively expensive.[125]

Fintech in Sub-Saharan Africa is therefore built on an ICT ecosystem characterised by high mobile subscriptions, slow internet speed, and few fixed telephone or broadband connections. This has significant impact on the type of products introduced into the financial markets, the potential consumers using these products, and the saliency of regulation required to properly monitor the markets. I examine these in the next Part.

countries such as Germany (24.1 Mbps) and the United Kingdom (26.0 Mbps). See Akamai State of the Internet Q1 2017 Report.

123 ITU Facts and Figures 2019.

124 According to the ITU World Telecommunication/ICT Development Database, mobile subscriptions increased from 0.002 per 100 people in Sub-Saharan Africa in 1990 to 77 per 100 people in 2018. See Figure 3.14 above.

125 For instance, a recent research found that Zimbabwe is the country with the most expensive internet connection in the world, with 1 Gigabyte (GB) of mobile data costing an average of US$75.2. This contrasts with Rwanda (also in sub-Saharan Africa) with an average cost of US$0.56 for 1GB of mobile data. See Cable, 'Worldwide Mobile Data Pricing: The Cost of 1GB of Mobile Data in 230 Countries', <https://www.cable.co.uk/mobiles/worldwide-data-pricing/>. Infrastructure deficit sits at the core of the internet access and affordability problems in sub-Saharan Africa, and as with other aspects of physical infrastructure deficit in the region, the solution to the internet infrastructure problem is unlikely to be an immediate, short-term fix.

3.3.3. The Role and Impact of Financial Technology on Securities Markets in Sub-Saharan Africa

The starting point in a discussion on the impact of Fintech on securities markets operating in Sub-Saharan Africa is the recognition that Fintech has had significantly greater impact on the banking and payments sectors than on securities markets in the region. Fintech has largely been employed in providing the enabling infrastructure and technology for banks and other financial companies and driving financial inclusion by providing payment services to largely unbanked individuals. The distribution of Fintech activity in sub-Saharan Africa over time is captured in Figure 3.15.

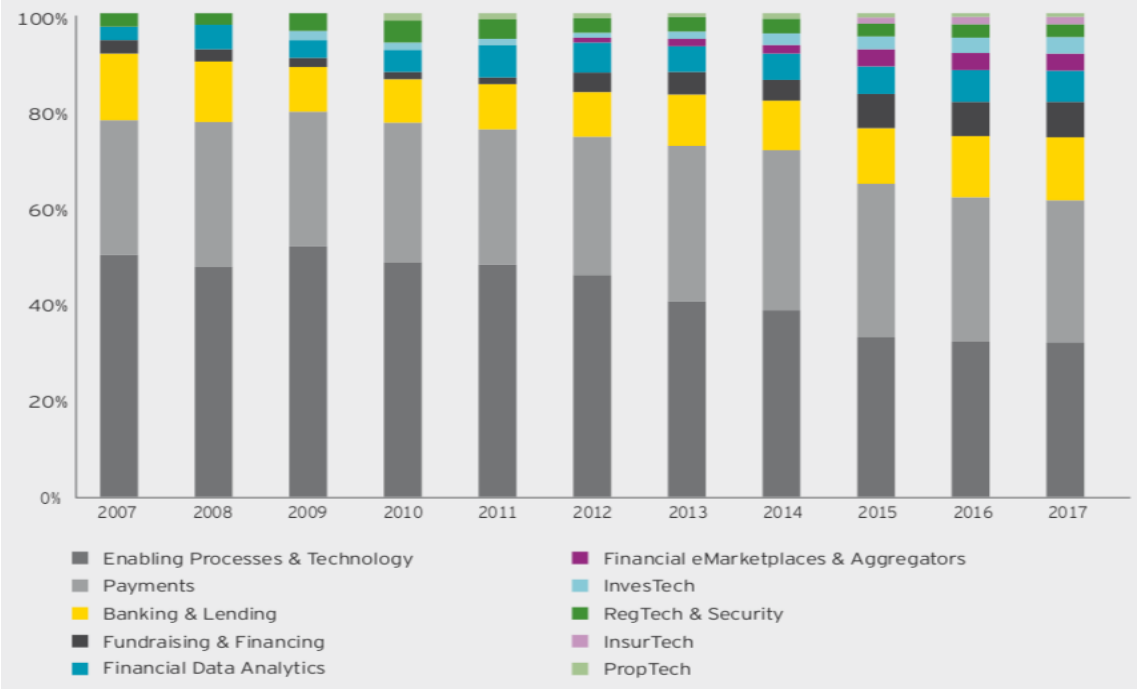

Figure 3.15 - Distribution of Fintech Segments in Sub-Saharan Africa 2007-2017[126]

126 Source: Ernst & Young 'Fintechs in Sub-Saharan Africa: An Overview of Market Developments and Investment Opportunities' (2019). According to the report, Kenya, Nigeria and South Africa act as regional hubs for Fintech start-ups in the continent. However, financial e-marketplaces constitute only 5%, 6% and 3% respectively of total Fintech activity in Kenya, Nigeria and South

This is perhaps unsurprising given the ICT infrastructure on which Fintech is built in the region. As noted in the previous sub-section, Fintech in sub-Saharan Africa is deployed in the context of an explosive growth in mobile phone ownership, substantial growth in mobile subscription and internet (but not fixed, broadband service), and often expensive but slow internet access. This creates a conducive atmosphere for the growth of Fintech solutions that provide simple services that can be easily accessed without strong internet connection.

It is in this ecosystem that M-Pesa, a mobile money solution developed and deployed in 2007 by Safaricom in Kenya has become the benchmark of successful Fintech deployment in sub-Saharan Africa. M-Pesa allows customers of the service to store funds in a mobile wallet, transfer those funds to others, and liquidate funds in the wallet into cash, using text messages, PINs and a network of local community agents.[127] M-Pesa has undoubtedly had a revolutionary impact on the financial system in Kenya, processing billions of transactions annually, growing its customer base to over 30 million customers, expanding its business across East Africa and Eastern Europe, and reducing the cost of remittances by up to 90 percent since its introduction.[128] Although other Fintech applications have since been established across sub-Saharan Africa (many of which operate

Africa respectively. On the contrary, banking and lending constitute 20%, 18% and 11% of Fintech activity in the three countries, and payments constitute 33%, 38% and 19% respectively.

127 A comprehensive discussion of mobile banking and digital payments falls outside the scope of this thesis. For a discussion on mobile banking and payment, see Jonathan Greenacre, 'The Regulation of Mobile Money' (DPhil Thesis, University of Oxford 2017). On the regulation of mobile money and other digital payments and financial services, see for instance Jonathan Greenacre, 'The Roadmap Approach to Regulating Digital Financial Services' (2015) 1 Journal of Financial Regulation 298; Jonathan Greenacre, 'Regulating the Shadow Payment System' in Ioannis Lianos and others (eds), *Regulating Blockchain: Techno-Social and Legal Challenges* (OUP 2019).

128 In 2013 alone, it is estimated that M-Pesa processed the equivalent of 50% of Kenya's GDP. See Lydia Ndirangu and Esman Morekwa Nyamongo, 'Financial Innovations and Their Implications for Monetary Policy in Kenya' (2015) 24 Journal of African Economies i46.

in the digital payments space),[129] there is a recognition that M-Pesa is an outlier in terms of its disruptive impact on the financial system.[130]

What factors account for the success of M-Pesa specifically and for the growth of Fintech applications in the banking, lending, and payments space, but not in the securities markets? Of course, the regulatory environment in which Fintech applications are deployed go a long way in shaping their deployment, acceptance, and scalability. Indeed, as Professor Brummer argues, the disruptive impact of technology on the securities markets in the United States was as much a product of technological advancement, as it was a product of regulation.[131] However, there is a recognition that M-Pesa's growth is largely attributable to its simple service that leveraged existing ICT infrastructure and could be used by customers without the need for smartphones or internet connectivity.[132] Physical infrastructure is therefore a significant impediment to Fintech growth in sub-Saharan Africa.[133] It limits the types of technological applications that can be productively deployed in the region, and the disruptive potential of these solutions.[134] What Fintech solutions have been deployed in the securities markets in sub-Saharan Africa? What role do they

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129 See n 126 above.

130 Thorsten Beck, Lemma Senbet and Witness Simbanegavi, 'Financial Inclusion and Innovation in Africa: An Overview' (2015) 24 Journal of African Economies i1.

131 See Brummer, 'Disruptive Technology and Securities Regulation' (n 10) (discussing the role of regulation (particularly Regulation D, Regulation New Market System and the JOBS Act in facilitating the growth of disruptive technology in the US markets).

132 See David Yermack, *Fintech in Sub-Saharan Africa: What Has Worked Well And What Hasn't* (2018) NBER Working Paper 25007 25007 <https://www.nber.org/papers/w25007>.

133 ibid 2, 'The largest impediment to more rapid Fintech growth appears to be the electrical and communications infrastructure in many developing countries, which have only limited, unreliable access to broadband internet connections and smartphone handsets'.

134 On the importance of physical infrastructure to the growth of Fintech in providing digital financial services, see Asli Demirgüç-Kunt and others, *The Global Findex Database 2017: Measuring Financial Inclusion and the Fintech Revolution* (World Bank, 2018).

play in these markets? What is the potential of these solutions to bypass traditional securities markets institutions? Below, I review two such applications of Fintech to sub-Saharan Africa's securities markets.

3.3.3.1. Automated Trading and Other Trade Simplification Strategies

Automated trading forms the bedrock of Fintech application in the securities markets. Intuitively, algorithmic and high-frequency trading, and big data analytics cannot work in the absence of a computerised trading system. Similarly, dark pools and off-exchange private capital markets critically depend on the existence and reliability of market data to be viable. These technology-enabled services cannot function in a manual open cry market system.

As at December 2019, 7 of the 24 stock exchanges operating in sub-Saharan Africa still operated open outcry trading systems, and 2 of the remaining stock exchanges with automated trading systems only recently achieved trade automation.[135]

In addition to trade automation, some stock exchanges in the region have started specifically deploying technology in pursuit of greater retail investor participation. Leveraging on the growth in mobile phone ownership, some stock exchanges, including Kenya,[136] Nigeria[137] and Mauritius[138] are developing mobile applications to provide market information directly to mobile phones of retail investors, in order to promote investor

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135 See Chapter 1, n 34-35 and accompanying text.

136 Nairobi Securities Exchange, Annual Report (2018) 17.

137 Nigerian Stock Exchange, 'NSE Prepare to Launch X-Mobile to Boost Investors Participation', 10 September, 2019 <http://www.nse.com.ng/mediacenter/pressreleases/Pages/NSE-Prepares-to-Launch-X-Mobile-to-Boost-Investors-participation.aspx> accessed 27 December, 2019.

138 Stock Exchange of Mauritius, Annual Report (2019) 60.

education and ultimately, retail investor participation. According to Samuel Kimani, the Chairman of the Board of the Nairobi Securities Exchange (KSE):

> Our growth plan comes at a crucial time in Kenya and around the world where there is a great shift in how consumers are accessing financial services. This changing landscape has exposed the massive potential of growing our reach especially to retail investors through online and mobile technology. We are keen on capitalizing on this change through fostering innovation to support our reach globally. In view of this, we have commenced a process which when successfully completed, will enable retail investors directly access the market from their mobile phones. This will give us access to more than 85% of the Kenyan population who have access to mobile devices.[139]

Perhaps the most noteworthy attempt to promote retail participation in securities markets came from the Government of Kenya itself. On 30 June 2017, the Kenyan government collaborated with the KSE, mobile network operators, stockbrokers and investment banks, and the central depository corporation in launching the M-Akiba Bond.[140] The bond was a significantly more ambitious strategy to facilitate simplified securities trading by retail investors, promote savings and strengthen financial inclusion. The bond was targeted at retail investors who could open securities accounts, purchase bond units, receive periodic coupon payments and sell their bonds on the floor of the KSE using Unstructured Supplementary Service Data (USSD) codes instead of the internet.[141] The bond sold in denominations as low as KShs3,000 (~US$30), subject to a daily maximum purchase of KShs140,000 (~US$1,400) and paid a tax-free annual coupon rate of 10%.[142] The bond was open to Kenyan citizens aged 8 and above, and who had a mobile

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139 Nairobi Securities Exchange, Annual Report (2019) 14.

140 'M' meaning mobile and '*Akiba'* meaning savings in Swahili.

141 See M-Akiba < https://www.m-akiba.go.ke>.

142 See M-Akiba Frequently Asked Questions < https://www.m-akiba.go.ke/index.php/faqs-page2>.

money enabled telephone, a registered telephone line and a National Identity Card.[143] Investors who wished to purchase the bond could register by dialling *889# on their mobile phones and following a series of prompts, which required them to input their details and confirm acceptance to the Bond's terms and conditions.[144] At the conclusion of the registration, potential investors received their M-Akiba Account Numbers on their mobile phones, with which they could immediately commence trading. Upon registration, each investor was assigned to a participating stockbroker in a round robin allocation process.[145] Imputing the relevant USSD code to purchase the bond served as an instruction to the investor's mobile money operator to deduct the equivalent value (plus applicable charges) from the investor's mobile wallet. The stockbroker allocated to the investor was simultaneously authorised to purchase the relevant units of bonds and credit same in the investor's M-Akiba Account. Similarly, upon imputing the relevant USSD code to sell the Bond, the stockbroker was authorised to sell the Bond on the floor of the exchange and pay the value (less applicable fees) into the investor's mobile wallet. The investor can then transfer the mobile money or liquidate the cash value with a local mobile money agent. Purchase and sale confirmations occur in real time depending on mobile network coverage.

By guaranteeing instantaneous liquidity of the bond and linking bond payment to the mobile money systems, the M-Akiba Bond leveraged the low-tech platform that made M-Pesa and other payment systems extremely successful in Kenya. Unlike M-Pesa which was an undeniable success, the outcome of the M-Akiba offering was rather mixed. On the

143 ibid.

144 ibid.

145 M-Akiba Terms and Conditions, available at < https://www.m-akiba.go.ke/m-akiba-tc.PDF>.

downside, although 300,000 Kenyan citizens registered to purchase the bond, only 5,988 actually purchased it during the launch, leading to a bond uptake of KShs247.75 million (~US$2.4 million) which was significantly lower than the KShs1 billion (~US$10 million) on offer.[146] On a positive note, research by FSD Kenya revealed that 85% of customers who purchased the bond had never bought a bond before, the bond had a truly national uptake as buyers were distributed virtually across all Kenya's 47 counties, and 80% of buyers were likely to invest again.[147]

These trade simplification strategies facilitated by Fintech are certainly welcome developments as they have the potential to simultaneously meet several regulatory goals (such as improved investor education, increased participation and hence liquidity, and financial inclusion). Nonetheless, given the increasing use of telephones as the medium for deployment of these technologies, they invariably would be used by retail investors more than by institutional investors. In the environment of low income and low financial sophistication that characterises most sub-Saharan African countries, such a deliberate drive towards increasing retail investor participation comes with an increased risk of conflicts of interest,[148] as well as market abuse and other types of securities fraud. Curbing these vices and preserving market integrity will therefore require strong legal institutions

146 Tamara Cook and Evans Osano, 'The Story of M-Akiba: Selling Kenyan Treasury Bonds Via Mobile' (*Financial Sector Deepening Kenya, 10 May 2018*) <https://fsdkenya.org/blog/the-story-of-m-akiba-selling-kenyan-treasury-bonds-via-mobile/>.

147 ibid.

148 Although this thesis does not examine financial advice or intermediary regulation, it is noted that in practice, conflicts of interest can arise between investment firms/banks and unsophisticated retail investors. The investment firm/bank may advise the retail investor to buy securities issued by the same institution or by one of its clients, thus directly or indirectly gaining at the expense of the unsophisticated retail investor. With proper algorithms, robo-advisors may be less tainted by conflicts of interests in facilitating retail investors' savings allocations into securities.

providing credible enforcement and sound rules against insider trading, market manipulation and minority expropriation, as well as mandating the faithful disclosure of relevant information. This is likely to make the traditional institutions of securities regulation discussed in Section 1 of this Chapter more (and not less) salient.

3.3.3.2. Crowdfunding and Crowdinvesting

As discussed above,[149] crowdfunding essentially involves raising capital to fund a project or business through monetary contributions from a large pool of funders over the internet. The growth of social media has fuelled the growth of crowdfunding by providing a cost-efficient method of promoting visibility of the project online and connecting project promoters with a large pool of potential funders in geographically diverse locations.

Crowdfunding has experienced gradual but uneven growth in sub-Saharan Africa. A 2017 report estimated that there were 57 crowdfunding websites headquartered and operating in Africa in 2015, 21 of which were based in South Africa, 9 in Nigeria, 2 in Kenya and the rest spread around all the sub-regions of the continent.[150] In terms of categorisation, there were 21 donations-based platforms, 19 equity platforms, 13 rewards-based platforms, 2 peer-to-peer platforms and 2 hybrids.[151]

Africa-based crowdfunding platforms are estimated to have raised US$32.3 million in 2015 (less than 0.1% of the total funds raised through crowdfunding globally).[152] This contrasts sharply with diaspora remittances of about US$35.2 billion sent by Africans

149 See n 109 above.

150 Afrikstart, 'Crowdfunding in Africa: Fundraising Goes Digital in Africa – The Emergence of Africa-Based Crowdfunding Platforms', <https://afrikstart.com/report/>.

151 ibid.

152 ibid.

living abroad to the continent in the same year. Of the US$32.3 million, about US$30.8 million (approximately 95%) was raised in South Africa alone, reflecting the uneven development of crowdfunding across the region, and its nascent state of development in many sub-Saharan African states.[153]

Fortunately, the story is not all gloomy. The World Bank estimates the market potential of crowdfunding in sub-Saharan Africa to reach US$2.5 billion by 2025,[154] driven in large part by channelling diaspora remittances directly into crowdfunded projects. Although this will still amount to only a fraction of the estimated global crowdfunding activity (projected by the World Bank at between US$90 – 96 billion annually by 2025), it will still constitute a significant source of funding for many African businesses and projects. To meet this potential, states in sub-Saharan Africa will need to address their physical ICT infrastructure (particularly the reliability and cost of high-speed internet access), and enact optimal regulation.[155] So far, policymakers in the region have generally adopted a permissive stance towards crowdfunding and many regulators in the region are only in early stages of developing crowdfunding regulations. The notable exception to this is in Nigeria where the Securities and Exchange Commission explicitly banned equity crowdfunding in 2016.[156] Given that companies seeking to raise capital through

153 ibid.

154 Crowdfunding's Potential for the Developing World (2013) InfoDev, Finance and Private Sector Development Department, World Bank.

155 See Armour and Enriques, 'The Promise and Perils of Crowdfunding: Between Corporate Finance and Consumer Contracts' (n 109) (discussing the role of securities regulation in fostering the growth of equity-crowdfunding in the UK but its limiting effect in the US, and the role of consumer protection law in fostering the growth of reward-crowdfunding in the US, but its limiting role in the UK).

156 This was on the basis that equity crowdfunding will fall within the public offering regulatory perimeter under Nigerian securities law. Even in the absence of an explicit ban, equity crowdfunding is unlikely to have gained much traction in Nigeria. The Nigerian Companies and Allied Matters

crowdfunding and crowdinvesting would invariably be start-up companies, and retail investors seeking to invest in these companies would invariably stand at a severe informational disadvantage to the business promoters, regulation would need to maintain a fine balance between investor protection concerns and facilitating access to capital, bearing in mind that 'poorly-crafted intervention can easily make things worse rather than better'[157] One useful approach that has therefore been suggested is for regulators to focus engagement on crowdfunding platforms rather than on the underlying contract between the entrepreneur and funder.[158] Since the platforms are repeat players, they have more incentives to introduce better nuanced safeguards to increase retail demand for crowdfunding offerings, and these incentives can be increased by the threat of regulatory intervention.[159]

Thus, at present, crowdfunding has had only a modest effect on financing practice in sub-Saharan Africa, although it clearly has the potential to blossom further with improved regulation and physical infrastructure.

Act 2020 s 22(3) limits the number of shareholders in a private company to a maximum of 50. A company crossing this threshold will be required to register as a public company. A public company (whether or not it is listed) is subject to the 2013 Code of Corporate Governance for Public Companies issued by the Nigerian SEC. The Code imposes board composition requirements and requires certain public disclosures from all public companies (including publication of annual audited financial statements) which are unlikely to be attractive to start-up companies.

157 Armour and Enriques, 'The Promise and Perils of Crowdfunding: Between Corporate Finance and Consumer Contracts' (n 109) 53.

158 ibid 76.

159 ibid 77.

3.4. Conclusion

To recap, the process of market development is essentially a process of institutional development. To develop their markets, policymakers in sub-Saharan Africa must provide and strengthen formal institutions requiring adequate disclosure and constraining value expropriation. Similarly, they must provide and strengthen enforcement mechanisms to ensure fidelity to formal rules. Together, these formal rules and enforcement activity can influence the incentive structures of market participants and create a culture of compliance and trust, which is critical to market participation, liquidity and, ultimately, market development.

Achieving the level of institutional growth required to support well-functioning markets in sub-Saharan Africa is not straightforward. Available evidence suggests that many markets operating in sub-Saharan Africa are operating amid severe institutional limitations. One option available to policymakers to spur market development in the face of this institutional limitation is to import institutional structures from more developed markets. However, this transplantation is unlikely to succeed if the transplanted institutions do not sit comfortably with other institutions operating in the policy environment. Policymakers must therefore focus on domestic solutions to the institutional limitations the markets suffer and can reform these institutions either by improving them incrementally or by bypassing dysfunctional institutions altogether.

Fintech offers a potentially game-changing method of developing sub-Saharan Africa's securities markets. Significant Fintech-enabled disruption is already underway in developed countries and holds substantial promise in sub-Saharan Africa. However, when applied to the region's securities markets, Fintech appears to be playing a different role:

promoting retail participation in securities markets, which is likely to make traditional institutions of securities regulation more (and not less) salient.

Thus, in the immediately foreseeable future, the traditional institutions supporting well-functioning securities markets (i.e., disclosure rules, rules constraining value expropriation and effective enforcement institutions) will remain the most appropriate frameworks for policymakers seeking to develop securities markets in sub-Saharan Africa. I examine disclosure and market abuse rules in the Chapter 4, and enforcement in Chapter 5.

CHAPTER 4 - DO THE FORMAL RULES OF SECURITIES REGULATION HINDER MARKET DEVELOPMENT IN SUB-SAHARAN AFRICA?

Given the dearth of scholarship on securities law in sub-Saharan Africa, the question whether securities 'law on the books' is itself impeding market development has rarely come up for consideration.[1] This Chapter engages in a comparative analysis of securities law in Kenya, Nigeria and South Africa in an attempt to cover this gap in the existing literature. The purpose of this analysis is to provide a deeper understanding of the formal rules regulating these markets to inform an assessment of the extent to which market development has been promoted or hindered by formal legal institutions.

A comparative analysis of this nature is, understandably, ambitious. Given the sheer volume of regulation to cover, this Chapter does not attempt to cover every possible area of regulation. Rather, I examine two broad areas of regulation: issuer regulation and market abuse regulation. In each case, I first lay out a brief theoretical justification for regulation in that area. Then, I compare the rules provided in the selected African countries.

The analysis reveals a broad convergence of formal rules of securities regulation. In many instances, regulation is stated to pursue similar goals, and adopt similar strategies (in some instances, using identical wording) to achieve them. This broad convergence of formal rules suggests that the stark levels of market underdevelopment in sub-Saharan Africa is unlikely to be fully explained by the state of formal law. However, in certain

[1] See the literature review in Chapter 1, section 1.3.

circumstances, it appears that countries adopt potentially restrictive rules that can hinder market development. High eligibility requirements and stringent disclosure rules potentially limit the number of companies that can approach the market whilst increasing compliance cost of those that do, making the choice of raising capital from public markets a potentially costly one. In addition, the strong reliance on criminal as opposed to administrative sanctions for market abuse, coupled with ineffective regulatory tools to support market monitoring, affects the ability of regulators to protect market integrity.

The central argument in this Chapter is therefore fairly straightforward: although there are some important areas where the law on the books can hinder market development, the wide disparity in market development among countries in sub-Saharan Africa cannot be fully explained by the content of the laws on their books. Thus, although sub-Saharan African states must address instances of arguably restrictive laws on the books, achieving market development will require more than good formal legal institutions. I address two of the additional reforms required (i.e. enforcement and market integration) in Chapters 5 and 6, and recommend a simple and gradual improvement of the laws on the books in Chapter 7.

This Chapter adopts the comparative research methodology discussed in Chapter 1 of this thesis,[2] using Kenya, Nigeria and South Africa as case studies and South Africa as the comparative benchmark. Limitations to the comparative study and the conclusions drawn in this Chapter are also identified in Chapter 1.[3]

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2 See Chapter 1, section 1.4.2.

3 See Chapter 1, section 1.6.

The rest of this Chapter is structured as follows: Section 1 examines issuer regulation in Kenya, Nigeria and South Africa, and more precisely rules on eligibility for listing and disclosure obligations. I do not examine corporate governance given that a comprehensive discussion of governance falls more within the remit of corporate law and thus outside the scope of this thesis. In Section 2, I examine market abuse regulation, focusing on insider trading and market manipulation. Section 3 concludes.

To my knowledge, this Chapter represents the first attempt to systematically study securities law in these three countries. Thus, whilst a lot more work is needed to properly understand securities law in sub-Saharan Africa and close the gaps in the existing body of literature, this Chapter gets the conversation started.

4.1. Issuer Regulation

Issuer regulation is pivotal to securities regulation. Before investing, prospective investors face severe risks of informational asymmetry leading to adverse selection.[4] If improperly managed, this can keep prospective investors away from the market. After investing, the investor, amongst others, faces moral hazard risks.[5] Again, if improperly managed, this can chill investments from prospective investors or cause committed investors to prematurely liquidate their funds to prevent further expropriation. Consequently, to assure the proper

[4] The investor stands at an informational disadvantage in relation to the managers or controllers of the issuer who ordinarily know more about the firm than the investor. This risk is heightened in securities markets where the investor trades in intangibles that are not subject to physical examination. See George Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 Quarterly Journal of Economics 488.

[5] The moral hazard risk arises from the fact that the issuer now controls the investor's funds and can act opportunistically with the funds by failing to use the funds for value maximising purposes or by outright theft. See Bernard Black, 'The Legal and Institutional Preconditions for Strong Securities Markets' (2000) 48 UCLA Law Review 781.

functioning of markets, securities regulators subject issuers to various entry and ongoing obligations.

As a condition to entering the market, issuers need to make certain disclosures and meet various listing eligibility requirements. Disclosure regulation stands at the centre of issuer regulation given the information asymmetry between the issuer and the investor.[6] Thus, initial disclosure is typically triggered at the time the issuer brings its securities to the market and its overall content reflects policymakers' view on the information a reasonable investor would require in making an informed investment decision.[7] Whilst its securities are trading on the market, an issuer is typically subject to both periodic (annual, semi-annual and sometimes quarterly)[8] and ad-hoc reporting (disclosure of any factor that has or is likely to have a material impact on the price of the issuer's securities). Here, issuer disclosure supports accurate pricing and corporate governance,[9] and as such, in theory, assists an investor in determining whether to buy, sell or hold securities.[10]

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6 See Niamh Moloney, *EU Securities and Financial Markets Regulation* (3rd edn, OUP 2016) 48-194.

7 Moloney (n 6) 54; Black (n 5). Although it is widely recognised that investors rarely take the pain to read through lengthy disclosure, retail investors can free ride on the work of analysts and other sophisticated investors who are better able to utilise the informational value of disclosure. See Armour and others, *Principles of Financial Regulation* (OUP 2016) 166.

8 On the frequency of reporting obligations, there are ongoing debates on the utility of mandating quarterly reporting. Whilst some commentators argue that quarterly reporting is key to efficient and orderly securities markets and can improve the informational environment in which firms operate, others take the view that mandatory quarterly reports can exacerbate short-termism, promote earnings manipulation and increase compliance cost. See Jeff McMullin, Brian Miller and Brady Twedt, 'Increased Mandated Disclosure Frequency and Price Formation: Evidence from the 8-K Expansion Regulation' (2019) 24 Review of Accounting Studies 1.

9 Moloney (n 6) 54; Paul Mahoney, 'Mandatory Disclosure as a Solution to Agency Problems' (1995) 62 University of Chicago Law Review 1047.

10 Armour and others (n 7) 163-164.

Although there is a broad consensus on the importance of disclosure to securities regulation,[11] there has been a lengthy debate as to whether disclosure ought to be made mandatory.[12] The prevailing viewpoint today is that mandatory disclosure is justified as it supports the accurate pricing of all securities trading in the market, compels insiders to disclose information they would otherwise have been reluctant to disclose, supports comparability of disclosed information and supports the credibility of the issuer's commitment to continue providing disclosure.[13] Consequently, current debates on mandatory disclosure largely focus on the scope of disclosure and how to strengthen enforcement.[14]

Similarly, eligibility restrictions are put in place to assure liquidity of listed securities, whilst managing the cost burden on issuers. Stock exchanges and regulators achieve this goal by setting various tests for listing (such as trading history, governance requirements and minimum float). Theoretically, high size thresholds may be justified in circumstances where a severe adverse selection problem exists, and regulators therefore deliberately set high entry requirements, taking size as a signal of safety and reliability.[15]

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11 ibid 167.

12 For an overview of the competing arguments, see Roberta Romano, 'Empowering Investors: A Market Approach to Securities Regulation' (1998) 107 Yale Law Journal 2359; Merritt Fox, 'Retaining Mandatory Securities Disclosure: Why Issuer Choice Is Not Investor Empowerment' (1999) Virginia Law Review 1335; Merritt B Fox, 'Why Civil Liability for Disclosure Violations When Issuers Do Not Trade' [2009] Wisconsin Law Review 297.

13 For a thorough examination of these factors, see Armour and others (n 7) 164-167; Moloney (n 6) 54-59.

14 Benjamin Hermalin and Michael Weisbach, 'Information Disclosure and Corporate Governance' (2012) 67 Journal of Finance 195.

15 The underlying intuition in this approach is that large firms either have owners who have committed funds into the venture, have financiers who trust the firm and its management enough to invest significantly into it, or the firm has been successful for a period and reinvested its profits, all of which are good proxies of reliability/trustworthiness.

There are however at least two problems with this approach. First, size is an imperfect proxy for quality as firm size is not always a result of effective management or viable products. For example, where credit markets are state-controlled or access to credit at favourable terms is only possible through political affiliations, growth to the required size may be the outcome of political affiliations rather than good management or firm quality.[16] Second, in sub-Saharan Africa, as will be seen below, access to capital for the purposes of growing to the required size can sometimes be problematic. It is therefore impossible to generalise on what the optimal regulatory perimeter is.

The remainder of this Section discusses eligibility requirements and disclosure regulation in South Africa, Kenya and Nigeria. The first part examines listing eligibility criteria, whilst the second part examines disclosure rules (both initial and ongoing). The analysis aims to interrogate where these jurisdictions set their minimum listing standards and the stringency of the disclosure obligations imposed on issuers. This facilitates a preliminary assessment (undertaken in the third part of this Section) of the extent to which high eligibility criteria and stringent disclosure obligations in Kenya and Nigeria affect the pool of potential issuers able to list securities, and the compliance cost of listing for issuers that do.

[16] Of course, outside investors may consider the political affiliations of the firm's managers to be useful, particularly in developing countries.

4.1.1. Eligibility Criteria

Each of the three jurisdictions has listing rules which set out eligibility criteria for listing.[17] To ensure listing standards are not unduly burdensome on small companies, each jurisdiction divides its markets into different segments and sets eligibility requirements depending on the segment an issuer intends to list on.

Thus, the JSE is divided into two segments: the Main Board and the Alternative Exchange (AltX). On the other hand, the Nairobi Stock Exchange (KSE) is divided into three segments: the Main Investment Market Segment (MIMS), the Alternative Investment Market Segment (AIMS) and the Growth Enterprise Market Segment (GEMS); the Nigerian Stock Exchange (NSE) is divided into the Premium Board, the Main Board and the Growth Board. Below, I discuss the main eligibility tests for listing in the main market in each jurisdiction. I do not discuss eligibility requirements on the alternate boards for

[17] In South Africa, the listing requirements are set out in the JSE Listing Requirements. For Kenya, the requirements are provided in the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002 (as amended 2016) ('CMA Regulations 2016'). In Nigeria, the listing requirements are set out in the Rulebook of the Nigerian Stock Exchange, 2015 ('NSE Rulebook 2015'). The CMA Regulations were issued in 2002 and amended in 2016. Although Kenyan company law is heavily influenced by English company law, it is not clear which country served as the motivation for the CMA Regulations given how much they diverge from more familiar rules in the UK and South Africa (see for instance the dscussions on net asset tests, lock up periods and operating track record below). Nonetheless, it does not appear that the CMA Regulations have materially improved market development in Kenya given that there have been no IPOs in Kenya since the amendments were enacted in 2016 (see Chapter 1, Figure 1.8). For its part, the NSE Rulebook was issued in 2015. The Financial Markets Act 2012 of South Africa (FMA 2012) provided the motivation for several parts of the NSE Rulebook. Thus, as detailed below, an 'insider' is defined in rule 1.24 of the NSE Rulebook 2015 in identical language to the definition in section 77 of the FMA 2012. Similarly, rule 17.13 of Part 1 of the NSE Rulebook 2015 gives a non-exhaustive list of trading practices that would violate the market manipulation rules, using identical wording to section 80 of the FMA 2012. It also does not appear that the NSE Rulebook has materially improved market development in Nigeria given the few IPOs in the country since the rulebook was passed (see Chapter 1 Figure 1.8). Indeed, there have been only two IPOs in Nigeria since 2015, one of which (the listing by introduction of telecommunications company MTN Nigeria) was as a result of regulatory pressure by the Federal Government of Nigeria.

space considerations.[18] Where local currency is stated, for comparability, I have converted the currency to US Dollar, using the approach stated in Chapter 1.[19]

4.1.1.1. Minimum Capitalization and Net Assets

Each jurisdiction sets minimum capitalization tests for listing on the main board of the stock exchange. The minimum capitalization thresholds are set out in the table below.

Requirement	JSE (SA)	KSE (Kenya)	NSE (Nigeria)
Minimum Capitalization ($)	3,557,000	494,000	11,080,000[20]
Minimum Net Assets ($)	-	988,000	-

Table 4.1 - Minimum Capitalization and Net Assets Required in South Africa, Kenya and Nigeria

As seen from the table above, the JSE requires a minimum capitalization of ≈$3,557,000 but does not set a minimum asset test. On the other hand, although Kenya sets a lower minimum capitalization requirement, it stands alone in setting a minimum net asset test which is twice the minimum capitalization requirement. Although Nigeria, like South Africa, does not impose a minimum net asset test, it requires a minimum capitalization at least 2 times the size of that required in South Africa.

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18 Intuitively, it can be fairly expected that the alternate boards will be even less liquid than the already illiquid main markets in these countries. This is explicitly the case in Nigeria. The Growth Board was launched on 29 January 2020 to replace Nigeria's former secondary market, the Alternate Securities Market (ASeM). As the NSE itself acknowledged, the ASeM was performing extremely poorly. Until the launch of the Growth Board, there were only 9 companies listed on the ASeM, yearly average liquidity on the ASeM was 0.86% (as opposed to 36.99% on the Main Board) and the ASeM Index was down by -27% between 2013-2019 (as opposed to the Main Board Index which was up +53% in the same period).

19 See Chapter 1, n 112.

20 The capitalization requirement relates to Initial Listing Standard C for listing on the Main Market. Standards A and B do not have capitalization thresholds but require shareholders to have a minimum equity of N3billion (i.e. US$8,310,000). Issuers must have a minimum capitalization of 200billion naira (i.e. $554,016,000) to upgrade to the Premium Board.

4.1.1.2. Minimum Float

Each jurisdiction sets a minimum float requirement as summarised in the table below.

Requirement	JSE (SA)	KSE (Kenya)	NSE (Nigeria)
Minimum Float	20%	25%	20%
Minimum Number of Shareholders	Not specified	1000 shareholders excluding employees	300 shareholders

Table 4.2 - Minimum Float Required in South Africa, Kenya and Nigeria

Thus, JSE requires an issuer to have not less than 25 million shares in issue, a minimum of 20% of which must be publicly held.[21] No minimum number of shareholders is required. On the other hand, the KSE sets a minimum float requirement of 25% which must be held by no less than 1,000 shareholders excluding employees.[22] Nigeria, like South Africa, sets a minimum float requirement of 20% but requires this to be held by no less than 300 shareholders for each of the Initial Standards and the Premium Board.[23]

4.1.1.3. Operating Track Record and Profit History

Each jurisdiction sets track record tests to ensure prospective issuers have been in existence for a sufficient period of time and are in good financial standing. These requirements are summarised in the table below:

Requirement	JSE (SA)	KSE (Kenya)	NSE (Nigeria)
Audited Financials	3 years	5 years	3 years

21 JSE Listing Requirements, r 4.28.

22 CMA Regulations 2016, sch 1.

23 NSE Rulebook 2015, Part A1, r 1.1 (a) v; r 1.1 (b) v; and r 1.1 (c) iv and Part A2 r 12.2 (b) (4).

Requirement	JSE (SA)	KSE (Kenya)	NSE (Nigeria)
Profit ($)	1,067,000[24]	-	831,000
Accounting Standard	IFRS	IFRS	IFRS

Table 4.3 - Operating Track Record and History Required in South Africa, Kenya and Nigeria

The JSE requires a prospective issuer to show an audited financial history for the three preceding years, the last of which must have reported an audited pre-tax profit of at least 15million rand (≈ $1,067,000).[25]

Unlike South Africa, the KSE increases the number of years for which prospective issuers must show audited financial statements to five years[26] ending not later than four months prior to the proposed date of the offer.[27] These financial statements must be prepared on an unqualified going concern basis. In addition, the issuer must have declared profits attributable to shareholders in at least three of the last five years.[28] However, unlike South Africa, no profits thresholds are required.

For its part, Nigeria, like South Africa, requires a prospective issuer to have a minimum of three years' operating track record[29] and provide three years audited financial statements ending not more than nine months before the submission of the listing

24 Where the issuer cannot meet this threshold, it can be listed if it has a subscribed capital of at least 500million Rand (≈$35,572,000).

25 JSE Listing Requirements, r 4.28 (c) (i) (a).

26 CMA Regulations 2016, sch 3, Part A.

27 ibid, sch 1.

28 ibid.

29 NSE Rulebook 2015, Part A1 r 1.1 (a) ii. Under Rules 1.1 (b) ii and 1.1 (c) ii, an issuer will be equally eligible under Initial Standards B and C if it has evidence of a core investor who has a minimum of 3 years' operating track record.

application.[30] In addition, the NSE requires a prospective issuer to show a cumulative pre-tax profit from continuing operations of not less than 300million naira (≈ $831,000), with at least 100million naira (≈ $277,000) profit in each of two of the last three years.[31] All jurisdictions require accounts to be audited according to the International Financial Reporting Standards (IFRS).

4.1.1.4. Lock-up Periods

Lock up arrangements are not required under the JSE Listing Requirements, and it is unclear to what extent prospective issuers include lock-up arrangements in underwriting agreements as a matter of practice.[32] On the other hand, lock-up periods are formally included in the listing requirements in both the KSE and the NSE. In Kenya, the lock-up period is triggered only in the case of a listing by introduction,[33] and applies to existing shareholders, associated persons and control groups that are able to influence the company's management.[34] When triggered, the KSE lock-up period lasts for 24 months.[35] On the other hand, in Nigeria, the lock-up period lasts for 12 months, is triggered on any type of listing, and applies to promoters and directors who are restrained from selling more

30 ibid, Part A r 1.1 (a) iv, Under Rules 1.1 (b) iv and 1.1 (c) iv, an issuer will be equally eligible under Initial Standards B and C if it has evidence of a strong technical partner who has a minimum of three years' operating track record with substantial equity and involvement in the issuer's management.

31 ibid, Part A r 1.1 (a) iii. The pre-tax profit threshold under Initial Standard B is set at a minimum of 600 million naira (≈ $1,662,000) and is expunged for Initial Standard C.

32 The absence of lock-up periods for listing on the main market in South Africa is probably deliberate, given that the JSE Listing Requirements expressly provide for lock-up periods on the alternate board.

33 This is a method of bringing securities to listing without an issue of new securities or marketing of already existing issued securities because the spread of shareholders already complies with the listing conditions.

34 CMA Regulations 2016, sch 1.

35 ibid.

than 50% of their shares during the lock-up.[36] The lock-up arrangements for the three jurisdictions are summarised below.

Requirement	JSE (SA)	KSE (Kenya)	NSE (Nigeria)
Persons restricted	-	Shareholders, associated persons and members of the issuer's control group	Promoters and directors.
Duration	-	24 months	12 months
Volume threshold	-	-	Restrained from selling more than 50% of holding

Table 4.4 - Lock-Up Period Required in South Africa, Kenya and Nigeria

4.1.1.5. Sponsors

As summarised in the table below, all three jurisdictions require the appointment of some type of sponsor or advisor for listing on the main board.

Requirement	JSE	KSE	NSE
Sponsor/Advisor	Sponsor	Transaction Advisor	Dealing Member
Sponsor Responsibility	Initial and ongoing	Initial only	Initial and ongoing

Table 4.5 - Appointment of an Advisor in South Africa, Kenya and Nigeria

The JSE,[37] KSE[38] and NSE,[39] require that the issuer's listing application is sponsored by a Sponsor,[40] Transaction Adviser, or a Dealing Member,[41] respectively. In

36 NSE Rulebook 2015, Part A.

37 JSE Listing Requirements, rr 2.2 and 4.2.

38 CMA Regulations 2016, reg 5A.

39 NSE Rulebook 2015, Part II, Section C, para A.

40 A Sponsor is a corporate broker, bank or other professional adviser entered on the JSE's Register of Brokers. See JSE Listing Requirements r 2.1.

41 A Dealing Member is a member company licensed by the NSE as a securities dealer. See NSE Rulebook 2015 r 1.24.

South Africa and Nigeria, the Sponsor/Dealing Member is to assist the issuer in meeting both its initial and ongoing obligations under the listing rules.[42] On the other hand, Transaction Advisers in the KSE assist prospective issuers meet their initial (but not ongoing) obligations.[43]

4.1.1.6. Independent Business

Unlike the JSE,[44] neither Kenya nor Nigeria requires a prospective issuer to show evidence of running an independent business as a matter of either law or practice.

4.1.2. Disclosure

As a condition for entering and remaining on the public market, regulators typically impose various initial and ongoing disclosure obligations. The three jurisdictions under examination are no different. Below, I examine the disclosure rules in the three jurisdictions.

4.1.2.1. Initial Disclosure

A broad level of convergence exists in the initial disclosure obligations imposed on issuers in each of South Africa, Kenya and Nigeria. Where an issuer that is eligible for listing applies to have its securities admitted to listing on an exchange or offers its securities to the public, it has to publish a prospectus.[45]

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42 JSE Listing Requirements r 2(a) and (b).

43 CMA Regulations 2016, reg 5A.

44 JSE Listing Requirements, r 4.28 (d).

45 The technical term is pre-listing statement in South Africa and prospectus in Kenya and Nigeria. For simplicity, I use prospectus throughout this Chapter.

Each jurisdiction prescribes a general disclosure standard, requiring issuers to disclose such information as investors would reasonably require in making informed investment decisions.[46] The general disclosure standard is then supplemented by lists of specific items of disclosure including details of the issuer and its management, the securities offered for subscription, the operating track record of the company, risk factors affecting the issuance, ownership and shareholding structure, material contracts and related party transactions.[47] The information all three jurisdictions require the prospectus to contain is largely historical in nature, mirroring the approach adopted in the EU.[48] Where profit forecasts are permitted in the prospectus, they are tightly controlled and no safe harbours are provided.[49] Neither jurisdiction is particular about the form the prospectus is to take, so long as the complete disclosure required is provided clearly and concisely.[50]

4.1.2.2. Ongoing Disclosure

In addition to initial disclosure, each of South Africa, Kenya and Nigeria has detailed rules on periodic and ad-hoc disclosures[51] an issuer will be required to make as long as its

46 See for instance JSE Listing Requirements, r 6.6(b); CMA Regulations 2016, reg 12.

47 See generally, JSE Listing Requirements, Rules 6.6 - 6.10, Rule 7 and Rule 11; CMA Regulations 2016, sch 3; Investments and Securities Act 2007 ('ISA 2007'), sch 3, Part A; Securities and Exchange Commission Rules, 2013 (SEC Rules), r 288; NSE Rulebook 2015, r 3.1.

48 See Armour and others (n 7) 177.

49 Where profit forecasts are included in the prospectus, the JSE requires that the assumptions underlying the forecasts are explained and are specific, precise and readily understandable by investors. In addition, the directors must distinguish between assumptions about factors that the directors can influence and those that are exclusively outside their control. See JSE Listing Requirements r 8.43. In Kenya, the CMA Regulations require that the assumptions underlying the forecast are explained, the reporting accountant examines and reports on the forecast and the sponsor confirms that the forecast was made after due and careful enquiry by the directors. See CMA Regulations 2016, sch 3, Part A, section D.04.

50 See JSE Listing Requirements r 6.7; SEC Rules 2013, r 285.

51 Periodic disclosures are mandated at fixed time intervals (e.g. annually or quarterly); whilst ad-hoc (or event-driven) disclosures are required on the occurrence of the stated event. See Armour and others (n 7) 174.

securities are admitted to listing and trading on the exchange.[52] When assessed against South Africa, Nigeria appears to retain the strictest ongoing disclosure rules.

All three jurisdictions require issuers to file annual[53] and interim (half-year)[54] reports. However, Nigeria imposes the shortest time-frame for the preparation of these periodic reports,[55] and stands alone in requiring quarterly reports, as distinct from South Africa and Kenya, which provide for quarterly reporting on an opt-in basis for issuers that have chosen to provide quarterly reports.[56] As with initial disclosure, the periodic information required by the three jurisdictions is largely historical in nature and forward-looking statements and profit forecasts are strictly regulated.[57] On the other hand, Nigeria again stands alone in mandating earnings forecasts by requiring all listed companies to release earnings forecasts within 20 days of the commencement of each quarter.[58]

Finally, like the EU,[59] all three jurisdictions require immediate disclosure of information that is likely to have a material impact on the price of the issuer's securities.[60]

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52 For South Africa, see JSE Listing Requirements, r 3. For Kenya and Nigeria, see CMA Regulations 2016, reg 19 & sch 5; SEC Rules 2013, r 38; NSE Rulebook 2015, Part C, r 17.20.

53 JSE Listing Requirements, r 3.19; CMA Regulations 2016, sch 5, r B.20; SEC Rules 2013, rr 38 and 39.

54 JSE Listing Requirements r 3.15; CMA Regulations 2016, sch 5, r B.05; SEC Rules 2013, r 4.

55 Nigeria requires annual reports to be filed within 90 days from the end of the financial year; whilst both Kenya and South Africa require four months. In addition, Nigeria requires half-yearly reports to be filed within 30 days from the end of the reporting period, whilst Kenya and South Africa require 60 days and 3 months respectively.

56 Nigeria requires quarterly reports, prepared in accordance with IFRS, to be filed within 30 days of the end of the relevant quarter. See SEC Rules 2013, Rule 41. On the position in South Africa and Kenya, see JSE Listing Requirements, r 3.15 and CMA Regulations 2016, r B.06 (3) respectively.

57 See for instance JSE Listing Requirements, rr 8.35 – 8.44.

58 SEC Rules 2013, r 40.

59 Market Abuse Regulation (Regulation (EU) No 596/2014, [2014] OJ L173/1 ('EU MAR') art 17(1).

60 JSE Listing Requirements, rr 3.4 & 3.5; CMA Regulations 2016, reg 19(2); NSE Rulebook 2015, r 17.2.

4.1.3. Potential Impact of Rules of Issuer Regulation on Market Development

Both historically and presently, all three jurisdictions have struggled to attract and retain listings. Although the problem exists in all three countries, it has been more pronounced in Kenya and Nigeria than in South Africa. Indeed, there is a sizeable number of large private companies in the region that have chosen to remain private.[61] The difficulty in attracting new listings can be seen by tracking the number of Initial Public Offerings (IPOs) in the last decade (2010-2019) as shown in Figure 4.1.

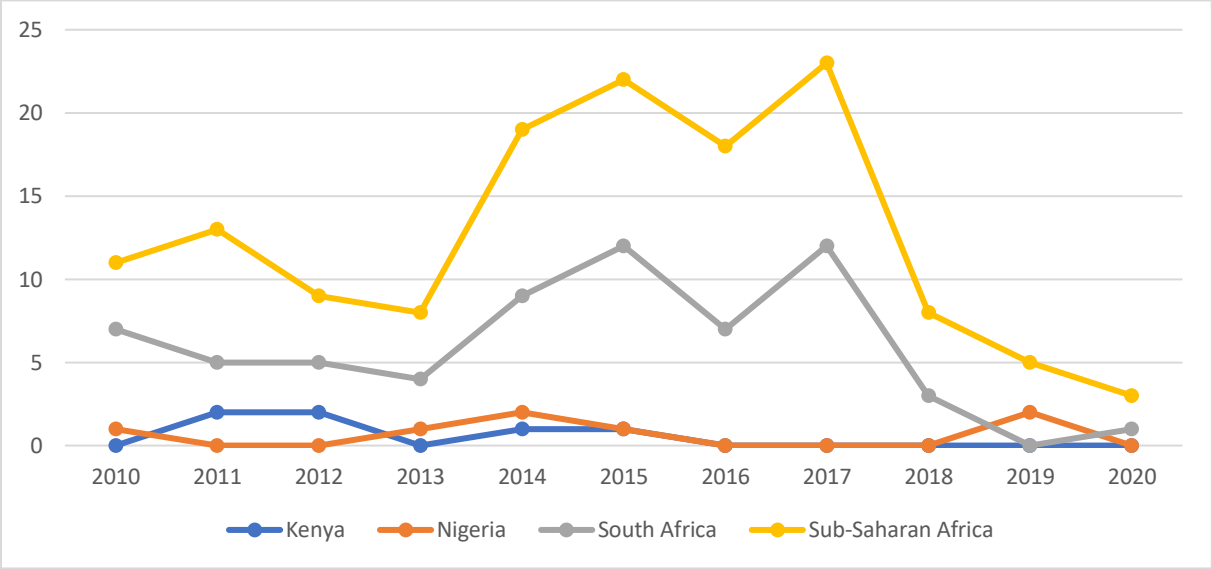

Figure 4.1 - Number of IPOs in Kenya, Nigeria, South Africa and sub-Saharan Africa (2010-2020)[62]

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61 According to a 2016 McKinsey report, there are 700 companies in Africa with annual revenues of over $500 million, only 40% of which are listed. 567 of the 700 companies were based in sub-Saharan Africa. Of this number, 300 were based in South Africa, 56 were based in Nigeria and 25 were based in countries across Eastern Africa (Kenya, Uganda, Tanzania, Burundi, Rwanda and South Sudan). See McKinsey & Company, 'Lions on the Move II: Realizing the Potential of Africa's Economies' (McKinsey Global Institute, September 2016) <https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Middle%20East%20and%20Africa/Realizing%20the%20potential%20of%20Africas%20economies/MGI-Lions-on-the-Move-2-Full-report-September-2016v2.pdf> accessed 27 March 2021.

62 Source: PwC Africa Capital Markets Watch 2019. The chart reports data for both the main markets and the alternate markets.

The chart reveals that South Africa has been more successful in attracting new listings than Kenya and Nigeria. Indeed, Kenya has not had an IPO since 2015, and both Kenya and Nigeria have recorded at least 5 years with no IPO of the 10 years tracked in the chart.

On the other hand, the difficulty in retaining already listed companies can be seen by looking at the number of listed companies in the three countries in the last 15 years (i.e. 2005-2019) as seen in the chart below:

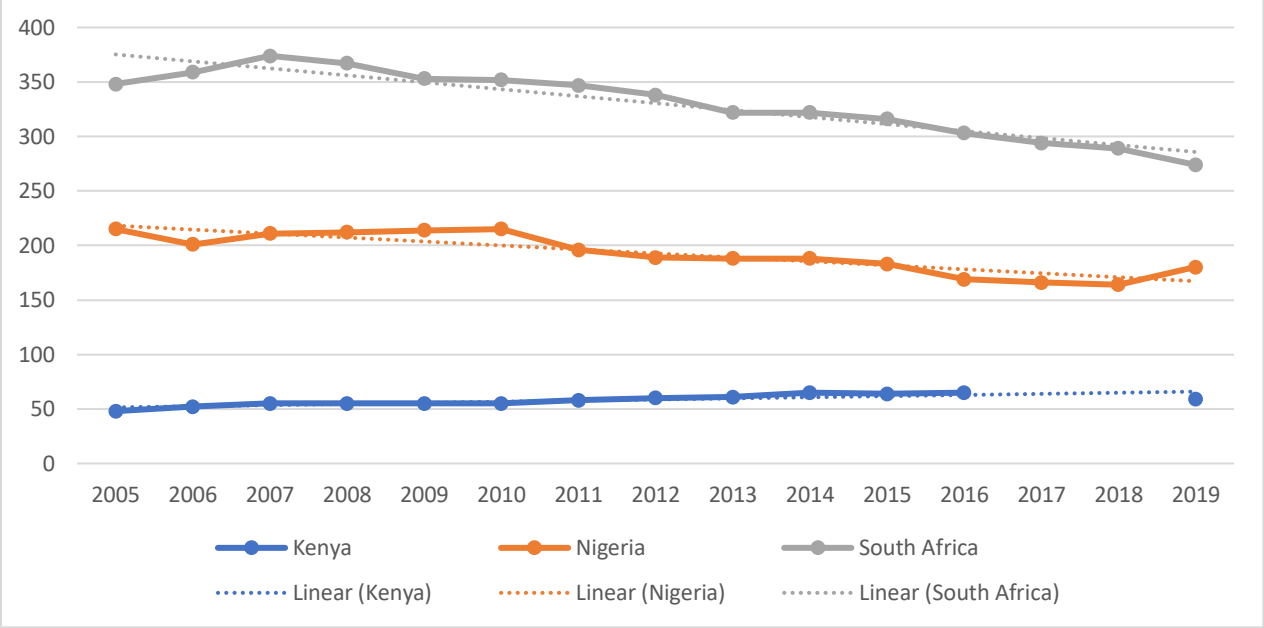

Figure 4.2 - Number of Listed Companies in Kenya, Nigeria and South Africa (2005-2019)[63]

As can be seen from the linear trend-lines on the chart, Kenya has experienced a very modest average increase in number of listing. On the other hand, Nigeria and South

[63] Source: The World Bank. Data is unavailable for Kenya in 2017 and 2018.

Africa have witnessed significant declines in the number of listed companies,[64] although this drop is consistent with current global trends and as such may be unrelated to the state of Nigerian and South African securities regulation. Does available evidence support the contention that eligibility requirements and disclosure obligations hinder the number of companies able to list in Kenya and Nigeria? I examine this question below. I first consider the potential impact of listing eligibility requirements and thereafter examine the potential impact of disclosure obligations.

4.1.3.1 Eligibility Criteria

Our examination of the eligibility criteria supports the claim that those for listing in Kenya and Nigeria may be set too high relative to the two countries' level of financial development. Thus, given the limited funding by banks and other sources to the real economy in both countries, eligibility tests are likely to screen out high quality issuers that have not attained the required size to list on the main markets. In making good this point, I divide the eligibility criteria into financial (minimum capitalization, net assets, profit thresholds and minimum float) and non-financial (operating track-record, lock-up and governance) criteria and compare Kenya and Nigeria on the one hand to South Africa on the other hand, using these criteria.

4.1.3.1.1 Financial Criteria

Each jurisdiction sets financial thresholds of size and/or assets as a condition for listing. As seen above, a prospective issuer must have a minimum capitalization of $494,000 (Kenya) and $11,080,000 (Nigeria) to list on its main market. Nigeria requires a minimum

[64] South Africa started with 615 listed companies in 1993, reaching a peak of 652 listed companies in 1999 before plummeting to 294 listed companies in 2017.

capitalisation of $554,016,000 to upgrade to its Premium Board. Kenya goes ahead to require a minimum net asset of $988,000; whilst Nigeria requires minimum profits of $831,000 (for three years). In contrast, an issuer seeking a listing on the Main Board of the JSE must have a minimum capitalization of $3,557,000 and minimum profit of $1,067,000 (for the last year prior to listing), with no minimum assets threshold.

Momentarily discounting the net asset and profit tests, and using only minimum capitalization as a size benchmark to assess the financial criteria for listing, the smallest company considering a listing on Nigeria's main market is required to be between about two times and three times the size of its South African counterpart depending on its listing category.[65] Where a company listed on the Main Board of the NSE wishes to upgrade to the Premium Board, it is required to be over 150 times the size of its South African counterpart. For its part, although Kenya's minimum capitalization tests are the lightest of the three countries, it stands alone in setting minimum assets tests and imposes the most stringent minimum float requirement of the three countries, both in terms of the percentage of shares required to be in public hands (25%) and in terms of the number of shareholders holding those shares (1,000 shareholders excluding employees).

Perhaps this problem would have been manageable if the financial sectors in Kenya and Nigeria were deep and resilient enough to provide the required capital to prospective issuers to enable them grow to the minimum size required to consider a listing. However, access to credit in both countries is very poor, as seen in Figure 4.3.

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65 Indeed, the Nigerian company will need to be between 10 and 13 times the size of the smallest company considering a Premium Listing on the London Stock Exchange, using a minimum market capitalization of £700,000.

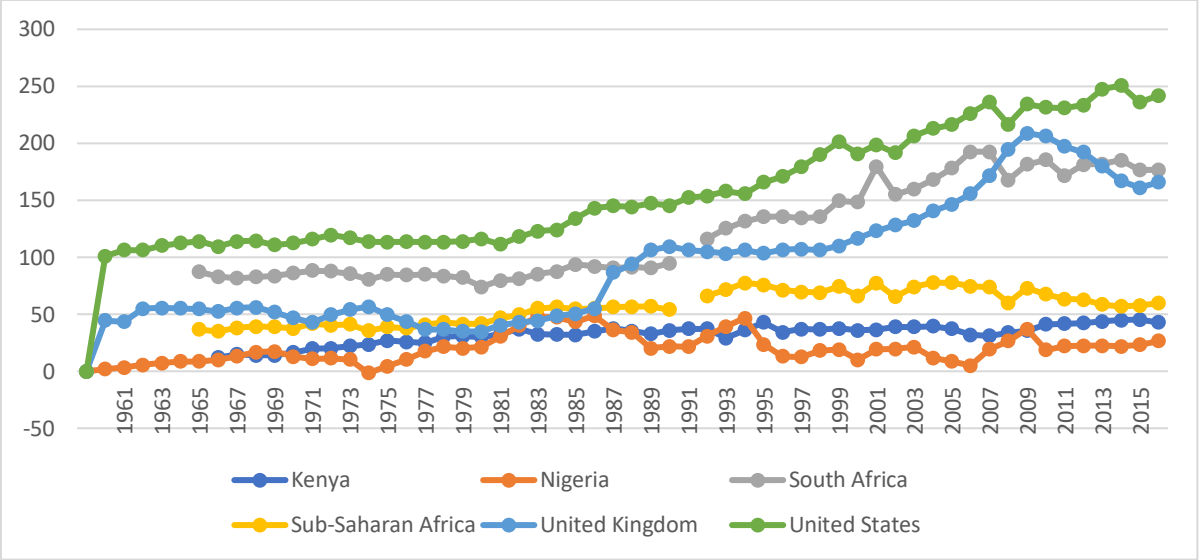

Figure 4.3 - Domestic Credit Provided by the Financial Sector (% of GDP) 1960-2016.[66]

Indeed, as seen in the chart, the domestic credit provided by the financial sector as a function of GDP in both countries is consistently below the already low sub-Saharan Africa average (as at 2017, this stood at 26.56% (Nigeria) and 42.78% (Kenya)). Thus, companies already lack access to a sound capital base to grow to the size where they can meet the minimum requirements for listing on the domestic stock exchanges. When the minimum capitalization test is added to the profits, net assets and minimum float tests, it is arguable that Kenya and Nigeria set unduly high eligibility criteria for listing.

Are there likely to be many firms in Kenya and Nigeria that are unable to achieve a listing because of lack of access to a sound capital base to grow to the required size? To examine this question, consider that firms are unlikely to seek public listings as their first source of external finance. Rather, it is more common for firms to seek growth capital and

66 Source: The World Bank.

achieve scale prior to listing. Such growth capital typically comes in the form of private equity financing or bank loans.

Although private equity has witnessed a steady growth in sub-Saharan Africa,[67] with a lot of private equity funds focusing on venture capital and angel investing,[68] private equity financing in sub-Saharan Africa is still in a nascent state.[69] In addition, the illiquidity of domestic stock exchanges has made it unattractive to pursue exits through public offerings,[70] thus limiting available exit options.[71] Thus, although firms may be able to raise capital through private equity investments, private equity is not routinely available to firms seeking capital to grow.

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67 On the growth of private equity in Africa, see for instance The Economist Corporate Network, 'A Growth Engine: Trends and Outcomes of Private Equity in Africa' (2017) The Economist Corporate Network <https://www.heliosinvestment.com/uploads/files/A-growth-engine-Trends-and-outcomes-of-private-equity-in-Africa.pdf> accessed 27 March 2021 (discussing the growth in the number of private equity firms and the amount of money invested by in Africa).

68 Kalu Ojah and Odongo Kodongo, 'Financial Markets Development in Africa: Reflections and the Way Forward' in Célestin Monga and Justin Yifu Lin (eds), *The Oxford Handbook of Africa and Economics: Volume 2* (OUP 2015).

69 For instance, according to the African Private Equity and Venture Capital Association, total deal value and volume across the African continent was $3.9billion and 613 deals respectively between 2014-2019, with an annual average deal value of $0.7billion. See African Private Equity and Venture Capital Association, 'Venture Capital in Africa: Mapping Africa's Start-Up Investment Landscape' (2020) <https://www.avca-africa.org/media/2603/01746-avca-venture-capital-report_4.pdf> accessed 27 March 2021.

70 Tom Trimble and John Bryant, 'Illiquidity in African Stock Markets a Challenge for Private Equity (2019) EMPEA Legal and Regulatory Bulletin <https://www.empea.org/app/uploads/2019/11/LRB_No28_2019_Articles_WinstonStrawn.pdf> accessed 27 March 2021 (discussing the difficulty in exiting private equity investments through initial public offerings). See also Ojah and Kodongo (n 68) 410-411.

71 Given the underdevelopment of the domestic securities markets, trade sales (particularly to foreign buyers) have now emerged as the typical exit medium in private equity deals in sub-Saharan Africa. See the Economist Corporate Network (n 67). See also Ben Jackson, 'Africa's Private Equity Exits: Finding the Way Out' (Private Equity International, 31 August 2020) <https://www.privateequityinternational.com/africas-private-equity-exits-finding-the-way-out/> accessed 27 March 2021.

Similarly, securing business loans in the two countries has proven difficult, largely due to prohibitively high interest rates.[72] It is therefore unsurprising that the Central Bank of Nigeria sought to deliberately intervene in lending to the real economy by mandating an increase in the loan to deposit ratio to address the issue of banks retaining large amounts of liquid assets in government securities rather than lending to the real economy.[73]

Consequently, given the state of financial development in both countries and the level of funding to the real economy, it is likely that many firms in both countries may find it difficult to raise sufficient capital to grow to the required size to meet the listing eligibility requirements.

4.1.3.1.2. Non-Financial Criteria

Apart from the size thresholds, each jurisdiction sets non-financial thresholds for listing. Each jurisdiction requires annual audited accounts for at least three years (five years in the case of Kenya) in addition to various other requirements including lock-ups (24 months in Kenya, 12 months in Nigeria but none in South Africa), sponsorship, and independent business (only South Africa).

Although Kenya has the lightest financial threshold of the three jurisdictions (save for the net asset test), it arguably has the most stringent non-financial thresholds. Kenya

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72 According to data from the Central Bank of Nigeria, as of December 2020, prime lending rates charged by banks (i.e., rates charged to perceived creditworthy borrowers) was 11.35% whilst maximum lending rate (i.e., rates charged to perceived risky borrowers) was 28.31%. The rates rose to as high as 17.88% for creditworthy borrowers and 31.39% for perceived risky borrowes in September 2017. See <https://www.cbn.gov.ng/rates/mnymktind.asp?year=2020> accessed 27 March 2021. In the case of Kenya, the weighted average lending rate by Kenyan commercial banks was 12.02% as at December 2020. The weighted average lending rate was as high as 20.34% in March 2012. See <https://www.centralbank.go.ke/statistics/interest-rates/> accessed 27 March 2021.

73 See Chapter 1, section 1.1.

retains the longest audited historical financial statements (5 years) and most stringent lock up period (24 months). Whilst a prospective issuer in Kenya might meet the lower financial tests (which, as argued above, may be high for the level of its financial development), it will have to show a longer existence, a broader share ownership, and selling shareholders will face a 24-month lock-up period, which might ultimately prove burdensome. This problem is particularly acute for start-up companies funded by venture capitalists who intend to use the stock exchange as an exit mechanism.

Ultimately, although the question whether listing eligibility criteria hinders market development in Kenya and Nigeria can only be fully answered empirically, there is some indication that the eligibility tests are in some respects restrictive and can screen out otherwise safe companies that are either too small to meet the high financial tests (e.g. in Nigeria) or too young to meet the high non-financial tests (e.g. in Kenya).

It was in recognition of these issues that on 29 January 2020, the Nigerian Stock Exchange launched the Growth Board to provide a lighter listing and capital raising regime for the over 41 million MSMEs operating in Nigeria.[74] The Growth Board represents a deliberate and welcome attempt at making the listing eligibility criteria better suited to the types of companies likely to seek external capital in Nigeria. Although it is too early to properly ascertain how effective it has been in achieving its objectives,[75] the Growth Board retains the stringent ongoing disclosure rules applicable to companies on the Main Board (including the requirement to file quarterly returns within 30 days of the end of the relevant

[74] See the launch announcement of the NSE, available at http://www.nse.com.ng/mediacenter/news_and_events/Pages/nse-set-to-launch-growth-board-for-high-growth-companies.aspx, accessed 31 July 2020.

[75] As at 31 October 2020, the Growth Board had still not attracted a new listing. Of course, listing and market activity in 2020 would have been severely impacted by the coronavirus pandemic.

quarter). The fixed costs required for compliance with this obligation will fall heavily on the small companies contemplating a listing on the Growth Board.

4.1.3.2 Disclosure Rules

As with the eligibility criteria, there is no universally optimal level of disclosure. Although the content of disclosure typically reflects the policymaker's view on the information a rational investor will require to make an informed investment decision, certain rules of disclosure pursue objectives other than assisting investors in making rational investment decisions.[76] Consequently, momentarily discounting the other social objectives disclosure may pursue, as a rule of thumb, policymakers attempt to require a level of disclosure that will support the informational efficiency of the market, but which will not be unduly burdensome on issuers.

The comparative analysis above supports a preliminary case that the disclosure obligations in Nigeria are set too high.[77] As noted above, Nigeria sets the shortest timeframes for companies to file annual and interim reports and stands alone in requiring issuers to file quarterly reports and profit forecasts.[78] Available evidence suggests that given the severe illiquidity of the Nigerian market, Nigerian issuers do not appear to benefit from a reduced cost of capital sufficient to justify the compliance cost of mandatory

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76 For instance, the Nigerian SEC Code on Corporate Governance requires listed companies to make specific disclosure on the company's strategy for managing the impact of HIV/AIDS, malaria and other serious diseases on employees.

77 Similar arguments have been made in Kenya. See for instance Bryan Shipp, 'Going Long on the Nairobi Exchange' (2010) 23 McGeorge Global Business & Development Law Journal 243, 247 'Many market participants complain about the CMA's "over-regulation". In particular, they complain that the agency's tendency to impose reporting and compliance requirements are [sic] too costly and complex to administer for a market as thin as the Nairobi Securities Exchange'.

78 See n 55-58 above.

quarterly reporting. Thus, on 31 July 2019, a Nigerian company, First Aluminium Nigeria Plc, voluntary delisted from the Nigerian Stock Exchange. Its explanatory memorandum to the stock exchange is telling in this regard. According to the company:

> Over the last 7 years, there has been little or no trading activity on the shares held by the minority shareholders. The share price was stuck at 50 kobo [~$0.0013] for about six years between June 2011 and June 2017, and thereafter experienced further diminution, both in share price and trading volumes… Shareholders are not benefiting from the continued listing as they are not getting exit opportunities and their investments have been locked up, thereby finding it difficult to dispose of their shareholding. Neither the company nor its shareholders have benefitted as the company's shares continue to trade at a significant discount to the intrinsic value… The purpose for listing First Aluminium was to raise capital for the Company as well as provide liquidity to its shareholders. The current illiquidity nature of the market has rendered this primary corporate objective unattainable for First Aluminium. Over the last 12 months, there has been a significant fall in average daily trading volumes to 2,918 units between July 2017 – June 2018 and further dip to 2,816 units (July 2018 - Dec 2018). Neither the Company nor any shareholder is benefiting from the continued listing on the NSE. Furthermore, rationalization of operational expenses to support the Company's business and to meet the needs of various stakeholders as the attendant cost required to comply with its listing requirements including filing fees, penalties or sanctions, are not commensurate with the benefits to the Company.[79]

On this basis, it is arguable that by mandating profit forecasts and quarterly reporting, and penalizing late/non-filing of mandated reports,[80] the disclosure obligations in Nigeria increase compliance cost on listed companies without commensurate benefits in terms of liquidity and cost of capital.

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79 Explanation Statement to Shareholders of First Aluminium Plc <http://www.nse.com.ng/Financial_NewsDocs/25746_FIRST_ALUMINIUM_NIGERIA_PLC_CORPORATE_ACTIONS_APRIL_2019.pdf> accessed 27 March 2021.

80 The SEC imposes a daily penalty of N2,000 and N5,000 per day for late filing and non-filing, respectively, of both quarterly and annual reports for the period of default. In addition, the NSE imposes a penalty of N100,000 per week for late submission of accounts and can suspend an issuer's listing for failure to comply with its disclosure obligations. See Rule 21.3(a) of Part II, and Appendix III of the NSE Rulebook 2015.

Therefore, it is arguable that listing eligibility criteria (in both Kenya and Nigeria) and disclosure obligations (in Nigeria) unduly limit potential issuers from issuing their securities on the public markets. As earlier noted, the precise impact of these rules on market development can be more conclusively examined in subsequent country-specific empirical studies. I frame an agenda for future research and offer suggestions for law reform in this area in the concluding Chapter of this thesis.

4.2. Market Abuse Regulation

Market abuse regulation is also central to securities regulation. Even where high eligibility standards are met, inappropriate securities trading can keep potential investors away from the market. Similarly, the presence of insiders can reduce the participation of other investors in the market where non-insiders consistently lose to insiders.

Insider dealing aside, market participants can disclose false or misleading information or create a false or misleading impression about the price or activity in traded securities. Left unregulated, these schemes not only have an impact on liquidity, but they also undermine informational efficiency since all genuine information will not be impounded in the prices of the securities.[81] Securities regulators therefore prohibit insider trading and market manipulation in order to protect investors and promote market integrity.

Below, I examine the regulation of insider trading and market manipulation (both trade-based and information based) in South Africa, Kenya and Nigeria. Before proceeding into the analysis that follows, it is useful to bear in mind that the analysis below only

[81] Armour and others (n 7) 185.

considers the formal law on the books. Chapter 5 examines the enforcement of these rules and provides more robust conclusions on market abuse regulations in the three countries.

4.2.1. Insider Trading

Insider trading essentially involves using undisclosed, price sensitive information about a company or its securities in order to make a profit or avoid a loss through trading activity.[82] Insider trading regulation commenced in the US from the generic anti-fraud provisions of SEC Rule 10b-5.[83] Since then, insider trading regulation in the US has witnessed exponential growth and has been shaped over the decades by enforcement actions and case law.[84] In turn, the US insider trading rules have influenced insider trading regulation in other countries particularly in Europe.[85]

4.2.1.1. Who is an Insider and when is liability imposed?

The way a jurisdiction defines an 'insider' for the purpose of imposing insider trading liability reflects the policies underlying its insider trading law.[86] Today, the insider trading prohibition in the US is founded on the misappropriation theory endorsed by the US

82 ibid 182.

83 The modern prohibition of insider trading can be traced to the US SEC's enforcement action *In re Cady, Roberts & Co.* 40 SEC 907 (1961).

84 For a detailed discussion of the evolution of the insider trading regulation in the US, see Stephen Bainbridge, 'An Overview of Insider Trading Law and Policy: An Introduction to the *Research Handbook on Insider Trading*' in Stephen Bainbridge (ed), *Research Handbook on Insider Trading* (Edward Elgar Publishing, 2013); Adam Pritchard, 'Launching the Insider Trading Revolution: *SEC v. Capital Gains Research Bureau*' in Stephen Bainbridge (ed), *Research Handbook on Insider Trading* (Edward Elgar Publishing, 2013).

85 See Katja Langenbucher, 'Insider Trading in European Law' in Stephen Bainbridge (ed), *Research Handbook on Insider Trading* (Edward Edgar Publishing, 2013) 429.

86 ibid 443.

Supreme Court in *US v O'Hagan*.[87] Under this theory, 'a fiduciary's undisclosed use of information belonging to his principal, without disclosure of such use to the principal, for personal gain constitutes fraud in connection with the purchase or sale of a security and thus violates Rule 10b-5'.[88] In essence, a strong focus is placed on the relationship between the insider and the issuer[89] and the typical insider in US law has a special relationship with the issuer. On the other hand, the underlying policy behind insider trading prohibition in European law is not the misappropriation of information but the integrity of the market.[90] Thus, the relationship with the issuer is irrelevant to the definition of an insider under European law and an insider is a person with insider information regardless of how the information was obtained.[91]

All the jurisdictions under examination define an 'insider' for the purpose of imposing insider trading liability.[92] Kenya joins South Africa in adopting the European approach and defining an insider by reference to the possession of insider information.[93] On the other hand, in Nigeria, there is a tension between the definition of an insider under the ISA and the SEC Rules on the one hand, and the definition in the rules of the stock exchange on the other. Whilst the ISA and the SEC Rules define an insider by reference to

87 *United States v O'Hagan* 521 US 642 (1997).

88 Bainbridge (n 84) 8.

89 Armour and others (n 7) 188.

90 Langenbucher (n 85) 443-444; EU Market Abuse Regulation, recital 23. See also *Case C-45/08, Spector Photo Group* 2009 ECR I-12073, para 48.

91 Armour and others (n 7) 188.

92 Financial Markets Act No. 19 of 2012 ('FMA 2012'), s 77; Capital Markets Act, Chapter 485A, 2000 (as amended 2018), s 32A(2) (c); ISA 2007, s 315.

93 In Kenya, an insider is defined simply as a person in possession of inside information. In South Africa, an insider includes a person in possession of inside information in circumstances where the person knows that the direct or indirect source of the information is an insider.

a relationship with the issuer or a related company,[94] the stock exchange rules define an insider by reference to the possession of insider information, in identical wordings to the definition under the South African FMA.[95] This lack of clarity raises doubt as to whether insider trading liability can be imposed by the stock exchange on third parties who obtained insider information inadvertently. Although the ISA prohibits third parties who received insider information from themselves trading on the basis of that information, the ISA requires that the third party must knowingly (rather than inadvertently) obtain the information, and know or have cause to believe that the insider ought not to disclose the information.[96] Thus, it remains unclear whether a person who inadvertently received inside information becomes an insider under Nigerian law.

All three jurisdictions impose a duty on insiders not to trade when in possession of inside information. 'Inside information' for this purpose generally includes all information which, if disclosed, is likely to materially affect the price or trading in the issuer's securities.

In addition, Nigeria, like South Africa, maintains a requirement of *scienter*. This requires that the insider must know that he/she is in possession of price-sensitive information and deal whilst in possession of that information.[97] On the other hand, Kenya

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94 ISA 2007, s 315; SEC Rules 2013, r 400 (3). The ISA and the SEC Rules require that an insider is a director, officer, employee, a person in a professional or business relationship, a substantial shareholder (5% shareholding or more) or a member of the audit committee.

95 NSE Rulebook 2015, r 1.24.

96 ISA 2007, ss 111(2) and (3).

97 ibid, s. 111; FMA 2012, s. 78. On the requirement under South African law that the insider knows that the information in question is inside information, see *Zietsman and Another v Directorate of Market Abuse and Another* (A679/14) [2015] ZAGPPHC 65; 2016 (1) SA 218 (GP) (24 August 2015). On the knowledge requirements for insider trading in Nigeria, see AA Oluwabiyi, 'A Comparative Legal Appraisal of the Problem of Insider Trading in Mergers and Acquisitions' (2014) 2 Frontiers of Legal Research 1;

previously maintained a scienter requirement and a narrow definition of insider trading. Following an unsuccessful attempt to enforce these provisions in the case of *The Republic v Terrence Davidson*,[98] the Kenyan Parliament amended the Capital Markets Act, by removing the scienter requirement and making it unlawful for a person to deal in securities that are price-affected in relation to non-public information in his/her possession. There is no requirement for the person to know that the information is inside information, and the inside information need not be of a specific or precise nature, so long as the information relates to the securities or to the issuer, is unpublished and is likely to have a material effect on the price of the securities.

4.2.1.2. Additional Tools for Dealing with Insider Trading

In addition to the prohibition of insider trading, South Africa and Nigeria (but not Kenya) have additional tools to deal with insider trading.

In the first place, both jurisdictions require directors to disclose their dealings in the company's shares.[99] In South Africa, a director of a listed company must obtain clearance from the Chairman of the board (or a director designated for this purpose) prior to dealing.[100] The director must thereafter notify the issuer no later than three business days after dealing, and the issuer in turn must announce the dealing to the market no later than 24 hours after receiving the director's notification.[101] On the other hand, there is no requirement to obtain clearance prior to dealing in Nigeria. In addition, the post-dealing

98 *Republic v Terrence Davidson* Nairobi CMCC 1338 of 2008. I discuss the case in more detail in Chapter 5.

99 SEC Rules 2013, r 401; NSE Rulebook 2015, Part II r 17.15(c); JSE Listing Requirements, r 3.65.

100 JSE Listing Requirements, r 3.66.

101 ibid, r 3.55.

disclosure is required to be made only to the Nigerian SEC[102] and the issuer.[103] There is no obligation to publicly disclose a director's dealing to the market, although the issuer is required to maintain a record of notifications of director's dealings, which it must provide to the NSE within two business days of the NSE requesting for it.[104]

In addition, both Nigeria and South Africa impose various closed periods during which directors are prohibited from dealing (and in the case of South Africa, the Chairman of the board is prohibited from giving clearance to deal).[105] The closed periods generally cover periods before the disclosure of financial statements and interim reports, and periods where the company is considering significant decisions or, in the case of South Africa, when the company is trading under a cautionary statement. This is on the basis that the directors are more likely to be in possession of material price-sensitive information during these periods.

Nigeria alone requires issuers to maintain and regularly update an insider list which should contain the identities of employees and other relevant persons with inside information, the reason they have access to the information, the date they received access to the inside information and the date the list was created.[106] The list provides the exchange with a preliminary reference in an insider trading investigation, and can provide evidence of a lapse in internal systems and controls if a person who is found to have violated the insider trading rules is not on the insider list.

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102 SEC Rules 2013, r 401.

103 NSE Rulebook 2015, Part II r 17.15(c).

104 ibid.

105 ibid, Part II, r 17.17 - 17.18; JSE Listing Requirements, r 3.67 – 3.69.

106 NSE Rulebook 2015, Part II r 17.8.

4.2.1.3. Liability for Insider Trading

In all three jurisdictions, a person can be found guilty of insider trading not only by dealing in the shares of the issuer for his/her own account, but also on other grounds such as dealing on the account of others, knowingly dealing for an insider, tipping, or procuring or counselling another person to deal.[107] Criminal penalty is invoked as the primary liability for a breach of the insider trading rules. In both Kenya and Nigeria, the penalty upon conviction gets as high as seven years imprisonment, fines and the payment of twice the amount of gain made or loss avoided.[108] On the other hand, the penalties in South Africa include imprisonment for up to ten years, a fine and a penalty of three times of the gain made or loss avoided, in addition to interest and the cost of the suit and investigation costs.[109]

However, there are a few areas of divergence between the insider dealing rules in South Africa on one hand and Kenya's and Nigeria's on the other. First, whilst insider trading in South Africa carries both criminal and civil liabilities (the civil liability carries an administrative penalty which has to be proven to the balance of probabilities),[110] insider trading in Kenya and Nigeria is a criminal offence which must be proven beyond a reasonable doubt. This means the public regulator in South Africa has a lower standard of proof in establishing insider trading violation than its counterpart in Kenya and Nigeria.

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107 See generally, FMA 2012 s 78; Capital Markets Act s 32; ISA 2007 s 111.

108 Capital Markets Act s 32E, ISA 2007 s 115.

109 FMA 2012 ss 82 and 109.

110 *Pather and Another v Financial Services Board and Others* (866/2016) [2017] ZASCA 125; [2017] 4 All SA 666 (SCA); 2018 (1) SA 161 (SCA) (28 September 2017).

Second, as regards liability to pay damages to investors in a civil suit, South Africa provides for a 'statutory class action' procedure initiated by the regulator.[111] Under this class action procedure, investors who claim to have suffered loss from the alleged insider trading must submit claims to the Financial Services Conduct Authority (FSCA) within 90 days from the publication of a notice inviting persons affected by the insider dealing to submit their claims. Where the FSCA's claim is successful and the investor can prove to the reasonable satisfaction of the FSCA that he/she indeed suffered a pecuniary loss as a result the insider trading, the investor will receive an amount equal to the lesser of (a) the difference between the price at which the claimant dealt and the price, determined by the FSCA, that the claimant would have dealt at if the inside information had been published at the time of dealing, or (b) a pro-rata share in the fine imposed on the insider.[112] The sum is taken from the fines imposed on the violator who therefore would have no additional liability to investors for that sum.[113]

On the other hand, Kenya specifically confers a right of private action on investors that suffered pecuniary loss as a result of insider trading.[114] Therefore, these investors will be required to commence claims against the violator.[115] In Nigeria, a person found guilty of violating of the insider trading rules is liable to pay compensation at the order of the

111 Stephanie Luiz and Kathleen Van der Linde, 'The Financial Markets Act 19 of 2012 - Some Comments on the Regulation of Market Abuse' (2013) 25 SA Mercantile Law Journal 458, 470.

112 FMA 2012 s 82(6).

113 See FMA 2012 s 87 preventing the recovering in a private action of sums recovered under the administrative procedure in s. 82. But see Howard Chitimira, 'Selected Aspects of the Regulation of Insider Trading and Market Manipulation in the European Union and South Africa' (2015) 8 African Journal of Legal Studies 182 (criticising the lack of a court-driven civil liability regime for insider trading under South African law).

114 Capital Markets Act s 32K.

115 See n 117 below, and accompanying text on the feasibility of this counterparty right of action in Kenya.

SEC or the Investments and Securities Tribunal (IST) to aggrieved persons who suffered loss as a result of the difference between the price at which they traded on the market and the price they would have traded if the contravention did not occur.[116] It is unclear how this counterfactual will be established, given that, as shall be seen in Chapter 5, there has to date been no insider trading enforcement action in Nigeria.

Thus, both Nigeria and South Africa provide a regulator-controlled process for providing compensation to victims of insider trading violations. However, whilst the compensation is taken from the fine imposed on the violator in South Africa, the liability to pay compensation in Nigeria is free-standing and independent of the sanctions imposed by the regulator. It is unclear whether this process under Nigerian law operates in addition to or as a substitute for a common law right of action. Given that there has been no prosecuted case of insider trading enforcement in Nigeria, this point has not come up under Nigerian law and there is no guidance as to how it will be resolved when it does arise.

4.2.1.4. Preliminary Comments on Insider Trading Regulation

A point that arises from the analysis above is that matched against South African law, Kenya and Nigeria retain strong laws on the books prohibiting insider trading. All three jurisdictions make insider trading a criminal offence punishable with a combination of penalties and terms of imprisonment. Nigeria goes a step further by mandating issuers to maintain insider lists and joins South Africa in mandating insiders to disclose their dealings in the company's securities promptly. On its part, Kenya's previously lax insider trading rules have been significantly revamped after loopholes in the law were exploited. In

116 ISA 2007 s 116.

addition, all three jurisdictions maintain a private liability regime to provide compensation to investors who may have suffered loss from the alleged insider trading. Whilst Nigeria and South Africa do this through a regulator-led model, Kenya explicitly gives a right of action to investors harmed by the alleged insider trading, which will ostensibly require them to institute securities class actions, given the potentially small damage that may be suffered by individual investors.

However, private liability rules for insider trading regulation in Kenya and Nigeria remain rather unclear. As shall be seen further in Chapter 5, neither Kenya nor Nigeria has successfully prosecuted an insider trading case. Consequently, there has been no guidance on how their private liability rules will operate in practice. In Nigeria, it remains unclear whether the regulator-controlled process operates in addition to or as a substitute for a common law right of action. In Kenya where a counterparty right of action is contemplated, it is unclear who has the right to sue: the direct counterparty to the insider, or all persons who suffered a pecuniary loss by trading in securities that were price-affected by the wrongful act of the insider.[117] It is also unclear how damage will be established in the absence of establishing the counterfactual that would have existed at the time of the trade if the information had been disclosed. Given the difficulties already faced by Kenyan public regulators in enforcing the insider trading prohibition, it is doubtful whether guidance on these points will come from the Kenyan courts in the near future.

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117 Some commentators argue against a counterparty right of action on the basis that failure to disclose information is not actionable per se. See for instance Henry Manne, 'Insider Trading and Property Rights in New Information' (1984) 4 Cato J 933 For a strong counter-argument on this 'victimless-crime hypothesis', see Mark Klock, 'Mainstream Economics and the Case for Prohibiting Inside Trading' (1993) 10 Georgia State University Law Review 297.

Perhaps one additional downside to Kenya's insider trading law on the books is that it does not provide the regulator or the exchange with additional tools to monitor market activity. Thus, there are no closed periods during which insiders must not trade, and issuers are not required to maintain insider lists or notify the exchange or the regulator of trades by insiders. This places additional strain on the regulator and the exchange which are not provided with readily usable tools to facilitate their monitoring and enforcement activity. However, although this is an area where Kenya may benefit from further improvement to its law on the books, it is worth noting that even in the absence of these regulatory tools, Kenyan prosecuting authorities have instituted two criminal actions for alleged insider trading violation[118] as compared with Nigeria which provides additional tools for enforcement and monitoring but where no insider trading actions have been instituted.

The point has been made that it is not the prohibition of insider trading, but the enforcement of that prohibition that leads to positive outcomes for the market.[119] Thus, whilst a law on the books analysis shows that all three jurisdictions prohibit insider trading, and impose potentially severe sanctions for its violation, robust conclusions on the insider trading prohibition in the three jurisdictions can only be reached after a consideration of enforcement of the insider trading prohibition in Chapter 5.

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118 As discussed in Chapter 5, both actions were ultimately unsuccessful owing to the high standard of proof required for the criminal charge.

119 See Utpal Bhattacharya and Hazem Daouk, 'The World Price of Insider Trading' (2002) 57 Journal of Finance 75. See also John Armour and Caroline Schmidt, 'Building Enforcement Capacity for Brazilian Corporate and Securities Law' in R. Huang and N. Houson (eds), *Public and Private Enforcement: China and the World* (CUP 2017) '*... it is well established in the literature that the quality of enforcement institutions are at least as important as the substantive law in facilitating investment*'.

4.2.2. Market Manipulation

Market manipulation generally refers to activity which creates an artificial movement in the market price of a security.[120] Market manipulation can generally be divided into information-based and trade-based manipulation. Information-based manipulation captures actions which cause an artificial movement in price by giving false or misleading information or failing to correct false information. On the other hand, trade-based manipulation generally captures the creation of an artificial movement in the price of a security by inappropriate trading activity. In both instances, the rationale for forbidding manipulation is investor protection and the promotion of market integrity.

Whilst the prevention of market manipulation is, no doubt, an important regulatory objective, in practice, drawing the line between unlawful manipulation and value-enhancing trading behaviour can prove difficult. As Professor Armour and others have argued, defining the precise ambit of rules designed to constrain market manipulation can be tricky as some activities designed to artificially move market prices can be perfectly legitimate.[121] In addition, the creation of new products and new trading methods (such as algorithmic and high frequency trading) continue to test the boundaries of market manipulation rules. In this imperfect universe, securities regulators generally impose effects-based criteria to determine whether manipulation has occurred (such as whether a trade resulted in a change in the beneficial ownership of the securities).[122] In the US, as

120 Armour and others (n 7) 182.

121 These include share buyback schemes where the issuer reasonably believes that the market price of its securities is lower than their correct valuation, and stabilisation mechanisms by investment banks to support the market price of an issuer shortly after a listing. See Armour and others (n 7) 190.

122 Armour and others (n 7) 191.

contrasted with the EU, these objective effects-based criteria are supplemented with a subjective *scienter* test which requires the person accused of manipulation to have intended to commit the manipulation.

4.2.2.1. Information-Based Manipulation

As seen in the discussion on ongoing disclosure, all three jurisdictions require the immediate disclosure of information likely to have a material impact on the price of the issuer's securities.[123] In addition, all three jurisdictions prohibit spreading false or misleading information in respect of an issuer whose securities are traded on an exchange or in respect of the securities themselves.[124] In Nigeria and South Africa, it is sufficient for the imposition of liability if the person disseminates the information knowing it to be false or misleading. Kenya on the other hand, imposes an additional requirement that the person must have made the false statement for the purpose of inducing the purchase, sale or subscription of the securities.

Furthermore, like South Africa, both Kenya and Nigeria require issuers to publish cautionary announcements immediately the issuer is aware of rumours in the market or knows of any price sensitive information, the confidentiality of which cannot be maintained.[125] As noted above, the publication of a cautionary statement in South Africa triggers a closed period during which the Chairman of the board must not give clearance to a director to trade in the company's shares.[126] Although publishing a cautionary

123 See n 59 and 60 above and accompanying text.

124 FMA 2012 s 81; Capital Markets Act, s 32J; ISA 2007, s 107.

125 JSE Listing Requirements r 3.9; CMA Regulations 2016, sch 5, r A.06; NSE Rulebook 2015, Part II, r 17.11.

126 See n 105 above and accompanying text.

statement in Kenya and Nigeria will not impose legal obligations on insiders not to trade in the company's shares, regulators will understandably be interested in trades by insiders when the company is trading under a cautionary statement. South Africa requires the issuer to update the market at least every 30 days on the subject of the cautionary announcement until it is withdrawn.[127]

4.2.2.2. Trade Based Manipulation

In addition to information-based manipulation, all three jurisdictions prohibit trading practices that artificially move the market price of traded securities or create a false or deceptive appearance of the demand for, supply of or trading activity in respect of those securities.[128] In addition to this general ban, all three jurisdictions (Nigeria using identical wording with South Africa) give a non-exhaustive list of trading practices that would contravene the market manipulation rules including trades which do not involve a change in the beneficial ownership of the securities and offers to sell at prices which are substantially the same as prices at which the person (or an associate) makes an offer to buy the same number of securities.[129] All three jurisdictions impose a scienter requirement for the trade-based manipulation by requiring the person to intend the creation of the effect prohibited.

Reflecting the difficulty in drawing the line between harmful manipulation and value-enhancing trade practices, whilst South Africa specifically exempts price stabilisation from the ambit of the manipulation rules if it conducted in accordance with

127 JSE Listing Requirements r 11.40 – 11.42.

128 FMA 2012 s 80; Capital Markets Act s 32F – 32I; ISA 2007 s 105 & 106.

129 FMA 2012 s 80; Capital Markets Act s 32G; NSE Rulebook 2015, Part 1 r 17.13.

the listing requirements of the stock exchange,[130] both Kenya and Nigeria specifically prohibit price stabilization as a form of manipulation.[131] The absence of stabilisation in Kenya and Nigeria can negatively affect primary market activity as issuers are subject to the full force of market pressures on the price of their securities immediately after listing.

None of the three jurisdictions has specific rules dealing with algorithmic and high frequency trading. Given the size of their markets and the state of their power and information technology infrastructure, it is doubtful if high frequency trading can be profitably deployed in Kenya and Nigeria in the short/medium term, and if it can, whether it will develop quickly enough to justify the devotion of scarce regulatory resources to its regulation. On the other hand, the markets and infrastructure in South Africa are mature enough to support high frequency trading.[132] Consequently, although the JSE does not specifically regulate high frequency trading, its trading systems automatically throttles the number of trades a broker can submit to 300 orders per second per broker.

4.2.2.3. Liability for Market Manipulation

On liability, all three jurisdictions use criminal sanctions including fines and terms of imprisonment as the primary tools for deterring market manipulation.[133] Where market intermediaries (such as brokers) are liable for breaching the market manipulation rules,

130 FMA 2012 s 80(4).

131 Capital Markets Act s 32J; ISA 2007 s 106(1); NSE Rulebook 2015 r 17.14.

132 In 2012, the JSE migrated to a new trading platform capable of supporting trade execution 400 times faster than its previous platform. In addition, in 2014, the JSE launched a co-location facility which allows traders and banks to place their computers next to the computers that drive the JSE market. These innovations significantly improved trading speed in South Africa and opened the market to high frequency traders.

133 Capital Markets Act s 32L; ISA 2007 s 115 and FMA 2012 s 109.

they are also subject to disciplinary action by the stock exchanges and securities regulators which have the power to impose fines, censures and revoke operating licenses. As seen in Chapter 5, South Africa complements its criminal regime with a strong administrative sanction regime.

As regards liability to investors for market manipulation, Kenya and Nigeria maintain the same rules that apply to insider trading liability i.e. a direct right of action and payment of compensation on the order of the SEC or IST respectively.[134] On the other hand, the statutory class action procedure under section 82 of the South African FMA is limited to insider trading. This leaves investors with only a common law right of action for compensation for violation of the market manipulation rules. As shown in Chapter 5, none of the three jurisdictions has had a class action lawsuit to enforce the market manipulation rules. The courts in the three jurisdictions have therefore not laid down tests on whether the claimant has to prove reliance on the false information as an inducement to trade, or whether the claimant can rely on the fraud on the market theory developed for private enforcement action in the US. However, given the additional scienter test requiring that false information must be given for the purpose of inducing a trade,[135] there is a good probability that a claimant in Kenya will be required to show reliance. While it can be fairly expected that claimants in all three countries will argue for the adoption of the fraud on the market theory using US law as persuasive authority, it is impossible to predict how successful that line of argument will be.

134 See n 114-116 above and accompanying text.

135 See Capital Markets Act, s 32J.

4.2.2.4. Preliminary Comments on Market Manipulation Regulation

From the analysis above, there are a number of important areas where Kenyan and Nigerian law can be improved when matched against South African law. As stated above,[136] Kenya and Nigeria do not exempt price stabilization from the prohibition on trade-based manipulation. Consequently, underwriters to a listing cannot engage in trading practices to stabilise the price of securities in the period immediately after listing. This can impact on primary market activity as it places a burden on issuers who are forced to bear the burden of price fluctuations of their securities after listing.

In addition, Kenya sets a very high burden to successfully prove information-based manipulation by requiring that the person who gave the inaccurate information must have done so with the intention of inducing a transaction in the securities. Arguably, it is easier to meet this scienter requirement in the primary market where issuers make disclosures in the hope of attracting outside investors to purchase the new securities on offer, or where a market intermediary makes a false statement to induce trading in a security it is dealing in. However, the scienter requirement becomes tricky in situations where an issuer makes a false statement in an ongoing disclosure where it is not simultaneously raising capital in the market. In these circumstances, the false statement is more likely to affect the market price of the security (rather than itself directly inducing the transaction), and the issuer is unlikely to be in a position to induce a market participant's individual investment decision or take any direct benefits from the transaction. In these circumstances, it is doubtful whether the issuer can be found liable for violating the market manipulation rules as

136 See n 130-131 above and accompanying text.

currently framed. As discussed above, there is no judicial guidance on this point under Kenyan law.

4.3. Conclusion

What lessons can we draw from the analysis above? Using South Africa as a benchmark, this Chapter examined securities laws on the books in Kenya and Nigeria, with a view to seeing whether some of the formal rules of securities regulation in these jurisdictions can hinder market development. Given the volume of regulation that needed to be covered, this Chapter did not attempt a comprehensive review of all aspects of securities regulation in the three jurisdictions but instead focused on eligibility for listing, disclosure and market abuse regulation. In addition, whilst the methodology adopted attempted a representative sampling of markets in the region, the use of case studies invariably means that in-depth studies have not been carried out on the other markets in the region, and it is difficult to generalise to what extent the findings of this Chapter will hold true in these other markets. However, given that the three markets examined are the largest and most influential markets in their sub-regions, the analysis gives a flavour of some of the issues that may arise in the much smaller markets operating in sub-Saharan Africa.

It is acknowledged that the use of the qualitative comparative methodology adopted in this Chapter limits the ability to reach firm conclusions on the impact of laws on the books on market development in the countries examined. Thus, there remain important areas where more work can be done on deepening our understanding of securities regulation in sub-Saharan Africa and covering the gaps in the existing body of knowledge on the subject. Notwithstanding this, the analysis in this Chapter supports the following preliminary conclusions:

1. Eligibility criteria are often set too high, thus limiting the pool of entrants into the markets. This is in circumstances where poor access to capital already limits the number of prospective issuers able to raise sufficient capital to meet the high listing standards and severe illiquidity in the alternate markets do not incentivise issuers to pursue listings there.
2. It is arguable that disclosure obligations are sometimes obtrusive, requiring frequent reporting and forecasts without providing effective safe harbours. This increases compliance and regulatory costs, without providing commensurate benefits in terms of improved liquidity or reduced cost of capital. Although stringent disclosure requirements can be justified in high adverse selection environments, they will only serve positive benefits if they are faithfully enforced. As seen in Chapter 5, enforcement in Kenya and Nigeria is weak.
3. The criminalisation of market abuse sets a high standard of proof on prosecutors, in circumstances where they are sometimes not provided with effectively legal tools to adequately monitor the market, leading to difficulties in establishing offences and protecting market integrity.

Whilst macroeconomic, institutional and political factors undoubtedly affect market development, it is arguable that laws adopted by the countries themselves can also hinder market development. The discussion in this Chapter gets the conversation on this topic started and attempts to draw out some useful examples of such potentially restrictive rules, in the hope that their actual effects on market development can be the focus of more in-depth, country-specific, empirical analysis in later work.

There is, however, a silver-lining to the tale. Whilst it is more difficult to ensure macroeconomic stability, entrench the rule of law and strengthen institutions, it is easier to tweak rules of securities regulation to make them more optimal in their institutional context. I offer suggestions on law reform in this area in in the concluding Chapter of this thesis. For now, the examination of the formal rules of securities regulation is simply one part of the equation. The other is enforcement, which forms the focus of the next Chapter.

CHAPTER 5 – ENFORCEMENT OF SECURITIES REGULATION IN SUB-SAHARAN AFRICA

The previous chapter examined formal rules of securities regulation in sub-Saharan Africa, using Kenya, Nigeria and South Africa as case studies. This Chapter examines the enforcement of those formal rules of securities regulation.

Formal rules of law by themselves are unlikely to materially affect actions and behaviour, unless those rules are faithfully enforced. This is true of the regulation of markets and the economic behaviour of its participants.[1] Law on the books must therefore be backed with equally strong supervision and enforcement to achieve optimal regulatory outcomes.

But achieving effective supervision and enforcement is not straightforward, as jurisdictions need to grapple with very complex policy questions. How should markets be supervised and securities regulation enforced? What style should the regulator adopt in supervising its markets: *ex ante* supervision, *ex post* enforcement, or what mix of the two? Should the state allow private claimants to enforce the rules? If so, how can the state ensure private rights of action are protected without being abused? Questions of this nature have been on the forefront of securities law scholarship globally and have produced lively scholarly debates and a rich body of literature.[2] In essence, and as Professor Moloney notes,

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1 See Donald Langevoort, 'The Social Construction of Sarbanes-Oxley' (2007) 105 Michigan Law Review 1817, 1818 'Simply because something is enacted into law, clearly or not, does not tell us much about how strongly it will influence economic behaviour'.

2 See for instance John Coffee Jr, 'Law and the Market: The Impact of Enforcement' (2007) 156 University of Pennsylvania Law Review 229; Howell Jackson, 'The Impact of Enforcement: A

the debates have been framed in terms of how enforcement relates to strong securities markets.[3]

Given that most markets in sub-Saharan Africa are largely illiquid and weak, it is important to examine how countries in sub-Saharan Africa supervise their markets and enforce their securities regulation, and the extent to which effective enforcement encourages market participation and supports market development.

The central argument of this Chapter is that although the formal rules of securities regulation give wide-ranging powers to public regulators, public enforcement in practice is weak. Weak public enforcement is complemented by even weaker private enforcement. Again, although the rules on the book provide strong private liability regimes, weak public enforcement and rules of law practice combine to stultify private claims. Consequently, although jurisdictions maintain stringent private liability rules and give wide-ranging powers to public regulators, supervision and enforcement remain weak, which in turn, is at least a contributory factor to the persistence of weak markets in sub-Saharan Africa. In this Chapter, I utilise the same methodology discussed in Chapter 1[4] and retain Kenya, Nigeria and South Africa as the case studies. Given the dearth of private enforcement actions in the three jurisdictions and the significantly stronger private enforcement regime in the US, I use the US as the comparative benchmark on private enforcement.

Reflection' (2007) 156 University of Pennsylvania Law Review 400; Howell Jackson and Mark Roe, 'Public and Private Enforcement of Securities Laws: Resource-Based Evidence' (2009) 93 Journal of Financial Economics 207.

3 Niamh Moloney, *EU Securities and Financial Markets Regulation* (3rd edn, OUP 2016) 948.

4 See Chapter 1, section 1.4.2.

This Chapter is structured as follows: In Section 1, I examine the importance of enforcement to market development, laying the foundations for the channels through which enforcement promotes market growth. Given that neither of the three jurisdictions is a familiar market in global securities law scholarship, Section 2 briefly sketches the regulatory design adopted in the three jurisdictions to familiarise the reader with the bodies conferred with regulatory authority and the devolution of powers between them. Sections 3 and 4 thereafter examine public and private enforcement in the three jurisdictions respectively. Section 5 concludes.

5.1. The Importance of Enforcement to Market Development

Some commentators have argued that the 'single most effective use of a capital market authority's resources is to build and empower a robust law enforcement program'.[5] Why is securities law enforcement so important to market development?

First, a strong enforcement programme increases trust in the public markets which in turn increases market participation, hence improving liquidity and reducing the cost of capital. Investors commit funds in the expectation of receiving sufficient returns to justify their investments. Where investors are defrauded of their investments, are not provided with sufficient information to make informed investment decisions or where their committed funds are tunnelled from the firm without consequences, investors either pull out their funds from the market or demand a higher cost of capital to justify the increased

[5] Ziven Birdwell, 'The Key Elements for Developing a Securities Market to Drive Economic Growth: A Roadmap for Emerging Markets' (2010) 39 Georgia Journal of International and Comparative Law 535, 538.

risk of the investment.[6] Indeed, as discussed in Chapter 2, improved liquidity and reduced cost of capital as a result of strong enforcement formed the basis of Professor Coffee's '*bonding hypothesis*', whereby, to reduce their cost of capital, issuers seek out markets with strong enforcement to provide an implicit guarantee to investors that they are committed to truthful disclosure and proper use of investor funds.[7]

As a consequence of its effect on liquidity and the cost of capital, strong securities law enforcement creates positive externalities that support economic growth. By improving liquidity and reducing the cost of capital, strong enforcement has a positive effect on market participation on both the issuer and the investor side. For the issuer, reduced cost of capital means increased valuations and more capital to execute value-maximising projects, which, on the margin, may otherwise have gone unfunded. For the investor, improved liquidity means reduced bid-ask spreads and the ability to participate more confidently in the market and obtain higher returns than would have otherwise been possible from a lower-risk investment portfolio. The combination of more investors willing to invest and more funds available to firms interact to provide a strong catalyst to economic development.

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6 Michael Piwowar, 'Remarks Before the 27th International Institute for Securities Market Growth and Development' (Washington DC, 27 March 2017) <https://www.sec.gov/news/speech/remarks-27th-international-institute-securities-market-growth-and-development> 'Nothing will drive away investors from your capital markets faster than fraud. If investors perceive that the issuers are cooking their books, or that the market is rigged with manipulation and insider trading, or that their brokers are not held accountable for unauthorised trades, then investors will demand a higher cost of capital, if they do not pull out altogether'. See also Bernard Black, 'The Legal and Institutional Preconditions for Strong Securities Markets' (2000) 48 UCLA Law Review 781.

7 Coffee Jr (n 2) 230 '[H]igher enforcement intensity gives the U.S. economy a lower cost of capital and higher securities valuations'. See John Armour and Caroline Schmidt, 'Building Enforcement Capacity for Brazilian Corporate and Securities Law' in R. Huang and N. Houson (eds), *Public and Private Enforcement: China and the World* (CUP 2017) (noting the importance of enforcement in facilitating arm's-length finance in emerging markets).

Furthermore, although strong laws on the books are important, law in and of itself cannot regulate away wrongdoing.[8] Whilst the enactment of laws may be sufficient to alter the economic behaviour of some market players, in the absence of enforcement, other market players will find it more profitable to cheat than to comply faithfully. In this wise, strong enforcement increases the cost of non-compliance with law, making cheating costlier, and if deployed correctly, ultimately unprofitable. It has been argued that this method of deterring breach through *ex-post* sanction rather than attempting to regulate away the problem *ex-ante* is more efficient, as it better utilises the scarce resources of the regulator.[9]

However, the fact that enforcement is important to market development does not answer a number of underlying policy questions that have to be at the fore of policymakers' minds when creating an enforcement regime. In the first place, the mere importance of enforcement to market development says nothing about the relative importance of public and private enforcement, and which of the two methods is more amenable to market development. This debate came to the limelight with a 2006 paper by Professors La Porta, Lopez-de-Silanes and Shleifer, who found little evidence that public enforcement benefits securities markets but strong evidence that laws mandating disclosure and facilitating private enforcement through liability regimes promote securities market development.[10]

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8 Birdwell (n 6) 550.

9 ibid 549-550. See also Michael Piwowar (n 6) 'The beauty and efficiency of enforcement is that it focuses our limited resources on a risk based approach to addressing the problems in the market, in contrast to burdensome and ultimately futile attempts to regulate away the problems'.

10 Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'What Works in Securities Laws?' (2006) 61 Journal of Finance 1, 18 'Public enforcement plays, at best, a modest role in the development of stock markets. In contrast, the development of stock markets is strongly associated with extensive disclosure requirements and a relatively low burden of proof on investors seeking to

This prescription was supported by the World Bank, which, in recommending institutional changes to promote market development in developing countries, promoted rules on private enforcement as more important than public enforcement.[11] These prescriptions have been roundly criticised by legal scholars who have argued that the methodology adopted in reaching these findings focused too heavily on the law on the books rather than other indicators of regulatory intensity.[12] Using a resource-based measure of enforcement, Professors Jackson and Roe found that public enforcement performed at least as well as the measures of private enforcement found to be important to market development.[13] But there are additional reasons why a strong reliance on private enforcement may be a dubious choice for developing countries. First, private enforcement is subject to well-known collective action and free-rider problems which are likely to be heightened given the institutional contexts prevailing in most developing countries.[14] In addition, private enforcement will be subject to potentially slow judiciaries that may lack the subject-matter sophistication required of complex securities litigation.[15] Furthermore, where penalties or awards of damages are imposed on the issuer as a result of a private enforcement action, it

recover damages…' See also Simeon Djankov and others, 'The Law and Economics of Self-Dealing' (2008) 88 Journal of Financial Economics 430.

11 The World Bank, 'Institutional Foundations for Financial Markets, <http://siteresources.worldbank.org/INTTOPACCFINSER/Resources/Institutional.pdf> accessed 26 January 2019: 'Stock market development is strongly correlated with private enforcement, but not much with public enforcement'.

12 See for instance Jackson and Roe (n 2); Coffee Jr (n 2).

13 Jackson and Roe (n 2).

14 The intuition is that there are few investors willing to commit their resources to participate in those markets, and still fewer investors who will be willing to commit the resources needed to champion a class action in the event of a fraud. This is in addition to the reduced sophistication of the investor-class which makes it more difficult to detect and establish non-compliance.

15 Michael Barr, Howell Jackson and Margaret Tahyar, *Financial Regulation: Law and Policy* (Foundation Press 2016) 854.

may end up transferring losses from one innocent group of shareholders to another, leading to an inequitable wealth transfer amongst shareholders.[16] In an environment where participation is already low and investors are otherwise reluctant to come to the market, wealth transfers of this nature, while deterring wrongdoing on the part of the firm, are likely to have the unintended consequence of chilling further investments from willing shareholders. Consequently, neither private nor public enforcement should be ruled out as important to market development in developing countries. Rather, it is perhaps more important to examine how both interact and how they can be optimised to achieve better outcomes.

Second, the mere importance of enforcement to market development says nothing about what styles should be adopted by the regulator. On the one hand, regulators like the US SEC see themselves primarily as law enforcement agencies, whilst regulators like the UK Financial Conduct Authority do not see themselves as being primarily led by enforcement.[17] This has led to a divergence in regulatory styles, with some regulators primarily focusing on strict *ex-post* enforcement and others focusing more on regulatory guidance and *ex-ante* supervision, with the latter being the prevalent approach globally.[18] As seen above,[19] strong *ex-post* enforcement has been identified as a key reason for the lower cost of capital and higher securities valuations in the United States. However, it

16 ibid; Merritt Fox, 'Securities Class Actions Against Foreign Issuers' (2012) Stanford Law Review 1173.

17 Birdwell (n 5) 544-545.

18 Chris Brummer, 'Post-American Securities Regulation' (2010) 98 California Law Review 327, 350.

19 See n 6-7 and accompanying text.

remains unclear what the optimal intensity of enforcement should be[20] since over-zealous enforcement can easily stifle market development.[21]

Consequently, although strong enforcement is important for market development, in creating an enforcement regime, policymakers must maintain a delicate balance between public and private enforcement and between *ex-ante* supervision and *ex-post* enforcement of penalties. Regulators must have adequate powers and appropriate tools to conduct meaningful market surveillance to ensure regulation is properly complied with. Where regulation has been breached, regulators must be able to invoke meaningful sanctions, to demonstrate a strong culture against non-compliance.

5.2. Regulatory Design

Given that the securities regulation of South Africa, Kenya and Nigeria do not feature prominently in global securities law literature, in this Section, I briefly sketch the regulatory design adopted in each of the three countries. This provides the reader with a brief overview of the distribution of regulatory powers in the three jurisdictions and acts as a prelude to the discussions on public enforcement in Section 5.3.

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20 Moloney (n 3) 948.

21 This viewpoint gained significant traction from the 2006 Interim Report of the Committee on Capital Market Regulation which argued that the US capital market was losing its competitiveness and identified private litigation risk as one of the factors contributing to this decline. See also Luigi Zingales, 'Is the U.S. Capital Market Losing Its Competitive Edge?' (2007) ECGI Finance Working Paper 192/2007 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028701>.

5.2.1. South Africa

Historically, South Africa first adopted an institutional design in which banks, insurers and capital markets were separately regulated.[22] Following an intermediate change to its regulatory design in 1987, South Africa moved to a different model in 1993.[23] In this model, the financial system was regulated by two main regulators: the South African Reserve Bank (SARB)[24] regulating banks, and the Financial Services Board (FSB)[25] regulating non-bank financial institutions.[26]

At the end of the global financial crisis, although the South African National Treasury considered the country to have weathered the crisis relatively well, it considered regulatory reform to be necessary.[27] The reform came in the form of a move to an objective-based twin-peaks model.[28] The transition to twin peaks was completed through the Financial Sector Regulation Act, signed into law on 22 August 2017.[29] The Act created a Financial Sector Conduct Authority (FSCA) with responsibility for market conduct[30] and

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22 Andrew Schmulow, 'Financial Regulatory Governance in South Africa: The Move Towards Twin Peaks' (2017) 25 African Journal of International and Comparative Law 393.

23 Although the National Treasury itself described this design as integrated (see National Treasury, 'A Safer Financial Sector to Serve South Africa Better' (2011) National Treasury Policy Document 23 February 2011 <http://www.treasury.gov.za/twinpeaks/20131211%20-%20Item%202%20A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf>) a number of commentators described the system as partially functional and partially integrated. See Schmulow (n 22) 401.

24 South African Reserve Bank Act, No. 90 of 1989.

25 Financial Services Board Act, No. 97 of 1990 (FSB Act).

26 Schmulow (n 22) 402.

27 National Treasury (n 23) 9-20.

28 ibid 23-37; Financial Regulatory Reform Steering Committee, 'Implementing a Twin Peaks Model of Financial Regulation in South Africa' (2013) National Treasury, 1 February 2013 <http://www.treasury.gov.za/twinpeaks/20131211%20-%20Item%203%20Roadmap.pdf>.

29 Financial Sector Regulation Act, No. 9 of 2017 (FSR Act).

30 FSR Act, s 56-60.

a Prudential Authority with responsibility for prudential regulation[31] and assigned responsibility for overall financial stability to the SARB.[32] To achieve a smooth transition into twin peaks, the FSR Act repealed the FSB Act[33] and transferred the assets and staff of the FSB to the FSCA and the SARB.[34] Consequently, at present, the FSCA is the public regulator of the South African securities markets and the framework for regulation is set out in the FSR Act.

In addition, South Africa relies heavily on private actors (in particular the stock exchange) in the enforcement of its securities regulation. Stock exchanges, rather than public regulators have frontline responsibility for issuer regulation including disclosure, conduct and corporate governance standards, as well as market surveillance and disciplinary action for failure to comply with these standards.[35] In this vein, stock exchanges perform the function of both market infrastructures providing liquidity services, and listing authorities issuing listing requirements and enforcing compliance with listing and governance standards. This duality of function sparked debates after the demutualisation and self-listing of the Johannesburg Stock Exchange (JSE), with some commentators noting the inherent conflict of interest in this design and arguing in favour of transferring the listing functions of the stock exchange to the securities regulator.[36] The

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31 FSR Act, s 32-34.

32 FSR Act, s 11.

33 FSR Act, s 290 and sch 4.

34 FSR Act, s 293.

35 See Financial Markets Act No. 19 of 2012 ((‘FMA 2012’), s 11. See also International Monetary Fund, *South Africa: Financial Sector Assessment Program - Detailed Assessment of Implementation on the IOSCO Objectives and Principles of Securities Regulation* (IMF 2015) 38.

36 See for instance Tshepo Mongalo and Namangolwa Mateele, ‘The Questionable Role of the JSE Limited as a Regulatory Authority in the Aftermath of its Demutualisation and Listing on its Own Stock Exchange’ (2009) 21 South Africa Mercantile Law Journal 601.

approach adopted to resolve this issue was for the JSE to continue its listing and surveillance functions over the market, whilst the FSB (now FSCA) regulated listing, surveillance and governance of the JSE.[37] The move to twin peaks has not altered this regulatory structure, and the JSE continues to act as the frontline issuer regulator responsible for market surveillance.[38]

5.2.2. Kenya

For its part, Kenya adopts a strictly regimented institutional regulatory model. Banking regulation is under the remit of the Central Bank of Kenya (CBK);[39] insurance regulation is under the remit of the Insurance Regulatory Authority (IRA);[40] and securities markets are under the remit of the Capital Markets Authority (CMA).[41] In addition to these three broad business lines, regulation of the pension industry is under the remit of the Retirement Benefits Authority (RBA),[42] and regulation of Savings and Credit Cooperative Societies (Saccos) is under the remit of the Sacco Societies Regulatory Authority (SSRA).[43]

This regimented structure has been severely criticised.[44] Concerns have been raised about coordination among the different agencies and the cost of compliance on increasingly

37 IMF (n 35) 38.

38 Johannesburg Stock Exchange, *Issuer Regulation* <https://www.jse.co.za/current-companies/issuer-regulation> accessed 29 May 2018.

39 Central Bank of Kenya Act 2015, s 3.

40 Insurance Act 2006, s 3.

41 Capital Markets Act, Chapter 485A, 2000 (as amended 2018), s 5.

42 Retirement Benefits Act 1997, s 3.

43 Sacco Societies Act 2008, s 4.

44 See for instance Jacob Gakeri, 'Enhancing Securities Markets in Sub-Saharan Africa: An Overview of the Legal and Institutional Arrangements in Kenya' (2015) 1 International Journal of Humanities and Social Science 134.

interconnected financial services providers regulated by multiple agencies.[45] In response to these criticisms and in recognition of the growing interconnectedness of the Kenyan financial system, in 2009, the CBK, IRA, RBA and CMA entered into a Memorandum of Understanding on co-operation and information sharing. In his speech at the signing event, Professor Njuguna Ndung'u, the then Governor of the CBK, acknowledged the blurring of product lines as a key driver for increased cooperation among the regulators.[46] The policy drive towards greater coordination was given legislative support in the draft Financial Services Authority Bill, which seeks to replace the securities, pensions, insurance and cooperative societies regulators with a new, integrated Financial Services Authority (FSA). As currently framed, service providers falling within any of these business lines would be regulated by the FSA, whilst the CBK will retain authority over banks. Presently, the Bill remains a work in progress and continues its journey through the legislative process. Thus, the regimented institutional model remains in force, with the CMA as securities regulator, having its powers and functions set out in the Capital Markets Act.

Unlike South Africa, Kenya's regulatory design is heavily tilted in favour of public regulation. For example, stockbrokers and authorized dealers licensed by the CMA

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45 ibid 168, 'On the institutional platform, the multiplicity of regulators in the securities markets and the financial services generally has not engendered the securities markets. The uncoordinated segments of the financial services sector on which the markets depend have undermined their growth. The principal drawback is the lack of co-ordination and information sharing between the various administrative agencies.

46 '[A] new concept of cross-ownership and trading is emerging in our market, thus blurring sector boundaries and product lines. For example, we have banks that want to offer bancassurance while insurance companies are underwriting financial risks that were once the domain of investment banks… In the same vein, we are increasingly seeing banks acquiring brokerage firms in the capital market, harmonization of regulatory regimes in the entire financial sector is therefore critical in order to offer consistency and maintain financial stability'. See Prof. Njuguna Ndung'u, 'Opening Remarks' (Breakfast Meeting for Domestic Financial Regulators, 31 August 2009) <https://www.centralbank.go.ke/images/docs/speeches/2009/Speech-MoU.pdf>.

automatically acquire full and associate membership respectively of the Nairobi Stock Exchange (KSE), leaving the KSE with no discretion in determining its membership.[47] In addition, the CMA must be notified within seven days of any disciplinary action taken by the KSE against a member of the exchange or a listed company, and the CMA has the power to overrule the determination of the KSE.[48] Also, private right of action for breach of the market abuse prohibitions can only be instituted if the alleged wrongdoer is first found guilty of an offence.[49] Consequently, enforcement of securities law in Kenya critically depends on the skills, expertise, resources and incentives of the CMA.

5.2.3. Nigeria

Like Kenya, Nigeria also adopts an institutional regulatory model. Banking regulation is under the remit of the Central Bank of Nigeria (CBN);[50] insurance regulation is under the remit of the National Insurance Commission (NAICOM);[51] the securities markets are regulated by the Securities and Exchange Commission (SEC (N))[52] and the pensions industry is under the remit of the National Pension Commission (PENCOM).[53]

47 Gakeri (n 44) 159-160.

48 ibid.

49 Capital Markets Act, s 32K.

50 Central Bank of Nigeria Act 2007, s 1.

51 National Insurance Commission Act 1997, s 1.

52 Investments and Securities Act 2007 ('ISA 2007'), s 1. I use SEC (N) in this Chapter to refer to the Nigerian Securities and Exchange Commission.

53 Pension Reform Act 2014, s 17.

Nigeria's institutional model has also come under criticism for being wasteful and duplicative.[54] For example, each of the CBN, the SEC (N), the NAICOM and the PENCOM has a separate code of corporate governance covering banking, listed companies, insurance companies and pension administrators respectively.[55] In addition, as was seen in Chapter 4, both the SEC (N) and the Nigerian Stock Exchange (NSE) issue rules on similar issues such as disclosure and market abuse, leading to lack of clarity and regulatory duplicity. These criticisms have led to calls for a change in Nigeria's regulatory design.[56] Although the global financial crisis led Nigerian financial regulators to pay closer attention to covering regulatory gaps and catering for prudential supervision, there has been no move away from the institutional model. Thus, at present, the SEC (N) remains the public regulator in Nigeria, working within the regulatory framework established by the ISA 2007.

In addition, unlike South Africa, Nigeria relies heavily on public as opposed to private actors in the supervision and enforcement of its securities regulation. Although the ISA 2007 gives self-regulatory functions to the NSE and other self-regulatory organisations, they operate under stringent oversight by SEC (N).[57] For instance, the self-regulatory organisations must give the SEC (N) notice of disciplinary actions taken against

54 Folarin Akinbami and Franklin Ngwu, 'Overhauling the Institutional Structure of Financial Regulation in Nigeria: The Unfinished Reform' (2016) 17 Journal of Banking Regulation 311, 325 'The institutional approach towards the structure of financial regulation, which Nigeria currently uses, is characterised by duplication of duties and waste of scare resources due to the need to hire and pay for regulators that will perform similar duties in the different regulatory agencies'.

55 Louise Osemeke and Emmanuel Adegbite, 'Regulatory Multiplicity and Conflict: Towards a Combined Code on Corporate Governance in Nigeria' (2016) 133 Journal of Business Ethics 431.

56 See Akinbami and Ngwu (n 54) 325-330 (arguing for the adoption of an objectives-based regulatory design in Nigeria).

57 See ISA 2007, Parts V and IX.

members, and the SEC (N) has the power to set aside such determinations. The SEC (N) also has the power to issue binding directives to self-regulatory organizations and takes the frontline in regulating issuers directly. Consequently, like Kenya, Nigeria adopts a strictly regimented institutional regulatory model, which is heavily dependent on its public sectoral regulator rather than private self-regulation for effectiveness.

5.3. Public Enforcement

In this Section, I examine public enforcement in South Africa, Kenya and Nigeria. First, I conduct a 'law on the books' analysis on the investigatory and supervisory powers of public regulators the three jurisdictions. Thereafter, I examine the enforcement practice of public regulators in each jurisdiction, to understand how they use their enforcement powers in the real world.

5.3.1. Investigatory and Supervisory Powers

As noted above, public regulation of securities markets in South Africa falls under the remit of the FSCA (SA),[58] whilst it falls under the remit of the CMA (K)[59] and SEC (N)[60] in each of Kenya and Nigeria respectively. The establishment legislation gives each regulator wide powers of investigation and enforcement to deter market abuse and promote the safety and integrity of the market. I briefly examine these powers below.

58 Established under the FSR Act. See n 30 above.

59 Established under the Capital Markets Act. See n 41 above.

60 Established under the ISA 2007. See n 52 above.

5.3.1.1. Power to Require the Production of Information and Documents

The table below summarises the power of public regulators in the three jurisdictions to require the production of information and documents.

Power	South Africa	Kenya	Nigeria
Power to require the production of information and documents	Yes[61]	Yes[62]	Yes[63]
Who may be required to provide information or documents?	Any person[64] or a supervised entity.[65]	Any person[66]	All regulated entities[67]
Obtaining information through 'mystery shopping'[68]	Expressly provided by law.[69]	Not expressly provided by law	Not expressly provided by law

Table 5.1 - Formal Powers to Require the Production of Information and Documents

As the table reveals, each jurisdiction confers broad powers on their public regulators to require the production of information and documents. Whilst South Africa and Kenya expressly permit the securities regulators to require information from 'any person',[70] Nigeria only permits the securities regulator to require the production of information from regulated entities.[71]

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61 FSR Act, s 131(1).

62 Capital Markets Act, s 13(1).

63 ISA 2007, s 13(r).

64 FSR Act, s.131(1).

65 ibid, s 131(2).

66 Capital Markets Act, s 13(1).

67 ISA 2007, s 13(r).

68 Mystery shopping is a method of gathering information in which an officer of the regulator approaches a regulated entity like a customer or external stakeholder in order to get a natural feel of how the entity carries out its day-to-day activities.

69 FSR Act, s 131(3).

70 This will include both natural and juristic persons.

71 However, there is no convincing reason to expect the SEC (N) not to exercise this power over natural persons who are working for regulated entities in the securities industry.

Although South Africa stands alone in expressly permitting the securities regulator to obtain relevant information through mystery shopping, this does not fundamentally set it apart from Kenya and Nigeria in terms of formal powers of information production conferred by law on the securities regulators. Mystery shopping is only one of the several tools available to public regulators in acquiring information on regulated entities. In any event, the absence of an express power to engage in mystery shopping will not stop public regulators in Kenya and Nigeria from engaging in mystery shopping given the wide omnibus powers conferred on them by the Capital Markets Act and the ISA 2007 respectively.[72] Therefore, there are no significant differences between South Africa on the one hand, and Kenya and Nigeria on the other, in terms of the formal information production powers conferred by law on the securities regulator.

5.3.1.2. On-Site Inspections

The table below summarises the powers of public regulators in the three jurisdictions to enter and search the premises of regulated entities in the performance of their monitoring and surveillance functions.

Power	South Africa	Kenya	Nigeria
Power of search and entry expressly provided by law	Yes[73]	Yes[74]	Yes[75]
Requirement for consent or a warrant	Consent not required where the officer has obtained a warrant from a High Court judge or magistrate, or	Consent not required where the officer has	Not expressly provided as a matter of securities law, but a warrant will

72 See Capital Markets Act, s 11(3) (w) and ISA 2007, s 13(dd) on the extremely wide omnibus powers of the CMA (K) and SEC (N) respectively.

73 FSR Act, s 137(1).

74 Capital Markets Act, s 13A (2).

75 ISA 2007, s 12(w) and (x).

Power	South Africa	Kenya	Nigeria
to enter and search premises	the prior authority of the head of a financial sector regulator or a senior staff member delegated to authorise entry has been obtained.[76]	obtained a warrant from a magistrate.[77]	be required as a matter of administrative law.[78]

Table 5.2 - Formal Powers of Search and Entry

Again, as the table reveals, all three jurisdictions give their public regulators extensive powers to enter and search premises of regulated entities where there is a reasonable suspicion of non-compliance with securities regulation. This power of entry is carefully balanced against the right of privacy of the occupier of the premises who generally has a right to consent to entry into the premises unless required by a judicial order to grant entry.

However, South Africa goes a step further to enable investigators enter and search premises if authorised to do so by the head of a financial services regulator or a senior staff member delegated to grant this authorisation.[79] This authorisation can be granted where the head or senior staff member of the financial services regulator reasonably believes that a warrant will be issued if applied for, the delay in obtaining the warrant is likely to defeat the purpose for which entry is sought, and it is necessary to enter into the premises for the

76 FSR Act, s 137 (1) (a) (ii).

77 Capital Markets Act, s 13A.

78 ISA 2007, s 13(v) gives the SEC (N) the power to enter into premises and do 'whatsoever the Commission deems necessary for the protection of investors'. This power will however not entitle the SEC (N) to enter and search the premises of a regulated entity without a warrant. Procedurally, the SEC (N) will be required to apply to the Federal High Court (without notice to the regulated entity) to obtain a warrant to enter and search the premises of the regulated entity. See *Olawepo v SEC* [2011] 16 NWLR (Pt 1272) 122 (holding that the wide powers of the SEC must not be exercised arbitrarily).

79 FSR Act, s 137(1) (a) (ii) (bb).

purpose of the investigation. Thus, the FSCA (SA) has additional flexibility to act without a warrant if the urgency of the matter requires it.

5.3.1.3. Power to Appoint Specialist Investigators

Public regulators in each of the three jurisdictions have power to appoint specialist investigators to conduct investigations into the activities of regulated entities.[80] There is no difference in principle between the powers of specialist investigators in South Africa on the one hand, and those in Kenya and Nigeria on the other. Specialist investigators in all three jurisdictions have wide-ranging powers to conduct investigations into the activities of regulated entities. Each jurisdiction allows these specialist investigators to administer oaths[81] and subpoena documents and information.[82] Co-operation with these specialist investigators is mandatory and failure to provide required assistance is a criminal offence, which exposes the regulated entity to criminal and disciplinary action.[83]

5.3.1.4. Commencement of Enforcement Action and Right of Appeal

Prior to the change in South Africa's regulatory design, the Directorate of Market Abuse (DMA) exercised the powers of the FSB to investigate matters relating to market abuse offences. At the conclusion of investigations, the DMA determined whether or not to commence enforcement action.[84] Where the DMA considered there were justifiable

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80 FSR Act, s 134-135; Capital Markets Act, s 13B (1); Securities and Exchange Commission Rules, 2013 (SEC Rules), r 9(6).

81 FSR Act, s 136(1) (iv); Capital Markets Act, s 13B (2) (c); and SEC Rules 2013, r. 9(4).

82 FSR Act, s 136 (1); Capital Markets Act, s 33D; SEC Rules 2013, r. 9 (6).

83 See for instance SEC Rules 2013, r 9 (6); Capital Markets Act, s 13B (3).

84 FMA 2012, s 85.

reasons to do so, it could commence an action before the Enforcement Committee.[85] Appeals from determinations of the Enforcement Committee lay to the High Court, as if the determination was a decision of a magistrate court in a civil matter.[86] The FSR Act however repealed the FSB Act, and by so doing, abolished the Enforcement Committee.[87] The Enforcement Committee is now replaced by the FSCA. The FSR Act also mandated the FSCA to be substituted as a party in the place of the DMA in any action previously commenced by the DMA.[88] The implication of these repeals and amendments is to centralise enforcement power and authority in South Africa in the FSCA (SA) rather than the previous structure where the DMA investigated violations and the Enforcement Committee imposed sanctions. Appeals now lie from decisions of the FSCA to the Financial Services Tribunal (FST),[89] and applications for judicial review of decisions of the FST may be made to the High Court.[90]

On the other hand, in Kenya, at the conclusion of investigations, the CMA (K) determines whether a violation has been established and is empowered to issue fines and other penalties. A party aggrieved by a determination of the CMA (K) may appeal against the determination to the Capital Markets Tribunal (CMT).[91] Further appeals from decisions of the CMT lie to the High Court.[92]

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85 Financial Institutions (Protection of Funds) Act No. 28 of 2001 ('Financial Institutions Act'), s 6A(2). The Enforcement Committee was established under the FSB Act, s 10A.

86 Financial Institutions Act, s 6F.

87 FSR Act, s 290.

88 ibid, s 300(3).

89 ibid, s 219.

90 ibid, s 235.

91 Capital Markets Act, s 35A.

92 Capital Markets Act, s 35A (22).

In Nigeria, where an investigation leads to a finding of possible non-compliance, the SEC (N) may commence action before its Administrative Proceedings Committee (APC)[93] which can impose sanctions including fines, and restitution and compensation orders.[94] Appeals from decisions of the APC lie to the Investment and Securities Tribunal (IST),[95] with further appeals from the IST going to the Court of Appeal.[96]

5.3.2. Public Enforcement in Practice

Having examined the formal powers of securities regulators in the three countries, it is important to consider how these regulators exercise their powers in the real world and the level of regulatory intensity in the three jurisdictions.

As Professor Jackson has highlighted, there are 'substantial complexities' in comparing levels of regulatory intensity.[97] In broad outline, three approaches have been adopted in measuring levels of regulatory intensity.

First, some commentators have focused on formal rules and the supervisory and enforcement tools available to public regulators.[98] This approach has been criticised for focusing too heavily on the law on the books, thus paying little regard to the actual use of regulatory powers in practice. Indeed, regulators may have substantial regulatory powers,

93 SEC Rules 2013, sch 8, rr 2 and 3.

94 SEC Rules 2013, sch 8, r 16.

95 The IST is established under the ISA 2007, s 274.

96 ISA 2007, s 295. See also *Ajayi v SEC* [2009] 13 NWLR (Pt 1157) 1, 26 and *Eze Okorocha v United Bank for Africa Plc & Others* [2011] 1 NWLR (Pt 1228) 348, 374-375 confirming the jurisdiction of the IST to the exclusion of the Nigerian Federal High Court in the matters falling within its remit.

97 Jackson (n 2) 401.

98 See for instance La Porta, Lopez-de-Silanes and Shleifer (n 10).

but their effectiveness may be significantly hampered through human capacity constraints, chronic understaffing or underbudgeting.

Second, some commentators have focused on regulatory inputs i.e. staffing and budgeting.[99] Intuitively, a well-staffed and funded securities regulator ought to be more active in enforcement and supervision. However, regulatory inputs are imperfect proxies for regulatory intensity. A well-staffed and funded securities regulator may apply its resources wastefully and inefficiently. Significant portions of the regulator's personnel and budgets may be deployed to activities other than actual supervision, and outright corruption and theft may mean that large budgets on paper do little to improve actual performance.[100] Staff size may also not correlate with staff quality, in circumstances where a large staffing contingent is not sufficiently equipped and trained to act as a serious check to more sophisticated private actors. In addition, as Professor Jackson has identified, irrespective of how regulatory intensity is measured, there is always a lingering concern that not all regulatory inputs have been captured.[101]

Third, some commentators have focused on regulatory outputs i.e. number of enforcement actions taken and the levels of financial and non-financial penalties imposed.[102] Intuitively, irrespective of its staffing and budgeting levels, a regulator that is

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99 See the seminal work of Jackson and Roe (n 2).

100 Jackson (n 2) 404 '*[T]here is an obvious question of whether all resources allocated to regulatory agencies are in fact employed in bona fide supervisory functions, as opposed to serving as sinecures for cronies of political elites or positions from which to extract bribes and other economic rents'.*

101 ibid 402. This is because asides securities regulators, a number of other bodies play pivotal roles in the supervision and enforcement of securities regulation. These include stock exchanges, public ombudsmen, takeover boards, accounting regulators etc. This often leads to incompleteness in the reporting of regulatory inputs.

102 See for instance, Coffee Jr, 'Impact of Enforcement' (n 2).

able to frequently identify and actively punish offences will be better able to deter infractions and protect investors. Enforcement action however is also an imperfect proxy of regulatory intensity. As identified above in the debates on *ex-ante* and *ex-post* regulation,[103] it is unclear whether a regulator that actively supervises the market *ex-ante*, thus improving overall compliance and reducing infractions *ex-post* is performing worse than a regulator that focuses heavily on punishing infractions *ex-post*, as a means of deterring infractions *ex-ante*. Using regulatory output as a proxy for intensity is therefore likely to regard a regulator with a preference for ex-ante supervision as only attaining a sub-optimal level of intensity. This problem can be compounded by the fact that the soft-law methods adopted by regulators with a preference for ex-ante regulation are not always published. Thus, regulatory guidance and warning letters may not be easily identified by researchers considering these regulators. This can skew the understanding of the regulator's enforcement activities. Regulatory styles are therefore important when using regulatory output as a proxy for enforcement intensity.[104] Unfortunately, not all regulators (and none of the three discussed in this Chapter) are explicit about their preferred regulatory approaches.[105] Furthermore, there is a risk that severe financial sanctions may be reserved for perceived opponents to the government in power and as such may not reflect the intensity of regulation or deterrence for infractions.[106]

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103 See n 9 and 20- 21 and accompanying text.

104 See Jackson (n 2) 407 identifying the general propensity towards lawfulness and the light-touch approach and informal guidance adopted in the UK and Japan and arguing that the relative scarcity of enforcement action in these jurisdictions does not necessarily suggest noncompliance.

105 Unlike the U.S. and the U.K. that are clear in their approaches to securities regulation, many regulators have not communicated clear regulatory approaches to regulation.

106 See Jackson (n 2) 404-405 identifying the existence of the problem and arguing for the possibility of the problem occurring both in developing and developed jurisdictions.

With these caveats in mind, I analyse both regulatory inputs and outputs in South Africa and compare them with those of Kenya and Nigeria to assess the strength of public regulation in practice.

5.3.2.1. Regulatory Inputs

Research into the regulatory input of securities regulators focuses on staffing levels and budgets i.e. the number of staff the regulator has to perform its functions and the amount of resources at its disposal. To present comparable data, staffing levels are scaled to a fraction of the country's population to assess the number of staff deployed by the regulator per million of population. Similarly, budgets are scaled to market capitalization to assess the amount of resources available to the regulator relative to the size of the market.

5.3.2.1.1. Staffing

In relation to staffing, both the FSB/FSCA (SA) and the CMA (K) regularly publish annual reports that disclose their total staff complement. On the other hand, the most recent annual report published by the SEC (N) was for 2014, making 2014 the most recent year for which published data is available for all three countries. The table below presents summary statistics on the staffing strength for all three countries in 2014.

Number of Staff			Total Population			Number of staff per million of population		
SA	Kenya	Nigeria	SA	Kenya	Nigeria	SA	Kenya	Nigeria
511	83	599	54,539,571	46,024,250	176,460,502	9	2	3

Table 5.3 - Comparison of Staffing of the CMA(K), SEC (N) and FSB (SA) in 2014[107]

[107] Data obtained from the 2014 Annual Reports of the FSB (SA), CMA (K) and SEC (N). Population data obtained from the World Bank. Data for 2013 (for all 3 countries) and for 2015-2018 (for Kenya and South Africa) are on file with the author. Similar calculations on these years are consistent with the figures reported above for 2014.

As the numbers above reveal, when scaled to population, both Kenya and Nigeria staffed their securities regulators at close to the same level. On the other hand, although the South African regulator appears to have been significantly better staffed, some caution must be applied in reaching that conclusion. As noted in the discussion on regulatory design above,[108] unlike the CMA (K) and SEC (N) that are core securities regulators, the FSB (SA) regulated the insurance and pensions industries in addition to the securities industry. Therefore, not all the 511 employees reported above were directly involved in regulating the securities market. Whilst the 2014 Annual Report of the FSB does not provide a breakdown of staff members into their various divisions, a breakdown of the staff complement of the FSCA in 2018 revealed that of the 593 total staffing complement of the FSCA, 16 were focused on the capital markets, 12 on market abuse, 126 on financial advisory and intermediary services, 33 on collective investment schemes, 6 on credit agencies and 13 on hedge funds, making a total of 206 of 593 staff members directly involved in capital markets regulation.[109]

When the numbers in South Africa are corrected to account for this factor and scaled to population, the number of staff members directly involved in capital markets regulation in South Africa is unlikely to diverge significantly when compared with that of Kenya and Nigeria.

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108 See n 26-30 above and accompanying text.

109 See FSCA Annual Report (2018) 134. In addition, there was a total of 209 administrative and support staff, some of whom invariably would have provided support to the various capital market focused teams. Comparable breakdowns are unavailable in either Kenya or Nigeria.

5.3.2.1.2. Budgets

In relation to budgets, again, both the FSB/FSCA (SA) and the CMA (K) regularly publish annual financial statements showing information on their total income and expenditures for the year. Again, the most recent figures published by the SEC (N) were 2014. The table below presents summary statistics on budgeting for all three countries in 2014.

Total Budget ($)			Market Capitalization ($'000,000)			Budget per $1million of Market Capitalization		
SA	Kenya	Nigeria	SA	Kenya	Nigeria	SA	Kenya	Nigeria
55,390,000	10,065,000	44,630,000	934,931	24,094	62,766	59.3	418.2	708.4

Table 5.4 - Comparison of Budgets of the CMA(K) SEC (N) and FSB (SA) in 2014[110]

The numbers above reveal that scaled to market size and compared to the CMA (K) and the SEC (N), the FSB/FSCA (SA) is significantly under-funded. Again, given that the FSB/FSCA (SA) also has supervisory jurisdiction over the insurance and pension industries, the budget of the FSB (SA) is not utilised solely for the regulation of the securities market. Thus, the numbers above overstate the financial resources available to the FSB (SA) per $1million of market capitalization.

Therefore, taking regulatory inputs as a whole, the FSB/FSCA (SA) is not better resourced than the CMA (K) or SEC (N). Although it is better staffed relative to population, the FSB/FSCA shares its staff between the securities, insurance and pension sectors leading to a reduction in the number of staff directly regulating the securities markets. Again, scaled to market size, the CMA (K) and SEC (N) are better funded than the FSB/FSCA (SA). Using an input measure of regulatory intensity, one should therefore expect the CMA

110 Data obtained from the 2014 Annual Reports of the FSB (SA), CMA (K) and SEC (N). Data for 2013 (for all 3 countries) and for 2015-2018 (for Kenya and South Africa) are on file with the author. Similar calculations on these years are consistent with the figures reported above for 2014.

(K) and SEC (N) to be more active enforcement agencies than the FSB/FSCA (SA). I assess whether this is in fact the case in the discussion on regulatory outputs below.

5.3.2.2. Regulatory Outputs

Below, I examine public enforcement in practice in South Africa, Kenya and Nigeria in terms of the enforcement of rules against insider trading and market manipulation discussed in Chapter 4. The data utilized in this section is derived from the annual reports of the securities regulators[111] and publicly reported enforcement actions[112] in the six years between 2013 and 2018.[113]

5.3.2.2.1. Insider Trading

As discussed in Chapter 4, each jurisdiction makes detailed rules for the prevention and prosecution of insider trading. How do these jurisdictions enforce these rules in practice?

Between 2013 and 2018, the DMA successfully brought 10 enforcement actions on insider trading, imposing a total of R2,875,080 (≈ $205,000) in administrative penalties and costs,[114] ranging from as low as R10,080 (≈ $700)[115] to as high as R1,000,000 (≈

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111 See annual reports of the CMA (K) <https://www.cma.or.ke/index.php?option=com_phocadownload&view=category&id=13&Itemid=191>.

112 See publications of enforcement actions of the FSB/FSCA <https://www.fsca.co.za/Enforcement-Matters/Pages/Enforcement-Actions.aspx> accessed 31 July 2020. See also publications of enforcement actions of the SEC (N) available at https://sec.gov.ng/suspensions-and-penalties/.

113 As at June 2020, the CMA (K) had not released its 2019 annual report detailing enforcement actions undertaken in Kenya in 2019. At the time of writing, 2013-2018 were therefore the most recent years for which data in Kenya, Nigeria and South Africa was available.

114 Data obtained from the FSCA website <https://www.fsca.co.za/Enforcement-Matters/Pages/Enforcement-Actions.aspx> accessed 31 July 2020. Since inception in 2005, the DMA has registered a total of 137 cases of insider trading warranting investigations.

115 *Directorate of Market Abuse v. Lovell*, Case No. 20/2013, concluded by Settlement Agreement dated 13 December 2013 <https://www.fsca.co.za/Enforcement-Matters/Documents/ORDER_EC_1Time_2013-12-13.pdf>.

$71,000).[116] 7 of the 10 cases were closed by settlements agreements (which included admissions of contravention) and 3 cases proceeded to judgments issued by the Enforcement Committee. Between 2017 and 2018, independent claims officers distributed a total of R1,005,400 (≈ $72,000) to 28 claimants who traded in the opposite direction to insiders found liable for contravening the insider trading rules.[117]

On the other hand, neither Kenya nor Nigeria has successfully concluded any enforcement action on insider trading. In the case of Nigeria, no insider trading enforcement action has been commenced.[118] In Kenya, two insider trading actions have been instituted by prosecuting authorities in criminal courts. Both actions were in relation to alleged insider trading in the shares of Uchumi Supermarket Limited.[119] In *Republic v Terence Davidson*,[120] the prosecutors alleged that Mr. Davidson, who at the time was the Chief Executive Officer of Kenya Commercial Bank, bankers to Uchumi Supermarket Limited, was in possession of inside information on the poor financial situation of the Uchumi Limited when he instructed his brokers to sell Uchumi shares a few days before it

116 *Directorate of Market Abuse and Financial Services Board v Gavin Zietman & Harrison and White Investments (Pty) Limited*, Case No. 15/2013, Judgment of the Enforcement Committee dated 5 August 2014 <https://www.fsca.co.za/Enforcement-Matters/Documents/DETERMINATION_Enf_Cttee_Zietsman_2014-08-05.pdf>.

117 FSCA Annual Report (2018) 94.

118 AA Oluwabiyi, 'A Comparative Legal Appraisal of the Problem of Insider Trading in Mergers and Acquisitions' (2014) 2 Frontiers of Legal Research 1, 7 '*Enquiries at both the Stock Exchange and the SEC met the usual excuse that there has been no confirmed report of insider trading, and that if there was any report, it would be investigated and dealt with*'. Going further, the author, commenting on the enforcement of insider trading rules in practice in Nigeria notes at page 13, '*Their fight against insider trading is at best pedestrian. The summation is that in spite of the existence of the self-regulating dealing rules of the Stock Exchange and the criminalization of the practice under two laws, not much has been done to address the issue in Nigeria*.

119 *Republic v Terrence Davidson* Nairobi CMCC 1338 of 2008 and *Republic v Bernard Kibaru,* Nairobi CMCC 1337 of 2008.

120 ibid.

collapsed. In *Republic v Bernard Mwangi Kibaru*,[121] a similar allegation was levied against Mr. Kibaru, who, at the time, was the head of the buying and merchandising department of Uchumi and who had been attending Uchumi board meetings where the company's poor performance was discussed. Like Mr. Davidon, Mr. Kibaru sold his shares a few days before the company collapsed. In both cases, the prosecution argued that the defendants were in possession of material price-sensitive information regarding the poor performance of Uchumi at the time they authorised the sale of their shares. The courts however held that Uchumi's poor performance was a publicly known fact which had been publicised in newspapers and could therefore not constitute insider information under the insider trading rules. As a result, both defendants were acquitted.

The picture that therefore emerges is that whilst South Africa has been a lot more active in enforcing its insider trading rules, neither Kenya nor Nigeria has met any success in enforcing their insider trading regulations. Kenya has only unsuccessfully attempted to enforce its insider trading rules and Nigeria is yet to institute any enforcement action on insider trading.

5.3.2.2.2. Trade-Based Market Manipulation

How do the three countries enforce compliance with trade-based manipulation rules in practice? In the six years between 2013 and 2018, the DMA successfully brought 22 enforcement cases on trade-based manipulation, leading to total administrative penalties of R28,945,000 (≈$2,059,000). 16 of these cases were concluded by settlement agreements and admissions of liability, whilst the other 6 proceeded to judgment at the Enforcement

[121] See n 119.

Committee.[122] The penalties ranged from as low as R10,000 (≈ $700)[123] to as high as R10,000,000 (≈ $711,000).[124]

In contrast, again, Kenya and Nigeria have been a lot less successful at bringing enforcement action for market manipulation. Annual enforcement data from Kenya is available from the CMA's annual reports. Between 2013 and 2018, the CMA was only able to successfully bring three enforcement cases for trade-based market manipulation.[125] In all three cases the CMA issued regulatory warnings to the offender, and in two cases, it imposed financial penalties, totalling Kshs 80,850 (≈ $800). Scaling the total financial penalties imposed to market capitalization as at December 2018, Kenya imposed approximately $0.03 in financial penalties for breach of the trade-based manipulation rules, per $1,000,000 of market capitalization. This contrasts with approximately $1.63 per $1,000,000 of market capitalization imposed in South Africa. Thus, in both absolute and relative terms, South Africa imposed stiffer penalties for trade-based manipulation than Kenya.[126]

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122 Data obtained from <https://www.fsca.co.za/Enforcement-Matters/Pages/Enforcement-Actions.aspx>.

123 *Directorate of Market Abuse v. Friedland Warren* Case No. EC 26/2015, concluded by Settlement Agreement dated 26 October 2015, <https://www.fsca.co.za/Enforcement-Matters/Documents/ORDER_EC_Friedland_order%20and%20settlement%20signed%20by%20Chairperson_2015-11-26.pdf>.

124 *Directorate of Market Abuse v Frederick Jacobus De Beer*, concluded by Judgment of the Enforcement Committee dated 5 November 2015, <https://www.fsca.co.za/Enforcement-Matters/Documents/TRANSCRIPTION_EC%20Pinnacle_hearing%20proceedings%205%20November%202015_signed.pdf>.

125 Data obtained from the Enforcement Statistics published in the Annual Reports of the CMA for the years 2013-2018. The Annual Reports are publicly available on the CMA's website on <https://www.cma.or.ke/index.php?option=com_phocadownload&view=category&id=13&Itemid=191>.

126 Of course, the amount of $1.63 per $1,000,000 of market capitalization achieved in South Africa appears small by global standards. Thus, for example, between 2013 and 2018, the US SEC imposed

The unavailability of data affects the assessment of trade-based manipulation enforcement in Nigeria. As can be gleaned from the most recently published annual report of the Nigerian SEC (2014), although a total of 116 securities law cases were referred for enforcement action, there was no referral for market manipulation.[127] Similarly, of the 34 new cases referred for enforcement action in 2013, there was no referral for market manipulation.[128] There were, however, two suspensions for market manipulation in Nigeria in 2013.[129] The paucity of enforcement action for infringement of the market manipulation rules is further confirmed by the 2013 IMF/World Bank IOSCO Financial Sector Assessment Program Report on Nigeria.[130] The report noted that for the period under review (i.e. 2010, 2011 and 2012), no fines/financial penalties were imposed for breaching the insider trading or market manipulation rules in Nigeria.[131]

The picture that therefore emerges again is that South Africa is more active in enforcing the market manipulation prohibitions than Kenya or Nigeria.

approximately $23.57 billion in total disgorgement orders and financial penalties on all enforcement actions. Scaled to market capitalization as of December 2018, this amounts to $774.3 per $1,000,000 of market capitalisation. Whilst penalties and disgorgement orders for trade-based manipulation will only form a subset of this sum, it seems unlikely that this will fall short of the comparable figures in South Africa.

127 The cases referred for enforcement were in respect of unauthorised sale of client's stocks, non-purchase of stocks, mismanagement of client's portfolio accounts, non-allotment of shares paid for by investors, non-remittance of proceeds of sale of clients shares and non-rendition of periodic returns. See SEC (N) Annual Report (2014) 65, available at <http://sec.gov.ng/about/annual-reports/> accessed 22 February 2019. See also litigation involving the SEC (N) at the Investment and Securities Tribunal and before other courts in Nigeria, available at https://sec.gov.ng/litigation/,.

128 The cases referred for enforcement in 2013 were similar to those from 2014.

129 SEC (N) Annual Report (2013), 110-112.

130 IMF, *IOSCO Objectives and Principles of Securities Regulation: Detailed Assessment of Implementation, Nigeria* (IMF 2013).

131 ibid 54-55.

5.3.2.2.3. Information-Based Market Manipulation

As discussed in Chapter 4, information-based market manipulation refers to the dissemination of false or misleading information/statements in relation to a listed company or its securities, which the person disclosing knew or ought to have known was false/misleading. This traditionally occurs in relation to publicly disclosed information relating to the securities or the issuer, such as its business prospects and financial position.

Between 2013 and 2018, the DMA (SA) successfully instituted 6 cases against issuers/officers of companies for disseminating information which they knew or ought reasonably to have known was false.[132] The cases led to a total of R31,327,000 (≈ $2,229,000) in administrative penalties, with individual penalties ranging from R65,000 (≈ $4,600)[133] to R30,000,000 (≈ $2,134,000).[134] All the cases were concluded by settlement agreements.

In the same period, Kenya successfully concluded 4 market manipulation cases,[135] imposing a total of Kshs 6,000,000 (≈ $59,000) in financial penalties. In addition, the CMA imposed orders on two individuals disqualifying them from acting as company officers for

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132 Data obtained from <https://www.fsca.co.za/Enforcement-Matters/Pages/Enforcement-Actions.aspx>.

133 *Directorate of Market Abuse and Financial Services Board v Wesizwe Platinum Limited*, Case No. 18/2013, concluded by Settlement Agreement dated 26 November 2013.

134 *Directorate of Market Abuse v. Harmony Gold Mining Company*, Case No. 35/2017, concluded by an Order on 4 October 2018.

135 Data obtained from the Enforcement Statistics published in the Annual Reports of the CMA for the years 2013-2018. The Annual Reports are publicly available on the CMA's website on <https://www.cma.or.ke/index.php?option=com_phocadownload&view=category&id=13&Itemid=191>.

a term of 2 years [136] and 3 years[137] each, and in one case, requested the accounting regulator to commence disciplinary action against a company officer for professional misconduct as a certified public accountant.[138]

Within the same period, the SEC (N) successfully concluded one case, imposing the sum of N86,625,000 (≈ $240,000) in financial penalties on Oando Plc.[139] The SEC (N) also imposed other non-financial penalties on the company,[140] as well as financial and non-financial penalties on the erring directors personally.[141]

Scaling the total financial penalties imposed to market capitalization as at December 2018, Kenya imposed approximately $2.35 in financial penalties for breach of the information-based manipulation rules, per $1,000,000 of market capitalization. This contrasts with approximately $7.61 in Nigeria and $1.77 in South Africa. Relative to the size of the market, Kenya and Nigeria appear to have imposed stiffer penalties than South Africa.[142] However, in terms of the severity of the largest financial penalty imposed, the

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136 Enforcement action against Mr. Chadwick Okumu for inaccurate and incomplete financial statements. See CMA Annual Report (2017) 89.

137 Enforcement action against Mr. Munir Ahmed Sheikh for manipulation of financial statements of National Bank of Kenya. See CMA Annual Report (2018) 77.

138 Enforcement action against Mr. Chadwick Okumu. See n 136 above.

139 Enforcement action against Oando Plc and its directors. The SEC (N) found both corporate governance and securities law infractions against Oando Plc, including false disclosures, misstatements in financial reports, failures of internal controls, unjustified disbursements to directors and management of the company and related party transactions not conducted at arm's length. See Securities and Exchange Commission, 'Press Release on Investigation of Oando Plc' (Abuja, 31 May 2019) <https://sec.gov.ng/press-release-on-investigation-of-oando-plc/>.

140 The SEC (N) ordered the affected directors of the company to resign from their positions on the Board; ordered the company to convene an Extra-Ordinary General Meeting of Shareholders to appoint new directors.

141 The SEC (N) ordered the directors to refund improperly disbursed remuneration back to the company and barred the Group CEO and Deputy Group CEO from being directors of public companies for a period of 5 years.

142 It must be noted that the fine imposed on Oando Plc was not solely for breach of information-based manipulation rules but also included violation of corporate governance and other market abuse rules.

cumulative amount of penalties imposed, and the number of successful investigations conducted, South Africa was more active in enforcing its information-based manipulation rules than Kenya or Nigeria.

5.3.3. Towards a Stronger Public Enforcement Regime

To recap, each of Kenya, Nigeria and South Africa promulgate laws on the books which require the initial and ongoing disclosure of accurate information and prohibit insider trading and market manipulation. To enforce these rules, Kenya and Nigeria rely heavily on public actors, and by so doing, place a heavy bet on the competence and public-spiritedness of their securities regulators. These regulators are sector-specific, in line with a strictly regimented institutional regulatory design. Scaled to the size of the relevant populations and markets, they are also better provisioned for than their counterpart in South Africa. However, they have both been fairly ineffective in tackling market abuses. Since formation, neither regulator has successfully concluded an insider trading case, and although the CMA (K) has been more active in regulating market manipulation, it has only found market manipulation in a few instances, imposing paltry financial penalties when viewed in absolute terms.

South Africa on the other hand took a different path. To enforce its rules, it also relies strongly on public actors, but, as seen in Chapter Four and further below, gives additional responsibilities to stock exchanges. In this wise, it places a lesser bet on the skills of the public regulator and rather relies on the combined skills of the public regulator and the stock exchanges in regulating the market. The regulatory design is not sector-specific, but objectives-based. Scaled to the size of the population and the market, it is not as well-provisioned as its counterparts in Kenya and Nigeria. However, the South African

regulators have been more effective in tackling market abuses, repeatedly finding instances of insider trading and market manipulation, extracting admissions and settlements, and often imposing significant penalties.[143]

Of course, the foregoing is not to say that South Africa has achieved an optimal level of enforcement (if one can ever be objectively gauged), or that compared to other better developed markets (e.g. the US or UK), there will be no areas where it can improve. The point is that it has been more active in enforcing its securities regulation and that Kenya and Nigeria can draw some useful lessons from it in strengthening their public enforcement programs. I explore three such lessons below.

5.3.3.1 Market Surveillance

As noted in the discussion on regulatory design in above,[144] South Africa gives the responsibility for market surveillance to stock exchanges as opposed to the securities regulator. Thus, the JSE monitors trading activity in all stocks listed on its market, whilst the securities regulator only monitors trading in the stocks of the JSE. The securities regulator and surveillance staff of the stock exchange meet on a bi-weekly basis to consider surveillance results and assess unusual trading activity. This saves the regulator the

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143 Between 1999 and December 2018, public regulators in South Africa (the Insider Trading Directorate, followed by the Directorate of Market Abuse and now the FSCA) investigated a total of 416 market abuse cases, and proceeded with enforcement action in 91 cases, imposing approximately R138,000,000 (≈ $9,560,000) in penalties for market abuse offences till date. See FSCA Press Release, 6 December 2018, 'Report by the FSCA on Status of Various Investigations', available at <https://www.fsca.co.za/News%20Documents/FSCA%20Press%20Release%20-%20Report%20by%20the%20FSCA%20on%20status%20of%20various%20investigations%20-%2006%20December%202018.pdf> accessed 23 February 2019. Of course, it may be fairly expected that given the sheer size of the South African market, its securities regulator would have been more successful in its enforcement activities than the regulators in Kenya and Nigeria with much smaller markets.

144 See Chapter 5, section 5.2.

resources it would otherwise have spent in acquiring and updating regulatory technology ("RegTech")[145] tools to maintain surveillance over the entire market, and gives the surveillance function to better skilled private individuals.

As South African securities regulators themselves acknowledge, this calibration of responsibility is one of the reasons for the success of their enforcement programme.[146] On the other hand, the Kenyan Capital Markets Authority (CMA) attempts to perform surveillance itself, but this has led to its surveillance system falling behind the trading technology adopted by the Nairobi Stock Exchange (KSE) and the Central Depository System.[147] The Nigerian Securities and Exchange Commission (SEC) does not have automated surveillance systems to identify unusual transactions, and like South Africa, relies on a collaboration with the stock exchange.[148]

Today, developments in information technology have led to an exponential growth in the number of RegTech tools potentially available to securities regulators in monitoring the market.[149] Blockchain, data scraping tools, big data analysis techniques, artificial

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145 "RegTech" is a contraction of the words 'regulatory" and "technology" and primarily refers to the use of information technology in regulatory monitoring, reporting and compliance. See Douglas Arner, Jànos Barberis and Ross Buckley, 'FinTech, RegTech, and the Reconceptualization of Financial Regulation' (2017) 37 Nw J Int'l L & Bus 371.

146 See FSCA Annual Report (2018), 94 'Most matters were detected via sophisticated surveillance systems at the JSE… The success of the DMA's investigations can also be attributed partly to the high level of co-operation from market professionals and their compliance functions'.

147 See CMA Annual Report (2018), 79 identifying a project to upgrade and integrate the CMA's market surveillance system to align with the automated trading system at the stock exchange and the central depository.

148 See IMF (n 130) 53 (noting the absence of a surveillance system at the SEC, but that the SEC maintains two members of staff permanently on the premises of the NSE).

149 See Arner, Barberis and Buckley, 'FinTech, RegTech, and the Reconceptualization of Financial Regulation', (n 145). See also Deloitte, 'RegTech Universe: Take a closer look at who is orbiting the RegTech Space' <https://www2.deloitte.com/lu/en/pages/technology/articles/regtech-companies-compliance.html> accessed 30 June 2020 (listing 306 RegTech firms and the services

intelligence and machine learning greatly improve the effective use of large amount of data and can significantly increase the accuracy and effectiveness of market monitoring.[150] These tools have the potential to significantly improve the accuracy and effectiveness of market monitoring and supervision, whilst remaining cost-effective for both regulators and market participants.[151]

Given this growth in the RegTech space, regulators in Kenya and Nigeria have access to numerous technological tools that can be deployed to effectively monitor the markets. Why then have regulators in the two jurisdictions not deployed these tools effectively enough to translate to better market monitoring and enforcement outcomes? No simplistic answer can be proffered. What is clear, however, is that in recent times, both Kenya and Nigeria have attempted to leverage technology in the regulation of their markets. As noted above,[152] in 2018, the Kenyan CMA set out a portion of its budget to upgrade its surveillance system to align with the trading system adopted by the KSE. Similarly, in July 2017, the NSE deployed NASDAQ's SMARTS surveillance solution to

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they provide in the areas of regulatory reporting, risk management, identity management and control, compliance and transaction monitoring).

150 On possible roles financial regulators can play with respect to RegTech, see Luca Enriques, 'Financial Supervisors and Regtech: Four Roles and Four Challenges' (2017) 53 Revue Trimestrielle de Droit Financier 53. On the application of RegTech solution to financial institutions, see Yvonne Lootsma, 'Blockchain as the Newest RegTech Application – the Opportunity to Reduce the Burden of KYC for Financial Institutions' (2017) 36 Banking & Financial Services Policy Report 16.

151 See Douglas Arner, Jànos Barberis and Ross Buckley, 'The Emergence of RegTech 2.0: From Know Your Customer to Know Your Data' (2016) 44 Journal of Financial Transformation 79, 'For the financial services industry, the application of technology to regulation and compliance has the scope to massively increase efficiency and achieve better outcomes. For regulators, RegTech provides the means to move towards a proportionate risk-based approach where access to and management of data enables more granular, effective supervision of markets and market participants'.

152 See n 147 above.

proactively monitor the market and detect and deter market abuses.[153] Given that the SEC maintains staff members permanently on the floor of the NSE,[154] the hope is that with additional time and familiarity, SEC staff members will be able to recognise suspicious trading practices and therefore more effectively enforce market regulation.

Presently, however, in the absence of a strong surveillance system (Kenya) or a functional surveillance relationship with the stock exchange (Nigeria), the enforcement practice of both jurisdictions have focused on bright-line, low hanging fruits, such as late filing of financial statements or publication of notices in one as opposed to two newspapers as required by regulation,[155] and resolving customer complaints such as unauthorised sales of client's stocks, non-allotment of securities paid for, or non-remittance of proceeds of sale.[156] As identified by the IMF in the case of Nigeria, this has resulted in '*managing innumerable disputes between customers and brokers dealing basically with contractual disputes and unauthorised transactions'*[157] which ultimately is inefficient in terms of time and resources devoted.[158]

An effective surveillance programme is therefore key, and to strengthen their enforcement programmes, Kenya and Nigeria (and other sub-Saharan African countries as required by domestic circumstances) must strengthen their surveillance systems and

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153 See The Nigerian Stock Exchange, 'NSE Goes Live with Nasdaq SMARTS Market Surveillance Technology' (Monday, 17 July 2017) <http://www.nse.com.ng/mediacenter/news_and_events/Pages/NSE-Goes-Live-with-Nasdaq-SMARTS-Market-Surveillance-Technology.aspx>.

154 See n 148 above.

155 For Kenya, see for instance the enforcement action against Equity Investment Bank and Natbank Trustee and Investment Services Limited, CMA Annual Report (2018) 76.

156 For Nigeria, see n 130 and accompanying text.

157 See International Monetary Fund (n 130) 53.

158 ibid.

effectively deploy available RegTech tools to align with market infrastructure. The lesson South Africa teaches in this respect is that a public regulator does not necessarily require its own surveillance system if it has a strong, functional collaboration with the stock exchanges in using market infrastructures to detect and investigate unusual trading patterns or transactions from individuals who possess insider information.

5.3.3.2. Use of Administrative Sanctions

As discussed in Chapter 4, each of the three jurisdictions examined in this thesis invokes criminal penalties as the main sanction for breaching its insider trading[159] and market manipulation rules.[160] However, South Africa has been a lot more active in pursuing market abuse offences through imposing administrative penalties. Indeed, prior to the introduction of administrative sanctions for insider trading, the South African regulators, like their counterparts in Kenya, were unable to successfully prove an insider trading case.[161] The switch in emphasis from criminal to administrative penalties reduced the burden of proof required of the regulator, making it easier to secure findings of contravention.

Kenya and Nigeria on the other hand, rely more on criminal prosecution. This was seen in Kenya in the two insider trading prosecutions related to transactions on Uchumi Supermarket shares.[162] The facts in both cases were fairly straightforward. The individuals were the CEO of Uchumi's bank and Uchumi's head of buying and merchandising. Both

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159 See Chapter 4, section 4.2.1.3.

160 See Chapter 4, section 4.2.2.3.

161 Stephanie Luiz, 'Market Abuse and the Enforcement Committee' (2011) 23 SA Mercantile Law Journal 151 (noting the transition from criminal sanctions to civil suits and then to administrative sanctions for the enforcement of insider trading in South Africa).

162 See Chapter 5, section 5.3.2.2.1.

individuals were able to have precise information regarding Uchumi's poor financial state. Both individuals instructed their brokers to sell off their shares in Uchumi a few days before its collapse. In the criminal trial, the burden was on the prosecution to prove the elements of the offence beyond a reasonable doubt. In an administrative proceeding, this burden would have been reduced, and the possibility of securing a finding of violation greatly improved. Although Kenya's insider trading rules have been strengthened after the Uchumi cases by removing the scienter requirement and the requirement for the insider information to be of a precise or specific nature,[163] both countries continue to rely on criminal sanctions for the enforcement of their insider trading and market manipulation rules. This means that the standard of proof will remain high and therefore more difficult to meet compared to the imposition of administrative penalties.

Policymakers in Kenya and Nigeria (and other sub-Saharan African countries to the extent justified by domestic circumstances) can therefore amend their rules to increase the use of administrative sanctions in securities law enforcement.

5.3.3.3. Use of Settlement Agreements

Settlement agreements complement administrative proceedings and reduce the amount of time and resources regulators would otherwise have spent in establishing violations. Thus, regulators can conclude cases quicker and cheaper, offering reduced punishments to violators in exchange.

[163] See Chapter 4, section 4.3.1.1.

As identified in above,[164] South Africa relied heavily on settlement agreements in the pursuit of its market abuse enforcement programme. Between 2013 and 2018, 29 of the 38 successful market abuse cases were concluded by settlement agreements, making the securities regulator more efficient in the use of its limited resources. Kenya also utilises no-contest settlement agreements in regulating its market,[165] but it is unclear if these are utilised only in the bright-line cases or in cases requiring deeper investigations. Given the fewer market abuse cases instituted in Kenya and Nigeria, and their leaning towards criminal sanctions, it is unlikely that settlements are routinely used as a regulatory tool when dealing with market abuse offences. Indeed, between 2013 and 2018, there was no enforcement action for insider trading in Kenya and three of the seven market manipulation cases are currently the subject of appeals at the Capital Markets Tribunal,[166] which means that the penalties imposed were not reached through settlement.

To improve enforcement efficiency, Kenya and Nigeria should consider using settlement agreements more frequently in market abuse cases. This can reduce the time and resources spent in establishing violations and increase the number of cases the regulators can successfully establish, thus improving investor's trust in the capacity of regulators to deter market abuse.

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164 See Chapter 5, section 5.3.2.2.

165 See for instance, CMA Annual Report (2018), 78.

166 Enforcement action against Mr. Wycliffe Kivunira (see CMA Annual Report (2018) 74); Enforcement action against Mr. Munir Ahmed Sheikh (see CMA Annual Report (2018) 77); and Enforcement action against Mr. Chadwick Okumu (see CMA Annual Report (2017) 89).

5.4. Private Enforcement

As noted above,[167] some commentators have taken the view that effective private enforcement more closely correlates with strong securities markets than public enforcement. Undoubtedly, private enforcement has its advantages. Private enforcement potentially leads to more meaningful reliefs to investors than public enforcement. This is more likely the case where public enforcement relies heavily on criminal sanctions. Investors who have overpaid for securities based on false or misleading statements are likely to be more interested in recovering the overpaid sum than the imprisonment of the offending party. Whilst public enforcement tools (in the forms of fines, disqualifications and criminal sanctions) undoubtedly reinforce the investor's trust in the efficacy of supervision, compensatory damages more directly addresses the harm that has been caused to the investor by the wrongful act of the offending party. In addition, private enforcement increases the intensity of enforcement and thus, in theory, can deter corporations and managers from violation of rules of securities regulation and hold them to faithful disclosure. This in turn improves the liquidity of their securities, increases transparency and reduces their cost of capital.[168]

However, private enforcement has its limitations. In the first place, in the US, with the most active private enforcement regime globally, private enforcement relies heavily on

167 See n 10-11 above and accompanying text.

168 Fox, (n 16), 'The threat of liability does, however, help deter issuers from making such misstatements in the first place. The resulting increase in their transparency improves both their corporate governance and the liquidity of their shares'.

public enforcement.[169] In other countries with less active private enforcement regimes, the rules of securities law often do not permit private investors to take the lead on enforcement, but rather give them the right to seek compensation only against offending parties that have been found guilty of violating market rules by a public regulator.[170] Even where the rules permit private enforcement to precede or proceed alongside public enforcement, public regulators have much stronger tools[171] to ensure surveillance of the market, detect questionable trading patterns and compel the discovery of evidence, than private enforcers in the absence of a court order. Thus, even where public and private enforcement can proceed together, the commencement of a public enforcement action is often the event that tips off investors about the potential violation of securities regulation, and a successful enforcement action provides investors with evidence of a violation with which to seek damages if they suffered pecuniary loss from the offending conduct. In this way, either as

169 See for instance James Cox, Randall Thomas and Dana Kiku, 'SEC Enforcement Heuristics: An Empirical Inquiry' (2003) 53 Duke Law Journal 737 (finding that private lawsuits with parallel SEC actions (1) settle for significantly more, (2) take substantially less time to conclude, and (3) have significantly longer class periods, than private lawsuits without such SEC proceedings. See also James Cox, Randall Thomas and Dana Kiku, 'Public and Private Enforcement of the Securities Laws: Have Things Changed Since Enron' (2004) 80 Notre Dame Law Review 893.

170 See for instance, the Kenyan Capital Markets Act, s 32K: 'A person who is convicted of an offence under this Part [insider trading and market manipulation] shall, in addition to the penalty imposed for committing the offence, be liable to an action by a person who has sustained pecuniary loss as a result of having purchased or sold securities at a price affected by the act or transaction which comprises or is the subject of the offence'. See also the ISA 2007, s 116: 'A person who is liable under this part of this Act [insider trading and market manipulation] shall pay compensation at the order of the Commission or the Tribunal, as the case may be, to any aggrieved person who, in a transaction for the purchase or sale of securities entered into with the first-mentioned person or with a person acting for or on his behalf, suffers a loss…' See generally, Chapter 4, Section 4.4.1.3 (on the ability to bring private action for insider trading violation in Kenya, Nigeria and South Africa) and Section 4.4.2.3 (on the ability to bring private action for market manipulation in Kenya, Nigeria and South Africa).

171 See Section 5.3.1 above on the formal powers of securities regulators in Kenya, Nigeria and South Africa, including the power to compel the disclosure of information, and the power of search and entry.

a rule of law or a mark of prudence, private enforcement frequently piggybacks on public enforcement.

Second, private enforcement is subject to well-known free-rider problems. In the event of a successful private enforcement action, all similarly wronged investors will have a stronger legal basis to seek compensation. However, the cost of an unsuccessful action often falls solely on the person who instituted the action. In these circumstances, although there might be valid grounds to commence an action, some investors will shirk in the face of the significant cost implications of commencing the action and prefer to free-ride on enforcement action brought by other investors. The prevalence of the free-rider problem is likely to reduce the incentive to commence private actions.

Third, private enforcement faces very acute collective action problems.[172] This is because the individual claims of harmed investors and the amount of compensation due to each of them is almost invariably insufficient to justify the cost of each of them instituting their own individual action for compensation. This is the case whether the rules of court adopt a '*loser-pay approach*' (as is the case in the UK) or mandate each side to bear its own cost (as is the case in the US).

To overcome these downsides and achieve meaningful compensation and effective deterrence, class actions have emerged as an effective way of aggregating the individually small claims of private claimants and obtaining effective compensatory reliefs from offending parties.[173] In a typical class action, the claims of numerous individual claimants

172 Stephen Choi, 'The Evidence on Securities Class Actions' (2004) 57 Vanderbilt Law Review 1465, 1466.

173 ibid.

are aggregated into a single claim which is pursued by representatives of persons that fall within the 'class' of claimants. The class is defined by the court, and depending on the rules of court, individual members can either elect to join the class (an *opt-in class action*) or elect to leave the class (an *opt-out class action*). All members of the class are bound by the decision of the court unless they opt-out of the proceedings, and settlements are typically approved by the court to ensure that the settlement is fair to the members of the class.

Securities class actions and private enforcement of securities law have become distinctive features of US securities law enforcement,[174] and have been far less common in other jurisdictions.[175] However, although strong private enforcement in the form of frequent securities class actions contribute to the intensity of enforcement and thus a reduction in the cost of capital and increased valuation of listed companies, class actions in the US have been criticised on at least three main grounds. First, the potential amounts at stake and high cost of conducting the litigation, in cases where each side bears its own costs, puts enormous strain on defendants to settle claims and thus, increases the propensity for claimants to file frivolous lawsuits.[176] Second, given the propensity to file frivolous lawsuits, securities class actions have increasingly become an avenue for securities lawyers

174 See for instance, Coffee Jr (n 2) on the frequency of securities class actions, settlements and damages imposed in securities class actions in the US as compared to Germany and the UK.

175 Contrast Coffee, 'Impact of Enforcement' (n 2) and John Armour and others, 'Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and the United States' (2009) 6 Journal of Empirical Legal Studies 687 (finding very few instances of private enforcement of corporate law in the UK). For a recent discussion on the current trends and growth of securities class actions around the world, see Dechert LLP, 'Global Securities Litigation Trends: December 2020 Update' <https://corpgov.law.harvard.edu/2020/12/21/global-securities-litigation-trends-2/> accessed 26 March 2021 (examining the growth of securities class actions in the US, EU, Netherlands, Germany, Italy, UK, Australia, Canada, Israel and Japan and also noting stronger securities litigation in the US than in the other countries examined).

176 See for instance Choi (n 172) 1477-1499.

to extract rents and enrich themselves at the expense of class members and defendants through settlements. This often means that the plaintiff class only gains marginally from meritorious class actions given high attorney fees, and the deterrence value of securities class actions is compromised where attorneys prioritise their fees over pursuing the class action with the level of dexterity the plaintiff class requires.[177] Third, payment of damages by the defendant corporation to harmed investors has been shown not to have a net fairness effect, as compensation simply moves from one set of shareholders to another.[178]

Given the role securities class actions play in the private enforcement of securities regulation, its recognition in the laws of all three countries,[179] and the leading position of the US in private enforcement,[180] this Part uses securities class actions as a proxy for private

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177 ibid 1502. See also John Coffee, 'Reforming the Securities Class Action: An Essay on Deterrence and its Implementation' (2006) 106 Columbia Law Review 1534 (arguing that as currently practised in the US, securities class actions neither deter nor compensate).

178 For an elaboration on this argument, see Fox (n 16) 1192-1195 (arguing that payment of compensation by one set of shareholders to another does not correct the unfairness allegedly suffered by the injured shareholder, but simply moves it around). See also Coffee Jr, 'Reforming the Securities Class Action: An Essay on Deterrence and its Implementation' (n 177) 1537 (comparing punishing the corporation and its shareholders for misleading statements in the secondary market where the corporation does not derive any benefits to seeking to deter burglary by imposing penalties on the victims of burglary, and arguing that imposing the full cost of securities class actions on shareholders can be inequitable). For a justification of the issuer liability model of securities class actions, see for instance Martin Gelter, 'Risk–Shifting through Issuer Liability and Corporate Monitoring' (2013) 14 European Business Organization Law Review 497 (arguing that the issuer liability model incentivises dominant shareholders in concentrated ownership countries to better monitor management and thus reduce the risk of securities fraud, since they would suffer the bulk of the economic consequences of the issuer being ordered to pay compensation to harmed shareholders).

179 In Kenya and South Africa, class actions are constitutionally recognised in the defence of human rights. See Constitution of the Republic of Kenya, 2010, ss 22 and 258; Constitution of South Africa, 1996, s 38(c). In Nigeria, class actions are recognised in the pursuit of intellectual property claims. See Order 9 Rule 4(1) of the Federal High Court (Civil Procedure) Rules 2009.

180 See n 174-175 above. According to a recent report by the National Economic Research Associates, a total of 3,239 federal securities class actions were filed in the US between 2010 and 2020, with a record of 429 federal securities class actions filed in 2018 alone. 323 securities class actions were filed in 2020. See Janeen McIntosh and Svetlana Starykh, 'Recent Trends in Securities Class Action Litigation: 2020 Full-Year Review' (2021) National Economic Research Associates <https://www.nera.com/content/dam/nera/publications/2021/PUB_2020_Full-Year_Trends_012221.pdf> accessed 26 March 2021.

enforcement and the US as the comparative benchmark for active private enforcement. I first consider the incidence of securities class actions in Kenya, Nigeria and South Africa to determine the level of private enforcement intensity in the three jurisdictions. I thereafter examine factors inhibiting the growth of securities class actions in the three jurisdictions. I conclude by examining the existence of credible alternatives to securities class actions as a tool of private enforcement in the relevant countries.

5.4.1. Securities Class Actions in South Africa, Kenya and Nigeria

Have there been securities class actions leading to judicial opinions in reported cases, to enforce violations of securities regulation in South Africa, Kenya and Nigeria?[181] To examine this question, I examined available law reports from the three jurisdictions. In the case of South Africa, I examined the South African Law Reports (1947–2018).[182] In Kenya, the National Council for Law Reporting[183] runs a free, public law reporting service, available to the public,[184] and containing up-to-date judgments of all courts in Kenya. In

[181] The present enquiry is limited to securities class actions leading to judicial opinions in reported cases. Given the number of countries examined and the practical challenges involved in collating reliable data, the enquiry does not seek to examine how frequently securities class actions are instituted in courts as was done by Professors Armour, Black, Cheffins and Nolan. See Armour and others, (n 175). For a flavour of the difficulty involved in examining how frequently securities class actions are instituted (as opposed to how often they lead to judicial opinions), consider that under section 251 of the Nigerian Constitution, the Nigerian Federal High Court has jurisdiction over matters of securities and investments. Presently, each of the 36 states in Nigeria has a Federal High Court where issues relating to the securities market may be filed. Although it is expected that more of such matters will be filed in the Federal High Courts in Lagos and the Federal Capital Territory (being the commercial and administrative capitals of Nigeria, respectively), similar actions can be pursued in any of the Federal High Courts given that they are all courts of concurrent jurisdiction across the country. In addition, the records of the court are not stored electronically, leading to a potentially unmanageable number of court files to be studied manually.

[182] I accessed the law reports from the South African Juta Law database. Access to the database was obtained from the Bodleian Law Library.

[183] The Council is established as a state corporation by the Kenyan National Council for Law Reporting Act. The mission of the Council is to provide universal access to Kenya's public legal information.

[184] The service is available electronically at <http://kenyalaw.org/kl/>

Nigeria, there is no online database providing access to all reported cases in the country. I therefore manually examined the annual index of the All Nigerian Law Reports (1961-1990) and the Nigerian Weekly Law Reports (1990–2018).

For South Africa, I searched for "class action" in the "Practice" section of the subject-matter index. The search produced 9 reported cases. 6 of these cases were against listed companies.[185] I read all six cases. These cases were mainly in the field of human rights and consumer protection and none involved alleged violation of securities regulation. Again, similar searches for "stock exchange", "insider trading" and "market abuse" did not reveal any private actions for the enforcement of the market abuse rules.

For Kenya, I ran a search for "class action" from the subject option of the advanced search menu. The search produced only 1 result (*Rose Wanjiru v Standard Chartered Bank Kenya Limited and Another*).[186] A similar search of "class action" on the custom search menu produced 78 results with *Rose Wanjiru* being the key case produced by the search. The *Rose Wanjiru* case involved the alleged arbitrary increase of interest rates by banks without the prior approval of the Minister of Finance as required under section 44 of the Kenyan Banking Act. No violation of securities regulation was alleged. For Nigeria, I searched for "class action" in the "Action" and "Practice and Procedure" sections of the index of the All Nigerian Law Report and the Nigerian Weekly Law Report from 1961 to

185 These were: *FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd* 2008 (2) SA 592 (C) (Cape Provincial Division); *Mukaddam and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 254 (SCA) (Supreme Court of Appeals); *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) (Supreme Court of Appeals); *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC) (Constitutional Court); *Nkala and Others v Harmony Gold Mining Co Ltd and Others* 2016 (5) SA 240 (GJ) (Gauteng Local Division, Johannesburg); and *Mahaeeane and Another v Anglogold Ashanti Ltd* 2017 (6) SA 382 (SCA) (Supreme Court of Appeals).

186 Civil Suit 433 of 2003; 2015 eKLR.

2018. The search produced no reported cases. Similar searches for "stock exchange", "insider trading", "market manipulation" and "market abuse" did not reveal any private actions brought to enforce the market abuse rules.

From the results above, there has not been a single reported securities class action case in South Africa, Kenya or Nigeria. This finding of low private enforcement activity in the three countries is consistent with findings in other jurisdictions[187] and contrasts very sharply with the frequency with which securities class actions are filed in the US which has by far the most robust private enforcement regime globally.[188]

5.4.2. Factors Inhibiting the Growth of Securities Class Actions

Below, I discuss various factors inhibiting class actions generally, and securities class actions specifically, in the three jurisdictions.

5.4.2.1. Poor Public Enforcement

As noted above, in the US where private enforcement is more robust, private enforcement often relies on public enforcement.[189] This link between public and private enforcement is pronounced in Kenya and Nigeria given that as noted above[190] and in Chapter 4,[191] a private right of action for violation of the market abuse rules in both countries only crystallises upon a finding of liability by the public regulator. However, neither Kenya nor Nigeria has successfully found a violation of the insider trading rules and both have only found

187 See n 174-175 above.

188 See n 180 above and accompanying text.

189 See n 170-171 and accompanying text.

190 See n 170 above.

191 See Chapter 4, sections 4.3.1.3 and 4.3.2.3.

violations of market manipulation rules on few occasions. Consequently, no cause of action has accrued for violation of insider trading rules in either jurisdiction, and they have only accrued a few times in the case of market manipulation. Thus, however well-incentivised private litigants are, their ability to pursue private claims is severely limited by poor public enforcement.

5.4.2.2. Restrictive Rules of Court

In contrast with the US, Kenya and Nigeria arguably have restrictive rules of court procedure which can affect the ability to bring and maintain securities class actions. On its part, although South African courts have interpreted the constitutional provisions on class actions broadly, class actions have been used more frequently in the field of human rights and consumer protection.

The US has fairly clear class action rules and a sophisticated judiciary experienced in routinely applying these rules. Thus, for a class action to be certified, the plaintiff must meet two sets of requirements. First, the plaintiff must meet each of the four requirements in Rule 23(a) of the Federal Rules of Civil Procedure.[192] Second, the plaintiff must satisfy one of three additional conditions set out in Rule 23(b).[193] Where the requirements are met, and the court finds against a motion to dismiss (typically brought by the defendant), the

[192] These require that (a) the class must be so numerous that a joinder of all members is impracticable, (b) there are questions of law or fact common to the class, (c) the claims or defenses of the representative parties are typical of the claims and defenses of the class, and (d) the representative parties will fairly and adequately protect the interests of the class.

[193] These are that (i) prosecuting separate actions can potentially lead to inconsistent standards of conduct or impair other class members' ability to protect their interests, (ii) final injunctive or declaratory relief is appropriate because the party opposing the class acted on grounds generally applicable to the entire class, and (iii) common issues of law and fact predominate over individual issues and a class action is the superior mechanism for resolving the plaintiff's claims.

court will certify the class. The certification order will define the class and appoint class counsel and the court will issue directions on giving notice to persons caught in the class definition, who would be able to opt-out of the class action. Added to the entrepreneurial approach to litigation by the plaintiff bar,[194] this has led to securities class actions being filed with a lot more regularity than in other countries in the world.

In Kenya notwithstanding the constitutional recognition of class actions as a mode of collective actions, its deployment in practice has been problematic. This can be seen most clearly in the case of *Rose Wanjiru v Standard Chartered Bank Kenya Limited and Another*[195] In that case, an applicant sought to join all customers of the defendant banks to the action seeking damages for interest rate increases without ministerial approval, unless they opt out of the action. The Applicant relied on the constitutional recognition of class actions and argued that many of the customers of the banks are poor and illiterate and may either not be aware of the existence of a class action to opt into or may be unable to apply to opt into the class action because of their financial situation. He thus argued that the requirement that a person must apply to opt into the class action will be discriminatory of impoverished claimants. Although the Court recognised that Order 1 Rule 8 of the Kenyan Civil Procedure Rules permit class actions,[196] the court rejected the contention that the rule permits opt-out class actions and held that bank customers who have the same interest in

194 In practice, the plaintiff bar typically monitors the market for statistically significant drops in share price. Where one is found and the law firm can come up with a theory of fraud, the law firm may announce that it is investigating potential claims against the issuer. Although these advertisements are not necessary to bring a claim and are not necessarily indicative of an investigation, they often serve as a prompt to claimants with standing to bring claims.

195 Civil Suit 433 of 2003; 2015 eKLR.

196 ibid [28]: 'Essentially, the proceeding in Order 1 rule 8 of the Civil Procedure Rules is a representative suit which may also include class action and derivative suits'.

section 44 of the Kenyan Banking Act may apply to join the action as parties to the suit.[197] Order 1 Rule 8 of the Civil Procedure Rules was therefore interpreted restrictively to only permit opt-in class actions in Kenya, meaning that individuals who wished to join the suit had to apply to be joined.

A similar issue can be seen in Nigeria. In the case of *Daba Bright West v Union Bank of Nigeria Plc*,[198] the Claimants alleged that they lost large amounts of money from unauthorised ATM withdrawals from their accounts, and accused the defendant banks of negligence for failing to install adequate security software on their ATM systems to, amongst others, detect and retain cloned debit cards. The court granted an *ex-parte* order[199] certifying the matter as a class action. In filing their defences, the defendants applied to strike out the matter as a class action on the grounds, amongst others, that Order 9 Rule 4 of the Nigerian Federal High Court (Civil Procedure) Rules only contemplates class actions for intellectual property claims. The defendant's application was successful and the class certification was set aside. On the other hand, in the case of *EP Investments Ltd v BGL Limited*,[200] the Claimants commenced an action at the Federal High Court claiming that the defendants breached the terms of the representations and guarantees which formed the basis upon which the Claimants decided to subscribe to the private placement of shares in the first Defendant. The Claimant applied *ex-parte* for the certification of the suit as a class action, which was granted. Upon service of the order, the Defendants challenged the certification on the basis that the subject matter of the suit (securities subscription) does

197 ibid [31].

198 Unreported Suit No. FHC/L/CS/827/09.

199 An *ex-parte order* is an order made after hearing only one party to the dispute.

200 Unreported Suit No. FHC/L/CS/1298/09.

not fall within the provisions of Order 9 Rule 4 of the Federal High Court (Civil Procedure) Rules. Unlike the court in the *Daba West* case, the court rejected the application to de-certify the class action, and instead directed the Claimant class representatives to amend their pleadings to expunge the issues that were not common to all Plaintiffs represented. A search for a reported decision from this case was unsuccessful.[201]

For their part, South African courts have interpreted class action rules broadly. Although class actions are only formally provided for in the protection of human rights, the South African Supreme Court of Appeals expanded the subject matter of class actions beyond human rights, with the understanding that courts will develop their jurisprudence on the procedure to be adopted in class action cases.[202] Presently, both opt-in and opt-out class actions are permitted, and class certification will be granted as long as an applicant is able to show that the determination of common issues will allow the cases of individual class members to move forward without the duplication of judicial analysis.[203]

Thus, even where a cause of action exists, rules of court in Kenya and Nigeria have proven restrictive. In Kenya, individual claimants will be required to apply to the court to join the Claimant class as Order 1 Rule 8 of the Civil Procedure Rules do not support opt-out class actions. Although this is not necessarily fatal, it does not fully ameliorate the

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201 The cases of *Daba West* and *EP Investments* were probably not captured in the search on the All Nigerian Law Reports and Nigerian Weekly Law Reports because they are decisions of the Federal High Court. Given the proliferation of Courts in the Nigerian judicial system (each of the 36 states has a State High Court, a Federal High Court, and a Customary Court of Appeal or Sharia Court of Appeal), publishers of law reports focus on cases with precedential value (i.e. decisions of the Court of Appeal and the Supreme Court). This means that most decisions of the High Court that are not appealed go unreported, leaving room for inconsistent judicial decisions as the two cases reveal. For a discussion of both cases, and class actions in Nigeria more generally, see Uche Val Obi, *Class Actions in Nigeria* (MIJ Professional Publishers 2015).

202 *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd* (n 185).

203 *Nkala v Harmony Gold Mining Co Ltd* (n 185).

collective action problem that justifies class actions in the first place. This is because only few claimants may choose to opt into the initial class action, with the hope of avoiding costs if the action is unsuccessful, and free-riding on a finding of liability if successful. Added to the challenges of poverty and illiteracy identified in the *Rose Wanjiru* case, opt-in class actions are unlikely to gain substantial traction in Kenya. On the other hand, in Nigeria, there are conflicting decisions of the Federal High Court on whether Order 9 Rule 4 of the Federal High Court (Civil Procedure) Rules can be invoked to institute class actions in subject matters other than intellectual property claims. At present, there is no guidance from an appellate court on this point, meaning that the law on class actions in Nigeria is both underdeveloped and uncertain.[204]

5.4.2.3 Litigation Funding and Contingency Fee Arrangements

Even where a cause of action exists, and the rules of court permit the commencement of class actions, funding of the class action litigation may still prove difficult. Again, rules in Kenya are stringent when compared to applicable rules in the US and in Nigeria and South Africa.

In the US, the Federal Rules of Civil Procedure permit the court to award reasonable attorney fees and non-taxable costs and provides for a process for plaintiff attorneys to file a motion for fees after the class has gotten a judgment or a settlement.[205] Third-party

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204 See the Nigerian Institute of Advanced Legal Studies, 'Communique on the Roundtable on Class Action Litigation in Nigeria' (2013) NIALS, 12 March 2013 <https://nials.edu.ng/index.php/2015-12-10-16-05-04/roundtables/175-communique-on-the-roundtable-on-class-action-litigation-in-nigeria-12th-march-2014> 'Class actions are novel to our jurisdiction. In its wide and technical ramifications, class actions are not clearly developed, although in substance, the concept is not alien to our jurisprudence'.

205 Federal Rules of Civil Procedure, r 23(h).

litigation financing is permitted and attorneys representing the class may either recover fees under a "loadstar method"[206] or as a percentage of the award or settlement.

Both Nigeria and South Africa also permit contingent fees and litigation financing. As the South African Supreme Court of Appeals found, under South African law, an agreement whereby a person agrees to fund the litigation of another in exchange of a share in the proceeds of the litigation[207] is neither void nor contrary to public policy.[208] Even if such an agreement were illegal, its illegality is extraneous to the dispute between the parties and cannot form the basis of a defence on the merits to the action. Similarly, in Nigeria, the Rules of Professional Conduct for Legal Practitioners permits a legal practitioner to enter into contingency fee arrangements in respect of civil matters but only where it is 'reasonably obvious that there is a bona fide cause of action' and the lawyer has advised the client on the effect of the arrangement.[209] However, the legal practitioner must not purchase or otherwise acquire an interest in the subject matter of the litigation or enter an agreement to pay for, or bear the expenses of the litigation.[210]

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206 The loadstar method is typically used where the action is brought under a statute permitting fees to be recovered from the defendant. In this case, the court multiplies the number of hours spent on the matter by a reasonable hourly rate and adjusts the figures upwards or downwards depending on the risk or quality of work.

207 In strict legal terms, this is called a '*champertous agreement*'.

208 *Price Waterhouse Coopers Inc & Others v National Potato Co-Operative Limited* 2004 (6) SA 66 (SCA) (Supreme Court of Appeals).

209 Rules of Professional Conduct for Legal Practitioners r 50(1) (c) and 50(4).

210 ibid rr 50(3) and 51.

On the other hand, the Advocates Act of Kenya maintains strict rules against contingency fee arrangements,[211] which are faithfully enforced by the courts.[212] This adds to the practical hurdles a prospective Claimant will have to face to institute a securities class action in Kenya.

Ultimately, although a change in class action rules may be beneficial to strengthen securities class actions, it is not possible to know the net effect of such a change in law without a careful analysis of other areas of law where class actions are used in the jurisdictions under examination.[213] Consequently, a change to class action rules may not be feasible even if it may be beneficial from a purely securities law perspective.[214]

5.4.3. Regulator-Controlled and Statutory Class Action Procedures as Alternatives to Securities Class Actions in Private Enforcement

So far, this Chapter has used securities class actions as a proxy for private enforcement. On that analysis, although South Africa provides more lenient rules for bringing class actions (including judicial recognition of the application of class actions in proceedings other than human rights actions and permissive contingency fee rules), there has been no securities class action leading to a reported judicial opinion in South Africa. Kenya and Nigeria have not performed any better. Is the absence of securities class actions caused by

211 The Advocates Act CAP 16 of 1989 (as amended, 2017), s 46(c).

212 See *Njogu & Co. Advocates v National Bank of Kenya Limited* [2007] 1 EA 297, 303 'My opinion is that when an Advocate makes a champertous agreement with his client, the Advocate is more guilty, for he knew the contract stipulated terms contrary to the essence of the Advocates Act'.

213 For instance, human rights law and consumer protection law. See n 185 above.

214 Of course, countries keen on improving securities class actions as a way of strengthening private enforcement may consider enacting special rules to favour securities class actions.

the presence of credible alternatives which provide wronged investors with sufficient recompense to make recourse of securities class actions futile?

One reason for the absence of class actions in South Africa may be the presence of the regulator-controlled class action procedure. As discussed in Chapter 4, South Africa retains a procedure for investors to claim damages for the breach of insider trading rules. Under this procedure, investors who claim to have suffered loss from alleged insider trading must submit claims to the FSCA within 90 days from the publication of a notice inviting persons affected by the insider trading to submit their claims. The FSCA is empowered to award compensation to investors from amounts paid by the offending party where the FSCA is successful in its enforcement action and the investor can prove to the reasonable satisfaction of the FSCA that he/she suffered pecuniary loss as a result of the insider trading.[215]

When utilised, this procedure has the potential to add significant value. First, it effectively deals with the collective action and free-rider problems militating against private enforcement, since the investor will not be commencing a new action but will instead simply be liaising with the regulator to establish the validity of its claims. Second, the action side-steps several of the criticisms levied against securities class actions in the US as it can screen out potentially frivolous claims and does away with the need for a rent-seeking plaintiff class action bar. Third, utilising this regulator-controlled processes promotes judicial economy and efficiency as the process operates entirely outside the law

215 See Stephanie Luiz and Kathleen Van der Linde, 'The Financial Markets Act 19 of 2012: Some Comments on the Regulation of Market Abuse' (2013) 25 South Africa Mercantile Law Journal 458. See generally, Chapter 4, section 4.3.1.3.

courts. There is evidence that this procedure has been utilised in South Africa,[216] and as such could substitute for private rights of action in insider trading cases. However, the procedure can only be utilised in insider trading cases and cannot be adopted for breach of the market manipulation rules.[217]

In contrast, a person found guilty of violating the market abuse rules in Nigeria (i.e. both insider trading and market manipulation) may be ordered by the SEC (N) to pay compensation to aggrieved persons.[218] This compensation obligation, when imposed, is free-standing and independent of the sanctions imposed by the regulator.[219] However, given the absence of public enforcement of the insider trading rules in Nigeria, invariably, the SEC (N) has not issued any compensatory orders arising from breach of insider trading rules in Nigeria. Whilst such orders can also be made in relation to market manipulation, there is no evidence of any such orders issued under s. 116 of the ISA. Consequently, the regulator-controlled process in Nigeria has not provided a substitute for securities class actions. This is likewise the case in Kenya which does not have any such statutory or regulator-controlled procedure for compensating investors in the event of a breach of its market abuse rules.

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216 See FSCA Annual Report (2018) 94, noting that between 2017 and 2018, independent claims officers distributed a total of R1,005,400 to 28 claimants who traded in the opposite direction to insiders found liable for contravening the insider trading rules.

217 Thus, investors that have suffered pecuniary loss from prohibited trading practices or misleading financial statements will have to institute personal actions and in so doing, will need to rely on class actions to ameliorate the collective action and free-rider problems. Surprisingly, these class actions for breach of the market manipulation rules remain non-existent even where the FSB/FSCA (SA) has found a violation of the market manipulation rules or extracted a settlement with admission of liability.

218 ISA 2007, s. 116.

219 See generally, Chapter 4, sections 4.3.1.3 and 4.3.2.3.

5.5. Conclusion

Enforcing securities regulation is not easy. However, even though setting up and deploying a credible enforcement programme may be difficult, it is an inevitable aspect of securities regulation as the laws on the books alone will not regulate away wrongdoing, and the intensity of enforcement promotes investor trust, improves liquidity and market participation and ultimately reduces the cost of capital of listed companies.

This Chapter built on the foundations in Chapter 4 and examined enforcement of securities regulation in sub-Saharan Africa, using Kenya, Nigeria and South Africa as case studies. The discussions above support the following conclusions:

1. Consistent with the findings in Chapter 4, when compared against South Africa, both Kenya and Nigeria have fairly robust laws on the books equipping regulators to enforce compliance with securities regulation. However, both Kenya and Nigeria place more emphasis on using public actors (the CMA (K) and the SEC (N)) to conduct market surveillance and enforce compliance. In theory, this is not necessarily bad. In practice, however, this means that Kenya and Nigeria stake a heavy bet on the skills, competence and incentives of the public regulators.
2. Both Kenya and Nigeria have been significantly poorer in enforcing securities regulation than South Africa. Neither jurisdiction has been successful in enforcing its insider trading laws, and although there is some evidence of enforcement of market manipulation rules, available evidence suggests that this only occurs sparingly. In the absence of effective surveillance programs and given the increased standard of proof required in criminal prosecutions, public regulators in Kenya and Nigeria have recorded more success in enforcing bright-line, low-hanging

violations of disclosure obligations (such as late filing of financial statements or improper publication) and investor complaints (such as unauthorized trading).[220]

3. Poor public enforcement in Kenya and Nigeria reinforces poor private enforcement. Given how the liability rules under the Kenyan Capital Markets Act and the Nigerian Investments and Securities Act are set up, investors only have a cause of action to enforce market abuse rules upon a finding of liability by the CMA (K) or SEC (N) respectively. Poor public enforcement therefore has a knock-on effect on the ability of investors to institute claims. Where this hurdle is crossed, restrictive rules of court and strict rules against contingency fees and litigation funding (as compared to more permissive rules in the US) aggravate the collective action and free-rider problems facing private investors.[221] Although an alternative to class actions exist in Nigeria, it also relies on a successful public enforcement action. Thus, even discounting factors such as the rule of law, the ease of instituting actions, the independence of the judiciary and the speed of resolving disputes, there are significant hurdles confronting investors wishing to commence actions for compensation for a breach of securities regulation. In sum, enforcement in Kenya and Nigeria remain weak.[222]

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220 For Kenya, see for instance the enforcement action against Equity Investment Bank and Natbank Trustee and Investment Services Limited, (CMA Annual Report (2018) 76). For Nigeria, see (n 127) above and accompanying text. As identified by the IMF in the case of Nigeria, this has resulted in 'managing innumerable disputes between customers and brokers dealing basically with contractual disputes and unauthorised transactions'. See IMF (n 130) 53.

221 As noted above, although South Africa also has permissive class action rules, class actions have been utilised more in the fields of human rights and consumer protection than in securities regulation.

222 This finding is of course not peculiar to Kenya and Nigeria or to sub-Saharan Africa more generally. Indeed, weak enforcement is an endemic problem in most emerging markets. See Armour and Schmidt, (n 7) 20.

Weak enforcement in Kenya and Nigeria arguably contribute to reduced market participation and hence illiquidity, increased cost of capital and ultimately market underdevelopment. Policymakers in both jurisdictions as well as in other sub-Saharan African states keen on developing their domestic markets must therefore strengthen their enforcement programs as a crucial step to improving market participation. I offer some suggestions on this in the concluding Chapter.

Another creative way of improving market participation and achieving market development is to strengthen ties with neighbouring countries and promote market integration across the various regions within sub-Saharan Africa. This forms the focus of the next Chapter.

CHAPTER 6 – CAPITAL MARKETS DEVELOPMENT IN SUB-SAHARAN AFRICA: MARKET INTEGRATION AS A SOLUTION?

One of the most debated issues in the African capital markets development literature is the extent to which market integration[1] can provide a solution to the persistent challenges of thin and illiquid markets. The basic theory is that given the small size of African capital markets (themselves a reflection of the small size of most African economies), market integration ought to break down market fragmentation, provide diversified investment opportunities to investors and deeper markets to issuers. The combination of these should lead to a more robust regional (and possibly continental) market, which ought to be stronger, as a unit, than the sum of its currently fragmented parts.

But experience shows that capital market integration is not straightforward. Capital markets operate in an environment impacted by macroeconomic policy, the legal and political systems, the credibility of institutions and the culture and idiosyncrasies of market participants. Given the sheer diversity of its economies, efforts at capital markets integration in Africa are understandably ambitious.

[1] In this Chapter, I adopt the definition of "integration" given by Akpan Ekpo and Chuku Chuku as 'a market or institutionally driven process of broadening and deepening the financial interrelationships within a region'. See Akpan Ekpo and Chuku Chuku, 'Regional Financial Integration and Economic Activity in Africa' (2017) 26 Journal of African Economies 40, 41. For a similar definition, see John Wakeman-Linn and Smita Wagh, 'Regional Financial Integration as a Potential Engine for Financial Development in Sub-Saharan Africa' in Marc Quintyn and Geneviève Verdier (eds), *African Finance in the 21st Century* (IMF 2010) 'Regional financial integration refers to a process, market driven and/or institutionalized that broadens and deepens financial links within a region'. See also Ole Thonke and Adam Spliid, 'What to Expect from Regional Integration in Africa' (2012) 21 Africa Security Review 42, 43.

The ambitious nature of the integration project has, however, not kept African states at bay. Heads of African governments, backed by strong commitments from intergovernmental organizations (primarily the United Nations Economic Commission for Africa (UNECA), the African Development Bank (AfDB) and the African Union (AU)) have continued to pursue aggressive political and economic integration projects, with the long-term potential to fundamentally alter African markets and economies of tomorrow. Viewed in this context, capital markets integration in sub-Saharan Africa largely forms a portion of, and is strongly influenced by, this broader integration agenda. In reality, however, this integration agenda is not unique to sub-Saharan Africa. Around the world, various states and economic communities are also pursuing policies of capital markets integration. This drive spans the European Union (with clearly the most advanced capital markets integration agenda), South-East Asia, North-America, and Oceania.[2]

This move towards integration brings to the fore a number of policy questions. What is the rationale behind integrating Africa's (and more broadly, other regions') markets? How have African states pursued these integration attempts so far? How successful have they been, and what impediments do they face? Given that Africa is not alone in the integration journey, what lessons can African states draw from similar market integration projects in other regions of the world?

Apart from these broad policy questions, integration poses certain unique challenges. Essentially, in any actively-pursued integration agenda, states that hitherto had the power to make and enforce regulation over entities within their remit, decide to

[2] See section 6.5 below for a discussion on capital markets integration initiatives in the EU, North America and Oceania.

harmonise their regulation or cooperate with each other in performing their functions. This can happen within a specific country (for instance the US) or amongst different countries in a geographical region (for instance Europe or North America). In this situation, a choice exists between 'state' regulation (i.e. amongst the different federating units in a federation or amongst different member states in a region) and 'federal' regulation (the federal government in a federation or a regional legislature or regulator in a region). Both the choice of who is best-suited to make and enforce law in this universe, and the likely result of competition amongst the different member states or federating units raise important legal questions. Who should make (and enforce) the law governing an increasingly integrated market? A 'federal' authority or the contracting 'states'? Where laws are harmonised, do uniform laws on paper translate to uniform laws and practices in reality? Is regulatory harmonization more likely to lead to better outcomes than regulatory competition (i.e. is it better to replace several regulators with a single regulator)?[3] These questions have been extensively debated in discussions about securities law harmonization and regulatory competition, leading to a robust literature.[4] I contribute to this literature by extending the analysis to sub-Saharan Africa.

[3] These questions are particularly relevant for Eastern Africa since the goal of the region is to integrate from independent states to a political federation. See Appendix 6.2.

[4] For a comprehensive review of the debates in the literature, see Luca Enriques and Tobias Tröger, 'Issuer Choice in Europe' (2008) 67 Cambridge Law Journal 521. See also Luca Enriques and Matteo Gatti, 'Is There a Uniform EU Securities Law After the Financial Services Action Plan' (2008) 14 Stanford Journal of Law, Business & Finance 43 (arguing that the EU had not achieved full harmonization of securities law among member states even after the Financial Services Action Plan); Emilios Avgouleas and Guido Ferrarini, 'A Single Listing Authority and Securities Regulator for the CMU and the Future of ESMA' in Daniel Busch, Emilios Avgouleas and Guido Ferrarini (eds), *Capital Markets Union in Europe* (OUP 2018) (arguing for centralized approval of public offers and the creation of an EU Listing Authority and an EU securities commission modelled after the SEC in the US).

In this Chapter, I argue that successful integration has the potential to strengthen the otherwise small, fragmented and illiquid capital markets operating in sub-Saharan Africa. Thus far, African states have pursued the integration objective on a regional basis through different Regional Economic Communities (RECs). Influenced by their different political and economic circumstances, colonial histories and cultural factors, these RECs have adopted different integration models, and have achieved varying levels of success. Both in terms of harmonization of rules of securities regulation, and regional cross-listing of securities, capital markets integration in sub-Saharan Africa correlates with, and reflects, patterns of regional trade: RECs with more intraregional trading activity are more advanced in their capital markets integration programs than RECs with lesser trading activity. Low intraregional trade, coupled with other country and sub-region specific political, economic and cultural factors make it unlikely that well-functioning, integrated markets will exist in sub-Saharan Africa in the short/medium term. Although these challenges can be mitigated by improved trade resulting from the recently concluded African Continental Free Trade Agreement (AfCFTA), the growth of technology and expansion of cross-border securities trading, the expansion of existing monetary unions, and learnings from the examples of other regional market integration programs, African states must remain cautiously optimistic in their view on how quickly market integration can promote market development. Market integration is therefore unlikely to be a short/medium term solution to market underdevelopment in sub-Saharan Africa, and African states must continue to aggressively pursue strategies to develop their domestic public markets in the short/medium term, whilst pursuing these integration strategies in the long term.

The remainder of this Chapter is structured as follows: Section 1 discusses the core economic case in favour of capital market integration in sub-Saharan Africa, demonstrating that the arguments offered in favour of capital markets integration in sub-Saharan Africa mirrors similar arguments used to justify capital markets integration in other regions of the world. Section 2 then situates capital markets integration in the context of the broader integration programs ongoing in sub-Saharan Africa. Section 3 thereafter assesses progress towards capital market integration in sub-Saharan Africa. I do this across four dimensions: the integration model adopted; the harmonization of securities regulation; securities cross-listing; and cross-border trading of listed securities. In the process, I highlight the progress towards market integration by each of the RECs and the rate of success achieved so far. In Section 4, I take stock of the challenges and impediments to successful capital markets integration in sub-Saharan Africa, highlighting core political, economic and cultural barriers to increased market integration. Thereafter, Section 5 draws lessons from other jurisdictions that have attempted similar capital markets integration agendas. Section 6 speculates into the future of capital markets integration in sub-Saharan Africa, identifying continent-wide stock exchange linkages, the continental free trade area and the renewed drive towards single regional currencies as key developments that could shape the capital markets integration project in the future. Section 7 offers concluding thoughts.

6.1. The Case for Capital Markets Integration

Numerous commentators have argued in favour of increased co-operation and eventual integration of capital markets operating in Africa.[5] The arguments proffered to justify capital markets integration in Africa closely mirror similar arguments in favour of increased capital markets integration in other regions and the Capital Markets Union in Europe.[6] This section distils the core economic and market arguments in favour of market integration.

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5 See for example Jacqueline Irving, *Regional Integration of Stock Exchanges in Eastern and Southern Africa: Progress and Prospects* (IMF 2005) (arguing in favour of integration of capital markets in Eastern and Southern Africa); Charles Okeahalam, 'Strategic Alliances and Mergers of Financial Exchanges: The Case of the SADC' (2005) 31 Journal of Southern African Studies 75 (arguing in favour of the merger of national exchanges in the Southern Africa Development Community as a means of scaling and boosting the liquidity of stock exchanges operating in Southern Africa); Jenifer Piesse and Bruce Hearn, 'Regional Integration of Equity Markets in Sub-Saharan Africa' (2005) 73 South African Journal of Economics 36 (discussing the benefits small markets can derive from linking up with larger, better functioning markets acting as regional hubs); Samuel Onyuma, 'Regional Integration of Stock Exchanges in Africa' [2006] African Review of Money Finance and Banking 97 (arguing in favour of gradual integration of capital markets in Africa after a process of economic and market reforms); Charles Yartey and Charles Adjasi, *Stock Market Development in Sub-Saharan Africa: Critical Issues and Challenges* (IMF 2007) (noting the potential benefits of capital markets integration in sub-Saharan Africa, but identifying several pre-conditions to be met for a successful integration project); Collins Ntim, 'Why African Stock Markets should Formally Harmonise and Integrate their Operations' (2012) 4 African Review of Economics and Finance 53 (arguing that greater integration of African markets is likely to improve their informational efficiency).

6 For a discussion on the political and economic advantages of integration of global capital markets, see Harald Baum, 'Globalizing Capital Markets and Possible Regulatory Responses' in Jürgen Basedow and Toshiyuki Kono (eds), *Legal Aspects of Globalization: Conflict of Laws, Internet, Capital markets and Insolvency in a Global Economy* (Kluwer Law International 2000). On the development of a capital markets union revolving around federal securities law in the US, see Jeffrey Gordon and Kathryn Judge, 'The Origins of a Capital Market Union in the United States' in Franklin Allen and others (eds), *Capital Markets Union and Beyond* (MIT Press 2019). On the economic case for deeper capital markets integration in Europe, see Commission Staff Working Document, Economic Analysis Accompanying the Action Plan on Building a Capital Markets Union, [SWD (2015) 184 Final]. For a very recent discussion on the economic case for a capital markets union in Europe, see Ashok Bhatia and others, *A Capital Markets Union for Europe* (IMF 2019). But see Centre for European Policy Studies and European Capital Markets Institute, 'Rebranding Capital Markets Union: A Market Finance Action Plan' (Report of a CEPS-ECMI Task Force, June 2019) <https://www.ceps.eu/wp-content/uploads/2019/07/Rebranding-Capital-Markets-Union.pdf>, assessed 30 October 2019 (noting that the measures adopted under the capital markets union plan in Europe focus more on market development than on market integration, and arguing for a more in-depth capital market union action plan).

6.1.1. Improved Liquidity

Illiquidity remains arguably the biggest problem facing capital markets in sub-Saharan Africa.[7] Various factors account for low investor participation, and hence market illiquidity in sub-Saharan Africa. Poverty, low income levels and wealth inequality constrict the number of retail investors able to invest in securities, and the capacity of institutional investors to pool funds together.[8] Developments in finance literature also show a number of factors that potentially restrict stock market participation including literacy,[9] trust, and culture,[10] which are particularly problematic in the African context.[11] In addition, as argued in the previous chapter, weak enforcement of securities regulation disincentivises investors from participating in the market.[12] Secondary market illiquidity in turn increases the cost of capital and discourages prospective issuers from issuing securities on the primary market. These factors in turn reduce the number and variety of securities traded on the domestic exchange, thus reducing its depth.

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7 See generally Chapter 1, section 1.2.

8 Piesse and Hearn (n 5) (noting the constraining effect of poverty and wealth inequality in capital market development in Mozambique and Eswatini).

9 See for instance Mark Grinblatt, Matti Keloharju and Juhani Linnainmaa, 'IQ and Stock Market Participation' (2011) 66 Journal of Finance 2121 (noting a high correlation between IQ and stock market participation); Maarten Van Rooij, Annamaria Lusardi and Rob Alessie, 'Financial Literacy and Stock Market Participation' (2011) 101 Journal of Financial Economics 449 (noting that people with lower levels of financial literacy purchase less stocks).

10 Luigi Guiso, Paola Sapienza and Luigi Zingales, 'Trusting The Stock Market' (2008) 63 Journal of Finance 2557 (noting the correlation between levels of trust in a society and stock market participation).

11 See for instance Piesse and Hearn (n 5) 40 (noting the lack of a stock market culture in many African countries and the continued preference for holding physically held commodities as a store of wealth).

12 See Chapter 5, section 5.1.

In this universe, commentators have argued that capital market integration in sub-Saharan Africa can improve market participation by increasing the number and variety of securities that investors (both retail and institutional) will be exposed to and broadening the pool of available investors willing to purchase those securities.[13] Issuers issuing securities on the broader integrated markets are therefore exposed to more (and potentially better capitalised) investors, whilst investors are exposed to more (and potentially better quality) issuers.[14] The interaction of these factors ought to ameliorate the current problem of small and fragmented markets, spur increased participation and hence improve liquidity.[15] Improved liquidity in the integrated market in turn encourages more companies to list on a scale not possible on their domestic markets, thus improving market depth.

6.1.2. Risk Diversification and Market Efficiency

Risk diversification is one of the key arguments in favour of capital market integration in sub-Saharan Africa, and indeed, globally.[16] Capital markets in sub-Saharan Africa

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13 Irving (n 5) 8, 'By pooling the resources of fledgling and fragmented capital markets, regionalization could boost liquidity and the ability of these markets to mobilize local and international capital for private sector and infrastructural development. Investors would gain access to a broader range of shares and issuers would gain access to a larger number of investors'.

14 Similar arguments have been canvassed in support of the Capital Markets Union in Europe. Here, the challenges of predominantly bank-based finance, fairly illiquid bond and private placement markets and low levels of trading on mid-sized listed firms shares combine to further justify the move towards deeper capital markets integration. See for instance Commission Staff Working Document (n 6) (providing an economic justification for the Capital Markets Union and discussing low liquidity in medium-sized firms in Europe and the impact of high frequency trading in reinforcing the attractiveness of larger-sized companies in Europe). See also Bhatia and others (n 6) (noting the risk of increased illiquidity of European securities after Brexit).

15 Yartey and Adjasi (n 5), 'Integration is expected to solve the fragmentation problems of African stock exchanges since the number of national exchanges in an integrated market reduces. This promotes cost efficiency, and improves liquidity and price discovery'.

16 Irving (n 5), 8 (noting the diversification benefit to investors who are better able to hold a more diversified portfolio of securities in an integrated market); Masafumi Yabara, *Capital Market Integration: Progress Ahead of the East African Community Monetary Union* (IMF 2012) (noting improved risk diversification as a benefit of capital market integration in Eastern Africa). For a

generally show very little correlation with regional[17] and international markets.[18] On the other hand, they have been rather fragmented and isolated from both neighbouring and global markets. This lack of correlation provides investors an opportunity to reduce the risk profile of their portfolios by diversifying their holdings.

Thus, by permitting securities from different countries to trade across borders in an integrated market, investors in one country can hold securities issued by foreign issuers, and by so doing, reduce their risk profile through diversification. Reduced risk ought to lead to improved returns, which in turn, should stimulate increased market participation and development.

Similarly, it has been argued that integration improves the flow of information in the market, thus improving informational efficiency.[19] Better informational efficiency in

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discussion of risk diversification as a justification for deeper financial integration in Europe, see Diego Valiente, 'CMU and the Deepening of Financial Integration' in Daniel Busch, Emilios Avgouleas and Guido Ferrarini (eds), *Capital Markets Union in Europe* (OUP 2018) (noting the role of the Capital Markets Union in Europe as a 'risk absorber' by facilitating better risk sharing over space and over time); Bhatia and others (n 6) (arguing that capital market integration would support a healthy diversity in European finance, at least through the increased risk-absorbing properties of equity claims).

17 See for instance Aklilu Gebrehiwot and Mustafa Sayim, 'Financial Market Integration: Empirical Evidence from the COMESA' (2015) 5 Business and Economic Research 242 (arguing that the level of financial integration in the Common Market for Eastern and Southern Africa is not significant and most markets in the region remain fragmented). See also Grakolet Gourene, Pierre Mendy and Lancine Diomande, 'Beginning an African Stock Markets Integration? A Wavelet Analysis' (2019) 34 Journal of Economic Integration 370 (arguing that the level of integration of African stock markets remains low despite integration-focused reforms).

18 Gail Ncube and Kapingura Forget Mingiri, 'Stock Market Integration in Africa: The Case of the Johannesburg Stock Exchange and Selected African Countries' (2015) 14 International Business & Economics Research Journal 367 (arguing for the presence of diversification opportunities owing to the low levels of integration between African and international stock markets). But see Abdullahi Ahmed and Rui Huo, 'China–Africa Financial Markets Linkages: Volatility and Interdependence' (2018) 40 Journal of Policy Modeling 1140 (arguing that financial markets in Africa are increasingly becoming integrated with markets in China and that the Chinese stock market now plays an influential role in African markets given the magnitude of China's investments in Africa).

19 In theory, information should flow better within one integrated market than it would across several fragmented markets. See Ntim (n 5) (arguing that the core reason why African stock markets should support integration is to improve the informational efficiency of their markets).

integrated markets ought to support more accurate price discovery, and thus, overall market efficiency.

6.1.3. Economies of Scale

Running a well-functioning securities market is not easy. Modern markets require rules to regulate the ever-evolving conduct of market participants; technology to adequately monitor the market and ensure compliance with regulation; sophisticated, trained and well-provisioned regulators with the skills to detect market infractions and incentives to take enforcement action; and a properly functioning and sophisticated judicial system to clearly and quickly adjudicate over disputes.[20] This leads to potentially high operational costs, which many small markets are simply unable to commit to.[21] Indeed, this problem also persists in some of the larger markets in the region.[22]

On this basis, several commentators have argued that integration of the fragmented markets will provide economies of scale and scope by pooling together the otherwise small resources of the various states to build a market system that is larger and better functioning than the summation of its fragmented parts.[23] These economies are expected to benefit

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20 See generally Bernard Black, 'The Legal and Institutional Preconditions for Strong Securities Markets' (2000) 48 UCLA Law Review 781 (itemising a list of legal and institutional requirements to support the proper functioning of securities markets).

21 See Chapter 2 above noting several fringe markets in sub-Saharan Africa without a functioning website; Onyuma (n 5) (noting that the Zambian Stock Exchange abandoned a proposed link up with the Johannesburg Stock Exchange as it was not able to raise up the US$2 million required for the project).

22 See Chapter 1, n 80 and accompanying text and Chapter 5, section 5.3.3.1.

23 For scale economies arguments in Africa, see Irving (n 5) 21 (arguing in favour of setting up the Johannesburg Stock Exchange as a single securities market hub for Eastern and Southern Africa because of the economies of scale, cost and efficiency benefits it will bring); Okeahalam (n 5) 97 'Economies of scope and scale derived from mergers and strategic alliances of financial exchanges in SADC would reduce unit cost and increase the likelihood of better service for traders and

issuers (who are exposed to more investors), traders (who can trade in a wider variety of instruments than traditionally provided for in their domestic markets), investors (who are exposed to a wider variety of issuers) and overall, the general quality of regulators and institutions in the region.[24]

6.1.4. Visibility and Credibility

As a consequence of their small size, fragmentation, illiquidity, infrequent listing activity and little contribution to the real economy, many markets in sub-Saharan Africa lack the visibility and credibility (regionally and internationally) to attract good quality issuers to raise capital on their markets. Lack of visibility and credibility also reduces foreign investment in these markets given that, although opportunities for diversification exists, foreign investors do not have sufficient incentives to invest in these fringe markets.

By integrating, it has been argued that these fragmented markets can piggyback on the depth and liquidity of larger neighbouring markets to improve their own visibility and credibility. For example, whilst Togo or Guinea-Bissau in West Africa may struggle to attract good quality issuers to list on their markets, or attract portfolio investments from foreign investors, by integrating with larger, geographically proximate markets (as they did to create the *Bourse Regionale des Valeurs Mobilieres* (BRVM)) these fringe markets can

investors'. For a similar justification for market integration in Europe on the ground of scale economies, see European Commission Staff Working Document (n 6).

[24] Ekpo and Chuku (n 1) 41, 'Overall, it is expected that financial integration would enable participating regional economies take advantage of the 'systemic scale economies' that accrue to larger financial systems. These scale effects emanate from several angles, including the expansion of the spectrum of opportunities for financial intermediation; the creation of larger markers, which makes it more cost effective to improve financial infrastructure; the efficiency effects that arise from the increase in the number of financial sector participants… and lastly, the increased capacity to withstand financial crisis'.

improve their visibility and hence their ability to attract better quality issuers and investors. Increased visibility also benefits issuers listed in these integrated markets as it strengthens their name recognition and enhances the image of their products and services outside of their domestic markets.[25] In addition, integrated markets are larger than previously fringe markets, and given the ability of integrated markets to draw from a larger and more diverse pool of talents and resources, they ought to be more effective in monitoring market participants. This, in turn, should make integrated markets more credible and as such improve investor trust and participation.[26]

6.2 African Capital Markets Integration in its Political Context

Viewed properly, the economic case for capital markets integration in Africa cannot be divorced from its political context. In reality, the small size of most African capital markets reflects the small size of their populations[27] and economies,[28] and the fragmentation of the markets from regional and global markets reflects their marginalization from both regional

25 See Onyuma (n 5) (arguing that integrated markets will improve the name recognition of issuers and the image of their products and services across the region or the continent). See also Gourene, Mendy and Diomande (n 17) 371 (noting an increase in visibility among global investors as a benefit for the integration of African securities markets).

26 Ntim (n 5) (arguing that integrated markets will be better at monitoring market participants and detecting insider trading and other market infractions).

27 For instance, as at 2008, 12 of the countries in sub-Saharan Africa had a population of less than 2 million people. See Trudi Hartzenberg, 'Regional Integration in Africa' (2011) World Trade Organization Staff Working Paper ERSD-2011-14) <https://www.econstor.eu/bitstream/10419/57595/1/669412368.pdf>.

28 See Patrick Honohan, 'Finance in Africa: A Diagnosis' in Marc Quintyn and Geneviève Verdier (eds), *African Finance in the 21st Century* (IMF 2010) 34, 'it is evident that the small absolute size of the typical African financial system is largely a reflection of the small size of the economies'. As at 2010, 41 of the countries in sub-Saharan Africa had a GDP of less than 30 billion dollars, including 28 with a GDP of less than 10 billion dollars.

and global trade and policy.[29] These problems of small populations, economies and fragmentation are compounded by the number of landlocked states without access to seaports and well-functioning transportation infrastructure, which significantly increases the cost of regional trade.[30]

The policy response to these issues has been to pursue integration between states as a solution to the problem of small, fragmented and landlocked economies. Although integration initiatives have a long history in Africa,[31] regional integration gained momentum in the wake of the independence movements of the 1950s and 1960s and the establishment of the Organization of African Unity (OAU) in 1963. Ideologically, the debates around regionalisation revolved around two competing viewpoints between two of Africa's foremost nationalists: Kwame Nkrumah (the first Prime Minister and President of Ghana) and Julius Nyerere (a former Prime Minister and President of Tanzania). President Nkrumah supported a so-called 'maximalist' approach which called for the entire continent to unite into a political federation, whilst President Nyerere supported the 'gradualist' approach calling for a more gradual form of integration, utilising the continent's sub-regions as the foundations.[32] Ultimately, the gradualists prevailed in the regional integration debates.[33]

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29 See United Nations Economic Commission for Africa, *Economic Report on Africa 2017* (UN Economic Commission for Africa, 2017) 17 (noting that Africa's share in global merchandise exports fell to 2.4% in 2015).

30 See for instance Trudi Hartzenberg (n 27) 3 (estimating that whilst it will cost US$1,500 to ship a car from Japan to Abidjan (Ivory Coast), shipping the same car from Addis Ababa (Ethiopia) to Abidjan will cost US$5,000).

31 The first regional integration groupings in Africa were the South African Customs Union (established in 1910) and the East African Community (EAC) (established in 1919).

32 See generally Thonke and Spliid (n 1) 45-46.

33 ibid.

The mid-1970s to the early 1980s saw a strong wave of regional integration activity and the establishment of some RECs.[34] However, perhaps the most important regional initiatives coming from this period were the Lagos Plan of Action (LPA) and the Final Act of Lagos (FAL).[35] Both the LPA and the FAL were the products of 'an overwhelming necessity to establish an African social and economic order primarily based on utilizing to the full the region's resources in building a self-reliant economy'.[36] The core policy thrust of the LPA and the FAL was the creation of an African Common Market by the year 2000, and the establishment of an African Economic Community on the basis of a treaty to be subsequently concluded.[37]

This treaty for the establishment of an African Economic Community was concluded in the second strong wave of integration activities which took place in the 1990s.[38] On 3 June 1991, African heads of states adopted the Treaty on the Establishment

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34 Tsefaye Dinka and Walter Kennes, 'Africa's Regional Integration Arrangements: History and Challenges' (European Centre for Development and Policy Management Discussion Paper No 74, September 2007) <https://ecdpm.org/wp-content/uploads/2013/11/DP-74-Africa-Regional-Integration-Arrangements-History-Challenges-2007.pdf>. This wave saw the establishment of the Economic Community of West African States (ECOWAS) in 1975, and the Southern African Development Co-ordinating Conference (SADCC) which morphed into the Southern African Development Community (SADC) in 1992 after South Africa joined.

35 Lagos Plan for the Economic Development of Africa, 1980-2000, OAU 1981, published by the International Institute for Labour Studies, Geneva.

36 United Nations Economic and Social Council and United Nations Economic Commission for Africa, '*Appraisal and Review of The Impact of The Lagos Plan of Action on The Development and Expansion of Intra-African Trade*', UN ECA Conference of African Ministers of Trade Meeting (11th session April 15–19, 1990; Addis Ababa, Ethiopia).

37 Final Act of Lagos, Article II.A. See also Rose D'Sa, 'The Lagos Plan of Action - Legal Mechanisms for Co-operation between the Organisation of African Unity and the United Nations Economic Commission for Africa' (1983) 27 Journal of African Law 4 (noting the ambitious proposal for the creation of an African Common Market as the culmination of proposals to achieve economic integration on a continent-wide basis).

38 Dinka and Kennes (n 34). This second wave also saw the re-establishment of the EAC in 1999.

of an African Economic Community (AEC).[39] The Treaty contemplates the creation of the AEC in a stepwise sequence of six stages, over a period not exceeding 34 years and leading to a continent-wide Economic and Monetary Union.[40] The integration plan recognises eight RECs as building blocks of the AEC.[41] In reality, progress towards integration has been uneven across the RECs.[42]

Notwithstanding the slow progress towards integration, recent developments have brought the integration agenda back to the fore of policy debates in Africa. Following the adoption of the Abuja Treaty in 1991, African states have reaffirmed the ideals of integration and the move towards the AEC in the Constitutive Act of the African Union[43] and the 2012 Boosting Intra-African Trade Action Plan.[44] Of far greater significance, on 21 March 2018, African heads of states signed the AfCFTA. Covering over 1.2 billion people and over US$3trillion in GDP, the AfCFTA is lauded as the largest free trade area

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39 Treaty Establishing the African Economic Community (adopted on 3 June 1991, entered into force on 12 May 1994) ('Abuja Treaty').

40 Abuja Treaty, art. 6. The integration process provided in the Treaty is as follows: Stage 1 – Strengthen RECs (expected completion: 1999); Stage 2 – Eliminate tariff and non-tariff barriers (expected completion: 2007); Stage 3 – Establish a Free Trade Area and Customs Union in each REC (expected completion: 2017); Stage 4 – Establish a Continental Customs Union (expected completion: 2019); Stage 5 – Establish a Continental Common Market (expected completion: 2023); Stage 6 – Establish a Continental Economic and Monetary Union (expected completion: 2028).

41 These are the EAC, the Common Market for Eastern and Southern Africa (COMESA) SADC, ECOWAS, Intergovernmental Authority on Development (IGAD), Arab Maghreb Union (AMU), Economic Community of Central African States (ECCAS) and Community of Sahel-Saharan States (CEN-SAD).

42 United Nations Economic Commission for Africa and others, *Assessing Regional Integration in Africa* (UN Economic Commission for Africa, Addis Ababa, 2019) 1.

43 Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3 (Constitutive Act of the AU), preamble 2.

44 Action Plan for Boosting Intra-African Trade (endorsed by Heads of States and Government of the African Union at the 18th Ordinary Session of the Heads of States in Addis Ababa, January 2012), para 27 'Indeed if the objectives of the African Union of People and a Pan-African Economic Community, as encapsulated in the Constitutive Act of the African Union, are to be achieved; regional and continental factor market integration must be accorded some priority'.

in the world since the creation of the World Trade Organization.[45] The speed of adoption and ratification of the AfCFTA is unprecedented in the history of the African Union,[46] and sends a clear message that African political leaders are actively in support of greater economic cooperation and integration.

What does the above mean for capital markets in the region? Quite apart from the economic arguments discussed above, and without detracting from the remarkable strides achieved, as explained further below, by some capital market integration initiatives in Africa (most notably the BRVM), capital markets integration must be understood as an important part of a broader economic integration project.[47] This broader integration project significantly influences the trajectory and progression of the capital markets integration agenda. Given the clear move towards integration, the important question is not whether African capital markets should pursue integration, but how best to do so to achieve optimal results. Since the RECs act as the building blocks of integration, this calls to question how they have pursued capital markets integration in their respective regions, and how successful they have been. This is addressed in the next Part.

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45 Kanzanira Thorington, 'African Continental Free Trade Area: A New Horizon for Trade in Africa' (*Council on Foreign Relations*, 10 June 2019) <https://www.cfr.org/blog/african-continental-free-trade-area-new-horizon-trade-africa>.

46 By 1 April 2019 (just over a year after its signing), the AfCFTA had met the threshold 22 ratifications for its entry into force. See UN Economic Commission for Africa (n 42). As at July 2019, 54 of the 55 states in Africa had signed the AfCFTA (with the exclusion of Eritrea), 27 of which had deposited instruments of ratification.

47 Indeed, some scholars have supported the move toward a capital market integration on the basis that it will promote the broader economic integration programme. See Irving (n 5) 9 (arguing that harmonization of securities market regulation and trading practices can strengthen integration in other policy areas such as taxation, accounting standards and corporate governance). See also Onyuma (n 5) 103-104 'An integrated stock market can be an integral part of the deepening and widening the economic integration process in Africa. It will promote the movement of capital across the continent, increase investment opportunities, encourage optimum financing for firms irrespective of where they reside, and increase the attractiveness of Africa as an investment area both by local and foreign investors'.

6.3. Progress Towards Capital Market Integration in the Regional Economic Communities in Sub-Saharan Africa

In this Part, I examine the progress towards capital markets integration in sub-Saharan Africa. For depth of analysis, I examine integration along four dimensions: the model of integration adopted; the progress towards harmonization of rules; issuer cross-listing; and cross-border trading.[48] Sub-Saharan Africa is made up of four geographical regions: Eastern, Western, Central and Southern Africa. Existing RECs operating in sub-Saharan Africa however do not follow this neat subdivision based on geographical proximity. On the contrary, they often straddle different geographical sub-regions[49] and exhibit significant membership overlap.[50] For clarity of analysis, I adopt the classification into geographical regions and examine the major REC operating in each region i.e. the EAC, ECOWAS and SADC along the above dimensions. Section 4 extrapolates challenges faced by all three regions in their move towards capital markets integration.

6.3.1. Capital Markets Integration Models in Sub-Saharan Africa

Although the treaties establishing the RECs provide for ambitious integration plans, the regions have not adopted a single model for capital markets integration. This is not necessarily bad, and there do not seem to be good reasons to recommend a specific

48 In the three Appendices to this Chapter at the end of this thesis, I discuss the capital markets integration agenda in each of the RECs individually (and in greater detail) to provide the reader with additional background information and context.

49 For example, the Common Market for Eastern and Southern Africa (COMESA) is made up of countries in both Eastern and Southern Africa.

50 The problem of membership overlap between African RECs is well documented in the literature. See for instance Jaime de Melo and Yvonne Tsikata, 'Regional integration in Africa: Challenges and Prospects' in Célestin Monga and Justin Yifu Lin (eds), *The Oxford Handbook of Africa and Economics*, vol 2 (OUP 2015).

integration model to be applied by all RECs across sub-Saharan Africa irrespective of regional differences. Intuitively, the optimal model to be adopted in each region will be influenced by various factors including the size and dominance of neighbouring stock exchanges,[51] region-specific political and historical issues, the capacity and motivation of domestic and regional institutions, the level of political commitment, and economic and socio-political factors playing out in the member states.

States and public markets pursuing an integration policy have a menu of options to select from. [52] First, they can merge existing public markets and regulators into a single regional market and single regulator, in a '*fully integrated*' model.[53] A fully integrated model will require a '*comprehensive harmonization*' resulting in uniform laws applied across the integrated market.[54] Second, they can maintain separate public markets and regulators but aim at harmonizing rules, facilitating cross-border activity, increasing cooperation in supervision and enforcement, and promoting mutual recognition of actions of other regional regulators (what we can call the '*EU Model*').[55] Third, public markets can

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51 For instance, as argued in this Chapter, the overwhelming size of the JSE relative to other stock markets in the SADC partly accounts for the resistance of other smaller exchanges in the SADC to the full integration of SADC exchanges.

52 United Nations Economic Commission for Africa and Others, *Assessing Regional Integration in Africa: Towards Monetary and Financial Integration in Africa* (UN Economic Commission for Africa, 2008) 271-273.

53 This is the model adopted by the integrated markets in sub-Saharan Africa i.e. the BRVM and the BVMAC.

54 Baum (n 6) 100, 'comprehensive harmonization resulting in uniform law may be attempted on the government level if a completely integrated market is to be achieved'. Professor Baum expresses scepticism as to whether comprehensive harmonization leading to uniform law is a realistic opton for securities regulation on an international (as opposed to regional) scale.

55 This is an oversimplification of the financial markets model adopted in the European Union. See the discussion in section 6.5.3 below on the evolution of the EU Model and the drive towards greater integration of the EU capital markets. At the domestic level, this is similar to the model adopted in Canada with each of the 13 provinces maintaining separate public markets and securities regulators whilst pursuing supervisory convergence to promote uniformity. For an overview of the securities

merge and adopt a single rulebook for listing, trading, clearing and settlement, but remain subject to licensing and supervision by domestic regulators (the '*Euronext Model*');[56] Fourth, they can remain separate and independent of each other but promote cross-border market activity by facilitating cross-listing and cross-border trading of listed securities.

Table 6.1 summarises the integration model adopted in the three RECs:

Integration Model	EAC	ECOWAS	SADC
Full Integration	No	Partial	No
EU Model	Yes	No	No
Euronext Model	Yes	No	No
Cross-Listing	Yes	Yes	Yes
Cross-border trading	Yes	Yes	Yes

Table 6.1 - Model of Capital Markets Integration adopted by various RECs in sub-Saharan Africa[57]

As summarised in the table above, all three RECs are pursuing drives to improve cross-listing and cross-border trading of listed securities.[58] In addition, as explained in greater detail in the appendix to this Chapter, neither the ECOWAS nor the SADC currently have plans to integrate towards the EU or Euronext models, and the SADC currently has no plans to move towards full integration of public markets. On the other hand, for political

regulation architecture in Canada, see Pierre Lortie, 'Securities Regulation in Canada at a Crossroads' (2010) 3 The School of Public Policy Publications Research Papers 1.

56 This is again a simplification of the Euronext exchange model. Euronext is a pan-European stock exchange created by a merger of the stock exchanges in Amsterdam, Brussels, Lisbon and Paris. This created an integrated marketplace and clearing and settlement system for investors from all four countries to buy and sell listed securities of companies from the four countries. However, the listed firms and the securities exchanges continue to be regulated by their home regulators. For a discussion on the Euronext exchange, see Grace Pownall, Maria Vulcheva and Xue Wang, 'The Creation and Segmentation of the Euronext Stock Exchange: A Solution to the Inadequacy of National Securities Regulators?' (2015) 29 Accounting Horizons 853.

57 I use the word 'partial' when at least a part of the REC is already moving in the stated direction.

58 I discuss cross-listing and cross-border trading separately and in greater detail in sections 6.3.3 and 6.3.4 of this Chapter.

and historical reasons, ECOWAS currently has a capital markets structure where Francophone West African countries operate a fully integrated market (the BRVM) and Anglophone West African countries operate independent markets.[59]

In contrast, although countries in the EAC expressed an intention to integrate their capital markets even before the re-establishment of the EAC itself,[60] the EAC does not appear to be pursuing a strategy of full integration. On the other hand, the EAC Treaty enjoined Partner States to promote the establishment of a regional stock exchange within the EAC with trading floors in each Partner State[61] but maintain national authorities and securities regulators which should adhere to harmonised stock trading systems,[62] harmonise and implement common standards for market conduct[63] and cooperate with each other through mutual assistance and information sharing.[64] Thus, the regional stock exchange is to operate via trading floors in the different Partner States which are to maintain separate securities regulators applying increasingly harmonized rules.

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59 See Appendix 6.3 for a discussion on the creation of sub-regional monetary unions in the ECOWAS and the impact of this on the creation of the BRVM as the integrated stock exchange for Francophone West Africa.

60 Historically, Eastern African capital markets have always been closely linked. Indeed, the Nairobi Stock Exchange operated as the regional exchange for the Eastern African British Protectorate (comprising Kenya, Uganda and Tanzania) from its establishment in 1954 until the initial collapse of the EAC in 1977 when all non-Kenyan companies were delisted and nationalised in their respective countries. In 1997, following the establishment of independent stock exchanges in Tanzania and Uganda and prior to the re-establishment of the EAC itself, the securities regulators of Kenya, Tanzania and Uganda signed a Memorandum of Understanding establishing the Eastern African Member States Securities Regulatory Authorities (EASRA) as the coordinating body for capital markets integration and co-operation in Eastern Africa.

61 Treaty For the Establishment of the East African Community (adopted 30 November 1999, entered into force 7 July 2000) 2144 UNTS 255 (EAC Treaty), art 85(h).

62 ibid, art. 85(i).

63 ibid, art. 85(e).

64 ibid, art. 85(g).

6.3.2. Harmonization of Securities Regulation

Institutions in the SADC and EAC (but not ECOWAS) have pursued strategies for the harmonization of their securities regulation. The current state of securities law harmonization in the three RECs is presented in the table below:

Harmonization Initiative	EAC	ECOWAS	SADC
Formal Harmonization	Yes	No	Limited
Bottom-up convergence	Limited Evidence	No Evidence	Limited Evidence
Presence of 'Federal' securities law	Yes	No	No

Table 6.2 - Harmonization of Securities Regulation in sub-Saharan Africa

At present, there are no initiatives to drive formal ECOWAS-wide securities law harmonization.[65] On the other hand, there is evidence of formal harmonization of securities regulation in both the SADC and the EAC. Following its establishment and formal recognition as an SADC institution, the Committee of SADC Exchanges (COSSE) drew a plan to get all member exchanges to harmonize their listing requirements based on the principles of the JSE Listing Requirements,[66] which was fully implemented by 2000.[67] For its part, the EAC has been the most explicit REC in its drive towards formal securities law harmonization and the EAC Treaty explicitly enjoins Partner States to pursue formal harmonization of securities regulation.[68]

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65 It must be noted that formal harmonization of securities regulation in BRVM member states has been achieved as a result of the full integration model adopted by these countries.

66 Palesa Shipalana and Mopeli Moshoeshoe, 'Bridging the Divide: Integrating SADC's Capital Markets' (South African Institute of International Affairs, Occasional Paper 295, April 2019) <https://saiia.org.za/research/bridging-the-divide-integrating-sadcs-capital-markets/.

67 Irving (n 5) 11.

68 See EAC Treaty, art. 85. See also Appendix 6.2 for additional details on securities law harmonization in the EAC, including the regional institutions overseeing the process.

Even without formal harmonization, bottom-up convergence of securities regulation can occur as more companies voluntarily opt to subject themselves to those rules through cross-listing.[69] Again, there is no evidence of bottom-up harmonization in the ECOWAS given the very limited amount of cross-listing within the ECOWAS. Although there are more cross-listed firms in the EAC, there is very limited evidence that cross-listing is driving bottom-up harmonization of securities regulation. From the regional cross-listing data examined in Chapter 2, Kenya is the single largest exporter of cross-listed firms in the EAC,[70] and the destination of regionally cross-listed Kenyan firms is better explained by these firms seeking to improve their regional presence in the countries where they operate, than by the superiority of Ugandan, Rwandan or Tanzanian securities law and enforcement.[71] Similar dynamics arise from the regional cross-listing data in the SADC. Here, South Africa accounts for most firms pursuing a regional cross-listing in the SADC[72] and the destination of regionally cross-listed firms within the SADC is better explained by

69 On functional convergence of securities law through cross-listing, see for instance John Coffee Jr, 'Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications' (1998) 93 Northwestern University Law Review 641. See also Ronald Gilson, 'Globalizing Corporate Governance: Convergence of Form or Function' (2001) 49 The American Journal of Comparative Law 329.

70 Indeed, Umeme Limited of Uganda is the only non-Kenyan EAC company pursuing a regional cross-listing.

71 On this, see Chapter 2, section 2.3.3. See also section 6.4.2.2 below (arguing for a correlation between regional trade and regional cross-listing). In any event, the listing rules of the Ugandan stock exchange as well as the trading rules of both the Ugandan and Tanzanian Stock Exchanges have been harmonized around equivalent Kenyan rules. See Iwa Salami, *Financial Regulation in Africa: An Assessment of Financial Integration Arrangements in African Emerging and Frontier Market* (1st edn, Routledge 2012), 87. It is therefore clear that Kenyan firms are not pursuing cross-listings to opt into better quality securities law and enforcement.

72 20 of the 36 regionally cross-listed firms within the SADC are incorporated and operating in South Africa.

managers seeking to raise capital from markets in which they operate than by the superiority of the legal regime in the country of destination.[73]

Finally, neither the SADC nor ECOWAS attempt to lay down rules of securities regulation at the regional ('federal') level. On the contrary, the EAC Council has issued several EAC-wide directives[74] on a number of matters pertaining to the securities markets including public offers of equity securities,[75] public offer of debt securities,[76] public offer of asset backed securities,[77] collective investment schemes,[78] admission to trading on

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73 See also Chapter 2, section 2.3.3. Indeed, although Namibia is the largest net importer of cross-listings in the SADC (accounting for 19 inward cross-listings), 15 of Namibia's inward cross-listings were from companies incorporated and operating in South Africa. As noted above, (see note 66 above and accompanying text) Namibia, like other SADC countries has harmonised its listing requirements in accordance with the requirements of the JSE. Furthermore, historically, the King Report on Corporate Governance (the South African corporate governance code) was applied directly in Namibia and the current Namibian code of corporate governance is substantially based on the King Report. See Meyer van den Berg and van Zijl, 'The Corporate Governance Review - Edition 9: Namibia' (The Law Reviews, April 2019) <https://thelawreviews.co.uk/edition/the-corporate-governance-review-edition-9/1189459/namibia>. It is therefore clear that South African firms cross-listing into Namibia are not doing so to opt into better quality securities law and enforcement.

74 For a long time, Directives were also the main tool used for securities law harmonization in the European Union. See generally Section 6.5.3.1 below.

75 Directive EAC/EX/CN29/Directive 17 of the Council of Ministers of (29 April 2014) on Public Offers (Equity) in the Securities Market, Legal Notice No. EAC/23/2015 (EAC Council Directive on Public Offer of Equity).

76 Directive EAC/EX/CN29/Directive 17 of the Council of Ministers of (29 April 2014) on Public Offers (Debt) in the Securities Market, Legal Notice No. EAC/24/2015 (EAC Council Directive on Public Offer of Debt).

77 Directive EAC/EX/CN29/Directive 17 of the Council of Ministers of (29 April 2014) on Asset-Backed Securities, Legal Notice No. EAC/26/2015 (EAC Council Directive on Asset-Backed Securities)

78 Directive EAC/EX/CN29/Directive 17 of the Council of Ministers of (29 April 2014) on Collective Investment Schemes, Legal Notice No. EAC/21/2015 (EAC Council Directive on Collective Investment Schemes).

secondary exchanges,[79] regional listing in the securities markets[80] and corporate governance for securities markets intermediaries.[81] Like EU directives, EAC directives do not have direct effect but Partner States are required to bring their domestic laws into conformity with the provisions of the directives. This raises two EAC-specific legal questions: Who should make securities law in the EAC? and have the EAC Directives led to uniformity of EAC securities law?

The question of the proper maker of EAC securities law mirrors similar questions asked in the context of EU securities regulation, where there is a recognition that 'federal' law may be justified for the purpose of removing barriers to cross-border activity and that harmonized rules can play a useful role in securities regulation to provide legal certainty, facilitate cross-border capital flows and reduce transaction and compliance costs for issuers raising capital in the common market.[82] The same is easily true of the EAC and 'federal' securities law harmonizing rules on cross-border securities activity in the EAC[83] may be justified on the basis of enhancing legal certainty, facilitating cross-border capital raising and reducing legal and compliance cost.

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79 Directive EAC/EX/CN29/Directive 17 of the Council of Ministers of (29 April 2014) on Admission to Trading on a Secondary Exchange, Legal Notice No. EAC/22/2015 (EAC Council Directive on Admission to Trading).

80 Directive EAC/EX/CN29/Directive 17 of the Council of Ministers of (29 April 2014) on Regional Listings in the Securities market, Legal Notice No. EAC/25/2015 (EAC Council Directive on Regional Listing)

81 Directive EAC/EX/CN29/Directive 17 of the Council of Ministers of (29 April 2014) on Corporate Governance for Securities Market Intermediaries, Legal Notice No. EAC/27/2015 (EAC Council Directive on Corporate Governance).

82 As discussed in section 6.5.3 below, the EU has continued to drive increased harmonization of EU securities law and in recent times, has converted important securities law directives into regulations to promote legal certainty and predictability.

83 See the EAC Directives in n 75-80 above.

On the question whether the 2014 EAC directives have in fact led to the uniformity of securities law in the EAC, as Professors Enriques and Gatti have argued, uniformity of rules can only be achieved through substantive law harmonization measures that are 'comprehensive, maximal and leave no room for discretion at the Member State level'.[84] Applying this test to the core EAC securities law directives,[85] although there is greater convergence of rules of securities regulation in the EAC, uniformity has still not been achieved in spite of the expanding scope of 'federal' regulation.[86]

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84 Enriques and Gatti, 'Is There a Uniform EU Securities Law After the Financial Services Action Plan'

85 The EAC Council Directive on Public Offer of Equity; the EAC Council Directive on Public Offer of Debt; the EAC Council Directive on Regional Listing; and the EAC Council Directive on Corporate Governance.

86 Both the directives on the public offer of equity and the public offer of debt (which provide the disclosure and other requirements for publicly offering equity and debt securities in more than one Partner State) are partial as they do not provide liability rules, but simply require Partner States to ensure that 'appropriate administrative measures can be taken or administrative sanctions imposed against the persons responsible, where the provisions adopted in the implementation of this Directive have not been complied with'. Similarly, issuers are free to select in the offering memorandum, the applicable law and mode of dispute resolution to be applied in a dispute between issuers and investors, leading to divergence in practice on the dispute resolution frameworks investors will be faced with to enforce their rights. For its part, although the EAC Council Directive on Regional Listing (harmonising standards on listing of equity and debt securities arising from a regional offer) are mandatory, it is partial in scope, in that it only applies to regional offerings of securities, thus permitting divergence in rules applicable to domestic offerings. In addition, the directive preserves the ability of national regulators to apply idiosyncratic rules in the interpretation of the directive. Thus, whilst article 10 of the Directive requires prospective issuers seeking regional listings not to be insolvent and to have adequate working capital, it does not provide rules for determining what level of working capital will be considered sufficient or when a company will be considered insolvent for the purpose of the directive, thus permitting idiosyncratic interpretation and application of the principles. The EAC Council Directive on Corporate Governance is partial given that it only applies to market intermediaries approved by a competent authority in an EAC Partner State to deal in securities or other transactions incidental to dealing in securities. It therefore is inapplicable to issuers and listed firms, who are subject to domestic corporate governance requirements.

6.3.3. Cross-Listing

In Chapter 2 of this thesis, I presented data on securities cross-listing in sub-Saharan Africa[87] and discussed the implications of this data to the debates on securities regulation as pertains to the region.[88]

As it relates to capital markets integration, the reality from the cross-listing data is that, yet again, ECOWAS lags behind the EAC and SADC in its integration agenda.[89] For its part, the EAC has made significant progress in encouraging regional cross-listing. The interesting fact from the cross-listing data in Eastern Africa is that whilst only few companies have decided to cross-list, the ones that do often pursue multiple cross-listings across the EAC which often reflects the regional/continental scale of their operations. Thus, there are currently 3 companies cross-listed on all four stock exchanges operating in the EAC,[90] and 4 companies cross-listed on three of the exchanges.[91] Interestingly, all seven companies with multiple cross-listings of this nature are incorporated in Kenya, again showing Kenya's dominant position in the EAC and perhaps suggesting that companies in other EAC Partner States have not taken full advantage of the EAC harmonization initiatives.[92] Finally, the SADC has been the most successful of the RECs in promoting

87 See generally Chapter 2, section 2.3.1 and 2.3.2.

88 See Chapter 2, section 2.3.3.

89 ECOWAS has only two firms with regionally cross-listed securities, compared to 9 in the EAC and 36 in the SADC.

90 These are Uchumi Supermarket Limited, Nation Media Group and Kenyan Commercial Bank Group Limited. See Table 4 to the appendix to Chapter 2.

91 These are East African Breweries Limited, Equity Group Holdings Limited, Jubilee Holdings Limited and Kenya Airways Limited.

92 The EAC Directive on Regional Listing (see n 80) seeks to harmonize listing standards of stock exchanges across the EAC with a view to allowing multiple or simultaneous listings. The Directive (amongst others) sets out minimum eligibility criteria for EAC issuers contemplating a regional

regional cross-listings. However, as argued above,[93] there is little evidence that cross-listing is driving bottom-up harmonization of securities regulation in the EAC and SADC.

6.3.4. Cross-Border Trading

Even where securities are not cross-listed into foreign markets, foreign investors may have access to these securities if their brokers have access to the markets where the securities are trading. In this wise, even where cross-listing is low, facilitating access by brokers in one state to markets in another state can reduce the cost of cross-border trading in securities listed in other states. This offers issuers a potentially more diversified investor base, and offers investors access to a potentially more diversified portfolio of listed securities.

All three RECs have made deliberate efforts to facilitate cross-border trading by foreign investors of securities listed in domestic markets. Thus, stock exchanges in the ECOWAS and SADC now grant indirect access to their trading facilities to stockbrokers licensed in other member states of the region. This makes it possible for stockbrokers in one member state to trade in securities listed in another member state through stockbrokers licensed in that other state.[94] Similarly, EAC stockbrokers who wish to provide securities services in other Partner States can now do so on the basis of their home country

listing, permits issuers to pursue simultaneous listings across more than one exchange in the region, and mandates them to appoint Sponsoring Stockbrokers who either have a regional presence or who can appoint a stockbroker with trading rights in the other exchange(s) where the issuer intends to list. Although it is unclear why companies from other Partner States have not taken full advantage of the regional listing directive, the eligibility requirements for regional listing suffers from the same major criticism levied against the eligibility requirements for listing on the Nairobi Stock Exchange: the requirements focus unduly on company size (for instance requiring a minimum capitalization of US$850,000 and minimum net assets of US$1,200,000 prior to listing) and as such are simply beyond the reach of many potential issuers in the market.

93 See n 69 - 73 above and accompanying text.

94 See discussions on the Interconnectivity Hub and Spoke Model (in the SADC) and the Qualifying West African Broker scheme (in the ECOWAS) in the appendices to this Chapter.

authorization and supervision.[95] Market intermediaries licensed by a competent authority in an EAC Partner State now have the right to establish branches and offices in every EAC jurisdiction, and to access trading facilities, central depository systems and clearing houses in these other Partner States subject to meeting their conditions for admission, which cannot be applied discriminatorily against them.

6.4. Challenges Facing Capital Markets Integration in Sub-Saharan Africa

In this Section, I draw from the discussions above and in the appendices to this Chapter to examine some of the key challenges facing capital markets integration in sub-Saharan Africa. For analytical clarity, I group these challenges into three broad categories: political challenges, economic challenges and cultural diversity.

6.4.1. Political Challenges

6.4.1.1. Suspicion of Trade Migration to Larger Stock Markets

Suspicion by smaller markets of the largest markets operating in the region appears to be a factor hindering capital markets integration in sub-Saharan Africa. This concern seems to be more prevalent in the SADC than in the EAC or ECOWAS, given the overwhelming dominance of the JSE relative to other markets operating in the region.[96]

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95 Directive EAC/CM/Directive 15 of the Council of Ministers of 27 OOctober 2017 on Licensing in the Securities Market, Legal Notice No. EAC/145/2017 (EAC Council Directive on Licensing). The Directive is a maximum harmonization directive, and explicitly precludes Partner States from imposing additional requirements on market intermediaries operating in more than one Partner State.

96 The JSE accounted for approximately 97% of the market capitalization of all SADC stock exchanges as at December 2018. See Shipalana and Moshoeshoe (n 66).

There is a concern that even in a connected market comprising autonomous exchanges, trading is likely to migrate from the smaller markets to the JSE, increasing the size and liquidity of the JSE at the expense of the smaller markets. A particular case in point brings this out clearly. In August 2003, the JSE announced that it was in discussions with other SADC exchanges and the Ghana Stock Exchange to create a 'Pan-African Board' to facilitate the trading of securities of large African issuers on a virtual African exchange overseen by the JSE.[97] Under this proposal, qualifying companies will be able to list simultaneously on all participating exchanges and national regulators will retain their supervisory autonomy.[98] The Botswana Stock Exchange however launched a scathing, publicised criticism of the proposal, arguing that instead of boosting liquidity of smaller exchanges, the proposal would lead to capital flight towards the JSE, reduce the number of issuers and investors on other SADC exchanges and in effect result in even lower trading volumes on other stock exchanges.[99] This effectively put an end to the proposal.

As Professor Okeahalam reports, this concern has not been helped by the perceived arrogance and overbearing attitude of South African business (including members of the

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97 Irving (n 5) 12.

98 ibid.

99 Botswana Stock Exchange, *Press Statement: Response to the JSE's Claim of a Pan African Bourse* <http://www.bse.co.bw/press/BSE%20Press%20Statement%20-%20Pan-African%20Bourse.pdf> accessed 3 August 2019. The statement read in part: '*The BSE* [Botswana Stock Exchange] is deeply disturbed by the suggestion made by the Chief Executive Officer of the JSE, that the BSE will be joining a "club" of stock exchanges creating a single African stock market, utilizing the JSE Securities Exchange as a hub. This statement is incorrect, misleading and certainly does not reflect the strategic vision of the BSE. We object to the JSE concept on the grounds that the JSE is attempting to apply pressure on the smaller SADC exchanges into accepting an unreasonable proposal which will allow the JSE to siphon order flow from the smaller SADC exchanges in an effort to boost their own trading volumes and revenue. This proposal will reduce the number of issuers and investors on SADC stock exchanges; diminish trading volumes and most certainly lead to capital flight towards Johannesburg'. The statement concluded by arguing that the BSE was not prepared to trade its history of 'exceptional performance' for a subservient role in a JSE dominated market.

JSE's management) in dealings with their SADC counterparts.[100] Indeed, the Pan-African Board program may be evidence of this perceived overbearing attitude, given that, as the BSE argued, only 3 of the other 10 SADC exchanges existing at the time had been given the chance to consider the proposal before the JSE publicly announced the plan.[101]

This problem has not been as pronounced in the EAC or in ECOWAS and so far, no serious concerns have been raised over the dominance of the KSE or NSE relative to other markets operating in the two regions. In both cases, neither the difference in size between them and the other markets in their regions nor their influence through cross-listing or cross-border trading of securities have reached such a magnitude as to raise concerns over a possible migration of trading volumes away from other domestic markets. As the EAC's model of integration becomes clearer, it is possible that concerns may be raised in the future over the KSE's significantly stronger position relative to other markets in the EAC.

6.4.1.3. Inadequate Regional Enforcement Mechanisms

One of the greatest challenges of regional market integration in sub-Saharan Africa is the weakness of regional institutions tasked with fostering integration and convergence. Regional integration treaties set ambitious integration plans and aggressive implementation timelines. However, implementation is slow leading to postponements and sometimes, the re-adjustment of agreed integration plan. In some instances, there are no formal sanctions

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100 Okeahalam (n 5) 91-92 (noting the presence of this perception and cautioning that the perception cannot simply be wished away and has the potential to exclude other stock exchanges which are significant stakeholders in the integration program, and thus derail market integration in the SADC).

101 ibid.

to enforce convergence;[102] in others where regional enforcement mechanisms have been put in place, they have sometimes been dismantled for political expediency.[103] The inability of regional institutions to enforce faithfulness to agreed integration milestones reduces the incentives for participating states and exchanges to comply with stated timelines and results in delayed implementation. This ultimately means that although there is often a clear political drive towards capital market integration, this commitment is often not matched by action on the ground.

6.4.2. Economic Challenges

6.4.2.1. Transition Cost and Inadequate Technology

Capital markets integration is not costless. Whether integration takes the form of the creation of a single exchange to cater for several countries, or the interconnection of several autonomous exchanges, participating exchanges and countries will need to harmonize rules and regulatory expectations around pre-determined minimum standards. Intuitively, for countries falling above these standards (i.e. countries whose trading and regulatory systems are above the agreed regional baseline), transition costs can be expected to be low. However, for countries falling below these thresholds, transition costs may be fairly significant. Unfortunately, there would often be more countries falling below this regional threshold, making transition costs fall heavily on smaller markets.

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102 See Andrew Lovegrove and others, *Financial Sector Integration in Two Regions of Sub-Saharan Africa: How Creating Scale in Financial Markets can Support Growth and Development* (Working Paper: Making Finance Work for Development, World Bank, 2007) 64 (noting the absence of formal sanctions to enforce convergence in both the UEMOA and WAMZ zones of Western Africa).

103 See for instance n 8 to appendix 6.1 on the dismantling of the SADC Tribunal.

The transition cost problem is heightened by the financial position of some exchanges operating in sub-Saharan Africa. As discussed in Chapter 4[104] even the larger markets of Kenya and Nigeria have struggled to attract new listings or retain already listed companies. This is compounded by several of the smaller markets with no listed companies.[105] In all instances (perhaps with the exception of South Africa), trading volumes remain low. Consequently, several stock exchanges are unable to raise sufficient funds from their operations (through trading and listing fees) to invest in meeting regional standards to facilitate integration of their markets and attempts to increase operating revenue by increasing listing or trading fees will increase transaction cost and thus may worsen the liquidity problems. It therefore comes as little surprise that the Zambian Stock Exchange abandoned a proposed link with the JSE because of its inability to raise US$2 million.[106]

Closely related to the transition cost problem is the problem of technology. On the regulatory side, even the larger markets struggle with sufficient regulatory technology to properly monitor their markets.[107] On the trading side, several of the smaller markets still utilize open outcry manual trading systems, making integration around automated trading

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104 See Chapter 4, section 4.2.3

105 For instance, since inception, the Maseru Securities Market of Lesotho has not attracted a single issuer to list securities on the market, despite aggressive public awareness campaigns and roadshows. See Bereng Mpaki, 'Companies Shun the Stock Exchange' *Lesotho Times* (Lesotho, 31 March 2018). The Angolan stock exchange Angola has similarly been unable to attract a single equity listing since the commencement of its operations in December 2014. Although the exchange hoped to attract its first IPO at the end of 2019 (see Ecofin Agency, 'Angolan Exchange to Proceed to its First IPO by end 2019' (*African Markets*, 4 May 2019) <https://www.african-markets.com/en/news/southern-africa/angola/angolan-exchange-to-proceed-to-its-first-ipo-by-end-2019>) as at March 2020, the exchange had still not attracted its first IPO.

106 See n 21 above and accompanying text.

107 See the discussion on Regulatory Technology (RegTech) in Chapter 7, section 7.3.6.

systems impossible.[108] Where integration takes the form of the connection of autonomous markets with each retaining supervisory competence over its market and its issuers (as the SADC and ECOWAS are pursuing) it is important that investors in one country can trust the competence of regulators in another to detect and punish market abuses taking place in their markets. Similarly, it is important for trading, clearing and settlement procedures to be streamlined across the markets to facilitate smooth trading and reduce settlement risk. But investing in these regulatory and trading technologies are not costless, making it difficult for fringe markets to participate in these integration initiatives.

6.4.2.2. Currency Convergence and Regional Trade

Despite the existence of three operating monetary zones (i.e. the CFA Franc zones in Western[109] and Central Africa[110] and the Common Monetary Area in Southern Africa[111]) Africa is the continent with the largest number of currencies.[112] This raises unique problems for market integration. For an investor to purchase securities regionally in this universe, the investor's returns will have to be sufficient to justify the risk of investment,

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108 See notes 18-19 to the appendix to this Chapter and accompanying text on the failure of a COSSE Hub and Spoke Project on account of 5 markets operating manual trading systems.

109 See Appendix 6.3 on the CFA Franc issued by the BCEAO as a single currency for Francophone countries in Western Africa.

110 A separate CFA Franc is issued by the *Banque des États de l'Afrique Centrale* i.e. the Central Bank of Central Africa serving six Central African States (Cameroon, Central African Republic, Chad, Equitorial Guinea, Gabon, and the Republic of Congo).

111 The Common Monetary Area is made up of Eswatini (formerly Swaziland), Lesotho, Namibia and South Africa. The South African Rand is legal tender in all four countries and South Africa sets monetary policy in the zone.

112 See Xavier Debrun, Paul Masson and Catherine Pattillo, 'Should African Monetary Unions Be Expanded? An Empirical Investigation of the Scope for Monetary Integration in Sub-Saharan Africa' (2011) Vol. 20, AERC Supplement 2 Journal of African Economies ii104, 105. For further discussions on monetary zones operating in sub-Saharan Africa, see Célestin Monga, 'African Monetary Unions: An Obituary' in Célestin Monga and Justin Yifu Lin (eds), *The Oxford Handbook of Africa and Economics*, vol 2 (OUP 2015).

after discounting for foreign exchange risk. Thus, an already high cost of capital implied by inadequate supervision and enforcement is compounded by foreign exchange risk and sometimes stringent capital controls on the repatriation of interest and dividends.[113] This makes regional trading in the absence of currency convergence difficult.

Similarly, the trend that may be inferred from the regional cross-listing data discussed in Chapter 2 suggests that most companies pursuing regional cross-listing of their securities do that, at least in part, to improve regional visibility in regional markets in which they operate. Indeed, of the 48 companies with securities regionally cross-listed within sub-Saharan Africa, 34 were cross-listed into countries in which they had ongoing operations, suggesting that regional operation was at least a factor influencing cross-listing decision of African firms. But regional operations will not thrive in the absence of macro-economic convergence and regional trade. Indeed, the level of regional cross-listing among the different RECs is closely correlated with the level of intra-regional trade. This can be seen from the share of intra-regional trading taking place amongst the RECs. Tables 6.3 and 6.4 report import and export trade amongst the EAC, SADC and ECOWAS.

REC	Intra-Community	China	United States	European Union	Africa	Rest of the World
EAC	17	14	5	19	14	31
SADC	16	27	8	21	3	25
ECOWAS	8	4	13	31	6	38

Table 6.3 - Percentage Value of Average Import Trade among Regional Economic Communities by Partner States (2000-2017)[114]

113 On this, see for instance Christopher Adam and others, 'Exchange Rate Arrangements in the Transition to East African Monetary Union' in Paulo Drummond, Kal Wajid and Oral Williams (eds), *The Quest for Regional Integration in the East African Community* (IMF 2014).

114 Source: United Nations Economic Commission for Africa and Others (n 42) 6, Table 1.3.

REC	Intra-Community	China	United States	European Union	Africa	Rest of the World
EAC	20	5	4	19	18	34
SADC	19	20	8	20	3	30
ECOWAS	9	3	12	29	7	40

Table 6.4 - Percentage Value of Average Export Trade among Regional Economic Communities by Partner States (2000-2017)[115]

The interesting fact emanating from the above data is that for both import and export data, EAC and SADC have more intra-regional trade than ECOWAS. This correlates with more intra-regional cross-listing in EAC and SADC than in ECOWAS. Similarly, all RECs trade more within their region than with other countries in Africa. This also correlates with the tendency for African firms to cross-list more within their regions than in other public markets outside their region. One potential implication of this is that regional trade impacts capital market integration, at least through cross-listing.

6.4.3. Social Factors

Asides the diversity of currencies, Africa has a unique diversity of languages and cultures shaped fundamentally by its colonial history.[116] This diversity affects market integration. In the first place, given the different official languages adopted by different countries in the region, market information is not always readily available to market participants from countries speaking a different language.[117] Given that the official language of most

115 Source: United Nations Economic Commission for Africa and Others (n 42) 5, Table 1.2.

116 For a recent, interesting discussion on language diversity in Post-colonial Africa, see Nkonko Kamwangamalu, *Language Policy and Economics: The Language Question in Africa* (Palgrave Macmillan 2016).

117 For instance, the website of the BRVM and BVMAC are in French, the website of the BVM and BODIVA are in Portuguese and several important documents on the Egyptian Exchange (including the Listing Guide) are only available in Arabic.

countries in Africa is an offshoot of its colonial history, integration initiatives among countries with different colonial histories can often be challenging, as the unsuccessful efforts to achieve monetary convergence in ECOWAS suggests.[118]

Linguistic and cultural diversity also mirrors diversity of legal systems. In broad terms, Francophone and Lusophone countries adopt a civil law legal tradition whilst Anglophone countries adopt a common law legal tradition. The two fully integrated public markets operating in sub-Saharan Africa (i.e. the BRVM and the BVMAC) utilise the French civil law system and the EAC (which is the most advanced African REC in its economic integration agenda), is comprised of Anglophone common law jurisdictions. Difficulties arise where integration is pursued amongst countries with different legal traditions. Indeed, there has been no attempt to replace existing autonomous stock exchanges run by countries with different legal traditions with a single regional exchange (reflecting the difficulties in harmonising legal systems) and evidence of cross-listing of companies incorporated in a country with one legal tradition into a country with a different legal tradition is very weak.[119]

6.5. Lessons from Other Jurisdictions

As stated in the introduction to this Chapter,[120] the pursuit of regional integration of securities markets is not unique to sub-Saharan Africa. In this Section, I present a high-level overview of attempts towards capital market integration in the Association of South-

118 See Appendix 6.3.

119 As at June 2020, Ecobank Transnational Incorporated of Togo was the only company in sub-Saharan Africa incorporated in a pure civil law country (Togo) and cross-listed into common law countries (i.e. Ghana and Nigeria).

120 See n 2 above and accompanying text.

Eastern Nations (ASEAN), the European Union (EU), and two bilateral cooperation arrangements i.e. the Trans-Tasman Mutual Recognition of Securities Offerings (MRSO) scheme between Australia and New Zealand and the Multi-Jurisdictional Disclosure System (MJDS) between the US and Canada. In each case, I first provide a high-level overview of attempts towards capital markets integration and then distil lessons which sub-Saharan African states can learn from their integration experience.

6.5.1. Capital Markets Integration in the Association of South-Eastern Asian Nations

6.5.1.1. Progress towards Capital Market Integration

The ASEAN is made up of ten countries,[121] nine of which have domestic stock markets.[122] Following the Asian financial crisis of 1997, ASEAN member states agreed to work towards creating an ASEAN Economic Community and securities market integration was identified as one of the goals towards broader economic integration.[123] In furtherance of this, in 2009, the ASEAN Capital Markets Forum (ACMF)[124] issued an implementation plan setting out the agenda towards the integration of domestic markets in the ASEAN

[121] Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

[122] Brunei is the only ASEAN country without a stock market. Myanmar opened its stock exchange in 2015 and the stock markets in Cambodia and Laos are extremely small.

[123] Wai Yee Wan, 'Cross Border Public Offering of Securities in Fostering an Integrated ASEAN Securities Market: The Experiences of Singapore, Malaysia and Thailand' (2017) 12 Capital Markets Law Journal 381.

[124] The ACMF is a body made up of the securities regulators of all ASEAN member states. The ACMF was established in 2004.

region.[125] The Implementation Plan was based on three broad strategies: legal and regulatory convergence through the harmonisation of minimum standards and mutual recognition; improved securities markets connectivity through linking of securities market infrastructure; and the creation of indices to promote the development of ASEAN equity as an asset class.[126] ASEAN has now developed the ASEAN Disclosure Standards Scheme to facilitate the cross-border offering of securities across the ASEAN region.[127] The ASEAN Disclosure Standards are substantially based on the disclosure standards on cross-border offerings issued by the International Organization of Securities Commissions.[128]

Although ASEAN successfully established the ASEAN Economic Community in 2015, movement towards capital market integration has been more difficult. Much like in the SADC in Africa, the stark differences in initial conditions among countries with domestic markets meant that simultaneous market integration across all ASEAN states could not be meaningfully pursued. The progress towards market integration in the ASEAN region reveals two important facts. First, recognising the level of development of domestic markets operating in the region, the ASEAN Disclosure Standards are not binding on all countries or indeed on issuers. Conversely, the standards are applicable on an opt-in basis, both at the member state level and at the issuer level.[129] Thus, states can decide if and when

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125 The Implementation Plan to Promote the Development of an Integrated Capital Market to Achieve the AEC Blueprint 2015, approved by the ASEAN Finance Ministers at the 13th ASEAN Finance Ministers' Meeting in Thailand, 9 April 2009. See <https://www.theacmf.org/about/acmf-implementation-plan-2009-2015> ('Implementation Plan').

126 See Wan (n 123).

127 See ASEAN Disclosure Standards <https://www.theacmf.org/publications/asean-disclosure-standards>.

128 ibid.

129 Wan (n 123).

to opt into the scheme, and issuers can decide whether to use the scheme in a cross-border issuance among member states, or to comply with the full disclosure requirements under the securities laws of the host state. Presently, Singapore, Malaysia and Thailand are the only three jurisdictions to opt into the ASEAN Disclosure Standards.

Second, in 2009 when Singapore, Malaysia and Thailand agreed to opt into a harmonization framework, they did this on an 'ASEAN and Plus' basis. This system followed a 'minimum harmonization' framework in which issuers making securities offerings in host countries had to comply with the agreed common standards in addition to country-specific standards in the host market. The three countries subsequently agreed to have only one set of ASEAN Disclosure Standards and eliminate variations found in the 'Plus' Standards in order to remove additional regulatory barriers and reduce compliance cost.[130] This move towards a single disclosure standard however has some important limitations,[131] and available evidence suggests that issuers have not used the standards frequently in practice.[132]

Nonetheless, the ACMF has continued with the drive towards harmonising ASEAN markets (including the development of ASEAN equity asset classes and improving trading interconnection). Thus, in April 2016, the ACMF developed the ACMF Vision 2025 setting out the vision of capital markets integration in ASEAN in the ten-year period after the end

130 ibid.

131 ibid (noting that mutual recognition under the ASEAN standards is not automatic as issuers still have to comply with national laws on prospectus regulation and other applicable local laws in the host country, and given the absence of a supra-national securities agency, interpretation and enforcement are insufficiently coordinated).

132 ibid (finding no documented use of the ASEAN Disclosure Standards between 2010 and 2014) and finding limited evidence of cross-border IPOs and cross-listings.

of the Implementation Plan. The ASEAN Vision 2025 has three strategic objectives[133] to be implemented in two phases of five years each. To cater for the first phase, in April 2016, the ACMF launched the ACMF Action Plan 2016-2020.[134] The 2016 Action Plan sets six priorities for the first phase of Vision 2025,[135] in the expectation that a holistic review of the accomplishments in the first phase will be undertaken close to its expiry, which will form the basis of the formulation of the second phase from 2021-2025. Presently, although the ASEAN Trading Link has been completed to link the exchanges of Singapore, Malaysia and Thailand,[136] and a number of indices (such as the FTSE ASEAN Index Series) have been created, a lot more work remains to be done to promote market integration in the ASEAN region and meet the strategic objectives of Vision 2025.

6.5.1.2. Lessons for Sub-Saharan Africa

There are a number of similarities between the market systems operating in the ASEAN region and those operating in the various RECs within sub-Saharan Africa. Both regions comprise member states exhibiting a diversity of languages, legal traditions and levels of economic development. In addition, the markets participating in integration drives in both regions also show fairly significant variance in initial conditions. Notwithstanding the

133 The three objectives are enhancing and facilitating growth and connectivity, promoting and sustaining inclusiveness and strengthening and maintaining orderliness and resilience.

134 ACMF Action Plan 2016-2020 <https://www.theacmf.org/publications/-acmf-action-plan-2016-2020> accessed 30 August 2019.

135 These are improving regional market infrastructure and interconnectivity, improving cohesiveness in regulation and regulatory practices, promoting ASEAN asset classes, improving mobility of financial market professionals through cross-recognition of qualifications, education and experience, improving investor participation, and promoting stakeholder (including industry and private) participation and co-operation.

136 For more on interconnection in the ASEAN region, see Joseph Lee, 'Synergies, Risks and the Regulation of Stock Exchange Interconnection' (2017) 11 Masaryk University Journal of Law and Technology 291.

challenges ASEAN countries have faced, there are a number of useful lessons sub-Saharan African countries can draw from ASEAN's capital market integration journey.

First, the ASEAN experience demonstrates the importance of market development in the journey towards market integration. Although market integration and development may mutually reinforce each other, they are nonetheless separate objectives[137] which are not necessarily pursued using the same means. Thus, the stark differences in levels of market development and initial conditions (for instance as exists between South Africa and Mozambique in the SADC, and between Singapore and Laos in ASEAN) poses significant difficulties in an integration approach that contemplates all markets moving together on the integration journey. A key lesson ASEAN teaches in this regard is that rather than delaying integration efforts to enable smaller markets catch up, integration policies can be created on an opt-in basis so that markets which have reached a similar level of development may proceed immediately with the integration agenda, whilst fringe markets take their time to catch-up. Concurrent progress towards market integration amongst all member states in a regional grouping is neither a necessary nor a sufficient condition for successful capital market integration.

Second, where the intention is to maintain domestic exchanges and regulators who would have responsibility for interpreting, implementing and enforcing agreed regional standards, then, implementation and application become particularly important. Differences in interpretation and implementation can perpetuate market fragmentation and

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137 Raymond Atje and Ira S. Titiheruw, *ASEAN Capital Market Integration: The Way Forward* (Centre for Strategic and International Studies, Economics Working Paper 01-2016, 2016) '*…it is by now clear that each AEAN member country should continue to develop its capital market as a part of the country's overall financial development irrespective of the integration plan*'.

frustrate integration efforts. This is also the case where national authorities can impose additional requirements on issuers, thus increasing regulatory complexity and compliance cost. Thus, RECs that currently aim to integrate market infrastructures without replacing domestic markets must be cautious in ensuring strong coordination between member states to prevent a situation where markets are integrated on paper but fragmented in reality.

Third, although public actors and political institutions are important stakeholders in the integration project, private actors and industry participants (including issuers, brokers, investment banks and investors) are also critical stakeholders. Whilst the public actors set the broad agenda and provide the political backing to the integration plan, the success of the integration agenda ultimately depends on its utilization by market participants. In recognition of this, the ACMF has worked closely with private stakeholders including the Asian Development Bank, the ACMF Industry Consultative Panel[138] and national experts and consultants in developing its implementation and action plans. In addition, strengthening these relationships and promoting stakeholder interaction forms a key priority in the 2016 Action Plan. The lesson for sub-Saharan African states is that whilst public actors remain key players in the integration project, private actors are also a critical stakeholder constituency, and their inputs are crucial to the success of the integration agenda. Efforts must therefore be taken to ensure that stakeholder participation is actively encouraged and industry views obtained in progressing market integration plans.

[138] The Panel was formed to provide a formal engagement platform for dialogue with industry representatives to obtain market views on integration project.

6.5.2. Bilateral/Multilateral Agreements

Even in the absence of a formal integration plan, states and public markets can improve cross-border activity through bilateral (or multilateral) cooperation agreements. Two well-known agreements of this nature are the Multi-Jurisdictional Disclosure System (MJDS) between Canada and the United States,[139] and the Trans-Tasman Mutual Recognition of Securities Offering (MRSO) scheme between Australia and New Zealand.[140] Broadly, both the MJDS and the MRSO schemes permit issuers in one state to offer certain financial products in the other state, using disclosure documents prepared substantially under the securities regulation of the issuer's home state.[141] Thus, issuers under both schemes are not

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139 The MJDS was adopted by the US SEC and the Canadian Securities Administrators (comprising all securities regulators in Canada) on 1 July 1991.

140 The MRSO was launched pursuant to the Agreement between the Government of Australia and the Government of New Zealand on the Mutual Recognition of Securities Offerings. The Agreement was signed in 2006 and came into force in 2008.

141 Regarding the MRSO, see Financial Markets Authority and Australian Securities and Investments Commission, Regulatory Guide 190: Offering Financial Products in New Zealand and Australia under Mutual Recognition, December 2016 (RG 190). The scheme requires that the offer to be made in the other state must be a 'recognised offer' (broadly an offer which will require filing of disclosure documents in the home state); the issuer must be duly established under the laws of the home state; that no person concerned with the management of the issuer is disqualified from managing the affairs of a company or prevented from providing financial services under the laws of the home and the host state and that the financial products to be offered fall within specific classes of financial instruments (these are essentially shares, debentures and interests in managed and collective investment schemes). See RG 190.13-190.26 (for entry requirements applying to New Zealand issuers) and RG 190.37-190.45 (for entry requirements applying to Australian issuers). As regards the MJDS, see Securities Act Release No. 33-6902 (June 21, 1991) [56 FR 30036]. The MJDS permits eligible Canadian issuers to register securities under the US Securities Act and report under the Securities Exchange Act by using documents prepared largely in accordance with Canadian requirements. Eligible securities that can be offered under the MJDS include rights offers, exchange offers, investment grade non-convertible debt, securities issued in connection with mergers and other business combinations and other securities including equities and certain types of derivatives. To be eligible to issue equities under the MJDS, a Canadian issuer must be incorporated in Canada and be a foreign private issuer or crown corporation; have been reporting to Canadian securities regulators for the preceding 12 months; comply with its reporting obligations; and have a public float of at least US$75 million. For a discussion on the MJDS and the rules applying to US issuers seeking to utilise the MJDS in Canada, see Anna Drummond, 'Securities Law Internationalization of Securities Regulation-Multijurisdictional Disclosure System for Canada and the US' (1991) 36 Villanova Law Review 775. See also Edward Greene and others, *US Regulation of the International Securities and Derivatives Markets* (11th edn, Wolters Kluwer 2015).

subjected to the full breadth of securities regulation in the host state. On the contrary, the schemes utilise mutual recognition frameworks that enable issuers to use one disclosure document to offer securities to investors in both countries, subject to meeting minimal entry and ongoing requirements.[142] Available evidence suggests that issuers on both sides of the Tasman Sea as well as predominantly Canadian issuers have utilised the MRSO and MJDS schemes frequently,[143] resulting in a streamlined regulatory process, significant cost savings for issuers[144] and a broader range of investments available to investors.[145]

142 Under the MRSO, an issuer has to comply with some ongoing requirements as a condition for its securities remaining on the scheme. These broadly relate to timely information notification to the host state on specified matters, and remaining compliant with both home and host state securities regulation. On this, see RG 190.28-190.31 (for ongoing requirements for New Zealand issuers) and RG 190.46-190.48 (for ongoing requirements for Australian issuers). Similarly, issuers under the MJDS can generally satisfy their continuous disclosure obligations by filing disclosure documents prepared in accordance with their domestic disclosure requirements (supplemented by disclosures required by the Sarbanes-Oxley and Dodd-Frank Acts and equivalent requirements in Canada as applicable). See Drummond (n 141).

143 IOSCO, 'Task Force on Cross-Border Regulation: Final Report' (IOSCO Report No FR23/2015, September 2015) <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD507.pdf> (reporting that between June 2008 and November 2013 there were 80 New Zealand issuers and 1035 Australian issuers making offers into the other country). On the MJDS, see Edward Alden, 'Canadians Mobilise Over Loss of MJDS Disclosure' (Financial Times, 1 December 1999) (noting that the MJDS facilitated a 'sharp expansion' of cross-border financing activity by Canadian companies and about 100 large Canadian companies regularly use the MJDS). See also Joseph Callaghan, Mohinder Parkash and Rajeev Singhal, 'The Impact of the Multi-Jurisdictional Disclosure System on Audit Fees of Cross-Listed Canadian Firms' (2008) 43 International Journal of Accounting 99 (finding that 78 of the 118 Canadian firms cross-listed into the US between 2002 and 2003 used the MJDS and that audit fees paid by MJDS firms were substantially lower than audit fees paid by non-MJDS firms).

144 ibid.

145 Èilis Ferran and Look Chan Ho, *Principles of Corporate Finance Law* (2nd edn, OUP 2014) 429-430 'The [MRSO] is considered to have brought significant cost savings for issuers offering securities and also benefits investors by providing them with a wider range of investments'.

6.5.2.1. Lessons for Sub-Saharan Africa

At least three factors appear to account for the success of the MJDS and MRSO schemes. These present valuable lessons to sub-Saharan African states in their quest towards market integration.

First, the MRSO and MJDS journeys suggest that the fewer the number of states in the integration agenda, the more probable it would be to achieve a successful outcome. Intuitively, discussions between two states are significantly easier than discussions among several states. Indeed, this is consistent with evidence from sub-Saharan Africa where market integration efforts in the EAC (comprising only 4 states) are more advanced than those in ECOWAS and the SADC. Thus, pursuing simultaneous market integration efforts across large regional groupings might be difficult. Consistent with the approach taken in the ASEAN region, the MRSO and MJDS suggest that different individual countries that share sufficient macroeconomic, institutional and legal similarities may usefully pursue integration at their domestic levels, without prejudice to the broader integration agenda taking place in the REC as a whole. Such an approach will be very helpful in the case of ECOWAS and SADC. In ECOWAS, both Ghana and Nigeria share fairly similar levels of institutional quality and a common law legal tradition. In addition, although Nigeria has the larger capital market, the difference in market development between the two countries is not so stark as to constitute a barrier to bilateral market integration efforts between the countries. Similarly, in the SADC, members of the Common Monetary Authority (Eswatini, Lesotho, Namibia and South Africa) already utilise the rand as legal tender, share the same legal traditions, and similar macro-economic policies. Although the JSE is an overwhelmingly larger market than the other markets combined, there is still utility in

pursuing greater market integration at this smaller level as they share several similar supporting institutions which make integration at this level more probable. In this situation, it will be important to ensure that market integration efforts taking place at the level of fewer domestic states do not conflict with the region-wide market integration or the broader economic integration agenda.[146]

Second, the MJDS and MRSO suggest that domestic market development and institutional quality are important to market integration. Substituted compliance and mutual recognition of actions taken by regulators in other jurisdictions require an implicit trust in the skills, competence and capacity of the other regulators and the stringency of regulatory oversight provided by the other jurisdiction.[147] Given that both the US and

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146 The important question here is how this deeper integration at a sub-regional level can be achieved without impeding region-wide integration plans. On this, African states can usefully learn from the EU's system of 'enhanced cooperation'. Under this procedure (the most prominent use of which has been the issuance of the euro) a minimum of 9 EU countries can establish advanced integration in a particular area without the involvement of other EU countries. This permits integration plans to proceed without getting blocked by one or a small group of individual countries. The principle of 'variable geometry' in Article 7 (1) (e) of the EAC Treaty which permits various Partner States to progress co-operation at different speeds is analogous to the EU's enhanced cooperation principle. Although the treaties establishing the SADC and ECOWAS do not provide for procedures analogous to the enhanced cooperation or variable geometry procedures, in reality, various states have successfully pursued similar procedures within their RECs (the most prominent of which are the economic and monetary union in Francophone West Africa, which gave rise to the WAEMU and the BRVM within ECOWAS; and the monetary union in Southern Africa, which gave rise to the Common Monetary Authority within the SADC). Thus, more robust bilateral agreements can be usefully pursued between individual states in the ECOWAS and the SADC in matters pertaining to the capital markets. For instance, Ghana and Nigeria can actively pursue a mutual listing plan modelled after the MRSO and the MJDS as this will not impede the region-wide WACMI plan that seeks to strengthen broker access. The same is true of bilateral listing arrangements between countries in the SADC as this will not impede the Interconnection Hub and Spoke project being pursued on a region-wide basis.

147 For recent comprehensive discussions on substituted compliance in the US, see Howell Jackson, 'Substituted Compliance: The Emergence, Challenges, and Evolution of a New Regulatory Paradigm' (2015) 1 Journal of Financial Regulation 169. See also John Coffee, 'Extraterritorial Financial Regulation: Why ET Can't Come Home' (2013) 99 Cornell Law Review 1259. Outside the context of securities offerings, substituted compliance and mutual recognition have been applied in the area of broker access. Thus, in 2008, the US and Australia entered a mutual recognition arrangement which permits eligible US and Australian broker-dealers to operate in both jurisdictions without the need for separate regulation in both countries in certain important respects. On this, see

Canada (in the case of the MJDS) and Australia and New Zealand (in the case of the MRSO) have fairly strong institutions and regulatory systems, they are better able to trust the actions taken by the other regulator and cooperate with each other as the need arises. The importance of strong institutions to market integration cannot be overemphasised. Countries with strong institutions face the risk of recognising sub-optimal regulatory actions of countries with weaker institutions, which in turn can compromise the quality of their own regulatory systems. To mitigate this risk, countries with strong institutions may be forced to impose their own standards over and above the common standards agreed in the integration agenda. This in turn leads to added compliance cost and regulatory burdens on countries with weaker institutions, which the integration agenda was set up to tackle in the first place. Thus, in the absence of supra-national standards setting and enforcement, market integration efforts are likely to be impeded where one or more jurisdictions have significantly less developed institutions than the others. This reinforces the need for domestic market development to be pursued simultaneously with market integration, and for integrating markets to achieve fairly similar levels of institutional quality before meaningful integration can take place.

Third, the MJDS and MRSO show the importance of the similarity of cultures to successful integration. As discussed above,[148] broader cultural factors often have little to do with securities regulation. Nonetheless, they can pose substantial barriers in cross-border transactions and market integration efforts. The lesson that the MJDS and the MRSO teach in this regard is that market integration amongst countries with widely

Greene and others (n 141). See also John Armour, Martin Bengtzen and Luca Enriques, 'Globalization' in Merritt Fox and others (eds), *Securities Market Issues for the 21st Century* (2018).

148 See Section 6.4.3. above.

different cultures, languages and legal traditions (as exists in sub-Saharan Africa) cannot be a short/medium term objective and is unlikely to result in immediate gains. Thus, it is ultimately counterproductive to impose unrealistic timelines or to rush the integration process. Integration among countries in this situation must therefore be pursued patiently and deliberately over a long period of time to enable market participants develop fluency and familiarity with the different cultures and legal traditions in the participating countries. This suggests that market integration must not be seen as an immediate solution to market underdevelopment and that in the short to medium term, states should take concrete steps to develop their domestic markets and develop their familiarity with the other participating states in the integration agenda.

6.5.3. The European Union

6.5.3.1. Progress towards Capital Markets Integration

The European Union is a *sui generis* political system.[149] It goes without saying that a comprehensive discussion of its history, organs and fundamental principles falls outside the scope of this thesis.[150] Similarly, capital markets integration in the European Union has undergone a long history and it will be unnecessary to undertake a comprehensive discussion of the EU's capital markets integration journey in this thesis.[151] The modern

149 For a discussion on the unique features of the EU political system, see for example William Phelan, 'What Is Sui Generis About the European Union? Costly International Cooperation in a Self Contained Regime' (2012) 14 International Studies Review 367; Ingeborg Tömmel, 'The European Union - A Federation Sui Generis?' in Finn Laursen (ed), *The EU and Federalism: Polities and Policies Compared* (Routledge 2016).

150 Readers interested in an introductory discussion of EU law can see Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases and Materials* (6th edn, OUP 2015).

151 Interested readers can see for instance Niamh Moloney, *EU Securities and Financial Markets Regulation* (3rd edn, OUP 2016) 1-48.

drive towards capital markets integration in the EU can be traced to the 1999 Financial Services Action Plan (FSAP)[152] which sought to leverage on the creation of the Economic and Monetary Union to remove barriers to capital movement and facilitate the free movement of capital within the EU. The FSAP was largely implemented in the early 2000s, and this period saw the issuance of the main blocks of EU securities regulation, including the Prospectus Directive[153] (setting out the disclosure requirements for issuers to offer securities to the public or have their securities admitted to trading on a regulated market), the Market Abuse Directive[154] (dealing with insider trading and market manipulation), the Transparency Directive[155] (setting out ongoing disclosure requirements for listed issuers), and the Markets in Financial Instruments Directive[156] (governing investment services and

152 European Commission, 'Financial Services: Implementing the Framework for Financial Markets: Action Plan' (Communication) COM (99) 232.

153 Prospectus Directive 2003/71/EC [2003] OJ L345/64. The Prospectus Directive was repealed and replaced with the Prospectus Regulation in June 2017. See Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC [2017] OJ L168/12 (Prospectus Regulation).

154 Market Abuse Directive (Directive 2003/6/EC [2003] OJ L96/16). The Market Abuse Directive was repealed and replaced with the Market Abuse Regulation in April 2014. See Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L173/1 (EU MAR).

155 Transparency Directive (Directive 2004/109/EC [2004] OJ L390/38. The Transparency Directive was revised in 2013. See Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC [2013] OJ L294/13 (Revised Transparency Directive).

156 Markets in Financial Instruments Directive I (Directive 2004/39/EC [2004] OJ L145/1) (MiFID I). MiFID I was amended on several occasions and in May 2014, was recast as the Markets in Financial Instruments Directive (Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L173/349) (MiFID II). MiFID II is now complemented by the Markets in Financial Instruments Regulation (Regulation (EU) No 600/2014 of the European Parliament and

trading venues). In broad outline, EU securities law adopts an increasingly maximum harmonization and mutual recognition framework, although there are still areas where member states can impose requirements beyond those provided for by EU legislation. Under this system, an issuer in a home state is permitted to comply with a single, EU-wide system of regulation and host state competent authorities are generally prevented from imposing more stringent requirements on the issuer. Unlike the EAC which seeks to replace domestic markets with a single regional market with trading floors in each Partner State, the EU framework maintains domestic markets and domestic regulators, but aims to facilitate uniformity of regulatory approaches and centralized regulation. [157]

The global financial crisis of 2008/2009 saw an increased drive towards capital market integration in the EU. The crisis revealed that the EU's financial sector was heavily tilted towards bank financing, and when banks faced liquidity challenges during the financial crisis, securities markets were unable to act as a credible alternative. In 2014, Mr. Jean-Claude Juncker (the then president-elect of the European Commission) therefore conceived the idea of a 'Capital Markets Union' (CMU).[158] The CMU aims to strengthen capital markets in the EU, make it easier for EU issuers to access finance, and break down

of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 [2014] OJ L173/84) (MiFIR)) to strengthen uniformity in the application of the regulatory framework.

157 Moloney (n 151) 27, 'Under the FSAP, harmonization changed in character. It was no longer simply a functional device for removing obstacles and addressing market failures in the form of regulatory costs. It became the device through which centralized regulation was imposed on the EU marketplace'.

158 The term 'Capital Markets Union' was first used by Jean Claude Juncker in his opening statement to the European Parliament in July 2014. See Jean-Claude Juncker, *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change*, opening statement in the European Parliament session (European Commission, Strasbourg, 15 July 2014).

fragmentation and other barriers to cross-border investments.[159] In February 2015, the European Commission published a green paper[160] and an action plan[161] on achieving the CMU. Although the Action Plan recognised the CMU as a long-term project, it set out the building blocks[162] for establishing the CMU by 2019 and set out the direction towards achieving this goal. In its 15 March 2019 communication, the European Commission stated that it had delivered all the specific measures it had committed to in the Action Plan, but called for further action to address other economic and social challenges, including the UK's exit from the EU and the growing impact of climate change and technological advancement.[163]

6.5.3.2. Lessons for Sub-Saharan Africa

Although the EU has successfully implemented its market integration plans, there is still a lot more work to be done. In particular, integration has not yet led to significant deepening of the markets in some EU member states, which continue to have low market capitalization relative to GDP despite implementation of the integration agenda.[164]

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159 For a discussion on the history and political economy of the CMU, see Lucia Quaglia, David Howarth and Moritz Liebe, 'The Political Economy of European Capital Markets Union' (2016) 54 Journal of Common Market Studies 185.

160 European Commission, 'Green Paper: Building a Capital markets Union' (Communication) COM (2015) 63.

161 European Commission, 'Action Plan on Building a Capital Markets Union' (Communication) COM (2015) 468 final.

162 The CMU is built around 7 pillars: improving financing for start-ups and non-listed companies, improving the ease with which EU companies can enter and raise capital on public markets, promoting long-term, infrastructure and sustainable investments, fostering and encouraging retail investment, strengthening bank's capacity to support the wider economy, strengthening the capacity of EU's capital markets and facilitating cross-border investment.

163 European Commission, 'Capital Markets Union: Progress on Building a Single Market for Capital for a Strong Economic and Monetary Union' (Communication) COM (2019) 136 final.

164 According to World Bank data, as of 2019, many continental European countries had a market capitalization ratio of less than 30%, including Austria (29.9%), Cyprus 17.2%, Czech Republic

Nonetheless, the EU market integration journey presents some useful lessons for sub-Saharan Africa.

Central to the EU's success in timeously implementing its integration agenda is the quality of its institutions. The EU's governance systems enable it to make directives which member states must transpose into domestic law within a given timeframe or to issue regulations which are directly applicable under the national law of member states. The EU therefore has a sophisticated legal system which enables it to hold member states to binding commitments. Contrasted with regional initiatives in sub-Saharan Africa where deadlines for meeting integration milestones are repeatedly missed, there is better fidelity to regional initiatives in the EU, due, in part, to strong regional institutions which can enforce pan-EU commitments. The EU story therefore shows the importance of strong regional institutions in the capital market integration project, particularly where integration is pursued among many countries with different cultures, legal traditions and levels of market development. RECs in sub-Saharan Africa or regional bodies saddled with regional market integration initiatives must therefore be able to invoke meaningful enforcement procedures to compel participating states/stock exchanges to honour their regional commitments. In the absence

(17.3%), Greece (25.6%), Hungary (20.1%), Poland (25.4%), Romania (10.4%) and Slovenia (14.6%). Similarly, the market capitalization ratio of major continental European countries is lower than those of major economies around the world. Thus, France (84.9%), Germany (54.3%) and Italy (21.8%) all have lower market capitalization ratios than other developed countries such as Japan (121.8%), Canada (112.9%), Malaysia (110.8%) and Singapore (187.4%). Several factors may account for this. In particular, despite decades of reforms and market integration initiatives, there is significant shareholding concentration in continental Europe (on this, see generally John Armour and others, 'What is Corporate Law' in Reineer Kraakman and others *The Anatomy of Corporate Law: A Comparative and Functional Approach* (OUP 2017)) (discussing shareholding concentration in continental Europe including Germany, France and Italy). Shareholding concentration may reduce market liquidity and raise the cost of capital, making a public listing potentially costlier. Over the long run, this can contribute to the size of the market remaining small relative to the size of the economy. The comparatively lower market capitalization ratios in the EU suggest that integration initiatives may not immediately deepen securities markets at least in the short term.

of strong regional institutions and enforcement mechanisms, member states/participating exchanges are likely to be reticent in honouring market integration initiatives, thus impeding the market integration agenda.

In addition, the EU experience shows that although region-wide securities regulation can be left to national regulators in a system of interconnected but autonomous markets, concerns are likely to arise in the interpretation, implementation and enforcement of these rules. Left unchecked, this can lead to inconsistent treatment of similar situations by different national regulators, leading to regulatory uncertainty and fragmentation. The EU experienced this challenge and sought to address it by creating and expanding the scope of functions of the European Supervisory Authorities,[165] replacing a number of directives with regulations to prevent 'gold-plating'[166] at the point of transposition to national law, and promoting consistent interpretation and enforcement.[167] This emphasises the importance of having regulatory tools to address inconsistent application of agreed regional regulation, where states intend to maintain domestic control of their markets. This lesson is particularly important for ECOWAS and the SADC given that the integration models

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165 The European Supervisory Authorities are the European Banking Authority, the European Insurance and Occupational Pensions Authority, the European Securities and Markets Authority (ESMA) and the European Systemic Risk Board. European Supervisory Authorities issue standards to promote the consistent interpretation and application of EU law. In relation to securities law enforcement, there is a recognition of a growing trend towards direct supervision and enforcement by European regulators. See for instance Miroslava Scholten and Annetje Ottow, 'Institutional Design of Enforcement in the EU: The Case of Financial Markets' (2014) 10 Utrecht Law Review 80 (arguing that enforcement of financial markets law in the EU has become increasingly 'Europeanised').

166 Gold-plating refers to the addition of national provisions in the legislative transposition of EU directives. See Nicholas Véron and Guntram Wolff, 'Capital Markets Union: A Vision for the Long Term' (2016) 2 Journal of Financial Regulation 130, 144.

167 As discussed in notes 153, 154 and 156 above, the Prospectus and Market Abuse Directives have been replaced with Regulations and MiFID II is now complemented by the MiFIR. On the increasing drive towards 'supervisory convergence' and the role of ESMA in this process, see Niamh Moloney, *The Age of ESMA: Governing EU Financial Markets* (Hart Publishing 2018) 169-240.

pursued in both regions contemplate that the domestic markets will remain under the supervision of national regulators.

6.6. The Future of Capital Markets Integration in Sub-Saharan Africa

In this Section, I project into the future of capital markets integration in sub-Saharan Africa, analysing trends and recent developments that may affect the future of integration in the coming years. I argue that three factors are likely to have a significant effect on capital markets integration in the medium/long term, and the way African states and market participants respond to them will be crucial to the integration journey in the foreseeable future.

6.6.1. Increased Regional Trade: The Influence of AfCFTA

As explained above and in Chapter 2 of this thesis, one of the trends that can be identified from the regional cross-listing data is that African firms are more likely to cross-list their securities into markets where they have ongoing operations.[168] Significant trade activity within a particular regional grouping correlates with multiple firms pursuing cross-listings within that region (EAC and SADC), whilst depressed intra-regional and inter-regional trade correlates with reduced cross-listings both within the region and into other regions in the continent (ECOWAS).[169]

It is in this context that the AfCFTA can have a potentially significant effect on regional cross-listing and ultimately market integration in sub-Saharan Africa. As

[168] See Chapter 2, section 2.3.2 and section 6.4.2.2 above.

[169] See the discussions in Section 6.4.2.2 above.

discussed above[170] the AfCFTA was signed on 21 March 2018 and came into force on 30 May 2019. The agreement creates a large free trade area and is potentially a catalyst for boosting regional trade within Africa. Since continental trade of this magnitude will not necessarily be done on a regional basis,[171] there is significant scope for improved trade relations amongst African states.[172] Taking full advantage of the AfCFTA is therefore a major challenge for African states in the coming years.[173] If African states are able to do so and improve the number of firms operating outside of their country of incorporation, then, increased continental trade may lead to an increase in the number of firms cross-listing their securities. Since such trade can happen across sub-regional lines, the full implementation of the AfCFTA can lead more firms to pursue inter-regional as opposed to merely intra-regional cross-listing.

6.6.2 Strengthening Regional Securities Hubs: The Influence of Technology and the African Exchanges Linkage Program

Harmonising principles of securities regulation is only one aspect of capital markets integration. Capital markets integration can also be usefully pursued by linking trading infrastructure among autonomous exchanges, to give investors in one country access to

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170 See notes 44-46 above and accompanying text.

171 It is recognised that trade in physical goods will still rely on physical infrastructure and may therefore be easier amongst geographically proximate countries. However, there is a significant increase in the growth of trade in services in Africa. For instance, in 2017, over 53% of Africa's GDP came from services as opposed to trade in goods. See UN ECA (n 42) 13.

172 See for instance Shakir Akorede, 'How a Single Market Would Transform Africa's Economy' (*World Economic Forum*, 28 February 2018) <https://www.weforum.org/agenda/2018/02/how-a-single-market-will-transform-africa-s-economy/> accessed 1 September 2019.

173 See UNECA (n 42) 71-101 (discussing the challenge ahead of African states in taking full benefit of the AfCFTA).

securities trading in another exchange, without issuers in that country having to be cross-listed into the investor's domestic exchange.[174]

Integration through trading linkages among stock exchanges can strengthen cross-border trading of securities, giving investors access to a broader pool of investment options, and giving issuers access to a wider market. However, trade linkages of this nature critically depend on technology. And as the experience of the SADC has shown, technology is not costless. Some markets still utilise manual trading systems and where trading is automated, creating trading linkages requires participating stock exchanges to consider compatibility issues to ensure that trading systems can appropriately interconnect with each other.

To foster trade linkage among the different markets operating in Africa, the African Securities Exchanges Association (ASEA) and the AfDB recently launched the African Exchanges Linkages Program (AELP) as a joint initiative to facilitate cross-border trading and settlement of securities across participating exchanges in Africa. The AELP aims to address the shallowness and illiquidity of many African markets and promote pan-African capital flows[175] by connecting the trading and information systems of seven African exchanges (i.e. the exchanges in Morocco, Egypt, Kenya, Nigeria, Mauritius, South Africa and the BRVM). Figure 6.1 presents the vision of trade linkages in African stock exchanges following the AELP.

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174 See for instance Appendix 6.3 below (on the West African Capital Markets Initiative Council) and notes 20-21 below and accompanying text on the SADC Brokers Network launched by COSSE in Southern Africa.

175 African Development Bank, 'African Development Bank, Partners Meet Over Securities Exchanges Linkage Project' available at < https://www.afdb.org/en/news-and-events/african-development-bank-partners-meet-over-securities-exchanges-linkage-project-19240>.

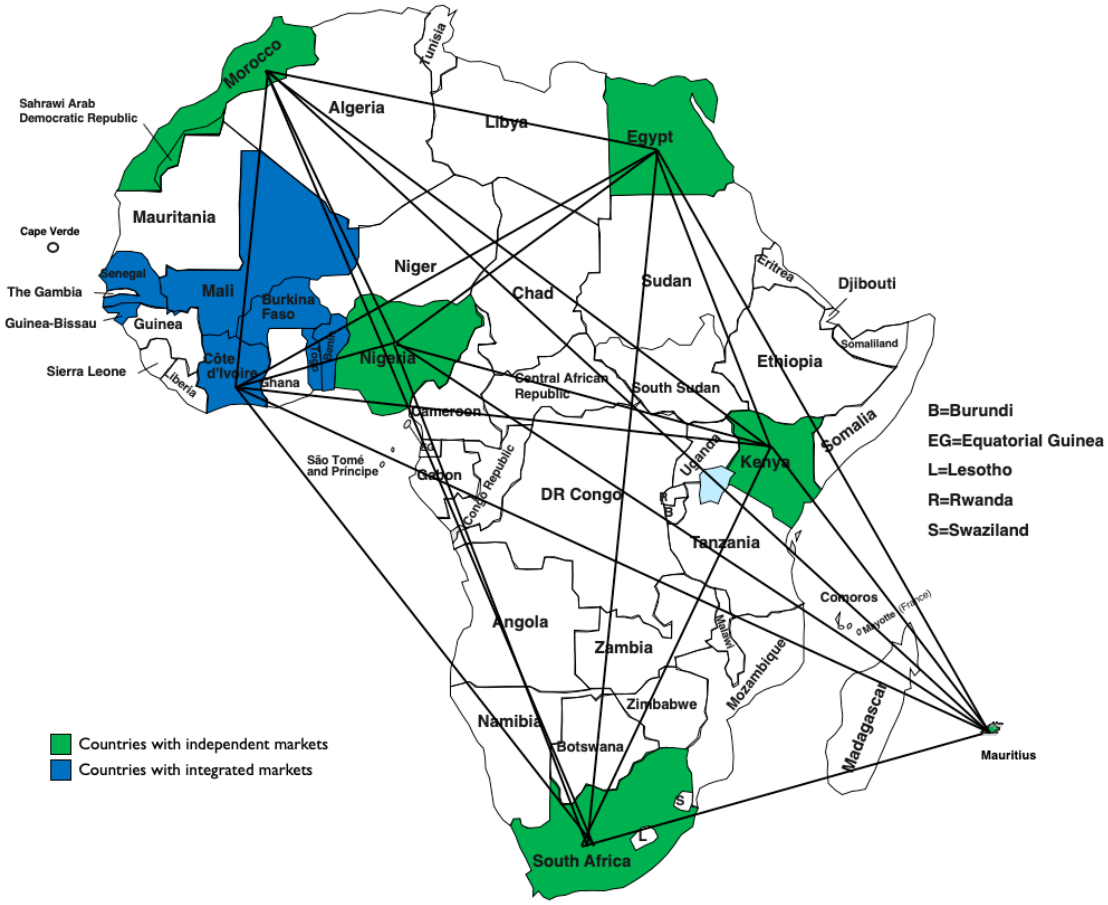

Figure 6.1 - Map of Africa showing Regional Securities Hubs after the AELP[176]

Brokers originating trades in one country ('originating brokers') will need to enter into template agreements with brokers in other countries in which they intend to execute trades ('executing brokers') giving them sponsored access to their own participating exchanges in turn. Where an investor in her own (home) country (e.g. Nigeria) wants to trade in securities listed in a host country (e.g. Egypt), the originating broker will give the client's KYC details to the executing broker and open an account for the client with the central securities depositary of the host country. In a buy order, the client instructs the originating broker to purchase the securities. The originating broker passes the instruction

176 Base map obtained from Geocurrents Customizable Base Maps, available at: http://www.geocurrents.info/wp-content/uploads/2015/12/Customizable-Africa-Maps.ppt

to the executing broker for execution. The client will need to have sufficient funds (converted to the relevant currency) with the originating broker to settle the trade. The executing broker executes the trade in the local currency of the host country and pays the client's funds into the clearing and settlement system of the host country at settlement.[177] The securities are then transferred into the client's account at the central depositary of the host country. In a sell order, the originating broker transmits the client's instructions to the executing broker, who confirms that the client has the securities and then executes the sell order. The central depositary transfers ownership of the securities and cash is transferred to the client through the originating broker.[178]

Unlike other integration efforts that have been regional in approach, the AELP takes a continental approach, and instead of building on the basis of geographical proximity and harmonization of regulation, the AELP is building links on the basis of market liquidity, turning the largest markets in the various regions into continental securities hubs. In November 2018, the AELP received a grant of US$980,000 from the AfDB Korea-Africa Economic Cooperation Fund to finance the project. The AELP hosted its first stakeholder's roundtable at the AfDB headquarters in Ivory Coast on 24 April 2019 and work towards implementation has commenced.

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177 Francis Garrido and Stian Overdahl, 'African Stock Exchanges Link Up to Boost Liquidity, Foreign Investment' (*S&P Global*, 20 March 2019) <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/50279868>.

178 For a full description of the trading process contemplated by the AELP as well as modifications for institutional investors, see AELP Stakeholder Engagement Forum, 28 November 2019 <https://www.jse.co.za/content/JSEPresentationItems/AELP%20Forum%20Programme%20+%20Speaker%20Presentations_Final%20(1).pdf>.

The AELP is a potential game-changer in the securities landscape across Africa for a number of reasons. First, the AELP offers a potentially transformative way of boosting the liquidity of domestic stock exchanges through Exchange Traded Funds (ETFs) and can directly support the expansion of ETFs in sub-Saharan Africa. ETFs have contributed significantly to the liquidity of securities markets globally[179] by providing investors with a financial product that provides exposure to a diversified portfolio of underlying assets.[180] ETFs focusing on African equity are also growing. Presently, global index providers already provide indexes that track African equity[181] and a few ETFs specialising in African equity are currently listed and trading in global markets.[182] Given that all securities trading on each participating exchange will be available to traders in other participating countries,

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179 Although ETFs were first issued in 1989, they have grown exponentially across the world. See for instance Ehsan Nikbakht, Keith Pareti and Andrew Spieler, 'Exchange-Traded Funds' in Kent Baker, Greg Filbeck and Halil Kiymaz (eds), *Mutual Funds and Exchange Traded Funds: Building Blocks to Wealth* (OUP 2015) (noting the growth of ETFs from $102 billion in assets under management in 2002 to $1.7trillion in 2013). Today, ETF assets under management have exceeded $5 trillion (see Bob Pisani, 'US ETF Market Tops $5 trillion in Assets as Investors Stampede into Stocks on Vaccine Hopes' (CNBC, 17 November 2020) <https://www.cnbc.com/2020/11/17/us-etf-market-tops-5-trillion-in-assets-as-investors-stampede-into-stocks-on-vaccine-hopes.html> accessed 19 November 2020) and are now some of the most actively traded securities on global exchanges (see Dani Burger, 'Stocks Are No Longer the Most Actively Traded Securities in Stock Markets' (Bloomberg, 12 January 2017) <https://www.bloomberg.com/news/articles/2017-01-12/stock-exchanges-turn-into-etf-exchanges-as-passive-rules-all?cmpid=flipboard> (noting that seven of the ten most actively traded securities in the US in 2016 were ETFs).

180 For a comprehensive discussion on the operation of ETFs, see Henry Hu and John Morley, 'A Regulatory Framework for Exchange-Traded Funds' (2017) 91 Southern California Law Review 839.

181 For instance, the FTSE ASEA Pan Africa Index ex South Africa is a regional index comprising stocks of companies listed on a stock exchange that is a member of the ASEA, excluding South Africa. As at October 30, 2020, the index comprised 209 African stocks listed on 15 ASEA member stock exchanges. Similarly, the MSCI Emerging Frontier Markets Africa ex South Africa Index captures 31 large and mid-cap stocks from 14 African countries excluding South Africa. Both FTSE and MSCI have South African indexes (the FTSE/JSE All Share Index and the MSCI South Africa Index). These are in addition to the domestic indexes run by the local stock exchanges.

182 A number of African ETFs are currently trading in the US, including the iShares MSCI South Africa ETF (tracking the MSCI South Africa Index), the Global X MSCI Nigeria ETF (tracking the Solactive Nigeria Index comprised of 20 stocks of companies based in, listed on or deriving revenues primarily from Nigeria) and the VanEck Vectors Africa Index ETF (tracking the performance of the Down Jones Africa Titans 50 Index, comprising some of the largest companies across Africa). Again, these are in addition to domestic ETFs trading on the local stock exchanges.

investors across sub-Saharan Africa will be able to easily and cheaply obtain exposure to a diversified portfolio of African equity through ETFs.[183] Greater ETF liquidity in turn may incentivise the creation of better and more reliable pan-African indexes,[184] which in turn may make exposure to African equity as an asset class more attractive, thanks to greater diversification.[185]

Second, the AELP is a significantly more ambitious and potentially more impactful project than the other regional integration initiatives discussed in this Chapter. The AELP aims to link 7 markets covering 14 countries and create an 'African Listed Securities' asset class comprising over 1,000 listed companies and US$1.1 trillion in market capitalization. Investors in the participating exchanges will therefore have access to a much broader range of listed firms and an expanded range of asset classes beyond equities and bonds.[186]

Third, the AELP takes a truly pan-African approach, incorporating securities markets in the North African countries of Egypt and Morocco into the project. Given that

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183 For instance, South African or Egyptian investors will be able to easily gain exposure to Nigerian banking stocks or the largest 30 companies trading on the Nigerian Stock Exchange by purchasing the Vetiva Banking ETF or the Vetiva Griffin 30 ETF (tracking the NSE Banking Index and the NSE 30 Index respectively) as these ETFs will be available on the trading screens of their local brokers in their domestic markets.

184 For instance, it may be possible to create indexes comprising the largest 50 or 100 companies trading on the AELP, or the largest 10 companies in each of the participating countries, or indeed an 'AELP All Share Index' comprising all companies listed on participating AELP exchanges (given that these are the largest and most liquid markets in sub-Saharan Africa, although such an index will invariably include some illiquid stocks). Illiquidity of the underlying securities can be addressed using index optimisation and synthetic replication strategies. For a discussion of this, see for instance Nikbakht, Pareti and Spieler (n 179) 155-157.

185 I offer additional suggestions on the development of cross-border trading in sub-Saharan Africa in the concluding Chapter.

186 Asides shares, investors in participating exchanges will also be able to invest in other financial products such as derivatives and ETFs. This is significant given that not all participating exchanges currently have a variety of tradeable asset classes. For instance, both the BRVM and the Casablanca Stock Exchange currently only deal in equities and bonds; the Nigerian and Kenyan markets deal in equities, bonds, ETFs and real estate investment trusts; whilst the JSE is the only participating exchange that deals in all asset classes including derivatives.

the project is not tied to the various RECs on the continent, it is able to take advantage of stronger continental (as opposed to regional) institutions (ASEA and AfDB) to promote securities market activity at a much larger scale than would have been possible with the purely regional approaches.

Fourth, by exposing investors to a broader range of securities and asset classes, the AELP can significantly diversify the investor base in the participating markets, thus exposing issuers to better sources of capital and pools of liquidity that are not available in the domestic markets. Many of the participating markets display a strong domestic investor bias, as seen in the chart below:

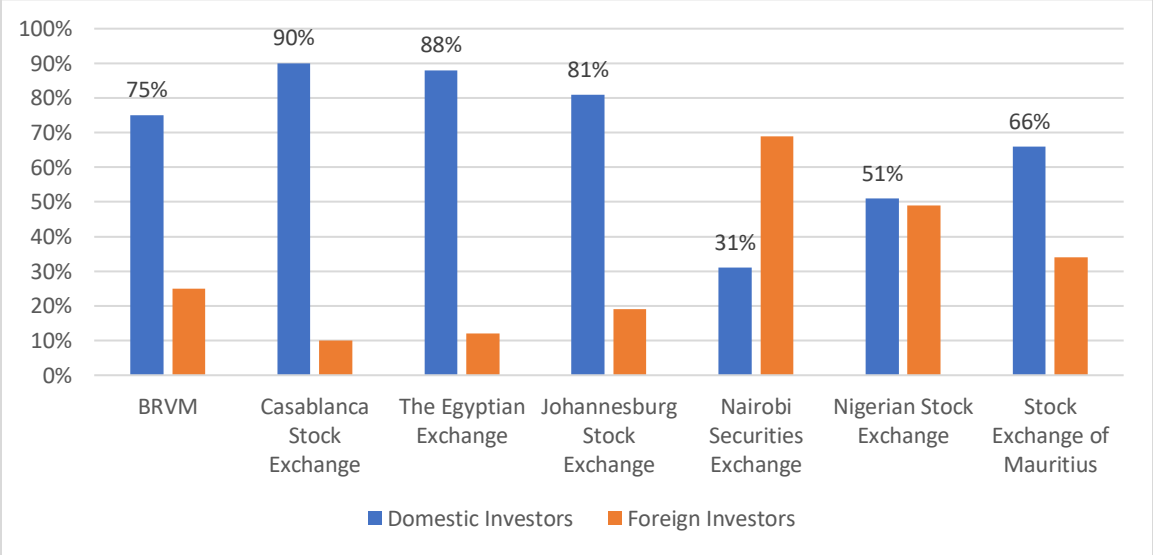

Figure 6.2 - Domestic versus Foreign Investor Participation in AELP Participating Exchanges as at 31 December 2019[187]

[187] Data obtained from the AELP Q1 2020 Brochure <https://african-exchanges.org/sites/default/files/programs/aelp_brochure_-_2020_march_1_0.pdf> accessed 5 October 2020.

As seen in the chart above, the BRVM as well as the markets in Morocco, Egypt and South Africa all have domestic investor participation of over 75%. By giving investors in other participating countries better access to these markets, the AELP can diversify their investor base, which can be extremely beneficial for large capital raisings that the domestic market may not be deep enough to absorb.

Fifth, the AELP is not dependent on more general economic integration or extensive harmonisation of securities law. On this basis, it represents a less politically intrusive and more geographically inclusive regional integration agenda. Integration on the basis of trading rather than harmonization of rules and cross-listing potentially brings immediate benefits to both investors and issuers. The focus on the largest markets means that implementation costs can be better managed, and funding and support from AfDB brings a key pan-African stakeholder into the efforts.

Finally, although the AELP does not depend on general economic integration, it complements many of the broader continent-wide integration agendas. Thus, promoting pan-African investments and capital flows operationalises the ideals of pan-African trading and investment in the Abuja Treaty[188] and the African Union's Agenda 2063.[189]

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188 Abuja Treaty (n 39) art 45.

189 The African Union's Agenda 2063 was adopted by African Heads of State in May 2013 during celebrations to mark the golden jubilee of the formation of the African Union (see <https://au.int/en/agenda2063/goals> accessed 5 October 2020). The Agenda is Africa's 50-year blueprint for inclusive and sustainable pan-African development. The Agenda sets 7 aspirations, 20 goals and several priority areas to achieve its vision, including promoting African capital markets (Aspiration 7, Goal 20, Priority 1), and promoting an integrated continent and functional continental financial and monetary institutions (Aspiration 2, Goal 9).

However, there are a few challenges to the implementation and use of the AELP. First, the AELP exposes investors to foreign exchange risk,[190] and the countries currently have divergent foreign exchange regimes and approaches to funding securities transactions.[191] Second, tax treatment of securities transactions differ across the seven participating countries, which can reduce investor appetite in some participating countries.[192] Third, the project will not directly reduce transaction costs nor provide foreign investors with greater confidence in the ability of regulators to properly supervise their markets and enforce market regulation. Nonetheless, the AELP has potentially enormous long-term benefits for participating exchanges, and there seem to be good reasons to be optimistic about its potential long-term impact on liquidity and securities market development in Africa.

6.6.3. The Development of Currency and Monetary Unions

Both ECOWAS and the EAC are prioritising efforts towards the establishment of regional currencies. On 30 November 2013, EAC Partner States signed the Protocol establishing

190 Garrido and Overdahl (n 177).

191 For instance, both Morocco and Nigeria do not have flexible foreign exchange regimes, Egypt has capital controls, and Kenya, South Africa and the BRVM all require investors to pre-fund securities transactions by undertaking currency purchases and sales ahead of placing orders for the underlying securities. See n 178 above.

192 For instance, both Egypt and Nigeria impose a 10% withholding tax on dividends, Kenya imposes 10% on foreign investors and 5% on local investors, Morocco imposes 15% on dividends on equity and 10% on interest on debt and the rate in the BRVM ranges from 7% to 12%. South Africa gives a 20% exemption on withholding tax to non-residents receiving dividends from foreign companies listed on the JSE, subject to applicable double taxation agreements, whilst Mauritius is the only participating country that does not impose withholding tax on dividends. Similarly, Kenya, Nigeria, Mauritius and Egypt grant full exemptions to capital gains tax on securities. South Africa grants an exemption only to non-residents, whilst full capital gains tax is levied in Morocco. Finally, some countries have other additional taxes e.g. South Africa (0.25% securities transfer tax imposed on the value of shares transferred) and Nigeria (0.075% stamp duty tax levied on securities transactions). Mauritius is the only country that will achieve a 0% tax impact on investors. For a fuller discussion on the tax, market and regulatory positions of AELP participating countries, see AELP Stakeholder Engagement Forum (note 178).

the East African Monetary Union which laid the foundations for the EAC to converge to a single currency by 2023.[193] Similarly, at the ECOWAS Summit in June 2019, ECOWAS Heads of States agreed to the launch of the 'Eco' as the single currency of the ECOWAS region by 2020.[194] Although there are no additional single currency drives in the SADC, the Common Monetary Authority is in existence, linking South Africa, Namibia, Eswatini and Lesotho through the South African Rand.

Currency unions can go a long way in promoting capital market integration as they remove foreign exchange risk from cross-border issuances and trading. Added to the anticipated benefits of the AfCFTA, achieving a single currency across their respective regions can significantly transform regional trade amongst member states of both the EAC and ECOWAS and act as a catalyst to increased regional cross-listings.

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193 See Appendix 2 below on the EAC's move towards a regional currency.

194 Mercy Abang, 'West Africa Bloc Adopts 'ECO' As Name of Planned Shared Currency' (*Al Jazeera*, 30 June 2019) <https://www.aljazeera.com/news/2019/06/west-africa-bloc-adopts-eco-planned-shared-currency-190630103927903.html>; Aisha Salaudeen, 'West African Countries Choose New 'ECO' Single Trade Currency' (*CNN*, 9 July 2019) <https://edition.cnn.com/2019/07/01/africa/single-trade-currency-ecowas/index.html>. Since the June 2019 ECOWAS Summit, there has been a lot of activity regarding convergence to a single ECOWAS currency, a full examination of which will be outside the scope of this thesis. On 21 December 2019, President Alassane Ouattara of Ivory Coast announced three important reforms to WAEMU monetary policy (Ange Aboa, 'West Africa Renames CFA Franc but Keeps it Pegged to Euro' (*Reuters*, 21 December 2019) <https://www.reuters.com/article/us-ivorycoast-france-macron/west-africa-renames-cfa-franc-but-keeps-it-pegged-to-euro-idUSKBN1YP0JR> accessed 31 July 2020). First, the CFA Franc of West Africa will be renamed the 'Eco'. Second, France will no longer hold 50% of the reserves of WAEMU members, although the French Central Bank will continue to guarantee the convertibility and fixed parity between the Eco and the Euro. Third, arrangements requiring French government officials to participate in governance meetings of the Central Bank of West Africa will be withdrawn. These policy reforms have elicited mixed reactions. Whilst the Managing Director of the IMF welcomed the reform, calling them a 'key step in the modernization of long-standing arrangements between the West African Economic and Monetary Union and France' (see Kristalina Georgieva, *Statement by the IMF Managing Director on the Reform of West Africa's CFA Franc* (Press Release No. 19/487 2019), reception amongst the non-WAEMU ECOWAS members has been less enthusiastic. On 16 January 2020, the finance ministers and Central Bank governors of the non-WAEMU ECOWAS members rejected the decision of WAEMU to unilaterally rename the CFA Franc to Eco. Nonetheless, WAEMU countries continue to progress the reforms.

But achieving a single currency is not easy, and although there is political support for the adoption of single currencies in both the EAC and ECOWAS, the transition to a single currency would require strong macroeconomic convergence and alignment of national interests, which member states have struggled to achieve.[195] Thus, monetary integration in the EAC and ECOWAS can potentially improve capital markets integration in both RECs, but it is unclear when monetary integration will be achieved, and by how much it will propel capital markets integration.

6.7. Conclusion

Although capital market integration can go a long way in addressing the liquidity and scale problems facing most markets in sub-Saharan Africa, capital markets integration is itself a daunting task. States and participating stock exchanges face complex political, economic and social challenges in their journey towards well-functioning, integrated markets. These challenges are by no means unique to sub-Saharan Africa or indeed developing economies more broadly. However, the sheer diversity of member states, coupled with the vast difference in initial conditions, levels of development and political inclinations makes achieving well-functioning, integrated markets in sub-Saharan Africa particularly difficult. The shift from continent-wide to region-wide integration efforts has helped to fast-track the integration agenda, but the evidence suggests that capital markets integration is proceeding a lot slower than would have been preferred.

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195 See UNECA (n 42) 2 'Five of the eight RECs have set macroeconomic and monetary convergence targets aimed at harmonizing economic indicators. However, the member countries within these RECs have not converged enough. Coordinating the endorsed programmes to facilitate meeting targets set by both the RECs themselves and the AU has proved challenging, resulting in a mixed picture with some countries progressing more than others'.

The AELP presents a potentially game-changing approach to securities market integration on a pan-African basis. By developing participating exchanges into securities hubs and promoting integration on the basis of liquidity rather than geographical proximity, the AELP potentially side-steps many of the challenges plaguing other approaches to market integration pursued in the continent, which, for the most part have formed parts of broader economic integration agendas.

Although there are good prospects for improved capital markets integration in the long-term, in the short/medium term, it is unlikely that full integration of such a nature as to appreciably influence capital market development in sub-Saharan Africa will occur. Consequently, whilst pursuing a long-term goal of deepening market integration, in the short/medium term, states must continue pursuing aggressive plans towards domestic market development. In this respect, the discussions in Chapters 4 and 5 on properly calibrating rules of securities regulation and strengthening enforcement mechanisms remain crucial. For all its benefits, market integration must not be seen as an immediate panacea to market underdevelopment, but as a long-term plan to inject life into the bloodstream of the financial system.

CHAPTER 7 – SUMMARY AND CONCLUSION

7.1. Summary

This thesis set out to examine five questions in the development of securities markets in sub-Saharan Africa. The thesis started by providing a background and overview of securities markets in sub-Saharan Africa, noting the illiquidity and shallowness (both in absolute and relative terms) of most markets operating in the region. The thesis then examined the literature on capital market development in the region, noting the key recommendations and gaps in the literature. Thereafter, the thesis explained the research design and methodology, and discussed its contributions to the literature as well as its limitations. Chapters 2–6 answered each of the five research questions.

On the first question (i.e., whether securities market development matters in sub-Saharan Africa and the extent to which sub-Saharan African firms seek to bond themselves to better securities law or achieve greater iquidity through cross-listing), the thesis examined the theoretical and empirical economics literature on the relative importance of securities markets to economic growth and evaluated the extent to which firms in sub-Saharan Africa seek to bond themselves to better securities law or achieve greater liquidity through cross-listing. The thesis found that there is some empirical support for the theoretical claim that liquid securities markets correlate with economic growth. On cross-listing, the thesis found that trans-continental cross-listing is more consistent with a motivation to seek liquidity rather than bond to better systems of investor protection, but

also that regional cross-listing within sub-Saharan Africa was not consistent with either bonding or liquidity motivations.

On the second question (i.e., the legal and institutional requirements needed to support well-functioning securities markets in sub-Saharan Africa and the role of Fintech in securities markets in the region), the thesis examined the impact of institutions and Fintech in developing securities markets in sub-Saharan Africa. Leveraging on developments in the institutional economics and legal literature, the thesis examined the formal and informal constraints and enforcement mechanisms regulating securities markets. The thesis noted that rules mandating faithful disclosure and preventing market abuse and the credible enforcement of these rules are traditional institutions that are helpful (but insufficient) in fostering securities market development. This segued into an examination of the institutional frameworks prevalent across sub-Saharan Africa and options open to policymakers to spur market development even in weak institutional contexts. The thesis thereafter examined the role of Fintech in securities markets in sub-Saharan Africa, noting that Fintech is primarily deployed in galvanising retail participation, making the traditional institutions of securities regulation more (and not less) salient in sub-Saharan Africa.

With this foundation, the thesis then examined the third research question (i.e., whether rules of securities regulation hinder securities market development in sub-Saharan Africa) using Kenya, Nigeria and South Africa as case studies and focusing primarily on listing eligibility requirements, disclosure obligations and market abuse regulation. Consistent with previous findings in the literature, the thesis argued that listing eligibility requirements are sometimes too high given the state of financial development in the region

and the constraints firms face in raising capital to grow to the size required to list. The thesis also argued that disclosure obligations may impose compliance costs on issuers that are not sufficiently compensated by improved liquidity or reduced cost of capital. Finally, the exclusive reliance on criminal sanctions can make market abuses more difficult to punish, thus affecting enforcement credibility.

On the fourth research question (i.e. how countries in the region enforce their securities law and the level of public and private securities law enforcement intensity in the region), the thesis found that public enforcement in the select countries (measured by the number of successful enforcement actions and the severity of penalties imposed) was largely weak, although it was better in South Africa, in part due to the reliance on market surveillance by the stock exchange. Weak public enforcement coupled with restrictive rules of court and procedure in turn reinforce weak private enforcement. Thus, overall, the thesis found securities law enforcement in the selected countries to be weak.

Finally, on the fifth research question (i.e. the extent to which the recent drive towards economic and market integration can address the problems facing securities markets in sub-Saharan Africa), the thesis explained the economic justification for market integration, as well as the progress and challenges facing market integration drives in the region. The thesis also briefly discussed the market integration journey of other regions in the world and speculated into the future of market integration in sub-Saharan Africa, highlighting recent developments that can have transformative effects on African capital markets of tomorrow. Finally, the thesis found that market integration cannot properly be considered as a short/medium term solution to the problems of illiquidity and scale facing securities markets in the region.

7.2. Conclusion

7.2.1. Securities Market Development Matters for Sub-Saharan Africa

The thesis concluded that it is important to develop securities markets in sub-Saharan Africa. By providing an avenue for investors to exit their investment positions in secondary markets, securities markets facilitate the funding of firms and projects which, on the margin, may go unfunded. This function of securities markets is especially important in sub-Saharan Africa given the severe financing deficit in the region, and the low levels of credit provided by the region's banks to its real economy.

However, this conclusion does not mean that all countries in sub-Saharan Africa need (or can support) independent markets. Small economic and population sizes in many countries mean that many independent markets in the region will face severe scale problems and the cost of establishing and maintaining well-functioning securities markets may be extremely high for small economies.

7.2.2. Cross-Listing Is Not Yet an Effective Alternative Source of Capital

This thesis empirically examined securities cross-listing in sub-Saharan Africa. Regarding trans-continental cross-listing (i.e. cross-listing into the US or the UK), the thesis found that there is a lot more cross-listing by sub-Saharan African firms into the UK than into the US. This finding is more consistent with liquidity as opposed to bonding as the key justification for pursuing trans-continental cross-listing. The thesis also found evidence of cross-listing within sub-Saharan Africa, driven by the tendency of firms to cross-list sub-regionally and into countries into which they have existing operations.

However, the thesis found no evidence of firms from countries without domestic markets cross-listing trans-continentally and found only one firm from a country without a domestic market cross-listing within sub-Saharan Africa. The thesis also found that firms pursuing regional cross-listing within sub-Saharan Africa are more likely to be incorporated and listed in larger markets but cross-listing into smaller, less liquid markets. Thus, the thesis concluded that cross-listing has not proven to be effective in providing capital to firms in sub-Saharan African countries with no domestic markets or with badly underdeveloped markets.

7.2.3. Traditional Institutions Supporting Well-Functioning Markets are Likely to Remain Salient in Sub-Saharan Africa in the Future

This thesis argued that rules mandating faithful disclosure and preventing market abuses, and the credible enforcement of these rules are traditional institutions necessary (but insufficient) for securities market development. Although Fintech is growing rapidly in sub-Saharan Africa and disrupting securities markets globally, the thesis found that Fintech largely plays the role of galvanising retail market participation in sub-Saharan Africa and is likely to do so in the future. Increased retail participation in an environment of low financial literacy means that the traditional institutions supporting well-functioning markets are only going to be more salient in the foreseeable future in sub-Saharan Africa.

7.2.4. Formal Rules of Securities Regulation Potentially Hinder Securities Market Development in Sub-Saharan Africa

The comparative analysis of the listing eligibility requirements and disclosure obligations in Kenya, Nigeria and South Africa revealed that listing eligibility requirements (in both

Kenya and Nigeria) and disclosure obligations (in Nigeria) are arguably too stringent, when viewed against the level of financial development in both countries. Both countries set high financial and non-financial thresholds for listing which proxy issuer size for issuer quality. Given the limited funding by banks and other sources to the real economy of both countries, these size-based tests are likely to screen out high quality issuers that have not attained the required size to list on the main markets. Although both countries have alternate markets for smaller-sized issuers, the alternate markets are even more illiquid than the already illiquid main markets, making them unattractive listing venues.

In addition, this thesis found that both countries rely heavily on criminal sanctions in enforcing their market abuse regimes. This raises the standard of proof of regulators, and by extension, the difficulty of achieving successful enforcement outcomes.

7.2.5 Securities Law Enforcement is Fairly Poor

This thesis empirically assessed the intensity of securities law enforcement in Kenya, Nigeria and South Africa, examining the powers of securities regulators on the books, regulatory inputs and outputs, and the use of securities class actions in private enforcement by investors. The thesis found that the law on the books give securities regulators fairly robust powers of inspection, investigation and supervision. The thesis also found that securities regulators in Kenya and Nigeria were, on average, better provisioned than their counterpart in South Africa.

However, both in terms of the number of enforcement actions successfully brought and the severity of penalties imposed, South African public regulators were significantly

more active than their Kenyan and Nigerian counterparts, repeatedly finding violations and often imposing stiff penalties.

Regarding private enforcement, the thesis found that rules of court practice and procedure limit the ability of claimants to institute securities class actions in Kenya and Nigeria. Overall, the thesis found securities law enforcement to be fairly poor.

7.2.6. Market Integration is a Promising but Difficult Journey

This thesis reviewed the justifications for and progress towards increased market integration in sub-Saharan Africa. The thesis noted the potentially transformative impact of market integration in addressing the scale problems facing several markets in the region. However, the thesis noted several challenges to market integration in the region which make it unlikely that integration of such a nature as to appreciably influence market development in the region is unlikely in the short/medium term.

The thesis also noted the potentially transformative effect of the African Exchanges Linkage Project (AELP) as a less politically intrusive and more geographically inclusive integration agenda based on market liquidity rather than geographical proximity. Although the AELP will not address divergent tax and foreign exchange policies which can be significant impediments to cross-border trading, the thesis concluded that the AELP can significantly improve the liquidity of stocks and ETFs trading on participating exchanges and thus foster market development. Overall, the integration journey is a promising but difficult one, and states must continue to adopt domestic policies to spur market development in the short/medium term, whilst pursuing market integration in the long term.

7.3. Recommendations

Below, I propose several recommendations for policymakers seeking to develop their domestic markets in sub-Saharan Africa. The broad philosophy behind the recommendations is to adopt gradual, low-cost strategies to relax the stringency of the laws on the books, but at the same time, significantly improve enforcement credibility. The expectation is that relaxing the laws on the books will reduce the barriers to entry into the markets, whilst strengthening enforcement credibility will improve the quality of participants who remain in the market, and the trust investors repose in the system.

Given the level of diversity in the region, it is worth prefacing that policymakers must consider these recommendations in light of their peculiar domestic circumstances.

7.3.1. Capital Market Development is not a Substitute for Banking Development

As this thesis has stressed, capital markets development is not easy. Even where countries have strong institutions and achieve macroeconomic and political stability, in the absence of increased integration, scale problems can limit the number, size and capitalization of issuers, investors and market intermediaries, and hence market efficiency.[1]

Thus, for sub-Saharan African countries without domestic markets, policymakers must carefully assess whether they really need (and can sustain) domestic markets. Where the answer is in the negative, such countries can continue taking prudent steps to develop

[1] This is, of course, true for the countries that have struggled to attract a single issuer, and also for very small countries such as Eswatini and Lesotho.

their banking sectors.[2] Similarly, these countries can promote bilateral/multilateral discussions within their Regional Economic Communities (RECs) to remove barriers (such as tax and foreign exchange) to regional cross-listing, so as to facilitate easy access of firms in their countries to the stock exchanges of neighbouring countries.

Even for countries that have established domestic markets, policymakers must continue to assess whether scarce regulatory resources are best deployed to promote banking or capital market development, taking their specific industrial structures into account. Overall, the case for capital market development is not a case against banking sector development. Both must be pursued to achieve effective funding to spur economic growth.

7.3.2. Rethinking Minimum Size Thresholds

As discussed in Chapter 4,[3] Kenya and Nigeria often rely on issuer size (measured in terms of minimum capitalization and minimum assets requirements) in setting listing eligibility criteria. Whilst this may be justified in certain situations, the reality is that given the poor state of domestic credit to the private sector in both countries and the problems of access to and cost of finance, firms may find it difficult to raise capital to scale to the size where they become eligible for public listings.[4]

To attract good-quality issuers, regulators in Kenya and Nigeria seeking to attract good-quality issuers may therefore consider relaxing or completely removing existing size

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2 Of course, the answer to this question is not always in the negative. For instance, Ethiopia which aims to be the next African country to establish a domestic market has a larger economy and better capitalised companies than many other countries in Eastern Africa.

3 See Chapter 4, section 4.1.3.1.

4 ibid.

thresholds (minimum capitalization and net assets). If the focus is shifted on the accuracy of information disclosed, investors will still be able to make informed investment decisions on whether to purchase an issuer's securities and, irrespective of their size, issuers will still be able to signal their quality to the market.

7.3.3. Preparing Companies for Public Markets Through Peer Mentoring and Business Support

Apart from reducing or eliminating size thresholds, policymakers in sub-Saharan Africa can more deliberately prepare companies for capital raising in the public markets through peer mentoring and tailored business support. The ELITE programme run by the London Stock Exchange provides a good example of how this has been deployed in the global markets.

The ELITE programme provides an ecosystem to assist ambitious companies and provides mentoring and business support to business leaders to enable them scale to the right size and raise capital to achieve their business objectives. Companies signed up to the programme become part of a community of businesses, investors and advisors, build expertise by learning from expert advisors, academics and entrepreneurs and can access different types of public and private, equity and debt capital.[5]

A programme like this is particularly useful in sub-Saharan Africa given the region's financing deficit and the high size thresholds for raising capital on the public markets. Connecting ambitious companies with strong business support and capital raising

[5] For a brief overview of ELITE, see https://www.lseg.com/elite.

options can improve the quality of their products and management, as well as help them scale to the appropriate size to approach the public markets in an IPO.

Domestic stock exchanges in sub-Saharan African countries that are struggling to attract new listings can therefore consider mentoring and business support programmes like this to prepare ambitious firms for life as listed companies. The expertise and human capital required for such initiatives already exist in the largest markets in sub-Saharan Africa. Such programmes also align with other recommendations discussed in this thesis, as companies from the programme will have been subject to ongoing independent scrutiny at the point of listing[6] and will have directors that are better equipped with the skills necessary to govern listed companies.[7]

7.3.4. Rethinking Disclosure Rules: From Frequent Disclosure to More Faithful Disclosure

Academics and market participants have discussed the seeming over-regulation of securities markets in Kenya and Nigeria and the tendency to adopt rules of investor protection that increase entry costs and potentially deter prospective issuers.[8] As noted in Chapter 4,[9] Nigeria stands alone in requiring issuers to issue mandatory quarterly reports and earnings forecasts. Although in theory, frequent reporting can improve the

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6 See Recommendation 7.3.2. above.

7 See Recommendation 7.3.3. above.

8 See Patrick Honohan, 'Finance in Africa: A Diagnosis' in Marc Quintyn and Geneviève Verdier (eds), *African Finance in the 21st Century* (IMF 2010) (noting the tendency to adopt strict rules of investor protection which can deter would-be investors and recommending a lighter and more pragmatic form of issuer regulation). See also Bryan Shipp, 'Going Long on the Nairobi Exchange' (2010) 23 McGeorge Global Business & Development Law Journal 243 (reporting the complaints of over-regulation by market participants in the Nairobi Stock Exchange).

9 See Chapter 4, section 4.1.3.2.

informational efficiency of the market, thus improving liquidity, available evidence suggests that Nigeria (which imposes the strictest disclosure obligations) is the least liquid of the three exchanges examined.[10] Thus, although one could argue that the Nigerian market may be even less liquid without mandatory quarterly reports, the data suggests that the level of liquidity in Nigeria over time is grossly insufficient to justify the continued imposition of mandatory quarterly reporting.[11] This is more so given that mandatory quarterly reports increase compliance costs, the fixed component of which falls disproportionately on small companies thus raising barriers to entry into the public markets.

Therefore, Nigeria can adopt the approach taken by Kenya and South Africa and make quarterly reporting available on an opt-in basis to issuers who want to bond themselves to more frequent disclosure. Intuitively, if quarterly reports and earnings forecasts promote the liquidity of Nigerian stocks, companies that opt into the quarterly reporting regime should witness more liquidity and a lower cost of capital than companies that do not. This in turn should incentivise other companies to similarly opt into the quarterly reporting regime. For its part, the regulator can focus more attention on the enforcement of the truth of disclosed information to prevent the dissemination of false or misleading information.

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[10] See Chapter 1, Figure 1.5 on the value of stocks traded relative to GDP in Kenya, Nigeria and South Africa. Nigeria has trailed Kenya on this measure for a few years and reached an all-time low of 0.37% in 2016, the year when South Africa recorded its peak of 136%.

[11] See the example of First Aluminium Plc discussed in Chapter 4, n 79 and accompanying text.

To the extent permitted by domestic circumstances, this recommendation is also useful to other countries in sub-Saharan Africa with mandatory quarterly reporting requirements.[12]

7.3.5. Strengthening Enforcement in Practice

This thesis found that the problem with securities law enforcement in Kenya and Nigeria is unlikely to be an input problem or a problem of regulators having insufficient powers. To the contrary, the problem appears to be the fact that regulatory powers and inputs do not lead to strong enforcement intensity in practice. The use of criminal sanctions increases the standard of proof on regulators and limits the ability to quickly conclude enforcement actions through administrative sanctions and settlement agreements. Similarly, market surveillance has not proven effective in detecting market abuse.

This thesis has explored three strategies that public regulators can adopt to improve enforcement in Kenya and Nigeria.[13] On the surveillance side, there are indications that Kenya and Nigeria are already investing in additional regulatory technology tools to improve their surveillance capability.[14] This is a welcome development. In addition to this, it will be crucial for both countries to move from criminal penalties to administrative sanctions and settlements to improve the frequency with which they can establish violations, conserve regulatory resources and thus strengthen enforcement intensity.

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12 Mandatory quarterly reports are required in several other countries in sub-Saharan Africa, including Botswana, Zambia, Namibia and Mauritius.

13 See Chapter 5, section 5.3.3.

14 See Chapter 5, section 5.3.3.1.

7.3.6. Deeper Integration to Improve Scale

The thesis argued that making and enforcing credible rules of securities regulation are helpful (but not necessarily sufficient) in building well-functioning securities markets in sub-Saharan Africa. Scale inefficiencies mean that fringe markets in the region are unlikely to build the levels of liquidity necessary to contribute meaningfully to economic development in their countries. The policy response to this scale problem has been to pursue increased integration at the sub-regional level. However, achieving integration has not been easy given the political, economic and social challenges integration agendas have so far been faced with. The thesis reviewed the integration journeys of different countries and regions in the world and drew lessons which policymakers in the different RECs in sub-Saharan Africa can apply.

Countries/regions that have progressed integration agendas in the absence of strong regional economic and institutional systems have largely done so either on a bilateral basis (for example the Mutual Recognition of Securities Offerings (MRSO) and Multi-Jurisdictional Disclosure System (MJDS)) or amongst countries forming a smaller sub-set of the broader integration plan (Singapore, Malaysia and Thailand in the ASEAN region). Indeed, this thinking has now been invoked in Eastern Africa. In November 2020, the stock exchanges of Burundi, Rwanda, Tanzania and Uganda completed the EAC Capital Markets Infrastructure (CMI), a technology platform financed by the World Bank to interconnect

securities trading systems in East Africa.[15] Crucially, the project progressed without Kenya, the largest market in the region.

To progress their integration journeys in the absence of strong regional arrangements, policymakers in Western and Southern Africa can usefully pursue deeper integration amongst a smaller sub-set of countries, which can be achieved with a lot less friction than the region-wide integration plans currently proposed. For example, given that Eswatini, Lesotho, Namibia and South Africa already utilize the South African Rand as legal tender and harmonise macroeconomic policy with that of the South African Reserve Bank, integration at this smaller level will be more feasible in the short/medium term than integration agendas seeking to cover the entire SADC region. Similarly, Nigeria and Ghana in Western Africa can usefully pursue deeper bilateral arrangements modelled along the MRSO or MJDS which will permit easier access to the securities markets of one state by issuers approved in the other.

This approach can start addressing the scale problem of many of the smaller markets in the region, whilst efforts to address the difficulties facing longer-term, region-wide integration agendas continue.

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15 Julius Bizimungu, 'Regional Stock Markets Automate Trading' (The New Times Rwanda, 30 November 2020) <https://www.newtimes.co.rw/news/regional-stock-markets-automate-trading> accessed 2 December 2020. Like the AELP project, the CMI permits brokers in each of the participating countries to see all markets across the region. Stockbrokers who meet the requirements of the EAC Council Directive on Licensing (Directive EAC/CM/Directive 15 of the Council of Ministers of 27 October 2017 on Licensing in the Securities Market, Legal Notice No. EAC/145/2017) will be able to trade directly across all four participating exchanges. Stockbrokers who do not meet the requirements of the Directive will need to enter into reciprocal agreements with stockbrokers in the host markets. For a brief discussion of the Directive, see Chapter 6, section 6.3.4.

7.3.7. Creating Incentives for Cross-Border Trading

As noted in Chapter 6, the AELP is currently the integration project with the most transformative potential across Africa. The AELP facilitates cross-border trading of securities listed on participating exchanges across Africa, by granting brokers in one country access to the trading infrastructure of other participating countries. The project seeks to pursue integration based on liquidity rather than geographical proximity, is pursued on a pan-Africa basis, and has obtained the financial and institutional backing of key pan-African stakeholders including the African Development Bank and the African Securities Exchanges Association.

Cross-border trading of this nature can inject much needed liquidity into African securities markets by connecting investors across the continent with both stocks and ETFs listed in other countries. To encourage active cross-border trading, it will be important for policymakers to stimulate investor participation through tax and foreign exchange policy. As noted in Chapter 6, AELP participating countries currently have different tax and foreign exchange policies.[16] Thus, whilst a Nigerian investor receiving dividends from a Mauritian company will not be subject to withholding tax, the same investor will be subject to a 15% withholding tax on dividends from a Moroccan company. Participating countries also have divergent foreign exchange policies,[17] which can affect the incentives of foreign investors to invest in their companies. The result is that in the absence of careful policies addressing tax and foreign exchange issues, some countries may not obtain the full benefit

16 See Chapter 6, n 205-206 and accompanying text.

17 ibid.

of the AELP and cross-border trading will flow towards countries that are most receptive to foreign capital.

Participating countries can take some steps to incentivise foreign participation and make the AELP successful. First, they can grant tax reliefs or exemptions on securities (including stocks and ETFs) purchased by foreign investors to incentivise cross-border trading under the AELP. Second, it will be helpful for countries to maintain flexible foreign exchange regimes to allow foreign investors easily convert and repatriate capital and dividends so that foreign investors' funds are not trapped or convertible only at artificial rates. Finally, some markets in sub-Saharan Africa have commenced listing securities in multiple currencies to facilitate foreign investment.[18] This reduces foreign exchange risk and can therefore improve participation by foreign investors. Other participating countries can consider adopting this innovation.

7.4 Agenda for Further Research

Although this thesis makes several important contributions to our understanding of securities markets in sub-Saharan Africa, there are several opportunities for future research. Below, I set out a proposed agenda for further research to better improve our understanding of capital markets development in sub-Saharan Africa.

[18] For instance, the Stock Exchange of Mauritius is a multi-currency listing venue, able to list securities in Dollars, Pound Sterling, Euro and South African Rand.

7.4.1. Research into the Impact of Other Legal Institutions on Well-Functioning Markets

The discussions on formal legal institutions in this thesis focused on traditional areas of securities law (listing requirements, disclosure obligations and market abuse regulation). Whilst these are crucial areas of enquiry, there are similarly other legal institutions that can facilitate or hinder market development.

Further research on capital market development in sub-Saharan Africa can therefore expand on the work done in this thesis and consider other legal institutions. One useful area of enquiry in this regard is corporate governance, including corporate governance reporting and agency cost regulation. Given that most firms in the region have controlling shareholders, it will be a productive research agenda to understand how different countries in the region regulate relationships between controlling and minority shareholders, the opportunities for extraction of private benefits of control, the protections available to minority shareholders and how corporate governance affects capital market development in the region.

In addition, further research can usefully examine intermediary regulation, particularly the regulation of broker/dealers and auditors. The point has been made that Nigeria has a problem with brokers/dealers conducting unauthorised transactions on clients' accounts[19] and consumer complaints of this nature can have serious consequences for trust in the market, particularly in a population with low financial literacy.

[19] See n 157 above and accompanying text. See also <https://sec.gov.ng/suspensions-and-penalties/> accessed 30 November 2020.

Similarly, given the key role auditors play in providing external certification of the accuracy of company's disclosures and the few findings of violations for disclosing inaccurate or misleading information, future research can productively examine auditor regulation to assess the stringency of auditor regulation and the incentives of auditors to provide faithful opinions on company disclosures. In addition, the Big Four accounting firms[20] all have a significant presence in sub-Saharan Africa and provide audit services to listed companies in the region. Future research can productively examine whether this matters for the quality of audit services provided in the region and whether their African arms abide by the same standards as their main jurisdictions.

7.4.2 Deepening Our Understanding of Securities Cross-Listing in Sub-Saharan Africa

This thesis examined securities cross-listing in sub-Saharan Africa. The examination revealed several interesting patterns not previously observed in extant literature.

Future research can build on this foundation and further improve our understanding of securities cross-listing in the region. Additional empirical work could include interviewing business leaders in cross-listed firms to better understand the drivers for their cross-listing decisions. This will enable policymakers better understand what changes to law and policy may be necessary to improve securities cross-listing in the region.

Similarly, although this thesis noted that the trans-continental cross-listing data is more consistent with the liquidity than the legal bonding hypothesis, the thesis did not rule

[20] Klynveld Peat Marwick Goerdeler (KPMG), PricewaterhouseCoopers (PwC), Ernst & Young and Deloitte.

out the fact that the legal bonding hypothesis may also be able to explain why only seven firms from South Africa have their securities cross-listed in the US. Further research can therefore explore whether the seven South African firms listed in the US are truly exceptional and have better-than-average governance arrangements. If this is the case, then, the traditional conception of the legal bonding hypothesis (focusing on the exceptionalism of foreign firms cross-listed into the US) will be shown to retain its predictive value in sub-Saharan Africa.

7.4.3. Deepening our Understanding of the Impact of Formal Law on Capital Market Development in Sub-Saharan Africa

This thesis argued that rules of formal law potentially hinder capital markets development in sub-Saharan Africa, by raising the cost for companies to enter and remain on the market, without consequential benefits in terms of improved liquidity or reduced cost of capital. The thesis noted the limitations of a comparative methodology in reaching definitive conclusions on this point.

Further research can therefore use empirical tools to examine the extent to which managers of companies either eschew a prospective listing or delist already listed companies on account of compliance costs imposed by listing requirements. As noted in Chapter 4, Nigeria and South Africa have experienced a decline in their number of listed companies[21] whilst Kenya and Nigeria have historically struggled to attract new listings.[22] Future research can determine the extent to which these trends are attributable to the state

[21] See Chapter 4, Figure 4.2.

[22] See Chapter 4, Figure 4.1

of formal law. For example, future research could include interviewing managers of voluntarily delisted companies in Nigeria and South Africa to determine the extent to which their decisions to delist were affected by the cost of complying with listing requirements. Similarly, future research could include interviewing managers of companies that ostensibly meet listing eligibility requirements but decide not to list, to better understand the drivers for this decision.

7.4.4 Additional Research into Securities Law Enforcement

This thesis conducted an empirical and a law on the books assessment of securities law enforcement in sub-Saharan Africa. Whilst data was largely available in annual reports and websites of securities regulators in Kenya and South Africa, there were challenges with data gathering in Nigeria. The 2014 annual report of the Nigerian SEC is its most recent publicly available annual report. Attempts to obtain more recent data on staffing and budgets from the SEC were unsuccessful.[23]

I hope that future research will be able to present more recent data on the regulatory inputs and outputs in Nigeria, thus deepening our understanding of securities law enforcement in Nigeria and across sub-Saharan Africa.

[23] I placed a few calls and wrote several letters and emails to the Nigerian SEC requesting for securities law enforcement data in Nigeria. The letters were neither acknowledged nor replied. On one call, I was informed that the SEC considers its budget and staffing data to be proprietary information (which is, of course, strange given that the SEC is a public body). In response to further emails requesting for enforcement data in Nigeria, the External Relations Department of the SEC requested me to obtain the information from the internet (correspondence with the SEC on file with me). It is doubtful if the data in the enforcement section of the regulator's website is current as some sections of the website report enforcement data as at 2011.

In the end, sub-Saharan Africa must deploy all available sources of capital in funding its development. Developing the region's capital markets is not an easy journey, but it is a journey well worth traveling.

APPENDIX TO CHAPTER 2

Table 1: Cross-Listing destinations of African firms (1985-2006)[1]

	Belgium	Canada	France	Germany	Luxembourg	Switzerland	South Africa	UK	US	Total
Egypt	-	-	-	-	-	-	-	7	-	7
Ghana	-	1	-	-	-	-	-	1	-	2
Morocco	-	-	1	-	-	-	-	1	-	2
Nigeria	-	-	-	-	-	-	1		-	1
South Africa	6	4	1	6	5	1	-	7	11	41
Tunisia	-	-	-	-	-	-	-	1	-	1
Zimbabwe	-	-	-	-	-	-	1	1	-	2
Total	6	5	2	6	5	1	2	18	11	56

[1] Extracted from Sarkissian and Schill (Chapter 2, n 96) 2496.

Table 2: African firms cross-listed in the US (NASDAQ, NYSE and AMEX) as of June 2020.

Name	Country of Incorporation	Countries of Operation	IPO Year
AngloGold Ashanti Limited	South Africa	South Africa	5 August 1998
DRDGOLD Limited	South Africa	South Africa	30 December 2011
Gold Fields Limited	South Africa	South Africa	9 May 2002
Harmony Gold Mining Company Limited	South Africa	South Africa	27 November 2002
MiX Telematics Limited	South Africa	South Africa	9 August 2013
Sasol Ltd	South Africa	South Africa	9 April 2003
Sibanye Gold Limited	South Africa	South Africa	11 February 2013

Table 3: African firms cross-listed in the UK (as of June 2020).[1]

S/N	Name of Company	Incorporation	Industry	Listing Segment	Eligibility to raise capital
1.	AECI LTD	South Africa	Basic Materials (Chemicals)	Main Market	Eligible
2.	Alexandria Mineral Oils Company S.A.E.	Egypt	Energy	Admission to Trading Only	Eligible
3.	Amer Group Holding Company S.A.E.	Egypt	Real Estate	Admission to Trading Only	Eligible
4.	Arabian Food Industries Company S.A.E.	Egypt	Consumer Goods (Food)	Admission to Trading Only	Eligible
5.	Barloworld Limited	South Africa	Industrial (Industrial Goods and Services)	Main Market	Eligible
6.	Commercial International Bank (Egypt) S.A.E.	Egypt	Financial (Banks)	Main Market	Eligible
7.	Diamond Bank Plc	Nigeria	Financial (Banks)	Professional Services Market	Not Eligible
8.	Edita Food Industries S.A.E.	Egypt	Consumer Goods (Food)	Main Market	Eligible
9.	EFG-Hermes Holding S.A.E.	Egypt	Financial Services	Main Market	Eligible
10.	Ezz Steel Company S.A.E.	Egypt	Basic Materials	Main Market	Eligible

[1] https://www.londonstockexchange.com/reports?tab=issuers assessed 30 July 2020.

11.	Grit Real Estate Income Group Limited	Mauritius	Real Estate	Main Market	Eligible
12.	Guaranty Trust Bank Plc	Nigeria	Financial (Banks)	Main Market	Eligible
13.	Hwange Colliery Company Limited	Zimbabwe	Energy	Main Market	Not Eligible
14.	Kakuzi Limited	Kenya	Consumer Goods	Main Market	Eligible
15.	Madinet NASR for Housing and Development S.A.E.	Egypt	Real Estate	Admission to Trading Only	Eligible
16.	Meikles Limited	Zimbabwe	Consumer Goods	Main Market	Eligible
17.	Naspers Limited	South Africa	Technology	Main Market	Eligible
18.	NMBZ Holdings Limited	Zimbabwe	Financial (Banks)	Main Market	Eligible
19.	Old Mutual	South Africa	Financial (Insurance)	Main Market	Eligible
20.	Orascom Investment Holding S.A.E.	Egypt	Telecommunications	Main Market	Eligible
21.	Paints and Chemical Industries Company S.A.E.	Egypt	Industrial Goods	Main Market	Eligible
22.	Palm Hills Development S.A.E.	Egypt	Real Estate	Main Market	Eligible
23.	Press Corporation Plc	Malawi	Industrial Goods	Professional Securities Market	Eligible
24.	Seplat Petroleum Development Plc	Nigeria	Energy (Oil and Gas)	Main Market	Eligible

25.	Stilfontein Gold Mining Co. Limited	South Africa	Mining	Main Market	Not Eligible
26.	Telecom Egypt S.A.E	Egypt	Telecommunication	Main Market	Eligible
27.	Zambeef Products Plc	Zambia	Consumer Goods	AIM	Eligible
28.	ZCCM Investments Holding Plc	Zambia	Basic Materials	Main Market	Eligible
29.	Zenith Bank Plc	Nigeria	Financial (Banks)	Main Market	Eligible

Table 4: Regional Cross-Listing within Sub-Saharan Africa (as of June 2020)

S/N	Company	Incorporation	Regional Listing	Operation	Industry	Shareholding Information[1]
1.	4Sight Holdings Limited	Mauritius	South Africa	Non-operating holding company	Investment Holding Company (Technology)	• 47 out of 2,329 shareholders holding over 1 million shares each own 94.66%. • Individuals/Retail investors own 67.82%.
2.	African Oxygen Limited	South Africa	Namibia, South Africa	Sub-Saharan Africa	Industrial Goods	• Individuals/Retail investors own 1.18%. • Largest shareholder owns 50.47%.
3.	African Rainbow Capital Investments Limited (30 June 2020)	Mauritius	South Africa	South Africa	Financial Services (Investment Company)	• Individuals/retail investors own 7.63%. • 46 out of 16,695 shareholders holding 1million+ shares each own 88.1%. • Largest shareholder owns 51.1%.
4.	Alphamin Resources Corporation (31 December 2020)	Mauritius	South Africa	Democratic Republic of Congo, Rwanda	Mining	• Largest shareholder owns 48.6%.
5.	AngloGold Ashanti Limited	South Africa	South Africa, Ghana	Global	Mining	• Largest shareholder (Black Rock) owns 9.93%.

[1] High-level shareholding information was obtained from the 2019 Annual Report of the companies, showing ownership structure as at 31 December 2019 unless stated otherwise.

S/N	Company	Incorporation	Regional Listing	Operation	Industry	Shareholding Information[1]
						• Only 3 shareholders hold more than 5% of the company's shares (total of 23.85%). • Public shareholders own 99.90% of shareholding.
6.	Arden Capital Limited	Mauritius	South Africa	Zimbabwe	Financial Services (Investment Company)	• 11 out of 107 shareholders holding over 1 million shares each own 92.63%. • 4 beneficial shareholders holding more than 5% together own 85.45%. • Largest shareholder owns 58.85%.
7.	Astoria Investments Limited	Mauritius	Mauritius, South Africa	Mauritius	Financial Services (Investment Company)	• 22 out of 1,741 shareholders holding 1million+ shares each own 91.30%. • Largest shareholder owns 78.45%.
8.	Barloworld Limited	South Africa	Namibia, South Africa	16 countries (including Russia, Siberia, UAE and UK)	Transportation (Automotive, Equipment and Logistics)	• 29 out of 8,521 shareholders holding 1million+ shares each own 70.32% • Largest shareholder (Government Employees Pension Fund) owns 17.06% • Geography: Shareholders in South Africa, US, Canada, UK and Europe own 93.4% of the shareholding.
9.	Bravura Holdings Limited (31 March 2019)	Mauritius	Mauritius, Namibia	Southern Africa	Financial Services (Investment Company)	• 5 corporate shareholders own 99.96% of the shareholding

S/N	Company	Incorporation	Regional Listing	Operation	Industry	Shareholding Information[1]
10.	CAFCA Limited (30 September 2019)	Zimbabwe	Zimbabwe, South Africa	Southern and Central Africa	Manufacturing (Electronic and Electrical Equipment)	• 20 largest shareholders own 95.33% of the shareholding.
11.	Centum Investment Company Limited (31 March 2020)	Kenya	Uganda, Kenya	East Africa	Financial Services (Investment Company)	• 27 out of 36,588 shareholders holding over 1 million shares each own 71.68%. • Uganda Securities Exchange owns 0.89%. • 30 foreign companies own 11.05%. • 196 foreign individuals own 0.30%. • Local individuals own 56.65%. • Largest shareholder owns 30.08%.
12.	Choppies Enterprises Limited (30 June 2019)	Botswana	Botswana, South Africa	Eastern and Southern Africa	Retail Supermarket	• 64 out of 7,963 shareholders holding over 1 million shares each own 94.19%. • Retail investors own 11.03%. • 10 largest shareholders own 80.75%.
13.	East African Breweries Limited (30 June 2020)	Kenya	Uganda, Kenya, Tanzania	East Africa	Consumer Goods	• 10 largest shareholders own 59.23%. • 82 out of 25,672 shareholders holding over 1 million shares each own 77.88%.
14.	Ecobank Transnational Incorporated	Togo	BRVM, Ghana, Nigeria	40 countries in Africa (except South Africa)	Financial Services (Bank)	• 76 out of 7633,580 shareholders holding 1million+ shares each own 88.15%. • 10 largest shareholders own 80.22%.
15.	EPE Capital Partners	Mauritius	South Africa	Africa	Financial Services	• 5 out of 1,494 shareholders holding over 1 million shares each own 26.57%.

S/N	Company	Incorporation	Regional Listing	Operation	Industry	Shareholding Information[1]
	Limited (30 June 2020)				(Investment Company)	• Only 1 shareholder with more than 5% shareholding.
16.	Equity Group Holdings Plc	Kenya	Kenya, Uganda and Rwanda	Eastern and Central Africa	Financial Services (Bank)	• 334 out of 25,612 shareholders holding over 1 million shares each own 92.35%. • 10 largest shareholders own 35.27%.
17.	Firstrand Limited (30 June 2020)	South Africa	Namibia, South Africa	Sub-Saharan Africa, India, London	Financial Services (Banking, insurance and investments)	• Individuals/retail investors own 3.7% of shareholding. • Geography of shareholders: South Africa (54.6%), International (31.4%), Unknown /Unanalysed (14.0%)
18.	Flame Tree Group Holdings Limited (30 April 2020)	Mauritius	Kenya	East Africa, Southern Africa and the UAE.	Consumer Goods	• Largest shareholder owns 84.01%. Next largest owns 1.61%. • Geography of shareholders: EAC Partner State Individuals (95.12%) EAC Partner State Institutions (3.98%); Foreign individuals (0.84%); Foreign institutions (0.06%).
19.	Go Life International Limited (31 December 2015)	Mauritius	Mauritius, South Africa	South Africa	Health Care	• Largest shareholder owns 59.95%. • 11 out of 491 shareholders holding over 500,000 shares each own 88.56%. • Individuals own 81.94%.
20.	Grit Real Estate Income Group Limited (30 June 2019)	Mauritius	Mauritius, South Africa	Africa (not operating in South Africa)	Real Estate	• 30 out of 1180 shareholders holding over 500,000 shares each own 89.74%. • Individuals own 5.08%.

S/N	Company	Incorporation	Regional Listing	Operation	Industry	Shareholding Information[1]
21.	Hwange Colliery Company Limited (31 December 2017)	Zimbabwe	Zimbabwe, South Africa	Zimbabwe	Mining	• 20 largest shareholders own 91.17%. • Largest shareholder (Government of Zimbabwe) owns 36.77%.
22.	Investec Limited (31 March 2020)	South Africa	Namibia, South Africa, Botswana	Southern Africa	Financial Services (banking and wealth management)	• 294 out of 8,978 shareholders holding over 100,000 shares each own 89.8%. • Geography: South Africa (57.3%); South Africa, UK, US, Canada, Europe and Asia (88.3%). Other countries and unknown 11.7%
23.	Jubilee Holdings Limited	Kenya	Uganda, Kenya, Tanzania	Kenya, Uganda, Tanzania, Burundi, Mauritius, Pakistan	Financial Services (Insurance)	• 6 out of 6,393 shareholders holding over 1,000,000 shares each own 56.31%. • 10 largest shareholders own 58.62%.
24.	Kenya Airways Plc	Kenya	Uganda, Kenya, Tanzania	Global	Transportation	• Largest shareholder (Government of Kenya) owns 48.90%. • 10 largest shareholders own 98.22%. • 15 out of 80,401 shareholders holding over 1,000,000 shares each own 98.31%. • Geography: Foreign Individuals (0.10%) Foreign Institutions (8.28%); Local

S/N	Company	Incorporation	Regional Listing	Operation	Industry	Shareholding Information[1]
						individuals (1.76%); Local institutions (89.86%).
25.	KCB Group Plc	Kenya	Uganda, Kenya, Rwanda, Tanzania	Uganda, Kenya, Rwanda, Tanzania, South Sudan, Burundi, Ethiopia	Financial Services (Bank)	• Largest shareholder (Government of Kenya) owns 19.76%. • 10 largest shareholders own 37.18%. • Geography: Kenya individual (25.41%); Kenya institutional (49.09%) EAC individual (0.09%); EAC institutional (3.46%); Foreign individual (1.81%); Foreign institutional (20.13%).
26.	Lighthouse Capital Limited (30 September 2019)	Mauritius	Mauritius, South Africa	UK and Europe	Real Estate	• 24 out of 2,711 shareholders holding over 1,000,000 shares each own 76.2%. • 4 largest shareholders own 54.5%.
27.	Momentum Metropolitan Holdings Limited (30 June 2020)	South Africa	Namibia and South Africa	12 countries in Sub-Saharan Africa, UK and India	Financial Services (insurance, wealth management)	• 130 out of 17,918 shareholders holding 1,000,000 shares each own 86.3%. • 3 largest beneficial owners own 39.7%. • Retail investors own 3.5%.
28.	Nation Media Group Limited	Kenya	Uganda, Kenya, Rwanda, Tanzania	Eastern and Central Africa	Media	• 13 out of 11,665 shareholders holding over 1,000,000 shares each own 67.67%. • 10 largest shareholders own 65.79%.
29.	Nedbank Group Limited	South Africa	Namibia, South Africa	7 countries in SADC	Financial Services (Bank)	• 62 out of 45,573 shareholders holding over 1,000,000 shares each own 70.00%. • Retail investors own 2.95%.

S/N	Company	Incorporation	Regional Listing	Operation	Industry	Shareholding Information[1]
30.	New Frontier Properties Limited (31 August 2019)	Mauritius	Mauritius, South Africa	UK and Europe	Real Estate	• 12 largest shareholders own 77.75%. • Non-public shareholders own 49%.
31.	Oando Plc (31 December 2018)	Nigeria	Nigeria, South Africa	Nigeria, Ghana, Togo and Benin	Energy (Oil and Gas)	• 2 largest shareholders own 73.29%.
32.	Oceana Group Limited	South Africa	Namibia, South Africa	Global	Consumer Goods (Food)	• 15 out of 11,011 shareholders holding 1,000,000+ shares each own 57.6%. • Retail investors own 2.2%.
33.	Old Mutual Limited	South Africa	Malawi, Namibia, Zimbabwe, South Africa	Sub-Saharan Africa and Asia	Financial Services (Insurance)	• 3 largest shareholders own 32%.
34.	Pretoria Portland Cement Limited (31 March 2019)	South Africa	Zimbabwe, South Africa	Sub-Saharan Africa	Industrial (Construction and Materials)	• 162 out of 11,273 shareholders holding 1,000,000 shares each own 90.67%. • Retail investors own 2.80%. • 8 largest shareholders owning over 3% each together own 52.36%.
35.	PSG Konsult Limited (29 February 2020)	South Africa	Namibia, Mauritius, South Africa	Namibia, South Africa	Financial Services (Asset Management, Insurance, wealth)	• Non-public shareholders (parent company, management, directors and treasury shares) own 69%. • Institutional investors own 16.6%.

S/N	Company	Incorporation	Regional Listing	Operation	Industry	Shareholding Information[1]
36.	Sanlam Limited	South Africa	Namibia, South Africa	Global	Financial Services (Life Insurance)	• 165 out of 433,576 shareholders holding over 1,000,000 shares each own 79.54%. • Shareholder Geography: South African institutional shareholders (49.41%), individuals (13.06%), institutional and other offshore (37.53%).
37.	Santam Limited	South Africa	Namibia, South Africa	33 countries in Africa, Middle East, India and South East Asia	Financial Services (Nonlife Insurance)	• 1 out of 7,110 shareholders holding over 1,000,000 shares own 58.93%. • Retail investors own 3.47% • Companies own 74.60%
38.	Seed Co International Limited (31 March 2020)	Botswana	Botswana, Zimbabwe	10 countries in Sub-Saharan Africa	Consumer Goods (Agriculture)	• 3 largest shareholders with over 5% shareholding own 66.95%. • Public shareholders own 41.57%.
39.	Shoprite Holdings Limited (30 June 2019)	South Africa	Namibia, Zambia, South Africa	Sub-Saharan Africa and Middle East	Retail Supermarket	• 80 out of 38,749 shareholders holding over 1,000,000 shares each own 75.40% • Retail investors own 3.64% • Public shareholders own 82.90%. • Geographical spread of beneficial ownership: South Africa (50.3%), US (29.6%), UK (3.2%), Singapore 3.1%. Others (13.8%).
40.	Standard Bank Group Limited	South Africa	Namibia, South Africa	Global	Financial Services	• 10 largest shareholders own 43.9%.

S/N	Company	Incorporation	Regional Listing	Operation	Industry	Shareholding Information[1]
					(Banking and wealth)	• Shareholder Geography: South Africa (48.6%), China (20.2%), Namibia (1.2%). Others (4.3%).
41.	Tadvest Limited (31 December 2016)	Mauritius	Mauritius, Namibia	South Africa, Namibia, Poland, Australia, Sweden and North America	Financial Services (Investment Company)	Company had only 4 shareholders. All were institutional shareholders: 2 from Mauritius and 2 from Namibia.
42.	Trustco Group Holdings Limited	Namibia	Namibia, South Africa	Namibia, South Africa, Mauritius	Financial Services (Banking, Insurance, Investments)	• 10 largest shareholders own 96.09%. • Largest shareholder owns 52.04%.
43.	Trust Bank Limited (31 December 2018)	Gambia	Ghana	Gambia	Financial Services (Bank)	• 2 largest shareholders own 59.1%
44.	Truworths International Limited (30 June 2020)	South Africa	Namibia, South Africa	Holding Company	Investment Holding Company (General Retail – Fashion)	• Public shareholders own 93.1%. • Shareholder Geography: SA (65.7%), US, UK and Europe (31.7%), Rest of the world (2.6%).

S/N	Company	Incorporation	Regional Listing	Operation	Industry	Shareholding Information[1]
45.	Uchumi Supermarket Limited	Kenya	Uganda, Kenya, Rwanda, Tanzania	Kenya	Retail Supermarket	No shareholding breakdown available.
46.	Umeme Limited (31 December 2018)	Uganda	Uganda, Kenya	Uganda	Energy (Electricity)	• 118 out of 5,637 shareholders holding over 1,000,000 shares each own 90.30%. • 10 largest shareholders own 67.28%. • Largest shareholder (National Social Security Fund of Uganda) owns 23.24%.
47.	Universal Partners Limited	Mauritius	Mauritius, South Africa	UK and Europe	Financial Services (investment company)	• 40 out of 114 shareholders holding over 1,000,000 shares each own 98.8%. • 85% of shares in issue are traded on the JSE; 15% in Mauritius.
48.	Vukile Property Fund Limited (31 March 2019)	South Africa	Namibia, South Africa	Southern Africa, Spain, United Kingdom	REIT	• 126 out of 11,509 shareholders holding 1,000,000+ shares each own 77.1% • Retail investors own 5.98% • 9 beneficial shareholders with a holding of more than 3% each together own 47.57%.

APPENDIX TO CHAPTER 6[1]

Appendix 6.1 – Capital Markets Integration in the SADC

Capital markets integration has been a longstanding goal of the SADC[2] and has been largely driven by the Committee of SADC Stock Exchanges (COSSE), a private sector association established in 1997 and formally recognised as a part of SADC institutions.[3]

The recent drive towards capital markets integration in the SADC can be traced to 2006, when the SADC Summit of Heads of States issued the Protocol on Finance and Investment.[4] The SADC Protocol specifically enjoins State Parties to facilitate co-operation between their respective stock exchanges[5] and encourages Member Exchanges to explore opportunities for developing cross-listings and cross-market harmonisation of listing requirements, share information and training, and to cooperate in matters pertaining to market surveillance and self-regulation.[6] The SADC Protocol recognises COSSE, assigns it responsibility for monitoring the undertakings of Member Exchanges under the Protocol, and enjoins Member Exchanges to report steps taken to fulfil their obligations

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1 Footnote cross-references in this appendix are to footnotes to Chapter 6.

2 The SADC was established in 1993 pursuant to the Treaty of the Southern African Development Community adopted by Heads of States of the SADC. See Treaty of the Southern African Development Community (adopted 17 August 1992, entered into force 5 October 1993) (SADC Treaty).

3 At a meeting of the Committee of SADC Ministers of Finance and Investment held in July 1997, SADC Ministers of Finance and Investment agreed to recognise COSSE as a private sector association, pursuant to which COSSE was formally established on 6 October 1997.

4 SADC Treaty Protocol on Finance and Investment (adopted 18 August 2006, entered into force 16 April 2010) http://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance__Investment2006.pdf (SADC Protocol).

5 SADC Protocol, art 14.

6 SADC Protocol, Annex 11, art 2.

under the Protocol to COSSE.[7] Disputes arising from the Protocol may be referred to the SADC Tribunal.[8]

COSSE's original vision was to establish an integrated real-time network of national securities markets within the SADC by 2006, and pave the way for regional cross-listing in order to facilitate the process of financial integration within the SADC region and achieve the SADC's objective of transforming Southern Africa into a dynamic and well-integrated economic block.[9] Following its establishment, COSSE's efforts to strengthen the integration of national stock exchanges were well received and supported by both the market and member states.[10] COSSE's first strategy was to get all stock exchanges to harmonize their listing requirements based on the 13 principles of the JSE Listing Requirements.[11] This was achieved in 2000.[12]

The second strategy was to agree to a list of requirements for the integration of SADC exchanges and develop a suitable model to interconnect the stock exchanges operating in the region.[13] The move towards interconnection has however been problematic. At the meeting of COSSE in Zambia in May 2003, member exchanges agreed

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7 See SADC Protocol, Annex 11, art 6.

8 SADC Protocol, art 24. The SADC Tribunal was established by the SADC Treaty, art 16. After a 2008 landmark judgment against Zimbabwe, the Zimbabwean Government lobbied the Summit to restrict the jurisdiction of the Tribunal. In 2010, the Tribunal's jurisdiction to hear individual applications was suspended and in 2012, the jurisdiction to hear individual cases was terminated altogether, leaving the Tribunal only with jurisdiction over States. See Frederick Cowell, 'The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction' (2013) 13 Human Rights Law Review 153. At present, the SADC Tribunal is non-functional.

9 Preamble to the COSSE Charter, paragraph 4.

10 Shipalana and Moshoeshoe (n 66) 14.

11 ibid.

12 Irving (n 5) 11.

13 Shipalana and Moshoeshoe (n 66) 14.

to link emerging exchanges with the JSE to make it possible for any SADC citizen to trade in shares listed in any of the regional stock exchanges through their national exchange.[14] Although this plan was created to facilitate cross-border trading in listed securities, it raised serious concerns among the smaller exchanges about possible domination and the possibility of trade migration from their exchanges to the JSE. These concerns compelled COSSE members to consider a less ambitious integration project and lack of clarity around the form which this new integration project was to take led to COSSE missing the 2006 integration deadline set out in its Charter.[15]

Having missed the 2006 deadline, COSSE considered a new interconnection model. In May 2008, COSSE introduced the SADC Interconnectivity Hub and Spoke Project which sought to achieve integration through shared trading platforms.[16] In this model, an external hub was to be created which would allow participating exchanges to connect to each other's trading platforms and give investors the ability to trade on all SADC exchanges through their local brokers.[17] This Project again faced fierce resistance from member exchanges[18] and a revised hub and spoke interconnection model did not go forward as only few member exchanges (at the time, only 6 of the 11 SADC exchanges)

14 Shipalana and Moshoeshoe (n 66) 15.

15 ibid.

16 ibid.

17 Salami (n 71) 74.

18 Shipalana and Moshoeshoe (n 66) 16 '*The model was met with resistance, as most SADC exchanges feared a loss of independence brought about by platform sharing that could ultimately lead to the consolidation and emergence of a single regional exchange… The perception among the smaller, less competitive members was that larger exchanges seemed to be much more attractive to larger and more lucrative companies, and the possible migration of these companies to larger regional exchanges would come at a cost to smaller regional exchanges*'.

had automated trading systems and COSSE was unable to raise funding for a technology solution.[19]

A later partnership between the AfDB and COSSE brought life back into the SADC integration project. The AfDB and COSSE aim to update the interconnectivity model by establishing a joint venture that will own and operate technology that will route orders from brokers via gateways on the different exchanges. In addition, on 9 December 2016, COSSE launched the SADC Brokers' Network and a template SADC Associate Agreement that brokers can utilise to enable them to trade in each other's stocks.[20] Therefore, today, investors in one SADC country can instruct their brokers to place orders with brokers in other SADC countries for the purchase of securities listed on those other exchanges. However, brokers across the SADC do not have direct access to the trading platform of other member exchanges, and COSSE plans to re-visit the interconnectivity hub and spoke model in the future when a business case exists, and more exchanges switch to automated trading.[21]

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19 Shipalana and Moshoeshoe (n 66). See also COSSE Interconnectivity Project Presentation, December 2016 <https://cossesite.files.wordpress.com/2016/12/cosse-interconnectivity-presentation160618_sadc_draft3.pdf> accessed 3 August 2019.

20 COSSE Template Associate Agreement <https://cossesite.files.wordpress.com/2016/11/standard-counterparty-agreement-for-cossee-cross-border-trading.pdf> accessed 3 August 2019

21 COSSE (n 19).

Appendix 6.2 – Capital Markets Integration in the EAC

The EAC is pursuing a plan of integration of existing domestic exchanges into a regional exchange, to be regulated by national securities regulators. At least three factors appear to be fuelling the EAC's integration agenda. First, and perhaps most importantly, the EAC's ultimate goal is to integrate into a customs union, a common market, a monetary union, and ultimately into a political federation. Presently, both the customs union and the common market are operational[22] and Partner States to the EAC Treaty signed the Protocol establishing the East African Monetary Union on 30 November 2013, laying the foundation for the EAC to converge to a single currency by 2023. Integration into a single capital market thus fits into this unification plan. Second, although the Nairobi Stock Exchange is the largest stock exchange in the EAC, the disparity in levels of development between it and the other exchanges operating in the region are not as stark as the disparity among the exchanges in the SADC. Thus, fears of migration of trading to the largest exchange in the region are not as pronounced. Third, there is a clear recognition that even judged by regional standards, all the exchanges in the region are small. Thus, even the Nairobi Stock Exchange is merely a fraction of the Nigerian or the Johannesburg Stock Exchange, leading to concerns that most of the markets in the region are simply too small to be viable on a stand-alone basis. A September 2016 World Bank Report thus found a 'clear' case for

[22] The EAC Customs Union was launched on 1 January 2005, whilst the EAC Common Market was launched on 1 July 2010. For a brief history on the development of the customs union and common market in the EAC, see Kennedy Gastorn and Masinde Wanyama, 'The EAC Common Market' in Emmanuel Ugirashebuja and others (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill Nijhoff 2017).

capital markets integration in the EAC and considered it to be a 'compelling solution' to the small scale of markets in the region.[23]

As discussed in section 6.3.1, there was a clear intention to integrate the EAC's capital markets even prior to the re-establishment of the EAC.[24] Thus, at its re-establishment in 1999,[25] the EAC Treaty enjoined Partner States to harmonise capital market policies on cross-border listing, foreign portfolio investments, taxation of capital market transactions, accounting, auditing and financial reporting standards;[26] harmonise and implement common standards for market conduct;[27] harmonise policies impacting on capital markets, particularly incentives for the development of capital markets in the region;[28] promote co-operation among stock exchanges and capital markets and securities regulators through mutual assistance and information sharing;[29] promote the establishment of a regional stock exchange within the EAC with trading floors in each of the Partner States;[30] ensure adherence by national authorities to harmonised stock trading systems;[31]

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23 International Development Association, 'Project Paper on a Proposed Grant in the amount of SDR7.6million to the East African Community for a Financial Sector Development and Regionalization Project' (The World Bank Report No PAD 2022, 8 September 2016) <http://documents.worldbank.org/curated/en/382441475460029458/pdf/EAC-AF-PP-09142016.pdf> accessed 3 August 2019 '*Similarly, the case for capital markets integration is also clear, in theory… Regional integration is arguably the most expedient way to build a deeper and more efficient capital market that can meet the region's long-term financing needs. Hence, it follows that all the countries in the region would benefit from combining their capital markets into a single integrated EAC market with the advantages of greater scale, efficiency and visibility with institutional investors*'.

24 See n 60 and accompanying text.

25 Treaty on the Establishment of the East African Community, art 2.

26 ibid, art. 85(c).

27 ibid, art. 85(e).

28 ibid, art. 85(f).

29 ibid, art. 85(g).

30 ibid, art. 85(h).

31 ibid, art. 85(i).

and promote the cross-listing of securities, establish a rating system for listed companies and an EAC index to facilitate trading of shares within and outside the EAC.[32]

The strong endorsement of capital markets integration in the EAC Treaty paved the way for the establishment of regional bodies saddled with the responsibility of establishing a single regional exchange. In 2001, the Capital Markets Development Committee (comprising representatives of Partner States' central banks, securities market regulators, ministries of finance, stock exchanges, and insurance and pension sector regulators) was established to drive the capital markets integration agenda.[33] Following an expansion of its mandate, the Committee was reorganized into the Capital Markets, Insurance and Pensions Committee (CMIPC).[34] Similarly, in November 2004, the Kenyan, Tanzanian and Ugandan stock exchanges formed the East African Stock Exchanges Association (EASEA) to promote development and integration of EAC stock exchanges.[35] The work of both the EASRA and EASEA feed into the overall market integration plan through the CMIPC which now drives convergence of rules of securities regulation across the EAC.

32 ibid, art. 85(j).

33 Salami (n 71) 87.

34 Yabara (n 16) 9.

35 Onyuma (n 5) 109.

Appendix 6.3 – Capital Markets Integration in the ECOWAS

Capital markets (and at a broader level, economic and monetary) integration in ECOWAS has been strongly influenced by political and historical factors which led to the creation of sub-regional monetary zones and influenced the structure and development of capital markets in the region.

ECOWAS is often divided into Francophone[36] and Anglophone[37] West Africa, broadly (but not accurately) reflecting the official language and colonial history of the Member States.[38] The 8 Francophone West African States established the West African Economic and Monetary Union (WAEMU)[39] on 14 November 1973.[40] The WAEMU members have achieved full monetary integration, utilising a single currency (the CFA Franc) issued by the Central Bank of West Africa (BCEAO).[41] In December 1993, the WAEMU Council of Ministers agreed to establish a regional capital market and mandated

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36 This comprises all the member states of the BRVM i.e. Benin, Burkina Faso, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal and Togo.

37 This comprises Gambia, Ghana, Sierra-Leone, Liberia, Nigeria.

38 Whilst useful for analytical purposes, the classification into Francophone and Anglophone West Africa has some challenges. First, it excludes the island nation of Cape Verde which has Portuguese as its official language. Second, it rather inaccurately includes Guinea-Bissau into the Francophone classification even though Portuguese is the widely used language, and excludes Guinea from the Francophone classification even though French is the widely used language. See Lovegrove and others (n 102), 60.

39 Formally known by its French name: *Union Economique et Monétaire Ouest Africaine* (UEMOA).

40 Treaty Establishing the West African Economic and Monetary Union (adopted 14 November 1973) 1481 UNTS 29. In 1994, the initial UEMOA treaty was revised, resulting in the Revised Treaty Establishing the West African Economic and Monetary Union (adopted 10 January 1994, entered into force 1 August 1994). See Kathryn Lavelle, 'Architecture of Equity Markets: The Abidjan Regional Bourse' (2001) 55 International Organization 717, 732.

41 Formally known by its French name: *Banque Centrale des Etats de l'Afrique l'Ouest* (BCEAO). The BCEAO serves all 8 countries. The CFA Franc has fixed parity and guaranteed convertibility to the Euro. See Lavelle (ibid) 726-727.

the BCEAO to lead the project.[42] This led to the establishment of the BRVM on 18 December 1996. The BRVM is regulated by a single, regional regulator the *Conseil Régional de l'Epargne Publique et de Marchés Financiers* (CREPMF). All member states of WAEMU use a single rule book for listing, trading, clearing and settlement, under the supervision of a unified regulator, making it the world's first model of a single fully integrated capital market serving multiple countries in a region.[43]

The creation of the WAEMU (and by extension the BRVM and the CREPMF) posed severe difficulties for non-WAEMU ECOWAS Member States who were distrustful of the link to France which WAEMU necessitated.[44] They therefore established the West African Monetary Zone (WAMZ) in April 2000 to achieve monetary integration amongst themselves before merging with WAEMU members to achieve ECOWAS-wide integration.[45] In 2001, Heads of State of the WAMZ established the West African Monetary Institute (WAMI) to fast track the integration process.

The recent drive towards ECOWAS-wide capital markets integration only started fairly recently. In January 2013, the West African Capital Markets Integration Council (WACMIC) was inaugurated as the governing body for ECOWAS-wide capital market integration. The council is made up of the Chief Executives of the securities regulators and

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42 ibid 733.

43 Salami (n 71) 80, Lovegrove and others (n 102) 88.

44 Two links between WAEMU and France particularly stand out. First, until reforms announced on 21 December 2019, the Central Bank of West Africa held 50% of its reserves in the French Treasury. Second, both the Minister of Finance of France and the Governor of the Bank of France participated in biannual meetings of the Central Bank of West Africa, one of which took place in Paris. These ties proved difficult for non-WAEMU ECOWAS members. As noted by a commentator, '*Non-UEMOA countries found it difficult to accept that they would tie their countries to the links with the French system implied in the CFA*'. See Lovegrove and others (n 102) 67.

45 ibid 62.

stock exchanges in Nigeria, Ghana, Sierra Leone and the BRVM, and its goal is to manage the implementation of a process that will facilitate the creation of an integrated capital market in West Africa.[46]

WACMIC launched the West African Capital Markets Integration program (WACMI) working in collaboration with WAMI.[47] The WACMI program is to run in three sequential phases. In the first phase, brokers in member countries will be granted remote access to the trading facility of participating exchanges through local brokers in those countries who would sponsor their market access. In the second phase, qualifying brokers (QWABs) will be mutually recognised by all WACMI member exchanges, securities commissions and depositories and will be granted direct access to trade across WACMI participating exchanges. In the final phase, all WACMI exchanges are to be linked in a virtual West African Securities Market (WASM), QWABs will have access to market information and be able to execute transactions across the region, and issuers will be able to raise capital regionally.[48]

Although WACMIC's initial plan was to achieve the integrated market by 31 December 2015, it only successfully completed the first trade between two West African

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46 See WACMIC Electronic Brochure, available at http://www.nse.com.ng/investors-site/becoming-an-investor/FAQs/WACMIC%20Overview.pdf. WACMIC hopes to achieve a harmonized trading, clearing, depositary and settlement framework, integrated trading platforms, harmonized listing and regulatory frameworks and a Qualified West African Brokers (QWAB) common passport.

47 ibid.

48 ibid.

countries under Phase 1 on 28 July 2015.[49] Presently, it is unclear when participating states will move to Phase 2 of the program and when the integrated market will be achieved.

[49] Helen Oji, 'WACMIC Executes First Trade for United Capital, CAL Brokers' (*The Guardian,* 2 August 2015) <https://guardian.ng/business-services/wacmic-executes-first-trade-for-united-capital-cal-brokers/>.

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