COMPETITION AND REGIONAL INTEGRATION
DEVELOPING AN EFFECTIVE REGIME FOR ASSESSING REGIONAL MERGERS AND PROSECUTING CROSS-BORDER CARTELS


Presented by; Arnold Okanga and Linus Melly from CAK

Vision: "A Kenyan economy with globally efficient markets and enhanced consumer welfare for shared Prosperity"
Overview

• Current status of cross border merger analysis and cartel prosecution
• Formal cross border merger analysis and cartel prosecution
• Informal cooperation on cross border merger analysis and cartel prosecution
• Challenges to effective cross border merger analysis and cartel prosecution
• Conclusion and way forward

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INTRODUCTION

• Need for cross border merger analysis and investigation of cartel activities;
  ✓ Increased cross-border traffic;

  ✓ Development of trading blocs such as COMESA, SADC and EAC;

  ✓ Increasing number of registered companies and more so holding companies domiciled in countries like Mauritius; and

  ✓ Internationally, it is the way to go. The EU has been key in overseeing competition in Europe.

• Effective cross-border competition assessments should arrive at minimizing; unnecessary duplication of filings, delays in merger filings, filing fees burden and promote effective merger and cartel enforcement.

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CURRENT STATUS OF CROSS BORDER MERGER ANALYSIS AND CARTEL PROSECUTION

- Nature of relationship currently; Formal relationship and Informal
  - **Formal cross border merger analysis and cartel prosecution**
    - Relationship is marked by very official means of sharing information. Include; the Comesa Competition Commission, the SADC MoU.
  - **Informal cooperation on cross border merger analysis and cartel prosecution**
    - Marked by low level sharing of information and case discussions at the level of case analysts. Include Agencies’ own initiatives, the ACF and the ICN.

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COMESA Competition Commission (CCC)

- COMESA consists of 19 member states

- The CCC has a primary jurisdiction over all matter with a regional dimension:
  - The operation of a merger in two or more Member States under Article 23(3)(a)
  - The exceeding of the prescribed thresholds as required under Article 23(3)(b)

- CCC prohibit certain anticompetitive business in so far as they affect trade between Member States. With fines of up to 10% of annual turnover in the COMESA Common Market

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## CCC Continued...

**Table 1: Total Number of Merger Cases handles by CCC from 2013-2017**

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>Comfort Letter Granted</td>
<td>2</td>
<td>16</td>
<td>3</td>
<td>5</td>
<td>5</td>
<td>31</td>
</tr>
<tr>
<td>Unconditional Approval</td>
<td>16</td>
<td>23</td>
<td>16</td>
<td>19</td>
<td>18</td>
<td>92</td>
</tr>
<tr>
<td>Approved with Conditions</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>7</td>
<td>3</td>
<td>13</td>
</tr>
<tr>
<td>Cases referred to Member States</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Non-merger Transactions</td>
<td>3</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>Ongoing Transactions</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>8</td>
<td>8</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td><strong>21</strong></td>
<td><strong>42</strong></td>
<td><strong>21</strong></td>
<td><strong>32</strong></td>
<td><strong>34</strong></td>
<td><strong>150</strong></td>
</tr>
</tbody>
</table>

*Source: COMESA Competition Commission (Comesacompetition.org, 2018)*

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CCC Continued...

• On-going investigations include:
  ✓ AkzoNobel South Africa (Pty) Ltd and Regal Paints Uganda Limited
  ✓ Wirtgen Group and various undertakings in Ethiopia, Madagascar, and in Mauritius
  ✓ Deere and Company and AFGRI Zimbabwe Private Limited
  ✓ an alleged violation of the Regulations by subsidiaries of The Coca-Cola Company (“TCCC”) in Ethiopia and Comoros in regards to 3rd party distributors
  ✓ an alleged violation the Regulations by the Confédération Africaine de Football (“CAF”) (the commercialization of media and marketing rights for African football tournaments)
South Africa Development Community (SADC)

• Established in 1992

• 15 Member States, predominantly the South African Region from Tanzania to South Africa

• Members signed an MoU in 2016 on cross-cutting competition issues.

• So far, several cartel in the cement, petroleum and fertilizer sectors investigated under SADC.

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The East Africa Community Competition Authority (EACCA)

• Established in 2014.
• 6 East Africa member states.
• Established as an independent organ of the EAC to oversee competition.
• Mandated to establish appropriate procedures for public sensitization, consultation and participation.

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Informal Cooperation
The International Competition Network (ICN)

- Made up of 5 simple, flexible, result based and easy to join working groups.
- The network provides competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition concerns.
- The ICN, compared to the other formal forums for sharing cross border merger analysis experiences, provides a more productive platform.

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The African Competition Forum (ACF)

- Constituted in 2010.
- Made up of 35 African member states.
- Core function of the ACF is to enable sharing of knowledge and experiences by the member states who are currently in various stages of the implementation of the competition law.
- Aimed at achieving strong competition laws across Africa and promoting cross border competition enforcement.

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ACF Continued…

<table>
<thead>
<tr>
<th>Country</th>
<th>Bilateral cooperation activities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kenya</td>
<td>Information sharing regarding specific cases with South Africa, Tanzania, and Zambia.</td>
</tr>
<tr>
<td>COMESA</td>
<td>The CCC has cooperated with COMESA member states (most of whom are members of the ACF) on an ongoing basis to conduct investigations and carry out advocacy and capacity building initiatives in the Common Market.</td>
</tr>
<tr>
<td>Malawi</td>
<td>Bilateral cooperation with Zambia and Tanzania has included the signing of MoUs, exchange of information, and study visits in the sugar sector and automotive industry. This cooperation has been facilitated bilaterally, outside the ACF framework.</td>
</tr>
<tr>
<td>Mauritius</td>
<td>Cooperation with South Africa and the Seychelles through data sharing, training, and knowledge sharing in Investigations. This was facilitated through networking built through the ACF.</td>
</tr>
<tr>
<td>Seychelles</td>
<td>Information request made to Mauritius. Officers from South Africa conducted a workshop in the Seychelles on Fighting Bid Rigging in Public Procurement in 2014.</td>
</tr>
<tr>
<td>Tanzania</td>
<td>Information request made to Mauritius. Officers from South Africa conducted a workshop in the Seychelles on Fighting Bid Rigging in Public Procurement in 2014.</td>
</tr>
<tr>
<td>Botswana</td>
<td>Informal sharing of information on investigative processes, reports, and sector-specific data with South Africa and Zambia. Cooperation has taken place outside the ACF framework.</td>
</tr>
</tbody>
</table>
Agency’s Own Initiative

- Interactive frameworks between agencies in the spirit of trust and competence.
- For instance; CompCom SA and CAK in the several Coca Cola cases.
- Have yielded more in terms of moving the case forward.
- Should be the future of cross-border competition enforcement.

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CHALLENGES TO EFFECTIVE CROSS BORDER MERGER ANALYSIS AND CARTEL PROSECUTION

• The challenges that have been encountered in Inter-agency Corporation include:

✓ Confidentiality,
✓ Differences in competition Law (Lack of it, level of its development, implementation, prosecution powers and alignment with regional Law),
✓ Agencies internal procedures and bottlenecks,
✓ Incentives to engage.

• These among others need to be addressed for an effective collaboration and to manage the risk of any illegality

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CONCLUSION AND WAY FORWARD

• To get it right means:

✓ Big brother relationship between established agencies and the ones at infancy stages

✓ For countries with working regimes, corporation with their counterparts in the enforcement of competition Laws

✓ Competition Law jurisdictions should find a working balance between formal cooperation and informal cooperation.

✓ Agencies should embrace an informal cooperation set up, as its more effective, easy to formulate and manage and with minimal cost implication
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