

Are Southern African competition law regimes geared up for effective cooperation in competition law enforcement?

Nelly Sakata¹

1. Introduction

The importance of cooperation amongst competition agencies has been highlighted recently with more and more agencies formalising this cooperation through international agreements with their counterparts.² Closer to home, this need for cooperation has been reflected in the 2002 Southern African Customs Union (SACU) Agreement, the 2004 COMESA Competition Regulations and the 2009 Southern African Development Community (SADC) Declaration on regional cooperation in competition and consumer policies which all provide for cooperation between member states in the area of competition law enforcement. These initiatives were premised on the recognition that there was a need for increasing regional cooperation in tackling cross-border anti-competitive practices.

Thus far the implementation of these instruments has been faced with a number of challenges. For instance the exchange of information between agencies, while a key

¹ Nelly Sakata is a Senior Legal Counsel within the Legal Services Division of the Competition Commission of South Africa.

² Noteworthy agreements include those between: U.S. - Australia Cooperation Agreement (June 1982), U.S. - Australian Mutual Antitrust Enforcement Assistance Agreement, U.S. - Brazil Cooperation Agreement (October 1999), U.S. - Canada Cooperation Agreement (August 1995), US - Chile Agreement on Antitrust Cooperation (March, 2011), U.S. – China Memorandum of Understanding on Antitrust and Antimonopoly Cooperation (July 2011), U.S. - Germany Cooperation Agreement (June 1976), U.S. - Commission of the European Communities Cooperation Agreement (September 1991), US - EU Merger Working Group, Best Practices on Cooperation in Merger Investigations (October 2002), U.S. - Israel Cooperation Agreement (March 1999), U.S. - Japan Cooperation Agreement (October 1999), U.S. - Mexico Agreement (July 2000), OECD Recommendation on Cooperation Between Member Countries (July 1995).

aspect of cooperation, is often restricted by issues relating to the protection of confidential information. Whilst some competition authorities recognise that a corporate leniency policy is an important driver of cooperation between competition authorities, there are at present very few fully functioning leniency programmes in place in the region. In addition the analysis of cross-border mergers also raises challenges – in particular where there are regional effects. As such, apart from cooperation with regard to capacity building, there seems to be very little cooperation among member states of either of these regional institutions in the area of enforcement.

This paper explores some of the obstacles to effective regional cooperation in competition law enforcement within the Southern-African region. It also makes suggestions as to how these challenges can be overcome. The paper also looks at various instruments of regional cooperation in competition law, specifically the SADC declaration, SACU Trade Agreement and COMESA competition rules, as well as the regional cooperation instrument between EU member states.

2. Significance of cooperation

Globalisation has not only enhanced competition, but has also increased the geographical reach of business transactions and with that the international impact of anti-competitive practices.³ Given the global dimension of competition issues and the harm of cross-border anti-competitive practices, cooperation between competition authorities has become increasingly important. International cartels, for instance, have been found to have a significant negative impact on developing countries.⁴ Levenstein and Suslow report that in 1997, the value of the “cartel-affected” imports to developing

³ UNCTAD’s ‘Background paper on the review of the experience gained so far in enforcement cooperation, including at the regional level’ TD/B/CJ/CLP/10 (page 3, paragraph 5).

⁴ UNCTAD’s ‘Background paper on the review of the experience gained so far in enforcement cooperation, including at the regional level’ TD/B/CJ/CLP/10 (page 12, para 56).

countries was estimated at US\$51,1 billion, which was said to be higher than the amount of foreign aid given to developing countries: US\$39,4 billion.⁵

Competition authorities around the world recognise the importance of cooperation in investigating and prosecuting cross-border practices restricting competition.⁶ For example, the U.S. competition authorities have noted that “lack of cooperation mechanisms hinders effective competition law enforcement”.⁷ The Canadian, European and U.S. competition authorities have also “cited international cooperation specifically for enabling increased prosecution of cartel activity and greater merger review coordination.”⁸

Cooperation in combating anti-competitive practices, whether resulting from international cartels or cross-border mergers, has a number of benefits. An International Competition Network (“ICN”) report on cooperation between agencies in cartel investigations identifies the following benefits:⁹

- At the pre-investigation stage: agencies can notify each other of investigations of cartels that may have an effect in the jurisdictions of their counterparts; the various jurisdictions can also agree on specific markets and companies to be investigated;
- During the investigation stage: agencies could coordinate their investigative strategies, for instance, conducting simultaneous raids, issuing of summons or interrogating the parties;

⁵ Levenstein and Suslow - Contemporary International Cartels and Developing Countries Economic Effects and Implications for Competition Policy - Antitrust Journal, Vol 71, p.801.

⁶ http://ec.europa.eu/competition/ecn/index_en.html (Information accessed on 15 September 2011)

⁷ ABA Section of Antitrust Law – International Antitrust cooperation Handbook (2004) page 2.

⁸ Ibid.

⁹ International Competition Network (ICN) Cartels Working Group – Cooperation between agencies in cartel investigations – Report to the ICN Annual Conference (Moscow – May 2007) page 7.

- At the post-investigation stage: the agencies could share information about their prosecution strategy or possible settlements and remedies to be imposed.¹⁰

Cooperation in the case of cross-border mergers can have benefits for both parties and competition agencies. A “wish list” provided by private practitioners at a recent United Nations Conference on Trade and Development (“UNCTAD”) meeting reveals that parties hope that cooperation amongst competition agencies will lead to more coherence in:¹¹

- substantive analysis of cases;
- process and timing;
- information requests.

Further, with regard to mergers, agencies can cooperate regarding the setting of appropriate remedies as well as with regard to the monitoring of compliance with these remedies. This is particularly useful in situations where agencies impose structural or behavioural remedies that have an effect in another jurisdiction.¹²

3. Recommendations and best practices on cooperation

The 1995 OECD Recommendation on Co-operation has been used as a model for a number of competition agreements between agencies. In 2005 the OECD adopted Best Practices for the formal exchange of information between competition authorities in hard core cartel investigations, with the aim of overcoming some of the concerns over the

¹⁰ Ibid.

¹¹ Presentation given by Marc Hansen, Partner at Latham and Watkins Law Firm, during UNCTAD’s 11th Session of the Intergovernmental group of experts on Competition Law and Policy - 19 to 21 July 2011 (available www.unctad.org).

¹² “Cross border merger control: Challenges for developing and emerging economies” – Submission by South Africa at OECD Global Forum: 17 – 18 February 2011.

exchange of 'confidential information' which is considered to be very important for such co-operation. The OECD Best Practices are based on the following principles:

- “International treaties or domestic laws authorising a competition authority to exchange confidential information in certain circumstances should provide for safeguards to protect the confidentiality of exchanged information.
- Member countries should generally support information exchanges in cartel investigations. It should, however, always be at the discretion of the requested jurisdiction to provide the requested information in a specific case, or to provide it only subject to conditions, and there should be no obligation to act upon such a request.
- Appropriate safeguards should apply in the requesting jurisdiction when it is using the exchanged information.
- Information exchanges should provide safeguards for the rights of parties under the laws of member countries.
- The Best Practices specifically mention the legal profession privilege and the privilege against self-incrimination. Regarding legal professional privilege, whichever of the levels of protection is higher – that of the requesting or the requested jurisdiction – should be applied. The requesting jurisdiction should ensure that its privilege against self-incrimination is respected when using the exchanged information in criminal proceedings against individuals.
- In light of concerns that prior notice to the source of information can severely disrupt and delay investigations of cartels, the Best Practices advise against giving prior notice, unless required by domestic law or international agreement.”¹³

Enforcement cooperation can take different forms. The ICN identifies the following:

- Informal cooperation based on the 1995 OECD Recommendation on cooperation, other similar 'soft law' instruments, or with no particular legal basis;

¹³ ICN Cartels Working Group Report on Cooperation between competition agencies in cartel investigations. Available at www.internationalcompetitionnetwork.org.

- Cooperation based on waivers;
- Cooperation based on provisions in national law;
- Cooperation based on non-competition-specific agreements and instruments;
- Cooperation based on competition-specific agreements between jurisdictions;
- Regional cooperation instruments

UNCTAD has recognised that “*Regional/community agreement allows for more efficient and effective enforcement against anticompetitive behaviours affecting several countries within a given region.*”¹⁴ It is from that premise that some regional agreements on cooperation enforcement within the Southern African region have been concluded. Take the example of the Common Market for Eastern and Southern Africa (COMESA), the Southern African Development Community (SADC) and the Southern African Customs Union (SACU), which all have provisions on the importance of competition law in the economic development of their respective member states. Below the paper explores these instruments in so far as they relate to cooperation in competition law enforcement.

4. A look at instruments for cooperation in SACU, SADC and COMESA

- *The SACU Trade Agreement*

The Southern African Customs Union (SACU)¹⁵ traces its origin in 1889 from the Customs Union Convention between the British Colony of Cape of Good Hope and the Orange Free State Boer Republic.¹⁶ Its main purpose was *to promote economic development through regional coordination of trade.*¹⁷ Since 1910, SACU has provided for the free flow of products that are manufactured by SACU member states and within

¹⁴ UNCTAD’s ‘Background paper on the review of the experience gained so far in enforcement cooperation, including at the regional level’ TD/B/CJ/CLP/10 (page 8, para 34).

¹⁵ SACU has five member states, namely Botswana, Lesotho, Namibia, South Africa and Swaziland.

¹⁶ <http://www.sacu.int/about.php?id=394> (Information accessed on 12 September 2011).

¹⁷ *Ibid.*

the SACU region, without any duties or restrictions on quantity.¹⁸ The SACU agreement saw changes in 1969 and 2002.

One of the objectives of the SACU agreement is to *promote conditions of fair competition in the Common Customs Area*.¹⁹ In this regard, Article 40 of the SACU agreement provides for the adoption of competition legislation by each member states and cooperation between member states in competition law enforcement.

To date cooperation between SACU members has taken place on an informal basis and has been limited to technical assistance and capacity building. SACU member states are negotiating the provisions of an annex to Article 40 which will provide a practical interpretation of this Article for member states.

- *The 2009 SADC Declaration*

The Southern African Development Community²⁰ has been in existence since 1980. It finds its origin in the Southern African Development Coordination Conference (SADCC) which was established in Zambia (Lusaka). The initial purpose of the organisation was “*political liberation of Southern Africa*.”²¹ However, in 1992, when the organisation changed to SADC, the objective changed to include “*economic integration following the independence of the rest of the Southern African countries*”.²²

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ SADC’s current member states are Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

²¹ <http://www.sadc.int/> (Information accessed on 12 September 2011).

²² Ibid.

The SADC Declaration on regional cooperation in competition and consumer policies (“the SADC Declaration”) was adopted in 2009. It was based on article 25 of the SADC Protocol which calls for member states to *implement measures within the Community that prohibit unfair business practices and promote competition.*²³

The purpose of the SADC Declaration was premised on the recognition that:

- “*competition and consumer protection laws are national but the relevant markets can extend beyond national boundaries*”;
- *there is a need for increased regional cooperation in addressing cross-border anti-competitive practices.*²⁴ and also that
- *there is a need to formalise a system of cooperation between national regimes that can harness the collective efforts of relevant national authorities and add value to national enforcement efforts in the face of problems affecting more than one country.*²⁵

The SADC Declaration deals specifically with the issue of effective cooperation and provides, amongst others, for the establishment of:

- a system for effective cooperation;
- a transparent framework that contains appropriate safeguards to protect the confidential information (own emphasis) of the parties.

²³ SADC Declaration on regional cooperation in competition and consumer policies.

²⁴ SADC Declaration on regional cooperation in competition and consumer policies – Preamble.

²⁵ SADC Declaration on regional cooperation in competition and consumer policies – Preamble.

The SADC Secretariat has embarked on a project to implement the SADC Declaration through the development of a harmonization framework of national competition laws and policies in the SADC Region.

- *COMESA Competition Rules*

The Common Market for Eastern and Southern Africa (“COMESA”) is a regional organization that finds its origin in the mid 1960s.²⁶ It was formed from an idea of regional economic cooperation.

In 2004, COMESA adopted the COMESA Competition Regulations.²⁷ The main purpose of the regulations is to promote fair competition in the region/common market. In 2009, COMESA launched the COMESA Competition Commission with the main function of applying the COMESA Competition Regulations, which function also includes facilitating “exchange of relevant information and expertise”.²⁸

In terms of Article 10(2) of the COMESA treaty, the COMESA Competition Regulations are binding on all the member states. Article 3 of the regulations stipulates that they apply, among other things, to:

- “all economic activities whether conducted by private or public persons within, or having an effect within, the Common Market”,²⁹

²⁶ COMESA’s current member states include Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. Information available on <http://about.comesa.int/> (Accessed on 16 September 2011).

²⁷ The COMESA Competition Regulations were adopted in terms of Article 55(3) of the COMESA Treaty which stipulates that “the Council shall make regulations to regulate competition within the Member States.”

²⁸ COMESA Competition Regulations, Article 7(g).

²⁹ “Except for those activities as set forth under Article 4” of the Regulations.

- “anti-competitive business practices, conduct related to merger and acquisition and to consumer protection which have an appreciable effect on trade between Member States and which restrict competition in the Common Market.”

The COMESA Competition Regulations also encourage cooperation between COMESA member states in the form of notification, exchange of information, coordination of action and consultation among member states.³⁰

If we accept that enforcement cooperation between competition agencies is beneficial, in particular for developing countries,³¹ why is it that despite the existence of the abovementioned cooperation instruments within the Southern African region (“the region”), there seems to have been very little enforcement cooperation between member states?

5. Challenges to effective enforcement cooperation within Southern Africa

Effective enforcement cooperation amongst competition agencies within Southern-Africa is challenged by a number of factors including the fact that most agencies are relatively new; the divergence of substantive rules and institutional approaches; legal restrictions with regard to the exchange of information claimed as confidential and the perception of firms and individuals that confidential information might not be protected.

The vast majority of competition authorities within SADC are relatively young agencies.³² The competition laws of Zambia, Zimbabwe, South Africa and Malawi were

³⁰ COMESA Competition Regulations – Preamble.

³¹ UNCTAD’s ‘Background paper on the review of the experience gained so far in enforcement cooperation, including at the regional level’ TD/B/CJ/CLP/10; Michal S. Gal, *Regional Competition Law Agreements: An Important Step for Antitrust Enforcement*, Law & Economics Research Paper Series Working Paper no. 09-47.

³² UNCTAD – Review of the experience gained so far in enforcement cooperation, including at the regional level – Geneva, 19-21 July 2011 (page 6, para 21 – also page 14, para 71).

the first to be enacted in the region, in the mid/late 1990's³³ with their competition agencies becoming operational in 1997, 1998, 1999 and 2005 respectively. Tanzania's competition agency became operational in 2007 after enacting its law in 2003.³⁴ Mauritius, Namibia and the Seychelles competition agencies became operational in 2009.³⁵ Swaziland Competition Commission began operating in 2010.³⁶ Botswana has recently appointed its board of commissioners in 2010 after enacting its Competition Act in 2009,³⁷ while Angola, the Democratic Republic of Congo, Lesotho and Mozambique are in the process of adopting competition laws and policies.

The main priority for newer agencies is the building of institutional capacity. As such the focus of cooperation extended to newer agencies in the region has largely been based on the rendering of capacity-building and technical assistance in particular through staff exchanges, study tours and training workshops.

Further, the recent emergence of competition regimes within SADC member states has not meant a harmonisation of laws or institutional approaches within the region. Competition approaches of each state vary according to differences in policy as well as differences in their respective legal systems. This divergence in substantive provisions of the national competition laws together with legal restrictions to the release of confidential information and legal hindrances to the admissibility of evidence obtained through information exchanged has provided a further challenge for effective enforcement cooperation amongst agencies.³⁸

³³ Zambia Competition and Consumer Protection Act 24 of 2010 (which was initially the Competition and Fair Trading Act 18 of 1994); Zimbabwe Competition Act 7 of 1996, as amended; Malawi Competition and Fair Trading Act was enacted in 1998; South Africa Act 89 of 1998 was enacted in 1999.

³⁴ Tanzania Fair Competition Act 8 of 2003.

³⁵ Mauritius Competition Act of 2007, Namibia Act no. 2 of 2003, Seychelles Fair Trading Commission Act of 2009.

³⁶ Swaziland Act 8 of 2007.

³⁷ Botswana Act of 2009.

³⁸ UNCTAD – UNCTAD's 'Background paper on the review of the experience gained so far in enforcement cooperation, including at the regional level' TD/B/CJ/CLP/10 (page 14, para 66).

The paper explores the issue of information sharing as being one of the most important aspects of cooperation. However it is observed that the ability of agencies to exchange information is often restricted by the national laws of their respective jurisdictions preventing them from sharing confidential information.

The following sections look at the provisions relating to information sharing and confidential information in the competition laws of certain SADC member states, and discuss how issues related to confidential information may constitute an obstacle to effective cooperation within the region.

- *Exchange of information between agencies within the region*

The various competition laws within the region appear to have similar general provisions when it comes to exchange of information with other competition agencies.

For example, the Zambian Competition and Consumer Protection Act 24 of 2010 (“the Zambian Act”) stipulates that the Commission is authorised to exchange information with other agencies in the performance of its functions. In this regard, section 5(i) of the Zambian Act states that the Commission’s functions include “*to liaise and exchange information, knowledge and expertise with competition and consumer protection authorities in other countries.*”

Namibia and Mauritius have similar provisions in sections 16(1)(b) and 30(i) of the respective Competition Acts.³⁹

³⁹ Section 16(1)(b) of the Namibian Competition Act 2 of 2003 stipulates that the Commission’s functions include “*to liaise and exchange information, knowledge and expertise with authorities of other countries entrusted with functions similar to those of the Commission.*” Section 30(i) of the Mauritius Competition Act 25 of 2007 states that the Commission’s functions include “*to liaise and exchange information,*

The South African position is somewhat different. Section 82(4) of the South African Competition Act 89 of 1998, as amended (“the South African Act”) stipulates that “*The President may assign the Competition Commission any duty of the Republic, in terms of an international agreement relating to the purpose of the Act, to exchange information with a similar foreign agency.*” The question then arises as to whether the South African Competition Commission can only exchange information in cases where an international agreement to do so is in place? It is also unclear whether “information” referred to in this section relates to non-confidential information only.

In order for there to be effective cooperation, there is a need to clarify and have consensus on the types of information that can be exchanged. In this regard the ICN identifies four types of information that can be exchanged, namely *public information, agency information, information from the parties already in possession of one agency and information obtained from the parties at the request of another agency.*⁴⁰

- *Treatment of confidential information*

Below, the paper examines the treatment of confidential information in Namibia, Mauritius and South Africa.

Namibia

Section 55 of the Namibian Act prohibits the disclosure of information pertaining to the affairs of any person or firm, which information has come to the knowledge of a

knowledge and expertise with competition authorities in other countries entrusted with functions similar to those of the Commission.”

⁴⁰ International Competition Network (ICN) Cartels Working Group – Cooperation between agencies in cartel investigations – Report to the ICN Annual Conference (Moscow – May 2007), page 7

Commission's member or employee during the performance of any duty or during an investigation. However, the information may be disclosed if it is for the proper administration of the Act, proper administration of justice or at the request of any person entitled to receive the information.

The handling of confidential information is also regulated under Rules 10, 11 and 12 of the Rules promulgated under the Act.⁴¹ In terms of rule 12, access to confidential information would only be permitted "*subject to any conditions imposed by this rule or an order of the Court.*" The rule further states that confidential information may be released to "*any other person, with the written consent of the undertaking to whom the information belongs.*"⁴²

Mauritius

Section 70 (1)(a) of the Mauritius Competition Act restricts the disclosure of information, unless it is made, amongst others:

- "*for the purpose of responding to a request made by a foreign or multinational competition authority for the production of information in circumstances where Mauritius is a party to an international agreement providing for the production or exchange of such information.*"⁴³

South Africa

The treatment of confidential information under the South African Competition law is dealt with under sections 44 and 45 of the South African Act. Section 44 stipulates that the Commission is bound by a confidentiality claim. The Commission may, however, refer the claim to the Competition Tribunal in order to determine whether or not the information is confidential. Section 45 deals with the disclosure of confidential

⁴¹ Government Gazette of Republic of Namibia no. 4004 dated 3 March 2008.

⁴² Rule 12(f).

⁴³ Section 70(1)(a)(iv) of the Mauritius Act.

information. It states that a person who seeks to have access to information that has been claimed to be confidential may apply to the Tribunal to make an appropriate order for the access of confidential information. This would mean that if another jurisdiction wishes to have access to information that has been claimed to be confidential, it would have to apply to the Tribunal for an order to give it access to the information. As the South African Commission is obliged under the law to treat as confidential any information that the Competition Tribunal has determined to be confidential or that is the subject of a confidentiality claim, it would be difficult for this agency to effectively cooperate with other agencies by way of information sharing as far as confidential information is concerned, unless the owner of such information grants a waiver of the confidentiality claim or the Tribunal makes an appropriate order for the access of such confidential information.

- *Confidentiality waivers*

Given the strict treatment of confidential information in national competition laws, confidentiality waivers are a useful tool to facilitate cooperation. Competition authorities around the world generally accept that confidential information may not be exchanged without the granting of waivers by parties. As such “*cooperation based on waivers*”⁴⁴ has been one of the most valuable types of cooperation identified in the investigation and prosecution of cross-border anti-competitive practices.

Thus far, there is not much evidence of the usage of waivers to facilitate cooperation amongst competition agencies within Southern-Africa. A contributor to this might be the perception of the lack of harmonization with regard to the definition and treatment of confidential information amongst competition laws in the region. This can be problematic as the owner of the information would be reluctant to grant a waiver for the

⁴⁴ International Competition Network (ICN) Cartels Working Group – Cooperation between agencies in cartel investigations – Report to the ICN Annual Conference (Moscow – May 2007), page 11

sharing of its information with an agency that does not recognise confidential information. Furthermore, the lack of uniformity in the release or access of confidential data is also an issue impairing cooperation within the region.

- *Corporate leniency programmes*

A leniency policy is an important driver of cooperation between competition authorities, in particular where agencies have the ability to coordinate efforts. However, a leniency applicant would be reluctant to grant a waiver over confidential information, if the information is likely to be shared with a jurisdiction which could potentially prosecute it.⁴⁵ UNCTAD notes that cooperation in cartel cases is more effective if the jurisdiction with which information will be exchanged has a leniency programme as well.⁴⁶

Thus the lack of fully functional corporate leniency programmes in agencies within the region poses a challenge to effective cooperation in the investigation of international cartels.

Although the Zambian Act has provisions relating to corporate leniency, such a program is not yet fully functioning. In this regard, section 79 of the Zambian Act states that:

“(1) The Commission may operate a leniency programme where an enterprise that voluntarily discloses the existence of an agreement that is prohibited under this Act, and co-operates with the Commission in the investigation of the practice, may not be subject to all or part of a fine that could otherwise be imposed under this Act.

⁴⁵ A CLP applicant may be required to sign a waiver, as a CLP application and information supporting it is provided on a confidential basis.

⁴⁶ UNCTAD's *'Background paper on the review of the experience gained so far in enforcement cooperation, including at the regional level'* TD/B/CJ/CLP/10 at paragraph 67 and 68, page 14 specifically gives the example of Brazilian competition authority's inability to secure the same level of cooperation from cartelists in the Vitamins case due to it not having a leniency program at the time.

(2) *The details of a leniency programme under subsection (1), shall be set out in any guidelines of the Commission.*”

In 2008,⁴⁷ South Africa amended its previous Corporate Leniency Policy (CLP) that was issued in February 2004⁴⁸ to allow for provisions relating to the acceptance of oral statements⁴⁹ and application for a marker.⁵⁰ In terms of the CLP, a self-confessing cartel participant may be granted immunity from prosecution if, among other things, it is first to approach the Commission and provides it with information that will be sufficient for the Commission to prosecute the cartel.⁵¹ The CLP is undertaken on a confidential basis, in that the Commission will guard as confidential any information received from the leniency applicant, unless it grants its consent for such a disclosure.⁵²

Since 2008, South Africa has seen an increased number of corporate leniency applications. In 2009/2010, the number of corporate leniency applications reached 79 compared to 10 in the previous years 2005 to 2007.⁵³ The Competition Commission of South Africa notes that “the increase in the number of corporate leniency applications to the Commission indicates that firms are becoming more aware of competition law, are putting more effort into identifying where they may have contravened the law and are willing to cooperate with the authorities.”⁵⁴

⁴⁷ Government Gazette no. GG31064/2008, Notice 628 of 2008 dated 23 May 2008.

⁴⁸ Gazette notice 194 of 2004.

⁴⁹ Section 15 of the 2008 CLP policy has provision for the submission of information regarding the alleged cartel by way of an oral statement.

⁵⁰ Section 12 of the 2008 CLP policy allows a prospective leniency applicant to apply for a marker prior to the filing of a leniency application in order to protect its place in the “queue” of leniency applications.

⁵¹ See clause 3 of the South African Leniency Policy.

⁵² Clause 6.2 of the South African Leniency Policy.

⁵³ Submission by South Africa - *Compliance with Competition Law* – OECD Competition Committee: 29 – 30 June 2011 - Figure 1: Annual view of CLP applications received (2004-2011).

⁵⁴ Submission by Competition Commission of South Africa – *Compliance with Competition Law* – OECD Competition Committee: 29 – 30 June 2011.

A survey conducted by the Commission in 2009 shed some light on the factors which motivate firms to apply for immunity.⁵⁵ Amongst the most important factors motivating firms to consider applying for immunity was the fact that a *firm is being investigated in other jurisdictions*.⁵⁶ The existence of a leniency program is a driver for enforcement cooperation. This is because a leniency applicant may be more likely to grant a confidentiality waiver to allow competition agencies with which it has lodged leniency applications to share information submitted by it.⁵⁷ Thus the lack of fully functioning leniency programs within the region poses a challenge in achieving effective cooperation in the fight against cross-border cartels.

Thus the use of confidentiality waivers together with corporate leniency programmes may be useful tools in achieving effective cooperation. The paper now briefly considers the European Competition Network (“ECN”) model for regional cooperation.

6. A look at effective regional cooperation further afield: the ECN

The European Competition Network (ECN)⁵⁸ is a regional cooperation instrument between EU member states. The network was established to ensure harmonisation between the national competition laws of the 27 EU member states and the EC competition law. Its objectives include ensuring cooperation between the competition authorities of the EU Member States and the EU Commission, in their application of the EC competition rules.⁵⁹

⁵⁵ South Africa Competition Commission “Unleashing Rivalry: Ten years of enforcement by the South African Competition Authorities” – <http://www.compcor.co.za/10-year-review>. The survey was conducted amongst all major law firms working on competition matters.

⁵⁶ South Africa Competition Commission “Unleashing Rivalry: Ten years of enforcement by the South African Competition Authorities” – <http://www.compcor.co.za/10-year-review>.

⁵⁷ UNCTAD’s ‘Background paper on the review of the experience gained so far in enforcement cooperation, including at the regional level’ TD/B/CJ/CLP/10 (page 14, para 68).

⁵⁸ Created by Council Regulation (EC) No 1/2003.

⁵⁹ http://ec.europa.eu/competition/ecn/index_en.html (Information accessed on 15 September 2011) – It is mainly in relation to cases where Articles 101 and 102 of the Treaty of the Functioning of the European Union are applied. Article 101 deals with restrictive practices, whilst article 102 deals with abuse of dominance practices.

The ECN's *Commission Notice on cooperation within the Network of Competition Authorities*⁶⁰ recognises that information exchange is a key aspect to effective cooperation⁶¹ and reiterates that Article 12 of the Council Regulation allows the EU Commission and European competition authorities to exchange information, including confidential information.⁶² It states further that *Article 12 of the Council Regulations takes precedence over any contrary law of a Member State*.⁶³ There are also certain safeguards aimed at protecting the rights of firms and individuals.⁶⁴

A key element of the ECN is thus the ability of all EU competition authorities to exchange and use as evidence, information which has been collected by them for the purpose of applying EU competition rules (alone or together with national competition law). That said, it is important to note that information cannot be transmitted to a Member State authority for use against an individual in criminal proceedings which could result in a prison sentence. There are also special rules in place to protect leniency applicants requiring among other a waiver from the leniency applicant.

7. Improving cooperation within the region

While the ECN example could provide a useful guide for regional cooperation, Southern-African countries have their own realities and factors which must be taken into account in building solutions for the challenges faced in regional cooperation. Agencies within the region could consider using the following strategies in order to achieve effective enforcement cooperation:

- Building closer cooperative relationships between agencies based on mutual trust;

⁶⁰ Notice 2004/C 101/03 – Official Journal of the European Union C101/43 (27.4.2004).

⁶¹ Notice 2004/C 101/03 – at para 26.

⁶² Notice 2004/C 101/03 - at para 27.

⁶³ Ibid.

⁶⁴ Firat Cengiz – Multi-level governance in competition policy: the European Competition Network – EURLR 2010, 35(5), 660-677.

- Exchanges of non-confidential information with due regard to respective national laws;
- The use of confidentiality waivers signed by parties to facilitate exchanges of confidential information in both merger cases and corporate leniency applications;
- The establishment and implementation of clear safeguards for due process, the protection of confidential information;
- The inclusion of provisions in national laws allowing for cooperation and specifically for the exchange of information for enforcement purposes;
- The conclusion of bilateral cooperation agreements between agencies or between jurisdictions with a clear determination of the type of information to be exchanged and how the information shared would be treated. A good example of this is the joint protocol between Zambia and Zimbabwe for the exchange of information in competition cases;⁶⁵
- The conclusion of mutual legal assistance agreements allowing extensive reciprocal enforcement assistance between the two agencies, such as disclosing, exchanging and discussing information, taking individual testimonies and executing searches and seizures.
- In developing leniency policies, member countries may consider developing criteria for granting leniency that are similar, as difference in those criteria may discourage the granting of waivers by leniency applicants;
- Member states could also consider having provisions that give their respective national competition Acts an extra-territorial reach. Provisions on extra-territorial enforcement are also considered as valuable tools of cooperation. In that, these provisions form the basis upon which a competition agency could claim jurisdiction to investigate and prosecute cross-border practices having an effect within that specific jurisdiction, and thus a ground upon which the jurisdiction in which the restrictive practice took place could cooperate with the affected

⁶⁵ UNCTAD's 'Background paper on the review of the experience gained so far in enforcement cooperation, including at the regional level' TD/B/CJ/CLP/10 (page 7, para 27).

jurisdiction. At least most of the national competition Acts have provided for this issue.⁶⁶

8. Conclusion

There is a general perception that there is a lack of effective enforcement cooperation amongst Southern-African competition agencies. While there have been few cases of cooperation which have been publicised, agencies in the region are indeed cooperating albeit on a lesser scale than those of their counterparts in the developed world. For example the competition authorities of Zambia and Zimbabwe have established a joint trade protocol for the exchange of information in competition cases which has resulted in case-specific cooperation in both mergers and cartel cases.⁶⁷

Although cooperation between agencies in the region is undoubtedly important, one cannot ignore the differences in regulatory regimes, as well as political and economic realities. It is probably premature to ask the various jurisdictions to prioritise cooperation in competition law enforcement when some are still facing the challenges of establishing their competition authorities, and others are facing the struggle of grasping or enforcing their own domestic laws. Maybe the question posed in this paper could simply be answered by referring to Article 1(i) of the SADC Declaration which stipulates that “cooperation shall proceed in a gradual and phased approach with the ultimate aim of achieving harmonization and establishing a regional framework in competition and consumer policies.”

⁶⁶ On Extra-territorial enforcement provisions see Section 80 of the Zambian Act; section 3 of the Namibian, South African, Zimbabwe and Mauritius Acts, just to name of few.

⁶⁷ UNCTAD's 'Background paper on the review of the experience gained so far in enforcement cooperation, including at the regional level' TD/B/CJ/CLP/10 at paragraph 27, page 7. The competition authorities of Zimbabwe and Zambia have cooperated in amongst others in the investigation of Coca-Cola/ Cadbury-Schweppes merger and the mergers in the cement industry involving Lafarge of France, Blue Circle of the United Kingdom and Pretoria Portland Cement of South Africa as seen in the submission by Zimbabwe on the “*Analysis of cooperation and dispute settlement mechanisms relating to competition policy in regional free trade agreements, taking into account issues of particular concern to small and developing countries*” to UNCTAD's Seventh Session of the Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 30 October to 2 November 2006 (Information available at www.unctad.org).

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