CROSS-BORDER COMPETITION ENFORCEMENT IN AFRICA: DEVELOPMENTS, OPPORTUNITIES, CHALLENGES AND THE WAY FORWARD

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ABSTRACT

The issue of addressing cross-border competition enforcement has recently come into sharp focus. In order to address cross-border competition enforcement, Africa has established a number of regional competition regimes which presents a number of opportunities and challenges. This paper focuses on the COMESA Competition Commission (CCC) and the EAC Competition Authority (EACCA). It examines regional development of competition regimes, the opportunities and challenges on cross-border enforcement within these two competition regimes. It recommends that considering the time and intensive resources involved in investigating cross-border anti-competitive practices, there is the overarching need for enhanced co-operation between the regional and domestic competition regimes.
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INTRODUCTION

Cross-border transactions involving mergers, cartels, abuse of buyer power and abuse of dominance have the potential of not only distorting competition but hindering economic growth. Competition reforms in essence aim at increasing efficiency, innovation and lower prices to benefit all players including consumers. Competition reforms in African countries is geared towards liberalization of markets to enhance economic development. So far a number of jurisdictions in Africa have established domestic competition regimes to regulate mergers and anti-competitive conduct such as buyer power, abuse of dominant position and cartels.\(^1\) However, research indicates that Africa has a weak enforcement competition regime, lack financial resources, have inadequate skilled human capacity in competition law and policy that hinders competition enforcement.\(^2\)

While interest in establishing strong competition regimes in Africa continues to grow, globalization, trade liberalization, emergence of multinational companies and establishment in Africa, lessening of trade barriers and inflow of foreign products in the African market has increased the geographical reach of doing business.\(^3\) Merger regulation and regulation of anti-competitive conduct will not be contained within a country’s border. This calls for African competition regimes to develop and align its strategies to these developments. This paper discusses the key developments in African cross-border competition enforcement, opportunities, challenges and way forward. This paper will focus on CCC and EACCA.

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\(^1\) Kenya, Tanzania, Mauritius, South Africa, Cameroon have independent competition regimes.


A. DEVELOPMENTS IN AFRICAN CROSS-BORDER COMPETITION ENFORCEMENT.

In 2016, according to the Global Competition Review, more than 200 jurisdictions in the world had established competition enforcement agencies. In Africa, interest by African countries in competition law and policies prohibiting anticompetitive conduct and merger regulation is becoming increasingly active and complex. By 2016, more than 26 African countries had established a national regime to regulate competition in the market, adopted competition laws, amended the existing laws, and introduced new regulations and new policies. Madagascar and Mozambique established national competition agencies in 2016. Kenya, Nigeria and South Africa made amendments to their competition laws. All these developments indicate that African countries are recognizing the vital need of regulating competition in the market.

Despite these developments, in a study conducted by GSMA, it found that by 2016, out of the 50 countries surveyed in Sub-Saharan Africa, only 14 had established independent competition authorities. This implies that Africa still has a long way to go in addressing anti-competitive conduct and merger control at national level especially in countries that have not domesticated a competition regime. Countries that do not have a competition law regime will automatically lag behind. In addition to regulation of domestic competition, the ‘continued growth in regionalism of business activities correspondingly increases the likelihood that anti-competitive practices in one country may adversely affect competition in another country’. The opening up of domestic borders as a result of trade liberalization, evidence of competition cases such as mergers with an effect in more than two countries, economic global developments and technological advancement

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6 Kenya, Zambia, South Africa, Namibia, Ethiopia, Swaziland, Mozambique, Nigeria, Morocco, Botswana etc.
7 Morocco and Ethiopia adopted competition laws in 2016.
8 Kenya made amendment to its competition law in 2016 and inter alia granted the Competition Authority of Kenya the power to institute investigations on its own motion in consumer welfare issues and prohibited abuse of buyer power amongst other amendments.
10 COMESA introduced draft guidelines on restrictive practices
12 GSMA, Competition Policy in the Digital Age: Case Studies from Asia and Sub-Saharan Africa (GSMA 2016).
13 CCC, COMESA Competition Rules (CCC 2004).
calls for African competition regime to align its strategies to these developments. The emergence of new enforcement areas and the adoption on new cartel detection tools at the global level such as informant reward scheme is a clear indication that African competition regime must relook its competition enforcement.

In order to address cross-border competition enforcement in Africa a number of regional competition regimes have been established.\textsuperscript{14} These regional competition regimes include CCC, EACCA, Competition Authority of the Central African Monetary and Economic Community (CEMAC), West Africa Economic and Monetary Union Competition Commission. The Southern African Development Community (SADC) does not provide a regional competition regime however it provides a cooperation framework on competition policy and consumer welfare for member states. Establishment of regional competition regimes was informed by the potential of regional integration in increasing competition and business.\textsuperscript{15} The evidence of anti-competitive arrangements by cartels operating in Southern Africa in the fertilizer, cement, sugar and maize is evidence of cross-border competition cases.\textsuperscript{16} Large firms with market power at regional or international level, whether exerted unilaterally or through coordination, harms competition and the end result is high prices for goods and services.\textsuperscript{17}

The shared role of the regional competition regimes is to enforce cross border competition within their jurisdictions through: initiating and enhancing cooperation among Member States; assisting in adoption and harmonization of competition laws; assist in establishment and strengthening of domestic competition regimes; providing technical assistance through consultations and expertise; and enhance detection and investigation of anti-competitive conduct. The end result is enhanced regional integration, trade liberalization and economic development within the regional market.\textsuperscript{18}

\textsuperscript{15} A Mateus, ‘Competition and Development: Towards an Institutional Foundation for Competition Enforcement’, (World Competition, 2010).
\textsuperscript{17} Simon Roberts, Thando Vilakazi and Witness Simbanegavi ‘Understanding Competition and Regional Integration as Part of an Inclusive Agenda for Africa: Key Issues, Insights and a Research Agenda’ (A Draft Paper Submitted for the Competition Commission and Tribunal Annual, 2014).
\textsuperscript{18} Trudi Hartzenberg, ‘Competition Policy in Africa’ in C Hermann, M Krajewski and J Terhechte, European Yearbook of International Economic Law (Springer 2012)
Consumers also benefit through increased consumer protection against the effect of anti-competitive conduct in the market.

Investigating and enforcement of competition cases with an international dimension is more complex as developing countries are already facing challenges in enforcing competition within their own territories. Developing countries face a myriad of challenges such as involvement of government in the local economy, weak institutional framework, political interference, lack of sufficient awareness on competition, conflict among others that hinder enforcement of cross-border competition issues. Despite the fact that competition regime in Africa is still new, countries continue to strengthen their enforcement mechanisms amidst the challenges. However, they are still faced with a bigger challenge of enforcing competition practices arising from other countries that have detrimental impact on their domestic markets as result opening up of markets and technological advancements.

**COMESA Competition Commission (CCC)**

CCC was established in 2003 to regulate competition in the common market under the COMESA Competition Regulations of 2004. It has 19 members’ states and they include Burundi, Comoros, Congo, Djibouti, Egypt, Eritrea, Ethiopia, Libya, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. Tunisia will become a member state of the CCC during the upcoming October 2017 summit. The COMESA Competition Regulations of 2004 in its preamble recognizes that anti-competitive conduct may constitute an obstacle to the achievement of economic growth, trade liberalization and economic efficiency in the COMESA Member States. This informed the need to regulate competition in the Common Market if COMESA had to achieve its regional integration efforts.

CCC commenced its operation in 2013. In order to enhance cross-border competition enforcement, CCC regulates mergers and prohibition of anti-competitive conduct under Part 3, 4 and 5 of the CCC Competition Rules. So far CCC has been at the forefront in merger control and in 2014 alone

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it had approved 64 mergers.\textsuperscript{21} In the recent past from 2016, CCC has gone beyond merger regulation and initiated a series of market inquiries and investigations into anti-competitive conduct in the common market. For instance, in 2016 for the first time since 2013, CCC launched a market inquiry in the shopping malls sector to determine whether the mushrooming of shopping malls negatively affects the local small and medium enterprises in the whole common market.

CCC’s jurisdiction emanates from the provisions of Article 3 of the CCC Competition Rules. First, CCC shall invoke jurisdiction to all economic activities within the common market whether conducted by private or public entities apart from conduct excluded under Part 4 of the Rules.\textsuperscript{22} Article 3 of the CCC Rules limits its jurisdiction to the Common Market taking a regional dimension test.\textsuperscript{23}

Second, CCC jurisdiction is limited to the conduct under Part 3, 4 and 5 which has \textit{appreciable effect} on trade between Member States and restrict competition within the common market. Part 3 of the CCC Rules prohibit restrictive business practices that may affect trade between Member States and have the object or effect of preventing, restricting and distorting competition with the market\textsuperscript{24} and abuse of dominant position. Part 4 regulates mergers and acquisitions whilst Part 5 has provisions on consumer welfare. It is evident that while Kenya is the only country which has prohibited abuse of buyer power under Section 24A of its Competition Act, CCC has not prohibited the same. So in a scenario where abuse of buyer power exists in its Member States, CCC may not be able to invoke jurisdiction. The need to amend the CCC Competition Rules to reflect new developments in competition policy is paramount.

Third, CCC has primary jurisdiction over mergers and anti-competitive conduct that transcend in more than two member states. It lacks jurisdiction over conduct that is expressly exempted by

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\item Bowman (n 5)
\item These Regulations shall not apply to:
(a) Arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing terms and conditions of employment;
(b) Activities of trade unions and other associations directed at advancing the terms and conditions of employment of their members;
(c) Activities of professional associations designed to develop or enforce professional standards reasonably necessary for the protection of the public interest.
\item This prohibited practices include price fixing, market allocation, collusive tendering, bid rigging etc.
\end{enumerate}
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national legislation. In this case domestic competition regimes shall exercise primary jurisdiction. However where anti-competitive conduct affects more than one Member State within the common market, domestic competition regimes lacking extraterritorial jurisdiction, CCC shall have jurisdiction.

Finally, CCC has ‘primary jurisdiction over an industry or sector of an industry which is subject to the jurisdiction of a separate regulatory entity (whether domestic or regional) if the latter regulates conduct covered by Part 3 and 4 of these Regulations’.25 This brings in the role of SADC in competition regime. Whereas SADC is not a regional competition regime, it has been at the forefront in regulating competition. The need for SADC and CCC to cooperate is very critical especially instances where they have overlapping jurisdiction. Another notable element of the CCC merger regulation is that it has a mandatory merger filing regime, merger thresholds and lower filing fees.

**EAC Competition Authority (CCA)**

The EACCA on the other hand is the most recent regional competition regime in Africa. Whereas the EAC Competition Act was enacted in 2006, it was until 2016 when the EACCA was established. During the swearing of the five commissioners on November 2016, it was recognized that given the high percentage of competition cases with a significant regional and international ramification, the need for establishment of EACCA was overdue. Kenya, Uganda, Tanzania, Burundi and Rwanda are Member States of EACCA. Kenya and Tanzania have independent competition regimes: Competition Authority of Kenya and Tanzanian Competition Commission.

So far all the EACCA Member States have enacted a competition law apart from Uganda. In Uganda competition conduct is governed by the Capital Markets Authority Act, the Capital Markets (Takeovers and Mergers) Regulations of 2012 and the Companies Act of 2012 that regulates amalgamation. The need for Uganda to enact a specific competition law is important as its current legal framework does not cover ant-competitive conduct such as abuse of dominant position, abuse of buyer power and cartel. Whereas Uganda is a member of both the CCC and EACCA, harmonization of laws is key to the realization of the benefits that accrue from

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25 Article 3 (2), CCC Competition Rules.
competition regulation. EACCA competition law regime is relatively new and so far no merger has been notified or investigations into anti-competitive conduct initiated.

**B. OPPORTUNITIES CREATED BY CCC AND EACCA IN CROSS-BORDER COMPETITION ENFORCEMENT**

It is in no doubt that the establishment of regional competition regimes aim at enforcing competition issues beyond national borders. For instance the establishment of CCC was contemplated to be a one-stop shop competition regime like its counterpart the European Competition Commission. However, the development of regional competition regimes in Africa presents a number of opportunities in cross-border competition enforcement:

*a) Adoption of Competition Laws and Institutional Framework*

Completion law experts argue that in order to address cross-border anti-competitive conduct, a strong national competition regime is the bare minimum.\(^{26}\) Regional competition regimes provides an opportunity for adoption and harmonization of competition laws and institutional framework. Regional competition regimes provide technical assistance and capacity building to its member states. This is done through cooperation. The CCC Competition Rules recognize that ‘Member States should co-operate at regional level in the implementation of their respective national legislation in order to eliminate the harmful effects of the anti-competitive practices’. This is a shared responsibility.

The main objective of regional competition regimes is to achieve economic growth, trade liberalization and economic efficiency among its Member States. In order to achieve this objective, member states that do not have competition law and institutions must now adopt them in order to benefit. Regional competition regimes will therefore trigger through cooperation and technical assistance the adoption of competition laws and the establishment of competition institutions at a national level.

*b) Enhanced Cooperation through MoU’s*

Regional competition regime provide an opportunity for enhanced cooperation among Member States in cross-border competition enforcement in Africa. Given the nature of cross-border

\(^{26}\) Nurs Köktürk, _Internationalization of Competition Law and Policy_ (Bilkent University 2010)
competition enforcement, cooperation between competition regimes is very fundamental. Cooperation can involve ‘coordination of simultaneous searches, raids or inspections, exchange of information, discussions on general orientations regarding investigations, or gathering of information and interviewing of witnesses on behalf of another agency’. Cooperation enhances greater detection of cartel activity and merger regulation.

CCC Competition Rules recognizes that closer cooperation between COMESA Member States in the form of notification, exchange of information, coordination of actions and consultations among Member States should be encouraged. Regional competition regime has increased cooperation among member states. So far CCC has entered into a number of cooperation’s with its Member States such as Zambia, Kenya, Egypt, and Ethiopia. In 2016, eight members of SADC – Malawi, Mozambique, Namibia, Botswana, Seychelles, Mauritius, South Africa, Swaziland, Tanzania and Zambia - in order to address cross-border competition entered into a MoU.

The Competition Commission of South Africa (CCS) has already entered into a number of MoUs with competition agencies such as the Federal Anti-Monopoly Service of Russia, Competition Authority of Kenya (CAK), Competition Commission and the Directorate General of the European Commission, Namibian Competition Commission and BRICS Competition Authorities. Whereas the objectives of these MoU’s is to foster cooperation, exchange of information is limited to non-confidential information and the respective laws governing the conduct of parties. Section 3.3 of the MoU between CCS and CAK stipulates that in cross-border mergers the parties will endeavor to coordinate their activities to the extent possible and consistent with the applicable laws. This cooperation will be key in implementation of regional competition laws and in addressing jurisdictional conflicts. CCC Competition Rules recognizes the need not only to enhance harmonization and implementation of competition laws, policies and the CCC Competition Rules, but to lessen the possibilities or impact of divergent outcomes. This cooperation will also trigger the domestication of regional competition laws to enhance cross-border competition enforcement.

27 ICN, Cooperation Between Competition Agencies in Cartel Investigations (Report on the ICN Annual Conference in Moscow 2007).
For instance whereas CCC was intended to be a one-stop competition regime, there is still conflict whether mergers notified at the CCC must also be notified to the Member States. Some countries such as Kenya, parties must also notify CAK. This is deemed to increase filling fees.

The establishment of regional competition regimes in Africa will also increase cooperation with international competition regimes. For instance, the Canadian Competition Bureau recognizes that in order to fulfil its mandate it requires collaboration with competition authorities around the world. So far it has entered in a number of MoU’s with Australia, New Zealand, Brazil, Chile, European Union, India, Taiwan, UK, US, Mexico, Korea etc. These MoU enhance sharing of information, investigation of cross-border issues of shared interest, strengthens the Bureau’s enforcement activities and advancing the interests of the Canadian exporters and investors in markets abroad. It is time that CCC and EACCA use its economic power to cooperate with other global regional competition regimes to address international competition issues that transcend beyond African borders.

c) Enhanced detection and investigations of anti-competitive conduct

Detection of cartels or anti-competitive conduct generally is a major challenge facing competition enforcement in Africa. Due to inadequate resources and high cost of investigating cross-border anti-competitive conduct, regional competition regimes offers an opportunity for investigations at the regional level. So far since 2016, CCC has already initiated sectoral market inquiries in the fertilizer, sugar, bread sectors in the common market to investigate cartels. While some counties such as South Africa and Kenya have in place leniency programs for cartel detection, most of the African competition regimes have not established the same. Regional competition regimes offers an opportunity to provide technical assistance to such countries to adopt the same. This can also be done through sharing of information and notification of cartels among member states offers.

In addition to cartel detection through leniency applications, regional competition regime provides an opportunity to adopt new cartel tools drawing lessons from other jurisdictions. In some jurisdictions such as Korea, Hungary, Slovakia and UK they have adopted informant reward schemes to complement leniency program. In Africa there is no country that has adopted the same. This is an area that the regional competition regimes should look into in enhancing cross-border competition.
\textit{d) New Enforcement Areas}

Development of regional competition regimes offers the regimes an opportunity to focus on new enforcement areas to address cross-border enforcement. It is no doubt that global economic developments and technological advancements brings with it new enforcement areas in cross-border competition enforcement. These new competition enforcement areas include: platforms, networks and big data; use or misuse of algorithms; and competition, innovation and investment. Follow on damages instituted by parties injured by anti-competitive conduct such as: private litigation in competition; and local and global development on follow-on damages is also a new enforcement.

The reality is that most domestic competition regimes have not legislated these areas, creating a gap in cross-border competition enforcement. Whereas there is need to align competition enforcement with new developments, regional competition regimes provide such an opportunity through advocacy and technical assistance.

\textbf{C. CHALLENGES FACING ENFORCEMENT OF CROSS-BORDER COMPETITION IN AFRICA}

The development of regional competition regimes offer a number of opportunities in cross-border competition enforcement amongst them increased cooperation, however it creates a number of challenges. Scholarly work indicate that even developed countries face challenges in handling cases with a cross-border dimension.\textsuperscript{30} Experience also show that while some developed economies have been successful in dealing with some cross-border anti-competitive practices and merger control, developing countries and economies in transition still have a long way to go.\textsuperscript{31} For instance, while US has adopted extraterritorial approach in enforcing transnational anti-competitive practices in other countries which has had its own limitations, Africa lacks the economic and political power to adopt the same.\textsuperscript{32} Whereas Kenya provides for extra-territorial

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\item \textsuperscript{31} UNCTAD, \textit{Cross-border Anticompetitive Practices: The Challenges for Developing Countries and Economies in Transition}, (UNGA, TD/B/C.I/CLP/16 2012).
\item \textsuperscript{32} Takaaki Kojima, ‘International Conflicts over the Extraterritorial Application of Competition Law in Borderless Economy’ (Harvard Law School 2002).
\end{itemize}
\end{footnotesize}
application of its competition law under Section 6 of the Competition Act, it is yet to exercise the same.

Regional competition regimes bring forth a number of unique challenges. Enforcing cross-border competition cases by developing countries is not an easy task, as most of the competition regimes lack the political and economic muscle to do the same. Unlike the developing countries such as US which has exercised extraterritorial jurisdiction in cross-border enforcement, competition practices with an international dimension only come to the attention of developing countries in three scenarios; through leniency applications, public announcement by developed countries and finally and which is very rare, developing countries detecting cross-border anti-competitive practices. Whereas some of the African countries have leniency programs in place, it is still ineffective as rarely do international or domestic cartels apply. It is only in South Africa where the South African Competition Commission has been able to assess leniency application in domestic competition enforcement. In 2016, the South African Competition Tribunal granted a second leniency to an applicant in the wheat and milling cartel. In Kenya, while its competition law provides for a leniency programme under its competition regime, there is no public information indicating a leniency application by cartels. In 2017, CAK published its Leniency Program Guidelines to enhance leniency applications as cartel detection tool. However, CAK has the responsibility of creating awareness on the same.

Public announcements by developed countries on the other hand may only be sufficient if the developed country is willing to share information or cooperate. In most cases the information made public does not include confidential information shared by the parties. Whereas the international cartels may have participated in anti-competitive conduct that has a detrimental effect domestic

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33 While leniency applications is the most plausible, very few developing countries have leniency programs in place, and if they do it is very ineffective. In most cases the international cartels never apply for the leniency applications or cooperate. Lack of physical presence in developing countries, investigation and legal constraints such as confidentiality of key information, service of documents especially where cartelists are not cooperating.

34 Developing countries are likely to recognize the existence of international cartels through the investigation and enforcement mechanisms of developed countries.


36 Under the Guidelines, the Authority can offer full or partial immunity to an undertaking in respect of restrictive trade practices committed by it.
market, lack of physical presence in Africa coupled with legal constrains such as serving of documents and confidentiality of information hinders cross-border competition enforcement.

The last alternative which due to lack of political and economic power, is for the African country to initiate its own investigation in the cross-border anti-competitive conduct. This is hindered by jurisdictional conflicts, difficulties in serving documents, legal constraints, languages and non-cooperation with the said undertakings. For example while the vitamin case had an impact on developing States, no developing country apart from Brazil investigated the said cartel.\textsuperscript{37} The final alternative of African countries detecting and investigation international cross-border anti-competitive conduct is close to impossible. African countries already face challenges in enforcing domestic competition in their own countries, making it more complex to investigate cross-border anti-competitive conduct.

Whereas the objective of regional competition regimes is to enhance economic development and enforce cross-border competition, it brings with it a number of challenges if not addressed will undermine this goal. SADC has recognized that lack of competition laws in some of its member states, high costs of investigations, different priorities, voluntary nature of cooperation, lack of harmonization of laws and confidentiality of information are the major challenges facing cooperation and consultation in its region. Whereas most of the MoU’s allow for sharing of information, it is limited to non-confidential information. Parties provide in the MoU’s that no party is obligated to share information in contravention of the domestic laws or interest of the parties. The voluntary nature of the MoU’s calls for political will, hence the regional competition regimes must enhance its legality. Also the enforcement of the MoU’s will depend on the nature and extent of cooperation between the regional competition regime and member states.

Each country has also developed competition laws due to varied motives such as social pressure, tool to achieve development and others as a result of international pressure.\textsuperscript{38} This varied motives makes it even difficult to enforce cross-border anti-competitive conduct in the same regional block. Kenya is the first country to prohibit abuse of buyer power under Section 24A of the Competition Act in 2016. This was informed by abuse of buyer power by supermarkets in the retail sector.

\textsuperscript{37} OECD, 2014 ( n 19 ).
COMESA Competition Commission so far does not provide for abuse of buyer power. The lack of uniform laws will create conflict when applying the same to cross-border conflicts.

Jurisdictional conflict is a major challenge in cross-border enforcement that must be addressed.\(^\text{39}\) Which law should apply to international anti-competitive conduct has been subject of debate since the 1990’s when the EU proposed a globalized competition regime while US and developing states opposed such internationalization and proposed bilateral cooperation based on non-binding rules.\(^\text{40}\) Jurisdiction conflicts as a result of regional competition regimes in Africa is twofold. First it arises between the application of domestic law and regional competition law. The development of regional competition regimes creates two separate legal regimes governing the enforcement of competition policy and law: domestic and regional law. The net effect is dual competition regime. It is recognized in international law that States are sovereign and they enjoy exclusive jurisdiction. However, this jurisdiction is only limited to national borders.

The fear that CCC or EACCA would usurp powers vested by national competition regimes in merger review has been one the challenges facing cross-border competition regime. Previously before the establishment of the CCC mergers between more than one countries were notified to each member states. This was deemed tedious, costly and created uncertainties due to lack of unified competition laws. The establishment of the CCC was meant to cure these challenges and in that regard, once a notification is made to CCC, member states need not be notified. The question of whether this has been cured is still debatable.

A case example is the jurisdictional conflict between CCC and a Member State that arose in merger reviews in 2013.\(^\text{41}\) CCC provided that mergers with a regional dimension concluded after January 2014 should be notified to CCC, failure do so would render them null and void. This raised a jurisdiction conflict between the application of Kenya’s Competition Act and CCC Competition

\(^{39}\) WTO, *Doha Ministerial Declaration*, (WTO Doc WT/MIN(01)/DEC/1 2001).


Rules. Section 6 of Kenya’s Competition Act provides for extra-territorial application to conduct outside Kenya by a citizen or a person ordinarily resident in Kenya; a body corporate incorporated in Kenya; supply or acquisition of goods and services by a person into or within Kenya; and any person in relation to the acquisition of shares or assets outside Kenya resulting in the change of control of business in Kenya. This extends CAK jurisdiction to conduct outside the Kenyan market but which have an effect on the Kenyan market. In case of conflict with external bodies the Act prevails. This was the cause of jurisdictional conflict between CAK and CCC. So far this jurisdictional conflict has not been addressed. The net result is dual notification of mergers to CCC and CAK raising uncertainties and costs of merger filing. Kenya requires a merger notification even where the same is required by CCC despite the fact that CCC should be a one-stop-shop regime increasing the cost of merger filing. With the establishment of the EACCA, it only exacerbates the challenge of jurisdictional conflict.

The second scenario of a case of jurisdictional conflict is the overlapping jurisdiction within and between regional competition regimes. While the regional regimes provide primary competition enforcement to competition issues that involve more than one member state, some of the African Countries are currently members of more than one regional regimes. The question of who will exercise jurisdiction where a country is a member of more than one regional competition regime is unclear. For instance Kenya is both a member of CCC and EACCA. Tanzania on the other hand is a member of EACCA and SADC. Whereas SADC is not a regional competition regime, however its role in competition reforms within its jurisdiction cannot be overridden. In this regard, it remains unclear who will exercise primary jurisdiction between EACCA and CCC where a conflict arises. This will impact heavily on merger regulation and reviews. So far EACCA has not invoked jurisdiction. Overlapping jurisdiction between CCC and EACCA creates friction as to which regional block has jurisdiction over mergers or competition issues.42

CCC and EACCA jurisdiction is only limited to the conduct provided under their legislation. As countries enact legislation to regulate new enforcement areas such as abuse of buyer power, algorithms, big data etc, the need for regional competition regimes to review their jurisdiction is critical.

D. WAY-FORWARD

Regional development of competition regimes in Africa presents itself with a number of opportunities and challenges in cross-border competition enforcement. The shortcomings of domestic and regional application of competition laws to cross-border anticompetitive conduct and the need to extend national laws to international anti-competitive conduct remains the biggest hurdle for both developed and developing states.43 There are four ways that developed states have employed in addressing cross-border anti-competitive conduct: extraterritorial application of national laws; regional approach; bilateral and tripartite tracts; and global initiative that provides technical assistance and capacity building by organizations such as UNCTAD, OECD and International Competition Network (ICN). In this regard African competition regime can adopt the following mechanisms in addressing cross-border competition enforcement.

a) Strengthen national and regional competition regimes

The establishment of international competition regime is ongoing, but very dim. Mehta argues that strong national or regional regime may not be sufficient, and proposes the establishment of an international global agency.44 However he is very pessimistic that such an idea remains an Utopian idea due to geo-political situation. Regional competition regimes will remain key in addressing cross-border competition enforcement. The lack of international competition global agency means that developing countries should aim at strengthening national and regional competition regimes. This can be done through enhancing human resource and expertise; granting more powers to competition agencies to enforce anti-competitive conduct; education awareness on the legal and competition policy regime etc. Competition regimes should also keep abreast with competition developments at the international level, so that they can caution its domestic markets against anti-competitive conduct. Technological advancement has made it easy to access information on anti-competitive conduct with international dimension that may have an impact on another country.

b) Enhanced cooperation

Cooperation in competition enforcement is inevitably fundamental. In order to enhance competition reforms countries must cooperate. This cooperation takes three forms. First is African

44 Mehta (n 13).
countries entering in MoU’s with each other. For countries like Kenya, Zambia, South Africa and Botswana which are already active in competition enforcement, they should provide assistance to other African countries that have a young competition regime or lack none. A collaborative approach is essential in cross-border competition enforcement.

Second is the cooperation between regional competition regimes and member states. SADC has entered into a MoU with its member states to pursue information sharing, harmonization of laws and investigations. This is a great step. Whereas CCC has entered into a number of MoU’s with specific member states, it has not yet drafted a single MoU as in the case of SADC.

Third, there is need for cooperation amongst the regional competition regimes. Evidence of overlapping membership calls for the need for the regional competition regimes to cooperate.

Finally is the cooperation of regional competition regimes with other global actors in competition reforms. Considering the time and intensive resources in investigating cross-border anti-competitive practices, international cooperation by African countries with developed countries is inevitable. The famous vitamin cartel that transcended in various countries is a clear indication that it was more prevalent in countries that had a weak cartel enforcement regime.\(^\text{45}\) The cooperation shall involve the sharing of information and servicing of documents. Cooperation with developed nations such as the USA or developed regional regime like the EU will provide African countries with an opportunity to draw lessons on how to enforce cross-border competition. For instance US has a cooperation pact with Canada, EU and Latin American countries which has been key in sharing of information, collecting evidence and even extradition of citizens to appear before courts to provide evidence.

c) **Addressing Jurisdictional conflict**

When it comes to enforcement of cross-border competition, the biggest challenge lies in the realm of jurisdiction. Both the CCC and EACCA adopt the regional dimension test in determining jurisdiction.\(^\text{46}\) There is need for CCC to have exclusive jurisdiction on competition conduct that meets the regional dimension or threshold in the case of mergers. In such a scenario the jurisdiction


of a Member State is ousted automatically. This will enhance cross-border competition enforcement, reduce on costs and uncertainties. In order to address jurisdictional conflict member states should aim at domesticating regional competition law.

E. CONCLUSION

Competition regime in Africa is still developing. The establishment of regional competition regimes in Africa is a broad step in enforcing cross-border competition as it offers a number of opportunities such as enhanced cooperation and harmonization of laws. However it still faces a myriad of challenges such as jurisdictional conflict, lack of harmonized laws, and nature of voluntary cooperation amongst others. Taking into account that international anti-competitive conduct due to globalization, trade liberalization and technological advancement lead to transactions national or regional borders, the need to review African competition policy in cross-border enforcement is vital. African countries should strengthen its national and regional regimes. Second it must enhance cooperation at national, regional and international level.
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