The Role of Regional Competition Regimes in Supporting International Enforcement Cooperation

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This blog post discusses the role of regional competition regimes (RCRs) in supporting international enforcement cooperation. The appetite for trade among nations has been insatiable over the past several decades. As cross-border trade and business transactions increased, there was also widespread adoption of competition laws and an increased number of competition enforcement authorities around the world, both at the national level and regional level. As a result, there has also been an increase in the cross-border nature of business conduct investigated by competition authorities.

The adoption and enforcement of competition laws and increased cross-border trade have presented opportunities for competition authorities to work together

to enforce national and regional competition laws more effectively through international enforcement cooperation. Competition authorities engage in international enforcement cooperation when they speak with one another as they investigate the same business conduct. International enforcement cooperation occurs “between international enforcement agencies in specific enforcement cases, i.e. merger, cartel, unilateral conduct/abuse of dominance, and other (e.g., non-cartel agreement) cases”[2]. As RCRs often enforce regional competition laws with support from national-level competition authorities and interact with other competition authorities, they also benefit from international enforcement cooperation.

A recent report by the Organisation for Economic Co-operation and Development (OECD) and the International Competition Network (ICN) analyses international enforcement cooperation data collected from competition authorities worldwide. The OECD/ICN Report considered the benefits and challenges to effective international enforcement cooperation. In addition, it examined the role of regional competition networks and enforcement agencies, like RCRs, in facilitating and strengthening such cooperation. The OECD and ICN found an increase in cooperation “between authorities outside of their established regional organizations and networks in the last decade” (OECD/ICN Report page 31, para 17).

In the quest to expand markets and facilitate trade, Regional Economic Communities (RECs) with competition mandates[3] have proliferated on the basis that there is shared history, vision, destiny, heritage and similar levels of economic development among the Member States. This view is supported by Rudolf Von Ihering, who posited that:

> ***“While the States were fighting one another, trade found out and levelled the roads that led from one nation to another and established between them a relation of exchange of goods and ideas.” (see page 175).***

This exchange of goods and ideas continues today. As trade in goods and services grow, national and regional competition authorities continue to work together to support competition enforcement. International enforcement cooperation among competition authorities contributes to levelling the roads

that connect our nations.

Regional Competition Regimes and their Role in Supporting International Enforcement Cooperation.

The OECD/ICN Report identified many benefits of international enforcement cooperation: “opportunities for more efficient and effective consideration of competition matters; further enhancing coordination and cooperation systems and practices among authorities; and improving relationships, trust and transparency” (See OECD/ICN Report at page 33, para. 24). It also identified the challenges: “resourcing; coordination/timing; legal limitations, especially relating to confidential information-sharing, investigative assistance, and enhanced cooperation; trust and reciprocity; and practical issues (e.g. language, time differences etc.)” (OECD/ICN Report page 34, para. 27).

RCRs have the potential to reduce many of these barriers among their Member State’s competition authorities and when cooperating with other RCRs and national authorities in other regions. By their nature, RECs and RCRs foster trust and cooperation among nations, at least within a certain region, by creating higher-level common or aligned interests. Moreover, RECs and RCRs operate within the broader framework of international agreements that establish integrated markets to benefit the citizens of all the member countries.

RCRs also often resolve legal barriers to international enforcement cooperation directly. They can reduce or remove some legal and practical obstacles to international enforcement cooperation by aligning legal approaches and developing common practices among members. By reducing these barriers and fostering working relationships and communication among member states’ national competition authorities, RCRs can foster increased international enforcement cooperation. Further, agreements establishing RECs and RCRs and regular interaction and engagement encourages consensus and cooperation in competition law enforcement among member countries and regional institutions. The OECD/ICN Report found that regional enforcement cooperation supported “regional consistency, convergence and deeper cooperation among regional members, which helps enforcing competition law and makes decisions more effective” (OECD/ICN Report, at 178, para. 434).

As signatories to a regional agreement, member countries typically have an obligation to refrain from activities that would jeopardize the achievement of regional markets. For example, Member States of the Common Market for Eastern and Southern Africa ("COMESA" or "Common Market") are proscribed from taking any measures that could jeopardize the attainment of the aims of the Common Market by inter alia, complying with the COMESA Competition Regulations (the Regulations). This requires policy, legal, and enforcement coordination at various levels of government.

RCRs also provide platforms for member countries to engage in international enforcement cooperation by, for example, sharing information about pending investigations or conducting evidence-gathering activities. Further, RCRs can assist in resolving resource constraints faced by countries with smaller or less developed economies, which absent the RCRs, may be left out of the competition enforcement landscape altogether. An RCR and its members' national competition authorities also benefit from increased international enforcement cooperation with other national competition authorities and RCRs. National competition authorities have "noted that regional enforcement cooperation was often the most common and effective form of [international enforcement] cooperation for their authority" (OECD/ICN Report, page 35, para. 32).

In addition, competition authorities often have to prioritize certain enforcement actions over others due to scarce resources. Prioritization criteria may include having regard to the costs of enforcement relative to the harm of the conduct. When the effects at the national level may not be sufficient to justify a national authority's intervention, but the aggregated harm across the member countries is high, RCRs have the potential to increase incentives for joint enforcement actions that reduce the costs of enforcement at the national level.

International enforcement cooperation related to remedies can also benefit RCRs, member competition authorities, and other competition authorities. Sometimes, the remedies imposed by a single competition authority may have an extraterritorial effect. Through international enforcement cooperation, competition authorities may consider and communicate about remedies under consideration. In the OECD/ICN Report, 76% of respondent competition authorities stated they consider "other authorities' remedies" in their work

(OECD/ICN Report, at page 147, Figure 16.7). International enforcement cooperation related to remedies can help authorities understand the extraterritorial effects and tailor remedies to address the harm to competition, both inside and outside RECs.

Approaches to Regional Competition Regimes: COMESA and SADC.

The operating framework and legal authority of RCRs affects the types of cooperation tools available to a competition authority and how they are used. While most RECs have incorporated competition provisions in regional agreements in Africa, they have not all adopted the same framework. For example, the RCRs established under COMESA and the Southern African Development Community (SADC) have significantly different operating models. The COMESA RCR includes a regional competition law and a regional competition enforcement authority that has primary jurisdiction to investigate matters of a cross-border nature, while SADC adopted a non-binding competition policy framework.

The COMESA Competition Commission (CCC) operates as an independent regional body. As established, CCC seeks to act as an autonomous institution cushioned from Member State's influence. As a result, the CCC's policy and decision-making organ comprises representatives from at most thirteen Member States, such that decisions are not taken along national lines. It is expected that CCC cannot be influenced by a Member State, which helps promote transparency and trust.[4]

Moreover, the Regulations put a strong emphasis on the need for international enforcement cooperation for the sustainability of the integration process.[5] The preamble to the Regulations recognizes that the Member States should cooperate at the regional level in implementing national competition legislation to eliminate the harmful effects of anti-competitive practices. Closer international enforcement cooperation between the Member States in the form of notification, exchange of information, coordination of actions, and consultation among the Member States is encouraged and anticipated as part of the CCC's mandate and institutional design.

The COMESA RCR enables international enforcement cooperation among CCC and Member State's national authorities and supports cooperation with other

national and regional competition authorities worldwide. The CCC has provided a platform for its member states' national competition authorities to discuss substantive matters such as theories of harm, market definition, and remedies. The CCC has also helped Member States' national competition authorities build capacity to enhance competition law enforcement and develop the relationships and trust that further support international enforcement cooperation. The CCC has *inter alia*, undertaken the following activities:

1. Annual training to case handlers at national competition authorities to enhance the assessment of competition cases.
2. Facilitating attachment of staff from new and less experienced competition authorities to experienced competition authorities.
3. Providing advisory opinions to national competition authorities on matters that fall short of the regional dimension but affect only one country.
4. Conducting market studies with the Member States to identify markets and sectors susceptible to anti-competitive behaviour.

The SADC RCR has taken a different approach to competition and cooperation. It adopted a non-binding competition policy cooperation model that recognizes the importance of international enforcement cooperation. However, the SADC RCR does not include a regional competition law nor provide its member states with the legal tools to support international enforcement cooperation. Instead, it relies on member states to engage in international enforcement cooperation consistent with existing national laws through the SADC Declaration on Competition and Policies.

SADC's RCR does include a regional competition authority, but it has established a Competition and Consumer Policy and Law Committee. Through this Committee, the SADC RCR has successfully promoted the development of competition policy and built strong national-level enforcement institutions through capacity-building initiatives. However, as noted by Thula Kaira, international enforcement cooperation between SADC members' national competition authorities, particularly in the fight against cartels, has not occurred frequently.

Today, ongoing discussions at the Tripartite[6] and African Continental levels include competition policy and present an opportunity for RCRs to reduce the

barriers to effective international enforcement cooperation. Reducing such barriers will continue to improve international enforcement cooperation among an RCR's members and with other RCRs and national competition authorities in other regions. Given that the cross-border trade is not limited to countries within an REC, all competition authorities will benefit from increased international enforcement cooperation.

What's Next?

Closer cooperation among international competition authorities is a must for effective enforcement of competition laws. As seen in the OECD/ICN Report, competition authorities around the world support increased international enforcement cooperation. More so, international organizations like the OECD and ICN, and RECs, RCRs, and national competition authorities will continue to work to remove and reduce existing barriers. Competition authorities want to: "more effectively foster and utilise informal enforcement cooperation; improve access to, and promotion of, successful tools and models for enforcement cooperation; [support] earlier/more timely enforcement cooperation, including better pre-investigation cooperation; [achieve] greater transparency about what information authorities may share and how; [develop] more formal instruments to improve enforcement cooperation and remove legal barriers; [and support] more enhanced and co-ordinated enforcement cooperation on matters of mutual concern (i.e. where enforcement cooperation on specific cases intersects with broader policy or enforcement issues, such as some of the challenges arising from the digital economy)"(OECD/ICN Report, at page 37, para. 37).

Some of this work may include removing legal barriers to international enforcement cooperation by reviewing the legal instruments and cooperation tools provided in national and regional laws, cooperation agreements, and regional frameworks related to sharing confidential information. From COMESA's perspective, while significant achievements in the area of international enforcement cooperation have been made under the RCR, obstacles to more effective cooperation both within and beyond the Common Market remain. Accordingly, RECs and RCRs will continue to play an important role in reducing such barriers and obstacles as international enforcement cooperation among competition authorities continue to expand.

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[2] OECD/ICN, OECD/ICN *Report on International Co-operation in Competition Enforcement* (OECD/ICN 2021) page 61 and 86. This report also includes a list of regional cooperation networks and organizations, at Annex J, available at https://www.oecd.org/daf/competition/OECD-ICN-Report-on-International-Co-operation-in-Competition-Enforcement.pdf.

[3] These include the Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC), Economic Union of West African States (ECOWAS) (Communauté Economique Des Etats de l'Afrique de l'Ouest (CEDEAO)), West African Economic and Monetary Union (WAEMU) (Union économique et monétaire ouest-africaine (UEMOA)), Central African Economic and Monetary Community (CEMAC), and Caribbean Community (CARICOM), among others. See OECD/ICN Report, at Annex J.

[4] See Articles 6, 12,13 and 15 of the COMESA Competition Regulations.

[5] See Articles 7(2)(e), (h) of the COMESA Competition Regulations.

[6] The Tripartite includes the COMESA, SADC and the East African Community.

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