Southern African Regional Competition Regimes – Where are we today?

By:

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In the *Competition Commission vs Bank of America Merrill Lynch and others*[1], the South African Competition Appeal Court observed that:

> "*the rapid globalization of markets has challenged the ability of the nation state to pursue policies borne of indigenous democratic choice. Competition law is one such site of this problem in that anti-competitive conduct can detrimentally affect the national economy in circumstances where the conduct takes place on foreign soil or on the internet. In turn this raises a problem for the competition authorities of a nation state to enforce the relevant national law.*"

The above dictum was pronounced in the context of deciding the scope of the South African Competition authorities' jurisdiction in enforcing the South African Competition Act 89 of 1998, as amended against alleged anti-competitive

conduct by firms located outside the borders of South Africa. I view the above case as illustrating the effects that cross-border anti-competitive practices may have in a foreign jurisdiction and reminding one of the importance of cooperation between competition authorities in combatting anti-competitive practices.

Ten years ago (in 2011), I wrote an article titled *"Are Southern African competition law regimes geared up for effective cooperation in competition law enforcement?"*. In that article, I explored some obstacles of effective regional cooperation in enforcing competition law in the Southern African region. I looked at Southern African trade agreements that promote cooperation between member states in competition enforcement.

At the outset, I note that developing countries, in particular African countries, face their own political and economic realities, and any comparison with developed countries should be made with caution. However, the question I succinctly explore in this article is "Where are we today, 10 years later?" Answering this question requires extensive research and a possible survey of the relevant competition agencies' practices on regional enforcement cooperation.

Nevertheless, this article ponders on the developments in the Southern African cooperation in competition enforcement through some of the regional economic instruments, namely, the 2002 Southern African Customs Union (SACU) Agreement, the 2004 Common Market for Eastern and Southern Africa (COMESA) Competition Regulations, the 2009 Southern African Development Community (SADC)[2] Declaration on regional cooperation in competition and consumer policies, and the African Competition Forum (ACF). In this regard, I briefly touch on the importance of regional cooperation in enforcing competition regulation, the challenges faced in the implementation of Southern African regional competition regimes (RCRs), and the reasons why these RCRs face these challenges.

The Importance of International Cooperation in Enforcing Competition

It is widely recognized that cross-border anti-competitive practices are harmful to national economies. For instance, in the case of collusive conduct, numerous studies have shown that international cartels negatively affect not only the

global economy but, more specifically, the economies of developing countries. For example, Leveinstein and Suslow (2001) note that in 1997, developing countries imported $81,1 billion in goods that were the subject of price-fixing conduct during the 1990s, representing 6.7% of imports and 1.2% of GDP of developing countries.[3]

With the rise of globalization of trade, commercial activities are expanding beyond national borders. As noted by the South African Competition Appeal Court in the Forex case (paragraph 6), "new technologies have resulted in transnational and even global consequences". As a result, competition is no longer experienced locally but also globally, and with it comes, anti-competitive practices which may have a broader reach. Similar to the Covid-19 pandemic, a cartel may cross national borders.

A cartel's harmful effects often spread in countries where the cartelized products are sold, even when the cartelists are not located or domiciled in the affected countries. As a result, competition authorities are now facing the challenge of enforcing their local competition rules against companies located outside their jurisdiction. This raises the challenge of the extraterritorial application of competition law, which may necessitate cooperation between competition authorities in investigating and prosecuting cross-border anti-competitive practices or assessing cross-border mergers. In this regard, UNCTAD's Model Law on Competition recognizes that "*the principle of territoriality does not prevent a State from having subject matter jurisdiction over acts that originate in foreign countries but which produce effects within the State's territory.*"[4]

International cooperation in competition law enforcement can happen through: (a) notification of activities that may influence the domestic market of a partner jurisdiction; (b) exchange of information; and (c) coordination of enforcement action (e.g. parallel investigation, such as simultaneous dawn raids). Both (2015) identifies five factors that affect international cooperation in competition law enforcement: cross-border trade, confidentiality law, coherence of competition regimes, mutual trust, and availability of resources. It is from recognizing the importance of cooperation between national competition authorities that regional competition regimes (RCRs) were borne.

Southern African Competition Law Regimes

Southern African regional trade agreements (RTAs) such as SADC, COMESA, and SACU promote the cooperation of competition law enforcement between their respective member states.

SACU

SACU is one of the oldest custom unions established in 1889[5]. Its main objective is to promote economic development through regional coordination of trade. SACU provides for the free movement of products within the SACU region without any duties or quantitative restrictions. One of the objectives of the 2002 SACU Agreement that established the union is "*to promote conditions of fair competition in the Common Customs Area*". Article 40 of the SACU agreement deals with competition policy and stipulates that each member should adopt a competition policy. Article 40 also stipulates that SACU member states shall cooperate in the enforcement of competition laws and regulations. To date, cooperation between SACU member states in the competition law context has mainly been in the form of capacity building and training.

SADC

The 2009 SADC Declaration on Regional Cooperation in Competition and Consumer Policies was drafted from, among others, the realization that "*case specific cooperation on competition issues arising from the growth of cross-border anti-competitive practices is an essential element of regional integration, and that there is a need for increased regional cooperation in addressing cross-border anti-competitive practices*" (See Preamble). In particular, Article 25 of the SADC Protocol on Trade requires member states to implement measures that prohibit unfair business practices and promote competition. The 2009 SADC Declaration provides for, amongst others, the establishment of a system for effective cooperation in competition law enforcement and a transparent framework that contains appropriate safeguards to protect the parties' confidential information.[6]

The regional platforms that have been established to facilitate cooperation among member States include:

1. The Technical Committee on Competition and Consumer Laws and Policies. The Committee comprises representatives from the competition authorities/agencies and consumer agencies. The Committee deals mainly with policy, strategic, and key competition law enforcement issues;
2. Technical Working Groups. Five working groups on Cartels, Mergers, Dominance, Research and Consumer Protection were established. The working groups deal with case-specific cooperation to the extent consistent with each member's laws, regulations, and important common interests in preventing hard-core cartels, abuse of dominance, anti-competitive mergers, and unilateral conduct. These working groups are regarded as the most effective multilateral cooperation tools within the SADC cooperation framework.
3. Memorandum of Understanding (MoU). In 2016, member States signed an Inter-Agency MoU. The cooperation relates mainly to information sharing, coordination of investigation, harmonizing rules and procedures, and undertaking joint research.[7] However, it is noted that these bilateral agreements are restricted in effect, and greater cooperation is needed to achieve better regional economic integration.[8]
4. Bilateral Memoranda of Understanding (MoUs). The Member States entered into bilateral agreements to facilitate closer cooperation in the enforcement of competition law. For example, the Competition Commission of South Africa signed MoUs with competition agencies of Mauritius, Namibia, and Seychelles.

Some of the activities on the SADC cooperation implemented over the years, include: (i) Joint capacity building; (ii) Meetings of the Technical Committee on Competition and Consumer Law and Policy and Technical Working Groups; (iii) Study tours and staff exchange programmes among SADC competition authorities; (iv) Technical assistance to member States to enact competition legislation, set up and operationalize competition authorities; (v) Development of SADC Model Rules/Best Practice Guidance Documents, and Reference Manual on Competition Law enforcement; (vi) Joint research programmes by member States - research in the telecommunications, fertiliser, cement, pharmaceuticals and healthcare, construction and liquefied petroleum gas sectors.

In April 2015, the *SADC States adopted the SADC Industrialization Strategy and Roadmap 2015 – 2063*. The Strategy seeks to promote, amongst others, competitiveness and greater regional integration to prosecute cross-border anti-competitive practices. Moreover, in June 2018, the SADC Competition and Consumer Laws and Policies Committee (CCOPOLC) resolved to review the SADC Regional Cooperation Framework on Competition Laws and Policies and Consumer Protection Laws and Policies. This was in line with the Strategy of developing a regional competition and consumer protection policy by 2020, with full implementation envisaged between 2021 and 2030. It is not clear whether the review is completed.

COMESA

Article 55 of the COMESA Treaty provides for the Member States to prohibit any anti-competitive agreement within the Common Market. Article 55(3) of the COMESA Treaty provides for the adoption of the COMESA Competition Regulations. The Competition Regulations adopted in 2004 established the COMESA Competition Commission, which is responsible for promoting competition within the Common Market.

To date, the COMESA Competition Commission has assessed close to three hundred mergers and enforced the law against restrictive business practices. The Commission has also concluded MOUs with eleven (11) COMESA member states. The MOUs facilitate cooperation in the application and enforcement of the regional and national competition law.

Fox and Bakhoum (2019, p 138) observe that "*COMESA's merger decisions thus far do not reveal COMESA as a fearsome watchdog in defense of competition in its community*". This is due to the limited number of staff and funding coming from member states. Fox and Bakhoum (2019, 138-139) remark that "*a much larger budget, a much larger staff, and a requirement to publish fully reasoned decisions might embolden COMESA to use its injunctive powers against harmful mergers, as well as using fining powers against cross-border hardcore cartels.*" This is geared towards building the capacity and capability of the Commission.

There are also cooperation networks between African countries. One is the African competition Forum (ACF).

ACF

The ACF is a network of 19 African competition authorities. ACF was launched in Nairobi (Kenya) in 2011. The ACF aims "*to promote the adoption of competition principles in the implementation of national and regional economic policies of African countries.*" Its objectives are "*to promote the adoption of competition laws, help build the capacity of new authorities, and assist in advocating for the implementation of competition reforms to the benefit of member countries*".

ACF's activities include bi-annual conferences, meetings of the steering committee, working groups on mergers and cartels. The ACF has also conducted research in poultry, cement, sugar, and fertilizer training sessions with the participation and support of the US and EU enforcers (Fox and Bakhoum 2019, 155).

Challenges in Implementing Regional Competition Regimes

The implementation of regional agreements on competition law enforcement has encountered challenges. These include resource constraints (finance and staff), lack of competition culture in some African countries, inadequate knowledge of competition enforcement; weak or absent enforcement of competition rules; the reluctance of some jurisdictions to exchange information. The exchange of information may have to be regulated by courts or foreign affairs officers, resulting in costs and is time-consuming. Other factors include the fact that African agencies are relatively young; the divergence of substantive rules and institutional approaches; legal restrictions with regard to the exchange of confidential information, and the perception of firms and individuals that confidential information might not be protected.[9]

Reasons for these Challenges

The reasons for these challenges and these challenges are intertwined. Some of the reasons include the fact that certain African countries do not regard competition enforcement as one of their developmental or national priorities. The Priorities of African States often include food security, access to proper healthcare, job creation, etc.

In the case of competition enforcement, younger competition agencies' priority is on the building of institutional capacity. Cooperation is therefore focused on capacity building and technical assistance. In this regard, the main form of international cooperation entails informal communication between competition agencies and technical assistance, especially from advanced to less-experienced jurisdictions. However, informal communication mainly relates to non-confidential information, which often limits the benefits of cooperation. Yet, the exchange of confidential information remains a key element to effective international cooperation. So divergence in the rules regarding sharing confidential information or any restriction thereof is a major challenge to effective competition, as noted by OECD.

Other reasons include:

- Different national competition legislation or lack of competition laws or policies (e.g. the corporate leniency program). There may be complications in exchanging information between an agency under a legal system that criminalizes anti-competitive conduct and an agency under a civil/administrative competition law regime. In this regard, the degree of similarity in the legal regimes and interpretation of the core principles are regarded as factors facilitating international cooperation.
- Lack of proper interaction between regional competition regimes or regional trade agreements and national competition agencies.
- Lack of trust that the other competition agencies may not properly keep the confidential information.
- An insufficient commitment of the member States and overlaps between the regional competition regimes and national competition authorities.

Possible Solutions in Improving Regional Cooperation

Nevertheless, the number of competition agencies involved in international cooperation has increased. Both (2015) reports that at least twenty-five competition agencies have some experience in international cooperation of competition enforcement. Some of the solutions in addressing the above challenges include building closer cooperative relationships; exchange of non-confidential information; confidentiality waivers; safeguards for due process and the protection of confidential information; conclusion of bilateral

cooperation agreements – E.g. Joint protocol between Zambia and Zimbabwe for the exchange of information; hamonization of the competition laws within a region. For example, developing corporate leniency policies with similar provisions and developing standard forms for waiver of confidentiality; extraterritoriality provisions in national competition laws; inclusion of international cooperation in national competition legislation.[10]

An OECD/ICN report (2021) identifies 4 key areas to address challenges to effective international cooperation: (1) enhance enforcement cooperation work-products and networks; (2) improve transparency and trust between competition authorities; (3) provide policy and practical support for enhancing effective regional enforcement cooperation; and (4) remove substantive and legal barriers to cooperation.

Conclusion

Cooperation in the Southern African region is currently taking place, albeit mainly on an informal basis or through bilateral agreements, such as MOUs. Although one can be comforted by the SADC Declaration statement that "*cooperation shall proceed in a gradual and phased approach*", there is certainly a need for more cooperation and effective implementation of the regional agreements regulating cooperation. With the rise of globalization and digitalization of trade, new challenges to effective cooperation arise. Accordingly, there is a need to speed up the cooperation process a bit and look at new international or regional cooperation approaches to face these new challenges.

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[1] The Competition Commission v Bank of America Merrill Lynch and others (175/CAC/Jul19) para 2 ("the Forex case")

[2] "The SADC regional integration agenda forms part of a larger integration agenda expressed in the intended establishment of the Tripartite Free Trade Area (**TFTA**) which will encompass member states of the Common Market for Eastern and Southern Africa (**COMESA**), the East African Community (**EAC**) and SADC as well as the African Continental Free Trade Agreement (**AfCFTA**) which aims to create a single market for goods and people across the African continent." Regional Competition Agreements: Benefits and Challenges (SA

contribution to OECD-2018)

[3] Levenstein M. and Suslow V, 'What Determines Cartel Success? (31 January 2002) referring to Levenstein, Margaret C. and Suslow, Valerie Y. "Private International Cartels and Their Effects on Developing Countries." Background paper prepared for the World Bank's World Development Report 2001, December 2001.

[4] UNCTAD (2017) Model Law on Competition (2017) - Revised Chapter II, paras 50 and 51, as cited in Horna P. and Yamamoto A. - UNCTAD - *International Cooperation in Competition Law Enforcement Challenges for Developing Countries and Best Practices* (2021) p.6

[5] SACU has five member states, namely Botswana, Lesotho, Namibia, South Africa and Swaziland.

[6] Sakata N, '*Are Southern African competition law regimes geared up for effective cooperation in competition law enforcement?* (2011) - p.8

[7] Fox E. and Bakhoum M, *Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa (*Oxford University Press, 2019) p.139

[8] OECD, *Regional Competition Agreements: Benefits and Challenges - Contribution from South Africa* (OECD, 29 November 2018) p. 3

[9] Sakata N. *-Are Southern African competition law regimes geared up for effective cooperation in competition law enforcement?* (2011) p. 10; OECD Regional Competition Agreements - benefits and challenges (Contribution from South Africa - 29 November 2018) p.6.

[10] For example, section 82(4) the South African Competition Act 89 of 1998, as amended stipulates that "*The President may assign to the Competition Commission any duty of the Republic, in terms of an international agreement relating to the purposes of this Act, to exchange information with a similar foreign agency.*"

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