

DISCUSSION PAPER

Regional cartel enforcement – a cartel in South Africa is still a cartel in the region?

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1. Introduction and Background

This work builds on the previous work by the author titled “*Cartel enforcement in the southern African neighbourhood*”¹. In that work going up to a 2014, it was found that cartels that had been unearthed in South Africa in cement, construction, fertilizer, maize, bitumen, showed that most of these cartels had not been investigated in other SADC countries, notably the BNLS countries which form the Customs Union with South Africa. The thrust of the paper then was that a cartel in South Africa was inevitably a cartel in the neighbouring countries. It was an attempt at creating a “cartel mirror” which other competition authorities in the region could look into and act after seeing similar images in their countries of jurisdiction. It was noted that Zambia, Mauritius and Namibia had investigated one or two of cartels in sectors such as fertilizer, cement, construction, bread/flour/wheat, steel and bitument.

The World Competition Day theme held on 5th December 2017 *Fighting Bidrigging to Grow the Economy* was an international clarion call that was heralded as likely to bring to the fore the fight against cartel activity, in particular bid-rigging. However, we do not see much success in southern Africa in this area other than in South Africa and Zambia.

It is evident that the economic and social ties for countries in the southern Africa region are close knit through the Southern Africa Customs Union (SACU) and the Southern Africa Development Community (SADC). Business strategies likewise tend to have a regional strategy. As was aptly noted by Bosiu, in settling cartel cases with the Competition Commission of South Africa, few companies disclose the list of other countries that may be affected by the conduct, probably fearing possible litigation in the affected countries².

In this paper, we have a bird’s eyeview of some cartels where penalties have been meted out in South Africa, and an attempt of how other Southern Africa countries are or may be affected is made. Notable among these are the BNLS countries (Botswana, Namibia, Lesotho and Swaziland).

¹ Kaira, T. (2017). Cartel enforcement in the southern African neighbourhood. In Klaaren, J. et al. eds. Competition Law and Economic Regulation: Addressing Market Power in Southern Africa. Wits University Press. pp. 71-93.

² Bosiu, T, CCRED Quarterly Review, 20 December 2017

2. Cartel Enforcement in the SADC Region

It is a noteworthy milestone that on 26 May 2016, nine (9) competition authorities in the SADC region signed an MOU in Gaborone, Botswana. The nine countries were Botswana, Malawi, Mauritius, Namibia, Seychelles, South Africa, Swaziland, Tanzania and Zambia. The MOU committed the competition authorities in these countries to co-operate by sharing information on cases, co-ordinating investigations, harmonising rules of procedure and undertaking joint capacity building and research activities³. Arising from this, the working groups have been created, with workplans. It is not yet clear to outsiders how the MoU has fared since it was signed, notably in relation to coordinated investigations and harmonization of rules of procedure. For cartel conduct, which is regional/international in many cases, coordinated investigations and harmonization of rules of procedure (including Leniency Policies/Programs) would for instance, be a great leap ahead. It is however not yet in the public domain the extent to which any specific case collaboration in cartels has followed a pattern of coordinated investigations and simultaneous dawn raids (in the lines of the international *Vitamins* and *Lysine* cases of the 1990s). For cases identified in South Africa, they provide fertile ground for such collaboration due to the regional market strategies they employ. About 5 of such cases are identified below.

3. Cartels penalized in South Africa in 2016/17

A key development in the previous 2 years has been the criminalization of cartel provisions in the Competition Act of South Africa from May 2016. It is yet to be seen how cartel investigations will be impacted by this development.

From the Competition Tribunal's Annual Report⁴ 2016/17, it showed that it meted out fines of R1,616,718,501 for horizontal conduct under section 4(b) of the Competition Act of South Africa. Further, from the 2016/17 Annual Report of the CCSA, we learn of its approach in terms of efficiencies in investigations, strategic case selection and relations with international partners as part of the driving force in their successful trail.⁵ It is undoubted that the successful cartel busting in South Africa is a good signal to neighbouring countries (notably BNLS) to look closely at firms that have been identified as playing a part in those cartels. The strategies the firms use in South Africa are most likely the same strategies they would use in other neighbouring countries. The cases listed below have an arguable regional dimension.

3.1 The Steel Cartel

A record single administrative penalty of R1.5 billion was recorded by the Competition Tribunal in 2016/17 against ArcelorMittal South Africa (ArcelorMittal) in relation to collusion, information exchange and excessive pricing against ArcelorMittal with Cape Town iron & Steel Works (CISCO), Scaw and Cape Gate, for conduct that took place through the South African Iron and

³ Competition Authority of Botswana, Annual Report 2016-17, page 23

⁴ <https://www.comptrib.co.za/assets/Uploads/Reports/Annual-Reports/Competition-Tribunal-AR16.pdf>

⁵ Ibid, page 19

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Steel Institute (SAISI) and the South African Reinforced Concrete Engineers Association (SARCEA). This was in relation to pricing and discounts in the long steel, scrap metal, flat steel and wire mesh markets from at least 2003 to the time of the settlement with the CCSA was reached. We learn from the case that the focus was not just on the fine, rather on ensuring that desirable market conduct and status was to the extent possible, achieved. This was done through what was considered to be “far reaching and creative remedies” the CCSA and ArcelorMittal agreed upon. The “market restoration” mechanism was in the form of undertakings given by ArcelorMittal. Among others, the undertakings included requirements that for a period of five years, ArcelorMittal would limit its Earnings Before Interest and Tax (EBIT) margin to a cap of 10% for flat steel products sold in South Africa. In addition, ArcelorMittal committed to a R4.6 billion capital expenditure over the next five years. The CCSA was confident that these undertakings would lead to a reduction in pricing and improvement in the overall competitiveness of this priority industry⁶.

Steel industry is one of the priority sectors identified for intervention by the CCSA. The significance of the steel industry cannot be understated for lesser developed countries surrounding South Africa, which countries have a huge net-deficit in infrastructure development. Steel is used in all construction projects, whether for domestic and commercial purposes. The capping of the EBIT to a margin of 10% should otherwise raise eye-brows in other SADC/SACU countries. This inevitably means ArcelorMittal will have to recoup money elsewhere to fund the R4.6 billion capital expenditure that they will have to make in the South African economy over the next 5 years. What exactly are likely to be its pricing strategies in the export markets? This should be of interest to the SADC MoU competition authority partners. Table 1 below gives further highlights.

Table 1: Regional Foothold of Steel Cartel

CARTEL PARTICIPANT IN SOUTH AFRICA	PRESENCE IN SADC/SACU	INVESTIGATION DONE IN SADC/SACU OTHER THAN SOUTH AFRICA
ArcelorMittal	Almost all SADC countries are net importers of steel products from RSA. South Africa is also a big importer of scrap metal from the region	None
CISCO		
Scaw		
Cape Gate		

⁶ CCSA Annual Report 2016-17, page 15. See also *How the R1.5bn cartel settlement came to be* www.engineeringnews.co/za/article/how-the-r1.5bn-cartel-settlement-came-to-be-2016-09-02

3.2 The Bank Cartel

Another interesting case that was registered in 2016/17 South Africa is against 17 local and international banks. It was alleged by the CCSA that the banks were colluding by agreeing the terms for trading in the US Dollar/Rand currency pair – in ways that affected the currency prices in their favour. It is now in the public domain that the collusive maze was a casual use by traders of different trading platforms, chat rooms (prophetically coded “ZAR Domination”), meetings and phone conversations to co-ordinate their currency trades. The colluding banks would agree to hold trades, refrain from trading, take turns in trading and, in that way, distort demand and supply enough to reach their desired currency prices and achieve their profit motives. The traders were found to have affected currency prices in specified spot or short-term, transactions. One Bank settled with the Commission, paying a penalty amounting to R70 million for its part in the collusion, while the remaining respondents were facing prosecution⁷. The 17 bans were Bank of America, Merrill Lynch, BNL Paribas, JP Morgan Chase, JP Morgan Chase Bank of North America, Standard Bank of South Africa, Investec, Nomura, Standard New York Securities, HSBC Bank, Credit Suisse Group, Commerzbank AG, ANZ Bank Group, Macquerie Bank, ABSA Bank Limited, Barclays Capital, Barclays Bank. Of these, the South African banks were: ABSA, Investec, and Standard Bank of South Africa. The table 2 below highlights the likely cartel sphere in the region.

Table 2: Regional Foothold of Bank Cartel Members

CARTEL PARTICIPANT IN SOUTH AFRICA	PRESENCE IN SADC/SACU	INVESTIGATION DONE IN SADC/SACU OTHER THAN SOUTH AFRICA
ABSA Bank Limited	Botswana, Mauritius, Mozambique, Namibia, Seychelles, Tanzania, Zambia	Zambia was the first country in SADC to raid the banks in 2012 over alleged cartel conduct. No evidence was found. Botswana and Malawi carried out industry studies As Above
Barclays Bank⁸	Botswana, Mauritius, Mozambique, Namibia, Seychelles, Tanzania, Zambia	
Investec	Botswana, Mauritius, Namibia	
Standard Bank of South Africa	BNLS, DRC, Madagascar, Malawi, Mozambique, Tanzania, Zambia, Zimbabwe	
Bank of America	Through Correspondent Banks	
Merrill Lynch	Through Correspondent Banks	
BNL Paribas	Through Correspondent Banks	

⁷ Ibid, page 36

⁸ Barclays Bank is now part of the ABSA Group in Africa

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JP Morgan Chase	Through Correspondent Banks	
JP Morgan Chase Bank of North America	Through Correspondent Banks	
Nomura	Through Correspondent Banks	
Standard New York Securities	Through Correspondent Banks	
HSBC Bank	Through Correspondent Banks	
Credit Suisse Group	Through Correspondent Banks	
Commerzbank AG	Through Correspondent Banks	
ANZ Bank Group	Through Correspondent Banks	
Macquarie Bank	Through Correspondent Banks	
Barclays Capital	Through Barclays Bank	

3.3 The Paper Manufacturing and Packaging Value-Chain Cartel

Four cases involving price fixing, division of markets and collusive tendering in the paper manufacturing and packaging value chain were also recorded in 2016/17. Like many other cases, this was a *suo motu* investigation by the CCSA against PG Bison and Sonae for price fixing in particle boards.⁹ The cartel leader has direct investments in a number of SADC countries and also through agency/distributorships across a number of other countries. The Table 3 below further highlights the foothold.

Table 3: Regional Foothold of Paper and Packaging Cartel members

CARTEL PARTICIPANT IN SOUTH AFRICA	PRESENCE IN SADC/SACU	INVESTIGATION DONE IN SADC/SACU OTHER THAN SOUTH AFRICA
PG Bison/ PG Glass	BNLS, Angola, DRC, Malawi Mozambique, Tanzania, Zambia Zimbabwe (Directly or through agents/distributors)	None
Sonae Arauco/Novolam	Angola, Mozambique, Tanzania,	None

⁹ Ibid

3.4 Edible Fats and Oils Cartel

A case against Unilever South Africa (Pty) Ltd and Sime Darby Hudson Knight (Pty) Ltd in the edible fats and oils market was referred by the CCSA to the Tribunal for adjudication and another was under investigation in the 2016/17 period. The two were alleged to have illegally divided markets by allocating specific types of goods in the edible fats and oils market to one another. The investigation revealed that from 2004 to at least 2013, the two entities were reported to have had a general agreement not to compete with each other in respect of certain products, product sizes and market segments in the supply of edible oils and fats. According to the CCSA, the agreement had its origin in an agreement concluded by the parties in 2004 when Unilever sold its refinery business to Hudson and Knight, which later became Sime Darby Hudson and Knight. Following investigations, which included a dawn raid, Sime Darby came forward and settled with the CCSA for their part in the conduct. They agreed to pay an administrative penalty of R35 million and also agreed to various behavioural remedies. The Tribunal confirmed this settlement on 18 July 2016. During the same period, there were investigations initiated on collusion against DH Brothers Industries (Pty) Ltd t/a Willowton (Willowton) and others, who are competitors in the manufacturing and supply of refined edible fats and oils, including margarine and baking fats. There are no known similar cartel cases that have been raised in any SADC country, as noted under table 4 below.

Table 4: Regional Foothold of Edible Fats and Oils Cartel members

CARTEL PARTICIPANT IN SOUTH AFRICA	PRESENCE IN SADC/SACU	INVESTIGATION DONE IN SADC/SACU OTHER THAN SOUTH AFRICA
Unilever	SADC/SACU	None
Sime Darby Hudson Knight	TBC	None

3.5 Asphalt Cartel

Another case with regional implications/ramifications is the complaint on market allocation and collusive tendering in the asphalt products against Much Asphalt and others, during 2016/17 reporting period. Asphalt is a mixture of dark bituminous pitch with sand and gravel, used for surfacing roads, flooring and roofing. Bitumen is one of the key ingredients in the production of asphalt. Therefore, the bitumen cartel that was reported before 2016 in South Africa and its connection to asphalt should not come with a big surprise. Much Asphalt is reckoned to be the largest commercial producer and supplier of hot and cold asphalt in southern Africa¹⁰. The implications of this cartel on road construction projects in SACU/SADC may never be known. Table 5 below indicates the absence of similar cartel investigations in other SADC countries.

¹⁰ www.muchasphalt.com

Table 5: Regional Foothold of Asphalt Cartel members

FIRM NAME	PRESENCE IN SADC/SACU	INVESTIGATION DONE IN SADC/SACU OTHER THAN SOUTH AFRICA
Much Asphalt	TBC	None
Roadmac	TBC	None
Roadspan	TBC	None

4. Is a cartel in south Africa still a cartel in the Southern Africa Neighborhood?

The answer to this question cannot be a no. It should be a “Yes”. The contrary can be proven right only when competition authorities in the region use SA cartel investigations as a signal to begin to worry about whether similar cartels are either imported or exported into their jurisdictions. A great leap forward has been made in the context that competition authorities in the region have actually been very active in collaboration through both bilateral and regional approaches in their investigations. They should sustain the following with renewed impetus:

- (i) Continued collaboration under the SADC Cartels Working Group. As a way of implementing the MoU, a Cartel Working Group (CWG) has been established to coordinate cooperation in the enforcement of the law against cartel infringements. The Framework Document for the CWG was approved by the SADC Competition and Consumer Policy and Law Committee on 14 December 2016 and work immediately commenced to implement the approved Work Plans of the CWG¹¹.
- (ii) Synchronise priority sectors collectively, notably following from the South African lead, noting that the other economies have a high import bill from South Africa (trade imbalance)
- (iii) Continued training through the SADC arrangements to ensure that the competition authority investigative officers are of ‘one’ mind when it comes to cartel enforcement.
- (iv) Corporate Leniency Policy that is substantially similar to the one in RSA for CLP to be effective in SADC, notably SACU countries.
- (v) Coordinated investigations and harmonization of rules of procedure, subject to the national laws permitting, including Mutual Legal Assistance Treaties and other similar instruments that may be available.

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¹¹ CA Botswana Annual Report, 2016/17, page 23

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