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COMPETITION AND REGIONAL INTEGRATION

DEVELOPING AN EFFECTIVE REGIME FOR ASSESSING REGIONAL MERGERS AND PROSECUTING CROSS-BORDER CARTELS

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Abstract

Cross-border merger assessment and cartel prosecution need streamlining to address the different competition concerns and public interest issues raised while ensuring that the remedies arrived at in one jurisdiction do not impact negatively on competition and public interest in another. Streamlining of cross-border assessments should arrive at minimizing unnecessary duplication of filings, delays in merger filings, fees burden as well as promote effective merger and cartel enforcement to enrich analyses and thus more informed decisions across the region. Convergence towards recognized best practices and jurisdictional cooperation should be the way forward in culturing inter-agency staff trust while opening up communication at that level. The already established regional institutions have a crucial role to play in breaking down the competition barriers within the region and providing an enabling environment for inter-agency merger enforcement and cartel prosecution. Several hurdles may be encountered in inter-agency operations; confidentiality, differences in internal procedures, lack of incentive to engage and the internal bottlenecks within an organization are some of the challenges to be addressed for an effective collaboration.

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The views expressed in this paper do not reflect the views of CAK

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Abbreviations

ACF	African Competition Forum
CAK	Competition Authority of Kenya
CCC	COMESA Competition Commission
CEMAC	Economic and Monetary Community of Central Africa
COMESA	Common Market for East and South Africa
CompCom SA	Competition Commission of South Africa
DRC	Democratic Republic of the Congo
EAC	East Africa Community
EACCA	East Africa Community Competition Authority
ECOWAS	Economic Community of West African States
EU	European Union
ICN	International Competition Network
SACU	Southern Africa Customs Union
SADC	Southern African Development Community
US FTC	United states Federal Trade Commission
WAEMU	West Africa Economic and Monetary Union
WBG	World Bank Group

COMPETITION AND REGIONAL INTEGRATION: DEVELOPING AN EFFECTIVE REGIME FOR ASSESSING REGIONAL MERGERS AND PROSECUTING CROSS-BORDER CARTELS

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1. INTRODUCTION

Merger analysis and prosecution of cartels are the key activity of any competition agency. Equally, they are the major elements that give a bearing to competition and regulation of markets of any economy. It is for this reason that a firm foothold is required in the area for there to be effective competition. Although a country may be effective in its regulation of mergers and control of cartels, the opening up of, and increase in cross-border activities has increased the need for development of a regime to effectively control cross border mergers and prosecution of cartels.

Currently, there are approximately more than 6.7 million registered companies in the world according to the Africa Investment Report 2016 (AFRICA 2016: Trade and Investment Summit, 2016)[1]. According to World Bank Report 2016, Kenya alone has about 325,987 registered operational companies while South Africa had over 653,400 as at the end of 2016 (Econstats.com, 2018)[2]. Of all the companies in Africa, 23% are registered to engage in the extraction sector, 23% in the electricity generation and supply, 22% manufacturing, 14% construction, 7% ICT and Internet Infrastructure, 4% Logistics, Distribution and Transport, 3% business services, 2% sales, marketing and supplies, 0.64% as holding companies, 0.6% in education and the remaining 1% in other activities.

Evidently, the increase in the number of registered companies, especially so, holding companies, and the desire to expand and venture into other countries outside the domicile country, coupled with favorable fiscal policies such as taxation in jurisdictions like Mauritius, has created a lot of cross-border merger traffic. With this increased cross-border traffic, the need to investigate the cross-border market as a whole and check on cartel activities is unstoppable. It is for this reason that several trading blocs in Africa such as the East Africa Community (EAC), The Common Market for East and South Africa (COMESA) and the Southern African Development Community (SADC) have or are in the process of coming up with competition framework to oversee the cross-border competition activities involving member states.

Internationally, the European Union came up with a competition commission after the World War II to oversee competition in its 28 member states, predominantly European. Specifically, the commission was constituted on the following four main policy areas; Cartels, market dominance, mergers and state aid (Ec.europa.eu, 2018)[3]. It is the desire to form a single trading bloc in Europe that fueled the need for the EU Competition Law.

Lastly, with Africa increasingly coalescing its business activities, there is need to effectively come up with a regime that will ensure that cross-border mergers and acquisitions do not lead to creation of cross-border dominance and cartels do not take root across our borders. A regime that can effectively detect a potential cartel, Gather the prerequisite evidence, analyses these

[1] https://www.camara.es/sites/default/files/publicaciones/the-africa-investment-report-2016.pdf
[2] http://www.econstats.com/wdi/wdiv_494.htm
[3] http://ec.europa.eu/competition/general/overview_en.html

evidence and instigate a fine that allows it to find the compromise among damage settlement, deterrence from future violations, punishment of violators and the realization of the imposed fine.

2. CURRENT STATUS OF CROSS BORDER MERGER ANALYSIS AND CARTEL PROSECUTION

In the world over, there is a common consensus regarding the main goal of competition law. Economic reasoning and market analysis form the core of competition law and implementation world over and is geared towards improving the country's individual economic development and the quality of the output in the market (Law.ox.ac.uk, 2018)[4]. Essentially, putting these efforts together is an implication that countries are willing and ready to work across the borders to arrive at economic growth and development through the competition law. The readiness to work together gives credence to the need for a working formula in approaching this issue and an effective regime is key in ensuring successful relationships.

Although the ongoing processes of assimilation and harmonization of competition world over are laudable, there is need to cast a third eye into the entire excitement and especially if the efforts are likely to disguise the true state of domestic competition in the individual countries and their inherent characteristics. There is, already, an upcoming pressure on countries that decide to be different in their approach to competition, especially so, in Africa where most competition regimes are still new and trying to grasp the whole idea of competition.

Currently, Africa has been and is growing in both economic growth and development and competition (Chitonge, 2016). South Africa is leading the way and has made insurmountable steps in developing its competition enforcement both locally and across the borders through its Competition Commission of South Africa (CompCom SA). Kenya is also keenly following the footsteps of the European Union and South Africa the inception of its competition law. For instance, the formation and set up of the Competition Authority of Kenya borrowed heavily from both the EU competition law and the South African regime.

The relationship between the COMESA member states and the direct relationship between the South African and the Kenyan competition regimes have set a precedence for two types of cross border cooperation; formal cooperation through COMESA and an informal cooperation directly through the personnel within the commission. Based on the various experiences between the CAK and the CompCom SA, where case officers have directly engaged with each other on various cross cutting merger cases.

For instances the case officers in the Coca Cola merger cases have always discussed on cross cutting mitigating factors that are most suitable to the likely competition and public interest concerns likely to arise from the transaction. From the brief foregoing, and albeit inconclusively, it can be preliminarily hypothesized that informal cooperation is more beneficial to cross border merger analysis (CAK, 2018)[5].

[4] https://www.law.ox.ac.uk/sites/files/oxlaw/cclpl42.pdf
[5] Competition Authority of Kenya Mergers and Acquisitions Department.

Lastly, at least 16 competition authorities in Africa have search and seizure powers, but few have carried out raids. Moreover, at least seven countries have a leniency program. To date, leniency applications have only been received in South Africa and Mauritius (World Bank Group, 2018)[6]

3. FORMAL CROSS BORDER MERGER ANALYSIS AND CARTEL PROSECUTION

A formal interaction is a situation where two or more parties agree in writing that we shall share information but through certain contact persons and in a prescribed manner. In the world of competition, such kind of a setup is common especially so where more than one jurisdiction is involved.

3.1. Regional Bodies

Regional bodies with supranational mandates on Competition in Africa currently include; East African Community (EAC), Economic Community of West African States (ECOWAS), Economic and Monetary Community of Central Africa (CEMAC), West Africa Economic and Monetary Union (WAEMU), and The Common Market of Eastern and Southern Africa (COMESA). The key strength of these bodies is in their broader mandate to legislate and enforce competition law across borders, through a well-defined framework, but are heavy dependent on respective member states ability to analyze and enforce specific jurisdiction competition Law infringements.

3.1.1. COMESA Competition Commission (CCC)

The COMESA Competition Commission (CCC) is a regional body established under Article 6 of the COMESA Competition Regulations of 2004 ("the Regulations"). The Commission's core mandate is to enforce the provisions of the Regulations with regard to trade between Member States and promote competition within the COMESA Common Market through monitoring and investigating anti-competitive practices of undertakings within the Common Market and mediating disputes between Member States concerning anti-competitive conduct.

COMESA consists of 19 member states: Burundi, Comoros, Democratic Republic of the Congo (DRC), Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Kingdom of Swaziland, Uganda, Zambia, and Zimbabwe. And COMESA Competition Commission became operational on 14th January, 2013 and is based in Lilongwe, Malawi.

With the commencement of the enforcement of the Regulations, there are now two separate legal regimes which govern the enforcement of competition law and policy in the COMESA Member States, namely;

- The National Competition laws which are the national legal orders comprising the respective bodies of legal rules within each of the COMESA Member States.
- The Regional Legal Framework which comprises of the body of legal rules created at COMESA level such as the COMESA Competition Regulations and Rules.

[6] World Bank Group Report on "Breaking Down Barriers, Unlocking Africa's Potential through Vigorous Competition Policy " of June 2016

CCC states that, given the two legal orders, the national order shall apply to the enforcement of anti-competitive practices emanating at national level hence, enforced by the national competition authorities in their respective Member States. In contrast, the regional framework shall be invoked generally where there is a cross border impact.

Currently, the cross-border merger regime has an existing regional dimension. CCC is the only fully fledged regional body mandated to overlook competition within the region and the member states. Currently, it is the largest regional competition body which has managed to come up with a working framework to tackle cross border transactions. Since its establishment in 2004, the Commission has been receiving and solving cases which have increased gradually as shown in the **Table 1**:-

Table 1: Total Number of Merger Cases handles by CCC from 2013-2017

Approved Mergers/Year	2013	2014	2015	2016	2017	2013-2017 Total
Comfort Letter Granted	2	16	3	5	5	31
Unconditional Approval	16	23	16	19	18	92
Approved with Conditions	0	1	2	7	3	13
Cases referred to Member States	0	1	1	1	0	3
Non-merger Transactions	3	2	0	1	0	6
Ongoing Transactions	0	0	0	0	8	8
Totals	**21**	**42**	**21**	**32**	**34**	**150**

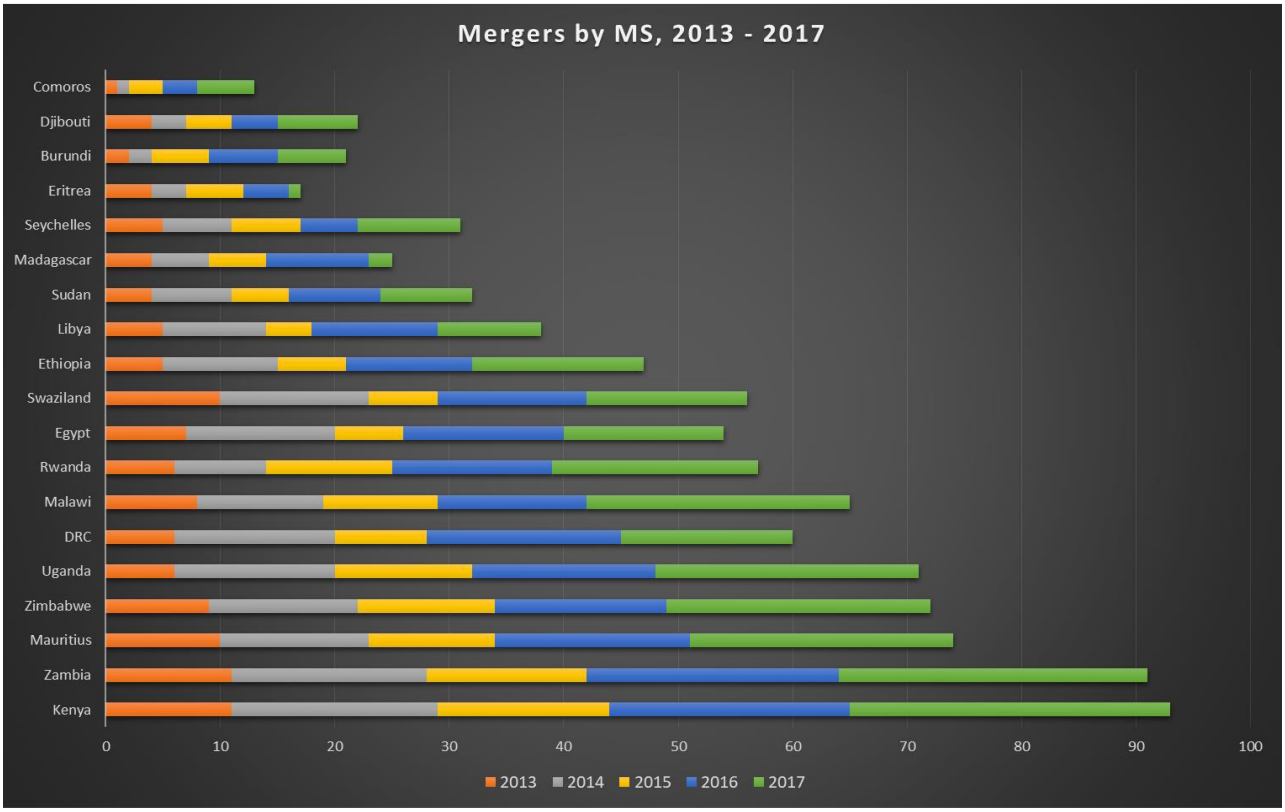
Source: COMESA Competition Commission (Comesacompetition.org, 2018)[7]

From the table, the commission has been receiving and analyzing Merger cases at an incremental rate. In 2013, they received 31 cases which increased by 61.90% to 34 application through to 2017. The increase in the cases is a sign that there is a lot if cross border merger transactions that are being undertaken. The CCC also engages analysts of various competition commissions among the member states to collect third party views and carry out competition analysis within the jurisdiction on a case that it has received.

Since 2013, Kenya, for instance, has received the highest number of requests for competition analysis and third party views on mergers and acquisitions from CCC as shown in the **Bar graph 1**:-

[7] http://www.comesacompetition.org/wp-content/uploads/2016/06/Merger-Statistics-2013-2017.pdf

Bar graph 1: The Per Country Number of COMESA Competition Commission Cases from 2013-2017



Source: COMESA Competition Commission (Comesacompetition.org, 2018)[8]

As per the table, most of the CCC member countries have been requested by the commission at one point to carry out analysis over a case that is cross cutting. The CAK has received the highest requests of more than 90 cases followed by Zambia and Mauritius respectively. Although the CCC platform has allowed for cross-border sharing of information, the information sharing is high level marked by numerous diplomatic approvals. Essentially, the case analysts on the ground rarely get a chance to compare notes and give their personalized view.

The COMESA Competition Regulations ("the Regulations") prohibit certain anticompetitive business practices as incompatible with the objectives of the COMESA Common Market in so far as they affect trade between Member States (Comesacompetition.org, 2018)[9].

The Regulations prohibits agreements, decisions by association of undertakings and concerted practices which include : Price fixing, Collusive tendering and Bid-Rigging, Market or Customer allocation, Allocation by quota as to sales and productions, Collective action to enforce arrangements; Concerted refusals to supply goods or services to a potential purchaser, or to

[8]http://www.comesacompetition.org/wp-content/uploads/2016/06/Mergers-by-Affected-Member-States-2013-2017.pdf
[9]http://www.comesacompetition.org/wp-content/uploads/2014/05/Notice-to-the-general-public-on-the-Wirtgen-Distributorship-Agreement-Sodirex-1.pdf

purchase goods or services from a potential supplier; or Collective denials of access to an arrangement or association which is crucial to competition.

The Regulations also prohibit any abuse by one or more firms of a dominant position within the COMESA Common Market or in a substantial part of it as incompatible with the Common Market in so far as it may affect trade between Member States, which include: imposing unfair trading terms such as exclusivity, excessive, predatory or discriminatory pricing, refusal to supply or provide access to essential facilities, and tying.

Some agreements may be exempted by the Regulations should the firms involved demonstrate that there are efficiencies accruing from the conduct which outweigh the anticompetitive effects

Contravention of Part 3 of the Regulations has serious consequences, and Firms engaged in activities which breach these provisions can face fines of up to 10% of annual turnover in the COMESA Common Market; and also expose themselves to actions for damages from customers and competitors who can demonstrate that they have been harmed by the anti-competitive behavior.

With such a strict enforcement framework for regional anticompetitive actions, it looks like CCC has the tools required to tackle regional challenges. However anti-competitive activities sometimes being jurisdictional specific requires member states to aid CCC in achieving effective enforcement of the Laws. Therefore harmonization of the separate competition Laws among member states should be in the forefront of achieving CCC enforcement goals together with the member states' agencies achieving their competition Law enforcement goals.

On-going investigations that CCC has sought member states' input include:

- an agreement between AkzoNobel South Africa (Pty) Ltd and Regal Paints Uganda Limited (Comesacompetition.org, 2018)[10]
- agreements concluded between Wirtgen Group and various undertakings in Ethiopia (Comesacompetition.org, 2018)[11], Madagascar (Comesacompetition.org, 2018)[12] and in Mauritius[13]
- an agreement concluded between Deere and Company and AFGRI Zimbabwe Private Limited (Comesacompetition.org, 2018)[14]

[10]http://www.comesacompetition.org/wp-content/uploads/2014/05/Notice-to-the-General-Public-AkzoNobel-Agreement-06022018.pdf
[11]http://www.comesacompetition.org/wp-content/uploads/2014/05/Notice-to-the-general-public-on-the-Wirtgen-Distributorship-Agreement-with-MOENCO-1.pdf
[12]http://www.comesacompetition.org/wp-content/uploads/2014/05/Notice-to-the-general-public-on-the-Wirtgen-Distributorship-Agreement-Sodirex-1.pdf
[13] http://www.comesacompetition.org/wp-content/uploads/2014/05/Notice-to-the-general-public-on-the-Wirtgen-Distributorship-Agreement-and-UMCL-1.pdf
[14]http://www.comesacompetition.org/wp-content/uploads/2014/05/Notice-to-the-general-public-on-the-Deere-Company-AFGRI-Distributorship-Agreements.-1.pdf

- an investigation into an alleged violation of Part 3 of the Regulations by subsidiaries of The Coca-Cola Company ("TCCC") in relation to distribution agreements with third party distributors in Ethiopia and Comoros (Comesacompetition.org, 2018)[15]
- an investigation into an alleged violation of Part 3 of the Regulations by the Confédération Africaine de Football ("CAF") in relation to the commercialization of media and marketing rights for African football tournaments (Comesacompetition.org, 2018)[16].

Concluded investigations that CCC has sought the input of member states include:

- Agreements entered into between Everyday East Africa Limited and various undertakings in a number of member states, these agreements were found not likely to negatively affect trade between member states; and
- Agreement entered into between Parmalat and its distributors (Comesacompetition.org, 2018)[17], agreement was not likely to negatively affect trade between member states.

CCC reserves the right to reopen any concluded investigations in regards to non-disclosures by the parties to an investigation, during the time of the investigations.

3.1.2. The South Africa Development Community (SADC)

The Southern African Development Community (SADC) is a Regional Economic Community comprising 15 Member States; Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. Established in 1992, SADC is committed to Regional Integration and poverty eradication within Southern Africa through economic development and ensuring peace and security (Sadc.int, 2018)[18].

SADC members have an understanding in form of an MoU signed in 2016 (Sadc.int, 2018)[19] to form to work together, just like the COMESA member states to tackle cross cutting competition concerns in the South Africa region from Tanzania to South Africa. The SADC has provided a platform where, just like CCC, members can agree on certain aspects of the competition law that should cut across the member countries to provide a conducive environment for cross border merger analysis and prosecution of cartels.

There have been cartels with a regional dimension unearthed in South Africa in sectors such as fertilizer, petroleum, cement, etc. Despite countries in the Southern Africa Customs Union (SACU) and Southern Africa Development Community (SADC) being economically interdependent, the

[15] http://www.comesacompetition.org/wp-content/uploads/2014/05/commencement-notice.pdf
[16]http://www.comesacompetition.org/wp-content/uploads/2014/05/Notice-of-Commencement-of-Investigation-No.-1-of-2017.pdf
[17] http://www.comesacompetition.org/wp-content/uploads/2014/05/CID-Decision_Parmalat.pdf
[18] Sadc.int. (2018). Southern African Development Community :: About SADC. [online] Available at: https://www.sadc.int/about-sadc/ [Accessed 28 Jun. 2018].
[19]https://www.sadc.int/files/4813/5292/8377/SADC_Declaration_on_Competition_and_Consumer_Policies.pdf

businesses which have utilized the cartel leniency in South Africa have not done so in other countries (Static1.squarespace.com, 2018)[20].

3.1.3. The East African Community Competition Authority (EACCA)

The East African Community (EAC) is a regional intergovernmental organization consists of 6 partner states: Burundi, Kenya, Rwanda, Tanzania, Uganda and South Sudan. The process towards an East African Federation is being fast tracked, underscoring the serious determination of the East African leadership and citizens to construct a powerful and sustainable East African economic and political bloc (Eac.int, 2018)[21].

EACCA is an independent organ of EAC but subject to judicial review by the EACJ (as provided for in Sections 44 and 46 of the EAC Competition Act, 2006, and which came into effect 1st December, 2014). EACCA is mandated to develop appropriate procedures for public sensitization, consultation and participation. The EACCA has been set up and is in the final stages of operationalizing it, efforts of which point to the need to improve the analysis of cross-border mergers and acquisitions and cartel prosecution.

4. INFORMAL COOPERATION ON CROSS BORDER MERGER ANALYSIS AND CARTEL PROSECUTION

Generally, the informal cooperation framework is a set up in which a group of individual and organizations with similar competition interests come together to share knowledge on the new trends in the area of interest without any preconditions. Currently, the international Competition Network is the only fully fledged and functional platform where members come together in an organized manner to exchange ideas and information.

4.1. The International Competition Network (ICN)

The ICN is made up of simple, flexible, result based and easy to join working groups. Currently, the ICN is made up of 5 working groups; advocacy, agency effectiveness, cartel, merger and unilateral conduct working groups. The working groups are tailored to classify members into the relevant groups based on their core activities in the various agencies. The network provides competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition concerns. This allows for a dynamic dialogue that serves to build consensus and convergence towards sound competition policy principles across the global world of competition (IDRC - International Development Research Centre, 2018)[22].

The ICN is unique as it is the only informal international body devoted exclusively to competition law enforcement and its members represent national and multinational competition authorities. Members produce work products through their involvement in flexible project-oriented and results-

[20]https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/55349ec0e4b047c173df887f/1429511872602/Thula+Kaira_Regional+cartels.pdf

[21] Eac.int. (2018). Overview of EAC. [online] Available at: https://www.eac.int/overview-of-eac [Accessed 28 Jun. 2018].

[22] http://www.internationalcompetitionnetwork.org/about.aspx

based working groups. Working group members' work together largely by Internet, telephone, teleseminars and webinars.

The network also holds annual conferences and workshops. The conferences provide opportunities for members to discuss working group projects and their implications for enforcement. The ICN does not exercise any rule-making function. Where the ICN reaches consensus on recommendations, or "best practices", arising from the projects, individual competition authorities decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements, as appropriate.

In a nutshell, the ICN, compared to the other formal forums for sharing cross border merger analysis experiences, the ICN provides a more productive platform where competition can be easily checked across board without having to be weary of the confidentiality tag. A competition analysis of a transaction can be carried out through the ICN without having to disclose the actual parties to the transaction and thus ensuring that the most current affairs on handling of cases and more so on how cartel formation have metamorphosed is effectively shared with the members who are able to curb the trend before it takes root.

4.2. The Africa Competition Forum (ACF)

The African Competition Forum (ACF), constituted in 2010, is made up of 35 member countries of the South Africa, North of Sahara and South of Sahara regions. The main aim of the forum is support and build capacity among competition agencies in those African countries that already have a competition law in place or drafted. In countries that have not yet set up competition agencies or laws, the goal is to support them in taking those steps (Wang'ombe Kariuki – Project Leader[23]).

The ACF is meant to enable sharing of knowledge and experiences by the member states who are currently in various stages of the implementation of the competition law. Therefore, the forum can provide a rich avenue where cross border mergers and acquisitions can be analyzed to avoid coalescing of market shares in one jurisdiction as a result of a merger in another.

Currently, the forum is in the process of setting up its activities and putting together the required budget for rolling out its activities. Additionally, it is also carrying out training on various aspects of competition in the member states. Generally, the forum's vision is to facilitate development of stronger competition laws and well-functioning institutions that promote competition are crucial to reducing anti-competitive practices in Africa. The forum will also provide a platform where cross border transactions meeting certain thresholds have to be deliberated on by its member states and amicable.

[23] https://www.idrc.ca/en/project/african-competition-forum-promoting-open-and-competitive-markets-0

Table 2: Examples of bilateral cooperation between ACF members in the last three years

	Bilateral cooperation activities
Kenya	Information sharing regarding specific cases with South Africa, Tanzania, and Zambia.
COMESA	The CCC has cooperated with COMESA member states (most of whom are members of the ACF) on an ongoing basis to conduct investigations and carry out advocacy and capacity building initiatives in the Common Market.
Malawi	Bilateral cooperation with Zambia and Tanzania has included the signing of MoUs, exchange of information, and study visits in the sugar sector and automotive industry. This cooperation has been facilitated bilaterally, outside the ACF framework.
Mauritius	Cooperation with South Africa and the Seychelles through data sharing, training, and knowledge sharing in Investigations. This was facilitated through networking built through the ACF.
Seychelles	Information request made to Mauritius. Officers from South Africa conducted a workshop in the Seychelles on Fighting Bid Rigging in Public Procurement in 2014.
Tanzania	Information request made to Mauritius. Officers from South Africa conducted a workshop in the Seychelles on Fighting Bid Rigging in Public Procurement in 2014.
Botswana	Informal sharing of information on investigative processes, reports, and sector-specific data with South Africa and Zambia. Cooperation has taken place outside the ACF framework.

Source: WBG Report on "Breaking down Barriers, Unlocking Africa's Potential through Vigorous Competition Policy "of June 2016

4.3. Agency's Own Initiative

In the spirit of coming up with an effective regime, some of the agencies have decided to come up with an interaction framework within themselves without having to go through all the bureaucracies and at the same time not having to break to confidentiality code. Agencies have to overcome the incentive to engage barrier and look at the other agency as an equal player in the world of competition, able and competent enough in its delivery.

For instance, the several interactions between the CAK and CompCom SA have been fruitful in ensuring that the analysis carried out on a case and the outcome of the same is yielding positive outcome especially on public interest and competition concerns under merger analysis. The bauty about this interaction is that it is instant, does not have any bureaucratic barriers and is able to address any information gaps in informing the analysis that has been carried out by the case officers.

In the case of CAK and CompCom SA, the case officers would set timelines and milestones to be achieved within those timelines and agree on when to reach out to each other again to give an update on the investigations. The update would be in form of the findings from the field and not on the information submitted by the parties, thus the confidentiality of the information sought would not be compromised.

Therefore, the agency own initiative is the most open and prompt means of cross border information sharing that ensures a convergence in terms of decision making and a consistency in

the application of the competition law across the borders without impeding on the confidentiality of the parties' information.

5. CHALLENGES TO EFFECTIVE CROSS BORDER MERGER ANALYSIS AND CARTEL PROSECUTION

The challenges that may be encountered in Inter-agency Corporation include: Confidentiality, Differences in competition Law (Lack of it, level of its development, implementation, prosecution powers and alignment with regional Law), Agencies internal procedures and bottlenecks, Incentives to engage. These among others need to be addressed for an effective collaboration and to manage the risk of any illegality.

5.1. Confidentiality;

Competition agencies have an 'affirmative' ability to disclose confidential information when it is in the interests of an investigation. ICN member survey (Internationalcompetitionnetwork.org, 2018)[24] on confidentiality Practices[25], observed that:

i. The protection of confidential information is a common component of competition enforcement frameworks.

ii. All information submitted during the course of an investigation is afforded confidential treatment upon submission without further requirements. Noting that confidential treatment is afforded only to the information that is designated as confidential, often with the requirement of some degree of substantiation or explanation beyond mere assertion as confidential.

iii. The responses reveal that often it is the investigative staff that reviews confidentiality claims, with the assistance of agency counsel or 'legal services,' particularly when there are questions or disputes involving the confidentiality claims

iv. Most competition agencies describe a system whereby confidential information obtained during an investigation is protected from disclosure except in specific and limited circumstances. The responses reveal four common scenarios for the disclosure of confidential information:
    - as necessary to advance an investigation (such disclosure can be to parties, and third parties)
    - to parties as necessary for their defense
    - to other governmental agencies, domestic or foreign, in a coordination or cooperation context
    - to courts in the course of adjudication or appeal of competition matters

The variety of methods to limit the extent of the disclosure of confidential information include: redaction, non-confidential summaries, aggregation and anonymization of information. These

[24] 2014 ICN Agency Effectiveness Project On Investigative Process, Competition Agency Confidentiality Practices

[25] Thirty nine ICN members, including Kenya and Zambia took part in the survey.

methods are usually deployed both by the CAK and CCC in their sharing of information with other agencies.

5.2. Differences in competition Law (Lack of it, level of its development, implementation, prosecution powers and alignment with regional Law)

In Africa, as of October 2015 (World Bank Group, 2018) [26], competition Laws had been enacted in 27 out of the 54 African countries, in five regional communities, and two regional agreements that include commitments to corporate in the implementation of competition laws[27]. At least six countries (Djibouti, Ghana, Liberia, Nigeria, Republic of Congo and Uganda) are discussing the adoption of competition laws. These Laws have similar scope that deal with: restrictive trade practices, merger control, and competition advocacy.

Furthermore, World Bank Group (WBG) in their report note that effective implementation of competition law and policy depends on several element:

I. **legal policy frame work**, which entails; Competition policy, Competition law, Laws that creates the competition Agency, and Other relevant laws with competition mandate (Such as sectorial frame work and public procurement)
II. **Operational frame work,** which entails Structure of the Authority, Staffing and financial resources of the Authority, Selection of Board Members and/or head of the agency and Strategic planning. Staffing is an important determinant of a competition authority's operational capability.
III. **Competition Law enforcement**, which entails the Regulatory framework, Competition Regulations and guidelines, Case Handling, Implementation of the Authority's powers and Administrative efficiency, procedural fairness, and due process in case handling
IV. **Integration of competition principles,** which entails Collaboration with regulators and ministries within the government, Opinion on relevant laws/regulations that are likely to harm competition, Market studies on sectors with competition concerns and Awareness raising/ capacity building for private sector, civil society, journalists, academia, public sector

An effective regime for assessing regional mergers and prosecuting cross-border cartels falls within the confines of the four areas above. Jurisdictions where these area are not well developed or are hampered by personnel issues, fall short in the effective execution of competition Law issues and may render in-effectiveness cross-border enforcement of competition laws, weather within the informal or informal regime set up.

Historically, the difference in the implementation of the competition law by the individual countries have affected cross border interactions in one way or another. For instance, the development of enforcement and cartel prosecution stage of competition law and policy has also been instrumental in determining the entire enforcement process in many of the jurisdictions, especially

[26] World Bank Group Report on "Breaking Down Barriers, Unlocking Africa's Potential through Vigorous Competition Policy " of June 2016
[27] SADC

so, in Africa. A case precedence that comes in handy here is the withdrawal of the DOJ's report on Competition and Monopoly which was seen to advocate for hesitancy in the application of section 2 of the Shermans Act[28]. The report was withdrawn by the AG Department of Antitrust withdrawal in 2009. As stated by Christine A. Varney, then Assistant Attorney General in charge of the Department's Antitrust Division: 'Withdrawing the Section 2 report is a shift in philosophy and the clearest way to let everyone know that the Antitrust Division will be aggressively pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition and harm consumers (Justice.gov, 2018)[29].

Additionally, the merger between American Airlines and US Airways and the Tesoro Corporation/BP, in an unusual manner, introduced the role of employees in merger analysis which is divergent from what other jurisdictions were doing then (Stblaw.com, 2018)[30]. This resulted in a heated debate on whether the other jurisdictions which were affected by the transaction should follow suit and onboard employees into more than public interest considerations. More generally, the application of US antitrust law through private and public enforcement had been criticized at times as too detached from its core ideals and entrenched as a bureaucratic specialty administered by technocrats.

Following the involvement of the employees, the US FTC approved Tesoro's acquisition of a BP refinery in Southern California. California's Attorney General also approved the transaction subject to conditions which included restriction on Tesoro's ability to lay off any workers at Los Angeles area refinery for two years: accessed 16 January 2015. As noted by Attorney General Harris: 'These commitments will protect jobs for potentially thousands of Californians.

Beyond the EU and US, other competition regimes have shown both vulnerability and variation to various economic requirements within their jurisdictions which do not resonate with their neighboring jurisdictions. For example in China, the Anti-monopoly Law advances consumer welfare and efficiency as well as the public interest and the development of a socialist market economy while most of the China Multinational companies are owned by the state. Essentially, Article 15 of the Chinese Anti-Monopoly Law limits the application of the law through exemptions that apply in a range of cases.

The Japanese Fair Trade Commission on the other hand advocates for 'fair and free competition, to protect and spur the innovation and creativity of upcoming novice businesses and entrepreneurs, generally encourage trade, optimize the level of employment each business faction can create and successfully maintain, and ultimately keep the country's national income reasonably high. Therefore, unlike the US FTC, the Japanese law does not directly involve the

[28] **Section 2 of the Sherman Act** makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations

[29]https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1

[30]http://www.stblaw.com/docs/default-source/related-link-pdfs/social-issues-in-selected-recent-mergers-and-acquisitions-transactions-2017

employees but high level specialists are used help the government protect jobs (Jftc.go.jp, 2018)[31].

In South Korea, competition law is set to encourage creative business activities, protection of consumers and promoting the balanced development (Oecd.org, 2018)[32]. While the Taiwanese competition law seeks to maintain trading order, protect consumers' interests, ensure fair competition, and promote economic stability and prosperity (Conventuslaw.com, 2018)[33].

In Namibia, competition law serves, among other things, to protect minority empowerment while in South Africa, public interest grounds include the impact on particular industrial sectors or regions, employment, and the ability of national industries to compete in international markets. Essentially, employment is looked at in terms of numbers and a red flag is raised only when a transaction is likely to result to mass loss of employment (Scholarship.law.duke.edu, 2018)[34].

The Ugandan market economy is still in its infancy, characterized by absence of enabling laws/ institutions in some sectors (and industries) or the existence of inadequate and/or archaic policies and laws e.g. sale of goods, consumer protection, food safety, intellectual property etc. The emergence of competition in the marketplace has largely been as a result of government's direct involvement in attraction of investments or enhancement of capacity for provision of goods and services where none existed or where their existence was inadequate[35]. Compared to its Kenyan counterpart, Uganda and Kenya would hardly sit down to deliberate on a merger at a low level discussion as to the nitty-gritties of the effect of a particular transaction on the cross border market structure. Instead, the discussion would be more on on-boarding the country and bringing it up to speed (Cuts-ccier.org, 2018)[36].

These examples highlight the challenges that come with the vision of a seamless cross border working environment on competition. To some jurisdiction like Kenya and South Africa, the already existing relationship can be polished further while for other agencies like Uganda, work need to be done to ensure that the countries match the rest of the world in growing their regimes so as to level up the discussions and interactions.

5.3. Agencies internal procedures and bottlenecks

First among agencies bottle necks are internal capacity constraints brought about by the number of available staff, training of these staff on emerging issues and challenges in given regions, availability of data in any given sector to necessitate feedback when prompted and different priorities.

[31] https://www.jftc.go.jp/en/legislation_gls/amended_ama09/index.html
[32] https://www.oecd.org/korea/34834187.pdf
[33] http://www.conventuslaw.com/report/taiwan-antitrust-competition-guide-2016/
[34] https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4801&context=lcp
[35] http://www.cuts-ccier.org/7up3/pdf/Comp_Law_in_Uganda_Toolkit.pdf
[36]http://www.monitor.co.ug/Business/Prosper/Why-Uganda-needs-a-competition-law/688616-3345456-svj0ui/index.html

According to the World Bank report (World Bank Group, 2018) [37], the proportion of staff working on competition in African authorities is approximately 32 percent of total staff, less than half the average of 68 percent in a sample of 34 established non-African competition authorities. This points to a challenge among African Jurisdictions, when transactions of regional dimensions are brought forth for investigations to jurisdictions where resources are already stretched thin on matters pertaining to competition.

Second having enough budget available for effective implementation of competition Law is imperative in the work of agencies and the ability to have an effective regime. Currently, agencies depend on a government budgetary allocation, merger review fees and fines on RTP's, and development partners to fund their activities

Third is the cooperation frame works established among agencies, which are subsequently enabled by processes and procedures within the respective agencies, to facilitate timely and credible response. Having a specific standard or joint Memorandum of Information Sharing and Cooperation signed by all ACF countries to harmonize cooperation efforts in the region and avoid the need to sign individual MoUs has been proposed before among members of ACF.

Lastly, technologies adopted by the various agencies to gather data, analyses data and store historically valuable data, disseminate information to stakeholders, and necessitate the processing of cases on a timely manner. This is pertinent as to if the technology is to facilitate the interaction with various stakeholders through receipt and deamination of information in an effective manner, or technology that enables an agency to process primary material fast enough to produce recommendations and take effective action in the shortest period, while making use of certain specialized skills within an agency. Of the existing 27 agencies in Africa excluding the regional agencies, South Africa and Swaziland have adopted technology for enhanced efficiency. CAK is in the initial phase of launching a case processing system and stakeholder interaction portal.

5.4. Incentives to engage, among others

More often than not, a competition Authority will weigh the payoffs from engaging with another regime. More like the incentive to collude in a monopoly market structure. Where the payoffs from engaging are not incentivizing enough, the jurisdiction will hesitate to engage. The situation mostly affects the old regimes who have been in it longer than others. The lack of incentive to engage stems from the fact that some regimes are still young and may seem to offer little if not nothing in return (Stawicki, O'Regan and O'Regan, 2018)[38].

For Africa to grow its inter-jurisdiction working relations, there is an almost urgent need to; firstly, encourage and work with the jurisdictions without competition regimes to come up with independent competition enforcement bodies, secondly, there is need for capacity development in order to build trust and confidence amongst jurisdictions. Once trust is developed, the

[37] World Bank Group Report on "Breaking Down Barriers, Unlocking Africa's Potential through Vigorous Competition Policy " of June 2016

[38]http://competitionlawblog.kluwercompetitionlaw.com/2015/12/17/a-strong-and-active-antimonopoly-authority-is-an-incentive-for-undertakings-to-engage-in-prevention-the-president-of-the-polish-competition-authority-presents-his-views-on/

jurisdictions will view each other as equals with the required potential to deliver on a complex case.

6. CONCLUSION AND WAY FORWARD

Enforcement of competition law and policy is an unstoppable force that is sweeping through Africa currently. For Africa to realize the fruits of economic growth and development, it is imperative that market structure and concentration is kept in a good shape that is pro innovation and creativity towards minimizing the cost of production through technological advancement to provide high quality products to consumers at the lowest price possible.

Compared to other parts of the world such as the European Union, United States of America, Canada, Japan and South Korea, Africa as a continent and the individual countries has lagged behind in the enforcement of competition. With economies in Africa at the preparation for takeoff and takeoff stages of economic growth and development, there is an incessant need to get it right in terms of competition. Creation of hardcore cartels and dominance at this stage will cripple the entire process and bring everything to the ground. To get it right means;

i. The countries with independent and working competition regimes should walk those who are in the process of developing their own regimes to fast track the process and ensure that they help them avoid the many mistakes they themselves made while formulating their own regimes;

ii. For countries with working regimes, reaching out to their counterparts to ensure that the analysis of mergers and acquisitions and prosecution of cartel within their jurisdictions does not lead to creation of cartels and dominance positions across the border;

iii. To ensure that action point (ii) above is effectively carried out, the jurisdictions should find a working balance between formal cooperation and informal cooperation. Formal cooperation works best in institutions which are at different stages of implementation of the competition law while an informal, almost casual, relationship is best suited to regimes that consider themselves almost at par in the implementation of the law.

iv. Generally, an informal cooperation is more effective, easy to formulate and manage and with minimal cost implications. At the same time, information sharing in such an informal forum is easy and more effective and does not require the tedious process of seeking for unveiling of the confidentiality veil. It is, therefore, the best route to take in seeking an effective regime for merger analysis and prosecution of cartels.

v. Currently being championed by ACF is the design of a cooperation mechanism framework that would promote sharing of information and technical assistance in investigations in specialized areas, as a means to build a pool of professionals for the Africa region who can move from one agency to the other to support investigations and other missions.

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