

*CPI's Africa Column Presents:*

# The Internationalization of Competition Law in Africa

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## **Introduction**

As competition law regimes have proliferated and developed throughout Africa, they have increasingly affected international businesses and interacted with competition authorities in other jurisdictions. Multiple regional organizations with responsibilities for competition policy have been established, with powers varying from merger control to coordination of cartel investigations. Increasing international cooperation has been facilitated by a wave of new memoranda of understanding (MoU) between authorities and aided by support from international development institutions. International trade agreements involving African countries also envisage deeper coordination of competition policy in the future. With additional countries adopting competition laws and existing regimes being expanded, African competition policy will continue to grow increasingly important for international businesses and regulators in years to come.

## **Competition law and development**

Competition policy has a key role within the development agenda. Transforming markets characterized by monopolies and cartels towards fair competition is likely to reduce prices, increase output and improve innovation as producers seek to make more attractive products than rivals in order to increase market share and maximize profit. Reducing prices and increasing supply of key input goods such as transport, energy and telecommunications is likely to increase international competitiveness of goods and services produced in developing countries. Further, reducing prices for consumer goods such as food and healthcare can lead to substantial welfare improvements for low income consumers. Competition shifts market share to the most efficient producers, thereby improving the efficient allocation of resources. Competition policy may complement other development policies by providing an environment in which producers are incentivized to expand output. In low and middle income economies, pro-competitive reforms often include not only merger control, cartels and abuse of dominance provisions, but also the removal of anticompetitive regulations such as price controls, selective treatment of firms and restrictions on the number of producers. The proliferation of competition policy in Africa is therefore essential to encourage growth and development across the continent.

## **Benefits of international competition cooperation**

Globalization has made international cooperation on competition policy increasingly important to address anticompetitive practices that cross borders. As barriers to trade have fallen and regional trading blocs have been formed, African economies are increasingly connected to each other and the global economy. Foreign competition authorities may be a valuable source of information to identify cartels and to prove the involvement of participants. This will be particularly important where local authorities do not have the resources to investigate the conduct or the alleged infringer has few operations physically based in the jurisdiction. Following leniency applications in multiple jurisdictions relating to the same conduct, authorities may wish to coordinate the timing of dawn raids to ensure that earlier dawn raids in one jurisdiction do not alert cartel participants in another jurisdiction. During a merger review it may be beneficial for competition authorities to coordinate to avoid imposing inconsistent requirements on the firms involved. Where possible, agencies should seek to avoid divergent approaches to their assessment of the competitive effects of a merger, which may undermine public confidence in the merger review process. This is particularly important for less established competition authorities that are seeking to build a positive reputation. There are currently

significant barriers to international competition collaboration with developing countries, such as legislation prohibiting the sharing of confidential information, insufficient resources and a lack of experience investigating cross-border cases. However, frameworks have been introduced by African competition authorities to encourage greater cross-border collaboration.

### **Competition law in Africa**

Competition law regimes are now widespread and increasingly developed across Africa. They typically have merger control reviews and investigate cartels and other anticompetitive agreements. This can be illustrated by statistics recently compiled by the World Bank, in partnership with the African Competition Forum (ACF). The number of jurisdictions with competition regimes has rapidly expanded from 13 in 2000 to more than 30 in 2017, reflecting the growing role of competition policy on the development agenda. As a result, African competition authorities completed at least 1,216 merger reviews in 2013 and 2014. Despite the widespread existence of competition law regimes, the size and resources of competition authorities in Africa varies substantially. South Africa hosts the largest and most established competition authority. The authority has over 130 staff, in contrast to 9 other African competition authorities which have fewer than 10 staff. Similarly, the South African Competition Commission had an expenditure of \$27 million in 2015/2016, compared with an average budget of \$1.4 million for other competition authorities on the continent.

Although many jurisdictions now have competition law regimes, there are a number of countries which have not fully adopted or implemented competition legislation. For example, Nigeria is one of the few major economies in Africa that has not implemented an antitrust regime. However, antitrust legislation may be introduced by the Federal Competition and Consumer Protection Bill of 2016 which is expected to come into effect in late 2017 or early 2018. Competition regimes are therefore present in a large number of African countries and will become increasingly prevalent across the continent in the coming years.

### **Regional forums and competition authorities**

Supranational competition regimes covering a number of regions in Africa have been formed. Although they vary in powers and experiences, their existence highlights the way in which competition law has become increasingly international across Africa. The Common Market for Eastern and Southern Africa (COMESA) Competition Commission is the most established and developed regional competition authority in Africa. It operates a mandatory merger control regime for the COMESA region and has received over 100 merger filings since its inception. Although it initially prioritized developing a merger control regime, over the past year, the COMESA Competition Commission (CCC) has advanced its role as an antitrust enforcer. In 2016 it issued a notice calling on firms to notify it of historic or prospective agreements which may be authorized on the basis of public benefits even if they are anticompetitive. The CCC also announced in early 2017 that it will investigate allegations of exclusionary behavior in relation to football broadcast rights granted by the Confederation of African Football.

Other regional trading blocs have also sought to introduce competition regimes:

- The East African Community (EAC) agreed competition legislation for the bloc in 2006, signaling its desire to cooperate on competition policy. The organization has taken an important step towards developing a fully operational competition authority by appointing its first competition commissioners last year. Competition law activity has therefore accelerated within the EAC and we may soon see the full functioning of the mandatory merger control regime.
- The West African Economic and Monetary Union (WAEMU) operates a voluntary merger filing regime. The Competition Commission and the Court of Justice can take action under articles 88 – 90 of the WAEMU Treaty of Union against anticompetitive agreements or any transaction that create or strengthen a dominant position within the WAEMU common market or a substantial part of it. However, the competition authority has only made a relatively small number of decisions on mergers.
- The Central African Economic and Monetary Community (CEMAC) has introduced a mandatory merger control regime and, while its competition authority does not yet appear to be fully operational, it has been reported that it has recently started to accept merger notifications. The CEMAC Regulation also prohibits anticompetitive agreements.
- The Economic Community of West African States (ECOWAS) first introduced competition legislation in 2008, including a prohibition on anticompetitive mergers. The ECOWAS Regional Competition Authority will be hosted by Gambia and is reportedly due to commence operations in August 2017.

The Southern African Development Community (SADC) does not have a regional competition law, but its members are committed to cooperating in the application of their national competition laws. In May 2016, SADC members entered into a MoU that enables heightened cooperation on competition policy. SADC members will collaborate on evidence gathering, remedy design and implementation when conducting merger reviews. The SADC already operated a Cartels Working Group since June 2015 with sub-groups concerning legal frameworks and investigative techniques. These initiatives build on the 2009 SADC Declaration on Regional Cooperation and Consumer Policies.

There is often an overlap between countries which are members of multiple African regional blocs, particularly between COMESA and the EAC. Going forward, regional authorities will need to find a way to ensure that competition policy frameworks, in particular merger filing requirements, progress in a way that is consistent with membership of multiple regional authorities. Regional authorities will also need to ensure merger filings are not duplicated for the same deal for both regional competition authorities and the competition authorities of their member states.

The African Competition Forum (ACF) was launched in March 2011 as an informal network of African competition authorities. It has since grown to include over 30 competition authorities as members, including four regional authorities. The forum assists competition authorities with advocacy and capacity building, and encourages the adoption of competition laws where they do not currently exist. Along with regional competition authorities, the ACF is likely to facilitate cross-border collaboration between African competition authorities and provide a network for evaluating competition policy across the continent.

## **International cooperation with African competition authorities**

African competition authorities have taken steps to create a framework enabling increased cooperation with each other and with competition authorities outside the continent. This has been driven by a wave of MoUs being signed recently. For example, the BRICS countries, including South Africa, signed a MoU in 2016 in which the parties agreed to exchange policies, laws and rules in competition policy. They also agreed to cooperate and coordinate with each other in investigations and enforcement proceedings pertaining to violations of competition law. The BRICS International Competition Conference is held every two years and working groups may be established to conduct joint studies. Following the signing of a MoU between South Africa and Russia in October 2016, the countries announced that they had made arrangements on joint investigations into car manufacturing, pharmaceuticals, telecommunications and food products.

In October 2016, Kenya and South Africa signed an extensive MoU, including an exchange program for experts to share views and processes. Reflecting on the impact of this MoU, Francis Kariuki, Director General of the Competition Authority of Kenya, stated that "there are some infractions in South Africa which are affecting Kenya and vice versa. We want to join hands to do market enquiries and do research. This will inform our governments when they come up with policies". This increased level of cooperation has had a tangible impact on activities of competition authorities. For example, Kenya and Namibia launched their first dawn raids in 2016 after the South African Competition Commission provided training on dawn raids to competition authorities in a number of African jurisdictions under the auspices of the ACF.

African competition authorities often have similar concerns and priorities leading to similar legislation and enforcement trends. For example, competition authorities in Botswana, Cameroon, Kenya, Namibia, South Africa, Zambia and Zimbabwe are all able to assess mergers in light of public interest considerations. This has led to a shared body of knowledge and experience of public interest considerations which are applied more frequently than in other more established competition regimes such as the US and EU. The authorities are also investigating similar areas reflecting similar priorities. COMESA, Botswana and South Africa all launched market investigations into shopping malls, whereas Kenya, South Africa and Zambia all investigated fertilizer sectors in recent years. Shared concerns have therefore provided a strong incentive for cross-border cooperation between African authorities.

Other MoUs have been signed between competition authorities in Zimbabwe and China, Kenya and Japan, and South Africa and the EU, amongst others. This forms part of a global trend towards increasing international cooperation in competition policy and follows extensive work done by the OECD on MoUs.

## **International trade agreements**

While many MoUs have been signed, African trading blocs aspire to incorporate competition provisions into international trade agreements, despite this being harder to achieve as it often requires legislative approval. The Economic Partnership Agreement between the EU and the EAC, signed in October 2014, contains an undertaking by the parties to conclude negotiations on competition policy within 5 years. Similarly, the Economic Partnership Agreement between the EU

and SADC also highlights that the parties may consider entering into negotiations on competition policy in the future. The Tripartite Trade Agreement, an ambitious trade agreement between COMESA, EAC and SADC, aims to conclude negotiations on competition policy within two years of the agreement coming into force, although it has still not yet been ratified by all states. We may therefore increasingly see competition policy reflected in trade agreements with African jurisdictions in the coming years.

### **Support from outside Africa**

International institutions have provided a substantial amount of support to competition regimes in Africa. The World Bank, in partnership with the ACF, has produced a detailed and comprehensive analysis on the potential of competition policy in Africa and has supported a number of authorities, such as those in Kenya and Namibia. UNCTAD has provided technical assistance to Ethiopia, Zimbabwe and, via its Middle East and North Africa program, Algeria, Egypt, Morocco and Tunisia.

Competition authorities from more established jurisdictions have also provided a wide range of support to African authorities:

- The Federal Cartel Office of Germany provided assistance to the competition authority of Egypt, detaching an expert to contribute to the drafting of guidelines on abuse of dominance;
- The Japan Fair Trade Commission has assisted the competition authority in Kenya through training on competition law and policy; and
- The US Federal Trade Commission provided assistance to Botswana, South Africa, Tanzania and Zambia.

These represent a small selection of the many instances in which international institutions and competition authorities from outside the continent have supported African competition authorities.

### **Future developments**

Competition policy is likely to become increasingly international across Africa as inward investment increases and local businesses grow beyond their home bases. There is considerable potential for competition regimes to expand and develop across Africa in ways that are likely to make their activities increasingly cross borders. The adoption of an antitrust regime in Nigeria, Africa's most populous country and second largest economy, is certain to impact on international businesses. Through regional competition regimes and MoUs, the foundations have been established for cross-border initiation of cartel investigations, market studies and co-ordination of remedies. As the ACF becomes increasingly active, competition policy in Africa is set to be evermore international, impacting regulators, businesses and consumers.