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Roundtable on:
**Informal Cooperation among Competition
Agencies on Specific Cases**

**Contribution
by
South Africa**

The views expressed are those of the author and do not necessarily reflect the views
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1. Introduction

The Competition Commission of South Africa (hereinafter referred to as **the Commission**) is a member and participates in various platforms at regional and international level such as SADC, BRICS, ACF, ICN, OECD, UNCTAD and others. These forums provide for cooperation in the area of competition law enforcement and are premised on the recognition that there is a need for increasing cooperation in tackling cross-border anti-competitive practices. These initiatives have also become urgent given an increase in the number of enforcement and merger cases that have an effect on more than one country or where firms are active in more than one jurisdiction.

The nature of cooperation between the Commission and other jurisdictions on cases is largely reactive, often triggered by either a merger notification of a case in multiple jurisdictions, including the Commission, or when a case being investigated by the Commission has an effect or implications for other jurisdictions. This approach is also similar to that adopted by other jurisdictions that have approached the Commission on cases.

Given that in most of these multi-jurisdictional cases there are no waivers readily availed to the competition authorities by the merging parties,¹ the only avenue open to authorities is to cooperate informally. Informal cooperation includes interaction with case handlers in other jurisdictions over telecons or by email in relation to the filing, markets investigated, timelines for investigation and decisions, preliminary concerns, likely remedies to be considered, other jurisdictions contacted, non-confidential decisions, etc.

The use of informal cooperation, however, seems to be prevalent among the 'younger' competition agencies. The more mature agencies either use waivers or have bilateral agreements, which facilitate better coordination in multi-jurisdictional investigations. The Commission's experience is also that with the more mature agencies such as the US and the EU, the nature of informal

¹ Unless requested formally, but in some cases there are delays.

cooperation tends to be robust but is limited to issues relating to the analysis of a case e.g. relevant market definition and remedies.

The extent of the co-operation with other African countries has only recently intensified, as the Commission previously interacted more with the mature agencies. Informal cooperation within the African region is also robust and goes beyond analysis and remedies, to consider issues of mutual interest such as likely effect on public interest issues. This cooperation takes place at any stage during an investigation and in some instances requests for cooperation may come after an investigation has been concluded by the Commission. The active participation of the Commission in capacity building initiatives within the continent also means that experiences and information on cases is also shared during these interactions.

However, with informal cooperation no confidential information submitted by the merging parties and third parties is shared with other agencies. In the absence of waivers, only general information is shared. Different jurisdictions also have laws which regulate how and when information from merging parties can be shared with third parties and any actions to the contrary could prejudice an investigation.

Although informal cooperation presents these challenges, it has proven useful in a number of multi-jurisdictional cases, especially in merger review. The value of information cooperation is coordination of effort, information sharing, efficient and focused investigations, and getting different perspectives e.g. on possible remedies. Even in cases where informal cooperation takes place after a decision has been taken in other jurisdictions, each jurisdiction is able to take an independent decision which addresses its identified competition concerns. In fact, for the Commission, history does show that its decisions are not always the same as those of the other authorities that investigated the same matter.

2. Informal cooperation in specific cases

The Commission, in table 1, sets out a few key cases where there was informal cooperation and/or information sharing.

Table 1: Selected cases on informal cooperation (2010 – 2014)

Case	Agency	Information shared	Type of investigation
Wal-Mart Stores Inc and Massmart Holdings Ltd	Namibia	The Commission's approach in dealing with public interest concerns raised by numerous stakeholders	Merger review
Kansai Paint Co. and Freeworld Coatings Ltd	Namibia	Remedies	Merger review
Clover SA (Pty) Ltd and Bottled Water Division of Nestlé South Africa (Pty) Ltd	Namibia	Approach to investigation, including markets investigated	Merger review
Metropolitan Holdings Ltd and Momentum Group Ltd	Swaziland and Namibia	Public interest (employment) Market definition	Merger review
DCD-Dorbyl (Pty) Ltd and Elgin Brown & Hamer Group Holdings (Pty) Ltd	Namibia	Market definition Conditions (divestiture)	Merger review
MTO Forestry (Pty) Ltd and Boskor Sawmill (Pty) Ltd	Swaziland	Market definition	Merger review
Van Schaik Bookstores and Juta Bookshops	Botswana	Request by Botswana for non-confidential report of the Commission	Merger review
Bucketfull (Pty) Ltd and The Cartons and Labels Business of Nampak Products Ltd	Namibia	Market definition	Merger review

Nestlé South Africa (Pty) Ltd and the Nutrition business of Pfizer Inc.	EC Mexico	Remedies Broad discussion on the investigation (Discussions mostly with the ACCC because both agencies had confidentiality waivers)	Merger review
Kuehne + Nagel, Schenker and SAAFF	EU and US	Coordinated dawn raids (freight forwarders)	Enforcement
Waste Management cases involving Enviroserv Waste Management (Pty) Ltd	Canadian Competition Bureau	Overview of the Canadian Waste management industry; relevant markets and the approach adopted in assessing them. This also included discussion on landmark cases in the waste management industry.	Enforcement
SAA and Qantas	ACCC	Assessment of the exemption application, as well as the approach adopted in assessing the exemption, including major concerns and other key issues for consideration.	Enforcement
CCSA and Computicket (Pty) Ltd	Singapore Competition Commission	Non-confidential report and decision requested by the Commission	Enforcement
Various construction firms	NMa	Assisting the Commission with the construction fast track process	Enforcement

Source: Competition Commission

Although Table 1 does not include all cases where there was informal cooperation by the Commission and other jurisdictions, it does underline the fact that most of the informal cooperation on investigations has been through merger cases.

Through a forum such as the African Competition Forum (hereinafter referred to as **the ACF**), the Commission and other member states also seek to strengthen the adoption of competition law in policies by African countries in order to support and enhance the socioeconomic objectives of these countries. For example, ACF members collaborate on projects which enhance the understanding of the impact that multi-national firms have on key sectors that affect the vast majority of Africans.

The majority of the other competition authorities within Africa are relatively young agencies, as such cooperation is largely on rendering capacity-building and technical assistance (in particular through staff exchanges, study tours and training workshops) than informal cooperation on investigations.

3. Practical challenges

There are some practical challenges which limit the extent to which informal cooperation can be used optimally, and these include the following:

Legal challenges

Restrictions on the release of confidential information and legal hindrances to the admissibility of evidence obtained through information exchanged are a challenge for effective informal cooperation among agencies.

However, as mentioned above there is value in discussing an investigation among the case handlers in the absence of a waiver. The discussions could also shed light on whether the information that is required would be best obtained through a waiver than an informal discussion.

The merging parties should also be obliged to file fairly similar notifications in different jurisdictions to avoid the delays that sometimes occur while waiting for waivers, and to give the investigators more or less the same basis from which to discuss an investigation with other jurisdictions.

Different approaches in assessment

Competition authorities may have different approaches when investigating a merger with an international dimension. For example, many developing countries would assess the impact on public interest even when there are no competition issues arising. It is therefore important that competition authorities recognise each jurisdiction's special requirements in order to ensure that conflicting outcomes and transaction delays are avoided.

Timing

Cooperation would be easier if cases are filed at more or less the same time in all affected jurisdictions. From a practical point of view, same timelines for investigations and decisions would make cooperation easier but in reality this is hardly the case.