

INFORMAL COOPERATION AMONG COMPETITION AGENCIES: GENEVA, 14TH IGE, JULY, 2014

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THE VIEWS EXPRESSED ARE THOSE OF THE AUTHOR AND DO NOT NECESSARILY REFLECT THE
VIEWS OF UNCTAD

"A Kenyan economy with globally efficient markets and enhanced consumer welfare for shared Prosperity"

Need for Cooperation

- “ **...Chances of extra-territorial infractions increase** with establishment of RECs. Unfortunately, these infractions cannot be handled competently by national legislations **due to their limited jurisdictional competence...that is why Kenya, has been active in the promulgation** of the EAC and COMESA competition regulations...”
- “ As more and more...countries establish competition laws, we expect to gain from network effects resulting from their implementation. We Kenyans view and anticipate two kinds of economic value which all of us can derive from these network effects: [i] inherent;...the value we derive from implementation of our competition law, and; [ii] network; the value we derive from the others' implementation”

H.E. Uhuru Kenyatta, President of the Republic of Kenya, then Deputy Prime Minister and Minister For Finance while officiating the launch of the ACF on 2nd March, 2011

Need for Cooperation, Cont'd...

To summarize the aforesaid, need for competition law enforcement cooperation is gaining momentum due to: -

- ▶ Trade liberalization and hence creation of RECs and globalization.
- ▶ Increase in the number of countries with Competition laws (an increment by 600% since 90's to current). Therefore need to minimize inconsistent decisions.
- ▶ Increase in cross-border M&A's (from 90's to current by about 250%-350%-OECD). In Kenya, in 2014 alone, 69% of mergers had international dimension. This means they are exposed to multiple agencies for approval.

Forms of Cooperation

► Formal Cooperation:

- I. Negative Comity – a country ensures its laws/law enforcement do not injure another country's interests;
- I. Positive Comity – remedying anticompetitive practices so that it may not injure another country;
- II. Investigatory assistance-provision of assistance in regard to a country's enforcement action.

Examples: Agreements between EU, Canada and US; and some countries like Australia, Canada, Germany and UK have laws recognizing international sharing of information.

Multilateral Cooperation Platforms (UNCTAD, ICN, OECD) and RECs agencies (EU, COMESA, EAC, WAEMU)

Forms of Cooperation, cont'd:-

Informal Cooperation

- It does not use any treaty or legislation.
- Depends on 'personal' networks and national strategic interests.
- Faces challenges in terms of exchange of confidential information and also they are not binding.

Examples: ICN; ACF; Country-to-Country

Areas of Informal Cooperation

- ▶ Case handling (cartels) – through information sharing;
- ▶ Cross-border Mergers & Acquisitions (country by country)
- ▶ Aligning Best practices in laws formulation (ICN)
- ▶ Research and Advocacy (ACF)
- ▶ Capacity Building

Challenges in Informal Cooperation

- ▶ Sharing and handling of Confidential information
- ▶ Different levels of development (in terms of the law; infrastructure; human capital).
- ▶ Differing prioritization, among agencies – M&A's vis-à-vis Anti-competitive agreements
- ▶ Nationalistic driven analysis
- ▶ Basically based on individuals trust

Way forward in Informal Cooperation

- ▶ **Best when it germinates from regional to international:** - Countries of the same region generally have same levels of development and aspirations, and therefore; trust(?) each other;
- ▶ Need to have a framework on sharing and protecting of confidential information;
- ▶ May expand from cooperation in research in competition matter (to elucidate a common problem) and hence create need for cooperation. See ACF six-country joint Research Studies.
- ▶ Start also from; sharing of information on gains of competition enforcement; Benchmarking missions; Exchanging staff/Building Capacity, among others.