



# **International Experiences and Best Practices in Competition Law Enforcement Against Cross-Border Cartels**

## **The COMESA Experience**

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# Introduction

- Cartels have been a priority area for competition authorities for many years now
- Increasing globalization presents opportunities for firms operating across multiple markets to coordinate their conduct
- Competition agencies therefore have a growing need to build relationships with fellow agencies to combat cross-border cartels.

## COMESA Legislative Framework

- The COMESA Competition Commission (“CCC”) is a statutory body corporate established by Article 6 of the COMESA Competition Regulations, enacted pursuant to Article 55(3) of the COMESA Treaty
- The Regulations apply to all economic activities whether conducted by private or public persons within, or having an effect within the Common Market. The Regulations apply to conduct which has an appreciable effect on trade between Member States and which restricts competition in the Common Market.
- The Regulations allow the CCC to monitor, detect and punish any conduct which has anti-competitive effects in the Common Market. Thus the CCC is empowered to investigate and sanction cartels having an effect in the Common Market, regardless of the geographic location of the perpetrators.

- The 21 Member States of COMESA are obliged by Article 5(2)(b) of the COMESA Treaty to confer upon the Regulations of the Council the force of law and necessary legal effect within their respective territories.
- Similarly, Article 5 of the Regulations obliges Member States to take all appropriate measures to ensure the fulfilment of the obligations rising out of the Regulations or resulting from action taken by the CCC under the Regulations.



## Cross Border Cartel Enforcement

- One of the major challenges with investigating and sanctioning cross-border cartels includes **limited investigation and enforcement powers**
  - competition authorities are limited in their abilities to obtain evidence during an investigation; or
  - competition authorities have limited powers to enforce decisions, including collecting fines outside their respective jurisdictions.
- Another challenge with cross-border competition enforcements is that competition authorities are legally bound to keep information **confidential**. Under merger review, waivers can be obtained much easily.
- However, under cartel investigations, undertakings are less likely to oblige because sharing such information could expose them to prosecutions from other authorities. This therefore restricts competition agencies from sharing information with their counterparts.

- Another challenge with cross-border enforcement is the **lack of a regional leniency program**.
  - Firms have no incentive to report their cartel conduct in exchange for reduced penalties
  - Firms may also be skeptical that applying for leniency at regional level may not absolve them from criminal liability in some Member States where cartel conduct is criminal
  - Applying for leniency at national level could expose firms to prosecution from neighbouring authorities, especially the competition authorities of trading partners.
  - This perpetuates cartel conduct in the Common Market.
- Absent a leniency program, competition authorities have to scale up their market intelligence and monitoring activities to detect anti-competitive conduct in the market.
- However, different priorities across multiple jurisdictions result in fragmented enforcement action targeting the same sectors across the region.

- Another challenge with cross-border enforcement is **different skills** levels across competition authorities.
  - Few competition authorities in the Common Market have successfully completed a cartel investigation
  - Few competition authorities in the Common Market have used various information gathering tools available, such as a dawn raid
- In the event that cooperation on a cross border cartel is successful and a multiple jurisdiction raid is conducted, there may be further hurdles at adjudication stage with the **admissibility of evidence** in the requesting authority's jurisdiction.

- CCC has observed that Member States' competition authorities cannot exercise their powers to oblige undertakings to produce information unless the NCA have initiated an investigation into the same conduct.
- This is where the importance of a regional authority comes into play. Since the Regulations are binding on governments, national courts and undertakings operating in the Common Market, undertakings are obliged to submit information pursuant to a request by the CCC.
- Such exercises, however, require experienced NCAs to collect the right type of information for the CCC as well as harmonization of the national laws with the regional law.

## Cooperation agreements

- The CCC has realised that cooperation agreements are a critical enforcement tool for competition authorities, which can facilitate joint enforcement of cross-border cartels. As recognized by ACCC Chair:

*“Working more deeply with the highly-experienced competition investigators in other countries, who are often dealing with the same companies or industries, will greatly assist in gathering evidence across borders.”*

- Since 2015, the CCC has concluded bilateral cooperation agreements with 11 Member States which cover:
  - Notification procedures
  - Exchange of information
  - Cooperation on investigations
  - Confidentiality considerations

- At multilateral level, the CCC has set up the COMESA Restrictive Business Practices Network (“RBP Network”) where case handlers responsible for investigating restrictive business practices can
  - Share information
  - Exchange knowledge
  - Cooperate on enforcement activities
  - Capacity building exercises
- Cooperation through the RBP Network yields fast results since they communicate directly with officers who have hands on information about particular sectors.
- Moreover, the direct communication among case handlers has cured the bureaucratic hurdles of requesting information and mutual assistance through Heads of Authorities.
- The RBP Network has conducted various inquiries in sector specific clusters and screened identified markets for anti-competitive conduct. The outcome of these activities has been enforcement action.

## Way Forward

- The CCC has scaled up its efforts to identify **priority areas** across multiple Member States to facilitate joint monitoring of the market for anti-competitive conduct
- The CCC is liaising with COMESA Member States to finalise **Regional Leniency Program** which will target cross-border cartels and is expected to attract leniency applicants from within and outside the region.
- The CCC has initiated the process of **reviewing the legislative framework to bring it up to date enabling to capture emerging issues** while at the same time advancing its cooperation mechanisms with Member States.
- The CCC shall continue to use the existing multilateral mechanisms to prioritise specific sectors across the region and focus resources towards monitoring and detecting anti-competitive conduct.

Thank you  
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