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**The Place of Competition Law and Policy in
Regional and Continental Integration:
A Case Study of Paint Sector
Cartel Conduct in
Kenya
CAK Experience**

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UNCTAD WORKING GROUP ON CROSS-BORDER CARTELS MEETING.



The Place of Competition Law and Policy in Regional and Continental Integration: A Case Study of Paint Sector Cartel Conduct in Kenya

CAK Experience

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10th April 2025

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Presentation Outline



- ▶ Background
- ▶ Objectives
- ▶ Methodology
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- ▶ Kansai Plascon and Sadolin merger
- ▶ Paint Sector Cartel case in Kenya
- ▶ Cross-Border Cartel and Regional Cooperation
- ▶ CCC and CAK Cooperation in merger and cartel case
- ▶ Findings
- ▶ Conclusions
- ▶ Recommendations

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Background

- Increased economic activities in global markets regional and continental markets- resulting in rapid growth in cross-border trade.
- In turn, have increased the level of complexity in regional and international cooperation in competition law enforcement.

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Background

- ▶ Increased complexity of cooperation in cross-border competition law enforcement
- ▶ Thereby underscoring the need to advance practices and approaches of cooperation
- ▶ As regional and international trade increase -Number of competition law enforcement activities on cross-border mergers and cartels conduct rise significantly

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Background



- ▶ CCC in 2017 approved -Kansai Plascon Africa Ltd and Sadolin Paints Limited both operating in the Common Market.
- ▶ Subsequently, in 2019, Kansai Plascon Kenya Limited was part of the paints sector cartel investigated by the CAK

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Objectives

- ▶ Examines the adequacy of cooperation between CCC and CAK in the merger analysis and the cartel case
- ▶ Analyses whether the merger generated a conducive market for cross-border cartel conduct in the Kenyan paints sector.
- ▶ Examines whether the merger presented an opportunity for CCC to conduct an ex-post examination of its merger evaluation regime and investigate the sector for a cross-border cartel.

Methodology

- ▶ A case study approach in analyzing the interconnection between the Kansai and Plascon East Africa merger and the cartel conduct in the Kenyan paints sector.
- ▶ Primary and secondary data

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THE KENYAN PAINT MANUFACTURING SECTOR



- ▶ Kenya the economic powerhouse for East Africa and
- ▶ Has the strongest ability to sway the region's growth of paint sector.
- ▶ Paint sales value is projected to hit US\$ 590 million in 2023
- ▶ Attributed to increased demand for housing paint products.
- ▶ Kenya government committed to construct 1,000,000 low-cost affordable houses -boosting the demand for paint products.

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THE KENYAN PAINT MANUFACTURING SECTOR



- ▶ Crown Paints-leading with a 36% market share with operations in EA countries including Uganda, Tanzania, and Rwanda.
- ▶ Basco Paints -22% -operations in EA region, products available in Tanzania, Uganda, Rwanda, Burundi, South Sudan, and the Democratic Republic of Congo.
- ▶ Kansai Plascon Kenya Ltd -15% of the Kenyan market as of 2023, manufacturing plants in Uganda and Tanzania, while exporting to the Zambian
- ▶ 80% of Kansai Plascon Kenya Ltd paint products are consumed locally in Kenya-20% exported to Zambia

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THE KENYAN PAINT MANUFACTURING SECTOR



- ▶ Other paint manufacturers in Kenya:-, Galaxy Royal Pains, Solai Paints, Glory Paints, Maroo Paints, Pegler and Seweco Paints.
- ▶ The country equally has imported paint brands which continue to provide competition in the paint market
- ▶ The total production of paints and related products - 66.2 million litres in 2015,
- ▶ 91.5 million litres by 2020.
- ▶ 111.5 million litres in 2021 and increased by 4.2% in 2022 to 116.2 million litres

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KANSAI PLASCON AND SADOLIN MERGER



- ▶ In 2017, the CCC approved a merger involving the acquisition of 100% shares of Sadolin by Kansai Plascon Limited.
- ▶ The merged entity Kansai Plascon Africa operates in Mauritius, South Africa, Kenya, Uganda Tanzania, and Zambia
- ▶ Merger justified on the grounds -part of the initiatives by Kansai Japan towards global expansion and the growth commitment towards ensuring that the company had a Pan-African presence

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Relevant product and Geographical Market



- The relevant product market for the merger was the manufacturing and sale of paint and coating products
- The geographical market for the target Sadolin was national as it operated in Kenya only.
- Kansai Plascon had a regional presence in South Africa, Mauritius, Uganda, Tanzania Rwanda, and was exporting to Zambia. Globally, Kansai had fifty-one operation points.

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Market share projections; pre-merger, post-merger, and present market shares



Paint Manufacturer	Market shares pre-merger (%)	Market share post-merger (%)	Market shares in 2023 (%)
Crown Paints	36	36	36
Basco Paints	22	22	22
Kansai Plascon Paints	11	11.6	15
Galaxy	6	6	6
Kansai South Africa	0.6	-	-
Others	24.4	24.4	21.4
Total	100	100	100

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Market shares- Contn

- ▶ The increase in Kansai Plascon market share - to expansion in production, rise in turnover, adoption of more advanced technology in paint manufacturing, increased investments.
- ▶ Reduction in market share of other paint producers- rise in paint imports- presenting stiff competition for smaller paint manufacturers.

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Merger Analysis

- ▶ The merger occurred at the shareholding level; not expected to present any negative competition concerns
- ▶ Booming construction and housing sector and government's commitment to put up over one million low-cost affordable houses.
- ▶ No any entry barriers into the Kenya paints sector;
- ▶ Consequently, MSMEs Micro-paint manufacturers and individual manufacturers have entered paint manufacturing.

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Analysis of the Merger

- Merger was unlikely to lead to substantial lessening of competition; market structure and concentration did not change significantly.
- Merger did not have the potential to exhibit any negative public interest concerns.
- Approved unconditionally.
- Analysis was devoid of potential coordination among the leading paint manufacturers in Kenya who enjoyed joint dominance as they controlled over 75% of the market.

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Paints Sector Cartel Case In Kenya



- ▶ The reference here is to the cartel cases, as investigated and finalized by CAK
- ▶ The Cabinet Secretary -Education ordered that all school vehicles used to transport children be painted yellow by 31st March 2018.
- ▶ Consequently, there was an upsurge in demand for paint products.
- ▶ The CAK, conducted a screening exercise to evaluate the competitive strategies and reactions or lack thereof in paint manufacturing, in view of the directive.

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Paints Sector Cartel Case In Kenya



- ▶ The screening guided by the general theory of harm- a possibility of collusion.
- ▶ Specifically, these were:
 - i. price fixing in the form of agreements to adhere to a price schedule or range among the paint manufacturers;
 - ii. setting minimum or fixed prices;
 - iii. advertising prices cooperatively;
 - iv. coordination in the determination of discounts and discounting structure, and
 - v. Agreement on the transport arrangements
 - vi. possibility of territory/market allocation

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Paints Sector Cartel Case In Kenya

- ▶ The cartel case- concluded in 2019
- ▶ Four leading paint manufacturers including Kansai-Plascon paid pecuniary penalties at varying amounts totaling USD 464,788.
- ▶ The cartel conduct in this industry came to light just one year after the CCC had approved a merger in the sector involving a player who was not only found culpable of cartel conduct but also paid a financial penalty and agreed to cease and desist from the conduct

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Cross-border Merger Aiding a cross-boder cartel



- ▶ Explored the extent, if any, that the merger decision by CCC aided the cartel conduct in Kenya.
- ▶ Interaction with CAK and CC has indicated otherwise.
- ▶ CAK was of the view that the merger did not have the potential to lessen competition and would not result in concentration
- ▶ Even though the four leading paint manufacturers controlled 75% of the market.

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Cross-border Merger Aiding a cross-border cartel



- ▶ Analysis suggests- with the 4 manufacturers controlling more than three-quarters of the market, the likelihood of them engaging in cartel conduct could not be ruled out.
- ▶ Competition analysis at the time of the merger approval failed to be futuristic and analyzed what was and not what would be.
- ▶ The market outcome post-the-merger -analyzed based on likely competition issues that the merger could raise at the time of filing as opposed to the likely future conducts

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Cross-border Cartels and Regional Cooperation



- ▶ A cartel is an intentional association of legally independent companies -intent of increasing their profits jointly by executing explicit agreements.
- ▶ Hard-core cartel customizes their agreements including contracts, deals, and coordinated bidding among others with the object of controlling market prices and restricting market supply directly (Gerber, D. J., 2016).
- ▶ Companies voluntarily join cartel- to set price ceilings, fix production volumes, share markets, undertake geographical market allocation, and assign key customers.

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Cross-border Cartels and Regional Cooperation



- ▶ Cross-border \international cartel -cartels whose members are composed of companies from a multiplicity of countries(Levenstein, M. C., & Suslow, V. Y., 2008).
- ▶ Notwithstanding the stunning number of cartel discoveries, -number of cross-border cartels that are unidentified is still high.

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Cross-border Cartels and Regional Cooperation



- ▶ Between 1990 and 2016, the economic damages associated with cross-border cartels resulted in overcharges of more than \$ 1.5 trillion globally. (Martyniszyn, M. 2021)
- ▶ Detected cartels -cause great economic detriments to developing countries

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Cross-border Cartels and Regional Cooperation



- ▶ Regional cooperation in cartel enforcement exhibits certain **distinct characteristics** from other anti-competitive practices like merger control and unilateral conduct at regional and international levels (Levenstein, M. C., & Suslow, V. Y., 2008).
- ▶ Due international nature of cross-border cartels, domestic techniques and approaches including search and seizure (i.e. dawn raids) and leniency programs- proved ineffective with respect to cross-border cartels.

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Cross-border Cartels and Regional Cooperation



- ▶ Typical international tools including formal cooperation agreements- have not been exploited adequately.
- ▶ Due diversity in legal provisions in anti-cartel laws in terms of administrative versus criminal offences as well as the failure to remedy the same through legal treaties (Case of Mutual Legal Assistance Treaties)

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Cross-border Cartels and Regional Cooperation

- ▶ Competition agencies are willing to cooperate in cross-border cartel cases –but are constrained by the legal impediments w.r.t administrative law principle of legality, on domestic competition law proceedings (Horna, P., 2017).
- ▶ The principle of legality in civil law jurisdictions- implies that to government officials, any information that is not expressly sanctioned for sharing is forbidden (Dyzenhaus, D., Hunt, M., & Taggart, M. , 2001).
- ▶ Competition agency staff unless explicitly sanctioned by law- find it difficult to share confidential cartel information with regional and other competition agencies.
- ▶ CAK could not share confidential information with CCC and EACCA

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Cross-border Cartels and Regional Cooperation



- ▶ Competition agencies -have to either amend their laws or craft a legal framework for sharing of confidential information with regard to related cartel cases that are being handled across borders.
- ▶ **Novelty of cooperation** -a cartel investigation case officer at the national level may not be condemned for not requesting for relevant information from other (regional) competition agencies
- ▶ But risks condemnation in case of reaching out for information from counterpart in other jurisdiction –Implies no officer will cooperate by requesting or sharing information.

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Cross-border Cartels and Regional Cooperation



- ▶ Incentives to cooperate in cross-border cartel cases could be crystalized when various synchronized mechanisms are undertaken by key law enforcement agencies
- ▶ **This is only feasible in jurisdictions with:**
 - i. comparable investigative powers;
 - ii. strong internal reward systems; and
 - iii. jurisdictions with converging anti-cartel laws

Kenya is much ahead of its neighbors – countries in which paint cartels operated.

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- ▶ Level of maturity in competition law enforcement may affect their ability to cooperate in cross-border cartel cases. (CAK-Kenya has matured in competition law enforcement compared to the other countries-where cartel operated.)
- ▶ Countries that had not matured competition law, coupled with limited competition culture, were not able to participate in cross-border cartel investigations in air cargo cartel in EU.(Bergman, H., & Sokol, D. D. , 2014).

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CAK and CCC Cooperation in Merger Analysis and Cartel Case



- ▶ CCC and CAK -cooperate in the enforcement of competition law on regulation of mergers, restrictive trade practices, consumer protection, and research and market inquiries.
- ▶ Have MoU since 2019- in bolsters cooperation, -provides for the sharing of information, *undertaking joint training, investigations, market research and inquiries, and sharing experiences and learning in cartel and merger investigations.*
- ▶ At the time of the merger analysis in 2017, the cooperation agreement was adequate; information shared was appropriate for the intent of making a determination

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CAK and CCC Cooperation in Merger Analysis and Paint Cartel



- ▶ However, there could have been a shortfall in the analysis of the information gathered to the extent to which the merged entity could have the potential to aid future cartel conduct in in Kenya the Common Market.
- ▶ Competition agencies in strengthening regional cooperation ought to evaluate whether the model of information sharing is adequate, and the extent of analysis of the same.
- ▶ In merger case, the analysis was based on present competition concerns; what is as opposed to what could be.
- ▶ CCC and CAK did not subject the case to any futuristic tests of any potential restrictive trade practice in Kenya and the region

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CAK and CCC Cooperation in Merger Analysis and Paint Cartel



- ▶ The analysis focused on market concentration and a public interest test
- ▶ Although the information shared was adequate for making a determination on the merger, more insightful analysis could have been undertaken w.r.t the probable future conduct of the four leading paint manufacturers
- ▶ Controlled over 75% of the market at the time

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CAK and CCC Cooperation in Merger Analysis and Paint Cartel



- ▶ Information sharing between CAK and CCC during cartel case was non-existent.
- ▶ The manufacturers have operations in other countries that are within the Common Market
- ▶ No evidence of CCC seeking formal information on the cartel case from CAK or any attempt to progress an investigation into the Common Market.
- ▶ Agencies communicated informally on the outcome.

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CAK and CCC Cooperation in Merger Analysis and Paint Cartel



- ▶ The leading paint manufacturers, including Crown Paints and Kansai-Plascon, have operations in other countries with the Common Market, -high chances cartel conduct was cross-border.
- ▶ The extent to which this could be confirmed depended on:
 - i. the gravity to which CCC viewed the outcome of CAK findings and
 - ii. the ease with which it is for CCC to conduct a cross-border cartel investigation

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CAK and CCC Cooperation in Merger and Paint Cartel Analysis



- ▶ Constraints to cooperation between national and regional competition agencies including:
- ▶ international notifications to individuals abroad in a domestic cartel case could considerably hamper the case outcome;
- ▶ non-harmonization of work plans;
- ▶ non-appreciation of competition law; and
- ▶ divergence in legal provisions across countries with respect to cartel conduct.

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CAK and CCC Cooperation in Merger Analysis and Paint Cartel



- ▶ Formal cooperation agreements -under-utilized due to divergence in legal provisions on anti-cartel laws on criminal versus administrative violations.
- ▶ These are aggravated by the incapability of legal truces to remedy these constraints
- ▶ The cooperation between CCC and CAK-not exempt from the fundamental challenges stemming from divergence in prioritization of activities.
- ▶ Cooperation in cross-border cartel cases faces the risk with regards to confidential information disclosure (Cartels, C, 2012)- CAK not exempted.

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Findings

- ▶ **Cooperation**-The information shared was adequate for making a determination on the merger transaction.
- ▶ Analysis not futuristic, failed to take advantage of the merger analysis to undertake an in-depth analysis of the possibility of coordinated conduct occurring in the paint industry.
- ▶ There was glaring joint dominance -four leading paint manufacturers controlled over 75% of the Kenyan paint manufacturing and sales market.

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Findings

- ▶ No explicit formal cooperation between CAK and CCC in the cartel case.
- ▶ Agencies did not formally share information or evidence of the investigations on cartel case.

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Findings

- ▶ cooperation in cross-border cartel cases presents very distinct challenges which is characterized by complexities, unlike cooperation in merger investigations. Challenges include:
 - i. non-uniformity in appreciation of anti-cartel laws across jurisdictions;
 - ii. non-existent of and or different level of maturity of competition law in the region;
 - iii. non-alignment of work plans to cartel investigations activities in national competition.
 - iv. lack of clear frameworks for cooperation in cross-border cartel cases

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Findings

- ▶ Admissibility of evidence obtained in one jurisdiction at the regional level
- ▶ The merger in 2017 did not aid the cartel conduct in the Kenya Paint sector. -4 firms controlled over 75% of the paint market even pre-merger.
- ▶ Cartel conduct could have been executed notwithstanding the outcome of the merger transaction

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Conclusions

- ▶ There was no justification CCC to conduct a second investigation and subsequently penalize the players
- ▶ Would be a case of double jeopardy; stemming from the *non-bis in idem* principle or not twice against the same.
- ▶ Prohibit prosecution of the paint companies twice for the same contravention – Penalties paid in kenya

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Conclusions

- ▶ Additionally, not all the players had operations in all the countries in the Common Market,
- ▶ Three of the manufacturers had operations outside Kenya.
- ▶ Kansai Plascon had more presence in the Southern African region including Mauritius, South Africa and Zambia.
- ▶ Crown Paints and Basco had operations in East Africa including Kenya, Uganda, Tanzania, and Rwanda.
- ▶ This could constrain CCC in terms of procedural and substantive issues.

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Conclusions

- ▶ The fines were deterrent enough -were the highest fines ever imposed then on market players for cartel conduct in Kenya at the time.

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Conclusions

- ▶ CCC was expected to face the challenges of non-appreciation of competition law in Uganda, South Sudan and the Democratic Republic of Congo.
- ▶ countries had no competition laws as at the time of making determinations of the cartel case.
- ▶ Uganda, for instance, passed a bill on competition law in May 2023.
- ▶ Rwanda operationalized its competition agency in 2017-expected to face teething issues in cross-border cartel investigation.

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Recommendations

- ▶ Competition agencies to appreciate the significance of better cooperation on procedural and substantive matters
- ▶ It is critical for the member states/partners to develop guidelines to share tools during the initial stages of investigation to benefit authorities
- ▶ More engagement activities should be carried out under the auspices of the CCC, AfCFTA Competition protocol, and various working groups such as the Cartel and Mergers Working Groups
- ▶ Hold more cross-border cartel specific fora

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Recommendations

- ▶ Cartel Working Group need to re-evaluate the adequacy of their activities towards handling and extinguishing cross-border cartels.
- ▶ National, regional, and continental competition agencies should develop a framework for the formal sharing of information on cross border cartel investigations and on how to progress such investigations while being cognizant of double jeopardy.
- ▶ Adopting work-plan-based cooperation- on cartel cases that may have cross-border dimensions

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Recommendations

- ▶ Regional and national competition agencies should embrace positive comity;
- ▶ a competition agency invites another competition agency in a different jurisdiction to investigate and remedy a cartel conduct or anti-competitive behavior which would be better extinguished through enforcement initiatives in the beneficiary nation. Positive comity -implemented in bilateral cooperation agreements amongst nations
- ▶ Conduct post-merger evaluation especially in markets where there is joint dominance.

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THE END



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