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Country Statement:

International Cooperation of Competition Authorities in the Fight Against Cross-Border Anti-Competitive Practices and Mergers

– The Case of Kenya-

Contribution by Competition Authority of Kenya

COUNTRY STATEMENT

INTERNATIONAL COOPERATION OF COMPETITION AUTHORITIES IN THE FIGHT AGAINST CROSS-BORDER ANTI- COMPETITIVE PRACTICES AND MERGERS

THE CASE OF KENYA



A. Introduction

1. Currently, there are approximately more than 6.7 million registered companies in the world according to the Africa Investment Report 2016 (AFRICA 2016: Trade and Investment Summit, 2016).
2. Although a country may be effective in the enforcement of its competition law, the opening up of, and increase in cross-border activities has created the need for development of a regime to effectively control cross-border anticompetitive practices and mergers.
3. According to the World Bank Report 2016, Kenya had about 325,987 registered operational companies while South Africa had over 653,400 as at the end of 2016 (Econstats.com, 2018). Of all the companies in Africa, 23% are registered to engage in the extraction sector, 23% in the electricity generation and supply, 22% in manufacturing, 14% in construction, 7% in ICT and Internet Infrastructure, 4% in Logistics, Distribution and Transport, 3% in business services, 2% in sales, marketing and supplies, 0.64% as holding companies, 0.6% in education and the remaining 1% in other activities.

B. Forms of Cooperation Currently Available

4. Increase in the number of registered companies especially holding companies, and the desire to expand and venture into other countries outside the domicile country, coupled with favorable fiscal policies such as taxation in jurisdictions like Mauritius, has created cross-border merger traffic (Chitonge, 2016). With this increased cross-border traffic, the need to investigate the cross-border market as a whole and check on mergers happening across these borders has arisen.
5. It is for the above reason that several trading blocs in Africa such as the East Africa Community (EAC), The Common Market for East and South Africa (COMESA) and the Southern African Development Community (SADC) have or are in the process of developing frameworks to oversee the cross-border competition activities involving member states and to ensure that



proper mitigating measures are analyzed across the borders before being implemented to address the concerns of anticompetitive mergers.

6. Currently, regional cooperation in Africa is facilitated through the COMESA Competition Commission (CCC), the East Africa Community Competition Authority (EACCA), the African Competition Forum (ACF) and the South Africa Development Community (SADC) among others.
7. Internationally, the European Union set up a competition commission after the World War to oversee competition in its member states which has reached around twenty eight (28) countries. The Commission was constituted on the following four main policy areas; Cartels, market dominance, mergers and state aid (Ec.europa.eu, 2018). The desire to form a single trading bloc in Europe fueled the need for the EU Competition Law to oversee cross-border mergers and acquisition among other competition regulations.

C. COMESA Competition Commission (CCC)

8. The COMESA Competition Commission (CCC) is a regional body established under Article 6 of the COMESA Competition Regulations of 2004 (“the Regulations”). It became operational on 14th January, 2013 and is based in Lilongwe, Malawi (Comesacompetition.org, 2018).
9. The Commission’s core mandate is to enforce the provisions of the Regulations with regard to trade and promote competition within the COMESA Common Market through monitoring and investigating anti-competitive practices of undertakings and mediating disputes concerning anti-competitive conduct between Member States.
10. There are two separate legal regimes governing the enforcement of competition law and policy in the COMESA Member States, namely; the **National Competition laws** which are the national legal orders comprising the respective bodies of legal rules within each of the COMESA Member States and the **Regional Legal Framework** which comprises of the body of legal rules created at COMESA level such as the COMESA Competition Regulations and Rules.



11. Currently, CCC is the only fully fledged regional body mandated to oversee competition within the region and the member states. It is the largest regional competition body that has developed a framework to tackle cross border transactions. Since its establishment in 2004, the Commission has been receiving and analyzing merger cases which have increased gradually.

Table 1: Total Number of Merger Cases handles by CCC from 2013-2017

Approved Mergers/Year	2013	2014	2015	2016	2017	2013-2017 Aggregate
Comfort Letter Granted	2	16	3	5	5	31
Unconditional Approval	16	23	16	19	18	92
Approved with Conditions	0	1	2	7	3	13
Cases referred to Member States	0	1	1	1	0	3
Non-merger Transactions	3	2	0	1	0	6
Ongoing Transactions	0	0	0	0	8	8
Totals	21	42	21	32	34	150

Source: COMESA Competition Commission (Comesacompetition.org, 2018)

12. In 2013, twenty one (21) cases were handled, which increased by 61.90% to thirty four (34) in 2017. This growth in the number of notifications, signifies the increased cross border merger transactions being undertaken.

13. Further, CCC engages analysts of various competition agencies among the member states to collect third party views and carry out competition analysis within the jurisdiction on a case that it has received.

D. The East Africa Community Competition Authority (EACCA)

14. The East African Community (EAC) is a regional intergovernmental body consisting of six partner states: Burundi, Kenya, Rwanda, Tanzania, Uganda and South Sudan. The process towards an East African Federation is being fast tracked, underscoring the serious determination of the East African leadership and citizens to construct a powerful and sustainable East African economic and political bloc (Eac.int, 2018).



15. EACCA is an independent organ of EAC, subject to judicial review by the East Africa Community Judiciary (EACJ) (as provided for in Sections 44 and 46 of the EAC Competition Act, 2006, and which came into effect on 1st December, 2014).
16. EACCA is mandated to develop appropriate procedures for public sensitization, consultation and participation. The EACCA has been set up with the sole objective to improve analysis of cross-border mergers and acquisitions while mitigating against any anticompetitive effects of such mergers.

E. The Africa Competition Forum (ACF)

17. The African Competition Forum (ACF), constituted in 2010, is made up of 35 competition agencies from South Africa, North of Sahara and South of Sahara regions. Its objective is to enhance trade through adoption of competition laws, building the capacity of new authorities and assisting in advocating the implementation of the law to the benefit of African economies.
18. In countries that have not yet set up competition agencies or laws, the goal is to support them in taking those steps (Wang'ombe Kariuki – Project Leader¹). The bigger picture being cross-border cooperation in merger analysis.
19. The ACF is set to enable sharing of knowledge and experiences by the member agencies who are currently in various stages of the implementation of the competition law. Therefore, the forum provides a rich avenue where cross border mergers and acquisitions can be analyzed to avoid coalescing of market shares in one jurisdiction as a result of a merger in another.
20. Currently, the forum is in the process of firming up its activities in the region, also carrying out training on various aspects of competition in the member agencies. Generally, the forum's vision is to facilitate development of stronger competition laws and well-functioning institutions that promote cross-border competition. The forum also provides a platform where cross-border

¹ <https://www.idrc.ca/en/project/african-competition-forum-promoting-open-and-competitive-markets-0>



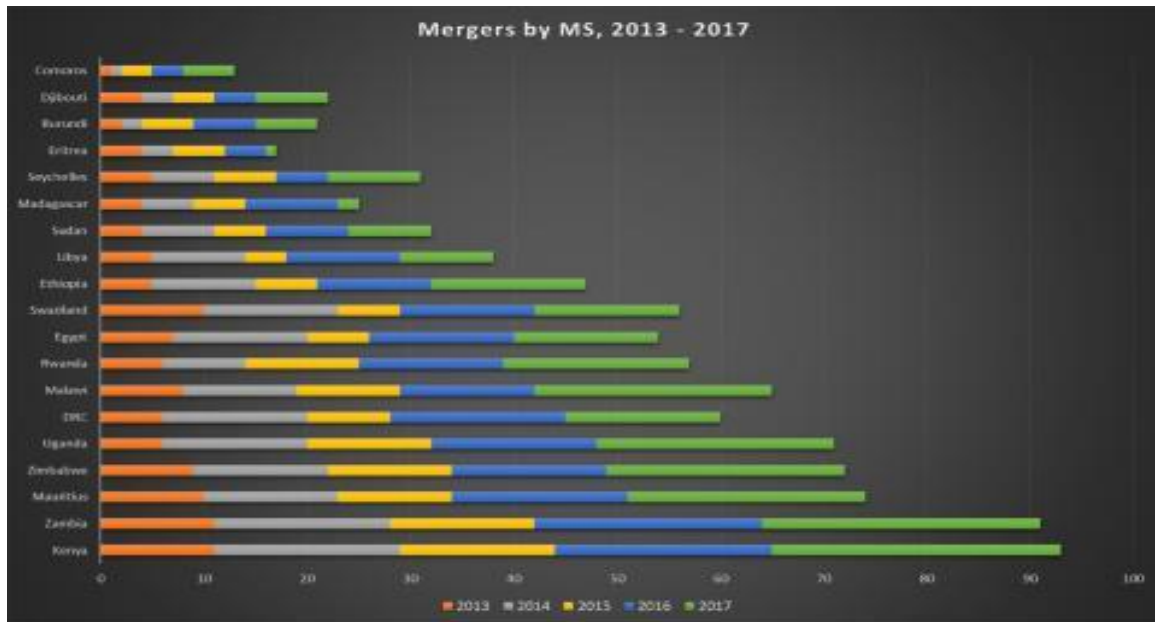
transactions meeting certain thresholds have to be deliberated on by its member agencies.

F. Instances of Cross-border Cooperation in Merger Analysis

21. The Competition Authority of Kenya (the Authority) is one of the most vibrant competition agencies in the region. Since 2013, Kenya has received the highest number of requests for competition analysis and third party views on mergers and acquisitions from CCC as shown in **figure 1**.

22. As illustrated below, most of the CCC member countries have been requested by the commission at one point to carry out analysis over a case that is cross cutting. Kenya has received the highest requests of more than ninety (90) cases followed by Zambia and Mauritius respectively. The sharing of information among COMESA member states has made it possible to control mergers with a cross-border dimension.

Figure 1: The per Country Number of COMESA Competition Commission Cases from 2013-2017



Source: COMESA Competition Commission (Comesacompetition.org, 2018)

23. The ACF has also provided forums where member states have been able to discuss and come up with remedies to mergers and acquisitions that have a cross-border dimension as elucidated in **Table 2**.



Table 2: Examples of bilateral cooperation between ACF members in the last three years

Country	Bilateral cooperation activities
Kenya	Information sharing regarding specific cases with South Africa, Tanzania and Zambia
COMESA	The CCC has cooperated with COMESA member states (most of whom are members of the ACF) on an ongoing basis to conduct investigations and carry out advocacy and capacity building initiatives in the Common Market
Malawi	Bilateral cooperation with Zambia and Tanzania has included the signing of MoUs, exchange of information, and study visits in the sugar sector and automotive industry. This cooperation has been facilitated bilaterally, outside the ACF framework
Mauritius	Cooperation with South Africa and the Seychelles through data sharing, Training and knowledge sharing in Investigations. This was facilitated through networking built through the ACF
Seychelles and Tanzania	Information request made to Mauritius. Officers from South Africa conducted a workshop in the Seychelles on Fighting Bid Rigging in Public Procurement in 2014
Botswana	Informal sharing of information on investigative processes, reports, and sector- specific data with South Africa and Zambia. Cooperation has taken place outside the ACF framework

Source: WBG Report on “Breaking down Barriers, Unlocking Africa’s Potential through Vigorous Competition Policy June 2016

G. Agency’s Own Initiative

24. In order to promote effective regimes, agencies have developed an interaction framework that reduces bureaucracies while at the same time maintaining the confidentiality code. In a bid to deliver on its mandate, the Authority has entered into formal agreements with two competition regulators in Africa – Competition Commission of South Africa (CCSA) and COMESA Competition Commission (CCC).

25. The main objectives of these agreements are;

- a. To promote economic development of Kenya by removal of trade and investment barriers; and
- b. Strengthening capacity building at the national level by sharing information and experience that can deepen competition in the country and therefore, promote compliance with the competition law and policy.

26. The Authority has collaborated with other national and regional competition agencies on investigating restrictive trade practices (RTP).The nature of this collaborations include:-



- a. Exchange of information on investigations;
 - b. Facilitating the process of getting information from firms located in Kenya;
 - c. Discussions on the investigation methodology that applied similar investigations that were carried out previously; and
 - d. Programme exchange and regional trainings between the Authority and other agencies to build capacity on investigation processes.
27. For instance, the several interactions between the Authority and CCSA have been fruitful in ensuring that analysis carried out on a case and the outcome of the same is yielding positive outcome especially on public interest and competition concerns under merger analysis. This interaction enables both agencies address any information gaps in analysis.
28. In the case of the Authority and CCSA, case officers set timelines and the milestones to be achieved then reach out to each other again to give an update on the investigations. The update would be in form of the findings from the field and not on the information submitted by the parties, thus the confidentiality of the information sought is not compromised.

H. Some Cases Handled

29. **Telecommunications sector** - The Competition Commission of South Africa and the Authority while investigating Restricted Trade Practices in this sector, were able to co-operate in information exchange that aided in the investigations.
30. **Paints sector** - The Authority received allegations of a sales, manufacturing and distribution agreement between two paints firms in 2017. However, an analysis of the matter indicated that the agreement was between a Kenyan company and a subsidiary of another firm based in Uganda. The Authority advised COMESA to scrutinize the case since the matter did not fall within Kenya`s jurisdiction.
31. **Exclusive contracts in the sports Industry** - The Authority facilitated the COMESA Competition commission (CCC) to get evidence from the local broadcasting stations on an alleged exclusive



contract.

32. **Allegations of predatory pricing in the taxi services industry** - The Authority interacted and got views on how the CCSA had investigated the allegations of abuse of dominance by other taxi hailing companies against Uber. The exchange of the ideas enabled the Authority to identify the relevant market and also got ideas on how to source for the relevant data for the case.

I. Benefits of International Co-operation

33. The collaboration between the agencies has brought about practical skills transfer on how to gather information, the investigation processes involved and the best practices across the globe.

34. The collaborations help in capacity building and exchange of information between the agencies hence faster finalization of cases.

35. Inclusivity, exchange of information and market inquiries across jurisdictions has enabled the agencies to initiate investigations on Restrictive Trade Practices in certain sectors due to the common market characteristics within the region, for instance the cement sector study in collaboration with ACF.

J. Challenges

36. There are gaps in skills especially among the agencies that have been in existence longer.

37. Different jurisdictions have different priorities with regard to areas of investigation; this divergence may be a challenge.

38. While African countries are setting up and building competition agencies to oversee competition in the region, it is quite evident that the biggest hurdle in cross-border anti-competitive practices and merger analysis is confidentiality of the information and the time it takes to obtain such information given the rigidities by undertakings.

39. Competition regimes should, therefore, work collectively towards getting an easier way of



delivering on results by ensuring that cooperation is possible and equally efficient to prosecuting and mitigating against any anticompetitive concerns that may arise.

K. Opportunities

40. Formal collaboration, in terms of Memorandum of Understanding between different jurisdictions to enhance co-operation should include joint implementation work plans to guide the process and harmonize the priorities.
41. Increased training and exchange programs between the agencies to bridge the skills gap for better regulation of competition law and policy.



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