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**Agenda Item 3c. Enhancing international cooperation in the
investigation of cross-border competition cases: Tools and
procedures**

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**Round Table on enhancing international cooperation in the investigation
of cross-border cases: tools and procedures**

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1. Background

UNCTAD's Intergovernmental Group of Experts (IGE) on Competition Law and Policy has invited contributions for its round table during its 16th session on *Enhancing international cooperation in the investigation of cross-border cases: tools and procedures*. This is in accordance with paragraph 8 of the Agreed Conclusions adopted by the IGE at its fifteenth session in 2016.

2. Introduction

The proliferation of competition authorities in the world has augmented the need for cooperation in order to ensure the effectiveness of each country's anti-cartel enforcement regime. There are push and pull factors that give rise to a need for inter-jurisdictional cooperation in anti-cartel enforcement. The push factors are those factors which the competition agencies themselves experience when enforcing their respective anti-cartel laws independent of each other. The pull factors are those factors which economic agents (firms) that are subjected to cartel regulation experience when they have to cope with multiple enforcement regimes. The young agencies particularly those in the Southern African

Development Countries (SADC) region, in respect of which the discussion in this paper relate to, face a mix of these factors.

In this contribution we are firstly going to discuss the mix of various push and pull factors for the SADC region which lend credence to a need for cooperation in the fight against cartels. Secondly and lastly, this contribution deals with obstacles that exist to achievement of more intensive forms of cooperation and what attempt is made to overcome these obstacles, in particular the various steps that have been taken by the SADC region to achieve cooperation including the less intensive forms of cooperation that have been achieved so far.

3. The push factors that drive cooperation

3.1 Multinational firms

The SADC member states have a number of companies with either a local presence in each country or, if no local presence, that supply their products to customers located in various SADC states from locations within the SADC region.

There are two main considerations which could complicate an investigation of a multinational firm by one state. One such issue relates to the state that is doing the investigation and other issue relates to the other states where the multinational firm operates.

Firstly, the success of the investigation in the state that is instituting the investigation could be hampered if the firm's decisions relating to the collusive arrangements were taken in another state. In the SADC region this problem is likely to emerge given the fact that a number of companies which supply their products throughout the region have their headquarters in South Africa. In this regard, if another state other than South Africa launches an investigation without assistance from the South African competition authorities, such investigation is likely omit some important evidence if the such evidential material, at least that which can be obtained from the South African company, is stored in South Africa.

Secondly, there is a negative externality on other states which arises when one agency chooses to launch an investigation without coordinating with other agencies, in particular if the investigation involves contact with cartelists such as dawn raids, summoning of information and interrogations. The negative externality arises from the fact that the investigation effectively alerts the cartelists that their conduct is no longer a secret. The cartelists may, in order to thwart investigations by other states, that may have not yet instituted their own separate investigations, conceal the evidence of collusion in respect of those states.

In SADC states such as South Africa, Namibia, Swaziland, Botswana and Zambia where many sectors are served by common players this negative externality could be more pronounced since the evidential material could be lost to the non-investigating states from more than one player.

These two drivers constitute the subcategories of the first push factor to inter-jurisdictional cooperation. In this regard, it is the competition authorities themselves, and not the regulated firms, which demand cooperation due to factors which affect the effectiveness of cartel enforcement.

3.2 Establishment of fora to share best practices

The establishment of fora for sharing of best practices to strengthen domestic enforcement mechanisms could lead to recognition of a need to coordinate case investigations in SADC.

The establishment of multilateral working groups such as the newly formed SADC Cartels Working Group provides platforms for exchange of ideas on how to improve cooperation between SADC member states. There are also bilateral arrangements between states in the form of memoranda of understanding (MoU) such as the one which the Competition Commission of South Africa has with the Namibian Competition Commission which create channels of communication.

Unlike other areas of competition enforcement such as abuse of dominance, vertical restraints and concentrative mergers there is a general convergence worldwide and amongst SADC member states that Hard Core Cartels are an egregious form of competition law infringements and almost always have no redeeming features as they are purely aimed at reducing competition in order to make profits or avoid losses. This convergence in the substantive view of cartels has resulted in enactment of similar legislative provisions in many jurisdictions which by their nature do not require an assessment of the effects of a hard core cartel on competition once evidence has shown that the firms are indeed engaged in this form of competition law infringement. This convergence in both substantive assessment of cartels and in the manner (procedure) of dealing with cases of cartelisation has paved the way for formation of various international fora such as the International Competition Network (ICN) and the OECD where high level discussions take place and also to the formation of even much more cooperative groups such as the European Competition Network (ECN) where joint enforcement, case coordination and more extensive sharing of information takes place.¹

¹ OECD Policy Roundtable: Improving International Co-operation In Cartel Investigations 2012

However, the anomaly with the SADC region is that despite the fact that the economies of this region are characterised by presence of numerous firms with operations across the region, the region has not been able to achieve the more intensive case related cooperation like that of the ECN but has thus far only been able to interact on a high level involving the sharing of non-confidential information and carrying out of capacity building programmes. The justification for this approach being that a lot of the agencies in the SADC region are new and therefore more emphasis has been placed on the need to provision of training to staff of these agencies by relatively experienced agencies such as those from South Africa and from even more experienced agencies in developed countries. However, a number of SADC member states, such as Zambia, Botswana, Namibia and Mauritius are now already undertaking more demanding forms of investigations, such as dawn raids and interrogations of individuals. Therefore, there is currently a growing need to evolve to the next level of cooperation beyond capacity building to joint investigations of cases.

4. The pull factors that drive cooperation

4.1 The multiplicity of penalties

As noted above, the pull factors are those which come from outside the agency. These emanate from the benefits accruing to regulated firms as a result of inter-jurisdictional cooperation.

Unlike merger notifications proceedings, which are authorisation proceedings, cartel investigations are prosecutorial and there is an inherent incentive for firms to minimise the number of jurisdictions where they are exposed to prosecution. This consideration skews the regulated firms' preference towards less coordination between competition authorities. However, there are pull factors which favour multijurisdictional cooperation in anti-cartel enforcement. The issue of exposure to multiple fines on the same turnover is one such pull factor in favour of multijurisdictional cooperation. This is particularly important from a South African perspective since the relevant fining provision of the Competition Act No. 89 of 1998, as amended, namely section 59(2) provides that the penalty may not exceed 10% of the annual turnover of the firm in the Republic of South Africa including *exports from the Republic of South Africa*. This effectively means that the penalties that can be levied by South African competition authorities are calculated not only in respect of sales in South Africa but also includes sales into other states. The fact that when penalising firms the South African competition authority do not take into account penalties levied or yet to be levied in other jurisdictions is another form of negative externality and constitute a form of a pull factor calling for cooperation between states in order to avoid crippling the very entities

that are being regulated by failing to take into account the penalties levied by other authorities. It is important to note that this may call for a much more extensive form of cooperation.

4.2 Adoption and harmonisation of leniency programmes

Adoption and harmonisation of leniency programmes is important for jurisdictions seeking to cooperate with each other. This is a significant benefit to firms since it means the same documentary evidence used to file a leniency application with one jurisdiction can be used in another jurisdiction without more or less compliance requirement and the same criteria for qualifying for leniency will apply. This reduces the risk that a firm will become a successful leniency applicant in one state and not in another due to being pre-empted by another firm as result of delays in preparation of sufficient application for the second state or for failure to meet a criteria unique to that state's leniency programme.

A good leniency programme is one of the best tools for the detection and combating of cartels. While there are widely-accepted views as to what a good leniency programme should include, there are divergent approaches in different jurisdictions to leniency programmes. Competition Authorities recognise the need for the universal adoption of and harmonisation of formal leniency policies in all jurisdictions. In recognition of sovereignty, harmonisation is sought rather than standardisation. Leniency programmes need not be identical but ought to aid and not hinder each other.

5. Hindrances to the achievement of effective inter-jurisdictional cooperation

In this section, hindrances to the achievement of effective inter-jurisdictional cooperation are identified for both push factors and pull factors in the SADC region.

5.1 Lack of trust

The SADC countries have a number of multinational companies with either a local presence in each country or, if no local presence, that supply their products to customers located in various SADC countries from locations within the SADC region.

The hindrance relating to the first driver towards inter-jurisdictional cooperation emanates from lack of trust between competition authorities in the region. Lack of trust can be divided into two. Firstly, there is lack of trust which relates to differences in the *boni mores* of different states concerning cartel conduct. In some countries the attitudes towards cartel conduct may not have developed to the stage where cartel conduct vitiates against good morals. This could discourage cooperation in that one agency may be reluctant to share information with another agency if it perceives that the information will not be accorded the

value it requires. This could range from total disregard by the receiving agency of the information provided to lack of interest in coordinating investigation of the cartel conduct such as conducting joint dawn raids, especially if the receiving agency does not perceive the information as sufficient to warrant a dawn raid.

The fact that some SADC member states have not yet even established their own competition authorities could be an indication that competition law issues do not yet feature prominently in their societies as concerns that require urgent attention. What compounds this form of lack of trust is that with regard to cartel investigations there is a strategic necessity to initially keep information about an investigation surreptitious, especially when a dawn raid is contemplated. Therefore, sharing information with a jurisdiction which does not have the same attitude to cartel conduct could put the investigation at risk. The receiving agency may simply decide to send an information request to cartelist and consequently thwart the investigation strategy of the agency that has provided the information with the aim of coordinating a dawn raid.

Fortunately, from interactions with most states in the SADC region which have set up their own competition authorities this has not been found to be the case. There is an agreement that cartels are the most egregious form of anticompetitive conduct and should be dealt with in the most decisive manner.

The second element which contributes to lack of trust is lack of familiarity with the processes for the safeguarding of confidential information that exists in other agencies. The Competition Commission of South Africa has taken proactive steps to learn about the processes of other SADC member states. In 2016 South Africa sent selected staff members to SADC agencies including Mauritius and Namibia to assist in actual case investigations including preparation and execution of dawn raids. This has assisted in knowing the internal processes of these agencies in order to strengthen trust of these institutions and to establish relationships of trust with its employees.

South Africa believes that cooperation with neighbouring states where a large number of South African firms have operations should evolve to case coordination as the most effective way to internalise the negative externality arising from individualistic enforcement since this will limit the avenue available to firms to conceal evidence of collusion while at the same time ensuring that there is consistent treatment of cartel conduct across the region. In the words of Ioannis Lianos, South Africa hopes that “... *the long history of interaction of these*

actors and their collective memory” will be a source of trust.² In addition, “Geographic proximity, common language, shared values and preferences facilitate interaction and thus build a certain level of “personal trust” between the different actors.”³

Ideally South Africa would like to see the coordinated investigations that took place in 2007 being repeated in the SADC region. In 2007, following discussions, the Commission conducted raids in coordination with its counterparts from the European Commission and the US Department of Justice. The raids were conducted simultaneously between the three competition jurisdictions for maximum impact on a cartel involving freight forwarding companies whose reach was believed to be international. As a result of the coordination of efforts the investigation in South Africa was concluded with the signing of settlement agreements with two of the cartel members.

5.2 Establishment of fora for deepening cooperation

The SADC Cartels Working Group has already started with two important projects which run parallel to each other in order to pave the way for more intensive cooperation. The first is the review of enabling legislations of its member states with the aim of identifying existing provisions which could facilitate more intensive cooperation. In South Africa, section 82(4) of the Competition Act 89 of 1998, as amended, stipulates:

“The President may assign the Competition Commission any duty of the Republic, in terms of an international agreement relating to the purpose of the Act, to exchange information with a similar foreign agency.”

This project is also aimed at identifying areas where proposals could be made for amendments to enabling legislation in order to facilitate cooperation as a more effective way in the fight against international cartels.

The second project is the periodic sharing of information about cases being investigated by each jurisdiction, preferably as soon as the investigation is initiated in order to alert member states of cases which are suitable for joint investigation early in the life of the investigation.

5.3 The multiplicity of penalties

Barring the establishment of a single competition law enforcement agency in the SADC it does not seem there is much that can be done at this stage with respect to multiplicity of penalties on the same turnover.

² Lianos, Ioannis, Global Governance of Antitrust and the Need for a BRICS Joint Research Platform in Competition Law and Policy (August 1, 2016). CLES Research Paper Series No. 5/2016, Page 31. Available at SSRN: <https://ssrn.com/>

³ See footnote 1.

5.4 Adoption and harmonisation of leniency programmes

When states are looking at cooperating with each other in actual investigations the effectiveness of the country's own leniency programme can be affected by the lack of ability of the company to apply for leniency in other jurisdictions where it engaged in similar conduct. Risk of exposure to fines elsewhere in the world is an important factor for firms. A few SADC states with active competition regimes have not yet adopted their own corporate leniency programmes. Namibia which recently executed a dawn raid is still in the process of adopting its corporate leniency programme.

Part of the work of the SADC Cartels Working Group is to encourage its members to adopt leniency programmes as a gateway to a more meaningful information sharing of non-confidential and confidential information which is possible through waivers of confidentiality by leniency applicants that have been granted leniency in more than one jurisdiction.

6. Conclusion

There have been a lot of interactions between agencies in the SADC region but until recently this has been more at a high level involving the sharing of non-confidential information, investigation strategies and provision capacity building programmes. With the formation of the SADC Cartels Working Group, the region is gearing up for more intensive forms of cooperation relating to coordination in investigation of cases while encouraging member states to harmonise processes including the adoption of corporate leniency programmes.