

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

**REGIONAL COMPETITION AGREEMENTS: BENEFITS AND CHALLENGES
- Contribution from South Africa**

- Session III -

29 November 2018

This contribution is submitted by South Africa under Session III of the Global Forum on Competition to be held on 29-30 November 2018.

More documentation related to this discussion can be found at: oe.cd/rca.

Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

JT03440126

Regional Competition Agreements: Benefits and Challenges

-- South Africa --

1. Introduction and Background

1. There is widespread recognition across Africa that deeper regional integration and lowering of tariff and non-tariff barriers can increase trade, stimulate economic growth and foster more productive firms and industries, allowing domestic firms to become more competitive abroad and contribute greater value-add to the domestic economy.

2. South Africa is part of two regional economic communities (**RECs**), the Southern African Development Community (**SADC**) and Southern African Customs Union (**SACU**). Its membership of these RECs forms part of a broader strategy for regional integration and development across the African continent.

3. African integration efforts can be traced back to the establishment of the Organisation for African Unity in 1963. The SADC regional integration agenda forms part of a larger integration agenda expressed in the intended establishment of the Tripartite Free Trade Area (**TFTA**) which will encompass members states of the Common Market for Eastern and Southern Africa (**COMESA**), the East African Community (**EAC**) and SADC as well as the African Continental Free Trade Agreement (**AfCFTA**) which aims to create a single market for goods and people across the African continent.

4. The SADC integration agenda is primarily framed in terms of trade integration (in both goods and the movement of people) and includes the establishment of a free trade area, customs union, common market, monetary union and ultimately the introduction of a single currency.¹ The development of a common agenda for regional industrialisation flowed from the broader commitment to economic integration and the anticipated development of a regional competition policy is part of the economic policy framework to support the regional trade and industrialisation agenda.

5. In April 2015, the SADC Heads of State and Government adopted the SADC Industrialization Strategy and Roadmap 2015 – 2063 (**Strategy**). The Strategy is primarily focused on long-term economic and societal transformation of the economies within SADC. In seeking to achieve the Strategy, competitiveness and deeper regional integration; as cross-cutting issues, are elevated alongside comprehensive programmes such as trade.

6. The Strategy recognizes that industrial policy and the implementation thereof will largely be undertaken at the national level and that its success depends on forging a compact for industry consisting of government, the private sector, civil society, labour and development partners. The Strategy aims to accelerate growth momentum and enhance the comparative and competitive advantage of the economies within SADC. The Strategy is also driven by national development strategies, visions and plans along with regional instruments such as the SADC Treaty, the Regional Indicative Strategic Development Plan,

¹ SADC Integration Milestones. Available at <https://www.sadc.int/about-sadc/integration-milestones/>. Last Accessed November 2018

SADC protocols (including that on trade), and the SADC Industrial Development Policy Framework.

7. Competitiveness is one of the pillars of regional integration. There is consensus within SADC that competition policy is a key driver of growth and that there is a need to promote competition regulation in all economies within SADC and to promote greater regional cooperation to prosecute cross-border anticompetitive conduct. In this context, in 2009, the SADC Heads of State and Government signed the SADC Declaration on Regional Cooperation in Competition and Consumer Policies (**Declaration**).

8. The preamble to the Declaration explicitly states that the regional agreement to cooperate on competition and consumer policies flows from a requirement in the SADC Protocol on Trade that member states implement measures to prohibit unfair business practices and promote competition to ensure fair, equitable and mutually beneficial trade. The preamble envisages establishing a formal system of case-based cooperation over time, to be implemented in a phased manner.

9. The Declaration also established the SADC Competition and Consumer Laws and Policies Committee (**CCOPOLC**) which is tasked with, amongst other things:

- Fostering cooperation and dialogue among competition authorities aimed at encouraging soft convergence of laws and policies, analysis, common understandings and common competition culture;
- Fostering cooperation and dialogue in the field of consumer policy and facilitating further convergence in this area;
- Facilitating and coordinating capacity building and technical assistance programmes for the development and implementation of competition and consumer policy and law of SADC Member States;
- Facilitating and coordinating ways and means to deal with regional and global effects of anticompetitive practices; and
- Considering the nexus between trade, competition and consumer protection policies in promoting growth and the alleviation of poverty.

10. In recognising the importance of continuing the regional competition policy programme, the CCOPOLC resolved in June 2018 to undertake a review of the SADC Regional Cooperation Framework on Competition Laws and Policies as well as Consumer Protection Laws and Policies. This is in line with the objectives set out in the Strategy of developing a regional competition and consumer protection policy by 2020 with full implementation envisaged between 2021 and 2030. This review is still underway.

11. In practice, and despite the existence of the SADC regional cooperation agreement, bilateral agreements remain the prevailing form of cooperation within the SADC REC. Bilateral cooperation agreements between agencies (in the form of Memorandums of Understanding) have played a significant role in promoting the development of competition policy as well as building strong enforcement institutions through capacity building initiatives. These bilateral agreements are, by definition, limited in their effect. Greater multilateral cooperation through RCAs is required for better collaboration on competition across Africa, especially within the context of greater regional economic integration. This will become apparent in the discussion of key cases that follows.

12. The most effective multilateral cooperation tools within the framework of the SADC RCA are arguably the two Working Groups established for Mergers and Cartels in order to facilitate the development of joint positions on the enforcement of competition law. These Working Groups meet annually for regional capacity building workshops and provide a forum for the discussion and development of common enforcement principles.

13. Over and above the SADC REC, there are several other RECs on the African continent. The Africa Regional Integration Index Report (2016)² noted that of the 54 countries recognised by the African Union (AU) on the African continent, most countries belong to one or more AU-recognised RECs. These are:

- SADC;
- Community of Sahel–Saharan States (**CEN–SAD**);
- Common Market for Eastern and Southern Africa (**COMESA**);
- East African Community (**EAC**);
- Economic Community of Central African States (**ECCAS**);
- Economic Community of West African States (**ECOWAS**);
- Intergovernmental Authority on Development (**IGAD**); and
- Arab Maghreb Union (**UMA**).

14. With respect to the prevalence of competition authorities across the continent, the World Bank/African Competition Forum Report of 2016 states that 27 of the 54 countries on the African continent have some form of competition framework, be it legislation only, or the requisite legislation with institutions to enforce competition laws. This number has likely increased as Nigeria and Angola have recently introduced domestic competition legislation. Looking at SADC countries, 15 out of the 16 countries already have competition legislation with the last, Lesotho, in the process of drafting its legislation.

15. Although some of the regional agreements of the RECs on the African continent make specific reference to competition regulation, some do not, making competition enforcement across the RECs inconsistent, especially where no specific enforcement or cooperation mechanisms are in place.

16. The RECs are also in various stages of development with respect to the establishment of regional competition bodies. SADC does not yet have regional legislative instruments and institutions with jurisdiction over competition regulation and enforcement while COMESA has a relatively well-established authority that commenced operations in 2013. The COMESA Competition Commission has already worked on several cross-border mergers and investigations. The East African Competition Authority is also more advanced than SADC but less so than COMESA. It appointed five commissioners in 2016 and has recently started operating with an initial focus on market studies. The integration of these institutions will be a notable challenge in the future establishment of a regional authority in the TFTA, should this come to pass.

17. The challenge of crafting a RCA across the TFTA is further exacerbated by the fact that some countries have overlapping membership of several economic communities (Table 1). For example, Tanzania is part of the EAC and SADC but not of COMESA while

² https://www.uneca.org/sites/default/files/PublicationFiles/arij-report2016_en_web.pdf

Kenya is part of EAC and COMESA but not of SADC. Careful thought must thus be given to the question of overlapping jurisdiction of regional institutions and how this will be addressed to avoid the burden of multiple merger filings and the challenge of concurrent overlapping investigations.

Table 1. TFTA Member States

Member State	COMESA	EAC	SADC
1. Angola	No	No	Yes
2. Botswana	No	No	Yes
3. Burundi	Yes	Yes	No
4. The Comoros	Yes	No	Yes
5. Democratic Republic of Congo	Yes	No	Yes
6. Djibouti	Yes	No	No
7. Egypt	Yes	No	No
8. Eritrea	Yes	No	No
9. Ethiopia	Yes	No	No
10. Kenya	Yes	Yes	No
11. Lesotho	No	No	Yes
12. Libya	Yes	No	No
13. Madagascar	Yes	No	Yes
14. Malawi	Yes	No	Yes
15. Mauritius	Yes	No	Yes
16. Mozambique	No	No	Yes
17. Namibia	No	No	Yes
18. Rwanda	Yes	Yes	No
19. South Africa	No	No	Yes
20. Sudan	Yes	Yes	No
21. Swaziland	Yes	No	Yes
22. Seychelles	Yes	No	Yes
23. Tanzania	No	Yes	Yes
24. Uganda	Yes	No	No
25. Zambia	Yes	No	Yes
26. Zimbabwe	Yes	No	Yes

2. Challenges to RCAs

18. Cooperation agreements across member states and RECs are informed by broader economic integration agenda within the region and primarily by the objectives for increased trade within a larger market. Therefore, at times, based on these priorities and objectives, competition policy may find itself as secondary. However, it appears that many countries (at least in SADC) have recognised the importance of competition regulation in economic development and the broader objectives of regional economic integration.

19. As stated above, the fact that there are many RECs that exist and that countries may be members to more than one of these may cause overlaps. In this regard, the various initiatives that exist and the multiplicity of goals and objectives may cause confusion. Authorities may also find that they need to enter in several RCAs and if these are not aligned, this may make them ineffective.

20. It should also be noted that the developmental goals of each country may also influence their willingness and ability to enter into and implement RCAs. The uneven levels of development in the African RECs will certainly affect the effectiveness of RCAs. Further, there exist imbalances in the capacity and resources between authorities in the region which has also played a role in hindering regional cooperation.

21. Another factor that remains a major obstacle for RCAs is that without an alignment of the underlying domestic and regional legislative frameworks, the RCAs that exist (such as the SADC Declaration) will remain limited in their application and effectiveness. The CCOPOLC in its current review is considering how alignment between national and regional competition laws can be improved.

22. Finally, cooperation agreements are also limited by domestic laws and regulations that restrict the sharing of confidential information and in some instances how competition authorities can interact in carrying out their enforcement mandates.

3. Case Studies: Enforcement record across SADC emphasises the potential benefits of a more effective cooperation within the region

23. The Competition Commission of South Africa has uncovered several cartels involving firms that either operate within other SADC states or where the South African cartel may have had an effect on the economy of another SADC member state. These include cartels in fertiliser, steel, cement, forex and the bread and milling cartels. Despite the fact that these cartels may have operated in or had an effect in other SADC states, the cartels were not widely prosecuted (see below). More effective cooperation within the context of the existing regional competition agreement may have uncovered the regional effects of these cartels and paved the way for wider prosecution.

24. Examples of the cartels with cross-border effects include:

- **Fertiliser Cartel** – apart from the CCSA only the Competition and Consumer Protection Commission of Zambia initiated a similar investigation, notwithstanding the fact that some of the firms implicated operate in the region or are exporters into the region.
- **Steel Cartel** – apart from the CCSA no other competition authority in SADC undertook a similar investigation notwithstanding the fact that some of the firms implicated operate in the region or are exporters into the region.
- **Cement Cartel** – apart from the CCSA, the Namibian, Tanzanian and Zimbabwean competition authorities investigated similar or related cartels, notwithstanding that this cartel was in fact uncovered across the globe and the implicated firms operate throughout the continent.
- **Construction Cartel** – apart from the CCSA no other SADC member state has instituted an investigation similar to this against any of the named firms despite the fact that they have operations across the continent.
- **Bread/Flour/Wheat Milling Cartel** – this cartel was only investigated and successfully prosecuted by the competition authorities of South Africa.
- **Forex banking cartel** – this is another global cartel in which to date only the CCSA has initiated an investigation and is engaged in prosecution within the region.

25. Another area in which greater regional cooperation would be advantageous relates to mergers and acquisitions. Many member states across the RECs have dealt with significant cross-border mergers but have done so independently and different (or no) conditions have been attached to the mergers in different jurisdictions. A regional assessment and a more aligned approach may have resulted in the imposition of conditions advantageous to other member states. These mergers include:

- **Walmart/Massmart transaction** – this transaction was notified in South Africa, Tanzania, Namibia, Malawi, Swaziland and Zambia. Only Namibia and South Africa approved the transaction subject to conditions.
- **Coca-Cola bottling transactions** – this transaction was notified in South Africa, Botswana, Tanzania, Namibia, Kenya and COMESA and only South Africa approved the transaction with conditions.
- **AB InBev/SAB** – this transaction was notified in South Africa, Botswana, Ethiopia, Kenya, Namibia, Swaziland, Tanzania, Malawi, Zambia and Zimbabwe and at least seven of these countries approved the merger subject to conditions.
- **Bayer/Monsanto** - this transaction was notified in South Africa, Kenya, Tanzania and COMESA. The transactions were approved subject to conditions in South Africa and COMESA.
- **Dow/DuPont** – this transaction was notified in South Africa and COMESA. South Africa approved the merger and imposed conditions whereas COMESA did not.