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REGIONAL COMPETITION AGREEMENTS: BENEFITS AND CHALLENGES

Contribution from Kenya

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Regional Competition Agreements: Benefits and Challenges

-- Kenya --

1. Background

1. The Competition Authority of Kenya ('the Authority') is a statutory agency mandated to;
 - Enhance the welfare of the people of Kenya by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct; and
 - Offer advisory services to Government and liaise with regulatory bodies, including COMESA and EAC.
2. In this contribution, we focus on the function of liaising with regulatory bodies namely; COMESA Competition Commission (CCC) and East Africa Community Competition Authority (EACCA). This liaison is of a formal nature with the Authority.
3. We will also focus on the African Competition Forum (ACF), a network of competition agencies. The agencies in the network have generally 'informal' working arrangements.

2. Legal frameworks

4. The law mandates the Authority to participate in deliberations and proceedings of among others, regulatory authorities and other bodies in relation to competition and consumer welfare.
5. Further, the Authority has powers to promote co-operation and provide for exchange of information with any body charged with public regulation within a particular sector of the economy.
6. Due to the challenge of double notification by parties, the Competition Act No. 12 of 2010 was amended in 2016 in order to, among other things, allow for filing of cross-border merger cases.

3. COMESA Competition Commission (CCC)

7. The CCC is a regional body established under Article 6 of the COMESA Competition Regulations.
8. The Commission's core mandate is to enforce the provisions of the Regulations with regard to trade between Member States and promote competition within the Common Market through monitoring and investigating anti-competitive practices of undertakings within the Common Market and mediating disputes between Member States concerning anti-competitive conduct.

4. The East African Community Competition Authority (EACCA)

9. The EAC Customs Union member states include Kenya, Uganda, Tanzania, Rwanda, South Sudan and Burundi.

10. The co-operation envisaged in the EAC is broad based, covering trade, investments and industrial development; monetary and fiscal affairs; infrastructure and services; human resources, science and technology; agriculture and food security; environment and natural resources management; tourism and wildlife management; and health, social and cultural activities (EAC Establishment Treaty, 2002).

11. Under the Customs and Trade Protocol the EACCA is established to co-operate with the regional and international organizations and with foreign competition authorities.

12. The EAC Competition Act of 2006, is an Act of the Community to promote and protect fair competition in the Community, to provide for consumer welfare, to establish the East African Community Competition Authority and for related matters.

5. African Competition Forum (ACF)

13. The ACF is a network of national and regional competition authorities, launched in March 2011 as a network of competition authorities in African countries. The network is comprised of 31 national competition agencies.

14. 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.

6. Considerations to enter into a Regional Competition Agreement

15. There are two forms of co-operation that the Authority is engaged in;

- Formal
- Informal

6.1. Formal Co-Operation

16. Formal co-operations are entered into as national obligations with the main aim of promoting trade and investment among the member states. In order to deepen the competition culture EAC and COMESA are the two such arrangements that the Authority has engaged in.

17. Formal regional agreements have not made much progress in terms of competition due to bureaucracy that delays decision making. For instance, the Commissioner representing Kenya at COMESA Commission is appointed by the Ministry of Industry, Trade and Co-operatives, whose main agenda is to promote trade. Therefore, when a competition issue arises the matter would be referred to another agency first.

6.2. Informal Co-operation

18. Informal co-operations, on the other hand, are entered into by mutual agreements among the participating parties, with the main objective of promoting competition. For instance, the ACF was formed for the sole reason of promoting and building capacity among regulatory bodies of the member states. There is very little bureaucracy in this informal setting.

19. In a bid to deliver on its mandate, the Authority has entered into formal agreements with two competition regulators in Africa – South Africa Competition Commission (SACC) and COMESA Competition Commission (CCC).

20. The main objectives of these agreements are;

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

7. Benefits of entering into a Regional Competition Agreement (RCA)

21. **Information Sharing** - The collaboration between the Authority and the CCC has enabled sharing of information. It enhances enforcement capacity by sharing information on cross border restricted trade practices and merger cases. In addition to this, it helps fast track of investigations that have a cross border dimension. This in turn saves time and cost of finalizing cases due to the fact that information is readily available that can inform decisions.

22. **Joint Market Studies** - The ACF, through the member states conducted a cross border study and published the findings on Competition in the Construction sector. This was an area of interest among all the states, whereby the study was financed by all members. Data collection and analysis was done by the participating agencies. In the financial year 2017/18, the Authority conducted a regional study on shipping and trucking, where CCC facilitated the fieldwork in Uganda, Rwanda and Burundi on behalf of the Authority.

23. **Common understanding in enforcement of competition related Issues** - The agencies offer assistance to each other in enforcing their activities to the extent compatible with their respective competition laws and the respective interests, and within the reasonably available resources. It also avails an opportunity for the partners to apply international best practices in enforcement. For instance, the Authority has helped CCC to define the cross border merger thresholds as well develop regulations to inform the guidelines.

24. **Technical Assistance and Capacity Building** – In the financial year 2017/18, SACC hosted two of the Authority’s staff for an exchange programme for two months. The staff acquired knowledge on various departments of SACC that they have been able to transfer to the Authority. In addition to this, in the development of the Merger Threshold Rules, the Authority gathered information from SACC and CCC to inform the process. In October 2018, COMESA approached the Authority to provide capacity building for Sudan Competition Council that is in the process of being set up. The Authority has been and continues to participate in Cartels and Mergers workshops organized by CCC.

8. Obstacles and challenges to a successful RCA

25. **Asymmetrical Priorities** – Regional objectives may conflict with National objectives. For instance, if the Government of Kenya changes its policy on competition, then the enforcement activities will be curtailed, and this may affect the cross-border trade with the other member states. A difference also comes where the member states are not involved in the planning process and therefore, prioritization of the activities is left to only a few members. For co-ordination purposes between Kenya and CCC, a memorandum of understanding was signed and one of the ways it is implemented is through drafting of a mutual work plan, in order to co-ordinate activities.

26. **Dual Membership** - Some of the COMESA member states also belong to EAC, for instance Kenya, Rwanda, Burundi and Uganda. This means that once the EACCA becomes operational, the cases of double notification with regional regulatory bodies would seem inevitable. There will be need for regulations to guide the operationalization of competition activities and avoid creating a *lacuna* that causes anti-competitive behaviour.

27. **Enforcement Capability Constraints** – Some of the agencies are more developed than others in terms of technical capacity and resources while others have no legislative framework in place. This presents a challenge to the already established agencies, expected to collaborate with these younger agencies, especially in terms of unenforceable decisions arising from conflicting analysis of cross border cases.

28. **Lack of Established Focus Points** - Some of the COMESA member states have developed rules and regulations but have not yet established institutions to enforce them. While this makes it difficult to regulate competition within these jurisdiction, it also affects the way cross-border cases are handled and decisions are arrived at. The RCA can contribute to the creation of these institutions as it has a stronger bargaining power. For instance within the EAC, only Kenya and Tanzania have established competition agencies.

9. Opportunities/Remedies

29. Creation of harmonized legal and institutional frameworks to enforce competition law and policy.

30. Foster collaboration and co-operation between agencies to build capacity and share experiences, information exchange, co-ordination in handling cases and international best practices.

31. Setting clear merger thresholds between CCC, EACCA and national agencies to avoid double notification.

10. An example of a cross-border collaboration case with decisions

32. The proposed transaction involved the acquisition of 100% shares in ENGEN International Holdings (Mauritius) Limited (ENGEN INT) by VIVO Energy Holding B.V. (VIVO Energy), from ENGEN Holdings (Pty) (ENGEN). The transaction met both the Thresholds for notification in Kenya and also COMESA where parties have operations in more than one COMESA member state.

33. Both parties are involved in the distribution and sales of refined petroleum products; being the importation, storage and retailing of refined petroleum products such as fuels and lubricants through a network of retail outlets (Retail stations) as well as to various commercial and industrial customers. Therefore, the relevant product markets for the proposed transaction were the markets for; the importation of Petroleum Products and the downstream market of retail of Petroleum products.

34. A field survey conducted to establish the likelihood of the proposed transaction lessening or preventing competition in the retail market for petroleum products established fifteen (15) regional markets. These markets were defined according to local characteristics with the retail of petroleum products being structured along strategic routes, depending on commuter patterns, traffic flows, main types of vehicles and retail outlet characteristics and offering.

35. Based on the analysis, two retail markets were likely to raise significant competition concerns since the merger would lead to acquisition of a dominant position. Additionally, the barriers to entry were significantly very high considering the lack of readily available land in these markets, current infrastructure and road set up.

11. Collaboration with CCC

36. During the review of the VIVO/ENGEN merger, the Authority coordinated with CCC in the definition of relevant market.

37. There was also collaboration in coming up with the remedies.

38. CCC put a condition on non-soliciting of employees from the target for a period of three (3) years, although the Authority had approved the merger on condition that VIVO takes up all of ENGEN's employees.

39. The conditional approval granted by CCC presented some challenges in terms of implementation and monitoring in the Kenyan market.

12. The Authority's decision

40. CCC's decision indicated that ENGEN continues to supply lubricants in the Kenyan market yet, VIVO had fully acquired most of the retail stations. However, the Authority had not established any competition concern in this market segment. Further, the licensing agreements between Shell and VIVO would prohibit them from stocking competing products. The Authority, in its analysis observed that in a previous transaction involving Total and Chevron, although Chevron had exited the market for lubricants, it was able to adequately re-enter the Kenyan market.

41. In regard to public interest considerations and specifically on Small Medium Enterprises (SMEs) (pharmacies, food joints, car wash, tyre centres among others), the parties were directed to honour all the existing agreements

42. To avoid any likely negative impact on competition the transaction was approved on condition that, the merged entity divests the retail stations to a player currently not operating along that area or to a new entrant.