

## Challenges of Cross – border Cartel Enforcement

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### Abstract

*During the past decades, Cartels have always and are still a headache to competition law authorities and to the entire Law community. We can relate back to the history of the United States (1890 evolution of antitrust law in the USA) where we trace the evolution and history of Competition/Antitrust Law as the name differs from one country to another. Our focus in this paper is basically aimed at primarily exploring what cartels and cross-border cartels are all about?, the challenges that exist in the domain of cross-border cartel enforcement, and secondly examining what has been done so far by the European Committee, African Committee ( that's what has been done so far by the African continent) to minimize the challenges of cross-border cartel enforcement. And at the end we shall also bring in some suggestions.*

### I- Introduction

Competition Law aims at preserving and maintaining the integrity of free markets. Maintaining competition in the market has two aims or rather let's call it benefits; firstly, it protects consumers from companies<sup>1</sup> that may at times seek or use market power to raise and fix prices and reduce output, secondly competition promotes productivity growth. This is achieved through the fact that competition imposes rivalry among companies to succeed in gaining business of customers which in turn lead to faster economic growth<sup>2</sup>.

Worldwide more and more jurisdictions are applying competition Law. Although some substantive elements in the law may vary from one country to another, procedures vary even more, regimes are remarkably similar. Some common elements include prohibition against cartels, review of mergers based primarily or exclusively on their effects on competition, and the ability to take actions against firms with market power that may be deemed as anti-competitive behavior<sup>3</sup>.

The dissemination of competition law and competition enforcement authorities, is an extremely great and positive development in most countries around the world and the OECD Competition Committee has played a big role in this development<sup>4</sup>. It is important to note that competition law is a key to preserving the benefits of a market operation at all levels, in the global value chain. It actually protects the global value chain from effects of restrictions on competition<sup>5</sup>, that raise market power and inefficiently increase cost down the value chain.

Furthermore, the fact that international trade has increased dramatically since the year 1990<sup>6</sup>, I think the enforcement of competition law is important and a very vital primary exercise in each country of the world. The increasingly cross-border dimension of many business activities<sup>7</sup>, alongside with the increase in the percentage of competition authorities, this creates additional complexity for cases with a multi-jurisdictional element. This factor of complexity actually creates a lot of challenges for the effectiveness and consistency of competition law<sup>8</sup>.

<sup>1</sup> Challenges of International Co-operation in Competition Law Enforcement, pub. 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>2</sup> Challenges of International Co-operation in Competition Law Enforcement, pub. 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>3</sup> Challenges of International Co-operation in Competition Law Enforcement, pub. 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>4</sup> Challenges of International Co-operation in Competition Law Enforcement, pub. 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>6</sup> Challenges of International Co-operation in Competition Law Enforcement, pub. 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>7</sup> Challenges of International Co-operation in Competition Law Enforcement, pub. 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>8</sup> Challenges of International Co-operation in Competition Law Enforcement, pub. 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

We can briefly site the example of a case where multiple authorities have to investigate the same cartel or merger case. The aspect of multi-jurisdictional impacts which is often focused on the duplication of administrative costs<sup>9</sup>. The complexity of coordinating the case because it is in the hands of two different jurisdictions. In the paragraphs that precede we shall discuss and analyze in a more detailed manner about the challenges of cross-border cartel enforcement<sup>10</sup>. And we cannot do so without discussing about cartels as a whole or what they consist of.

## II-BRIEF HISTORICAL BACKGROUND ON CARTELS

### 1-Concept of Cartel

A cartel can be defined as a formal or informal agreement between a number of oligopolistic firms to exploit and share the market, they often do this by defining common prices of their goods<sup>11</sup>.

Furthermore, cartels are a form of collaborative activity between firms in an oligopolistic industry with the aim of monopoly pricing, sharing of the market, imposing uniform sales or let's rather say fixing prices<sup>12</sup>.

In the economic and market domain cartels are considered the worst form of market agreements, this is because there are no economies of scale in this kind of monopoly, and the policy protection of competition is weak<sup>13</sup>.

A cartel also means a number of companies who come together to control the supply, as well as the price of a commodity<sup>14</sup> in which they collectively own the majority of the market shares within that market. We shall go further and site some common characteristics of cartel.

### 2-Types of Cartels.

#### a-Public cartel

Where a government is involved to enforce a cartel agreement, and the government's sovereignty shields such as cartels from legal action, this is explained through the following:

##### i-Depression Cartel

This is permitted in many countries, in this case industries deemed to be requiring price and production stability or to permit rationalization of industry structure and excess capacity. For example, in Japan the arrangements permitted for steel, aluminum melting, ship building and chemical industries. They draw their genesis from the Great Depression, when some cartels were allowed in a bid to bring about price and productivity stability.

##### ii-International Commodity Arrangement:

There are products such as coffee, sugar, tin and more recently oil (OPEC) which are typical examples of products that will fall in the international business domain; therefore, they can also become international cartels with public entailed agreements, between different national governments.

##### iii-Crisis Cartel

These are organized by the government in certain countries, particularly for various industries or products in different countries, in order to fix prices and ration production especially in periods of acute shortage. The next kind of cartel we shall examine is the private cartel.

#### b- Private Cartels:

These group of cartels are subject to legal liability under most anti-trust laws. Their primary purpose is to benefit uniquely those who constitute or are part of the agreement. Private cartels are agreements on terms and conditions that provide members with mutual benefits, but these advantages may not be known or detected by outsiders or parties that are not party to this agreement.

## 3- Common characteristics of Cartels

<sup>9</sup> Challenges of International Co-operation in Competition Law Enforcement, pub. 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>10</sup> Challenges of International Co-operation in Competition Law Enforcement, pub. 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>11</sup> What is a cartel? 2019 Home >>Accounting Dictionary >>[www.myaccountcourse.com](http://www.myaccountcourse.com)

<sup>12</sup> What is a cartel? 2019 Home >>Accounting Dictionary >>[www.myaccountcourse.com](http://www.myaccountcourse.com)

<sup>13</sup> What is a cartel? 2019 Home >>Accounting Dictionary >>[www.myaccountcourse.com](http://www.myaccountcourse.com)

<sup>14</sup> What is a cartel? 2019 Home >>Accounting Dictionary >>[www.myaccountcourse.com](http://www.myaccountcourse.com)

Cartels are considered as a group of firms that decide to act together in the market. They have a common characteristic which is firstly that they function in secrecy. Considering the fact that they exist secretly it is hard and very difficult for competition authorities to track them down or bring evidence to proof the existence of cartels.

Secondly the members of a cartel often seek and strive to camouflage both their existence and activities in a bid to avoid detection by competition authorities. Furthermore, cartels also have the characteristic of perpetuation of cartels which is maintained through retaliation threats. For example, if any member cheats, the cartel members retaliate, this could be through temporary price cuts, to take business away from that partner or can isolate the cheating member<sup>15</sup>.

Cartels also have another characteristic which is known as the compensation scheme, this method is resorted in order to discourage cheating. Under this scheme if a member of a cartel was found to have sold more than its allocated shares, it would have to compensate the other members<sup>16</sup>.

Moreover, we have analyzed cartels by defining what cartels are all about, giving their characteristics and also listing some types of cartels that exist, actually we could not write this paper without giving an overview of what a cartel is and this is in a bid to help any reader who takes up this paper without any knowledge on what competition law is or better still what a cartel is will not be lost while reading. We shall precede by examining and analyzing the challenges of cross-border cartel enforcement which is our main focus in this research paper.

### III- CROSS-BORDER CARTEL

#### The Concept of cross-border cartel.

Firstly, cartels can either be at the domestic level (national level) or at the international level (cross-border). A cross-border cartel involves illegal behavior by companies belonging to two different countries or rather two jurisdictions. The average number of cross-border cartels per year has greatly increased since the 1990's. When the word cross-border is used it simply implies that the cartel agreement is international. In any cross-border cartel case there are two jurisdictions involved, two competition enforcement authorities involved, and also two different laws applicable in this case or even more. Taking all these into consideration, it is practically normal for there to be a lot of challenges in enforcing cross-border cartel.

#### 2-Challenges of cross-border cartel enforcement.

In this section of our work we shall give an analysis of some challenges faced in the field of cross-border cartel enforcement.

##### a-Non co-operation of Competition enforcement authorities

In a case where competition enforcement authorities do not co-operate effectively in order to investigate a case or a cartel, its harmful activities could go unpunished. In the field of cross-border cartel enforcement, there is a need for authorities to investigate into the case and get more proofs and details about the case. And it is quite important for the authorities involved to co-operate in order to facilitate investigation.

Some International cartels are beyond the effective reach of laws in the countries where they have their most pernicious effect. A good example can be illustrated by the **beer market in Africa**, in several deals large or dominant beer companies decided to divide the continent up, with each given a near-monopoly in its own set of countries<sup>17</sup>. This is due to the fact that there may be national anti-trust laws but none covering the African continent<sup>18</sup>.

Some countries specifically exempt cartels from the competition law framework, meanwhile others will only investigate cartels if they have an adverse effect on their jurisdiction. Even though most of such agreements serve as a legitimate marketing system than as cartels, when export cartels have more market power, the effects can be substantial. This is illustrated by an estimate made by Jenny, she estimates that between 2011 and 2020, China will pay an average overcharge of about US\$900 million per year, as a charge or fine for cartelization of the potash export market<sup>19</sup>.

<sup>15</sup> Dr. V. K. Agarwal, Bharata's Competition Act, 2002, Bharat publishing House, New Delhi ed.2012.

<sup>16</sup> S. M. Dugar & U. P. Mathur, S M. Dugar's Guide to Competition Law 5<sup>th</sup> ed., Lexis – Nexis, New Delhi.

<sup>17</sup> Philippe Perdrix <<Le marche de la biere africaine monte en pression>> Jeune Afrique 10/09/2008.

<sup>18</sup> Philippe Perdrix <<Le marche de la biere africaine monte en pression>> Jeune Afrique 10/09/2008.

<sup>19</sup> Jenny, Federic, Export Cartels in Primary Products: The Potash Case in Perspective in trade, Competition and the pricing of commodities, 99, Simon J. Evenett and Federic Jenny, eds. February 2012. Available at <https://ssrn.com/abstract=206486>

Moreover, the little or total absence of co-operation between authorities, during investigations might in practice cause one party to be unable to obtain the information it needs from overseas authorities, especially if the headquarters of the company its investigating are found elsewhere. And also, where the witnesses to the case are in another jurisdiction. There is also concern about sharing important information especially confidential information across borders that can restrict the sharing of such information. Feasible forms of co-operation can be affected by the type of enforcement regime available for cartels, including whether a regime has criminal or civil/ administrative systems in place and whether there is recourse to private action against cartels.

The fact that co-operation between authorities involves the sharing of information, and one of the consequences of refusal to share information is that many countries in which consumers have suffered harm, from a global cartel are not able to prosecute the cartel for violation that has occurred according to the laws of the countries. In fact, some countries in which violations occur may not have access to necessary evidence, which is needed to determine the guilt or innocence of the parties involved.

It is important to note that since the 1990's the OECD has played a very important role in resolving and consolidating the factor of co-operation in cross-border cartel enforcement. This can be illustrated by the case of **Kodak and Fuji**; brief facts of the case show that during the post 1945 period, Fuji was able to solidify its position in the Japanese film market, arguably assisted by Japan's tariffs on imports of photographic film and paper. When Japan began to reduce these tariffs until they were eventually eliminated in 1994, Kodak undertook numerous promotional efforts in Japan. Despite these efforts Kodak's share of the Japanese market remained virtually unchanged. Subsequently Kodak blamed its lack of success in Japan on Fuji, by claiming Fuji was using its dominant position in the Japanese market to prevent other distributors from dealing with foreign competitors. In this case there was no cooperation, to provide the elements to proof Fuji's dominant position.

Moreover, Kodak charged that the Japanese government had tolerated and actively encouraged Fuji's anti-competitive practices. A trade claim was filed by the US government against the Japanese government over alleged restrictions of market access to non-Japanese film producing companies. The trade dispute brought by the US government under the WTO dispute resolution system was the first example of a new international legal approach for resolving international competition law disputes<sup>20</sup>.

Finally, many cartels remain undiscovered due to the lack of co-operation, therefore non-co-operation is a very important factor and it is a great challenge to cross-border cartel enforcement.

#### **b-The cost of investigations.**

There is some certainty about the challenges of cross-border cartel enforcement which is that the challenges are inter related, it's like a chain of affairs very inter related. This is because due the absence of effective co-operation, it may occur that multiple jurisdictions repeat the same investigative steps, resulting to extra cost. This is in relation to investigations for cartels and costs to competition authorities. Co-operation saves both parties from unnecessary duplication as far as investigation steps are concerned. International co-operation will always minimize the cost and expenditures of investigating cartel cases<sup>21</sup>.

#### **c-Time consuming Aspect**

As already mentioned above the factor of non-co-operation between competition law authorities and jurisdictions leads to other secondary challenges, such as the time-consuming factor. As a general rule, international cases are often time consuming, so talking about cartels, it is very obvious that there is a time-consuming challenge, due to the fact that cross-border cartel enforcement is in the hands of two or two or more countries and eventually different jurisdictions.

In the case of a cross-border cartel enforcement, the competition law authorities need to investigate; what if one of the parties is not willing to carry out investigations at a point in time but the other party is willing and ready to? This means one party has to work at the pace of the other party, which is very time consuming given the fact that that jurisdiction does not only have that case to handle they have other responsibilities, so it is very contradictory and complicated.

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<sup>20</sup>See WTO Panel Report, Japan – Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R, adopted 22 April 1998, DSR 1998: IV,1179.

<sup>21</sup>See [www.internationalcompetitionnetwork.org/](http://www.internationalcompetitionnetwork.org/).

Furthermore, given the fact that cartels are often very secret, investigating and getting proof of their existence is a difficult task even at the national level, so we can all imagine how time consuming it can be for competition authorities to investigate, and assemble all the proofs they need in order to file a case in court especially if the company is found in another country or in another jurisdiction.

In the law domain, cartel cases are naturally time consuming, despite the fact that they may not be as complicated as cross-border cartel investigations. Cartels are highly secretive due to the fact that most competition law regimes in the world, sanction it as a crime against the natural flow of competition.

#### **d- Lack of Evidence or Insufficient evidence**

Cross-border cartels exhibit a substantial scope for co-operation between competition law authorities<sup>22</sup>, for example during investigation and collection of evidence it is important that the evidence be collected through raids<sup>23</sup> in locations where the evidence is kept, which is often in the corporate headquarters but at times it can be found in regional headquarters or other locations<sup>24</sup>. Given there is a situation in which there is lack of co-operation between authorities to organize raids to obtain evidence, there will obviously be little or no evidence.

Furthermore, distance can also affect negatively the collection of evidence; this applies to the case of cross-border cartels in cases where the cartel been investigated is found in another country or jurisdiction. The other party may have difficulties in collecting evidence needed by the court (the case of some developing countries) thus making it a challenge in the process of cross-border cartel enforcement.

In addition, lack of evidence may also be because of one party's refusal to share evidence with the other party, finally and once more all this ties down to the issue of non-co-operation.

#### **e- A difference in substantive rules**

Many multi-national companies are accustomed to dealing with different approaches in different countries, and therefore, we must have an understanding that economic and legal situations will differ from one country to another. Competition specialists have discussed the problems caused by differing substantive rules<sup>25</sup>. For example, the **GE-Honeywell case**, in this case different approaches were used for assessment of a merger between suppliers of complementary products and this led to conflicting decisions taken by US and EU authorities<sup>26</sup>.

There are cases in which substantial differences might arise directly from the law<sup>27</sup>. For example, differing evaluation criteria might be embodied in legislation, such as considering employment effects, or protection of small sellers against big sellers. Some authorities pay close attention to market shares than others or may be more concerned about vertical linkages<sup>28</sup>. All these factors can lead to differences in decisions given by authorities.

Nevertheless, the above paragraphs and analysis already give us an appraisal of the challenges encountered in cross-border cartel enforcement. The challenges as already mentioned above are in one way or the other linked to the non-co-operation factor. Faced with such challenges, what is the way forward? What has been done so far at the economic, legal and in the competition domain to minimize the re-occurrence of such challenges like time consuming and cost factors.

In the paragraphs that precede we shall examine what has been done so far since the 1990's till date especially by the EU, US government and also by the African continent.

### **VI- Developments to minimize challenges both by the Western world and by Africa.**

Some years back many countries did not give importance to the enforcement of competition law in their various countries. But with time many governments and economists started seeing the importance of competition law.

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<sup>22</sup>Challenges of International Co-operation in Competition Law Enforcement, 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>23</sup>Challenges of International Co-operation in Competition Law Enforcement, 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>24</sup>Challenges of International Co-operation in Competition Law Enforcement, 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>25</sup>Substantive differences are considered to include differences in legal and procedural matters, for example where the burden of proof lies.

<sup>26</sup>The case is very well-known and has been discussed in many other places. See for example Eleanor Fox's account in Fox, E. M., & Crane, D. a. (2007). *Antitrust stories*. Foundation Press. Note that the General court overturned the finding relating to complementary products, but upheld the EU Commission's decision on the other grounds.

<sup>27</sup>Challenges of International Co-operation in Competition Law Enforcement, 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>28</sup>Challenges of International Co-operation in Competition Law Enforcement, 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

The earliest traces of competition law enforcement dates back in the USA, Europe and then other countries eventually followed the chain. Enforcing competition law in the market system of a country plays a very important role which is firstly maintaining economic efficiency, which is very important for the economic growth and development of each country. Another important role competition law enforcement play lies un the fact that the country is able to level up to the standards of the international market. Many countries for example Kenya in Africa had to draft and enforce competition law rules in order to level up to the standards of the international market.

These all leads us to discuss about International trade which has a great effect on cross-border cartel enforcement. Through international trade different countries are able to carry out business transactions amongst themselves, this eventually leads to agreements like cartels or even mergers but our focus here is on cross-border cartels. Cartels are horizontal agreements in competition law. These agreements are one of the most illegal agreements that exist in the field of competition law.

Moreover, it is very difficult to detect their existence at the national level, so going to an international level may even be more complex. Therefore, cross-border cartel enforcement is very challenging and we can understand that from the challenges mentioned above. When we are faced with challenges, we often strive to bring in solutions to handle these challenges.

### **a-The efforts made by the Western world to minimize challenges**

#### **International Co-operation and the role of the OECD.**

The urgent need to address challenges that competition authorities face in cross-border cartel cases is not something new for the OECD Competition Committee<sup>29</sup>, and for the competition enforcement community as a whole.

In the past decades the Competition Committee has devoted a lot of time and resources, to enhancing international co-operation between competition authorities, and also since the establishment of its Working Party No. 3 (WP3) on enforcement since 1964<sup>30</sup>. Till present date, international co-operation is the area in which the Committee has developed, the greatest percentage of best practices and recommendations.

Challenges faced when investigating cross-border cartel cases requires a coordinated approach by several enforcers and this has become more and more complex as years pass by. The number of cases with such characteristics has increased rapidly, and the number of enforcers regularly involved in the review of cross-border cases has also grown in number. Prior to this the OECD and its Competition Committee<sup>31</sup>, have done a great job in developing new approaches to address this evolving challenges. In this case the increasing number of cases is a point that needs to be addressed.

An example of a recommendation proposed by the OECD dates back to 1967. The 1995 Co-operation<sup>32</sup> is the one in force today. It requires that powers of competition law co-operate and encourages member countries to, (a) notify other countries of investigation involving an important interest of that country (b) co-ordinate their respective actions in cases where more than one jurisdiction is handling the case, and (c) endeavor to supply one another with any necessary information on anti-competitive practices<sup>33</sup>. This recommendation acknowledges that competition authorities should operate with the limit of existing national laws, and that the recommendation should not be construed as affecting national sovereignty, and extra-territorial application of national competition laws<sup>34</sup>.

### **2-The expansion of the international law concept of Comity**

Over time the OECD has developed innovative approaches to co-operation, for example the OECD has expanded the scope of the international law concept of “comity”. This concept now goes beyond the traditional boundaries as developed under public law also called tradition or negative comity to develop a new concept of “positive comity”<sup>35</sup>, wherein competition authorities can request another jurisdiction to address anti-competitive conduct that might best be fixed with an enforcement action in the recipient country. Nowadays positive comity is often included in bilateral co-operation agreements between countries.

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<sup>29</sup>Challenges of International Co-operation in Competition Law Enforcement, 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition)

<sup>30</sup>According to the last mandate, WP3 shall enhance the effectiveness of competition law enforcement, through measures that include the development of best practices and the promotion of co-operation amongst competition authorities of their member countries.

<sup>31</sup>Challenges of International Co-operation in Competition Law Enforcement, 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition)

<sup>32</sup>See the OECD Report (2013) Secretariat Report on OECD/ICN Survey on International Enforcement Co-operation

<sup>33</sup>Challenges of International Co-operation in Competition Law Enforcement, 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>34</sup>Challenges of International Co-operation in Competition Law Enforcement, 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>35</sup>Challenges of International Co-operation in Competition Law Enforcement, 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

Actually, comity is a defining principle of international co-operation, it is an international principle whereby a country agrees to take the other country's important interest into account, while conducting law enforcement activities<sup>36</sup> in return for the other country to do same too.

Over 100 years now, public international law has acknowledged comity, as a means for tempering the effects of unilateral assertion for extra-territorial jurisdiction<sup>37</sup>. Comity can be considered as a horizontal, sovereign state to sovereign state concept. It cannot be considered as abdication of jurisdiction, it is rather considered as the exercise of jurisdiction, with an accompanying understanding of the impacts the exercise of jurisdiction may have on the law enforcement activities of other countries<sup>38</sup>. The principle of Comity also applies to areas of law like tax, insolvency, anti-bribery and environmental regulations. This this in a bid to ensure that the cross-border enforcement problems are resolved, in a manner that balances the policy and enforcement concerns of states involved<sup>39</sup>.

### 3-The OECD also Recommends Investigative assistance

Investigative assistance is a tool to strengthen enforcement in one jurisdiction, with the help of enforcers in other jurisdictions<sup>40</sup>. It also involves assistance in sharing and assembling information on behalf of foreign country, but this actually requests the assisting country to state in its enforcement act the need for assistance<sup>41</sup>. The proceedings are therefore conducted by the country that receives the request. An effective and efficient investigation process,<sup>42</sup> may often go beyond selecting one, or the other and require a wider range of co-operative activities<sup>43</sup> at some point or points in time. The OECD was the first to develop principles in this area, which is clearly distinguished in the OECD's 1995 Recommendation<sup>44</sup>. Based on the increasing pressure on authorities to engage in effective co-operation, in order to minimize the challenges faced in cross-border cartel enforcement of competition law<sup>45</sup>.

The OECD Committee has a project on international co-operation and, amongst others the Committee is discussing on whether there is sufficient scope to develop new principles<sup>46</sup>, and tools to assist authorities in their efforts to investigate cross-border anti-competitive practices. Or even national anti-competitive practices, for which the investigation requires access to information located in foreign jurisdiction<sup>47</sup>.

### 4- Organizations and Committees established to for International Competition

Competition policy and enforcement have been on the international agenda for many decades. In the 1940's the "Havana Charter", and the creation of the ITO (**International Trade Organization**) as a specialized agency of the United Nations completion. It was referred to as a key component to eliminate trade barriers and to improve the liberalization of trade.

Later on, the **General Agreement on Tariffs and Trade (GATT)** was established, with its market-oriented nature and provisions seeking to eliminate artificial barriers and discriminatory practices. And this also paved a way to a Code of international competition applicable to inter-state trade. But, no common rule on competition was developed at the international level.

At the regional level the **1957 European Treaty** put competition at the core of the European construction and of the common market by prohibiting anti-competitive agreements and abuse of dominant position through a series of provisions found in the Treaty. We shall move forward to examine the efforts put in by the African continent in a bid to resolve the challenges of cross-border cartel enforcement.

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<sup>36</sup>Challenges of International Co-operation in Competition Law Enforcement, 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>37</sup>Challenges of International Co-operation in Competition Law Enforcement, 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>38</sup>Challenges of International Co-operation in Competition Law Enforcement, 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>39</sup>Challenges of International Co-operation in Competition Law Enforcement, 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>40</sup>Challenges of International Co-operation in Competition Law Enforcement, 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>41</sup>Challenges of International Co-operation in Competition Law Enforcement, 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>42</sup>Challenges of International Co-operation in Competition Law Enforcement, 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>43</sup>Challenges of International Co-operation in Competition Law Enforcement, 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>44</sup>Challenges of International Co-operation in Competition Law Enforcement, 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>45</sup>Challenges of International Co-operation in Competition Law Enforcement, 2014 [www.oecd.org/daf/competition](http://www.oecd.org/daf/competition).

<sup>46</sup>OECD (2014) "OECD@ 100: Policies for a Shifting world".

<sup>47</sup>See OECD Report on International Enforcement Co-operation, 2013.

**b- The efforts made by the African Continent to minimize challenges of cross-border cartel enforcement.**

In order to address cross-border competition enforcement in Africa, numerous regional competition regimes have been established<sup>48</sup>. The **regional competition regimes** include **COMESA Competition Commission (CCC), the EAC Competition Authority (EACCA), the Competition Authority of Central African Monetary and Economic Community (CEMAC), and the West African Economic and Monetary Union Competition Commission**. There is also the **South African Development Community (SADC)** which however, does not provide a regional competition regime but provides a cooperation framework on competition policy, and consumer welfare for member states.

Actually, South Africa established this regime because of the increase in competition and business due to regional integration<sup>49</sup>. This could be visibly seen through the **anti-competitive agreements by cartels operating in South Africa in the fertilizer, cement, sugar and maize where there are evidences of cross-border competition cases**. It is clear and certain that firms with market power at the regional or international level, whether they exert unilaterally or through coordination, it often harms competition and the result is often high prices of goods and services<sup>50</sup>.

Therefore, the shared role of the regional competition regimes is to enforce cross border competition within their jurisdiction through some measures like: initiating and enhancing cooperation among member states, assisting in the establishment and strengthening of domestic competition regimes, and also assist in the adoption and the harmonization of competition law provisions, providing technical assistance through consultation and expertise, and lastly enhancing the detection and investigation of anti-competitive practices.

The final and positive results is **enhanced regional integration**, trade liberalization and economic development within the regional market<sup>51</sup>. After the above discussion on African competition regimes and others we shall proceed by discussing the **opportunities created by CCC and EACCA in cross border competition enforcement**.

It is no doubt that the creation of regional competition regimes aims at enforcing competition issues at an international level, for example the creation of the CCC was aimed at equalizing with the European Competition Commission. However, the development of regional competition regimes in Africa presents a number of opportunities in cross-border competition enforcement:

**1-Adoption of Competition Laws and Institutional framework**

Most competition law experts argue that in order to address the cross- border competitive behavior, a strong national competition regime is the bare minimum requirement. Regional competition regimes provide a means for the adoption and the harmonization<sup>52</sup> of competition laws and institutional framework.

Moreover, regional competition regimes provide technical assistance and capacity building to its member states, this is done through cooperation. From a personal point of view this is a very great step which actually helps to minimize the challenge of no-cooperation when faced with cross-border competition cases. The fact that the CCC Competition Rules provides that member states should co-operate at the regional level, in the implementation of their respective national legislation in order to eliminate the harmful effects of the anti-competitive practices. It is actually a great thing that this responsibility is shared one.

There is actually a challenge that some African countries face in cross-border cartel enforcement which is the absence or **lack or non-applicability competition laws** and also **the absence competition law institutions**. Given that laws and institutions are main structures or building pillars needed in any domain of the law, it is therefore very essential that these building pillars be available.

Although, the main objective of regional competition regional regimes is to achieve economic growth, trade, liberalization and economic efficiency among its member states.

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<sup>48</sup>P Mehta, 'Living with Cross-border Competition Challenges in the Absence of Global Competition Rules' Available online at <http://ww.pradeepsmehta.com/Presentations/Cross-Border.pdf>

<sup>49</sup>A Mateus, 'Competition and development: Towards an Institutional Foundation for Competition Enforcement', (World Competition, 2010)

<sup>50</sup>Simon Roberts, Thando Vilakazi and Witness Simbanegavi 'Understanding Competition and Regional Integration as Part of an Inclusive Agenda for Africa: Key Issues, Insight and Research Agenda' (A Draft Paper Submitted for the Competition Commission and Tribunal Annual, 2014)

<sup>51</sup>A Mateus, 'Competition and development: Towards an Institutional Foundation for Competition Enforcement', (World Competition, 2010)

<sup>52</sup>NursKokturk, Internationalization of Competition Law and Policy (Bilkent University 2010)



But in order to achieve these goals, member states that do not yet have competition law and institutions have the obligation to adopt them for their interest first and all other country's benefit. Regional competition regimes will therefore trigger through cooperation and technical assistance.

## 2-Enhanced Cooperation through MoU's

Regional competition regimes in Africa provides an opportunity for cooperation among Member States, in cross-border competition enforcement in Africa<sup>53</sup>. Given the complex nature of cross-border competition enforcement, cooperation is a fundamental and very vital factor. Cooperation can involve coordination of investigations, raids or inspections, or rather still gathering of information, and necessary evidence through questioning of witnesses on behalf of another agency<sup>54</sup>. It is a great thing to mention that cooperation enhances a greater detection of cartel agreements, and even mergers.

The CCC Competition Rules recognizes that closer cooperation between COMESA Member states in the form of notification, coordination of actions and consultations between member states should be encouraged especially the task of exchange of information. We all have to agree that regional competition regimes have increased cooperation among African states that are party to this regime. As of date, the CCC has entered into a number of cooperation's with its members such as Zambia<sup>55</sup>, Kenya, Egypt, and Ethiopia.

In the year 2016 eight members of SADC that is Malawi, Mozambique, Namibia, Botswana, Seychelles, Mauritius, South Africa, Swaziland, Tanzania and Zambia joined the MoU of the CCC in order to address cross-border competition affairs. There are some African countries who have taken the step forward of becoming parties to the MoU of other Regional, International or Western Competition agencies. Such as the Competition Commission of South Africa (CCS) who is a party to the Federal Anti-Monopoly Service of Russia, the Competition Authority of Kenya (CAK), Competition Commission and the Directorate General of the European Commission, Namibian Competition Commission and BRICS Competition Authorities<sup>56</sup>.

Even though the aim of these MoU's is to encourage cooperation, exchange of information is still very limited among states in cases of cross-border cartel enforcement. Information sharing is limited due to the fact that, some parties in cases of cross-border cartel enforcement, only share non-confidential information. Section 3.3 of the MoU between CCS and CAK provides that in cross-border cartel cases and mergers the parties will endeavor to coordinate their activities in consistence with the applicable laws. Cooperation is the key element in addressing jurisdictional conflicts.

CCC Competition Rules also recognizes the necessity not only to enhance the implementation and the harmonization of competition laws, policies and the CCC Competition rules, but also the task to lessen the possibilities or impact of divergent outcomes in court judgements. The cooperation will also go further to trigger the domestication of regional competition laws, to enhance cross-border competition enforcement<sup>57</sup>.

The most important aspect of the creation of competition regimes in Africa, is that it will also increase the percentage of cooperation with international competition regimes. For instance, the Canadian Competition Bureau recognizes that in order to fulfill its mandate, it requires collaboration with other competition authorities around the world. Some countries have also adopted this model of MoU's, this includes countries like Australia, New Zealand, Brazil, Chile, European Union, India, Taiwan, UK, US, Mexico and Korea just to name a few. These MoU's have enhanced and are still enhancing the sharing of information, and the investigation of cross-border matters of shared interest.

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<sup>53</sup>Cross-Border Competition Enforcement in Africa: Developments, Opportunities Challenges and the Way Forward, by VellohKedogoKigwiru. A Paper presented on the 31<sup>st</sup> August 2017 during the 11<sup>th</sup> Annual Conference on Competition Law, Economics and Policy on the Future of Competition Policy.

<sup>54</sup>ICN, Cooperation Between Competition Agencies in Cartel Investigations (Report on the ICN Annual Conference in Moscow 2007).

<sup>55</sup>CCC and Competition Consumer Protection Commission of Zambia, Enforcement Cooperation Agreement Between COMESA Competition Commission and Competition and Consumer Protection Commission of Zambia (2016)

<sup>56</sup>Competition Commission of South Africa, 'MoU International' <http://www.compcom.co.za/mou-international/> accessed 2019 May 02

<sup>57</sup>Cross-Border Competition Enforcement in Africa: Developments, Opportunities Challenges and the Way Forward, by VellohKedogoKigwiru. A Paper presented on the 31<sup>st</sup> August 2017 during the 11<sup>th</sup> Annual Conference on Competition Law, Economics and Policy on the Future of Competition Policy.

It also strengthens the Canadian Bureau's enforcement activities and advancing the interest of Canadian exports and investors in markets abroad<sup>58</sup>.

It has come to a point where CCC and EACCA should use their economic power to cooperate with other global regional competition regimes to address international competition issues that go beyond Africa.

### **3-Enhanced detection and investigation of anti-competitive practices.**

In Africa the detection of cartel and other anti-competitive conducts is generally often a very difficult task and very challenging in the field of competition enforcement. This may be due to inadequate resources and high cost of investigating cross-border anti-competitive conduct. The role played by regional regimes is a vital one because it offers opportunities for investigations at the regional level. Since the year 2006 the CCC<sup>59</sup> has organized sectoral market inquiries in the fertilizer, sugar, bread sectors in the common market in a bid to investigate cartels. It has been a great step for South Africa and Kenya<sup>60</sup> as they have adopted **Leniency programs** for cartel detection, but sadly most of African countries have not adopted this program.

The leniency program has greatly improved the detection and investigation process of cartels as well as cross-border cartel enforcement, in Europe, USA, UK, China etc. But given the fact that some African countries have not adopted the leniency program, the regional competition regimes therefore offer an opportunity to provide technical assistance<sup>61</sup> to such countries to follow the steps of countries who have adopted already.

Finally, the detection of cartel or anti-competitive conduct through leniency application, and through regional competition regimes provides an opportunity to adopt new cartel tools lessons from another jurisdiction.

### **4-Focusing on New Enforcement Sectors**

The development of regional competition regimes gives an opportunity for regimes, to focus on new areas to address cross-border cartel enforcement. It is no news that global economic development and technological advances, brings with its new enforcement areas in cross-border competition enforcement. Some of these new developments in the competition area include: platforms, networks, use and misuse of algorithms, innovation and investment. The reality is that some domestic competition regimes have not legislated in these areas, therefore creating a lapse in cross-border competition enforcement.

Meanwhile there is a need to line up competition enforcement in accordance also with new developments, regional regimes provide such an opportunity through advocacy and technical assistance. The paragraphs above show the efforts been put in by the African continent in a bid to minimize the challenges of cross-border cartel enforcement.

## **V-THE WAY FORWARD**

Firstly, we can notice that despite the efforts and the struggle put in by the African continent and the Western world to minimize the challenges the world faces in cross-border cartel enforcement, it is clear that these challenges cannot be totally eradicated. Thus, the question can the challenges of cross-border cartel enforcement be totally eradicated? To me the answer is NO.

The developments of competition regimes in a bid to handle the cross-border cartel enforcement is a great job already been done by Competition Commissions like OECD, UNCTAD, CCC, EACCCA etc. But considering the complex nature of cross-border cartel enforcement and of cartels itself, more has to be done.

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<sup>58</sup>Cross-Border Competition Enforcement in Africa: Developments, Opportunities Challenges and the Way Forward, by VellahKedogoKigwiru. A Paper presented on the 31<sup>st</sup> August 2017 during the 11<sup>th</sup> Annual Conference on Competition Law, Economics and Policy on the Future of Competition Policy.

<sup>59</sup>Cross-Border Competition Enforcement in Africa: Developments, Opportunities Challenges and the Way Forward, by VellahKedogoKigwiru. A Paper presented on the 31<sup>st</sup> August 2017 during the 11<sup>th</sup> Annual Conference on Competition Law, Economics and Policy on the Future of Competition Policy.

<sup>60</sup>Cross-Border Competition Enforcement in Africa: Developments, Opportunities Challenges and the Way Forward, by VellahKedogoKigwiru. A Paper presented on the 31<sup>st</sup> August 2017 during the 11<sup>th</sup> Annual Conference on Competition Law, Economics and Policy on the Future of Competition Policy.

<sup>61</sup>Cross-Border Competition Enforcement in Africa: Developments, Opportunities Challenges and the Way Forward, by VellahKedogoKigwiru. A Paper presented on the 31<sup>st</sup> August 2017 during the 11<sup>th</sup> Annual Conference on Competition Law, Economics and Policy on the Future of Competition Policy.

There are four ways that some developed countries<sup>62</sup> in the world have adopted as a way forward and a means of addressing cross-border anti-competitive conduct: extraterritorial application of National laws, regional approach, bilateral and tripartite tracts, and also global initiative that provides technical assistance and capacity building through organizations like UNCTAD, OECD, and the International Competition Network (ICN)<sup>63</sup>. In this regard Africa and the world's competition regime can adopt the following schemes in addressing cross-border cartel enforcement.

### **1-Build up national and regional competition regimes**

It is a great issue that there is an ongoing project for the establishment of an international competition regime, even though very dim. Mehta argues that strong regional regimes may not be a sufficient factor therefore, he proposes the **establishment of an international global agency**<sup>64</sup>. Even though this idea may be too perfect to be real, given the geopolitical situation of the world.

However regional competition regimes will remain key in addressing cross-border competition enforcement. The lack of an international competition global agency simply indicates that, developing countries should aim at strengthening national and regional competition regimes. All this can be achieved through building up human resources and expertise, granting more powers to competition agencies to enforce anti-competitive conduct, and also education awareness on the legal and competition policy regime. Therefore, competition regimes should be updated with the competition developments at the international level, so they can caution their various domestic markets against anti-competitive practices.

### **2-Adressing Jurisdictional conflict.**

In the field of Enforcement of cross-border competition, one of the biggest challenges is the realm of jurisdiction. The CCC and the EACCA adopt the regional dimension test in determining jurisdiction<sup>65</sup>. The idea of determining the jurisdiction in which the case is to be handled, is actually very vital for all parties concerned by this case. This enhance cross-border competition enforcement, reduction in costs and other expenditures and uncertainties<sup>66</sup>, all these could address the challenge of jurisdictional conflict. There is also the need of international laws in the domain of cross-border cartel enforcement. **Harmonization of laws either continent by continent** could be a first approach, this is because it is hard to assure any one that an international law governing the sector of cross-border cartel enforcement can be established.

### **3-Enhanced cooperation**

The factor of cooperation has been over emphasized in this paper, but this is to show to what extent it is vital in the field of cross-border cartel enforcement. Cooperation in competition enforcement is very fundamental, be it at the national level where in competition law authorities need the cooperation of the member that decides to denounce the existence of a cartel, in investigating and assembling all the evidence needed in the court of law. This same principle applies when it comes to enforcing cross-border cartel.

Therefore, in order to enforce competition reforms countries must cooperate. In Africa this cooperation can be grouped in three forms: firstly, African countries need to enter in MoU's with each other.

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<sup>62</sup>Cross-Border Competition Enforcement in Africa: Developments, Opportunities Challenges and the Way Forward, by VellahKedogoKigwiru. A Paper presented on the 31<sup>st</sup> August 2017 during the 11<sup>th</sup> Annual Conference on Competition Law, Economics and Policy on the Future of Competition Policy.

<sup>63</sup>Cross-Border Competition Enforcement in Africa: Developments, Opportunities Challenges and the Way Forward, by VellahKedogoKigwiru. A Paper presented on the 31<sup>st</sup> August 2017 during the 11<sup>th</sup> Annual Conference on Competition Law, Economics and Policy on the Future of Competition Policy.

<sup>64</sup>Mehta (n 13).

<sup>65</sup>Marianne Wagener and Candice Upfold, 'The Jurisdiction of the COMESA Competition Commission Merger Transaction' in Laurence Boule, *International Economic Law and African Development* (Siber Inc 2014).

<sup>66</sup>J Clarke and SJ Evenett, *The Different Effects of Natural Anti-Cartel Laws: Evidence from the International Vitamins Cartel* (Word Trade Institute 2002)

Countries like Kenya, Zambia, South Africa and Botswana which are already active in competition enforcement need to assist other African countries that have newly established competition regimes or lack these regimes and laws. Collaboration is essential in cross-border cartel enforcement<sup>67</sup>.

Secondly, cooperation between regional competition regimes and member states, for example SADC has entered into a MoU with its member states to pursue information sharing, harmonization of laws and facilitating investigations. This is actually a great step, although the CCC has entered into a number of MoU's with specific member countries, it has not yet drafted a uniform MoU.

Thirdly, there is the urgent need for cooperation amongst regional competition regimes, if there is evidence of overlapping membership this therefore calls for the need of regional competition regimes to cooperate<sup>68</sup>.

Finally, the cooperation of regional competition regimes with other global actors in competition reforms. Taking into consideration the time and numerous resources needed in the investigation of cross-border cartels and anti-competitive practices, international cooperation by African countries<sup>69</sup> with developed countries is inevitable. We can cite the example of the famous **Vitamin cartel case** that transcended in several countries, it is a clear indication that it was more prevalent in countries with weak legal cartel enforcement regime<sup>70</sup>. This cooperation shall involve the sharing of informational and servicing documents. Cooperating with developed countries like the USA or a developed regional regime like the EU will provide African countries with an opportunity to draw lessons on how to enforce cross-border competition cases. For example, US has a cooperation pact with Canada, EU and Latin American countries which has been so fruitful in sharing information, collecting evidence and even extradition of citizens to appear before courts in order to provide evidence or stand as witnesses.

## VI-Suggestions

After reading and going through many articles, books and online documents, we came to an awareness that cooperation is an important aspect in cross-border cartel enforcement, also laws governing this sector of competition need to be stricter and stringent. If it is necessary to make some crimes have life imprisonment as their penalties it should be done in order to ensure that challenges are eliminated or less existent in the competition domain.

Further the harmonization of laws or legal framework in relation to cross-border cartel enforcement is necessary, this will aid competition authorities and avoid the situation of conflicting laws and jurisdiction in cross-border cartel enforcement.

## VII- Conclusion

The competition sector is a developing sector and laws need to be adopted in accordance with the changes and needs of this sector. *Ceteris pari bus*, that's everything been equal it is hard to certify that the challenges of cross-border cartel enforcement can totally be eliminated. These challenges are realm in this sector, so the best thing to do is to minimize them or limit the effects of these challenges in cross-border cartel enforcement. Nevertheless, there is still the need to look for methods to handle these challenges in one way or the other.

Lastly developing countries need to update their competition regimes so that they can meet up with the standards of the international market.

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<sup>67</sup>Cross-Border Competition Enforcement in Africa: Developments, Opportunities Challenges and the Way Forward, by VellahKedogoKigwiru. A Paper presented on the 31<sup>st</sup> August 2017 during the 11<sup>th</sup> Annual Conference on Competition Law, Economics and Policy on the Future of Competition Policy.

<sup>68</sup>Cross-Border Competition Enforcement in Africa: Developments, Opportunities Challenges and the Way Forward, by VellahKedogoKigwiru. A Paper presented on the 31<sup>st</sup> August 2017 during the 11<sup>th</sup> Annual Conference on Competition Law, Economics and Policy on the Future of Competition Policy.

<sup>69</sup>Cross-Border Competition Enforcement in Africa: Developments, Opportunities Challenges and the Way Forward, by VellahKedogoKigwiru. A Paper presented on the 31<sup>st</sup> August 2017 during the 11<sup>th</sup> Annual Conference on Competition Law, Economics and Policy on the Future of Competition Policy.

<sup>70</sup>Cross-Border Competition Enforcement in Africa: Developments, Opportunities Challenges and the Way Forward, by VellahKedogoKigwiru. A Paper presented on the 31<sup>st</sup> August 2017 during the 11<sup>th</sup> Annual Conference on Competition Law, Economics and Policy on the Future of Competition Policy.

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