

Nexus between Competition Policy Enforcement and Regional and Continental Integration: A Case of Cross-Border Cartel

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Abstract

Competition law and policy enforcement is increasingly becoming transnational, demanding for enhanced cooperation among competition agencies. This paper examines the adequacy of cooperation between the COMESA Competition Commission (CCC) and the Competition Authority of Kenya (CAK) in the Kansai-Plascon Paints and Sadolin Paints merger analysis and the Kenyan Paint sector cartel case. It further analyses whether the merger generated a conducive market for cross-border cartel conduct in the sector. The paper adopts a case study approach in analyzing the interconnection between the merger and the cartel conduct in the Kenyan paint sector. The findings indicate that there was adequate cooperation between CCC and CAK at the point of evaluating the merger. Nonetheless, there was no explicit formal cooperation during the cartel case even though the cartel parties had cross-border business operations. Additionally, the merger did not create conducive market environment for the cartel conduct in the sector. The paper recommends that African competition agencies explore and appreciate the importance of cooperation in cross-border cartel investigations. The competition agencies need to appreciate the significance of better cooperation, particularly on procedural and substantive matters. Further, competition agencies should hold more cross-border cartel-specific fora. Competition agencies need to re-evaluate the adequacy of their activities towards handling cross-border cartels, while being cognizant of double jeopardy. Lastly, positive comity should be embraced by continental, regional, and national competition agencies.

Keywords

Competition Law and Policy, Cross-Border Cartels, Regional and Continental Integration

1. Background

Increased economic activities continue to be witnessed not only in global markets but also in regional and continental markets, resulting in rapid growth in cross-border trade. These, in turn, have increased the level of complexity in regional and international cooperation in competition law enforcement in addition to bringing about great economic benefits. In facilitating regional and international cooperation in competition law enforcement across borders, competition agencies have devised an array of both formal and informal tools; bolstering mutual trust and understanding and shared experiences and learning of cooperation in specific enforcement cases. Regional and international cooperation therefore continues to grow and plays a critical role in the enforcement of competition law (Capobianco & Nagy, 2016).

The complexity of cooperation in cross-border competition law enforcement in the context of the regional and African continent has increased substantially over the years, thereby underscoring the determination to advance practices and approaches of competition agency cooperation. As regional and international trade increase, so do the number of competition law enforcement activities relating to cross-border mergers and cartels conduct rise significantly. Competition cases increasingly becoming international in nature, calling for increasing international cooperation in investigations and for the reconsidering of the appropriate tools and procedures with which to tackle them (Artemiev, 2017). The growth of cross-border markets, cartels, and mergers necessitates enhanced cooperation in the enforcement of competition law among national, regional, and continental competition agencies (Capobianco, Davies, & Ennis, 2014).

The COMESA Competition Commission (CCC) in 2017 approved a merger in the paints industry involving Kansai Plascon Africa Ltd and Sadolin Paints Limited (the merger), both operating in the Common Market including Kenya, Tanzania, Uganda, South Africa, Mauritius and Zambia with the main business being paint manufacturing. After the merger, the company operated in Kenya under the brand name Kansai Plascon Kenya Limited. Subsequently, in 2019, Kansai Plascon Kenya Limited was part of the paints sector cartel investigated by the Competition CAK of Kenya (CAK) and later found to be culpable of cartel conduct.

To this end, this paper examines the adequacy of cooperation between COMESA Competition Commission (CCC) and CAK in merger analysis and the cartel case in aspects of information sharing sufficiency and efforts that were undertaken by CCC and CAK to promote regional and continental cooperation. Further, the paper analyses whether the merger generated a conducive market environment for cross-border cartel conduct in the Kenyan paints sector.

In achieving the above objectives, the paper adopts a case study approach in analyzing the interconnection between the Kansai and Plascon East Africa merger, as approved by the CCC, and the cartel conduct in the Kenyan paints sector as investigated by CAK.

The rest of the paper is organized as follows; section two details an analysis of

the Kenyan Paint manufacturing sector, whereas section three presents details on the merger between Kansai-Plascon and Sadolin. Section four presents the Kenyan Paint sector cartel case that was investigated and penalized by CAK, while section five examines cross-border cartel and regional cooperation. Section six examines the adequacy of cooperation between the COMESA Competition Commission (CCC) and CAK in merger analysis and the Paint cartel case. Section seven analyses whether the Merger created a conducive environment for cartel conduct. Section eight details a summary of the findings, conclusions, and recommendations.

2. The Kenyan Paint Manufacturing Sector

Kenya remains the economic powerhouse for East Africa and has the strongest ability to supply and encourage the growth of the paint and coating sector. In the year 2023, paint sales value is projected to hit US\$ 590 million, attributed to increased demand for housing paint products. The Kenya government in its Bottom-up Economic Transformation Agenda (BETA) has committed to construct one million low-cost affordable houses across the country, which is key to boosting the demand for architectural paint products.

The leading manufacturer of paint products in Kenya is Crown Paints with a 65% market share in the premium paint category¹ but with 36% market share in overall, with Kansai Plascon Kenya Limited coming third by controlling 15% of the market. Other market players are Basco Paints, Galaxy Paints, Solai Paints, Glory Paints, United Paints Royal Paints.

In spite of the many paint manufacturers in Kenya, Crown Paints remains the leading manufacturer with a 36% market share in the country with operations in other East African countries including Uganda, Tanzania, and Rwanda. Basco Paints which controls a sizable market (22%) in Kenya equally has operations in the East Africa region with its products available in Tanzania, Uganda, Rwanda, Burundi, South Sudan, and the Democratic Republic of Congo. Kansai Plascon Kenya Ltd is estimated to control about 15% of the Kenyan market as of 2023, with other manufacturing plants in Uganda and Tanzania, while exporting to the Zambian market. The company is a sub-subsidiary of Japan-based Kansai Paints Company, a leading paint manufacturer in Japan and ranked among the top ten global company and with fifty-one operations worldwide.

Eighty percent (80%) of Kansai Plascon Kenya Ltd paint products are consumed locally in Kenya while 20% are exported to Zambia. Other paint manufacturers in Kenya though with a marginal market share include Royal Pains, Solai Paints, Glory Paints, Maroo Paints, and Seweco Paints. The country equally has imported paint brands which continue to provide competition in the paint market².

Trends in Paint Production in Kenya, 2018-2021

The performance of the Kenyan paint sector has exhibited an increasing growth

¹<https://www.crownpaints.co.ke/about-us/annual-reports-and-financial-statements/>.

²<https://cconlinenews.com/2020/07/20/7-best-paint-manufacturing-companies-in-kenya/>.

trajectory over the years. The total production of paints and related products was 66.2 million litres in 2015, which increased to 91.5 million litres by 2020. These rose to 111.5 million litres in 2021 and increased by 4.2% in 2022 to 116.2 million litres. The growth is attributed to the construction boom being experienced across the country. There has been an increase in the construction of residential housing, office buildings and shopping malls in Kenya occasioning an upsurge in demand for decorative paint and coatings³.

The boom in the paints industry can also be accredited to the aggressive marketing and innovation undertaken by companies in this industry. Kenya has equally witnessed an increasing trend in export of paint products. **Figure 1** presents the trend analysis of the country's exports and imports.

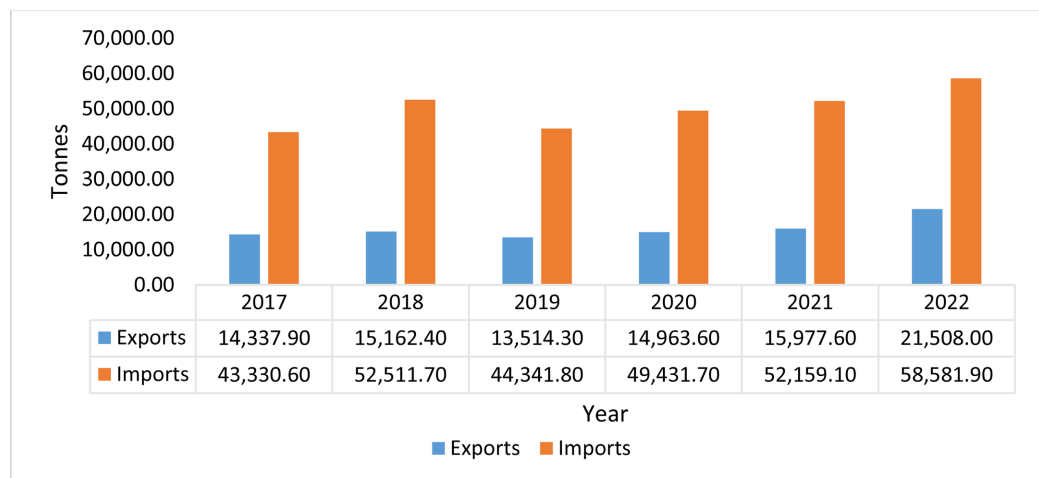


Figure 1. Paint exports and imports, 2017-2022 (Tonnes)⁴.

According to **Figure 1** above, Kenya has been importing more paint products since 2019. Paint imports rose from 44,331 tonnes in 2019 to 58,581 tonnes in 2022; an indication that the country's market is increasingly receptive to imported paint products. Similarly, the country has continued to export paint products though in very insignificant quantities. Paint exports have risen from 13,514 tonnes to 21,508 tonnes in 2019 and 2022 respectively; an indication that domestic consumption is the main target market for Kenyan paint manufacturing. The exports are majorly to Uganda, Rwanda, Zambia, South Sudan, and the Democratic Republic of Congo.

3. Kansai Plascon and Sadolin Merger Case

This section provides details of the merger between Kansai Plascon and Sadolin as analyzed and determined by CAK and the COMESA Competition Commission

³Supply and Demand Analysis of the Decorative Paint and Coatings Market in Kenya and Tanzania. Available at

<https://www.coatingsworld.com/contents/view_breaking-news/2012-11-12/frost-and-sullivan-reports-on-the-decorative-coatings-market-in-kenya-and-tanzania/> Accessed on 16th August, 2023.

⁴<https://www.knbs.or.ke/wp-content/uploads/2022/05/2022-Economic-Survey1.pdf>.

(CCC).

In the year 2017, the CCC approved a merger involving the acquisition of 100% shares of Sadolin by Kansai Plascon Limited. The merged entity resulted in the formation of Kansai Plascon Paints Limited. The merged entity Kansai Plascon Africa Limited has operations in Mauritius, South Africa, Kenya, Uganda Tanzania, and Zambia.

The merger was justified on the logic that it was part of the initiatives being undertaken by Kansai Japan towards global expansion and the growth commitment that the Kansai group has towards Africa in ensuring that the company had a Pan-African presence. The relevant product market for the merger was the manufacturing and sale of paint and coating products. On the other hand, the geographical market for the target Sadolin was national as it operated in Kenya only while Kansai Plascon had a regional presence as it operated in South Africa, Mauritius, Uganda, Tanzania Rwanda, and was exporting to Zambia. Globally, Kansai had fifty-one operation points.

The market shares of the paint manufacturing were projected to shift post-merger, **Table 1** presents the estimated market shares in 2017 and 2023.

Table 1. Market share projections; pre-merger, post-merger, and present market shares.

Paint Manufacturer	Market shares pre-merger-2017 (%)	Market share post-merger (%)	Market shares in 2023 (%)
Crown Paints	36	36	36
Basco Paints	22	22	22
Kansai Plascon Paints	11	11.6	15
Galaxy	6	6	6
Kansai South Africa	0.6	-	-
Others	24.4	24.4	21.4
Total	100	100	100

Table 1 shows that Crown Paints commands the largest share of the paint manufacturing market in Kenya controlling 36% of the market, followed by Basco Paints at 22%. Kansai Plascon however, has its market share increased to 11.6% after the merger. As of 2023, Kansai-Plascon Africa Limited controls 15% of the Kenya paint market. The increase in Kansai Plascon market share is attributed to expansion in production, rise in turnover, adoption of more advanced technology in paint manufacturing, increased investments, and bolstered production in Uganda and Tanzania. The witnessed reduction in market share of other paint producers is attributable to the rise in paint imports which continue to present stiff competition for smaller paint manufacturers.

The merger having occurred at the shareholding level was not expected to present any negative competition concerns. Equally, the presence of a booming con-

struction and housing sector coupled with the government's commitment to put up over one million low-cost affordable houses⁵, continue to inhibit any entry barriers into the Kenya paints sector; consequently, Micro-Small and Medium Enterprise paint manufacturers and individual manufacturers have entered paint manufacturing in Kenya.

Analysis of the merger indicated that it was unlikely to lead to substantial lessening of competition as the market structure and concentration did not change significantly. Equally, the merger did not have the potential to exhibit any negative public interest concerns. To this end, it was approved unconditionally. The analysis was, however, devoid of potential coordination among the leading paint manufacturers in Kenya who enjoyed joint dominance as they controlled over 75% of the market.

4. Paints Sector Cartel Case in Kenya

The reference here is to the cartel cases, as investigated and finalized by the Competition Authority of Kenya. The cases were triggered by the Ministry of Education directive on school transport, in line with the enactment of the Traffic (Amendment) Act, 2017 in January 2018. Through the directive, the Cabinet Secretary responsible for education gave order that all school vehicles used to transport children be painted yellow by 31st March 2018. Consequently, there was an upsurge in demand for paint products. The CAK through market intelligence, conducted a screening exercise to evaluate the competitive strategies and reactions or lack thereof in paint manufacturers, in view of the directive which presented a surge in demand for paint products.

The screening exercise was guided by the general theory of harm that entailed a possibility of collusion by the paint manufacturers in Kenya. Specifically, these were: price fixing in the form of agreements to adhere to a price schedule or range among the paint manufacturers; setting minimum or fixed prices; advertising prices cooperatively, coordination in the determination of discounts and discounting structure, and agreement on the transport arrangements and possibility of territory/market allocation among the manufacturers of paints.

The screening of the sector established consistencies and a high degree of exactness in the price lists distributed by paint manufacturers. Consequently, and pursuant to the provisions of section 31 of the Competition Act No. 12 of 2010, the CAK conducted a search and seizure exercise on the premises of four leading paint manufacturing companies, namely; Crown Paints PLC, Basco Products (K) Ltd, Kansai Plascon Kenya Ltd and Galaxy Paints and Coatings Ltd in December, 2018.

The CAK considered the evidence obtained during the investigations, the written and oral submissions by Crown Paints PLC, Kansai Plascon Kenya Ltd., Basco Paints (K) Ltd., and Galaxy Paints and Coatings Ltd. It made a finding that these companies have engaged in a market practice which amounts to agreement on

⁵<https://www.treasury.go.ke/wp-content/uploads/2023/06/Press-Release-Budget-Statement.pdf>.

prices and transport charge. Premised on the above, the CAK invoked section 36 of the Act that empowers it to impose a financial penalty of up to 10% of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question. The four companies were thereafter penalized accordingly.

The cartel case was concluded in 2019 in which the four leading paint manufacturers including Kansai-Plascon paid pecuniary penalties at varying amounts. In 2021, the four culpable paint manufacturers paid pecuniary penalties totaling USD 464,788. The cartel conduct in this industry came to light just one year after the COMESA Competition Commission (CCC) had approved a merger in the sector involving a player who was not only found culpable of cartel conduct but also paid a financial penalty and agreed to cease and desist from the conduct. To this extent, this paper attempts to explore the extent, if any, that the merger decision by CCC aided the cartel conduct in Kenya. Interaction with CAK and Kansai-Plascon has indicated otherwise. CAK was of the view that the merger involved 100% acquisition did not have the potential to lessen competition in the paint industry and would not result in concentration even though the four leading paint manufacturers controlled seventy-five (75%) percent of the market.

Analysis nonetheless suggests that with the four manufacturers controlling more than three-quarters of the market, the likelihood of them engaging in cartel conduct could not be ruled out. Competition analysis at the time of the merger approval nevertheless did not extend to possible future market outcomes post-merger and analyzed what was and not what would be. The market outcome post-merger was therefore analyzed based on likely competition issues that the merger could raise at the time of filing as opposed to the likely future conducts in the long-run. Futuristic analysis entails long term scenario simulation of possible markets outcomes after consummation of the merger and not merely focusing on short-term price effects and market structure. This includes analyzing likely long-term effects of the merger on competition and how this is likely to manifest in conduct. Such analysis encompasses the use of predictive modelling and data screening tools with the intent of detecting structural set-up and conducts in the market that could catalyze collusion. These tools could have been used in assessing the risk of future collusion focusing on price distributions data in the paint sector, use of algorithms in pricing, market demand characteristics and product homogeneity.

5. Cross-Border Cartels and Regional Cooperation

The key question we raise is whether there were linkages between cross-border cartels and regional cooperation among competition agencies. For instance, a cartel is an intentional association of legally independent companies with the intent of increasing their profits jointly by executing explicit agreements. Further, hard-core cartel customizes their agreements including contracts, deals, and coordinated bidding among others with the object of controlling market prices and restricting market supply directly (Gerber, 2016). Companies voluntarily join cartel

formation in order to set price ceilings, fix production volumes, and market share quotas, undertake geographical market allocation, and assign key customers to particular companies who are members of the cartel among other conducts.

After the year 2000, an increasing number of cartels continued to be detected globally with the majority being found culpable for international price fixing (Connor, 2020). Cross-border/international cartel in this context would mean cartels whose members are composed of companies from a multiplicity of countries (Levenstein & Suslow, 2008). Notwithstanding the stunning number of cartel discoveries, it is perceived that the number of cross-border cartels that are unidentified is still high.

Detected cartels have been found to cause great economic detriments to developing countries, which specifically manifest through the importation of goods worth hundreds of billions in sectors characterized by price-fixing practices (Levenstein & Suslow, 2001). For instance, it is estimated that between 1990 and 2016, the economic damages associated with cross-border cartels resulted in overcharges of more than \$1.5 trillion globally (Martyniszyn, 2021a). The imports accounted for 6.7% of total imports as well as 1.2% of Gross Domestic Product in developing economies. Notably, the proportion of these imports is higher for poor developing economies at 8.8% of total imports (Levenstein & Suslow, 2003). These not only constrain the economies' gain attributable to international trade but also limit their ability to access supply chains globally. These effects may be more intense taking into consideration that the preceding projections are subject to descending bias as they are reflective of only detected cross-border cartels and entail only a single anti-competitive conduct.

Regional cooperation in the context of cartel enforcement exhibits certain distinct characteristics from other anti-competitive practices like merger control and unilateral conduct at regional and international levels (Levenstein & Suslow, 2008). Based on the inherent international nature of cross-border cartels, principal domestic techniques and approaches permitted within domestic laws including search and seizure (i.e. dawn raids) and leniency programs have proved deficient with respect to cross-border cartels. For instance, Kenya has a Leniency Program established in 2017 under the Competition Act Cap 504 Laws of Kenya. The intent of the Program is to enhance the level of compliance with the Act and bolster investigations on alleged infractions specifically on cartel conducts by undertakings. This is to be realized by making a cartel participant a key witness upon their successful application to be accorded leniency. The applicant would then receive full or partial immunity on the administrative penalties that would otherwise be imposed on it had it not applied for the leniency and confessed to being part of a cartel conduct in a market. This degree of immunity however is dependent on the extent of their participation and the value of the information provided during their confession. The Leniency Program under the Kenyan competition regime however, has not achieved its objectives since no undertakings have come forward and applied despite the Competition Authority of Kenya having investigated and

imposed pecuniary penalties on cartel participants in the Kenya paints sector. This notwithstanding, application for leniency by any the parties in the paint cartel would have enriched the investigation but this would be subject to the value of the information that would have been provided by the applicant.

At the regional level, the CCC is yet to enact a regional leniency program, the Commission has however initiated the process of developing regional leniency guidelines. Therefore, with reference to the paint sector cartel case in Kenya, there was no provisions to explore regional leniency application. It is however, expected that as CCC drafts the regional leniency guidelines, it will ensure it harmonized not only with the Kenyan but other leniency programs in the Common Market and learn from the challenges of implementing the same in Kenya.

Additionally, the prescriptiveness of the effects doctrine limits the ability and enforceability of domestic competition law in a foreign country with regards to remedying against competition dampening activities in a foreign country that are harmful to competition in domestic markets (Martyniszyn, 2021a). Moreover, it has been opined that extra-territorial enforcement jurisdiction is not permitted under international law (Martyniszyn, 2012).

On the other hand, typical international tools including formal cooperation agreements have not been exploited adequately, owing to the diversity in legal provisions in anti-cartel laws in terms of administrative versus criminal offences as well as the failure to remedy the same through legal treaties.

Cartels are rudimentary collusions in which several companies jointly agree not to compete with the object of increasing their collective profits. The increase in profits can be attained by various strategies; however, all involve increasing prices and output restriction, which ideally would not take place in circumstances of healthy competition amongst the firms (Griffin, 2001).

Enforcers of competition law agree to a large extent with regard to the competition effects of hardcore cartels including allocation of markets, fixing of prices, output restriction, and bid-rigging despite the extensive dissimilarity in legal provisions across jurisdictions. Irrespective of the market power yielded by market players, their objects, and claimed rationale, many countries rightly prohibit hardcore cartels (Noona, 2008). In divergence from other agreements that entail certain horizontal integration arrangements, cartels in principle are deficient in any element of productive efficiency as concerns optimal resource utilization or even reduction in costs (Horna, 2017).

In spite of the appreciation that competition agencies are increasingly willing to cooperate in cross-border cartel cases within the boundaries of their confidentiality legal provisions, they are constrained by the legal impediments with respect to administrative law principle of legality, which oversee domestic competition law proceedings, and in effect impede cooperation significantly (Horna, 2017). The principle of legality in civil law jurisdictions implies that government officials are governed by the assumption that any information that is not expressly sanctioned for sharing is forbidden (Dyzenhaus, Hunt, & Taggart, 2001). These chal-

lenges are further compounded by legislations pertaining to confidentiality which are highlighted critical inhibitions towards bolstering transnational inter-agency cooperation. One of the justifications put forward in this regard is the requirement to safeguard against commercially sensitive firm information shared by competition agency finding its way to the hand of competitors in a foreign country. Moreover, the effectiveness of leniency programs potentially could be undermined by information sharing across borders, where the cooperating company in the cartel case may find itself being under investigation in another jurisdiction, particularly where agencies shared incriminating information. Equally, it is posited that cross-jurisdictional sharing of cartel information by competition agencies are likely to be discovered in the receiving jurisdiction; this is likely to occur under evidence access guidelines or within the provisions of freedom of information laws. This in effect may put culpable companies to risk of private litigation by suing for damages (Martyniszyn, 2015).

Competition agency staff unless explicitly sanctioned by law, therefore, find it difficult to engage in any informal cooperation with regional and international competition authorities as well as other national competition agencies. This implies that competition agencies will have to either amend their laws or craft a legal framework to facilitate their staff in reaching out to their international colleagues in order to obtain information with regard to related cartel cases that are being handled across borders. Evidence of implementation of the later remains very scanty. Other than the above-highlighted constraints, the other barrier relates to the novelty of cooperation in which a cartel investigation case at the national level may not be condemned for not requesting for relevant information from other (regional) competition agencies but risks condemnation in case of reaching out for information from counterpart in other jurisdictions. It is only likely that the investigation fails to cooperate with other competition agencies on cross-border cartels (Horna, 2017).

Nonetheless, incentives to cooperate in cross-border cartel cases could be crystallized when various synchronized mechanisms are undertaken by key law enforcement agencies. This however is only feasible in jurisdictions with comparable investigative powers, and strong internal reward systems as well as in jurisdictions with converging anti-cartel laws (Bergman & Sokol, 2014). Additionally, the environments under which cooperation between competition agencies takes place differ from one jurisdiction to another. As a result, equivalent incentives may at times result in disparate outcomes in different settings. The level to which a country has matured in competition law enforcement may affect their ability to cooperate in cross-border cartel cases. For instance, countries that had not matured in their adoption of competition law, coupled with limited competition culture, were not able to participate in cross-border cartel investigations (Bergman & Sokol, 2014).

In addressing cooperation challenges in cross-border cartel cases, the significance of informal cooperation among competition agencies is emphasized. Equally, early cooperation among competition agencies is critical in which regional competition

agencies commence their cooperation early enough by identifying jurisdictions affected by the cross-border cartel case (Dhanjee, 2021). Most important is intensification and sustainability of efforts on collaboration and cooperation, coupled with trust building and knowledge sharing (Martyńiszyn, 2021b).

6. Adequacy of CAK and COMESA Competition Commission Cooperation in Merger Analysis and the Paint Cartel Case

This analysis entailed the cooperation between CCC and CAK in enforcement of competition law at the national and regional levels. It should be noted that the CCC and CAK have continued to cooperate in the enforcement of competition law in areas including regulation of mergers, restrictive trade practices, consumer protection, and research and market inquiries. The two agencies have had a working Memorandum of Understanding (MoU) since 2019 in bolstering their cooperation, which provides for the sharing of information on competition cases, undertaking joint training, investigations, market research and inquiries, and sharing experiences and learning in cartel and merger investigations. Considerations have to be taken that Kenya is a member state of COMESA, however the MOU with CCC was a necessity to the extent that it strengthened and formalized framework of engagement between CAK and CCC.

The paper notes that at the time of the merger analysis in 2017, the cooperation agreement was adequate and the information shared was appropriate for the intent of making a determination on the merger. However, there could have been a shortfall in the analysis of the information gathered to the extent to which the merged entity could have the potential to aid future cartel conduct in the paint sector not in Kenya alone but within the Common Market in which the paint producers operate. In this regard, competition agencies in their efforts to strengthen regional cooperation in competition law enforcement ought to evaluate whether the model of information sharing is adequate, and the extent to which shared information should be analyzed. Alternatively, should the analysis be limited to present competition issues or be expounded to incorporate future potential competition concerns and to what degree should this be undertaken.

In the Kenyan paint sector merger case, the analysis was based on prospective competition concerns with respect to potential Prevention and Lessening of Competition; that is what is as opposed to what could be, this is unlike restrictive trade practices in which analysis is retrospective. CCC and CAK did not subject the case to any futuristic tests of any potential restrictive trade practice not only in Kenya but in the region. The analysis focused on market concentration and a public interest test. It must however be appreciated that at the time of the merger approval in 2017, CAK and CCC did not have an active MoU. The agencies have since 2019 signed and are implementing an MoU on competition law enforcement on cases with cross-border and regional dimensions.

It is therefore concluded that although the information shared was adequate for making a determination on the merger between Kansai Plascon and Sadolin, more

insightful analysis could have been undertaken with respect to the probable future conduct of the four leading paint manufacturers who controlled over 75% of the market.

Information sharing between CAK and CCC during the Kenya Paint sector cartel case was non-existent. CAK conducted the investigation and made decisions penalizing the players within the premise of the Competition Act No. 12 of 2010. Further, there was minimal cooperation, if any, with CCC on the cartel case. This notwithstanding the fact that the manufacturers have operations in other countries that are within the Common Market.

We also find no evidence of CCC seeking formal information on the cartel case from CAK or any attempt to progress an investigation into the paint sector in the Common Market. However, we observe that the two agencies could have communicated informally on the outcome of the investigation including finding the four leading paint manufacturers culpable of cartel conduct and imposing on them pecuniary penalties.

Premised on the fact that some of the leading paint manufacturers, including Crown Paints and Kansai-Plascon, have operations in other countries with the Common Market, there are high chances that the cartel conduct was cross-border. The extent to which this can be confirmed depends on the gravity to which CCC viewed the outcome of CAK findings on the Kenyan paint sector as well the ease with which it is for CCC to conduct a cross-border cartel investigation. We similarly appreciate the constraints to cooperation between national and regional competition agencies in enforcing competition law, including international notifications to individuals abroad in a domestic cartel case could considerably hamper the case outcome (Dhanjee, 2021), non-harmonization of work plans, and non-appreciation of competition law and non-uniformity in legal provisions across countries with respect to restrictive trade practices including cartel conduct. Definitive international tools like formal cooperation agreements appear to be under-utilized as a result of divergence in legal provisions on anti-cartel laws specifically on criminal versus administrative violations. These are aggravated by the incapability of legal truces to remedy these constraints.

The cooperation between CCC and CAK is not exempt from the fundamental challenges stemming from the utter divergence in prioritization of activities as competition authorities seek to collaborate. Equally, cooperation also faces the risks in cross-border cartel cases with regards to confidential information disclosure (Cartels, 2012). Further, legal constraints obstruct national competition agencies from sharing confidential information on cross border cartel conducts, unavailability of this information consequently creates a barrier to cooperation on cases with cross-border dimension (Martyniszyn, 2015).

7. Merger Created a Conducive Environment for Cartel Conduct

The article analyses whether the Sadolin and Kansai Plascon merger provided an

enabling market for cartel conduct in the paint manufacturing sector. This observation stems from the fact that the merger control is a key pillar in competition law and policy enforcement. Control of mergers is necessary for ensuring that anti-competitive mergers that are likely to Substantially Prevent and Lessen Competition (SPLC) through an increase in prices, reduction in output, limited commodity variety, fewer innovations, and market allocation among others are inhibited. The two mechanisms through which mergers can lead to anti-competitive effects are; unilateral effects and coordinated effects. The latter occurs when post-merger the firms gain increased market power by coordinating their actions (Fabra & Motta, 2013). The question is whether the merger between Sadolin and Kansai-Plascon Limited in 2017 aided cartel conduct in the Kenyan Paint sector concluded by CAK in 2021.

The merger involved the acquisition of 100% shares of Sadolin by Kansai Plascon Limited, which gave birth to Kansai Plascon Paints Limited. The merged entity; Kansai Plascon Limited has operations in Mauritius, South Africa, Kenya, Uganda Tanzania, and Zambia. An interview report with Kansai Plascon in August 2023 indicated that post-merger, the manufacturer expanded its production capacity, witnessed a rise in the market shares to 15% from 11% in 2017, and employed more advanced technology in its production. The company also attracted more foreign investors. Kansai group has since grown to become the fifth largest paint manufacturer globally operating in fifty-one locations across the world.

Pre-merger, the combined market shares of the four leading paint manufacturers in Kenya, including Crown Paints, Basco Paints, Plascon Paints, and Galaxy Paints, was approximately 75%. This denotes that the four manufacturers controlled three-quarters of the paint market in Kenya notwithstanding the outcome of the merger and had the power to engage in cartel conduct pre-merger. Post-merger, the combined market shares changed marginally to 75.6%. The change in combined market shares as a result of the merger was insignificant, and therefore, the merger did not result in any significant change in the market controlled by the four leading paint manufacturers.

Premised on the above analysis, it is safe to state that the merger did not aid the cartel conduct in the Kenya paint sector. The cartel conduct could have existed prior to the merger, but there had been no sufficient triggers for CAK to suspect the same by 2017. The government directive requiring all school vans and buses to be painted yellow was most probably an opportunity for the players to intensify the collusion and hence the conduct became more and more discernable.

We further explore the extent to which evaluation of the merger incorporated analysis and identification of factors that would facilitate collusion in the paint sector, owing to the fact that the merged entity formed part of the leading paint manufacturers that controlled over 75% of the Kenyan paint market at the time of the merger determination.

A factor is perceived to facilitate collusion if it permits firms to sustain as well

as have a commonality of a collusive scheme in markets where sustaining collusion would otherwise not be feasible. Likewise, a practice is facilitative if it strengthens collusion by permitting companies to increase the profits earned as a result of collusive agreements in markets where undertakings were already sustaining prices way beyond the competitive point of reference.

Precise identification of collusion-facilitating factors is specifically pertinent in merger evaluation just like it is in markets that are pre-disposed to collusion in which coordinated effects have a higher propensity to occur (Fabra & Motta, 2013). Some of the facilitating factors include: the number of firms in the market, coordination among fewer firms is easier compared to many companies. The smaller the number of competitors, the less difficult it is for them to deal with problems of coordination. Further, fewer participants in a collusion have fewer challenges in addressing collusion implementation setbacks as it is less strenuous to monitor one another and the inducement of deviating from the collusive arrangement is always very weak. Sustaining the collusion is equally easier (Compte, Jenny, & Rey, 2002). In retrospect, the scenario described above matched the Kenya Paint Cartel case where there were only four manufacturers controlling over three-quarters of the market. The few number of firms was a facilitating factor with regard to the merger. However, it must be noted that this may not be true in all cartelization cases as there were cases involving over forty firms and a cross-border cartel was still possible to execute (Martyniszyn, 2021b).

Other facilitating factors though found to be catalysts in the Kenya merger case are; excess capacity, entry, and firms' asymmetries. The facilitating factor of demand elasticities, however, seemed to be relevant in the Kenyan market in regard to the merger analysis. This analogy connotes that firms find it more beneficial to collude in markets characterized by low demand elasticities. The merger evaluation was silent on demand elasticities in the paint industry, despite the fact that even with collusion, demand for the paint products of the four paint manufacturers would still remain high.

We are nonetheless cognizant of the fact that in markets where producers are selling homogenous products through choosing of prices, individual firms' demands remain perfectly elastic within the boundaries of collusive price, notwithstanding the overall market demand elasticity. Undeniably, in addition to market demand elasticity, an individual firm's residual demand elasticity is determined by a combination of variables such as competition model, product differentiation levels, switching costs, network effects, and level of awareness by consumers of prices among others. Since these variables are likely to affect collusion in opposing directions, it was generally implausible to offer a definitive stand with regard to the extent to which each paint manufacturer's residual demand function could have affected the possibility of collusion.

The findings with respect to the merger and cartel cases in the context of continental integration and cooperation in competition law enforcement are key learning points and relevant to the implementation of the Africa Continental Free

Trade Area (AfCFTA) Competition Protocol. AfCFTA Competition Protocol must be prepared to experience the challenges of substantive versus procedural matters in cross-border cartel cases. The Protocol must also appreciate that cross-border cartel cases will present more distinct and peculiar cooperation constraints in comparison to merger cases, market inquiries, buyer power, advocacy, and consumer protection matters. These challenges pertain to information sharing; specifically, commercially sensitive information obtained from cartelists without the express authority to be shared by other enforcement agencies across borders. It must however, be appreciated that the Protocol provides a platform for information sharing, cooperation and coordination on matters competition policy and law at the continent. The Protocol, nonetheless is to be implemented through development of regulations, which will have to be innovatively crafted to address challenges of information of sharing information on cross-border cartel conducts. To this extent, the protocol must be prepared to design cross-border cartel-specific cooperation frameworks including promoting the inclusion of positive comity in bilateral treaties among countries in the continent in efforts to extinguish as well as achieve better outcomes and avoid failures and controverting consequences of the same cross-border cartel cases in different jurisdictions.

Moreover, the Protocol should be alive to the fact that not all countries in Africa appreciate competition law, with most nations having no explicit competition law. Countries that have enacted competition law are at different stages of appreciation and maturity of competition law enforcement (Martyniszyn, 2021b). As supra-national competition agencies, the CCC and the AfCFTA Competition Protocol must lead the way in remedying these challenges, specifically with regard to cross-border cartel cases by designing frameworks that legally permit agencies to share information on cartel cases in their jurisdiction with the Protocol, to the extent that the shared information is admissible in any other regional competition agencies. The frameworks on information sharing can only be clarified through guidelines, given that the Protocol only provided a platform for information sharing but not how this will be implemented.

These notwithstanding, the Protocol being a new giant in the block, should adopt more innovative approaches in merger evaluation. This encompasses elements of empirical analysis of past pricing and production levels, predictive analysis, pricing algorithm and analysis of facilitating factors for coordinated conducts in mergers analysis, and the existence of or potential for joint dominance in markets as a result of a merger.

8. Summary, Conclusion and Recommendations

8.1. Conclusions

The article concludes that there was adequate cooperation between CCC and CAK at the point of evaluating the merger in 2017. The information shared was ade-

quate for making a determination on the merger transaction. However, the two competition agencies were not futuristic in their analysis and failed to take advantage of the merger analysis to undertake an in-depth analysis of the possibility of coordinated conduct occurring in the paint industry in future. This is founded on that there was glaring joint dominance as the four leading paint manufacturers controlled over seventy-five percent of the Kenyan paint manufacturing and sales market.

Nonetheless, there was no explicit formal cooperation between CAK and CCC that happened during the investigation to finalization of the cartel case in the sector. In spite of the informal discussions between the competition law enforcers, the agencies did not formally share information or evidence of the investigations on the case.

Further, the cooperation in cross-border cartel cases presents very distinct challenges which is characterized by complexities, unlike cooperation in merger investigations. The challenges include: non-uniformity in appreciation of anti-cartel laws across jurisdictions; non-existent of and or different level of maturity of competition law in the region; non-alignment of work plans of regional competition agencies to cartel investigations activities in national competition agencies; and lack of clear frameworks for cooperation in cross-border cartel cases as well as admissibility of evidence obtained in one jurisdiction at the regional level.

Additionally, the merger did not aid the cartel conduct in the Kenya Paint sector. The four paint manufacturers that were culpable of the cartel conduct controlled over three-quarters of the paint market pre-merger. This market control changed marginally post-merger, and the cartel conduct could have been executed notwithstanding the outcome of the merger transaction.

There was no justification COMESA Competition Commission to conduct a second investigation and subsequently penalize the players as this would be a case of double jeopardy; stemming from the *non-bis in idem* principle or not twice against the same. These prohibit prosecution of the paint companies twice for the same contravention since the companies had paid pecuniary penalties and settled the same in Kenya.

Additionally, not all the players had operations in all the countries in the Common Market, only three of the manufacturers had operations outside Kenya. Whereas Kansai Plascon had more presence in the Southern African regions including Mauritius, South Africa and Zambia, Crown Paints only had its operations in East Africa including Kenya, Uganda, Tanzania, and Rwanda. Basco Paints operates in Kenya, Uganda, Tanzania, and Rwanda while Galaxy operates only in Kenya. This definitely could constrain the CCC in terms of procedural and substantive issues.

Moreover, the fines were deterrent enough as these were the highest fines ever imposed then on market players for cartel conduct in Kenya, prior to the steel sector penalties in August 2023. By virtue of the above conclusion, the cartel conduct did not warrant cross-border investigation and intervention.

Finally, CCC was expected to face the challenges associated with non-appreciation of competition law in certain countries in the Common Market in which Crown Paints, Basco Paint, and Kansai-Plascon operated including Uganda, South Sudan and the Democratic Republic of Congo. These countries as at the time of making determinations of the cartel case had no competition laws in place. Uganda, for instance, passed a bill on competition law in May 2023⁶. Rwanda operationalized its competition agency in 2017 and⁷, hence was expected to face teething issues in cross-border cartel investigation.

8.2. Recommendations

Several options available to the regional and national competition agencies towards fostering cooperation in cross-border cartel cases. In order to bolster outcomes for competition law enforcement on cross-border cartel cases, African competition agencies ought to explore and appreciate the importance of informal cooperation and the need to share tools, especially at the early stage of the investigation. Early cooperation between regional and national competition agencies is indispensable if agencies are to have a better outcome in extinguishing cross-border cartels. Competition agencies therefore should continue to appreciate the significance of better cooperation, particularly on procedural as well as substantive matters.

Further, to deepen informal cooperation, more engagement activities should be carried out under the auspices of the CCC and various working groups such as the Cartel and Mergers Working Groups. More importantly, Cartel Working Group needs to re-evaluate the adequacy of their activities towards handling and extinguishing cross-border cartels.

Similarly, national, regional, and continental competition agencies should develop a framework for the formal sharing of information on cartel investigations that are cross-border in nature and on how to progress such investigations while being cognizant of double jeopardy.

Cognizant of the reality that cooperation complexities have the likelihood of resulting in detrimental outcomes, including incongruities in decisions and continuity of prohibited cartel conducts in a market, the cost of cooperation failures can be very grave. In remedying the cooperation failures, regional and national competition agencies should explore new cooperation options such as adopting work-plan-based cooperation, especially on cartel cases that may have cross-border dimensions, particularly where national competition agencies have implicating evidence on the existence of cross-border cartel like conduct.

Lastly, regional and national competition agencies should embrace positive comity; whereby a competition agency makes an invitation for another competition agency in a different jurisdiction to investigate and remedy a cartel conduct

⁶<https://www.parliament.go.ug/news/6733/parliament-passes-bill-regulating-competition-among-businesses>.

⁷ <https://www.rica.gov.rw/index.php?eID=dumpFile&t=f&f=26817&token=fdc2f4a7603858082e27fa72dd4312a490324676>.

or anti-competitive behavior which would be better extinguished through enforcement initiatives in the beneficiary nation.

Disclaimer

The views expressed in this article are my own and does not reflect in anyway the views of Competition Authority of Kenya.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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