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Competition Policy in SADC

Trudi Hartzenberg
University of Cape Town

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ABSTRACT

This paper provides an overview of the interconnectedness between trade, competition and investment in SADC, and explores the competition implications emerging therefrom. From a review of existing competition policy in SADC, key national and regional competition challenges are examined, with a view to suggesting options for regional collaboration to address these issues.

EXECUTIVE SUMMARY

SADC countries are engaged in the process of implementing the SADC Trade and Investment Protocol to establish a free trade area. This process of intra-regional trade liberalisation is providing impetus to regional integration. Regional integration is also promoted by cross-border investment especially by South African firms; as South Africa has become the major source of foreign direct investment for the other SADC countries. Both cross-border investment and intra-regional trade have important competition implications, as the establishment of market presence through import penetration, or commercial presence, through a merger or acquisition or Greenfield investment can significantly impact the nature and intensity of competition in, especially a small market.

Only four SADC countries have competition policy and institutions – South Africa, Tanzania, Zambia and Zimbabwe. A number of others are drafting policy; the SACU countries in response to the latest SACU Agreement which requires that each member country have a competition policy.

Key areas of competition concern include merger control and transnational restrictive. International mergers raise obvious competition issues – in the SADC case, it may also be that the regional impact of South African merger transactions should be considered, given the market presence of South African firms in the national markets of SADC countries.

Transnational restrictive practices are more difficult to deal with. Usually they involve conduct by firms located in a specific country, and the impact of that conduct is in another country. The country at the receiving end of the anti-competitive conduct does not have jurisdiction in the firms' home country. For regional (SADC) transnational restrictive practices, it is important to develop a regional position and process to address such practices through collaboration. Collaboration may be either bilateral or perhaps preferably regional.

1. INTRODUCTION

At the 1996 Singapore Ministerial Conference of the World Trade Organisation (WTO) competition policy became one of the 'new' issues on the WTO agenda, and at Doha WTO members made a commitment to begin negotiations 2005 towards a multilateral agreement on competition policy.

Although the primary concern of competition policy is the promotion and maintenance of competition; the accommodation, and even active pursuit of development needs and priorities in competition policy is gaining ground among developing countries, including countries in the Southern African Development Community (SADC). For example, Zambia aims to encourage innovation and ensure fair distribution of income, and to reduce unemployment with their competition policy. South Africa's competition policy considers job losses related to mergers and acquisitions, as well as the promotion of small land medium-sized firms, and the empowerment of previously disadvantaged individuals.

This paper reviews briefly the relationship between trade, competition and investment in the SADC context. Their interconnectedness, and perhaps specifically the role of South Africa in the region, have important implications for competition policy in SADC.

A status review of competition policy in SADC follows. Although only four countries currently have competition policy and institutions, there is certainly much policy development in process. For Southern African Customs Union (SACU) countries this is motivated by the fact that the latest SACU Agreement requires each member country to have a competition policy.

A selection of competition policy challenges for the SADC region, and specific member countries are then considered, with recommendations on how to address them through different modes of collaboration.

2. TRADE, COMPETITION AND INVESTMENT: CHALLENGES AND TENSIONS IN SADC

The relationship trade and competition policy[1] is a complex one. Trade liberalisation increases the contestability[2] of markets, by facilitating entry of new products and services, and new firms. As firms establish market presence through import penetration, the nature and intensity of competition may change considerably. Herein lies the connector to trade liberalisation.

From the relationship between trade and competition a logical link to investment emerges. To examine the linkages among these three policies, an assessment of

[1] A distinction is sometimes made between competition policy and competition law. Competition law refers to the legislation to give effect to and to implement competition policy. Competition policy may include also industry promotion initiatives, which would impact on competition.
[2] Contestability is used here to indicate both the entry of firms to establish commercial presence, and as they establish market presence through their products or services.

industrial configurations in SADC countries is important. It is not unusual to find industries in SADC countries that consist of a concentrated core – an oligopoly or perhaps monopolistic competition – and a competitive fringe populated by small businesses. In many cases the large firms are subsidiaries of multinationals, and the small businesses are locally owned.

2.1 Trade and competition

The link between trade and competition policy is perhaps most obvious in the area of import competition. Quotas, tariffs, anti-dumping duties as well as non-tariff barriers such as burdensome bureaucratic procedures shield domestic producers from potential import competition. Trade theory concludes that with trade protection, producer surplus increases and consumer surplus decreases with higher prices and lower output levels. Trade protection limits domestic competition, and can also impede structural market developments. This is especially true for developing countries where markets and market processes are thin and fragile.

With trade liberalisation, potential import competition is likely to materialise. Import competition can be expected to improve resource allocation and application, and limit the abuse of market power by domestic firms.

Following this argument, it has been suggested that trade liberalisation reduces the need for competition policy, as anti-competitive practices are less feasible in an open economy, even when markets are relatively concentrated. Import competition as firms establish market or virtual presence may therefore serve as a form of countervailing power in domestic markets.

Recent empirical studies seem to suggest that the competition effects of trade liberalisation may be less significant than previously thought. The emerging consensus seems to be that liberalised trade policy cannot substitute for competition law but that the two complement each other in the promotion of trade, market access, global economic efficiency and consumer welfare.

Intra-regional trade liberalisation, as envisaged in the SADC Trade and Investment Protocol, plays an important role in shaping markets and developing market processes. SADC countries began the process of intra-regional trade liberalisation in September 2000, to create a free trade area (FTA). This involves both tariff reduction and the elimination of non-tariff barriers, and has already led to significant changes to market access conditions within the region.

Briefly, the structure of a market may be characterised by a number of features, including:

- Seller concentration - the extent to which economic activity is dominated by a few large firms
- Entry conditions – specifically barriers which may prohibit the entry of new firms (or their products) into a market

Intra-regional trade liberalisation, by increasing market access, enhances the contestability of markets within the SADC region. Investment liberalisation and the mobility of capital flows further enhance the contestability of markets, by facilitating the establishment of commercial presence. The theory of contestable markets,[3] supports the conclusions of trade theory presented above, and suggests that the reduction of entry barriers will enhance efficiency and encourage competitive pricing – both of which are objectives of competition policy.

As intra-regional trade is stimulated by trade liberalisation, imports from other SADC countries, may compete intensively with local businesses. Increased competition may provide incentives to improve efficiencies, increase product variety and quality and lower prices.

It is also possible that the increased competition may lead to the demise of local businesses, especially perhaps small businesses. Such demise could be seen as the outcome of the competitive process, but could also raise competition concerns. Competition policy is focusing more and more on efficiency-plus concerns; the public interest or other concerns in for example South Africa, include the development of small business. The ability of small business to compete is therefore a competition concern.

The clothing and textile sector in a number of SADC countries provides an interesting case study. With liberalisation of this sector and the subsequent increase in import competition, domestic firms were after extended periods of protection, faced with the challenge to restructure their organisations, adopt new technology and upgrade skills of workers. Many, especially small businesses, did not survive this process of organisational and industrial restructuring. In some countries this led to employment losses, which could ill be carried by society or economy.

A number of questions arise in this connection. First, what can competition policy do to pro-actively support, for example, small business development. Second, to what extent and how should trade liberalisation be accompanied by complementary policies (eg industrial policy) to ensure that its benefits are not captured by a small number of powerful firms.

Proponents of the free market would argue that what emerges in the wake of trade liberalisation should be regarded as the efficient solution. However, on the counter side, just as the market process itself does not necessarily produce an efficient never mind an equitable outcome, trade liberalisation may not independently guarantee outcomes that are efficient or in the public interest. The checks and balances can come from competition policy and also from industrial policy. Lessons from the European Union competition policy with regard to exemptions related to size, are instructive. Industrial policy is perhaps one of the most challenging policy areas, especially for developing countries. Many instruments of industrial policy, such as direct subsidies, are not WTO compatible. Policy makers are faced with the challenge of creatively devising support programmes and initiatives that can improve their

[3] Trade liberalisation presents an interesting application of the theory of contestable markets.

competitiveness in domestic markets, that are permeable to new competition, and in global markets where competition is even more intense.

Figure 1 below shows the well-documented trade surplus that South Africa (SACU) has with the SADC region, and specific SADC countries. In the SADC context, competition concerns may be associated with the trade surplus. South Africa's role as an investor and the links between trade and investment, specifically as regards for example intra-company transactions, makes this a thorny issue. It is not so much the trade surplus itself but the competition implications associated with the trade surplus that are cause for concern.

Figure 1

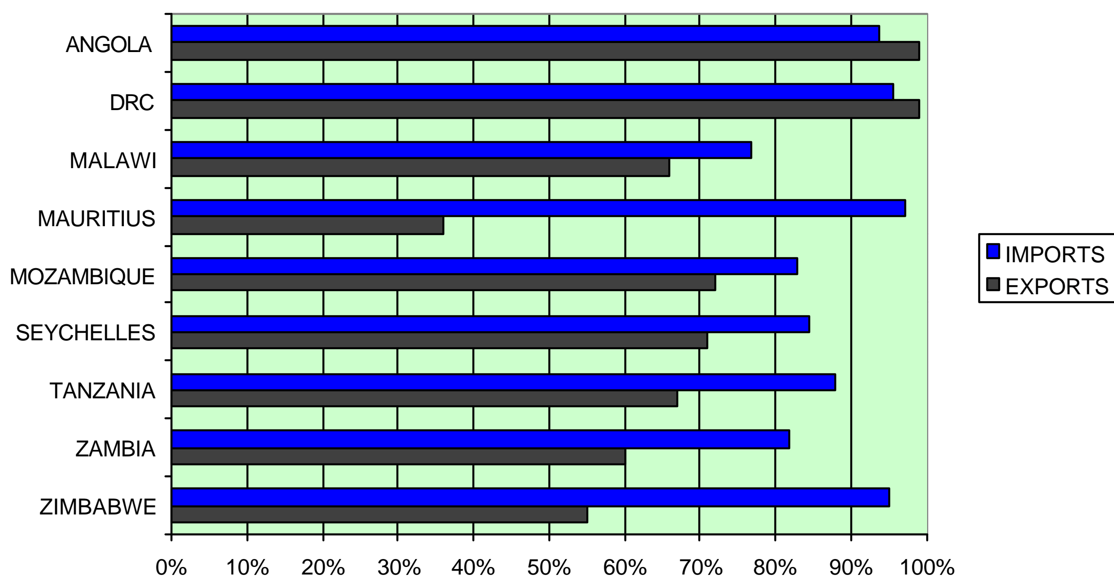

Figure 1. Trade with SACU as Percentage of Trade with SADC, 1996

Source: Robertson, 2002

2.2 Investment and competition

An important policy linkage exists between investment and competition. Given the significant savings constraint faced by all SADC countries, and hence the limited capacity to generate domestic investment, the attraction of foreign direct investment (FDI) is a key policy focus, and there is evidence of incentive competition among SADC countries to attract FDI. FDI can, however, have significant competition implications. The crisis in Zimbabwe has shown the impact of neighbourhood effects, and suggests that potential investors already regard SADC as an integrated economic space. This highlights the interdependence of national and regional developments, as regards investment and competition.

The impact of the entry of new firms on market structure and on competition may differ, depending on the modality of establishing commercial presence. For example,

if entry takes the form of a merger, then seller concentration will increase, and competition may be harmed or enhanced, depending on initial market concentration level. Alternatively if entry is in the form of a greenfield investment, then concentration may not increase (unless the entry is large enough relative to market size), and competition may be promoted. FDI can also bring new technologies, knowledge and experience, which are positive for competition.

Most countries do have some restrictions related to FDI, often motivated by not only to economic but also public interest considerations. These may relate to ownership restrictions, or repatriation of profits, the legal framework (competition law too), intellectual property and other property protection. It is important that consider these factors that potential investors consider as they assess risk-return profiles of potential investment destinations.

The increasing mobility of even FDI presents opportunities but also challenges to SADC countries. Within SADC the introduction of the African Growth and Opportunity Act occasioned the relocation of clothing firms from, for example, South Africa and Mauritius to less developed SADC countries such as Lesotho and Tanzania. From a competition perspective such relocations may have important implications[4]. Given intra-regional trade liberalisation firms that have relocated from South Africa may still be able to retain their regional competitive market presence (or even enhanced competitive presence) despite the fact that their commercial presence has shifted within the region.

Table 1 shows that in 2000, almost US$4 billion in FDI flowed to SADC, out of the US$11 billion FDI that flowed into Africa, representing about 36% of the African total. Angola accounted for over 45% of total SADC FDI inflows, and South Africa just over 22% of the SADC total.

Approximately 42% of total FDI inflows into SADC were in the form of mergers and acquisitions. This figure is significantly lower than that for South Africa alone, where M&A's accounted for over 60% of total FDI inflows.

[4] The relocations also have significant implications for robust and sustainable, regional development.

Table 1: FDI Inflows into Individual SADC Economies, 1987-2000, US$ millions

	1987 -1992 Annual average	1993	1994	1995	1996	1997	1998	1999	2000
Angola	178	302	170	472	181	412	1 114	2 471	1 800
Botswana	-29	-287	-14	70	71	100	96	37	30
DRC	-11	7	-2	1	2	1	1	1	1
Lesotho	11	15	19	275	286	269	262	136	223
Malawi	12	11	9	25	44	22	70	60	51
Mauritius	25	15	20	19	37	55	12	49	277
Mozambique	12	32	35	45	73	64	213	382	139
Namibia	44	55	98	153	129	84	77	111	124
Seychelles	19	4	15	40	30	54	55	60	56
South Africa	-24	-17	334	1 241	818	3 817	561	1 502	877
Swaziland	62	72	63	33	-62	-48	165	90	-37
Tanzania	3	20	50	150	149	158	172	183	193
Zambia	102	2	40	97	117	207	198	163	200
Zimbabwe	-8	38	41	118	81	135	444	59	30
TOTAL	**396**	**269**	**878**	**2 739**	**1 956**	**5 330**	**3 320**	**5 304**	**3 964**

Source: World Investment Report, 2000, www.unctad.org

South Africa has become the largest source of FDI in SADC, accounting for approximately 85% of total FDI in all other SADC countries in 2000 (Muradzikwa, 2002). South African companies, long denied the opportunity to invest substantially offshore due to exchange controls, have increasingly sought opportunities for expansion outside South Africa. The sectors of choice for South African investment in SADC include financial services, mining and quarrying, clothing and textiles, retail and food and beverages, and tourism.

Recent experience has shown that cross-border investment in SADC (into the retail sector, for example) reflects in intra-regional trade flows, as products are sourced from the home country. Competition is thus impacted through two distinct channels; the entry of the retail firms, and also import competition as goods are sourced from South Africa, for example.

The investment by South African retailers in Zambia provides a good example. Since 1996 South African retail firms have gained significant presence in the Zambian retail sector. Shoprite/Checkers, Dunns Clothing and Pep Stores and a number of fast food chains such as Nandos, first opened branches in Lusaka, and followed with others in the Copperbelt region, Kabwe, Kitwe, Livingstone and Ndola. The collapse of the state-run retail enterprises[5] opened significant opportunities in this sector, which were enhanced by 'market-friendly' policies, especially the extensive privatisation and trade liberalisation. Concerns arose about the sourcing practices of the South African companies – some fast food chains even source tomatoes and potatoes from South Africa – and the impact on local businesses in this sector.

[5] The retail sector had been nationalised during the Mulungushi Reforms of 1968, which prompted multinational companies to relocate.

3. COMPETITION POLICY: WHAT EXISTS IN SADC?

Most SADC countries implemented structural adjustment programmes (SAP) under the auspices of the International Monetary Fund and the World Bank. It is notable that the SAPs of the 1980s and early 1990s did not contain any reference to competition policy or regulation.

Trade and market liberalisation were key features of the SAPs. Markets were opened to new competition and market forces were freed to determine outcomes in sectors that were previously fettered by price and other controls. The expansion of markets in SADC countries reflects international developments; the countries of the former Soviet bloc are of course a good example in this regard, and more recently the liberalisation of economic life in China.

The wave of privatisation, with the state retreating from productive economic activity, with state-owned monopolies being taken over by private interests or protected monopolies being exposed to the market, generated renewed policy interest in regulatory oversight of infrastructure and other previously state controlled sectors. The retreat of the state opened opportunities that could be seized by private concentrations of economic power and which could produce outcomes no more efficient or equitable than those associated with the previously state-owned enterprises.

The response to these developments has been a focus on competition policy and regulation. The rationale for regulating markets emerges from the very incentives that the market process creates. On the one hand the market provides incentives to produce cheaper, better quality products. On the other hand it provides incentives for its own destruction. A firm with market power can restrict output, raise price, and exclude potential competitors. Competition policy is framed to guard against the possibility that the competitive process may lead to behaviour that endangers that very process.

Three SADC countries currently have competition policy and institutions. They are South Africa, Zambia and Zimbabwe. Tanzania has a Fair Trade Practices Act to regulate competition-related matters.

3.1 South Africa

After South Africa's democratic transition in1994 an extensive review of economic policy followed. The Maintenance and Promotion of Competition Act, no 96 of 1979, was found to be inadequate to deal with the competition challenges facing South Africa.

Competition challenges arose from South Africa's apartheid history, its economic isolation, financial sanctions and high levels of market and ownership concentration, especially in mining and manufacturing. The decisions of the competition implementation agency, the Competition Board, were subject to review and approval

by the Minister of Trade and Industry. The Competition Board thus lacked independence and was criticised for making decisions subject to political influence.

New legislation was promulgated in 1998 to address the shortcomings of the previous competition legislation, and to focus on the challenges that South Africa faces in the pos-apartheid, WTO-era. The Competition Act, no 89 of 1998 covers all economic activity in South Africa, and extends to cover extra-territorial transactions such as international mergers to the extent that they impact on South African markets. The Competition Act also makes provision for the establishment of three institutions to implement and enforce the legislation.

The Competition Commission is an investigatory body, to which competition complaints may be addressed. It also conducts preliminary investigations in merger impact assessments, and makes recommendations to the Competition Tribunal. The Competition Tribunal is an adjudicatory body (or court of first instance) to which complaints may be referred by the Commission, and to which larger merger transactions are referred. The third institution is the Competition Appeal Court, which hears appeals emanating from decisions by the Tribunal.

The purpose of the Competition Act is to maintain and promote competition, in order:

- To promote the efficiency, adaptability and development of the economy;
- To provide consumers with competitive prices and product choices;
- To promote employment and advance the social and economic welfare of South Africans;
- To expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- To ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

Competition Act, no 89 of 1998, Republic of South Africa

To promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

The South African competition law explicitly includes public interest considerations, both in the articulation of its purpose, and also in its merger control provisions. It therefore attempts to balance efficiency concerns and broader development priorities in the competition framework.

The following are prohibited practices:

- Restrictive horizontal practices;
    - practices which refer to any agreement between or concerted practice by firms or a decision by an association of firms, that substantially lessens or prevents competition, unless any technological, efficiency or other pro-competitive gain which outweighs that effect
    - directly or indirectly fixing a purchase or selling price or any other trading condition

  - dividing markets or allocating customers, suppliers, territories or specific types of goods or services
  - collusive tendering

- Restrictive vertical practices
  - an agreement between parties in a vertical relationship (at subsequent stages of the supply chain), if it substantially prevents or lessens competition in a market, unless a party can show technological, efficiency or other pro-competitive gain resulting from the agreement outweighs the effect.
  - resale price maintenance

- Abuse of a dominant position, [6] in the following sense;
  - charging an excessive price to the detriment of consumers
  - refusing to give a competitor access to an essential facility when it is economically feasible to do so
  - engaging in an exclusionary act, if the act outweighs any technological, efficiency or other pro-competitive gain
  - engaging in any exclusionary acts, by i) requiring or inducing a supplier or customer to not deal with a competitor, ii) refusing to supply scarce goods when it is economically feasible to do so, iii) tying the sale of goods or services, iv) selling below marginal cost and v) buying up a scarce supply of intermediate goods or resources required by a competitor.

- Price discrimination by a dominant firm is prohibited

The merger control provisions provide for a pro-active stance on market structure, specifically seller concentration. Mergers are classified, according to turnover or assets, into three categories; small, intermediate and large. Intermediate and large mergers require notification and approval before implementation. Consideration of mergers involves assessment of whether the merger is 'likely to substantially prevent or lessen competition.'

If the merger is likely to substantially reduce or prevent competition then technological, efficiency or other pro-competitive gain will be considered to determine if they are likely to outweigh any reduction of competition; and whether the merger can be justified on public interest grounds. Public interest considerations include i) the impact on a particular industry or region, ii) employment, iii) the ability of small businesses, or firms controlled by historically disadvantaged persons to become competitive, and iv) the ability of national industries to compete in international markets.

Recognising the importance of the interface between sector regulation and competition law, the Competition Act specifies that the Competition Authorities and Sector Regulators have joint jurisdiction in relevant sectors. A Regulator's

[6] A firm is dominant, in a market, if it has i) at least 45% of that market, or ii) at least 35% but less than 45%, unless it can show that it does not have market power, or ii) it has less than 35% of the market, but has market power.

Forum is being established to implement this provision of the Act and makes the Competition Commission responsible to 'negotiate agreements with regulatory authorities to co-ordinate and harmonise the exercise of jurisdiction over competition matters' within a specific sector or industry.

Thus far only the Independent Communication Authority of South Africa (ICASA) and the Competition Commission have developed a memorandum of understanding, which delineates their respective jurisdictions.

Since promulgation of the Competition Act and establishment of the competition authorities important strides have been made to affirm the independence of the authorities, to develop credibility, and to amplify the letter of the law through a body of case precedents. Corporate compliance has improved however it is still the case that until faced either with a proposed merger transaction or a complaint there are very few companies that willingly introduce compliance programmes.

A particular challenge emerges from the lack of consumer organisation in South Africa. Consumers are generally not aware of their rights and the potential to pursue complaints through the competition authorities and South African does not have specific consumer protection legislation. Reference to consumers and the importance of providing them 'with competitive prices and product choices' is stressed in the purpose of the Act.

3.2 Zambia

Zambian Competition Law came into force largely as a consequence of the conditionalities of the International monetary Fund and the World Bank.

The Zambia Competition Commission (ZCC) was established in May 1997, under the Competition and Fair Trading Act, section 4 of Chapter 417 of the Laws of Zambia, which had been promulgated in February 1995. The objectives of the Act are to:

- Encourage competition in the economy
- Protect consumer welfare
- Strengthen the efficiency of production and distribution of good sand services
- Secure the best possible conditions for the freedom of trade; and
- Expand the base of entrepreneurship

Zambia Competition Commission, Annual Report 1999

The law covers the following areas:

- *Anti-competitive trade practices*; being practices that have the aim of preventing, restricting or distorting competition to an appreciable extent in Zambia or any substantial part of the country.
- Vertical restraints; these arrangements are dealt with under a 'rule of reason' or case-by-case approach. Abuse of a dominant market position or market power is prohibited.

- Merger Control; all mergers (and acquisitions) that involve the acquisition of a significant interest in the whole or a part of the business of a competitor, supplier, customer or other person is covered. Trans-national mergers are covered in that if either of the enterprises was prior to the merger operating in Zambia, it has to be notified to ZCC, and gain authorisation.
- Trade agreements; price fixing, collusive tendering, market or customer allocation, sales/production quotas, refusal to supply. Collective denials of access to an arrangement or association which is crucial to competition.
- Anti-competitive trade practices by Associations; unjustified exclusion from a trade association or recommendation to trade association members on prices to be charged or terms of sale.
- Control of Monopolies and Concentrations of Economic Power[7]; the provision permits scrutiny of collective or joint dominance.
- Unfair trading/Consumer Welfare and Protection[8]; covering misleading or deceptive conduct, false of misleading representations, misleading the public as to the nature or characteristics of goods or services.[9]

ZCC is an autonomous corporate body under the Ministry of Commerce, Trade and Industry. Although the Minister may overrule decisions by ZCC, there has been no record of overrule to date.

3.3 Zimbabwe

The Zimbabwean Competition Act, no 7 of 1996, was a response to the recognition that anti-competitive activities were pervasive in the Zimbabwean economy characterised by monopolies and oligopolies.

The objectives of competition policy in Zimbabwe are:
Maintenance and promotion of the competitive process through

- Prohibition of price fixing agreements and abuse of dominant market position
- Lessening the adverse effects of government intervention in markets
- Improving access and opening markets by reducing barriers to entry
- Prevention of abuse of economic power and thus protecting consumers and producers
- Achieving economic efficiency so as to encourage allocative and dynamic efficiency through lowered production costs and technological change and innovation.

The Competition Act provides for the establishment of The Industry and Trade Competition Commission, and its work with other sector regulators. An Administrative Court exists to hear appeals by parties aggrieved by a decision of the

[7] A monopoly is defined as a dominant undertaking or an undertaking which together with not more than two independent undertakings, produces, supplies, distributes or otherwise controls not less than one-half of the total goods of any description that are produced, supplied or distributed throughout Zambia or any substantial part of the country (Competition Rules in Zambia, ZCC)
[8] Section 12, contains a consumer protection provisions.
[9] Liability for defective good is excluded.

Commission. The role of the Commission is to protect the process of competition rather than individual competitors. The focus of the Commission is therefore on the business behaviour of enterprises rather than on the size on enterprises. There are also provisions for public interest considerations such as employment creation, generation of foreign currency.

The Act distinguishes two types of prohibitions; *per se* and *rule of reason* prohibitions. Unfair trade practices, which require only proof that the act was engaged in, are *per se* prohibited. These include collusive agreements between competitors, predatory pricing, bid rigging and undue refusal to distribute goods or services. Restrictive practices fall under *rule of reason* prohibitions. They require an evaluation to determine whether the practices are pro or anti-competitive. Examples include agreements or arrangements, whether enforceable or not, to restrict competition directly or indirectly.

Companies are required to apply for authorisation of mergers and acquisitions and restrictive business practices prohibited by the Competition Act.
The Commission also performs an advocacy function by running publicity campaigns to promote compliance.

An amendment to the Competition Act was introduced in 2001 to amalgamate the Tariff Commission and the Competition Commission. In terms of the amendment, the Competition and Tariff Commission has additional powers to monitor prices.

3.4 Tanzania

In Tanzania, competition legislation takes the form of the Fair Trade Practices Act of 1974 that does not prevent or prohibit monopolies or enterprises seeking to be monopolies '*per se*'. The Act provides for the imposition of restrictions where monopolies are not in the public interest.

In terms of the Act, restrictive trade practices are defined as

- agreements that reduce or eradicate the opportunity to take part in the production or distribution of goods or services, reduce or eliminate the opportunities of paying a fair market price to acquire or purchase the goods or services by arrangement or agreement between manufacturers, wholesalers, retailers or contractors,
- discriminatory agreements or arrangements between sellers or between sellers and buyer to grant rebates to buyers of goods calculated with reference to the quantity or value of the total purchases by those buyers from those sellers not to sell/buy goods in any particular form or kind to buyers/sellers,
- arrangements or agreements between persons whether as producers, wholesalers or retailers or buyers to limit or restrict the output or supply of any goods, or withhold or destroy supplies of goods, or allocate territories or markets for the disposal of goods.

In addition to other unfair practices, the Fair Practices Act prohibits: misrepresentations, misleading advertising and conduct, bait-supply and harassment and coercion.

Prior approval of the proposed merger transaction by the relevant Minister is required before implementation. The Commission is required to carry out an investigation of the situation under review and following this process it makes a recommendation to the Minister. The Act provides for a set of criteria for evaluation and recommendation. The Minister would normally be expected to accept the recommendation but is not obliged to do so. The Act provides the right to appeal against the Minister's decision at the Competition Tribunal.

The institutional framework for the Fair Practices Act consists of two levels of implementation, the Fair Trade Practices Commission and the Appeals Tribunal. The Commission for Trade Practices is responsible to monitor, investigate, evaluate, prosecute, issue orders, impose penalties or otherwise resolve alleged contraventions. The Commission is not independent of the hierarchical structure of the parent ministry.

The Fair Trade Practices Tribunal has been established as an Appellate body for decisions of the Minister and the Commission. The Tribunal has jurisdiction to hear and determine any complaint relating to trade practices, to inquire into any matter referred to it and to issue orders. Appeals from decisions of the Tribunal are limited to judicial review.

4. EMERGING COMPETITION POLICY ISSUES IN SADC

The lack of capacity in the area of competition policy compounds the competition challenges in SADC. There is, however, currently a great deal of interest and activity in this area in the region. A number of countries, including Swaziland and Botswana are drafting legislation, some with the assistance of UNCTAD, resources from the region and COMESA. The recently concluded SACU Agreement requires that each member country have a competition policy, providing impetus for policy development. The multilateral negotiations due to begin in 2005 have also focused policy minds on competition policy.

The implementation of the SADC Trade and Investment Protocol has highlighted challenges of regional integration in SADC. Implicit in the process of integration is a complex tension between national and regional priorities. In the case of competition policy this exists in that policy is bounded within national jurisdictions, reflecting national priorities. Regional integration in the form of cross-border investment and intra-regional trade activities is enhanced by intra-regional trade liberalisation, and competition therefore has a national, but increasingly a regional character.

The tension between national and regional priorities is also evident in other areas such as labour market policy, where the hierarchy of priorities is definitely national first and regional second. Taking a longer-term view of regional development prospects, the regional character of competition concerns as well as, for example, labour market issues and sector-specific regulation, deserve policy attention.

Privatisation is an important investment and competition-related issue for SADC countries. Many SADC countries have vigorously privatised previously state-owned enterprises or public utilities. The objectives of privatisation may be articulated to include a rationalisation of the role of government in the productive sphere of the economy and the attraction of foreign direct investment. In this context the competition implications of privatisation are important. If a private monopoly (through FDI) is replacing a public monopoly, how can the abuse of market dominance be precluded, and what will be the relationship between competition policy and sector-specific regulation that may apply in the case of telecommunications or a transport sector? These are the kinds of issues that need to be addressed in the development of a workable and coherent interface between competition policy and sector specific regulation. Much work in the region is needed in this area, taking into account for example the lag between privatisation and the introduction of competition policy or regulation in most countries.

The challenges implicit in the process of regional integration for the conduct and implementation of competition policy are considerable. As regards merger control; in the consideration of a merger in retail or the production of consumer goods in South Africa, for example, the cross-border impact on other SADC countries, such a South African merger, could be significant. In order to appropriately assess the merger impact, a number of options are possible.

First, the geographic market may be defined to include the relevant SADC markets (either as a single geographic market or as separate relevant geographic markets), and the merger could be assessed under the South African jurisdiction.

Second, the relevant competition authorities (if they exist or a proxy, if a country does not have competition law) could collaborate in the merger impact assessment, having agreed on the criteria for assessment. This may involve some rationalisation of relevant competition laws (or for the specific purpose of assessing regional merger impacts) – a positive step to developing a regional position on merger control, and perhaps a regional competition policy. Similar collaboration in the case of restrictive practices (perhaps more complicated than in the case of merger control) could be devised too.

For the assessment of international (extra-regional) mergers, similar collaboration within SADC may be considered. For example, recent international mergers in the cement of pharmaceutical industries impact on most SADC countries. In such cases taking a regional perspective, complemented by focus on specific national concerns, could be workable and effective.

Turning to restrictive or anti-competitive practices, it is useful to delineate two sets of practices that can inhibit both competition and trade:

- Transnational practices that inhibit the effects of trade liberalisation – these include import cartels, vertical restraints between manufacturers and retailers, domestic abuses of dominant positions, international cartels that prevent the market allocation of flows of imports and exports through customer allocation or market sharing or entry limiting behaviour.

- Transnational practices that prohibit trading countries from reaping the benefits of trade – export cartels (some may even be sanctioned by their home governments[10]), transnational abuse of dominant positions, or price fixing by international cartels (eg vitamins, lysine)

The task of competition authorities, given their national jurisdiction, is complicated in the assessment of restrictive practices, by the regionalisation and globalisation of markets. Restrictive practices usually involve action by firms with commercial presence in one country on the market of another country where they have market, but not necessarily commercial presence. The national character of competition law precludes the competence to investigate or sanction firms located in another country. This implies effectively a loss of operational competition sovereignty in the national market.

A number of collaboration options are possible. First bilateral collaboration, such as that between the US and Canada, could be considered. Collaboration can take the form of information sharing and evidence gathering.[11] The strengthening of regulatory oversight that comes with such collaboration could reduce incidence of for example collusive activities (cartels).

Second, it is possible to extend the bilateral option to a regional (SADC) or third, even a multilateral platform.[12]

Although these options may be particularly relevant to control of (hard-core) cartels, they could also be applied as indicated, to merger control or other restrictive practice assessments where effects spill over from a single country to others in the SADC region. With regional integration the incidence of such spill over effects increases considerably.

5. CONCLUSION

Much exploratory work is being done in the area of competition policy in developed and developing countries. For developing countries the globalisation of markets and the mobility of international capital, and the increased mobility of even FDI, which used to be perceived as a long-term commitment, are drivers to consider competition issues and competition policy seriously. The paucity of resources in the area of competition policy in SADC makes this a challenging task; however there are several initiatives to develop policy, and institutional capacity in SADC.

There is also in support of these endeavours, much interest in competition policy research across the region, and a growing collaboration between researchers, and policy makers and competition authorities, to develop capacity and enrich the knowledge base of competition policy in SADC to understand the challenges to robust and sustainable regional, as well as national development.

[10] The recent Ansac, soda ash case is an example – sanctioned as an export cartel by the US.
[11] Some countries include strong confidentiality provisions in their law – these have to be considered in this regard.
[12] To precede a multilateral agreement on competition, for example.

The interconnectedness of competition, trade and investment translates into a policy nexus that provides significant challenges to policy makers. As the SADC region becomes more integrated in terms of, not only, trade but also other cross-border economic activities, the importance of competition policy, at national, regional and also multilateral levels increases. The development of markets requires effective intervention to ensure that efficient and equitable outcomes are possible, and that they materialise. Competition policy provides the necessary counterweight to the powerful incentive to rig the market process and skew the distribution of the benefits of trade liberalisation, perhaps especially intra-regional trade liberalisation.

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