Regional Activity to Promote Integration Through Dialogue and Policy Implementation (RAPID)

RAPID

Strengthening the Policy Framework for Competition in the SADC

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1. Introduction

The purpose of this paper is to examine the broader policy framework as a foundation for competition policy and to review some of the more important issues in implementation of competition policy and further development. This requires an examination not only of the SADC Trade Protocol itself, but also of its relationship to the broader policy environment in the Member States.

2 Towards a More Effective Competition Policy

Competition is a process that leads to economic efficiency and maximises consumer welfare through lower prices, higher quality and better services. Competition provides firms incentives for continual innovation and systematic upgrading of products and production process necessary to keep pace with competitors. Experiences of other countries show that robust domestic competition brings substantial benefits to the economy. These include:

- Improved competitiveness of industry
- Long term growth in employment and incomes
- Increased consumer welfare
- Promotes adaptability of the economy

It is recognised that domestic competition is one of the critical factors contributing to competitiveness of domestic industries. If firms compete with one another (and with imports) in domestic markets for consumers by offering products of lower prices, higher quality and better service, then they are likely to be able to do so successfully in international markets. By improving competitiveness, competition fosters long term economic growth and maximises consumer welfare. Consumers benefit through lower prices and higher quality products. Competition also promotes adaptability of the domestic economy. Competition prepares businesses to make the structural adjustments necessary to respond to changing market conditions. There is now a growing body of evidence that economies with strong domestic competition are better placed to adjust quickly to changing global market conditions.

Firms producing for domestic markets typically face competition from two directions: other domestic firms and imports. Entry/exit policies and restrictions on investment determine domestic rivalry. Import competition is determined by the degree of tariff and non-tariff barriers, including restrictions on the domestic distribution system. Thus, the level of competition in an economy is largely determined by the government’s industrial and trade policies. Industrial policy measures such as, restrictions on entry/exit, including foreign investment, controls on distribution of goods and services, price controls, subsidies and tax holidays to specific firms all reduce domestic rivalry as they prevent foreign and domestic firms from fully participating in the economy. Trade polices such as tariffs and non-tariff barriers prevent domestic firms from being efficient as they lack the competitive restraint that would come from imports.

3. What is Competition Policy?

The principal objectives of competition policy are to maintain and encourage competition as a vehicle to promote economic efficiency and maximise welfare. In this regard, competition policy is a key element of an effective economic framework because it promotes efficiency and provides incentives for innovative activity necessary to compete with competitors. Trade liberalisation, industry deregulation and the privatisation of public enterprises are the major parts of the broadly defined term of 'competition policy'. A competition law is only one possible element of competition policy.

Policy reforms promote the increased use of the market mechanism to improve efficiency in the allocation of resources. Trade liberalisation frees up international prices and signals; industry deregulation and privatisation frees up domestic market signals. Competitive pressures from greater domestic rivalry and import competition resulting from these reforms restrains anti-competitive behaviour of firms in domestic markets. Imports, for example, impose a ceiling on the prices dominant firms or cartels can charge consumers, effectively eliminating their market power to charge excessive prices. These reforms also encourage firms to respond to competitors in both the domestic market and international markets.

In practice, countries take competition policy in steps. Industry and trade deregulation is addressed first, especially those who have been chipping away at regulations and trade policies on a very gradual basis. Privatisation has been underway in many countries, sometimes on a very long-term track. A competition law has typically been one of the last elements to be put in place. One rationale for this sequencing is that gains in efficiency can be more effectively pursued through trade liberalisation and deregulation, supplemented with privatisation. Once a sector has been liberalised by way of introducing new competitors into the market, competition law and its enforcement usually plays the primary role in maintaining competition as well as avoiding distortions caused by anti-competitive practices (e.g., erecting artificial barriers to entry) of firms should they arise.

From an examination of some of the discussions in the local press and a reading of some Member States' competition legislation, it is apparent that "competition policy" means different things to different people. Some of the objectives of competition policy that have been written into legislation include 'public interest benefit' 'control of economic power', 'protection of small and medium firms' and 're-distribution of ownership in industry'. However, these objectives are not based on marketplace efficiency considerations, and are inherently inconsistent with the objectives of competition policy.

Take the example of the South African wheat, milling and bakery industries. Past regulatory arrangements in the wheat industry included import restrictions, price controls, and a single channel marketing system under the control of the Wheat Board. In the milling industry there were entry restrictions and price controls. In the bakery sector regulations governed the number of plant bakeries per location, delivery zones/routes, product standards including bread weight, prices were fixed and subsidies were provided. These regulations were designed to create a market structure that reduced competition in the vain belief that this system was superior to market mechanisms in stabilising prices, ensuring a continuous supply of wheat flour to end users, as well as to protect incomes of farmers, producers and employees – that is the 'public interest benefit' argument. Economic analysis of this sector clearly shows that this regulatory regime fell short of its objective of income development for obvious economic reasons (see Report to Section 7 Committee, 1999). Importantly, these policies were in conflict with marketplace efficiency as they protected inefficient firms, deterred new entry and created over-capacity in the milling industry. These inefficiencies were the primary motivation for eliminating many of the distortionary regulations in the wheat, milling and bakery industries between 1991 and 1997. Unfortunately, since 1997 the government has increased the customs tariff rate on wheat flour and the industry is now unlikely to be liberalised under the SADC Trade protocol.

4. Overview of the Current Policy Environment

SADC member countries' approach to competition policy has been ad hoc and unsystematic. Some countries have embraced elements of a competition policy more vigorously than other member countries. For example, Zambia has made significant progress in dismantling barriers to entry and other restrictions on domestic competition. Large-scale privatisation of public entities, trade policy reforms and deregulation of the industrial and agricultural sectors over the past decade or so eliminated many (but not all) of the restrictions on new entry, including foreign investment.

Regulatory constraints on domestic competition in most countries have, and still do, take many forms involving various government agencies. These restraints include the cumbersome licensing system, import restrictions, entry and exit controls in specific industries, public ownership of specific industries, restrictions on foreign ownership, marketing restrictions, price controls, and special assistance (subsidies and tax holidays) to specific industries. The commencement of the SADC Trade Protocol last year promises to eliminate tariffs and non-tariff barriers on the bulk of intra-SADC trade within the next 12 years. While this is a step in the right direction, many member countries' still have high MFN tariff rates by international standards.

The key components of the policy regime for competition - trade policy, industrial licensing and privatisation of state enterprises are reviewed below.

4.1 The SADC Trade Protocol

The starting point in our discussion on the policy framework for competition is the trade policy reforms under the SADC Trade Protocol. The Trade Protocol document provides a framework for an agreement among the Member States to achieve a substantial liberalisation of trade among themselves by 2000, with (almost) complete elimination of tariffs on intra-SADC trade by 2012.[1] The main instrument of trade liberalisation is to be the elimination of customs tariffs and non-tariff barriers (NTBs) on the vast majority of intra-SADC trade. To date, it is the liberalisation of trade in goods, and especially the phasing down of import duties on intra-SADC trade that has been the primary focus of attention in the Trade Negotiation Forum (TNF) process.[2]

As in almost all similar arrangements in the world, the terms outlined in the Trade Protocol do not represent an agreement to establish completely free trade among the Member States. What it does is to substantially liberalise trade within the region and at the same time to define the limits on free trade. The limits on and exceptions to free trade under the Protocol will play a key role in shaping its impact on competition and competitiveness. We briefly discuss a few of the key limitations of the Protocol in this respect. These include: (1) rules of origin, (2) non-tariff barriers, and (3) excluded goods

(i) Rules of Origin

The Protocol sets out criteria that must be met for goods to be certified as originating in member countries and hence to qualify for preferential tariff treatment under the Protocol. There is no intention to harmonise members' external tariff rates. If these differences are substantial, there will be an incentive for importers to engage in "tariff jumping" – i.e., to import goods into low tariff countries and re-export them to other higher tariff SADC countries. To avoid tariff jumping preferential trade agreements (PTAs) find it necessary to develop rules of origin (ROO).

The rules of origin signed in 1996 are relatively simple requiring simply that one of the following three criteria be satisfied:

- the goods have been wholly produced in the exporting member state, or
- the Goods have undergone substantial transformation in their production and
    - Imported raw materials account for no more than 60 percent of those used in their production, or
    - The value added resulting from their production accounts for at least 35 percent of factory cost, or
- There is a change of tariff heading resulting from the production or processing of imported (non-originating) materials.

In discussions leading to ratification of the Trade Protocol, the ROO became a source of contention and subsequently were tightened, with product-specific ROO drawn up for a large number of significant manufacturers including electronics and electrical goods, textiles and garments, motor vehicles. This was done in order both to achieve

[1] See Frank Flatter (February 2001), 'The SADC Trade Protocol: Impacts, Issues and the Way Ahead', for a discussion of the limitations and likely impacts of the SADC Trade Protocol on intra-SADC trade.

[2] Trade liberalisation under the Protocol is not achieved immediately, but rather is phased in gradually. A characteristic of the offers is that they are back-loaded; that is, a large part of most countries trade liberalisation is postponed until the late stages of implementation of the Protocol. Most of the products being liberalised in the early years are those that already have low MFN tariff rates.

greater ‘clarity’ of regulation and to achieve industrial development goals (see Boxes 1 and 2: How Restrictive ROOs Can Reduce Trade).

Box 1
How Restrictive Rules of Origin Can Reduce Trade:
The Example of Wheat Flour

In discussions leading to ratification of the Trade Protocol, rules of origin became a source of contention for wheat flour and consequently agreement on wheat flour has not yet been reached. However, it appears likely that this sector will be subjected to special arrangements, which threatens to reduce intra-SADC trade in wheat flour. The dispute centres around whether millers must use wheat wholly produced in SADC member countries or are allowed to mix it with imported quantities of wheat in order to gain preferential access to the SADC market under the Trade Protocol. Proponents of a more relaxed ROO for wheat flour argue that some imports of wheat are necessary for certain types of wheat-based products as locally produced wheat may not be suitable or in insufficient supply. If SADC adopts a restrictive ROO for wheat flour it will mean that a significant proportion of wheat flour will not have access to the SADC market at low tariff rates, thereby reducing intra-SADC trade in wheat flour.

It is the use of ROO as an instrument of industrial development that is of the greatest importance from a competition policy perspective. Competition from imports of these goods from other Member States will certainly be curtailed by the use of restrictive ROOs. This in turn will reduce pressure on home industries to improve efficiency that comes from competitive imports. By limiting imports, restrictive ROO also adversely impact household welfare, as consumers end up paying more for goods than otherwise the case.

Box 2
How Restrictive Rules of Origin Can Reduce Trade:
The Case of Malawi Garments

In late 1999 the South African customs impounded garments exported from Malawi and demanded that duties be paid retroactively. The dispute centred on the interpretation of the bilateral agreement’s rules of origin (Roos). Under the bilateral agreement garments are given originating status if 25% of the value is added in Malawi. RSA contended that the 25% value added definition did not include labour costs and overhead costs. Thus, under this interpretation, many of the garments entering RSA from Malawi did not meet the Roos. Malawi argued that the 25% local value added included labour and overhead costs. They also argued that their interpretation of the Roos was consistent with established practice since the bilateral agreement was implemented and it is only then that South Africa had raised the dispute. Underlying this dispute was RSA’s allegations that third country garments were being exported to RSA under Malawi certificates of origin. RSA highlighted the large discrepancy between Malawi’s export figures and RSA garment import figures from Malawi as support for their allegations. (Malawi recorded about R3.5 billion of garment exports to RSA, while RSA recorded almost R5 billion of garment imports from Malawi).

The implementation of more restrictive ROOs had adverse implications for the development of the Malawi garment industry. According to representatives for the industry, almost all major producers had closed down resulting in the reduction of exports of garments from Malawi to South Africa and consequently loss of hundreds of jobs.

Source: Presentation by Industry officials at the SADC Trade Protocol private Sector Workshop, Blantyre, Malawi, January 28, 2000

(ii) Non Tariff Barriers

The Protocol provides an ambitious and important program for the elimination of NTBs.[3] However, to date little attention has been given to documenting official and non-official NTBs let alone designing a program for their eventual removal. Moreover, businesses continue to complain about the imposition of new NTBs on trade within the SADC market. One example is customs in Zimbabwe recently imposed a transit tax on wheat flour exports going to neighbouring countries. By doing this Zimbabwe authorities can increase the final price of rivals' wheat flour in their competing export markets in region. This will be an important part of the agenda for future implementation of the Trade Protocol and broader framework for competition policy.

(iii) Excluded Goods

The Trade Protocol allows for the exclusion of certain goods and sectors from the general trade liberalisation provisions of the Protocol. Under these provisions, each country has excluded certain goods from its tariff reduction offers. In addition, the TNF process has resulted in different arrangements for textiles and garments, motor vehicles, sugar and possibly wheat flour. These special arrangements are exemption from the general provisions for tariff reductions and elimination of NTBs and QRs under the Protocol. The sugar agreement is a special one in which the major sugar producing countries are quotas to the South African market at favourable prices (relative to the world price). Agreement on wheat flour has not yet been reached. However, it appears likely that this sector will be subjected to arrangements to provide special and very high rates of protection to millers in most member countries (see Flatters, Feb 2001).

The agreements on sugar and wheat flour are typical examples of resistance to outside competition and appear to violate the intent of the Protocol. The impact will be that end-users (i.e., producers of processed foods) will have to pay much higher prices than they would otherwise and reducing their competitiveness in the international market. Consumers are also forced to pay higher prices than otherwise. The agreements on textiles and garments and motor vehicles are more complex. While appearing to violate,

[3] The Trade Protocol provides for the elimination of non-tariff trade barriers (NTBs) and for phasing out of quantitative restrictions (QRs) on imports and exports originating in (destined for) other SADC Member States. However, under article 7 a Member State can apply a quota on imports originating from a SADC country as long as the tariffs under the quota system are lower than the preferential rates agreed under the Protocol. Finally, Article 9 of the Protocol allows for continued imposition of quantitative import restrictions for a number of reasons including the protection of public morals and maintenance of public order, protection of human, animal and plant life, or health (SPS reasons).

at least the spirit of the Protocol, they are nevertheless arguably consistent with Article 2 (2), which states that the reform process should be accompanied with an industrialisation strategy. The arrangements could also be consistent with the infant industry exemption in the Trade Protocol, which provides for temporary protection of an industry.

Special treatment of these industries and the general qualifications to trade liberalisation either under the 'industrialisation strategy' or 'infant industry' argument in the Trade Protocol highlights the conflict that can arise between competition policy and the industry policy. Industry policy has traditionally been viewed as a set of instruments to regulate internal trade with the usual end goal of promoting a strong domestic industrial base. It has overriding assumptions that government-designed incentives are superior to market signals, and that picking-winners through infant industry and similar policy works. An 'industry policy' of this kind usually includes measures that seek to provide special assistance to particular industries or firms such as, direct or indirect subsidies, directed bank credit, tax holidays, preferential government procurement rules, entry restrictions, price controls, and distribution controls. Similarly, trade policy has traditionally been seen as a set of instruments to regulate international trade at the border, with the objectives in most cases of protecting domestic production and distribution environment from foreign competition and promoting exports. These measures include tariffs, import licensing, and duty drawback facilities for direct exporters. The overriding assumption is that net economic welfare is served by promoting domestic production interests over domestic consumption needs.

Industrial and trade policies viewed in this way and the measures used to achieve these objectives are clearly inconsistent with marketplace efficiency, and therefore conflict with competition policy objectives. In this regard, competition policy can make a key contribution to national economic welfare by challenging such anti-competitive manifestations of industry and trade policies. Even if market efficiency is foregone in favour of non-economic objectives (such as protecting certain types of industries), at the very least competition policy ensures that the competitive market implications of a policy are recognised. In Canada, for example, the Director of Investigation and Research has frequently used his statutory right to intervene before federal and provincial regulatory bodies in order to voice concern over relevant competition issues.

In the last ten to twenty years there has been a rethinking about trade, industry and competition policies by many governments. There has been a realisation that consumers pay heavy for trade protection, and that incentives for productive and dynamic efficiency are often weakened by it, with negative implications for economic growth and export performance. The poor results in many countries from decades of activist state intervention in industry have been identified and put under pressure from fiscal restraints and intense competition in international markets. The outcome has been a growing move to trade liberalisation, typically through tariffication of border barriers, progressive reduction of tariff levels, and removal of NTBs, liberalisation of investment and industrial licensing, and a move towards privatisation of public enterprises.

One common lesson from the deregulatory experience of many countries, including in Africa, is that for an effective competition policy to be put in place, progress in all policy areas is desirable; not just trade policy reforms, but also wholehearted industry deregulation and privatisation. This is for the following reasons. If trade liberalisation is carried without deregulation and privatisation, foreign and local competitors can not fully participate in the local economy to a full degree. If deregulation of industry policy is carried out without full trade liberalisation, then domestic firms may not be efficient as they lack the competitive restraint that would come from imports.

4.2 MFN Tariff Structure

The SADC Trade Protocol only promotes liberalisation on intra-SADC trade and not on trade with the rest of the world. Traditionally, SADC member countries have participated less in trade and investment with the world economy than has been the case in most other regions of the world. The trade and investment that does occur has been heavily influenced by domestic tax and regulatory restrictions aimed at meeting a mix of revenue needs and industrial development and social goals (see Flatters, 2001).

Despite some progress in dismantling barriers to imports in recent years, many member countries' most favoured nation (MFN) tariff rates are still high by international standards. Table 1 shows Member States MFN tariff base rate structures. One notable feature is that the more developed SADC countries (i.e., SACU member countries) have the highest range between the minimum and maximum tariff rates and a more complex tariff structure. The least developed countries have lower duties and simpler tariff structure. SACU tariff rate structure has 28 tariff ranges with the maximum rate at 140 percent. In addition SACU has 22 specific duties on imports (ad valorem MFN tariff rates are not calculated for these specific duties in Table 1). Zimbabwe and Mauritius have the next highest tariff rate dispersion with maximum rates at 100 percent and 80 percent respectively. Zambia has the lowest tariff rate dispersion – 0 to 25 percent. Tanzania and Malawi also have low MFN tariff rate dispersions, with a maximum tariff rate of 30 percent. Unfortunately, there are no estimates of effective rates of protection for member countries so we do have a measure of the extent to which these countries' trade and industrial policies have created costly resource distortions. Nevertheless, given the large dispersions of rates in the tariff structures of SACU member countries, Mauritius and Zimbabwe, we would expect trade policies in these countries to have created significant resource misallocation.

Table 1 SADC MFN Tariff Rate Structure

	Ad Valorem MFN Tariff Rates		No. of different Specific Duty Rates
Country	No. of Different Rates	Range	
Malawi	7	0-30%	None
Mauritius	9	0-80%	None
Mozambique	5	0-35%	None
SACU	28	0-140%	22
Tanzania	5	0-30%	None
Zambia	4	0-25%	None
Zimbabwe	15	0-100%	17

Source: RAPID project

These tariff rate structures understate the extent of price distortions in their respective economies, as a number of member countries have devised other ways to protect domestic industry either by erecting new NTBs or by revaluing imports of so-called ‘strategic’ or ‘essential commodities’ so to increase their ‘unofficial’ tariff rates. For example, the Tanzanian government provides customs with large discretion to revalue imports of about 30 designated ‘strategic’ commodities in the event custom officials suspect importers are ‘under-invoicing’ goods. The danger of this non-transparent instrument is that countries can and do use it to protect selected industries and therefore vested interests from import competition.

Unilateral trade liberalisation of MFN tariff rates are recognised as the most effective way for a small economy (all SADC member states have small economies) to integrate with world markets and to create domestic incentives necessary to promote market-based economic development. By liberalising MFN rates, local firms can source inputs from the lowest cost international source. This in turn enables firms to lower their production costs and better compete on world markets. This is particularly important if African countries want to maximise the gains from the African Growth and Opportunity Act (AGOA) since African countries will now have duty free access to the large US market for most products. From a competition policy perspective, unilateral liberalisation of MFN tariff rates are also the most effective way to reduce anti-competitive behaviour of firms operating in highly concentrated markets – i.e., domestic monopolies and oligopolies; Imports put a ceiling on the prices local monopolies and oligopolies can charge consumers and other end-users.

4.3 Investment Restrictions and Industrial Licensing

In recent years, almost all member countries have made some progress in dismantling barriers to investment. The pace of these reforms, however, differs across member countries. Zambia, for example, has lifted most restrictions on investment including foreign investment, while Tanzania and Mozambique still retain some foreign ownership restrictions and complex and costly licensing procedures for businesses. In Tanzania, to establish and operate a business the company must obtain numerous licenses, approvals and permits involving various government agencies. The types of licenses required cover virtually every aspect of business. For example, for the importation of goods, the process can take up to two weeks, involving more than 20 steps, and requires visits to eight or more offices depending on the product involved (Price, Waterhouse & Coopers 1999).[4] The high cost of the large number of business permits and documentation required, exacerbated by the lack of transparency in the approval process, is an important constraint on private sector development in Tanzania and other countries that have retained a complex industrial licensing system. The cumbersome and expensive licensing system also has a strong bias against small and medium enterprises.

4.4. Privatisation of State Enterprises

A key element of the policy framework to improve competitiveness is the privatisation of state enterprises. Privatisation of state enterprises frees up domestic price signals and allows the private sector to fully participate in the economy. In the past, state ownership and management of enterprises was extensive in all but a few of the SADC member countries. Many state firms held (and some still do) monopoly positions in production, distribution and services. High barriers to imports were erected to protect market positions of many of these parastatals. In addition, many of these firms had regulatory and licensing functions that were often used to impede new competitors. In recent years some Member States have begun large-scale privatisation programs, and these programs inevitably include important competition policy issues.

For many of the privatised enterprises, deregulation of the industry and removal of customs tariffs will be sufficient to ensure a competitive environment (Box 3: Captive Markets: An Examples From Zambia's Privatisation Program). Infrastructure, such as road, railways, ports and other utilities, issues of pricing are a concern and need to be addressed within the broader framework for competition policy. Another issue that needs to be addressed under competition policy is access to infrastructure owned by both state and private enterprise (e.g., telephone lines, the electricity grid, railway lines, water supply and distribution). We briefly discuss these issues in the context of recent moves to

[4] Price, Waterhouse & Coopers (1999),'.Tanzania Investment Guide: Final Report.

privatise railway operations. [5] Many of the issues cut across other utilities including telecommunications.

Box 3
Captive Markets: An Example from Zambia's Privatisation Program

Since 1992 the Zambian government has successfully privatised 238 out of 311 state enterprises designated for privatisation. For many of the state enterprises, deregulation of the industry and reduction in import tariffs have been sufficient to ensure a competitive environment. However, there have been a number of privatisation agreements that have included provisions that inadvertently protected the privatised firms from competition either from new entrants or imports. One example is the privatisation of the state-owned brewery.

Investors in 'high risk' emerging markets are concerned with, among other things, disruptive changes in government polices that may adversely affect the profitability of the investment. For these reasons, privatisation agreements usually contain clauses that guarantee certain rights of the investor such as guarantees against nationalisation without prompt and adequate compensation, rights of repatriation of profits and capital, and free convertibility of foreign exchange.

The buyer of the state-owned brewery was also concerned about abrupt changes in government policies that may affect the profitability of the factory. Consequently, the agreement included the usual guarantees. Reportedly, the agreement also provided guarantees that policies related to this sector would not be altered for some specified period of time, especially if the policy change is disadvantageous to the local brewery.

This guarantee provided the investor with certainty with respect to policy, which in a high-risk emerging economy is crucially important for attracting investment. However, it also locks in bad policies that may be beneficial to the firm, but nevertheless be undesirable in an economic sense. This was clearly illustrated when the Namibian government requested the Zambian government to reduce their customs tariff rate on imported beers. The Zambian government refused to cut the rate, presumably this was deemed to be disadvantageous to the local private brewery.

The result of this guarantee is that the government has inadvertently protected the dominant position of the local brewery and forgoing the benefits to consumers of lower beer prices and better product selection that would have come from trade policy reform.

Privatisation of Railways

All privatisation's of railways so far have been in the form of a concession to a private firm to operate the railway line for a specified period of time (see Box 4 for some examples). A number of important competition issues immediately arise from the privatisation of this sector. These include, but are not limited too: (1) the process for awarding concessions, (2) the possibility of anti-competitive restrictions arising from the concessions, (3) and the need for supporting regulatory framework to promote competition.

[5] The following information on railway concessions is taken from the various countries' Technical Assessment Reports carried out under the USAID/RAPID project.

(i) The Process for Awarding Concessions

In privatising assets, especially if it involves monopolies, it is crucially important to ensure that the bidding process is open and fair. By ensuring competition in the bidding process the government is more likely to get the maximum possible price for the transferred asset. This in turn provides incentives for the new owner to improve operational efficiency so to earn comparable market rates of return on the asset. In contrast, the transfer of an asset to the private sector through a non-competitive bidding process often reduces the probably that the government will obtain the maximum possible price and increases the chance that the contract will be structured in a way that reduces competition from other competing service providers.

Two railway concessions (the Beitbridge-Bulaway railway line in Zimbabwe and the Nacala Corridor in Mozambique) were granted to private operators through a non-transparentg

Mozambique

The government awarded a concession to a private consortium to operate both the northern Port of Nacala and the Nacala railway line, which runs from the port to the border with Malawi (completion of the transfer is expected this year). Having already obtained the concession to Malawi railway in 1999, this consortium would then operate the whole route from Malawi, through Mozambique and to the port. The concession was granted for 15 years. The concessionaire is free to determine and change tariffs.

The Government granted a concession to a joint venture between Spoornet of South Africa and Renefe of Spain to operate the Ressano Garcia Railway corridor.

The Government awarded a concession to operate the Port of Mabuto to a consortium, which includes the operator of the Port of Liverpool.

In each instance the concessionaire is free to determine and alter rates.

Zambia

In Zambia, the government is considering tendering a concession to operate the Zambian Railways under the Privatisation Act of 1991. There also exists a Railways Act which provides wide discretion to the Minister of Communications and Transport to grant entry permits and set tariffs. The ministry envisages that the current scope and extent of railway regulation is likely to continue in the short term and accordingly sees no immediate need to amend the Railways law. The Ministry does plan to review the regulatory framework. In the meantime, the Ministry will continue as a railway regulator.

Source: Various Country Technical Assessment Reports on Concessioning of Railways, USAID/ RAPID Project.

The most blatant example of this is the Zimbabwean government's concession to a private company to build and operate a rail line in the south of the country with the 'guarantee' that all transit traffic to South Africa would go though the new route and not via Botswana. In July 999, the line between Bulawayo and Beitbridge in the south of Zimbabwe was connected. The new connection involved construction of 170 km of new line between Beitbridge and the upgrading of an existing 147 km line from Collen Bawn and Henay Junction. This new line provided an alternative route to the then used route from Harare through Bulawayo to Plumtree and hence Botswana Railways for transit to Spoornet and South Africa and the other route from Zambia, through Bulawayo to Plumtree. The new line was constructed and financed by a private company known as Beitbridge-Bulawayo Railway Ltd (BBL) on a Build-Operate and Transfer Agreement. The private company has the concession for 30 years before transferring to the government.

This new connection should have provided direct competition to Botswana Rail for transit traffic to South Africa. This new competition would have likely improved operational efficiency, pushed down freight prices and improved delivery times. However, evidently the concession agreement has been structured in such a way that it allows Beitbridge-Bulaway Railway to capture most transit traffic between South Africa and to or through Zimbabwe. The agreement reportedly provides a *penalty clause* that if traffic is routed through Botswana Railways, the Government of Zimbabwe must compensate BBL for lost revenue. Thus, it is in the financial interest of the Government of Zimbabwe to ensure that traffic is routed through BBL and not through Botswana. This 'territorial' restriction has effectively removed Botswana Railways from participating in traffic moving to and from South Africa. In the absence of a railway tariff oversight commission, this concessionaire has significant market power to raise tariffs above levels that would prevail if there were competition from Botswana Railways.

The second example is the Nacala railway concession in the north of Mozambique. This concession also includes the Port of Nacala. The same private consortium also has the concession to the Malawi Railway. This vertically integrated transport structure provides the private operator with the potential for market power over the transit of a significant proportion of trade coming from the Port of Nacala, across Mozambique and into Malawi (and vice versa). By operating the port, the railway concessionaire could devise ways to minimize competition from road transport operators. This could be done, for example, by limiting their access to the port and warehouse facilities or charging prohibitive entry fees.

With the possible exception of the proposed concession to the Zambian railways, none of the other concessions promote open access to the railway lines. By providing open access to independent wagon operators could provide sufficient pressures to ensure improvements in efficiency and lower service prices. Open access raises complicated issues over determining the fee structure for use of the track and wagons, freight schedules, and requires a framework to resolve disputes between parties.

(iii) Regulatory Framework to Promote Efficiency

Privatising public utilities and infrastructure may in certain cases require a supporting regulatory framework to promote competition. The most common framework involves an independent price or tariff oversight commission. This type of agency is typically responsible for receiving and investigating complaints of excessive pricing in the sector, but the agency should not be intended as a price fixing agency. The agency could also examine other competition issues that may arise such as, finding ways to open access to infrastructure owned by the state or private sector.

5. Strengthening the Broader Policy Framework

As indicated above, SADC member countries' approach to competition policy has been ad hoc and unsystematic. Some member countries have embraced elements of a competition policy more vigorously than other member countries. The focus now should be on strengthening the broader policy framework as the foundation for competition policy. This would entail developing and implementing reforms in those areas covered by the SADC Trade Protocol. It should also address those areas of reforms that are not directly covered by the Protocol. This should also include developing the institutional resources necessary to improve awareness about competition policy issues among Member States. In the current environment these areas of policy reforms should include, inter alia:

- Documenting and designing a schedule for the elimination of non-tariff barriers under the SADC Trade Protocol
- Reduction in member states' MFN tariff rates
- Comprehensive deregulation that eliminates a large share of the existing requirements for approvals and licenses;
- Improved regulatory framework for privatisation of public utilities and infrastructure;
- Improved government procurement procedures;
- Promotion of principles of competitive neutrality in government business activities;
- Promotion of principles of competitive neutrality in policy formulation;
- Enhancement of institutional resources that would support policy makers to maintain and promote improved economic efficiency.

Accelerating Trade Policy Reform: Documenting official and non-official NTBs and designing a program for their eventual removal is an important part of the agenda for future implementation of the Trade Protocol and broader framework for competition policy. Promoting further liberalisation of member countries MFN tariff rates is also important to ensure that member countries are better integrated with the world economy and can maximise the benefits offered by the African Growth Act by being able to source raw materials at lowest international cost.

Promoting Deregulation: A more comprehensive reform of the industrial licensing system is critical to remove regulatory and administrative obstacles to doing business. This process should address the number of licenses required, fees, approval procedures, and complaints related to the lack of transparency and arbitrary nature of the approval process. However, effective implementation of reforms is not a trivial task given the complexity of the licensing system and the numerous government agencies involved in the process. A first step towards reform would be to undertake an inventory of key industrial licenses issued by the various government agencies. This should be followed quickly by the identification and elimination all nuisance licenses/permits/approvals.

Improved Regulatory Framework for Utilities and Infrastructure: Many state enterprises operate within a regulated monopolistic market structure. In other cases the state enterprises have regulatory functions in addition to their business activities (e.g., the local government water supply authority). A concern that has been raised is that privatisation may be merely transferring a state monopoly to private investors. Thus, there is a need for a transparent regulatory framework to ensure that privatised state monopolies are not simply transferred to the private sector in a manner inconsistent with competition policy. This regulatory framework will need to address several issues including:

- Deregulation of industries so to allow more competition
- Separating regulatory functions from state enterprise
- Price oversight mechanisms
- Improving open access to infrastructure owned by the state or the private sector

- Transparent and competitive bidding procedures for the transfer of state-enterprises to the private sector.

Improving Government Procurement Procedures: In the past, firms (in some member countries) have raised concerns with the lack of transparency in their government procurement procedures and appeal and dispute settlement mechanisms. The SADC Trade protocol provides for reform in this area. Apparently preliminary work has begun in this area and development and implementation of standard practices are crucially important.

The WTO agreement on government procurement provides detailed procedures to follow that improve transparency in the process. While most member countries are not signatories to the agreement, the SADC Member States should give serious consideration to integrating these procedures within its broader policy framework for competition policy.

Competitive Neutrality in Government Business Activities: Issues of competitive neutrality in government business activities also need to be dealt with under a competition policy. In many instances government businesses, including state-enterprises, pursue anti-competitive conduct by cross-subsidising products, assigning sole distributors, and tying their purchases of goods to other SOEs/firms These policies lessen competition and hinder private sector development in these sectors.

It is recommended that government introduce rules of competitive neutrality in government business activities. These rules should cover business conduct such as full cost pricing, assigning distributors, and procurement of goods and services. A mechanism for addressing complaints should also be established to serve as a means for promoting competitive neutrality in government business activities.

Competition Legislation: Several Member States of SADC have enacted competition laws or are currently considering enacting one.[7] A competition law provides a framework for adjudicating on anti-competitive business practices of firms. Like the broader competition policy, the primary objectives of a competition law are to maintain and encourage competition as a vehicle to promote economic efficiency and to avoid business practices that unambiguously reduce consumer welfare.

Member countries' competition laws differ between each other on several grounds. For example, the objectives of the Malawi competition law are essentially efficiency-based ones, while the South African law includes multiple economic and non-economic objectives such as "to promote employment", "protect small-medium enterprises", and "promote greater spread of ownership among citizens, in particular historically disadvantaged groups". Objectives like these are generally recognised to be inconsistent with marketplace efficiency, and therefore in conflict with competition

[7] Malawi, Zambia, Zimbabwe, and South Africa have enacted competition legislation and established variants of a competition commission. Tanzania and Botswana are considering enacting competition laws in the near future.

policy objectives. In this connection a distinction needs to be made between protecting competition (and the competitive process), and protecting competitors. A competition law is designed to protect the competitive process, and not competitors – whether small or large firms. The latter generally tends to protect inefficient firms and gives rise to a distorted and 'high-cost' economy.

Most the competition laws contain both structural provisions and conduct provisions related to competition. These provisions include presumptions on abuse of dominant position or monopoly power based on market structure criterion, provisions prohibiting price fixing and market-sharing arrangements, predatory pricing, and vertical restrictions on trade (exclusive dealerships and territories, etc). In most of these laws the conduct provisions assess the various types of practices on a case-by-case basis under a rule of reason approach weighing the relative costs and benefits of the business practice as well as taking into account the objectives of the law. Where the objectives of the law are essentially efficiency-based, as in Malawi, this rule of reason approach may not be too problematic. However, where there are multiple economic and non-economic objectives as in the South African law there is the danger that this approach will be used to protect certain competitors.

The Member States competition laws also differ on the number and types of exemptions under their laws. The Malawi law explicitly excludes trade union activity from the ambit of the legislation, but does not explicitly exclude anti-competitive conduct of state enterprises. Unfortunately, the law provides a dangerous 'catch-all' clause, which undermines the effectiveness of the law: Article 3(h) states that nothing in this act shall apply to such business or activity as the Minister may, by notice published in the Gazette, specify.

The South African law excludes any conduct designed to achieve non-economic objectives and economic activities subject to public regulation (including statutory monopolies or licensed activities) from the ambit of the law. The latter exclusion is particularly serious as it protects several large enterprises and activities including those in the telecommunications sector (e.g., Telkom and Eskom), port authorities, and railways from a competition-based challenge.

There have been no comprehensive reviews of the performance of the Member States' Competition Commissions including an assessment of the likely effects of selected decisions on the competitiveness of the specific market. However, there is a view that the various commissions have not been effective in preventing even the most blatant cases on anti-competitive behaviour. Nor have the Commissions been particularly effective in their roles as advocates for competition policy especially when it is clear that certain industry policy measures are inconsistent with marketplace efficiency. This can be partly explained by the fact that most of the commissions are not effectively independent bodies – the Malawi and Zambian competition commissions are under the Minister for Industry and Trade or Commerce. Even if market efficiency is foregone in favour of non-economic objectives (such as protecting certain types of industries), at the very least competition commissions should ensure that the competitive market implications of a policy are recognised. In this regard, it is now timely to assess the performances of the various Competition Commissions in the region.

In any case, a competition law should not be viewed as a substitute for continued efforts to liberalise and deregulate an economy. It is well established that the most effective way to increase efficiency and competition is to promote increased use of the market mechanism through trade liberalisation, deregulation and privatisation of state enterprises. Furthermore, the effectiveness of a competition law in maintaining competition is limited when regulations and trade policies restrict competition.

Supporting Institutions: This report has identified a number of policy areas where reform would improve competitiveness. However, it is also apparent that there are important institutional issues related to implementation in individual member countries and within SADC as a regional grouping. Some of the policy areas identified have competitive implications for an individual member country and, thus, are better dealt with by that country's competition policy framework (e.g., unilateral liberalisation of MFN tariff rates). Many other issues cut across member states. For example, the anti-competitive outcome of the Beitbridge-Bulawayo Railway concession not only has adverse implications for users in Zimbabwe, but also users in neighbouring countries as well as BBL's nearest rival Botswana Railways. As it stands currently there is no framework to deal with anti-competitive practices that occur in one country but adversely affects users in neighbouring countries. In this context SADC as forum might be in a better position to deal with these issues. SADC may also be an effective forum to begin promoting principles of competitive neutrality in state business activities, privatisation and policy formulation.

As a first step, SADC member countries might wish to consider a Competition Policy Protocol that would establish principles and guidelines relevant to strengthening the broader policy framework as the foundation for competition. An important element of this institutional development and capacity building is providing analytical support. One important task in this regard is to create awareness among member states and their private sectors about the economic costs of anti-competitive policies and restrictive business practices. Since very little information is available about the current state of competition in SADC member economies, this task will require studies assessing the extent of competition in specific industries in the SADC region. A comprehensive incentive study such as the one now under consideration by the RAPID project is an important step in this direction. Dissemination of these issues could be carried out through a series of workshops on competition policy.