



VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

**A TRIPARTITE REPORT ON THE UNITED REPUBLIC OF
TANZANIA-ZAMBIA-ZIMBABWE**

COMPARATIVE ASSESSMENT

Overview



NOTE

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PREFACE

1. This comparative assessment report is part of the voluntary tripartite peer review of competition policies in the United Republic of Tanzania, Zambia and Zimbabwe. The purpose of this tripartite peer review is to assess the legal framework and enforcement experiences in each of the three jurisdictions; draw lessons and best practices from each jurisdiction; and examine the value-added of the harmonization of competition law and its enforcement in the sub-region, as well as increased cooperation. The national reports review the competition policy systems in each country above, and serve as a basis for the present comparative assessment report that addresses pertinent issues from a sub-regional perspective.

I. INTRODUCTION

2. The United Republic of Tanzania, Zambia and Zimbabwe have all introduced their competition law in the mid 1990s prompted by a process of privatization and liberalization that started in the late 1980s. After years of experimentation with a centrally planned economy, the opening up of markets was seen as the solution to large inefficiencies and slow economic growth. The process of liberalization is not yet complete and regulatory restrictions are still widespread, a legacy of colonial times and socialist tradition.¹

3. Accordingly, the purpose of competition law in the three countries was to:
- Accompany the development of market mechanisms, making sure that existing dominant companies, often shielded by decades of protectionism, would not abuse their position by blocking or delaying the entry of competitors;
 - Ensure that markets would not be cartelized and that anticompetitive mergers would not lead to a substantial lessening of competition;
 - Advocate competition principles in regulatory reform.

II. COMPARATIVE REVIEW

4. On the substantive aspects of the law very useful suggestions for adjustments are contained in the reports for the individual countries. Certainly, one major improvement would be for the three jurisdictions to at least converge on the way legal provisions are interpreted, which would strengthen cooperation and allow for more mutual learning. Therefore, the Report will mainly concentrate

¹ Stiglitz, J. (2000) "Keynote address," *First course on competition law and policy*, World Bank, Washington D.C. (author recollection).

on the process of convergence among the three jurisdictions, while changes in the law will be suggested only when strictly necessary.

5. The three jurisdictions under review will be mainly compared on the:

- Substantive provisions of competition law;
- Different investigative powers of the authorities;
- Sanctions imposable for procedural and substantive violations;
- Role of the judiciary;
- Effectiveness of merger control;
- Resources allocated to these authorities in relation to the tasks assigned to them;
- Competition authorities' enforcement records role; and
- The role regional agreements² play in promoting a more effective antitrust enforcement environment.

1. The substantive part of the law: Is a common interpretation possible?

6. In all three jurisdictions, the law addresses anticompetitive agreements and abuses of a dominant position, as well as merger control. All economic activities are within the scope of the law and exceptions are limited. However, while the Tanzanian and Zambian laws are nearly fully in line with international best practices, the Zimbabwe Competition Act requires substantive revision. The major shortcoming of the Zimbabwe law is the introduction of a very artificial distinction between unfair trade practices that can be sanctioned and unfair business practices that can only be declared null and void. While it is clear that this situation results from a lack of coordination in the drafting of the 2001 revision of the law, this shortcoming cannot be overcome through interpretation. As it now stands, the law lacks a deterrent function.

7. Besides reformulating the provisions on sanctions, the Zimbabwean law needs to be improved further. For the details, refer to the recommendations of the national assessment report to the legislature.

8. As the individual reports show, as a result of recent changes, the laws in the United Republic of Tanzania and Zambia are already in line with international best practices. They contain a general prohibition of restrictive agreements and the abuse of a dominant position. The main difference between the two jurisdictions

²The United Republic of Tanzania is a member of East African Community (EAC) and the Southern Africa Development Community (SADC), while Zambia and Zimbabwe are both members of the Common Market for Eastern and Southern Africa (COMESA) and the Southern Africa Development Community (SADC).

is that Zambia's Competition Act introduces a system of notification and individual exemption for horizontal and vertical agreements above certain market share thresholds. In the United Republic of Tanzania, there is no market share threshold and parties can voluntarily notify any agreement that they believe deserves an exemption. The standard for an exemption is very similar in the two jurisdictions and requires that efficiency gains outweigh the negative effects associated with the restrictions of competition.

9. A notification system is not very effective to promote compliance with an antitrust law, since the most serious restrictions to competition will never be notified. As the European experience shows (in Europe the notification system was abandoned in 2004), firms, when subject to an authorization system, notify only agreements that they believe can be exempted. Serious violations are kept secret. As a result, notifications just overburden competition authorities with paper work, but do not result in an improvement of the competitive environment. Therefore, should the number of notifications increase too much, the authorities in Zambia and the United Republic of Tanzania may need to issue block exemption regulations that would reduce significantly their number, along the lines of what happened in the European Union before 2004.

10. The individual country reports for the United Republic of Tanzania and Zambia do not recommend amending the substantive competition law provisions. There are however some suggestions to revise specific procedural issues. If this cannot be realized through legislative amendments, the suggestions may be implemented through case law development and the adoption of guidelines.

11. The regional groupings to which the three jurisdictions belong could help with the formulation of these guidelines by providing reference documents.

12. Furthermore, it is very important that decisions by the authorities be motivated and published on the website of the authorities for the purposes of educating business actors and creating legal certainty. In addition, court rulings in competition cases should be published as well.

2. The investigative powers of competition authorities

13. A major problem in antitrust cases is that the evidence for a violation is difficult to obtain. Asking potential infringers to provide evidence voluntarily would not be effective. Firms only provide information voluntarily if this is in their own interest. Therefore, outside the area of merger control,³ competition authorities need strong investigative powers in order to gather the necessary evidence.

³As regards merger control, firms have an interest in providing the necessary information for the authority to issue a quick decision.

14. In all three jurisdictions, the authority can open an enquiry ex officio, act on complaints, and require a person to submit information, produce a document or appear in person.

15. Furthermore, where the authority has reason to believe that a person is in possession or control of any documents that may be relevant for an investigation, the authority may, under a preliminary approval by a Tribunal, enter premises to conduct a search and make copies or take extracts of documents therein. Among the three jurisdictions, only Zambia has started to gain experience with dawn raids, having conducted two of such raids in recent years. All three authorities would need specialized training for conducting effective searches.

16. As for Zimbabwe, full investigative powers can be used by the authority only once a notice is published in the Government Gazette and in National Newspapers circulating in the area covered by the investigation, stating the nature of the proposed investigation. While such publication may be necessary for inviting interested parties to submit evidence on the case, it should not be required for the use of investigative powers. Especially with respect of inspections, it is very important that they come as a surprise for the firms involved. Too much advanced information would risk making them useless, since firms would be able to destroy beforehand all relevant evidence. Therefore, the publication should be made on the same day the inspection takes place.

17. As for the investigative procedure, in all three jurisdictions at the end of the investigation, all stakeholders are heard in front of the authority. In principle, a statement of objection should be sent to the parties beforehand, so that they know the charges that are being raised against them and can properly defend themselves. While transparency in these hearings is important, it should not go as far as having the press present at the hearing, as is the case in Zimbabwe. Otherwise, companies may not discuss confidential information and thus, making it very difficult for the authority to achieve a full understanding of the case.

18. As for the burden of proof, any violation of the law should be proved by the authority, while the parties should provide the necessary evidence for any possible exemption they request to be adopted. In general, the structure of the law in the three jurisdictions follows this pattern. However, the Tanzanian requirement that the law be violated intentionally makes the whole system much weaker and more difficult to enforce. Subjective appreciations of this kind should not be part of an administrative enforcement system and should be eliminated. If that is not possible, the requirement of intentionality should be interpreted very narrowly. For instance, it could be read as meaning that a fine can only be issued if it is generally known through case law or guidance of the authority that specific practices are indeed prohibited or the reach of the law is extended to new areas.

19. Finally in all three jurisdictions, the authority is vested with the power to adopt interim measures to prevent serious or irreparable damage resulting from the potentially anticompetitive behaviour.

3. Sanctions

20. Sanctions are necessary to make sure that legal provisions are respected. All three authorities have powers to impose procedural sanctions. In the United Republic of Tanzania and Zambia the authorities can also impose sanctions for violations of antitrust provisions: as noted in Zimbabwe the Law does not foresee any sanctions on anticompetitive business agreements, aside from declaring them null and void.

21. As regards procedural infringements, in the United Republic of Tanzania, the sanction for not providing information or for providing false information is quite low, while in Zambia and Zimbabwe, it is very high (imprisonment for the obstruction or delay of the authority's investigation or the provision of false or misleading information). It is clear that in such cases, imprisonment is excessive and therefore not deterrent, since a judge would hardly sentence someone to jail for misleading the authority. While their enforcement is unlikely, the existence of criminal sanctions for procedural infringements may nonetheless have a negative effect on investment, scaring foreign investors and keeping them out of the country. Therefore, adequate administrative sanctions would be more effective, for instance a fine of up to 1 per cent of the turnover achieved in the preceding business year.

22. As for pecuniary sanctions for the punishment of the violations of the substantive parts of the law, the level of fines in Zambia, up to 10 per cent of the offending enterprise annual turnover, is in line with international best practices. On the other hand, the fining policy in Zimbabwe, besides the fact that antitrust violations are not subject to any fine, is nonetheless clearly too weak, the maximum fine being \$5,000, and what is more problematic is that fines are not decided by the competition authority itself but by a different body that does not have a precise representation of the seriousness of antitrust offenses. The best solution in Zambia and in Zimbabwe would be to change the law, eliminating the possibility of imprisonment for petty violations. Alternatively, the authority could well issue a statement on when criminal sanction will be used, strictly limiting the possibility of imprisonment. In Zimbabwe, administrative fines should be set at a percentage of the global turnover of the firms involved, like in Zambia and the United Republic of Tanzania, introducing a 0-10 per cent interval.

23. What is in any case very important for antitrust enforcement to be effective is that fines be actually paid. This implies that firms should not wait for the issuing

of the appeal judgment before paying the fine. Only when a judge (under a request for interim orders) concludes that a decision is prima facie wrong, he may suspend the obligation to pay the fine after the appeal was heard. In any case public administration should be efficient in fine collection.

24. Fines should not become a source of funding for the authority like in Zambia where the authority is allowed by the law to retain a percentage of the fines paid, even though the law has not been made operational. This was very wise on the part of the authority. The system clearly modifies the incentives of the authority to fine offending companies and therefore should be abolished, as the individual Report on Zambia suggests, since the authority might lack neutrality in deciding on cases.

4. Judicial review

25. The rule of law requires that decisions by competition authorities can be appealed in front of a judge and this is indeed the case in the three countries under review.

26. As regards judicial review of competition cases, four issues are particularly relevant: (a) the question whether the decision by the competition authority is enforceable pending appeal; (b) the scope of the review of the judge (the standard according to which the judge decides); (c) the level of the judge's expertise in competition issues, and (iv) the time frame of judicial review.

27. In the United Republic of Tanzania, judicial review of competition cases is performed by a specialized tribunal, the Fair Competition Tribunal. Despite its specialization, final decisions/judgments take too long given a lack of staff necessary for assisting judges in writing the judgments after the decisions are made. This deficiency is very serious because in antitrust enforcement the rapidity of judgments is very important. Furthermore, judges should be trained in antitrust enforcement, since most judges have not received respective training on these issues during their university studies or in preparation for the bench. As regards the standard of review, the judges should base their judgments on the decision of the authority, the evidence the authority had collected (that should be made available to the judge) and the grievances of those affected by the decision.

28. In Zambia, the new Competition and Consumer Protection Act of 2010 provides for the establishment of a specialized Competition and Consumer Protection Tribunal. The law is not clear as to the standard of review to be applied by the tribunal and more importantly, as to whether it is constrained by the evidence collected by the authority. This aspect should be clearly ruled in the law. The Tribunal, which was established in 2011 but is still not operational, does not have powers of reviewing the imposition of criminal sanctions on breach of

the country's competition law. Members of the Tribunal can be removed by the Minister for unspecified reasons. This unspecified threat may strongly reduce the independence of the Tribunal. Judges should be removed only for very specific and serious reasons provided for in the law along the lines of the rules that exist in the United Republic of Tanzania.

29. In Zimbabwe, there is a double jurisdiction for judicial review of competition cases of the Administrative Court and the High Court without clear definition of the relationship between the two bodies. This may lead to conflicting decisions. In addition, it does not allow the judges handling competition cases to gain relevant expertise in the area. It is therefore necessary to assign exclusive jurisdiction over competition cases to one of the two courts. For the purpose of capacity building, the selected court should then ensure that always the same judges handle competition matters. Such an arrangement (concentrate the cases in a section of a larger Court) would be preferable also for the United Republic of Tanzania and Zambia (where specialized Courts have been created) where judges do not have many cases over which to build their expertise, while they would still be working as judges if integrated in a larger court.

30. Finally, judicial review of competition cases needs to be reasonably timed in order not to become irrelevant or even detrimental to economic activities.

5. Merger control

31. All three jurisdictions under review have established a mandatory notification system for merger control, which is very useful.

32. For the proper functioning of such system, a clear and uncontroversial definition of transactions subjected to control is required. In line with international best practices, in the three jurisdictions under review, the acquisition of control of an independent firm is the triggering event for merger control.

33. Given that only potentially anticompetitive mergers should be subjected to merger control, having a notification system based on turnover thresholds helps to identify the type of mergers to be reviewed. In the United Republic of Tanzania, the actual turnover thresholds are set by the authority itself, which allows fine-tuning the system.

34. A weakness of the Tanzanian merger control system, however, is the provision of immunity to a person who acts unintentionally in contravention of the merger notification provisions. This test is difficult to apply and probably leads to many mergers not being notified. Thus, it should either be deleted from the law or be interpreted so rigorously that it is hardly applied.

35. In the United Republic of Tanzania, restrictive mergers can be authorized if there is an overriding public interest. The public interests listed by the law would fall under normal competition considerations in most jurisdictions, like the failing firm and the efficiency defenses. Only the protection of the environment appears as a pure public interest item. It seems therefore that the public interest objectives to be considered in the United Republic of Tanzania entail only a competition type assessment.

36. Also in Zambia and in Zimbabwe, mergers above a certain threshold need to be notified. The thresholds in both countries follow the same structure and are based only on the combined turnover or assets of the merging countries within the domestic market. This is disadvantageous for larger firms that individually meet the notification threshold and therefore have to notify even the smallest transactions and acquisitions in instances where the influence of such transactions on the domestic economy is insignificant.

37. In order to remedy this situation, the notifications system should be based on two combined triggers: (a) the combined turnover or assets of the merging parties exceeding a fixed level; and (b) at least two parties have individually more than a fixed minimum turnover or assets in the jurisdiction. This is the direction all three jurisdictions should move.

38. Zambia and Zimbabwe differ with respect to the time frame to carry out the merger control. The Zambian law sets a timeframe of 90 days, extendable by 30 further days. However, simple transactions should be cleared much faster. If the law is not changed along the lines suggested by the country report (a two phases procedure), the authority may decide to clear simple transactions faster at its own initiative.

39. In Zimbabwe, the law does not provide binding time frame for merger assessment, which may cause long delays for a decision. Although changes in the law would clearly be preferable to address this issue, the authority can announce to respect a reasonable time frame of three to four months based on its own initiative.

40. As regards the standard for merger control, also Zambia and Zimbabwe adopt a public interest test. In Zimbabwe, once the authority concludes that a merger substantially lessens competition, it determines whether there is any technological efficiency or other pro-competitive gains which would offset the lessening of competition. Like in the United Republic of Tanzania, the public interest test in Zimbabwe is essentially an efficiency defense and is clearly within the best practice in merger control.

41. In Zambia the definition of public interest is much wider: besides rightly considering the efficiency and the failing firm defenses, the law allows an otherwise anticompetitive merger to be authorized for a number of very general reasons, including inter alia: “socioeconomic factors as may be appropriate; and any other factor that bears upon the public interest.”

42. Such broadly formulated public interest considerations weaken substantially the technical approach of the authority in the evaluation of mergers. While authorities are well equipped to evaluate the effect of a merger on competition in affected markets, a public interest standard that introduces a multidimensional approach requires balancing different policy objectives for which a competition authority is not equipped. The best approach would be to limit the public interest test in Zambia to the efficiency and the failing firm defenses, along the lines of the Tanzanian and the Zimbabwean laws.

43. If the law is not changed, the Zambian authority should interpret these public interest provisions very strictly and authorize an anticompetitive merger only if the evidence that it is beneficial is compelling and unquestionable.

6. Public resources dedicated to antitrust enforcement

44. In all three jurisdictions the antitrust authority is a relatively small, and besides antitrust enforcement, the authorities are involved with consumer protection, fair trading, plus counterfeit goods (United Republic of Tanzania), relocation of Plant and Equipment (Zambia) or Tariff issues (Zimbabwe). This reduces the amount of resources dedicated to competition law and policy enforcement.

45. In Zimbabwe, the authority has a staff establishment of 29: 16 are technical and 13 support staff. The head is the Director and Secretary of the Commission who is also the most experienced in competition issues and has been in the Commission since 1999. Among the operational staff, none has undergone competition training at University; comprehensive in-house training of staff has not been sufficient⁴. In this area, the authority should consider mobilizing resources and organize tailor made training aimed at addressing knowledge and skills gaps for both the Commissioners and staff.

46. The staff of the authority is paid civil service type salaries; seven times lower than those of sector regulators or of the Central Bank⁵. As a result, the authority does not attract well trained people and such remuneration does not provide the right incentive for a well trained antitrust enforcer. Resources dedicated

⁴ See *Voluntary Peer Review of Competition Policy : Zimbabwe, Part 3.8 `Agency Resources, Caseload, Priorities and Management`*

⁵ *Ibid.*

to competition have to increase substantially to cover better salaries, more staff and the quality of the whole organization. Otherwise, the Zimbabwe economy is not likely to fully benefit from a competitive environment.

47. The authority of the United Republic of Tanzania is better funded. It has a staff of 58, of which 24 is dedicated to antitrust enforcement and competition advocacy. Contrary to Zimbabwe, the staff salaries are much higher than the average civil service and competitive with the private sector.

48. In Zambia, the authority has a total staff of 29, of which 17 are directly involved in competition and consumer issues and only half on antitrust enforcement. Staff salaries are quite good and compare well nationally and regionally. The present staffing level of the authority however is strongly inadequate and staff is strained in handling increasing number of cases. The authority recently appointed 10 part time Inspectors and a total of 60 Inspectors are planned to be hired in all the nine Provinces. The Inspectors need specialized training.

49. The Zambian authority's major constraint is funding. Government funding needs to be increased substantially from the current level (at around 36 per cent of the total). The major source of the Commission's income is statutory fees and fines, of which merger notification fees are predominant. New fees to be soon established for the exemption of anti-competitive agreements are hoped to significantly increase the total (it may not be so because the fees may substantially reduce the incentive to notify).

50. It is not advisable for Government institutions to be funded through fees levied on statutory activities. The major problem is that once the fees are in place, funding considerations may take precedence when important decisions are taken by the authority. In other words the funding of the authority may become a reason to avoid well meaning reforms (for example elimination of exemption procedure or change of thresholds for merger notifications if it reduces the flow of funds to the authority).

51. Direct funding of the authority through fines should be avoided. The fines imposed on breach of competition law should be paid to Treasury, to avoid the possibility of the authority resolving cases based on their budgetary needs. This affects the independence of the authority.

52. If there is a need for external funding, merger notification fees are less problematic, since their structure could be devised in relation to the complexity of the analysis. In other words the fee could increase in proportion of the turnover of the acquired company, not just with the turnover of the notifying party.

53. Merger notification fees exist in all three jurisdictions and everywhere they are biased on turnover of the notifying company. This bias should be eliminated. In Zambia there is the extra problem that fees are way too high and may be up to K3 billion (or about US\$600 000). As the Zambia Report rightly notes, “the very high merger notification fees increase the transaction costs of merger transactions, and places a heavy financial burden on the merging parties who in most cases enter into merger transactions for economic and viability reasons. Secondly, it would not be prudent for the Commission to over-rely on merger notification fees for the funding of its operations since such fees are not a stable source of income.”

54. The financing of competition authorities is best achieved through Government funds, as long as independence is maintained. Any funding related to an action of the authority may influence the outcome of that action. A further advantage with Government funding is that the authority is accountable for the use of its resources, and is required to report the use of funds to Parliament. Examples can be drawn from the United States or United Kingdom where the governments periodically evaluate the performance of antitrust authorities and require them to justify value for money.

55. Government funding has some drawbacks as it may put into question the independence of the authority, pushing it to consider special interests in its decisions. In such circumstances, it may be appropriate to provide direct funding of the authority by some sort of a tax on undertakings, as has been done for example in Turkey (where a tax on the capital increases of all incorporated or limited companies funds the authority) and, more recently, in Italy (where the authority is funded by a turnover tax).

7. Enforcement record

56. The individual reports on the three jurisdictions indicate the output of the authorities in terms of the number of competition cases that have formed their caseload over the past: a 10-11 year period in the case of Zambia and Zimbabwe and 3 years in the case of the United Republic of Tanzania.

57. The Zambian authority over the period 1998-2010 handled 386 restrictive business practices cases and 331 notifications of mergers and acquisitions. Confining attention to the period 2008-2010, 103 cases were handled, 13 resulted in “cease and desist” orders and a further 55 were closed. This would imply that a substantial number remains open. The introduction of a notification system under the Act of 2010 has led to a large increase of new cases. The notification system is likely to consume significant resources that could be better employed in detecting and prosecuting serious violations such as cartels. Over the same

period 93 merger notifications were reviewed and 49 of them were determined by the Commission.

58. The Zimbabwe authority over the period 1999-2010 handled 220 cases of restrictive practices and 222 notifications of mergers. More detailed data indicates that the Zimbabwean competition authority takes annually on average around 8 decisions on restrictive business practices, out of which 18 per cent are decisions to proceed to a full investigation and 7 per cent are decisions to refer a case to the office of the Attorney General. In the absence of sanctions for violation, the best decision can be assumed to be declaration of nullity. In the field of merger control, the Zimbabwean competition authority takes on average 10 decisions per year. 1 per cent of the mergers handled between 1999 and 2011 were prohibited, while 20 per cent were approved conditionally. 79 per cent were either approved unconditionally or not challenged.

59. The Tanzanian authority over the period 2008/9 to 2010/11 handled 4 cases of restrictive agreements, 8 of unnotified mergers and 32 notified and reviewed mergers. A number of cases are pending before the authority. The strategic plan for 2011-2013 foresees an enforcement focus on cartel investigations.

60. This overview of enforcement record suggests some conclusions. Besides Zimbabwe, each of the other two authorities has been systematically deciding more cases related to non-competition areas. Violations of the law associated with these other tasks are somehow easier and require less resource. Apart from procedural penalties, with some notable exceptions, very few prohibition decisions are recorded. The notable exceptions such as in the Breweries sector (Serengeti Breweries V Tanzanian Breweries, or that involving Zambian breweries) are an indication of attainable scope with stronger enforcement. The overload of merger notifications can be well resolved with appropriate merger notification thresholds and the introduction of simplified decisions.

61. The key to obtaining the benefits for the economy and consumers from implementing competition law resides in achieving a credible enforcement record through prohibition decisions. This also accords credibility and respect to the authority. Most authorities have introduced a combination of training and capacity building programmes in cartel detection, investigative methods, merger assessment for operational staff and instruction in case management and assessment techniques for senior officials. With respect of the three jurisdictions under review, training on the practical aspects of conducting investigations (how to conduct a dawn raid, what type of information to ask in the course of investigations, how to handle a request for access to file, how to set sanctions, how to prove cartels, what type of behavior to consider an abuse, how to set up a strategic plan for action, etc.) would be particularly important.

By becoming more effective in investigating relevant cases, the status of the authorities in the three jurisdictions can be enhanced. First (relevant) cases should be investigated and prohibition decisions taken. As a result the credibility of the authority would be strengthened and so would be their status as first class government institutions.

III. REGIONAL AGREEMENTS

62. All three jurisdictions participate in some Regional agreements. The United Republic of Tanzania is a member of East African Community (EAC) and the Southern Africa Development Community (SADC), while Zambia and Zimbabwe are both members of the Common Market for Eastern and Southern Africa (COMESA) and the Southern Africa Development Community (SADC). SADC is the Regional organization to which all three jurisdictions belong.

63. While in the globalised economy there is a strong need for competition authorities to cooperate at the international and regional levels in order to address cross-border competition cases, the major weakness of some of these regional agreements is the complexity of the tasks assigned to them and inadequacy of funds available to accomplish them.

64. COMESA is moving towards becoming a custom union. The provisions of the COMESA Treaty are primarily devoted to the elimination of trade barriers, to the enforcement of antidumping rules and to the creation of a free trade area. Recent developments have occurred which are part of a progressive effort towards the creation of a common market. Antitrust enforcement is one of such efforts.

65. In 2006, a full Competition Commission composed of nine Commissioners from COMESA member States was created. The Commission has been fully in place and operational since December 2009. The COMESA Competition Commission is responsible for enforcing the rules against abuse of dominance and cartel behavior and it also has some powers with respect to merger control.

66. The institutional structure of COMESA and in particular the existence of a COMESA court of justice could rapidly lead to an efficient system of antitrust enforcement. However, since many COMESA member States are also members of other regional groupings with overlapping memberships, jurisdictional issues are enormous, including litigation burden. For the three jurisdictions under review, the COMESA Competition Commission will have the preliminary task of going through EAC configuration when deciding on any case.

67. The European experience suggests that the adoption of the principle of “effet utile” may be a way to alleviate the jurisdictional issue faced by regional groupings

such as COMESA. According to the principle, in order to determine jurisdiction, what matters is the substance of the decision. Judges or domestic antitrust authorities could apply either community or domestic antitrust laws, but the decisions they reach should conform to community case law and jurisprudence. As a result of this principle, domestic competition laws became fully integrated with community law, not simply complementary to it.

68. In the past the COMESA Competition Commission faced inadequacy of funding for the operation of the board and staff recruitment. Adequate funds are an essential feature of any organization. Recently COMESA started recruiting new staff, a good sign towards the effectiveness of the organization. However, since the United Republic of Tanzania is not a member, COMESA does not represent the complete solution for the three jurisdictions under review. However, Zambia and Zimbabwe can share cross border enforcement experiences with the United Republic of Tanzania and also exchange best practices. They can also act as a force to advocate for policy coherence and implementation within the two regions.

69. The South African Development Community (SADC), to which all three countries belong, aims at furthering the socio-economic cooperation and integration for its 15 members. SADC has created a framework of cooperation and not a supranational institutional structure like COMESA. SADC competition policy is governed by the Declaration on Regional Cooperation in Competition and Consumer Policies aimed at facilitating investigations on anti-competitive practices that have cross-border effects. The declaration promotes cooperation among SADC member States, establishing comity principles among them, and setting up an institutional structure, the Competition and Consumer Policy and Law Committee (CCOPOLC). CCOPOLC was established in 2008 as a forum where member States' competition authorities, meets once a year to exchange information and share enforcement experiences.

70. SADC structure does not have enforcement powers. In addition to promoting cooperation in competition enforcement, SADC could also become a center of promotion of best practices on substance, procedure and institutional structure. This can be enhanced through appropriate training of staff within the Secretariat and its member states.

71. To further its cooperation facilitating mandate, SADC should prepare a comparative enforcement performance report of member States competition authorities, starting with the three jurisdictions under review. This could be very useful for exchange of enforcement practices, adoption of better procedures and strengthening of domestic institutions.

72. There are regional efforts in place to establish a tripartite free trade area, aimed at minimizing the effects of the overlaps in the membership of COMESA, SADC and EAC. It has been found prudent for the three regional groupings to co-operate and harmonize their trade, infrastructure and other regional integration programmes, including competition law and policy. With respect to competition, the three regional groupings are supposed to co-operate and exchange information in the formulation and/or implementation of the competition policies and laws. This would indeed be a good step towards reducing enforcement overlaps and enhance the implementation of the recommendations of this review in the three jurisdictions individually and collectively.

IV. FINDINGS AND RECOMMENDATIONS

73. In the antitrust field, the United Republic of Tanzania, Zambia and Zimbabwe have many things in common. Their laws were introduced around the same time in the mid 1990s, their competition authorities have a number of different mandates besides antitrust. Zambia has plant dislocation, the United Republic of Tanzania, counterfeits and Zimbabwe, tariffs. This puts pressure on the amount of resources dedicated to antitrust enforcement. In order to increase their effectiveness, the authorities need more resources and better funding. It is not easy to convince Governments to dedicate resources. The best way to convince Governments to avail more resources to antitrust enforcement is to have a few high impact cases, along the lines of the brewery cases in the United Republic of Tanzania and Zambia. Such cases can uphold the importance of competition law and policy to the public and Government. While improving resources and funding of the national competition authorities constitutes the core recommendation of the comparative assessment, further issues need to be addressed in order to better the enforcement of competition law and policy in the three countries and at the regional level.

1. Recommendations to be implemented at the national levels

a. Recommendations addressed to the legislature

74. As regards legislative reforms, the Zimbabwean competition law needs to be revised, as described in the national assessment report in order ensure that antitrust violations can be fined. Otherwise, as the law stands, deterrence cannot be achieved. Zambia and the United Republic of Tanzania do not need to change major parts of their laws. In these jurisdictions, however, there is a need to revise and reinterpret several specific provisions in order to converge to best practices.

Sanctions

75. Appropriate sanctions for procedural and substantive competition law breaches is a major area for revision/reinterpretation in all three jurisdictions:

76. The Zambia and Zimbabwe authorities should ensure that petty violations are not punished with criminal sanctions. Failure to notify a merger or providing misleading information to the authority should be sanctioned by a pecuniary fine. Imprisonment in such instances is not recommended. Such unnecessarily harsh penalties may weaken the flow of foreign direct investment to the country and may be counterproductive for economic development. In practical terms, a judge is unlikely to sentence a person to jail for such minor violations. However, the existence of such penalties in the law still represents a threat to outsiders. In cases where the law may not be easily amended, the authority should develop guidelines by way of subsidiary legislation, which provides for very exceptional circumstances, under which the criminal provisions may be applied. This could be hedged on repeated violation and when it is clearly a part of a complex scheme of obstruction of justice.

77. Apart from criminalization of petty violations, in Zambia the provisions on sanctions are in line with international best practices. In the United Republic of Tanzania, there is a need for a minor change in the law, since the fine provided for in the law (from 5 to 10 per cent of the annual turnover) does not allow for firms to be compensated if they decide to cooperate with the authority. In this respect, it is proposed that the scope of the sanctions start from zero. However such reforms may not be a matter of urgency. A leniency program becomes necessary and effective as authorities strengthen their enforcement credibility. There is room for the Tanzanian authority to grow with the existing legislation. Some major refinements are necessary in Zimbabwe, to provide for antitrust violations to be fined, to deal with the existing fines structure, which is inefficient to serve as a deterrent to violations. Also in Zimbabwe fines should be set as a percentage of turnover (0-10 per cent).

Merger control

78. In all three jurisdictions, mergers above a certain threshold are notifiable. However, in the United Republic of Tanzania, the thresholds can be modified by the competition authority. This is very important aspect to consider fine tuning the existing system in Zambia and Zimbabwe, which places big firms at a disadvantage. The laws require big firms to notify even transactions where the acquired company has an extremely small domestic turnover. This law needs to be revised to give some flexibility to the authority in to identify the most appropriate turnover threshold. For Zimbabwe, pending revision of the law, Merger assessment of a merger may be determined by an administrative decision of the authority to review all simple

mergers within a month and more complex ones within four months.

79. All three jurisdictions have a public interest defense for otherwise anticompetitive mergers. While the test is quite appropriate in the United Republic of Tanzania and Zimbabwe, practically referring only to efficiency and a failing firm defense, the public interest test introduced in Zambia is very wide. In Zambia, besides the efficiency and failing firm defenses, the law includes export promotion, competitiveness, and socio-economic factors, as matters to be considered as part of the public interest. Unless the law is revised, the authority should interpret these provisions very rigorously and grant a public interest exception only when there is a net consumer benefit (i.e. interpreting these exceptions as extended efficiency defenses).

Judicial review

80. In the United Republic of Tanzania and Zambia, judicial review is assigned to specially established competition tribunals which ensure a high level of required expertise for judges in charge of judicial review of competition cases.

81. In general, however, it may not necessary to introduce a specialized Court, it is sufficient to ensure that judicial review of the competition authority's decisions is always carried out by the same judges of a more general Court so that these judges can develop the expertise required for the review of competition cases. The double jurisdiction of the Administrative and High Court in Zimbabwe need to be addressed. While a revision of the law to assign jurisdiction for judicial review of competition cases to a single body is the preferred option, there may be other practical solutions, for example a memorandum of understanding between the two Courts on a division of tasks.

b. Recommendations addressed to the government

82. In all three jurisdictions, the antitrust authority is a relatively small institution and responsible for a number of functions (consumer protection, fair trading, counterfeit goods, relocation of plants and equipments, tariffs). As a result, the amount of resources dedicated to competition law and policy enforcement is limited. In terms of staff remuneration, in Zambia staff salaries are good. In the United Republic of Tanzania, conditions of service are far better than the civil service conditions and competitive with the private sector. The low salaries in Zimbabwe pose a severe challenge for staff retention.

83. Antitrust enforcement is a professional activity and the quality of the staff of the authority is an asset on which every government can rely on for the development of a more market oriented regulatory environment. If the competition authorities achieve a reputation comparable to that of central banks, then staff salaries would

be sufficiently high to attract well trained personnel. If staff is not well trained, the quality of enforcement cannot be guaranteed to enable these authorities make a difference in their jurisdictions.

84. The funding of the authorities in the three jurisdictions needs to be improved. Either the authorities should be funded directly by government or be funded by a tax on corporate entities above a certain thresholds, along the lines of similar practices in jurisdictions like Italy or Turkey. Having notification fees (like all three jurisdictions have) or providing the authority with a percentage of the fines (as provided for by the Zambian law) should be changed because it is not reliable and may influence the outcomes of the case decisions by the authority.

c. Recommendations addressed to the competition authorities

Enforcement practice

85. The first recommendation addressed to the competition authorities in the three jurisdictions is to enforce the law more effectively, starting with some high profile cases, prompted by dawn raids and ending with important sanctions. The reputation of the authorities would greatly benefit as a result, and any strengthening of the organization (including the necessary increase in funding) would be made politically easier.

86. Dawn raids are the most common way to discover whether a firm had actually violated the antitrust provisions, especially for cartels and abuse of dominance type violations. Dawn raids should come as a surprise to the firm; otherwise there is a risk that the evidence is destroyed. In the United Republic of Tanzania and Zambia, the possibility of inspections is clearly within the reach of the authority and, in Zambia, there have been two dawn raids in recent years. In all jurisdictions practical experience should be gained for the authorities to become more effective in conducting inspections. Specific training would be particularly useful.

87. As for Zimbabwe, since there is a mandatory publication provision on the reasons for each investigation, inspections should be organized on the same day of the publication.

88. The United Republic of Tanzania will need to make sure that the provision that the competition law is violated intentionally be interpreted very restrictively. In this sense, when the reach of the law is extended by the case law to new areas or new practices, a fine should be issued only once it is well known that such practices are indeed prohibited. Otherwise there is a risk that subjective appreciations about intentionality would put the effective application of competition law in the country at risk.

89. For deterrence to be achieved, fines need to be actually paid. Collection of fines is not to be undertaken by the authority, but the authorities in the three jurisdictions should advocate the Government to ensure collection of antitrust fines.

90. Furthermore, the Tanzanian and Zambian authorities should exercise great care with the way they will handle the flow of notifications of restrictive practices that the new law has made possible. Such notifications, as the EU experience shows very well, are unlikely to uncover the most serious violations of the competition law. This indeed is the reason why the EU eliminated the notification system in 2003. Over a thousand agreements were notified to the European commission in over 40 years and only a handful was prohibited.

Staff development

91. The strengthening of the reputation of the competition institutions requires extensive training of its staff and of the judges responsible for judicial review. The staff of the authorities should be trained on the substantive aspects as well as the procedural aspects of law enforcement: how to conduct a dawn raid, what to put in a file of a case, how to handle a request for access to file, how to write a statement of objections and a final decision, how to set the fine, what type of remedies to identify, when to adopt a simplified procedure for mergers, etc.

92. Training would also be necessary for the drafting of guidelines and communications on how to interpret the substantive provisions of the laws. This type of training should be provided directly to the three jurisdictions as well to their respective regional groupings. The enforcement problems in the three countries are similar and common issue papers could be drafted with the help of the individual authorities cooperating at the regional level under the auspices of international organizations that could provide specific expertise.

2. Recommendations to be implemented at the regional level

93. In their efforts to establish well functioning market economies, to a certain extent, the three countries face similar restrictions of competition. Furthermore, cross border anti-competitive practices are present in the region as everywhere in the world. Recently, regional initiatives have been put in place which would allow addressing these issues, namely the competition frameworks of SADC, COMESA and EAC. The three countries under review should make best use of the regional initiatives to strengthen their enforcement efforts by converging in the interpretation of the laws, exchanging experience and cooperating on case handling.

94. All three jurisdictions are members of SADC, which is an exception among the relevant regional organizations (EAC, COMESA and SADC), since it only offers a framework for cooperation and exchange of experience, but does not establish a supranational competition regime to be enforced by a regional competition authority.

95. As a result, SADC may serve as a forum for all the three jurisdictions under review to work on convergence and best practices, such as solutions to substantive and procedural problems of common interest.

96. The two countries under review who are members of COMESA (Zambia and Zimbabwe) have an opportunity to benefit from enforcement procedures under its competition regulations and share best practice arising from cross border case resolution. It is recommended that they share experience gained within COMESA with the United Republic of Tanzania, the third country under review. At the same time, taking into account that Zambia and Zimbabwe are members of COMESA and SADC, they are in a special position to advocate the avoidance of conflicts between the two regional competition regimes.

97. In this respect, the effort to establish a tripartite free trade area, aimed at minimizing the effects of the overlaps in the membership of COMESA, SADC and EAC is likely to be beneficial. It has been found prudent for the three regional groupings to co-operate and harmonize their trade, infrastructure and other regional integration programmes, including competition law and policy. With respect to the latter, the three regional groupings are supposed to co-operate and exchange information in the formulation and/or implementation of the competition policies and laws.

98. In addition to formal cooperation within the regional competition groupings, the three competition authorities under review should further strengthen their ties informally so as to exchange experience and possibly cooperate at enforcement level. Joint training activities should aim at increasing competition law expertise and at the same time enhance networking and the forging of professional relationships.
