



# COMPETITION ISSUES IN THE ECONOMY OF MOZAMBIQUE





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## NOTE

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## Abbreviations

ADM	Aeroportos de Moçambique (Airports of Mozambique)
BCM	Banco Comercial de Moçambique (Commercial Bank of Mozambique)
BPD	Banco Popular de Desenvolvimento (Popular Development Bank)
CCOPOLC	Competition and Consumer Policy and Law Committee of SADC
CNELEC	Conselho Nacional de Electricidade (Electric National Council)
CPI	Centro de Promoção de Investimentos (Investment Promotion Centre)
CTA	Câmara do Comércio de Moçambique (Chamber of Commerce of Mozambique)
DECOM	Associação de Defesa do Consumidor de Moçambique (Consumers Protection Association of Mozambique)
EBA	Everything But Arms
EDM	Electricidade de Moçambique (Electric Company of Mozambique)
EU	European Union
FDI	Foreign and Direct Investment
GDP	Gross Domestic Product
GNP	Gross National Product
HCB	Hidroelectrica de Cahora Bassa
IAM	Instituto do Algodão de Moçambique (Cotton Institute of Mozambique)
ILO	International Labour Organisation
IMF	International Monetary Fund
INCM	Instituto Nacional das Comunicações de Moçambique (Postal & Telecommunications Regulatory Authority)
IPEx	Instituto para a Promoção das Exportações (Exports promotion Institute)
ISO	International Sugar Organization
LAM	Linhas Aéreas de Moçambique (Mozambique Airline)
MSMEs	Micro, Small and Medium Enterprises
PPP	Public-Private Partnership
PRO-CONS	Associação Para o Estudo do Consumidor (Association for the Education of Consumers)
SADC	Southern African Development Community
SMBs	Small and Medium Businesses
SMEs	Small and Medium Enterprises
TMM	Telecomunicações Móveis de Moçambique (Mozambique exclusive mobile telephone operator)
OECD	Organisation for Economic Co-operation and Development
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
UTRE:	Unidade Técnica de Reestruturação Empresarial (Government Companies Reestructuring Unit)
WTO	World Trade Organisation

## **I. EXECUTIVE SUMMARY**

### **1. Background**

1. The background to this study on competition in Mozambique is amply given in UNCTAD's 2006 study on a competition policy framework for Mozambique as follows:

“The Ministry of Trade and Industry requested UNCTAD to assist it in the preparation of a competition policy framework paper, which could then serve as a basis for the drafting of a competition law. The overall objective is to improve the country's policy framework for business conduct and promote an environment that is favourable for the creation of a dynamic private sector, attract foreign direct investment and promote competitiveness of Mozambique products and services. This process of reform is global and regional, most neighbouring countries, including South Africa, Tanzania and Zambia have already adopted a competition law and set up competition authorities for enforcing competition rules.

The adoption of a competition policy is part of that process of reform to modernise the ways business conduct its transactions, and introduce neutrality in government policies towards private and public sector enterprises. With regards to competition, it had become increasingly apparent that Mozambique lacks laws to deal with national and cross-border competition issues. It was to meet this objective that UNCTAD was requested to examine the need for a competition policy as part of a fair trade law regime”.

2. Mozambique (whose official name is the Republic of Mozambique) is a country in south-eastern Africa bordered by the Indian Ocean to the east, Tanzania to the north, Malawi and Zambia to the northwest, Zimbabwe to the west and Swaziland and South Africa to the southwest, with a total area of 308,642 square miles. It has an estimated population (2009) of 20.2 million, of which about 48.2 per cent are male and 51.8 per cent are female, with an annual population growth of 1.9 per cent. The country's current (2010) Gross Domestic Product (GDP) is US\$17.64 billion, with a GDP per capita (2009) of US\$465. The real GDP growth rate in 2010 was 7.2 per cent<sup>1</sup>. A mix of sound economic reforms, political stability, foreign investment flows, and continued international donor support sustain the high economic growth rates recorded in recent years.

3. Mozambique's natural resources include hydroelectric power, coal, natural gas, titanium ore, tantalite, graphite, iron ore, semi-precious stones, and arable land. Agriculture

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<sup>1</sup> Source: International Monetary Fund, *Mozambique - First Review Under the Policy Support Instrument and Request for Modification of Assessment Criteria*, December 2010.

contributes 21 per cent to GDP, with an annual growth rate of 7.9 per cent, and the major agricultural exports include cotton, cashew nuts, sugarcane, tea, cassava (tapioca), maize (corn), coconuts, sisal, citrus and tropical fruits, potatoes, sunflowers, beef and poultry. Industry contributes 31 per cent to GDP, with an annual growth rate of 10 per cent. The main industrial sectors are food and beverages, chemicals (fertilizer, soap, paints), aluminium, petroleum products, textiles, cement, glass, asbestos, and tobacco. Services contribute 39.7 per cent to GDP, with an annual growth rate of 4.7 per cent. Major import products include machinery and equipment, vehicles, fuel, chemicals, metal products, foodstuffs, and textiles, with the main suppliers being South Africa, Netherlands, and Portugal.<sup>2</sup> Major export commodities include aluminium, cashew nuts, prawns, cotton, sugar, citrus fruits, timber, bulk electricity, and natural gas, with the main markets being Belgium, Italy, South Africa, and Zimbabwe.

4. Mozambique is a member of the Southern African Development Community (SADC)<sup>3</sup>. Most of the SADC countries have adopted competition policies and laws at national level, and established competition authorities to implement the policies and enforce the laws. These are Botswana (2009), Madagascar (2005) Malawi (1995), Mauritius (2007), Namibia (2003), Seychelles (2010), South Africa (1979), Swaziland (2007), Tanzania (2007), Zambia (1994), and Zimbabwe (1996). Mozambique is one of the few SADC countries that have still not passed competition legislation.

5. Due to the relatively tight fiscal and monetary policies adopted, Mozambique responded better to the global crisis compared to its peers in sub-Saharan Africa (SSA). However, there is currently a major concern on how to control annual inflation reaching an alarmingly high level (13.5 per cent) in 2010. The Central Bank of Mozambique's monetary policy aims to stabilize the local currency and bring inflation back to single digits in 2011 and reiterates its medium-term objective of 6 per cent.<sup>4</sup>

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<sup>2</sup> See U.S. Department of State, "Background Note: Mozambique", November 5, 2010, Bureau of African Affairs, <http://www.state.gov/r/pa/ei/bgn/7035/htm>.

<sup>3</sup> SADC(Southern Africa Development Co-operation) is a trade and development regional grouping, whose country membership comprise the Republic of Angola, the Republic of Botswana, the Democratic Republic of Congo, the Kingdom of Lesotho, the Republic of Malawi, the Republic of Mauritius, the Republic of Mozambique, the Republic of Namibia, the Republic of Seychelles, the Republic of South Africa, the Kingdom of Swaziland, the United Republic of Tanzania, the Republic of Zambia, and the Republic of Zimbabwe.

<sup>4</sup> Republic of Mozambique, *Memorandum of Economic and Financial Policies presented to the IMF on November 8, 2010*.

## **2. Objectives of the Report**

6. This report has two main objectives: (i) provide background information for the preparation of the chapter on competition in the Investment Policy Review<sup>5</sup> currently under preparation by UNCTAD; and (ii) provide comprehensive knowledge of the market structure and market access with a view to prepare the set up of the competition authority, updating the 2006 UNCTAD Study on Competition Policy Framework in Mozambique (“2006 Report”).<sup>6</sup>

## **3. Methodology Used**

7. Literature review was conducted by the consultants on the existing statutory laws, regional and international instruments ratified by Mozambique, case law material, past reports and statistics on selected sectors of the economy, including banking, telecommunications, concessions in transport, ports, construction, sugar and cotton sectors, and comparative studies from other relevant jurisdictions. The Embassies of the Republic of Mozambique in Harare (Zimbabwe) and Brasilia (Brazil) also provided useful information to the consultants.

8. A one-week mission and telephone interviews with key government officials were also undertaken. Finally, presentation meetings about market structure were held with Brazilian businessmen who conduct business in Mozambique.

## **4. Key issues in the status of competition in Mozambique**

9. Mozambique has recently adopted a number of initiatives – mainly economic reforms – to improve the environment for investment and promote competition. The country transitioned from a centralised economy to a market economy, with privatisations and deregulations<sup>7</sup>. Additional privatisations are underway for the remaining state companies, including electricity, ports and railways.

10. Since the 2006 Report, there were important developments worth noting. Competition policy seems these days to be a real concern to the government. In 2007, the Council of

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<sup>5</sup> UNCTAD’s Investment Policy Reviews provide an objective evaluation of the country’s legal, regulatory and institutional framework for FDI to attract increased foreign and direct investment. The review includes FDI entry and establishment, treatment and protection of investment, taxation and business environment.

<sup>6</sup> In 2006, UNCTAD conducted a study on the Competition Policy Framework analysing the competition environment in Mozambique with a view to develop the draft competition law of Mozambique. A draft competition law has been prepared and it is under consideration by the Government of Mozambique. The economy of Mozambique has undergone significant adjustments during the last four years in response to a range of internal and external factors. Consequently, the findings and recommendations of the 2006 study need to be re-examined in the light of the current economic and regulatory environment.

<sup>7</sup> U S Department of State, “Background Note: Mozambique”, November 5, 2010, Bureau of African Affairs, available at <http://www.state.gov/r/pa/ei/bgn/7035.htm> (access: January 10, 2011).



Ministers of Mozambique issued “*Resolução No. 37/2007 – Política de Concorrência*”, which establishes the need for a competition policy and the establishment of a competition authority in Mozambique<sup>8</sup>. The mentioned regulation recognizes the need for improving competition in the country and highlights a number of existing anticompetitive practices that take place in different economic sectors, namely excessive pricing, price discrimination, predatory pricing, refusals to deal, bundling, and horizontal agreements such as cartels. A concern with excessive concentration among firms is also present. Finally, the document states that the implementation of a competition law shall be gradual and shall take into consideration small and medium enterprises (SMEs).

11. Competition concerns are also present throughout the government’s five year strategy paper for 2010-2014 (*Programa Quinquenal do Governo para 2010-2014*, issued in May 2010), which is implemented through annual social economic plans (*Planos Economicos e Sociais*). For example, as for air transportation, the five year strategy paper establishes as a goal to define and implement competition rules to the airline companies (p. 72). The same goal is provided for the telecommunications sector (p. 73).

12. At the regional level, Mozambique has endorsed the SADC Declaration on Regional Cooperation in Competition and Consumer Policies, which was signed in September 2009. The SADC Protocol on Trade provides that Member States should implement measures within the Community that prohibit unfair business practices and promote competition. It also states that a framework of trade co-operation among member States based on equity, fair competition and mutual benefit would contribute to the creation of a viable Development Community in Southern Africa. The SADC Protocol recognises the important role that competition and consumer policies can play in promoting economic growth, economic efficiency, development and reducing of poverty in the region. The Declaration calls for the establishment of a system for effective cooperation in the application of member States’ respective competition and consumer protection laws, but acknowledges that cooperation should proceed in a gradual and phased approach with the ultimate goal of achieving harmonisation and establishing a regional framework in competition and consumer policies. A Competition and Consumer Policy and Law Committee (CCOPOLC) was established in August 25, 2008<sup>9</sup> to foster cooperation and facilitate and coordinate capacity building and technical assistance programs.

13. Laws modifying the business environment have recently been passed. In April 2006, the Council of Ministers approved the Mozambican Anti-Corruption Strategy. Furthermore, in 2005 the government approved Decree No. 54, which established the rules for public

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<sup>8</sup> Published in the Official Gazette (*Boletim da República*) of November 12, 2007.

<sup>9</sup> See SADC/CCOPOLC/2008/1.

procurement, aimed at improving the transparency of contracts and their award procedures<sup>10</sup>. Moreover, in 2003 the government issued an insurance law which provided that foreign insurance companies are not required to become incorporated in Mozambique, being allowed to offer their services through branches.<sup>11</sup> In the mining industry, regulations were revised in 2006 to allow both foreigners and nationals to engage in prospecting activities and obtain mining concessions, although permits for some categories of small-scale activity are reserved for Mozambicans<sup>12</sup>. Those initiatives are certainly contributing to levelling the playing field and are a clear indicator of the willingness of the government to promote competition to the benefit of consumers and taxpayers.

## 5. Relationship between Competition Law and Policy

14. Competition law cannot be regarded in isolation from competition policy of which it is a component. In a broad sense, competition policy is generally regarded as the set of public policy tools that lay the foundations for a market economy by allowing for the efficient allocation of resources. Competition policy is generally seen as the fourth pillar for government's economic policy, along with monetary, fiscal and trade policies. In a more restricted and common sense, competition policy could be defined as the policy specifically directed to prevent anticompetitive business practices by firms and unnecessary government intervention in the marketplace and is usually carried out by a competition agency as defined by a competition law.

15. A workable competitive market can take place with or without a competition law in place – in fact, a competition law has only a complementary role in promoting competition as it acts mainly on a case-by-case basis, enforcing the competition law (*ex post* effect). Major effects on competition are due to broader competition policies, which not only can be less expensive but also more immediately beneficial to the overall business environment and economy than enforcing prohibitions against a given number of business practices. In other words, as stated in the 2006 Report, “*the law itself can never guarantee that markets will function effectively unless a broad range of other Government policies conform to basic market principles.*”

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<sup>10</sup> A copy of the law is available at <http://www.cfmnet.co.mz/decret542005.htm> (Portuguese version only).

<sup>11</sup> Following the introduction of the law, four foreign-owned insurance companies have entered the market, previously dominated by the state-owned insurer.

<sup>12</sup> WTO, Mozambique – Trade Policy Review, WT/TPR/G/2009, March 2009.

## 6. Social Benefits of Competition Policy

16. The socio-economic impact of the implementation of a competition policy<sup>13</sup> has been greater on increasing consumer welfare. Increasing competition in a given sector of the economy should raise efficiency and labour productivity, increase product quality and lower prices. It has also been found that competition and consumer welfare are mutually enhancing: consumer satisfaction that arises and flows from the protection and benefits of competition leads to increased public appreciation and acceptance of the implementation of competition policies and laws, which in turn facilitates the creation of a healthy culture of competition in the society.

17. The promotion of static efficiencies, the traditional goal of competition law, does not imply improving the prospects for long term growth. However, in spite of the relatively low importance of traditional static efficiencies in the long run perspectives for growth, competition has substantial positive effects over society which were not foreseen by the literature at the outset of antitrust enforcement. Indeed, recent studies show that the level of competition may be very important to stimulate dynamic efficiencies, which in turn are key ingredients for a successful economic performance.

18. The social benefits of effective implementation of competition policy in Mozambique are likely to be significant; using the experience of Zimbabwe is an indicator<sup>14</sup>. The study “*Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe*” concluded that the effective implementation of a competition policy and law positively contributes towards general economic development. Specific benefits that accrued, and are still accruing, from the mergers that were reviewed and approved with conditions by the competition authority included: (i) creation and/or retention of employment; (ii) development of export markets and generation of increased export earnings; (iii) promotion of foreign direct investment; (iv) continued availability of goods and services on the domestic market; and (v) indigenisation or localisation of control of strategic economic activities.

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<sup>13</sup> The World Trade Organization (WTO) summarised some socio-economic objectives of competition law as follows: (i) Protecting consumers from the undue exercise of market power; (ii) Promoting economic efficiency, in both a static and dynamic sense; (iii) Promoting trade and integration within and economic union of free trade; (iv) Facilitating economic liberalisation, including privatisation, deregulation and the reduction of internal trade barriers; (v) Preserving and promoting the sound development of a market economy; (vi) Promoting democratic values, such as economic pluralism and the dispersion of socio-economic power; (vii) Ensuring fairness and equity in market place transactions; (viii) Protecting the ‘public interest’, including considerations relating to industrial competitiveness and employment; (ix) Minimising the need for more intrusive forms of regulation or political interference in a free market economy; and (x) Protecting opportunities for small and medium-sized businesses. See Annual Report of the WTO Secretariat, 1997.

<sup>14</sup> *Report on Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe*, Competition and Tariff Commission, Harare, Zimbabwe, November 2006 (Part I) and December 2008 (Part II).

19. The study also showed that the control and elimination of restrictive business practices by the Zimbabwean competition authority had significant economic benefits to the country. For example: (i) horizontal restraints arising from collusive and cartel-like behaviour were reduced in key and essential industries and sectors, such as the cement industry, the coal industry and the dry cleaning and laundry services sector; (ii) vertical restraints with substantial economic and efficiency benefits were allowed to continue, but with restrictions, in other essential industries like the coal tar fuel industry, thereby ensuring constant supplies of essential industrial inputs without wastage; (iii) abusive practices of firms with dominant positions in consumer products industries as well as in utilities sectors such as electricity and telecommunications were reduced; and (iv) entry barriers were removed in industries such as the cement industry, the coal industry, the sugar industry, and the fertilizer industry, resulting in the introduction of new economic players and increased employment. The Zimbabwean competition authority made recommendations to the relevant government authorities for the barriers to be removed.

20. Furthermore, when competition is introduced in a given sector, there are initial first round job losses especially if it is in an area where government had given support and subsidies. Therefore, potential social problems might arise from loss of employment and bankruptcies. It would be important to introduce social measures that are complementary to the introduction of a competition law to overcome such problems. Such policies should be directed at removing institutional and structural obstacles to enable redeployment in other sectors, for example, training and measures to assist mobility as well as measures that would facilitate the creation of businesses, particularly for small firms.

21. Finally, competition law may limit the ability of domestic firms to become internationally competitive because it makes it difficult to coordinate their business policies and strategies with domestic rivals by agreement. Equally a law directed at controlling mergers would also hinder such strategic combinations of firms necessary to obtain international competitiveness. However, as stated in the 2006 Report, *“such fear is offset by the fact that monopolies often enjoy their “monopoly rents” without becoming more competitive abroad at the expense of domestic consumers and eventually at the development of the economy as a whole.”*

## 7. Coherence between Competition Policy and Other Government Objectives

22. As stated by Khemani (1999)<sup>15</sup>, since competition legislation is usually a law of general application and therefore applies to all sectors of economic activity, unless special exemptions are provided, there are complex interrelationships between competition policy and other public economic policies, including trade policy; industrial policy; regional development policy; intellectual property policy; privatisation and regulatory reforms; science and technology policy; investment and tax policies.

23. Khemani noted that various sector-specific policies tend to have measures more likely to restrict than to promote the objectives of competition policy, and therefore advocated that the formulation and implementation of these and other policies need to be tuned to take into account competition principles to ensure consistency in government decision-making and avoid distortions in the marketplace.

24. A competition policy that promotes consumer welfare as opposed to total welfare is not likely to conflict with national policy goals that embody criteria which is contrary to economic efficiency. Indeed, a system that could work for some countries as Mozambique is to have a competition law that ensures both increasing levels of efficiency and a fair share of the gains resulted from a given transaction to consumers. A strict application of the efficiency goal makes no distinction between producer and consumer surplus. Given that Mozambique has a substantial number of foreign companies, we can say that while consumer surplus accrues only to national consumers, a significant part of the producer surplus is expected to leave the country through foreign remittance.

25. It is reasonable to say that Mozambican government major objectives are generally consistent with competition policy. The government of Mozambique major goal is to reduce poverty - reflected in its three-year Policy Support Instrument, 2010-2013 (PSI) with the IMF and the five-year strategy paper<sup>16</sup> - and competition could only help the country to achieve this goal – by ensuring the government will get the best contracting conditions and that consumers will pay reduced prices for products and services. In addition, the promotion of small and medium enterprises receives special attention from the government. According to the government's industrial strategy policy paper:

“The importance of this sector derives from the substantial contribution it can make to the expansion of the industrial network, to the growth of production and the creation

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<sup>15</sup> R Shyam Khemani, 'Objectives of Competition Policy', in *A Framework for the Design and Implementation of Competition Law and Policy*, The World Bank, Washington DC, and Organisation for Economic Co-operation and Development (OECD), Paris, 1999.

<sup>16</sup> Poverty Reduction Action Plan (2011-2014)

of employment. Other characteristics that also favour micro, small and medium industries are:

- a. Flexibility to adapt to market fluctuations
- b. Less dependence on imports and ability to adapt to supply difficulties
- c. Ability to take advantage of production factors and installed capacity
- d. Minimum need for skilled labour, infrastructure and services
- e. Ability to take advantage of small raw material supply sources, such as in
- f. agriculture and that otherwise would not have a market; and
- g. Adequacy of existing management skills for their operational needs.”<sup>17</sup>

26. A sound competition policy will also help the government in achieving economic diversification and it will ensure the most efficient allocation of resources throughout society.

## **8. Summary of Recommendations**

27. While substantial progress has recently been made to improve competition in Mozambique, substantial work remains to be done. The list below summarizes the recommendation to the government:

- a. Reduce entry barriers, access to financing, corruption, and inefficient government bureaucracy, mainly to start up and operate new businesses, are generally pointed out as the most problematic factors for doing business in Mozambique<sup>18</sup>. According to the *2011 Doing Business Report*, a publication of the World Bank which provides objective measures of business regulations around the world<sup>19</sup>, Mozambique ranked 126 out of 183 economies in the overall rank. Even though the country does relatively well regarding the “Starting a Business” topic (in takes on average 9 procedures and 13 days to open a business in Mozambique against the average of 5.6 procedures and 13.8 days of the OECD countries), it has severe limitation in topics as

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<sup>17</sup> Republic of Mozambique, *Industrial Strategy Policy* Approved by Council of Ministers Resolution N°.23/97, of 19 August.

<sup>18</sup> The government is clearly concerned in how to improve market conditions for the private sector. In 2009, the World Bank Board of Executive Directors approved for Mozambique an International Development Association (IDA) credit of US\$25 million equivalent to support the implementation of the Competitive and Private Sector Development Project, which seeks to improve the business environment and enhance enterprise competitiveness. The project will contribute to the country's own development strategy goal of reducing poverty through placing the private sector as the main engine of growth and employment. This objective requires a robust private sector and an improved business environment to attract investments.

<sup>19</sup> World Bank, *2011 Doing Business Report*,  
<http://www.doingbusiness.org/data/exploreconomies/mozambique> (access on April 28, 2011).

“Closing a Business” (ranked 129 out of 183), “Enforcing Contracts” (ranked 132 out of 183) and “Registering Property” (ranked 144 out of 183).

- b. Facilitate access to credit, as credit is one of the major barrier entrepreneur's face in Mozambique in starting-up and operating a business. A draft bankruptcy law was submitted to Parliament, but has yet to be enacted. Also, the employment law enacted in 2007 significantly increases the barriers for hiring foreign employees;
- c. Deregulate activities in order to ensure a greater number of market participants. Inefficient supply of utilities by state-owned companies operating under monopoly still inhibits the business environment and overall competitiveness;
- d. Reduce or eliminate price control policies. Even though the government now formally regulates prices just for a limited number of sectors<sup>20</sup> (mainly utilities and taxi fares), it still plays a major role in defining prices for different sectors in Mozambique, as fuels and sugar<sup>21</sup>;
- e. Enact a competition law. Mozambique's competition authority, once it is established, should prioritise the execution of concurrent jurisdiction agreements with those sector regulators that have competition functions in their sectors, and general cooperation agreements with the other sector regulators.
- f. In situations where State enterprises in Mozambique compete with private enterprises in the provision of goods and services, the country's competition law should be applied equally to all such enterprises, and in cases where State enterprises have exclusivity, the monopolisation provisions of competition law should be applied (with no exception). The competition authority to be established in Mozambique could be actively involved in the country's privatisation programme through the performance of its advocacy and enforcement functions.
- g. The small and medium enterprises (SMEs) sector in Mozambique should not be given specific protection or exceptions under the competition law. SMEs should be allowed to grow in a competitive environment as long as anticompetitive conduct by larger firms is dealt with by competition law provisions.

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<sup>20</sup> In 1986, products with regulated prices accounted for about 70 percent of GDP. By 1996, only wheat flour, bread, rents, fuel, utilities, and certain transportation fares remained regulated. As of April 2002, only utilities and some taxicab fares were regulated. Source: IMF. Republic of Mozambique: *Statistical Appendix*, (July 2002), Table 13, Mozambique: Prices Administered by the Government, 1999-2002.

<sup>21</sup> For example, in February 2008, the government introduced an adjustment factor to the fuel sector that kept prices below market prices for social reasons. In 2010, the government began increasing fuel prices, with a cumulative price increase of 73 per cent for petroleum products other than diesel. The government already signalled its plans to compensate importers through cross-subsidization.

- h. While the Central Bank of Mozambique could continue with its examination of bank mergers, for the purposes of exchange control and protection of the interests of depositors, the competition authority to be established should have final authorisation of all merger transaction, given its oversight of the whole economy.
- i. Competition issues should be taken into account at the various stages of granting concessions (i.e. at the design of the concession, at its award, and at its execution, as well as in the regulatory framework for the relevant markets).
- j. There is need to educate the Mozambican business community on various types and forms of restrictive business practices (RBPs) and their effect on enterprise efficiency.

## **II. MARKET STRUCTURE AND STATUS OF COMPETITION IN MOZAMBIQUE**

### **1. Economic policy: market structure**

#### **a. The manufacturing sector**

28. In 2009, the manufacturing sector in Mozambique accounted for 26 per cent of the country's GDP (as opposed to services 45.2 per cent and agriculture 28.8 per cent). The products identified by the government as key manufacturing priorities are food processing and agro-industries (salt, sugar, copra, processed fish, processed fruit and cashew nuts).<sup>22</sup> Other priorities include milling products, sisal, tea, bakery products, pasta, processed meat, tobacco, animal feed, dairy products and liqueurs; textile and clothing and metallurgy – which are pretty much the same identified in the 2006 Report.

29. In 2007, the government approved a five-year strategy to revitalize the industry in the country<sup>23</sup>. Three are the major pillars: (i) development of agrarian land; (ii) exemption of enterprises in industrial free zones from personal income tax during the first ten years of operations<sup>24</sup>; and (iii) development of infrastructures valued at US\$1,2 billion.

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<sup>22</sup> The government considers that food processing and agro-industries offer the best opportunities to contribute to the deconcentration of industry, not only in terms of the location of industry close to the sources of raw material but also because certain segments of such industry are particularly appropriate for the creation of small and micro-businesses. Republic of Mozambique, *Industrial Strategy Policy* Approved by Council of Ministers Resolution N°.23/97, of 19 August 1997.

<sup>23</sup> Republic of Mozambique, *Política e Estratégia Industrial*, revised, Council of Ministers, July 2007.

<sup>24</sup> The first industrial free zone was the Industrial Park of Beluluane, established 1999. Other investment projects enjoy “industrial free zone” status, and these include the MOZAL aluminium plant and the heavy sands projects in Moma-Nampula and Chibuto.



30. A potential obstacle to the full development of the manufacturing sector – which also applies to the other sectors – is the country’s restrictive labour laws to foreign workers. According to Law No. 23/2007, only 5 per cent of all workers for companies with more than 100 employees may be expatriate staff, rising to 8 per cent for medium firms and 10 per cent for firms with up to 10 employees. There is a lengthy process required for the Ministry of Labour to grant approval to the companies wanting to hire foreign workers above such percentages, even when local workers are semi-skilled<sup>25</sup>.

#### **b. Cotton**

31. The agriculture sector occupies about three quarters of the population in Mozambique, mostly engaged in subsistence farming on an informal basis, and cotton (locally referred as “white gold”) has a special importance within this context. Ninety-four per cent of the cotton production comes from family producers, five percent comes from associations and the remaining comes from small private companies. Since the end of the civil war in 1992, the sector has been functioning based on a concessions regime (the main idea behind was to attract investments) and the number of concessions granted has remained unchanged since the 2006 Report. The concession operators are responsible for providing resources and technical assistance to cotton producers, obtaining exclusive rights to trade their product in the concession region (a legal monopsony). Even though the concessions regime intended to facilitate farmers’ access to seeds, credit and modern crop techniques, severe restrictions of credit remained to local countrymen and no significant technological improvement was adopted.

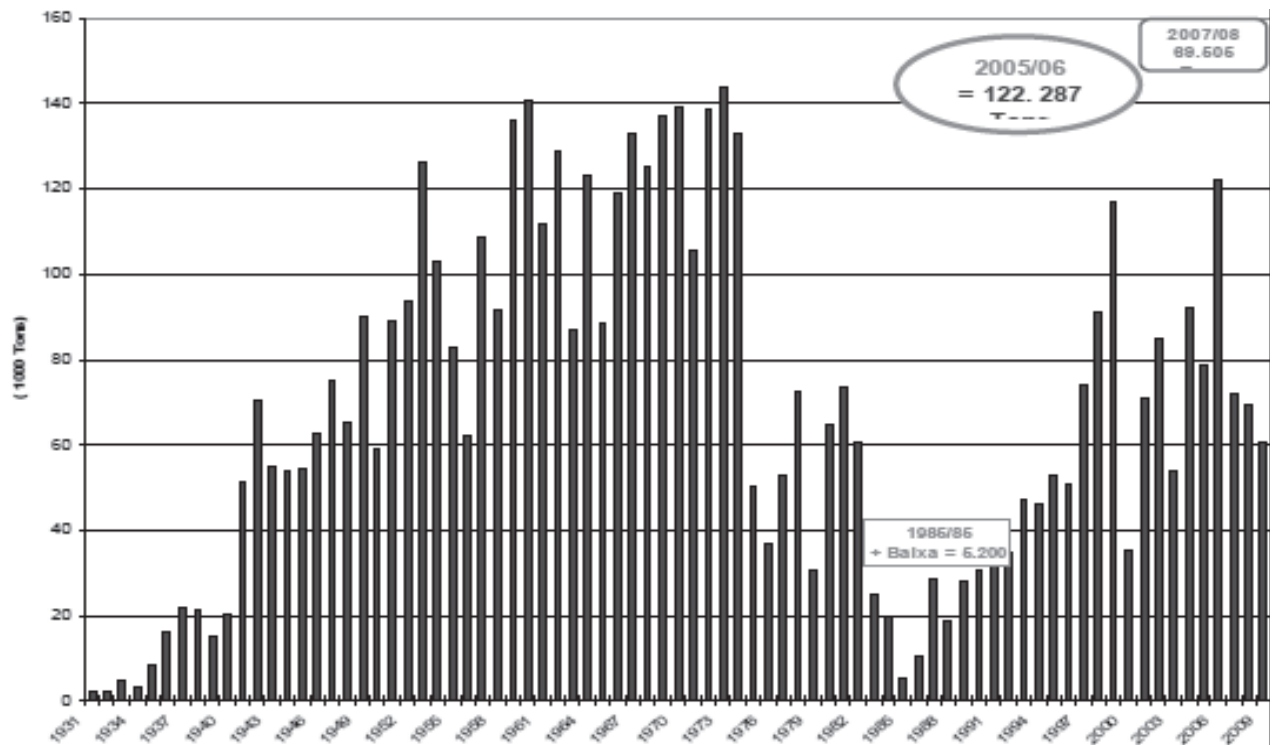
32. The chart below presents the evolution in tons of the cotton production from 1931 to 2009. As we can see, the civil war (1977-1992) adversely affected the production, and the country achieved the lowest production levels in 1985. There is also a relatively unstable growth pattern during the last ten years. In 2009, cotton plantations occupied an estimated area of 165 thousands hectares and generated revenues of approximately US\$25 million.<sup>26</sup>

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<sup>25</sup> See “*Regras sobre os processos de contratação de trabalhadores estrangeiros*” (Rules for hiring foreign workers), [http://www.portaldogoverno.gov.mz/Informacao/emprego/trabalhadores\\_estrangeiros/regras\\_contrat\\_estrang/](http://www.portaldogoverno.gov.mz/Informacao/emprego/trabalhadores_estrangeiros/regras_contrat_estrang/) (Portuguese only).

<sup>26</sup> Source: IAM Statistics, *Resumo Estatístico – Reunião Técnica*, available at [http://www.iam.gov.mz/IMG/pdf/IAM\\_-\\_Apresentacao\\_RT-NAMIALO\\_2010\\_V1.pdf](http://www.iam.gov.mz/IMG/pdf/IAM_-_Apresentacao_RT-NAMIALO_2010_V1.pdf).

### Evolution of the Cotton Production – seeds (1931-2009)<sup>27</sup>



33. The sector is in the process of abandoning the concession regime to adopt a wholly liberalized system as per the government document named “*Modelos de Fomento do Algodão*” (Models for the Development of the Cotton Sector), approved by the Council of Ministers on September 16, 2008, which can be considered the major development since the 2006 Report. There is a consensus that the concessions model has not fulfilled the expectations, and the country today suffers from weak productivity growth and quality concerns.

34. According to the new framework, the sector will be fully based on open competition, with a transition period of seven years, which will enable the current concession operators to recoup any investments they have made based on the concessions model. The government expressed the need for investments in R&D in order to achieve better results in the cotton production. Economies of scale and a higher degree of mechanization are expected results of the new system, increasing the sector’s competitiveness in the international market.

35. The rules currently governing the sector are as follows:

- a. *Decree No. 7/1991*: overrules all legislation passed during the colonial era referring to the cotton sector and introduces the concessions model;

<sup>27</sup> Source: IAM Statistics, *Resumo Estatístico – Reunião Técnica*, available at [http://www.iam.gov.mz/IMG/pdf/IAM\\_-\\_Apresentacao\\_RT-NAMIALO\\_2010\\_V1.pdf](http://www.iam.gov.mz/IMG/pdf/IAM_-_Apresentacao_RT-NAMIALO_2010_V1.pdf).

- b. *Decree No. 8/1991*: establishes the general framework for production and commerce of cotton and provides for the existence of minimum price for the cotton (Article 6 provides that the Cotton Institute of Mozambique - *Instituto do Algodão de Moçambique - IAM*, a body linked to the Ministry of Agriculture, shall propose a minimum price for the cotton to the government on a yearly basis, as explained below);
- c. *Ministerial Diploma No. 91/94*: regulates Decree No. 8/91. Establishes six types of producers based on their size and role in the market: family producers, non-autonomous producers, autonomous producers, concession operators, industrial producers, and cotton traders; the latter can also produce cotton fiber<sup>28</sup>;
- d. *Models for the Development of the Cotton Sector* (“*Modelos de Fomento do Algodão*”), approved by the Council of Ministers on September 16, 2008.

36. Today, the sector's strategy and prices are a result of joint negotiations on the part of the producers, through the National Forum of Cotton Producers (*Fórum Nacional dos Produtores do Algodão - FONPA*), and the concession operators, through the Cotton Association of Mozambique (*Associação Algodoeira de Moçambique - AAM*), overviewed by the Cotton Institute of Mozambique (*Instituto do Algodão de Moçambique - IAM*), a body linked to the Ministry of Agriculture. Sector' strategies and minimum price policies have to be later submitted to the Council of Ministers to be implemented. Once approved by the Council of Ministers, the minimum price is mandatory. There are three major meetings annually (namely Annual Meeting, Technical Meeting and Minimum Price Meeting). Over the last years, many rural workers had abandoned cotton planting, discouraged by prices, which stand at approximately 5 meticals per kilo of first class cotton<sup>29</sup>, and preferred to dedicate their time to growing sesame, which is sold at 25 meticals per kilo. Based on the 2011 price discussions<sup>30</sup>, the IAM submitted to the Inter-ministerial Price Commission a price of 15 meticals per kilo of first class cotton, a record price over the last 20 years.

37. A substantial part of the cotton produced in Mozambique is exported, mainly to Asia (Indonesia, India, China, Taiwan, Singapore), Africa (South Africa, Kenya, Mauritius), and Europe (Portugal, Germany, France and Switzerland)<sup>31</sup>. Ninety percent of cotton exports

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<sup>28</sup> A copy of the legal diploma is available at [http://www.iam.gov.mz/IMG/pdf/Regulamento\\_da\\_Cultura\\_do\\_Algodao.pdf](http://www.iam.gov.mz/IMG/pdf/Regulamento_da_Cultura_do_Algodao.pdf) (Portuguese only).

<sup>29</sup> For the government decision establishing the price of 5,2 metical per kilo of first class cotton, see [http://www.iam.gov.mz/IMG/pdf/Sntese\\_da\\_reuni\\_Negoc\\_Pre\\_Min.09.pdf](http://www.iam.gov.mz/IMG/pdf/Sntese_da_reuni_Negoc_Pre_Min.09.pdf).

<sup>30</sup> For the minutes of the April 2011 meeting, see [www.iam.gov.mz/IMG/pdf/Programa\\_da\\_reuniao\\_d\\_preco\\_2011\\_.pdf](http://www.iam.gov.mz/IMG/pdf/Programa_da_reuniao_d_preco_2011_.pdf)

<sup>31</sup> Source: IAM, [http://www.iam.gov.mz/article.php3?id\\_article=6](http://www.iam.gov.mz/article.php3?id_article=6).

from the 2009 harvest were sent to Asia, seven percent to Africa and the remainder to Europe<sup>32</sup>.

### c. Sugar

38. The sugar industry in Mozambique is inefficient, characterized by government coordination and very low levels of competition. It survives largely thanks to a local market which is protected from foreign entry, and export markets which are subsidized by special programs such as the Everything but Arms initiative of the European Commission.

39. Sugar production and distribution processes both for internal consumption and exports are controlled by the so-called National Sugar Distributor (*Distribuidora Nacional do Açúcar – DNA*). The DNA, which is composed by the four major sugar refineries in Mozambique and is overviewed by the government, was created in 2002 aiming to achieve economies of scale in the distribution chain. The major sugar refineries in Mozambique are Marromeu, Mafambisse in the Sofala province, and Xinavane and Maragra in the Maputo province. Foreign companies have been recently buying stakes in Mozambican sugar companies – e.g., *Tereos International*, a French company, bought in 2007 through the Brazilian *Açucar Guarani*, 75 per cent of the shares of *Sena Holdings de Moçambique* (Marromeu sugar refinery).

40. The rules currently governing the sector are as follows:

*a. Resolution No. 35/2004* : incorporates into the national legislation the International Sugar Agreement of 1992<sup>33</sup> and enables Mozambique to be a member of the International Sugar Organization (ISO);

*b. Decree No. 4/2002*: created a special tax regime to exempt producers from the payment of the IVA (Value-Added Tax) regarding the production, distribution and any kind of investment related to the sugar sector;

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<sup>32</sup> Source: IAM, [http://www.iam.gov.mz/article.php3?id\\_article=6](http://www.iam.gov.mz/article.php3?id_article=6).

<sup>33</sup> The International Sugar Agreement of 1992 ensures enhanced international cooperation in connection with world sugar matters and provide a forum for intergovernmental consultations on sugar so as to improve the world sugar economy, to facilitate trade by collecting and providing information on the world sugar market and to encourage increased demand for sugar, particularly for non-traditional uses. Members to the agreement: European Economic Community, Argentina, Australia, Austria, Barbados, Belarus, Belize, Brazil, Cameroon, Colombia, Costa Rica, Cuba, Côte d'Ivoire, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Fiji, Finland, Guatemala, Guyana, Honduras, Hungary, India, Iran, Jamaica, Japan, Kenya, Latvia, Malawi, Mauritius, Mexico, Moldova, Mozambique, Nigeria, Pakistan, Panama, Paraguay, Philippines, Russia, Serbia and Montenegro, South Africa, Sudan, Swaziland, Switzerland, Tanzania, Thailand, Trinidad and Tobago, Turkey, Vietnam, Zambia, Zimbabwe.

c. *Ministerial Diploma No. 56/2001*: issues the “*Regulamento do Regime Aduaneiro da Importação do Açúcar*”, which establishes surtaxes to the sugar imports aiming to protect the national market.

41. Mozambique sugar seasons run from April to October. Production is 300,000 tonnes a year and it is expected to be increased to 500,000 tonnes by 2012. Mozambique exports about 40 per cent of its total annual production, mainly to the Europe<sup>34</sup>, taking advantage of the EBA initiative through the Framework Agreement<sup>35</sup> and the special preferential sugar regime (SPS), and to the US markets – the U.S. African Growth and Opportunity Act grants to Mozambique duty-free and quota-free access to the U.S. market until 2015 (few exceptions apply). The sector employs more than 25,000 people throughout the year.<sup>36</sup>

42. The production of sugar cane is vertically integrated: most of the sugar cane is produced in plantations belonging to the refineries. On March 25, 2009 the Council of Ministers approved the National Policy and Strategy for Bio-fuels (“*Política e Estratégia Nacional de Bio-combustíveis*”)<sup>37</sup>, which focuses on the production of ethanol and biodiesel. Sugar cane was one of the crops identified with potential for the production of ethanol.

43. As we can conclude from the above, the sugar and ethanol sector in Mozambique is structured in a way which raises at least two competition issues. First, the role of government as coordinator of the sector enterprise activities and price setting, along with all the major players, eliminate any resemblance of a market economy. Second, the highly vertically integrated structure of the industry deters market entry. The absence of non-vertically integrated distributors deters entry even at the distribution and whole sale levels. It seems that the government understands the need for liberalization of the sugar sector, but claims that this should be done gradually, as the country’s sugar industry would not become suddenly competitive if it faced a sharp cut in prices of the product as a result of international competition.

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<sup>34</sup> The European Commission provides duty-free and quota-free access for all products originating in Mozambique, with the exception of rice and sugar.

<sup>35</sup> The European initiative Everything But Arms (EBA) has brought a number of benefits to the Mozambican sugar industry. The EBA is an initiative of the European Union under which all imports to the EU from the Least Developed Countries are duty free and quota free, with the exception of armaments. EBA entered into force on 5 March 2001. There were transitional arrangements for bananas, sugar and rice until January 2006, July 2009 and September 2009 respectively. The EBA is part of the EU Generalized System of Preferences (GSP).

<sup>36</sup> Centro de Promoção da Agricultura de Moçambique, Relatório do 1º. Trimestre de 2009, 2009.

<sup>37</sup> A copy of the policy paper is available at <http://www.mozlii.org/legislacao/boletim-da-republica/serie-i/2009/br20.pdf> (Portuguese version only).

#### d. Telecommunications

44. The telecommunications sector in Mozambique has undergone major changes characterised by growing levels of liberalization since the 2006 Report. The sector is regulated by *Instituto Nacional das Comunicações de Moçambique* (INCM)<sup>38</sup>, which also regulates postal services. The general rules applicable to the sector are set forth by Law No. 8/2004<sup>39</sup>, which overruled the 1999 law. Among the INCM duties provided for by Article 12 of the Telecommunications Act is “*to promote a healthy competition in the supply of telecommunications services and networks, taking the necessary measures to prevent anticompetitive practices and abuses from operators with dominant position*”.

45. In the government’s five year strategy paper covering the period 2010-2014, the strategic objective established for the telecommunications sector is “*to promote the development of the postal and telecommunications sectors, aiming universal access, in a competitive environment, ensuring quality for the citizens*”. According to the document, the necessary measures to achieve such goal are the following: (i) develop a regulatory framework and mechanisms for the promotion of competition; (ii) increase the quality of the mobile telephone services and ensure their use in favour of the productive market; (iii) ensure country-wide coverage for voice, data and Internet services; (iv) create mechanisms to protect consumer of telecommunications services.

46. Mozambique has now four primary phone operators, three in the mobile segment and one with activities in the fixed telephone services. The Government plans to implement further liberalisation by granting additional licenses to increase competition – any issuance of a new license has to previously approved by the Council of Ministers. INCM seems to

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<sup>38</sup> The local press has recently raised concerns over an alleged illegal intervention of the telecommunications regulator on the then two mobile companies. In October 2010, INCM was accused of sending a letter to the companies asking them to suspending the SMS service of mobile pre-paid phone users during the riots over price rises - apparently, rioters were inciting each other by text message. Vodacom Moçambique issued a statement in mid-October confirming the receipt of such letter. Following this incident, the Minister of Communications issued a ruling requiring all pre-paid mobile phone users to register themselves or face suspension of service. According to the Minister, this was taken as a necessary measure to prevent criminals to benefit from using the mobile phones anonymously. *Insert source*

<sup>39</sup> Available at <http://www.incm.gov.mz/Documentos/Legislacao/Lei%20de%20Telecomunicacoes.pdf>. The objectives of the Telecommunications Act: “a) to promote the availability of high quality public use telecommunications services; b) to promote private investments in the sector of telecommunications; c) to promote universal access services so as to ensure the existence and availability of public communications services; d) to establish competition rules to operators and suppliers of telecommunications services so as to ensure that non-discriminatory and competitive conditions be created to all operators and services suppliers for telecommunications; e) to ensure the public interest and the preservation of national security are being pursued; f) to ensure the existence, availability and quality of the public use telecommunications networks so as to satisfy the needs citizens and social and economic activities have to communicate in all national territory, as well as ensure international calls; g) to promote the establishment of rules such as to create a favorable environment to the global development of telecommunications and information technologies in the interest of the sustainable development in the whole country.” (Law No. 8/2004, Article 3).

recognize the key role that foreign investment and service providers will play in developing the Mozambican telecommunications networks.

47. As for the mobile services segment, in August 2002 the government issued a license for a company – *Vodacom Moçambique*<sup>40</sup> – to compete with the state-owned company *Moçambique Celular* (Mcel). It started operations in December 2003, based on a 15-year contract. Following the approval by the Council of Minister of the entry of a third mobile operator in the Country (Resolution No. 50/2009, of July 14), in November 2010, the government announced that a joint-venture of Viettel, a Vietnamese military-run company, and Mozambique’s SPI Invespar Company won a bid to establish the country’s third mobile-phone operator, Movitel<sup>41</sup>.

48. The entry of this third operator is expected to add some welcome competition to the mobile segment, breaking the duopoly currently enjoyed by the two incumbents.<sup>42</sup> All the three companies are subject to the same legal provisions and conditions. According to Mcel, it has over 3 million users, which accounts for approximately 60 per cent of the market, with Vodafone holding the remaining share.<sup>43</sup> It is worth noting that Mozambique experienced a significant increase in the number of mobile users following the introduction of pre-paid services in the country in 2000. The INCM is of the opinion that the present telecommunications infrastructure in Mozambique can only support three mobile operators.

49. As for the fixed telephone service, *Telecomunicações de Moçambique S.A.R.L.* (TDM) - a company held 80 per cent by the government - is the sole market player. The company was originally created through Decree No. 5/1981 and since 2002 it is a limited liability company. It offers not only fixed telephone services (local and long distance calls), but also Internet connections, data transmission and cable services. TDM owns 100 per cent of Mcel. The number of users of fixed line services is decreasing yearly, which reflects the consumer’s preference to acquire mobile lines. With a penetration rate below 20 per cent<sup>44</sup>, the number of new telephone lines added to the system in 2009 decreased 32 per cent

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<sup>40</sup> Vodacom beat Econet International, MSI (Celtel), and Telecom Africa Corporation in a bid.

<sup>41</sup> Viettel beat Portugal Telecom and Uni-Telecom to win the license, despite the fact that its bid of US\$29 million was not the highest. However, it was awarded the contract by the national telecoms regulator, INCM, on the basis of its alleged technical superiority. Over a five-year period, Movitel plans to invest about US\$400 million in Mozambique and to reach 85 per cent of the Mozambican population. See Vietnam Business News, *Viettel to invest in Mozambique*, November 16, 2010, available at <http://vietnambusiness.asia/viettel-to-invest-in-mozambique/>.

<sup>42</sup> Isidore Pedro da Silva, chairman of the National Communications Institute (INCM), said he believed that a third service provider entering the market would force down the fees charged by the two incumbents.

<sup>43</sup> See Mcel, *Sobre nós*, available at [http://www.mcel.co.mz/content/view/560/666/lang.pt\\_PT/](http://www.mcel.co.mz/content/view/560/666/lang.pt_PT/) and Vodacom, *A Empresa*, <http://www.vm.co.mz/pt/Individual/A-Empresa/Perfil2>.

<sup>44</sup> The companies are: Itelplus, Satcom, Syscom, Intra, Telebuild, Sita, Teledata, Emilnet, Sifikile, GS Telecom, VM Moçambique, TDM, Spet.com, Telecom África Moçambique, Sinvest, Mintiro Internaci, and Multinet. For the number of the license and its expiration date, see <http://www.incm.gov.mz/Documentos/listaempresas.pdf>.

compared to the 2008 figures and the existing number of fixed lines dropped from 80.145 users in 2008 to 74.146 users in 2009.<sup>45</sup>

50. The market for data transmission and Internet seems to enjoy a greater competition and seventeen companies have licenses to operate in the market.<sup>46</sup> The penetration rate is still very low: only 1,6 per cent in 2009 for fixed broad-band,<sup>47</sup> which leaves considerable room for growth. *TDM Banda Larga* (broad band) reports an increase of 25 per cent in the total number of connections in 2009 compared to 2008, and report a decrease in prices of approximately 30 per cent in 2009, which were justified to “ensure a greater market penetration for this service”.<sup>48</sup>

51. Regulation affecting the telecommunications sector issued since 2006 includes:

- a. *Decree No. 36/2009 of 13 August*: Radio Regulation establishing the legal regime for the management and monitoring of the radio spectrum and licensing conditions, installation, operation and monitoring of radio stations and networks;
- b. *Decree No. 37/2009 of August 13*: Regulation for approval of the type of equipment for telecommunications and radio communications, which establishes the legal regime for approval equipment in order to ensure interoperability, reliability and electromagnetic compatibility of systems;
- c. *Resolution No. 50/2009, of July 14*: Approval by Council of Ministers of the entry of the third mobile operator in the country;
- d. *Resolution No. 33/CA/INCM72007, of December 19*: approves new tariffs for national interconnection as a result of a costing model study. The new charges came into force in January 2008. The interconnection tariffs shall be reviewed yearly by the INCM and the competition authority so it would not turn the interconnection as a barrier of entry for new competitors.

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<sup>45</sup> See TDM 2009 Annual Report, available at [http://www.tdm.mz/portdm/rc2009/rc\\_2009.pdf](http://www.tdm.mz/portdm/rc2009/rc_2009.pdf).

<sup>46</sup> The companies are: Itelplus, Satcom, Syscom, Intra, Telebuild, Sita, Teledata, Emilnet, Sifikile, GS Telecom, VM Moçambique, TDM, Spet.com, Telecom África Moçambique, Sinvest, Mintiro Internaci, and Multinet. For the number of the license and its expiration date, see <http://www.incm.gov.mz/Documentos/listaempresas.pdf>.

<sup>47</sup> United Nations Development Programme, Human Development Report 2010, New York: Palgrave Macmillan, at [http://hdr.undp.org/en/media/HDR\\_2010\\_EN\\_Complete\\_reprint.pdf](http://hdr.undp.org/en/media/HDR_2010_EN_Complete_reprint.pdf) (access December 28, 2010).

<sup>48</sup> See TDM 2009 Annual Report, available at [http://www.tdm.mz/portdm/rc2009/rc\\_2009.pdf](http://www.tdm.mz/portdm/rc2009/rc_2009.pdf).



## e. Transport

### *Air transport*

52. Mozambique's civil aviation institute (*Instituto de Aviação Civil de Moçambique - IACM*) concentrates policymaking and regulatory functions. The body is responsible for regulating procedures of policy application, technical regulation, and accident investigation. *Aeroportos de Mocambique – ADM* is responsible for infrastructure operations.

53. Mozambique has three international airports (Maputo, Beira and Nampula), six main airports, other ten secondary airports, six military airfields, and approximately 300 additional landing strips. Seven operators provide services on international, regional, and domestic routes, as follows:

Carrier	International	Regional	Domestic
Linhas Aéreas de Moçambique (LAM)	*	*	*
Air Portugal (TAP)	*		
Air Corridor <sup>49</sup>			*
Moçambique Expresso <sup>50</sup>		*	*
South Africa Airlines		*	
Pelikan Air		*	
Kaya Airlines <sup>51</sup>			*

54. The major market player in the passenger air transport subsector is *LAM – Linhas Aéreas de Moçambique*, designed as the “national flag carrier”. The company was created by the Portuguese government in 1936 and firstly named *DETA – Direção de Exploração de Transportes Aéreos* - division for services of the Ports and Railways which extinguished in 1980 by a government decree and transformed into a state enterprise under the supervision of the Ministry of Transport and Communications. Due to Decree No. 69/98, of December 23, LAM is now a limited company - the state owns 91per cent of its shares and its employees the remaining shares. LAM transported a total of 533,775 passengers in 2010 (both nationally and regionally), an increase of 76,608 passengers compared to 2009.<sup>52</sup>

<sup>49</sup> Air Corridor temporarily ceased operations in 2008. It is privately owned and has two aircrafts.

<sup>50</sup> Company wholly-owned by LAM.

<sup>51</sup> Former Transairways.

<sup>52</sup> See <http://www.lam.co.mz/pt/Empresa/Historia-e-Perfil>.

55. The major rules governing the air transport subsector are as follows:
- a. *Resolution 40/2002*: defines general civil aviation rules and states the need to adjust the number of operators to demand in the domestic market;
  - b. *Decree 41/2001*: creates IACM;
  - c. *Regulation 39/98*: defines market access for different segments: regular international (intercontinental and regional), regular domestic, and non-regular. With regard to route allocation, it calls for consulting the incumbent before giving any other operator access to a particular market.

56. The government's five year strategy paper for 2010-2014 establishes as a goal for the period to promote a healthy competition in the air passenger market and to increase consumer choices. Also, the 5th Freedom of the Air<sup>53</sup> is currently being introduced<sup>54</sup>, allowing foreign carriers to drop off and pick up passengers from third countries. For example, TAP or LAM could fly from Nampula to Lisbon and enjoy traffic rights between those two cities and Luanda. Foreign carriers could also connect Maputo and Johannesburg while serving both cities from points beyond the region.

57. Even though the 5<sup>th</sup> Freedom of the Air is expected to introduce more competition in the market, a number of additional measures should be adopted. More competition will ensure lower prices and increased quality and safety for passengers. The fact that IACM is both a technical regulator and a policy maker could affect policy in favour of the state-owned company LAM, so it is recommended to create a separate independent body to be the technical regulator, including that the members of the new body are not related or former employees for LAM and / or IACM. It is crucial to ensure the same legal and actual conditions for all the operators – for example, ensuring that all the companies have equal opportunity to obtain premium times and slots in airports.

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<sup>53</sup> The freedoms of the air are a set of commercial aviation rights granting a country's airline(s) the privilege to enter and land in another country's airspace. 1<sup>st</sup> Freedom: The right to fly over another country without landing. 2<sup>nd</sup> Freedom: The right to make a landing for technical reasons in another country without picking up/setting down revenue traffic. 3<sup>rd</sup> Freedom: The right to carry revenue traffic from your own country A to the country B of your treaty partner. 4<sup>th</sup> Freedom: The right to carry traffic from country B back to your own country A. 5<sup>th</sup> Freedom: The right of an airline from country A to carry revenue traffic between country B and other countries, such as C or D. 6<sup>th</sup> Freedom: The use by an airline of country A of two sets of 3rd and 4th rights to carry traffic between two other countries but using its base A as a transit point.

<sup>54</sup> Adopted following a recommendation of the U.S.Aid (see USAID, *Liberalization in Mozambique's Aviation Policy*, DC, 2006).

## *Railways and Ports*

58. *Portos e Caminhos de Ferro de Moçambique* – CFM is the state-owned company in charge of railways and ports. It is under the structure of the Ministry of Transport and Telecommunications, having administrative and financial independence.<sup>55</sup> CFM grants concessions for third-parties to explore ports and railways. Some firms with public concessions have legal exclusive rights in the markets where they operate, specially in the underdeveloped areas of the country. Such exclusive rights were established in the contracts of concession as a mean of attracting resources to the region.

59. As for ports, there are currently five ports serving Mozambique, operated through a concession system in which both public and private companies operate: Maputo, Beira, Nacala, Pemba and Quelimane. For example, The Mozambican deepwater ports of Maputo have been conceded to the Maputo Port Development Company (MPDC) for a period of 15 years, with a 10 year extension option - the concession commenced on April 14, 2003. As for railroads, there are three main systems crossing Mozambique: the South, Central and North Corridors<sup>56</sup>, which end up in their respective ports (Maputo, Beira and Nacala). There is no directly interconnecting rail service between the three lines.

60. The concession process seems to be conditioned by government decision without an open selection process. Several firms with public concessions have exclusive rights in the markets where they operate, particularly in underdeveloped areas of the country. The government's five year strategy paper for 2010-2014 establishes as a goal for the period to revise the concessions regime for railroads and ports, without detailing how the process will be conducted. Increased transparency in the concessions process is needed in order to increase competition during the bidding process.

61. Given the volume of traffic and the size of the country, there is a potential for competition to some degree among the various mode of transportation and operators, such as: (i) competition among the three regional transport subsystems including railways and ports; (ii) competition between roads and railway on same routes; (iii) competition between the Ports of Maputo and Durban. The latter can be characterized as a logistics competition given the distance between the ports and the city of Johannesburg.

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<sup>55</sup> See <http://www.cfmnet.co.mz/presente.htm>.

<sup>56</sup> In October 2010, Brazilian mining company Vale, holder of a coal concession in Moatize, purchased a 51 per cent stake in the Mozambican logistics company SDCN, who holds a 51 per cent controlling share in the North Corridor (*Corredor de Desenvolvimento do Norte* - CDN).

## f. Construction sector

62. The construction sector has been presenting a good performance over the last few years based on the number of mega projects launched, tourism growth (specially related to beach destinations along the coast) and country post-war reconstruction. Examples of recent mega projects - mostly in the energy and minerals sector - include MOZAL Aluminium Smelter (RSA&UK), SASOL gas export pipeline (RSA), Moma Heavy Sands (Ireland), Maputo Port Development (UK), Nacala Corridor Development (U.S.), Nacala Oil Refinery (U.S.), Moatize coal mine (Vale, Brazil), and Corridor Sands<sup>57</sup>. One of the projects that currently deserve special attention from the government is the road expansion, which will generate demand for the construction sector:

**“Among the projects under evaluation by the Government, the following specific projects enjoy the highest priority at present:**

- An expansion of electricity production at the Cahora-Bassa dam in central Mozambique, which should enhance the reliability of the supply of electricity;
- The construction of a power line between the Cahora-Bassa dam and Maputo, which would reduce the dependency on electricity re-imports;
- An expansion of the road network, as currently only about one-third of Mozambique’s road infrastructure is asphalted. Possible priority projects could include transit corridors from key economic centers to the borders with neighboring countries, such as the 287 km road connecting the port city of Beira to Machipanda at the border with Zimbabwe or the 131 km road between the capital city Maputo and the Ponta d’Ouro border post with South Africa...” (Republic of Mozambique, *Memorandum of Economic and Financial Policies presented to the IMF on November 8, 2010*, 2010).

63. Major foreign construction companies are entering the Mozambican market. In February 2010, the Brazilian engineering and construction company Odebrecht and the government of Mozambique signed an agreement to transform the Nacala Air Base into an International Civil Airport in the Province of Nampula. The construction work began in March 2010 and is estimated to extend for a two-year period, with investments of US\$ 111 million.<sup>58</sup> Also, in 2005 Odebrechet, in a joint venture with Camargo Correa, another Brazilian construction company, started building the facilities for the massive open-face coal mine that the Brazilian mining giant CVRD will develop in Moatize, in the northwestern

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<sup>57</sup> In October 2010, the government launched an international tender, which will be open until March 2011, for rights to develop the Corridor Sands titanium project in the Gaza province. The Mozambique authorities are attempting to revive interest in the project, which had been under development for over a decade but was finally mothballed by BHP Billiton.

<sup>58</sup> See <http://www.odebrechtonline.com.br/materias/01901-02000/1933/>.

province of Tete, by mid 2011. Mega-projects like this usually involve resettling local families that live in the area and building temporary cities for the workers.<sup>59</sup>

64. Given this increase in demand, output from the local cement industries has failed to meet rising demand, resulting to soaring of cement prices. National cement production is currently covering 80 per cent of the needs in the south of Mozambique, 70 per cent in the central provinces, and only 60 per cent in the north.<sup>60</sup> The Mozambican cement market is currently almost entirely dominated by *Cimentos de Moçambique* - a Cimpor (Cimentos de Portugal) group company, which owns 82 per cent of its capital, with the remaining 18 per cent shared by the Mozambican state, the insurance company Emose and the railway company CFM. Cimentos de Moambique places around 700,000 tons of cement every year and has one cement plant (Matola), one plant another construction, two cement grinding units and four ready-mix concrete units.<sup>61</sup>

65. In view of the poor supply of cement, the government, through the Centre for Promotion of Investments - *Centro de Promoção de Investimentos*, is promoting the construction of cement plants aiming to provide affordable product to the rapidly growing local market, as well as providing an alternative to the expensive imports. CPI has lately approved four investment projects for construction of cement factories in Southern Mozambique. In 2010, CPI approved the China Development Bank to fund the construction of a cement factory in Beluluane, in Mozambique's Maputo province costing US\$100 million. The new factory would have capacity to produce 1 million tons of cement per year. The government has already signaled the reduction of import duties in order to cut prices and increase supply of cement in the country – the first step was to suspend in December 2008 the 10.5 per cent surtax applicable to imported cement (the suspension was valid for two years).<sup>62</sup>

66. As elsewhere, the construction sector in Mozambique is highly concentrated and the

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<sup>59</sup> In the case of the Moatize coal project, Odebrecht was responsible for building two settlements, erecting two towns from scratch and equipping each of them with schools, a medical center, sports facilities, shops and a police station. All of the one- to four-bedroom homes will have electricity, and none will be further than 350 meters from a stand pipe (public water fountain). In one of the settlements, called 25 de Setembro, about 300 homes were built on 600-sq.m lots. The other settlement, called Kateme, will house families that make their living from the land. In addition to houses built on 180m x 40m lots, residents have land where they can cultivate small community fields. While building these two settlements, the joint-venture contractor is also setting up the jobsite facilities for 2,000 people for the coal mine. Those comfortable temporary facilities will include a movie theater, a web café, a soccer pitch, playing courts, a laundry, a chapel, a clinic and a convenience store. The dining hall and kitchen, which are equipped to serve up to 4,000 meals, officially opened on March 27 during a visit from the President of Mozambique, Armando Guebusa. See <http://www.odebrechtonline.com.br/materias/01901-02000/1933/>.

<sup>60</sup> According to Mussa Usman, Centro de Promoção de Investimentos.

<sup>61</sup> See [www.cimpor.pt](http://www.cimpor.pt).

<sup>62</sup> According to the local press, *Cimentos de Moçambique* has expressed its concerns with predatory pricing and poor quality of the cement offered by the potential new market players (Oje, 17.07.2009, *Cimentos de Moçambique querem regulação do mercado*). See also “Governo suspende sobretaxa de importação de cimento”, [http://www.portaldogoverno.gov.mz/noticias/governacao/dezembro2008/nots\\_go\\_503\\_dez\\_08/](http://www.portaldogoverno.gov.mz/noticias/governacao/dezembro2008/nots_go_503_dez_08/).

products in each market (cement, crushed rock, steel, etc.) are homogeneous, which, added to the fact that there is no competition law in the country, creates the incentives for market collusion (regional market allocation) and bid-rigging. There are no formal complaints to the government in connection with this matter. Competition authorities on a global basis – including Brazil, the European Commission, Mexico, South Africa, Zambia, and Zimbabwe – have investigated and in some cases punished a number of cartels in the construction sector, such as cement and crushed-rock cartels.

#### **g. Banking sector**

67. The banking sector in Mozambique has undergone major reforms and it is now viewed as having some degree of competition, with improved central bank operations. The reforms separated the retail activities of Banco de Moçambique from typical central bank's functions, introduced new monetary control instruments, issued new prudential regulations and privatized commercial loans. The playing field has also been leveled and the different banks seem to operate under the same rules.

68. Fifteen commercial banks operate in the country, five of which were established since 2006.<sup>63</sup> Most of the banks are owned by foreign institutions from Portugal, South Africa and Botswana. The government also holds stakes in a selected number of financial institutions such as BCI Fomento. Banks are required by the Banco de Moçambique to meet capital adequacy standards that are generally consistent with the Basel capital adequacy framework.

69. Although the number of banks has significantly expanded over the last 20 years, access to financial services is still not a reality to most of the population, especially in the rural areas. Less than 6 percent of the adult population has credit from a registered financial institution, and just over 10 percent has a savings account.<sup>64</sup> There are a number of structural deficiencies that contribute to this situation: poor physical access and infrastructure, high costs of doing businesses, and weak financial reporting of small companies and individuals. According to the IMF:

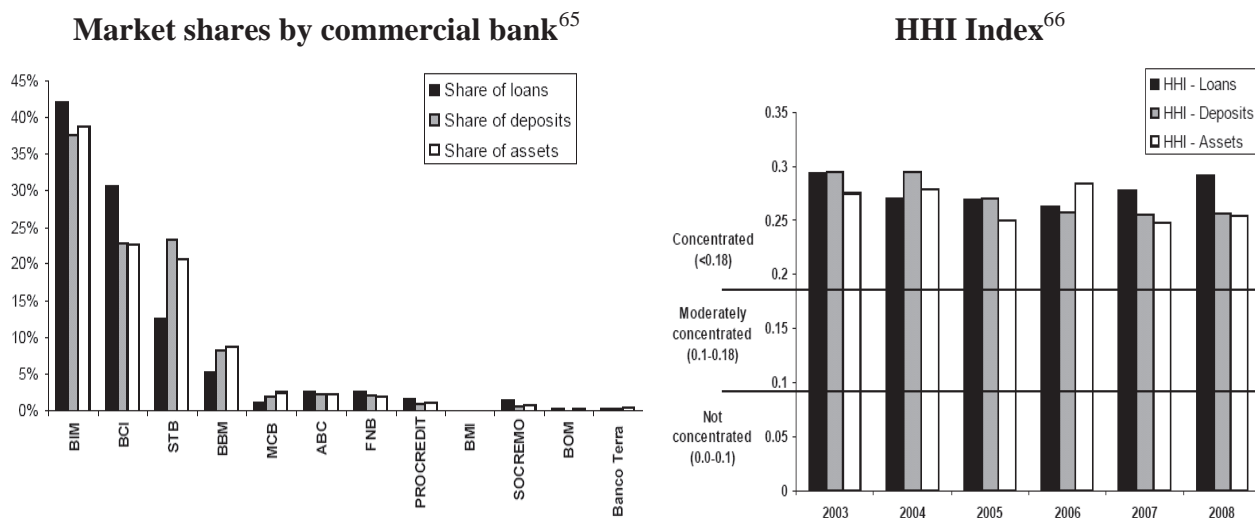
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<sup>63</sup>Namely Banco Internacional de Moçambique S.A. (BIM), Barclays Bank Moçambique S.A. (BBM), Standard Bank S.A. (STB), Banco Comercial e de Investimentos S.A. (BCI Fomento), International Commercial Bank (Mozambique) S.A., The Mauritius Commercial Bank Moçambique S.A., African Banking Corporation (Moçambique) S.A., FNB Moçambique S.A., Soremo Banco Microfinanças S.A., Banco Mercantil e de Investimentos S.A., Banco ProCredit S.A., Banco Oportunidade de Moçambique S.A., Banco Terra S.A., Moza Banco S.A., and Banco Tchuma SARL. Source: Bank of Mozambique, see <http://www.bancomoc.mz/Instituicoes.aspx?id=GINS0001&ling=pt>.

<sup>64</sup> IMF estimates. See International Monetary Fund, *Republic of Mozambique: Financial Sector Assessment program—Financial System Stability Assessment*, 2010.

“The limited progress in financial deepening is attributable to two sets of factors: economy-wide, structural impediments to financial intermediation, which limit the number of creditworthy clients or increase the costs and risks of offering financial services; and the lack of competition in the banking system, which dampens deposit mobilization and contributes to high borrowing costs. Further efforts to improve the debt recovery process, increase credit information, and enhance transparency on service charges would help overcome these obstacles. But these policies would yield results only in the medium- to long-term.” (IMF, *Republic of Mozambique: Financial Sector Assessment program—Financial System Stability Assessment*, 2010).

70. Available data (2008) shows a high market concentration in Mozambique. Banco Internacional de Moçambique S.A. (BIM), Banco Comercial e de Investimentos S.A. (BCI), Standard Bank S.A. (STB), and Barclays Bank Moçambique S.A. (BBM) together hold approximately 90 per cent of the market. The banking sector in Mozambique has indices well above the safe harbour levels of HHI (Herfindhal-Hirschman Index) of 1800 and CR<sub>4</sub> (Concentration Ratio) of 75per cent , indicating a potentially anti-competitive sector. The high CR<sub>4</sub> of 89 per cent also indicates an oligopolistic sector dominated by three big banks, raising concerns over collusion and/or monopolisation.



71. Commercial banks in Mozambique are also highly profitable, which is an objective indicator that more competition would be welcomed in the sector. To some extent, the lack of competition is due to the small size of the market. Following the gradual entry of additional customers in the sector, competitive pressures are expected to increase, benefiting the consumer through, e.g., lower interest rates and banking fees.

<sup>65</sup> Source: International Monetary Fund, *Republic of Mozambique: Financial Sector Assessment program—Financial System Stability Assessment*, 2010.

<sup>66</sup> *Ib. idem.*

### Comparison of Bank Commissions (Metical)<sup>67</sup>

Commission	Mozambique	South Africa	Botswana	Mauritius	Tanzania
Cost of issuing 1 normal check	12.5	1.4	1.6	1.7	1.5
Cost of bouncing check	1500.0	268.7	994.3	173.2	820.1
ATM cash withdrawal	8.0	10.2	7.6	0.0	10.3
Interbank money transfer commission	500.0	35.8	104.8	0.0	130.9
Annual credit card fee	1820.0	394.0	381.0	86.6	380.0

72. In November 2010, the government of Mozambique, through the Governor of Banco de Moçambique and the Minister of Finance, included as a goal to improve competition and consumer protection in the coming years:

“We intend to open a dialogue with the financial sector, the private sector, and civil society on developing a financial services charter aimed at improving access to finance and credit. This will include discussion of measures to broaden financial sector products, enhance their marketing and distribution channels, strengthen competition, establish a consumer protection program, and improve financial literacy.” (Republic of Mozambique, *Memorandum of Economic and Financial Policies presented to the IMF on November 8, 2010*, 2010).

#### **h. External trade**

73. Mozambique has faced radical changes in its external trade policy over the last decades. The government has abandoned a system of managed trade and has moved towards a liberal regime, with imports subject to ad-valorem tariffs.

74. According to the policy statement submitted by Mozambique to the WTO<sup>68</sup>, “*The objective of Mozambique's external trade policy is the creation of an environment conducive to promoting the competitiveness of Mozambican products in the international markets, especially those of the developed economies of Europe, America, and Asia. This does not prejudice the promotion of intra-African trade, an important part of Mozambique's trade policy. Trade policies are formulated with a view to aiding Mozambique's industrialization process by creating linkages with international value chains and, importantly, by reducing the barriers to imports of key inputs. In pursuing its trade policy objectives Mozambique is fully engaged in multilateral, regional and bi-lateral trade negotiations*”.<sup>69</sup>

<sup>67</sup> Source: International Monetary Fund, *Republic of Mozambique: Financial Sector Assessment program—Financial System Stability Assessment*, 2010 and Banco de Moçambique, *Custos da intermediação financeira versus lucratividade das instituições de crédito*, 2007.

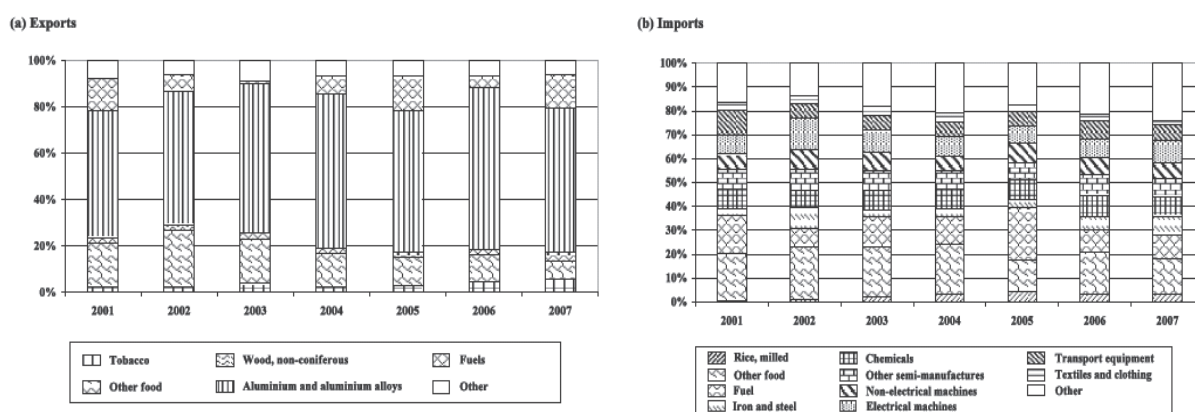
<sup>68</sup> WTO, Mozambique – Trade Policy Review, WT/TPR/G/2009, March 2009.

<sup>69</sup> Mozambique has signed agreements with the WTO-World Trade Organization, World Bank, IMF-International Monetary Fund, Lomé convention, SADC-Southern Africa Development Community, IOR-ARC



75. Over the last fifteen years, Mozambique has increased its exports at an average annual rate of 10 per cent (export receipts have decreased in the last two years mainly because of the depreciation of the metical). Mega-projects involving electricity, natural gas and aluminium account for a substantial percentage of exports and also generate substantial imports due to the need of machinery and inputs. Forty percent of the country imports are related to machinery, electrical goods, vehicles and cereals.

### Structure of Merchandise Trade<sup>70</sup>



76. As for trade barriers, in January 2008 the SADC Free Trade Agreement was implemented (the tariff reduction started in 2000). Considering that a significant percentage of Mozambican trade is with neighbouring countries (in 2009, 48.8 per cent of the imports came from South Africa), the free trade agreement can significantly contribute to promote competition. Indeed, free entry provides effective price discipline and enhances consumer welfare.

77. Mozambique also benefits from initiatives such as the Everything But Arms (EBA - European Commission) and the Africa Growth and Opportunity Act<sup>71</sup> (AGOA - United States). In 2008 Mozambique subscribed to India's Duty-Free Tariff Preference Scheme (DFTP) for least-developed countries.

78. Domestic firms now face a greater number of foreign competitors in their home markets. In the context of a global marketplace, Mozambican businesses stress both the importance of achieving efficiencies and the importance of entering new markets. The

Indian Ocean Rims Association for Regional Cooperation, AGOA-African Growth and Opportunity Act, GSP-Generalized Systems of Preferences and Trade Preferential Agreement with South Africa.

<sup>70</sup> Source: WTO, Mozambique – Trade Policy Review, WT/TPR/S/2009, December 2008.

<sup>71</sup> The African Growth and Opportunity Act (AGOA) was signed into law on May 18, 2000 as Title 1 of the Trade and Development Act of 2000. The Act offers tangible incentives for African countries to continue their efforts to open their economies and build free markets. Amendments to the Act were passed in 2002, 2004, and 2006

government should be aware that local companies, faced with competition, will ask for protective measures - sometimes veiled in technical requests (as allegations that the imported product does not comply with Mozambican quality standards).

## 2. Market access

### (a) Regulation<sup>72</sup> and anti-competitive practices

79. In Mozambique, the Constitution, which came into force in November 1990, takes precedence over all other laws and is “*the fundamental law for all political and social organisation in the Republic of Mozambique*”, according to its preamble.

80. One of the fundamental aims of the Republic of Mozambique in terms of Article 6 of the Constitution is “*the development of the economy and scientific and technological progress*”. Under the Constitution, the State is given a very prominent role in the economy. In terms of its Article 35, “*the ownership of natural resources located in the soil and the subsoil, in interior and territorial waters, on the continental shelf, and in the exclusive economic zone is vested in the State*”. The public domain of the State includes: (i) the maritime zone; (ii) the airspace; (iii) archaeological heritage; (iv) nature conservation zones; (v) hydro-power resources; and (vi) energy resources. Article 46 also vests ownership of land in the State. Article 49 provides that “*the State shall promote and coordinate economic activity, acting directly or indirectly to resolve the fundamental problems of the people and to reduce social and regional inequities*” and that “*State investment shall play a dynamizing role in promoting development*”.

81. The role of non-State economic players is however also provided for under the Constitution. Article 42 provides that “*in satisfying the basic needs of the people, the family sector plays a fundamental role*” and that “*the State shall support and provide incentives for family sector production, and shall encourage peasants as well as individual labourers to organise themselves into more advanced forms of production*”. Article 43 provides that “*the State shall promote and support the active participation of the national business sector in the*

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<sup>72</sup> The term ‘regulation’ refers to the various instruments by which governments impose requirements on enterprises and citizens. Regulation has both positive and negative effects on competition. Positively, it basically aims at alleviating market imperfections by substituting regulatory measures for the working of market forces. Regulation can therefore play an important role in introducing and maintaining competition in the regulated sectors. It may however also have negative impacts on competition by the imposition of regulatory barriers to competition, such as creating administrative hurdles, such as complex and lengthy authorisation procedures, for the establishment of new market players; requiring compliance with uncommon norms and standards amounting to barriers to market entry; and preventing foreign firms from competing in national markets.

*development and consolidation of the country's economy*", while Article 44 provides that *"the State recognises the contribution made by small scale production to the national economy, and shall support its development as a way of making good use of the capacities and creativity of the people"*.

82. Foreign investment is also recognised and given a contributory role in economic development under the Constitution. In that regard, Article 45 provides that *"foreign investment shall operate within the framework of the State economic policy"* and that *"foreign ventures shall be permitted in all economic sectors, except those that are exclusively reserved for State ownership or development by the State"*.

83. Article 41 of the Constitution provides for the participation of various economic players and for different types of economic ownership in Mozambique. In that regard, it is provided that the national economy includes the following complementary types of ownership: (a) State ownership; (b) cooperative ownership; (c) joint private-State ownership; and (d) private ownership.

84. The above provisions of the Constitution of Mozambique have wide implications on competition. The State is given a leading role in the country's economic activities, with exclusivity in certain economic sectors, while the role of private enterprise, including foreign investment, in the economy is also provided for. The informal sector and small and medium enterprises are also recognised for State support. In economic sectors that are open to competition by both public and private enterprises, concerns over level playing fields would arise with State enterprises having unfair advantage over private enterprises in terms of funding and other regulatory support. In sectors that are exclusive to State enterprises, concerns over abuse of monopoly would also arise.

85. Competition policy and law can, and should, address the above competition concerns if applied effectively. An effective competition law should be of general application, and should apply to all economic activities and players with very few exemptions. Common exemptions to competition law include intellectual property rights (except to the extent that such a right is used for the purpose of enhancing or maintaining prices or any other restrictive business practices<sup>73</sup>), and collective bargaining negotiations and agreements. The best practice principle is that competition law should apply to all enterprises in regard to all their commercial agreements, actions or transactions regarding goods, services or intellectual property.<sup>74</sup> The rationale behind this general principle is that firms or enterprises engaged in

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<sup>73</sup> Competition Act [Chapter 14:28] of the Republic of Zimbabwe.

<sup>74</sup> UNCTAD Model Law on Competition, United Nations, New York and Geneva, 2010, in which 'enterprises' are defined as to mean "firms, partnerships, corporation, companies, associations and other juridical persons,

the same or similar business activities should be subject to the same set of legal rules and standards in order to ensure fairness, equality and non-discriminatory treatment under the law.

86. Therefore, in situations where Mozambican State enterprises compete with private enterprises in the provision of goods and services, the country's competition law should apply equally to all such enterprises. In cases where State enterprises have exclusivity, the monopolisation provisions of competition law should apply if the enterprises' monopoly positions are abused through the engagement of exploitative practices.<sup>75</sup>

87. While the Constitution of Mozambique supports the development of small and medium enterprises (SMEs), it does not specifically provide that such enterprises should be exempted from the application of any law. To wholly exempt SMEs from the application of competition law would in fact be condoning their involvement in *per se* prohibited restrictive business practices, such as price fixing, bid rigging, and other cartel activities, that have no economic justification and are harmful to the national economy.

88. The legislation on private investment in Mozambique comprises the Law on Investment (Law No. 3/93 of 24<sup>th</sup> June 1993) and the Regulation of the Investment Law (Decree No. 43/2009 of 21<sup>st</sup> August 2009). Law No. 3/93 was enacted in terms of Section 1 of Article 135 of the Constitution<sup>76</sup> to adequately adjust and improve the legal framework on private investment matters in the country. The following is the background to that Law as stated in its preamble:

- an awareness of the need to establish a legal framework to regulate the process of carrying out both national and foreign private investment undertakings in Mozambique, which can contribute to progress and the improvement of well-being in the country, led to the adoption of Law No. 4/84 of 18<sup>th</sup> August, and the

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irrespective of whether created or controlled by private persons or by the State, which engage in commercial activities and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them”.

<sup>75</sup> Zimbabwe's competition law provides that the law “applies to all economic activities within or having an effect within the Republic of Zimbabwe, and that the law “binds the State to the extent that the State is concerned in the manufacture and distribution of commodities”. In a recent competition case involving abuse of monopoly position by a State enterprise with a statutory monopoly in the production and distribution of electricity, the competition authority issue cease and desist orders against the power utility, and made recommendations to the relevant authorities on public interest concerns in the electricity sector that were identified during the investigation. The competition authority had proved the allegations against the power utility that it was engaged in abusive practices of an exploitative nature, including inflating electricity bills through the use of estimates and not actual meter readings, and discriminating between its customers.

<sup>76</sup> Section 1 of Article 135 of the Constitution of Mozambique provides that “the Assembly of the Republic shall have power to legislate on basic questions of the country's domestic and foreign policy”.

corresponding Regulations on Direct Foreign Investment, approved by Decree No. 8/87 of 30<sup>th</sup> January;

- in complement to the above, Law No. 5/87 of 19<sup>th</sup> January 1987 was enacted, and Decree No. 7/87 of 30<sup>th</sup> January 1987 approved the Regulations on the Procedures for national investments – Decree No. 10/87 of 30<sup>th</sup> January 1987 also established the tax and customs incentives applicable to private national investments; and
- the profound changes underway throughout the world in general, and in Mozambique in particular, especially those arising from the implementation of the Economic Recovery Programme and the adoption of the new Constitution, together with the need to adopt a more open and objective economic policy which favours greater participation, complementarities and equality of treatment of national and foreign investments, brought about the need to revise through Law No. 3/93 of 24<sup>th</sup> June the then existing legislation regarding investment matters.

89. Pursuant to Article 2 of Law No. 3/93, the object of the Law is to establish the basic and uniform legal framework for the process of carrying out both national and foreign investments eligible for the guarantees and incentives provided for in the Law. Article 3 however provides that the law does not apply to investments made, or to be made, in the areas of prospecting, research and production of petroleum and gas and in mineral resources extraction industries. The Law also does not cover public investments financed by funds from the State Budget or of an exclusively social character.

90. Article 11 of Law No. 3/93 gives guidelines on the areas for investments by free private initiative in that it provides that “*areas open to free initiative for private investments shall be all those of economic activities which are not expressly reserved to the ownership or exclusive operation by the Government or to the investment initiative by public sector*”. Areas reserved to public sector initiative are provided for in Article 12 of the Law, which generally provides that “*the Council of Ministers shall define the areas of economic activity reserved to the initiative of public sector for carrying out investments, with or without participation of the private sector, and, furthermore, define the percentage shareholding to private national and foreign investment*”.

91. Law No. 3/93 has particular positive implications on competition. One of the stated objectives of the carrying out of investments under the Law as provided for in Article 7 is “*the promotion of technological development and the improvement of entrepreneurial productivity and efficiency*”. Innovation and the achievement of economic efficiency (in terms of both productive and allocative efficiencies) are the basic tenets of the objectives of competition policy. Article 4 of the Law also provides for equality of treatment of national

and foreign investigators, which levels the playing field without discriminatory treatment of one set of investors.

92. The other laws and regulations in Mozambique that have a profound impact on anti-competitive practices are those that specifically affect certain economic sectors, such as financial services, telecommunications, and energy. These will be analysed in the section on Sector Regulation below.

93. The drafting of Mozambique's all-embracing competition law has now been finalised, and arrangements are being made by the Ministry of Industry and Trade to submit the draft law to the Council of Ministers for consideration and approval during the current semester. After that, the Competition Bill will be tabled before Parliament for adoption. Stakeholder hopes in Mozambique are that the competition law will be passed for execution soon.

94. According to the Ministry of Industry and Trade<sup>77</sup>, the draft competition law covers all competition issues, including anti-competitive agreements (both horizontal and vertical agreements), abuse of dominance (monopolisation), and mergers that have anti-competitive effects. The law provides for very few exemptions (with the notable exceptions of international agreements, collective bargaining, and non-profit making organisations), and applies to all economic sectors, including the small and medium enterprises sector. The recommendation is that no exceptions shall exist in the competition law, because it can facilitate erroneous interpretation and discrimination among players.

### **(b) Sector regulation**

95. As noted in the 2006 Report, Mozambique has various specific sector regulations including in the financial services (both banking and insurance), energy, telecommunications, water and sanitation, and services sectors.

96. In the banking services sector, there are two principal Acts of Parliament that govern the sector. The first is the Central Bank Act (Law No. 1/92), which established the Central Bank (*Banço de Moçambique*) as the regulator of commercial banks, and other financial institutions (excluding insurance companies and pension funds). The second is the Banking Act (Law No.15/99 (as reinforced by Decree No. 9/2004), which establishes rules for

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<sup>77</sup> The consultants' discussions in Maputo, Mozambique, with the Ministry of Industry and Trade on the subject matter were held with Mr Francisco Chuquela Langa, the head of the Commercial Policy Department in the Ministry.

commercial banks.<sup>78</sup> The Central Bank of Mozambique has some competition promotion functions in the financial services sector, including the authorisation of merger and acquisitions involving financial institutions.

97. In the telecommunications services sector, the Postal & Telecommunications Regulatory Authority (*Instituto Nacional dos Comunicações de Moçambique*) (INCM) is the autonomous regulatory authority, which was created by Decree 22/92 of 10 September 1992. The responsibilities of the INCM include tariff proposals, technical standards, frequency allocation, type approval, monitoring service quality and establishing licensing fees. The Telecommunications Act (Law No. 8/2004) also gives the INCM the functions of promoting competition in the telecommunications services sector, and of taking the necessary measures of preventing anti-competitive practices and abuse of dominant positions. One of the objectives of the Telecommunications Act is “*to establish competition rules to operators and suppliers of telecommunications services so as to ensure that non-discriminatory and competitive conditions be created to all operators and services suppliers for telecommunications*”.

98. Operators and suppliers of telecommunications services in Mozambique include *Telecomunicações de Moçambique* (TDM), which was entrenched in its position as the exclusive provider of fixed line national and international telephones by the former Telecommunications Act (Decree 14/99 of November 1999).<sup>79</sup> In the mobile cellular services segment, *Telecomunicações Móveis de Moçambique Lda* (TMM), which started operations in September 1997 and operated under the name Mozambique Cellular (Mcel), was until 2003 the only cellular operator in Mozambique. More recently, Vodacom Mozambique and Movitel started operations in the country (please see item II.1.d above).

99. In the electricity sector, the *Conselho Nacional de Electricidade* (CNELEC) is a Statutory Body that was established under the Electricity Act (Law No. 21/97) as an advisory body to government on electricity matters. While the Electricity Act is concerned over competition in the electricity sector, and creates space for private participation in the electricity market, it presently does not give CNELEC any competition functions since the advisory body is not a full regulatory authority.<sup>80</sup> There are however plans with the intended

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<sup>78</sup> The interview with Banco de Moçambique was held in Maputo, Mozambique, on 21 February 2001 with the Bank's Director for Banking Supervision, Mr Umaia Mahomed.

<sup>79</sup> TDM became a legal corporate body with administrative and financial autonomy on 1 January 1993. Decree 23/92 of 10 September 1992 changed the status of TDM from a parastatal organisation to a public corporation wholly owned by government.

<sup>80</sup> As submitted by Mr Guilherme Luis Mavila, the Chairman of the Board and Chief Executive Officer of CNELEC, during an interview held in Maputo, Mozambique, on 22 February 2011.

opening up of the electricity sector to private participation to transform the CNELEC into a full regulatory authority and give it competition functions.

100. There are presently only two major players in the Mozambican electricity sector, and both are in the public sector. One, *Hidroelectrica de Cahora Bassa* (HCB), is in electricity generation and the other, *Electricidade de Mozambique* (EDM), is mainly in electricity distribution with some involvement in generation.<sup>81</sup> There is therefore no real competition in the Mozambican electricity sector pending the bringing in of more players through private investment. CNELEC is however of the opinion that the distribution of electricity should remain as a public monopoly for some time because of the essential facilities involved in the transmission, but that private investment in electricity distribution could still be required in remote areas where the national grid does not reach<sup>82</sup>. It does not see any immediate problems in opening up electricity generation to private investment.

101. While the State still plays a major role in the regulated sectors as a player through public enterprises, the sectors are increasingly becoming accessible to private investment, both local and foreign. Competition in the sectors is therefore being facilitated and encouraged.

102. Sector regulation however has the potential of creating jurisdictional conflicts between the sector regulators and the soon to be established competition authority over competition in the regulated sectors<sup>83</sup>.

103. Jurisdiction between sector regulators and competition authorities over their common regulatory tasks may not be clear-cut, and often cause problems and conflict. Different countries have chosen different approaches to ensure coordination and policy coherence between sector regulators and the competition authority<sup>84</sup>. The country approach to sector

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<sup>81</sup> There is another player in the electricity sector, called MOTRACO, which was however established to exclusively transmit electricity to a single industrial user, Aluminium Smelter. MOTRACO's shareholding includes EDM and ESCOM of South Africa.

<sup>82</sup> Ibid.

<sup>83</sup> TD/B/COM.2/CLP/44 of 19 August 2004 (a study by the UNCTAD Secretariat on "Best Practices for Defining Respective Competences and Settling of Cases which Involve Joint Action of Competition Authorities and Regulatory Bodies), which was prepared for the Sixth Session of the Intergovernmental Group of Experts on Competition Law and Policy held in Geneva, Switzerland, during the period 8 – 10 November 2004, which was reissued as TD/B/COM.2/CLP/44/Rev.2-TD/RBP/CONF.6/13/Rev.1 of 17 August 2004 for the Seventh Session of the Intergovernmental Group of Experts on Competition Law and Policy held in Geneva, Switzerland, during the period 31 October – 2 November 2006.

<sup>84</sup> The South African and Namibian models on dealing with the jurisdictional conflicts between sector regulators and competition authorities seem to be the best in the SADC region since the concept of concurrent jurisdiction between the regulatory authorities is explicitly provided for in the competition legislation, and the authorities are compelled by the legislation to negotiate and enter into concurrent jurisdiction agreements to ensure the consistent application of the principles of competition law. Even though the Namibian legislation only provides that the concurrent jurisdiction agreements can only be concluded in cases where the relevant sector regulator



regulation and competition for countries in the SADC region, according to a 2004 UNCTAD study<sup>85</sup>, is generally to combine technical and economic regulation in a sector regulator and give it some or all competition law enforcement functions (Malawi, Mauritius, South Africa, Namibia, Zambia, and Zimbabwe). In Tanzania, while technical and economic regulation is combined in a sector regulator, competition law enforcement is exclusively left in the hands of the competition authority. In Zimbabwe, the competition authority is also given final authorisation on all mergers and acquisitions, including those in regulated sectors. In South Africa and Namibia, the competition legislation requires the competition authorities to negotiate and conclude concurrent jurisdiction agreements with sector regulators over competition matters.

104. All the sector regulators that were consulted in Mozambique accepted and appreciated the role of an all-embracing competition authority in the effective promotion of competition in the economy. Nonetheless, they were also of the opinion that sector regulators should continue undertaking their competition promotion functions in their respective sectors because of the highly technical nature of the sectors. *Banco de Moçambique* sees no technical problems in the establishment of a competition authority in Mozambique, provided that there are clear mandates between that authority and the Central Bank, and that the two regulators cooperate with each other on the promotion of competition in the banking sector. The *Instituto Nacional dos Comunicações de Moçambique* also does not see any jurisdictional conflicts over competition matters in the telecommunications sector between itself and the competition authority to be established, and feels that the two regulators would complement each other in that regard as long as there is a clear demarcation of functions between them. The *Conselho Nacional de Electricidade* sees the establishment of the competition authority in Mozambique as a benefit, and that such an authority can only add value instead of creating a conflict of interest situation, since Mozambique needs an authority that oversees competition, even though there may be sector regulators. It noted that sector regulators in Mozambique have competition functions in their respective sectors only because the country presently does not have an all-embracing authority on competition. An authority

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has jurisdiction over competition matters, the competition authority has nevertheless concluded general cooperation agreements with sector regulators that do not have specific competition functions for the purposes of exchanging information.

<sup>85</sup> In 2004 UNCTAD undertook a study on the best practices for defining jurisdiction and settling of cases which involve joint action of competition authorities and regulatory bodies, which discussed in depth sector regulation<sup>85</sup>. The study established that the role of sector regulation remains relevant in those areas of the economy that remain susceptible to market failures following privatisation and other market reforms. The study also found that while sector regulation and competition policy play complementary roles in promoting competition and safeguarding consumer welfare, the different approaches taken by competition authorities and sector regulators in meeting that common goal can be a source of friction between them. UNCTAD, 'Best Practices for Defining Respective Competences and Settling of Cases, which Involve Joint Action by Competition Authorities and Regulatory Bodies', 2006 (TD/B/COM.2/CLP/44/Rev.2 – TD/RBP/CONF.6/13/Rev.1)

that oversees the enforcement of a broad competition law would ensure the application of common rules, and thus attract investment. There should however be cooperation between the all-embracing competition authority and sector regulators in the promotion of competition in various sectors.

105. As confirmed by the Ministry of Industry and Trade<sup>86</sup>, possible jurisdictional conflicts between sector regulators and competition authorities over the promotion of competition were noted during the drafting of Mozambique's competition law. As such, the draft law provides that the competition authority and sector regulators must collaborate, and must enter into agreements of cooperation. Under the draft law, the competition authority has also been given jurisdictional control over mergers and acquisitions, as well as over anti-competitive agreements.

106. The Mozambican competition authority, once it is established, should therefore prioritise the conclusion of concurrent jurisdiction agreements with those sector regulators that have statutory competition functions, and general cooperation agreements with those that do not have explicit competition functions, for the consistent application of the country's competition law.

107. It is also noted that *Banco de Moçambique* has powers under the Banking Act to examine and make determinations on mergers and acquisitions in the banking sector, while under the draft competition law of Mozambique the competition authority is given jurisdictional control over such transactions. Therefore, while *Banco de Moçambique* can continue with its examination of mergers and acquisitions in the banking sector, for exchange control and protection of depositors' interests, the final authorisation of all merger transactions should be that of the competition authority, with its oversight of the whole economy<sup>87</sup>.

### **(c) Privatisation programme**

108. The Ministry of Industry and Trade submitted that Mozambique's privatisation program commenced in earnest in 1992 when a list of all the State-owned enterprises was

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<sup>86</sup> The interview at the Ministry of Industry and Trade was held with Mr Francisco Chuquela Langa, the head of the Commercial Policy Department.

<sup>87</sup> Such a system exists in other jurisdictions. For example, in Zimbabwe the competition law provides that "where a statutory body established to regulate the activities of any person or class of persons authorises a merger between two or more such persons, such body shall, unless the enactment establishing it expressly provides otherwise, apply to the Commission in terms of this Act for the final authorisation of the merger".

drawn up for privatisation. Before that, all the enterprises in Mozambique were in government hands.<sup>88</sup>

109. The privatisation program was implemented on three fronts. The first front was the privatisation and restructuring of large enterprises. In that regard, the *Unidade Técnica de Reestruturação Empresarial* (UTRE) was set up to oversee the privatisation and restructuring of about 20 large-scale enterprises. All the enterprises in the original privatisation list were either restructured or privatised by early 1999, with the exception of the national airline, *Aéreas de Moçambique* (LAM)<sup>89</sup>. The second front was the privatisation and restructuring of small and medium-sized enterprises. A program targeting an initial set of 222 enterprises was completed in 1999. That stage of the reform left the government with majority ownership in only 33 companies. On the third front, the government privatised the majority of shares in two banks, *Banço Comercial de Moçambique* (BCM) and *Banço Popular de Desenvolvimento* (BPD). By 1999, the Government of Mozambique had privatised a total of 1 417 companies.<sup>90</sup>

110. The last major privatisation, according to the Ministry of Industry and Trade, was in the textile and clothing industry in 2010, and was so successful that the industry is now exporting in large quantities. Preparations for privatisation are underway for other large State-owned enterprises in sectors such as electricity and transport. In privatising a State-owned enterprise the Government frequently selects a strategic foreign investor through a public international tender system.

111. Stakeholders consulted in Mozambique indicated that the country's privatisation programme has so far gone well without major hitches. The Ministry of Industry and Trade submitted that Mozambique has had no bad experiences in the programme, which is proceeding smoothly. Similar sentiments were expressed by *Centro de Promoção de Investimentos*.<sup>91</sup>

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<sup>88</sup> This was confirmed by the Mozambican Ambassador in Zimbabwe, H.E. Vicente Veloso, who also stated that the State's involvement in all economic areas was even in the operation of canteens.

<sup>89</sup> Because of the lack of acceptable bids, the Government converted the airline into a limited liability company, with the intention of selling the State's shares on the stock exchange.

<sup>90</sup> *Unidade Técnica de Reestruturação Empresarial* (UTRE), 'Privatisation in Mozambique', Technical Unit for Enterprise Restructuring, Ministry of Planning and Finance, Maputo, 1999.

<sup>91</sup> Dr Pauline Dibben, in a paper on 'Restructuring the Public Sector in Mozambique: Trade Unions and Employment Security', submitted to Work Employment & Society Conference, Aberdeen, 12-14 September 2007, however noted from other studies that "privatisation in Mozambique was arguably both hasty and careless (Cramer, 2001) and adequate regulatory structures were not put in place (Castel-Branco, *et al*, 2001). Enterprises were often sold cheaply in order to encourage domestic bidders, so that veterans were allowed to buy public assets at reduced prices to avoid political trouble, and private businessmen who had profited from the war invested in joint ventures with foreign investors (Castel-Branco, *et al*, 2001). However, other than these groupings, the procurement rules of credit institutions and donors tended to exclude Mozambican businessmen from tenders (CTA report, 2005) and a 60 days notice for bids excluded firms that were not familiar with

112. It is however noted that the remaining privatisations are in sectors that are characterised by large infrastructures, and akin to natural monopolies, such as the electricity and transport sectors. There is therefore the real danger of transforming the State monopolies into private ones unless competition policy and law is used to foster conditions that will lead to more competitive market structures and business behaviours.

113. The competition authority to be established in Mozambique should therefore be actively involved in the country's privatisation programme through the performance of its competition advocacy and enforcement functions. The competition authority could ensure that public monopolies are not simply transformed into private ones by advocating that any dominant State enterprise to be privatised should be split into one or more independent, but viable, units, and that structural barriers to entry into the relevant markets should be removed. With regards enforcement, an effective competition policy and law regime in Mozambique with strong merger control provisions could be used to identify those privatisation-induced combinations that would likely reduce substantially competition in the relevant markets to enable the necessary corrective measures to be taken before the conclusion of the privatisation process. Post-privatisation, the monopolisation provisions of competition law could be used to constrain any anti-competitive behaviours and conduct of the privatised enterprises.

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Mozambique, thus leaving an opening for businesses from countries that had already traded in or with Mozambique such as South Africa, the UK, and Portugal. Coupled with this, the new owners were not properly evaluated and often did not have the capital or knowledge necessary to effectively revive companies (interview with Peter Coughlin, 2006). More critically, the process of privatisation, including that of the Mozambican banks, has been tarnished by accusations of the corruption of buyers of privatised companies, and the receipt of donor loans that were not be repaid (Hanlon, 2004)".

#### (d) Concessions<sup>92</sup> and competition policy

114. Outside the privatisation program, and as a short-term substitute of that program, the Government of Mozambique undertook the deregulation and the concession of State-owned enterprises.

115. Concessions in Mozambique included the ongoing process of concession of railways, ports, and port services owned by the national Ports and railways company, *Caminhos de Ferro de Moçambique* (CFM), and the concession of water delivery in the five major cities of Maputo, Beira, Pemba, Quelimane, and Nampula. Other notable concessions have been in natural resources, such as the forestry concession in the Zambesia Province, and the coal concession in the Moatize coal region. According to the *Centro de Promoção de Investimentos* the concessions are granted through public tender. The public-private partnership (PPP) law, under which concessions fall, is under review to fix the percentages of State shares that can go to the private sector. For that purpose, there is an Institute for Management of State Shareholders.

116. The Mozambican Chamber of Commerce, the *Câmara do Comércio de Moçambique* (CTA)<sup>93</sup>, submitted that its members were not satisfied with the concessions granted so far since local companies were not given opportunities by the government to get involved in the projects<sup>94</sup>. Most of the concessions granted are on large infrastructure projects, and the perception in government is still that local companies do not have the necessary financial

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<sup>92</sup> Concessions are a form of public-private partnership, which are aimed at allowing the public sector to benefit from the know-how, experience and financial strength of private companies. Typical examples where concessions may be used are in the building and operation of large infrastructure projects such as sea and airports, and toll roads, under which the operational and financial risks of the projects are placed on the concessionaire. Apart from infrastructure services, the right to use natural resources may also constitute the subject matter of concessions. UNCTAD in its 2009 study on concessions<sup>92</sup>, identified the rationale behind the granting of concessions as to include the need: (i) to change inefficient market structures in industries that are characterised by public monopolies and state failure); (ii) to increase the efficiency of operators (since a private operator is expected to run the business more cost-efficiently than the State); and (iii) to relieve the public budget (to reduce government expenditures for infrastructure and maintenance). Concessions may thus contribute to a country's economic development by: (i) attracting additional private investment, including, and more importantly, foreign direct investment; (ii) contributing to more efficient market structures and facilitating new market entrants; and (iii) improving efficiency in the provision of infrastructure services. In TD/B/C.1/CLP/2 of 28 April 2009 (a study by the UNCTAD Secretariat on "Public Monopolies, Concessions, and Competition Law and Policies"), prepared for the Tenth Session of the Intergovernmental Group of Experts on Competition Law and Policy held in Geneva, Switzerland, during the period 7 – 9 July 2009.

<sup>93</sup> The General Secretary of the Chamber of Commerce, Mr Manuel Notiço, was interviewed in Maputo, Mozambique, on 22 February 2011.

<sup>94</sup> The 2009 UNCTAD study on concessions noted from other studies that there are widespread perceptions in some developing countries that concession programs have been unfair and have benefitted the wealthy and hurt the poor through job losses and higher tariffs, and that the processes have lacked transparency, proceeds have been misused, efficiency gains secured by operators have not been shared by the users, and corruption has been rampant. It was however also noted in that study that despite this negative image, some concessions have contributed to economic development and consumer welfare since they have improved and expanded infrastructure, and introduced greater efficiency.

capital to manage them. The situation is however changing as an increasing number of local companies are becoming financially viable to participate in many of the large projects and tenders.

117. The aforementioned Chamber is also of the view that even though the concessionaires are given special treatment by the government, in order to protect the public investments, there are no competitive problems in that since the concessions are only in terms of big infrastructure projects. The outcome and results of the projects are also felt to be pro-competitive since they create the necessary enabling conditions for local companies in terms of operational infrastructures.

118. It should however be noted that concessions, by their nature, often confer monopoly or dominant positions on the concessionaires. Concerns over abuse of dominance (or monopolisation) therefore come to the fore. Another serious competition concern would be the ability of a vertically integrated concessionaire to foreclose or discriminate against its unintegrated competitors who might need to access the services provided or infrastructure controlled by the concessionaire. Competition policy and law thus help to constrain anti-competitive conduct on the part of the concessionaires.

119. While the concessions granted so far by the Mozambican Government may not have materially restricted competition in the relevant markets, because they have mostly been granted to foreign companies which had not previously been players in the economy, and have involved large infrastructure projects, as submitted by the Chamber of Commerce, the situation is most likely to change. An increasing number of local companies are likely going to be involved in the concession projects as their financial positions improve. The perceived competition concerns over abuse of dominance and vertical restraints would then become a reality.

120. There would therefore be need for the competition authority to be established in Mozambique to take competition issues into account at the various stages of a concession, i.e., at its design, the awarding and its execution, as well as in the regulatory framework for the relevant markets. Transparency in the design and awarding of the concession is essential in providing the necessary competition between potential concessionaires for the identification of the most suitable concessionaire at the best conditions. After the concession is awarded, potential anti-competitive conduct during the term of the concession, arising from possible and likely abuse of dominance over the relevant infrastructure and/or services, has to be constrained by competition law and policy.

### (e) Small and medium enterprises

121. The small and medium enterprises (SMEs) sector in Mozambique is relevant since it comprises about 90 per cent of all the enterprises in the country, with only big enterprises being in gas, water, aluminium, and electricity sectors.<sup>95</sup> The SMEs are found in virtually all the economic sectors, including food processing, textiles and clothing, and even the steel industry. Also, many members of the Chamber of Commerce of Mozambique, the *Câmara do Comércio de Moçambique* (CTA) are SMEs, who comprise about 70 per cent of the Chamber's membership.<sup>96</sup>

122. According to the CTA, the Government of Mozambique was not paying much attention to the SME sector in terms of institutional arrangements, until about five years ago. The government has however now created an institution that deals directly with SMEs. That institution is doing sterling work in areas such as simplified procedures in the establishment and operation of companies.

123. The Ministry of Industry and Commerce confirmed that it is now government policy to help and give assistance to SMEs in infrastructure, credit and training. In many of the country's Provinces there are Boards that also help SMEs in setting up and organisation, as well as in the provision of facilities. The institute of SMEs was created by the government two years ago, and falls under the Ministry of Industry and Commerce.

124. However in Mozambique the SMEs sector is not specifically protected under the country's draft competition law, nor is it given exemption from the application of the law. That should be the case since players in that sector are involved in the greater part of the country's economic activities. To give the sector specific preferential treatment under competition law could adversely affect the effective implementation of the country's competition policy and law by excluding the larger portion of economic activity from the full application of the law. It could also seriously affect competition in the relevant markets through the creation of uneven playing fields between the economic players.

125. It should however be noted that competition law on its own generally provides in-built protection to small and medium enterprises through *des minimus* rules without outrightly exempting that sector from the application of the law. Competition law's *des minimus* rules stipulate only those practices and conduct that materially restrict competition should be

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<sup>95</sup> As submitted by the head of the Commercial Policy Department in the Ministry of Industry and Trade, Mr Francisco Chuquela Langa, during the consultations held in Maputo, Mozambique, on 21 February 2011.

<sup>96</sup> As submitted by the General Secretary of the *Câmara do Comércio de Moçambique*, Mr Manuel Notião, during the consultations held in Maputo, Mozambique, on 22 February 2011.

prohibited. The unilateral practices of most individual SMEs do not materially restrict competition in the relevant markets because of their smallness. Merger control under competition law is also generally subject to merger notification thresholds that effectively exclude mergers and combinations involving SMEs from being notified to the competition authority for examination.

**(f) Informal sector**

126. According to the Ministry of Industry and Trade the informal sector in Mozambique is very large. In a presentation that was largely based on studies made by Gbossa (1997) and Seruziá (1993)<sup>97</sup>, the informal sector in Mozambique was defined as “the informal commercial activity which employs less than 10 people”. In that presentation, the following statistics were given on the country’s informal sector:

- during the colonial period (i.e., before 1975), 70 per cent of agriculture in terms of production was in the informal sector (55 per cent in subsistence farming and 15 per cent in commercial farming), and the remaining 30 per cent was in the formal sector;
- during the 1995-2009 period, the informal sector grew because of the migration from the rural to urban areas (urbanisation) caused by the war;
- in 2009, of Mozambique’s then population of 19.5 million, 52.5 per cent were workers, and of those, 75 per cent were in the informal sector (68.9 per cent in agriculture, 18.5 per cent in commerce and tourism, and 4.3 in the processing industry).

127. According to the Chamber of Commerce of Mozambique (the *Câmara do Comércio de Moçambique* - CTA), the informal sector in Mozambique is largely created by enterprises in the formal sector to avoid the payment of taxes in the distribution of their merchandise. Also, a large number of the players in the informal sector are cross-border traders, who are very well organised under an association called *Mukherista* that lobbies and takes issues with the government. The government has responded to the plight of the informal sector by providing training to the sector, and entering into agreements with financial institutions on behalf of the sector.

128. According to the Ministry of Industry and Trade, the importance of the informal sector to the economy of Mozambique is because of the following factors: (i) the sector does not require much capital; (ii) the sector is labour intensive since it uses more raw materials and less machinery; (iii) it is easy to change the operating environment of the sector; (iv) the

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<sup>97</sup> Presentation on ‘The Role of Informal Trade in the Developing Economy of Mozambique’, July 2009.



sector is a way of enhancing salaries and wages of the formally employed through moonlighting; and (v) the sector contributes to the revenue of local government. The following disadvantages however also arise from the country's informal sector: (i) the sector constrains the growth of the formal sector; (ii) the sector facilitates and encourages child labour; (iii) many of the activities of the sector are not taxable; (iv) the sector attracts illicit activities; and (v) the activities of the sector can be against the consumers and public health because of the conditions in which they are undertaken.

129. The Ministry is therefore of the view that besides the importance of the informal sector to the country's economy, it is necessary to transform that sector to formality because of its adverse socio-economic effects. In order to reduce the growth of the informal sector in the country, the Government approved simplified business licensing procedures. Under the new procedures, one can now get a business license the same day using the One-Stop shop facility. One can also now pay taxes once a year instead of monthly. The creation of the institute of SMEs two years ago was also designed to induce the informal sector to turn to formality.

130. The existence of a large informal sector in Mozambique is cause for serious competition concern. Because of its role and economic importance to Mozambique, the informal sector should ideally be subjected to the application of competition law and policy if the country is to reap the full benefits of enterprise competition. The application of competition law and policy to the informal sector can however face fundamental problems because of the very nature of that sector. In most cases, enterprises in the informal sector operate outside, and are not necessarily constrained and disciplined by, the confines of official rules and regulations that govern mainstream business activities.

131. Problems in applying competition law and policy to the informal sector are mainly related to the roles that economic players in that sector can play in a competition case, given the fact that the players operate in a sector that does not strictly adhere to formal rules and regulations that govern normal business activities. Players in the informal sector, like any other economic players, have a right to seek the protection of competition authorities against restrictive business practices of larger enterprises. As such, competition complaints from that sector can, and should, be addressed and redressed by competition authorities. Players in the informal sector as other interested stakeholders in a competition case can also positively contribute to the investigation of the case by giving valuable information on the business ethics and operations of the respondent parties, as well as general information on the operation of the relevant market.

132. It is however the role of informal sector players as respondents in a competition case that causes problems. While a competition authority should have no undue problems in investigating cases involving players in the informal sector as respondents, since competition investigation techniques used are basically the same regardless of the sector being investigated, the problem would arise in the enforcement of the authority's decision against the informal sector player found guilty of the anti-competitive practice. The difficulty in enforcing competition orders on offenders in the informal sector is that since players in that sector are not properly registered enterprises, they are not corporate bodies that can effectively sue or be sued in their corporate names. Suing the players in their personal capacities also presents other problems. For example, fines against certain competition violations, such as collusive and cartel-like behaviour, can be very high and beyond the means of individual persons. Imposing such personal fines on players in the informal sector can therefore be a futile exercise, which would not produce the desired results.

133. The efforts being made by the Mozambican Government to reduce the size of the informal sector by making the formal sector more attractive to small and medium enterprises are therefore commendable, and should be intensified.

#### **(g) Areas of particular concern**

134. It was noted during stakeholder consultations in Mozambique that the Chamber of Commerce of Mozambique, the *Câmara do Comércio de Moçambique* (CTA), which is the largest business association in the country with a membership numbering over 500, seems not to be aware of the existence of common anti-competitive practices in the country, particularly those associated with abuse of dominance and anti-competitive mergers and acquisitions, and the engagement of its members in such practices. That contrasted with the other consulted stakeholders in the public sector, such as sector regulators and other governmental bodies, and even in the consumer protection sector, that acknowledged the existence of various forms of restrictive business practices in the country, and appreciated the economic harm of such practices.

135. Therefore, there is need for a campaign to educate the Mozambican business community on various types and forms of restrictive business practices, and their effect on enterprise efficiency, to start building a culture of competition in the country.

136. Another area of concern was the apparent facilitation of restrictive business practices by the government. An example is the concern raised by the Ministry of Industry and Trade over the possible existence of a price-fixing cartel in the sugar industry. The sugar industry has four independent sugar refineries, which are all privately owned. The refineries have

however combined, with the approval and authorisation of the government, in an organisation called the National Sugar Distributor (DNA) that determines the prices of sugar, and thereby effectively eliminating price competition between the refineries.

### III. SELECTED CONSUMER PROTECTION ISSUES

137. Mozambique has two consumer protection associations, the Consumers Protection Association of Mozambique, the *Associação de Defesa do Consumidor de Moçambique* (DECOM), and the Association for the Education of Consumers, the *Associação Para o Estudo do Consumidor* (PRO-CONS). According to the associations' representatives<sup>98</sup>, the two associations are complementary and share the same objectives and vision, and participate in each other's activities.

138. DECOM is however the biggest of the two associations, with its members mostly being professional people, and is evidently the more active. It actively participated in the formulation of Mozambique's consumer protection legislation, and presented the draft Bill to Parliament. It also runs a small consumer support centre at its offices for the purposes of informing and educating the consumer on, and addressing, consumer issues. It further introduced a course on consumer protection and welfare at the University of Mozambique.

139. Mozambique now has consumer protection legislation, the Consumer Protection Act (Law No. 22/2009 of 28 September), which was enacted under Article 179 of the Constitution. Regulations under the Act are in the process of being drafted, and the body to implement and enforce the law will be established once the regulations are adopted.

140. According to DECOM, Mozambique's consumer protection law covers all consumer issues, and is largely based on the United Nations Guidelines on consumer protection. It defines areas that the government must follow, as well as basic consumer rights that must be observed, such as: quality of goods and services; health and physical security; training and education of the consumer; information for the consumer; protection of economic interests; access to justice; protection of consumer associations in administrative decisions on consumer issues; and protection against misleading advertising.

141. The law also provides for the establishment of an Institute of Consumers for the handling of all issues on consumers, which are presently fragmented and spread over various government Ministries.

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<sup>98</sup> A joint interview with the two associations was held in Maputo, Mozambique, on 23 February 2011, at which DECOM was represented by its President, Mr Mouzinho Nicols, and PRO-CONS was represented by Mr Alexandre Baciaó.

142. Both DECOM and PRO-CONS are content with the consumer protection law as enacted. They welcome the establishment of an independent body that will solely concentrate on consumer issues, unlike the practices in some other SADC countries that combine the implementation of consumer and competition policies under one body. An autonomous consumer protection body with exclusive consumer functions will not sacrifice consumer issues for other issues.

143. The concerns of the two Mozambican consumer protection associations are however on how the government will implement the country's consumer protection policy and legislation. Concerns are that the Ministry of Industry and Trade wants to control the body that will be established to implement the consumer protection law. Consumer issues however involve various Ministries, such as the Ministries responsible for health, education, industry and commerce, and justice, which should all participate, including civil society, when consumer issues are being considered and discussed. DECOM therefore feels that what is needed is an independent body that is not dependent on one Ministry alone but works with all the relevant Ministries, including the Ministry of Industry and Trade.

144. Capacity building was also identified as a major constraint in consumer protection in Mozambique. It was submitted that even though DECOM has participated in an UNCTAD training programme on consumer protection and competition, together with the Government of Angola, and has also worked with the Consumer Unity & Trust Society (CUTS), an international consumer welfare organisation based in India, in the organisation of training and workshops on consumer protection in Mozambique, there is still a lot to be done on capacity building.

145. Therefore, in October 2010 DECOM submitted to UNCTAD a capacity building and technical assistance request, covering areas such as: (i) information, and dissemination of information to consumers; (ii) drafting of regulations under the consumer law; and (iii) the creation of the consumer body to enforce the consumer law. DECOM hopes that UNCTAD in providing the capacity building and technical assistance will work with local consumer associations, who are well conversant with local consumer requirements, to capacitate them, instead of working with foreign experts.

146. The other identified constraint facing Mozambique's two consumer protection associations is their inability to cover the whole country. While PRO-CONS has a branch in Nampula, the branch needs massive support beyond the means of the association. The establishment of the Consumer Institute under the new consumer protection law, which will be supported by the Government, is therefore welcomed since it could be the solution to the coverage problem. There is also need for the creation of Consumer Support Centres in the

country's various Provinces, along the lines of the small one being run by DECOM in Maputo to inform and educate consumers, and to address consumer claims in the form of small claims courts.

147. It is also hoped that the regulations being drafted under the new consumer protection law will solve the problem of the funding of the two consumer protection associations. The associations presently do not receive any funding from the Government to support their activities, and have to rely on projects and member contributions.

148. There therefore seems to be a dearth of consumer information and education in Mozambique, which the country's two consumer protection associations feel should be corrected for the effective protection of the Mozambican consumer. Consumers associations have a right under Article 35 of the Mozambican Consumer Protection Act (Law No. 22/2009 of 28 September) to represent consumers in consultation and audition aimed at resolving conflicts. The associations can therefore initiate and undertake class action on behalf of consumers.

#### **IV. CONCLUSION AND RECOMMENDATIONS**

149. Deregulation and other economic reforms have substantially changed the economy of Mozambique since UNCTAD conducted in 2006 the study on the Competition Policy framework analysing the competition environment in that country. The changes have been profound in the area of competition policy.

150. Competition policy is now a concern of the Mozambican Government. Resolution No. 37/2007 of 12 November 2007 that was issued by the Council of Ministers established the need for a competition policy and the establishment of a competition authority in Mozambique. That was after the government noted the existence of different types and forms of anti-competitive practices, such as excessive pricing, predatory pricing, price discrimination, refusals to deal, bundling, collusive and cartel-like behaviour, and excessive concentration among firms, in various economic sectors. The government's five-year strategy paper for 2010-2014 also establishes a goal to define and implement competition rules in strategic sectors such as air transportation and telecommunications.

151. A formal competition policy has therefore since been formulated and adopted by the government, and the drafting of the competition law has been finalised for the consideration and approval of the Council of Ministers.

152. At the regional level, Mozambique has endorsed the SADC Declaration on Regional Cooperation in Competition and Consumer Policies, which was signed by the SADC Heads of State and Government in September 2009, and is a member of the Competition and Consumer Policy and Law Committee (CCOPOLC) that was established to implement the system of cooperation under that Declaration.

153. The relevant major stakeholders in Mozambique in the private sector (the Chamber of Commerce), the public sector (the Ministry of Industry and Commerce, the Investment Promotion Centre), and consumer protection associations, have all accepted and support the adoption of competition policy and law in the country.

154. The current follow-up study to the 2006 Report has however identified further areas in the competition environment in Mozambique that need to be addressed, and is therefore making the following recommendations:

Study Area	Recommendation(s)	Rationale
<b>Key Issues in the Status of Competition in Mozambique</b>	1. The enactment of competition law in Mozambique should be expedited.	While substantial progress has recently been made to improve competition in the country, the enactment of a formal competition law will ensure the realisation of full benefits of competition.
	2. Increased liberalisation and other broader competition policies should be adopted in Mozambique in areas such as: (i) entry barrier reduction; (ii) credit access facilitation; and (iii) reduction or elimination of price control policies.	Existing substantial market entry barriers factors include access to financing and inefficient government bureaucracy to start up and operate new businesses. While government price controls on utilities and taxi fares may be justified for socio-economic reasons, those on other commodities such as fuels and sugar hamper effective competition in the affected sectors.
<b>Social Benefits of Competition policy</b>	3. Social measures that are complementary to the introduction of a competition law should be introduced in Mozambique to overcome problems such as employment and bankruptcies.	When competition is introduced in a given sector, there are initial first round job losses, especially if it is an area where government had given support and subsidies. Social measure policies to be introduced should be directed at removing institutional and structural obstacles to enable redeployment in other sectors, for example, training and measures to assist mobility, as well as measures that would facilitate the creation of businesses, particularly for small firms.

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<b>Regulation and Anti-Competitive Practices</b>	4. In situations where State enterprises in Mozambique compete with private enterprises in the provision of goods and services, the country's competition law should be applied equally to all such enterprises, and in cases where State enterprises have exclusivity, the monopolisation provisions of competition law should be applied.	Firms or enterprises engaged in the same or similar business activities should be subjected to the same set of legal rules and standards, to ensure fairness, equality and non-discriminatory treatment under the law.
<b>Sector Regulation</b>	5. Mozambique's competition authority, once it is established, should prioritise the execution of concurrent jurisdiction agreements with those sector regulators that have competition functions in their sectors, and general cooperation agreements with the other sector regulators.	Jurisdictional conflicts between sector regulators and competition authorities over the promotion of competition occur worldwide, and can adversely affect the consistent application of a country's competition law. The South African and Namibian models on dealing with such conflicts, through the conclusion of concurrent jurisdiction agreements, have worked very well in the SADC region.
	6. While the Central Bank of Mozambique could continue with its examination of bank mergers, for the purposes of exchange control and protection of the interests of depositors, the competition authority to be established should have final authorisation of all merger transaction, given its oversight of the whole economy.	The Central Bank of Mozambique has an important role to play in avoiding excessive market concentration in the banking and financial services sector. The competition authority will however also have statutory responsibilities of ensuring that mergers and acquisitions in one sector do not adversely affect competition in other sectors.
<b>Privatisation Programme</b>	7. The competition authority to be established in Mozambique should be actively involved in the country's privatisation programme through the performance of its advocacy and enforcement functions.	There is need to ensure that public monopolies to be privatised are not simply transformed into private ones. The competition authority could therefore advocate the splitting of the public monopolies into independent, but viable, competing units before privatisation. Post-privatisation, the competition authority could constrain any anti-competitive behaviours and conduct of the privatised enterprises through the effective enforcement of competition law.
<b>Concessions and Competition Policy</b>	8. Competition issues should be taken into account at the various stages of the granting of	Even though the concessions granted so far by the Government of Mozambique may not have materially restricted

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	<p>concessions, i.e., at the design of the concession, at its award, and at its execution, as well as in the regulatory framework for the relevant markets.</p>	<p>competition in the relevant markets, because the concessions have mostly been for large infrastructure projects and have been granted to foreign companies which had previously not been players in the economy, the situation is most likely going to change as an increasing number of local companies are getting involved in the concession projects.</p> <p>Transparency in the design and awarding of the concessions is therefore essential for the identification of the most suitable concessionaires, and provision of the necessary competition between the concessionaires. After the concession has been awarded, potential anti-competitive conduct by the concessionaires arising from possible and likely abuse of dominance would be constrained by the competition authority through the enforcement of competition law.</p>
<p><b>Small and Medium Enterprises</b></p>	<p>9. Even though the small and medium enterprises (SMEs) sector in Mozambique is critical to the economy, and is given special mention in the country's Constitution, the sector should not be given specific protection or exceptions under the competition law.</p>	<p>The SME sector in Mozambique is very large, and comprises about 90 per cent of the country's enterprises. Therefore, to give that sector specific preferential treatment under competition law could adversely affect the effective implementation of the country's competition policy and law by excluding the larger portion of the country's economic activities from the full application of the law. In any case, competition law has inbuilt <i>des minimus</i> rules that protect SMEs from the abusive practices of larger enterprises.</p>
<p><b>Informal Sector</b></p>	<p>10. Efforts being made by the Government of Mozambique to reduce the size of the informal sector by making the formal SME sector more attractive should be intensified.</p>	<p>The informal sector in Mozambique, while having positive contributions to the national economy, also has some adverse socio-economic effects of a serious nature. It is also extremely difficult to apply competition law on deviant players of that sector.</p>
<p><b>Areas of Particular Concern</b></p>	<p>11. There is need to educate the Mozambican business community on various types and forms of restrictive business practices (RBPs) and their effect on enterprise efficiency.</p>	<p>While the public sector in Mozambique is conversant with the different types of anti-competitive practices that are prevalent in that country, the same cannot be said about the private sector, as represented by the Chamber of Commerce of Mozambique who seem not</p>



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<b>Selected Consumer Protection Issues</b>		to be aware of the existence of the common types of restrictive business practices, and the engagement of its members in such practices.
	12. As part of its advocacy work, the competition authority to be established in Mozambique should discourage the Government from inadvertently facilitating restrictive business practices in the economy.	The establishment by the four sugar refineries in Mozambique of the National Sugar Distributor (DNA) to distribute sugar in that country at uniform prices was authorised by the Government, even though the move constituted collusive price fixing, and even market sharing, arrangements.
	13. The consumer protection associations in Mozambique require massive capacity building and technical assistance, particularly in the area of consumer education.	The two consumer protection associations in Mozambique, DECOM and PRO-CONS, identified capacity building, particularly in the area of information and the dissemination of information to consumers, as a major constraint in consumer protection in the country.
	14. There is also need for the Mozambican consumer protection associations to work very closely with the Consumer Institute to be established under the recently passed consumer protection law to cover the whole country.	Presently, the consumer protection associations are only able to operate from Maputo and Nampula because of limited resources.

