

# **A SADC Sheriff to police anti-competitive behaviour – is it the way to go, or not?**

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## **Abstract**

*“South Africa cannot be an island in the sea of poverty; hence our destiny is inextricably linked to that of the continent”. These words of former President Nelson Mandela are the bedrock of South Africa's foreign policy imperative to integrate the political, social and economic spheres of Africa in order to achieve collective self-sufficiency and unity for the continent. With regards to economic integration, the ultimate objective is to create an African economic community based on a common market and monetary union. Certainly, as Africa integrates its market, Competition law and policy will become central to managing competition issues arising from such an integrated market and in safeguarding the gains born out of such a market for the benefit of all Africans. This paper, focusing on SADC, seeks to explore more broadly, the role that competition policy can play in regional economic integration with a view to ascertain the viability of a common African framework for considering competition law and policy issues.*

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## A SADC Sheriff to police anti-competitive behaviour – is it the way to go, or not?

### Introduction

The pursuit of regional economic integration, as a subset of a long standing pan African ideal to integrate the African continent, is high on South Africa's foreign policy imperative to consolidate the African Agenda. Economic integration is a complex process that possibly presents as many challenges as opportunities. In simple terms, economic integration entails a systematic integration of different national markets to create one regional market thus ignoring previously established national boundaries. Of course, given that integration by its nature varies in degrees, so too does economic integration. Consequently, it is possible to speak of several forms of deepening economic integration.

To assist with understating the various complexities associated with economic integration or regionalization as it is sometimes called; various theories have been posited over the years. The most common model of integration is the so called “linear or market integration” model.<sup>1</sup>In terms of this model:

- There is as an early step, the creation of a *free trade area* (FTA) wherein goods are traded freely between the participating regional states without tariffs. Other forms of non-tariff barriers may nevertheless exist<sup>2</sup>;
- A *Customs Union* is another step created wherein the groups of nations agree both to tariff-free trade within their collective borders and to a common set of external trade barriers including a common external tariff. A move towards a customs union by a group of countries may necessitate a common trade policy or common trade negotiating mechanism; meaning that countries relinquish some of their national autonomy as they have to consult. Importantly, goods within a customs union move freely between states without

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<sup>1</sup> David N Balaam & Bradford Dillman, *Introduction to International Political Economy*, Fifth Edition, pg. 297, 299.

<sup>2</sup>Ibid.

any need for border inspection. Even more important is that the Customs Union would have increased the market size leading to economies of scale.<sup>3</sup>

- The next step is *Economic Union*: This step of economic integration is usually the last, but within it has a series of other activities meant to deepen integration, have to occur. The hall mark of this is the creation of a *common market* characterised by elimination of non-tariff barriers and all tariffs to create even more integrated markets. Member countries entering into an Economic Union essentially agree to four freedoms of movements of goods, services, people and capital.<sup>4</sup>

Economic Union therefore is the deepest form of market integration which includes a Free trade area characterised by elimination of tariffs, Customs Union; characterised by common external trade policies and tariffs, Common Market characterised by common or harmonised microeconomic policies, and a monetary union characterised by macroeconomic policies and a common currency. In certain instances Nation States that achieve Economic Union end up in a Political Union which along with having an economic Union maintains common foreign policy and some form of political governance.

While these text book theories are useful to explain integration, in practice the market dynamics dictate the speed and extent of integration. As such, whereas countries may be said to be at step 1, the sophistication of the market integration may already require common, complementary or harmonised policies to facilitate market activities.

South Africa is currently engaged in the process of regional economic integration both in the context of the Southern African Development Community (SADC)<sup>5</sup> and Africa. To date SADC has only "achieved" step one according to the theory, meaning

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<sup>3</sup> Supra fn 1.

<sup>4</sup>Supra fn 1.

<sup>5</sup>SADC member states are: Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

that SADC is effectively a Free Trade Area. There is therefore a significant amount of market integration punctuated by a significant amount of cross border business activities.

Perhaps more significantly is that, in terms of SADC policies, there is an ambition to achieve full economic union; hence deeper market integration. These policies are in direct support of the African Union policies to achieve the African Economic Community with a fully integrated market.

As such, this paper seeks to explore two main issues. First the extent to which the role of common competition law and policy can effectively be used as an impetus to regional economic integration, especially in light of the growing number of cross border investments, business activities and growing intra-regional trade. Secondly, investigate, with a view to answer the question of what are the appropriate competition structures, mechanisms and institutions necessary for the purpose of ensuring fair competition among SADC members.

In exploring these two central questions, the paper will among others do a comparative analysis of approaches taken by other regional entities, in particular Common Market of Eastern and Southern African States (COMESA) and the European Union (EU). In conclusion some proposed recommendations for South Africa and SADC will be made on how to approach competition policy and law within the SADC Economic integration Agenda, and a hypothetical structure of a regional SADC competition law enforcement body will be proposed.

## **Perspective: the SADC Market, Free Trade Area, and Competition**

This exploratory paper is inspired by challenges and problems stemming out of regionalised market dynamics, particularly trying to harmonise policies to deal with collective challenges in the context of a FTA. These challenges are more poignant in the context of Africa and its many regional economic communities including SADC; many of which have established FTAs.

The SADC economies are heterogeneous and at different levels of development. On the one hand there is South Africa with a sophisticated economy and concomitant domestic competition authority, well equipped to address any type of anti-competitive behaviour. On the other hand there are relatively small to least developed economies such as Zambia, Lesotho and Namibia with less capacity to deal effectively with anti-competitive behaviour; let alone anti-competitive behaviour by foreign multinational firms.

Importantly, SADC is a free trade area expected to create business opportunities as a result of the elimination of 85% of customs duties/tariff when a product or goods-capital or intermediary- are imported from a SADC state. The SADC FTA thus creates a regional market worth US\$360 billion with a total population of 170 million. With the expected addition of Angola and DRC to the FTA a further US\$71 billion and 77 million people to the SADC market can be expected. Even more importantly is that, commercially, the SADC FTA will also benefit SMEs which typically have limited access to investment capital. In that regard liberalized trade in an FTA provides an advantage to large and SME manufactures, who benefits from a greater supply of inputs at lower prices, which enables them to be regional and globally competitive.<sup>6</sup>

The need to root out anti-competitive behaviour in regional economic integration is mainly driven by various interests. Chief among the interest group is the export group who argue that such restrictive practices impede their ability to sell goods and services in the foreign markets. The concern also extends to the effect that cross border mergers, particularly huge ones may have on competition. Hitherto, SADC has adopted a cooperation mechanism to deal with cross border competition issues, mainly to discourage unfair competition through friendly consultation, information sharing and best endeavour clauses; and to encourage exchange of technical knowhow that would enable SADC countries without competition policies, legislation and institutions to develop such.

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<sup>6</sup> Du Toit J (2000), Southern African Development Community: An economic Profile.

However as the market deepens, more and more damaging types of anti-competitive practices, from big players in more developed economies, such as cartels and restrictive business practices can block market access. Within trade, there may be export cartels specialising in exploiting their market power to dominate foreign markets; using tools such as predatory pricing or dumping. These damaging types of unfair practices not only affect regional players in the same market sector but may actually impede other countries' economic development and consumer welfare imperatives.

The question therefore is whether or not a cooperation mechanism adopted by SADC is appropriate or even effective in dealing with such anti-competitive behaviour. It is important in answering this to make a distinction between a regional competition policy and a regional competition law. The former would entail a much broader thrust that would deal with broad measures and instruments used to determine the principles and types of market competition that should prevail in the regional market. This is easier done on paper than in practice given the complexities involved in developing common policy for heterogeneous economies. Regional Competition law, therefore may, on the other hand be relatively easy to achieve since it is a component of competition policy and limits itself to the behaviour and conduct of firms whether domestic or cross border<sup>7</sup>.

## **Background to SADC and Regional Integration in Africa**

In Southern Africa, regional integration has taken the institutional form of the SADC which was formed in 1992. SADC was created with the aim to promote economic and social development through co-operation and integration. In terms of the SADC Treaty, economic integration seeks to achieve self-sustaining development, economic growth, the alleviation of poverty, the promotion of resources management and the achievement of sustainable utilisation of natural resources.<sup>8</sup>

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<sup>7</sup>Benard M Hoekman & Michel M Kostecki, *The Political Economy of the World Trading System*, 2009, pg. 595.

<sup>8</sup> SADC Treaty Art 5(1) (a, b, g, l).

Although SADC is currently one of the strongest Regional Economic Communities in terms of economic strength by country gross domestic product (GDP), it remains underdeveloped. With an approximated population of 234 million people and a Gross National Income (GNI) per capita of US\$1,563, increasing poverty and inequality are seen as the major over-arching challenges facing SADC. About 60% of the population in the region lives below the international poverty line of US\$2 a day with about 45% below the US\$1 a day absolute poverty line. Notwithstanding that, efforts towards ideals contained in the SADC Treaty have been underway with success and failures recorded.<sup>9</sup>

Continental integration, particularly on the economic front, has long been held to be critical in advancing Africa's endogenous growth and development. This because such integration is, among others, critical in promoting economies of scale, enabling competitiveness, promoting diversification, addressing supply side constraints, promoting knowledge sharing, fostering regional value additions chains, promoting intra-region trade and investment; promoting cross border infrastructure and functional integration, and overcoming the challenges of small markets, both from the perspective of global integration, trade negotiations and attraction of Foreign Direct Investment.<sup>10</sup>

The traditional gains from regional integration arrangements include, among others, increased returns and increased competition. Thus, within a tiny market, there may be a trade-off between economies of scale and competition. However, market enlargement removes this trade-off and makes possible the existence of (i) larger firms with greater productive efficiency for any industry with economies of scale and (ii) increased competition that induces firms to cut prices, expand sales and reduce internal inefficiencies.<sup>11</sup>

Given the high level of fragmentation in Sub-Saharan Africa (SSA), it is expected that market enlargement would allow firms in some sectors to exploit more fully

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<sup>9</sup>Lolette Kritzingler-van Niekerk, Regional Integration, Concepts, Advantages, Disadvantages and Lessons of Experience.

<sup>10</sup>Supra fn 8

<sup>11</sup> Supra fn 8.

economies of scale. Competition may lead to the rationalization of production and the removal of inefficient duplication of plants. However, pro-competitive effects will be larger if low external tariff allows for a significant degree of import competition from firms outside the zone.<sup>12</sup>

Against this backdrop, the primary concern of competition policy and competition law is the promotion and maintenance of competition and the active pursuit of development needs. As such, priorities in competition law and policy are gaining ground among developing countries, including Africa.

## **Competition Effects in Regional Economic Integration**

Cross-border activities involving mergers, cartels, abuses of dominance and other restrictive business practices have the potential to, among other consequences distort trade to the advantage of the perpetrators, eliminate weaker domestic trading partners, stifle entrepreneurship and ultimately retard economic development. It is widely acknowledged that anti-competitive practices with a cross-border effect can adversely affect trade flows thereby undermining those benefits which would otherwise be delivered by trade liberalisation and open markets.<sup>13</sup>

### **Cross Border Mergers**

Mergers and acquisitions can impact the nature and intensity of competition, not only in the particular country, but also in the national markets of other countries, especially given the market presence of South African firms in the national market of SADC countries through the FTA. Among the objectives of the Competition Act<sup>14</sup> in South Africa is to expand opportunities for South African participation in world markets and to recognise the role of foreign competition in the Republic. However, the Competition Act is limited to the South African Jurisdiction, hence does not

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<sup>12</sup> Supra, fn8.

<sup>13</sup> Issues Paper on Cross Border Competition Issues In the Context of the DOHA Agenda.

<sup>14</sup> Act No 89 of 1998 (as amended).

provide for any special provisions relating to cross-border merger control or for a mechanism to assess the impact of regional or extra territorial anti-competitive conduct. Consequently cross-border mergers are assessed with the same criteria used to analyse domestic mergers.

The disadvantages of assessing cross border mergers under the current model where each country relies on its domestic law, includes among others, the lack of effective coordination amongst competition authorities leading to ineffective resolution of such. A relevant example for SADC is the *Walmart acquisition of Massmart*. At the time of this merger, Massmart employed 27 000 employees in 14 countries in Sub-Saharan Africa and operated 288 stores through a variety of wholesale and retail formats each focused on high-volume, low-margin, low-cost distribution.<sup>15</sup> Wal-Mart on the other hand is the world's largest retailer, and its acquisition of Massmart essentially would have a cross border impact on the different affected markets in the SADC region. However, as a result of lack of coordination between the authorities in the affected markets, each assessed the impact of the merger for its domestic market without regard to the impact on the regional market.

This shows that some rationalisation of relevant competition laws for the purpose of assessing regional merger impact, and a positive step to developing a regional position on merger control is required to better deal with cross border mergers, particularly as foreign investors are increasingly turning their attention on Africa.

### ***Restrictive Practices***

Turning to restrictive practices, it is useful to delineate two sets of practices that can inhibit both competition and trade in the region: these include; (i) import cartels, vertical restraints between manufacturers and retailers, and domestic abuses of dominant positions; and (ii) international cartels: that prevent the flows of imports and exports through customer allocation or market sharing or entry limiting behaviour. Of grave concern among these are hard-core cartels, in particular, international cartels

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<sup>15</sup> Trade Law Centre Article, *Massmart-Walmart Merger (finally approved)*, March 2012.

especially since the risk of detection is often minimal due to weak legal structures and enforcement capacity. Professor Simon Evenett estimated the annual loss for developing countries from a few known international cartels to be about 1.7% of these countries GDP. The same author noted in his presentation to the World Trade Institute, WTO symposium in April 2002, that the effect of merely 16 cartels on developing country imports was an estimated US\$81,1 billion, which amount was likely to be an underestimate. Accordingly, in terms of comparison with international aid flows to developing countries, the harm done by cartels to developing economies was 3 to 6 times the recent increase in US aid and that overcharges by cartels were equal to at least one-third of aid received by developing countries.<sup>16</sup>

The region and most other developing countries in Africa are most vulnerable to the effects of such anti-competitive behaviour because national competition laws; to the extent that they exist; often lack the necessary extra-territorial reach to counter cross border anti-competitive practices. This is compounded further by the fact that developing countries, unlike their developed counterparts, do not have the necessary competition policies and framework in place to deal with anti-competitive behaviour of trans-national companies.

As a result of regionalisation or economic integration which has increased the geographic reach of the market and of business transactions, the likelihood that conduct by one firm in one country can affect the business in another country, either positively or negatively is inescapable. The need to effectively deal with cross border anti-competitive conduct within SADC therefore deserves urgent attention.

## **Comparative analysis: Focus on EU and COMESA**

### ***European Model***

Some valuable lessons can be learnt from the European Union (EU) approach. Although the EU model is now regarded by many as a successful model of

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<sup>16</sup> Supra fn 12.

integration and hence of an integrated competition law and policy, in the past it had its fair share of challenges, and has evolved and grown from an infant model to the strong and effective supranational model it is today. The EU is an economic and political union of 28 member states. It operates through a system of supranational independent institutions and negotiated decisions by the member states organised as an intergovernmental body. Institutions of the EU include *inter alia* the European Commission (EC), the Council of the European Union, the European Council, and the Court of Justice of the European Union.<sup>17</sup>

The EC ensures the correct application of competition rules through monitoring of anti-competitive behaviour agreements (hard-core cartels in particular), abuses by companies of dominant market positions, mergers and acquisitions and government support. To do this the Commission has a wide range of inspection and enforcement powers including to investigate businesses, hold hearings and grant exemptions. Governments also have a duty to notify in advance any planned support for business, i.e. state aid.

Economic integration has been the primary force behind establishing an EU wide competition regime. Economic integration was viewed as a means by which Europe could obtain the unity needed to compete effectively against the economic and political powers of the United States and the Soviet Union. Competition policy was therefore seen as one of the means to buttress the EU integration agenda. As such the EU grew to realise the political significance and ideals of integration, so too has competition system garnered considerable legitimacy and support as a fundamental instrument among EU members.

In the early days Germany, like South Africa today in SADC, was the only Member State effectively operating a widely respected competition system. Most European states were thus sceptical about competition principles at the formation of the Community. However, the integration agenda helped to make the Member States more willing to accept regional competition policy, which, in turn, allowed the Commission to establish a strong competition practice with minimal Member State involvement.

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<sup>17</sup> Wikipedia accessed on 19 July 2013.

Wide powers were then conferred to the Commission to construct, institutionalise and realise regional competition policy. First the Commission: established a central role in order to marginalize the role of the national authorities. Secondly, it augmented the Commission's powers *vis-a-vis* the Member States by establishing its own ability to "legislate" regarding competition matters, thus shielding the Commission from political influence by minimizing the Member States' role in competition policy.

The ECJ has now expanded its influence in competition matters and is able to deal effectively with anti-competitive behaviour, through effective competition law enforcement. It has now earned a reputation of being a "motor of integration" in Europe. This comes as no surprise given the number of high profile cases it has resolved; creating pioneering jurisprudence heavily relied on by other competition authorities globally.

Despite these rapid emergence however, coordination and unity between the ECJ, the Commission and Member States Authorities has remained a challenge. However, because of the shared ideals and values around integration and constant refinement of the EU competition policies and legal framework, a proper balance has been maintained.<sup>18</sup> The EU experience surely offers some useful insight for SADC in so far as its efforts to create an effective supranational body are concerned.

## **COMESA**

COMESA traces its origins to the mid 1960's.<sup>19</sup> Like SADC, the ideas of regional economic co-operation received considerable push from the buoyant and optimistic mood that characterised the post-independence period in most of Africa. The mood

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<sup>18</sup>Alisa A, Meade, *Modelling a European Competition Authority*, Duke Law Journal Vol. 46" 152 – 195.

<sup>19</sup> The Member states are: DRC, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, Zimbabwe

then was one of pan African solidarity and collective self-reliance born of a shared destiny.<sup>20</sup>

COMESA's vision is to be a fully integrated, internationally cooperative regional economic community with high standards of living for its entire people ready to merge into an African economy. Its mission is further to achieve sustainable economic and social progress in all member states through increased cooperation and integration in all fields of development as well to provide excellent technical services to COMESA in order to facilitate the region's sustained development through integration."<sup>21</sup>

COMESA launched a Free Trade Area (FTA) on the 31<sup>st</sup> of October 2000 and declared itself a Customs Union in 2009. Its plans to become achieve the full status of a Common Market in the near future. The absence of tariff and non-tariff barriers under the FTA and Customs Union has enhanced competition in the COMESA region. In order to ensure fair competition and transparency among economic operators in the region, COMESA has adopted a regional competition policy – namely the COMESA Competition Regulations.

The Regulations establish the COMESA Competition Commission (“CCC”) as a body corporate that will be responsible for promoting fair competition and penalising uncompetitive practices in the region, and recognise that anti-competitive practices may constitute an obstacle to the achievement of economic growth, trade liberalisation and economic efficiency in the COMESA member states.

The Regulations apply to “all economic activities conducted by private or public persons within or having an effect within, the Common Market: anti-competitive business practices, conduct relating to merger and acquisition and to consumer

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<sup>20</sup> COMESA *History of COMESA* Available at [http://about.comesa.int/index.php?option=com\\_content&view=article&id=95&Itemid=117](http://about.comesa.int/index.php?option=com_content&view=article&id=95&Itemid=117) (last viewed on 29 July 2013)

<sup>21</sup> Supra fn 15

protection, which have an appreciable effect on trade between member states and which restrict competition in the Common Market place.”<sup>22</sup>

The Regulations established the COMESA Competition Commission (CCC) which is intended to administer a supra-national competition and consumer protection regime.<sup>23</sup> The supra national merger control, competition and consumer protection enforcer commenced its functions on 14<sup>th</sup> of January 2013.

With regards to its regulation of anti-competitive practices and conduct, the CCC oversees restrictive business practices by ensuring that all agreements and undertakings between parties which have as their objective or effect the prevention, restriction or distortion of competition within COMESA are generally prohibited and declared void. Prohibited practices include *inter alia*, price fixing arrangements, collusive tendering and bid rigging, market or customer allocation agreements, and abuse of dominant positions.

While the CCC may still be at its infancy stage and still has many hurdles to overcome in fulfilling its mandate, there are some lessons to be drawn by SADC from its model. More so since SADC and COMESA more or less face the same challenges of integration, and given that the two regions are actually engaged the Tripartite Free trade negotiations that will create a SADC-COMESA-EAC Free trade area. SADC could thus use the experience of COMESA in constructing its own institutions, and the necessary regulations.

## **The Creation of A SADC Competition Authority**

This paper proposes the formation of a SADC Competition Commission, similar to the COMESA model. However, the practicalities of how such a body could operate may pose some challenges, particularly when considering the development asymmetry in the economies of the SADC countries, as well as the fact that some of

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<sup>22</sup> COMESA Frequently Asked Questions Available at <http://www.comesacompetition.org/faq> (last viewed on 19 August 2013)

<sup>23</sup> Supra fn 15

the SADC member countries are so far behind in terms of developing their competition policies as well as competition enforcement bodies.

The coordination of the SADC Member States' economies in general, and competition policy in particular is clearly necessary and of primary importance if economic integration is to yield maximum development and consumer welfare. Consequently, building on the current cooperation model in SADC, the development of a SADC supra-national body, with economic integration as its fundamental, unifying precept must be pursued as a one of the priorities.

In light of some of the challenges that might be anticipated from such a model, any reform that is made should take into account the successes and failures of systems in other unions, such as Europe and COMESA. As it is however, actual establishment of the SADC region competition sheriff does not appear imminent given other regional challenges. Currently many of the Member States are reluctant to push for a SADC competition authority, especially since the discussions for a CU are proceeding slowly due to the current tripartite FTA negotiations.

Notwithstanding, work towards building the institutions of the SADC competition regime should proceed albeit with caution given the complexities involved in structuring an effective body.

### ***Policy recommendations***

What we can learn from both the EU and COMESA experiences is that, while the aim is to ensure efficiency and fairness in the regional markets, the jurisdictional, political and practical limitations may make the realisation of a supra national competition authority harder than anticipated.

To counter some of the challenges of establishing a SADC competition authority, a gradual and incremental approach should be considered to allow for an organic growth of such an authority. In order to achieve this, the following recommendations as a build up from the current cooperation mechanism could be considered:

- The creation of a politically independent regional network composed of representatives from national competition authorities. The role of such a network could be to raise awareness and police cross-border anti-competitive behaviour in the region, while gradually developing appropriate regional policies. In essence assuming the role of a steering committee towards a supranational body.
- The network could also act as a forum to rationalise the assessment of cross border anti-competitive practices, including, vertical and horizontal restrictive practices, abuse of dominant positions by firms, as well as harmful cross border mergers. The latter could also be done through the adoption of simple and uniform filing processes in the region.
- Through awareness and outreach programmes, the network could educate, inform and galvanise all the member states and private sector stakeholders towards the establishment of a SADC Competition Commission.
- As part of the mandate, the network could champion the creation of a workable legislative framework and establishment of well-resourced and independent structures for the operation of the SADC competition authority.

## ***Conclusion***

As the SADC region becomes more integrated in terms of, not only, trade but also other cross-border economic activities, the importance of competition policy, at national, regional and also multilateral levels increases. The development of markets requires effective intervention to ensure that efficient and equitable outcomes are possible, and that they materialise.

Competition policy provides the necessary counterweight to the powerful incentive to rig the market process and skew the distribution of the benefits of trade liberalisation. Hence, there may be a rationale for a move towards complementary economic

policies and one productive structure establishing a “one stop shop” dealing with competition issues in SADC.

Certainly such a body would be in line with the spirit of deepening regional integration. It may serve to enhance private sector confidence in the regional market, and facilitate transparency and consistency in the interpretation and application of competition law in the SADC region. However, the mechanics of how such a body would operate still require careful assessment, considering the many foreseeable challenges of integration such as harmonizing policies and concomitant erosion of national policy space.

It seems therefore that SADC still has a long way to go before an effective Regional Sheriff can be established. Looking at the EC and COMESA experiences, there is hope that SADC will eventually come up with its unique competition framework to adequately and comprehensively deal with competition concerns of the region. The idea is to gradually construct such an authority in line with the dynamics associated with market integration.