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Empowering African Food Producers and Agricultural Enterprises Through Stronger Competition Law and Policy

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FOREWORD

This excellent report on African food production and agricultural enterprises uncovers a frightening problem: authorities have stood by while key parts of the agricultural industry have cartelized and consolidated, driving up food insecurity, poverty, and hunger, while exploiting, excluding and undermining farmers and small suppliers.

The report uniquely combines data on economic concentration in specific Africa agricultural markets, analysis of the relevant African institutions – national competition authorities and regional organizations and their degrees of functionality and disfunctionality, and a set of practical policy recommendations tailored to the existing capabilities of the authorities.

A major message is that Big Ag is strong and powerful, and that most of the African competition authorities (with a couple of notable exceptions) are weak and ineffective. The goal is to obtain fair and efficient agricultural markets that serve the people, protecting not only price and availability but also livelihoods, food security, nutrition, and sustainability.

The Report is a call to action. The call needs to be heard.

Eleanor Fox

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EXECUTIVE SUMMARY

The extreme concentration of food and agricultural markets in Africa is a critically overlooked force driving up food insecurity and poverty, harming small producers, informal businesses, and consumers alike. Competition laws and policies need urgent reform to empower small agricultural businesses and farmers in Africa and thus enable the transition towards more inclusive and sustainable agri-food systems. Global market concentration hampers productivity, investment, and innovation, favouring large firms over micro, small, and medium enterprises (MSMEs).

This report reviews the state of concentration and competition in agriculture and food markets and the consequences for producers and MSMEs in Africa; undertakes a situation analysis of the state of competition law and institutions in Africa; reviews the actions taken by African competition institutions to date; and sets out a new agenda for strengthening competition regimes to empower African food producers and agricultural enterprises to achieve sustainable agri-food systems. The report finds three main problems:

1. Excessive market concentration in African agri-food systems is harming producers, MSMEs, and consumers

The extreme levels of concentration in many African food and agricultural markets reveal dysfunctions and distortions in the system. From input to retail, markets are concentrated and present high barriers to entry, leading to frequent and harmful cartels. These cartels are widespread and cross-border, as exemplified in this report through the cases of fertilizers, seeds, and poultry.

Anti-competitive conduct and concentrated market power in Africa is allowing large, vertically integrated companies to earn excessive margins. As a result, prices paid to farmers are diminished while customers pay inflated prices. For example:

- Three out of the five main fertilizer companies operating in 24 countries across Africa have been involved in cartels and increasing prices to farmers (World Bank, 2016). Researchers estimate that international collusion in potash and phosphate exports have driven up prices by 50 - 63 per cent (Jenny, 2012; Gnutzmann & Spiewanowski, 2016);

- In the soybean feed market, the African Market Observatory Price Tracker found that traders earn mark-up of up to 91 per cent on top of producer prices after taking transport costs into account, suppressing farmer prices in Malawi and Zambia, and increasing prices to feed buyers in the poultry sector in Kenya (**see Figure 2**);
- Competition institutions across southern and eastern Africa, including the Competition Commission of South Africa, which has the most vigorous competition enforcement in Africa, uncovered cartels in markets for fertilizer, silo storage and trading, poultry, maize milling, wheat milling, bread, and dairy. In the wheat flour market, cartels hiked up prices by 24-42 per cent and simultaneously excluded smaller bread bakeries; (Roberts, 2020a; Muzata et al., 2017) and;
- Between January and July 2023, the urea fertilizer price in east and central Africa was three times higher than world prices (**see Figure 4**). As a result, farmers' access to an essential input was constrained and food production yields lowered.

2. Large parts of Africa lack national competition laws, policies and/or institutions

A review of the state of competition laws, policies, and institutions in the 48 Sub-Saharan African countries reveals that nearly half of the countries - 22 out of 48 - do not have national competition laws or institutions in place.

Only nine countries have competition laws and institutions that are more than ten years old. Importantly, these countries are gathering the resources and building capacity to take action against anti-competitive conduct. The remaining countries have put in place new laws and nascent competition institutions within the last 10 years. However, ensuring the proper enforcement of rules against the abuse of market power starts with robust and effective laws, policies, and competition institutions.

Using three indicators: (1) existence of competition laws, (2) state of institutions, and (3) enforcement history, this report groups Sub-Saharan Africa countries into four clusters:

Cluster A - Established institutions (in place for over than 10 years) with strong enforcement history and capacity: 9 countries, including Mauritius, South Africa, Kenya, and Zambia.

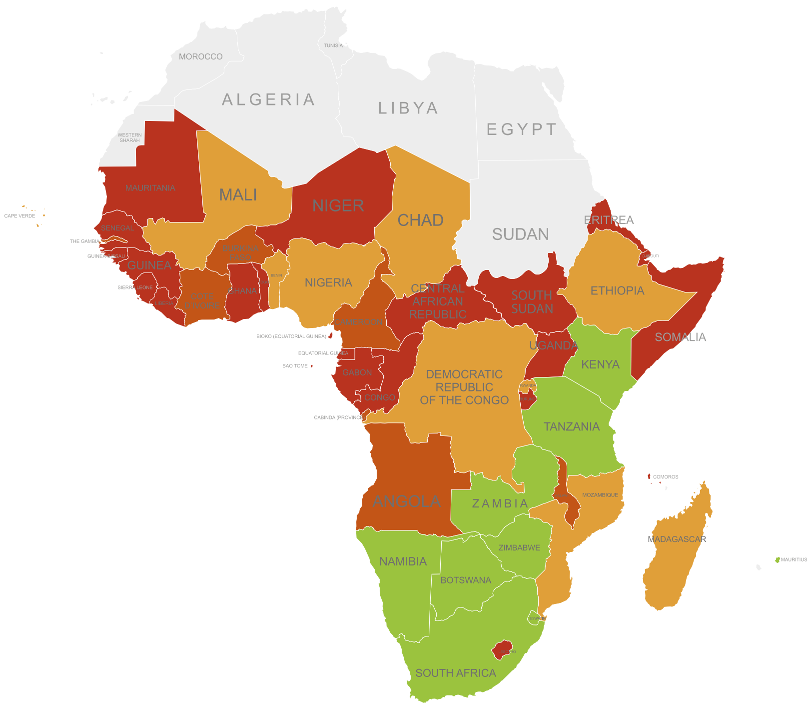
Cluster B - Established competition institutions (in place between 5 to 10 years) with a limited enforcement history: 8 countries, including The Gambia and Malawi.

Cluster C - Nascent competition regimes – with existing competition laws but not (yet) enforced and newly established competition institutions (in place between 1 to 4 years): 9 countries, including Nigeria, Madagascar, and Rwanda.

Cluster D - Countries without national competition laws and institutions: 22 countries, mainly in West Africa

> Almost half the countries in sub-Saharan Africa do not have competition laws nor institutions

Clustering countries in sub-Saharan Africa based on status of competition regime



Cluster A. Established institutions with strong enforcement history and capacity (>10yrs)

Cluster B. Established competition authorities with a limited enforcement history (5-10 yrs)

Cluster C. Nascent competition regimes (<5yrs)

Cluster D. Countries without national laws or institutions

3. African countries lack the resources, data, and political support necessary to effectively prevent anti-competitive conduct in agri-food markets

Available information shows that African countries – even those with competition institutions - lack the resources, data, and political support necessary to take effective action against anti-competitive conduct in agri-food markets. As many examples have shown, competition institutions in nearly all countries examined have blocked very few mergers despite having the necessary power to review mergers that could result in anti-competitive conduct.

Cartel behaviour has been even more difficult to prevent. Cartels are typically powerful and comprised of connected companies who wish to protect their collusive profit margins. Authorities need specialized investigative powers, including search, seizure, and interrogations. In some instances, these investigative powers are not accorded by the law. However, where the powers are legally granted, they are still difficult to exercise, especially when the colluding parties are not domiciled in the country in question. Despite these limitations, several countries have successfully built capabilities and greater awareness about anti-competitive conduct as has been the case with Zambia's experience with cartel conduct.

Regional economic communities, such as the Common Market for Eastern and Southern Africa (COMESA) and the West African Economic and Monetary Union (WAEMU), play a catalytic role in tackling regional anti-competitive conduct, given the cross-border nature of much of the anti-competitive conduct. Nevertheless, most Sub-Saharan countries participate in more than one regional economic community (REC) which leads to overlapping mandates and competences in competition activities.

Moreover, most of these RECs are under-resourced. This puts the continent at risk for fragmentation, given the possibility for contradictory decisions and a lack of harmony and consistency in legislation and decision-making. As with national authorities, regional competition regimes require reform and strengthening for effective enforcement and as part of the wider effort to build more effective rules and institutions under the African Continental Free Trade Area (AfCFTA).

The report proposes five areas for action and reform. They are:

[01] **Urgently scale up support to the nine mature African competition authorities to enable them to act and enforce laws more effectively**. This can be done through technical and legal assistance with market inquiries, cases, and ex-post merger reviews, as well as through the development of a common knowledge base such as a market observatory tool.

[02] **Build the capabilities of the 17 nascent African competition authorities**. This can be achieved through learning and exchanges with the mature authorities, support for enforcement, and improve the availability of data and analysis on market conduct. It includes South-South learning activities, training on technical and legal issues, and the availability of regular market information and analysis through a common knowledge base such as a market observatory tool.

[03] **Prioritize regional African institutions and enforcement to build a continent-wide response**. Better coordination and cooperation between regional competition authorities as well as with national authorities will ensure that cross-border anti-competitive conduct is regulated. This is of particular importance for countries that currently do not have in place competition laws or institutions. This can be achieved through regional economic commissions, like COMESA and WAEMU, increased regional cooperation, and technical assistance for regional regimes.

[04] **Mobilize political support among affected constituencies in the country, such as farmers' cooperatives, associations of MSMEs, and civil society to ensure lasting support for effective competition policies**. This can be achieved through targeted support for authorities in the form of advocacy campaigns led by or in collaboration with other stakeholders to build political support for action.

[05] **Introduce and reform existing laws, policies, and institutions in the longer term to ensure flexible and responsive national and/or regional competition regimes**. These national and/or regional competition regimes should be rules-based, keep abreast of developments in markets and technology, and implement effective institutions with the authority to prepare and enforce orders.

PART 1

Part 1: The Impact of Weak Competition Law and Policy on Food Producers & Agricultural Enterprises in Africa

1.1. Introduction

Part 1 documents the increasing concentration in food and agricultural markets and analyzes its impact in Africa. It outlines the specific challenges confronting low and middle-income developing countries (hereafter, developing countries) in competition law and policy. Developing countries' markets tend to be smaller and have higher barriers to the entry and growth of SMEs and MSMEs (see Box 1). This results in higher levels of market concentration and the increased likelihood and harm from anti-competitive behaviours.

Box 1: What are SMEs and MSMEs?

Agricultural small and medium enterprises (agri-SMEs) are defined *as profit-oriented enterprises that are involved in the agricultural value chain either directly or by providing enabling services to value chain actors* (ISF & SAFIN, 2021, p. 2).

To be defined as an agri-SME, these enterprises must be able to service an investment of USD 50,000 – USD 2 million, as indicated by at least two of the following characteristics:

- More than five but fewer than 250 employees (at least 25 members for co-ops)
- An annual turnover between USD 100,000 – USD 5 million
- Assets totalling at least USD 20,000

Agri-SMEs may include small commercial farms, in which farmers sell at least 50% of their production, as well as businesses owned by a cooperative.

Agricultural micro, small and medium enterprises (MSMEs) have the following characteristics:

- Fewer than five full-time equivalent employees
- Less than USD 100,000 in annual turnover

Source: SAFIN & ISF, 2021

Market concentration and anti-competitive behaviours undermine MSMEs. They face exclusion and exploitation due to abuses of market power, further compounding the effects of market volatility and barriers to entry. Consumers pay higher food prices thus limiting food access and increasing food insecurity in low-income households.

1.2. Context: Increasing market concentration and anti-competitive conduct

Market concentration, whether national, regional, or global, has three main effects (Akcigit et al, 2021; Aghion et al. 2021; De Loecker et al. 2022; Eeckhout, 2021; Tirole, 2022):

- [01] it enables anti-competitive practices by large firms at the expense of producers, MSMEs and consumers,
- [02] it weakens productivity and innovation
- [03] it suppresses investment.

Market concentration is not inherently problematic, nor does it always result from anti-competitive practices by large firms. A market with only a few active companies may be the result of the intrinsic features of the industry. This is the case with the production of genetically modified seeds and related agricultural technologies due to the extensive research, regulatory approvals, and intellectual property protections involved. Economies of scale and scope, as well as network effects, allow larger companies to have lower costs and can potentially offer more attractive services to producers and consumers. However, increased concentration amongst a few companies becomes problematic when it changes ***how*** they behave.

Market concentration becomes a problem when it results in:

- [01] large firms being able to ***shape*** markets, exercising substantial power at the expense of smaller producers, enterprises, and consumers;
- [02] new enterprises facing higher barriers to entry; and
- [03] increased likelihood of anti-competitive coordination between firms, through price fixing, dividing up markets, or rigging bids for tenders.

Because mergers can lead to anti-competitive conduction, they are among the most common practices overseen by competition laws and policies. However, in recent years, the rise of mega-mergers has challenged competition regulators across the world. Agri-food mega-mergers, in particular, are among the largest in terms of transaction value (Clapp, 2022) (Figure 1).

The rise of big food and agriculture through recent mega mergers

Figure 1. Agri-food megamergers (in red) are among the largest in terms of transaction value (in USD billions)

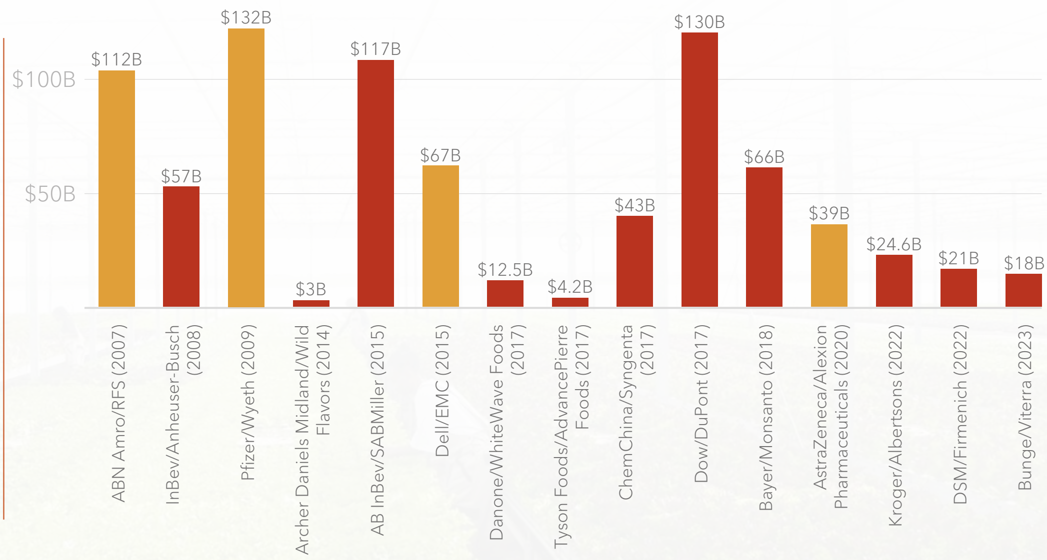


Chart: Myriam Hammadi
Source: *Agrifood Atlas 2017, Chemchina, Tyson Foods, Reuters, Food Business News, CNBC*

In the United States and the European Union, the rise of big tech giants, such as Google, Amazon, Meta, Apple and Microsoft, alongside their anti-competitive conduct, has led to a major rethink of competition law and policy.

Competition regulators have responded with increasing urgency, using the dual policy levers of antitrust law and industrial policy. Concern has now moved beyond digital platforms. The US government has started targeting big pharma and big agriculture, with the aim of "full and aggressive enforcement for antitrust laws" as described by President Biden (MSNBC, 2021; White House, 2021; FTC, 2022a; FTC, 2022b). In March 2023, the US Department of Agriculture unlocked USD 89 million to deconcentrate the meat processing sector and announced initial steps to create a more competitive marketplace for seeds and other agricultural inputs (USDA, 2023). Similarly, EU regulators are taking steps to reduce concentration in agriculture and food markets (Case AT.40134 – AB InBev Beer Trade Restrictions, 2019; Case AT.40127 Canned vegetables Coroos and CECAB Group, 2021).

In developing countries, and specifically in Africa, the competition landscape is much more challenging than in the United State and the European Union. Markets are typically smaller and less developed while the costs to entry are often prohibitively high for small producers and MSMEs.

1.3. Market concentration in Africa: the good, the bad, and the ugly

Agricultural and food markets in Africa are particularly vulnerable to anti-competitive conduct. They are among the smallest markets by sector, thus requiring high levels of investment to enter, have complex regulatory barriers to navigate, government policies that favour established business, and weak institutional frameworks.

1.3.1. African markets are concentrated and dysfunctional

In a well-functioning market, firms compete for market share by offering better products and services to consumers at lower prices. However, in markets that do not function well, firms do not need to compete for market shares and can accrue a substantial market power which allows them to set prices and control markets. These large firms can charge prices unrelated to the actual costs of supply - including through collusion with other firms to increase prices and profit margins. Developing countries tend to have more concentrated markets and higher barriers to entry – conditions that make it difficult for new firms to enter a given market. As a result, cartels in developing countries are likely to be stronger and have significant price mark-ups (Cheng, 2020; International Finance Corporation, 2021; Roberts, 2020b). Therefore, collusion is simultaneously more likely and more harmful in highly concentrated markets.

In many African food and agricultural markets, the extreme levels of global concentration affect the entire food system, from the inputs used for production to the final sale to end consumers. Local producers are squeezed upstream and downstream since the firms that sell the inputs control prices while large buyers control the market for their outputs (Christiaensen & Martin, 2018). High price volatility further increases small producers' vulnerability.

Other parts of the value chain are highly concentrated with detrimental impact on consumers. Because the processing sector is also heavily concentrated, and specifically in Africa, MSMEs struggle to enter and compete with large firms. At the retail level, consumers in African cities pay higher food prices than in other developing countries (Nakamura et al., 2016; Allen, 2017), limiting accessibility of food and driving food insecurity (Sitko et al., 2018; Bell et al. 2020; Ochieng et al, 2019; Baulch et al., 2021; Cedrez et al., 2020).

1.3.2. Cartels are widespread in food and agricultural markets in Africa

In Africa, markets for inputs such as fertilizer, seeds, and pesticides are highly concentrated, thus facilitating anticompetitive behaviour by large firms across borders (World Bank, 2016; Burke et al., 2019; Vilakazi 2017). In fertilizers, three out of the five main companies operating in 24 countries across the continent have been involved in cartels detected in South Africa and Zambia, which increased prices to farmers (World Bank, 2016). Cartels in fertilizer and poultry have increased prices by 50 per cent and more (Tups & Dannenberg, 2023; Hernandez & Torero, 2013; Connor, 2020).

As a result, farmers are squeezed by cartels both as buyers of inputs (for which they pay higher prices) and sellers of agricultural products (for which they are paid lower prices), due to high levels of concentration at input and processing levels (Connor, 2020; Lianos et al., 2022; World Bank, 2021).

Investigations of food and agricultural markets by African competition authorities' have uncovered extensive cartel conduct. For example, South Africa, which has the most vigorous competition enforcement in Africa, identified cartels in the markets for fertilizer, silo storage and trading, poultry, maize milling, wheat milling, bread, and dairy (Roberts, 2020b; Muzata et al., 2017). In the wheat flour case, the cartel was found to have marked-up prices by 24-42 per cent and simultaneously excluded smaller bread bakeries (Mncube, 2013; 2014). Extensive collusion was also uncovered in maize-meal – the main staple food - by some of the same companies involved in wheat milling (Makhaya & Roberts, 2013). Higher in the grain value chain, a dominant grain silo owner was found to have abused its market power in storage to squeeze out smaller traders (Roberts, 2012).

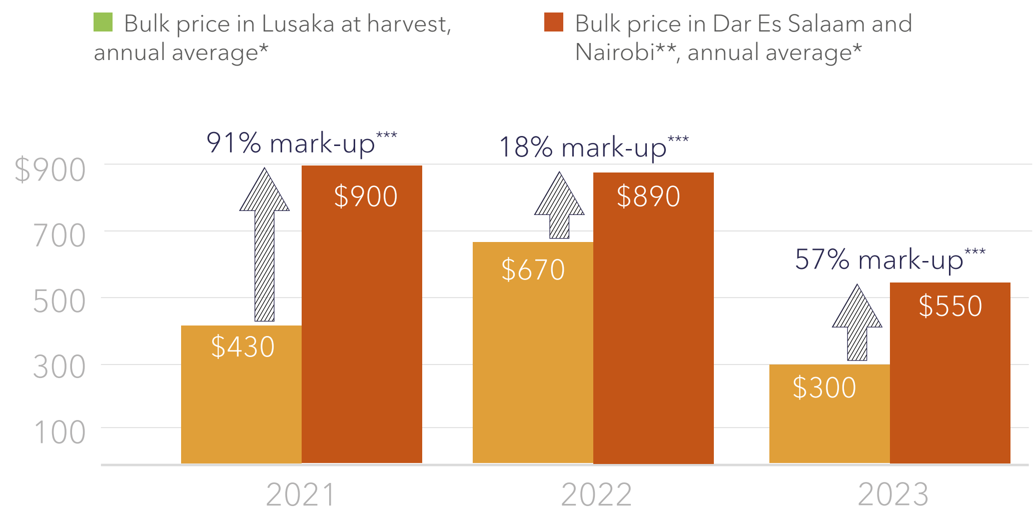
Given the reach of the companies involved, the impact of these cartels is felt across southern Africa, including in Botswana, Eswatini, Namibia and Lesotho. Competition authorities in Zambia and Kenya, which are also well established, have identified cartel conduct in many agri-food products and services (Kariuki & Roberts, 2016). Cartel conduct in poultry, fish-farming and fertilizer has been reported in Zambia and Kenya has identified widespread coordination concerns in agricultural markets.

1.3.3. Anti-competitive conduct and market power lead to higher prices for producers, MSMEs and consumers

High levels of concentration mean big corporations have the market power to set prices, even when explicit anti-competitive conduct is not detected. Data collected by the African Market Observatory shows that large vertically integrated input suppliers and traders in Africa earn excessive margins, thus reducing prices to farmers and increasing prices to customers including small food businesses (Nsomba et al., 2022a; 2022b; Roberts, 2023). In the soybean trade, for example, traders earn a mark-up of up to 91 per cent in addition to producer prices, and after taking transport costs into account. They suppress farmer prices in Malawi and Zambia while increasing prices to buyers in Kenya (see Figure 2).

Traders in the soybean market profit from huge mark-ups in Kenya and Tanzania

Figure 2. Prices at harvest in Zambia, compared with prices at point of sale in Kenya and Tanzania



*The annual average is based on the harvest season prices (April to June each year)

** Prices at the point of sale include the transport costs, based on responses in interviews, averaged at USD 90 per tonne.

***The mark-ups are calculated over the supplying country prices, net of the transport costs to Dar es Salaam and Nairobi

Chart: Myriam Hammadi • Source: *African Market Observatory Price Tracker*

Higher prices in mature and competitive markets can be caused by a variety of reasons. However, in small markets, with high barriers to entry and a small number of competitors, the high prices points to dominant corporations with market power being able to set prices even when explicit anti-competitive conduct is not detected.

1.3.4. Excessive market power can be used to exclude MSMEs from markets

Excessive market power can be used to exclude MSMEs from markets. A dominant firm[1] can unilaterally (not only in collusion with others) use its substantial market power to exclude rivals from the market and/or exploit customers by, for example,

[01] Raising rivals' costs by blocking their access to critical inputs through an increase in prices or a reduction in output, significantly harming the ability for the rival firm to compete;

[02] Imposing exclusivity obligations through contracts with customers that prevent them from accessing other suppliers. Contracts can also include onerous terms for MSMEs, such as a contract without the possibility of termination or expiration; and

[03] Price discrimination resulting in a firm unjustifiably charging customers different prices for the same good or service.

Vertical integration can contribute to excessive market power when it allows the dominant company to serve as a 'gatekeeper' and engage in the abuses described above.

Dominant firms can also erect strategic barriers to entry. These firms exert their market power to undermine MSMEs by controlling supply chains and access to markets. Strategic barriers to entry can compound intrinsic features of a market thereby limiting potential entry and expansion by MSMEs into that market (Nkhonjera, 2020).

As a result of increasing global concentration, national and regional food markets are shaped by a small number of global producers. As discussed above, these firms may engage in exclusionary strategies as well as rely on a range of mechanisms to secure their market position. This could include political lobbying and leveraging influences in financial institutions, to restrict competitors' access to finance. This reinforces market failures which work against SME market entry and expansion.

1.4. Market concentration in the seeds, fertilizers, and poultry sectors

Awareness is growing about the harm caused by market concentration and weak competition to consumers and producers in African markets. This section provides evidence of this harm through case studies in the seeds, fertilizers, and poultry markets.

Consumers and small producers in African countries bear the negative impacts of high global concentration in the trading and input markets (OECD, 2018; Paelo, et al., 2018; Ncube et al., 2016; Vilakazi & Roberts, 2019; Tups & Dannenberg, 2021). Theoretically, farmers can benefit from the efficiencies generated by integrated traders and input suppliers. However, because of this concentration, farmers have limited alternatives and retain a very weak bargaining position (Sitko

1. Dominance is normally defined as a firm having 'substantial market power', which in some jurisdictions means a market share above 40 to 50 per cent.

& Chisanga, 2017). In cases where the same companies operate in many countries across Africa, such as in fertilizer and grain trading, then collusion is more likely (World Bank, 2016).

Addressing such collusion can bring tremendous gains. According to the World Bank and the African Competition Forum, disciplining cartels and improving competition regulations could help reduce the prices of food staples by 10 per cent, alleviate poverty levels for 500,000 farmers in Kenya, South Africa, and Zambia, and save consumers more than USD 700 million each year (World Bank, 2016).

Yet, many African countries have not yet reached this goal. In general, competition enforcement resources are highly constrained, and their jurisdictional reach is limited. This hinders their ability to act decisively against dominant firms engaging in anti-competitive practice, especially in cases where the behaviour is cross-border. Moreover, because some countries have not set up an effective competition authority, such behaviour may continue despite being identified and sanctioned in another country.

> The situation in seed, fertilizer and poultry markets in Africa provides a compelling example of the negative impact of anti-competitive practices on producers, MSMEs, and consumers.

1.4.1. Seeds - the case of weak local competition and stifled innovation

Since the late 1990s, the seed industry has undergone tremendous consolidation worldwide. Consolidation refers to the act of merging or integrating separate firms, resulting in fewer independent competitors and structural alterations in the market. It differs from market concentration which measures the level of market power held by a few firms within that market.

Mergers have been the primary driver of market consolidation with clear knock-on effects in African countries. Between 1996 and 2018, the four largest firms accounted for nearly 400 ownership changes (Howard, 2020). As a result, these firms, namely Corteva, Bayer, ChemChina and BASF, account for over 40 per cent of global seed sales and over 60 per cent of proprietary seed sales (Mooney, 2018; Shand & Wetter, 2019). Such extreme levels of global market concentration impact African countries profoundly (OECD, 2018; Competition Commission of South Africa, 2021; Bosiu et al., 2017).

Global consolidation in agricultural biotechnology has limited the availability of conventional seeds and reduced options for farmers and consumers. Seed companies have cut back on non-biotech offerings, resulting in fewer choices for those who prefer non-genetically engineered crops while market concentration has led to higher prices (Shi et al., 2010; Bonny, 2017; African Centre for Biodiversity, 2017). For example, a survey revealed that 60 per cent of farmers in countries cultivating genetically modified cotton, including the United States, struggled to source conventional seeds (American Antitrust Institute, Food & Water Watch, and the National Farmers Union, 2017).

Consolidation in the seed industry has sparked concerns as to whether competition authorities are applying the appropriate merger review standards, including standards to safeguard innovation (see also Federico et al., 2019; Lianos & Katalevsky, 2017). In the Bayer and Monsanto merger, the European Commission raised concerns related to the reduction of price and innovation competition in a significant number of markets where the parties' activities overlapped, such as in the development of seeds and traits. To address these concerns, the merged entity divested Bayer's business and assets in the overlapping markets where competition concerns were raised within the EU (Coublucq et al., 2022). However, the effects of the merger were not evaluated in regions with weaker competition authorities.

Pioneer's acquisition of the South African seed company Pannar is another example of the negative effect of consolidation on seed innovation (see Box 2). This exemplifies the risks of mergers leading to concentrated control over knowledge of climate and soil, which is vital for the future development of improved, climate-resilient seeds. Such innovation is crucial to make African food systems more resilient to the devasting impacts of climate change on food production.

Box 2. Consolidation in the seeds industry – limited local competition

Consolidation in the seeds industry has led to reduced local competition, stifling much-needed innovation in climate-resistant seeds crucial for mitigating the impact of climate change on food security.

The merger between Pioneer and Pannar in South Africa exemplifies this issue. It granted a single multinational company control over Pannar's extensive genetics library of maize germplasm, previously accessible to other companies for developing improved hybrid seeds. Despite claims of enhanced competitiveness, the merger reduced competition.

The Competition Commission of South Africa (CCSA) initially recognized the potential harm and prohibited the merger, given its concerns about the consolidation of two major players in the hybrid maize seed breeding market. However, the Competition Appeal Court overturned the decision, albeit with certain conditions. Subsequent review has unequivocally shown that the promised benefits of increased innovation and superior cultivars resulting from the merger were nonexistent. Instead, farmers in regions where Pioneer and Pannar were competitors faced a reduction in seed variety due to Pioneer's limited introductions. Further exacerbating the situation, Pioneer-branded seeds continued to perform poorly compared to those of their competitors, indicating a clear lack of long-term incentive for innovation stemming from the merger.

These outcomes highlight the adverse consequences of mergers in the seed industry. It has obstructed the research and availability of climate-resistant seeds crucial for combating the food security challenges imposed by climate change.

Source: Paelo et al., 2018

Increased consolidation in the seed industry and the entry of international firms through local entities is also evident in other African countries. In Zimbabwe, the Competition and Tariff Commission approved the USD 30 million acquisition of Pannar Seeds by Du Pont Pioneer in 2015. In Zambia, Syngenta (now merged with ChemChina) acquired the Zambian seed company MRI Seed in 2013. At the time of the acquisition, many considered MRI Seed's maize germplasm collection one of Africa's most comprehensive and diverse (Chisoro-Dube & Kaziboni, 2017). However, the acquisition of local firms by global and transnational seed companies has undermined local competition in the African seed industry.

Competition authorities have often not directly assessed the innovation and dynamic competition effects arising from acquisitions involving global firms. In fact, merger control has not historically been overly concerned with the potential for these transactions to dampen innovation. For example, the EU had never used innovation as a primary reason for a merger review until it examined the Dow and DuPont transaction. Ever-stronger intellectual property rights, including extended patents and plant breeders' rights, exacerbate this blind spot in merger control and makes innovation more expensive for competitors (African Centre for Biodiversity, 2017).

1.4.2. Fertilizers – the case of high prices and excessive margins

Fertilizers are an essential input for food production. However, farmers in African countries are at the mercy of export and trading cartels, and extremely high levels of concentration in primary fertilizers. Sub-Saharan African countries import fertilizer, making them highly vulnerable to disruptions in global supply chains and international cartels charging inflated prices.

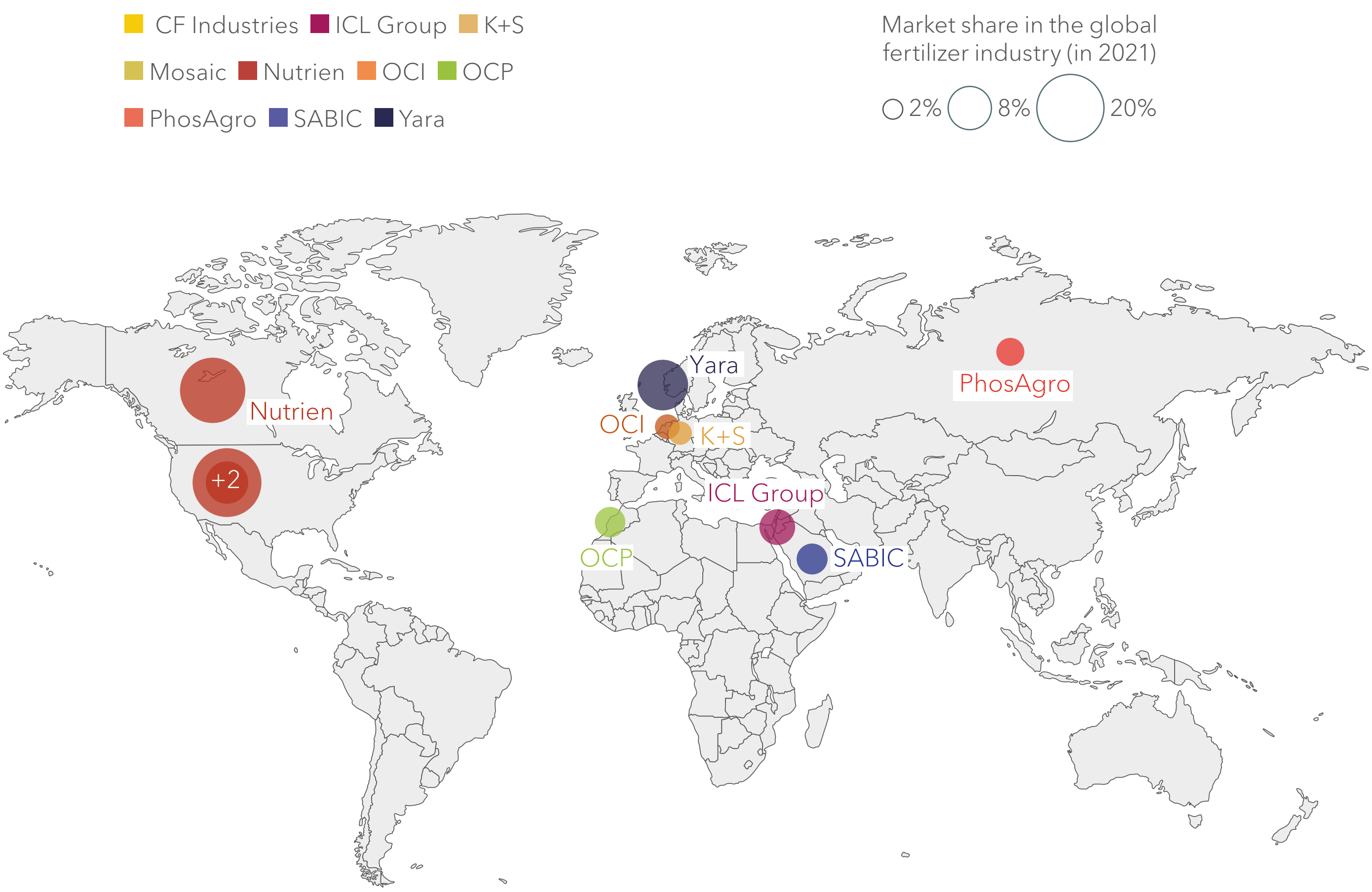
Morocco and the western Sahara hold over three quarters of global phosphate rock reserves, while Canada and Russia account for 80 per cent of global potash reserves. It is estimated that international collusion in potash and phosphate exports have driven up prices by 50 - 63 per cent (Jenny, 2012; Gnutzmann & Spiewanowski, 2016). In addition, the three largest North American potash producers operate a joint marketing organisation, Canpotex, whose membership also includes PotashCorp and Mosaic, thus facilitating their coordination. The three largest Russian and Belarusian potash producers also operate a joint venture, Belarusian Potash Company (BPC).

African competition authorities have also identified fertilizer trading cartels in Mauritius, Zambia, and South Africa. This has resulted in further driving up already inflated prices (Box 3).

A wave of mergers over the past decade has further increased concentration in global fertilizer supply (Tups & Dannenberg, 2023; Hernandez & Torero, 2013; Connor, 2020). The world's largest fertilizer companies are in North America, Europe and the Middle East (Figure 3), yet their mergers have increased the concentration impacting African countries (Roberts 2019; Nsomba et al. 2022b).

Sub-Saharan African countries are vulnerable to global concentration of fertilizer companies

Figure 3. Geographical concentration of the 10 biggest fertilizer companies in the world



Map: Myriam Hammadi • Source: *IATP and Statista*

Fertilizer prices have increased in recent years, far above the already elevated levels in international markets, due to the Russia-Ukraine war. This highlights issues with competitive supply (CCRED, 2022). The price of the widely used urea fertilizer was USD 1,000 to USD 1,200 per tonne in central and east Africa in the first half of 2023, compared with the international price of USD 400 per tonne, making it three times more expensive. Taking into account reasonable transport and trading costs to supply inland countries in central and east Africa of USD 250 per tonne, this suggests excess margins of USD 450 per tonne or an excess price mark-up of 60 to 70 per cent on top of a fair delivery price.

Central and East African prices for urea fertilizer are three times higher than world prices

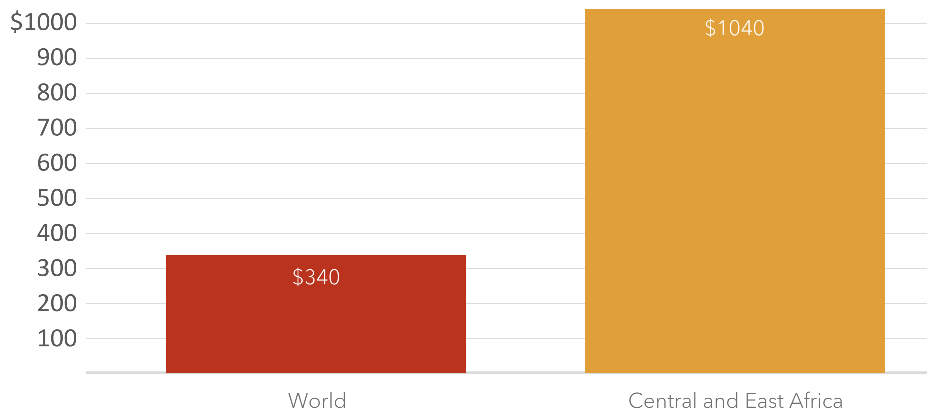


Figure 4. Prices paid for urea fertilizers in USD per tonne from January to July 2023

Chart: Myriam Hammadi
Source: *African Market Observatory Price Tracker*

Global and regional anti-competitive arrangements as well as inefficiencies along the value chain push up the fertilizer prices paid by farmers in Africa. They are fuelled by extraordinarily high levels of concentration (Ncube et al. 2016; Vilakazi & Roberts, 2019). Collusive conduct within Africa, involving multinationals and local suppliers, have increased prices farmers paid even further (Box 3).

Box 3. Concentration, collusion, and high mark-ups of fertilizers

In addition to global collusive arrangements in fertilizer supply, African competition authorities have identified trading cartels that have increased mark-ups even further. Zambia uncovered collusion between the major suppliers in 2012, while Mauritius identified cartels between its two major importers in 2023.

In 2009, the South African Competition Commission identified a cartel between regional suppliers which had operated until the mid-2000s. This cartel coordinated across southern Africa and shared information in various committees for imports, exports and a 'Nitrogen Balance Committee'. It also undermined smaller suppliers and importers who attempted to by-pass the cartel and reach farmers. It is highly likely that the arrangements affected other countries in southern Africa; however, it is difficult to see how national authorities could have identified and addressed these arrangements without international cooperation and strengthened national authorities.

A 2015 inquiry and 2016 study found high and increasing mark-ups above international prices in Kenya and Tanzania. Recent data by the African Market Observatory (2022) further indicated that high fertilizer prices remain an acute crisis in some countries such as Malawi and Zambia. Extremely high fertilizer prices in 2021 and 2022, blamed on Russia's invasion of Ukraine have, in fact, had much higher mark-ups than compared with international prices.

These high fertilizer prices harm farmers and directly undermine food production and food security.

Sources: Mauritius Competition Commission, 2023; Ncube et al., 2016; Vilakazi & Roberts, 2019; African Market Observatory, 2022

1.4.3. Poultry – the case of concentration and increased cross shareholding

Poultry is one of the fastest growing markets, offering low production costs. It is also the animal protein with lowest greenhouse gas emission. This makes it critical for achieving food and nutrition security in an environmentally, economically, and socially sustainable way. However, high levels of concentration in poultry production and processing in African countries threaten to undermine small, local producers and disrupt the critical role that the poultry sector can play in transforming food system sustainably.

Only a small number of multinational firms shape the development of the poultry industry and the rapidly expanding poultry markets in Africa. Concentration has increased through a large number of mergers and acquisitions which have, with a few exceptions, been unchallenged by competition authorities.

Concentration in the poultry sector is found throughout the supply chain, although primarily in breeding stock which is the most concentrated sector in industrial foods (ETC, 2022). Only two multinationals dominate breeding stock and control over 95 per cent of global supply. These companies provide access to their breeds either through licensing or distribution agreements, or by integrating directly into production in countries. The intellectual property embodied in the breeding stock is therefore a key factor driving the internationalization of the industry and higher levels of concentration.

Poultry production systems have involved close coordination between companies supplying breeding stock and animal feed, together with those slaughtering and processing birds. As a result, smaller independent farmers who grow birds are confronted with very large and powerful input suppliers and bird buyers, thus reducing their bargaining power.

Moreover, the high levels of concentration in breeding stock have been found to fuel collusive arrangements uncovered around the world (Roberts, 2023). This includes extensive collusive conduct identified in 2021 in the USA, where a cross-supply chain cartel increased chicken prices by as much as 50 per cent (Li & Weisman, 2023; Sappington & Turner, 2023). Similar conduct was uncovered in 2018 in Zambia (Box 4) (Goga & Roberts, forthcoming).

Box 4. Collusion in the Zambian Poultry Industry

In 2018, the Competition and Consumer Protection Commission (CCPC) uncovered that Zambian growers faced a cartel on day-old chicks. The main companies (hatcheries) with the licences for the international breeds restricted supplies and the terms for farmers to order chicks.

This de facto production quota inflated the prices paid by farmers for day-old chicks. The market concentration of the Zambian poultry meat industry, with the top two players holding a significant market share of around 75%, raised concerns about anti-competitive practices stifling competition and contributing to the high day-old chick prices.

It was revealed that the hatcheries had agreed policies through the Poultry Association of Zambia (PAZ) which the CCPC determined violated the Competition and Consumer Protection Act since they aimed to limit chick production and manipulate prices. As a result, the hatcheries were fined, and they were instructed to terminate the agreement and establish independent, reasonable requirements for chick orders.

Source: Goga & Roberts, forthcoming.

The examples above highlight the adverse effects on small producers and consumers in African countries caused by the high levels of concentration and market power of multinational firms in agricultural input markets. Farmers and small producers are squeezed by highly integrated suppliers and buyers as well as by higher prices for food and inputs.

1.5. Conclusion

African countries' markets are smaller and have higher entry barriers than in most other regions in the world. This results in anti-competitive behaviours being both more likely to occur and more harmful. The examples of fertilizer, seeds, and poultry show that concentration leads to market power being exerted to undermine producers and MSMEs and to charge high prices to consumers. These factors compound the obstacles already faced by agri-food MSMEs and worsen food insecurity. This must change.

First, markets must be fair[2], including in food and agriculture. African farmers should not pay inflated prices for inputs and receive low prices for their outputs, with poor options for storage and

2. In the words of Kyuck-Lee, with reference to competition in South Korea, cited in Fox (2002, p. 407), '…if the outcome of competition is to be accepted by the society at large, the process of competition itself must not only be free but also conform to a social norm, explicit or implicit. In other words, it must also be fair. Otherwise, the freedom to compete loses its intrinsic value. Fair competition must go in tandem with free competition. These two concepts embody one and the same value.'

processing. Smaller food producers should not be blocked from major retail chains. The power of vertically integrated gatekeeper firms which can block diverse business models and disruptors needs to be curtailed.

Second, markets require appropriate rules and institutions to address issues of substantial market power, externalities, and imperfect information. If these intrinsic features are not tackled, then market outcomes reproduce inequalities in ways which are socially and politically unsustainable.

Third, markets struggle to set the appropriate signals for the major structural changes required to respond to climate change and transform agri-food systems. Market prices value marginal or incremental sales by existing companies, not new products and ways of producing goods and services[3]. Competition rules therefore need to be part of the wider policy framework for sustainable and inclusive markets and production. This includes policies and regulations to achieve resilient production with lower emissions, such as more efficient use and application of fertilizer, and a more diverse range of crops, including those that are under-utilized.

Agriculture and food markets exemplify these challenges. They are concentrated at many levels of the value chains, are responsible for important positive and negative externalities for the climate and are essential for transitioning food systems towards greater climate change mitigation and adaptation. Better rules for agriculture and food markets require competition law and policy reforms which need to be translated into practical actions at the national, regional and international levels. The challenges are particularly acute in developing countries, such as Africa, with mostly young or nascent competition regimes.

Part 2 of this report provides a situation analysis of competition law and policy regimes in Africa which are, with some exceptions, not up to the challenge of effectively enforcing competition in markets dominated by a few large multinational firms. It also reviews the actions taken by African competition institutions against anti-competitive conduct. The last part of this report (Part 3) presents a reform agenda to strengthen competition regimes to reduce the impact of concentration in African food and agricultural markets.

The purpose of this research is to support efforts to reform and strengthen competition law and policy into a tool that will enable producers and MSMEs to have fairer and more competitive access to markets, while protecting consumers.

3. They also do not price in externality effects such as the effects of fertilizer usage on bodies of water.

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PART 2

Part 2: The State of Competition Regimes in Africa: A Situation Analysis & Review of Enforcement Experience in Agri-Food Systems

2.1. Introduction

Robust and effective competition laws, policies, and institutions are crucial for disciplining anti-competitive conduct in the market. This is particularly important in the agri-food markets in Africa given the high levels of concentration. Yet, as this report finds, nearly half of countries in Sub-Saharan Africa do not have national competition laws or institutions in place. In countries where competition laws and institutions exist, these regimes often lack the necessary experience, resources, data, and political support to take effective action. These are essential to build strong competition regimes.

Available information shows that many African competition authorities are struggling to effectively prevent anti-competitive conduct in agri-food markets. For example, despite having powers and the mandate to conduct merger reviews, competition authorities very rarely block mergers, with the exception for a few cases in South Africa.

Cartel behaviour has been even more difficult to prevent. Cartels are typically powerful and well-connected companies seeking to protect their collusive profit margins. Authorities need specialized investigative powers such as search, seizure, and interrogations. In some instances, these powers are not included in the law. However, where the powers are legally attributed, they remain difficult to exercise, especially when the colluding entities are not domiciled in the country. However, several countries with the necessary capabilities and awareness levels have achieved important successes, such as Zambia and its experience with cartel conduct.

Regional institutions and regional level enforcement are key to building a better response to anti-competitive conduct, especially for countries that do not have a national competition regime. Regional economic communities, such as the Common Market for Eastern and Southern Africa (COMESA) and the West African Economic and Monetary Union (WAEMU), have played a catalytic role in tackling regional anti-competitive behaviour. Nevertheless, these regional competition regimes require reform and further strengthening for effective enforcement alongside national authorities. This will also help build effective rules and institutions as part of the African Continental Free Trade Area (AfCFTA).

Part 1 of this report documented the impact of the increasing concentration and related corporate power in agri-food markets. It demonstrated the critical importance for developing effective competition regimes to empower producers, MSMEs, and consumers in Africa.

Part 2 of this report presents the current state of competition institutions in Africa. This section begins with a review of national and regional competition authorities' enforcement experiences in disciplining anti-competitive conduct. It is followed by a situation analysis of competition laws and institutions across Africa and groups countries into four clusters, depending on the existence and longevity of competition laws and institutions. Part 2 serves as the foundation from which to propose five areas for action and reform, developed in Part 3, to address the impact of excessive market power in agri-food markets across Africa.

2.2. Diversity of competition regimes in Africa

There is significant diversity among competition regimes in Africa. For example, South Africa and Zambia have relatively well-established authorities, while Ghana and Uganda are yet to enact competition laws and establish institutions. This report groups the competition regimes in different clusters to better analyse and accommodate the local situations and challenges. This approach draws on Fox and Bakhoum (2019) who placed African countries into three clusters based on their phase of development. Doing so enables the adoption of different approaches to support countries that are based on their specific local conditions and underpinned by common norms (Jenny, 2020).

National competition laws need to consider the specific challenges and economic conditions in each country, as well as the levels of concentration in national markets for food products and agricultural inputs that are key to food security (Jenny, 2020). Using such a bottom-up approach makes competition law and policy more relevant for food security and inclusive growth in developing countries (as argued by Fox and Bakhoum).

Regional authorities and regional level enforcement have an important role when national authorities either do not exist or are in the process of being established. This is the case for smaller countries in regional economic communities where the markets for food and agricultural inputs may be regional in scope. Regional competition authorities can address such conduct and advance effective competition enforcement, including support for the development of national regimes. Greater emphasis on regional enforcement is also important in countries without competition authorities or competition laws.

The different evolution in laws and institutions across the continent demonstrates the level of work and resources needed to create effective regulations and institutions. The different country experiences highlight the many factors that need to be considered. Despite the little information available on the work, experience, and caseloads of competition authorities, interviews with current and former senior staff help to understand the process for implementing competition rules within national jurisdictions and across the region.

2.3. Enforcement experience of national competition authorities in tackling anti-competitive conduct in agri-food markets

The experiences of African competition authorities, based on available information and interviews with senior staff, show that they lack the necessary resources, information, and political support, to take action against anti-competitive conduct in agri-food markets. This section assesses that experience based on the growing evidence of increasing concentration in agri-food markets and likely collusive conduct among firms participating in those markets.

While appropriate laws and institutions provide the necessary foundations for effective competition regimes, enforcement actions are fundamental to maintain competition in the market and protect smaller firms and consumers. The different types of conduct that a competition institution acts upon are described in Box 5. This section focuses on the following actions by competition authorities: merger reviews, prosecuting cartels, and abuse of dominance assessment.

Box 5. Types of conduct and tools used by competition institutions

Abuse of dominance: Abuse of dominance is unilateral conduct by a company using their dominant position in the market to harm competition. It is measured by the ability of a company to act without constraints, to influence prices to exclude competitors, or to consistently maintain prices above the cost of supply. Such conduct generally translates into predatory pricing, exclusive dealing, loyalty rebates, tying and bundling, and refusal to deal. Competition authorities generally address this issue by preventing the use of substantial market power and sanctioning it when observed.

Cartels: A cartel is an agreement between competitors to collude with each other in order to improve their profits and dominate the market. It takes place through practices such as price fixing, limiting production, allocating markets, and bid-rigging. It is one of the central anti-competitive behaviours that competition laws and institutions are designed to prevent.

Cartel investigation: The process of gathering and assessing evidence by competition authorities to ascertain whether specific conduct in the market can be considered a cartel.

Corporate leniency: The reduction of penalties granted by competition authorities to companies involved in cartels in exchange for revealing the existence of the cartel or for their contribution to the authorities' investigation by presenting evidence.

Market inquiry: A market inquiry is a formal process to research the general state of competition in a particular sector or market, without necessarily investigating a specific company. The purpose is to determine whether there is anti-competitive conduct, why, and how to reduce it, taking into account regulatory and economic factors as well as business and consumer behaviour.

Merger: A merger is when one or more companies acquires direct or indirect long-term control of one or more other companies. It includes the acquisition of shares, the acquisition or lease of assets, a joint venture between two or more independent enterprises, among others. It is the most common conduct that competition laws and institutions are mandates to review and oversee.

Merger control: Merger control is the process by which a competition authority reviews mergers within its jurisdiction. The procedure normally starts with notification from the merging parties and ends when competition authorities reach a decision on whether the merger may be approved, with or without conditions, or prohibited, depending on the substantive assessment of the effect on the market.

Source: Healey et al., 2023

2.3.1. Merger reviews in African competition authorities

Mergers are the primary driver of market concentration with clear knock-on effects in African countries. Competition laws and policies oversee mergers through merger reviews to ensure against the substantial reduction of competition in the market. Merger reviews are a fundamental task of competition authorities.

A merger review is more straightforward than an investigation of a cartel or an abuse of dominance. In jurisdictions where the laws require pre-merger notification, companies wishing to merge must file the transaction with the authority for review and approval. If the law prevents the merger from proceeding until the completion of the review, merging companies will have an interest in providing the necessary information to the authority. The authority may require further information relevant for the assessment. Typically, this includes marketing and strategy information about how the companies view the relevant markets, along with detailed pricing, costs, and sales data.

Even without pre-merger notification and approval, authorities may still find mergers anti-competitive and require their reversal. However, this 'unscrambling of the eggs' has been difficult to achieve even in well-established competition regimes around the world. It is therefore an advantage that most African countries enacted pre-merger review requirements in their competition law. As a result, young competition authorities conduct merger review as a major part of their workload. This also enables stakeholders to acknowledge competition authorities from the onset.

However, African competition authorities have blocked very few mergers, except in South Africa. For example, in the first ten years of its operation, the Competition Authority of Kenya did not prohibit any mergers, although it mandated conditions for some (Box 6).

The lack of mergers prohibitions could be a positive signal that enacted competition laws deter anti-competitive mergers. However, the international record suggests otherwise. Rather, mergers have contributed to increasing levels of concentration, resulting in a growing consensus in favour of much more robust merger review regimes.

Box 6. Competition Authority of Kenya: Building a regime through mergers and inquiries

- Years in operation: 11 (since 2012)
- Approximate number of employees: 70

From the onset, the CAK worked to mobilise constituencies to support its activities. It held workshops with journalists and business groups, an annual symposium and training sessions for legal practitioners to help improve their understanding of competition law. The Authority also adopted a strategic plan to prioritise focus areas.

The CAK also effectively used its market inquiry tool to assess market outcomes without initiating investigations on specific companies. The inquiries allow the Authority to obtain information and impose remedies for anti-competitive conduct. Using these powers, the CAK undertook inquiries into agriculture and financial services as part of special compliance programmes and uncovered cartel conduct. These inquiries provided the basis for introducing a corporate leniency policy.

In addition, the inquiries targeted concentrated sectors where one firm appeared to be dominant. In the sector for mobile money, the CAK adopted specific remedies, such as the reduction in US dollar charges and limiting a margin squeeze, where it uncovered unilateral abuses of market power.

Regulations were introduced to improve merger reviews, including improved screening of merger notifications, new thresholds, and minimum information requirements. Merger review powers provided a basis for building the Authority's market analysis capabilities, increasing its visibility and burnishing its reputation through major cases (such as a merger in the dairy sector). For example, two supermarkets, Tuskys and Ukwala, abandoned their merger plans and needed to pay a fine after they were found to have been colluding. However, in its first decade of operation, the CAK did not prohibit any mergers which indicates the immense challenges involved in merger review.

Sources: CAK Annual Reports, 2012 to 2022; Mudida & Ross, 2021; Kariuki & Roberts, 2016; Kariuki, 2023

2.3.2. Importance of prosecuting cartels and associated challenges

Developing countries can reap significant gains from combating cartels (Kitzmuller & Licetti, 2013; Connor, 2020; Muzata et al. 2017; World Bank 2016; Levenstein & Suslow, 2006). Developing countries are likely to face higher cartel price mark-ups compared with the median international mark-up of approximately 15-25 per cent (Connor, 2020). In addition to increasing costs for goods and services, cartels typically have low productivity and minimal incentives for innovation. International cartels can also undermine the gains from regional integration by allocating markets to create local monopolies (Roberts, 2021).

Notwithstanding the harm caused by cartels, enforcement against collusion is a challenge in developing countries. Cartels are typically powerful and connected companies that seek to protect their collusive profit margins. In some cases, government policies facilitate the development and perpetuation of cartel behaviour among firms (Licetti, 2013).

Implementing effective anti-cartel enforcement in developing countries is further challenged by the need for specialized investigative powers. Authorities need powers to conduct search and seizure operations on company premises, to seize electronic devices and obtain communications, and to interrogate company managers. In some instances, the law does not provide for these powers. However, in countries where the powers are legally granted, they remain difficult to exercise, notably when the colluding entities are not domiciled in the country in question.

Countries that have built their capabilities alongside wider awareness have benefitted from important successes. The experience of the Zambian Competition and Consumer Protection Commission (CCPC) with cartel conduct is one such example (Box 7). Following an advocacy programme undertaken for a number of years and a special amnesty programme from 2019 to February 2020, the CCPC identified extensive ongoing cartel conduct which it is prosecuting (Sampa, forthcoming).

Box 7. Zambian cartel-busting

The Zambian CCPC prosecuted cartels involving multinational and local companies in the cement, fertilizer, poultry, and fish-farming sectors. The CCPC is often cited as a success given its cartel enforcement actions and substantial penalties imposed. In some cases, such as cement, prices have since dropped.

The CCPC faced several notable challenges in cartel enforcement including (i) low awareness or understanding of the leniency policy and as such, a lack of applicants; and (ii) an absence of bilateral agreements (or MOUs) with agencies thereby limiting information sharing.

In 2019, the CCPC implemented a temporary amnesty programme which called upon individuals or enterprises engaged in or having knowledge of anti-competitive behaviour to disclose such behaviour, in exchange for immunity from possible civil and criminal prosecution. Prior to this amnesty, the CCPC repetitively warned businesses against engaging in collusive conduct and adopted a variety of measures including discounted administrative penalties for firms that contravened the Act.

The cartel amnesty programme ended in February 2020. Unfortunately, no firms came forward to make disclosures of cartel behaviour leading the CCPC to declare: "Let the cartel members out there know that it's a matter of time before their conduct is uncovered. In 2019 alone, the Commission uncovered 55 suspected cartel cases and once investigations are concluded, the Commission will send a strong signal by prosecuting both the companies involved and their directors in their individual capacities" (MoneyFM, 2020).

Sources: Roberts et al., 2022; Kaumba et al., 2016; Chilufya-Musonda, 2021

2.3.3. Abuse of dominance assessment and associated challenges

Tackling abuse of dominance is typically viewed as more challenging than cartel conduct (Buthelezi et al., 2023). Most competition laws prohibit cartels per se, meaning the authority does not have to prove an anti-competitive effect. Rather, it must provide evidence of the agreement or understanding between competitors. Abuse of dominance provisions, on the other hand, address conduct which, when undertaken by a dominant company, will harm competition. Bringing cases of abuse of dominance requires the authority to bear the burden of characterizing the conduct and assessing the harm to competition.

The South African experience indicates the challenges of requiring the authority to demonstrate anti-competitive effects on a case-by-case basis (Buthelezi et al., 2023; Roberts, 2020). Cases have taken a decade or more to conclude and a very high bar placed for the authority to prove the conduct falls within a set of specified abuses of dominance. Instead, where there are entrenched dominant firms, with an inherent incentive to use this position to exclude rivals, it is more feasible for the law to place the onus on the firms to justify their conduct (Evans, 2009; Katsoulacos & Ulph, 2022). This aligns with EU law which places a 'special responsibility' on dominant firms to ensure their conduct does not distort competition.

For authorities with relatively limited capabilities, it is even more important that they can draw on presumptions of the likely effects and require large and powerful companies to demonstrate why conduct does not harm smaller companies and consumers. The authority also needs the powers to enforce remedies and penalise conduct, as the case of The Gambia indicates (Box 8).

Box 8. The Gambia tackles abuse of dominance

The Gambia has had varied experience in addressing abuse of dominance. Given the small size of its economy, The Gambia has a high number of global players operating (through licensed agents or outlets owned by local entities) in many business sectors. For example, several internationally recognized and established financial institutions, such as Western Union, MoneyGram, RIA and Money Express, provide money transfer services through licensed outlets, including commercial banks and foreign exchange bureaus. These establishments, which act as local representatives, agents or sellers of these companies, are bound by an agreement which prevents them from serving a competitor in the same outlet, both during and after the termination of the contract.

In 2010, J-Financial Services Ltd, a local service provider acting as an agent of MoneyGram since 2008, expressed concern over a clause in its agreement which restricted it from providing money transfer services to customers of its competitors, and even up to 180 days after the termination of the contract. In this case, the Gambia Competition & Consumer Protection Commission (GCCPC) concluded MoneyGram had abused its dominant position and engaged in conduct that distorted competition in the market.

The GCCPC was challenged when implementing the required remedy and penalty for the abusive conduct. Currently, the law limits the ability of the Commission to impose financial penalties for infringed abuse of dominance conduct. In this case, the GCCPC directed the removal of the exclusivity clause in the agreements signed with local agents. However, no other pecuniary penalty was imposed.

The GCCPC has highlighted this legal gap as a factor limiting their enforcement action and ability to yield positive results. As such, there is currently a process in place to introduce amendments to the Act which will ensure that the GCCPC can impose penalties for abuse of dominance infringements (amongst other proposed changes).

Sources: interviews with Amadou Ceesay, Executive Secretary at The Gambia Competition and Consumer Protection Commission on 30 March 2023; Cham, 2012.

2.4. Situation analysis of competition regimes in Africa

Country reviews indicate the ways in which competition regimes developed relative to countries' economies, norms and contexts (Cheng, 2020). In East Asian countries, such as South Korea, strong links developed between competition and industrial policy. In Latin America, however, competition regimes confronted the power of large, politically connected business groups, engaged in cartel behaviour (International Finance Corporation, 2021).

In Africa, much greater diversity exists among competition regimes despite their relatively new legal frameworks and advocacy by a handful of international institutions (see Budzinski, 2008; Fox, 2003; Singh, 2016). The differences reflect each country's unique economic situation as well as their different ideological and political perspectives on markets, market power, and market failures.

In recent years, international financial institutions and development partners have vigorously promoted the implementation competition laws in Africa. However, certain factors limit the ability of African competition authorities to actively enforce these laws and prosecute anti-competitive conduct. In African agri-food markets, these factors include:

- [01] large inequity in litigation resources;
- [02] difficulties in securing evidence from multinational corporations when a jurisdictional head office is located in another country; and
- [03] a high standard and low cost of appeal (Buthelezi et al., 2023).

Furthermore, information asymmetry and signal jamming behaviour[4] have increased the burden of evidence placed on competition authorities. Taken together, these factors result in considerable delays to the investigation and prosecution of prohibited practices. In South Africa, cases typically require five to eight years to reach an adjudicated outcome.

2.4.1. A framework for clustering competition regimes in Africa

The wide diversity between competition regimes in Africa provides a strong rationale for tailoring and sequencing support, based on the unique circumstances of each country. This report clusters competition regimes in the 48 Sub-Saharan African countries into four groups. Doing so enables the adoption of an adapted set of interventions to support a country reform agenda based on the status of its competition laws, policies and institutions[5].

Two main indicators form the basis of the clustering approach:

- [01] whether competition laws exist or not, and,
- [02] the status of the competition institution

A third indicator, the enforcement history of competition institutions, provides important insights

4. 'Signal jamming' behaviour is where respondents use economics and economic theory to conclude that the analysis relied on by the competition authority is incomplete but they do not rule out a particular reason nor do they provide contrasting economic evidence to allow for scrutiny by the courts/tribunal.
5. The assessment also includes Djibouti and Somalia, which are not included in some classifications of Sub-Saharan African countries.

into the authorities' enforcement history and experience. When available, this information supplements the ranked indicators since it provides a clearer picture of how competition institutions function in each country[6]. Finally, the clustering approach categorizes the different jurisdictions based on their phase of development tailoring the recommendations and policy solutions accordingly.

2.4.1.1. Competition laws and regulations in Africa

National laws addressing mergers, abuse of dominance, and restrictive business practices, such as cartels, constitute the baseline reference for reviewing the legal framework in the countries assessed (see Box 9). This baseline also incorporates, when applicable, criteria such as the availability of an independent body with powers to investigate anti-competitive conduct and sufficient deterrence powers, including penalties and the imposition of remedies. These factors consist of the basis for the legal framework of a competition regime (see Box 9).

Additional features assessed include the resources and powers of competition authorities to address concentration in agricultural and food markets. This covers the ability to prioritize cases in key food commodities or agricultural input markets and the powers to conduct market inquires to allow for the authority to better monitor agri-food markets and inform investigations. It also covers the effectiveness of the appeal process in allowing for transparency and greater scrutiny of decisions made by the authority and the availability of independent funding (such as merger filing fees) to allow for greater autonomy of the authority and competition regime.

Box 9. Legal framework

BASELINE

- Law addressing mergers which substantially lessen or prevent competition (with pre-merger notification), prohibiting anti-competitive agreements, abuse of dominance, and/or other restrictive business practices.
- Law establishing an independent body with powers to investigate, initiate investigations, and compel the provision of information, including in search and seizure operations.
- Provisions granting powers to adjudicate, penalize (deter) and impose remedies.

ADDITIONAL FEATURES

Law attributing the institution with the following:

- Independent sources of funding (merger filing fees)
- Ability to prioritize investigations and cases
- Powers to conduct market inquiries or studies

Further attributions of the law:

- Effective appeal process by a specialist body (tribunal or court)
- Corporate leniency policy

6. This factor is, however, not directly part of the clustering as it is based on qualitative evidence gathered on country specific experiences in the application of competition law.

2.4.1.2. Institutional capability of competition regimes in Africa

Enacting competition laws differs from putting in place effective competition institutions. Many examples exist of a significant time lapse between the adoption of the law and the establishment of institutional and administrative mechanisms for its implement. For example, the Philippines enacted anti-monopoly laws as of 1935 but did not set up a central agency or any administrative mechanism to oversee and implement the legislation until the 2010s. Similarly, while Mauritania enacted its competition law in 2015, it has not established an independent body to oversee the legislation and has instead relied on a division within its Ministry of Trade to do so.

In calling for countries to adopt competition laws, international financial institutions and development partners have underestimated the considerable time required to establish institutions and build the necessary economic and legal skills. The time and learning required for institutional development, coupled with the importance of testing laws and building precedent, takes about twenty years or more for institutions to become embedded (Kovacic & Hyman, 2012; Kovacic & Lopez-Galdos, 2016; Burke et al., 2019; Burke, 2018).

The length of time required depends on the country's context, including its human resource endowments and quality of education, as well as the type of legal provisions and institutional structure. This report uses as its baseline the establishment of a sufficiently endowed institution and professional staff in operation for a minimum of five years. Further development of the competition authority requires building the institutional structure and staff capabilities, which is likely reflected in the level of detail and transparency found in case decisions (See Box 10).

Box 10. Institutional framework

BASELINE

- Number of years in operation (application of the law)
- Size and technical capabilities of the institution (i.e. budget of the institution compared to the size of the country's economy and markets)
- Staff expertise, specifically for competition enforcement (not wider competition and consumer policy)

ADDITIONAL FEATURES

- Institutional structure with divisional specializations
- Level of transparency and detail in decisions

2.4.1.3. Enforcement experience

The cluster approach also considers the enforcement experience through the track record of national competition regimes. It supplements the legal framework and the institutional capability indicators by providing a clearer picture of how competition regimes apply national regulation.

Effective competition enforcement does not mean a minimalist approach to enforcement until the competition institutions reach a certain level of sophistication. Rather, clear and administrable standards need to consider the country-context, the likelihood of anti-competitive arrangements, and institutional capabilities. A referee in football must be able to take decisions, including issuing red and yellow cards, even when there is no video assistant referee (VAR) in place.

The effectiveness of the regime also depends on the political and economic realities, including the power of vested interests (see Rodrigues & Menon, 2010; Mateus, 2010) such as those within agri-food markets in African countries. Taking on powerful interests is inherent in applying competition law and requires advocacy, inquiries, and research to demonstrate the harm from anti-competitive conduct. These are also important tools for an institution to build public awareness and the support among key constituencies.

Unlike the legal framework and the institutional capability indicators, enforcement experience is not measured in terms of levels since it is based on the qualitative evidence gathered on country specific experiences and case law in the application of competition law. This evidence focuses on the numbers of mergers investigated and whether the authorities prohibited or authorized (with or without conditions) them. It also assesses the number of cartels and abuses of dominance investigated by the authority, the percentage resulting in fines, and the amount of the fine.

2.5. Four clusters to group national competition institutions in Africa

The diversity of country situations and the wide range of competition regimes in Sub-Saharan Africa highlights the need for tailored solutions. These solutions must match the level of development of each country's competition regime to ensure that the national framework is developed in such a way to enable institutions to manage the challenges of concentrated agri-food markets. In many cases, this will require a stronger reliance on regional competition regimes and regional capacity.

Countries are grouped into four clusters to facilitate the discussion of appropriate next steps to strengthen competition law and policy regimes:

- **Cluster A -** Established institutions (in place for over than 10 years) with strong enforcement history and capacity: 9 countries including Mauritius, South Africa, Kenya, and Zambia.
- **Cluster B -** Established competition institutions (in place between 5 to 10 years) with a limited enforcement history: 8 countries, including The Gambia and Malawi.
- **Cluster C -** Nascent competition regimes – with existing competition laws but not (yet) enforced and newly established competition institutions (in place between 1 to 4 years): 9 countries, including Nigeria, Madagascar, and Rwanda.
- **Cluster D -** Countries without national competition laws and institutions: 22 countries, mainly in West Africa

The report uses a five-point scale to reflect the situation of countries' competition regimes along different dimensions of legal and institutional development (Figure 1, Figure 2, Figure 3, Box 9 and Box 10). A measure of 1 on the scale means a gap or absence in the area being considered, while a 5 represents a comprehensive legal provision or a fully developed institutional capability. For example, a country that does not have a cartel leniency programme would get a 1, whereas a country that does have such a programme will get a 5. These scores for all the legal and institutional areas are simply averaged for a summary measure without any weighting. As such, it is a first step for evaluating the development level of the competition regime and does not reflect an assessment of its performance.

This section opens with the presentation of Cluster A and highlights the achievements of the institutions in this cluster. Cluster A comprises countries that have made significant strides in terms of legal and institutional development. Despite the challenges they face, they currently represent the highest competition regime development levels in the continent.

2.5.1. Cluster A: Established institutions with strong enforcement history and capacity

Of the 48 countries in Sub-Saharan Africa reviewed in this report, only nine countries have institutions with more than ten years of experience (Box 11). The laws governing these institutions provide for their autonomy – notably through the availability of independently sourced funding. They also provide the institutions with an array of legal means to ensure efficiency at all steps of the process, including the access to crucial information (through market inquiries, search, seizure and interrogation powers, as well as leniency policies) and the possibility of imposing penalties. The legal provisions of Cluster A countries also provide for the ability to appeal decisions in specialist courts.

Box 11. Cluster A - Established institutions with strong enforcement history and capacity

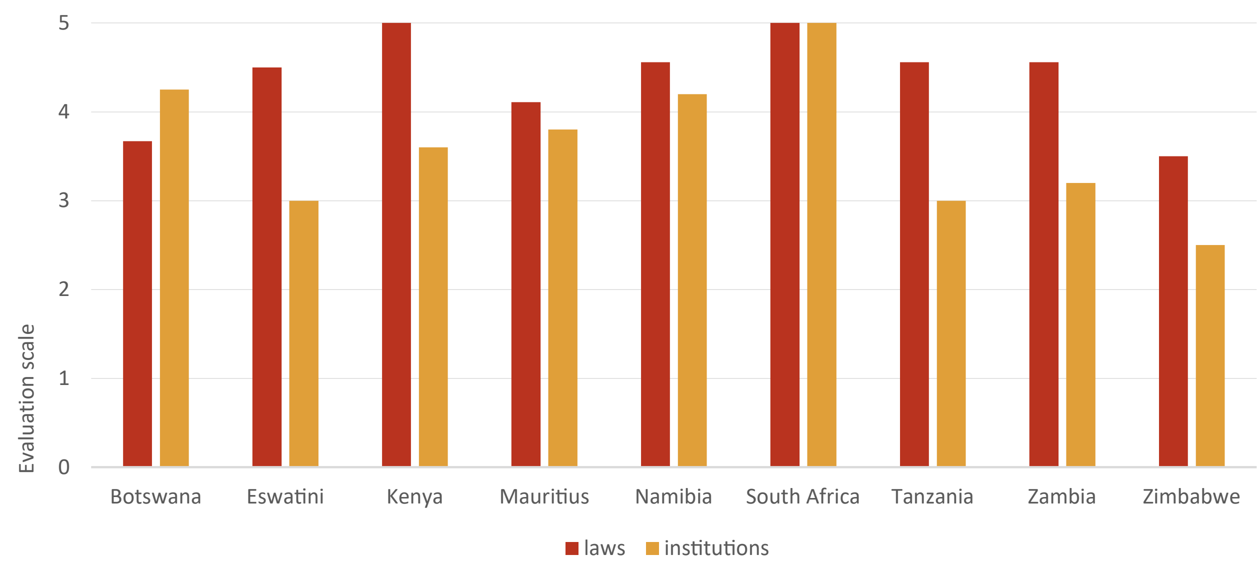
Botswana	South Africa
Eswatini	Tanzania
Kenya	Zambia
Mauritius	Zimbabwe
Namibia	

From an institutional perspective, the authorities in Cluster A are generally well staffed, in numbers and skills, and have specialist divisions to investigate anti-competitive conduct. The decisions issued are publicly available. Furthermore, most of these authorities have entered into bilateral agreements with each other and with other developed jurisdictions such as the European Commission's Department for Competition (DG COMP) and the United States' Federal Trade Commission (FTC). These agreements allow for greater peer review and information sharing on cases.

There is, nevertheless, a wide range when measuring institutional effectiveness. Countries such as Botswana, Namibia and South Africa have all scored high, while countries such as Zimbabwe, Eswatini and Tanzania, have lower scores. These reflect challenges such as the limited specialization in the institutions' internal structure. For instance, the latter three countries' institutions do not have specialist divisions for cartels separate from abuse of dominance. Additionally, neither Eswatini nor Zimbabwe have specialist divisions for lawyers and economists, who are instrumental for better enforcement and research in complex matters. This means that while the authority has been in place for a long time, its effectiveness to enforce competition is limited by the failure to adapt its internal structure, and the lack of legal provisions that allow for it to better investigate and enforce certain conduct.

Countries in Cluster A have established institutions and strong enforcement history

Figure 5. Ranking of countries in Cluster A based on laws and institutions



Cluster B: Established competition institutions with limited enforcement history

Of the 48 countries in Sub-Saharan Africa reviewed, seven countries have competition laws and established competition institutions with five to ten years of relevant experience (See Box 12). These countries are quite diverse in terms of the coverage of the laws and the level of institutional development.

The competition laws enacted broadly cover the baseline measures (independent source of funds, powers to impose remedies, penalties, and conduct search and seizure operations, for example). There are, however, some exceptions. For example, Cameroon and Cote d'Ivoire do not have a specialist body or court to provide an effective process to appeal the decisions of the investigating authority, and The Gambia is the only country able to impose penalties on cartel conduct (but not abuse of dominance)[7].

Box 12. Cluster B - Established competition institutions with limited enforcement history

Angola	Malawi
Burkina Faso	Seychelles
Cameroon	The Gambia
Côte d'Ivoire	

In addition, some countries, such as Malawi, Seychelles, and The Gambia, lack a corporate leniency policy in their enacted legislation. This policy enables competition institutions to better tackle cartels. Other countries, such as Malawi, do not require companies to notify their merger to the competition authority. This provision may be addressed through the legislative reform underway and could allow the authority to function more effectively.[8]

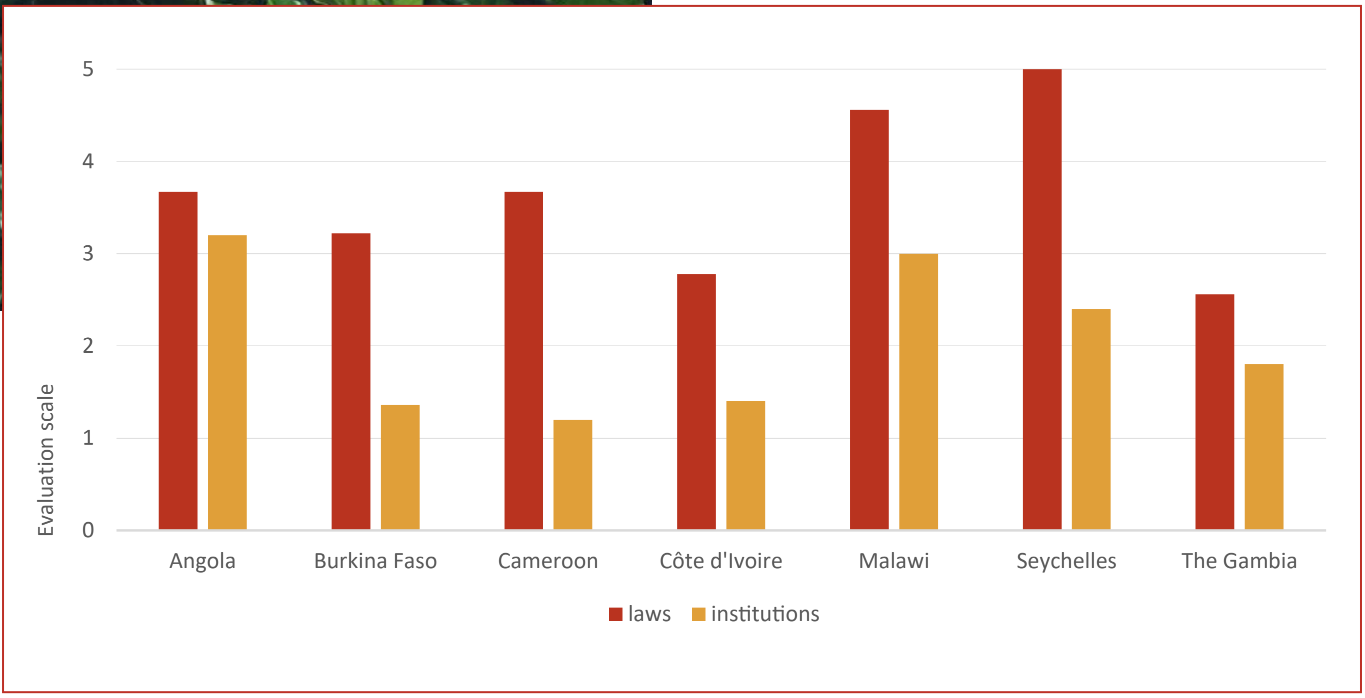
The majority of authorities operating in these countries have little specialization to target the main areas of conduct. This means that these institutions do not have divisions dedicated to particular conduct or arrangements (divisions for cartels, mergers, and enforcement or market conduct, for example). Specializing by conduct allows for investigators working within these institutions to develop the technical expertise to investigate more thoroughly and effectively.

In terms of building expertise, interviews with officials from authorities highlight the challenges of having few staff members with the technical expertise required for complex competition matters. In the case of the Seychelles, a high rating for the law is combined with a low rating for the institution reflecting that just two employees out of 33 are handling competition specific matters, while the rest are non-technical staff or personnel employed for the consumer protection unit (Figure 6).

7. Interview with Amadou Ceesay from the GCCPC on 30 March 2023.
8. Interview with Rex Nyahoda and Apoche Itimu of the CFTC on 23 March 2023.

Countries in Cluster B have established institutions and limited enforcement history

Figure 6. Ranking of countries in Cluster B based on laws and institutions



Countries categorized in Cluster B reflect a limited, but growing, enforcement activity. For example, The Gambia has conducted several market studies and abuse of dominance investigations in a variety of markets including key staple food markets such as rice and sugar. The imposed remedies have been limited despite the investigations. While The Gambia can conduct market studies, the findings of those studies are non-binding and require the Commission to begin an investigation process against a particular firm. This contrasts with more developed regimes, such as in South Africa, where the recommendations of a market inquiry are legally binding.

2.5.2. Cluster C: Nascent competition regime

Of the 48 countries in Sub-Saharan Africa reviewed, ten countries have enacted competition laws but are not yet enforcing them fully. (See Box 13). This can be the result of either not having a competition authority with the mandate to enforce competition law or having a recently established competition institution (less than five years) but without the necessary procedures and capacity in place to enforce the law. This includes countries where institutions exist and work is underway with regional bodies, as is the case in the Democratic Republic of Congo (DRC) and Rwanda.

Box 13. Cluster C - Nascent competition regimes

Benin	Madagascar
Cape Verde	Mali
Chad	Mozambique
Democratic Republic of Congo	Nigeria
Ethiopia	Rwanda

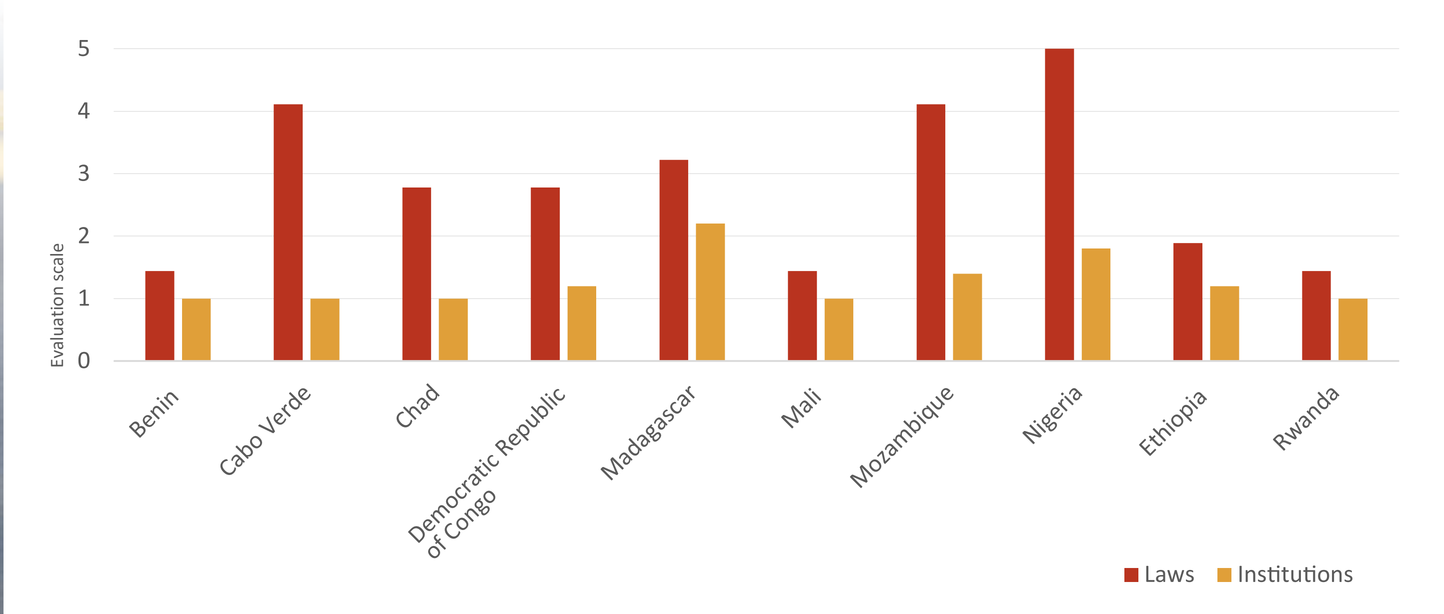
The five-point scale shows that Nigeria, Mozambique and Cape Verde aligned with or close to the baseline expectations. However, the competition authorities have been in operation for less than five years and their organizational structure does not include divisional specialization focused on conduct (Figure 3).

These nascent institutions initiate few investigations and offer limited transparency on their decisions, which are not made publicly available. This may be to the result of limitations in the competition law or their institutional capabilities.

These countries need to invest in building their institutions to address the significant constraints they face in being able to address anti-competitive conduct in agri-food markets and its impact on food security. Most notably, they need to contend with the small number of employees at their institution, limited budget, and a scarce skills base from which to hire.

Countries in Cluster C have nascent competition regimes

Figure 7. Ranking of countries in Cluster C based on laws and institutions



For some countries in this Cluster, the existing competition law may not provide sufficient information gathering and enforcement powers to allow the authority to tackle major competition matters in agri-food markets such as those observed in Part 1 of the report. In such cases, more work is needed to amend the existing laws to provide for sufficient powers, including the power to conduct search and seizure operations, as well as to conduct market inquiries.

Despite the challenges outlined above, some authorities have exercised the powers mandated through enacted laws. For example, in less than two years of operation, Mozambique has issued two infringement decisions.[9]

2.5.3. Cluster D: Countries without national competition laws and institutions

Of the 48 countries in Sub-Saharan Africa reviewed, 22 countries, or nearly half the countries, do not have any competition laws or institutions in place (See Box 14). The economic size of these countries ranges from small landlocked countries, such as Lesotho, to large, coastal countries such as Ghana. The reasons for the absence of competition laws and institutions are complex and inter-related, and include conflict, level of economic development, political choices and/or national policy priorities.

Box 14. Cluster D - Countries without national competition laws and institutions

Burundi	Liberia
Central African Republic	Mauritania
Comoros	Niger
Djibouti	Republic of Congo
Equatorial Guinea	Sao Tome
Eritrea	Senegal
Gabon	Sierra Leone
Ghana	Somalia
Guinea	South Sudan
Guinea – Bissau	Togo
Lesotho	Uganda

9. The first decision involved the imposition of a MT41.1 million (approx. USD 643,000) fine on CFAO Motors for undertaking a merger without approval. The second decision relates to a contravention of the price fixing provisions of the Mozambique Competition Law. The conduct involved price fixing for driving lessons by the industry association. As the prices had not been put into practice, no fine was imposed, but the association has been warned about engaging in further anticompetitive practices (Wagener & Upfold, 2023).

While these countries do not yet have competition laws and institutions in place, the majority are members of regional blocs such as the Common Market for Eastern and Southern Africa (COMESA), the Economic and Monetary Community of Central Africa (CEMAC), the West African Economic and Monetary Union (WAEMU) and the Economic Community of West African States (ECOWAS).

These regional bodies have developed or are developing regional competition regimes. By participating in such regional trade blocs, Cluster D countries may decide to delegate their competition duties, as is the case with WAEMU members Guinea-Bissau and Togo. This approach provides benefits within the African context since many anti-competitive practices are cross-border. Regional blocs can also help in coordinating national efforts to develop competition laws which are consistent across the region. Countries also benefit from information and capacity sharing at the regional level while the financial burden is mutualized.

2.6. The emergence of regional competition authorities – implications for competition enforcement across Sub-Saharan African

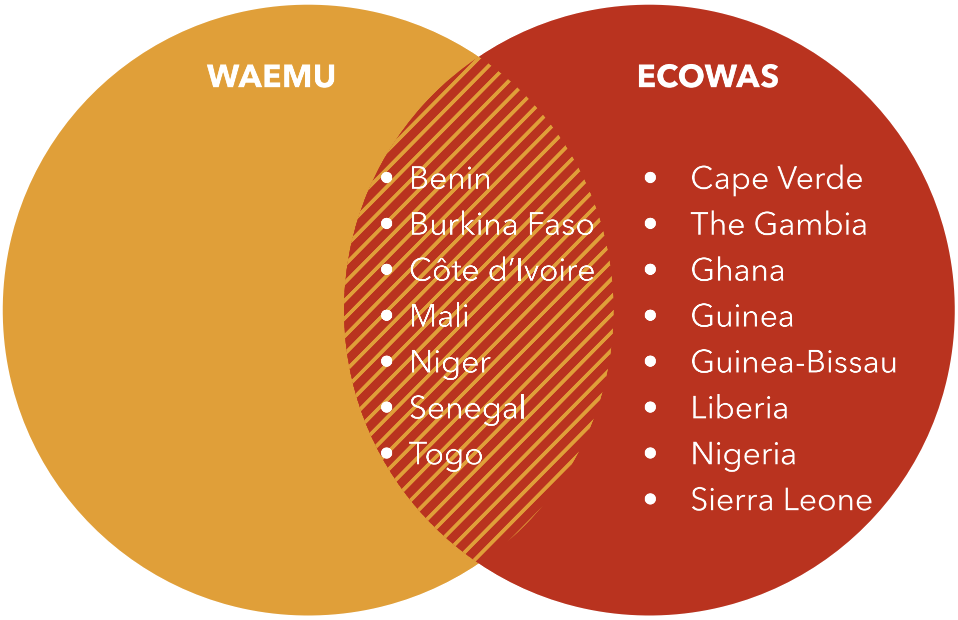
In many agri-food sectors, including fertilizer, poultry and sugar, dominant firms govern regional value and supply chains (Padayachie & Vilakazi, 2022). Regional organizations therefore have a catalytic role in the enforcement of competition laws and policies to tackle and deter anti-competitive behaviours that take place regionally.

As found by the International Competition Network (ICN) and the Organisation for Economic Co-operation and Development (OECD), regional integration is key to successful enforcement: "Authorities frequently experience their most extensive, intensive and successful enforcement cooperation though regional cooperation networks and organization" (2021, p. 177). Regional organizations can provide a strong legal basis for the exchange of information and incentivize the convergence of national laws and enforcement mechanisms which leads to greater consistency across the region and encourages regional integration.

As observed in the clusters detailed in section 2.5, most countries belong to a regional organization. In West Africa, WAEMU and ECOWAS offer a framework for competition. Eight of the 15 ECOWAS member states are also WAEMU members (see Figure 8). In central Africa, CEMAC provides a competition framework through its recently revised regulation (Table A).

Who is in charge? Membership overlap between regional organizations creates confusion about jurisdiction

Figure 8. Overlap between WAEMU and ECOWAS member states



Four regional economic communities operate in eastern and southern Africa:

- Common Market of Eastern and Southern Africa (COMESA),
- East African Community (EAC),
- Southern African Development Community (SADC), and
- Southern African Customs Union (SACU)

All SACU member states are also within SADC, while the other three organizations have varying degrees of overlapping members states.

From a competition perspective, these regional economic communities are at different stages of maturity: COMESA and the EAC have competition laws and authorities in place and all EAC members, apart from Tanzania, are also members of COMESA.

COMESA, EAC and SADC have developed regional competition committees. The EAC is in the process of establishing the procedures and regulations for its Competition Authority while SADC has put in place a committee with a co-operation framework on competition. The COMESA Competition Commission (CCC) is the most well-established regional body on the continent and has been in operation for a decade. Box 16 reviews its work and the lessons learned, notably in the development of merger regulations which introduced notification thresholds and defined the criteria determining a merger notification to either the CCC or a national authority. This has enabled the merger review regime to thrive and allowed the CCC to build its capabilities, strengthen its relationships with national authorities, and establish its financial independence (through filing fees).

COMESA, SADC and EAC have begun tripartite negotiations to potentially set up a single regional integration bloc.

Table A. Regional organizations with competition laws, policies and practices in Africa

Organization	Law (and year)	Institutions (and year)	Practice/record	Members
AFCFTA	*AfCFTA Competition Protocol negotiations ongoing*	*AfCFTA Competition Protocol negotiations ongoing*	*AfCFTA Competition Protocol negotiations ongoing*	*AfCFTA Competition Protocol negotiations ongoing*
CEMAC	CEMAC Regulation adopted in 1999, revised in 2019: *Règlement relatif à la concurrence n°06/19-UEAC-639-CM-33 du 7 avril 2019*	CEMAC authority	*No information available*	Cameroon, Central African Republic, Chad, Equatorial Guinea, Gabon, Republic of the Congto
COMESA	COMESA Competition Regulations (2005)	COMESA Competition Commission (2013)	369 M&A assessed. Over 40 Restrictive Business Practices assessed Over 44 Consumer Protection cases handled More than 12 market screenings and studies undertaken Three businesses fined for non-compliance with the Regulations (see Coertzen, 2023).	Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia and Zimbabwe.
EAC	EAC Competition Act (2006)	EAC Competition Authority (EACA)	No information available	Burundi, Kenya, Rwanda, Uganda and Tanzania

Organization	Law (and year)	Institutions (and year)	Practice/record	Members
ECOWAS	Regional Competition Policy Framework (RCPF), (2007)	ECOWAS Regional Competition Authority (ERCA), 2019.	No information available	Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo
SACU	2002 ACU Agreement Article 40 and Article 41	No information available	No information available	Botswana, Lesotho, Namibia, South Africa, and Swaziland.
SADC	Article 25 of the Protocol on Trade & SADC Declaration on Competition and Consumer Policies (2009)	SADC Competition Commission	No information available	Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic Tanzania, Zambia and Zimbabwe.
WAEMU	WAEMU Treaty, Regulations 2, 3 and 4/2002/CM/UEMOA	The Commission	Between 2007 and 2019 (12 years), the Commission rendered eight decisions The Commission has become significantly more active in recent years, with decisions in preparation in almost 15 cases (in 2020) (see UNCTAD, 2020). Eight decisions and three investigations in 2022 (see West African Economic and Monetary Union, 2022).	Benin; Burkina Faso; Côte d'Ivoire; Mali; Niger; Senegal; Guinea Bissau

These organizations' legal frameworks provide the authorities with an array of powers including: assess market concentration, investigate anti-competitive practices and in some cases sanction them, conduct market inquiries, and issue recommendations for states. Nevertheless, most of these organizations show a weak track record given the number of years that they have operated (generally more than ten years) (Table A).

For some regional organizations, their current structure undermines competition enforcement. For example, the WAEMU pre-empts national jurisdiction on all competition matters, thus weakening national authorities and increasing the WAEMU workload for which it does not have sufficient human or financial resources. In 2019, a new challenge appeared in with the launch of a competing authority, ECOWAS' Regulatory Authority for Competition (ERCA). With all members of WAEMU also being members of ECOWAS, questions on jurisdictional overlaps arise (Box 15).

Box 15. The case of West Africa: jurisdiction conflicts

WAEMU seeks to achieving the economic integration of its member states by strengthening competition in an open and competitive market with a harmonized legal environment. It was the first regional economic community to provide a competition framework to West African countries and det up its Competition Commission in 2007.

ECOWAS, established in 1975, is a trading and political union with 15 member states[10], which aims to promote regional economic integration. It adopted a Regional Competition Policy Framework (RCPF) in 2007, and two subsequent regulations a year later. In 2019, its Regional Competition Authority, ERCA, started operating.

Eight WAEMU members are also ECOWAS members.

ERCA and WAEMU's Competition Commission competences have some overlap (such as investigation of anticompetitive practices, search and seizure powers) and their provisions are, to some extent, contradictory. While WAEMU's Competition Commission pre-empts all jurisdiction, ERCA's mandate supports national competition structures including through training (article 3 A/SA.2/12/08).

Available data shows that ERCA has no track record, perhaps due to the fear of entering in conflict with WAEMU before the conclusion of a cooperation agreement.

The WAEMU Competition Commission has been hampered by its lack of independence and insufficient human resources. Collaboration with national authorities remains difficult given that most countries do not have competition laws or institutions in place.

To avoid discrepancies in the implementation of competition rules in West Africa, both organizations have been working to harmonize their framework. A first consultation and negotiation meeting to discuss collaboration took place in 2021. They finalized a draft agreement for a harmonized implementation of competition rules in 2022. This agreement lays down the basic principles of cooperation between the two competition authorities and determines the rules for the allocation of jurisdiction.

Source: UNCTAD, 2020; WAEMU, 2022.

10. Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal,

Other organizations have a stronger enforcement history, despite facing resource constraints. In the case of COMESA, this success results from a preventive strategy, through a focus on merger review to limit cross-border excessive concentration. Nevertheless, COMESA's action has been hampered by legal provisions, such as excessively high thresholds of notification and assessment methods (Box 16).

Box 16. COMESA Competition Commission

The COMESA Competition Commission (CCC) is the leading regional competition regime in Africa having been in operation for 10 years. The CCC has regulations and guidelines in key areas (notably merger review), has built relationships with national authorities, and has grown its employees from five to 35, including some with specialist training and experience.

The majority of the CCC's work has been in merger review. The law makes pre-merger notification mandatory which means that companies must provide the information required by the CCC to assess the merger. Initially, however, the CCC did not have a minimum threshold for notification which resulted in notifications for all mergers affecting two or more COMESA member states. The law thus required that if one of the merging companies traded with another COMESA member state, then the merger had to be notified, regardless of the size of the company.

In practice, this was not a reasonable approach. As a result, companies did not notify COMESA of mergers and some member states, notably Kenya, indicated that they would continue to assert the primacy of their jurisdiction.

The CCC developed merger regulations which introduced notification thresholds and set out how a national or regional nexus would determine whether a merger would be notifiable to the CCC or a national authority. This has seen the merger review regime take off, with the CCC building its methodology and working relationships with national authorities. It also contributed to the institution's autonomy and ability to grow its team, as merger notification means that filing fees are paid to CCC.

Many mergers have been reviewed by the CCC and more detailed decisions published in recent years. The CCC has not prohibited any mergers although some have been approved with conditions. Over the past 10 years, the CCC has reviewed 39 mergers in agriculture and agro-processing, including the Monsanto/Bayer merger. The CCC approved the Monsanto/Bayer merger since, at the time, the CCC deemed that the merging companies did not overlap. Other acquisitions have also been approved, leading to the expansion of multinational companies in trading and processing of key staples, such as soybeans.

The CCC has taken up very few cartel and abuse of dominance cases, with no major findings. This is partly attributed to the institution's limited resources. However, the CCC has supported ongoing market studies of agri-food markets to assess market structure and conduct which provides the basis to initiate future investigations.

Sources: Büthe & Kigwiru, 2020; Nsomba et al, 2021.

The experience of the most effective regional body on the continent highlights the time and capacity required to tackle major cross-border anti-competitive conduct. While regional competition regimes have a very important role to play, given the international concentration and indications of anti-competitive conduct, their track record reflect the institution building challenge involved. For example, SADC and EAC have enacted laws and frameworks for competition enforcement but they are not yet functioning.

Finally, some are still in the process of negotiating a framework on competition, which is the case of the AfCFTA. The AfCFTA is the world's largest free trade area, which entered into force in May 2019 and brings together the 55 countries of the African Union (AU) and eight (8) Regional Economic Communities (RECs). Its overall mandate is to create a single continental market, including the elimination of trade barriers and boosting intra-Africa trade. The AfCFTA Competition Protocol negotiations are ongoing.

2.7. A reform agenda for regional competition authorities

The numerous under-resourced regional economic communities with overlapping agendas in competition pose great challenges. They put the continent at risk of fragmentation, especially since the cluster analysis reveals that most countries participate in regional organisations and, in some cases, more than one. However, the potential benefits of an enhanced role for regional competition authorities in tackling high levels of concentration in agri-food markets are significant for countries in all four clusters.

The enforcement record across the region emphasizes the potential benefits of effective cooperation. For example, the Competition Commission of South Africa has uncovered several cartels involving firms that either operate within - or may have influenced the economy of - other SADC member-states. These include cartels in key agri-food markets such as fertilizer, bread and milling (Box 17). While these cartels may have operated in or had an effect in other SADC member states, the cartels were not widely prosecuted by other SADC members. This indicates that an effective regional competition enforcement tool could play an important role in ensuring that all SADC countries benefit from the enforcement of conduct through the wider prosecution of firms.

Box 17. Cross-border cartels that would have benefited from regional prosecution

[01] *Fertilizer cartel* – apart from South Africa, only Zambia initiated a similar investigation, notwithstanding the fact that some of the firms implicated operate in the region or export into the region.

[02] *Bread/flour/wheat milling cartel* – only South Africa investigated and successfully prosecuted this cartel.

[03] *Forex banking cartel* – to date, only South Africa has initiated an investigation and engaged in prosecution of this global cartel within the region.

[04] *Steel cartel* – apart from South Africa, no other competition authority in SADC undertook a similar investigation, despite some of the involved firms operating or exporting into the region.

[05] *Cement cartel* – competition authorities in South Africa, Namibia, Tanzania and Zimbabwe investigated similar or related cartels; this cartel operated across the globe and has been implicated throughout the continent.

Source: OECD, 2018

A similar trend is observed in relation to mergers with a global or regional effect. In such instances, countries assess cross-border mergers independently and, at times, impose different (or no) conditions. This is another example that highlights the potential benefits of a regional perspective to allow for greater alignment between countries in assessing mergers. Such an approach also allows for the imposition of conditions advantageous to all member states.

Box 18. Cross-border mergers that would have benefited from a regional assessment

[01] Walmart/Massmart transaction – this transaction was notified in Eswatini, Namibia, Malawi, South Africa, Tanzania, and Zambia. Only Namibia and South Africa approved the transaction subject to conditions.

[02] Coca-Cola bottling transaction – this transaction was notified in Botswana, Kenya, Namibia, South Africa, Tanzania, and COMESA. Only South Africa approved the transaction with conditions.

[03] AB InBev/SAB transaction – this transaction was notified in Botswana, Eswatini, Ethiopia, Kenya, Malawi, Namibia, South Africa, Tanzania, Zambia and Zimbabwe. Seven of these countries approved the merger subject to conditions.

[04] Bayer/Monsanto transaction - this transaction was notified in Kenya, South Africa, Tanzania and COMESA. COMESA and South Africa approved the transaction subject to conditions.

[05] Dow/DuPont transaction – this transaction was notified in South Africa and COMESA. South Africa approved the merger and imposed conditions whereas COMESA approved it without requiring any conditions.

Source: OECD, 2018

Effective regional competition authorities need sufficient resources and means (human, legal and financial) to be independent and meet the demands of enforcement in the markets covered. They also need sufficient capability to make proper assessments, including the analysis of regional geographic market and the scrutiny of cross-border anti-competitive effects.

Regional authorities should also empower national authorities, notably through capability training. As highlighted in the cluster analysis above, national competition authorities face a variety of challenges depending on the level of development of the competition regime. For each cluster, regional authorities may provide support.

2.8. Conclusion

African countries must build more effective competition regimes and enhance cooperation and coordination at the regional level to counter the anti-competitive conduct of multinational firms. The lack of adequate competition laws and varying capacities of national competition institutions pose significant challenges. Many African countries lack experience and resources in this regard.

Developing competition regimes in Africa requires significant effort, with limited information available on investigations and track records. Prioritizing enforcement efforts against market concentration and collusive behaviour is necessary, but limited resources hinder the assessment of international mergers and the tackling of cartels and abuse of dominance.

Regional organizations such as COMESA, EAC, ECOWAS, SACU, SADC and WAEMU, hold potential for enforcing competition laws, including in the agriculture and food sector. However, most require reforms to strengthen their enforcement capabilities.

By prioritizing the development of robust competition regimes, allocating adequate resources, and strengthening institutional capacities, African countries can foster fair competition, prevent market distortions, and ensure economic growth and consumer protection in the agri-food sector and beyond. Part 3 provides pathways for strengthening competition regimes in Africa.

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PART 3

Part 3: A Reform Agenda for African Competition Institutions to Empower African Producers and MSMEs in Agri-Food Systems

3.1. The case for stronger competition laws, policies, and institutions in Africa

Part 1 of this report reviews the state of concentration and competition in agriculture and food markets and the consequences for producers and MSMEs in Africa. Part 2 provides a review of the actions taken by African competition authorities against anti-competitive conduct in agri-food systems to date and a situation analysis of competition laws and institutions in Africa.

Part 3 identifies reforms to African competition regimes to meet the challenges that producers, MSMEs, and consumers now face as well as the steps to develop the enforcement capabilities of African competition authorities. It also identifies the key issues for building African regional and international enforcement and highlights the importance of a market observatory to support better competition data and analysis in the continent.

The reforms to ensure competition regimes in Africa are fit for purpose should draw on the rethinking of competition rules underway to tackle digital platforms. The proposals in the United States, the United Kingdom and the European Union aim to reduce the high levels of concentration and entrenched incumbent positions of the large digital platforms (Schnitzer et al., 2021; Chopra & Khan, 2020). These complement the approach in South Korea which has set rules for its major conglomerates to ensure their conduct remains consistent with the country's development goals (Cheng, 2020). For African countries, agriculture and food markets require a similar approach to ensure effective rules for large companies.

3.2. Five areas for action and reform

Five areas for action and reform are needed to address the negative impact of concentrated market power in agriculture and food markets across Africa. The first three opportunities can happen immediately with important positive impacts. The second two require more time and longer-term investments to yield results. The different areas for reform are mutually reinforcing and should be implemented in a coherent and complementary manner.

First, there is an urgent need to scale up support to the nine mature African competition institutions to enable them to act and enforce laws more effectively. This can be done through technical and legal assistance with market inquiries, cases, and ex-post merger reviews, as well as through the development of a common knowledge base such as a market observatory tool.

Second, there is an immediate opportunity to build the capabilities of the 17 nascent African competition institutions. This can be achieved through learning and exchanges with the mature authorities, support for enforcement, and improving the availability of data and analysis on market conduct. It includes South-South learning activities, training on technical and legal issues, and the availability of regular market information and analysis through a common knowledge base such as a market observatory tool.

Third, prioritizing regional African authorities and regional enforcement will help to build a continent-wide response. Better coordination and cooperation between regional competition authorities as well as with national institutions will ensure that cross-border anti-competitive conduct is regulated. This is of particular importance for countries that currently do not have in place competition laws or institutions. This can be achieved through regional economic commissions, like COMESA and WAEMU, increased regional cooperation, and technical assistance for regional regimes.

Fourth, mobilizing political support among affected constituencies in countries, such as farmers' cooperatives, associations of MSMEs, and civil society, will ensure lasting support for effective competition policies. This can be achieved through targeted support for authorities in the form of advocacy campaigns led by or in collaboration with other stakeholders to build political support for action.

Fifth, introduce and reform existing laws, policies, and institutions in the longer term to ensure flexible and responsive national and/or regional competition regimes. These national and/or regional competition regimes should be rules-based, keep abreast of developments in markets and technology, and implement effective institutions with the authority to prepare and enforce orders.

3.3. Build capabilities and support for effective enforcement: technical and legal assistance

A multi-pronged strategy is needed to address the diversity of experiences among African competition authorities, and to build their capacity for more effective enforcement. The record of the more mature competition institutions (Cluster A) on merger reviews and cartel enforcement is mixed. And yet, these two functions are essential to tackle the high levels of concentration observed. Much more needs to be done for competition regimes to step up to the challenges posed by concentration in African agriculture and food markets and the implications for food security, inequality, and climate change on the continent.

To reach the appropriate findings within the timeframes indicated, authorities require robust capabilities and powers. The necessary capabilities include the ability to identify anti-competitive conduct and merger impacts, while unique powers are needed to obtain company and market specific information such as detailed information on market outcomes over time, and marketing and strategy documents from the firms concerned. These powers need to be robustly exercised.

The relevance of this data is evident, and the companies generally have the data easily available, as it relates directly to the decisions around supply and pricing which they use to operate their businesses. However, companies and their advisers will naturally seek to provide only the data which is favourable to their case. Authorities must therefore use their powers to compel the provision of all necessary information.

It is also crucial for authorities to consider the research over recent decades pointing to the likely harm from mergers which increase concentration, within and across borders, especially within agricultural and food markets. Authorities need to have the capacity to challenge such transactions in terms of setting out the harm and in undertaking the necessary analysis.

While the challenges are substantial, there are also important sources of assistance. In many cases, the companies, products, and services are the same across countries. There is considerable scope for peer learning between competition authorities across Africa. Some forums already provide opportunities for sharing insights and approaches on the continent; however, it needs to be substantially scaled up. A common pool of technical advice and knowledge on markets in Africa, working with African competition authorities, could have a big impact together with a proposed market observatory.

3.4. A market observatory tool to support competition policy and enforcement

Access to market data empowers authorities to more effectively regulate and enforce laws. To assess market structures and market outcomes, public authorities require data on prices and quantities. Big businesses integrated across regions have extensive private information databases and can lobby for favourable trade and industrial policies and regulations. A public knowledge base that tracks market outcomes is essential for appropriate policymaking and for enforcement. Research organizations with a strong research and analytical base are also important for assisting young institutions to frame questions and prioritize enforcement, including introducing reforms and enforcement.

Independent market monitoring is paramount for food systems transformation (see Fanzo et al., 2021; Folke et al., 2019; Dinesh et al., 2021). Monitoring is necessary for evidence-based reviews of initiatives in a 'test-and-learn' approach, with institutional cross-country learning-by-doing. A concrete example of this is competition policy-led steps such as codes of conduct for supermarkets (as adopted in different forms in Namibia and Kenya, following examples in countries such as the United Kingdom).

In this sense, a **market observatory**, in partnership with national and regional competition authorities, the African Competition Forum, and public research institutions is key. It should focus on the main markets and value chains and combine market monitoring with technical expertise and advice in investigations and market inquiries.[11] It is also necessary to locate competition within the wider set of market rules by addressing the ways in which regulations affect competitive rivalry and firm strategies. For example, regulations which act as trade restrictions bolster the market power of dominant firms within countries.

The market observatory can be linked to the legal and technical assistance (section 3.3) and provide analysis for competition authorities. This could include assessing the likely operation of regional and international cartels, regional mergers, and abuse of substantial market power by dominant firms.

There is a growing network of organizations working in Africa on food, agriculture, and climate change. However, they are not generally incorporating an assessment of markets and market power. The market observatory will build a common knowledge base on concentration and market power and link the organizations working in different ways on sustainable agri-food systems transformation.

11. The EU has an observatory for food and agriculture markets. However, it is unlikely that African countries will collectively undertake such an initiative and instead will partner with it.

3.5. Prioritize regional competition institutions and effective regional enforcement

Regional enforcement and cooperation between national competition authorities is essential to improve the continental rules-based regime for agriculture and food markets. The drawing of borders by colonial powers in Africa meant that, perhaps even more than in other continents, many natural geographic markets (where buyers look for ready sources of supply in relative proximity) are cross-border. For example, the closest port to Johannesburg is Maputo in Mozambique. As a landlocked country, Rwanda must rely on ports in Dar Es Salaam, Tanzania and Mombasa, Kenya. Competition cases in South Africa, as well as Kenya and Zambia, point to the regional (cross-border) dimensions of anti-competitive arrangements including in food and agriculture markets.

The governance of value chains by large and leading firms, such as supermarket chains, and the expansion of major traders, input suppliers and processors mean that food and agriculture markets are especially likely to be regional in scope (Das Nair, 2019; Mondliwa et al., 2021). Regional enforcement and cooperation can take the form of **cooperation** between authorities sharing views and studies, facilitated by researchers including via the proposed market observatory, and **formal coordination** through collaborating on investigations and inquiries as is the case on international cartels[12] and some mergers.

Effective regional competition authorities need to have the sufficient resources and means (human, legal, and financial) to be independent and meet the demand of enforcement in the markets they cover. They also need enough capability to make proper assessments, including the analysis of regional geographic market and the scrutiny of cross-border anti-competitive effects.

Regional authorities should also empower national authorities, notably through capability training. As highlighted in the cluster analysis (Part 2), national competition authorities face a variety of challenges depending on the level of development of the competition regime. For each cluster, regional authorities could provide the following support:

- **Cluster A:** For countries with experienced institutions with a strong enforcement history, regional bodies will remain important. Their role will include not only coordinating knowledge sharing between countries in the region but assisting in merger notification of regional and global mergers and allowing for information exchange between mature competition institutions and their counterparts in the European Union and the United States.

12. Where, for example, inspections of companies ('dawn raids') have been coordinated around the world.

- **Cluster B:** For countries with competition institutions that have a growing track record, regional bodies may provide crucial technical support (for investigations and economic analysis) particularly in matters with a cross-border impact. Further, regional bodies may assist in establishing peer review mechanisms with countries in Cluster A. This would be highly beneficial for these countries as there are potential benefits to learning from the experience of other institutions.
- **Cluster C:** For countries with a nascent competition regime, regional authorities may play a greater role in the establishment of these national authorities. This may be in coordinating peer review mechanisms with more developed authorities and assisting in upskilling staff to allow for greater technical capability.
- **Cluster D:** For countries that currently do not have national competition laws or institutions in place, it is essential to prioritize better coordination and cooperation with regional bodies to ensure that competition matters are addressed, whilst greater advocacy is conducted to enact national competition laws.

In southern and eastern Africa, lessons can be learned from the COMESA Competition Commission which has been building its merger review process together with national institutions and is now extending to enforcement. In addition, the ongoing **tripartite process** across COMESA, EAC and SADC, with the drafting and adoption of a competition protocol underway, is an important cooperation initiative to strengthen national institutions and build regional institutional capacity.

The regional and multilateral developments need to be supported by research on markets and expert advice, as part of the evolution of the AfCFTA competition agenda. This includes defining national and regional authority responsibilities, building trust, and addressing legal obstacles to cooperation.

Progress in this regard will further support an African position relating **to reform of international competition rules** which is essential given the global scope of competition issues.

Advice, research and technical support provided by the market observatory and research institutions should include cross-country research studies with competition authorities, assistance with cross-border market inquiries and cases, and advice on rules and regulations as part of the development of institutions and the regional and continental competition regime.[13]

Research will demonstrate the effects of poorly working markets and the positive outcomes from competition interventions. This is an important part of building broad-based coalitions behind a fair, inclusive, competitive market agenda led and implemented by African institutions and stakeholders.

13. Examples include procedures and regulations for merger screening, appropriate public interest tests, prioritization procedures, cartel screening, advocacy campaigns and undertaking inquiries (see Kariuki & Roberts, 2016; Bonakele et al., 2022; Makhaya & Roberts, 2013; Ramburuth & Roberts, 2009; Roberts, 2013, 2014, 2019a, 2019b, 2020; Roberts et al., 2017). These types of initiatives need to be combined to have the required scaled-up impact with regard to food and agriculture markets.

3.6. Mobilize constituencies behind institutions to build political will for action

By their nature, competition cases require tackling powerful interests. An institution's ability to do this, in practice, depends on it having broad-based support, from government and important constituencies such as producers, MSMEs, and consumers. To mobilize support on an ongoing basis, it is essential to build advocacy campaigns, based on the evidence, to empower the competition authorities. The failure to mobilize constituencies and build advocacy campaigns leaves authorities isolated and vulnerable to lobbies and powerful interests.

Competition cases and inquiries conducted by African authorities have built-up an evidence base on the harm caused and the benefits of robust enforcement. However, this evidence needs to be drawn on by support networks such as research centres and presented in accessible ways to build support for enforcement. An example of this, at a global level, is how the case has been built from research to policy reforms to tackle digital platform power. A similar effort is required for agri-food markets in Africa.

Mobilization of constituencies means explaining the effects, as outlined in part one of this report, on groups such as small-scale producers, MSMEs, and urban consumers. Mobilization through advocacy, advice and technical assistance informs policymakers on the necessity of reforms and how they can be implemented. This includes drawing on analysis of the harm from extreme concentration, substantial market power and anti-competitive conduct, and the lessons learned where authorities have such powers and have used them.

3.7. Reform competition laws, policies and national institutions

In the long-term, law, policy, and institutional reforms are required to strengthen competition regimes. These reforms need to ensure flexible and responsive competition regimes which are rules-based; can keep-up with developments in markets and technology; and, have effective referees (institutions) to make and enforce orders. The reforms will require amendments in many countries across Africa (to differing extents depending on the current laws and institutions, as outlined in Part 2).

At a national level, law, policy, and institutional reforms are recommended in six main areas:[14]

3.7.1. Expand the objectives of competition laws to promote healthy, sustainable markets in the interests of balanced and inclusive economies in African countries

The objectives of competition laws have been generally focused on consumer welfare and economic efficiency, and not on effective economic participation in the interests of balanced economic development. This restricts the role of authorities to analyse why markets are not functioning, including the effects of economic concentration and market power, for example, through market inquiries. To tackle the concentration in agricultural markets, in the interests of small-scale producers, MSMEs, and consumers, it is crucial for authorities to have a wider mandate.

3.7.2. Grant general powers for competition authorities to obtain information from companies and third-party data gatherers for purposes of pursuing their mandate

Through digitalization, large amounts of data are being collated by third parties and companies. Competition authorities require access to this data for the exercise of their mandate, and under obligation to maintain confidentiality, if applicable. This is crucial for African competition authorities, for which the information asymmetries and resourcing challenges are extreme. At present, many authorities do not require disaggregated firm-level data and documents and instead rely on what the firm's advisors provide to the authority as part of influencing the direction of an inquiry.

Transparency itself will have an impact on companies' conduct. They will anticipate being more readily held to account compared with their current ability to act with impunity.

3.7.3. Tighten merger control for international deals, conglomerate mergers and those with effects on livelihoods, food security, nutrition, and climate change

Merger control needs to place greater weight on the likely harm from increasing concentration. This should include the assessment of possible effects of vertical and conglomerate mergers, by reversing the onus on very large incumbents when they make further acquisitions. One aspect is widening merger review to cover 'creeping mergers', where large firms acquire many smaller businesses and each merger on its own does not raise substantial competition concerns.

From a geographic market perspective, it is essential to strengthen assessment of the likely cross-border effects of a merger. It is necessary to review acquisitions of firms in adjacent geogra-

14. These are not unprecedented and draw from the approach adopted in jurisdictions such as South Korea (Fox, 2002), Germany and Japan, and proposals being considered elsewhere, including those set out by Eeckhout (2021), Wu (2018), and Aghion et al (2021).

phic markets and to properly assess the cross-border effects in Africa of local competitors being acquired by multinationals. The business plans of the companies and likely market developments must be considered to determine the potential harm to competition, such as where the firm being acquired would have likely grown as an effective competitor.

Mergers which may impact economic development and food security should be submitted to a public interest test. If the merger has been approved on information which turns out to be incomplete or conditions for approval have not been fulfilled, the regulatory framework should enable divestiture.

Finally, an effective international merger regime requires sharing of information across all affected jurisdictions, to assist African authorities in assessing effects in their countries.

3.7.4. Ensure collusion (cartel) enforcement addresses international arrangements and those involving information exchange

By placing the onus on multinational companies where they have been found to have colluded in one jurisdiction, companies will be required to confirm through affidavit that the conduct did not impact on other jurisdictions in Africa where they operate. Companies will also bear the burden of proof to justify the submission of information with potential competitive significance to industry associations and other third parties.

Effective cartel enforcement also requires empowering competition authorities to obtain information, with potential competitive significance that is shared by firms including indirectly via industry associations and other third parties. This is especially important in agri-food markets, where associations play a key role.

3.7.5. Strengthen abuse of dominance (substantial market power) provisions, reverse the burden of proof, and control the players with substantial market power to limit abusive behaviours.

This requires placing a general obligation on companies with substantial market power not to lessen, prevent, or distort competition (as is already the case in some, but not all, jurisdictions).

Regulatory provisions should enable authorities to designate firms with an entrenched position of substantial market power. This includes firms that have 'gatekeeper' power in a market or markets and/or over a value chain,[15] or have 'strategic market status' due to the nature and extent of their market power. For such companies, orders should be issued to oblige the designated firm to terminate specified conduct that is particularly damaging to competition. Examples of such conduct include creating or raising barriers to entry, extending its position into non-dominated markets, or undermining smaller rivals by refusing access to necessary facilities or data.

15. See provisions in section 19a of the 10th amended German Competition Law (July 2021) on conduct of undertakings with paramount significance for competition across markets.

The abuse of dominance provisions should also ensure that companies with significant market power cannot abuse their position in the market vis-à-vis smaller competitors who might depend on them.

3.7.6. Grant powers for competition authorities to conduct market inquiries or studies

Market inquiries - also termed market investigations or studies – enable authorities to address situations where markets are not working well (Motta et al., 2022). Inquiries require powers to obtain information from firms without needing an allegation of a possible contravention of the law in an investigation. This way, authorities can recommend or implement remedies, such as ('no fault') divestitures, and establish appropriate regulatory mechanisms. The Groceries Code Adjudicator for supermarkets in the UK is an example. Market inquiries also allow for the assessment of market workings and outcomes in broader terms than alleged anti-competitive conduct. This could include, for example, sustainability, economic development concerns, and effects on vulnerable consumers.

The recommended reforms detailed above provide a roadmap for competition regimes to tackle concentration and market power in agri-food systems in Africa. The implementation needs to be appropriate to the current situation of countries which are at varying stages of development of their competition regimes and has implications for the organisations supporting the institutions as well as for the competition authorities. We group the proposed reforms in a table using the clusters defined in Part 2, as follows (Table B).

Table B. Proposed reform agenda by competition regime cluster

Competition regime cluster	Recommended priority areas
Cluster A – Established institutions with strong enforcement history and capacity	• Establish specialized departments within institutions to increase the technical expertise of investigators. • Grant powers to competition institutions to conduct market inquiries or studies. • Amend laws to include provisions that enable an improved capture of certain conducts – ensuring cartel enforcement addresses international arrangements and tightening merger control for international deals. • Strengthen abuse of dominance (substantial market power) provisions by reversing the burden of proof and monitoring the players with most market power to limit abusive behaviours. • Coordination and cooperation with competition authorities from developed countries (through bilateral agreements). • Technical and legal assistance to enable authorities to take more effective action against anti-competitive conduct (e.g. supporting market inquiries, providing price information for cases, ex-post merger reviews, and through a common knowledge base such as a market observatory tool).

Competition regime cluster	Recommended priority areas
Cluster B – Established competition institutions with a limited enforcement history	• Law and policy reforms to ensure flexible and responsive competition regimes which are rules-based; can keep-up with developments in markets and technology; and have effective institutions that can make and enforce orders (e.g. establish a specialist body or court to provide an effective appeal process to the decisions of the investigating authority; enacting a corporate leniency policy; creating specialized departments within the authorities to increase the technical expertise of investigators). • Ensure collusion (cartel) enforcement is able to address international arrangements and those involving information exchanges. • Strengthen abuse of dominance (substantial market power) provisions reverse the burden of proof and monitoring the players with most market power to limit abusive behaviours. • Tighten merger control for international deals, conglomerate mergers, and those with effects on livelihoods, food security, nutrition, and climate change. • Mobilize constituencies behind the authorities to build political will for action and increase the available resources (e.g. employees, budget, etc.). • Collaborate and coordinate with regional competition regimes. • Build capabilities through technical assistance (e.g. providing support for priority investigations). • Provide data and analysis on market conduct (market observatory tool). • Learning and exchanges with more mature competition authorities (e.g. establishing bilateral and multi-national agreements for peer review, information sharing, knowledge building and greater coordination on cases).
Cluster C – Nascent competition regimes	• Expand the objectives of competition law to include promoting healthy, sustainable markets in the interests of balanced and inclusive economies. • Grant general powers to authorities to obtain information from companies and third-party data gatherers for purposes of pursuing their mandate. • Grant powers to competition authorities to conduct market inquiries or studies. • Mobilize constituencies behind the authorities to build political will for action and increase the available resources (e.g. employees, budget, etc. • Build capabilities through technical assistance • Provide data and analysis on market conduct (market observatory tool) • Learning and exchanges with the more mature competition authorities (both national and regional)
Cluster D - Countries without national competition laws and institutions	• Mobilize constituencies behind the authorities to build political will for action. • In the interim, prioritize regional competition institutions and effective regional enforcement to address conducts and acquisitions with a regional impact. • Put in place law and policy reforms to create flexible and responsive competition regimes which are rules-based; can keep-up with developments in markets and technology; and build effective institutions that can make and enforce orders.

3.8. Conclusion

African countries urgently need effective competitive regimes to address high and increasing concentration in agri-food markets. The introduction of competition laws and the establishment of independent competition authorities are the best institutional fixes for abuse of market power and its resulting consequences (North et al., 2009; Acemoglu & Robinson, 2012; Stiglitz, 2017). These institutions now need to scale up their efforts.

The proliferation of competition laws around the world is one of the most striking developments in recent years (OECD and International Competition Network, 2021). However, competition regimes have not yet proved effective in tackling excessive concentration and its negative effects. First, the extent of market power is much greater than anticipated. Second, authorities require greater powers and capacity than has generally been allocated in legislation. Finally, competition regulators in low and middle-income countries in Africa are simultaneously challenged by the difficulty of regulating powerful and well-connected entities and their limited experience and resources.

Effective enforcement of competition laws on a global scale is a prerequisite for open economies, fair trading conditions, a level playing field, and, ultimately, inclusive economic development for enhanced food security and better lives (Ratshisusu et al., 2021). This report identifies four clusters of competition regimes across Sub-Saharan Africa in order to propose an appropriate institution-building agenda tailored to a country's national context and existing competition framework. These clusters are based on indicators such as the adoption of competition laws and the properly functioning competition institutions.

This analysis shows that Africa boasts a vibrant and rapidly growing body of competition agencies both domestically and regionally. Some national agencies and regional bodies are advanced with competition laws and active enforcement of conduct. Others, however, are at a nascent stage. As a result, a tailored approach is needed to address the development stage of these competition regimes and thus curtail market concentration in agriculture and food markets in Africa.

Regional competition authorities are paramount in addressing cross-border anti-competitive behaviours. These regional competition authorities exist but their enforcement actions have been limited. With the exception of the COMESA Competition Commission, few regional competition regimes are currently operational. The extent of cross-border markets in Africa, and the regional footprint of the major agriculture and food businesses, requires effective regional competition bodies for markets to function properly.

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FINAL THOUGHTS

For more than two decades, agriculture and food markets have been increasingly controlled by fewer and fewer companies. Small and medium food producers and agricultural enterprises struggle to compete, even when they offer greater efficiency, innovation and lower prices. As a result, producers and consumers in many countries face high prices, less innovation, and high barriers to entry in agri-food markets. These are key drivers of poverty and food insecurity across Africa.

The current activities underway in the European Union and United States to break up dominant digital platforms demonstrates that reform is possible. Low and middle-income countries should build on this momentum and take action.

The effective establishment and enforcement of competition laws is a prerequisite for open economies, fair trading conditions, a level playing field, and ultimately, inclusive economic development for enhanced food security and better lives. This report demonstrates how this can be done in Africa.

Part 1 documents the increasing concentration in food and agricultural markets and analyzes its impact in Africa. It outlines the specific challenges confronting developing countries in competition law and policy.

Part 2 of this report provides a situation analysis of competition law and policy regimes in Africa which are, with some exceptions, not up to the challenge of effectively enforcing competition in markets dominated by a few large multinational firms. It also reviews the actions taken by African competition authorities against anti-competitive conduct.

The final part of this report presents a reform agenda to strengthen competition regimes to lessen the impact of concentration in African food and agricultural markets. Based on the four clusters of competition regimes identified in Part 2, this section proposes an appropriate institution-building agenda tailored to a country's national context and status of their competition framework.

This research supports efforts to strengthen competition law and policy to enable producers and MSMEs to have fairer and more competitive access to markets, while protecting consumers. Empowering African food producers and agricultural enterprises will reduce poverty, help end hunger and strengthens local economies.

Empowering African Food Producers and Agricultural Enterprises Through Stronger Competition Law and Policy

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