



# 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 mandated 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-com-

petitive 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<sup>4</sup> 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<sup>5</sup>.

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

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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<sup>6</sup>. 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 inquiries 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**

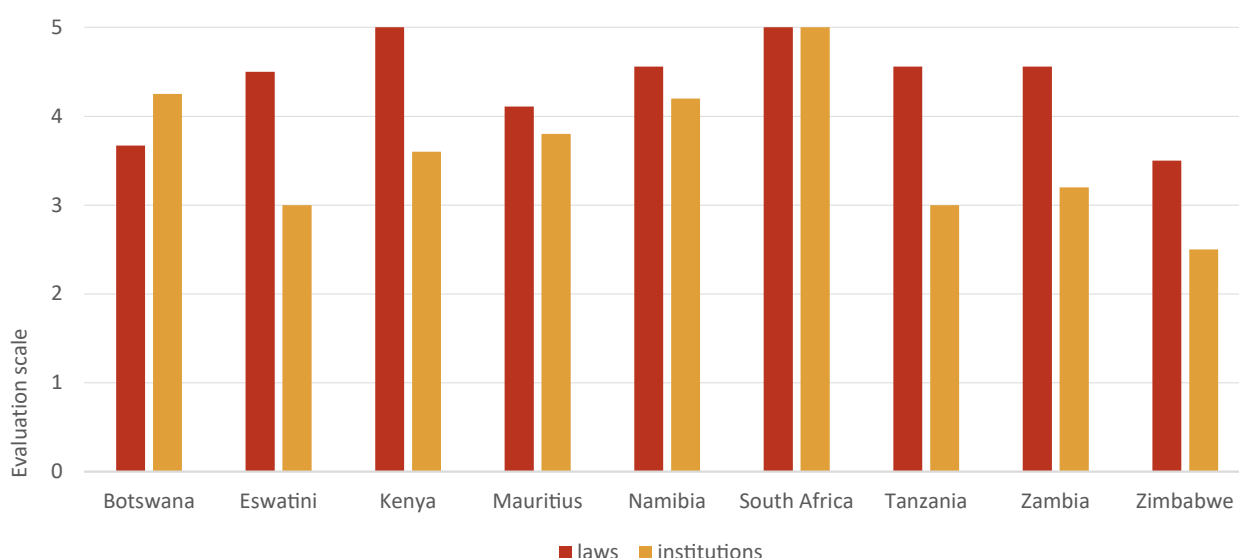
Botswana	South Africa
Eswatini	Tanzania
Kenya	Zambia
Mauritius	Zimbabwe
Namibia	

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

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

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

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)<sup>7</sup>.

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.<sup>8</sup>

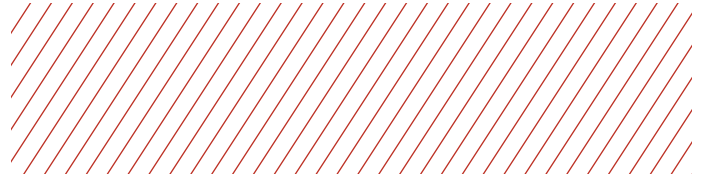
The majority of authorities operating in these countries have little specialization to target the main areas of conduct. This means that these institutions do not have divisions dedicated to particular conduct or arrangements (divisions for cartels, mergers, and enforcement or market conduct, for example). 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).

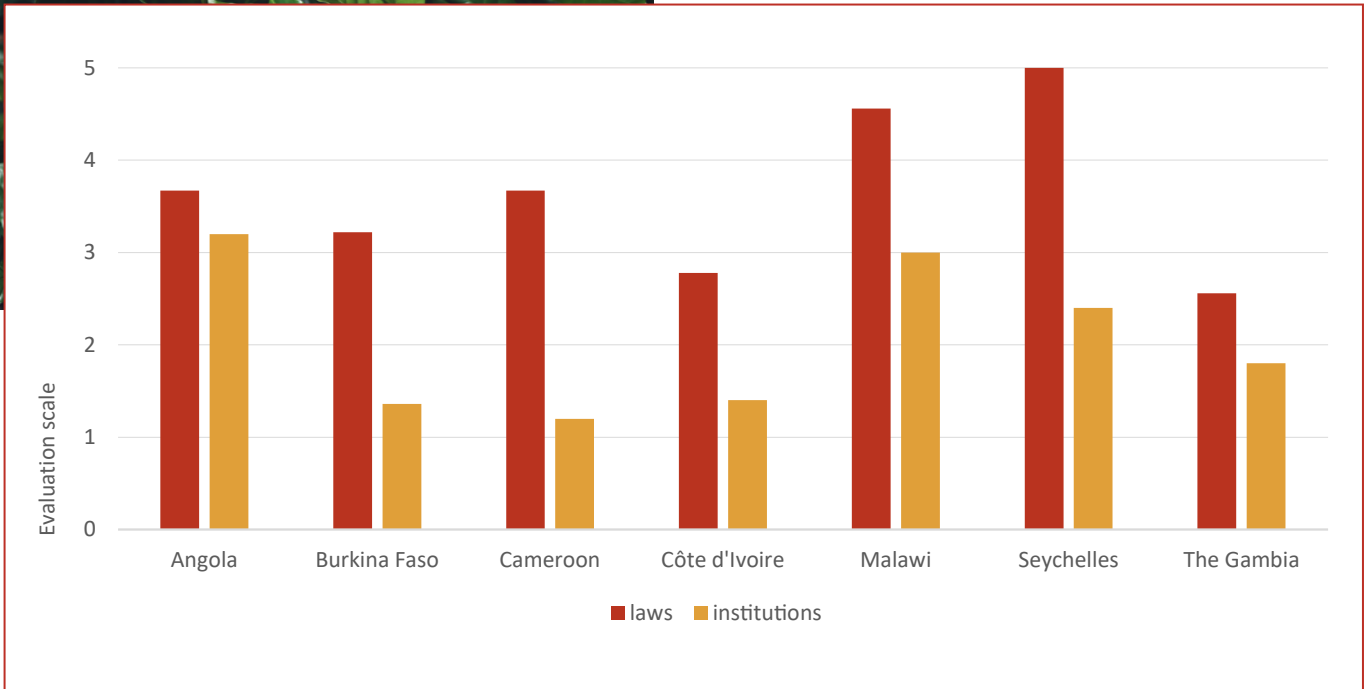
7. Interview with Amadou Ceesay from the GCCPC on 30 March 2023.

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

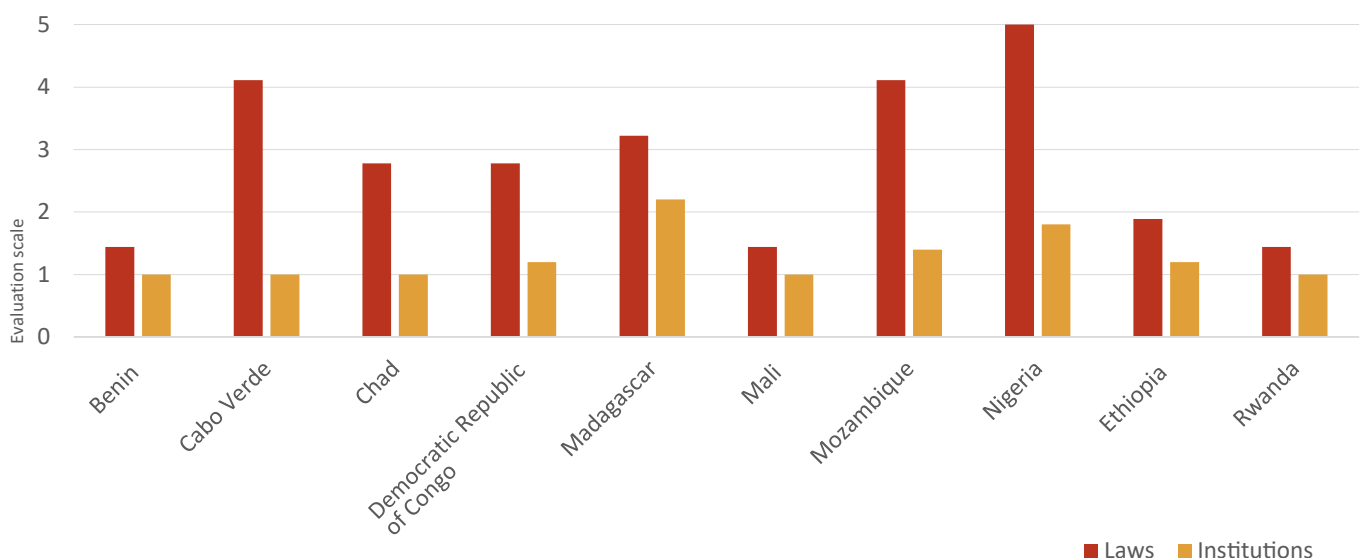
The five-point scale shows that Nigeria, Mozambique and Cape Verde aligned with or close to the baseline expectations. However, the competition authorities have been in operation for less than five years and their organizational structure does not include divisional specialization focused on conduct (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.<sup>9</sup>

### 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

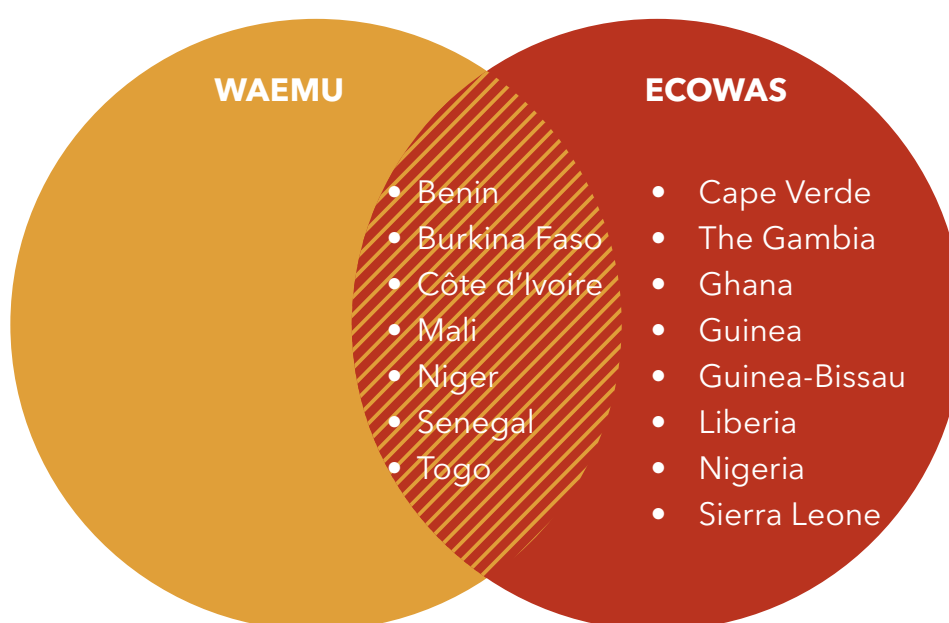
In many agri-food sectors, including fertilizer, poultry and sugar, dominant firms govern regional value and supply chains (Padayachie & Vilakazi, 2022). Regional organizations therefore have a catalytic role in the enforcement of competition laws and policies to tackle and deter anti-competitive behaviours 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 through 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
<b>AFCFTA</b>	<i>AfCFTA Competition Protocol negotiations ongoing</i>	<i>AfCFTA Competition Protocol negotiations ongoing</i>	<i>AfCFTA Competition Protocol negotiations ongoing</i>	<i>AfCFTA Competition Protocol negotiations ongoing</i>
<b>CEMAC</b>	CEMAC Regulation adopted in 1999, revised in 2019: <i>Règlement relatif à la concurrence n°06/19-UEAC-639-CM-33 du 7 avril 2019</i>	CEMAC authority	<i>No information available</i>	Cameroon, Central African Republic, Chad, Equatorial Guinea, Gabon, Republic of the Congo
<b>COMESA</b>	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.
<b>EAC</b>	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
<b>ECOWAS</b>	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
<b>SACU</b>	2002 ACU Agreement Article 40 and Article 41	No information available	No information available	Botswana, Lesotho, Namibia, South Africa, and Swaziland.
<b>SADC</b>	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.
<b>WAEMU</b>	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 set up its Competition Commission in 2007.

ECOWAS, established in 1975, is a trading and political union with 15 member states<sup>10</sup>, 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.



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.

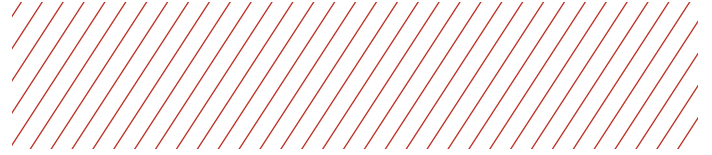
Developing competition regimes in Africa requires significant effort, with limited information available on investigations and track records. Prioritizing enforcement efforts against market concentration and collusive behaviour is necessary, but limited resources hinder the assessment of international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