



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 cartels¹² 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
<p>Cluster A - Established institutions with strong enforcement history and capacity</p>	<ul style="list-style-type: none"> • 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
<p>Cluster B - Established competition institutions with a limited enforcement history</p>	<ul style="list-style-type: none"> • 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).
<p>Cluster C - Nascent competition regimes</p>	<ul style="list-style-type: none"> • 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)
<p>Cluster D - Countries without national competition laws and institutions</p>	<ul style="list-style-type: none"> • 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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