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# TOWARDS A TRACKING SYSTEM TO ENFORCE COMPETITION LAW IN THE SOUTHERN AND EAST AFRICAN REGION

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# Introduction

Because competition authorities have become increasingly interested in evaluating both their impact on markets and effect on consumers, we now have measures and benchmarks for ex-post evaluation of enforcement. Robust ex-post evaluations help authorities show the benefits of having competition policy in markets, and also their impact on consumers' wellbeing. They help competition authorities improve enforcement and the quality of their decisions (Ilzkovitz & Dierx, 2015). Assessing an authority's substantive interventions and internal procedures can also provide it with invaluable insight into how to improve its overall performance (Kovacic, 2006). These evaluations allow us to examine the effects of the existing regulation and provide a basis for major procedural and administrative changes which may be needed for the authority and the law to function optimally. Ex-post evaluations are crucial for competition authorities and, by extension, other regulators, to meet their objectives and successfully enforce competition law.

The current measures and benchmarks designed and applied in developed countries are not always suited to developing countries. One major constraint is data which causes difficulties for the southern and east African region authorities to carry out studies. Instead, to date, the impact of competition on markets has been measured on a case-by-case basis. However, such measures have also been argued to be imperfect measures – to the extent that findings cannot always be generalised. This gives rise to the need to design different measures and benchmarks specific for ex-post evaluations in the developing countries. A starting point is to appreciate what data is available from competition authorities regarding their enforcement activities and resources. This can be used to track authorities' progress and capabilities so they can benchmark themselves in their efforts to improve performance.

Over the years there have been attempts to develop datasets which measure competition enforcement activities and resources, but these have tended to be limited in their own right. For example, Clougherty (2010) used data on enforcement budgets to examine trends in competition policy. As will be discussed in this paper, information on enforcement budgets is not always available for competition authorities in the southern and east African region. Other databases include the Global Competition Review (GCR). This database, while useful, is not always available for public use and primarily captures information on a small number of Organisation for Economic Co-operation and Development (OECD) countries.

To overcome this gap in the literature, Bradford et al. (2019) sought to create a comparative competition authorities database. The authors collected data on the activities and resources of competition authorities across 100 jurisdictions between 1990 and 2010. This study is particularly useful because it provides a template for the cross-national collection of data in the region – with the caveat that the variables would need to be tailored for the region.

This study argues that a comparative database would be more useful in the regional context to allow for comparative and country-specific analysis of competition authorities. It would highlight areas to assist in tracking competition activities and resources while highlighting areas for better data reporting.

This paper explores the potential to create a comparative database of the major characteristics of competition authorities in the southern and east Africa region, akin to the approach adopted in Bradford et al. (2019). This will help us track existing trends and authorities' progress. It can also be seen as an important step towards enabling authorities to learn from each other and monitor progress on their activities.

To test the broad applicability of, and to understand the quality and breadth of data available to track progress, this study focuses on a selection of competition authorities in the region, namely Kenya, South Africa, Zambia and Zimbabwe. These were among the first authorities established in the region. In a very exploratory approach, we compiled a dataset deliberately using publicly available information gathered from authorities' websites, annual reports, newsletters and news articles. This data was gathered between 2017 and 2020. This paper:

- offers an overview of competition law enforcement in the region;
- unpacks key outcomes in enforcement of mergers and cartels;
- considers the issue of governance with the understanding that observing due processes reinforces the legitimacy and credibility of competition authorities altogether; and
- presents a proposed template for tracking competition authorities' activities and resources in the region using Bradford et al. (2019).

The database provides a preliminary view of the authorities' activities and their capabilities based on the resources available to them. This template makes the case that with more detailed reporting, this dataset could be built further and used as a tool to provide competition authorities in the region with a useful resource to track and benchmark their progress – and more broadly to improve competition enforcement in the region.

## An overview of competition law enforcement in the region

In the last three decades there has been a proliferation of both national and regional competition authorities in southern and east Africa. The region now has15 enforcement agencies. They are linked through various regional cooperation regimes, including the Southern African Customs Union (SACU), Regional Cooperation on Competition Policy and Unfair Trading Practices, the Southern African Development Community (SADC), Declaration on Cooperation in Competition and Consumer Policies and the Common Market for East and Southern Africa (COMESA) Competition Commission (CCC) (Buthe & Kigwiru, 2020). The cooperation model does not involve creating or adopting a common regional competition law for the regional body, although a multilateral African competition protocol now forms part of policy discussions relating to the Africa Continental Free Trade Area (AfCFTA) agreement. Rather, it involves member states' commitment to adopt national level competition laws, and to cooperate on enforcement.

Despite progress made in the region, a majority of the competition regimes are in their nascent stages of development (See Table 1).

Table 1: Year competition authority operationalised

| Authority | Year |
|---|---|
| Zambia | 1997 |
| Zimbabwe | 1998 |
| South Africa | 1999 |
| Mauritius | 2009 |
| Kenya | 2010 |
| Tanzania | 2007 |
| Namibia | 2008 |
| Mauritius | 2009 |
| Eswatini | 2010 |
| Botswana | 2011 |
| Malawi | 2013 |
| COMESA | 2013 |
| Madagascar | 2015 |
| Rwanda | 2017 |
| East African Community | 2018 |
| Angola | 2019 |
| Mozambique | 2021 |

Source: Authors' compilation from authority websites

A review of the emerging scholarly work reveals a disparity between the stated objectives and enforcement capacity and capabilities of corresponding authorities (Fox & Bakhoum, 2019; Kigwiru & Mwemba, 2021; Moodaliyar, 2012; Molestina, 2019). The studies highlight the challenges facing the enforcement of competition law (Fox & Bakhoum, 2019; Kigwiru & Mwemba, 2021). This includes:

- constrained capacity due to limited financial resources;
- inadequate human expertise;
- jurisdictional conflicts between national and regional competition agencies;
- lack of competition laws at the national level;
- challenges with the design of competition laws; and
- the nascent development of a competition enforcement culture and ecosystem, including networks of legal practitioners, academia and civil society working on competition issues.

While globalisation has enhanced market competition, it has also increased the geographical reach of business transactions, and the international impact of anticompetitive practices (World Bank, 2016). Therefore, the consolidation of markets at a global level, together with restrictive practices now transcending national borders, impact on markets in the region.(Roberts, 2016). The formal process of regional integration through the promulgation of regional economic communities has also contributed to the spread of firms' activities across borders, together with anticompetitive and exploitative practices in African economies (Klaaren, 2021). As a result, dominant firms' market conduct can distort both economic growth and competition in a single jurisdiction and across borders. Competition agencies' cooperation and coordination in enforcement activities is imperative.

However, Klaaren et al. (2017) find that the complex way African competition law has evolved has not resulted in a body of knowledge from which African competition agencies can learn from each other's experiences. As a result, there is poor translation of findings in cases from one jurisdiction to another. One example is cartel findings in South Africa and follow-up investigations in neighbouring countries in SACU and SADC which is also discussed later (Klaaren et al., 2017).

The presence of various competition agencies in the region has meant that certain competition cases – whether mergers or restrictive business practices – will be assessed by more than one authority due to notification requirements. However, given that the different agencies vary in stages of development, and that their resource allocations also vary, enforcement is not necessarily uniform. Key sectors, such as agriculture, construction, and food and beverages have had notable competition cases over the past decade.

To illustrate some of the challenges and opportunities in enforcement, in this paper we consider the broad sectors. Multiple agencies in the region have assessed these cases, with clear differences in their approaches to enforcement, often resulting in different market outcomes. While there have been mechanisms and agreements in place, such as trade and cooperation agreements to promote cooperation in enforcement, the region continues to face challenges implementing them (Sakata, 2021). These challenges have, in part, been attributed to authorities' inadequate knowledge of competition enforcement, a lack of competition culture, and a reluctance by some jurisdictions to exchange information (Sakata, 2021).

Despite the various constraints, it is widely accepted in southern and eastern Africa that competition has a significant role to play in creating more dynamic regional markets. Authorities' implementation of measures to constrain anticompetitive business practices illustrate that there is an increasing understanding that firstly, active competition law enforcement propels increased economic participation and development; secondly, because anticompetitive conduct can go beyond political borders, countries need to cooperate to deal with firms' behaviours that undermine common development goals (Roberts et al., 2017).

Conducting assessments of authorities' enforcement activities is a crucial step in identifying what is needed to create effective support for increased cooperation and allocation of resources. The following sections consider the availability of enforcement data – outcomes on mergers and cartels – in the four selected countries. They also illustrate the types of analysis that can be conducted using a common benchmarking and tracking framework. Given the lack of available data, information on abuse of dominance is not included in this study.

## Mergers

The assessment of mergers largely involves making informed predictions about future developments. Merger control is one of the main pillars of a competition system because it preserves the competitive structure of markets. Merger assessment can be difficult given the multidimensional nature of competition, and the various factors that need to be considered in determining pro- and anticompetitive effects. Data on merger decisions is important because it allows competition authorities to assess whether predictions on specific cases – given the information

available at the time – were appropriate. It also improves the quality of the tools and models for use in future decisions.

All four countries define a merger notification threshold based on the combined assets or turnover of companies, with South Africa and Kenya also differentiating between small, intermediate and large mergers, as shown in Table 2. The South African Competition Act allows for voluntary notification of small mergers by the parties at any time. In some cases, the Competition Commission South Africa (CCSA) may require the parties to a small merger to notify the merger within six months after implementation. Zambia and Zimbabwe do not categorise mergers by size. They have relatively lower notification thresholds at US$2.8m and US$1.2m respectively.

Table 2: Merger notification thresholds, US$ in millions

| Country | Combined turnover |
|---|---|
| **Kenya** | |
| Small | 4.5–9 |
| Intermediate | 9–450 |
| Large | 450 and above |
| **South Africa** | |
| Intermediate | 40 |
| Large | 430 |
| **Zambia** | 2.8 and above |
| **Zimbabwe** | 1.2 and above |

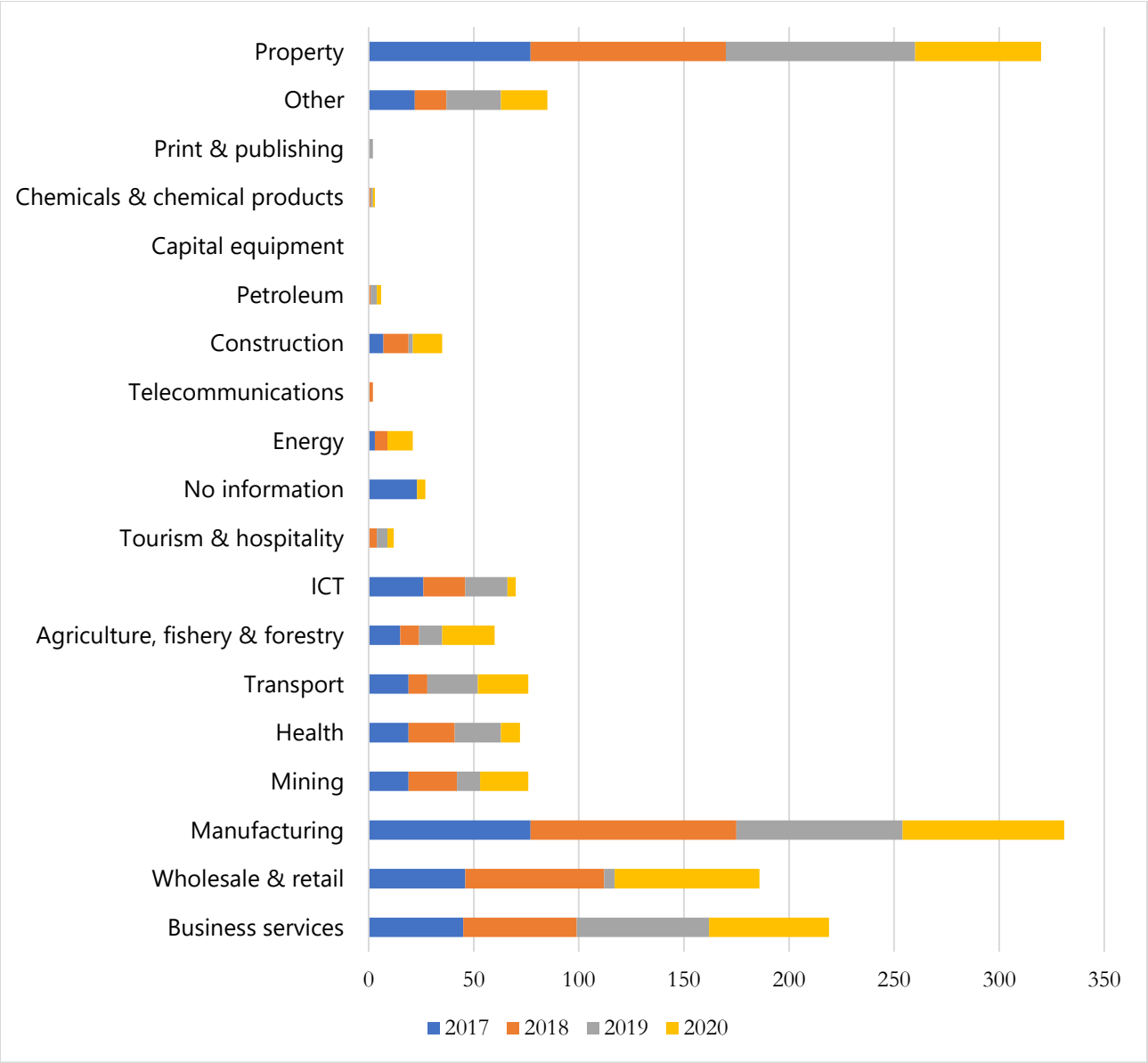
Source: Competition authority data

In small economies where markets are even more likely to be highly concentrated, there may be a strong rationale for requiring all mergers to be brought forward for assessment relative to other economies (Burke et al., 2017), or for relatively lower notification thresholds. A challenge here is that the number of non-problematic cases brought to the authorities could be high. However, this is mitigated by the fact that most of the countries' economies are relatively small. This means a lower number of cases in aggregate terms, as the study in this assessment has found. However, despite the expectation for a lower caseload in smaller economies, the gaps in reporting in some jurisdictions studied is concerning.

Over the period 2017–2020, a total of 1 737 finalised merger cases have been identified across Kenya, South Africa, Zambia and Zimbabwe. South Africa accounted for 1 427 (82%) of all merger cases. The incompleteness of the reported data across the other jurisdictions is concerning, particularly for Zambia and Zimbabwe. Much of Zambia's merger case information is not readily available in the public domain before 2020, and Zimbabwe's case information is relatively patchy.

The aggregate merger activity is broken down by sector to identify whether there are some parts of the economy where merger activity is more prevalent, as shown in Figure 1.

Figure 1: Finalised merger cases by sector, 2017–2020




Source: Competition authority data

The largest category for mergers is the manufacturing sector, with a total of 331 mergers over the four years. This includes mergers in the food and beverage, textiles and packaging industries. This is closely followed by the property sector with 320 mergers, all in South Africa. Many of the acquiring firms in the property mergers are institutional investors such as banks and pension funds, consolidating their ownership in commercial property such as shopping malls and offices. As highlighted by Burke et al. (2017), property owners' decisions often directly affect routes to market for consumer goods through shopping malls. These cases therefore require more analysis to curb possible harms to competition.

Over the four-year period, 185 mergers took place in the wholesale and retail sector, including mergers related to vehicle dealerships, clothing retailers, and supermarkets and grocery stores. The region continues to see the

increasing importance of formal, corporatised supermarkets as a route to markets. This is because they are strong catalysts in stimulating the growth and development of small and medium-sized suppliers of processed foods and manufactured goods (Das Nair and Landani, 2021). The consolidation of retail markets therefore poses potential entry threats to smaller rivals that can contest markets at the supplier level. Mergers in this sector therefore also require specific attention, owing to potential competition concerns in retail and adjacent markets. Notably however, both the CCSA and Kenya's CAK have carried out other enforcement measures such as grocery retail market inquiries and buyer power enforcement guidelines. These aim to address the effects of high levels of concentration in retail markets on smaller suppliers.

Although there is a record of only 60 mergers in the agriculture, fishery and forestry sector, there has been important merger activity across some jurisdictions. All four jurisdictions have seen the consolidation of markets in animal feed, poultry and fish value chains. Zimbabwe, for instance, has had market consolidation with key acquisitions by large vertically integrated market players National Foods and Profeeds. The former, in operation since 1920[1], is Zimbabwe's largest food manufacturer[2], while Profeeds is a leading animal feed manufacturer. In 2020, the Competition and Tariff Commission (CTC) of Zimbabwe prohibited the Profeeds and Produtrade/Ashram Investments merger which would have significantly consolidated the poultry and animal feed market, as discussed next. Kenya and Zambia have also had noteworthy mergers, such as Aaryan Investments/Bidco Land O'Lakes and Yalelo Limited and Aller Aqua Zambia Limited/Veris Aquaculture B.V. respectively.

Growing urbanisation in southern and east Africa has also meant rapid growth in demand in animal feed to service the poultry and fish value chains (Ncube et al., 2017; Nsomba et al., 2021). Large firms have played a lead role in developing the value chain in southern Africa because they are able to make coordinated investments at different levels, along with their strategies of being regional in nature (Ncube et al., 2017). However, as larger firms dominate these industries, regard has to be had to the effects of high concentration levels on consumers' welfare, on smaller rivals within the respective value chains, and on small and medium-sized farmers and traders who provide inputs such as soybean for animal feed production.

## The need for regional competition enforcement

The southern and east Africa region is generally characterised by small, open economies. There is typically a small number of firms controlling production in key industries which are characterised by scale economies, such as in agriculture and agro-processing, and industrial inputs. In some cases, the reach of the largest firms is both within countries and across the region (Roberts, 2016). It is enhanced by the continued global and regional consolidation of markets as highlighted earlier. Large firms may be internationalised along different dimensions, including through

[1] https://nationalfoods.co.zw

[2] http://www.profeeds.co.zw

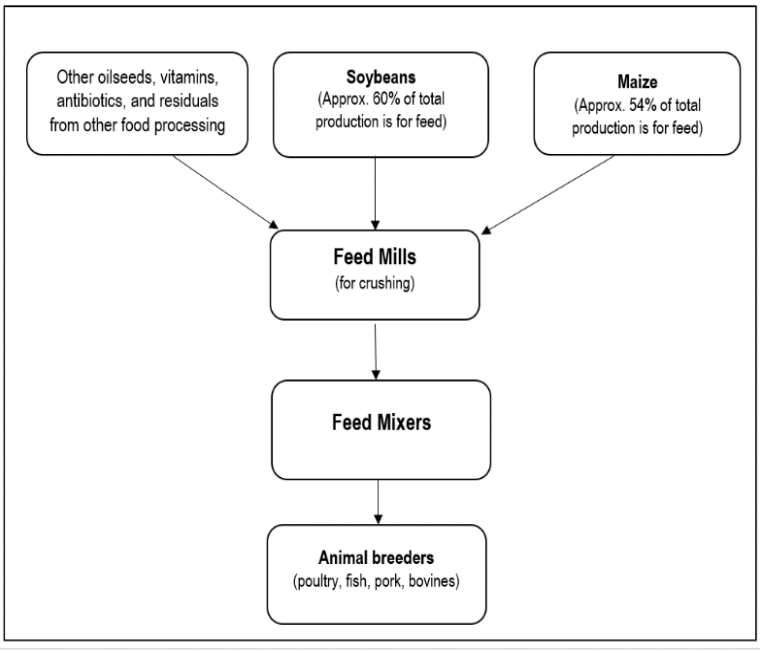
ownership relations, strategic partnerships and distribution arrangements (Roberts, 2016). Within the region the need for data availability and impact assessments is therefore even more urgent, as national competition decisions and outcomes will likely have regional effects and vice versa.

To demonstrate the importance of a regional lens and tracking of mergers, we briefly highlight the Profeeds and Produtrade/Ashram Investments merger which the Zimbabwe competition authorities prohibited in 2020, and the Coca-Cola/Almasi Beverages merger which was approved with conditions in Kenya in 2019. These mergers took place in the animal feed and poultry, and beverages markets respectively. Both are key sectors in the region that encompass growth opportunities. But they also have a history of market concentration and anticompetitive behaviour, which can impede potential gains from market entry and competitive rivalry. Drawing from the discussion so far, these mergers further highlight why a coordinated approach to enforcement is crucial, together a need for regional enforcement where gaps exist, even where national competition regimes are present.

## Profeeds and Produtrade/Ashram Investments

Rapid growth in urbanisation has led to increases in demand for processed food in the region. Demand for poultry has increased as this is the main source of protein in developing countries (Ncube et al., 2017). The poultry industry is a very important part of agro-processing, with strong backward linkages to the production of maize and soya for animal feed. The animal feed value chain is key to understanding soybean as the 'green gold', the key source of protein for animal feed around the world. As Nsomba, Roberts and Tshabalala (2021) schematically represent in Figure 2, at the upstream level of the feed value chain maize, soybeans, vitamins and other products are sourced by feed mills as the primary ingredients. They are then processed into animal feed.

Figure 2: Animal feed value chain




Source: Nsomba G., Roberts, S. and Tshabalala, N. (2021)

To appreciate the potential effects on competition and entry upstream of high levels of concentration in the downstream segments of the value chain, it helps to understand the animal feed value chain.. The region is characterised by integrated market players, from the feeding mills to animal breeding. Further market consolidation through merger activity can also mean customer and input foreclosure in various levels of the chain. This was the CTC's concern in Ashram Investments' proposed acquisition of a 49% stake in Profeeds and Produtrade. Profeeds is a Zimbabwean animal feed producer. The company produces feed for fish, cattle and poultry, among other livestock. Produtrade is an agricultural commodity brokerage firm. It specialises in bagged and bulk grains such as maize, wheat and soybean. Innscor Africa Limited (Innscor) created Ashram Investments as a special purpose investment vehicle.

Innscor acquired Profeeds and Produtrade. Innscor manufactures various consumer staple foods, including bread, animal feed, chickens, day-old chicks, pork, beef and eggs. Innscor is present in a number of countries in East Africa and in Botswana, South Africa, Zambia and Zimbabwe. It also has stakes in other milling and protein food production companies, as shown in Table 3.

Table 3: Innscor Africa's company interests

| **Company** | **Activities** | **Stake** |
|---|---|---|
| National Foods | Food manufacturer including animal feed | 100% |
| Irvine's | Poultry and eggs producer | 49% |
| Associated Meat Products | Beef producer | 50.1% |
| Calcom Division | Pork and animal feed | 100% |
| Pangolin | Dairy | 50.1% |

Source: https://www.innscorafrica.com/home/group-structure-and-profile/

Ashram Investments was fined a penalty of $40.5m for implementing the merger without notification. Upon subsequent merger notification, the CTC prohibited the merger. This followed a finding that the transaction would lead to a monopolisation of the animal feed and poultry markets, and result in potential input and customer foreclosure in the animal feed to poultry value chain.

In assessing available merger data in Zimbabwe, this study also notes previous merger transactions which involved the consolidation of the animal feed and poultry market, and other potential markets for food products where Innscor was at the heart of mergers. In 2017, the CTC approved the following mergers which it noted were horizontal mergers and resulted in the removal of a competitor in the relevant markets: Pangolin/National Foods, National Foods/ProBrands and the animal feed manufacturing business of National Foods/Profeeds.

Previous research found that the main poultry and animal feed companies in Botswana, South Africa, Zambia and Zimbabwe are all interrelated and spread across the region (Ncube et al., 2016). Irvine's Africa, which is owned by Innscor, holds the breeding rights to the Cobb 500 breed, described as one of the most productively efficient broiler breeds, in all countries in Africa except South Africa (Ncube et al., 2016). Innscor's scope of activities, at least as far as its animal feed and poultry activities are concerned, is evidently regional in scope. This suggests that mergers in

this priority productive sector should be tracked and assessed across countries through a regional lens where possible. The CTC's acknowledgment of the power afforded to Innscor through the blocking of the merger is relevant across the southern and east African region. Data availability and measurements of impact are important to have to ascertain the effects of the blocking of the merger on the region more widely.

## Coca-Cola/Almasi Beverages

The demand for drink-on-the-go beverages has increased throughout the region, in line with growth and urbanisation trends (Nsomba, 2021). As a result, the region has seen significant contestation in beverage markets over the last two decades, with local entrants contesting national markets against larger integrated firms, such as Pepsi and Coca-Cola (Nsomba, 2021). Over the past 30 years, the beverages value chain has rapidly evolved to meet changing consumer trends. For manufacturers to remain competitive through cutting costs, the value chain has adapted to changes in technology. Some changes have included customers electing for off-site consumption and a growth in third-party logistics services. This has led to significant growth in the use of third-party services, particularly for bottling and distribution, and for the changes in packaging of beverages. It is in this context that various jurisdictions considered the significant proposed merger between The Coca-Cola Company (TCCC) and Coca-Cola Beverages Africa (CCBA) in 2017 which brought together the bottling activities of beverage manufacturers Coca-Cola and SABMiller (now part of AB Inbev).

The TCCC/CCBA merger was significant. It brought to light various issues regarding regional competition enforcement. These issues included the importance of understanding the regional scope of firms, cross-ownership, and why it is important to track market consolidation across various jurisdictions. The TCCC/CCBA merger was followed by a series of acquisitions across the region, including in Kenya with the CCBA/Almasi Beverages merger in 2019. This merger entailed CCBA's acquisition of 54% of Almasi Beverages' bottling and distribution activities. The merger implied the removal of an effective competitor in the bottling industry, and the potential to foreclose rival beverage companies' access to third-party bottling activities. CCBA also subsequently acquired ownership of bottlers in Rwanda, Tanzania, Uganda and Zimbabwe (Nsomba, 2021).

The CAK noted that the CCBA/Almasi Beverages merger was vertical in nature and would result in the CCBA owning key inputs in the downstream beverages market for value addition and distribution. The CAK's assessment considered that the merger would potentially lead to foreclosure relating to inputs and customers. They found the impact on competition would be heightened because after the merger, Coastal Bottlers Limited, a third-party beverage bottler, would be the only independent bottler. The theory of harm considered was that CCBA would grant its acquired bottlers preferential treatment over Coastal Bottlers Limited when procuring concentrates. This amounted to a type of input foreclosure which could increase Coastal Bottlers Limited's cost of production, making its products less attractive to consumers due to higher prices. It was also understood that CCBA

would gain direct control of the bottling process and, through dictating how coolers[3] are issued through their bottlers, exercise greater influence over the retail level. The CAK approved the merger on condition that:

1) No less than 20% of the coolers' total storage space would be made available to small and medium-sized enterprises (SMEs) for competitors' products except the brands belonging to those of Coca-Cola Company's three largest global non-alcoholic ready-to-drink competitors.

2) For a three-year period following completion of the proposed transaction the merged entity would retain 1 749 employees of the total of 1 760 permanent employees.

3) The merged entity must honour the existing agreement with Coastal Bottlers Limited and, within nine months of completion of the transaction, amend the agreements between the merged entity and its distributors to permit distributors to distribute other non-alcoholic ready-to-drink products.

4) CCBA would remove all clauses that stipulate the prices and profit margins for the sale of its products.

## The case for tracking of merger enforcement activities

The animal feed to poultry value chain and beverage value chain hold significant opportunities for market contestation and effective rivalry, ultimately benefitting consumers across the region (Nsomba, Roberts & Tshabalala, 2021; Nsomba, 2021). While opportunities for market entry and inclusion of smaller effective rivals typically arise at the national level, the industries' nature is that there is significant benefit in expanding across borders to achieve scale economies. It is at regional level that rivals need to compete with larger firms that have extensive cross-ownership, wide-ranging distribution arrangements – which can render markets incontestable – and strategic vertical partnerships through value and supply chains.

At stake is the potential for competition and market entry to drive localised production and manufacturing activities, which in turn lead to domestic and regional job creation and value addition. Entrants typically draw on newer technologies and production processes. This reduces production costs and prices over time. It is insightful therefore that national competition authorities have played a role in closely scrutinising mergers in food and beverage processing value chains that involve large, international firms. Their scrutiny has had a necessarily particular emphasis on ensuring SMEs' participation, such as in the Coca-Cola/Almasi Beverages merger. Opening up markets through encouraging participation in adjacent markets such as transport, third-party distribution and retail is also critical for fostering entry in industries, particularly because success in manufacturing and retail in the beverages market is inevitably linked to access to distribution and shelf space.

[3] The CCBA provides coolers for the storage of their products. See the CAK's decision. Available: https://cak.go.ke/sites/default/files/2019-10/CAK%20Decision%20on%20Proposed%20Acquisition%20of%20a%20Controlling%20Stake%20in%20Almasi%20Beverages%20Ltd%20by%20Coca-Cola%20Sabco%20%28East%20Africa%29%20Limited.pdf.

However, there is a need to take these enforcement measures a step further through ensuring that cross-border implications are accounted for. The region has recognised this though the CCC's enforcement work and its memoranda of understanding with national competition authorities. Still, the assessment of these types of transactions at a regional level has perhaps not been sufficiently comprehensive, particularly in anticipating the long-term implications of consumer goods markets' regional consolidation (Burke et al., 2017).

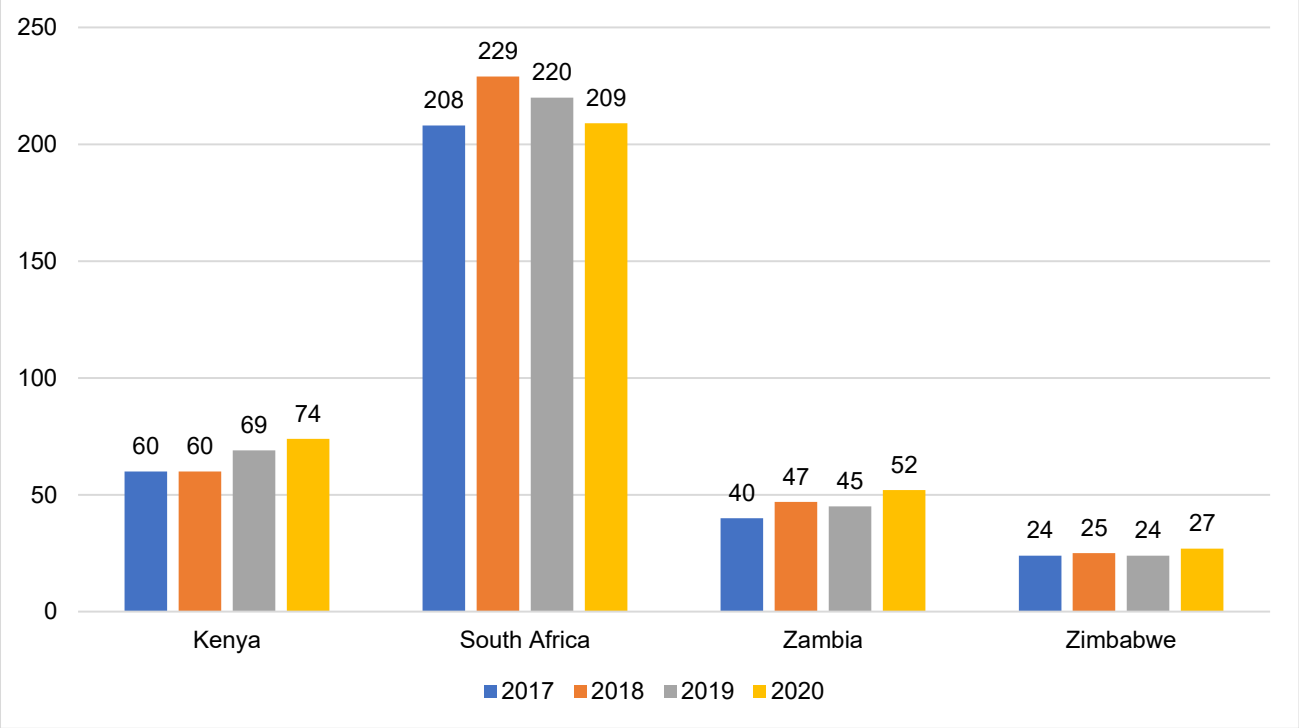
The availability of disaggregated market information and data is critical in this regard. It enables authorities and researchers to track consolidation at a regional and country level over time. Forging enforcement links between countries, especially where they share national borders, is an important prerequisite for effective intervention. Such a step would enhance authorities' potential to share detailed information on key markets and transactions. Understanding the impact of these transactions means that efforts need to be directed towards robust collection and reporting of merger data over time. This is for the purposes of merger assessments for a specific jurisdiction, and it can inform additional enforcement measures to deal with other industrial policy goals for specific industrial sectors.

## Cartel conduct

Cartel conduct is one of the most egregious forms of anticompetitive conduct. It distorts markets and harms consumers (Nkosi and Boshoff, 2021; Senona, 2014). Competition agencies around the world regard enforcement against cartels as being a critical aspect of competition enforcement. While the same view is evident in southern and east Africa (see Dawar & Lipimile, 2020), authorities' enforcement activities have not been robust.

To date, South Africa has been the most active in cartel enforcement, relative to Kenya, Zambia and Zimbabwe. South Africa completed over 200 cases each year between 2017 and 2020, as shown in Figure 3.

Figure 3: Completed cartel investigations, 2017–2020




Source: Competition authority data

There are several reasons for the vast difference in the number of cartels investigated. They include the success of the CCSA's corporate leniency programme; the CCSA's growing experience as an enforcement institution; and having more resources relative to competition authorities in the region.

South Africa plays an important role in the region. It is the largest and most developed country and has significant influence on multiple supply chains, and is a source for direct and indirect investment. Consequently, cartels prosecuted in South Africa have at times involved firms that also operate or have a presence in the region. This raises questions as to whether firms found to have participated in collusive conduct in South Africa could have extended those arrangements into other countries in the region where they have operations (Kaira, 2017). It is apparent that profits from cartel activity in multiple countries outweigh the costs of being prosecuted in just one jurisdiction. If consumers are to benefit from firms being sanctioned for cartel conduct, enforcement activities need to be effective across jurisdictions in the region.

The progress of enforcement across jurisdictions in the region is difficult to track, given that reporting across competition authorities is not uniform; its authorities report to varying degrees of detail and across different measures. The CCSA, for example, makes case files publicly available with details of penalties and corporate leniency applications. It also reports on cartel enforcement statistics, including on completed investigations, referrals to the Competition Tribunal, and cases closed without adverse findings. In the case of Zambia and Zimbabwe however, the authorities' annual reports are not consistently publicly available, nor are case files. It is not yet possible to

conclude that the publicly available information on cartel cases in Kenya, Zambia and Zimbabwe is for all the completed investigations in those jurisdictions.

The level of detailed reporting in South Africa provides a useful benchmark for assessing the categories of data required to inform a systematic tracking of cartel cases in the region. This study reflects on the data that is available, and the common themes identified in the outcomes of cartel decisions in Kenya, South Africa, Zambia and Zimbabwe. Table 4 collates the information generally available about cartels in Kenya, Zambia and Zimbabwe. It illustrates key categories of data available for developing a benchmark for comparative analysis of authorities. The data on South Africa is considerably more comprehensive – although omitted from the table because of the vast number of cases – and the data can serve as a useful benchmark for further analysis.

In what follows, consideration is given to some cross-cutting thematic observations about the available information. Key gaps in authorities' reporting are identified, making the case for the types of analysis that could be conducted about cartel enforcement in the region if more comprehensive information was available over time

Table 4: Observable cartels in Kenya, Zambia and Zimbabwe, 2017–2020

| Firms | Year case was concluded | Industry | Sub-industry | Product | Industry association | Corporate leniency application | Key industrial input | Contravention | Duration | Administrative penalty |
|---|---|---|---|---|---|---|---|---|---|---|
| **Kenya** | | | | | | | | | | |
| Firms not named | 2018 | Agriculture, fishery and forestry | Sugar milling | Sugar | Yes | No | No | Not clear what the conclusion was in terms of the contravention | Not provided | Not provided |
| Firms not named | Initiated in 2018, case is still ongoing | Agriculture, fishery and forestry | Maize milling | Maize flour | No | No | No | The earlier interrogations did not establish the alleged claims of cartels in the relevant market | Not provided | Not provided |
| Basco Products (K) Ltd | 2019 | Manufacturing | Paint manufacturing | Paint | No | No | Yes | Price fixing | Not provided | Not provided |
| Ingenious Concepts Limited | 2019 | Media | Advertising and market research | | Yes | No | No | Price fixing | Not provided | Provided |
| **Zambia** | | | | | | | | | | |

| Firms | Year case was concluded | Industry | Sub-industry | Product | Industry association | Corporate leniency application | Key industrial input | Contravention | Duration | Administrative penalty |
|---|---|---|---|---|---|---|---|---|---|---|
| Dangote Cement Zambia, Lafarge Zambia, Mpande Limestone | 2020 | Manufacturing | Cement manufacturing | Cement | No | Yes | Yes | Price fixing and market division | Not provided | Provided |
| Palabana Fisheries Limited, Mukasa Agro Solutions and Fish Farm Limited, Savana Streams Limited, Chirundu Bream Farm Limited, First Hatch Investment Limited, Iban Aquafish Solutions and Consultancy Limited; and Msekese Fisheries Limited | 2021 | Agriculture, fishery and forestry | Fishing | Fish finger-lings | No | No | No | Price fixing | Not provided | Not provided |
| **Zimbabwe** | | | | | | | | | | |

| Firms | Year case was concluded | Industry | Sub-industry | Product | Industry association | Corporate leniency application | Key industrial input | Contravention | Duration | Administrative penalty |
|---|---|---|---|---|---|---|---|---|---|---|
| Bakeries under the National Bakers Association of Zimbabwe – firms not named | 2019 | Manufacturing | Bakery industry | Bread | Yes | No | No | Price fixing | Not provided | Not provided |
| Millers under Grain Millers Association of Zimbabwe – firms not named | 2019 | Agriculture, fishery and forestry | Milling | Not specified | Yes | No | No | Price fixing | Not provided | Not provided |
| Pharmacies under the Retail Pharmaceuticals Association – firms not named | Initiated in 2020, case is still ongoing | Wholesale and retail | Pharma-ceutical | Chronic drugs | Yes | No | No | Price fixing | Not provided | Not provided |
| Security Companies – firms not named | 2017 | Security industry | Security activities | Security guard services | No | No | No | Collusive tendering | Not provided | Not provided |

Source: Competition authority data

From Table 4, we can see that corporate leniency has not featured in most cases reported by authorities in Kenya, Zambia and Zimbabwe. Corporate leniency programmes (CLP) were introduced as a mechanism to detect cartel activities. They serve as a deterrent by offering full or partial amnesty to offenders that come forward to reveal information about a cartel. The use of leniency programmes has made it possible for competition authorities to discover more cartel activity. It has also led to an increase in number of fines imposed (Kaumba, 2016). South Africa introduced its leniency programme in 2004 as a key innovation for cartel detection. Nkosi and Boshoff (2021) find that of 118 cartels detected between 1998 and 2019, 25% were associated with a corporate leniency programme application. Fifty percent of leniency applications triggered cartel investigations while 33% of leniency applications were responses to the Competition Commission's invitation to firms to apply for immunity. Thus, corporate leniency in South Africa has been instrumental in either the detection or investigation of cartel cases. This stands in stark contrast to the outcomes observed in Kenya, Zambia and Zimbabwe. It is not implied that there has been no cartel activity in the three countries.

Kenya's Competition Act includes a provision that permits the Competition Authority of Kenya (CAK) to waive, under its leniency programme, all or part of the fine that could be imposed in instances where a firm discloses the existence of a prohibited practice and cooperates with the authority in an investigation. To curb restrictive trade practices, in 2015 the CAK published the terms of its voluntary disclosure programmes applicable to trade associations in two sectors. The voluntary disclosure programmes were aimed at determining the level of compliance of trade associations in the financial and agriculture sectors.. They were particularly aimed at insurance companies, commercial banks, micro-finance, foreign exchange and capital markets, and firms in agriculture and agro-processing. The process sought to remedy collusive behaviour, amongst other anticompetitive conduct, and contraventions of the Competition Act. Furthermore, to provide more information on how the authority would handle leniency applications, in 2017 the CAK published its Leniency Programme Guidelines. The guidelines set out the principles governing the processing and granting of leniency.

Zimbabwe's Competition Act does not provide for a leniency programme. However, the Zambian Competition and Consumer Protection Act includes a provision for a leniency programme for firms that voluntarily disclose the existence of prohibited agreements and those that cooperate with the commission in their investigation. The programme played a significant role in uncovering information about a cartel's workings in the cement industry.

A cartel consisting of three major players in the cement industry in Zambia was uncovered in 2020 (CCPC, 2021).[4] The CCPC uncovered evidence in a dawn raid, and along with information provided by Dangote Cement Zambia Limited, which applied for leniency, showed that Lafarge Zambia Plc, Mpande Limestone Limited and Dangote Cement had colluded by allocating markets, including foreign markets. Furthermore, they were engaged in price fixing to ensure that Lafarge Zambia's price was always higher than Dangote's price, which in turn was always higher than Mpande Limestone's price (CCPC, 2021).

Dangote was granted full leniency for its cooperation with the commission. Lafarge Zambia and Mpande Limestone were both fined 10% of each of their 2020 and 2021 annual turnovers. The commission also ordered the three firms to revert to pre-cartel prices for one year from the date they received the commission's decision. Insufficient evidence was found against Zambezi Portland Cement Limited, another major player in cement manufacturing in Zambia. The charges against them were dropped.

Cartels are prevalent in concentrated industries and CLPs are important because they increase the number of uncovered cases. Therefore, the number of CLP applications may be expected to rise over time. However, because of regional authorities' lack of reporting, it may be difficult to attribute a reason for such a rise. The available information does not always indicate if the cases have CLP applicants, although this may have been a significant factor in the cases prosecuted in Kenya and Zambia. Among factors contributing to the small number of cartel cases may be a lack or ineffective application of CLPs in Kenya, Zambia and Zimbabwe. In Kenya, while the effectiveness of the leniency programme depends on Kenyan firms' ability to report each other, given information asymmetries and low levels of awareness, firms are unlikely to be able to do so (Kigwiru, 2022; Andiva and Masereti, 2020). This raises questions as to whether the programme needs to be modified to reflect and appeal to the local business community (Kigwiru, 2022).

Together with experience in investigating cartel cases, competition culture and information asymmetries have been raised as concerns limiting the effectiveness of leniency programmes in the region. This may be one of the main explanations for why there are so few cases of cartel conduct prosecuted or reported on. However, effective cartel enforcement also requires deterrence through penalties for firms that are involved in such arrangements. As Table 4 attests to, there is very limited reporting on authority-issued penalties in the region.

[4] This followed the South African Competition Commission's uncovering of cartel arrangements which affected the SACU region between Pretoria Portland Cement (PPC) Lafarge South Africa, Afrisam and Natal Portland Cement Cimpor (NPC) in 2009. PPC was a leniency applicant in the case (Moothoo Padayachie et al 2020).

## Penalties in cartel enforcement

An appropriate framework for penalty determination creates a disincentive to collude, particularly where the legislated level of penalties is high. Additionally, it creates an incentive for cartel members to apply for leniency, or to settle cases (Muzata, Roberts & Vilakazi, 2017). Penalties are a critical tool for cartel punishment, destabilisation and deterrence, with an effective leniency programme and penalties providing "carrot and stick" inducements for cartels to be revealed (Nkosi & Boshoff, 2021; Katsoulacos, Motchenkova & Ulph, 2019; Houba, Motchenkova & Wen, 2017). The general lack of data on penalties is thus an obvious gap in the authorities' reporting. This could be remedied through a coordinated approach to reporting in the region.

Both South Africa and Zambia have penalties capped at 10% of a firm's annual turnover. In their study, Nkosi and Boshoff (2021) find that 85% of firms in their dataset were penalised. However, the CCSA has penalised firms well below the statutory limit with penalties typically ranging below 5% of turnover (Nkosi & Boshoff, 2021). The caveat here may be that almost all South Africa's cartel cases have been penalised through the settlement process. This implies a lower penalty in exchange for cooperation and early resolution. Generally, in the case of South Africa, there has been a sustained increase in cartel penalties since 2008 (Nkosi & Boshoff, 2021).

Despite surcharges from cartel conduct being higher in smaller economies, small markets typically imply smaller penalties (United Nations Conference on Trade and Development [UNCTAD], 2010). This links to the role of penalties as a deterrent to cartel conduct, and the appropriate balance between the penalty amount, the possibility of detection of cartel conduct, and the harm to society from cartel conduct. For deterrence to be effective the likelihood of cartel detection and the resulting penalty must be sufficiently high when set against the illicit gain from the conduct (Muzata, Roberts & Vilakazi, 2017). Importantly, very high penalties have little deterrent effect if there is no realistic possibility of detection.

While sanctions through penalties have been advocated for across the globe to deter cartels, it is not clear whether penalties in the region have the direct effect of deterring cartel behaviour. In a survey of law firms and analysis of detected cartels in South Africa, Maphwanya (2017) finds that firms may still perceive expected penalties to be low, although it is difficult to identify whether this is as a result of low penalties, or a low probability of detection.

Of the cases in Table 4, information on the penalty amount is only available for two cases. Furthermore, the information on how long the cartels operated is also not available. Cartel duration affects penalty determination, and knowledge of both factors is important to achieve deterrence. Providing information on the value of fines signals the extent of enforcement. This is important for deterrence. Providing information on duration illustrates how serious and systemic the cartel's conduct is. If this information has

significant gaps, there will be no deterrent effect. Authorities and scholars are limited in the types of impact assessments they can conduct on cartel cases to demonstrate the impacts for society. It is telling, therefore, that unlike Kenya, Zambia and Zimbabwe, there are several impact assessment studies of cartels in South Africa, not least because of the extent of information the authority makes available to the public (See Mondliwa & Das Nair, 2019; Theron & van Niekerk, 2017; Govinda et al., 2016; Boshoff, 2015; Khumalo et al., 2014; Mncube, 2014).

Furthermore, when company names are not disclosed in cartel reporting, as is the case with some cartels authorities report on (Table 4), it is not easy to determine whether industry associations are implicated, or which firms have played a role in the conduct. Public knowledge itself serves as an important deterrent and punitive function because it increases the reputational harm risk and cost to firms found to be involved in a cartel. Similarly, it is important to report information about the involvement of industry associations as platforms for coordination in cartels. This is because these groupings are ubiquitous in many industries in the region such that it serves a deterrent effect to report on their involvement in anticompetitive conduct under the guise of industry representation. It is notable that industry associations have played a role in several of the arrangements reported in Table 4. Further analyses, with more complete data, will enable authorities to introduce advocacy programmes and interventions to change firm and industry association behaviour towards compliance.

## The case for tracking cartel cases in the region

Aside from publications on the CCSA's case information, a scan of publicly available information reveals that information on penalties imposed in the majority of cartel cases in Kenya, Zambia and Zimbabwe is not readily available. This has a significant impact on studying the record of enforcement across the region. It also has an impact on assessing whether enforcement activities are in fact leading to the detection and deterrence of cartel conduct. Providing information on penalties signals the seriousness of enforcement, which is important for deterrence. Studies on enforcement in South Africa have shown that information on penalties, participation in leniency programmes, and facilitating practices for cartel behaviour are critical for understanding cartel likelihood and deterrence, as well as the effects of enforcement (Boshoff, 2015; Govinda et al., 2016; Khumalo et al., 2014; Maphwanya, 2017; Mncube, 2014; Mondliwa & Das Nair, 2019; Nkosi & Boshoff, 2021; Theron & van Niekerk, 2017). Building similar databases of information about cartels in the region is critical. It requires more detailed reporting so that benchmarking and comparative analysis can be done. This would also help authorities to learn from each other, as with cement industry cases in the region.

## Governance and institutional issues

In addition to prescribing their mandates regarding functions and powers, the legislative frameworks for competition authorities also provide for their governance structures. This study explores the extent to which authorities can be benchmarked based, among others, on governance, institutional design and transparency of reporting. These characteristics typically form part of the measures included in various international benchmarking indices – understood as the structural factors – that indirectly shape authorities' effectiveness and impact. However, these benchmarking indices have not been applied in the African context. This study therefore assesses the extent to which this information is available in the selected countries, with a view to building a tracking and benchmarking system in the region.

## Administrative autonomy and capacity

The UNCTAD Model Law on Competition is based on the assumption that the most efficient type of administrative authority for competition enforcement is likely to be one that:

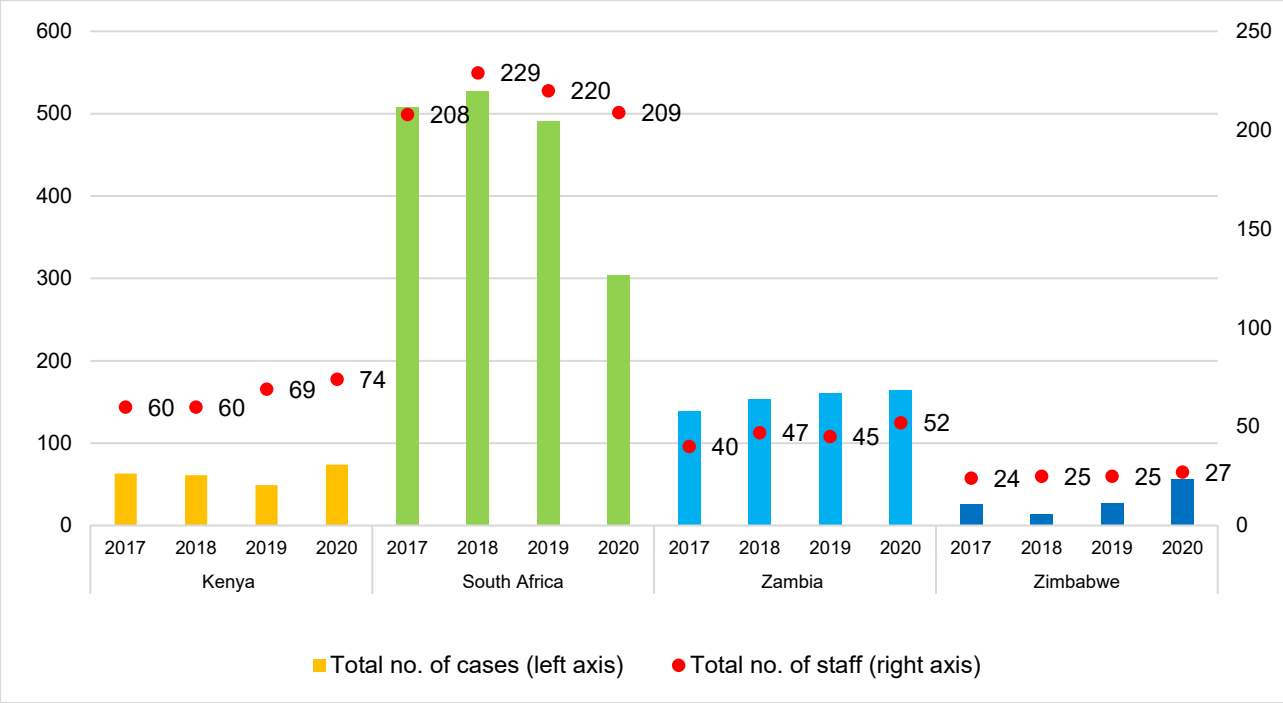
> (a) is quasi-autonomous or independent of the government, with strong judicial and administrative powers for conducting investigations and applying sanctions; and
>
> (b) provides the possibility of recourse to a higher judicial body (UNCTAD, 2008).

This ensures that competition authorities' decisions would be based on objective evidence, are consistent with market principles, and are made fairly and transparently. The rationale is that sound policy outcomes are assured only when competition authority decisions are not politicised, discriminatory, or implemented on the basis of interest groups' narrow goals (Cukierman, 2005; Wettenhall, 2005). A high degree of freedom with which a competition authority conducts its daily business of enforcing competition law, and taking decisions generally, implies that the authority is not subject to routine direct supervision by government. It may then be assumed that competition authorities have been granted all the necessary powers to fulfil their legislative mandate. It would mean they have the discretion to set their priorities themselves, and to make decisions without undue influence (Burke, 2018).

Therefore, it is critical that competition authorities should have some degree of administrative autonomy from central government. This usually translates into a separate staff who respond only to the agency's leadership. All the jurisdictions under review – Kenya, South Africa, Zambia and Zimbabwe – were found to be autonomous in how they are structurally constituted. Structurally, Zambia and Zimbabwe's the competition authorities have investigative arms which report to the adjudicative board of commissioners. Kenya and South Africa have specialised tribunal systems. Operationally, autonomy also implies that the competition authority should have adequate human resources and skills to sufficiently serve its economy.

This considers a complete mix of specialised personnel, such as lawyers and economists, and adequate support operational staff. Figure 4 shows the trends in staff complement for the competition authorities over the years under review. It provides some indication of the human resource base available for authorities to execute their mandates and thus achieve an impact on society.

Figure 4: Number of cases per staff member, 2017–2020




Source: Authors' compilation from authorities' annual reports

The size of a competition authority may portray, among other things, the level of economic activity in a country which warrants the need for adequate human resources for effective competition enforcement. On the surface, these numbers can provide a basis to understand institutional capacity to be able to effectively implement competition law. According to Voigt (2009), for competition authorities to have impact it is not just the content of the law, it is also the structures erected to implement the law that matter. Staff numbers are only a useful indicator if they are also reflected in the magnitude of cases an authority handles annually.

An authority's staff capacity is especially relevant for considering its capacity to process and execute case investigations. Other things being equal, the quality and effective processing of case investigations and decisions is negatively impacted if an authority has a low ratio of total staff to cases as shown in Figure 4. It is worse if there is a limited number of 'technical' staff, such as economists and lawyers in particular, as shown in Figure 5.

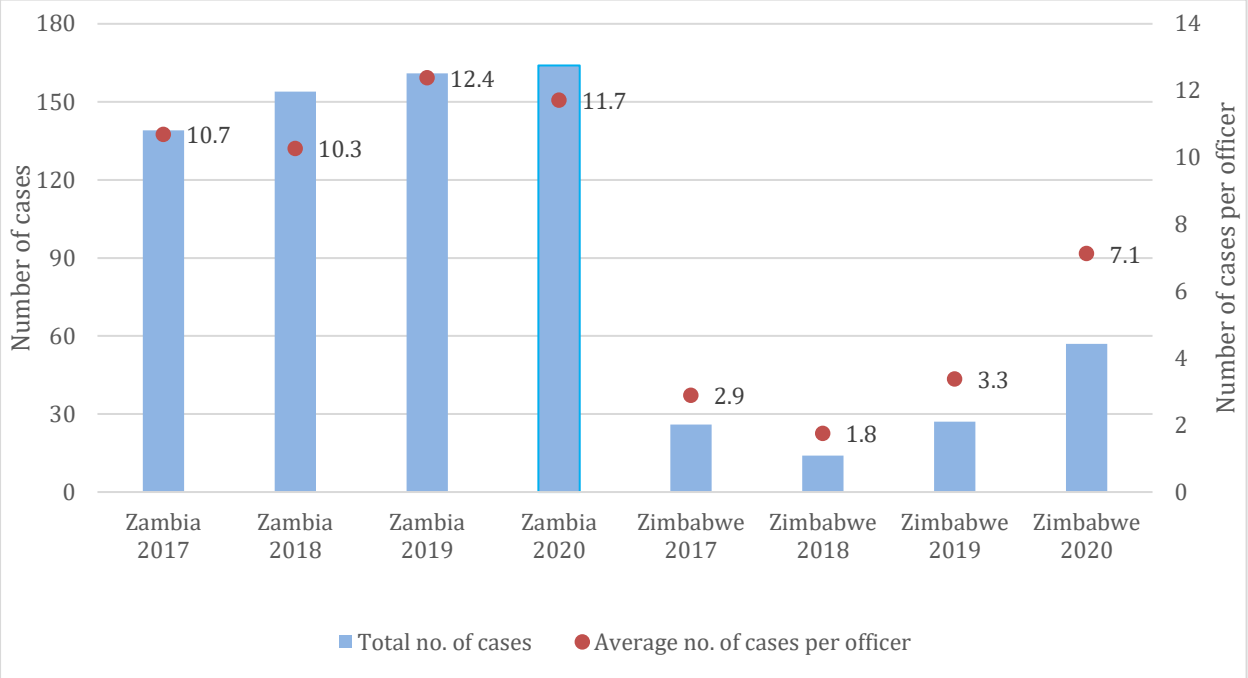
A striking observation from the data is that other things being equal, the Zambian authority is consistently 'doing more with less' in the period analysed. Although the authority has a considerably lower number of total staff than the South African authority, and around three-quarters of the Kenyan authority's staff capacity, it has a higher ratio of staff per case (Figure 4). However, the ratio can be affected by factors that include the staff in some authorities, such as Zambia and Zimbabwe, may serve in different functions. For example, some staff may serve in both tariffs and consumer protection, or total staff numbers may account for staff related to different functions outside of competition. It is not possible to disaggregate from the available data. In the case of South Africa and Kenya, it is also likely that the authorities have a large complement of staff members not working strictly on cases, given that these authorities also have a relatively large number of different divisions. This includes divisions such as market inquiry, and corporate and advocacy functions.

Regarding technical staff, the data in Figure 5 shows the number of cases for each technical officer, that is, the case load for economists and lawyers, in relation to the total number of cases – on the left axis – that the Zambian and Zimbabwean authorities handled from 2017 to 2020.[5] Divisional staff numbers for the Kenyan and South African competition authorities were not publicly available. The chart is nonetheless illustrates the relative capacities of the authorities.

The number of cases being handled by each technical specialist in Zambia is on average 11 each year, compared with Zimbabwe's seven cases for 2020. While the numbers do not reveal anything about the complexity, or successful completion, or early dismissal, of cases, they do tell us something about technical staff's caseloads in the authorities.

[5] The figure outlines the average number of cases per officer in the respective jurisdictions. The data included only explicitly stated staff numbers for the competition and legal divisions, who are most likely to work on competition cases in Zambia and Zimbabwe.

Figure 5: Number of cases per technical staff member in Zambia and Zimbabwe, 2017–20206




Source: Authors' own compilation from authorities' annual reports

The presumption, is that high-skilled technical staff may be able to address a higher number, and greater sophistication, of cases. However, this level of output is dependent on their ability to process cases effectively (and thoroughly and correctly) to completion, and may be reduced by a caseload that is very high. This is a critical area for further investigation. It would best be understood through further inquiry with the authorities. For now it suffices to note that the availability of quality, disaggregated data can enable a valuable comparative approach to analysing authorities' work. This can, in turn, enrich the authorities' organisational strategies.

To take a caseload analysis a step further, there would need to be a standard mechanism of weighting the cases across the different authorities to account for the degree of case complexity, for example by incorporating an element of qualitative analysis. This is because caseload needs to be considered on the degree of complexity involved in each case, and more complex cases may require a larger team of

[6] We note that there was a significant increase in the reported (available information) number of cases for the Zimbabwean authority between 2019 and 2020. While the number of technical staff (8) did not change, the number of cases increased from 27 (2019) to 57 (2020). This seems to be explained by a sharp increase in the reported number of mergers, from 20 (2019) to 53 (2020). Authors' own calculations from authroities annual reports.

economists. In reality, it may be very difficult to construct a system of measuring these detailed aspects of the authorities' work. For example, it could introduce an unfavourable degree of subjectivity in the evaluation of what is considered a complex matter. It is also more likely that a simpler measure of comparison, based on total numbers of cases and treating all cases as equal, would be the most pragmatic starting point for building a consistent system of tracking outcomes and capacity over time.

## Financial resources and budget autonomy

Transparent funding of a competition authority helps avoid corruption and thwarts private and politically vested interests from capturing competition enforcement agencies. As statutory bodies, most competition authorities have annual budget allocations from the legislature in their respective jurisdictions. This is important: it gives the authorities the discretion to apportion these financial resources to various uses, thereby granting them budgetary autonomy. Adequate funding, and being empowered to manage these funds autonomously, determine the extent to which the regulator can carry out its mandate. The ability to manage funds independently could be more relevant than the source of funding (OECD, 2017).

It is necessary for competition authorities to have adequate annual budget allocations so they can effectively enforce competition policy. The authorities have the responsibility to publish their annual budgets and sources of funding as a way of being accountable and transparent to all their stakeholders. The disclosure of financial information must be accompanied by an audit report prepared by an external auditor (CAF, 2021). Budget information also shows the authority's ability to effectively enforce competition policy, and hire external economic and legal experts on special investigations and prosecution of cases. It is invaluable for comparing with other jurisdictions. According to Voigt (2009), the development of the budget of the competition agency in real terms is one of the single most important factors for their effectiveness. However, Ilzkovitz and Dierx (2015) argue that the resources a country invests in its competition regime may simply reflect the size of the economy. It is therefore important to control for market size, by analysing budgets as a percentage of GDP, for an objective analysis.

As for publication of budget information, only the Kenyan and South African competition authorities presently do so. The South African authority's budget is multiple of between four and five times that of the Kenyan authority, with approximately three times as many total staff.[7]

[7] Exchange rate fluctuations also have a bearing on the budget values in US$ terms as both the KES and ZAR currencies depreciated in value over the years under review.

In the case of Zimbabwe, the competition authority's annual reports only contain information on other sources of funds, such as merger filing fees, and penalties imposed for abuse of dominance, or late notification of mergers. In addition, Zimbabwe's annual reports include audited financial statements. However, the annual budget for the authority is not disclosed. It is therefore important that budget information be disclosed in all competition authorities. This is necessary for both benchmarking purposes and to assist in understanding why some authorities perform better than others. With adequate resources, authorities are able to retain and attract competent personnel, support competition enforcement activities, hire external specialists, and uphold professionalism in their work.

## Transparency, accountability and reporting

As organs of state established to execute legislative mandates, competition authorities have the responsibility to account for their annual enforcement performance against clearly set strategic targets. Regarding current best practice, transparency is considered a fundamental element of good corporate governance with both internal and external effects for organisations. Externally, transparency is critical for the generation of trust. This influences the competition authority's reputation. Competition authorities are accountable to the private sector, including foreign investors; the general public, as consumers and interested parties; and the media and other commentators, such as academics (Fox, 2007). As specialised arms of government operations that use public funds, it is a necessary for authorities to demonstrate transparency in their communication with interested stakeholders, including citizens.

The OECD's Policy Framework for Investment (PFI) User's Toolkit provides that since transparency is a key facet of accountability, financial audits and annual reports become the main instruments for authorities' performance reporting. The competition authority websites and other governmental sources are the main repositories of such key information that stakeholders can easily access (OECD, 2012). According to Lewis et al. (2004), competition authorities have to demonstrate the connection between efficiency and the promotion of broader social objectives.

Transparency can be achieved through a variety of technical means, including, among others, press releases and by the authorities publishing guidance papers and well-written, well-argued decisions.

In line with literature (Fox, 2007; Lewis et al., 2004), this study found authorities are making a significant effort on to improve transparency through providing information on their websites. However, there isn't consistency amongst authorities in terms of the different categories of information the authorities publish. For instance, Zimbabwe publishes detailed summaries of each case determined by their Board of Commissioners. The summaries detail the parties involved, the nature of the transaction, category of transaction/case, the relevant market, and the final decision. The South African authorities also publish detailed information on a number of cases however the categories of information provided differ. This

information is important for transparency purposes, especially if it were to be adopted across the region. When the authorities' decision-making process is transparent, undue influence is more visible, and it is less likely that outside forces would influence them. Therefore, transparency of authorities' activities and processes should be a matter of principle in communicating with all interested stakeholders and citizens across the region.

## Publishing of annual reports

In implementing good practices in reporting, public sector entities need to demonstrate that they have delivered their stated commitments, requirements and priorities; and that they have used public resources effectively in doing so. This also applies to competition authorities which are expected to report publicly at least annually. Then stakeholders can understand and make judgments on issues, such as the entity's performance, whether it has sound stewardship of resources, and whether it is delivering value for money (CAF, 2021). Annual reports are the key instruments for competition authorities to report against their performance targets and budgets outlined in their strategic plans. Publishing annual reports are therefore not a mere compliance requirement but rather a key performance indicator for public entities' best practice. Table 5 highlights the selected competition authorities' regularity of reporting through annual reports.

Table 5: Publishing of annual reports by competition authorities, 2017–2021

| Year | Kenya | South Africa | Zambia | Zimbabwe |
|---|---|---|---|---|
| 2017 | Y | Y | Y | Y |
| 2018 | Y | Y | Y | N |
| 2019 | Y | Y | Y | N |
| 2020 | Y | Y | Y | N |
| Y = Yes, published<br>N = No, not published | | | | |

Source: Authors' compilation from competition authorities' website content

Only the Kenyan, South African and Zambian authorities have consistently published their annual reports on their websites. It is worth noting that while the Zimbabwean authority only published its 2017 annual report on its website, reports for other years can be accessed on request because public entities, such as the Zimbabwean authority, are obligated to produce and publish their annual reports. Through annual reports, competition authorities subject themselves to the executive, or the legislative branch, for scrutiny on how they have discharged their functions and spent the allocated funds. Some may view this as limiting the ability of the competition authority to act in the way it considers most appropriate, for fear of displeasing the bodies reviewing its activities – and sometimes deciding on its budget. However, there cannot be independence, and the competition authorities cannot impose strong sanctions without accountability. This should be a consistent practice across the region. A good example is South Africa, where the annual reports

also contain a detailed breakdown of sanctions levied on enforcement, and the manner in which the funds were distributed. This information is important because it eliminates any possibility of institutional bias, and improves stakeholder confidence in how the competition authority executes its mandate to promote and maintain competition in the economy. Therefore, published annual reports are another important indicator that can be useful in measuring the impact of competition policy across the region.

## The type of information published on actual cases

To maintain trust and confidence, public entities should demonstrate that they always act in the public interest. They should do this through openness about all their decisions, actions, plans, resource use, forecasts, outputs, and outcomes (IFAC, 2013). In both their public records of decisions, and in explaining them to stakeholders, competition authorities should be explicit about the criteria, rationale, considerations on which decisions are based, and the most probable impact and consequences of those decisions. Based on the available information, there is a strong indication that authorities in the region publish a significant level of detail on specific cases. This helps with the development of case precedent and tracking of authority outcomes, as shown in Table 6.

Table 6: Case information published by competition authorities

| Description | Kenya | South Africa | Zambia | Zimbabwe |
|---|---|---|---|---|
| Enforcement category (mergers, abuse of dominance or cartels) | Y | Y | Y | Y |
| Total cases received under each category (mergers, AODs or cartels) | Y | Y | Y | Y |
| Total cases handled under each category (mergers, AODs or cartels) | Y | Y | Y | Y |
| Total cases cleared with/without any competition concern (mergers, AODs or cartels) | Y | Y | Y | Y |
| Remedial actions to correct competition concerns | Y | Y | Y | Y |
| Detailed case summaries on Board decisions | N | N | N | Y |
| Penalties (fines and criminalisation) | Y | Y | Y | Y |
| Selective case studies under each category (mergers, AODs or cartels) | Y | Y | Y | Y |
| Governance issues (board members/commissioners, board sittings, directorate key teams) | Y | Y | Y | Y |
| Accountability (transparency on budgets, incomes and expenditures) | Y | Y | Y | N |
| Y = Yes/published<br>No = No/not published | | | | |

**Source:** Authors' own compilation from authorities' annual reports, media releases and newsletters

The results in Table 6 show that all the competition authorities under review provide some information to the public on how they undertake competition enforcement activities and reach decisions. This is in line with the IFAC (2013) prescription to act in the public interest at all times and maintain trust and confidence. However, although the competition authorities are making efforts to improve their openness, there is a lack of consistency in reporting. While information may be ascertained for a particular case, the detail(s) thereof may not necessarily be categorised in the same way across the region. As important is the extent to which case summaries can provide greater detail for public consumption. The communication process could improve if a high-level, detailed summary of each case is adopted across region, as is the example of the Zimbabwean board's decisions.

Overall, the analysis found a high degree of inconsistency in the presentation of information for public consumption by the completion authorities. This can readily be addressed through a standardised system for reporting and tracking in the region.

## Data and data reporting

No measure or other tool has been developed in southern and east Africa to track competition authorities' enforcement activities and resources. While there are many reasons for this, it is primarily because of authorities' inconsistency in reporting, often because they have not maintained data gathered during their investigations, or made it publicly available (Ilzkovitz & Dierx, 2015).

Tracking the work of a competition authority is important. It will help to improve competition policy decisions, improve the effectiveness of competition law, set internal priorities, and defend and improve competition policy enforcement. Other reasons include to strengthen transparency, and for benchmarking against other authorities (Ilzkovitz & Dierx, 2015).

In the southern and east African region, the tracking of data on enforcement activities and institutional and governance structures would prove useful for drawing insights on why some competition authorities may have more enhanced capabilities compared to others. It would also help improve the overall impact of competition policy in the region, given the potential for authorities to benchmark and learn from each other.

To do such tracking, it is proposed to build on a template developed by Bradford et al. (2019) to create a dataset for the tracking of competition enforcement activities and resources in the southern and east African region.

## Developing a framework for data collection

Developed by Bradford et al. (2019), the Comparative Competition Enforcement Dataset covers 100 jurisdictions over the period 1990 to 2010. The method used to collect data for this study involved identifying jurisdictions which had a competition agency in place. This study collected data by engaging with all publicly available information from agency websites and annual reports as well as, where possible, from the authorities themselves. Within the southern and east African region data was collected for Burundi, Ethiopia, Kenya, Malawi, Mauritius, Namibia, South Africa, Tanzania, Zambia and Zimbabwe. However, as the authors note, in the case of non-OECD countries, publicly available information was limited (Bradford et al., 2019). To the authors' knowledge, the dataset has not been updated, nor does it account for all the countries in the southern and east African region.

It is against this background that data for the competition authorities of Kenya (CAK), South Africa (CCSA), Zambia (CCPC) and Zimbabwe (CTC) was gathered. The aim was to determine whether, and if so, how a comparative competition enforcement dataset for the region could be developed using the Bradford et al. (2019) template. The data gathered by this study is based on publicly available information

from the competition authorities' websites, annual reports, newsletters and news articles. While all of the agencies make some information publicly available, issues encountered in this data collection process included inconsistency of reporting, incomplete reporting and missing information on some variables of interest. Nevertheless, data on the authorities' enforcement activities and resources for the period 2017 to 2020 was gathered.

To measure enforcement activity, data related to merger control, cartels, and abuse of dominance was gathered. Information related to authorities' resources – annual budget and staff – was also gathered. Next, we illustrate how the data could be collated and analysed as part of an index and tracking system. The variables included are those required to compile an index comparable to the Comparative Competition Enforcement Dataset.[8]

Table 7 provides a snapshot of the data captured to compare competition authorities in the region between 2017 and 2020.

[8] Available: https://comparativecompetitionlaw.org/data/

Table 7: Comparative Competition Enforcement Dataset for the Southern and East African region, 2017–2020

| Variable | Kenya | South Africa | Zambia | Zimbabwe |
|---|---|---|---|---|
| Merger control | | | | |
| No. of mergers filed | 131 | 1 445 | 344 | 56 |
| Mergers conditionally approved | 29 | 157 | Yes, but details are not available. | 3 |
| Mergers blocked | 0 | 24 | 0 | 1 |
| Mergers withdrawn | Not available | 19 | Not available | Not available |
| Cartels | | | | |
| No. of cartel investigations authority initiated | 3 | 78 | 31 | 7 |
| Average duration of cartel investigations | Not available | Not available | Not available | Not available |
| No. of cartel investigations closed with a fine or remedy | CAK's penalties are not publicly disclosed for all cases. No findings of cartel conduct for 2 cases. A remedy imposed in 1 case. | 151 investigations closed (with a fine or remedy – not clear for all cases). 106 cases referred to the Tribunal. | 35 (not clear on what grounds the cases were closed). | 4 remedies imposed |
| Total average amount of cartel fines imposed | CAK penalties are not publicly disclosed in all cases. | Provided in annual reports. | Available but not all fines or remedies are reported. | No penalties levied in the period. Fines can be imposed. |

| Variable | Kenya | South Africa | Zambia | Zimbabwe |
|---|---|---|---|---|
| No. of cases where criminal remedies sought | Cartel conduct is criminalised under section 21 of the Kenya Competition Act. Not aware of any criminal charges brought or convictions made against any persons and/or entities for engaging in any anticompetitive conduct. | Cartel conduct/anticompetitive conduct is an offence punishable by imprisonment. No criminal charges sought yet. | Cartel conduct is criminalised in Zambia. No criminal charges imposed in the period. | Cartel conduct is criminalised in terms of the Competition Act. There have been no criminal charges pursued against any firms. |
| No. of cases where criminal remedies imposed | 0 | 0 | 0 | 0 |
| Abuse of dominance | | | | |
| No. of AOD cases launched | 12 | 12 | 53 | 3 |
| Average duration of case from initiation to close | Not provided | Not provided | Not provided | Not provided |
| Number of investigations with remedies imposed | 0 | Available but not provided in annual reports. | Available but not provided in annual reports. | 1 |
| Number of cases closed | 9 | Available but not provided in annual report. | 36 | 3 |
| Authority resources | | | | |
| Staff | 263 | 866 | 184 | 101 |
| Budget (Government grant/subsidy) reported | Yes | Yes | Yes | Yes |

Source: Authors' own compilation

## Evaluating merger control in the Southern and East African region

Competition authorities' work has largely focused on merger control as compared to cartel and abuse of dominance investigations. This is evident from the number of mergers filed in each of these countries. Despite merger notifications being mandatory in the studied jurisdictions, it is not clear whether all mergers are in fact notified.

The difficulty with assessing competition authorities' performance on this basis is that it does not necessarily speak to the authorities' capabilities or impact. For example, taking the number of cases handled on its own as a measure for the strength of an authority is unreliable. Instead, it would be necessary to also have regard to the complexity of the merger cases; whether cases have been prohibited; and whether they have been conditionally approved. Captured in this dataset are the additional variables of the 'number of mergers blocked' and the 'number of mergers conditionally approved'. These variables are useful in that, together with data on staffing, they can be used to draw inferences about authorities' capabilities, even though this might still not reflect their impact.

Interestingly, while 1 445 mergers have been filed in South Africa, only 24 have been prohibited over the last four years. This, however, stands in contrast to the experience of the CAK and CCPC which have not prohibited any mergers over the period. Zimbabwe has prohibited one, as discussed earlier in this paper.

Prohibiting mergers that potentially have anticompetitive effects is challenging given the economic expertise and evidence needed to support such a conclusion. Outsourcing economic expertise can be expensive, and it can be a hurdle for authorities that do not have significant in-house expertise. Similar levels of economic expertise are needed for cases of conditional approval (Makhaya et al., 2012).

It could therefore be argued that South Africa, because of its staff complement, has been the most successful competition authority in both prohibiting and conditionally approving mergers. This is because South Africa has, over the years, invested in extensive staff training and in employing highly skilled economists, to the extent that it relies primarily on in-house economic expertise to assist in the assessment of mergers (Makhaya et al., 2012). While other authorities are capacitating their staff and increasing staff complements, engaging fewer skilled staff may impact their ability to challenge mergers where anticompetitive effects are apparent, bearing in mind that merger notification thresholds may be higher in some countries than in others.

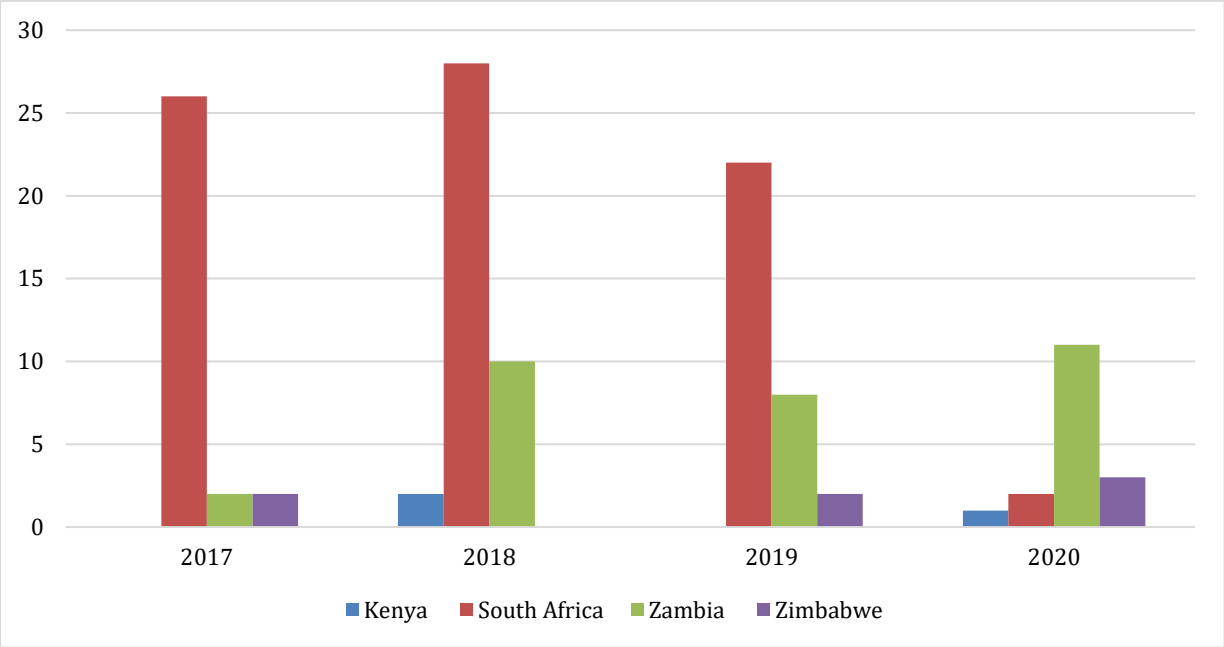
Apart from these variables, the data revealed an inconsistency in the public reporting of conditions imposed. It is noteworthy that the conditions for only a select number of cases by the CCPC and CAK are made public. This is concerning, especially because assessing the impact of merger decisions is a useful way to strengthen regional enforcement. This is an element which the dataset in its current form does not capture.

Overall, given that competition authorities in the region have largely focused on merger control, it is to be expected that their reporting in this area is more complete than on cartel and abuse of dominance investigations. While it may prove useful to build additional variables into the dataset in the future – such as complexity of cases, or regional enforcement – the analysis suggests that building a more composite index of enforcement activity is possible, provided more information can be collected from the authorities.

## Drawing insights on cartel enforcement in the southern and east African region

The CCSA is the most successful authority in the region regarding investigating and prosecuting cartel conduct. This is reflected by the number of cartel investigations reported publicly as initiated over the period 2017 to 2020 (Figure 6).

Figure 6: Cartel enforcement cases initiated in the region, 2017–2020




Source: Competition authorities' annual reports

However, simply considering the number of investigations initiated in the period, as in the framework, misses the fact that South Africa also completed 151 cartel investigations, and referred 106 cases to the Competition Tribunal of South Africa for adjudication.

Table 8: Additional information collected by the CCSA

| Variable | 2017 | 2018 | 2019 | 2020 |
|---|---|---|---|---|
| Number of cartel investigations initiated by the authority | 26 | 28 | 22 | 2 |
| Completed investigations | 33 | 63 | 30 | 25 |
| Referrals to the Tribunal | 27 | 52 | 18 | 9 |

Source: Competition Commission Annual Reports

This is important context because it demonstrates the efficiency, capability and resources at the CCSA's disposal to initiate new cases while still managing ongoing investigations. According to Kaira (2017), the CCSA's success can also be closely linked to its corporate leniency programme as outlined earlier. Nkosi and Boshoff (2022) further find that the corporate leniency programme has contributed to the prosecution of approximately 30% of cartels since its introduction. Together with its leniency programmes, the CCSA used dawn raids to gather information. These variables are not accounted for in the dataset, yet the CAK, CCSA and CCPC have these competition policy tools at their disposal. The authorities could integrate information about the number of dawn raids and CLP applications into the dataset.

The competition authorities of Zambia, Kenya and Zimbabwe's cartel enforcement has been less extensive. Zambia initiated 31 cartel cases, representing 26% of total cartel cases in the region; Zimbabwe initiated seven cases (6%); and Kenya initiated three cartels cases (3%) between 2017 and 2020. These figures pale in comparison to South Africa which has a total of 78 cases (65% of the total). However, the underperformance of competition authorities in cartel enforcement has long been a concern and generally speaks to the authorities' resource constraints (Kaira, 2017).

It could be argued that CCSA's aggressive investigation and enforcement against cartels may be difficult for Kenya, Zambia and Zimbabwe's competition authorities to replicate due to resource constraints. But from the data available it is also difficult to gain insight into the extent of their cartel enforcement activities, due to under-reporting on key variables such as penalty information and duration of cartel investigations. Deterring cartels requires a competition authority to signal to firms that it can carry out investigations and secure prosecutions. However, to serve as an effective deterrent, it is also necessary that cartel conduct is penalised, and that this is publicised. Publicising cartel fines and penalties can create a reputational threat for the firms involved, deterring other firms from engaging in such conduct (Kaira, 2017).

Data on penalties was difficult to gather from authority websites and annual reports for Zambia, Zimbabwe and Kenya. This made it difficult to draw inferences on the potential significance of cases the authorities dealt with, along with the monetary value of the fines. For example, the CAK indicates that it does not

publicly disclose all the remedies or penalties imposed. On closer inspection of the three cases investigated by the CAK, two were closed due to insufficient evidence and only one case had a remedy imposed. In Zambia, the CCPC closed 35 investigations over the period. But limited information was available on the remedies imposed, and it was not clear from the annual reports whether these cases were all prosecuted or closed due the absence of evidence of a contravention.

An additional variable in the dataset not reported by any of the authorities – although it is likely that this information is available – was the average time taken for cartel investigations. This speaks to the overall efficiency of the authority.

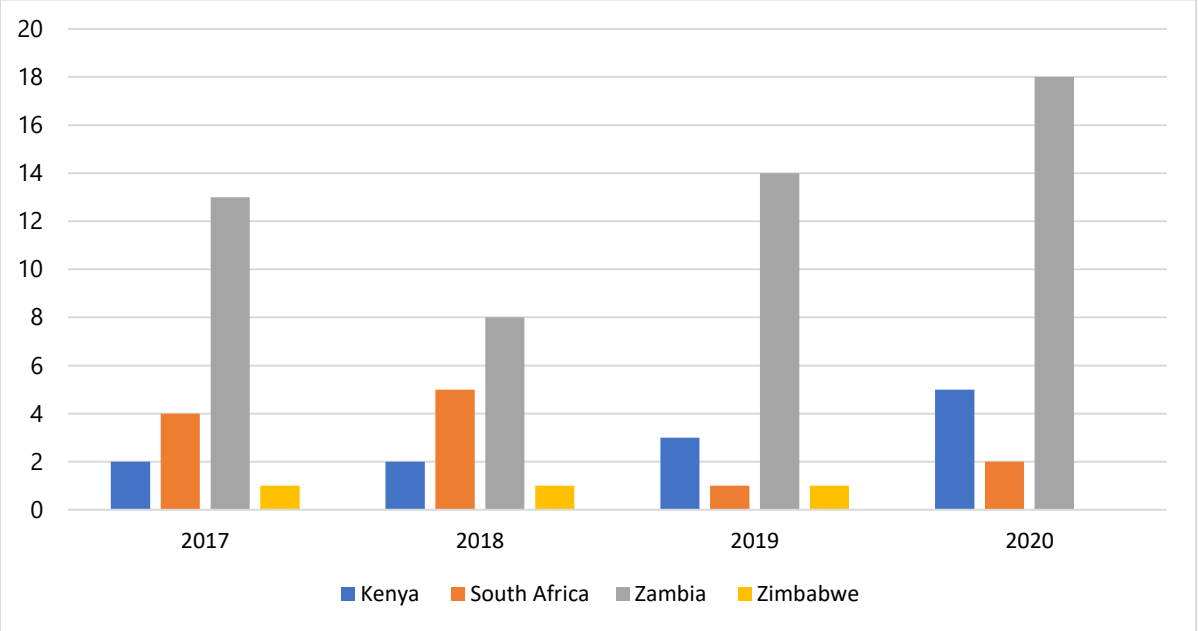
The study found that simply counting the number of cartel investigations, as is done in the international index, can lead to ambiguous conclusions on the effectiveness of cartel enforcement. The findings reported in this study suggest that better reporting is needed on the number of cases won, the penalties imposed, and the average duration of cartel investigations. This will support an analysis of authorities' effectiveness regarding cartel enforcement. Further, it may be that additional variables need to be built into the framework, such as the number of completed investigations. This would also show the authority's ability to handle these types of cases, as has been the case with the CCSA. In addition, we need more detailed information on the cases the authorities closed. This will give us insights on the authority's success with prosecution. In other words, was it able to impose remedies, a criminal sanction, or a fine? In the event that there are settlement agreements, this needs to be quantified.

## Reasons for the increase in the number of abuse of dominance cases in the region

Abuse of dominance cases are notoriously difficult to investigate and prosecute. They incur significant litigation costs to complete and require expert skills for the evaluation of these cases (Makhaya et al., 2012).

However, being able to conduct abuse of dominance investigations may also serve as a proxy for an authority's capabilities and experience. For instance, following on from cartel investigations, it appears that Zambia is second to South Africa in enforcement. Interestingly, the CCPC leads in the investigation of abuse of dominance, launching 66% of cases. This is followed by the CCSA (15%), as shown in Figure 7. Still, not much inference can be drawn from these figures other than to recognise that there has been a steady increase in abuse of dominance cases launched, especially for Zambia.

Figure 7: Abuse of dominance cases in the region, 2017–2020




Source: Competition authority annual reports

Another challenge is that there are some differences in the thresholds for dominance across the region. This may impact on the burden of proof an authority requires, and thereby its ability to launch investigations into abuses of dominance. Furthermore, the Covid-19 pandemic may have skewed the data to some extent due to resources of the authorities being directed towards abuse of dominance cases during this time; as such it may be that fewer cases of abuse of dominance will be launched in the future. However, the data suggests that the number of cases the CCPC handled is indicative of the increasing skills and expertise of its staff.

## Organisational resources: Staff and budgets

This section focuses on how the Comparative Competition Enforcement Dataset framework could be enhanced for application in the region, building on the analysis of authorities' staff and budgets in previous sections of this paper.

The first observation is that competition authorities have often identified the relevant expertise and experience of staff as being a major contributor to their effectiveness (Makhaya et al., 2012). However, staff skill level and occupation, whether economist or lawyer, is not being reported by all the authorities, or is difficult to determine from public information. For example, the average number of staff employed over the region by the various authorities is CCSA (216), CAK (65), CCPC (46), CTC (25) over the period. However, what would more useful would be a disaggregation of staff by occupation, for each division,

training and skills, and their case load. This information was especially difficult to obtain for South Africa, which has had the most success in overall enforcement in the region.

Secondly, competition authorities, such as the CCPC, have also expressed the need to expose their staff to learning opportunities to enhance their technical and economic analysis, especially in regard to mergers and market analysis. Furthermore, they recognised that their staff needs to strengthen their investigative capacity. This is with a specific focus on detecting infringements, managing investigations and handling evidence (CCPC Annual Report, 2020). Within the budgets however, this, is not always possible. Perhaps what is needed is a better understanding of how authorities use their budgets.

## Conclusion

This study has determined an urgent need for more consistent and uniform tracking of competition authorities' enforcement activities. In assessing the data available for merger and cartel enforcement, it appears there is much to be gained from more comprehensive reporting on enforcement activities across jurisdictions, particularly in light of regional integration, including through the AfCFTA agreement. The ways in which authorities fulfil their mandates also plays a critical role in the success of enforcement. Financial and administrative autonomy, together with transparency, accountability and reporting, have been shown to be pivotal in authorities' enforcement. Therefore, while it is important to track the enforcement activities of authorities, it is just as important to track how enforcement institutions are governed. In the case of the authorities studied, there are gaps in how governance metrics are reported. Streamlining the tracking of how institutions are governed – at least with comparable capabilities and outcomes from which aspects of performance and impact could be inferred – can be a useful way of accounting for enforcement institutions' progress and growth of in the region.

The discussion above has demonstrated that although there are gaps in data reporting, competition authorities in the region are gathering a vast amount of data. The inconsistency and unreliability of the data gathered in this study appears to be due to limitations confronting competition authorities regarding sharing more detailed information in the public domain. This could be due to confidentiality concerns, or lack of capacity within authorities to collect, analyse and report this information publicly.

The analysis has also demonstrated that the dataset has been useful in gaining an understanding of authorities' capabilities – and how this affects their ability to enforce competition law in the region. However, it is important to recognise that the data collection framework used in the international dataset was not tailored for the southern and East African context. Further, given that the Comparative Competition Enforcement Dataset covers 100 jurisdictions, it is unsurprising that some variables are generic. They report issues at a lower level of detail for each country, relative to breadth of variables

reported on, than would be required to conduct more substantive comparative analysis of authorities' performance and capabilities in the region.

As identified throughout the discussion, there are additional variables which could be built into the dataset to enhance tracking of the authorities' work. For example, given the number of cartels uncovered with regional effects, variables which capture regional enforcement could be added to the dataset.

Overall, the analysis has shown there is adequate data that can be used as a basis towards building a tool for tracking and benchmarking the enforcement activities and resources of competition authorities in the region. However, it is only through establishing collaboration with and between authorities that the consistency and reliability of reporting can be improved. This will go a long way towards a competition policy enforcement benchmarking tool that would be useful for both authorities and comparative research.

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