



Promoting Competition Reforms for Development *How to Proceed in West Africa?*

Enforcement of competition regimes in the developing world is often impeded by a number of factors ranging from absence of political will to resource and capacity constraints. This briefing paper summarises such factors encountered by CUTS while implementing the 7Up4 project in seven countries of the Economic Community of West African States (ECOWAS) and suggest measures that can help address them. An effective competition regime is an essential element of the enabling business environment that can facilitate well-functioning markets, to drive the economy forward and create jobs in developing countries. Stakeholders, policymakers and development partners in these countries/region need to realise the importance of promoting competition for achieving some of the key national developmental goals.

Introduction

There is enough reference in the literature and evidence on the ground that clearly suggest how an effective competition regime (comprising an effective competition law and an active competition enforcement agency) is able to assist economic progress in developing countries and guard consumers from falling prey to marketplace malpractices. Many international organisations and development partners working on economic policy issues globally have bolstered their support over the years in favour of competition reforms, on the basis of the above realisation.

“Strong competition policy is not just a luxury to be enjoyed by the rich countries, but a real necessity for those striving to create democratic market economies”, opines Joseph Stiglitz. Most African countries adopted market-oriented reforms as part of the globalisation and liberalisation process, which they had embarked under the Structural Adjustment Programmes (SAPs) of the early 90s.

But due to various reasons, distortions have arisen in the working of market processes in many countries and across several key markets. This has affected the

capacity of the private sector to emerge as a driver of these economies by creating jobs to alleviate poverty.¹ In order for African economies to sustain the growth path that has recently been witnessed in them (continuing the upward trend, African economies are expected to grow at six percent in 2012, according to the IMF)², governments need to urgently focus on measures for promoting well-functioning markets. Establishment and successful operation of a national competition regime one such necessary step.

In this briefing paper, CUTS tries to identify factors that hinder the development of competition regimes in countries across West Africa – and expects that national policymakers and international organisations working would take stock and realise the need for addressing these challenges for ensuring economic progress in these countries.

Over the period 2008-10, CUTS implemented a project on competition policy and law issues in seven countries in West Africa (referred to as the 7Up4 project, www.cuts-ccier.org/7Up4), which was instrumental in developing background knowledge of both national and international stakeholders about the

Table 1: Investment and Industrial Policies

Burkina Faso	Industrial Development Strategy adopted in 1998: close cooperation among public sector, the private sector and technical and financial institutions
The Gambia	Full freedom for private sector expansion in an environment of social justice and equity
Ghana	Ghana Investment Promotion Centre Act, 1994 (Act 478) to provide a favourable climate for private investment
Mali	Investment promotion fund; development of better road networks and new industrial centres
Nigeria	Retreat of state associated with promotion of private sector through various measures: <ul style="list-style-type: none"> • 1995: Nigerian Investment Promotion Commission (NIPC) Act No.16; and repeal of Nigerian Enterprises Promotion Act restraining FDI • 1997: repeal of all laws restricting competition in the national economy • 1998: adoption of the Public Enterprises Promotion and Commercialisation Decree, to open up sectors such as telecommunications, electricity generation and oil exploration as well as hotels and tourism to private participation
Senegal	<ul style="list-style-type: none"> • New Industrial Policy (NPI) of 1986 to promote private sector with a view to enhancing its international competitiveness • Investment Policy providing criteria for selecting investors in strategic development sectors • Legal provision for use of public-private partnerships adopted in 2004
Togo	<ul style="list-style-type: none"> • Sustained growth based on promotion of private investments • Emphasis on promotion of SMEs, agriculture and mining sector

state of competition in seven countries in the region (Burkina Faso, Ghana, The Gambia, Mali, Nigeria, Senegal and Togo), and priority areas of concern in them.

Economic Reforms & Competition

Evidence from these seven countries indicates that they are characterised by a similar history of economic reforms. The countries share a common background of state control and central planning at independence. This was followed by a period till end-90s characterised by the SAPs of the International Monetary Fund (IMF) and the World Bank. As a result, there was a noticeable disengagement of the government from economic production through privatisation of State enterprises and the strengthening of the private sector. This was one of the main catalysts towards inducing competition into the economy, especially by boosting private sector participation. This was also complemented by investor friendly policies, which saw removal of barriers to investments.

Given that often the government is the largest buyer of private sector products and services, efforts were made in these countries to ensure that their public procurement regulations were in line with private sector promotion. This was due to the realisation that the public procurement process could create opportunities for corruption and has the ability to destroy and distort private sector development processes and competition. The public procurement policy has undergone phases

of change in the countries.

Another aspect that has also had significant bearing on competition in key markets is the process of evolution of their trade regimes, and influence of the regional integration process. It can be established that market liberalisation was in part due to obligations imposed by the World Trade Organisation (WTO) membership (1995-96) and regional integration processes under both the Economic Community of West African States (ECOWAS) and the WAEMU in addition to the SAPs. Membership of both the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (WAEMU) aims at liberalisation of community trade and prohibition of anticompetitive practices and other policies/measures distorting competition within these markets.

The seven countries were at different stages with regards to their national competition regimes. While five countries have competition laws as well as authorities/institutions to implement the same, the other two countries (Ghana and Nigeria) are yet to embrace a competition law.

Although the law was enacted in 2007 in The Gambia and the agency established pretty soon – they have not been able to start the process of competition enforcement due to lack of experience.

Even those countries with competition authorities (Burkina Faso, Mali, Senegal and Togo) are facing stiff challenges in implementation.

Table 2: Public Procurement System Across Countries

Burkina Faso	Public procurement reforms started in 2005 to achieve conformity with the international public procurement standards adopted by West African Economic and Monetary Union (WAEMU)
The Gambia	Public Procurement Act 2001: ended centralisation in procurement and seeks to provide transparency, efficiency, economy and accountability in public procurement through a system which is fair to all potential suppliers and provides adequate opportunities to all enterprises
Ghana	Public Procurement Act 2003 (Act 663) was adopted to control public procurement in line with the principles of good governance, poverty reduction and the struggle against corruption
Mali	Public Procurement Regulatory Authority created in 2008 to regulate public procurement with a view to increase transparency and efficiency in line with WAEMU directives
Nigeria	Creation of open tendering systems for government and public companies to enhance competition in 2004-06
Senegal	<ul style="list-style-type: none"> • Public Procurement Code adopted in 2007 to achieve conformity with WAEMU directives on public procurement • Adopted a Charter of Transparency and Equity in regard to Public Procurement in 2005
Togo	New law enacted to ensure compliance with directives of WAEMU and institutional changes introduced in the form of the setting up of a regulatory authority to enhance transparency

In Mali for example, the competition authority is not much visible on the ground and is reported to have handled only two cases in 2007-08, which were recommended to the regional competition authority (WAEMU Commission) for proper investigations.

Regional competition regimes have also been put in place as part of the process of regional economic integration in West Africa. Both the WAEMU and the ECOWAS have regional competition legislations. While the WAEMU Commission has a mandate to investigate cases in its eight member states, ECOWAS is in the process of setting up its regional competition agency for its 15 members.

Factors Affecting Competition Enforcement

Political Economy Constraints

Political economy factors that have adversely affected the pace of competition reforms are clearly evident in the two countries – Ghana and Nigeria. Despite the spirited efforts by some stakeholders aimed at developing the national competition legislation, both countries are yet to adopt a Competition Law. Although many competition bills have been prepared, none of them have really seen the light of the day.

In Nigeria, while uncoordinated and parallel processes have seen the emergence of different versions of competition bills being prepared and pushed simultaneously by different government entities. There is no consensus among Nigerian policymakers

regarding the line Ministry that should host the competition enforcement agency. Consequently, the National Assembly has been consistently turning down the bills; without providing any guidance on how to develop the legislation in the future.

In Ghana, three different competition bills have been prepared over the years by different agencies, with none of them having been presented to the Parliament for approval. It is not clear where the hurdle lies, as the relevant Ministry (Ministry of Trade and Industry) seems to be interested in pushing the process forward. There have been numerous calls from stakeholders on the ground, which have not been heeded to. Now, the Ghanaian government is thinking of developing a National Competition Policy, to precede the process of establishment of the Law.

Lack of Competitive Neutrality

Government regulations and attitude still continue to be the albatross around the competition authorities' necks. The State continues to play a key role in certain markets, mostly free from competition from the private sector (as state monopolies) or in competition with the private sector, for which these enterprises would gain some advantages. While the presence of state enterprise in the economy is not bad per se, it has generally been observed that competitive neutrality is often compromised. This implies that governments generally tend to favour public institutions often making them immune to regulatory provisions/oversight.

Table 3: Evolution of Trade Policy in Project Countries

Burkina Faso	<ul style="list-style-type: none"> • Lifting of administrative control of prices • Elimination of subsidies and export taxes. • Accession to WAEMU and ECOWAS in 1994 and 1995; party to ECOWAS negotiations with EC, and adoption of the WAEMU ratified Common External Tariff (CET) in 2000 • WTO membership in 1995 leading to two reviews of foreign trade policy based on recommendations of the WTO Secretariat which are reflected in the National Export Strategy and the country's participation in the 2003 WTO Cotton Initiative
The Gambia	<ul style="list-style-type: none"> • Is implementing CET and trade liberalisation scheme of ECOWAS; and is party to ECOWAS negotiations with EC • WTO membership in 1996
Ghana	<ul style="list-style-type: none"> • Member of WTO since 1995 • Signed interim agreement with EC in December 2007 to safeguard its free access to the European market and is using the Aid for Trade Programme to develop its infrastructure
Mali	<ul style="list-style-type: none"> • Member of WTO since 1995 • Engaged in trade liberalisation/regional integration processes of both WAEMU and ECOWAS, as well as the Economic partnership Agreement (EPA) negotiating process of ECOWAS with the EU • As LDC benefits from trade preferences under AGOA
Nigeria	<ul style="list-style-type: none"> • Member of WTO since 1995 • In the process of applying the ECOWAS CET and facilitating the free-movement of goods and persons agreed by the Community
Senegal	<ul style="list-style-type: none"> • Member of WTO since 1995 • Member of WAEMU and ECOWAS and party to EPA negotiations with the EU • Benefits from AGOA initiative in favour of LDCs and is part of the EU "Everything but Arms" Initiative
Togo	<ul style="list-style-type: none"> • Member of WTO since 1995 • Party to ECOWAS and WAEMU and participates in EPA negotiations between ECOWAS and the EU

SoEs in the Economy

A number of state-owned enterprises (SoEs) continue to exist in many sectors in receive State favours, in spite of being inefficient. This was notice in Burkina Faso; across all major sectors in The Gambia and Nigeria.

In The Gambia, the downstream competition for the groundnut sector is totally distorted by the presence of a public monopoly (The Gambia Groundnut Corporation), which is the sole buyer of groundnuts on a large scale.

Although Ghana has done very well in reducing the number of SoEs in operation (only a handful of the 350 SoEs still exist), there are still some sectors where they still dominate.

In Togo, many SoEs still remain, especially in services (financial services, post and telecommunications, ports, airports, etc.).

Institutional Weaknesses

From the analysis of the five countries that have adopted competition laws and established competition authorities, it emerges that several structural and functional factors restrict them from fully discharging their mandate. These factors include: lack of financial

resources, high staff turnover, lack of independence and general unawareness and support from other stakeholders.

National vs Regional Competition Regimes

In addition, members of WAEMU (Burkina Faso, Mali, Senegal and Togo) are also struggling to establish their identity given that the competition agencies here act merely as the referral desk for cases to be sent to the WAEMU Commission for investigations and final decisions. In countries like Togo, the Competition Agency reports to the Minister of Commerce and Industries, thereby limiting its independence and compromising its impartiality in dealing with SoEs.

The adoption of competition reform measures at the regional levels (under the WAEMU and ECOWAS) led to the creation of regional bodies with competition enforcement powers. However, in West Africa the absence of coordination between the national and regional competition agencies acts as one of the most daunting challenges for countries' endeavour to establish functional competition regimes at the national level.

As already mentioned, the national competition authorities in the WAEMU member states have ceded

Table 4: Laws and Competition Authorities in Project Countries

Country	Competition Law	Date	Competition Authority	Date of creation
Burkina Faso	Law 15-94 ADP	May 1994	CNCC	December 2002
Gambia	Competition Act	October 2007	The GCC	2009
Ghana	None			
Mali	Ordinance n° 07- 025/P-RM	July 18, 2007	DNCC et CNC	1998
Nigeria	None			
Senegal	Law n° 94-63	August 22, 1994	CNC	2002
Togo	Law n°99-011	December 27, 1999	DCIC & CNCC	December 16, 2001

some of their powers to the regional body (WAEMU Commission). What makes the situation more challenging, however, is the absence of clarity on the interface between the regional authority and national competition authorities.

Ideally, the regional authority should preside over cases that have an effect in more than one country, but WAEMU is now faced with a situation where they have to deal with country specific competition cases as well. This has resulted in an extremely heavy workload of complaints at the WAEMU Commission, which takes a long time to get cleared. The WAEMU Commission is also affected by a small team of competition practitioners and therefore has a long pending list of cases referred to it by the member states.

Consumer Protection Issues

The ECOWAS Commission is currently in the process of developing a blueprint for the regional competition agency and is expected to derive lessons from the above-mentioned challenge faced at the level of the WAEMU, and address this aspect effectively.

While a competition law can go a long way in protecting consumers against market malpractices, there is also a need for an alert national consumer protection agency and active consumer organisations to complement activities of the competition agency.

Only Nigeria has a comprehensive law on consumer protection (with the Consumer Protection Council of Nigeria entrusted to implement the same) in the region, although its implementation is faced with challenges. The lack of consumer protection agencies in the region indicates that consumer protection is not a priority of the governments. Some consumer organisations exist in the countries – but face considerable resource constraints that affect their visibility and advocacy/dissemination functions.

Anticompetitive Practices Causing Significant Impacts

One of the immediate fall-outs of ineffective national competition regimes in this region is the fact that anticompetitive practices including cartels, continue unabated across key markets. These allegations have not yet been proven, as competition authorities (where they exist) have struggled to take actions due to one or a combination of the above-mentioned factors.

Cartel allegations that were registered in some sectors like cement and fertilisers and have significant socio-economic implications are illustrated here:

- ◆ In Ghana, the cement market is dominated by a duopoly between Ghana Cement (GHACEM), and a cement firm of Indian origin, Diamond Cement. In 2007 the price of a 50 Kg bag of cement more than doubled, with attempts at intervention by the Minister of Commerce and Industry requesting limiting of prices being rejected. The duopoly has been accused of creating scarcities of cement in order to benefit when prices rise.
- ◆ The Nigerian domestic cement production is actually composed of 13 national producers who also import cement. The sector is dominated by WAPCO, a subsidiary of the French group Lafarge, which controls around 55 percent of the market. Together, the 13 cement firms which are members of the Cement Manufacturers' Association represent around 80 percent of the Nigerian market and are accused of coordinating their behaviour.
- ◆ In Burkina Faso, although there are many domestic private suppliers of fertilisers and phyto-sanitary products (e.g SOCOMA, SAPHYTO, SCAB, SIPAM, KING AGRO, BOUTAPA and SOFITEK), these companies are alleged to have engaged in market-allocation arrangement, where they have allocated territories amongst themselves

as a way of avoiding competing against each other. In addition, the quasi-uniform prices across markets also point to some possible price-fixing cartelisation as well.

- ◆ A similar situation is witnessed in The Gambia, where despite many suppliers (including SoEs like The Gambia Horticulture Enterprise and private players such as FIRST CHOICE, SANGOL, SILLA, BAKARY BOJANG), the concern among farmers is that the high prices is due to collusive price-fixing and market-sharing.
- ◆ Ghanaian farmers echo the same sentiments and allege that under the leadership of WIENCO (which is estimated to control 65 percent of imports and 75 percent of distribution in the country), the fertiliser companies are engaged in collusive practices such as price-fixing and market sharing.

The Way Forward

The following are **Key Action Points** that would lead to development of functional competition regimes across countries in this region:

- ◆ Convince politicians and policymakers of the need to adopt national competition reforms as a priority public policy measures

- ◆ Empower stakeholders with relevant information and knowledge (illustrating how an effective competition regime can help address socio-economic concerns), so that they raise demand for promoting competition
- ◆ Establish a mechanism for cooperation/coordination between national and regional competition authorities (ECOWAS and WAEMU) to build confidence and enhance visibility of national competition authorities
- ◆ Adopt appropriate institutional reform measures in the regional competition agencies
- ◆ Inform stakeholders (especially, consumer organisations, NGOs, academia, media, etc.) of the role they can play in implementing competition regimes
- ◆ Identify ‘champions’ among stakeholders, who not only understand the subject but also have the ability in promoting awareness across other groups, etc.
- ◆ Mobilise support from development partners in the countries/region to support competition enforcement.

Endnotes

1. CUTS (2008), ‘Competition Reforms – An Essential Element to Evolving a Sound Business Environment in Eastern and Southern Africa’; at: www.businessenvironment.org/dyn/be/docs/154/Sengupta.pdf.
2. <http://www.economist.com/node/21541015#footnote1>

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