



**Strengthening Constituencies for Effective Competition Regimes  
in Select West African Countries (7Up4 Project)**

# **A Time for Action**

Synthesis Report



#1013

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## Synthesis Report



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## Synthesis Report

Published by

CUTS Centre for Competition,  
Investment & Economic Regulation



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In Cooperation with:



Ministry for Foreign Affairs  
Sweden

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Printed at:

Jaipur Printers P. Ltd., Jaipur 302 001

#1013

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## Acknowledgements

The project 'Strengthening Constituencies for Effective Competition Regimes in Select West African Countries' - 7Up4 Project, was a first initiative of CUTS in West Africa. It was also a first CUTS project in francophone countries, making it a challenging endeavour. Successful implementation of this project would not have been possible without the assistance provided by various people including donors, country partners, advisers, key stakeholders in the countries, CUTS staff and various other friends of CUTS from within the region and outside.

We are grateful to all these people, and others we might have missed to remember, for their contribution on this extremely important subject especially in the context of West Africa, which still is a region less explored and understood at the international level. CUTS believes that the experience gained over the period of implementation of this project and the friends we were able to make during this period would continue to motivate and inspire us for developing future interventions in this region.

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# Foreword

The period including the 1990s and the first years of the present century has been characterised by the fact that a great many developing countries, in particular in Africa, adopted a competition law, or, in some cases, upgraded their existing law.

These legislative initiatives were premised on the belief that the fight against anti-competitive practices and transactions would contribute to economic development and alleviate poverty through a better allocation of resources and the elimination of monopolistic rents.

It is thus legitimate to try to assess both the effects those laws or amendments have had in the countries which have adopted them and the problems faced by countries which have not established a competition law regime.

The contribution of a competition law to economic development depends largely on two factors: first, whether the competition law is implemented in an effective way and, second, whether other economic policies such as trade policy, agricultural policy, consumer policy, and industrial policy enhance competition, thus complementing the enforcement of competition law, or stifle competition, thus undermining the enforcement of competition law.

For over a decade now, CUTS has analysed competition regimes in developing countries from across Africa and Asia, especially in terms of existing/evolving legislations, relevant institutions, prevailing environment and the role of stakeholders. In addition to strengthening CUTS efforts for promoting competition reforms in these countries, such analyses has also created a repository of information and knowledge about the nature of markets and behaviour of firms in developing countries that was otherwise absent. It has also contributed immensely in developing the understanding of (and creating interest within) the international community about challenges faced by developing countries

in enforcing competition regimes – so that these challenges can be met. Furthermore, this work has also created huge local interest in the countries (and in neighbouring countries) where the 7Up projects have been implemented and built up a cadre of well informed citizens, including capacities to do research and advocacy on competition issues.

When CUTS started implementing the 7Up4 project, it ventured into an unfamiliar territory, both in terms of situation and especially language in the seven countries of West Africa. While, the earlier 7Up projects (7Up1, 7Up2 and 7Up3) were implemented only in anglophone countries of Africa and Asia; this fourth in the 7Up line-up included four francophone countries. Nothing much was available to offer a bird’s eye view about the state of market competition in this region. Peer reviews and technical assistance reports of International Organisations mostly focused on state actors and institutions. There was this void that CUTS had identified and has effectively addressed through this report.

This report, ‘A Time for Action’, undertakes an in-depth analysis of the situation in seven West African countries: Burkina Faso, The Gambia, Ghana, Mali, Nigeria, Senegal and Togo, two of which (Ghana and Nigeria) do not yet have a comprehensive competition law.

This document is a unique source of information on the situation in each country and the comparative inter-country analysis leads to very useful observations relating to the sequencing of policies in the process of economic liberalisation, the institutional design of competition law systems at the national and regional levels, and the prerequisites for a successful transition to a market economy.

It emerges that there are huge opportunities for countries in this region to achieve economic development by evolving well-functioning markets, which are promoted by enabling policies and nurtured by effective institutions. These are areas that the international community should particularly focus its assistance efforts in the future.

**Frederic Jenny**  
Judge  
Supreme Court of France

## Preface

I have great pleasure in penning these lines as a preface to this report of a project which is the fourth in a series. CUTS has now implemented projects on competition reforms in 26 developing countries of Africa and Asia. Each of these projects has been an improvement over the earlier ones due to the experience gained. In this project, 7Up4, in addition to analysing the overall state of competition in the project countries, we have taken a closer look at competition concerns in the agricultural sector<sup>1</sup>. This project implemented during 2008-10 covers seven countries of West Africa: Burkina Faso, The Gambia, Ghana, Mali, Nigeria, Senegal and Togo.

Our experience in this project (7Up4), when compared to that of the 7Up3<sup>2</sup> and 7Up1<sup>3</sup> projects, reveals that although, regional authorities in West Africa – Economic Community of West African States (ECOWAS) and West African Economic and Monetary Union (WAEMU) – were established around the same time as that in Eastern and Southern Africa (viz. COMESA), the adoption of competition laws in many West African countries happened earlier, one of the reasons being the inclusion of competition reforms in the active agenda of the WAEMU. However, only some of the members<sup>4</sup> of the ECOWAS had initiated this process then; and others have only recently geared up to adopting national competition laws.

In those countries that did initiate this process, enforcement, even after a decade's experience, is still wanting. The progress in these countries has been extremely slow compared to that in Eastern and Southern African countries – casual empiricism reveals lack of political

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- 1 Competition Concerns in the Agriculture Sector in Select Countries of West Africa
  - 2 Botswana, Ethiopia, Malawi, Mauritius, Mozambique, Namibia and Uganda
  - 3 India, Pakistan, Kenya, South Africa, Sri Lanka, Tanzania and Zambia
  - 4 Benin, Burkina Faso, Cape Verde, Cote d' Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo constitute the ECOWAS

willingness, and insufficient human and financial resources as possible reasons; while experts also point to anomalies in the interface between the national and regional competition legislation as other probable reasons

However, a thorough assessment of country-specific challenges in regard to enforcement of competition was missing. CUTS felt that such a detailed assessment and analysis would help facilitate a process which would yield benefits to project countries in the form of better functioning markets. Thus, the CUTS 7Up4 project was suitably christened as *Strengthening Constituencies for Effective Competition Regimes in West African Countries*.

This was the first initiative of a project implemented by CUTS in West Africa, and also the first time that we worked in French-speaking territories. Naturally, some of us were therefore a bit concerned in the beginning. While the project team composing of bi-lingual advisers like Philippe Brusick and Lahcen Achy gave us a lot of confidence, the language barrier that we might run into in our day-to-day operations made us worry a bit. We recruited a couple of French-speaking staff in the project team, to deal with this and stretched our hands out for assistance from colleagues and friends whenever such a situation arose.

One of the main objectives of this project was to develop the capacity of multiple stakeholders to raise the ante on the need for an effective competition regime into the wider public domain. The project was targeted to not only help countries refine their competition regimes, but also in developing a roadmap for their effective implementation.

When CUTS started the project, competition institutions existed in all four Francophone project countries (*Burkina Faso, Mali, Senegal and Togo*), either as a full fledged agency or a department within the trade/commerce department handling competition issues. However, only *The Gambia* had announced the formation of a competition authority, among the Anglophone countries. While Nigeria and Ghana had draft laws, there was not much certainty about their formal adoption in either of them.

The project team anticipated a low level of understanding on the issue in the project countries and, therefore, little interest among stakeholders. However, the response received was far more encouraging than anticipated, which pointed to a latent demand that had not come to the fore because of the general lack of attention to competition issues shown

by national and international development partners working in the region.

CUTS own initiative in the form of a pre-project 'scoping mission' to test the waters in some of the project countries contributed to the enthusiasm evinced by stakeholders as it helped to convey CUTS' keen interest on competition reforms in the region and the possible benefits from the project. The contacts made during the scoping mission were extremely useful, and many of those institutions/individuals were engaged in the project as members of the National Reference Group (NRG).

One of the key outcomes from the 7Up4 project is the realisation that there is a need for a broad-based process for the evolution and enforcement of national competition regimes to achieve well-functioning markets in the interest of consumers at large. Government departments in charge of competition and existing competition agencies were able to appreciate the 'value-addition' that could happen from involving key stakeholders in this process. Roadmaps for national competition reforms were developed by integrating research findings, and highlighted this need in all project countries. The project was also able to convince stakeholders about how competition reforms could facilitate development, economic growth and poverty eradication in project countries.

The 7Up4 project has created an interest among both state and non state actors on competition policy and law issues, which needs to be further nurtured through follow-up actions. CUTS continues to motivate its country partners to take the lead in facilitating improvements in enforcement of competition law and policy, and bring the huge interest on competition and consumer protection issues and resulting demand for capacity building in the region to the attention of the international community.

Early signs of an urge among stakeholders to continue the campaign on competition reforms beyond the 7Up4 project period were witnessed in some countries, when the project was approaching its completion. An ECOWAS Competition Authority is expected to be up and running within the next couple of years, and is likely to exert considerable pressure on member states to beef up their national competition regimes. This would create a huge demand that would have to be met. Both ECOWAS and WAEMU are very keen now to gear-up their activities on competition

law evolution and enforcement in the member states, and have shown interest in partnering with CUTS towards this end.

When CUTS ventured into this region first, we did not have much experience of the state of affairs and the outcomes our intervention (7Up4 project) might achieve. But, now we have witnessed the huge demand for such work in this region which has inspired us to consider setting up our sixth overseas office in a West African country and anchor our future work on trade, development, competition and consumer protection.

Our long term development partners – the Department for International Development (DFID), UK; International Development Research Centre (IDRC), Canada; and the Ministry for Foreign Affairs (MoFA), Sweden – have kindly supported us in implementing this project. Each of these organisations has been supporting many other projects of CUTS in the area of trade and competition and we are indeed extremely grateful for their continuing support.

Furthermore, we are indebted to Frederic Jenny, noted competition scholar and practitioner, Chairman of CUTS International Advisory Board and our guide and mentor on competition issues for writing the foreword. Finally, my thanks to the entire CUTS team led by Rijit Sengupta, our partners in each of the seven countries and two advisers: Philippe Brusick and Lahcen Achy for enabling the successful completion of the project.

October 2010  
Jaipur

**Pradeep S Mehta**  
Secretary General

# *Competitive Markets as Means for Achieving Growth and Development in West Africa*

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## **Introduction**

CUTS has adopted and institutionalised a research-based-advocacy and capacity building approach for competition reforms in developing countries, through the participation of multiple stakeholders, referred to as the 7Up Model.

Over the period 2000-02, CUTS implemented its first project using this methodology to assess common challenges that seven developing countries of the Commonwealth were faced with. This came to be referred to as the 7Up1 Project and was implemented in India, Pakistan, Sri Lanka, Kenya, South Africa, Tanzania and Zambia. This was followed by the 7Up2 Project that was implemented in six Asian countries, viz. Bangladesh, Cambodia, India, Lao PDR, Nepal and Vietnam, who either had or were starting to evolve and implement national competition legislations. The 7Up3 Project was the third sequel in the series and was implemented in seven countries of eastern and southern Africa, viz. Botswana, Ethiopia, Malawi, Mauritius, Mozambique, Namibia and Uganda. The idea was to develop capacity of key stakeholders on competition policy and law issues, to enable them to play an active role in evolution and implementation of the competition regime.

This chapter collates findings from seven countries which were studied under the 7Up4 Project. A main objective of the 7Up4 Project was to raise the profile of competition issues in the countries, and facilitate a discourse on the best way forward for evolving competitive markets for growth, development and poverty reduction in them. Key challenges/concerns that need to be addressed by these countries are identified

here, so that a holistic approach to competition reforms can be adopted for them and indeed the region. Readers are also encouraged to read the individual country reports (The Gambia, Ghana, Nigeria available in English; and Burkina Faso, Mali, Senegal and Togo available in French).

## Context

The 7Up4 project was a two-year research, advocacy and capacity building project launched in June 2008 covering seven West African countries – Burkina Faso, The Gambia, Ghana, Mali, Nigeria, Senegal and Togo. The major objective of the project was to develop an appreciation of the need for an effective competition regime among national stakeholders such as policy makers, regulators, civil society organisations, consumer groups, academics and media persons and build their capacity as effective facilitators of such a regime.

The project endeavoured to achieve this objective through research aimed at highlighting the various challenges to implementation of effective competition regimes, which would culminate in capacity building and advocacy initiatives for their removal. As part of the project, detailed reports on each of the seven countries have been prepared. The country reports were centred on research themes focussed on diverse issues relating to competition. This monograph is in the form of a synthesis report – it would highlight the commonalities and differences among countries and point out country specific peculiarities in regard to each of the themes by drawing on the various country reports.

The issues captured by the seven country reports and therefore by the synthesis report can be classified into two sets – the first describing the *status quo* in relation to competition law and policy and its implementation in the project countries and the second outlining the ‘needs’ for change. The *status quo* and ‘needs’ are linked by a cause – effect relationship. The former includes political economy issues, current policies and laws in place, the extent to which laws in place are being enforced, as well as the economic structure. The latter includes prevailing anticompetitive practices and the level of awareness on competition and regulation issues in the economies.

## General Social and Economic Indicators

The West-African countries covered by the 7Up4 Project are very diverse with respect to both geographical area and population. The former (see Table 1) varies from 11,300 square km in case of the Gambia to 923,768 for Nigeria and 1.2 million for Mali with the variation in population exhibiting a different pattern – Gambia unsurprisingly is the least populous country with a population of merely 1.5 million; but Mali, despite its large land area has the third smallest population of 12.1 million while Nigeria with a population of 144.7 million is the most populous as well as the most densely populated country.

In terms of GDP, the Nigerian economy is by far the largest, with a current GDP of US\$207.12bn in 2008, according to the International Monetary Fund (IMF). The other economies are much smaller; Senegal, the second largest, had a current GDP of US\$13.25bn in 2008, while the smallest economy, that of The Gambia, amounted to a GDP of US\$806mn according to IMF data. With respect to GDP per capita in 2009, however, Senegal was first, with US\$ 2009, while Nigeria was far behind with US\$1089 and the remaining five were within a range of US\$639 per capita for Ghana to US\$408 for Togo. It is interesting to note that within this list, only Ghana and Nigeria are not counted as LDCs by the United Nations, while Senegal, which has a considerably higher GDP per capita than these countries, is still considered an LDC by the UN.

Table 1: Some Key Comparative Data for 7Up4 Countries					
Country	Area (Km2)	Population in million	GDP (in US\$bn)	GDP/capita (US\$)	UN standards classification
Burkina	274 200	14. 0	6.103	542	LDC
Gambia	11 300	1.5	0.806	434	LDC
Ghana	239 460	28.4	16.124	639	–
Mali	1,241 238	12.4	8.783	641	LDC
Nigeria	923 768	144.7	207.116	1089	–
Senegal	196 712	12.5	13.250	2009	LDC
Togo	56 785	5.4	2.890	408	LDC

Among these countries, Nigeria can be classified as a large economy on all three counts – GDP, land area and population. The largeness of its economy enhances the scope for competition by enlarging the demand facing various industries. A higher level of industry demand enables a larger number of firms to attain economies of scale and thus function viably. Note that Senegal, the second largest economy in terms of GDP, is around seven percent of the size of the Nigerian economy.

## **Government Policies that Impinge on Competition**

### **Overview**

While competition law to punish/prevent anti-competitive practices in the market is one way of enforcing competition, the policies of the national government can also have implications for the extent of competition. It is for this reason that country specific reviews of policies to ascertain consistency/conflict with promotion of competition are important. An overview of key policies across the countries with focus on similarities, in regard to such consistency/conflict, is attempted below:

### **Development Policies**

All the countries covered by the 7Up4 Project, have engaged in similar economic reform programmes (see Box 1).

Given the common background of state control and central planning from independence to the early 1980s, the subsequent period lasting till the end of the 1990s saw all these countries enter into successive Structural Adjustment Programmes (SAPs), widely inspired by the IMF and the World Bank, which aimed at disengaging the State from economic production through privatisation of State monopolies and the strengthening of the private sector. Privatisation and the mentioned boost to the private sector can be seen as competition enhancing measures.

At the end of the 1990s, all these countries adopted various Poverty Reduction Strategic Papers (PRSPs), subject to periodic review, which gave a central role to the agricultural sector and especially to social initiatives with four essential objectives:

- a) accelerating growth based on equity;
- b) ensuring access of the poor to basic social services and social welfare;

### Box 1: Reforms in West African Countries

- PRSPs in Burkina Faso followed the three SAPs implemented from 1991 to 1999 as a reaction to unemployment resulting from the privatisation and economic liberalisation agenda of these. The PRSPs gave central attention to agriculture, as more than 92 percent of the poor originate from the rural sector, with creation of the Centre for Enterprise Creation (CEFORE). This facilitated a reduction in time expenses and procedural complexity in regard to creation of new enterprises – from 32 days, 10 procedures and a start up expense of 500 000 FCFA to 7 days, the use of a one-stop window and a total start up cost of 60 000 FCFA. 3000 new enterprises were born in 2008 under the new procedures in Bobo-Dioulasso and Ouagadougou.
- Gambia too was characterised by similar drivers for the creation of PRSPs which have however failed to check the increase in poverty and inequality.
- After being one of the first African countries to launch a SAP (fiscal austerity, monetary tightening and liberalisation) in 1983, Ghana is operating a Growth and Poverty Reduction Strategy: success in wealth creation and poverty reduction already achieved in the first phase is being followed by attempts to accelerate private sector-led growth; develop human resources; and promote good governance and civic responsibility.
- In Nigeria, the SAP was followed by a reform programme which focuses on addressing the structural and institutional weaknesses of the economy, tackling corruption and overhauling public expenditure management.
- **Senegal's** implementation of consecutive SAPs from 1981 to 2000 was followed by its admission to the Highly Indebted Poor Countries (HIPC) Initiative of the IMF. As a reaction, a PRSP was implemented to bring about improved income distribution with accelerated growth; liberalise key sectors such as transport and communications; train rural workforces; and generalise access to essential services.
- The Government of **Togo implemented SAP agreements in the 1980s and 1990s**. Since 2004, the government has elaborated a strategy of poverty reduction in a preliminary document (DSRP) which set in motion the preparation of the final PRSP. The final PRSP was launched in March 2006.

- c) increasing equitable employment opportunities and income generating activities for the poor; and
- d) promoting good governance.

These PRSPs were undertaken by different countries with different levels of success. However, creation of employment was based to an extent on decentralising production (see cases of Burkina Faso and Ghana) through creation of new enterprises which should have had a direct positive impact on competition.

### **Agricultural Policy**

Agriculture is often considered a special case under competition policy in developed countries. The US, like the European Union (EU), have a long tradition of exempting agriculture from competition policy and of subsidising farmers heavily. The Common Agricultural Policy (CAP) in the EU and farm policy in the US provides many exemptions and exceptions from competition policy.

However, in developing countries, since the 1990s, along with the adoption of Structural Adjustment Programme (SAP), agricultural policy has introduced competition by abandoning subsidies and farming price-stabilisation boards.

Reforms in 7Up4 countries have therefore been characterised by the gradual retreat of state intervention leading to comeback of the private sector in agriculture; efforts to boost productivity and farm revenues, thereby enhancing food security and poverty; and encouragement to import substitution and export promotion (see Table 2). The retreat of the state associated with removal of price controls and introduction of market economy has direct positive implications for competition. As sketched out in Table 2, these vary from initiation of specific policies and acts in Nigeria, Mali and Senegal to long-term plans and programmes in other countries.

It should be noted that agriculture accounts for around 40 percent of GDP in these countries, employs about 70 percent of the workforce, and accounts for much of the poverty incidence. Poverty reduction strategies, therefore, attach great importance to agriculture.

Table 2: Policy Efforts to Boost Agricultural Productivity in 7Up4 Countries		
Policies and Acts Specifically Aimed at the Agricultural Sector	Nigeria	<ul style="list-style-type: none"> <li>• In 2000, farmer-friendly agricultural policy launched to achieve food security and create a conducive macro-environment for stimulating private sector investment</li> <li>• In 2008 National Food Security Programme launched after the world food crisis to achieve import substitution through enhanced competitiveness stimulated by private sector development</li> </ul>
	Mali	Agriculture Act of 2005: protection of farmers from non-sustainable practices and infringement of national, regional or international regulations; export promotion for growth of incomes
Long Term Plans and Broad Programmes	Senegal	New Agricultural Policy launched in the 1980s: retreat of the state; reduction in role of public price stabilisation and schemes for commodities, liberalisation and restructuring of commodity production-distribution chains.
	Burkina Faso	Strategic plan (2006-10) for poverty reduction in rural areas: improvement of natural resources; promotion of women and youth; introduction of market economy in agriculture
	Togo	Liberalisation and removal of price controls in agriculture which has stimulated private export activity in coffee and cocoa
	The Gambia	Vision 2020 programme as well as the Millennium Development Goals' thrust: promotion of competition to attract private investors, export promotion to ensure food security and employment
	Ghana	Food and Agriculture Sector Development Programme (FASDEP II): agricultural growth to achieve equitable growth and reduce poverty

**Table 3: Investment and Industrial Policies in Project Countries**

Burkina Faso	Industrial Development Strategy adopted in 1998: close cooperation among public sector, the private sector and technical and financial institutions
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"><li>● 1995: Nigerian Investment Promotion Commission (NIPC) Act No.16; and repeal of Nigerian Enterprises Promotion Act restraining FDI</li><li>● 1997: repeal of all laws restricting competition in the national economy</li><li>● 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</li></ul>
Senegal	<ul style="list-style-type: none"><li>● New Industrial Policy (NPI) of 1986 to promote private sector with a view to enhancing its international competitiveness</li><li>● Investment Policy providing criteria for selecting investors in strategic development sectors</li><li>● Legal provision for use of public-private partnerships adopted in 2004</li></ul>
Togo	<ul style="list-style-type: none"><li>● Sustained growth based on promotion of private investments</li><li>● Emphasis on promotion of SMEs, agriculture and mining sector</li></ul>

### **Investment and Industrial Policies**

Industrial and subsequent investment policies in the project countries incorporated common elements because of the common influence of SAPs: withdrawal of the state, though to different extents across project countries (see Table 3), coupled with promotion of involvement of the private sector through investor friendly investment policies. The promotion of the private sector was marked by a differential boost to competition – in most countries, barriers to private investment were alleviated with Nigeria making more direct attempts to remove barriers to competition.

### **Public Procurement Policies**

The rules and procedures governing public procurement have a huge bearing on competition, and misnomers in the process have the capacity to distort competition in the economy. In any economy, the government, through its various departments, is the single largest buyer in the economy, including from the private sector, and adoption of improper criteria for purchases could impair competition. It can be observed from Table 4 that public procurement policy has undergone changes in all seven countries so that it now serves to promote competition better.

As mentioned in Table 4, four of the seven project countries – Burkina Faso, Mali, Senegal and Togo – have revised their national legislation on public procurement to be in line with WAEMU directives (summarised in Box 2) which aim to improve efficiency, transparency and equity in public procurement procedures in member states and increase competition in the sub-region. It should be noted however, that a Community preference capped at 15 percent is admitted by WAEMU.

### **Trade Policy**

Any progress in trade liberalisation can be considered good for competition on the condition that it is not accompanied by anti-competitive practices by importers who might collude to fix prices to the detriment of domestic producers (cases of dumping or predatory-pricing) or of consumers and producers using such imports as inputs (excessively high prices); or by local firms attempting to block or restrain imports. Thus, effective competition rules must accompany trade liberalisation for the latter to be effective.

### Box 2: WAEMU Public Procurement Directives

Directive n° 04-2005-CM/UEMOA of December 09, 2005 on awarding, executing and regulating public procurement in WAEMU and Directive n° 05-2005-CM/UEMOA on controlling and regulating public procurement and delegation of public services in WAEMU have been transposed into national law in Burkina Faso, Mali and Senegal and recently in Togo.

Although the word competition does not appear often in these Directives, it is clearly the underlying principle in the WAEMU rules. Article 2 of Directive 04-2005-CM/UEMOA for example, states that (unofficial translation) :

“Public procurement and delegation of public services of any amount are subject to the following principles:

- Economy and efficiency of the purchasing process;
- Free-access to public procurement;
- Equality of treatment for all bidders, mutual recognition;
- Transparency of processes, through rationality, modernity and traceability of decisions”.

With the exception of provisions contained in Art. 62 of this Directive, member States undertake to prohibit any measure or provision based on nationality of bidders which may constitute a discrimination against nationals of a WAEMU member State. Member States further undertake to ensure that no bidder which is a public entity should distort competition to the detriment of private bidders”.

Article 62 concerns Community preference, which in any event cannot exceed 15 percent of the bid amount and which is to replace any existing national preference. Article 74 on selection of bids, provides that “the bidding procedure must be open or in two stages, with due respect to exceptions considered under the present Article”. with the first stage in the ‘two-stage procedure’ relating to pre-qualification of bidders, followed in the second stage by a competitive bidding procedure among pre-selected bidders.

Article 38, on direct agreement stipulates that “This procedure concerns cases where the authority opens discussions without proceeding through the bidding procedure with a potential supplier or service provider”, but that such proceedings must “be motivated and submitted to prior authorisation of the administrative authority in charge of controlling public procurement”.

<b>Table 4: Public Procurement Acts</b>	
Burkina Faso	Public procurement reforms started in 2005 to achieve conformity with the international public procurement standards adopted by 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"> <li>● Public Procurement Code adopted in 2007 to achieve conformity with WAEMU directives on public procurement</li> <li>● Adopted a Charter of Transparency and Equity in regard to Public Procurement in 2005</li> </ul>
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

Market liberalisation took place gradually in all the countries under study, first when SAPs were initiated in the 1980s and then with WTO membership between 1995 and 1996 (see Table 6 below); and concurrently through regional integration in ECOWAS and WAEMU. In addition, EPA negotiations by ECOWAS with the EU have had a direct effect on trade liberalisation in the region (see Box 4).

<b>Table 5: Evolution of Trade Policy in Project Countries</b>	
Burkina Faso	<ul style="list-style-type: none"> <li>● Lifting of administrative control of prices</li> <li>● Elimination of subsidies and export taxes</li> <li>● Accession to WAEMU and ECOWAS in 1994 and 1995; party to ECOWAS negotiations with the EC, and adoption of the WAEMU ratified Common External Tariff (CET) in 2000</li> <li>● 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</li> </ul>
The Gambia	<ul style="list-style-type: none"> <li>● Implementing CET and trade liberalisation scheme of ECOWAS; and is party to ECOWAS negotiations with EC;</li> <li>● WTO membership in 1996</li> </ul>
Ghana	<ul style="list-style-type: none"> <li>● Member of WTO since 1995</li> <li>● 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</li> </ul>
Mali	<ul style="list-style-type: none"> <li>● Member of WTO since 1995</li> <li>● Engaged in trade liberalisation/regional integration processes of both WAEMU and ECOWAS, as well as the EPA negotiating process of ECOWAS with the EU</li> <li>● As LDC benefits from trade preferences under AGOA</li> </ul>
Nigeria	<ul style="list-style-type: none"> <li>● Member of WTO since 1995</li> <li>● In the process of applying the ECOWAS CET and facilitating the free-movement of goods and persons agreed by the Community</li> </ul>
Senegal	<ul style="list-style-type: none"> <li>● Member of WTO since 1995</li> <li>● Member of WAEMU and ECOWAS and party to EPA negotiations with the EU</li> <li>● Benefits from AGOA initiative in favour of LDCs and is part of the EU "Everything but Arms" Programme</li> </ul>
Togo	<ul style="list-style-type: none"> <li>● Member of WTO since 1995</li> <li>● Party to ECOWAS and WAEMU and participates in EPA negotiations between ECOWAS and the EU</li> </ul>

### Box 3: The Cotton Initiative

Launched at the WTO in 2003 by four African cotton producing countries, (the C-4 countries) Benin, Burkina Faso, Mali and Chad, at a WTO Ministerial Conference held in Geneva on 12 December 2003 on the theme “Sectoral initiative on cotton at the WTO”, the so-called “Cotton Day” focused on the demands of the African countries that the cotton issue figure prominently on the agenda of the then forthcoming Cancun Ministerial Conference.

The Cotton Initiative intended to:

- establish a discussion forum among the parties concerned by cotton initiative: Geneva negotiators, industrialists, cotton producers and NGOs;
- make known the different concerns in order to better prepare a common negotiating position in forthcoming meetings;
- mobilise the African and International Press to keep it informed of the latest developments; and
- present and publicise the study “International Negotiations and Poverty Reduction: a White Book on Cotton” jointly prepared by ENDA Third World, in cooperation with the International Centre for Trade and Sustainable Development (ICTSD), Association of African Cotton Producers (APROCA) and African Cotton association (ACA).

Concretely, the Cotton Initiative requested that the Doha Round adopt modalities for reducing progressively the subsidies afforded to the cotton sector in the countries of the North with a view to eliminating them and offering transitory measures in favour of the cotton producers of the South including financial facilities for LDCs to compensate for the losses incurred by them as long as the subsidies persist in the North.

At present, there exists no such protection for the cotton producing countries of the C4 and the conclusion of the Doha Round is still uncertain.

#### Box 4: Regional Integration Agreements

##### (a) ECOWAS

All the countries covered by the 7Up4 project are members of ECOWAS. The other members are: Benin, Cabo Verde, Cote d'Ivoire, Guinea, Guinea Bissau, Liberia, Niger and Sierra Leone.

The 30<sup>th</sup> Conference of Heads of State and Governments (January 2006) decided to establish a Common External Tariff (CET) based on the WAEMU CET model (see below), with a few changes. At their meeting on January 2008 the Heads of State requested the ECOWAS Commission to add a new tariff line in addition to the four existing ones of WAEMU, this fifth line being no more than 35 percent. The WAEMU trade agreements are regulated by amended texts in Lomé in March 2007, but these texts are pending a decision of the Heads of State and Governments.

##### (b) WAEMU (UEMOA)

Members of WAEMU are Benin, Burkina Faso, Cote d'Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo, all members of ECOWAS. ECOWAS was established by the Treaty of Dakar of January 10, 1994 (ratified on August 01 of that year). The objectives of WAEMU are to:

- to reinforce competitiveness of economic and financial activities of member States within an open and competitive market characterised by a rationalised and harmonised juridical environment;
- to ensure convergence of economic achievements and economic policies of member States through the setting up of a multilateral surveillance system;
- to establish a Common Market among member States based on free movement of persons, goods, services and capital and the right of establishment of persons occupying independent or employed activities, as well as a CET and a Common Trade Policy;
- to coordinate national sectoral policies through implementation of joint initiatives, and eventually of Common Policies in particular in the fields of human resources, regional development, agriculture, energy, industry, mining, transport, infrastructure planning and telecommunications; and

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- to harmonise member States' legislation and fiscal regimes as necessary for the good functioning of the Common Market.

Accordingly, the CET was adopted in 2000. The WAEMU CET contains four distinct *ad-valorem* tariff lines (0, 5, 10 and 20 percent). Manufactured products originating from WAEMU included in the Preferential Community Tax (TPC) are imported duty-free. WAEMU has also adopted its anti-dumping code, under Regulation n°09/2003/CM/UEMOA of May 23, 2003, which fixes the conditions for the determination of dumping, opening of anti-dumping enquiries and decision-making, including establishment of anti-dumping duties and measures.

In the field of competition, WAEMU adopted Regulation n° 02/2002/CM/UEMOA of May 23, 2002, which covers cartel agreements, abuses of dominant power, State aids as well as anti-competitive practices resulting from State policy. Since 2002, the WAEMU Commission handled a number of cases at the Community level, involving airport services, motorcycles, flour-mills and State aids.

The impact of WTO membership and regional integration on national trade policies can be seen in the initiative taken by African cotton producing countries (described in Box 3) at the WTO requesting the elimination of competition distorting subsidies. Membership of both WAEMU and ECOWAS, which aim at liberalisation of Community trade; and consequent adoption of a Common External Tariff (CET) and prohibition of anti-competitive practices and dumping as well as subsidies distorting competition within these communities has also had some impact on trade policies (see Boxes 4 and 5). Such membership has enhanced competition among players within the community and standardised barriers to competition from players outside the community.

The commonalities in the impact of mentioned factors across project countries can be seen in Table 5.

### **Employment Policy**

All 7Up4 countries have adopted modern Employment Codes, comprising basic union rights for workers, the right to strike, fixing of a minimum wage (Ghana), and detailed principles concerning collective wage negotiations. It should be noted in this respect that competition

laws, where they exist, generally exclude collective wage negotiations from the list of prohibited anti-competitive practices.

All these countries suffer from high levels of unemployment and there exists an important informal sector, employing as much as 60-70 percent of the active population, a level even estimated to be around 90 percent in Gambia. This situation obviously has a bearing on competition between those firms in the “formal” sector which pay taxes and minimum wages, and abide by all the laws, regulations and standards at heavy cost, and those “informal” ones who can ignore every kind of legislation and bear no such costs. Nevertheless, the informal sector is sometimes the reflection of a “free market”, in particular when excessive laws and regulations are imposed on developing country markets which are clearly unable to cope.

### **Consumer Protection**

Competition laws in general offer some consumer protection and consumer protection laws, by guarding against consumer welfare decreasing collusion or malpractice, do enhance fair competition.

The only country having a comprehensive law on consumer protection is Nigeria, but its implementation is not very strong. Apart from Ghana which has no competition law (in addition to Nigeria), the remaining countries of the 7Up4 Project enjoy a certain amount of consumer protection through their competition laws. It could be said that Ghana’s Protection against Unfair Competition Act 2000 does provide consumer protection, but that law has never been enforced, neither is it clear as to who should enforce it.

It can also be seen that these countries, although lacking a comprehensive consumer protection law, do have mechanisms for consumer protection in regard to specific aspects of consumption: laws on food and drugs, weights and measures, standards and quality of products etc. as well as sector regulatory laws.

### **Remarks**

The general conclusion is that all the seven countries have adopted common policies, particularly those that could have a bearing on competition. Apart from granting of trade preferences which enhance as well as discourage competition in different ways, evolution of policy

**Box 5: Negotiations on an Economic Partnership Agreement  
between ECOWAS Member States and the EC**

Since the Cotonou Agreement in 2000, the EC proposes a new trade partnership based on the principle of reciprocity between the EU and African, Caribbean and Pacific (ACP) member States. These agreements, named Economic Partnership Agreements (EPAs), were meant to be signed by December 31, 2007. They propose full trade liberalisation between the EU and ECOWAS in two distinct stages:

- Adoption of a CET by ECOWAS: all members States are expected to harmonise their tariffs with the CET, including adoption of a 5<sup>th</sup> tariff line in addition to those contained in the WAEMU 4-tariff-line CET; and
- Determining a free-trade agreement between the European Union and ECOWAS member States involving an “asymmetric trade liberalisation” between the two sides, 100 percent by EU and a gradual 80 percent for ACP member States (ECOWAS, in this case), who will also have the possibility to exclude certain products or services altogether.

So far, however, these agreements have not reached the final stage and some countries, like Ghana have signed interim agreements while the negotiations continue between ECOWAS and the EC. Difficulties include revenue losses to be incurred by ACP countries as a result of gradual lowering of tariffs; strength of competition unleashed by acceptance of the principle of reciprocity; search of clear gains [relation between incentives brought by EPAs and those offered unilaterally by EU under the “Everything but Arms” (EBA) initiative]; and coordination between EPA negotiations and eventual results of the Doha Round [in particular with respect to market-access for agricultural and non-agricultural (NAMA) products], while consolidating the process of regional integration of ECOWAS.

is in line with the objective of promoting competition, examples being policies aimed at enhancing private sector participation, and withdrawal of the state from key productive activities.

However, the state continues to play a key role in certain sectors: a number of state-owned enterprises (SOEs) including (natural)

monopolies continue to exist in Burkina Faso; SOEs can be found across all major sectors of the economy, including agriculture, in Gambia though private shareholding in these companies has been allowed; 1,500 public enterprises characterised by a total investment of US\$100bn (600 owned by the Federal Government and the rest by the state and local governments), mostly monopolies and characterised by inefficiencies, continue to exist in Nigeria. Such a large incidence of state ownership of production units, often monopolies, adversely affects the level of competition.

Although Ghana still has some SoEs in operation, it has done relatively well: at the time of adoption of the SAPs, the government controlled about 350 enterprises; by the end of 2000, about 300 had been privatised; and in the next three years a further 18 were privatised.

The privatisation programme is far from complete in Senegal, but monopolies are becoming scarce. In Togo, at present the State has widened its privatisation objectives, but many SoEs still remain, especially in the field of services (financial services, post and telecommunications, ports, airports, etc.)

Often however, privatisation has been marked by the creation of private monopolies, raising serious competition concerns. There was and continues to be no functional competition law or authority, in many cases, to attend to these competition concerns. The resulting problems are explained in detail in the next section.

## **Progress in Operationalising Competition Regimes**

### **Overview**

The project countries are at different stages as far as operationalising their competition laws is concerned, with two countries having no law and one law at an early stage of being made operational, while other countries have laws, but face different challenges in implementation. However, the countries without active competition laws have taken steps to develop them. This section takes a look at the existing competition regimes, and briefly discusses the steps taken to formulate and enforce laws in countries with no laws.

A summary is provided in Table 6, which shows the situation in the seven countries.

<b>Table 6: Laws and Competition Authorities in Project Countries</b>				
<b>Country</b>	<b>Competition Law</b>	<b>Date</b>	<b>Competition Authority</b>	<b>Date of creation</b>
<b>Burkina Faso</b>	Law 15-94 ADP	May 1994	CNCC	December 2002
<b>Gambia</b>	Competition Act	October 2007	The GCC	2009
<b>Ghana</b>	None*	-	-	-
<b>Mali</b>	Ordinance n° 98-019	August 1998	DNCC et CNC	1998
<b>Nigeria</b>	None	-	-	-
<b>Senegal</b>	Law n° 94-63	August 22, 1994	CNC	-
<b>Togo</b>	Law n°99-011	December 27, 1999	DCIC & CNCC	December 2001
*In Ghana, the Unfair Competition Act 2000 is not strictly speaking a competition law (dealing with cartels and abuse of dominance) but a law against 'unfair competition' such as misleading advertising, counterfeit, cheating on weights and measures, etc.				

### **Competition Laws and Authorities**

Table 7 helps us understand differences and similarities across project countries in regard to activities prohibited by the competition law, and the powers of, and problems faced by the competition authorities. All four countries with a fully or partially functional competition commission and enforced competition law – Burkina Faso, Mali, Senegal and Togo – are characterised by a resource crunch facing competition authorities which also have to defer to WAEMU's competition commission in regard to cartels and abuse of dominance. Moreover, in Togo the independence of the competition commission is more restricted as it is presided over by the Minister for Commerce. Practices prohibited under competition laws in all four countries include both anti-competitive practices and those restraining competition.

<b>Table 7: Laws and Authorities: Prohibited Activities, Powers and Problems</b>			
	<b>Prohibited Activities</b>	<b>Powers/ Distinguishing Features of Competition Authority</b>	<b>Problems faced by Competition Commission</b>
<b>Burkina Faso</b>	Cartels; abuses of dominance; practices restraining competition such as resale price maintenance, refusal to deal, discriminatory practices among professionals and misleading advertising	Earlier consultative role has been changed to a more proactive one with powers to initiate inquiries, receive complaints from enterprises and impose sanctions on violators	<ul style="list-style-type: none"> <li>● No clarity about procedures to collect fines</li> <li>● Insufficient human and financial resources</li> <li>● Cartels and abuse of dominance at the level of WAEMU cannot be dealt with by it as these fall under WAEMU's competition commission</li> </ul>
<b>The Gambia</b>	Collusive horizontal agreements prohibited <i>per se</i> ; non-collusive horizontal agreements, vertical agreements and anti-competitive mergers prohibited on a rule of reason basis	Powers to impose penalties as well as issue cease and desist orders for breach of the Act	GCC has just started operation, and challenges would be identified with time

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	<b>Prohibited Activities</b>	<b>Powers/ Distinguishing Features of Competition Authority</b>	<b>Problems faced by Competition Commission</b>
<b>Ghana</b>	No specific competition law in place though Protection Against Unfair Competition Act, 2000 deals with unfair competition, such as misleading and false advertising, counterfeit and cheating through weights and measures		
<b>Mali</b>	Same as Burkina Faso: Unfair competition practices and practices in restraint of competition	In 1998, the National Directorate of Economic Affairs, the sole competition authority empowered with initiating enquiries and making decisions was replaced by the National Directorate of Commerce and Competition, (DNCC) which now shares the control of competition with the National Competition Council and sector regulators	Cartels and abuse of dominance at the level of WAEMU cannot be dealt with by it as these fall under WAEMU's competition commission
<b>Nigeria</b>	<ul style="list-style-type: none"> <li>● No competition law in place but Federal Competition and Consumer Protection Bill, placed in April, 2009 before the President, envisages regulating monopolies, controlling mergers and acquisitions and prohibiting anti-competitive practices such as cartels and abuse of dominance</li> <li>● Given past trends, unlikely to be adopted</li> </ul>		

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	<b>Prohibited Activities</b>	<b>Powers/ Distinguishing Features of Competition Authority</b>	<b>Problems faced by Competition Commission</b>
<b>Senegal</b>	Same as Burkina Faso	Investigation and powers to impose fines are provided for under the law, though the interface with WAEMU brings	<ul style="list-style-type: none"> <li>● Poor human, physical (office etc) and financial resources</li> <li>● Defers to WAEMU's competition commission in dealing with cartels and abuses of dominance at the level of WAEMU</li> </ul>
<b>Togo</b>	In addition to those above, also forgery, issuing false commercial documents, fraud regarding customs declarations, etc.,	Powers to investigate, impose penalties, issue cease and desist orders as well as order closure of business are provided under the law	<ul style="list-style-type: none"> <li>● Presided over by the Minister in charge of Commerce limiting its independence</li> <li>● Defers to WAEMU's competition commission in dealing with cartels and abuses of dominance at the level of WAEMU</li> </ul>

### **Box 6: Competition Regulations of WAEMU**

The Treaty of Dakar of August 01, 1994, which created WAEMU, had among its objectives (see Box III), “to reinforce competitiveness of economic and financial activities of member States within an open and competitive market characterised by a rationalised and harmonised juridical environment” and “to establish a Common Market among member States based on free movement of persons, goods, services and capital and the right of establishment of persons occupying independent or employed activities, as well as a CET and a Common Trade Policy” (Article 4);

Accordingly, the Treaty provides that in order to create a Common Market WAEMU will elaborate common rules of competition applicable to public and private enterprises, as well as to State aids (Article 76c). These provisions are supplemented by Articles 88-90 of the Treaty, relating to rules on competition which need to be implemented within the framework of a Common Market. In particular, Article 88 provides an absolute prohibition for a) agreements, associations and concerted practices among enterprises aiming at, or having the effect of, restraining or distorting competition within the Union; b) all practices by one or more enterprises in a dominant position of market power abusing that power in the Common Market or any substantive part thereof; and c) public aids capable of distorting the free play of competition by favouring certain enterprises or producers. Article 89 adds that the Council of Ministers of WAEMU, acting with a two-thirds majority of its members on proposal of the Commission of WAEMU, adopts by way of Regulations, the texts necessary for applying the prohibitions provided under Article 88.

Finally, Article 90, provides that the Commission of WAEMU is in charge, under the supervision of the Court of Justice of the l’Union, of applying the competition rules under Articles 88 and 89.

It is only on May 23, 2002, seven years after the Treaty of Dakar was adopted that the Regulations and Directives called for in Article 89 of the Treaty were finally adopted and entered in force on July 01,

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2002 for the Directives and January 01, 2003 for the three Regulations. These are:

- Regulation n°02/2002/CM/UEMOA of 23/05/2002 relating to anti-competitive practices within WAEMU;
- Regulation n° 03/2002/CM/UEMOA of 23/05/2002 relating to procedures against cartels and abuses of dominant position of market power, within the territory of WAEMU; and
- Regulation n° 04/2002/CM/UEMOA of 23/05/2002 relating to State Aids within WAEMU and to the modalities of application of Article 88c of the Treaty.

The first Regulation prohibits all forms of anti-competitive agreements, in particular those aiming at restricting the free play of competition or to fix prices (Article 3); abuses of dominant position including resale price maintenance, restraining output and markets to the disadvantage of consumers or technological progress, discriminating among professionals, etc. (Article 4); and State Aids when these distort or may distort competition within the (Article 5).

As for the Directives:

- Directive n° 01/2002/CM/UEMOA, relating to transparency of financial relations between member States and public enterprises on the one hand, and between member States and international Organisations, on the other hand, and
- Directive n° 02/2002/CM/UEMOA, relating to cooperation between the Commission and national competition authorities of member States, in application of Articles 88, 89 and 90 of the Treaty.

The latter provides exclusive competence on matters of competition within the Union to the WAEMU Commission, national authorities having only a general role of enquiry upon national initiative or upon specific reference by the WAEMU Commission. The national competition authorities are in charge of permanent surveillance of the market in order to detect infringements to the competition rules. They are also responsible for:

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- receiving and transmitting to the WAEMU Commission negative clearances, notifications for exemption, and complaints by physical or moral persons;
- elaborating and transmitting quarterly reports and information notes to the WAEMU Commission on the state of competition in sectors which have been investigated in the past;
- following up, in cooperation with other administrations in charge, the implementation of decisions related to persons other than the State, including collection of fines, and to report regularly to the WAEMU Commission;
- registering State Aids and providing quarterly reports on such Aids to the Commission;
- drafting an annual report on the state of competition in the country; and
- assisting the agents of the Commission when it conducts enquiries on its own.

The bodies in charge of applying the Community texts on competition are therefore the WAEMU Commission, the executive body of the Commission; and the Court of Justice of WAEMU. The WAEMU Commission is given exclusive powers on competition matters. Hence, Community law applies in the same way to anti-competitive practices affecting trade between States as for practices having effects only inside member States. The Commission can take provisional decisions, it can make orders against member States found in breach of competition rules, and is empowered to impose sanctions and fines in case of refusal to abide by its decisions. The WAEMU Commission is also empowered to deal with all distortions to competition among member States which result from State Aids, SOEs, and parastatal enterprises. The decisions of the WAEMU Commission can be appealed at the WAEMU Court of Justice.

### **Sub-regional Authorities and Interaction with National Laws**

As we have seen, a sub-regional authority is in charge of competition matters in West Africa, i.e. WAEMU, of which four countries of the 7Up4 Project are members, – Burkina Faso, Mali, Senegal and Togo. WAEMU has established a system which takes precedence on national law and competition authority. There is also another sub-regional authority, ECOWAS, whose membership covers all seven countries under study, including The Gambia, Ghana and Nigeria, which also

has a role in competition matters. The ECOWAS competition system is summarised in Box 7.

As a result of the commonality of objectives between ECOWAS and WAEMU, the two organisations have established a framework of permanent consultations aiming at harmonising their policies and regulations in the future. The first steps of such collaboration were made with respect to a case which emerged during the implementation of a gas pipeline project covering four member States of ECOWAS (Ghana, Nigeria, Benin and Togo), two of which (Benin and Togo) are also members of WAEMU.

#### **Box 7: Competition Regulations of ECOWAS**

The ECOWAS Treaty (1975) was revised by the Summit of Heads of State and Governments of Cotonou in July 1993. The revised Treaty aims at integration of West African countries, primarily at the economic level, but also in the other areas of social life, in order to accelerate development to the benefit of the people.

It is within the objective of creating a Common Market that adopting competition rules was envisaged, even if the Treaty itself does not make clear reference to competition. Nevertheless, ECOWAS has also elaborated its own competition regulations. These are embodied in two Supplementary Acts of ECOWAS, adopted at the 35<sup>th</sup> ordinary session of the Conference of Heads of State and Government in Abuja (Nigeria) on December 19, 2008. These are:

- Supplementary Act A/SA.1/06/08 adopting community competition rules and the modalities of their application within ECOWAS; and
- Supplementary Act A/SA.2/06/08 on the establishment, function of the regional competition authority for ECOWAS.

The first Supplementary Act concerns practically the same anti-competitive practices as other competition laws including WAEMU regulations. Article 4(1) states that it « applies to agreements, practices, mergers and distortions caused by member States which are likely to have an effect on trade within ECOWAS. The Rules shall concern notably acts, which directly affect regional trade and

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investment flows and/or conduct that may not be eliminated other than within the framework of regional cooperation”.

Article 4(2) provides a certain number of exemptions, among which (a) labour-related issues, notably activities of employees for the legal protection of their interests; (b) collective bargaining agreements between employers and employees; (c) agreements and trade practices approved by a regional competition organ of ECOWAS where these trade practices are authorised under the Supplementary Act; (d) activities expressly exempted by virtue of any treaty or any instrument or agreement in relation thereto or flowing there from, so long as the activities are not inconsistent with the purposes of this Supplementary Act; (e) activities of professional associations designed to develop professional standards”, etc.

Article 4(3) states that “the Community rules on competition should also apply to State enterprises”.

Article 5 concerns « agreements and concerted practices in restraint of trade » which are incompatible with the ECOWAS Common Market. Such agreements are prohibited and “shall be automatically void and of no legal effect in any member State of the ECOWAS Community”. These are, in particular: (a) directly or indirectly fixing purchase or selling prices and terms of sale; (b) limiting or controlling production, markets, technical development or investment; (c) sharing markets, customers or sources of supply; (d) applying dissimilar conditions to equivalent transactions with other trading parties; thereby placing them at a competitive disadvantage; and (e) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 6 prohibits abuses of dominant power by one or more enterprises, “singularly or collectively”, possessing “a substantial share of the market that enables it/ them to control prices or to exclude competition”. Such abuses include a list of possible abuses which repeats word for word the list given above for Article 5.

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Article 7 refers to mergers and acquisitions “where the resulting market share in the ECOWAS Common Market, or any significant part thereof, (...) shall result in abuse of dominant market position resulting in a substantial reduction of competition” Article 7(3), however, states that the prohibited merger or acquisition can be authorised “if the transaction concerned is in the public interest”.

Article 8 relates to State Aid, incompatible with the Common Market if it “distorts or threatens to distort competition”. However, exceptions are provided when such aid is of social character, such as in relief of natural disasters, or if they serve to promote economic development of regions, they favour culture and are in the Community interest.

Finally, Article 13 establishes a Regional Competition Authority, which will collaborate with other existing authorities (WAEMU). Article 13(4) also establishes a Consultative Competition Committee, both functions of which are to be specified by a Regulation to be adopted by the Council of Ministers.

The second Supplementary Act of ECOWAS (A/SA.2/06/08) on the establishment, function of the regional competition authority for ECOWAS provides in its Article 3, that cooperation with national, regional and NGOs will take place in implementing the obligations resulting from the application of the Supplementary Acts on competition.

In this case ECOWAS, which recognised the pipeline as a Community project, recognised the possibility of applying WAEMU competition rules to enterprises active in its market (while not present on WAEMU territory). Therefore, it is likely that with time, risks of conflicts of interest between the two sub-regional organisations should disappear.

### Remarks

The presence of two sub-regional authorities with competition mandates could give rise to some few issues. On collaboration between the two community competition authorities and national ones, each regulation refers to cooperation, but not in a sufficiently clear manner. In the WAEMU for example, Directive n°02/2002/CM/UEMOA of 23/05/

2002 provides, in Article 3, that the WAEMU Commission has exclusive competence on matters of competition.

However, in a wide market which lacks transparency, it is likely that the Commission will very quickly find itself unable to cope with an extremely heavy workload of complaints. Decision-making delays might become too long. The situation is very similar in the case of ECOWAS, where the Supplementary Act on the establishment, function of the regional competition authority of ECOWAS, while not specifically providing exclusive rights for the Regional Competition Authority, provides that in case of need the national authorities may be invited to collaborate in enquiries and references.

Thus, in the ECOWAS region like under WAEMU rules, national competition authorities do not seem to have the powers of deciding on anticompetitive practices. It is also not clear if, like in WAEMU their control is restricted to “practices in restraint of competition” because, contrary to WAEMU rules, the ECOWAS Supplementary Acts do not make a clear distinction between the two kinds of practices.

It is, therefore, necessary to review the cooperation among the community competition authorities on the one hand, and between them and their national counterparts on the other hand, as the regulations should clearly avoid conflicts of jurisdiction and accord more responsibilities to the national authorities in the immense task of sanctioning anti-competitive practices. Looking at European Commission Competition practice, it is interesting to note that EC has reformed its own system in a very different direction from WAEMU i.e. towards a new, more decentralised system, giving more powers to national competition authorities to apply Community law. Details of EC Competition Policy reforms of 2003-2004, are given below, in Box 8.

In conclusion of this section on competition law it can be said that the four 7Up4 countries which are both members of WAEMU and ECOWAS, have adopted competition laws and established, sometimes after many years, their competition authorities. In addition, the WAEMU Commission, followed by ECOWAS, have obtained exclusive competence to decide on competition issues such as cartels and abuses of dominance, leaving the national authorities with very limited and to a certain extent, unclear competencies, such as that of sanctioning “practices in restraint of competition” – resale price maintenance, loss-

selling, refusals to deal, discrimination, misleading advertising and false representations. As discussed above, even the latter seems to be under ECOWAS exclusive control.

As for the other countries studied under the 7Up4 Project, namely Ghana and Nigeria, which are both members of ECOWAS, none of them has adopted a comprehensive competition law, although many bills have been submitted to their Parliaments. In Nigeria, the process is hampered by some political economy issues, such as uncoordinated and parallel processes resulting in different Bills being prepared by different bodies. There is also no consensus as to the line Ministry the proposed competition authority will be under, which could also be the reason for multiplicity of bills. The Bills are constantly being turned down at the National Assembly due to unclear reasons.

**Box 8: Council Regulation (EC) No 1/2003 of December 16, 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty**

The preamble to the Regulation states that:

“(3) The centralised scheme set up by Regulation No 17 no longer secures a balance between those two objectives. It hampers application of the Community competition rules by the courts and competition authorities of the Member States, and the system of notification it involves prevents the Commission from concentrating its resources on curbing the most serious infringements. It also imposes considerable costs on undertakings.

4) The present system should therefore be replaced by a directly applicable exception system in which the competition authorities and courts of the Member States have the power to apply not only Article 81(1) and Article 82 of the Treaty, which have direct applicability by virtue of the case-law of the Court of Justice of the European Communities, but also Article 81(3) of the Treaty.  
(.....)

(6) In order to ensure that the Community competition rules are applied effectively, the competition authorities of the Member States

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should be associated more closely with their application. To this end, they should be empowered to apply Community law.

(7) National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles 81 and 82 of the Treaty in full.”

Hence, Articles 5 and 6 of the Council Regulation provide that:

“ Article 5, Powers of the competition authorities of the Member States  
The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

- requiring that an infringement be brought to an end,
- ordering interim measures,
- accepting commitments, and
- imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.

Article 6, Powers of the national courts

National courts shall have the power to apply Articles 81 and 82 of the Treaty”.

*Source: Eur-Lex/Europa/EU.*

In Ghana, it is not clear as to why the previous two competition bills could not be adopted as laws, although the third draft is now under consideration. The other project country, The Gambia, has a competition law which is at its nascent stage of implementation.

## **Interface Between Sectoral Regulation and Competition**

### **Overview**

The need for coexistence between sector regulators and competition authorities is an issue that has been widely emphasised in developing countries. It is argued that there might be some confusion among the stakeholders as to which authority to approach for regularising deals – the sector regulator, the competition authority or both if regulations are not clear. A previous CUTS project reported instances of decision by one authority being in conflict with that of the other, thereby causing tension not only among the stakeholders but also among the two sets of regulators. This results in the need for operational frameworks involving the two authorities.

It can be established that across all the countries, including Ghana and Nigeria which do not have any competition laws, sector regulators in some sectors have also been mandated with implementing competition-related issues in their own sectors. It might be important to get an understanding as to whether the demarcation of mandate is clear, and whether operational frameworks are existing or likely to exist to minimise conflicts and tensions.

A few sectors have been selected in this section for analysis. The regulatory framework for each project country under each sector will be explored, and the revealed information will be used to gauge whether there could be areas characterised by intersection of the respective mandates of the sector regulator and the competition authority.

### **Electricity**

An overview of interface issues is provided in Table 8. There are no interface problems at present in the case of Burkina Faso, Ghana and Nigeria as the first and each of the other two countries are characterised by the absence of an electricity regulator and competition authority respectively. However, Ghana and Nigeria might soon have competition commissions implying that interface issues might crop up.

In both Senegal and Togo, both competition authority and sector regulator are present and in the absence of an operational framework for coordination/cooperation, problems relating to interface exist. Mali is the only country where despite the existence of both sector regulator

and competition authority, problems relating to interface do not exist. This is because the regulatory authority is not authorised to take any decisions regarding competition issues.

### **Water and Sewage**

In some of these countries – Gambia, Ghana and Togo – problems relating to interface are ruled out presently because the law supports the existence of a public monopoly. In Nigeria, with private entry allowed there is a possibility for interface problems but only when the competition authority, as planned, is constituted. In Burkina Faso, interface issues are absent because a sector regulator does not exist. This leaves Mali and Senegal where the problem of interface exists because the authorities regulating the sector and economy wide competition are different.

### **Telecommunications**

Competition exists in all project countries in this sector. In Gambia, Ghana and Nigeria the sector regulator looks after competition issues. However, out of these Ghana and Nigeria currently lack a competition authority and once these are established problems relating to interface might come up. In Mali and Senegal, the regulator does not have any mandate regarding competition issues which are looked after by the competition agency.

### **Remarks**

In all countries, except Mali, the sector regulator in the telecom sector has powers relating to competition in the sector, and in Gambia, the regulation law has gone a step further to try and reduce the role of the competition authority in the sector. However, competition is not always effective in these markets. While the competition authorities also have a say in these sectors, frameworks and memorandums of understanding governing how they would co-exercise their mandate with sector regulators are not yet in place.

It is fortunate however that there are no conflicts or interface problems reported between the two sets of regulators across all the countries, despite the limitations in regulations. The interface issue is also not a serious concern for those project countries who are members of WAEMU, given that it has responsibilities over competition issues, with little role for the competition authority.

Table 8: Interface Issues by Country in the Electricity Sector		
Country	State of Interface	Competition Problem - Potential or Actual
Burkina Faso	No electricity regulator implies that the competition authority has a free reign with no interface concerns	The National Electricity Company has a monopoly thus it is possible for it to abuse such position against its suppliers, customers, and distributors
The Gambia	Both PURA and Gambia Competition Commission have mandates to ensure competition in the electricity sector, which brings to the fore the need for cooperation	At present, the sector is dominated by National Water and Electricity Company (NAWEC), which is a public monopoly of electricity transport, distribution and marketing. This implies there is scope for abuse of dominance
Ghana	There is no Competition Commission but two authorities share electricity regulation - the general public utilities' regulator (PURC) for competition and consumer protection issues, including quality control; and the Energy Commission for applying technical standards and delivering production licences. With a competition bill on the table, delineation of mandate between PURC and the proposed competition authority might become important	At present the sector is dominated by two public enterprises namely <i>Electricity Company of Ghana</i> (ECG) and <i>Volta River Authority</i>

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Country	State of Interface	Competition Problem - Potential or Actual
Mali	The independent National Electricity Regulatory Authority is not empowered to sanction unfair competition, which is the responsibility of the National Directorate of Commerce and Competition, or anti competitive practices which are the reserve of the WAEMU Commission	On paper, the sector is open to the competition but in reality public monopolies EDM SA and AMADER control the sub-sectors
Nigeria	The Electricity Regulatory Commission (NERC) is in charge of both economic regulation and competition in the sector	There is a monopoly in the sector, which means that abuse of dominance is possible. The sector is also potentially open to competition under new laws, creating scope for exclusionary abuse of dominance
Senegal	The electricity regulator is empowered to promote competition and given the existence of a competition authority, the possibility of conflict exists	After two failed attempts of privatisation, public enterprise SENELEC is still holding the monopoly status in the sector
Togo	Both the competition law and the sector regulation law do not provide an adequate framework for cooperation between the two regulators so that they harness their expertise while minimising conflicts over mandate	Private operator <i>Togo Electricity</i> obtained a concession to manage the sector and is currently the monopoly operator

Table 9: Interface Issues by Country in the Water and Sewage		
Country	State of Interface	Competition Problem - Potential or Actual
Burkina Faso	No specific regulator for water and sewage implies that the competition authority has a free reign with no interface concerns	Dominated by the public incumbent leading to scope for abuse of dominance
The Gambia	It is regulated by the general public utilities regulator PURA which is also responsible for promoting competition. Given that the Gambia Competition Commission also has a mandate to ensure competition in this sector, there is a need for a framework to ensure cooperation	At present, the sector is dominated by the National Water and Electricity Company (NAWEC). This implies there is scope for abuse of dominance
Ghana	General Regulator PURC is in charge of regulation. There is no Competition Commission. With a competition bill on the table, delineation of mandate between PURC and the proposed competition authority might become important, but only when entry into this sector is allowed	The State monopoly Ghana Water Company Limited (GWCL) has awarded the management of the sector to a private company, Aqua Vitens Rand Limited (AVRL) under a five years concession initiated in 2006. This implies that there is scope for abuse of dominance
Mali	A semi independent regulator exists but is not empowered to sanction unfair competition, which is the responsibility of the National Directorate of Commerce and Competition, or anti	Private entry is taking place though the existence of a dominant player implies there is scope for abuse of dominance

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Country	State of Interface	Competition Problem - Potential or Actual
	competitive practices which are the reserve of the WAEMU Commission	
Nigeria	The sector is regulated by the Federal Ministry of Water Resources (FMWR), thus creating scope for problems relating to interface when the competition authority is constituted	Though there is a monopoly the sector is potentially open to competition under new laws
Senegal	Regulated by the concerned ministry and given the existence of a competition authority, the possibility of conflict exists	<i>La Sénégalaise des Eaux</i> , a subsidiary of Bouygues Group is a private monopoly by the virtue of a leasing contract jointly with the <i>Société Nationale d'exploitation des Eaux du Sénégal</i> (SONEES)
Togo	Public monopoly - no question of interface problems as competition issues cannot crop up at present	There is a public monopoly - which gives rise to competition concerns

It can also be shown that the current competition bills in both Nigeria and Ghana have also not addressed the interface issue properly, and it is possible that such concerns could rise in future. It is pleasing to note that during the project period in Gambia, although the frameworks are not yet spelt out, both PURA and GCC registered their commitment towards ensuring that problems possibly arising from the absence of a framework in the legislations would not actually arise.

<b>Table 10: Interface Issues by Country in the Telecom</b>	
<b>Country</b>	<b>State of Interface</b>
Burkina Faso	New regulator has been put in place. Given the existence of a competition authority, there are potential interface problems
The Gambia	It is regulated by the general public utilities regulator PURA which is also responsible for promoting competition. The Gambia Competition Commission only has advisory powers in regard to competition issues in this sector
Ghana	Regulator is in charge of competition issues. There is no Competition Commission. With a competition bill on the table, delineation of mandate between the regulator and the proposed competition authority might become important
Mali	An independent regulator exists but is not empowered to sanction unfair competition, which is the responsibility of the National Directorate of Commerce and Competition, or anti-competitive practices which are the reserve of the WAEMU Commission
Nigeria	There is a sector regulator which also deals with competition issues
Senegal	Has a regulator which also looks after competition issues – no problems of interface
Togo	Presence of a regulator as well as competition authority implies that scope for interface problems exists

### **Allegations of Possible Anti-competitive Practices**

Allegations of anti-competitive practices across the seven countries in some specific sectors are summarised in this section. It is important to note that most of these cases have not yet been proven, as competition authorities (where they exist) are yet to take action. These are mostly allegations, drawn from different newspapers and interviews with key stakeholders. Some few sectors, which have cross-country concerns, have been selected for assessment as follows:

## Cement

On the seven countries studied here, three have reported problems in the cement sector. It should be noted that this sector is one which is traditionally sanctioned by competition authorities around the world. In Ghana and Nigeria, cement prices have skyrocketed and governments are at a loss regarding solutions that can be applied. The absence of a competition authority has been crippling in this regard

In **Ghana**, the cement market is dominated by a duopoly between Ghana Cement (GHACEM), and a cement firm of Indian origin, DIAMOND CEMENT, which is also present in Burkina Faso and Togo. Faced with uninterrupted cement price increases in Ghana – only in 2007 the price of a 50 Kg bag of cement more than doubled – the Minister of Commerce and Industry requested GHACEM to limit the price to a reasonable level. The Minister’s request was rejected by GHACEM, which reminded the Minister that the company was now totally privatised and that prices were free in Ghana. The duopoly has been accused of creating scarcities of cement in order to benefit when prices rise. Without an appropriate competition law empowering a competition authority to enquire on this matter, the State finds itself at a loss.

In **Nigeria**, domestic cement production is insufficient to satisfy demand and imports exceed 50 percent of local consumption. Imports were liberalised towards the end of the 1980s, but faced with the inability of domestic cement producers to compete, the government tried import substitution policies by blocking imports to favour domestic production. Faced with enormous scarcities, the government then authorised imports of cement, but only in bulk, which had to be packaged locally.

The domestic market is actually composed of 13 national producers who also import cement. Among them, WAPCO, a subsidiary of the French Group LAFARGE, controls around 55 percent of the Nigerian market. Together, the 13 cement firms which are members of the Cement Manufacturers’ Association, represent around 80 percent of the Nigerian market.

Like in other countries of the region prices are always on the rise, and consumers complain that the association is in reality a cement cartel, allowing its members to corner the market. The 50 Kg package is reported to rise often above 200 Naira, while in other countries the same package would only cost the equivalent of 60 Naira.

In a move to try to ease prices, the government awarded six additional import licences in 2008, allowing imports of cement packs for a limited period. That gave some respite to the market, but as soon as the measure was terminated prices started to rise again. As long as Nigeria will not have its own competition Law with a competition authority empowered to enquire the market and take measures to sanction infringements, the government will be unable to take effective remedial action.

### **Fertilisers**

Cartelisation is evident in Burkina Faso, Gambia, Ghana and Nigeria. In addition there are accusations regarding tied selling practices in Ghana and resale price maintenance in Nigeria. The problems regarding anti-competitive practices in these two countries are to be exacerbated given that the controlling authority of a competition agency is not present.

In **Burkina Faso**, numerous domestic private suppliers of fertilisers and phyto-sanitary products are active on the market, like SOCOMA, SAPHYTO, SCAB, SIPAM, KING AGRO, BOUTAPA and SOFITEX. Nevertheless, these companies are not present in all regions of the country and seem to have shared the market. In the Cascades region, SAPHYTO is the only big supplier. In the Hauts Bassins region SAPHYTO and SCAB share the market 50-50. Finally in the East, SOCOMA is clearly dominant with a market share of 75 percent while SAPHYTO has 25 percent. Competition seems to be more lively in the Centre region, where three firms are present: SIPAM with a 40 percent market share, BOUTARA, also 40 percent, and KING AGRO (20 percent). However, the quasi-uniform prices seem to indicate the existence of a price-fixing and market-allocation cartel.

In **The Gambia**, there are also many suppliers, some State-owned, like Gambia Horticulture Enterprise (GHE), and many private, such as FIRST CHOICE, SANGOL, SILLA, BAKARY BOJANG, etc. However, many farmers reported that in their opinion, the high-level of prices is due to collusive price-fixing and market-sharing.

In **Ghana**, liberalisation of the fertiliser market occurred in 1992, but import percent of distribution in the country. Interviewed farmers and some suppliers considered that high prices of fertilisers are due to collusive practices such as price-fixing and market sharing. Some farmers also complained about tied-selling practices in this sector.

In **Mali**, the market of agricultural inputs is characterised by a large number of retailers (84 for pesticides, 30 for fertilisers, etc.). However, 88 percent of the fertiliser market is in the hands of 4 suppliers and 81 percent of pesticides are obtained by 5 large firms. The competition commission should keep an eye on this sector where a limited number of operators control the market.

In **Nigeria**, the main fertiliser suppliers are governmental agencies which represent some 76 percent of the market; the rest is distributed by private domestic firms as well as multinationals. The CUTS interviews revealed that major anti-competitive practices encountered in this sector were price-discrimination, price-fixing and resale price maintenance.

### **Telecom**

In Burkina Faso, the historic operator, ONATEL, is believed to have a dominant position, reinforced by its monopoly of fixed lines and the international Gateway. This last monopoly means that all its mobile competitors have to access international lines through ONATEL's monopoly. It is reported that ONATEL has often refused to accord interconnection rights to newcomers, in spite of the fact that the Telecoms Law obliges it to do so. The two cases decided by the previous regulator, ARTEL described below in Boxes 9 and 10 are enlightening on this subject.

In Ghana, it should be noted that the two fixed operators, GT and WESTEL benefited from exclusivity of the international gateway until 2002 as a duopoly. Since then the international gateway is free for all mobile operators. Box 11 below provides another illustration of the competition problems faced by newcomers in a market dominated by the historic operator and regulated by an authority emerging from the Ministry and/or the historic operator, and unaware of competition law and policy.

Box 12 summarises the complaints of Internet Access suppliers against the factual monopoly held at present by SONATEL in Senegal.

**Box 9: Decision n° 2002-000038/DG-ARTEL/DR Relating to Public Tariffs for International Calls by TELECEL FASO through ONATEL**

According to Annex 5 to an Interconnection Agreement signed by the historic operator ONATEL, which has the monopoly of fixed lines and access to international lines and mobile operator TELECOM FASO, the agreed tariff for international mobile calls was based on a given percentage of the public tariff of ONATEL.

After the historic operator revised its public tariffs offering a 20 percent rebate, TELECEL FASO asked to be granted the same advantage, ONATEL refused on grounds that the new tariff was a promotional offer, and in any event was not foreseen in the interconnection contract. ONATEL added that the interconnection agreement with TELECEL FASO did not contain time-related variations, which was the segment where 20 percent reductions applied.

TELECEL FASO argued that since all mobile operators were obliged to access to international lines through ONATEL, in view of ONATEL's monopoly of the international gateway, another competitor, CELTEL (ZAIN) as well as ONATEL's mobile subsidiary TELMOB obtained the rebate in question.

In its decision ARTEL considered that while telephone operators were free to fix tariffs, they were under obligation under law to offer equal treatment for the same professional services to all professionals concerned, without any discrimination.

Hence ARTEL ordered ONATEL to offer equal treatment to TELECEL FASO, and to reimburse all arrears since the time when the case emerged.

**Box 10: Decision n° 2003-000039/DG-ARTEL/DR Relating to a Dispute between CELTEL (ZAIN) and ONATEL**

CELTEL (ZAIN) issued a complaint to the regulator ARTEL about the practice of ONATEL which restricted interconnection to its competitors, in particular CELTEL (ZAIN) in spite of the existence of an Interconnection Convention among the two operators. According to CELTEL, these restraints were aimed at favouring ONATEL's mobile subsidiary, TELMOB, against its competitors on the mobile market. In response, ONATEL argued that it restrained these communications in order to protect itself from excessive calls from State administrations which were not paid, and for which enormous unpaid claims existed in its books.

In its Decision, ARTEL considered that this practice resulted in discrimination against ONATEL's competitors and ordered to cease and desist this anti-competitive action which was contrary to the Law. ONATEL was invited to solve its problems of arrears by negotiating directly with the State.

**Box 11: Ghana Telecom : A Long Story of Abuse of Dominant Position on Fixed Telephones**

The second fixed telephone operator in Ghana, WESTEL, and the operator in rural districts CAPITAL TELECOM have experienced serious interconnection problems with the historic operator, GHANA TELECOM (partly privatised in 1996 when Telecom Malaysia bought a 30 percent managing share, which it later sold in 2002 to the Norwegian operator TELENOR; the remaining 70 percent of GT was the propriety of the State until it recently sold it to VODACOM from the UK).

According to WESTEL, its interconnection problems with GHANA TELECOM retarded its entry on the market. WESTEL proposed to introduce a pre-pay system opened to its network as well as to that of GT. However, GT requested that WESTEL should develop its own

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network before according it an interconnection. After lengthy negotiations, where the sectoral regulator NCA proved its inability to impose an interconnection, WESTEL was obliged to abandon its project of introducing a pre-pay card.

To date, GT is heavily dominant in the fixed telephone lines in Ghana, while WESTEL has a very small market share. Although much more expensive than fixed telephones, the mobile-phone sector has an undeniable success as demonstrated by the number of subscribers which is 9 times that of fixed line ones. This is also explained by the long waiting lists which exist if one wants to subscribe to a fixed line.

Consumers consider that NCA has failed in its mandate of assuring an independent and equitable role, given that most of its managers are directly recruited from the historic operator, itself part of the ancient State monopoly.

#### **Box 12: Senegal - Accusations of Abuse of Dominant Position and Monopoly in the Telecom Sector of Telecoms**

ARTP received many complaints for abuses of dominant position from the National Union of telecenter and teleservice providers (*Union nationale des exploitants de télécentres et téléservices du Sénégal*). They complain in particular that SONATEL applies excessive prices and price-discrimination to favour its own subsidiary SONATEL MULTIMEDIA to the detriment of its competitors on the market for access to Internet. These anti-competitive practices were accused of having caused the bankruptcy of two Internet suppliers of the name of Metissacana and Point Net.

In another case, the association of operators dealing with the last link (Collectif des opérateurs de terminaison d'appels, COPTA) accused SONATEL of fixing abusively high and discriminative prices for the minutes of end of calls, considering that fixed calls were sold for 30% more to Senegalese operators than to foreigners. As for mobile phones, the price was so high that they were unable to make offers.

## Cross-Sectional Perceptions on Competition Concerns

Competition law and policy can have an impact on the economy only if all stakeholders, from the State to public enterprises, the private sector and consumers, as well as the media and representatives of the civil society are aware of the importance and the benefits of competition to the economy as a whole, as an engine of sustainable growth and an instrument of the struggle against corruption. Hence, after having studied the countries covered by the 7Up4 Project, it appeared essential to explore to what extent the main stakeholders were aware of these questions. In order to obtain such information, a questionnaire was prepared by CUTS and submitted to a sample of stakeholders in each country under study. Table 11 below, indicates the number of stakeholders who responded to the CUTS questionnaire in each country.

Table 11: Number of Stakeholders Responded to CUTS Questionnaire	
Country	Number of respondents
Burkina Faso	190
The Gambia	150
Ghana	195
Mali	49
Nigeria	150
Senegal	94
Togo	162

In some countries like Mali, the number of respondents was rather small; in others it varies around 190, which is still a rather low number for a statistical enquiry. However, as can be seen below, the results of the enquiry point to similar findings across countries, and allow us to draw some useful conclusions. The stakeholders questioned were chosen at random among three distinct groups: business leaders, representatives from public administration and representatives from the civil society. Tables below provide a condensed view of the results of the enquiries.

Asked whether a competition law existed in their country, “yes” is the reply characterised by lowest incidence in countries where a comprehensive competition law still does not exist (Ghana, Nigeria). It

should be noted that for Senegal, replies are disaggregated by types of respondents: private sector/public administration/civil society. Percentages shown are those given in the Senegal study and do not total 100%. Thus, these are difficult to interpret.

<b>Table 12: Awareness about the Existence of a Competition Law in the Country</b>			
<b>Country</b>	<b>YES(%)</b>	<b>NO(%)</b>	<b>Don't know(%)</b>
<b>Burkina Faso</b>	49	14	37
<b>Gambia</b>	35	24	41
<b>Ghana</b>	19	23	58
<b>Mali</b>	43	17	40
<b>Nigeria</b>	26	31	43
<b>Senegal</b>	57	2	41
<b>Togo</b>	37	16	47

<b>Table 13: Awareness of the Existence of Consumer Protection Laws</b>			
<b>Country</b>	<b>YES(%)</b>	<b>NO(%)</b>	<b>Don't know(%)</b>
<b>Burkina Faso</b>	67	8	25
<b>Gambia</b>	53	47	0
<b>Ghana</b>	31	22	47
<b>Mali</b>	-	-	-
<b>Nigeria</b>	78	4	18
<b>Sénégal</b>	-	-	-
<b>Togo</b>	-	-	-

It is interesting to note that the percentage of “yes” responses to the question relating to the existence of a consumer protection law is much higher than that relating to the existence of a competition law. This shows that the public is much more keen about consumer protection issues and unaware about the effects of competition law.

<b>Table 14: Existence of competition/consumer protection authorities</b>			
<b>Country</b>	<b>YES(%)</b>	<b>NO(%)</b>	<b>Don't know(%)</b>
<b>Burkina Faso</b>	49	14	37
<b>Gambia</b>	91	0	9
<b>Ghana</b>	26	11	63
<b>Mali</b>	83	7	10
<b>Nigeria</b>	78	4	18
<b>Senegal</b>	-	-	-
<b>Togo</b>	49	21	30

To the question, “do you know if a competition authority exists in your country?”, it is useful to bear in mind that those who said “yes” were not automatically thinking about the national competition commission, but also about sectoral regulators and other agencies. In The Gambia, for instance, the general utilities regulator PURA is very well known to the general public.

<b>Table 15: Perceived Action Taken by These Authorities</b>			
<b>Country</b>	<b>YES(%)</b>	<b>NO(%)</b>	<b>Don't know(%)</b>
<b>Burkina Faso</b>	47	24	29
<b>Gambia</b>	75	7	18
<b>Ghana</b>	-	41	59
<b>Mali</b>	80	10	10
<b>Nigeria</b>	36	23	41
<b>Senegal</b>	-	-	-
<b>Togo</b>	-	-	-

With respect to action taken by these authorities, the incidence of positive replies is relatively high, although many considered that the lack of appropriate resources, and the existence of corruption may explain inaction by authorities.

<b>Table 16: Perceived Level of Prevalence of Anti-competitive Practices</b>			
<b>Country</b>	<b>YES(%)</b>	<b>NO(%)</b>	<b>Low or Nil(%)</b>
<b>Burkina Faso</b>	73	10	17
<b>Gambia</b>	22	45	33
<b>Ghana</b>	19	64	17
<b>Mali</b>	34	33	33
<b>Nigeria</b>	49	38	13
<b>Senegal</b>	32	38	30
<b>Togo</b>	31	33	36

The percentage of those who consider that anti-competitive practices are prevalent is relatively low, except for Burkina Faso. This might indicate the respondents were not really clear as to what was meant by such practices.

<b>Table 17: Perceived Impact of Competition on the Level of Income of Consumers</b>			
<b>Country</b>	<b>YES(%)</b>	<b>NO(%)</b>	<b>Nil(%)</b>
<b>Burkina Faso</b>	47	42	11
<b>Gambia</b>	53	43	4
<b>Ghana</b>	51	40	9
<b>Mali</b>	3	97	0
<b>Nigeria</b>	20	80	0
<b>Senegal</b>	-	-	-
<b>Togo</b>	1	99	-

Replies shown in the above table are very different across groups of countries. There seems to be coherence among the replies in Burkina Faso, Gambia and Ghana, but this does not seem to be the case in the other countries.

The most coherent replies are certainly those concerning the level of competition in the key sectors of the economy. Except for Togo and Senegal (where for an unknown reason totals do not add to 100%), the

<b>Table 18: Perceived Level of Competition in Telecom</b>			
<b>Country</b>	<b>YES(%)</b>	<b>NO(%)</b>	<b>Low or Nil(%)</b>
<b>Burkina Faso</b>	57	28	25
<b>Gambia</b>	59	25	16
<b>Ghana</b>	79	20	1
<b>Mali</b>	30	30	40
<b>Nigeria</b>	58	39	3
<b>Senegal</b>	23	35	42
<b>Togo</b>	12	29	59

replies correspond to what one would have expected: it is in the telecoms sector that competition is the most vibrant and in electricity where it is the lowest.

<b>Table 19: Level of Competition in Electricity</b>			
<b>Country</b>	<b>YES(%)</b>	<b>NO(%)</b>	<b>Low or Nil(%)</b>
<b>Burkina Faso</b>	4	2	94
<b>Gambia</b>	24	13	63
<b>Ghana</b>	3	6	91
<b>Mali</b>	3	0	97
<b>Nigeria</b>	0	3	97
<b>Sénégal</b>	1	4	95
<b>Togo</b>	23	7	70

<b>Table 20: Level of Competition in Transport</b>			
<b>Country</b>	<b>YES(%)</b>	<b>NO(%)</b>	<b>Low or Nil(%)</b>
<b>Burkina Faso</b>	41	34	25
<b>Gambia</b>	43	39	18
<b>Ghana</b>	31	34	35
<b>Mali</b>	47	3	50
<b>Nigeria</b>	69	27	4
<b>Sénégal</b>	30	27	43
<b>Togo</b>	26	36	38

Respondents indicate that they perceive quite a lot of competition in transport as well as in distribution (below). However, distribution is not seen as competitive in Senegal, which is a surprising result.

The last comparative table relates to the media's interest on competition issues. The response is rather negative: the table indicates that respondents in all countries feel that the media almost report about issues related to competition.

<b>Table 21: Level of Competition in Distribution</b>			
<b>Country</b>	<b>YES(%)</b>	<b>NO(%)</b>	<b>Low or Nil(%)</b>
<b>Burkina Faso</b>	50	30	20
<b>Gambia</b>	55	33	12
<b>Ghana</b>	47	38	15
<b>Mali</b>	77	7	16
<b>Nigeria</b>	51	42	7
<b>Senegal</b>	12	18	70
<b>Togo</b>	18	50	32

<b>Table 22: Competition Issues Reported in the Media</b>			
<b>Country</b>	<b>YES(%)</b>	<b>NO(%)</b>	<b>Rerely/Never</b>
<b>Burkina Faso</b>	4	2	94
<b>Gambia</b>	16	25	59
<b>Ghana</b>	18	49	33
<b>Mali</b>	7	33	60
<b>Nigeria</b>	24	55	21
<b>Senegal</b>	-	-	Rarely
<b>Togo</b>	-	-	Rarely

Two explanations could be proposed: either the media does not report on competition because it is a subject that does not interest the public and hence "does not sell"; or on the contrary, it is because the media is unaware of competition that the public is not informed and is thus not interested.

## General Conclusion

This synthesis report has tried to identify the main highlights of the seven country studies and thereby facilitate comparisons in regard to policies and situations relating to competition that bring out clearly the commonalities and differences across the 7Up4 countries. A strong degree of convergence among the policies followed by these countries is revealed: all have gone through structural adjustment under the influence of the Bretton Woods organisations in the 1980s and 1990s, and then engaged in Poverty Reduction Strategies. All these countries have been characterised by retreat of the state, though to different extents, from production and commerce through privatisation and deregulation; a gradual reduction of subsidies, although not in all sectors; and a gradual opening of markets to the private sector.

It deserves notice that the need for competition has not been adequately factored into these reforms. State monopolies were privatised, without taking care to avoid creation of private monopolies; market liberalisation took place without ensuring that newcomers could not eliminate local firms through anti-competitive practices such as cartels, abuse of dominant positions of market power or anti-competitive mergers and acquisitions.

Though membership in WTO and regional integration organisations (WAEMU and ECOWAS) has promoted competition strongly in international and regional markets, it has also created an acute need for national and regional competition rules to be effectively applied to avoid abuses. Aware of these problems, consumers in many countries have joined forces to defend their interests in the absence of competition and consumer protection laws.

A number of factors have negatively affected consumers with the liberalisation and globalisation of markets. First, contraband and fraud has developed fast in informal sectors that are free from any controls, especially official safety and health standards. Second, private enterprises have become accustomed to functioning in a system where no competition rules exist to prevent various anti competitive practices as well as others that promote unfair competition or restrict fair competition, to the detriment of consumers.

For some countries of the region, Bills on Competition are still pending in Congress or the National Assembly and have never been adopted.

All the countries that have adopted competition laws have found it very difficult to establish the competition authority created by the law. These authorities, even when established, suffer from serious budget constraints and have enormous difficulties in obtaining the necessary human and financial resources. In some countries, members of the competition commission are employed part-time to perform their competition duties, and spend the rest of their time as regular employees of a Ministry, thus leading to constraints on independent functioning of these competition agencies.

The importance of competition for creating a Common Market has been well understood by regional integration organisations such as WAEMU and ECOWAS, both of which have adopted rules relating to competition and established their own competition authority to deal not only with anti-competitive practices, but also State Aids, which might distort competition, as well as anti-competitive practices by States and public enterprises.

However, the enactment of regional rules and creation of regional competition authorities has dwarfed the functions of the national authorities, which were already under duress, having to cope with budgetary constraints. The reallocation of tasks between the national authorities and the regional ones is an important question which should be reviewed to avoid a full paralysis of the decision-making process in regard to competition issues.

With respect to utilities such as oil, electricity and water, transport and telecoms, many countries have rightly established autonomous regulatory authorities, charged with, among other tasks, ensuring healthy competition in the process of privatisation of SOEs and gradual opening of markets to new competitors. However, the tasks of these sector regulators in terms of ensuring competition are often plagued with difficulties.

First, their knowledge of competition is often inadequate. Second, most of their staff are former employees of the related Ministry or of the SOE monopolising the market before liberalisation, thus seriously compromising independence of the regulator.

It is difficult to explain, for example, why the incumbent firm in telecoms is sometimes exempted from paying operating licence fees when other

firms have to pay extravagant amounts to be granted a GSM licence. The length of time to reach an agreement on interconnection conditions and the inability of the regulator to intervene in a case also leads to doubts about independence and effectiveness.

Throughout the study many sectors have been examined in which collusion or abuse of dominance to the detriment of competitors and consumers is suspected but not remedied because of lack of an appropriate and effective competition regime. These cases point to the absolute necessity for adopting competition legislation in countries that still have not done so, and to establish competition authorities with the necessary resources for effective action.

The present study ends with a perception enquiry to check whether competition law and policy is an issue of clear concern to the stakeholders in the region, and it can be said that in general that is not the case, and that businessmen, government officials and the civil society as well as the media are ill-informed about the potential benefits that can derive from appropriate competition.

Accordingly, a number of general recommendations can be formulated:

- Competition and consumer protection laws should have been adopted before the initiation of market liberalisation and privatisation of SOEs. Since it is impossible to reform past mistakes, it is at least imperative that all stakeholders, starting with politicians, be convinced of the need to adopt such laws in the shortest time possible.
- In countries which have adopted competition and consumer protection laws together or as separate laws, it is not sufficient to have laws on the statute books; these laws have to be effectively applied. This is far from the reality in many countries studied under the 7Up4 Project. Competition authorities should be equipped with appropriate financial and human resources to enable them to perform adequately.
- The division of labour between national and regional competition authorities should be urgently revised to allow for a more rigorous and speedy resolution of cases.
- Sector regulators should be in close contact with their competition authority counterparts, as is provided for in the laws of many countries.

- The media should be encouraged to learn more about the implications and the need for competition and trained to contribute effectively to consumer education, in collaboration with consumer organisations.
- The civil society at large should also be encouraged to enter into a constructive dialogue with consumer organisations and competition authorities.



**Participants at the 7Up4 Final Conference held at Dakar, Senegal, on August 06-07, 2010**