Economic
Community of West
African States

Communauté
Economique des Etats de
l'Afrique de l'Ouest

ECOWAS
-
Regional Competition Policy Framework

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PRESENTATION OF THE DOCUMENT

In application of the recommendations of the Ministerial Monitoring Committee to harmonise policies within the context of the formulation of a community regulatory framework on competition within ECOWAS area, the work initiated by the ECOWAS Commission in collaboration with the UEMOA Commission and submitted to the Technical Thematic Group and the members States for consideration led to the preparation of three (3) documents:

- A Regional Competition Policy Framework document;
- Two Supplementary Act adopting: the Supplementary Community Competition Rules and the modalities of their application within ECOWAS; and Establishment, functions and operation of the Regional Competition Authority (RCA) for ECOWAS.

This Regional Competition Policy Framework document seeks to exhaustively clarify the basic elements of a competition policy and the form that it should take within the framework of regional integration.

It also highlights the components of a common regulation, a central element of a competition policy within an integrated setting, and the modalities for its implementation.

The policy is composed of the following five segments:

I. Competition Law and basic principles

This part presents the components of a competition policy and its benefits.

II. Case for a regional competition policy for ECOWAS

This part deals with the stakes of a regional competition policy within ECOWAS and its contribution to the consolidation of a common market.

III. Overview of the current state of competition law within ECOWAS

This part is devoted to the state of competition law within the region, laying emphasis on the areas of convergence between the rules adopted by UEMOA and those currently being prepared or in force in the other member States of ECOWAS.

IV. Highlights of a competition regulation within ECOWAS

This part relies on the status of competition within the draw up a draft regulation with its two components: the substantive rules relating to prohibited practices, and the institutional framework that focuses on the creation of a regional competition authority and its functions

V. Conditions for implementation

This part places emphasis on the prerequisites for an effective implementation of regional competition rules, especially capacity building, internal reforms in the member States and the phases for implementation.

I. COMPETITION LAW: PURPOSE AND BASIC PRINCIPLES

Ongoing efforts to facilitate economic integration in the ECOWAS sub-region and to promote regional economic growth will be meaningfully enhanced by the adoption of a sound regional framework for competition law. Competition law, also called antitrust law in some jurisdictions, lies at the core of the cluster of laws and regulations that cumulatively sustain the free market system. Informally defined, competition law is a set of rules (statutory and common law) used by governments, individuals and firms to evaluate and redress both public and private conduct that causes distortions to the "free flow" of competitive market interaction. Broadly speaking, the aims of competition law include:

- *the encouragement of free and open markets;*
- *the provision of fair and equal competitive conditions to all market participants;*
- *the promotion of allocative efficiency;*
- *the maximization of consumer welfare; and*
- *the establishment of transparency and fairness in regulatory processes.*

These goals are framed within a competition policy context designed to uphold a liberal competitive order that maximizes national comparative advantages, encourages the free flow of products and services at the lowest prices, promotes innovation and strengthens production capacities in national and regional settings. Competition law thus provides the basic principles necessary to support free and open competition, in order to achieve, most fundamentally, an efficient allocation of economic resources and affiliated benefits. In sum, "[f]reedom to compete presupposes freedom to enter the market, freedom to develop and grow in the market, freedom from artificial combinations or aggregations, and freedom from monopoly pressure."

The basic principle is to take all necessary measures to establish equal opportunities (level playing ground) for all enterprises operating within the region in order to ensure fair competition and promote efficiency, economic growth and development. Competition policy recognises the logic of free and active competition on the markets, the importance of property laws, the need for increased international competition and the facilitation of entry into markets within the context that takes into account the level of development of each

country and conscientiously seeks to correct structural imbalances and promote rapid growth and poverty reduction. In other words, the competition policy is founded on the dual principle of efficiency and fairness.

Competition policy is fundamentally related to the conditions that govern a system of free trade. There is a growing acknowledgement by national governments and international organizations that appropriate structure and vigorous enforcement of competition rules can promote international trade. Indeed, in some instances, competition law can be used to address trade barriers and enhance the benefits of non-discrimination required by multilateral and regional trade regimes. Further, a well-designed competition policy can enhance regional integration efforts by minimizing the ability of private firms (and governments) to use national practices to avoid trade obligations.

The principal benefits associated with the adoption of a comprehensive competition regulatory framework—regardless of the socioeconomic status of the geopolitical entity implementing such framework, and irrespective of whether it is created at the national or supranational level—can be summarized graphically as follows:

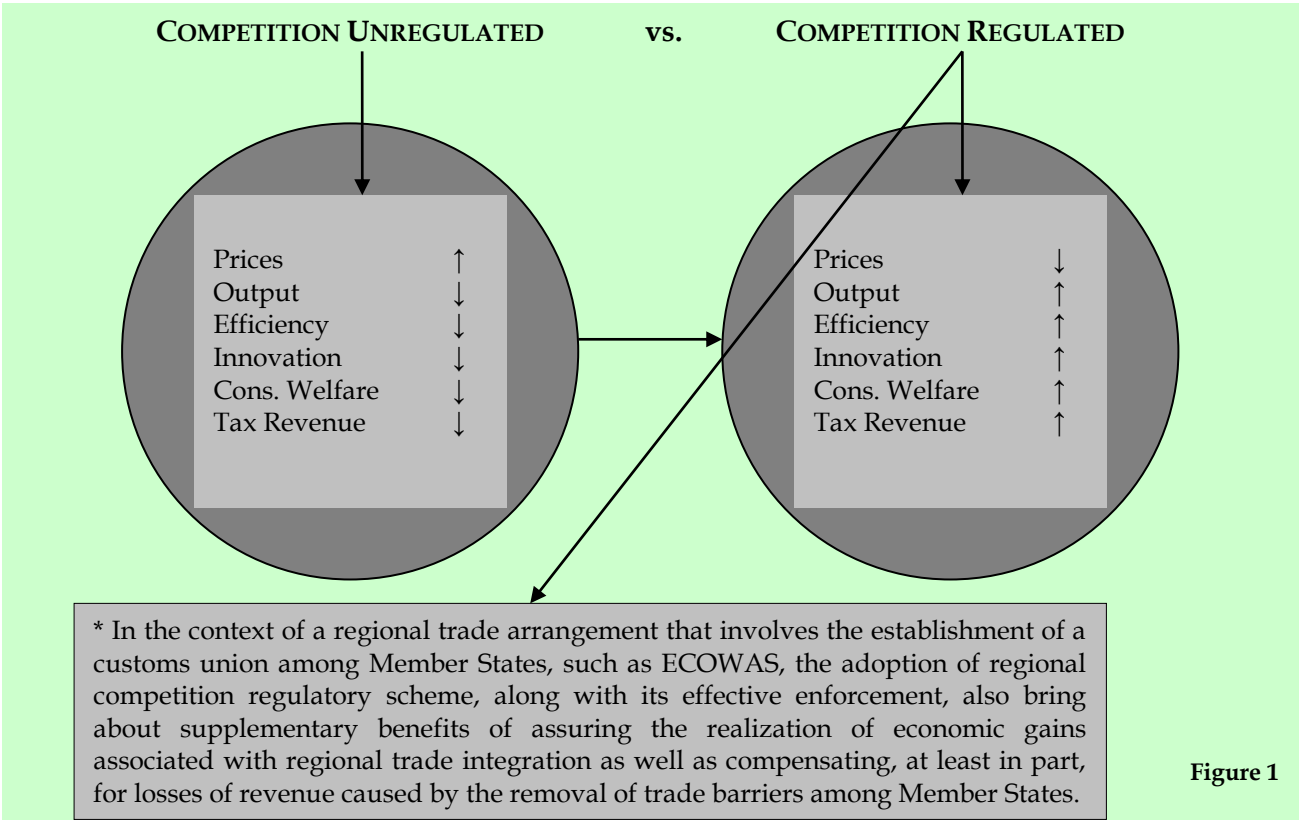

Figure 1

II. THE CASE FOR AN ECOWAS REGIONAL COMPETITION POLICY

The welfare benefits flowing from a successfully implemented regional competition policy are an important component of economic growth and development. It is unquestionable that competition law and policy have played, and continue to play a significant role in the economic prosperity of developed nations, which is reflected most significantly in strong economic growth, dynamic entrepreneurship, consumer welfare and social stability. These outcomes of a successful implementation of competition policies and law suggest strongly that ECOWAS Member States, all of which are striving to develop robust economies and stabilize market conditions, have much to benefit by seriously considering the adoption of a region-wide competition framework.

As the principal contributor behind innovation and growth in productivity, effective competition among firms in the ECOWAS Common Market must be seen as one of the key elements of a successful strategy to build up a competitive Community and reinvigorate the regional integration strategy. Although the ECOWAS Treaty does not explicitly mention "competition policy" as an area to be regulated at the regional level, the goals of the ECOWAS Treaty can be more fully and meaningfully accomplished by the creation of a *common* competition framework that can ensure that both private and public actors do not engage in activities, agreements or relationships that alter, undermine and ultimately frustrate the goals and benefits of trade liberalization in the region. In other words, competition policy is a *necessary* complement to trade policy and as such should be a central part of the ECOWAS system. A well designed and vigorously enforced regional competition regulation framework will help to concretely deliver on the goals of the ECOWAS integration strategy, by reducing the risk of trade disputes and policies of trade defences, contributing to increased productivity and economic growth, and ultimately raising the standard of living of the citizens of the Community. Furthermore, the development of a region-wide competition policy and regulation will enhance the Community's ability to confront and address anti-competitive behaviour by foreign firms, provide a basis for involvement and cooperation on negotiations regarding competition matters at the multilateral level, and establish a basis for the development of institutional competence on competition law for the region.

Compared to its major trading partners, ECOWAS is currently lagging behind substantially as regards "competitiveness" of the regional markets. Whilst important progress has been achieved in terms of market integration since the creation of the Common

Market, many economic sectors in ECOWAS remain fragmented and are characterized by weak competition and persistently high prices that harm industries and consumers alike. It is uncontroversial that lack of competition in the Community curbs innovation and hinders research efforts. Dominant firms may be less inclined to pursue new products and services, which merely displace the profits from their existing products. In contrast, firms in a competitive marketplace relentlessly seek innovations to challenge existing companies in high profit markets and better respond to emerging market demands. Moreover, the emergence of new competitors threatens the temporary monopoly profits from innovation and increases the incentive of the firms presently in the market to shorten the innovation cycle. A competitive environment ensures that there is more than one potential innovator in the "race" to produce a superior product or find a superior process. In sum, strong competitive markets, encouraged and protected by an ECOWAS regional competition policy provides the best guarantee for companies in the ECOWAS region to increase their efficiency and innovative potential and is a key driver for economic development within the Community.

While in theory, virtually all regulations and policies will influence the economic environment in some form, what is emphasized here are those provisions that shape the competitive environment in which producers and consumers make decisions based on prevailing market conditions that affect price, quality and, ultimately, consumer decisions. Within the ECOWAS region, some regulations are likely to cause distortions in the operation of competition within the market, notably through the uneven implementation by Member States of some reforms adopted by ECOWAS. Important examples include:
1) *Elimination of Duties and Quantitative Restrictions 2) Re-export and Transit; 3)Drawback and Compensation; 4) Regional MFN and Third Country Agreements; and 5). Regional National Treatment.*

The relationship between domestic competition policy and trade liberalization is evident if one considers that the objective of competition law is to promote a "contestable" territorial market. The idea of "contestability" is basic to competition and closely related to the economic objective of governments to increase the efficiencies of production and consumption in the marketplace using anti-competition *rules* to prohibit practices such as price fixing, collusion between firms for purposes of output restriction, abuse of dominant position, etc. The focus is upon consumers and the benefits they can derive from the proper functioning of competition, whether they be purchasing firms or the ultimate consumer.

It should be also noted that the notion of competition *policy* is somewhat broader than that of competition law, as the term can also encompass a whole basket of other regulatory (and deregulatory) activities of governments that relate to the conditions in the marketplace, either in protecting or creating competition. This can include systems of regulatory price controls over monopolies and policies dealing with privatization and deregulation. The term can be drawn broadly enough to also encompass the competition advocacy activities of national authorities and also the pro-competitive aspects of other laws, such as unfair trading practice laws or consumer protection laws. The term competition policy is often used to be inclusive of competition law.

For a customs union in particular, the core argument for a regional competition law can be expanded by considering the effects of anti-competitive practices on the trade liberalization commitments made by the Members to achieve free trade. The added element of customs union analyses emphasizes somewhat more the elimination of trade measures (and their future potential to be used) in a formed single customs territory. Since a customs union has the capacity to provide for free internal movement for goods of origin as well as duly admitted third country goods, a focus on eliminating the underlying trade distortions caused by anti-competitive practices is also drawn more to the centre of attention by looking at effects of high and low prices of goods or services in the absence of a regional competition law.

1) Prices too high

If prices of exports from one market to another are "too high" due to export cartel activity or a cross border abuse of dominant position, then this affects the trade between regional partners. In this scenario, tariff cuts made by the importing country are being allocated not to the import country consumers, but to the export country producers. If it has a functioning domestic competition law, the importing country can take legal action against these foreign practices. In the usual case, however, enforcement against foreign actors is very difficult for domestic agencies where the evidence lies outside of the enforcing territory. The more central the investigative and enforcement mechanisms are made, the more likely it is that these practices will in fact be addressed and remedied. A more decentralized approach to this problem would rely wholly on national laws and agencies and attempt to create a cooperative framework among them in order to share information and other investigatory assistance.

2) Prices too low

If prices of exports are "too low," as in the case of dumping, then this may also be the result of anti-competitive exclusionary practices in the export country. If firms can successfully dump goods (*i.e.*, sell them at a price that is below production cost), then they may be operating in a "closed" market whereby those dumped goods cannot be re-imported to challenge local prices. If there are no trade barriers in place, this "closure" may be created by a private set of exclusionary practices, perhaps in the form of vertical restraints in the distribution chain from a producer to the ultimate consumer. In this case the "trade solution" of parallel imports cannot be made effective, and this is then a competition law problem that is affecting trade between the Member States. It can be addressed in the producing territory by the affected foreign firms if there is a competition law that can be invoked against anti-competitive vertical restraints and which also guarantees a non-discriminatory right of action on behalf of all complainants. This remedy can be available in a decentralized scheme relying only upon national laws that have a provision to address anti-competitive exclusionary practices. However, if there is no competition law in the producing market, but other regional Members do have competition laws, then the overall result is potentially highly damaging for free trade regimes and economic integration. Firms from the countries without laws can effectively dump goods on the other regional Members without being challenged. At the same time, firms from regional Members with functional competition law can always be challenged if they engage in dumping using exclusionary vertical restraints. The tension caused by a lack of reciprocity in competition law remedies may result in some Members utilizing trade measures (anti-dumping duties or safeguards) irrespective of the tariff cutting schedule and commitments in the region.

To summarize, preferential trade liberalization within the ECOWAS region should facilitate increased competition in the regional market but national or regional competition policies may also be necessary to provide recourse for injurious firm behaviour that responds to the removal of governmental barriers. There may be a stronger argument for an independent regional law and a centralized competition authority in the case of export restraint behaviour that affects trade between the Members. The problem of dumping can be resolved by effective national laws and intergovernmental approaches. Mere cooperation may be sufficient except in the case where exporting Members refuse to pass and implement national laws that address anti-competitive practices. Overall, a regional competition law will provide a common regional basis to deal with anticompetitive conduct that affects the regional market, while also providing reinforcement for national competition laws and the authorities responsible for their implementation at the national level. For those Member

States who do not yet have the capacity or resources to enact national competition law, the regional law could serve as an important gap-filler.

III. OVERVIEW OF THE PRESENT STATE OF COMPETITION LEGISLATION IN THE ECOWAS COMMUNITY

A. UEMOA Community

The UEMOA Community's competition law is based on three Regulations and two Directives that were introduced in 2002, and that came into effect on 1 January 2003. The three Regulations cover concerted anti-competitive practices, abuses of a dominant market position, and state aid respectively. The two Directives apply to (1) transparency in financial relations between Member States and public enterprises, and between Member States and foreign or international organisations; and (2) cooperation between the UEOMA Commission and national competition authorities. In the UEMOA competition scheme, jurisdictional reach is limited only to anticompetitive practices capable of distorting competition within the Union market as a whole or within a "substantial part" thereof. Substantively, the scheme follows a familiar pattern found in most competition laws in the developed world—*i.e.*, its chief focus is aimed at: (1) agreements and concerted practices in restraint of trade; (2) mergers and acquisitions; and (3) monopolization-*i.e.*, abuse of dominant market position. Second, the UEMOA competition framework regulates government-induced market distortions such as state aid and anticompetitive market conduct of state-owned enterprises. Specifically, the provisions of Article 88 of the UEMOA Treaty prohibit the following: a) agreements, associations and organized practices between companies that have the objective or the effect of restricting or distorting competition within the Union; b) all practices of one or several companies or associations amounting to abuse of a dominant position in the Common Market or in a significant part thereof; and c) government aid liable to distort competition by favouring certain companies and products. A fourth category of violations known as "anti-competitive practices attributable to government" was introduced on the basis of the provisions of Articles 4(a), 7 and 76 (c) of the UEMOA Treaty.

B. Other Member States

Of the other non-UEMOA ECOWAS Member States, Guinea has working on competition law, while the Gambia, Nigeria and Ghana currently have draft competition legislation.

The Commission based its work on the draft competition laws of Nigeria and Ghana.

Consistent with their common law legal systems, both Nigeria and Ghana recognize several legal grounds for dealing with particular practices that could be deemed anti-competitive. Nevertheless, the draft competition bills represent the first attempt by Nigeria and Ghana to offer a comprehensive legal framework to regulate competition. Below are brief summaries of the two laws.

1. Nigeria

The Nigeria Bill voids "[a]ll agreements between undertakings, decisions by associations of undertakings and concerted or collaborative practices tending directly or indirectly to prevent, restrict or distort normal competition within the national market. . . ." Six types of specific anticompetitive agreements/coordinated actions listed include: (1) direct or indirect fixing of prices or of other trading conditions; (2) limits on or controls of production, markets, technical development, or investment; (3) division of market shares, customers or sources of supply; (4) boycotts; (5) discrimination in terms of trade and denial of access to arrangements or associations crucial to competition; and (6) tying arrangements.

The Nigerian Bill on competition also aims to eliminate both unilateral and joint "monopolization" market practices by prohibiting "[a]ll acts or behaviour constituting an abuse or acquisition and abuse of a dominant position of market power and enumerates examples, including: (1) the imposition of unfair purchase or selling prices or other unfair trading conditions with the purpose of eliminating competitors; (2) the imposition of limitations on production, markets or technical development to the prejudice of consumers; (3) the fixing of resale prices; (4) restricting imports of goods covered by overseas' trademarks with the aim of charging artificially inflated prices; (5) the application of unjustifiably dissimilar conditions to equivalent transactions; (6) the refusal to transact business according to an enterprise's customary commercial terms; and (7) tying arrangements.

Further, the Nigerian law sets forth the rules applicable to the regulation of mergers and acquisitions (M&A). The Bill provides a right to an appellate review (in a court of law) of all final decisions laid down by the Nigerian Competition Commission's dispute resolution bodies.

2. Ghana

The Competition and Fair Trade Practices Bill of Ghana was drafted a decade ago and is yet to be enacted into law. Based on information from the Ghanaian Ministry of Commerce, it is expected that a new competition bill for Ghana will soon be crafted. Certain provisions in the current Ghanaian Draft Bill reflect minimum standards evident in many other jurisdictions. The Draft Bill prohibits a person from "enter[ing] into or giv[ing] effect to an agreement which" (a) is boycott, or (b) has the purpose of substantially lessening competition; or (c) has the purpose or effect of fixing prices. These prohibited agreements are defined as those which 1) limit or control production, markets, technical development or investment; (2) divide markets or sources of supply; (3) apply different terms to equivalent transactions; or (4) feature a tying arrangement. The Draft Bill prohibits resale price maintenance arrangements, "[i]n so far as [they] tend to restrict fair competition" and also contains a broad prohibition of exclusive dealing arrangements. The draft law bans a person with "substantial degree of power in a market" to "misuse" that power for the purpose of, *inter alia*, eliminating fair competition, preventing market entry, and "pricing goods or services at an excessively high level;" proscribes collusive tendering and collusive bidding at auctions. Finally, the Draft Bill provides the framework for the regulation of mergers and acquisitions. Mergers and Acquisitions (M&As) that are "likely" to lead, to a "substantial lessening of competition in a market for the goods or services concerned" are prohibited.

In summary, the present role of competition law in ECOWAS Member States appears to be limited, but ongoing efforts in UEMOA, Nigeria and Ghana indicate recognition of the important role of competition law in promoting development goals and fostering a regulatory environment strongly conducive for economic growth. Based on the results of field research, other ECOWAS Member States are also interested in securing strong competitive national markets and recognize the important role of competition law in this effort. The development of competition law at the national levels will be well augmented by a regional competition framework. Tables in attached Appendices A and B identify (highlighted areas) points of convergence in substantive and procedural competition rules among the competition laws of UEMOA and the draft laws of Nigeria and Ghana. The similarities among the three bills should serve as an initial platform for the creation of a regional competition law for the ECOWAS Community as a whole.

IV. OUTLINES OF AN ECOWAS COMPETITION REGULATION

A. **Substantive Rules**

As regards substantive rules, the structure of the regional regulation should reflect the four (4) broad categories of "anticompetitive" market conduct that deserve the most extensive scrutiny under competition law. It also reflects areas of substantive convergence between the existing codes in the region (UEMOA, Nigeria and Ghana). At the top of the list of areas of convergence are:

(1) Agreements and Concerted Practices in Restraint of Trade-the regulation should aim to prohibit anti-competitive agreements (both vertical and horizontal), such as collusive price fixing, market sharing, output limitation, collective boycotts and tying arrangements.[i] Exemptions to the agreements/concerted practices prohibited by the regulation must relate only to pre-defined and pre-agreed subject matter that is specifically set forth.

(2) Monopolization Practices (*i.e.*, uni-/bi-/multilateral abuses of a dominant market position)-the regulation should be designed to effectively cope with situations where one or more enterprises substantially or completely controls a class or species of business, and engages in anti-competitive conduct which has the effect of preventing or lessening competition considerably. Examples of anticompetitive acts falling within this area include, *inter alia*, predatory pricing, refusals to deal, and discriminatory behaviour.[ii]

(3) Mergers and Acquisitions-it is essential to establish in the Regulation an acceptable threshold for all mergers, proposed or otherwise, in all sectors of the economy, likely to prevent or lessen, or likely to prevent or lessen, competition substantially.[iii] The Commission should be in position to prevent or correct any merger that would significantly impede effective competition in the Common Market, in particular as a result of the creation or strengthening of a dominant position.

(4) State-Induced Competition Distortions-the regulation should declare as incompatible with the Common Market of the ECOWAS Community and thus prohibited any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition within the Community by favoring certain enterprises or the production of certain goods.[iv] Moreover, the regulation should make it explicitly clear that all of its proscriptions extend also to public enterprises and enterprises to which Member States grant special or exclusive rights.[v]

It is recommended that the following arrangements and activities be specifically excluded from the ambit of the regulation:

a) labour relations matters involving activities of employees to protect their interests as such, and collective bargaining arrangements for fixing terms and conditions of employment;
b) agreements and business practices authorized by the proposed ECOWAS Competition Authority under conditions set forth in the supplementary Act;
c) activities expressly approved or required under any treaty between the ECOWAS Community and a third party or any instrument or agreement in relation thereto or flowing therefrom;
d) activities of professional associations responsible for developing or enforcing professional standards necessary for the protection of the public; and
e) activities exempted, after consultation with the Commission, by the ECOWAS Council of Ministers.

B. Institutional Framework

Successful implementation of a regional competition policy requires not only the careful design of substantive prohibitions, but also the formation of an effective body charged with competition regulation and enforcement. The approach recommended calls for independent regional action to create a central enforcement authority ("the ECOWAS Competition Authority") with specifically enumerated mandates. Ideally, the proposed Competition Authority should be vested with powers, including:

- ongoing review of commercial activities in the Common Market in order to ascertain practices, which may distort efficient market conduct or which may adversely affect the economic interests of consumers;
- the conduct of inquiries and investigations into business practices in the Common Market to determine whether any enterprise is engaging in anti-competitive acts, as well as the conduct of other inquiries and investigations considered necessary or desirable in connection with matters within the scope of the regulation;
- the power to eliminate anti-competitive agreements and abuses of a dominant position and impose fines;
- issuing advisory opinions and otherwise cooperating with national competition structures in carrying out activities and functions necessary to implement the obligations of the regulation; and

- advising Member States, the ECOWAS Parliament, and the Council of Ministers on such matters relating to the operation of the regulation as the Commission thinks fit or as may be requested.

To avoid undue encroachment into national prerogatives and, at the same time, leave enough flexibility for Member States to deal with purely domestic competition issues in line with the guidelines set up at the regional level, the jurisdictional reach of the supplementary Act on Community Rules shall extend only to agreements, monopolization practices, mergers and government distortions that "may affect trade in the ECOWAS Community" (*e.g.*, conduct that directly affects regional trade and investment flows and/or conduct that can only eliminated *via* regional enforcement cooperation) and have an anticompetitive purpose or effect.

Moreover, to avoid the conflicts of functions or competence that may arise as a result of the existence and application of the UEMOA Community Competition legislation, a mechanism should be put in place for consultations between the ECOWAS Competition authority and the competent UEMOA authority.

ECOWAS competition regulators will be required to interpret the phrase "may affect trade in the ECOWAS Community" during the application of the Community Rules to particular cases. There should be only one region-wide competition authority. This authority may consult with national competition structures and provide technical and other assistance where needed or at the instance of a Member State. Appeals of a decision of the region-wide competition authority can be taken before the ECOWAS Court of Justice (ECJ), and where necessary, the ECJ may invite the written opinion of national Supreme Courts and/ or national competition structures to advise the Court in its deliberations.

V. IMPLEMENTATION CONDITIONS

A. Capacity-Building

The ECOWAS Community, like other developing regions, will likely face significant challenges in developing the institutional capability for successful implementation of competition law and policy. This includes the administrative costs of setting up and operating the required institutions and of justifying the relative costs in light of benefits that are likely to accrue to citizens and the Community at large. Currently, ECOWAS faces, in general, either a lack or insufficiency of the human, technical, and institutional resources necessary to ensure the effective implementation of competition legislation. Enactment of a

regional competition law will be of no effect unless it is supported by the requisite legal, human, and institutional infrastructure to ensure its proper and effective implementation in support of national development objectives.

Capacity building with respect to trade and competition law will be a long-term project for the ECOWAS Community and will involve both study and institution building. Given the imbalance in terms of experience as well as capacity with respect to competition legislation and institutions, it is important for ECOWAS to seek assistance on issues relating to the implementation of the proposed competition Community Rules while also drawing on experts familiar with the unique legal systems and values unique to developing and least-developed countries.

Within the ECOWAS Commission, staff members should be appointed or selected to specialize in competition-law-related work in order to allow them to develop expertise. Academic qualifications in economics or law, and experience in financial or other economic investigations, would be useful backgrounds for staff members. A staff training programme should be developed to improve and promote the abilities of staff members. Policies should be developed to encourage staff retention. The ECOWAS Competition Authority, as well as national competition structures of Member States, need to develop sound case management procedures to ensure that cases are recorded and investigated adequately, and that work on them is completed within the time limits prescribed in the supplementary Act. Specific needs in terms of capacity will involve:

- support for the conduct of a regional educational and training programme to develop the human resource skills base necessary to create a competition culture in each country and to generate the expertise needed to staff the new regional competition authority and to ensure that the new competition law is enforced and implemented effectively;
- support for training, scholarships for advanced studies, fellowships, internships and other means of exposing the staff of the new regional competition authority to the practices and methodologies of more mature competition authorities; and
- support for the creation of strong and competent national competition structures through the establishment of conditions that enable the more advanced regional or national competition structures to help train and assist other member countries' competition' staff in the following areas: (i) handling of investigations, especially with respect to multinational corporations; (ii) development of competition-related information databases; (iii) competition advocacy; (iv) relationship of competition

legislation, such as those relating to consumer protection, business incorporation, anti-trust and anti-monopoly, intellectual property rights, public utilities, trade and tariffs, etc.

B. Proposed Schedule of Implementation

The first step in implementing a regional competition framework is the adoption by ECOWAS of the proposed competition community Rules, which will establish the substantive competition law for the region as well as a regional competition Authority that will be charged with its implementation. It is encouraged that official processes that will lead up to the adoption of the draft regulation be initiated as quickly as possible. Given recent transformation the ECOWAS Executive Secretariat to the Commission, this is a strategic time to include competition regulation in the newly established ECOWAS framework.

While the proposed competition community Rules has been evaluated and assessed by international and regional experts, as well as experts within ECOWAS, the regulation deals solely with substantive and institutional issues that are central to the regional law.

An important second step is the drafting of rules of implementation necessary to give actual force to the operation of the proposed Competition Authority, including such matters as procedures to govern cross-boundary mergers and acquisitions; the range of fines that the proposed Competition Authority may assess including establishing maximum limits; procedures for filing complaints and initiating investigations, etc. Drafting Rules of implementation may begin as soon as possible in order to be ready to operationalize the work of the Authority once the competition community Rules has been adopted into law.

The third step involves the Selection and appointment of the leadership of the proposed Regional Competition Authority. This will require identifying minimum qualifications and desired levels of experience. The development of such qualifications should begin, as should the process of selecting the initial leadership team of the proposed Authority. It is emphasized that the individuals chosen to fill these positions must be well qualified both in terms of education and experience to provide strong intellectual and practical leadership to the Authority.

Once the leadership team of the proposed Competition Authority has been established, other staff positions within the Authority should be filled in a prompt fashion. It should be noted that the Authority need not be a large body-indeed. It is recommended

that its development should be gradual and incremental in order to ensure that a solid institutional foundation is established.

In the fourth step, the ad hoc Advisory Board should be constituted. The Board should comprise of no more than 7 members, highly qualified in law, economics or other relevant discipline. The Board should assist in the development of internal rules of procedure for the authority, and provide counsel to the Authority and other ECOWAS institutions in matters pertaining to the regional competition law and its progressive implementation.

VI. CONCLUSION

It is well established that the design of competition rules, both substantive and procedural, is not simply a matter of applying basic economic principles and analyses, but is also *inherently* a political issue and has therefore by tradition been heavily influenced by interest group pressures and chosen policy objectives. The result has been notable variability in the regulation of competition law across countries and across time. Substantive differences in competition rules across jurisdictions reflect disagreements about, *inter alia*, the proper treatment of unfair or anticompetitive behaviour that does not immediately affect price or output levels, the appropriate regime for vertical restrictions, and the complex relationship between competition policy and broader national economic goals. Similarly, there is an ongoing debate, whether "competition" is, or should be, "a national goal for its own sake"—*i.e.*, whether there are certain species of "anticompetitive" conduct (*e.g.*, price fixing, division of markets, predation, bundling, *etc.*) that in all circumstances merit a "per se" holding of illegality without a "rule of reason" cost/benefit examination of its effects—or whether the definition of what constitutes "anticompetitive," (and hence illegal) conduct should always be governed by a pragmatic scrutiny of elements such as consumer welfare and efficiency consequences. For example, should basic principles of competition be suspended when a particular business arrangement or government aid might produce more jobs in the region? The answer will clearly be different across jurisdictions. Finally, the design and effect of competition rules across jurisdictions differs due to dissimilarities in institutional frameworks, enforcement mechanisms, as well as remedial and penalty structures of individual nations. The proposed regional competition framework for the ECOWAS region builds upon established legal principles in ECOWAS Member States, keeping the development objectives of the region as a central focus and maintaining a balance between national and regional jurisdiction to ensure the welfare of the ECOWAS

region. The development of this framework will evolve continuously over time as Member States remain committed to securing the welfare benefits of trade liberalization by complying with rules designed to preserve the open market established by the ECOWAS Treaty.

APPENDIX A

COMPARISON OF SUBSTANTIVE PROVISIONS

STATUTORY PROVISION	PROHIBITION TYPE	NIGERIA	GHANA	UEMOA	ECOWAS (PROPOSED)
General Prohibition of Agreements and Concerted Practices Tending to Prevent, Restrict or Distort Competition	Concerted Practices	✓	×	✓	✓
General Prohibition of Agreements that Have the Purpose of Substantially Lessening Competition	Concerted Practices	×	✓	✓	✓
Specific Prohibition of Agreements Fixing Prices (Directly & Indirectly) or Other Trading Conditions	Concerted Practices	✓	✓	✓	✓
Specific Prohibition of Limiting or Controlling Production, Markets, Technical Development, or Investment (Unilateral & Concerted)	Concerted Practices, Monopolization	✓	✓	✓	✓
Specific Prohibition of Exclusive Dealing Arrangements	Concerted Practices, Monopolization	×	✓	×	×
Public Interest Exception to the Prohibition of Exclusive Dealing Arrangements	N/A	×	✓	×	×
Kinship Exception to the Prohibition of Exclusive Dealing Arrangements	N/A	×	✓	×	×
Specific Prohibition of Market/Customer/Sources of Supply Division Agreements	Concerted Practices	✓	✓	✓	✓
Specific Prohibition of Boycotts	Concerted Practices	✓	✓	×	×
Specific Prohibition of Agreements to Limit Competitor Access to Arrangements or Associations Crucial to Competition	Concerted Practices	✓	×	×	×
Specific Prohibition of Collusive Tendering and Collusive Bidding	Concerted Practices	×	✓	×	×
Specific Prohibition of Applying Dissimilar Conditions to Equivalent Transactions (Unilateral & Concerted)	Concerted Practices, Monopolization	✓	✓	✓	✓
Specific Prohibition of Tying Arrangements (Unilateral & Concerted)	Concerted Practices, Monopolization	✓	✓	✓	✓
Inclusion of a Distributive Agreement Efficiency Exception to the General Prohibition of Agreements/Concerted Practices in Restraint of Trade	N/A	✓	×	✓	✓
General Prohibition of Abuse or Acquisition and Abuse of a Dominant Position in a Market	Monopolization	✓	✓	✓	✓
Specific Prohibition Against the Imposition of Unfair Purchase or Selling Prices or Other Unfair Trading Conditions with the Purpose of Eliminating Competitors (Unilateral & Concerted)	Concerted Practices, Monopolization	✓	×	✓	✓

Specific Prohibition of Resale Price Maintenance (Unilateral & Concerted)	Concerted Practices, Monopolization	✓	✓	✓	×
Specific Prohibition of Restrictions on the Importation of Goods Covered by Overseas' Trademarks with the Aim of Charging Artificially Inflated Prices (Unilateral & Concerted)	Monopolization	✓	×	×	×
Specific Prohibition of Misuse of Market Power for the Purpose of Preventing Market Entry	Monopolization	✓	✓	N/A	✓
Specific Prohibition of Misuse of Market Power for the Purpose of Preempting Scarce Goods	Monopolization	×	✓	×	×
Specific Prohibition of Misuse of Market Power for the Purpose of Preventing Erosion of Existing Price Levels	Monopolization	×	✓	×	×
Specific Prohibition Against the Misuse of Market Power by Adopting Specifications of Goods and Services Incompatible with Those of Others	Monopolization	×	✓	×	×
Authority of Regulatory Bodies to Seek out and Eliminate Concentrations of Economic Power Likely to Lead to Detrimental Consequences for the Public Interest	Monopolization	×	✓	N/A	×
Specific Prohibition of the Misuse of Market Power by Pricing Goods at an Excessively High Level	Monopolization	×	✓	×	×
Specific Prohibition of Refusal to Transact Business According to an Enterprise's Customary Commercial Terms	Monopolization	✓	×	×	×
Inclusion of a Public Interest Exception to the Prohibition of Agreements in Restraint of Trade/Abuse of Dominant Market Position	N/A	×	✓	✓	✓
Prohibition of Misleading, Deceptive, and Unconscionable Market Practices	Unfair Competition	×	✓	×	×
Specific Prohibition of Mergers and Acquisitions Tending to Enable Maintenance of Uncompetitive Prices for a Significant Period of Time	Mergers & Acquisitions	✓	×	×	×
Specific Prohibition of Mergers and Acquisitions Tending to Enable the Creation of a Commercial Entity with Dominant Market Power and/or Tending to Reduce Trade/Competition	Mergers & Acquisitions	✓	✓	✓	✓
Extension of Competition Bill to Government-Induced Market Distortions	State-Induced Distortions	×	×	✓	✓
Extension of Competition Bill to Practices Occurring Outside of National/Regional Jurisdiction Having Domestic/Regional Anticompetitive Effects	N/A	×	×	✓	✓

APPENDIX B

COMPARISON OF ENFORCEMENT & PROCEDURAL PROVISIONS

STATUTORY PROVISION	PROVISION TYPE	NIGERIA	GHANA	ECOWAS (PROPOSED)
Establishment of Specialized Government Agency (National/Regional) Charged with Competition Regulation	Enforcement/ Procedural	✓	✓	✓
Provision of Immunity to National Competition Regulators	Procedural	✓	×	×
Mandatory Inclusion of Private/NGO Sector Representatives in Decision-Making Organs of Competition Regulatory Bodies	Procedural	×	✓	✓ (Appellate Body)
Mandatory Disqualification from the Decision Making Process of Competition Regulators Burdened by a Conflict of Interest	Procedural	×	✓	×
Power of Competition Regulatory Bodies to Conduct Investigations and Inquiries	Enforcement	✓	✓	✓
Power of Competition Regulatory Bodies to Summon Witnesses/Examine Documents	Enforcement	✓	✓	✓
Power of Competition Regulatory Bodies to Enter and Search Premises	Enforcement	✓	✓	✓
Power of Competition Regulatory Bodies to Order the Termination of an Anticompetitive Agreement or Abusive Business Practice	Enforcement	✓	✓	✓
Power of Competition Regulatory Bodies to Directly Impose Sanctions/Fines for Anticompetitive Market Conduct	Enforcement	✓	✓	✓
Pre-Approval Investigations of Proposed Mergers and Acquisitions	Enforcement	✓	✓	× (To be set forth by the Commission)
Requirement to Notify a Regulatory Body About a Proposed Merger or Acquisition Affecting Domestic/Regional Market Irrespective of the Origin of the Transacting Firms	Procedural	×	✓	× (To be set forth by the Commission)

Legend:

× = means this provision has not been taken into account

✓ = means this provision has been taken into account

N/A = not available