Technical Assistance to Support Drafting of Ghana's Competition Policy

Inception Report

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1 Background and Rationale

Ghana has taken a leading role in the drafting the regional competition policy, despite not having finalised its own competition policy reforms. The coming into force of the AfCFTA Competition Protocol and the ECOWAS Competition Law, has spurred the Government of Ghana into being more vocal in advancing AfCFTA negotiations on Competition Policy reform, as Ghana cannot afford to be left behind without an institutionalisation functional competition regime to guide the conduct of the market.

The objective of a functional competition regime is to promote competition and contribute towards increased efficiency and curb anti-competitive practices in the market. A functional competition regime aims to ensure wider consumer choice in markets for goods and services, through innovation and efficient resource utilisation by players in the market to promote economic welfare. Further, it endeavours to stimulate effective price competition between suppliers, and deter anti-competitive behaviour, which helps consumers of good and services. If passed and implemented effectively, empirical evidence and country experience suggests that an effective competition regime can promote private sector development, economic growth and poverty reduction in both developing and least developed countries. Several studies[1] have corroborated this hypothesis, which has motivated many countries in Africa, including Ghana, to embrace competition law/policy reforms.

Until the late 1990's, most businesses and services in Ghana were owned by the government. Economic reforms in the 2000s initiated privatisation of state-owned firms creating publicly owned firms, which unfortunately shifted one form of a monopoly into another one. These firms continued to enjoy some form of protection by the government, resulting in practices that led to inefficient pricing, which has made the cost of doing business in Ghana high.

This project, funded by the Foreign and Commonwealth Development Office (FCDO), aims to support Ghana with its domestic competition policy reform. By developing an effective competition policy, Ghana will not only ensure a fair playing field for UK businesses looking to trade and invest in Ghana but will help to overcome the structural and behavioural entry barriers currently hindering Ghanian businesses. Thus, creating greater confidence in the market and increasing opportunities that benefit both the UK and the Ghanaian economy.

2 Purpose of this Report

The main purpose of this report is to elaborate on the planned approach to successfully implementing this assignment within a limited timeframe by Cowater International and CUTS Accra.

Cowater International, as contract holder and key point of FCDO as well as responsible for overseeing quality assurance, is a global international development consultancy firm with over 800 projects in more than 80 countries. We possess internationally recognized and award-winning experience at the policy, programme and project-levels, developing and managing major program and project initiatives, as well as undertaking more targeted studies, capacity building, and communications activities. Cowater has substantial experience in supporting public financial management reform both at national and sub-national levels, in revenue mobilization, as well as in audit and accountability within government and oversight bodies.

CUTS International, responsible for project delivery, is a non-profit NGO that catalyses the pro-trade, pro-equity voices of the Global South in international trade and development debates. It has made a name for linking people and issues in the world of multilateral trade with their counterparts in related policy areas. These include regional integration, agriculture, environment, competition, investment and consumer protection among others.

Together our organisations will work collaboratively to achieve the following:

- An understanding of UK Commercial opportunities created by the completion and implementation of the Competition Law in Ghana;
- Propose recommendations for revisions to be incorporated into the draft Competition Policy that would support further opportunities for UK trade and investment in Ghana; and
- Propose recommendations on the establishment of a body within the Government of Ghana to implement and regulate their Competition Policy.

[1] Some of the noteworthy reports/studies include, The World Bank's Global Economic Prospects 2003; Levenstein, M.C. and V.Y. Suslow (2001) "Private International Cartels and their Effects on Developing Countries"; Jenny, F. (2002) study of cartels for aluminium, steel and heavy electrical equipment; Clarke, J. and S. Evenett, (2003) "The Deterrent Effect of National Anti-Cartel Laws: Evidence from the International Vitamins Cartel".

3 Approach and Methodology

To ensure that the terms of reference (ToR) are met, the methodology will be as follows:

Identify other donors working on competition to avoid duplication and assess areas for potential join up.

The study will map all the development partners in Ghana and their areas of interest with respect to competition, trade, and investment. This will be done through desk study and key informant interview, where possible, to ascertain the areas of interest of donors.

Build an understanding of UK commercial opportunities created by the completion and implementation of the competition law in Ghana. These commercial opportunities, where applicable, should be clearly linked to specific the AfCFTA and ECOWAS legal frameworks.

The study will try to identify opportunities that are currently not available for investors due to the lack of enforcement of competition laws as well as lack of a general attitude to observe fair competition principles. The enforcement of competition laws would see such practices being eliminated, which creates a level playing field for all players in the economy. This means that there would be two aspects to the analysis:

(i) Assessing the existence of entry barriers and breach of competitive neutrality principles in the Ghana's economy which are currently making it difficult to attract entry and investments into the markets.

Entry barriers are an advantage enjoyed by an incumbent firm over potential entrants, which prevent new firms from entering the market. The evaluation of barriers to entry is also important because they are a significant cause of foreclosure in the industry and facilitate anticompetitive market conduct. Barriers to entry include 'absolute barriers' (legal/regulatory advantages), which exist when government regulations, such as licensing, limit the market participation or impose substantial regulatory approval costs which make it difficult to enter the regulated industries. They also include 'structural barriers' which arise from basic market conditions, such as cost, demand and technology.

While absolute and structural barriers might only get eventually resolved through advocacy initiatives by the competition authorities, it is 'behavioural barriers to entry', which are a result of actions by the incumbents to make entry difficult for new firms, which are directly regulated by the competition law when it becomes enforced. These are largely anticompetitive practices such as abuse of dominance and anticompetitive agreements, and the existence of these is largely dependent on the competence of the competition authority in identifying them.

Similarly, the study will identify breaches of competitive neutrality principles that distort the level playing field and hence harm competition. It will thus make an attempt at identifying some potential anticompetitive practices which are currently distorting the playing field and making it uneven, whose regulation might create favourable conditions for investment into Ghana by other players.

(ii) Assessing the adequacy of the competition framework in Ghana to deal with the identified structural bottlenecks and anti-competitive practices, including entry barriers and breach of competitive neutrality principle that could prevent competition on merit in the economy.

The second aspect of the study is to make an assessment of the provisions of the existing competition policy and law framework with a view to assessing whether they are sound enough to address the identified challenges. This would be done at three levels:

1. At the **national level**, where the existing competition framework, including Draft Competition Policy and Draft Competition Bill of Ghana would be assessed to identify whether it has been well crafted to deal with all categories of anticompetitive practices, anti-competition behaviour, regulatory entry barriers and breach of competitive neutrality principles. This includes identifying any gaps in the Draft Competition law for Ghana that might need to be strengthened.
2. At the **regional level**, which involves assessing the ECOWAS Regional Competition Policy and Competition Rules adopted by the Authority of Heads of States and Government in 2007 and 2008 respectively, enforced by the ECOWAS Regional Competition Authority (ERCA). ERCA was created by statute (Supplementary Act A/SA.2/12/2008) adopted in 2008 and is headquartered in the Republic of The Gambia. The study will assess the extent to which some of the potential competition challenges and opportunities in Ghana with a regional dimension can be unlocked through the enforcement of the regional competition law. In addition, this assessment would also guide alignment of Ghana's domestic competition framework with that of the ECOWAS.
3. At the **continental level**, which involves assessing the AfCFTA framework, in general, and Draft AfCFTA Protocol on Competition Policy, in particular; and identifying how it can also be enforced to deal with some of the challenges in Ghana with a continental dimension which could also affect

investment into Ghana. In addition, this assessment would also guide alignment of Ghana's domestic competition framework with that of the AfCFTA.

Propose recommendations for revisions to be incorporated into the Competition Policy draft and the existing competition law framework, that would not only be in alignment with ECOWAS and AfCFTA framework but would also tend to support further opportunity for UK trade and investment in Ghana.

The assessment of the Draft Competition Policy for Ghana may reveal a number of loopholes which would need to be tightened to ensure that it comes out as a strong competition enforcement tool that meets the modern standard requirements of a competition policy and law, such as that followed in the UK. Recommendations would then be made on how to ensure that these are incorporated into the Draft Competition Policy, draft Competition Bill and the existing competition law framework for Ghana.

Propose recommendations on how to establish a body within the Government of Ghana to implement and regulate the Competition Policy for the long term.

The enforcement of competition law has to be done by a number of institutions through a well-coordinated manner. In general, there is need for a competition authority that does the investigation but has to rely on another body for adjudication and prosecution. The adjudication roles also extend to the courts, such that if both the competition authority and the courts lack the capacity and independence, it would be difficult to achieve competitive outcomes in the market. There are generally three different models that have been instituted across the world in terms of the institutional framework; the bifurcated judicial model; the bifurcated agency (tribunal) model and the integrated agency model.

Under a bifurcated judicial model, after investigation, the competition authority has to go to the courts for the enforcement of the decisions. This means that the institutional arrangement would be such that there is only one competition authority, whose role is to investigate, but the institution would not have any enforcement power.

Under a bifurcated agency model, a specialised Tribunal is established for the purpose of enforcing the decisions of the competition authority, as well as to hear any appeals against the decisions of the competition authority. This implies that there would be two competition authorities, but with clearly defined roles and specialisation.

The integrated agency model would have the competition authority having arms; one investigating and then a Commission within the agency undertaking the first level adjudication.

However, in Africa there are two main institutional models that can be found; an integrated agency model and a bifurcated agency model. The arrangement under the integrated agency model, which is the most common, is that the competition authority investigates and adjudicates the cases, although these functions are carried out by different specialized units within the competition authority. The competition authority directorate would investigate and come up with a conclusion, while the Board of Directors of the same competition authority would be called upon for adjudication roles. [UK follows the integrated agency model in form of CMA]. In a bifurcated agency model, the competition authority would conduct the investigation but has to bring the findings before a specialised competition institution specializing only on adjudication, often known as a Competition Tribunal.

Given that each model has its own advantages and disadvantages, the study will recommend a model that is more suitable for Ghana, including taking into account the UK-CMA model.

As indicated, Ghana has a draft Competition Policy and Bill which needs to be aligned with the changing dimensions of competition and antitrust with reference to AfCFTA and other commitments to bilateral and multilateral trade treaties. The Act creates a National Competition Commission which will implement the Act. All things being equal, the operationalization of the policy will precede the Act. In the absence of the Competition Commission of Ghana, the institutional arrangement to oversee implementation of the Policy shall be the National Competition Policy Committee. Members of the Council shall be appointed by the Minister responsible for Trade and Industry (MOTI). Members of the Council shall be drawn from trade and economist experts from industry, academia, government, civil society, and private sector. Once the Competition Act becomes operational, the powers of the Committee shall be subsumed by the Commission. The committee expenditures shall be born from the budget of the Ministry of Trade and Industry. In the current draft of the policy, there is a national competition policy implementation committee.

4 Work Plan and Deliverables

Activity	Wk-1	Wk-2	Wk-3	Wk-4	Wk-5	Deliverable
	13/3	20/3	27/3	3/4	10/4	
Inception Meeting	■					Inception Report
Desk-based review/ analysis of UK-Ghana trade and investment policy-related barriers to trade and investment, and gaps in the draft competition bill and policy		■				-
Stakeholders' consultation (in person) to identify key opportunities from the competition policy, and which businesses and/or investors are best placed to utilise these opportunities.				■		-
Preparation of final draft report, including proposed revisions to the competition bill and recommendations on how to establish a body with this the Government of Ghana to implement and regulate the Competition Policy				■		Draft Report
Incorporation of Feedback into Draft Report and Submission of Final Report					■	-
Preparation of Project Completion Report					■	Final Report on Ghana's Competition Policy and Project Completion Report

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