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**Voluntary peer review of competition policies of WAEMU,
Benin and Senegal**



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Acronyms and abbreviations

ACP	Africa, Caribbean and Pacific
AIC	Inter-professional Cotton Association
APEC	Asia-Pacific Economic Cooperation
APC	Autonomous Port of Cotonou
ASEAN	Association of South-East Asian Nations
BCEAO	Central Bank of West-African States
BIC	Tax on Industrial and Commercial Earnings
BOT	Build-Operate-Transfer
CARDER	Regional Center for Rural Development
CCJA	Common Court of Justice and Arbitrage
CEB	Electrical Community of Benin
CEBENOR	Benin Centre for Standards and Quality Management
CFA	African Financial Community
CPI	Center for the Promotion of Investments
CPT	Common Preferential Tax
ECOWAS	Economic Community of West African States
EMU	Economic and Monetary Union
EPA	Economic Partnership Agreement
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FCFA	African Financial Community Franc
FDI	Foreign Direct Investment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GSP	Generalized System of Preferences
HCPI	Harmonized Consumer Prices Index
HIPC	International Debt-Relief Initiative for Highly-Indebted Poor Countries
ILO	International Labor Organization
IMF	International Monetary Fund
IRVM	Earnings Tax on Securities
LDC	Least Developed Country
MERCOSUR	Southern Common Market
NAFTA	North American Free Trade Agreement
NTIC	New Technologies of Information and Communication

OAPI/AIPO	African Intellectual Property Organization
OHADA	Organization for the Harmonization of Business Law in Africa
OPT/PTO	post and Telecommunications Office
SA	Incorporated Company
SARL	Limited liability company (Ltd)
SBEE	Benin Water and Electricity Utility (old name); actually: Société béninoise d'énergie électrique.
SME	Small and Medium-Sized Enterprise
SOBEMAP	Benin Port Manhandling Corporation
SONACOP	National Petroleum Products Trading Company
SONAPRA	National Agricultural Promotion Company
SONEB	Benin National Water Company
SONICOG	National Fats Trading Company
SYSCOA	West African Bookkeeping System
TNC	Transnational Corporation
UNDP	United Nations Development Program
VPS	Employer's Wage Contributions
WAEMU	West African Economic and Monetary Union
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

INTRODUCTION

The West African Economic and Monetary Union (WAEMU) aims at promoting common policies in favour of development and economic integration of eight States. Among these policies is competition policy, which is generally considered to play a central role within the legal framework of both regional groupings such as WAEMU and their member States. Clearly, economic policies implemented at the subregional or national levels constitute an integral whole, among which competition policy is an essential pillar, along with other policies. The other policies, such as trade liberalization, deregulation, privatization, creation of market institutions and all measures to establish a legal framework, are heavily dependent on the existence of a competition policy framework, especially in developing countries.

Although quite young, as it was created in 1994, WAEMU is quite experienced in this field. The specificities of the competition related provisions incorporated in the Dakar Treaty and emanating from it, deserve to be studied as a whole. The interest of such a study is increased by the fact that member States of the union have not all followed similar policies until the adoption of competition rules at the level of the union: to date, some member States have adopted national competition laws, while others have not.

The wish to undertake an assessment which could be followed up by action was expressed several times³ and it was finally decided to proceed with a voluntary peer review during the Fifth Review Conference on Competition Policy and the Intergovernmental Group of Experts of UNCTAD (31 October–2 November 2006) at which member States of WAEMU and representatives of the commission participated. Under peer reviews, the application of competition law and policy in a given country is analysed, in particular by studying the institutional arrangements which are in place to implement the law, examining how various sectors of the economy are regulated and which action of the authorities may impact on commercial activity.

Once prepared, the peer review report is submitted to experts from both developed and developing countries for examination. Finally, appropriate measures including capacity-building and technical assistance to strengthen national competition authorities are proposed. Peer reviews are not only aimed at studying to the needs of the country under review, but also help interested member States examine their own standards in the fields of competition law and policy⁴.

The present review covers not only the competition institutions of WAEMU, but also those of member States Senegal and Benin: the first, endowed with a national competition law and policy in line with UNCTAD's set of principles and rules, and the second having only partial national rules in this field.

³ "Regional economic grouping of States are created in all regions of the world, which include common competition rules at regional level. The aim of such common economic areas is *inter alia*, to harmonize competition rules within member States, in order to guarantee transparency between them. In doing so, it is essential to introduce a peer-review mechanism in order to compare its application in each member State." (Mr. Moudjaidou SOUMANOU, "contribution of the Republic of Benin" at the International Group of Experts on Competition Law and Policy meeting devoted to "Peer reviews on competition policy" (15–16 July 2004, pp. 2–5).

⁴ See in this respect UNCTAD's website: UNCTAD XI; the Fifth Review Conference on Competition Policy; and the International Group of Experts on Competition law and Policy (31 October–2 November 2006).

Whether they are endowed with a competition law or not, there are clearly benefits for the other eight member States in the peer review of WAEMU and of two of its member States, Senegal and Benin. In particular, this review should facilitate:

- Identifying possible deficiencies in the implementation of competition policy and laws in each member States of the union, under community rules or under national laws in different member States, including the two being reviewed and the other ones;
- Exchanging experiences among all countries participating in the peer review;
- Identifying the needs for capacity-building: the review is a sort of audit helping to identify both the strengths and weaknesses of the legal, regulatory institutions and organizational systems;
- Elaborating proposed measures to allow the countries in question to better adapt to the new institutional and regulatory environment of WAEMU.

The present study is in four parts:

- (a) Part one: focuses on WAEMU, as an organization endowed with competition rules under the treaty, which has promoted competition policy at least since the year 2000;
- (b) Part two: covers Senegal, a member State endowed with a modern competition law since 1994, and the institutions in charge of its application;
- (c) Part three: concerns Benin, a member State which does not have a competition law, strictly speaking, but which does has specific rules and institutions responsible for implementing these rules, which are generally recognized as being related to, and having certain synergies with, competition rules; and
- (d) Part Four: contains general conclusions, reviewing cross-cutting issues and putting forward recommendations aimed at improving the existing or future competition systems, both at community and national levels.

**PART ONE:
REVIEW OF THE COMMUNITY
COMPETITION POLICY OF WAEMU**

The West African Economic and Monetary Union (WAEMU) was created on 10 January 1994 by the Dakar Treaty signed by the heads of States and Governments of seven West African countries having a common national currency: the franc CFA. These are Benin, Burkina Faso, Côte d'Ivoire, Mali, Niger, Senegal and Togo. The treaty entered into force on 1 August 1994, after it was ratified by all member States. The seven founding States were joined by Guinea-Bissau on 2 May 1997.

WAEMU is now composed of eight member States, covering a total area of around 3,507,600 km² with a population of approximately 80,340,000 inhabitants, with growth rate estimated at 3 per cent. Its real gross domestic product (GDP) (at constant prices) is 18,458.8 billion francs CFA with a real growth rate of GDP of 4.3 per cent and an annual inflation rate of 4.3 per cent⁵.

I. HISTORICAL BACKGROUND

A. CREATION AND OBJECTIVES OF WAEMU: THE TREATY OF DAKAR

1. Background of WAEMU creation

The creation of WAEMU in January 1994 cannot be fully understood without considering its historical and economic background.

Historical background

Firstly, the creation of WAEMU pertains to renewal of the desire to integrate regionally the West African States after previous experiences based on the same premises.

The basic idea is that in a fragmented Africa composed of some 50 countries and States, often referred to as "micro-States" suffering from under-development and facing multiple crises, only regional integration and union constitute an alternative to promote harmonized and sustainable development of member States' economic activities, while allowing for a sufficient degree of economic independence permitting the fastest possible improvement of its population's living standards.

Each member State in isolation is generally characterized by a weak capacity for taking advantage of their economic potentialities, constrained as they are by small and segmented domestic markets, by their high degree of dependence on foreign countries, in particular of the Northern hemisphere, and by the weakness of their negotiating capacity in world forums. Regional integration, on the other hand, represents for these countries a great potential to create a larger sub-regional market permitting the achievement of economies of scale, development of trade links among member States resulting in the creation or intensification of a common market.

Moreover, such integration should result in strengthening African countries' negotiating position in world forums, in reducing their dependence with respect to the North, and increasing South-South relations, while eliminating artificial borders inherited from colonization and recreating ancient natural links based on complementarity of economic, cultural, linguistic and ethnic communities. Intensifying trade is a means to accelerate economic development and prosperity for the countries in question, by allowing in particular economies of scale for competitive enterprises to develop, by increasing their access to commodities and creating a larger market in which they can compete and henceforth stimulate their innovative capacity and dynamism. All

⁵ According to WAEMU website www.uemoa.int consulted on 5 march 2007.

such elements are favourable to technological progress and innovation, to channelling trade links towards further intra-regional exchanges, lowering prices of goods and services and increasing the quality and choice available to consumers.

Such integration was therefore considered a necessity in an international context characterized by globalization, where regional blocs are being established or strengthened in all regions – such as the European Union, the North American Free Trade Agreement (NAFTA), the Southern Common Market (MERCOSUR) in Latin America, the Association of South-East Asian Nations (ASEAN) in South-East Asia, and Asia-Pacific Economic Cooperation (APEC) in Asia-Pacific – to live up to the challenge of increased competition resulting from ever-increased trade liberalization (from tariffs and non-tariffs barriers) and to cooperate more intensively with other regions or subregions of the world. It was therefore considered more reasonable to integrate above all economically at the subregional level, as this could serve to widen the integration process to other fields, countries and subregions of the African continent.

In the recent past, many options and experiences of regional integration were launched in West Africa⁶. Such initial

⁶ In this respect one can refer to the Customs Union of Western Africa (CUWA, better known as U.D.A.O.), created on 9 June 1959. This was established as a sort of remake of the old Federation of French Western Africa (AOF) which was dissolved on 3 March 1959. It included originally Côte d'Ivoire, Dahomey (today: Benin), Haute-Volta (today Burkina Faso), Niger, Mauritania and the Federation of Mali (composed of Senegal and Mali). Merchandise trade was supposed to be free from any tariff or taxes, but in reality, this never happened. U.D.A.O. was reorganized in 1966, to create UDEAO, (Customs Union of Western African States or CUWAS) composed of the same member States, conceived as a means of deeper cooperation. UDEAO did not manage to function as a free trade zone, each member State imposing its own customs duties on imports from other member States, infringing the treaty establishing UDEAO. For these reasons, member States renegotiated their cooperation with the West African Economic Community (CEAO) and on 17 April 1973 signed the Treaty of

attempts were mainly aimed at protecting enterprises under import-substitution policies. After evaluating the social costs of such policies and the failure of such enterprises, the founding fathers of WAEMU were convinced of the need to change their vision and to assign new objectives to the new community they were about to create.

Economic background

At the end of the 1980s and beginning 1990s, the globalization process, based on the liberal view of market supremacy, marginalized to a considerable extent the African continent from world trade, drawing attention to the widespread lack of competitiveness of its economy and its enterprises.

Africa is the least-integrated region in the world economy: its share of world trade is less than 2 per cent (1 per cent for sub-Saharan economies), and its share of international financial flows and services trade is negligible. For example, while world trade flows expanded by annual rates of more than 6 per cent in the 1980–1990 period, Africa's exports receded on average by 1 per cent annually during the same period. At the same time, Asia and Latin America were expanding their trade flows by 7 per cent, respectively.

WAEMU appeared therefore as the solution, since open economies tend to grow faster than closed ones and increased

Abidjan between Benin, Burkina Faso, Côte d'Ivoire, Mali, Niger, Senegal and Togo.

A few years later, the heads of States of 15 countries of the subregion decided to widen the CEAO framework by creating a larger area, the Economic Community of West African States (ECOWAS), by signing the Lagos Treaty (Nigeria). These are the CEAO member States (Benin, Burkina Faso, Côte d'Ivoire, Mali, Niger, Senegal and Togo) plus Guinea, all French-speaking, plus five English-speaking countries (Gambia, Sierra Leone, Liberia, Ghana and Nigeria) and two Portuguese-speaking countries (Guinea-Bissau and Cape Verde). The ECOWAS agreement was revised in 1993 by the Cotonou Treaty.

competition on wider markets can stimulate these economies, by allowing exporters of manufactured products to come across, including new management techniques, encouraging technology transfer and helping to improve access to foreign resources in general. The new possibilities made available can, in turn, favour more efficient allocation of resources, create productivity gains and contribute to accelerating growth rates.

The persistence of important tariffs and non-tariff barriers, however, as well as other negative factors such as political instability and ill-conceived national policies in many countries, adversely affected their outcomes.

At the same time as WAEMU was created, it should be noted that the States of the franc CFA zone proceeded to devalue the franc CFA, under the aegis of the Central Bank of West African States (BCEAO)⁷, by 50 per cent with respect to the French Franc. This resulted in a strong structural change for these States.

⁷ BCEAO is the common monetary emission institute of WAEMU and the managing body of the monetary and credit policy which, within the framework of adjustment mechanism both at national and regional levels controls the main macroeconomic aggregates with a view to ensure the necessary monetary, financial and foreign exchange equilibriums, including the balance of current accounts and the equilibrium of the debt management.

The devaluation

At the beginning of the 1990's, most CFA zone countries faced a very serious economic recession, and member Governments fought to adapt their economies within a fixed exchange rate regime to the deteriorating terms of trade and the weakness of major export markets. However, some have hesitated to abandon the fixed exchange rates which had long helped them to keep high prices: they doubted the devaluation would stimulate supply and reignite growth.

They also were uncertain about the political reaction of those who would lose buying power and especially those who were struggling to obtain wage increases.

As the economic and financial crisis worsened, multilateral institutions such as the International Monetary Fund (IMF) and the World Bank and other donors intensified their pressure over CFA zone Governments to devalue.

They promised technical assistance and a package of measures aimed at reducing the debt and financing smooth transactions.

The decision to devaluate was taken in January 1994 and the CFA zone countries accepted a 50 per cent devaluation of their currency. This measure was accompanied by a stabilization programme based on fiscal adjustment, and structural reforms aimed at increasing market flexibility, developing the private sector, liberalizing the economy and reducing the size of the public sector.

2. The objectives of WAEMU

Apart from the general objectives common to all regional integration processes (access to a larger market implying economies of scale, better allocation of resources among enterprises and globally among all components of society, improved competitiveness of enterprises...), WAEMU pursues a number of specific objectives which have been adhered to by member States in the Preamble to the Treaty of Dakar, which recalls the objectives of the African Economic Community and the Economic Community of the West-African States (ECOWAS).

These objectives are found in article 4 of the Treaty of Dakar, namely:

- (a) To reinforce the competitiveness of the economic and financial

activities of member States within the framework of an open and competitive market and rationalized and harmonized legal environment;

- (b) To ensure converging performance and economic policies of member States by establishing a multilateral surveillance procedure;
- (c) To create a common market among member States, based on the free movement of people, goods and services, assets and the right of establishment of those exercising liberal professions or those employed, and a common external tariff and trade policy;
- (d) To institute coordinated national sectoral policies, by implementing common actions and eventually common policies, especially in the following fields: human resources,

regional development, transport and telecommunications, environment, agriculture, energy, industry and mining; and

- (e) To harmonize as appropriate the rules for the good functioning of the common market, laws of member States, and especially the tax regimes.

Accordingly, by signing the Treaty of Dakar, the contracting parties confirmed their determination to do their best to favour the economic and social development of member States.

The passage from monetary cooperation from WAMA (West African Monetary Association) to economic and monetary integration (as per WAEMU) testifies to the ambition not to limit liberalization to the free flow of merchandise, but to liberalize the free flow of capital, of services, of people, and to harmonize economic policies while maintaining a common currency.

In this way, the common market appears as a priority; it is conceived as open and competitive, characterized by minimal protection, and having free competition as one of its key elements.

3. The governing bodies of WAEMU

With a view to reach its objectives, WAEMU, in its function as regional integration organization, has adopted a series of rules of procedure which include the provisions on competition. A number of governing bodies play an important role in this respect:

The Conference of Heads of State and Governments, as governing body, defines the guiding principles of the policy of the union and names the members and the president of the commission.

The Council of Ministers ensures the implementation of the broad lines defined by the Conference of Heads of State and Governments. It adopts the budget of the union, issues regulations, directives and decisions. It may delegate to the commission the adoption of executive regulations. Composed by the respective ministers of the eight member States of the union, the council meets at least twice a year.

The commission is the executive body of the union. It implements the budget and takes all necessary decisions to implement the acts of the Council of Ministers. It is composed of eight members, one per each member State, with a renewable tenure of four years. The headquarters of the commission is in Ouagadougou, capital of Burkina Faso.

The Court of Justice ensures due process of law in interpreting and applying the Treaty of the Union and the community law provisions. It comprises eight members, one per member State, with tenure of six years, which is renewable. The court is also located in Ouagadougou.

The Audit Office (Cour des Comptes) controls the accounts of the bodies of the union. It is also competent to check the trustworthiness of data stated in the budget law of member States upon request by member States. It comprises three members, counselors named by the Conference in accordance with alphabetic order of member States, with tenure of six years, which is renewable. It is located in Ouagadougou as well.

The Parliament, entrusted with the democratic control of the bodies of the union, is part of the decision-making process of the union. The Parliament can be consulted on projected new laws, regulations and directives. Such consultation is mandatory in the following cases: acceptance of new member States

within the union; agreements of association with non-member States; adoption of the budget of the union; common sectoral policies; the rights of establishment and free-movement of people; the procedure for electing members of Parliament; taxes and all community levies. Members of Parliament are elected by direct universal vote (one-man-one-vote) for duration of five years, according to a procedure that remains to be determined by an additional act of the Conference (So far they have been designated by the legislative body of each member State).

The Regional Consular Chamber is the main consultative body of the union, principal forum of discussions with the main economic actors, with a view to effectively implicating the private sector in the integration process of WAEMU. It comprises 56 members representing the national consular chambers and the employers' associations of the eight member States, each State having seven representatives. The chamber is located in Lomé (capital of Togo).

The Central Bank of West African States (BCEAO) is the common monetary institute of WAEMU which manages monetary and credit policy; it controls the activities of the banking industry of member States. Its headquarters are in Dakar (Senegal).

The West African Development Bank (BOAD) aims at promoting balanced development of member States and to contribute to the economic integration of West Africa by financing important development projects. It is located in Lomé (Togo).

4. The legal system of WAEMU

In order to realize its objectives, WAEMU has at its disposition the instruments which constitute community law: the treaty and

additional protocols (primary law), and additional acts, regulations, directives, decisions, recommendations and opinions (derivative law).

Article 6 of the treaty stipulates that “acts decided by the bodies of the union for the realization of the objectives of the treaty in conformity with the rules and procedures established by it, are applicable in every member State irrespective of any conflicting national legislation enacted earlier or after the treaty.”

Two fundamental principles derive from these provisions of the treaty:

- The principle of immediate and direct applicability – Any provision of community law is incorporated within the legal order of member States as soon as it is duly published by the organs of the supranational organization, if it does not require the creation of any complementary national norms by the legislative or administrative authorities concerned. Private persons can directly take advantage of this principle⁸.
- The principle of primacy of community law over national laws – In case of conflict between a community and a national norm, it is community law which prevails. Together, these two principles endow WAEMU with a supranational character, member States having ceded part of their sovereignty (especially in the fields covered by the Treaty of Dakar) in favour of the sub-regional organization, which distinguishes it

⁸ This is particularly the case for regulations; in principle, directives are not directly applicable. They hence need to be included in the internal juridical order by the member States, before they can be implemented fully and for private persons to be able to take advantage of them with certainty.

from a simple regional cooperation agreement: this is the case with competition rules.

5. The financial regime of WAEMU

In conformity with article 49 of the Treaty of Dakar, WAEMU is endowed with autonomous resources allowing it to regularly finance its functioning, in particular through its budget, which is approved each year by the council upon proposal by the commission.

The resources of the union are provided in particular by a part of the Common External Tariff (CET) and indirect taxes collected within the union. They are collected directly by the union; the union can issue debt, provide subsidies and external aids in conformity with its objectives (article 54 of the Treaty of Dakar).

In the future, a value added tax (VAT) will be instituted for the union to replace part of the proceeds of indirect national taxes provided under article 54 of the treaty. If needed, additional taxes could be introduced by the union (article 55 of the treaty).

The treaty provides for a mechanism of temporary periods of compensation for losses from customs duty collection. The benefit resulting from this automatic financial compensation mechanism has been made subject to the gradual introduction of a new fiscal base and a new structure of tax proceeds by the member States concerned⁹. In addition, the treaty

⁹ A Community Solidarity Tax (CST) has been introduced under article 16 of additional act No. 04/96 of 10 May 1996 creating a temporary preferential tariff on trade between WAEMU member States, and its functional modalities. The tariff rate has been increased, as from 1 January 2000, from 0.5 per cent to 1 per cent. The CST rate constitutes the only autonomous resource of the union which has been applied since July 1996. On 31 December

provides that structural funds could be awarded to finance a balanced regional development of the community (e.g. the Aid Fund for Regional Integration (FAIR) aimed at reducing regional disparities).

Moreover, WAEMU has constantly benefited and continues to benefit from the support of a certain number of organizations, such as the European Union and UNCTAD, particularly with respect to its efforts and policies in the field of competition policy.

The European Union has adopted a strategic document for cooperation and indicative programme between the region and Europe. The strategy it proposes would favour long-term convergence between the two integration processes and ECOWAS.

In addition, an important Regional Economic Programme (PER) for 2004–2008 adopted on 29 March 2003 opens the way for new financing for priority actions and projects identified in the programme in question. Also, the Regional and Solidarity Branch (BRS) promotes independent employment facilities for populations traditionally excluded from regular banking systems. This financial structure is specially designed to finance agricultural, industrial, handcraft and small crafts micro-enterprises. Its objective includes the insertion of the young and of workers in the labour market and generally to develop activities that can provide employment and incomes.

6. Actions and policies implemented by WAEMU

In accordance with the declared objectives various types of actions are undertaken: harmonization of legislations, common policies (monetary policy, economic policy,

2003, total CST revenue received from member States by the union amounted to 140 billion FCFA.

free flow of merchandise, common trade policy, competition rules, free movement of persons, services and capital), and sectoral policies.

(a) *Harmonization of legislation*

Directives have been adopted to harmonize the legal accountancy, and statistics frameworks of public finances, followed by a code of transparency for the management of public finances within WAEMU, as well as a decision adopting the basic document of inception of the reform project for government procurement.

The reform of Government procurement entered its operational phase in 2003, with the recruitment of one specialist for the decision-making in public tender procedures, who acts as technical assistant for the commission under the first phase of the reform programme for Government Procurement (Programme de réforme des marchés publics, PRMP), holding of periodic meetings with the World Bank and the BAD (African Development Bank).

Implementation of the programme of harmonization of indirect internal tax systems continued up to 2003, with the finalization of the study on control and management modalities of tax exemptions.

The actions both with respect to the strengthening of the Customs Union, which entered into force on 1 January 2000, and to the implementation of the common trade policy; harmonization of customs instruments with the new version of the harmonized system were adopted by the Council of the World Customs Organization (OMD) in June 1999.

For statistics studies, the union adopted innovative instruments as follows: the Harmonized Consumer Prices Index (HCPI), the monthly notes on the HCPI published on the WAEMU website, the

statistics yearbook of WAEMU, the economic trend information bulletins.

The harmonization programme on internal direct taxes was adopted, including harmonization of VAT and the directive on taxation of oil products within WAEMU as well as the directive on harmonizing the regime of down payment (acomptes sur impôts) on tax on benefits.

In prevision of the customs union, a preferential transitory regime has successfully helped the economies of member States to rebound by accelerating intra-community trade; in addition to the traditional hand crafts which circulate under complete exemption from tariffs and taxes, thousands of approved products produced by hundreds of firms in member States circulate on the territory of the union under the community preferential tax regime (CPT) with a 5 per cent rebate.

Other steps include:

- The introduction since 1 January 1998 of the West African Accountancy System (SYSCOA);
- Adoption of various measures aimed at harmonizing accountancy (institution of a West African Accountants' Council and a Permanent Council of the profession of accountants; of a legal regime of authorized Management Centres (Centres de Gestion Agréés);
- Adoption of a Budget Nomenclature and the Accountancy Plan of the State;
- Adoption of a directive on harmonization of excise taxes;
- Adoption of regulations facilitating the free movement of funds;
- Adoption of a Transparency Code for Management of Public Finance within WAEMU;
- Adoption of measures against money laundering and financing of terrorism; and

- Creation of a Regional Council of Public Savings and Financial Markets; and the Regional Stock-Exchange of Abidjan.

(b) Coordination of national macroeconomic policies with the establishment of a multilateral surveillance procedure, complementing the previous monetary policy

In this respect, the union has adopted first and second tier criteria that have to be followed by member States to ensure a better convergence of their economic policies¹⁰. The establishment of multilateral surveillance allows member States the better control each other's economic policies in order to respond in due time to possible important macroeconomic imbalances that can adversely affect monetary stability.

The institutional strengthening of National Statistics Institutes, adoption of a Harmonized Consumer Price Index (HCPI), publication of a monthly and bi-annual regional consumer price index, the elaboration and publication of semestrial reports on the execution of multilateral surveillance (eight reports have been issued since July 1997), adoption of a Pact of

¹⁰ The first -tier criteria are as follows:

- The net budgetary base to nominal GNP ratio;
- The average annual rate of inflation which must not exceed 3 per cent;
- The outstanding internal and external debt to GNP ratio; which must exceed 80 per cent;
- The underlying criteria requiring that there be no lagging internal payments related to the current management period.

The second-tier criteria are:

- A ratio of total wages to tax receipts not exceeding 35 per cent within the community;
- A ratio of internal public investments to tax earnings of at least 20 per cent;
- A ratio of current accounts (excluding grants) to GNP which deficit should not exceed 5 per cent;
- A rate of taxation of at least 17 per cent as a community standard.

Convergence, Stability, Growth and Solidarity within WAEMU, adoption and evaluation of pluriannual programs of convergence among member States, including modalities of calculating the GNP, which constitute important progress.

(c) The establishment of a Common Market

The Common Market is characterized by the free-movement of merchandise within the community and the existence of a Common External Tariff (CET). The CET, which came into force on 1 January 2000, encompasses three permanent rights: the customs tariff; the statistics duty of 1 per cent for all, without exception; and the solidarity duty of the community with a unique rate of 1 per cent. It represents three main goals, namely the wish to open the WAEMU economic area to the outside world; protect community production; and to struggle against fraud.

(d) Implementation of sectoral policies

The sectoral policies provided for in the treaty reflect the willingness of the union authorities to ensure the conditions for balanced and sustainable development of member States. The common policies adopted concern especially the industrial sector, mining, handcraft, transportation and regional development of the community's territory. Their implementation is gradually put in place in with Member States. This includes:

- The telecommunications policy of WAEMU is based on five main objectives defined in Recommendation 11 No. 03/200/CM/WAEMU relating to the implementation of a programme of action to improve telecoms in WAEMU. This involves: pursuing gradual liberalization in the sector;

¹¹ Commission of WAEMU.

harmonizing its legal and regulatory frameworks; modernizing interconnection of telecom services within the community area; developing human resources; and developing the institutional framework. To this aim WAEMU has adopted a number of acts, including:

- Directive No. 01/2006/CM/WAEMU relating to harmonization of policies regulating telecoms;
 - Directive No. 02/2006/CM/WAEMU relating to network operators and service suppliers;
 - Directive No. 03/2006/CM/WAEMU relating to interconnection of networks and telecom services;
 - Directive No. 04/2006/CM/WAEMU relating to universal service and obligations of performance of the network;
 - Directive No. 05/2006/CM/WAEMU relating to harmonization of telecom tariffs; and
 - Directive No. 06/2006/CM/WAEMU relating to cooperation among national telecom regulators.
- Common Mining Policy. Under Additional Act No. 01/2000 of December 2000, the general objectives of this policy are: to promote effective community enterprises able to satisfy internal demand and to meet external competition; to upgrade agricultural resources, game and hydraulic as well as mining; to allow for diversification of mining output and local transformation. This policy is based on incentives for the

development of effective local private enterprises.

- The Common Energy Programme (CEP). The first Council of Ministers in charge of Energy for WAEMU member States met in Bamako (Mali) in April 1997 and adopted a Common Energy Programme (CEP) based around the following main principles: harmonization of legal frameworks and regulation of the Energy sector with a view to achieving the objectives of the union, in particular with respect to competitiveness and unification of national territories, creation of an integrated energy planning system, accelerating the interconnection of electricity networks; promoting new and renewable energies, rational utilization of energy, introduction of a communitywide system of supply of liquid and gaseous fuels, changes in the modes of production and consumption of energy in order to protect the environment and to achieve sustainable development, improved management of energy sector enterprises including ensuring better access to financial markets for such enterprises.
- Common Industrial Policies (CIP). The main guiding principles of this policy were agreed upon in order to create a common vision for the industry of the subregion, based on the hope that in the long-term, the countries of the union will be in a position to become “significant actors in globalization” as a result of a sustainable industrial development. In this respect, special emphasis was placed on competition: the creation of the regional common market is expected to provide full impetus to the free play of fair competitive forces; the principle of solidarity is invoked: WAEMU is composed of

eight member States where industrial development is uneven. It is therefore necessary to apply special policies in favour of the least developed members, (infrastructure, and subregional development). Cooperation between the States and enterprises is expected to stimulate relationships among economic actors and to facilitate commercial and financial deals with other African companies, with foreign multinationals present in Africa and with foreign investors. The policy should also contribute to improve the international standing of WAEMU member States.

7. Barriers to the process of integration

Irrespective of the many achievements and undeniable success of the policies implemented by WAEMU as described above, the integration process is affected and slowed down by some barriers and difficulties. These included for example some difficulties and impediments in the way of creation of a Common Market and of the convergence and competitiveness of economic and financial activities of member States.

(a) Obstacles to the creation of a Common Market

The free movement of merchandise and people within the community space is still not satisfactory due to the occurrence of frequent erratic controls and extortion of funds. Concerning trade barriers, irrespective of the general implementation of total tariff dismantling within the union, some tariff and non-tariff barriers still exist. While the Common External Tariff (CET) is applied, tariffs of some member States still include additional tariff lines, affecting different product lines than those included

in the CET, and including entry tariffs and levies which are not those of the CET.

Other tariff barriers also persist, such as certain taxes applied only to community products and not to domestically produced ones. Also, some non-tariff barriers continue to exist in the field of technical standards blocking production originating from the community, the setting up of numerous checking-points on the main traffic corridors of the union or in the obligation to make industrial products bearing original indications and accompanied with authentic certificates of origin.

Moreover, according to economic operators interviewed, rents benefiting historic enterprises persist, including with respect to other countries engaged in the same regional integration process. Accordingly, it is alleged that these enterprises tend to abuse their dominant positions of market power to try to maintain the market shares they had before the liberalization of trade within the union. This can occur through market-sharing cartel agreements (among two or three competitors per branch of activity).

At the same time, public interventions may also occur with the effect of distorting competition.

(b) Difficulties with respect to convergence and competitiveness of economic and financial activities of member States

For example, an analysis of the economic situation of member States revealed that each year, half of the member States are unable to achieve totally the four main criteria that they all are expected to comply with. Such shortcomings include the obligations to respect average annual inflation rates, non-accumulation of current account deficits, and ratio of wages to tax revenues. This situation is linked to the

existence of socio-political tensions in some member States which slow the macroeconomic convergence objectives of the union.

B. THE COMPETITION CODE OF THE COMMUNITY AS AN INSTRUMENT FOR THE CREATION AND CONSOLIDATION OF A REAL COMMON MARKET

1. Adoption by WAEMU of a community “code” on competition

As a logical follow-up to the declared objectives of the treaty, article 76, paragraph 6 stipulates that in order to create a Common Market, the union aims at establishing common rules of competition applicable to public and private enterprises, as well as to State aid.

These provisions are complemented by articles 88 to 90, concerning competition rules that have to be adopted within the framework of the establishment of a Common Market.

Article 88 of the treaty proclaims that the following practices are prohibited per se:

- (a) Agreements, associations and concerted practices among enterprises intending to, or having the effect of, restraining or distorting competition within the union;
- (b) All practices of one or more enterprises which may be considered as an abuse of dominant position on the Common Market or a substantive part of it;
- (c) Public subsidies that may distort competition by favouring certain enterprises or productions.

Article 89 adds that the council, with a two-thirds majority of its members on proposal by the commission, shall fix by way of

regulations the necessary provisions listed under article 88. The council hence establishes the procedure that shall be followed by the commission in exercising the mandate it is given by article 90, which also stipulates the sanctions and the obligations it can impose in case of infringements to the prohibitions stipulated in article 88.

The council may also adopt specific rules clarifying the prohibitions listed in article 88 or providing for limited exceptions to these rules in order to take into account specific situations. article 90 follows by indicating that the commission shall, under the control of the Court of Justice, implement the competition rules provided for in article 88 and 89.

While the treaty in question entered into force very rapidly as from 1 August 1994, it was only on 23 May 2002, seven years after the integration process started, that the related legislation on competition, in the form of regulations and directives of the WAEMU Council of Ministers was initiated.¹²

¹² The introduction of competition rules passed through a long period of preparation before being adopted. It is only after December 1999, when the Conference of Heads of States and Governments of the Union took place in Lomé, requesting the “diligent adoption and effective implementation of a community regulation on competition, in order to consolidate the Customs Union and the Common Trade Policy” (Commission of WAEMU, “Note of presentation of the project of Community legislation on Competition within the Union”, op. cit., p. 1). Accordingly, since 1999, the commission has undertaken, with the support of the European Union, to elaborate draft legal and regulatory texts in order to fix the framework of the application of competition within the Union (Idem, p. 1 *in fine*). Pursuant to this, a first project was submitted for discussion and amendment during a working group of national experts which took place in April 2000. According to the commission, the main point of contention during the workshop concerned the question of coexisting national competition laws with the Community law; an issue which was referred to for advice to the WAEMU Court of Justice (See Advice 003/2000 of 27 June 2000 of the

Hence, the community law on competition of WAEMU comprises, as it presently stands, both primary and derivative law. More specifically, the derivative law texts of 23 May 2002, comprising three regulations and two directives, are as follows:

- Regulation No. 02/2002/CM/WAEMU on anti-competitive practices within the West African Economic and Monetary Union;
- Regulation No. 03/2002/CM/WAEMU on procedures applicable to cartels and abuses of dominant position within the WAEMU;
- Regulations No. 04/2002/CM/WAEMU on State aids within the WAEMU and on modalities of application of article 88 (c) of the treaty;
- Directive No. 01/2002/CM/WAEMU on transparency in financial relations first between member States and public enterprises and secondly between member States and International or foreign Organizations; and
- Directive No. 02/2002/CM/WAEMU on cooperation between the commission and National Competition Systems of member States, for the application of articles 88, 89 and 90 of the WAEMU Treaty.

The three regulations entered into force on 1 January 2003 and the two directives on 1 July 2002, a six-month transition period

Court of Justice (Ibid., p. 2). The commission took this into account in finalizing its project of competition law. Finally, on 23 May 2002 the texts were adopted practically without amendment, by the WAEMU Council of Ministers.

having been awarded to member States to put their national legislation in conformity with the two directives.

2. The notion of competition under the treaty, the regulations and the directives

Like most national laws and international organization rules, the WAEMU texts do not directly or comprehensively define the notion of competition and, subsequently, the concepts of anti-competitive practices, competition law or competition policy, probably because these concepts have already been defined within the framework of other organizations in which WAEMU member States are members, such as UNCTAD, and which are known to most of the parties.

This is what emerged mainly from the communications of WAEMU representatives or of its member States during the various seminars of the Intergovernmental Group of Experts on Competition Law and Policy organized by UNCTAD or from the application of UNCTAD's "Manual on the Application of Competition Rules" during national or regional information and capacity-building seminars organized by WAEMU, on the basis of the basic UNCTAD documents on competition, in particular the *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, the *Model Law on Competition and the Handbook of Competition Legislation*.

Irrespective of the absence of direct definitions, in conformity with the liberal option chosen by WAEMU, the notion of competition is based on the principle of freedom afforded to every economic agent to produce and sell whatever it wishes and under the conditions of its choice. This concept and the legal instruments established relate to the notion of workable competition by opposition to the notion of

pure and perfect competition. Accordingly, a market where the free play of competition exists is a market where enterprises, independently from each other, undertaking the same activity rival to attract customers. In other words, it is a market where each enterprise is subject to competitive pressure from other enterprises.

Logically under this approach, certain practices can seriously affect competition. This is the case of horizontal agreements such as cartels, as well as abuses of dominant positions of market power.

Under the existence of the permanent threat of such anti-competitive practices, it proves necessary to elaborate and implement specific rules and regulations to control such practices which affect competition. In other words, it is necessary to adopt competition law and policy.

Competition policy can be defined as the range of government measures which can be used to promote competitive structures and behaviour on the markets, including (but without excluding other elements) competition laws of a general character controlling anti-competitive practices of enterprises. Hence, competition policy is made of two main tools:

- (a) Structural measures, including in particular the liberalization of the economy and trade; privatization and regulatory reform for certain sectors of activity; and
- (b) Adoption and implementation of a competition law.

3. The objectives of the competition policy of WAEMU

These objectives are to be found not only in the normal objectives of any domestic or community competition policy, but also in the specific objectives of a community policy of competition, linked to the implementation of a regional integration

process characterized by the creation of a Common Market.

WAEMU aims at protecting consumers, fighting inflation and promoting national competitiveness and achieving its actual orientation, namely to maximize the efficiency of market structures and diffuse economic power. In this light, the normal play of competition among economic actors is advantageous for African countries in two ways: on the one hand it provides optimal satisfaction for consumers and on the other it brings dynamism to the economy. Hence, it protects the interests of consumers as well as those of producers, and boosts the economy as a whole. Competition policy also offers consumers a wide choice of products at competitive prices while at the same time promoting productivity gains. Apart from the general objectives, the Community Competition Law aims at facilitating the integration process within the regional economy which is becoming globalized, which results in:

- (a) Enlarging the Common Market of the Union by opening up national markets and intensifying trade links;
- (b) Reallocating resources within the community area; and
- (c) Modifying the conditions for the supply of goods and services.

To this end, the Community Competition Law aims at keeping the common market free from enterprise level barriers to the free circulation of goods, services and capital.

The competition policy of WAEMU also plays an important role in the implementation of sectoral policies and especially in the liberalization of network industries by contributing to opening them up to competition.

4. The coherence of WAEMU's competition policy with its other policies

As with any competition policy, it is also understood that WAEMU's common competition policy is also linked to, and interacts with other policies, especially in the economic field. Competition policy is at the core of overall economic policy, along with other ones. It is clear that the other policies can flourish, especially in developing countries, only if these are accompanied by a competition policy.

Especially nowadays, with the generalizations of policies of economic liberalization in most countries and organizations, there is an obvious interaction between privatization of state owned enterprises, foreign direct investment, fiscal policy, deregulation of network industries, such as postal services, telecommunications, energy, water distribution, etc. with competition policy.

On a technical level, this includes in particular industrial policy, mining, energy, telecom and trade policy. It is therefore necessary to coordinate these public policies with competition rules, to make them compatible with each other and to maximize chances of success of these reforms.

This is essentially one of the objectives of the Community Competition Law of WAEMU, both at the regional and national levels of member States, even if it is not always easy to achieve.

(a) At the community level of WAEMU

The authorities of the union have chosen to establish rules on the customs union and trade policy before initiating competition rules conceived as an instrument for consolidating the Common Market.

It might have been possible, and even preferable, however, to engage all these policies at once in order to preserve a better political coherence. In fact, the implementation of competition policy and law in WAEMU could challenge the existence of certain customs barriers. In any event, although the different policies of WAEMU have not always been adopted at the same time and these policies have often been elaborated and implemented by different departments of the commission, with the risk of insufficient coordination among them, there has been a general effort to enhance the coherence of the common competition policy with other common policies.

This is particularly the case of the mining policy (based on the adoption of a common mining code), of industrial policy, of investment policy, the main objective being that enterprises should be treated equally in all parts of the community area. For example, it is the rule that industrial policy should be based on fair and equal treatment for all investors, in all parts of the union.

(b) At the level of member States

In the aftermath of independence, the countries of the subregion had all opted for industrialization policies based essentially on import substitution.

Public investment and protection of infant industry were the main instruments implemented to meet the objectives of the early leaders. The various crisis and the unconvincing results obtained gradually convinced leaders to revise their initial policy options.

Import substitution and protection policies were put in question. The new international trade rules have also influenced the redefinition of industrial policies, in which competitiveness became more a result of international competition.

The main question posed was how to reduce the involvement of the State in commercial and industrial activities while avoiding the meltdown of national enterprises under the pressure of foreign competition. It was also necessary to avoid the abuses resulting from entrenched vested interests.

In order to integrate in international trade in a balanced way, States needed to dispose of competitive supply capacities, which they tried to obtain by using protection and internal support measures such as subsidies and other public aids.

Many enterprises, for instance, search for host countries that offer most facilities to attract their investments. Hence, many member States offered a service of fiscal advantages or subsidies, as part of their mining, investment or industrial policies. They also created or maintained existing monopolies in certain sectors considered to be of strategic importance.

As a result, there has been a sort of competition among States to offer advantages to attract or to keep a maximum of investors, hence creating disparities in the treatment of enterprises within the WAEMU area.

Such different instruments of economic policy often contradict the policies of the community, which instead, aims at harmonizing the treatment of enterprises on all the territory of the union.

Much remains to be done in this respect at the level of individual member States. At the community level as well, a constant review of conditions must seek to harmonize the rules applied within the union. It is also necessary to undertake a census and to control the waivers and public aids at the level of the WAEMU Commission.

Enterprises concerned with this effort of harmonization of competition policy and industrial policy are especially public firms being privatized, the large enterprises responsible for exploiting the main local resources, the medium-sized mixed-economy enterprises (parastatals) created by the State to overcome the lack of private investment and those enterprises which are located in special exporting zones.

II. SCOPE OF APPLICATION OF THE COMMUNITY COMPETITION LAW

Within the background of elaboration of a common competition code in WAEMU, the scope of application can mainly be approached through three dimensions:

- (a) The issues flowing from the existence of a number of competition laws in the WAEMU area;
- (b) The basic rules prohibiting certain practices in the code; and
- (c) Through the many additional rules concerning sectoral application of competition.

A. THE CHOICE OF APPLICABLE LAW: COMMUNITY VS. NATIONAL LAW

Apart from the Community Competition Law of WAEMU, there are other competition laws actually or virtually applicable within the community area, mainly the competition laws of the member States and certain “transnational rights”¹³,

¹³ Here, the term “transnational” law refers to law emanating from many States, which scope of application is wider than the national territory of a single State. Hence, this term comprises as much laws emerging from international organizations such as the WTO as those emanating from supra-national organizations or legal harmonization rules such as

should they emanate from regional integration or legal harmonization organizations such as the Organization for the Harmonization of Business Law in Africa (OHADA) and ECOWAS, or to a certain extent those proceeding from WTO or UNCTAD.

The existence of many competition laws within the WAEMU area poses a certain number of questions: What are the relationships between the Community Competition Law and national laws within the WAEMU area, in terms of conformity, compatibility, hierarchy, collaboration, cooperation, competition or conflict – or even total ignorance among the institutions from which they emanate and which are responsible for their implementation?

1. The principle of exclusivity of community law with respect to national law.

As a result of a widespread wave of liberalization in Africa in the 1990s, the WAEMU area has witnessed a surge or a consolidation of national competition laws, as most member States adopted more or less comprehensive competition laws.

As indicated as early as November 2000 by the WAEMU Commission, after a review of existing laws in 1998 in each member State except Guinea-Bissau, and subsequently confirmed in April 2000 during a workshop of representatives of member States, three countries, namely Burkina Faso, Côte d'Ivoire and Senegal already had a national competition law¹⁴ “comprehensive, elaborate and with a wide

OHADA (The Organization for Harmonization of Business Law in Africa).

¹⁴ National competition law in Burkina Faso is mainly regulated by law No. 15/94/ADP of 5 May 1994 on the organization of competition; in Côte d'Ivoire by Law No. 91-999 of 27 December 1991 on competition, in Niger by Ordinance No. 92-025 of 7 July 1992 on price regulation and competition; in Senegal by Law No. 94-63 of 22 August 1994 on prices, competition and economic disputes.

scope of application”, and the other member States were engaged in a process of preparation or adoption of a more comprehensive national competition law. With the elaboration of the same time of the WAEMU rules on competition, in each member State started a process of coexistence of national with community law on competition. This situation posed the problem of compatibility between the fundamental rules and their implementation in accordance with the established procedures and sanctions.

More recently, it appeared that issues covered by the various national competition laws could partly differ from those covered by the community law or be redundant on certain points, both with respect to fundamental rules as to their implementation.

For example, the Burkina Faso law of 5 May 1994 covers most current aspects of competition law, including as much anti-competitive practices by enterprises (cartels and abuses of dominant positions)¹⁵ as it covers anti-competitive practices by States (price regulation)¹⁶ and competition restraints by enterprises (for example refusals to deal or resale price maintenance)¹⁷. While on fundamental provisions dealing with cartels and abuses of dominant positions (issues covered by national laws of Burkina Faso as well as WAEMU rules), a great similarity exists¹⁸,

¹⁵ See in particular Title III on Cartels and Abuse of dominant position (Articles 5 to 8) of Law No. 15/94/ADP of 5 May 1994 on Organization of Competition in Burkina Faso.

¹⁶ See in particular Title I on Price liberalization (Article 1) of Law No. 15/94/ADP of 5 May 1994 on Organization of Competition in Burkina Faso.

¹⁷ See in particular Title IV, on transparency in the market and practices in restraint of competition, (Articles 9 to 34) of Law No. 15/94/ADP of 5 May 1994 on Organization of Competition in Burkina Faso.

¹⁸ For instance, in the area of cartels, the prohibition contained in the WAEMU law is similar to that which is found in Article 24 of Law No. 94-63 of 22 August 1994 on prices, competition and economic

it is especially at the level of implementation mechanisms (procedures and sanctions) that differences occur.

Two opposing issues were noticed during the phase of preparation of the WAEMU competition rules, for example during the “Workshop on the project of competition law within the union”, held at the commission headquarters, in Ouagadougou, 10–14 April 2000.¹⁹

For some (experts from member States) national laws should continue to coexist with community laws, especially with respect to cartels and abuses of dominant position, by making sure that the provisions contained in national law are in conformity with those of community law, and specifying that community law should have precedence in case of conflict. For others, (including experts from the commission), WAEMU should have exclusive competence with respect to cartels, abuse of dominance and State aids, in order to avoid conflict of rules and procedures, national laws being limited to other areas of law, such as unfair competition.

The case was referred for an advisory opinion to the Court of Justice of WAEMU, which ruled in favour of the commission’s point of view, in its opinion N° 003/2000 of 27 June 2000.²⁰ According to the court, member States cannot exercise shared or concurrent competencies in this field, as

disputes, including examples where the two provisions are quasi-identical. Equally, in the area of abuse of dominance, the prohibition contained in WAEMU texts is also contained in article 27 of the same law of Senegal.

¹⁹ See in particular the request for Advice of WAEMU Commission with respect to articles 88, 89 and 90 of the treaty, concerning competition rules of the union, in Court of Justice of WAEMU, “Recueil de la jurisprudence de la Cour”, Court of Justice, Ouagadougou, February 2002, page 121.

²⁰ See opinion No. 003/2000 of 27 June 2000 concerning the interpretation of articles 88, 89 and 90 of the treaty, related to competition rules of the union, in Court of Justice of WAEMU, “Recueil de la jurisprudence de la Cour, op. cit., pp 119–132.

can happen, according to its analysis, under the principle of the double barrier applied under European Community law²¹ (by opposition to the principle of the single barrier chosen, according to the court, by the WAEMU treaty). There is, however, an exception with respect to formal orders of community institutions associating member States with the exercise of the competences allocated to the union.²² For the court, such a solution would simplify the dispute.

This opinion of the Court of Justice of WAEMU was taken into account in its principle by the WAEMU legislator in the Competition Rules of 23 May 2002, in particular under directive No. 02/2002/CM/WAEMU concerning cooperation between the commission and the national authorities of member States in charge of competition in their action against anti-competitive practices.²³ However, in practice, this principle has been applied with flexibility, in view of the wish of the WAEMU legislator to reconcile the exclusive competence of the commission with the necessity to ensure an effective control of markets by the national competition authorities.²⁴

²¹ The notion of competition, according to the European Community, is limited to the actions by States and behaviour of enterprises which may adversely affect commerce between member States. The Community law allows the existence of national competition laws which apply to behaviour which does not have effects on intra-community commerce, and are linked to the domestic markets. In other cases, all national laws are superseded by Community rules (Journal of the Court of European Justice, 15 February 1969, Walt Wilhem). In case of conflict of jurisdiction, Community law prevails. (CJCE, 13 Fe. 1969, Bayer A.G.).

²² According to the Court of Justice of WAEMU, member States remain after all exclusively competent, to make any criminal law decision sanctioning anti-competitive practices, breaches to the rules of market transparency and even to the organization of competition.

²³ See in particular references to this opinion in the visas to Directive No. 02/2002/CM/WAEMU.

²⁴ See in particular the reasons advanced by the lawmaker in the visas to Directive No. 02/2002/CM/WAEMU.

More precisely, while the enactment of the basic rules is the preserve of the community, in their implementation, there is sharing of investigative functions which takes place between the national competition authorities and the commission²⁵, even if the functions of investigation and decision are the sole preserve of the commission²⁶. While the investigative functions are shared between the national authorities and the commission, only the latter is empowered to cover practices relating to State aids, anti-competitive practices by public monopolies and State-owned enterprises and anti-competitive practices affecting trade between member States.²⁷

In so doing, the commission is required to inform the member States' national competition authorities of any investigatory procedures undertaken in respect to enterprises located in their national territory. It must transmit to them copies of certain documents, such as those relating to the specific allegations, requests for information addressed to enterprises and the hearings planned with such enterprises.²⁸ In spite of the adoption of the principle of the exclusivity of Community Competition Law in the field of anti-competitive practices, the problem of applicable law is not fully resolved, as two problems exist.

These concern both the temporal and spatial application of Community Competition Law.

- (a) Concerning the temporal application of WAEMU's

²⁵ See in particular article 3 and article 5, paras. 5.1, 5.2 and 5.3 of Directive No. 02/2002/CM/WAEMU.

²⁶ Article 5, para 5.4 of Directive No. 02/2002/CM/WAEMU.

²⁷ Article 5, para 5.2 of Directive No. 02/2002/CM/WAEMU.

²⁸ Article 5, para 5.3 of Directive No. 02/2002/CM/WAEMU.

Competition Law, these rules conform to the same provisions of the treaty as other rules. article 45 of the treaty specifies that the decisions made by the union bodies enter into force after their publication at the date they chose. Under these rules, it is sufficient to make reference to the date of publication of any act in the Official Bulletin of the union or to its notification to those concerned to determine at which time it comes into force. Article 88 a of the treaty stipulates that one year after the enforcement of the treaty, cartels, abuses of dominant positions and State aids are prohibited outright, and article 89 refers to regulations stipulating the exact magnitude of these prohibitions. However, it took seven years before the implementing regulations on competition were adopted. The question to be resolved concerns the infringements committed prior to the adoption of the regulations of implementation of articles 88, 89 and 90 of the treaty. The provisions of directive No. 01/2002/CM/WAEMU give the impression that the application of national law is implicitly accepted for cases being investigated during the transitory period. The community rules could apply during the investigative stage of cases, unless the commission to which the cases have been referred decides to apply the national rules on the basis of which the cases were initiated.

- (b) With respect to the spatial application of Community Competition Law, it is in principle WAEMU competition rules which apply over all the territory of the union. This principle flows from article 43 of the treaty which

stipulates that the regulations and directives are directly applicable in all member States, since the major part of the community code on competition is based on law derived from the treaty.

Many cases can occur:

- (a) The simplest one is the case where all the authors of the practice are located in the community area and the effects of the practice are felt in the common market. In such case, the community rules apply, irrespective of any conflicting national rule. It should be made clear that in this case there is no doubt with respect to intra-community trade flows.
- (b) The second case which may occur is that where enterprises collude or abuse their dominant position, but the effects of such behaviour are only felt in an overseas market, outside the Common Market of the union (for example, an export cartel). The question posed here is whether the enterprises concerned can be sued. The answer is no, except if the union has signed an agreement with the overseas country whose national market is affected, in which it has agreed to take action in such a case. And even then, the question of applicable law will have to be resolved: should community law be applied, or the competition law of the affected country?
- (c) The third case is that where many firms located outside of the community engage in practices having effects on the territory of the Common Market. In this case, community law could be applied, the only problem being the need to have the material and legal means to take enforcement action against the defendant firms located abroad.
- (d) The fourth case concerns enterprises located in a free-trade zone or under a free-point regime which are physically located within the community area, but benefit from a legal status of extraterritoriality. In principle, such enterprises, established to export outside the Common Market should not be able to act in a way to have anti-competitive effects within the territory of the union; therefore they should not be liable, except if they effectively sell part of their output in the Common Market.

2. Taking into account other regional transnational rules (ECOWAS and OHADA)

Currently, there are two other regional integration of legal harmonization organizations within the WAEMU area: ECOWAS and OHADA, which also plan to adopt their run competition laws, applicable within the WAEMU area.

(a) ECOWAS

ECOWAS was established by a treaty signed in Lagos (Nigeria) on 28 May 1975. This treaty entered into force in June of that same year after it was ratified by seven States members, in conformity with its article 62. ECOWAS is a truly regional integration organization having brought together countries of Western Africa with different colonial pasts. These are countries with different official languages, (Benin, Burkina Faso, Côte d'Ivoire, Niger, Senegal and Togo are French-speaking; Ghana, Gambia, Liberia, Nigeria and Sierra Leone are Anglophone; and Cape Verde, and Guinea Bissau are Portuguese-speaking countries). The headquarters of ECOWAS are in Abuja, Nigeria. The initial ECOWAS Treaty was revised at the Cotonou Summit of Heads of States in July 1993.

According to the revised treaty, ECOWAS aims at integrating its West African member States, in priority at the economic level, but also in other areas of social life, in order to accelerate development and welfare of its populations.

Hence, paragraph 1 of article 3 of the revised ECOWAS Treaty of 1993 lists the goals and objectives of the organization and provides that the community aims at promoting cooperation and integration towards an economic union of West Africa in order to improve the standards of life of its people, to maintain an increase economic stability, to intensify the relations between member States, and to contribute to the progress and development of the African continent.

With this in mind, a number of objectives were agreed under the treaty, which are to be found in particular in its article 3 paragraph 2 and in various texts of primary and derived law which include protocols, decisions and regulations.

More to the point, an analysis of these texts indicates that ECOWAS is pursuing two big objectives at the present time: first the creation of a common market and at a later stages the establishment of an economic and monetary union.

It is within this fundamental objective of creating a Common Market that the adoption of a competition law and policy may be envisaged, although the revised treaty does not mention it precisely. The only provisions related to competition in the revised treaty concern member States and relate to quantitative restraints (quotas) and dumping. Article 4 of the revised treaty stipulates that each member State shall gradually reduce and finally eliminate all QRs within a period of four years maximum after the implementation of the scheme referred to under article 54. This scheme was put in place in 1990 with a view to liberalizing trade flows within member States from any quantitative restrictions, including

prohibitions of entry and quotas, applied to merchandise imported from other member States and to ensure that no new restrictions to the free flow of intra-community trade could be put in place at a later stage.

As for article 42 of the revised treaty, it relates to dumping, which is defined as the importation and sale of merchandise originating from one member State in another at a price which is below that which is applied for the sale of similar merchandise in the exporting member State. This practice must cause, or be able to cause material injury to producers of similar goods in the importing member State, in which case, the importing member State must submit a complaint to the council for arbitration. This is a restrictive definition of dumping, which does not take into account the definition generally given to this notion, namely the case of products or services offered at a lower price than their total cost with a view to eliminating its competitors, in order to achieve in the end a monopoly or a dominant position of market power.

Clearly, these provisions are exclusively aimed at States, and do not concern individual enterprises.

In spite of the absence of a consistent legal basis on which to elaborate competition rules, ECOWAS has undertaken the task of preparing the text of a new competition law.

More precisely, as indicated in the proceedings of the Regional Seminar for the Validation of Framework Documents on Regional Competition and Investment Policies that took place in Niamey 28–30 September 2006²⁹, two types of documents were elaborated at the concluding session of the seminar, the first on a competition policy framework, and the second on draft rules on

²⁹ Final Report of the Ministerial Committee of Experts in charge of the follow-up to the Economic Partnership Agreement between West Africa and the European Community, held in Niamey 3–5 October 2006.

competition. This was followed by another meeting held in March 2007.

The regional competition policy framework proposal at this meeting includes:

- The aims of competition law and its fundamental principles;
- The justification for a regional competition policy for ECOWAS;
- The status of competition law within ECOWAS;
- The main elements of a common regulation of competition within ECOWAS, including matters relating to capacity-building;
- Conditions for implementation.

This policy is to be implemented, on the one hand, through the creation of a regional competition authority, which will establish a partnership with the competent institutions in member States; and, on the other hand, national regulations which will take principally into account the four main categories of anti-competitive practices, which are:

- Agreements and concerted practices restraining competition;
- Monopolistic practices;
- Mergers or acquisitions likely to lead to abuses of a dominant position; and
- Competitive distortions attributable to States.

This regulation would include the areas of convergence in member States' competition legislation. A consultative mechanism between the competent bodies of ECOWAS and WAEMU will be established, which would resolve eventual conflicts of jurisdiction and elaborate a capacity building programme for national and regional competition authorities.

The experts recommended that the member States should organize wide consultative processes at the national level on the framework projects of competition and investment policies, as well as draft texts of

regulations to be subsequently submitted to the Executive secretariat of ECOWAS.

The ECOWAS executive secretariat and the Commission of WAEMU were also invited to organize an expert meeting to validate these documents before they are submitted to the Council of Ministers of ECOWAS for adoption.

(b) OHADA

As for the Organization for the Harmonization in Africa of Business law (OHADA), it was created by the Treaty of Port Louis (Mauritius) signed on 17 October 1993 which came into force on 18 September 1995. The overall objective of OHADA is to facilitate, at the economic level, development and regional integration and legal and legal security for business within its 16 member States. These include all WAEMU member States, plus Cameroon, the Central African Republic, Comoros, Congo, Gabon, Guinea, Equatorial Guinea and Chad.³⁰

In particular, OHADA aims at providing its partner States with a harmonized business law, which should be simple, modern and adapted to their economic situation, to promote arbitration as an instrument of resolution of contractual disputes, while at the same time building capacities and training specialized lawyers and justice auxiliaries.³¹

Concretely, OHADA is enforcing a series of unified actions in many fields, including those related to commercial law in general, corporate law and rules on groups of economic interest, security for debts, simplified procedures for recovery of debt and for execution of judgements, collective writing off of debts as well as rules of arbitration.³²

³⁰ See in particular the preamble and articles 1 and 2 of the OHADA Treaty

³¹ Ibid.

³² Under article 10 of the OHADA Treaty, uniform acts are directly applicable in member States as soon

Moreover, OHADA envisages the launching of other legal harmonization efforts, including in the field of competition law, as indicated during its Council of Ministers held on 22 and 23 March 2001 in Bangui. Hence, it is possible that at some stage, OHADA and WAEMU competition laws, in particular their substantive rules, might clash.

Of course, in case of conflicts of jurisdiction between these Organizations, or between them and WAEMU competition rules, the Treaty of Dakar provides for cooperation and concerted action between these different Organizations. This is already a fact in relations between WAEMU and ECOWAS, which have set in place a mechanism aimed at settling conflicts and duplication.

Article 14 of the Treaty of WAEMU provides for cooperation between the union and all existing regional and sub-regional organizations.

It also adds that upon entry into force of the treaty member States should consult each other at the council in order to eliminate all possible conflicts or duplication which might exist between the laws and competencies of the union and the conventions concluded by one or more member State, in particular those establishing specialized international economic organizations.

Similarly, article 60 of the Treaty of Dakar stipulates that in the exercise of its functions, the Conference should take into account progress made in convergence among laws of States of the region, within institutions following the same goals as the union.

as they have been published, and they supersede national legislation. Uniform acts, in their effects, are hence comparable to regulations of WAEMU. Therefore, these acts, and OHADA itself, have a supranational character; see in this respect Djiboul Abarchi "The Supranational Character of the Organization for Harmonization in Africa of Business Law (OHADA)". In *Revue Burkinabé du droit* No. 37, First semester 2000, pp. 9–27.

It still remains, however, that although such provisions favouring cooperation exist to reduce incompatibilities among various laws and regimes, the emergence of competition laws both under ECOWAS and OHADA could in time be source of serious disputes arising from the existence of different mechanisms for the implementation of substantive rules.

3. Conformity with the principles adopted by international organizations (WTO and UNCTAD)

The Community Competition Law of WAEMU is in conformity with the principles and rules adopted by international organizations such as the World Trade Organization (WTO) and UNCTAD.

This is the result, first, of the adoption by WAEMU of the rules contained in the General Agreement on Tariffs and Trade (GATT) which has been succeeded by WTO.

Under article 83 of WAEMU, in the implementation of the objectives defined under article 76 of the same treaty, in particular the liberalization of intra-community trade flows, the establishment of a Common External Tariff (CET) and of common rules of competition, "the union respects the principles of the General Agreement on Tariffs and Trade (GATT) with respect to trade preferences. It takes into account the need to contribute to balanced development of intra-African and World Trade, to favour the development of productive capacities within the union against dumping and subsidies of third-countries."

Apart from this general declaration in the Treaty of Dakar, the content of these relations with third countries is stipulated nowhere else, in particular with respect to the details of the anti-dumping and anti-subsidies policies.

The Uruguay Round, which took place between 1986 and 1994, was the last round of negotiations of the GATT, and at its concluding session, which saw the signature of the Marrakesh Agreement, on 15 April 1994, gave birth to WTO, which replaced GATT.

WTO, which entered into force on 1 January 1995, pursues the same objectives of the GATT of 1947 (liberalization of world trade) aims in particular at encouraging the free play of competition by establishing disciplines for its contracting parties.

Through its various agreements, WTO prohibits or substantially limits the practices of dumping and export subsidies, and prescribes that monopolies and State-owned enterprises should abide by the free-trade rules.

Moreover, within the Tokyo Round of GATT, various codes had been adopted by some contracting parties, including on government procurement and on discrimination. Later on, during the Uruguay Round, further agreements were reached in respect of Trade Related Investment Measures (TRIMS) and Trade related Intellectual Property Rules (TRIPs).

The principles and rules contained in the Community Code on Competition of WAEMU are also in conformity with those of UNCTAD, as confirmed by the participation of WAEMU and its member States in the seminars of the Intergovernmental Groups of Experts on Competition Law and Policy, and the cooperation and technical assistance provided by UNCTAD to WAEMU.

Established in 1964, UNCTAD aims at integrating developing countries in the world economy in order to accelerate trade and sustainable development of these countries.

With respect to competition law and policy, its mandate is based on General Assembly

Resolution 35/63 of 5 December 1980, which adopted the “Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices”.

Although not mandatory, the Set represents the consensus of the world community on the importance of competition principles for trade and development. It constitutes the basis of UNCTAD’s work in this field.

More precisely, the Sets aims at ensuring that restrictive business practices (anti-competitive practices) should not impede or negate the realization of the benefits that should arise from the liberalization of tariff and non-tariff barriers.

Under this programme, UNCTAD convenes annually the Intergovernmental Group of Experts which studies anti-competitive practices and issues recommendations.

The Set of Principles and Rules lists a series of objectives for Governments inviting them to ensure that domestic and transnational corporations do not engage in anti-competitive practices adversely affecting international trade, in particular the trade and development of developing countries.

The Set has been considered for revision every five years since its adoption in 1980. The Fifth Review Conference which took place 14–18 November 2005 in Antalya (Turkey) was attended *inter alia* by representatives of WAEMU and some of its member States.

B. THE MATERIAL RULES OF THE COMMUNITY LAW ON COMPETITION

The WAEMU Community Competition Law applies exclusively to the following anti-competitive practices: anti-competitive collusive agreements (cartels), abuses of dominant position and anti-competitive interventions by the State.

1. Anti-competitive agreements

The WAEMU Treaty mainly indicates in its article 88 a) that agreements, associations and collusive practices among enterprises are prohibited per-se, when they have the goal or effect of restraining or distorting competition within the union. It also provides in article 89 that the Council of Ministers shall issue a regulation after entry into force of the treaty, setting up the procedures, sanctions and exceptions to be applied to this prohibition.

(a) *The principle of prohibition*

These provisions cited above establish in fact the principle of prohibition of cartels, in line principally with the various European competition laws, since cartels are defined traditionally as collusive action among independent enterprises, such as an agreement, a decision of association, or a concerted practice having the object of distorting or eliminating competition.

It is especially article 3 of regulation No. 02/2002/CM/WAEMU and annex 1 to regulation No. 3/2002/CM/ WAEMU that specify most the concept of cartel prohibition which is found in the Treaty of WAEMU.³³

(b) *Definitions*

In this regard, an enterprise, without which the notion of cartel prohibition does not exist, is defined as a single organization of personal, tangible and intangible elements, engaged in an economic activity in pursuit of a profit, in a long lasting manner, irrespective of its legal statute, public or private, and of

³³ Within article 32 of regulation No. 02/2002/CM/WAEMU of 23 May 2002, annex No. 1 on “notes of interpretation of certain elements” is full and integral part of the regulation and has therefore the same mandatory force as the regulation itself.

its mode of financing, and enjoying an independence of decision-making.³⁴

Moreover, it appears that the notion of a cartel must be understood in the widest³⁵ possible sense, as it was already interpreted by European lawmakers. In this way, the existence of an agreement among enterprises, under article 88a) of the treaty does not necessarily imply the existence of a written contract³⁶. The decisions of associations of enterprises will appear mainly in the form of discussions of professional associations. Also, simple parallel behaviour could constitute an agreement or collusive behaviour³⁷.

It is clear in WAEMU law that the mere existence of shared objectives among enterprises does not suffice to constitute a prohibited cartel agreement.

These shared objectives must aim at, or result in restraining or distorting competition within the union³⁸. Determining the anti-competitive effect, in particular by the Commission of WAEMU, must be done by

³⁴ Note 1 of annex 1 of regulation No. 03/2002/CM/WAEMU.

³⁵ Note 2 of annex 1 of regulation No. 03/2002/CM/WAEMU.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Contrary to article 88a) of the WAEMU Treaty, article 81 (ex article 85) of the EC Treaty refers to cartel agreements that “may affect trade flows between member States and which have the object or the effect of eliminating, restraining or distorting the free-play of competition within the common market”. Hence European Community Law related to cartels has a scope of application which is limited to its effect on trade among member States; as long as the practice in question only affects internal trade of a member State, the Community law on cartels does not apply. As will be seen later, in the discussion on problems of compatibility, this rule justifies at the European Community level the coexistence of national and community law on cartels. This is not the case in WAEMU law, where the absence of such a condition that the practices must affect trade flows among member States means that in Fine national law on cartels will be superseded by community Law.

using the criteria of the market share controlled by each firm indulging in the practice³⁹. Determining this market share requires before hand defining precisely which is the “affected market”, which is a combination of the “market of affected products” and the geographical market which is affected”⁴⁰. The objective and effects of the prohibited agreements constitute alternative conditions. In principle, whenever there is proof that the agreement in question has an anti-competitive object, it is unnecessary to search for its effects.

However, it is often useful to place the agreement in its economic context to determine whether it has substantive effects on competition of if *de minimis* rules are applicable.

The restraint to the free play of competition must be considered globally within the economic and legal context in which the agreement in question is located. The possible existence of similar agreements resulting in the same competition restraint can be taken into account.

The competition in question can be actual or potential competition. To determine whether potential competition exists, one often takes into account the technical, financial and commercial capacities of the enterprises. Is

competition between producers or distributors of a same trademark?

Article 3 of regulation No. 03/2002/CM/WAEMU cites examples of prohibited practices: these are agreements limiting access to markets of competition by other firms; agreements fixing directly or indirectly prices, maintaining resale prices, and in general, impeding the competitive pricing process by free market forces, to unduly increase or reduce the price, allocate markets or sources of supply; agreements aiming at limiting or controlling output, distribution networks, technical progress and investment, discriminating between commercial partners through unequal conditions for equivalent services, submitting the conclusion of deals to acceptance by the partners of additional conditions which, by their nature and according to Commercial practice, are not linked to the object of the contracts.

(c) The principles of exception and exemption

WAEMU rules admit the existence of exceptions to the principle of prohibition of cartel agreements. Article 89, chapter 3 of the Treaty of WAEMU gives the Council of Ministers the authority to provide for limited exceptions to the principle of prohibition of cartels in order to take into account specific situations.

The details of such provisions are specified mostly under regulation No. 02/2002/CM/WAEMU. Accordingly, the commission can authorize (exempt from the prohibition) individually or by categories of agreements those which not only contribute to improve production or distribution of products, or to promote technical or economic progress, while according to customers an equitable share of the resulting benefits, and which do not impose on the enterprises in questions restrictions that are not indispensable for reaching such objectives, and which do not give to these

³⁹ Note 4 of annex No. 1 to regulation No. 03/2002/CM/WAEMU.

⁴⁰ According to footnote 4 above, the market of products affected includes all the goods an/or services that the consumer considers as substitutes because of their characteristics, their price and the use they are designed for. The geographical market in question corresponds to the territories in which the enterprises concerned supply goods and services. Such a market must present sufficiently homogeneous conditions of competition and be able to be distinguished from neighbouring markets, mainly for noticeable differences of conditions of competition, according to factors such as the characteristics of the products or services in question, the existence of barriers at entry, distinctive market shares or substantial price differentials.

enterprises the possibility to eliminate competitors in a substantial part of the product market under consideration⁴¹. These four general exemptions are to be found in the Competition Rules of European Union and in national laws of some member States of WAEMU⁴².

More precisely, it appears that the Commission of WAEMU can adopt by means of executive regulation exemptions by categories, in particular with respect to specialization, research and development (R&D) and transfer of technology agreements⁴³.

With respect to exemptions, WAEMU law distinguishes between horizontal and vertical agreements among enterprises⁴⁴. Vertical agreements are defined as agreements between two or more enterprises operating at different levels of the production and distribution chain, relating to the conditions under which these enterprises can purchase, sell or resell certain goods or services⁴⁵.

Horizontal agreements are defined as those agreements between enterprises at the same level of production or distribution, in other words, as agreements among producers or agreements amongst retailers⁴⁶.

For WAEMU legislators, vertical agreements are less anti-competitive than horizontal ones. Hence, it results that the commission has a softer approach with respect to vertical

restraints, which are left outside the prohibition concerning horizontal agreements or cartels, with the exception of two types of vertical agreements which anti-competitive effects are considered to be worse on balance, than their positive effects, namely agreements resulting in an absolute territorial protection and those agreements fixing resale prices⁴⁷. Similarly, the commission is requested to exert a strict control on all vertical agreements among enterprises having a dominant position of market prices in the market in question⁴⁸. This last point is related to the prohibition of abuses of dominant positions included in the text of WAEMU, in addition to the prohibition in principle of cartel agreements.

2. Abuses of dominant position

(a) *The principle*

As in the area of cartel agreements, the WAEMU Treaty limits itself in indicating very succinctly the principle of prohibition of abuses of dominance. In this respect, article 88b) of the treaty provides that all practices of one or more enterprises which can be considered as being an abuse of a dominant position in the common market or in a significant part of it, are prohibited by law.

At first sight, the literal interpretation of article 88b) of the WAEMU Treaty does not allow to sanction abuses of dominant position as such since what is prohibited are practices considered as abuses of dominance. However, regulations No. 02/2002/CM/WAEMU and No. 03/2002/CM/WAEMU make it clear that abuses of dominant positions are prohibited, by précising what is meant by such practices.

WAEMU law makes it clear that for there to be abuse of a dominant position, the firm in question needs first to have a dominant

⁴¹ Article 7 of regulation No. 02/2002/CM/WAEMU.

⁴² See in particular article 81, chapter 3 (e.g. Article 85) of the Treaty of Rome and article 8, chapter 2 of law No. 15/94/ADP of 5 May 1994 on the organization of competition in Burkina Faso. These articles are practically identical to article 7 of regulation No. 02/2002/CM/WAEMU.

⁴³ Article 6 of regulation No. 03/2002/CM/WAEMU on European exemptions; see in particular Jean-Claude Gautron, "Droit européen", op. cit. pp. 117–178.

⁴⁴ Note 5 of annex 1 to regulation No. 03/2002/CM/WAEMU.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

position, and then that its should exploit in an abusive manner such a dominant position.

(b) *The notion of dominant position*

More precisely, a dominant position is defined as a situation in which an enterprise has the capacity, on a given market, to ignore effective competition, to be free from market constraints by playing a role of leader⁴⁹. Many criteria are used to determine the existence of a dominant position. The major criteria concern the market share of the enterprise in relation to the relevant market⁵⁰. This market share is calculated by taking into account the sales of the firm in question and those of its competitors on the market⁵¹. When the market share is insufficient to establish dominance, the community authorities have to look for additional criteria, such as the degree of vertical integration of the firm, its financial power or that of the group to which it belongs, and the existence or not of barriers of entry into the relevant market. Such barriers to entry can result from legal obstacles or from the

⁴⁹ Note 3 of annex no. 1 to regulation No. 3/2002/CM/WAEMU. Through these provisions, these texts adopt a definition of dominant position which is found in European Union law. See in this respect Etienne Cerexhe and Louis le Hardy de Beaulieu: "Introduction à l'Union économique africaine", op. cit. p. 79, in particular the following jurisprudence which has forged and established it: C.J.C.E, 21 February, case 6/72, Continental Can, Rec. 1973, p. 215; C.J.C.E, 14 Feb. 1978, case 22/76, United Brands, Rec. 1978, p. 207; C.J.C.E, 2 March 1994, case 53/92P, Hilti v. Commission, Rec. 1994, p. 667; TPI, 12 December 1991, case 30/89, Hilti AG v. Commission, Rec. 1991, II, p. 1439

⁵⁰ Note 3 of annex no. 1 of regulation No. 03/2002/CM/WAEMU. On similar European community law, see in particular C.J.C.E, 13 February 1979, case 85/76, Hoffman La Roche, Rec. 1979, p. 461; TPI, 12 December 1991, II, p. 1439; TPI, 6 October 1994, case 83/91, Tetra Pack II v. Commission, Rec. 1994, II, p. 755; C.J.C.E, 14 February 1978, case 22/76, United Brands, Rec. 1978, p. 207; C.J.C.E, 3 July 1991, case 62/86, Akzo Chemre BV v. Commission, Rec. 1991, p. 3,359.

⁵¹ Note 3 of annex no. 1 of regulation No. 03/2002/CM/WAEMU

specific characteristics of the functioning of the relevant market, including for example the complexity of the technology used in the product market, or the difficulty in obtaining necessary inputs and any restrictive practices of suppliers already established⁵².

The notion of dominant position is made convergent with that of concentration by WAEMU law. The following acts may constitute concentrations in mergers between two or more enterprises which were previously independent: transactions whereby one or more persons (previously in control of at least one firm) or one or more enterprises acquire directly or indirectly (through purchase of shares, of assets, by contract or by any other means) the control of one or more other enterprises; or create a joint venture which can act directly as an autonomous undertaking⁵³.

The mere existence of a dominant position is not sufficient for the enterprise to become liable for abuse of dominant position. For this, it must be proven that the enterprise concerned abusively exploits its dominant position.

(c) *The abuse of a dominant position*

WAEMU text stipulates that the practice by one or more enterprise of abusing a dominant position in the Common Market or a significant part thereof, is incompatible with the rules of the Common Market and hence prohibited⁵⁴. Also prohibited are any practices considered as abuses, such as in particular the operations of concentration which create or reinforce a dominant position held by one or more enterprises, and which have as a consequence the significant

⁵² Note 3 of annex no. 1 of regulation No. 03/2002/CM/WAEMU.

⁵³ Article 4, para. 4.3 of regulation No. 02/2002/CM/WAEMU.

⁵⁴ Article 4, para 4.1 of regulation No. 02/2002/CM/WAEMU.

distortion of effective competition within the Common Market⁵⁵.

WAEMU law stipulates that the following behaviour can be considered as abuse of a dominant position: (a) direct or indirect resale or purchase prices or other transaction conditions considered to be unfair; (b) limiting the output, distribution networks or technical development to the detriment of consumers; (c) applying unequal conditions to equivalent services of commercial partners, with the resulting distortion of competition; (d) conditioning the conclusion of contracts to the acceptance, by commercial partners of additional conditions which, by nature or according to commercial practice, have nothing to do with the object of such contracts⁵⁶. Also constituting an abuse are operations of concentration which create or reinforce a dominant position of one or more enterprises⁵⁷.

The mere existence of such behaviour is not sufficient for prohibiting abuse of dominance according to WAEMU competition law. Such behaviour must be shown to have the object or the effect of significantly affecting effective competition within the Common Market⁵⁸.

In the same way as was done to appreciate the anti-competitive effects of a cartel agreement, the Commission of WAEMU in particular, applies the market share as main criteria to appreciate the anti-competitive effect of an abuse of dominant position. This

is done after having well defined the relevant market by combining carefully the relevant product market with its geographical market⁵⁹. In this respect, the geographical territory of any member State, irrespective of its economic weight, could be considered as a substantive part of the Common Market⁶⁰.

Finally, it should be noted that the WAEMU law on competition does not directly list exemptions to the principle of prohibition of the abuse of a dominant position. It is only stated in the Treaty of Dakar (article 89, chapter 3) that the Council of Ministers can also “adopt rules specifying the prohibitions listed under article 88 or providing for limited exceptions to these rules in order to take into account specific situations”. It should be recalled that the prohibitions contained in article 88 relate to cartel agreements, abuses of dominant positions and State aids. But such exceptions are not provided for in the texts of derived law of 23 May 2002 on competition, as far as the abuse of dominance is concerned⁶¹.

The analysis shows that WAEMU law on competition has essentially incorporated the European experience accumulated in time in its application of competition rules to enterprises.

3. Public interventions (practices emanating from States)

The WAEMU Community Competition code contains provisions related to public interventions. These generic terms of public interventions cover two types of actions by

⁵⁵ Ibid.

⁵⁶ Article 4, para 4.2 of regulation No. 02/2002/CM/WAEMU. Article 82 (e.g. article 86) of the Treaty of Rome applies the same examples in quasi-identical terms.

⁵⁷ Article 4, para 4.1 of regulation No. 02/2002/CM/WAEMU. Under WAEMU law on competition concentration operations are considered as a sort of subsection of an abuse of dominant position, while European law frequently makes a distinction between the two.

⁵⁸ See article 88b) of the Treaty of WAEMU and article 4, paragraph 4.1 of regulation No. 02/2002/CM/WAEMU.

⁵⁹ See Note 4 of annex No. 1 to regulation No. 03/2002/CM/WAEMU of 23 May 2002 relative to the procedures applicable to cartel agreements and to abuses of dominant positions within the WAEMU.

⁶⁰ Ibid.

⁶¹ It should be also noted that the European law on competition, in particular in article 82 (e.g. article 86) of the Treaty of Rome and the texts of derivative law envisage no such exceptions, nor exemptions to the prohibition of abuses of a dominant position.

the State: State aids and practices that regulation No. 02/2002/CM/WAEMU calls anti-competitive practices emanating from the States.

(a) The incompatibility in principle of State aids with the Common Market

Article 88 c) of the Treaty of WAEMU prohibits by law any State aid which might distort competition by favouring certain enterprises or certain products, with the exception of cases that might be foreseen by the Council of Ministers under article 89 of the treaty. Hence the treaty proclaims the incompatibility of most State aids with the Common Market, since aids favouring all enterprises or productions on the Common Market are difficult to find. In pursuance of the principle established by the WAEMU Treaty, regulation No. 04/2002/CM/WAEMU recalls the prohibition while adding more precisions on its content and its scope.

With respect to this last text, the notion of State aid has to be understood in its widest definition, both in terms of the type of aid and in terms of the body which furnishes it.

Hence, it appears that a State aid includes any measure which involves a direct or indirect cost, or a lessening of income of the State, its parastatals or any public or private body established or designated by the State to manage aid, and hence advantages certain enterprises or the production of certain products⁶².

In consequence, similar to what is done in European Community law, any subsidies or loans afforded to enterprises, as well as tax exemptions, free goods and services supplied by the State are logically considered as State aids. This aid can stem from any central or decentralized authority, such as the authority of a province or a commune⁶³.

⁶² Article 1 b) of regulation No. 04/2002/CM/WAEMU.

⁶³ Ibid.

More precisely, the following aids are considered as prohibited without any need for any review by the commission: State aids conditioned, by law or in effect, exclusively or among other conditions, to export results towards other member States; aids conditioned exclusively or among other obligations to the use of local inputs instead of those imported from other member States⁶⁴.

Apparently inspired by the European law, the WAEMU law accepts a few waivers to the principle of prohibition of most State aids. This derives from article 89 c) of the Treaty of Dakar, as well as from regulation No. 4/2002/CM/WAEMU.

In this regard, within the framework of its review of the impact of State aids on competition, it seems. The commission is required to take into account the needs of member States with respect to their economic and social development, as long as the trade flows among member States and the community's objective of integration are not placed in jeopardy⁶⁵.

Hence, the six following categories of aids are considered compatible with the Common Market without any prior review of the commission:

- (a) Social aids afforded to individual consumers on the condition that they be offered without any discrimination with regard to the origin of the products;
- (b) Aids afforded to remedy natural disasters or other extraordinary events;
- (c) Aids destined to promote the realization of an important project of community dimension or to

⁶⁴ Article 4 of regulation No. 04/2002/CM/WAEMU.

⁶⁵ Article 2, para. 2.2 of regulation No. 04/2002/CM/WAEMU.

- remedy an important economic crisis in a member State;
- (d) Aids for research activities of enterprises or high schools or research institutes which have signed contracts with enterprises, if the said aid does not cover more than 75 per cent of the costs of industrial research or 50 per cent of the costs of pre-competition product development;
 - (e) Aids aimed at promoting the upgrading of existing facilities to new environmental standards imposed by law and/or regulations which weight on the enterprises' financial costs, on the condition that such aid does not exceed 20 per cent of the cost of upgrading, and that it be a one-shot occurrence; and
 - (f) Finally, aids aimed at promoting culture and the conservation of the national heritage when it does not distort competition in a significant part of the Common Market⁶⁶.

Likewise, the commission can, after consultations with the Consultative Committee on State aids, issue executive regulations creating categories of State aids which can be authorized by law⁶⁷ (in conformity with the powers conferred to the commission by article 24 of the WAEMU Treaty).

(b) *Prohibition of anti-competitive practices imputable to States*

⁶⁶ Article 3, para. 3.1 of regulation No. 04/2002/CM/WAEMU.

⁶⁷ Article 3, para. 3.2 of regulation No. 04/2002/CM/WAEMU.

As regards exceptions to the principle of prohibition of State aids, as indicated by C. Garbar, the European experience reveals especially that "waivers are rather restrictively accorded" as such aids are in principle incompatible with the common market (C. Garbar "State Aids: "practice in decision-making of the Commission of European Communities (1990-1994)", op. cit.

The Community Competition Law of WAEMU seems to introduce a new category of anti-competitive practices by qualifying certain interventions by public officials as anti-competitive practices emanating from States. Article 6 of regulation No. 2/2002/CM/WAEMU of 23 May 2002 which establishes this category of anti-competitive practices goes beyond the framework instituted by article 38 of the treaty which prohibitions are limited to cartel agreements, abuses of dominant positions, and State aids. However, the prohibited public interventions in the text are for the most part ancillary to anti-competitive practices indulged in by private or public enterprises, either by favouring them or by validating them.

The significance of this mechanism is less in the legal regime relating to such practices than in the political message the community authorities have wished to deliver to the authorities of Member States in terms of competition policy.

The wish to eliminate all administrative measures liable to restrain intra-country trade flows and the free play of competition is clearly affirmed through the provisions of regulations No. 02/2002/CM/WAEMU.

Article 6 prescribes those practices that are prohibited, the exceptions to the principle of prohibition of such practices and the legal regime of the anti-competitive practices emanating from member States.

The prohibited practices include:

- (a) Measures favouring anti-competitive behaviour by public enterprises and those enterprises supported by public officials; and
- (b) Measures favouring the anti-competitive behaviour of private enterprises.

In the first category, one finds decisions affording a monopoly to public enterprises, exclusive import licences for goods of

general consumption, etc. In the second category, one can list measures approving prices fixed by associations of private enterprises, administrative measures validating or approving decisions by enterprise associations to assign criteria of entry into specific sectors of activity, etc.

However, exceptions to this prohibition are envisaged, hence, enterprises responsible for managing services of general economic interest or having the characteristics of a fiscal monopoly can be exempted under the following conditions: the practice should be notified to the commission and it should demonstrate that the application of the rules of competition fixed by the treaty and its derived law would impede the accomplishment of the public service mission it has been vested with.

The peculiarity of anti-competitive practices emanating from member States is that they are not regulated by community law. In fact, article 6 of regulation No. 02/2002/CM/WAEMU refers to provisions of article 4 a), 7 and 7c) of the treaty for action to be taken and sanctions imposed for such infringements. Article 7 of the treaty invites all member States “to cooperate fully in order to achieve the objectives of the union and to abstain from blocking the application of the treaty and the decisions made for its implementation”. This rule applies to all the areas covered by the treaty and in principle should not qualify the anti-competitive practices emanating from States, which is a term the treaty has not used. Concerning the sanctions applied to such practices, the same remark applies.

For any act undertaken by a member State impeding the realization of the objectives of the union, the treaty establishes a special procedure including as a first step the issuance of an order inviting the member State in question to put an end to the practice in question or to revise the rules which might breach community law and as a second step, in case of refusal by the member State to

abide by the requirements of the commission, recourse to the Court of Justice of WAEMU.

However, there are no monetary sanctions foreseen in this case.

This does not mean that such sanctions could not be imposed on private or public enterprises which would continue to implement the acts prohibited by the commission. It is certainly at the level of enterprises that the prohibitions against anti-competitive practices emanating from member States can be effectively imposed. They could also serve as a basis for an appeal against any act taken by a public official or private person empowered by the State.

C. COMPETITION RULES AND SECTORAL REGULATIONS WITHIN WAEMU

Apart from the general regulations issued by WAEMU or its member States, there are specific competition regulations related to certain fields or sectors of activity both at the community and the national levels of member States. This type of regulation concerns in particular network industries such as postal services, telecommunications, media and communication, water and electricity.

Within member States, it should be recalled that State intervention which was common in the three first decades of independence of the countries of the WAEMU region, sectors considered as strategic by the State were usually served by State monopolies and State-owned enterprises, in markets which were totally closed to competition. As a result of economic reforms implemented within the framework of liberalization programmes, a new trend evolved consisting of opening such sectors to competition, by dismantling old monopolies and public enterprises and restructuring or privatizing them.

This is notably the case in the telecommunications sector, with the Société Nationale des Telecommunications (SONATEL) in Senegal in 1995, the Office of ports and telecommunications (OPT) in Benin in 2000 and the Office National des telecommunications (ONATEL) in Burkina Faso in 2007. These measures were preceded, accompanied or followed by the introduction of competition in the field of mobile phones (GSM).

In the field of electricity, one can cite the example of SENELEC in Senegal, SBEE in Benin and SONABEL in Burkina Faso.

In the field of water services, privatizations have been or are being implemented or envisaged of SONEES having resulted in the creation of SDE in Senegal in 1996, of SBEE in Benin and ONEA in Burkina Faso.

It is within this context that specific regulators have emerged, aimed at regulating these sectors, in particular with respect to the newly introduced competition and to ensure that various new operators abide by the rules of competition to the advantage of customers. One observation in this respect, relates to the abundance of regulation concerning specific sectors in the member States of WAEMU, including an inflation of rules, regulations, decrees, etc, as shown in particular by the regulation in the field of telecommunications in Burkina Faso. Another observation is the differences of approach of such sectoral regulations from one member State of WAEMU to another. Apart from the similarity of the objectives of such regulations, these regulations differ considerably in terms of their fundamental principles, the mechanisms implemented and the regulatory bodies (especially their competencies and constitution), as well as procedures and sanctions.

To illustrate this point, one can cite the sectoral regulation of Burkina Faso, which since 1991 has engaged in a process of gradual liberalization of the economy, which

has involved a gradual disengagement of the State from certain economic sectors which have been opened to private firms. The reforms of telecommunications in Burkina Faso which started in 1998 are part and parcel of this trend of economic reforms. They took the following format:

1. Adoption by the Government of a document of Sectoral policy for telecommunications, including the objectives and the strategy of the reforms;
2. Adoption by the National Assembly of a law on the Reform of the telecommunications sector;
3. Establishment of a Regulatory Framework;
4. Creation of a Regulatory authority;
5. Privatization of the National Telecommunications Operator.

Participation of the private sector in the activities of the public utilities necessitated a revision of the legislative and regulatory framework. Such participation makes it imperative for the State to reinforce its capacity to regulate the operators in the sector to ensure that essential social objectives it has fixed are met⁶⁸. Among these general principles, the following may be listed:

⁶⁸ In Burkina Faso, for example, the process of reforming the telecommunication sector started with the adoption of law No. 051/98/AN of 04 December 1998, on the Reform of the Sector of Telecoms in Burkina Faso. The main elements of the regulatory framework are:

- Decree pertaining to the modalities of fixation and control of tariffs;
- Decree approving the national plan of distribution of frequencies;
- Decree on modalities of implementation of universal access to telecommunications service;
- Decree instituting the rights and duties in favour of the Autorité Nationale de Régulation des Telecommunications;
- Joint order No. 00.01/MC/MEF of 20 September 2000 fixing the tariffs of duties for users of radioelectric frequencies.

- (a) Free fixing of charges for services, in accordance with the principles adopted by decree and the rules governing the charges;
- (b) Supervision of charges by the sectoral regulator who counterbalances the absence of sufficient competition;
- (c) Guarantee of equal treatment for clients by the suppliers of telecomm services on the whole territory of the member State.
- (d) Directive No. 03/2006/CM/WAEMU of 23 March 2006 pertaining to the interconnection of networks and services of telecommunications;
- (e) Directive No. 4/2006/CM/WAEMU of 23 March 2006 on the universal service and the performance obligations of the network; and
- (f) Directive No. 5/2006/CM/WAEMU of 23 March 2006 on the harmonization of tariffs for telecom services.

At the WAEMU level, a certain effort of harmonizing sector regulators was undertaken in recent years, in particular in agriculture, transport, banking and financial establishments, insurance companies, energy and telecommunications.

In telecoms for example, such an effort resulted in the adoption of a series of recommendation, directives and decisions which created a sort of competition regulation for this sector. In line with regulation No. 03/2000/CM/WAEMU related to the establishment of a programme of action for the improvement of telecommunications within WAEMU, the Council of Ministers of WAEMU adopted a decision and six directives on 23 March 2006, concerning numerous aspects of the telecoms sector:

- (a) Decision No. 09/2006/CM/WAEMU of 23 March 2006 establishing the Committee of National Telecommunications regulations of member States of WAEMU;
- (b) Directive No. 01/2006/CM/WAEMU of 23 March 2006 pertaining to the harmonization of the policies of control and regulation of the telecommunications sector;
- (c) Directive No. 02/2006/CM/WAEMU of 23 March 2006 relative to the harmonization of applicable regimes for network operators and suppliers of services;

The adoption of a community regulation in this field aims at fixing a standard timetable for introducing competition, replacing the incomplete framework of regulation in certain States by reaffirming the main principles underlying the sectoral regulation, remedying the difficulties encountered by some regulators to establish themselves in the sector and guaranteeing the acceptance of certain principles essential to the existence of competition.

The creation of the Committee of Regulators and the establishment of the Conference of Suppliers of Telecom Services aim at encouraging experience-sharing between regulators, operators and suppliers of telecoms services, ensuring coordination in the implementation of community text, and playing a role of counsel and assistance to the commission and other bodies of WAEMU in the field of telecommunication. In the same line, member States are invited to take all measures to facilitate the effective application of these community texts to ensure a better transparency of activities undertaken in the sector of telecommunications and TICs in the WAEMU area.

The existence of sectoral regulation of competition in addition to the Community Code of Competition of WAEMU and to the national law of competition of member States poses a certain number of questions which cannot be answered at this stage as the

phenomenon is relatively new and there have been no decisions adopted so far on these legal matters. Among such questions is the one concerning the priority of WAEMU competition law with respect to the sectoral regulation on competition.

In accordance with a principle usually applied in many fields of law, it might be that in the absence of confirmation by future decisions of the national and community competition authorities, in case of conflict of jurisdiction, the specific regulation might have precedence over community law.

III. THE INSTITUTIONAL FRAMEWORK

The institutional framework is composed of all authorities, national and community, which act in creating and implementing community law on competition. The activities of these authorities are based on cooperation regarding difficult questions which are basically summarized below.

A. COMMUNITY BODIES

At the level of the community, four bodies intervene in the elaboration and implementation of community law on competition

1. The Council of Ministers

The Council of Ministers ensures the direction or in other words, the function of regulator on matters of competition. Article 89 of the WAEMU Treaty provides that the council, with a majority of two-thirds (2/3) of its members and upon proposal of the commission, decides following entry in force of the treaty, by way of regulations, all the necessary provisions to enable the application of the prohibition listed in

article 88 of the treaty. Moreover, it is the council which fixes, upon a similar procedure, the rules to be followed by the commission in its mission of implementation of the competition rules, including the imposition of fines and obligations sanctioning the infringement to these prohibitions, in particular with respect to cartel agreements, abuses of dominant positions, and State aids which can distort competition. The council can also adopt rules specifying and providing limited exceptions to these prohibitions in order to take into account specific conditions.

It is based on these provisions that the Council of Ministers adopted the three regulations and two directives on competition, on 23 March 2002. In this respect, it might be surprising to see that WAEMU adopted two directives on competition law although article 89 of the Treaty of Dakar only refers to regulations, contrary to the Treaty of Rome, which prescribes similar powers in favour of the council by way of regulations and directives⁶⁹.

Recourse to regulations, by its direct impact, underlines more easily the primacy of community law, as it makes it possible to avoid certain inertia of States with respect directives, which obligates member States in relation to the objectives fixed, but leaves them the choice of the means to reach them. It is also this liberty of choice which characterizes the flexibility of a directive versus the rigidity of a regulation.

Under article 6, paragraph 2 of the WAEMU Treaty, the council usually brings together the Ministers of Economy, Finance, and the Plan (a total of eight ministers, from each member of State of WAEMU). However for adoption of policies other than economy and finance, the council regroups the competent

⁶⁹ Article 83 (ex article 87) of the Treaty of Rome.

ministers. Their deliberations are only final when the Ministers of Economy, Finance and the Plan confirm that they are compatible with the economy financial and monetary policies of the union. For issues related to politics and sovereignty, the Ministers of Foreign Affairs sit in the Council of Ministers of WAEMU.

2. The Commission of WAEMU

The commission plays an essential role in the inception and implementation of community law on competition as far as it exercises a triple function in the field of competition, within its function as guardian of the Treaty of the Union:

- A function of regulation;
- Definition of competition policy; and
- Implementation of community law;

Within the powers it holds from the Council of Ministers, it can adopt executive regulations and measures of application of these regulations in matters of:

- Exemption by category of certain illegal agreements taking into account specificities of the sector of activity or the contribution of this agreement to economic or technical progress;
 - Definition of the types, the details and other modalities of modification, including interest rates concerning State aids; and
 - Definition of other categories of State aids which can be fully authorized by law.
- The commission is also responsible for defining the competition policy of the union. It reports on its activity by issuing an annual report as prescribed under article 19 of regulation No. 03/2002/CM/WAEMU of 23 May.

The commission also directs studies and inquiries on various economic sectors with a view to deepen its knowledge about the functioning of markets of the union and undertakes hearings with professional organizations, consumer organizations and international organizations. These actions are meant to optimize its policy in the general interest.

Thirdly, the commission is mainly responsible for the application of the community law on competition. Article 90 provides that the commission under the supervision of the Court of Justice shall be responsible for the application of the competition rules contained in articles 88 and 89 of the treaty.

In this respect, it can take action on its own or upon request physical or moral persons lodging a complaint to engage in legal procedures against infringements.

The commission is not only competent for issuing negative clearance or exemptions, but also to apply the sanctions provided for under article 7 of regulation No. 03/2002/CM/WAEMU of 23 May 2002.

Concerning State aids, the commission can, in case of infringement by States, without prejudice to the provisions of article 5 of Additional Protocol No. 1 of the treaty adopt the following gradual measures: the publication, upon recommendation to the council of a communication on the situation of the State in question, of the partial or total suspension of financial subsidies and outstanding grants of the union to the concerned member State, the recommendation to the West African Development Bank (BOAD) to review its policy of intervention in favour of the State concerned.

The action of the commission takes the form of decisions, advices or recommendations that it addresses to the enterprises or to the member States. With

respect to its composition and organization the commission is a collegial body composed of eight members one of which is especially responsible for competition issues.

The WAEMU Commission is also a vast administration headed by eight commissioners mentioned above, and an administration which will be analysed with respect to its management of issues related to competition. More precisely, it should be noted that since the entry of Guinea-Bissau as the eighth member of WAEMU, there has always been seven departments within the commission headed each by a commissioner; in addition to the presidency of the commission which includes the president and his office.

These seven departments were as follows: (a) the Department of Economic Policy; (b) the Department of Fiscal, Customs and Trade Policy; (c) the Department of Structural Account and International Cooperation; (d) the Department of Social Development; (e) the Department of the Territory, Infrastructure, Transport and Telecommunications; (f) the Department of Rural Development and Environment; and (g) the Department of Energy, Mining, Industry, Handicrafts and Tourism.

More precisely, it is the Department of Fiscal, Customs and Trade Policies which is in charge of harmonization of fiscal, customs, and trade policies, including in the field of competition.

Under article 23 of decision No. 0180/2003/P.Com/WAEMU of 28 February 2003 pertaining to the creation and organization of the services of the WAEMU Commission, the Department of Fiscal, Customs and Trade Policies included:

- (a) A Directorate of Trade and Competition;

- (b) A Directorate of Customs Union; and
- (c) A Directorate of Taxes.

It is the Directorate of Trade and Competition which is in charge of competition issues, in particular with the concurrence of two officials in charge of competition. But since the reorganization of its services decided after the nomination of its actual members by Additional act No. 01/2007/ECGE/WAEMU of 20 January 2007, this commission includes, in addition to its presidency, the following departments:

- (a) The Department of Administrative and Financial Services (DSAF);
- (b) The Department of Community Territorial Development, Transport and Tourism (DATC);
- (c) The Department of Fiscal and Cultural Development (DDS)
- (d) The Department of Economic Policies and Internal Taxation (DPE)
- (e) The Department of Regional Market, of Commerce, Competition and Cooperation (DMRC);
- (f) The Department of Rural Development, of Natural Resources and Environment (DDRE); and
- (g) The Department of Enterprise Development, Telecommunication and Energy (DDE).

Among these departments, it is the department on Regional Market, Commerce, Competition and Cooperation (DMRC) which is, *inter alia*, in charge of “stimulating competition with a view to reduce prices and widen the choice offered to consumers, and more generally, of competition and direction of the anti-dumping code.” DDRM regroups the following services:

- (a) The Cabinet;
- (b) The Directorate of the Regional Market and the Customs Union;

- (c) The Directorate of External Trade;
- (d) The Directorate of Cooperation; and
- (e) The Directorate of Competition, which is the one responsible of matters related to competition.

Given the attributions and the organization of the department to which it belongs, as well as the organization of the commission, the Directorate of Competition's daily tasks are undertaken in close cooperation and synergy with many other services. It is the case first of all with certain services within its own department, in particular the Cabinet, then with other services related to the Presidency (in particular the directorate of the secretariat of the Commission and other departments, including those which have cross-cutting and supportive functions.

The quality of the action of the Directorate on Competition depends in part on that of the supportive services. Hence, the eventual delays and difficulties encountered within such services, including slow transmission of mail in the relations with the competition authorities of member States or in the support of travel or the organization of the authorities of the competition directorate can considerably undermine its effectiveness.

At the present time (as far as we know), the Directorate of Competition has only two members in charge of competition. This number can be compared to those of the officials of the commission and to the total employees of WAEMU. According to the 2005 Report of the commission, the staff of all the bodies of WAEMU (Commission, Court of Justice, Court of Accounts, Inter-parliamentary Committee, and Regional Consular Chamber) action in 2005 was 220 employees, of which 93 high grade managers, 50 mid-level officials and 73 agents of general services.

3. The Court of Justice of WAEMU

The Court of Justice, created by article 38 of the treaty is empowered to supervise the application of law with respect to the interpretation and application of the Treaty of the Union.

More precisely, the Court of Justice plays a very important role in terms of competition insofar as article 20 of the treaty provides that it controls the application of the rules by the commission.

In general, the Court of Justice has a competence of attribution, its consultative function being on an exceptional basis: disputes can only be brought before it if they fall within the competence that has been expressly granted to it by the treaty or in application of the treaty. That means that it is competent to consider:

- Recourse against failure to follow the law;
- Recourse against misinterpretation of the law;
- Competition disputes relating to fact and to law;
- Recourse action taken by staff of the union;
- Recourse on questions of liability; and
- Recourse relating to damages suffered.

Moreover, the Court of Justice can issue opinions and recommendations on draft legislation submitted by the commission. As a logical follow-up to all these functions, very concretely for what concerns competition issues, the Court of Justice reviews the legality of the decisions made by the commission with respect to cartel agreements and abuses of dominant positions, upon appeal from a member State or of the council, or of any physical or moral person involved⁷⁰. Likewise, the Court of Justice reviews, with full

⁷⁰ Article 31 of regulation No. 03/2002/CM/WAEMU.

competence on all questions of fact and law, appeals launched against decisions whereby the commission imposes a fine or a requirement, having the possibility to modify or annul the decisions, to reduce or increase the fines or the requirement or to impose specific obligations.

Moreover, with respect to the liberalization of monopolies and public enterprises, the Court of Justice can have a case brought before it by the commission when a member State does not abide by a decision or a recommendation of the commission recommending an amendment to a project of national legislation which might affect competition within the territory of the union⁷¹.

The Court of Justice is composed of eight members nominated by the Conference of Heads of States and Governments for a six-year tenure which is renewable. The current court has just been empowered by act No. 03/2007/CCGE/WAEMU of 20 January 2007 on the renewal of tenure, nomination and end of tenure of members of the Court of Justice of WAEMU.

The members are chosen among personalities offering all guarantees of independence and judicial competence necessary for exercising the highest juridical functions.

The members select a President from within their group, for a term of 3 years and award themselves the functions of judges and general advocates. The President directs the work, presides the hearings and deliberations. The general advocates are responsible for presenting to the public, in all fairness, the motivated conclusions of cases submitted to the court, in order to assist the court in accomplishing its duty. The court meets in the form of a plenary assembly, the Council's Chamber, a consultative general assembly and as internal assembly.

⁷¹ Article 6, paragraph 6-4 of regulation No. 02/2002/CM/WAEMU

4. The Advisory Committee on Competition

Established by article 28, paragraph 28-3 of regulation No. 03/2002/CM/WAEMU of 23 May 2002, the Advisory (or consultative) Committee is composed of two civil servants from each member State who have expertise in the field of competition (16 members in all). It is consulted by the commission of WAEMU for advice, before it makes any decision concerning a cartel agreement or an abuse of dominant position⁷² and before it takes some decisions on State aids, in particular conditional and negative ones⁷³.

B. NATIONAL COMPETITION AUTHORITIES AND MEMBER-STATE JURISDICTIONS

Pursuant to article 1 *in fine* of directive No. 02/2002/CM/WAEMU, national competition authority relates to “any national institution having general or sectoral competency to intervene in the field of competition law.” Apart from this short definition, WAEMU texts do not give any concrete indications about national competition authorities. Moreover, in the absence so far of any precise definition of national competition authorities in the acts or decisions of the commission or of the Court of Justice of WAEMU, it may be useful to make reference to European Country laws to specify somewhat this term⁷⁴ as well as to national competition

⁷² Article 28 paragraph 28.4 of regulation No. 03/2002/CM/WAEMU.

⁷³ Article 29 of regulation No. 04/2002/CM/WAEMU.

⁷⁴ In this respect, see Jean-Claude Gautron “La Cour de Justice, (30 January 1974 BRT/SABAM), in which he makes a distinction between “the authorities of member States”, i.e. administration or judicial bodies specially responsible for applying competition law and ordinary courts, which regulation No. 17 did not clearly specify. In France, the competition “authorities” include the Directorate General on Competition, the Council of

laws of different member States of WAEMU. These laws establish or designate a certain number of bodies responsible for the implementation of the national competition rules.

According to the institutional environment of member States, four categories of authorities in a position to implement community competition law can be singled out: (a) administrative authorities; (b) independent comprehensive competition authorities; (c) sectoral regulatory authorities; and (d) administrative, civil and commercial tribunals.

1. Administrative authorities

Located within administration, national competition directorates exist in all member States of the union. Their principal task is generally to:

- (a) Supervise price regulations;
- (b) Control inventories; and
- (c) Control accuracy of weights and measure instruments.

To a lesser degree, the national directorates are also responsible for controlling market distortions emanating from anti-competitive practices. In such case, these national directorates undertake investigations, receive information and issue reports. For Senegal and Benin, detailed information is provided in parts II and III, respectively, of this report.

Competition, the Paris Court of Appeals in appeal of the former), and the Cour de Cassation. (Jean-Claude Gautron, "European law" op. Cit., p. 179). See also on this, Gérard Farjat, "Les organes de gestion" in Jean-Marie Rainaud and René Cristini (under the direction of) "Droit public de la concurrence" op. cit. pp. 48-65.

In comparison, in Côte d'Ivoire, it is the Directorate of Economic Regulation (Direction de la Régulation économique) created by decree No. 2003-340 of 24 October 2003 which plays this role. This directorate is responsible for controlling the functioning of the market to detect illegal practices (order No. 39 of 23 July 2004). The directorate intervenes both on individual restraints to competition and on anti-competitive practices.

The sub-Directorate in charge of Economic Investigations (Sous-direction des Enquêtes Economiques) is the operational service within this directorate which is responsible for making the necessary investigations for the detection of anti-competitive practices as defined under article 88 of the WAEMU Treaty and 7 and 8 of the Côte d'Ivoire law No. 91-999 of 27 December 1991 on Competition. The inquiry report resulting from these investigations are mandatorily transmitted to the Competition Commission, the national authority empowered with general competencies, which proceeds with the examination of the case in order to advise the minister on the decision he may make.

In pursuit of its duties, the Directorate of Economic Regulation included 16 civil servants in 2005, (two senior managing agents – commissioners for economic investigations – 12 inspectors (college + 2 level) and 4 controllers (college level)).⁷⁵

The activities of surveillance and research on distortions of competition on the market are quasi-absent from the Directorate of Economic Regulation; as a result the Directorate has so far never been in a position to transmit a report of investigation to the Competition Commission. All existing resources are used to control other illegal practices such as individual restraints to competition (resale price maintenance, loss-selling, bait-selling) and market transparency (availability of price tags, invoicing).

At the institutional level, the responsibilities of the Directorate of Economic Regulation, which are limited to the investigatory function, are in conformity with the scope of application defined by directive No. 02/2002/CM/WAEMU relative to cooperation between commission of WAEMU and national competition authorities of member States.

In Guinea-Bissau, it is the Directorate General on Trade and Competition (DGCC) which is the main national competition authority. It includes a Directorate of Price and Competition Services (DSPC), which has the following functions:

- (a) It is responsible for the surveillance of prices of goods meeting basic needs, such as rice, oil, soap, sugar and construction materials;
- (b) It proceeds with the control and verification of inventories;
- (c) It is responsible for weight and measures; and
- (d) It controls the price of fuels in coordination with the ad hoc commission on the revision of prices of fuel.

The authority comprises eight persons including one director, two heads of department and five officers. Its resources are thus very limited in relation to the magnitude of its tasks. In addition, the authority faces major difficulties with respect to its responsibility in the field of competition. In order to remedy this situation a project aimed at creating an independent competition agency is underway.

2. The independent comprehensive competition authorities

The competition agencies are responsible for evaluating the inquiry reports they receive from the national directorates on competition, they are empowered if necessary, to launch an investigation on their own volition. Some are empowered to make decisions while others can only give advice to the minister, who then decides.

For the application of community law on competition, the Council of Ministers has issued directive No. 02/CM/WAEMU of 23 May 2002, which limits from now on the scope of activity of national administrative authorities to a simple mission of general investigation and surveillance of the market with a view to detect anti-competitive practices. To this end under article 3, paragraph 3 of the above-mentioned directive, the national administrative authorities are responsible for:

- (a) Undertaking, upon specific request from the commission or upon their own initiative, investigations aimed at detecting market distortions;
- (b) Elaborating and transmitting periodically to the commission reports or information notes on the State of competition in sectors

- which have been subject to inquiries;
- (c) Receiving and transmitting to the commission requests for negative clearance, notifications for exemptions and complaints from physical or moral persons (private persons or enterprises);
- (d) Following, in corporation with any other empowered administration, the implementation of decisions requiring other persons than the State to make payments and reporting periodically to the commission;
- (e) Making an inventory of State aids, and reporting quarterly to the commission; and
- (f) Elaborating once-a-year a report on the state of competition in the country.

The new functions of the national administrative authorities as defined in directive 02/2002/CM/WAEMU permit the establishment of useful cooperative relations with the commission in the application of community rules on competition.

Parts II and III deal in detail with the cases of Senegal and Benin, respectively.

For example, in Côte d'Ivoire, there is the Competition Commission. Law No. 91-999 of 27 December 1991 on Competition stipulates the responsibilities of this commission, bearing in mind that this law was adopted before the existence of the Community Code on Competition.

A reform of this law is planned, in order to adapt it to community competition law, in particular to the Directive on Cooperation between the Commission of WAEMU and national competition authorities.

In accordance with law 91-999, the Commission on Competition is empowered to issue an opinion for the settling of litigation related to cartels and abuses of dominant positions, as well as the control of economic concentrations. In order to implement this task, the commission uses the contradictory procedure, in which each party is notified the grievances held against it, their observations are collected and a report is elaborated, which is the basis for the opinion of the Commission, which is then submitted to the Minister of Trade for

decision-making.

The structure of the commission is based on an administrative body which coordinates day to day managerial issues and an executive body composed of seven members who deliberate on the matters referred to it for agreeing on the opinion to be submitted to the minister. In practice, the structure faces different problems: material working conditions are difficult, as human and financial resources are by far insufficient to comply with the tasks assigned to the commission.

To remedy this situation, a new structure is planned in the draft bill under consideration to amend law No. 91-999 of 27 December 1991 on competition. In particular, the new law would exclude all the provisions of the old law covered by articles 88 (a) and (b) of the Treaty of WAEMU. The new law would cover unfair competition and ancillary commercial practices instead, and the commission would be replaced by a Competition Council, which members would be increased from 7 to 11.

In its new version, the competition authority would be responsible for giving opinions on all issues related to competition referred to it by enterprises, regional bodies, professional organizations, Consular Chambers, consumer organizations and parliamentary jurisdictions and commissions. It would also have a general mission of surveillance of the market in order to detect any anti-competitive practices covered by community law under the authority of the commission of WAEMU.

In Mali, it is the National Competition Council (Conseil National de la Concurrence, CNC) which is the competition authority with comprehensive powers in this field. The National Competition Council is an advisory body attached to the Ministry of Commerce, of which one national directorate, the National Directorate on Trade and Competition (Direction nationale du commerce et de la concurrence, DNCC), is in charge of serving as the secretariat of the commission. In principle, the council is responsible for:

- (a) Advising the Government on all competition related issues;
- (b) Providing advice to the competent ministers about any concentration operation that might affect free-competition;
- (c) Advising on the application of laws and regulations restricting the exercise of a profession restraining entry into a market, or imposing uniform practices in terms of prices or sales conditions.

The National Competition Council is composed of eight members, of which two should be chosen from the magistrates of administration or judiciary order, preferably specialized in business law; two should be personalities involved or previously involved in productive, distribution or handcraft sectors, or in services or liberal professions; two should be chosen because of their competences in the fields of economics or competition; and two representative of the civil society.

The council can be referred complaints from the Government, the National Assembly, as well as local regulators and bodies. In practice, however,⁷⁶ as was made clear by the Evaluation Mission in 2005, the activities of surveillance and research on market distortions provoked by anti-competitive practices, are quasi-inexistent within the DNCC, whose limited resources are totally committed to other issues, in particular individual restraints to competition (resale price - maintenance, loss- selling, promotional bait - selling, ...) and other frauds and infringements to weights and measures, and market transparency (publicity

of price-tags, invoicing, etc...).

Moreover, institutionally, the distribution of tasks between the DNCC and the Competition Council is not sufficiently clear: the two authorities deal with the same issues, the former with the executive power in case of infringements to the law, the latter only with consultative powers. This situation has led to a practical paralysis of the council which members practically never meet;

With respect to the scope of application of the WAEMU rules and national legislation, as determined in directive No. 02/2002/CM/WAEMU concerning cooperation between the Commission of WAEMU and national competition authorities, it appears that the functions of DNCC and the Competition Council which include the possibility of making decisions and giving opinions on issues covered by article 88 of the treaty is not in conformity with the treaty. The reforms undertaken cover both institutional and legal frameworks. However, the institutional reform is limited to the creation of a new Directorate General on Trade and Competition whose competencies would be identical to those of its predecessor.

As for the legal reforms, while the bill stipulates that cartels and abuses of dominance are under exclusive responsibility of the Commission of WAEMU, it still does not specify the respective roles of the new Directorate General and the Competition Council in the implementation of article 88 of the treaty of WAEMU. In fact, it is nowhere indicated which of the two authorities will be responsible for the inquiry functions stipulated in directive No. 02/2002/CM/WAEMU.

3. Sectoral regulatory authorities

In the WAEMU area, sectoral regulatory authorities exist essentially in network sectors especially regulated, such as telecommunication, electricity, water and media and communications.

These regulators were created during the process of privatization of such sectors of general economic interest. Initially, their role was more technical and limited to fixing the technical interface and standards compatible with exiting system of utilization. Increasingly, however, they intervene in the settlement of commercial contract disputes. Within their responsibilities they also undertake inquiries sometimes related to the good functioning of market, including, cartel agreements and abuses of dominant positions. Such national regulatory authorities who have expertise in the field

of competition can contribute substantially to the implementation of community law.

In the telecommunications sector which, with media and communication, seems most advanced in this field, all member States of WAEMU have established a regulatory authority.

For instance, in Burkina Faso, in an environment of liberalization of telecoms, in particular with respect to mobile phones, following the recent privatization of the National Telephone Office (ONATEL), there is a sectoral regulator named ARTEL. ARTEL, which is progressively acquiring the necessary know-how to play fully its role assigned by law, has a limited sanctioning power, and has already been confronted with numerous disputes related to liberalization.

In Senegal, sectoral regulators were introduced alongside the liberalization programs in sectors previously controlled

by State monopolies which were progressively opened to competition (see part II of this report). Accordingly, law No. 2002-23 of 4 September 2002 created the legal framework for enterprises which were awarded the concession of a public service, stipulating the characteristics and responsibilities of regulatory agencies in Senegal.

Within their competences, regulators were given a role in the field of competition, more precisely on those issues covered by article 88 (a) and (b) of the WAEMU Treaty. Accordingly, article 5 of the law stipulates that the competent regulatory authorities have the following responsibilities in the field of competition to ensure: the application of rules stipulated in chapter 4 of this law; and that at the prohibition of anti-competition practices in regulated sectors is respected;

This law sets *inter alia* the principle of cooperation between sectoral regulatory bodies and other authorities, by indicating that regulators can make a reference to the competent competition authority with respect to cases which might constitute an abuse of dominance or anti-competitive practices they might come across.

It also describes the main anti-competitive practices that might restrain free competition, in particular those which amount to allocating markets, limiting access to market, and distorting prices. It also defines the notion of abuse of dominance and gives some examples, such as refusals to deal, discriminatory practices. Under the law, any agreement or contractual clause resulting in an anti-competitive practice is null and void.

It is in this context that a number of regulatory authorities have been established, including the Commission for Regulation of Energy. This independent body, created by law No. 98-29 of 14 April 1998 on the electricity sector, aims at:

- (a) Promoting rational development of supply of electric energy;
- (b) Ensuring a financially balanced sector;
- (c) Ensuring the protection of consumer interests and rights; and
- (d) Promoting competition and the participation of the private sector in the production, transportation, distribution and sales of electricity.

In practice, however, there is a lack of functional relations between the sectoral authorities and the general competition authorities, and this contributes to the partitioning of the market surveillance activities between these different authorities.

In some countries, reforms are underway to give more responsibilities to comprehensive competition authorities (e.g. general administration, commission), while in others no such efforts have been undertaken to comply with community directive No. 02/2002/CM/WAEMU of 22 May 2002 on cooperation among authorities and the commission. Finally, it is important to note that sectoral regulators are endowed with strong material and financial resources for the accomplishment of their tasks, while the authorities with general competences have very weak resources.

4. Administrative, civil or commercial tribunals

Community law provides for the recourse to civil or commercial courts to pronounce null and void illegal practices and to award damages and interests to the victims of such illegal agreements. The question of nullity is important because it is related to the legal security of enterprises, as provided for in article 2 of regulation No. 02/2002/CM/WAEMU of 23 May 2002. While nullity is fully provided for in this article, it can only be applied if the practice

or agreement in question falls clearly within the purview of the prohibitions contained in article 2, paragraph 1, but also if it does not justify any exemption.

Moreover, only national courts are competent to pronounce nullity of agreements infringing article 88 (a) of the WAEMU Treaty. Hence, a decision by the court is necessary for nullity to produce all its effects. This nullity has an absolute character, which means the agreement cannot be referred to in the relation among contacting parties and it is not opposable to third parties. Any interested person can use it and nullity can be automatically invoked by the judge. Community law recognizes the possibility for a victim of an infringement to article 88 (a) and (b) to obtain damages from the authors of the infringement. In this respect, article 22, paragraph 4, provides that sanctions pronounced by the commission are without prejudice to recourse before national jurisdiction for remedying damage suffered. National laws provide generally that, in order to obtain damages, the damaging act must be illegal. Is the mere existence of an infringement to a regulation sufficient to establish guilt?

In the present case, even if the illegal act consists of an infringement of a rule protecting public interest, the victim will have the right to obtain damages if he can prove that there is a causal link between the act and the damage he has suffered.

C. COOPERATION BETWEEN THE COMMISSION AND THE NATIONAL COMPETITION AUTHORITIES OF MEMBER STATES

The mechanisms established by WAEMU imply cooperation between the political, administrative and legal authorities of each member State of WAEMU with the community bodies, for full application of

community law in various fields⁷⁷. More specifically in the field of competition, the texts adopted by WAEMU on 23 May 2002, and especially directive No. 02/2002/CM/WAEMU establish a cooperation between the commission, and national competition authorities of member States.

1. Reasons and conditions for implementing cooperation

Issues of cooperation and mediation mechanisms in various regional integration agreements related to competition law and policy are dealt with differently according to the type or the degree of integration of member States. Hence, many solutions can be envisaged with respect to an economic integration agreement under which the level of transfer of sovereignty inevitably determines the mechanisms of harmonization of policies and rules in all fields, the range of possibilities going from a centralized system to a decentralized one.

In this respect, WAEMU has opted for a centralized system, placing the essential responsibility for implementing the competition rules in the hands of the community body, taking into account the advantages of this system. Such a totally centralized system is characterized by a central authority having exclusive competence to prohibit, authorize, and sanction an anti-competitive practice. The centralized system also suggests that the national judges cannot have competence in applying the law. The community authority in this case is the only one competent to control the administrative procedure in the competition field.

In the case of a decentralized system, the national competition authorities and juridical system are on the contrary those who are competent for the application of community law. Each national body is empowered to have its own interpretation

of community law, under the control of national jurisdictions, and not of the regional executive powers. An effective decentralized power implies total abandon of competency to the autonomous authority, having its own juridical personality and usually a distinct legal territory. That would imply that national competition authorities can apply directly community competition law, with possibly a consultative system at the community level for damages. This type of decentralization was found to be less compatible with the regional integration principles and objectives of WAEMU, which opted for a centralized system.

Hence all decisions are made at community level, while national competition authorities are involved in the preparation of such decisions. A number of advantages are obtained through centralization. Firstly, a centralized authority allows the avoidance of inconsistencies and ensures legal homogeneity. Secondly, the centralized system on competitive issues allows a better community integration, as rulings are in conformity with the objectives of the community and are better adapted to the context of integration of member States; as national markets become more integrated in a common market, the more cases will cut across national boundaries and justify even more the existence of a community authority on competition. Thirdly, a centralized system ensures better legal clarity and predictability and hence juridical security for enterprises active within the integrated economic area, improving respect of the rule of law. Finally, a centralized authority should be less exposed to national lobby groups and there should be less risk of a “captive” regulator.

Nevertheless, it was also found necessary to balance this system by implementing in practice a system of cooperation among national competition authorities. This choice by WAEMU is based on facts. The

resources of the community being limited, it makes sense to make use of the cooperation of the national authorities of WAEMU member State in the implementation of community law. Moreover, national authorities have a better knowledge of domestic markets and specific expertise in the field of litigation of anti-competitive practices. In the short-term, their implication is essential in order to capitalize on their expertise for the benefit of the union, and to develop a competition culture in the long-term.

In conclusion, legal but also practical considerations justify the establishment of cooperation between national and community authorities in application of the community rules on competition. In this respect directive No. 02/CM/WAEMU of 23 may 2002 determines the conditions for the implementation and the scope of cooperation relative to the role of each national authority and the necessary reforms each member State should commit themselves to.

The directive sets the specific roles to be played by the community authorities on one hand, and by national competition authorities on the other. It balances the exclusive competences of the commission with the necessity to proceed with an effective surveillance of markets by national authorities.

Division of tasks is fundamentally determined by the main procedural steps of implementation of community competition law, which include the inquiry, the handling of the case and the decision-making process. Hence, the responsibility of the national authorities should it be administrative or sectoral, is limited to the inquiry which involves the collection of information, retrieving it and writing a report. Such inquiries can be elaborated and finalized according to national legal proceedings, irrespective of community law. At the same time, the commission can initiate and conduct investigations in all the

fields covered by articles 88 and 89 of the treaty. However, it has exclusive competence in cases where national authorities could not guarantee independence. These concern inquiries on:

- (a) Anti-competitive practices which may affect trade among member States of the union;
- (b) State aids; and
- (c) Practices emanating from member States.

As the decision is under the exclusive competence of the commission, the handling of the judicial investigation of the case, which final conclusion bear substantially on the decision is logically exclusively the responsibility of the commission. However, it is not impossible to conceive a different reasoning aimed at avoiding ineffectiveness (see recommendations in part IV).

The new distribution of competencies requires institutional reforms by member States. They must restructure their competition authorities and services in order to conform to the responsibilities assigned to them by the directive. Moreover, in order to comply with community law, member States need to amend their national laws or to review them so that they do not clash with community law. Member States need as soon as possible, to notify to the commission the inquiries underway and to conclude those cases being handled or decided six months after the entry into force of the directive.

2. Scope of cooperation

The cooperation scheme introduced is not operational during the inquiries neither during the decision-making process. The inquiry is operated in close collaboration with the competent authorities of member States which are empowered to formulate

observations on these procedures. This collaboration covers both information and assistance. During its intervention, the commission informs national authorities about proceedings related to enterprises located on their territory, by sending them:

- Copies of requests and notifications as well as the most important documents to allow them to take note of the violation, or of an exemption;
- Copies of requests for information sent to the enterprises; and
- Copies of the investigations it intends to undertake with the enterprises.

The aim of transmitting such information is, first, to inform member States of the community proceedings concerning enterprises, especially those located on their territory, and secondly, to ensure better information of the commission by allowing it to compare the information received from enterprises with that provided by member States. National authorities also intervene actively both in order to assist the commission on demand, or their own initiative in investigating an enterprise's headquarters, or in order to proceed directly with the inquiries considered necessary by the commission. Finally, article 20, paragraph 2 of regulation No. 02/2002/CM/WAEMU of 23 May provide for the possibility that officers of the commission may assist national authorities in accomplishing their duties upon request of the commission, or of the competent authority of the member State.

IV. RULES OF PROCEDURE

For the commission, as well as for enterprises, associations and consumers, the procedural mechanism facilitates greatly the application of community competition

law. For the commission, it is imperative to ensure the cohesion of the common market by avoiding that enterprises or their association, and member States themselves use practices that can impede all the benefits that should flow from the liberalization of trade among member States. This mechanism also guarantees legal security and the protection of those covered by the law. Hence, the procedural mechanism, which ensures both efficiency and the protection of the rights of defendants, aims at various objectives.

The first objective of the procedural mechanism is to provide the commission with the means necessary to guarantee a flow of useful information enabling it to detect market distortions originating from anti-competitive practices proscribed under article 88 of the treaty. To this end, those affected are empowered to communicate at their own initiative any illegal practice. In this way, the commission is also empowered with wide investigative powers. The second objective aims at ensuring a homogenous application of competition rules in all member States. Finally, the procedural mechanism provides all those involved, third persons and member States with the possibility to defend their rights and interests by expressing their views with respect to the anti-competitive practice in question. It provides for hearings of all those interested, and enables the decision to be publicized. Moreover, the creation of a consultative committee on competition, in which representatives of member States participate, and whose advice is required before the adoption of any decision by the commission, contributes to preserve the rights of defendants.

In addition, the adoption of time limits for the process of decision-making contribute to the legal security of defendants. In spite of the adoption of rules of procedure covering all the aspects of legal safeguards and protection of the rights of defence, the

implementation of the community law on competition by the commission remains subject to the supervision of the Court of Justice.

A. GENERAL PRINCIPLES AND DIFFERENT TYPES OF PROCEEDINGS

1. General principles and guarantee of rights

The right of defence is based on the one hand, throughout the various stages of proceedings, on the need to safeguard the fundamental rights and freedoms and, on the other hand, on the need to ensure the neutrality of the body in charge of delivering justice. This principle is not only necessary to safeguard the equal treatment of all subjects, but also and especially to ensure the efficient application of the law.

The rule of law is based on the condition that those subject to the law believe that its application will be equitable and non-discriminatory and that each party will be given full opportunity to make its views known. The principles and rules adopted here are those in force in Northern democracies, and in particular in the European Union. In this way the community law of competition of WAEMU has elaborated rules of procedure which take into account the rights of defence both during the inquiries and in the phase of decision-making. To counter-balance the important powers of inquiry and decision-making the law gives to the commission, the proceedings in place offer an important role to the right of defence. These proceedings are based essentially on:

- Respect for the adversarial principle;
- Provision of reasons for decisions;
- The principle of proportionality; and
- The protection of other rights.

Article 17, paragraph 8 of regulation No. 03/2002/CM/WAEMU of 23 May 2002 on applicable proceedings for cartel agreements and abuse of dominant positions stipulates that the rights of defendants are fully guaranteed in these proceedings. Accordingly, the commission notifies the parties interested a precise and complete list of grievances contained in the complaints and allows them to express their views and observations with respect to those grievances. They can also express their views orally during hearings, with the assistance of a legal counsel. Moreover, each of the defendants has access to the file and all documents submitted by the other parties. This allows the defendants to better prepare their defence. It is also necessary to avoid a situation where preliminary investigations directly affect the right of defendants, especially when inquiries can have a decisive impact on establishing the proof of illegal behaviour of enterprises. This is why articles 18, paragraph 3 and article 21, paragraph 2 of the regulation provide that the commission must indicate the object and aim of the investigation or inquiry, and the sanctions incurred if the inspiration requested (books, documents) is withheld or incomplete (article 22).

The decisions finalizing the proceedings and the decisions taken during the proceedings must be reasoned in conformity with article 44 of the Treaty of WAEMU. The provision of detailed reasons aims at ensuring a better understanding of the decision by the parties concerned. Absence of reasons can be used to overturn the decision. It is an important means to protect the authority of the community and the parties concerned against any risk of arbitrary decisions or any conscious or unconscious distortions. That is why the motivation must be direct, explicit and circumstantiated. The reasons must include the consideration of facts and refer to the law on which the decision is based. It must also contain a certain number of fundamental elements:

- (a) Proof of the alleged prohibition;
- (b) The reasons for, and circumstances leading to the prohibition: does it have an anti-competitive aim or effect or is it incompatible with the Common market?
- (c) The decision must expressly aim at the behaviour of each party to the case, allowing the precise determination of the grievances related to an infringement of competition law.

The decision must be proportionate with the seriousness of the infringement and of the gravity of the damage caused to the economy and to the interests of the parties affected. The seriousness of the infringement depends on its duration, whether it was secret or not, the means used and the persistence of the parties committing such infringements in continuing these after the opening of the investigation. It also depends on the influence the infringing parties may have had in compelling other parties to undertake certain conduct. In terms of adverse effects on the economy, the criteria include price increases and the exclusion of certain parties which, if they had present in the market, would have played an active role as competitors.

Finally, the decision must also take into account the financial situation and the growth prospects of the parties concerned. The public interest in being informed of any decision relative to competition conflicts with the interests of the enterprises concerned which wish to preserve the confidentiality of their business secrets. To this end, regulation No. 03/2002/CM/WAEMU of 23 May 2002 makes every effort to conciliate such diverging interests.

The preservation of official secrecy is guaranteed by article 30 of the regulation, which stipulates that any information collected by the commission in the exercise

of its information and control powers can only be utilized for the reasons they were requested. Article 30 aims at preserving the rights of the parties which could be seriously compromised if the commission was to use against enterprises evidence obtained in other investigations with no bearing upon the investigation in question. It is also important to preserve the legal security of enterprises. Regulation 03/2002/CM/WAEMU instituted certain time limits for the adoption of certain decisions. After such deadlines have passed, the practice is considered to be accepted. Article 24 of the same regulation similarly established time limits beyond which legal prescription applies.

2. Different types of proceedings

Community law provides for different type of proceedings for decision-making according to the nature and effect of such decisions, except with respect to litigation proceedings concerning cases of cartel agreements or abuses of dominant position, which are developed more in detail below.

(a) Proceedings for adoption of a negative clearance and an individual exemption

The request for a negative clearance aims at providing for the commission to decide that there is no reason for it to intervene with respect to the practices described in the request, while the notification aims at obtaining an exemption for an illicit practice from application of article 88 (a) of the treaty because of its beneficial effects.

In order to obtain an individual exemption or a negative clearance, enterprises must submit a request or notify the practice in question by filling a form (N), requesting a series of information concerning the parties involved, the agreement, the market affected and the reasons for which the demand or notification has been submitted.

The decisional process is described below:

- (a) On receipt of the request or the notification, the commission publishes a brief communication summarizing the case as contained in a non - confidential brief attached to the form (N). This publication aims at inviting third parties to make their views known with respect to the agreement, the decision of association or the practice in question;
- (b) In the six months following the notification or the submission of the request, the commission can decide to issue a negative clearance or an individual exemption, under specific circumstances. In order to do so, it transmits without delay a copy of the request or notification to the authorities of member States, as well as all the most important documents it has received on the case. During this period, the commission can negotiate with the interested parties to amend their practices so that they are in conformity with the necessities of the Common market. To this end, it may conclude an informal agreement;
- (c) When the commission, after receipt of the notification or the request for negative clearance, has doubts about its compatibility with the rules of the Common market, it engages the contradictory proceedings. In this case, the commission informs the interested parties about the grievances standing against them, and gives them the opportunity to provide their views before it adopts a final decision within a deadline of 12 months.

If no decision has been made after the 12 months deadline, following the initial launching of the proceedings, the silence of

the commission corresponds to an implicit negative clearance or exemption.

(b) Proceedings relative to the adoption of executive rulings providing an exemption

Article 6, paragraph 7 of the regulation of proceedings provides that, when the commission intends to adopt an executive ruling providing an exemption it must publish a notice so that all persons and organizations interested are able to make their observations known.

Before making that publication, the commission must consult the Consultative Committee on Competition. It must also consult the Committee before adopting any final executive ruling.

(c) Proceedings relative to State aids

With respect to State aids, the WAEMU texts on competition envisage four sorts of proceedings: (a) the proceeding concerning notified aids; (b) the proceeding regarding illegal subsidies; (c) the proceeding concerning an abusive application of a State aid; and (d) the proceedings concerning existing aid regimes⁷⁸.

The proceedings concerning notified aids request each new aid project to be notified to the commission by the member State concerned⁷⁹. The project cannot be implemented unless the commission has adopted or is considered to have adopted a decision authorizing it⁸⁰.

The proceedings concerning illegal aid are initiated when the commission obtains information about such allegedly illegal subsidies⁸¹. To conclude the proceedings, the commission can decide that the concerned member State must take necessary measures to recuperate the aid from its beneficiary⁸².

The proceedings concerning an abusive aid is the same as that applied by the commission with respect to a procedure against illegal aid provision⁸³.

In the proceeding relative to existing aid regimes, the commission proceeds with the member State to a permanent examination of these regimes, with the possibility that it may issue recommendations proposing the adoption of useful measures⁸⁴. If the member State in question does not conform to a conditional decision or to a negative decision or to a cease-and-desist order, or to an order to recover aids already provided, or to judicial orders in this connection, the commission can, after having invited the member State to make its views known, adopt measures in a phased manner⁸⁵.

B. PROCEEDINGS BEFORE THE COMMISSION

Having reviewed the different proceedings provided by community law on competition and their conditions of application, we shall examine below in more detail the rules concerning cartel agreements and abuses of dominant position, with respect to, in particular, the litigation proceedings, through its various stages which include the referral of a case, the powers of investigation, the handling of a case and the decision-making by the commission, including the consultation of the consultative committee.

1. Referral of a case by the commission

The adversarial proceedings are initiated by a decision of the commission of WAEMU which communicates the charges following the receipt of a complaint⁸⁶, of a notification submitted by one or more interested persons, or by its own initiative (*ex officio*), in order to obtain a decision of

negative clearance, an individual exemption, or a condemnation for infringement of the prohibition of cartel agreements or abuse of a dominant position⁸⁷. The communication of charges⁸⁸ is made by the Commission of WAEMU which sends a written letter to each enterprise or association of enterprises concerned, or its common representative, giving them the possibility to present their defence in writing or orally in hearings⁸⁹.

2. Powers of inquiry of the commission

Pursuant to regulation No. 03/2002/CM/WAEMU of the Council Ministers of 23 May 2002 the commission is empowered with a triple power of inquiry aimed at obtaining information on the functioning of markets it needs to accomplish its duties. It can request the information from enterprises; it can make investigations; or it can make sectoral inquiries. The request for information is provided for in article 18 of the regulation mentioned above. Such requests can be addressed to member States or to enterprises and their association. In the absence of an answer to an initial request from an enterprise or an association, the commission makes the request by means of a decision.

Member States where the enterprises in question are located receive copies of the requests for information, including in the case of a decision. The request must indicate the legal basis on which the request is founded by the commission and the reason why the information is sought. It must also indicate the sanctions foreseen in case of false or misleading reply. It can also stipulate, if appropriate, the appeal made before the Court of Justice.

Search of enterprise premises can be made by the commission or by the competent authorities of the member State acting upon a request of the commission. Like the

request for information, it aims at enabling the commission to fulfil its task as provided by article 90 of the treaty and by the provisions decided in application of article 89. The investigation can take place upon delivery of a warrant by the commission, indicating the object and the aim of the investigation, as well as the sanctions incurred in case of incomplete presentation of the books or documents requested. It can, if necessary, be supported by a decision. When the investigation is made by the representatives of the commission, they are empowered to check the books and other professional documents, make photocopies or extracts, and request oral explanations as well as search all premises, land or means of transportation of the enterprises. The investigation is conducted in cooperation with the competent authority of the member State where it is taking place.

In this respect the commission informs the competent authority of the member State in question, of the aim of the investigation and of the identity of its authorized representatives. The authorities of the member State can assist the commission representatives in the accomplishment of their duties. In case the investigations are conducted by the authorities of member States, the representatives of these authorities obtain a written warrant issued by the competent authority of the member State. This search warrant stipulates the object and the aim of the investigation. Upon its request, or that of the member State, the commission may assist the domestic authority in its investigation. The local authorities act in conformity with their domestic laws and proceedings in this respect.

Article 19 of regulation No. 02/2002/CM/WAEMU of 23 May 2002 empowers the commission to proceed with inquiries of economic sectors, when it believes that competition is restrained or distorted in that sector. The commission

has wide powers of investigation in this respect. It can request enterprises or their associations to provide all information necessary for the application of the provisions of article 88 (a) and (b) of the treaty. The commission can also decide to launch studies and research or initiate a discussion with all concerned economic actors and in particular with the regional consular Chamber of the Union, the professional organizations, the national consular chambers the consumer organizations and the national and foreign competition authorities. At the end of these different inquiries, according to the value of the information collected and the conclusion of the discussion, the commission can engage in the adversarial proceedings leading to the adoption of a decision.

3. Judicial investigation procedures before the commission

The procedures before the commission have three characteristics:

- They are adversarial;
- They guarantee the respect of business secrets; and
- They are undertaken in close cooperation with member States.

In accordance with article 16 of regulation No. 03/2002/CM/WAEMU of 23 May 2002, the commission can initiate a case on its own, or receive reference of a case by a plaintiff. The plaintiff can be a member State or physical or moral persons. For the procedure to be launched, the commission must issue a declaration of judicial investigation indicating its intention to make a decision. Therefore, the procedure starts with the communication of grievances. The adversarial procedure consists of two phases: the written phase (communication of grievances) and the oral phase (hearings). The first includes among others the communication of grievances,

the problem of access to the file and the written comments of the parties.

Once the commission has collected, through its powers of inquiry, the elements allowing it to establish sufficient indication of an infringement, it opens the written proceedings by communicating to the enterprises the grievances retained against them. The aim of this communication is to enable the enterprises to present their observations and comments. It is necessary for the enterprises to be informed of the elements and facts of law upon which the commission has based its case at this stage of the proceedings.

The communication of charges is an act in preparation of the decision which will eventually be adopted. But this act is of special importance as the commission can only retain charges upon which enterprises concerned have been able to communicate their views. Hence, the communication of charges has the effect of fixing the position of the commission, which cannot thereafter include in its decision additional charges, other than those already communicated. The commission has the possibility to abandon certain charges or to communicate new ones, either in order to specify or to complete the initial communication, or to respond to the arguments put forward by the enterprise during the administrative proceedings. In order to better formulate their observations, the interested parties are entitled to have access to the file.

In order to respect the rights of defence interested persons must be able to express their views on the documents retained by the commission in its observations which are at the root of its decision. This right of defence is provided for by article 17, paragraph 8 of regulation No. 03/2002/CM/WAEMU of 23 May 2002. Access to the file is concretized by a physical check of the available documents, and the enterprises concerned can make photocopies. When communicating charges

the commission fixes the deadlines within which the enterprises can express their views. They are required to present, within the deadlines fixed, written observations in which they can express all opinions and facts necessary for their defence. They can use all documents necessary in this respect.

Following the communication of grievances, the commission must proceed with a hearing of all the parties against which it has retained grievances in view of adopting a decision. The commission must offer those who have requested it in their written observations the possibility to express their views orally. This concerns both defendant enterprises and third parties justifying a sufficient interest. The commission fixes the date of the hearings. A copy of the invitation to the hearings is transmitted to the competent authorities of member States who can designate a civil servant to attend. Those invited to attend appear in person, or through their legal representatives. Enterprises or their Associations can be represented by a duly authorized agent chosen from among their regular staff. They can be assisted by an attorney at law or by any other qualified person admitted by the commission.

The hearings are not public. The commission can hear the representatives separately or in the presence of other interested persons. In the latter case, the legitimate right of enterprises to protect their business secrets is respected. The declaration of each defendant is clarified in the most appropriate fashion. A copy is provided to those who have taken part in the hearings upon request. The adversarial proceedings which aim at ensuring the right of defendants to be heard, is immediately followed by the consultation of the Consultative Committee on Competition when the commission intends to make a decision prohibiting the practices in question and/or imposing fines.

4. Consultation of member States (the advisory committee)

The Advisory Committee on Competition is mandatorily consulted before any decision is made to prohibit a cartel agreement or an abuse of a dominant position. The consultation takes place during a meeting convened by the commission. A summary of the case indicating the most important documents and a draft decision for each issue to be examined is attached to the letter of invitation. The committee provides an Advice on the condition that at least half of its 16 members are present. This is issued in writing and attached to the draft decision. The advice of the committee does not oblige the commission in its final decision.

5. The decision of the commission

After consulting the Advisory Committee on Competition, the commission is in a position to make a decision, within the framework of the litigation on cartel agreements and abuses of dominant position, requiring the defendants to put an end to the infringement and imposing fines. It may also decide to take provisional measures after hearing the interested persons without having consulted the committee.

If the commission finds, upon request or on its own, that an infringement to article 88 paragraph (a) or (b) of the treaty has taken place, it can make a decision ordering the enterprises to cease the infringement. The decision can take the form of a positive injunction or a prohibition. Although regulation No. 03/2002/CM/WAEMU does not explicitly give the commission the right to make a decision ordering enterprises to cease an infringement, this power implies that a finding must have been made regarding the infringement in question, even if it has ceased. Such a finding may be

useful in case of risk of damage. It can also be useful to adopt a decision in order to establish the legal basis for a claim for damages and interest that the victims of an infringement might wish to initiate. The decision is compulsory for the enterprises concerned and is immediately enforced, except in case they have appealed before the Court of Justice. The financial sanction generally takes two forms: fines and obligations.

Regulation No. 03/2002/CM/WAEMU provides for two types of fines: fines for infringement of proceedings and fines for infringement of basic rules. Fines for infringement of proceedings can be imposed in the following cases, for a fixed amount of 500 000 FCFA:

- (a) Inexact or distorted information in response to a request for information;
- (b) Denial of response after a fixed deadline when the request is forwarded by way of a decision;
- (c) Incomplete presentation of documents, during an investigation, such as books or other requested documents;
- (d) Refusal to submit any information sought by way of a decision.

Infringement to the basic rules are subject to substantially higher fines, ranging from 500 000 to 100 million FCFA, which can amount to 10 per cent of sales during the preceding exercise or 10 per cent of the assets of these enterprises. These fines are imposed when an enterprise violates articles 88 (a) or (b) of the treaty.

The commission can impose penalties of between 50 000 and 1 million FCFA for every day of delay from the date fixed in its decision, to oblige enterprises to:

- (a) Cease any infringement to article 88 (a) or (b) of the treaty;

- (b) Provide complete and exact information requested under decision made in application of article 1 or regulation 03/2002/CM/WAEMU; and
- (c) Submit to an investigation ordered by a decision.

The fixing of such penalties has the following character:

- (a) It is in the form of a lump sum, which is not related to the importance of the violation, nor to its length of time or to the damages caused to third parties; and
- (b) It is not final since as soon as the defendant has ceased the violation the commission can fix the fine at a lower level than initially contemplated.

C. CONTROL OF THE COMMISSION'S ACTION

Article 90 of the treaty provides that the commission is responsible, under the control of the Court of Justice for the application of articles 88 and 89. In this respect the following lines specify the way in which an appeal can be formulated before the community judge and describes the modalities of such recourse.

1. Conditions for lodging an appeal

All the decisions made by the commission during the handling of case cannot be subject to appeal. Such recourse is only possible if the action challenged is a in the form of a decision, capable of producing legal effects and of modifying the legal or material situation of the appellants. The defendant can submit an appeal to the community judge challenging a decision of the commission only if this decision contains grievances against him (if he has an interest in acting). Otherwise, the request will be rejected for inadmissibility.

Decisions that can be subject to appeal are of two categories: those ordering that a practice be stopped and those taken during the judicial investigation. Enterprises which are subject to a decision by the commission can take action against a decision of exemption. The same is true for concentration constituting a practice akin to an abuse of dominance. In such a case, the enterprises concerned have the possibility to submit an appeal challenging the decision ordering that a practice be stopped in order to re-establish the situation existing before the decision, or asking for a modification.

Also, it is obvious that any decision ordering that a practice be ceased can be subject to appeal.

Recourse is also possible against any decision of the commission that can be issued during the judicial investigation, as soon as it can have legal effects. However, such appeal is not possible against a decision of the commission to initiate proceedings, or against the communication of charges to an enterprise. These acts have of a purely preparatory nature.

It is possible to challenge a decision asking for information or proceeding to an investigation under the conditions set up by articles 18, 19, 21 of regulation No. 03/2002/CM/WAEMU of 23 May 2002. Moreover, the decisions in view of the holding of hearings which normally cannot be appealed independently from the appeal against the final decision can be launched if the decision of the commission results in unjustified damage to the rights of the defence. These rights, as well as the protection of business secrets, which cannot be remedied by the quashing of the final decision, can be subject to immediate appeal. This is due to the fact that such a decision can modify substantially the legal situation of the concerned enterprise, because the possibility of submitting an appeal against the final decision is not

sufficient to ensure sufficient protection given the irreversible character of the effects of an undue transmission of secret information to a plaintiff.

Finally, the temporary measures, taken in case of serious and irreversible damages or of an intolerable prejudice to the public interest are subject to an appeal, in line with article 5, paragraph 9, of regulation No. 03/2002/CM/WAEMU of 23 May 2002.

2. The modalities of recourse

Appeals against the decisions of the commission can be exercised according to three modalities:

- (a) Recourse challenging the legality;
- (b) Recourse of full jurisdiction; and
- (c) Recourse in violation of a regulation.

In general, the community judge makes a ruling on a matter of law. He decides on the conclusions tending towards total or eventually partial repeal of a community decision. Within this framework, the commission's responsibility can involve complex appreciations of economic issues. The jurisdictional control conforms to this aspect, by limiting itself to examining material facts and juridical qualifications used by the commission. Hence, the nature of the jurisdictional control that may be applied to the decision of the commission covers essentially substantial and basic issues.

Concerning the respect of substantial issues, the control aims primarily at checking the reasoning behind decisions. The reasons must specify the facts and considerations upon which the commission based its judgement. Actually, the considerable powers of the commission oblige it to explain very clearly its decisions in order to enable a useful control to take place. Hence, in the case of a cartel

agreement to which many enterprises are parties, the commission will have to proceed with an in depth examination of the situation of each enterprise which it considers to have participated in the infringement of the law. In the absence of the provision of reasons by the commission, the judge can use his public policy prerogatives. Any issue relative to the regularity of the proceedings before the commission can also be brought to the attention of the judge, who checks the respect of substantial proceedings. The judge can take action with respect to the conformity of the communication of charges, to the procedural correctness of the hearing proceedings and, more generally, with respect to the rights of defence and the consultation of the Advisory Committee on Competition.

Concerning the recourse of full jurisdiction, the judge checks that the decision is not based on a legal flaw, in other words, that it is in conformity with the general principles of community law and that it is not based on incorrect material facts or on clearly mistaken economic appreciation. While the powers of the community judge are in principle those of a judge of legality, his powers are extended when a financial sanction has been imposed. In this case, the judge can review the amount of the fine or the penalty, which he can reduce or increase.

Within the framework of the application of community law on competition, the recourse in violation of a regulation concerns the control of anti-competitive practices by member States and State aids. To this end, article 6, paragraph 4 of regulation No. 02/2002/CM/WAEMU provides that if the member State in question does not abide by a decision of the commission, the latter can make a reference to the Court of Justice pursuant to articles 5 and 6 of the Additional Protocol No. 1 to the treaty. The same goes for State aids. In this case, when a member State does not

respect the decision taken pursuant to the provisions of regulation No. 04/2002/CM/WAEMU of 23 May 2002, the commission makes a reference to the Court of Justice. Hence, the recourse in violation of a regulation belongs to the commission. If it believes that a member State has not respected its community obligations, it addresses to that State a detailed opinion, after having given it the possibility to present its observations.

In case the member State in question does not abide by this order within the delay accorded to it, the commission can make a reference to the Court of Justice for recourse for violation of a regulation. This procedure is also available to each member State after reference by the commission. After allowing the member State concerned to make its observations, the commission has the obligation to issue an opinion. If the commission does not issue such an opinion within a period of three months after initiation of the request, the matter can be referred directly to the Court of Justice. If the Court of Justice considers that the appeal is receivable, it confirms the violation; upon which all bodies of the member State in question must comply with the order in their respective fields.

In case the member State which has been found in violation of a ruling continues to infringe the decision, the commission can refer the case to the Conference of Heads of State and Governments, so that it requests the member State to comply without prejudice to the sanctions provided for under article 7 of the Treaty of the Union, on multilateral surveillance. The main conclusions requesting the repeal or amendment of a decision of the commission can be supplemented by a provisional order. The conclusion in the provisional order can either request a suspension of the decision or request transitional measures. The suspension proceedings can only be applied under the following conditions:

- (a) The defendant enterprise must prove that the application of the decision would cause a damage that would be difficult to remedy and which should hence be suspended urgently; and
- (b) The defendant must show that there are serious reasons for overruling the decision.

Provisional measures are adopted on the condition that there is a serious or irremediable damage or an intolerable challenge to public interest which must be urgently avoided. In such a case the enterprise can request from the court that it takes any measures needed to suspend the decision of the commission as long as those measures have a provisional character and do not jeopardize the solution which will be adopted in the end.

V. EFFECTIVE IMPLEMENTATION OF COMPETITION POLICY

The community can undertake three types of actions, namely legislative action, contacts with national authorities, and advisory or decision-making action, the latter being essentially in relation to contested matters. During its first years of activity, the main part of the community's activity focused on legislative activity and accordingly on its relations with member States. The number of references for opinions or for decision-making has been limited.

A. Legislative activity

Directly dealing with competition matters, various texts were adopted in 2002, after long preparatory work and consultations. Their adoption was followed by detailed explanatory sessions. They concern three regulations and two directives:

- (a) Regulation No. 02/2002/CM/WAEMU on anti-competitive practices within the West African Economic and Monetary Union;
- (b) Regulation No. 03/2002/CM/WAEMU on proceedings applicable to cartel agreements and abuses of dominant positions within the WAEMU;
- (c) Regulation No. 04/2002/CM/WAEMU, on State aids within the WAEMU and on the modalities of application of article 88 (c) of the treaty;
- (d) Directive No. 01/2002/CM/WAEMU on transparency in financial relations on the one hand between member States and public enterprises and on the other, between member States and international or foreign organizations; and
- (e) Directive No. 02/2002/CM/WAEMU on Cooperation between the commission and national competition authorities of member States for the application of articles 88, 89 and 90 of the treaty of WAEMU⁹⁰.

In addition, many texts relating to sectoral policies have been adopted, of which some, dealing with competition policy, have been analysed earlier in this report.

At the present time, many drafts are being elaborated in the field of air transport. These include:

- (a) Draft executive regulation determining the modalities of application of competition rules to the air transport sector;
- (b) Draft executive regulation on the application of article 88 (a) of the treaty to certain types of agreements, decisions or collusive practices in the field of air transport in the union (concerning joint planning and coordination of timetables, for the

exploitation of joint facilities, for tariff condition for the transportation of passengers and cargo; and for the supply of maintenance services during stopovers);

- (c) Draft executive regulation on the application of article 88 (a) of the treaty to certain types of agreements among enterprises concerning computerized reservation systems for air transport services.

B. RELATIONAL ACTIVITIES

This type of activity is essential, especially during the implementation phase of a new policy. Relational activities are daily and informal on one hand, and are part of established proceedings, on the other. The first category consists mainly of daily contacts between the competition commissioner and the authorities of member States as well as between the two senior civil-servants of the commission in charge of competition with their counterparts in member States, (administration and competition commission or council) as well as with the civil society and economic circles of the

union, including enterprises, professional unions and consumers associations.

The established proceedings can take many forms: they include regular meetings of the Advisory Committee on Competition as well as seminars, conferences and international meetings which the commission organizes or in which it participates.

1. The tasks of the Advisory Committee on Competition

This body was created by article 28, paragraph 28, 3 of regulation No. 03/2002/CM/WAEMU of 23 may 2002. It is composed of civil servants trained in the field of competition (two per member State). The committee is consulted by the Commission of WAEMU for advice, before any decision is taken on a cartel agreement or an abuse of dominant position⁹¹ and before certain decisions are made on State aids, including in particular the conditional and negative⁹² ones. A meeting should have taken place every year since 2002; however, only three formal sessions were held, in 2004, 2005 and 2007, respectively.

The Advisory Committee on Competition held its first session on 5 July 2004, at the headquarters of the Bodies of the Commission, and proceeded with the examination of the draft executive regulation for the internal rules of the committee, the draft plan of action and the Annual Report on the State of Competition in member States in 2003.

Mr. Eugene Yai, commissioner in charge of the Department of Structural Funds and International Cooperation, representing the President of the Commission, indicated that the Consultative Committee on Competition constitutes one of the pillars of the organization and regulation of the functioning of the common market. He asked the participants to use their expertise and neutrality in order to ensure an efficient and credible application of the system and the union in the field of the control of competition.

The session was concluded on 7 July 2004.

The second ordinary session of the committee took place in Dakar 12–16 December 2005, and was enlarged to host the representatives from the Directorates of civil Aviation of member States. This second session's agenda was as follows:

1. Presentation of the internal regulation of the Consultative Committee;

2. Report of the evaluation mission of the competition policy in member States;
3. Presentation of the programme of strengthening of capacities in the field of competition in the union;
4. Presentation of draft executive regulation on the application of competition rules to the air transport sector and conditions of exemption of the application of these rules to certain categories of agreements, decisions and collusive practices;
5. Presentation by member States of their report on competition.

The third and most recent session of the Advisory Committee on Competition took place in Cotonou on 27-30 March 2007. The following points were part of the agenda:

1. Examination of the note concerning the preliminary report of evaluation of the competition policy of the union, prepared within the framework of the voluntary peer review;
2. Examination of draft executive regulations on the application of competition rules to the air transport sector taking into account the views expressed by interested parties.

2. Seminars and conferences

Many seminars took place in particular within the framework of capacity-building on competition law and policy (under the auspices of the joint committee created to this effect in cooperation with UNCTAD). Also, international and multilateral meetings and conferences have seen the participation of the commissioner in charge of competition and his colleagues. This was the case in particular with regional

conferences (for instance with the ECOWAS and OHADA) and multilateral (for instance the annual meetings of the International Group of Experts on Competition Law and Policy of UNCTAD). The Court of Justice, for its part, has initiated and has participated in many sessions for judges and civil servants on community law in general, including competition rules.

Example of a seminar recently held 22–24 November 2006 in Cotonou

This regional information and eye-opening seminar on community law on competition was organized by WAEMU within the framework of its capacity building project of human resources of member States, with the technical support of UNCTAD and the financial support of the French Cooperation. The seminar was presided by M Moudjaïdou Issoufou Soumanou, Minister of Industry and Commerce of Benin. All member States of the union were present. The aim of the seminar was, according to Mr. El Hadj Abdou Sakho, commissioner in charge of the Department of Fiscal, Customs and Trade Policies of WAEMU, aimed first and informing participants about the important role of competition rules in the regional integration process and second, to publicize the principles and proceedings adopted by the community in this field. It also explained the expected benefits flowing from a proper application of competition rules. The issues covered included:

- (a) The contribution of competition policy to economic development;
- (b) The role of the Court of Justice in the implementation of the rules on free competition within WAEMU;
- (c) Possibilities and role of consumer organizations in implementing the commission's competition policy; and
- (d) The role of consumer organizations of Benin in the regulation of markets.

C. ADVISORY ACTIVITIES AND LITIGATION

So far, and for many reasons, few cases have been covered. According to the competition service of WAEMU, seven cases have been identified since 2001, to which one may add those that have been referred to the Court of Justice.

1. Before the commission

One case concerned a “concentration” by takeover. Three cases were on State aids, respectively in 2001, 2003 and 2004. Two

concerned “anti-competitive practices emanating from the States” in 2006. One concerned a fraud practice. It should be noted that there were more cases on “hard core” anti-competitive practices: cartel agreements or abuses of dominant position. The sectors concerned include energy (oil and gas), cement, agri-food and tobacco. Enterprises from six member States of WAEMU were concerned (Benin, Burkina Faso, Côte d’Ivoire, Niger, Senegal and Togo). The table below gives details of these cases:

Table of cases treated by the commission

Case	Date	Sector and States concerned	Summary of cases	Decision of the commission
SOCOCIM V. State of Senegal and CEMENTS du Sahel	9 April 2003	Cement State aids (Senegal)	SOCOCIM complained that competition was distorted by exemption of duties given to its competition “Ciments du Sahel” for its import of clinker.	Injunction and prohibition to exempt import duties or import of clinker.
Gazoduc de l’Afrique de l’Ouest	6 May 2004	Gas pipeline State Aids and Cartel agreement among firms. (Benin and Togo)	Benin and Togo passed an international convention with Ghana and Nigeria to set up a gas pipeline financed and exploited by a joint venture among oil multinationals.	Negative clearance for the creation of joint venture and decision not to object to fiscal exemption.
Total Togo	17 November 2005	Oil Concentration (Togo)	Total Outremer proposed to purchase stocks held by Mobil in the capital of Mobil oil Togo.	Negative clearance
Société des Ciments du Togo SA V. commission	27 March 2001	Cement State aids (Togo)	Société des Ciments du Togo challenged a decision of the commission declaring itself incompetent to rule on a decision of ECOWAS.	Referral to the Court of Justice for procedural reasons.
SONACOS COSMIVOIRE and UNILEVER	16 November 2006	(Detergents) Unfair competition, Dumping, fraud on rules of origin. (Senegal and Côte d’Ivoire)	SONACOS complained about unfairly low prices practiced on the Senegalese market.	Case under investigation.

Case	Date	Sector and States concerned	Summary of cases	Decision of the commission
Distribution Alimétation du Faso (DAF) V.	9 May 2006	Food distribution	The State of Niger is accused of submitting imports of wheat to quantitative restrictions in order to favour domestic producers.	Injunction of the commission inviting the State of Niger to cease these restraints.
State of Niger. Ministry of Economy and Finance of Benin V. State of Niger	6 June 2006	Anti-competitive practices emanating from States (Niger)		

It should be noted that there is a lack of practice, and hesitations on how to transmit files to the commission from the part of national authorities: should they pass-on the information, or make a formal transmission? An example of this was discussed during the third session of the Advisory Committee on a complaint by telephone operator MALITEL against Orange. This complaint was lodged first before the Mali authorities (the Competition Council); in accordance with national proceedings a request for examination was transmitted to the Mali administration which passed on the file to the commission. The question posed is whether the file is transmitted to the commission for simple information, for opinion, or formally, in order to obtain a decision based on article 88 of the treaty and the 2002 regulations, in line with the principle of the exclusivity of decision-making which pertains to the commission. In the case of an anti-competitive practice, it is the third solution which applies.

2. Before the Court of Justice

The court can be requested to pronounce itself in full jurisdiction on the decisions and sanctions that may have been imposed by the commission against enterprises for infringement to the competition rules. These decisions by the court are made in first and last instance.

The Court of Justice has received two files in this respect. The first concerns the decision on Ciment Togo versus the Commission of WAEMU; but the court judged by an order of 20 June 2001 that the appeal was unacceptable for flaw of substantial forms in violation of the Rules of procedure. The second case concerns GDEIRI SA versus the Commission of WAEMU, a Burkina Faso company requesting the commission to invite the State of Niger to respect its contractual obligations with respect to a social dwellings construction market. The court has not supported the claim.

The court can receive referral on a violation by a State which does not respect an order or a recommendation pertaining to amending a national draft law when such a law might adversely affect competition within the union, in contravention of existing regulations⁹³. To date, the Court of Justice has received no such recourse for violation. Finally, in order to ensure unity in the interpretation of community law, a procedure of recourse for prejudice allows a national jurisdiction to question the Court of Justice of WAEMU on a point of community law to which it is confronted during litigation. Such decisions are mandatory and have a general and retroactive effect.

The Court of Justice has made a single decision in this respect on a recourse for prejudice by the Council of State of Senegal in the case Air France versus Syndicate of Travel and Tourism Agencies

of Senegal; in this case the court was asked to determine which jurisdictions are competent to receive a recourse since the decision made by the national Competition Commission of Senegal had been appealed domestically, before entry in force of the regulation.

VI. CONCLUSIONS: A LIMITED PERFORMANCE

Within the framework of WAEMU institutions as well as at the national level, as will be seen in parts II and III of this review, a considerable effort has been made in the last 10 years, especially since 2002 to elaborate basic rules, institutions and proceedings. However, although it is difficult, for lack of specific sectoral studies, to evaluate the situation of competition in the economy of the area; it is certain that the limited number of decisions cannot reflect the real state of the art of competition on the territory of the union.

A. PROBABLE EXISTENCE OF DISTORTIONS TO COMPETITION

The numerous meetings with administrative, international and professional bodies, as well as with consumer organizations allow us to believe that cartel agreements and abuses of dominant positions exist and are not sanctioned. For example, in the agri-food sector, (flour, sugar, groundnuts, vegetable oil) allegations of cartel agreements were often made; in the construction and public works sector, as well as in cement, existence of cartels were often alleged.

The transition from State monopoly to liberalization and privatization of network sectors (telecoms, energy, etc) may result in cartels and abuses of dominant position by incumbent firms searching to maintain their

market share. In fact, the operators, the professional customers and the final consumers complain about different anti-competitive practices. The new entrants are faced with exclusionary practices and discrimination, customer enterprises and consumers face abusive fidelity practices and excessive prices. To such practices observed in industrial and commercial activities, one can add the distortions created by the existence of the informal economy, which damage to the economy is greater than the dynamism it may bring about and the advantages it may offer to some. Although rules exist to sanction such practices, few formal complaints have been lodged and few decisions made.

B. EXPLAINING THIS LIMITED PERFORMANCE

The reasons for this low level of action against anti-competitive practices at the community level need to be analysed. The same is true for the limited action in member states. One could of course consider that the mere existence of the prohibitions imposed by the treaty and its derived law, including the possibility of heavy sanctions explain why infringements are few. This optimistic view, however, should be rejected, because it would mean that such rules are widely known, which is not the case in the rest of the world, where similar rules are enforced.

It is also possible that the “competition culture” and expertise are not sufficiently developed for the economic actors, the controllers, the direct victims which are the consumers, to realize the existence and the scope of such anti-competitive practices. This is an important reason, which is given a predominant place in part IV of this review.

It is also clear that there are many other policies that need to be implemented in developing countries and that priorities

have been set in other fields for which competition is seen through a different angle (sectoral policies, free trade zones, etc.)

The obligations flowing from structural adjustment reforms may also not have taken sufficiently into account the need for competition policy. Obviously, WAEMU can only take into account existing facts in its member States. Its legal system includes provisions calling for the respect of the proportionality of the objectives sought by a given policy with respect to its eventual adverse effects on competition. Nevertheless, although questionable, it is possible that initiating a case against anti-competitive practices might be refrained from because of the need to respect existing policies which might be contradictory.

Still more delicate is the argument supporting the idea that before reaching a certain economic level, both in terms of production as of trade and distribution, there would be no need to take action against anti-competitive practices. This issue has been often debated in international organizations, and is of actuality within WAEMU, given the level of LDC of its member States. Anyway, the dynamic effects of such policies on the national economics and the strengthening of the rule of law are enough to plead in favour of a rapid improvement in the application of these rules.

Apart from these general points, there are also criticisms by certain economic players relating to the various levels of rules, between community rules and national law, especially emanating from the countries which have adopted national competition law and policy. These questions can also explain the slow pace of implementation of community law in this field. The exclusivity conferred to the Commission of WAEMU seems to hamper the nascent activities of domestic competition authorities which feel “frustrated” for not

being able to handle the cases and make decisions on practices originating and having effects within the territorial limits of the member State in question. (See part II B3 on Senegal, where the question is crucial).

As long as cases do not affect other member States, there might be a tendency to refrain from transmitting certain cases to the Commission of WAEMU. The small number of references of the commission might also be due to the geographical and “psychological” distance between the community services and the authors (and victims) of alleged anti-competitive practices, naturally closer to their domestic authorities. This distance is said to increase the costs of proceedings and in particular to lead to a dilution of knowledge about local economic specificities.

Finally, another explanation rests on the difficulty for many to distinguish with certainty when opening a case, what is related to competition rules provided under article 88 of the treaty and what is under the scope of other rules, such as unfair competition or price regulation, which belong to the competency of national authorities.

PART TWO: REVIEW OF COMPETITION POLICY IN SENEGAL

INTRODUCTION

Senegal is in West Africa, one of the eight members of WAEMU, with a territory of 196,200 km². Senegal became a republic on 15 November 1958 and acceded to independence on 20 August 1960.

Its population is 10.9 million, mostly rural (50.2 per cent) with a total GDP of 4561.2 billion FCFA. Its per capita GDP in 2005 was \$763, with a strong growth rate of 6.1 per cent that year. It stood 157th of 177 along the development index of UNDP.

Its services industry is well developed, accounting for 63.6 per cent of its GDP, with good telecommunication infrastructures with heavy investments in teleservices, Internet and also a good level of tourism.

Its activities in the secondary sector (21.7 per cent of GDP) are basically mining and transformation of phosphates (fertilizers), peanuts (oil and food for livestock), sea products, and real estate and public works which have supported the production of cement. Finally, the primary sector (14.7 per cent of GDP) contributes to nearly 2 per cent of growth, dependant on agriculture (cereals, fishing, and livestock).

In 1994, the policy of liberalization initiated in the 1979 has accelerated with the new industrial policy.

Important structural, regulatory and institutional reforms were initiated with a view to promoting the opening of markets and accelerating investments and exports.

Three essential elements accompanied this open-market policy: a commercial policy based on free-competition and a reduction of the role of the State through privatizations of State-owned enterprises. These reforms were accompanied by regulatory reforms: the price regulations and control of economic fraud (law of 1965) which represented State intervention was replaced an economy driven increasingly by market forms instead of State intervention.

Hence, law No. 94-63 of 22 August 1994 on prices, Competition and Economic Litigation brought about price liberalization and market forces as the main driving force of the economy. It set up in particular a body regulating market practices, the National Competition Commission.

Deregulation was also accompanied by a process of privatization of industry, whereby the State reduced its role and opened the capital of State owned enterprises to private investors, while reducing monopolies and increasing competition.

This process introduced in the 1970s, with the new industrial policy was accelerated after 1985 under the influence of the IMF, and the adoption of law No. 87-23 of 18 August 1987 on privatization.

The disengagement of the State takes into account the specific interests of users or clients and takes the form of groupings of enterprises, or of total or partial sale of shares. In this respect a policy has been elaborated aiming at creating autonomously managed bodies with precise duties taking into account their mission of public utility or mission of general interest. The public infrastructure is operated by private partners, whereby there is a separation between the property and management (is the case of water) or a total transfer of ownership to the private sector (the case of telecoms).

The opening of markets has also included the establishment of regulations based on the provisions of article 6 of GATS, which aims at protecting local enterprises against distortions provided by foreign multinationals which might use unfair trade practices such as dumping or subsidies which may seriously damage domestic producers.

The liberalization process also brought about measures aimed at facilitating access as well as exercises of economic activities, for example through the elimination of professional or importer/exporter licences which were previously conditional for access to a profession.

On balance, the main conditions of a modern economy are met: this is why it is essential that an effective competition policy be implemented. The aim of this review is to verify to what extent national competition rules dealing with cartel agreements, abuse of dominant positions as well as State practices and aids have been complemented and even largely replaced by WAEMU rules.

I. THE HISTORICAL BACKGROUND

Senegal is one of the first developing countries from sub-Saharan Africa to be convinced of the necessity to open more their economies and to increase and diversify their exports in order to accelerate growth⁹⁴. Since January 1994, Senegal is in a phase of global adjustment of its economy, characterized essentially by structural reforms aimed at improving and liberalizing the environment of enterprises.

Opening of Senegal's economy has taken place through liberal policies whereby the role of the State has been gradually reduced to the benefit of the private sector. These reforms are faced with limitations, which

necessitate an effective application of competition rules.

A. A NEW ECONOMIC POLICY

A package of measures was adopted in order to reinforce the existing production capacity and to enable average GNP growth to be superior to the birth rate.

1. From 1980 to 1994

During the 1980s, the economic reform programs were essentially focused on an internal adjustment of the economy and aimed at limiting internal consumption by way of a restrictive fiscal and monetary policy which resulted mainly in reducing internal and external deficits.

At the institutional level, the reforms undertaken consisted in liberalizing markets and prices, developing the private sector and encouraging foreign direct investment as a means of increasing competition.

These measures included sectoral programs on agriculture (New Agricultural Policy) and on industry (New Industrial Policy), named NPA and NPI, respectively.

Hence, the growth of GNP depended on the rebound of both agriculture and industry, thanks to a much more competitive environment, supported by price liberalization.

2. The trade policy resulting from NPI

Elaborated in 1986 with the aim of putting an end to the excessive protection that had always characterized Senegal's industry to the detriment of exporting enterprises, the NPI could be considered as the trade policy aspect of the structural adjustment program.

It aimed at liberalizing both internal and external trade in order to increase the competitiveness of industrial firms and to eliminate the distortions of the domestic market, to rationalize industrial incentive schemes to promote higher value-added sectors which were export oriented, while liberalizing the market for employment by introducing more flexibility in the hiring and firing proceedings and in the determination of wages.

3. The shortcomings of NPI

In spite of the liberalization and deregulation of the economy as its main element, the NPI did not accomplish the expected results because it was only partly implemented: the World Bank itself noted that in its application, the NPI limited itself to the introduction of new tariffs⁹⁵.

According to Government, the shortcomings of NPI stem from two factors. First, difficulties at the macroeconomic and financial levels, as well as political and social instability which took place at the time made it impossible to adopt the auxiliary measures needed to help the enterprises face liberalization by operating a certain number of internal adjustments. Globally, there was need to reduce costs not only by technical means (reducing the prices of energy, telephone and transportation, as well as inputs protected by special agreements, such as sugar, flour, cement and petroleum), but also by revising employment codes and regulations in order to limit wage increases to the rate of productivity.

Second, the failure of NPI was attributed to the instability of the legal and institutional framework. For instance, the tax schedule was constantly revised, placing economic activity in a state of confusion. As a result of the failure of the NPI, the annual growth rate of GNP fell from 3.8 per cent in 1979–1983 to 2.6 per cent in 1984–1988, then to 1.7 per cent from 1988 to 1992.

These weak results were instrumental in reconsidering the role of some sectors, and that of the State itself. For example, the budget surplus obtained thanks to the improvement in the world price of phosphates and peanuts products in 1970 were essentially passed on to an increase in consumption and a deepening of the public and parastatals sector.

As for the private sector, the high degree of protection afforded to domestic industry by the protectionist import-substitution policies of the time, did nothing to encourage domestic producers to increase their productivity, as they were comfortably protected from any competition.

In the public sector and parastatals, the trend consisted in requesting more support from the State instead of producing profit and distributing dividends. Faced with this situation, the State was obliged to borrow both on domestic and international markets.

Moreover, the situation was worsened by the tendency of Senegalese consumers to use mainly imported goods and to limit savings. As a result the current accounts of Senegal sank into deficit.

In 1992–1993, the economic crisis deepened as the GNP per capita receded and the budget deficit worsened. This situation led the Government to adopt, in August 1993, an emergency plan to re-establish the financial capacity of the State and to resume growth.

Although there was a general consensus on the need to restore the public finances and the urgency of remedial actions, it seems this plan did not have direct effects on the trade policy of Senegal. It is rather the medium-term development strategy of the Senegalese economy resulting from the devaluation of the FCFA on 11 January 1994 that set the basis for today's trade policy.

4. Since 1994

The basic aim of the new economic policy following the devaluation rests essentially on two components: the promotion of exports and the transformation of Senegal into an attractive country for foreign direct investments.

To this end, the following efforts were undertaken: (a) adopting strict fiscal and monetary policies under the framework of WAEMU; (b) increasing the productivity of its economy; (c) rationalizing and reducing taxes for enterprises; (d) adding flexibility in the administrative and legal framework; (e) eliminating distortions to competition; (f) reducing the financial constraints on enterprises; and (g) strengthening the institutions supporting investment.

Attracting investors necessitates the creation of a transparent environment for enterprises where competition rules are implemented. That is why, since 1994, various measures were introduced to reduce gradually anti-competitive practices. Such measures were aimed in particular at exceptions authorizing monopolies as well as various licences which were required until then to enter a given profession or market. Such measures were considered to restrain competition. This policy resulted in the adoption of various rules in 1994 published by the Government under the name of "Economic liberalization: its basis and legal instrument".

This government publication refers in particular to:

- (a) Reinforcing competition by liberalizing prices and prohibiting anti-competitive practices (law 94-63); abolishing or renegotiating special agreements which protected various private and public enterprises (decrees No. 95-78; No. 95-99 on Compagnie Sucrière

- Senegalaise: Sugar Company; SOCOIM: Cement Company etc.);
- (b) Liberalizing trade by eliminating licensing procedures with respect to imports or exports as well as reference prices for customs (decree of 31 October 1994 and 30 June 1994), lowering of customs duties and simplification of tariffs, elimination of the monopoly on imports (law No. 95-04); and
- (c) Lowering transportation costs by liberalizing maritime transport (elimination of the cargo monopoly by law of 26 June 1994).

B. REDEFINITION OF THE ROLES OF THE STATE AND THE PRIVATE SECTOR

In the strategic options taken in the aftermath of the devaluation, the redefinition of the role of the State is important. Henceforth, the State is expected to set the rules of the game, and to leave the economic activity to the private sector.

It is only in 1985, under the threat of the IMF not to renew its financial support that the first privatization was undertaken by the Senegalese authorities. By 1993, the Government had privatized 24 of 36 State-owned enterprises (SOEs) due for privatization and had collected close to 20 billion FCFA (approximately \$68 million). These enterprises represented only 14.5 per cent of State participations).

Today, the movement has accelerated, and many industrial and commercial SOEs have been or are about to be privatized (water, telecoms, electricity). This has not always been without hesitation and difficulties, as shown by the case of SENELEC, the electricity operator which was de-privatized in 2000 after the privatization failed. A new privatization scheme is underway, in which the company's equity will be opened to private investors, especially domestic ones.

The privatization methods in Senegal can serve as models for some countries such as Côte d'Ivoire, Cameroon and Guinea, which have similar State monopolies and are faced with similar economic difficulties.

The privatization process took place in two phases. In the first, the preparatory phase, the Government elaborated a series of preliminary measures including in particular (a) the definition of the objectives of privatization; (b) the specification of the sectors to be privatized; (c) the determination of potential buyers; (d) the evaluation of the enterprises to be privatized; and (e) the definition of the bidding and selection procedures and the drafting of the concessions and sales contracts.

In the second phase, corresponding to the actual privatization, a law was passed on 18 August 1987 (Promulgation law) defining the procedures to be applied by the State to privatize. Four distinctive methods were adopted:

- (a) The creation of an autonomous management authority which, on the basis of a precise list of duties and an agreed fee manages the service in the name of the State (e.g. AGETIP, a public interest service; ANCAR, in the field of agriculture);
- (b) The licensing to a private operator, the contract of which concerns a public infrastructure which is operated by a private firm;
- (c) The separation of the ownership and the managerial functions: the State remains the owner and participates in the management board of directors while the daily management functions are in private hands (joint venture); and
- (d) The total transfer of ownership, which has the advantage of providing immediate revenues for the State (e.g. Telecoms).

Such reforms face difficulties relative to the structure of the markets and the role of the State.

In particular, the reduction of the role of the State has not always resulted in its replacement by a formal private sector; this was often accompanied by rapid growth of the informal sector.

Moreover, in spite of the improvements resulting from the 1994 reforms, analysts continue to note that the Senegalese economy is still hampered by a certain opacity of the legal system and of some administrations (customs, taxes, finance in spite of the single window), lack of clarity in the position of the State with respect to reforms (for example, on the competition law, implementation is weak, containing too many exemptions, the Competition Commission being hampered by lack of resources).

II. CONDITIONS FOR STRENGTHENING MARKET ECONOMY IN SENEGAL

A. THE LEGAL ENVIRONMENT

Apart from the competition law, a number of regulations form part of the economic reforms.

1. Business law

Like the other countries of the franc zone, Senegal has applied since 1 January 1998 modern legislation related to business resulting from the entry into force of the uniform law adopted within the framework the OHADA Treaty, signed on 17 October 1993 and ratified on 18 September 1995 by Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo, Côte d'Ivoire, Gabon, Guinea-Bissau, Equatorial Guinea, Mali, Niger, the Democratic Republic of the Congo, Senegal, Chad and Togo.

This treaty aims at improving the legal environment of enterprises in member States. Apart from certain national rules which have not been totally repealed, the business law in Senegal is based on the following harmonized law (actes uniformes):

- (a) Act uniforme on general commercial law which entered into force on 1 January 1998;
- (b) Act uniforme on commercial company law and on economic entities entered into force of 1 January 1998;
- (c) Act uniforme on securities law (1st January 1998);
- (d) Act uniforme on simplified procedures for fiscal purposes and their execution (10 July 1998);
- (e) Act uniforme on collective writing off of losses (entered into force on 10 July 1998);
- (f) Act uniforme concerning arbitration law, and arbitration regulation of the Joint Court of Justice and Arbitration (entered into force on 11 June 1999);
- (g) Act uniforme on accountancy law adopted in March 2000 and entered into force on 1 January 2001 for single enterprise accountancy and on 11 January 2002 for consolidated and combined accounts; and
- (h) Act uniforme on merchandise transport by road contracts, adopted 22 March 2003 and entered into force on 1 January 2004.

In terms of accountancy, the main references applied in Senegal are (a) those of the WAEMU Accountancy Plan for Banks and financial institutions (entered into force on 1 January 1996); (b) the Accountancy Plan of the CIMA Code (chapter 4) for insurance companies; and (c) the OHADA Accountancy Plan for commercial enterprises or enterprises having an economic activity within the OHADA area.

While the scope of application of SYSCOA is limited to enterprises active in the WAEMU area, the Accountancy Plan of OHADA applies to both the WAEMU and OHADA zones.

The harmonized law (acte uniforme) of OHADA on the organization and harmonization of accounts of enterprises located in member States was adopted by the Council of Ministers of Justice and Finance of the organization at its meeting of 23–24 March 2000 in Yaoundé (Cameroon) and entered into force on 1 January 2001 (1 January 2002 for consolidated accounts).

According to the new rules, enterprise accountancy must satisfy to the obligation of regularity and sincerity guaranteeing the authenticity of accounts so that these can serve as instruments of proof of rights and obligations of enterprise partners and of solid means of information for managers and for third parties.

With respect to intellectual property, Senegal (as well as Benin – see part three) is one of the 15 African members of OAPI, the African Organization of Intellectual Property Rules, created by the Bangui Agreement on 2 March 1977, of which Benin, Burkina, Cameroon, Côte d’Ivoire, Gabon, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, the Central African Republic, the Republic of the Congo, Senegal, Chad and Togo are members.

This agreement has established a system of community legal protection, the patents and certificates delivered in one member State of the union having automatic effects in all the other member States of OAPI. They concern invention patents, utility models, trade marks of goods and services, drawings and industrial designs, commercial names, appellation of origin and copyrights as well as neighbouring rights.

The Bangui Agreement was revised on 24 February 1999. The revision was aimed at ensuring the compatibility of OAPI rules with those of other international agreements, namely the TRIPS Agreement. It also aimed at simplifying the procedures of issuance of a right; widening the scope of protection; and avoiding certain legal loopholes. The duration of protection were revised in accordance with those of the TRIPS Agreement.

OAPI has a liaison office in each member State. The members State of OAPI are also signatories of the main international intellectual property rights conventions adopted under the World Intellectual Property Organization (WIPO).

Being members of WTO, both Senegal and Benin are parties to the TRIPs Agreement. This agreement provides for protection of rights that each member State has to affect with the establishment of a quasi-judicial dispute settlement system.

The most urgent issue in WAEMU members such as Senegal and Benin concerns the counterfeit of trade marks and unfair competition taking place within the informal sector. In addition, there is the issue of protection of biodiversity and of traditional knowledge.

These harmonized rules (*actes uniformes*) need to be completed by additional ones. The Council of Ministers of OHADA of 22-23 March 2001 in Bangui decided to include in the field of business law the following laws:

- (a) Competition law;
- (b) Banking law;
- (c) Intellectual property rules;
- (d) Civil society law;
- (e) Law on Cooperatives and mutual societies;
- (f) Contract law; and
- (g) Rules of proof.

With respect to competition law, the project was renewed during a meeting held in Lomé in March 2007.

Among the institutions created by OHADA, the Joint Court of Justice and Arbitration (CCJA) plays an important role. It receives appeals against the decisions made in final resort by national jurisdictions and it can review or challenge them; it also issues advices on the interpretation and application of common provisions of the treaty, of regulations and the harmonized acts (*actes uniformes*). It also intervenes on issues or arbitration.

2. Rules pertaining to the administrative framework regulating access to commerce and industry

In order to facilitate entry and the exercise of economic activities numerous measures have been adopted. First, the previous authorization or licensing procedures for certain commercial activities has been repealed in order to favour employment and investment (law 94-67 of 22 August 1994).

Second, the principle of free exercise of economic activity was adopted, which concretizes the principle of free access to a profession; in this respect law 94-69 of 22 August 1994 defines economic activities (article 1), institutes the free access and limits the licensing to the “safeguard of general interest” while defining the juridical status of the professional card (article 4). These provisions were invoked in 2004 to try to slow the entry of excessive Chinese imports in distribution, crafts and clothing.

To this end, it had been proposed to apply article 2 of law No. 94-69 by involving a threat to the general interest in order to protect or reduce the risks of seeing entire sectors of activity disappearing. Hence, article 1 of the draft decree would have introduced a pre-import licensing system to

be issued by the Ministry of Trade for any foreign person or enterprise outside to the WAEMU or ECOWAS countries. This draft was never adopted.

3. Regulations on distribution

In Senegal, it is the general contracts law which applies apart from regulations limiting or prohibiting specific practices such as cartels, refusals to deal, etc. It should be noted that, before liberalization, Senegal had taken legal action to regulate certain distribution channels. This was essentially the case of:

- (a) Law 67-50 of 29 November 1967 regulating economic activity taking place in the streets or in public places and its decree of application;
- (b) Law No. 74-27 of 18 July 1974 authorizing sales by installments of certain goods;
- (c) Decree No. 70-1335 of 07 December 1970 regulating exclusivity contracts on sales or purchases;
- (d) Decree 77-1074 of 5 December 1977 on the declaration of inventories of products;
- (e) Decree 93-1030 of 6 September 1993 amending and complementing article 3 of decree No. 89-1559 fixing the conditions of the prior - authorization of access to craft industry, manufactures and commercial professions; and
- (f) Ordinance No. 16546 of 14 December 1987 fixing the list of products authorized for direct sale by producers to consumers.

The liberalization of distribution channels initiated in 1986 within the plan of action for industry was completed in 1994 with the repeal of many regulations applied to distribution. This made it possible for operators to improve the performance of

their distribution channels and to adopt competitive prices.

At present, the problems concerning distribution are limited to the functioning of market. Big trade names have local partners. Hence, the multiplicity in recent years of distribution channels (selective, exclusive, franchised, etc.)

The problems concerning the distribution sector can be divided in two: those concerning the organization of market and those relating new practices.

(a) Concerning the organization of markets: absence of a sectoral trading policy

In Senegal, the development of the informal sector (60 per cent) of employment, as described below) and the increased decentralization of market surveillance, necessitates an organization of public areas.

The aim would be to rationalize the use of economic activity in times of deregulation as there is an explosion of unfair competition between the formal and informal sectors, the latter occupying “sidewalk” and “weekly” markets. The need for such regulation of distribution is growing because of the growing presence of important trade-marks on the one hand, and the invasion of Chinese imports on the other.

(b) Modern distribution channels

The arrival of large distribution companies in a wide numbers of sectors such as luxury trade-marks, food chains, tourism companies and other sectors, has brought about new distribution mechanisms.

Exclusive distribution is by and large covered by decree No. 70-1335 of 7 December 1970 on exclusivity contracts for sales or purchases. According to the decree,

agreements restraining competition can be authorized “if they improve and widen the distribution of production or accelerate economic progress through specialization and rationalization of distribution channels”.

The decree provides that exclusivity contracts can only be approved “if their use is not only motivated by the wish to restrain competition”. In other terms, exclusivity contracts should not impose competition restraints to distributors which go beyond of what is necessary to achieve economic progress.

These conditions of approval imposed by the 1970 decree can be compared to those of article 26 of law 94-63 on refusal to deal, and to article 3 of regulation 02/2002/CM/WAEMU if the minimum resale prices fixed between suppliers and vendors are similar to a cartel agreement (see below).

With respect to selective distribution, any discriminatory condition imposed by the suppliers may be considered as anti-competitive practices as provided by article 28 of law No. 94-63 (see below) which prohibits “any producer, trader or industrialist, individually or collectively, to discriminate in its conditions of sales, if these are not justified by differences in the total cost of supplies of goods or services”.

For example, law No. 94-57 of 26 June 1994 on public health, reserves the commercialization of pharmaceutical products to pharmacies (chemists). However, although paragraph 2 of the single article of this law includes cosmetics and body health products containing medical ingredients as medicines, these are found on other markets.

Hence, non-chemist resellers of such products are systematically faced with refusals to deal when they attempt to buy from official distributors (Laborex Senegal,

SODIPHARM). Busting the extension of the chemists’ drugs monopoly to cosmetics etc, could constitute a restraint to competition.

In Senegal there are no regulations dealing specifically with selective distribution. Nevertheless, the juridical system covers such vertical restraints through domestic and community law (law No. 94-63 and regulation No. 02/2000/CM/WAEMU, respectively).

Selective distribution channels have two mechanisms to block parallel distribution: complaints for unfair competition and against counterfeit goods.

Concerning *unfair competition*, it is article 35 of law 94-63 which prevails. Any distributor who obtains merchandise from non-approved distributors and resells products which he is not authorized to by the official dealer infringes the law.

Unfair competition may lead to a complaint being lodged to local courts. It should also be noted that when the packaging of the products in question indicate that they have to be resold by authorized distributors, the violation includes misleading or false advertising as well.

There is also the question of a breach of trade mark. Senegal’s penal code applies in case the distribution commercializes a trade-mark without prior authorization by its owner⁹⁶.

In all cases, the non-authorized retailer can be condemned if the violation is established, irrespective of the fact that an authorized dealer who would resell outside the authorized selective network would be in breach of contract.

Concerning the specific case of a complaint for counterfeiting, article 398 of the Penal Code of Senegal defines counterfeit as “any reproduction, representation or distribution,

in any way possible of an intellectual property in violation of the right of its owner". The counterfeit trade is highly damaging to the national economy, irrespective of the low prices for consumers. Counterfeit trade can be challenged in three ways:

- (a) On the basis of law No. 66-48 of 27 May 1966 on the control of foodstuffs and repression of frauds; and in accordance with the provisions of law No. 94-63 of 22 August 1994. As this violation is not singled out in existing economic legislation, the Direction of Internal Trade acts on the basis of fraud with respect to the quality or the origin, in accordance with articles 10, 12, 13, of law No. 66-48. At the same time, articles 34 and 35 of the law can be invoked to consider these practices as infringements to the rules concerning the display of prices tags and misleading information.⁹⁷
- (b) Civil action, which is so far the most common system of redress. In Senegal, the proceedings are in line with the Bangui Agreement of 1999, and in accordance with article 42 of that agreement with respect to Trade-Related Intellectual Property Rights (TRIPS). However, the plaintiffs often encounter difficulties to obtain and retain elements of proof of the existence of counterfeit.
- (c) Criminal action can be taken against the authors of counterfeit trade, both in terms of the general provisions of criminal law, if there is fraud, and in accordance with legislation on trademarks and copyrights. Also, article 61 of the TRIPS Agreements provides for criminal proceedings and sanctions for proven counterfeit of trademarks or piracy on a commercial scale. In Senegal, certain aspects of counterfeit trade are sanctioned by the Criminal

Code, in particular under its articles 397–400. Nevertheless, according to the ministry, the penalties are insufficient to dissuade violators, and prison sentences are often not applied because of the difficulty of establishing the “usual character of the violation” required under article 379 of the Criminal Code.

Franchise: this system is increasingly frequent in recent years, although it is still difficult to identify franchising because no specific formalities are required (no obligation to register a franchise with the commercial register). This distribution system has appeared since three to five years in Senegal, especially in the distribution of consumer goods, tourism, ready-made clothing, and catering services in general. So far, however, there exists no specific legislation or rules with respect to franchising, which are based on common rule.

Nevertheless, in accordance with article 3 of regulation No. 02/2002/CM/WAEMU, certain clauses such as resale price maintenance, local territory clauses, which might represent market allocation, exclusive purchasing, territorial exclusivity clauses, etc, fall within the purview of law and should be controlled.

Distribution through Internet has also grown in Senegal, in the absence of any specific regulations on electronic commerce and should be covered by rules relative to contracts between distant parties; such contracts also fall within the scope of regulation 02/2002/CM/WAEMU and of law 94-63.

An example can be found in the distribution of oil products, in which a contract between the agent of a gas station and the distributor obliged the former to pay an excessive price for the return of oil tanks, disproportionate with respect to its real value.

4. Unfair competition

Equity and free-competition are at the core of Senegal's competition rules. Competition is requested both by the authorities and by the enterprise managers themselves.

Accordingly, the capacity of businessmen to attract customers because of quality of service and innovation cannot be sanctioned, because the prejudice to competitors in this case is perfectly legal.

Competition is not only sought by the State⁹⁸ but also by businessmen themselves⁹⁹. Hence, the businessman who has the capacity and ideas to attract clients from other competitors will not be in breach of the law since the damage he inflicts on competitors is fully legal.

It is only if he indulges in unfair competition that other firms can lodge a complaint against him for prejudice. For this, the civil responsibility conditions of guilt, prejudice and a link of causality between guilt and prejudice have to be met (article 118 COCC, which corresponds to article 1382 of the French Civil Code).

For this reason, unfair competition action has always been linked to the general theory of civil responsibility. But today it is namely the respect of a right which is at issue: the right of the economic actor to appeal to his customers.

(a) The main cases of unfair competition

These include the following:

- (a) Disparaging a competitor or his products with the aim of disqualifying him: It is not sufficient to prove that the criticism is justified to exempt the author of allegations. The judges also take into account the intention to damage the competition. Hence, a trader who alleged that the products of his

competitors were prejudicial to their customers has been found guilty of unfair competition. Comparative advertisement is formally prohibited by law N° 83-20 of January 1983 in its article 9, which prohibits "any reference which might bring prejudice to an enterprise or another product".

- (b) Confusion: This consists of taking advantage of the good image of one firm to induce the consumers to believe this is the same enterprise. Confusion can bear on products, commercial on trade-mark, on location of premises, etc. Confusion must be distinguished from parasitical competition (free-riding) whereby the trader effectively tries to confuse the customer, but with respect to a different class of products, aimed at different customers¹⁰⁰.
- (c) Disorganization: This consists of destabilizing a competition in particular by means of:
 - i. Industrial espionage;
 - ii. Unduly attracting the employees of a competitor in order to attract his clients; or
 - iii. Distorting a competitor's flow of supplies, etc.

The authors of this review can draw the following conclusion: legal action against unfair competition presupposes a guilty action, not in violation of law, but of a professional practice. The guilt does not need to be intentional, although the judges take the intention into consideration to impose higher penalties

(b) Sanctions

Action against unfair competition is sanctioned by three types of civil penalties which can be cumulative:

- (a) Damages and interest which are difficult to evaluate precisely; but the judge can request a

condemnation which can even be symbolic;

- (b) Measures aimed at stopping the unfair competition, such as, for example the modification of the name, the location, or prohibition of an advertisement; and
- (c) Measures of public information: the judges often order the publication in the press of a decision at the expense of the defendant of an unfair competition practice.

Finally, unfair competition is also covered by law No. 94-63 in as far as it breaches the principles of free-competition.

5. Regulation of public procurement

(a) A necessary reform

Senegal has adopted a new Public Procurement Code, adopted by decree No. 2002-550, published in July 2002. This code was especially needed against distortions and in particular to fight against corruption¹⁰¹, many forms of abuses having appeared generally:

- (a) A too frequent recourse to direct purchasing procedures without using competitive bidding procedures, motivated by an erroneous interpretation of 1982 regulation¹⁰².
- (b) Direct orders: this procedure does not request a written contract but only a letter authorizing to order supplies from one or more supplies;
- (c) Exemptions: mainly decree No. 97-632 of 18 June 1977 on the Project of Reconstruction and refurbishing of Government Buildings (PCRPE), which authorizes direct contract awards on the basis of political urgency up to a volume of 100 million FCFA for feasibility studies and supplies; and 150 million for new works.
- (d) It was also a common practice for the contractor to orient the award of

the contract through various means: prior exclusion of potential bidders by limiting the publicity about the tendering procedure, launching of tenders pre-arranged to correspond to the specificities of certain bids, limited time of response for participants, excessive duties for releasing the files related to the tendering procedure, false allegations that files on the tender are no more available, etc.

- (e) The discretionary power of the commission in charge of awarding the contracts, with long tenure periods for the incumbents, facilitating their favouritism towards their cronies in the private sector.
- (f) Market allocation based on taking turns in time (“tontine”).

(b) The new code

In 2000, a Code on Transparency with respect to management of public accounts and a reform of Government procurement were adopted by the Council of Ministers of WAEMU. However, it has never been implemented so far.

This new Code on Government procurement introduces important changes in order to facilitate proceedings and especially, to introduce more transparency in the process of awarding contracts.

The first novelty of the Code is that it applies to a greater number of public authorities: it covers enterprises including corporations in which the State has a majority stake in the same way as the State itself, local government and public undertaking.

Two other important changes include first the introduction of a two-tier tendering procedure and second two types of contract awards: open bidding and limited bidding.

While the regulatory duration of bidding procedures has been lengthened, the total duration, from the public announcement to the award has been limited to a period of three months.

As for the thresholds, they have been increased to take inflation into account. The scale of procurement thresholds has been revised. While the new Code of Public Procurement does not change much in terms of the tendering procedure itself¹⁰³, it insists more on two principles; competition and transparency.

When the tendering procedure is launched, it must invite at least three bids to be considered competitive: each bidder must have the same information specified in his invitation to bid. The publication of the tender is usually in written form in the gazette of the Chamber of Commerce (distributed freely) and in daily newspapers.

The deadlines for bidding have been lengthened in order to attract more bids and increase competition. These are 20 to 30 days under normal conditions and 10 to 15 days under urgent proceedings. The opening of bids is done in public on a pre-announced date.

The regulation permits the “National preference”, but within limits. While there must not be any national preference clause, the minister can, if he deems necessary, decide to apply a preferential regime as a waiver to the regulation, in favour of Senegalese enterprises¹⁰⁴ or suppliers of products originating from Senegal, as long as their bids do not exceed the best offer by more than 10 per cent.

In principle, it would seem that such preferences would be limited, because in certain branches of activity such as construction and public works foreign firms have local subsidiaries established under Senegalese law, or otherwise because the

contract concerns products that are not produced in the country. Paradoxically, it is sometimes the lenders who (World Bank in particular) insist on a national preference based on criteria of nationality of shareholders for reasons of development of a local private sector, to the detriment of foreign subsidiaries established under Senegalese law. It should be noted in this respect that in many cases the latter provide more value added and employment facilities than the former types of enterprises with local shareholders.

The National Commission on Contracts of Administration is empowered with the control of markets. In addition, according to the regulation, each ministerial department, local Government and public undertaking will have to establish its own control units, to ensure the regulation is implemented satisfactorily. Disputes are settled out of court or by recourse to regional tribunals.

In accordance with OHADA rules, the award, execution and interpretation of government procurement can also be submitted to arbitration proceedings.

(c) *Effective implementation*

In fact, while the new Code on Government Procurement entered into force in July 2002, its decrees of application have still not been adopted and the Code is not operational.

This was observed not only by civil society, but also by the government itself, in cooperation with the World Bank. The distortions observed in the proceedings, juridical supports, stages of tendering procedures, lack of transparency, etc, are therefore likely to continue. Two unfortunate developments should be signaled in particular:

- (a) The legal framework: certain provisions of the new Code are not in line with the Code of obligations

of the Administration of 1965. More to the point, article 264 of the new Code repeals waivers, but this has not been applied so far.

- (b) The controlling bodies: to control the satisfactory execution of tendering procedures internal and regional commissions should be established in addition to the CNCA. But more than six months after introduction of the new code, the introduction of these bodies had not taken place.

6. Incentives for investors

Senegal has adopted a number of legal provisions to encourage private investors under the “Code on Investments”. Specific advantages have been accorded to enterprises in manufacturing or agriculture which export at least 80 per cent of their total output, under the duty-free regime for exports. These companies are subject to preferential corporate tax treatment, in addition to customs and fiscal exemptions.

This system is implemented with the cooperation of, in particular, (a) the Chambers of Commerce, Industry and Agriculture; (b) the Agency for the Promotion of Large Works; (c) the Agency for the Promotion of Small and Medium-sized Enterprises (SMEs); (d) the National Society for Industrial Promotion Studies (SONEPI); and (e) the National Agency in charge of the Promotion of Investment and Large Works (APIX). Also with the same objective, a free industrial zone has been created in Dakar, which offers selected enterprises fully furnished land under advantageous lease conditions.

The Investment Code has the following characteristics:

- (a) A wide scope of application:
- Agriculture, fisheries and breeding, related transformation activities, including harvesting

and preparing vegetable, animal and other products;

- Manufacturing and transformation activities;
 - Research, mining and transformation of mining products;
 - Tourism and related activities;
 - Culture-related activities by SMEs (books and newspapers) and centres of documentation and media;
 - Health services, education and assembly of industrial equipment; and
 - Port infrastructure works;
- (b) Flexible conditions of access: The investment must be equivalent to a minimum of 5 million FCFA and the employment opportunities at least three. Equity funds must represent at least 20 per cent (for investments between 5 and 200 millions FCFA) and at least 30 per cent (over 200 million).
- (c) Simplified formalities and procedures: The requests for authorization require a maximum of 10 days and all administrative formalities related with the establishment (authorization to start operations, identification with the fiscal authorities, inscription with social organization) are covered by the Single Window of APIX with a maximum duration of 20 days.
- (d) Social, fiscal and customs advantages in addition to “traditional” guarantees offered to investors: Free transfer of funds and profits and equality of treatment (non-discrimination between national and foreign before the administration and for access to property), is offered both to investment as well as operations. Moreover, special benefits are provided to SMEs which give priority to local suppliers and contribute to technological progress.

- (e) Duration and areas of location: The duration of the benefits offered to such operators are between 5 and 12 years, depending on the areas of location of the enterprises the benefits are gradually reduced in the three last years of special regime.

Common law provisions complement the Code of Investment (incorporation in the tax system, customs tariffs, Mining, Environment, Forests laws, as well as regulations on Employment).

The National Agency in charge of the Promotion of Investment and Large Works (APIX).

Created in July 2000, this agency plays a special role in promoting investment in Senegal.

Its duties include:

- Improving business environment in Senegal;
- Searching for and identifying national and foreign investors;
- Promoting the position of Senegal in terms of privileged host of FDI in Western Africa;
- Ensuring follow-up with investors;
- Following up and evaluating investment projects in Senegal;
- Implementing the large infrastructure projects of the Head of State, on the model of BT, BOT, BOOT, etc.

The services offered include:

- Receiving and helping investors through the different phases of their investment in Senegal;
- Supplying regularly economic, commercial and technical information on the main sectors of activity;
- Assisting investors in accomplishing the formalities of establishment of their firm, and in obtaining the various administrative licences (access to land, construction permit, authorizations, etc.); and
- Support in obtaining bonus or partnerships.

The creation of APIX is proof of the political will of the new Senegalese authorities to develop private investment in both manufacturing and infrastructure sectors. A specific characteristic of APIX is that it brings together management of large works with the Promotion of investment.

A multilingual staff is available to advise investors through each phase of implementation of their projects:

- Handling of requests for admission to the Code of Investment and to the status of Duty-Free Enterprises for Exports;
- Assistance to investors in resolving problems related to obtaining various permits and authorizations (construction permits, etc.), facilitation and conciliation in case of difficulties with the administration;
- Support for the outlook for financing, execution of studies aimed at improving business environment; and
- Managing the Centre of Formalities for Enterprises.

A modern single window guarantees the best possible follow-up of investment projects; a programme of action is about to be put in place with a view to obtain an ISO 9002 Certification for the Single Window and APIX.

Finally, APIX is in charge of a number of files related to improving the business environment, in cooperation with public administration:

- A review of the support mechanisms for the private sector;
- A simplification of Administrative Procedure;
- Elaboration of a general law on Investment; and
- A revision of the rules related to the business environment.

**B. ECONOMIC ASPECTS:
LIBERALIZATION MEASURES IN
CERTAIN SECTORS**

1. The oil sector

Senegal has adopted law No. 98-31 of 14 April 1998 liberalizing this sector.

(a) Situation of the oil sector before liberalization

Supply and distribution of oil were under the monopoly of Société Africaine de Raffinage (SAR), a refinery controlled by four oil companies (Elf, Mobil, Total and Shell) consolidated under the “group of oil producers” (GPP).

Depots and transport were also under the control of the cartel of the members of SAR. This was justified by the specificity of oil products and for security reasons.

(b) The reform

The reform is part of the programme of development of the energy sector (LPDSE) adopted in 1997, which adopted principles such as competition, authorization of mergers, and partial sales of assets.

The law of April 1998 therefore endorses the following new principles:

- (a) Replacing administered prices by a regime of ceiling prices;
- (b) Increasing the price of oil supplies to the reference called “priority with imports”;
- (c) Opening access to the oil deposits for new operators;
- (d) Putting an end to the import monopoly of SAR;
- (e) Opening of a “transport” segment – analysis of the functioning of the oil sector shows that the goals of the law have only been partially met;

- (f) There has been a single new operator (Elton Corp.);
- (g) Supplies at the “import parity” or import price level remain favourable to SAR, which monopoly position seems to have survived;
- (h) Entry barriers for new operators in the sector constitute a serious obstacle to entry; and
- (i) The calculations leading to the “import parity” mean that Senegal suffers from the disadvantages of a monopoly without benefiting from the advantages that should derive from economies of scale and from stability of monopoly action.

2. Telecommunications

The State has always controlled the telecoms sector for prudential reasons, in particular. Reform is underway in various stages.

Law 96-03 of 22 February 1996 (Code of Telecommunications) initially set the basis for liberalization of the sector, after privatization of SONATEL, the incumbent operator, which opened its capital to France Telecom which became its strategic partner after signature with the State of a concession including a business plan and a programme of development of the network.

After that, mobile telephones were opened to competition with the granting on 3 July 1998 of a GSM license to SENTEL, after an international tendering procedure.

Liberalization of the sector is confirmed by the adoption of a new Telecommunication Code (law No. 2001-15 of 27 December 2001) which establishes the functions of operation of the sector, the applicable legal system and creates a sectoral regulatory body. The new Telecoms Code introduced the following main innovations:

- (a) A better coherence among the basic principles regulating the sector:

- Transparency;
 - Healthy and fair competition;
 - Good treatment of customers;
 - Respect for secrecy of calls;
 - Respect for the conditions of an open network;
 - Contribution of operators to the tasks of developing universal services of telecommunications; and
 - Obligation of interconnection of networks.
- (b) Improved coherence among juridical regimes applicable to networks, services and telecom equipment:
- Freedom for internal networks and radio-electrical installations exclusively composed of low-power and small-distance capacities;
 - Licenses for establishment and/or operation of all networks open to the public;
 - Authorization of establishment operation of independent networks;
 - Authorization for radio-electrical installations, terminal equipments, test laboratories and measure telecoms equipment as well as specialists installing radio-electrical equipment; and
 - Declaration for the supply of value-added services.
- (c) Creation of an independent regulator named Agency for the Regulation of Telecoms (ART), in charge under the direct authority of the President of the Republic, of guaranteeing healthy and equitable competition for the benefit of consumers, operators of the network and overall, the national economy.

ART collects all the contributions and duties received from users, including a percentage on the income from licenses.

3. Electricity

Senegal has adopted, starting in 1998, a programme of reforms of the electricity sector, in particular with entry into force of law No. 98-29 of April 1998.

This reform aimed essentially at attracting important private investors and to introduce in time competition in the sector. To this end, the law introduces three major innovations:

- (a) Reform of the structure of the electrical power industry;
- (b) Establishment of a system of license and constitution; and
- (c) creation of a regulatory authority.

On all three types of activities – namely production, transportation and distribution of electric power – the aim is opening access even if the major position of SENELEC is to be maintained.

- (a) Production: it is relatively open to competition with the presence of private suppliers by way of tendering procedures, but SENELEC is the only purchaser of power from independent producers.
- (b) Transportation: the electricity network constitutes a natural monopoly. It is the support of the transportation activities and hence has to be regulated in the most efficient manner to ensure that consumers get electric power supply of good quality. SENELEC is the sole transporter of electric power throughout the country's network excepted for international interconnections. A concession agreement with universal service obligations binds SENELEC to the State, and fixes the conditions of access for independent operators and the role of SENELEC in the execution of its public service, its relations with consumers and the exchanges of power between the

different regions of the country and supply of electricity to large industrial companies.

- (c) Distribution: SENELEC is the exclusive distributor of electricity within the territory comprising all regions having electricity and those where power was being installed at the time of entry into force of its concession, plus those regions where the business plan requires it to install electric power.

In the future, a liberalization of the market for large customers is foreseen, as well as transportation for which network access duties will have to be paid by independent operators. At the institutional level the reform has resulted in the creation of a Commission for the Regulation of the Electricity sector (see below after Part IV B).

4. Agriculture

Senegal was the first West African country to engage in structural adjustment programs under the aegis of the Bretton Woods Institutions. After 1978, the economic crisis in Senegal, especially in agriculture, and its adverse effects on public finances obliged the Government to accept IMF-inspired stabilization program and then the economic and financial reforms (PREF, 1979).

(a) Structural adjustment policies: 1978–2000

Initiated in 1978, these policies had the following consequences on agriculture:

- (a) The closure of ONCAD in 1980, allowed a progressive disengagement of the State from the commercialization of agricultural products and from the supply of inputs to farmers;

- (b) The New Agriculture Policy of 1985 meant an acceleration of retreat of the State from the agricultural sector; NPA also made it possible for the State to eliminate gradually its subsidiaries or fertilizers; and
- (c) The Structural Adjustment Program of the Agriculture sector (PASA), which was approved by the World Bank in 1995 and the continuation of the retreat of the State from all economic activities, including commercialization, supply, and transformation of agricultural products was accompanied by the liquidation of the Price Equalization and Stabilization Fund (CPSP), the liberalization of rice importation, and the suppression of cross-subsidization between products of public consumption. The privatization of SONACOS only took place after the third attempt.

Senegal adopted certain international agreements which change the environment of family farms. This is the case with the Uruguay Round Agreements (prohibition of any non-tariff distortion in trade of agricultural products, elimination of import quotas, of import licensing procedures, reduction of aids to farmers and elimination of export subsidies). It is true with the WAEMU Treaty and the common tariff of the union which was adopted in 2000.

The directives on agricultural policy of the union have also been approved in 2001. The ECOWAS also follows the same path, in adopting a common external tariff. All these directives are based on the same liberal economic principles and result in increased free-trade in agriculture products where the farmers of the sub-region are more exposed to competition on their own markets.

The tendency is towards developing large-scale industrialized agriculture which is essential to strengthen the competitiveness

of the Senegalese agriculture and to diversify exports of agricultural products. Accordingly the peanuts producers would lose all State subsidies.

However, the decisions are not always in conformity with these principles. For example, the Government intervenes now and then in fixing prices of agricultural products (peanuts, cotton) and in providing loans to farmers. It also directly intervenes in the commercialization of farm products.

(b) Structural reforms and market liberalization

Market liberalization concerned essentially product distribution channels and markets which were previously subject to administered pricing such as peanuts where the State was the exclusive purchaser. The same was true for regulated agricultural products such as rice. Price and import regulation reforms led to the opening of the

import market for foodstuffs to private operators.

However, questions about regulation of agricultural markets became acute with respect to rice and other products such as poultry, onions, etc. this explains why a mediations authority, the Agency for Regulation of Markets (ARM) was set up in 2002, with the object of supervising the good functioning and organization of markets. ARM is part of the measures adopted concurrently with the liberalization of rice distribution networks and provides information to operators. It constitutes an instrument for stabilizing internal supply and demand as well as for rationalizing imports. Liberalization resulted in a restructuring of the organization and functioning of various channels of distribution, in particular in the field of peanuts.

The channel of distribution of the groundnuts industry

The development of this distribution channel is closely linked to pricing policies which were adopted from 1930 to 1967, when it was given preferential treatment by France. In 1963, a 10 per cent tariff was imposed on imports of vegetable oil, except from that imported from Senegal. In 1967, the preferential customs tariff was eliminated and producer prices were adjusted to world prices.

With respect to the organization of the market, this first step towards liberalization included the disappearance of the State as a purchaser and distributor and the entry of the private sector. This is the case in particular of SONACOS and its subsidiary SONAGRAINE, as well as NOVASEN, which are involved upstream in the production process as they manage inputs. A single purchasing price for peanuts is set at the beginning of the season in consultation with the producers.

Since 2003 a process of total privatization has been undertaken. In 2005 SONACOS has been sold through a tendering procedure to a French consortium called ADVENS, which is associated with SODEFITEX.

At the same time the State has kept a 20.15 per cent Stake in the company. This privatization remains to be completed by elimination of all protective measures on inputs of vegetable oils.

Hence, the phase of industrial transformation is done by SONACOS, NOVASEN, and the agro-industrial group TOUBA. SONACOS has the widest market-share, with an annual capacity of 600,000 tons. It supplies both the local market for refined vegetable oil (which is imported in its primary form and then refined) as well as the export market (essentially in non-

refined products).

NOVASEN, with capacity of 50,000 tons per annum has received duty-free exporter status, for its exports of non-refined vegetable oil. The agro-industrial group TOUBA for its part has a capacity of 30,000 ton per annum and sells refined oil on the local market.

The production-distribution chain of peanuts is ill-equipped for the new market conditions, in particular with respect to its long-terms strategy, which has been elaborated by SONACOS. The protectionist policies of the past have been detrimental to SONACOS which competitiveness of world market is weak. The duty on vegetable oils imposed initially to allow SONACOS to generate sufficient income to support the production - distribution chain has never been utilized to this end. The subsidization of vegetable oil, essentially through the fixing of producer price, was ensured by the State

A complaint in this field has been lodged by NOVASEN against the State of SENEGAL, with respect to the distribution of State aids to this sector. This file has been submitted both to the National Competition Commission of Senegal and to the Commission of WAEMU (see below).

5. The informal economy

The informal sector constitutes an important element of Senegal's economy as it concerns a large part of the workforce and production. In the Dakar region, the informal sector contributes to some 11 per cent of the GNP. However, this dynamism is fraught with instability, which underlines the weakness of the economy as a whole.

The study of the informal sector by the Directorate of Forecast and Statistics in the Dakar region is in line with the data obtained at the national level. For the Dakar region, the informal sector is estimated to have achieved a total output of about 522.4 billion FCFA and created value-added in the order of 380.9 billion FCFA; which represents 11.4 per cent of national revenue. This dynamism is undermined by the fact that it is a disorganized sector which totally escapes any control by the State and data collection by official statistical services.

Nevertheless, the State tolerates this sector which, as recognized, provides means of survival for a wide proportion of the low-income population and contributes to a

certain level of tax payments in the form of the "patente" or license. Around 40 per cent of the informal producers are unaware of the registration procedures. In all probability, 15 per cent of the informal sector would be able to comply with registration requirements. The fundamental problem of the sector is that it also ignores any accounting standards, market studies, social security, etc. The sector is therefore totally excluded from the traditional banking system for loans, credit, etc.

In spite of the precariousness created by this situation, the informal sector plays the role of security-valve for the economy by offering means of survival for the low-income population. The sector is approximately divided among the following activities:

- (a) Industrial production: 30 per cent;
- (b) Commerce: 30 per cent; and
- (c) Services (repairs, transport): 21 per cent. The last sector is the one which has the largest employment share (36 per cent).

In Dakar, the study of the Directorate on Forecasts and Statistics estimates there are about 281,600 informal production units. This corresponds exactly to the number of households in Dakar, which would imply

that each household generates at least part of its income through the informal production units. Another characteristic of the informal sector is that it employs many women: 42 per cent of active women are involved in the sector of which they hold the most precarious occupations. The small size of each unit and their high numbers makes this sector a very competitive one. The competitiveness of the informal sector is perceived as a handicap, however, by the commercial firms of the formal sector, some 22 per cent of which have to compete with them.

III. THE LEGAL ENVIRONMENT OF COMPETITION

Senegalese competition law is based on law No. 65-25 of 4 March 1965 on prices and infringements to economic legislation. This law, which had a “dirigiste” approach, especially on price matters, did not prohibit anti-competitive practices affecting prices. The law only concerned cartel agreements.

Today’s competition rules are based on various texts based on law No. 94-63 of 22 August 1994 on prices, competition and economic disputes, and its decrees of application. The fundamental principles of this new law are enunciated in article 1 as follows:

“The present law seeks to define the rules governing free-competition, free-prices and obligations on behalf of producers, traders, providers of services and all other intermediaries and aims at preventing any anti-competitive practices, to ensure equity and legality of all transactions including in particular price transparency, elimination of restrictive practices and inflation.”

The fundamental objectives of economic freedom, prevention of any practice aimed at distorting such freedom, as well as transparency in the market are among those clearly listed. This is a comprehensive law, which like some foreign laws (in particular the French ordinance of 1986), has a wide scope of application, which in its 91 articles covers not only competition as such, but also price regulations and unfair competition.

Market freedom means free-competition (it is only the abuses which are challenged) and free prices (contrary to law No. 65-25, the administrative control of prices has been eliminated and prices are from now on based on free-competition). Market transparency is ensured by various provisions of law No. 64-63 which regulates commercial information as one essential condition of the free-play of competition. This information is aimed principally at consumers, but it can also serve professionals.

A. DEFINITION OF PRACTICES WHICH MAY AFFECT COMPETITION

1. Governmental practices or measures

State intervention prior to the reforms included monopolies, price regulations, promotion of national champions, through a multiplicity of State aids meant to help local firms to face international competition in an environment characterized by small national markets and relatively small national firms. Of course, at the present time there still exist monopolies and waivers to the liberalization of prices, and State aids are afforded to certain enterprises. Some of these measures can be considered as compatible with competition law, for example where utility monopolies serve the general public interest. Others seem to be less in line with WAEMU community law, such as for example the promotion of FDI through investment

codes which favour foreign investors by affording them tax holidays which are not provided to other competitors.

2. Practices by enterprises

According to the information collected during interviews, the Senegalese economy is still largely hampered by anti-competitive practices, in spite of the economic reforms and the opening-up of most sectors to free-competition. This is the case, for example, with price-fixing arrangements under the aegis of professional associations. Service providers, transporters and liberal professions are also often accused of using such practices. Similarly, in sectors where one or a few enterprises are able to dictate their wishes by fixing resale prices, conditions of sales, etc, such enterprises are often accused of abusing their dominant position. Even more so with the opening of borders, where certain enterprises may feel threatened and therefore seek to entrench their position by trying to block entry through collusive agreements or abuses of dominant position.

3. Practices by foreign firms

Anti-competitive practices originating abroad are also often mentioned, especially by enterprises located in the common market of WAEMU. They may attempt to foreclose their domestic markets to Senegalese competitors. In the same way, foreign enterprises may also be tempted to enter the Senegalese market by way of dumping and other unfair practices which violate national, regional and multilateral rules, such as counterfeit trade.

B. LAW NO. 94-63 OF 22 AUGUST 1994

1. General description of the law

The text of the law includes various parts. Part one is on competition. First of all, the law provides for free prices and establishes a Competition Commission (Chapter I), it defines the rules regarding anti-competitive practices which include collusive practices (cartels agreements) and industrial practices (which cover not only refusal to deal, but also discrimination, predatory pricing, loss-selling and also abuse of a dominant position). Anti-competitive practices are defined as those which block “the positive evolution of market forces” (article 23). The notion of “positive evolution” draws attention because of its peculiarity, but does not seem to have operational consequences. If the distinction of anti-competitive practices between collusive and individual ones has any practical effect, it is somewhat peculiar to list abuses of dominant position among individual practices, since they are usually classified like cartels, among those practices that distort markets and are sanctioned taking into account their effect on the market. Individual practices, however, are those which can be sanctioned independently from their effects on the market.

Law No. 94-63 classifies anti-competitive practices in two categories: individual and collusive (or collective) ones.

- (a) Collusive practices under article 24 of the law include cartel agreements and all collusive arrangements having the effect of distorting free-competition.
- (b) Individual practices for their part, include:
 - (i) Refusals to deal (article 26);
 - (ii) Discriminatory practices (article 28);
 - (iii) Loss-selling (article 30);
 - (iv) Predatory prices (article 29);
 - (v) Abuses of dominant position (article 27.1): having the power to be independent from market conditions and hence obliging competitors to follow the market leader; and
 - (vi) Abuses of economic dependency (Art 27.2) which concerns contractual agreements among two enterprises. One of the partners, economically more powerful, imposes conditions which the weaker party is then obliged to accept.

Part II concerns commercial information. Paragraph 1 requires that economic operators accord equitable treatment to consumers, in particular by imposing price transparency, price tags, and by sanctioning fraudulent or misleading advertising. Paragraph 2 imposes that invoices and receipts should be established for each transaction.

Part III concerns price regulations, and defines various practices as illegal pricing practices, or practices that can be considered as such.

Part IV fixes rules with regard to the establishment that an infringement has taken place, including complaint procedures and references and means of redress for violations of price regulations and repression of fraud.

Part V relates to the powers of investigators.

Part VI in its general provisions calls in particular for respect of business secrets and regulates infringements to this principle.

2. The main rules

Among the provisions of the law, various types can be distinguished:

- (a) Those that are not analysed in terms of their effects on competition; practices regarding prices; and those regarding commercial information; and
- (b) Those that concern practices that are only prohibited if they affect competition, which refer to collusive anti-competitive practices and so called individual anti-competitive practices. Those that are not analysed in terms of their effects on competition need not be covered by the entry into force of community rules. The second category from now on fall under the scope of article 88 of the Treaty of WAEMU and its derived law and the third should be viewed in a more nuanced way.

(a) *Effects on prices*

The principle of free prices is clearly adopted. Article 2 states “Prices of goods and services are determined by the free-play of competition”. At the same time,

article 1 of the law specifies that one of the objectives of the law is to control inflation.

Moreover, article 42 allows the authorities to take measures to fix prices through legal or regulatory action “when the circumstances request it or for economic and social reasons”. Temporary measures are also possible by an order of the minister in charge of commerce “against excessive price increments when crisis or urgency situations, or exceptional or clearly unusual market conditions make it necessary”.

The law then lists the “illicit prices” when floor or ceiling prices fixed by the State in exceptional circumstances are not respected by market operators; and when such operators engage in hoarding and tied-selling. Other infringements are “amalgamated with illegal pricing practices” (non-compliance with rules relating to consumer credit, etc.)

Specific proceedings are provided for with respect to the investigation and sanction for infringements related to price regulation. These include the possibility of imposing fines on enterprises by the services of the Ministry of Commerce for breaching these provisions of the law. On appeal, it is the courts which are expected to resolve such cases.

(b) Collusive anti-competitive practices

Cartel agreements (whether formal or informal, tacit or any action, convention or coalition) “which have as object or may have the effect of limiting, restraining or distorting the free-play of competition” are traditionally covered here. A non-exhaustive list of such practices is then given as: practices aimed at impeding price-reductions; favouring price increases or artificially low prices; practices which impede technical progress, by limiting the free-play of competition. This could also include practices that are not cited but which have the same effect, such as market

allocation, resale price maintenance, refusals to deal or boycotts, etc. Such practices fall exclusively under the scope of community law and are subject to community proceedings.

(c) Individual anti-competitive practices

A list of such practices which are prohibited includes (a) resale price maintenance (article 26); (b) discriminatory practices (article 28); (c) loss-selling (article 30); (d) predatory pricing (article 29); and even (d) abuse of dominant position (article 27-1). The terms used in this article seem to imply that these practices can be prohibited outright (“per se”), irrespective of their effects on the market, since they are applied “individually” and in that case subject to national proceedings even if the community rules enter into force.

Meanwhile, the common heading (article 23) of the two paragraphs (dealing with collusive and individual practices) lead us to think that such infringements are only actionable “if they tend to distort in one form or another the positive evolution of the market forces”. If this is the case, the practices in question, could only be covered by community law since they are analysed as resulting from a cartel agreement or abuse of dominance.

(d) Requirements concerning commercial information

The obligations fall within the purview of the principle of equity towards consumers. This requirement implies “communication of exact sales conditions, but also good information on actual prices.” In practice, the fulfilment of this requirement necessitates “publicity of prices, display of price tags in shop windows, display of sources of origin and of trade marks, as well as information on general sales

conditions. Finally, the rules on invoicing have to be complied with.

C. INTRODUCTION OF WAEMU COMMUNITY LAW

The Treaty of WAEMU, which has introduced competition rules in several of its regulations and directives as well as by an opinion of the Court of Justice of WAEMU of 27 June 2000,¹⁰⁵ has profoundly modified the extent to which competition law is applied in Senegal. This relates more to its implementation than the fundamental principles it contains.

1. WAEMU rules on competition

The founding States of WAEMU, of which Senegal is a party, fixed at the outset the goals of strengthening the competitiveness of the union in the economic and financial fields. The treaty therefore provides very clearly in its preamble that member States are determined to adhere to the principles of an open market economy, which should be competitive and favour allocation of resources by competitive market forces. (Section III, entitled “On the Common market”).

Article 76 of the treaty stipulates that:

“In order to establish a Common market ...the union pursues the gradual implementation of ...adoption of common rules on competition applicable to public and private enterprises as well as to State aids.”

Paragraph 4 of the same section of the treaty on “rules of competition” contains three articles on competition law and its application, namely article 88, article 89 and article 90. Articles 88 prohibits all agreements, associations or practices

among enterprises, practices by one or more enterprises, which could be considered as an abuse of dominant position on the common market or in a substantive part of the common market, (such as Senegal, for example). Finally, it prohibits State Aids which might distort competition. Article 89 refers to the Council to adopt regulations aimed at facilitating the application of these rules and establishes the proceedings to be followed by the commission in implementation of the prohibition laid down in article 88 and with respect to the sanctions that should be applied for infringements of the law. Article 90 for its part, requests the commission, under the supervision of the Court of Justice, to implement these rules. In an order (No. 003/2000) referred to above, the Court of Justice of WAEMU has denied any competence for member States in the regulation and control of competition.

Various regulations and directives¹⁰⁶ specify the principles applicable to the implementation of competition rules at the country level, including the prohibitions of anti-competitive practices, the proceedings, State aids and transparency for public and private enterprises and cooperation between the Commission of WAEMU and national authorities of member States. The details of national competition law of Senegal are contained in the April 2004 edition of UNCTAD’s Handbook on Competition legislation; and Part I of the present Review focuses on the WAEMU rules on competition.

2. The consequences of the exclusive application of WAEMU rules on the application of national law

In principle, the priority given to community law over national competition law and the principle deriving from the opinion of the Court of Justice which gives exclusive powers to the Commission of

WAEMU to apply the provisions of the treaty (articles 88, 89 and 90) and its derived law on cartel agreements, dominant positions and State aids imply that national law and regulations in this area are no more applicable. It remains to be seen if the scope of application of national and community rules coincide exactly or if there is still a part reserved for action by the national authority. It is necessary to distinguish in this respect the consequences on national law and on proceedings.

(a) Consequences on national law

Concerning cartel agreements, there appears to be no contradiction between the provisions of the treaty and its derived law on the one hand, and the notions, definitions and provisions under the Senegalese legislation on the other, given the convergence observed among the two. This is also in conformity with the case in the EU between community competition law and member State legislation, such as that of France. The non-exhaustive lists of practices in both texts of law (article 3 of regulation 02/2002/CM/WAEMU and article 24 of Senegal's law of 1994) are similar and complementary. In this respect, identical rules will facilitate homogeneity in the evolution and interpretation of the laws by its jurisprudence.

With respect to the prohibition of abuse of dominant position, a similar conclusion can be drawn after examining the two laws. The fact that community law is more precise and detailed and that the practice in question is clarified as an "industrial practice" in the Senegalese law does not alter this view. However, the community principles do not seem to impede the implementation of the law at the national level. As far as it concerns "per se" abuses, as is the cases for refusals to deal (article 26), discrimination (article 28), resale price maintenance (article 21) or loss-selling (article 30). There still seems to be an ambiguity in this respect which merits

further discussions in Part IV of this Review.

As for the concentrations akin to an abuse of dominant position which are prohibited in community (article 4 of regulation No. 03/2002/CM/WAEMU; there is no contradiction since such concentrations are not covered by national competition law in Senegal.

Concerning State aids and practices emanating from member States (Respectively articles 5 and 6 of regulation 02/2002/CM/WAEMU) the issue is different. By definition all national measures providing an advantage to certain enterprises as well as the special and exclusive right benefiting public enterprises fall under the scope of community law as far as they distort competition.

(b) Consequences on proceedings

In principle, the commission is the exclusive body empowered to implement articles 88, 89 and 90 of the treaty. Existing authorities in member States, and in this case in Senegal, are not in a position to make decisions in application of these rules.

It is therefore necessary to make a distinction within the process of decision-making in this field¹⁰⁷: it is necessary to distinguish between the inquiry, the judicial investigation and the decision making phases. All three phases are part of the commission's responsibilities. However, a cooperation provision in directive No. 02/2002/CM/WAEMU on Cooperation between the Commission and Member State Authorities, attributes to the national authorities "a general competence in inquiries" either at national initiative or upon specific request of the Commission of WAEMU which can have a role in the inquiry for the detection of anti-competitive practices as well as for the handling of the case in the judicial investigations phase.

(See further discussion on this issue below).

Hence, two options can be considered: the one denying any role for national authorities in the control of anti-competitive practices, and the other giving them a role in the inquiry phase. If not in that of handling the judicial investigations once the inquiry phase has been concluded.

3. Reactions facing the exclusivity accorded to the Commission of WAEMU

Senegal is one of the first African States to have adopted a competition law. Since the entry into force of the 1994 law, it has made every effort to develop the law and improve the effectiveness of the authority in charge its implementation. The suspension of this new responsibility of the Ministry of Commerce and of the National Competition Commission represents a serious “psychological” challenge. This decision of the Court of Justice seems to many actors of competition policy in Senegal to be excessive for a number of reasons.

A first argument pertains to the fact that an anti-competitive practice does not always have the same impact at national and community levels. In consequence, some consider that as long as a practice affects only the national market, it should not be dealt with by the Commission of WAEMU. Any anti-competitive practice by a Senegalese enterprise should be subject to community law only if it affects the community market as well. A dividing line between national and community competencies could be established according to the geographical effects of a practice.

Another line of thought considers that the distance (and not only geographical distance) between the community authority and the practices involved in a given case

may seriously hamper the efficiency of remedial action. Apart from the territorial distance, the lack of experience “in the field” of the community authorities would not favour efficiency. This argument would lead to a different division of tasks and increased cooperation between the two authorities. There is also a possibility that such concentrations of powers on community authorities - which have limited resources - would result in an increased focus on cases of unfair competition and other methods of dispute resolution (arbitrage) to the detriment of the core concept of competition in terms of cartels and abuses of dominance.

In addition, the National Competition Commission of Senegal considers that there is a danger that its own authority might be weakened¹⁰⁸ as the national and community objectives do not always exactly coincide with each-other, “a decision in favour of the community objective could be rejected by the economic actors of one of the member States”. The National Commission also draws attention to the fact that community authorities could be rapidly overwhelmed by cases, hence proceedings would become very slow and the costs of proceedings could increase substantially because of the distance and the lack of expertise of sub-regional authorities with respect to local particularities of national markets.

Finally, there is the possibility that technical expertise may be lost at the community-level decision-making since national regulatory authorities would be reduced to acting in the phase of inquiry while there is a lack of expertise at the community level. These observations were made on several occasions by the President of the National Competition Commission of Senegal, Mr. Mouhamadou Diawara and its members, in particular the Vice-President, professor Abdoulaye Sakho. As a result, the National Commission proposes that the draft version be maintained with

respect to substantive law, while the draft should be revised and amended with respect to legal proceedings.

Such reform would consider the establishment of a two-stage process: litigation could in the first instance be exerted at the national level by the National Competition Commission, while at a later stage it would be considered by the community authorities (the Commission of WAEMU), with the intervention of the Court of Justice in case of appeal. The elimination of national law would in this case be a logical consequence and would not be contested. However, a closer comparison between community and national laws would support the idea that since both laws do not match exactly, the Senegalese law of 1994 should be partly maintained.

IV. INSTITUTIONAL AND PROCEDURAL MECHANISMS FOR THE IMPLEMENTATION OF COMPETITION AT THE NATIONAL LEVEL

A. THE INSTITUTIONS IN CHARGE OF CONTROLLING THE APPLICATION OF COMPETITION RULES

The bodies responsible for the application and implementation of competition law are primarily the community authorities in principle. However, Senegal has its own national competition authorities which remain in place and have the necessary resources and powers, as well as the goodwill to take effective action in this field.

1. The community bodies

These authorities have been extensively described and analysed in part I of the peer review.

(a) The Commission of WAEMU

The officials in charge of competition at the commission are in contact with the officials of the Senegalese Ministry and when necessary with the National Competition Commission of Senegal. So far, specific proceedings do not seem to have been established in this respect, apart from the meetings of the Advisory Committee of WAEMU in which a representative of the ministry of each member State participates, but not a representative of the National Competition Commission.

(b) The Court of Justice

The deep legal and judicial tradition in Senegal contributes to the high level of consideration afforded by the Senegalese authorities, by its National Competition Commission and the Council of State towards the Court of Justice of WAEMU.

2. National competition authorities of Senegal

(a) The Ministry of Commerce

The Directorate of Internal Trade is the main entity within the Ministry of Commerce in charge of domestic economic legislation. Under the authority of the Minister of Commerce, the Directorate is in charge of implementing the commercial policy of the State and the application of the price policies within the national territory. Its functions in this respect include:

- (a) Supervising satisfactory and regular supplies of current consumer goods for the people;
- (b) Defining and implementing measures aimed at facilitating and improving distribution networks;
- (c) Defending consumer interests in terms of prices, metrology and quality;

- (d) Ensuring the good functioning of free-competition;
- (e) Contributing to the development of consumer associations;
- (f) Participating in the policy of promotion of economic actors; and
- (g) Ensuring follow-up with the Chamber of Commerce, Industry and Agriculture.

The Directorate is composed of a number of specific services:

- (a) The Division of Competition, Economic Conditions and Forecasts;
- (b) The Division of Consumption and Quality;
- (c) The Division of Metrology; and
- (d) The External Services.

It also includes related services:

- (a) The Legal Service;
- (b) The Laboratory;
- (c) The Office of Administration and Finance; and
- (d) The Office of Mailing.

Apart from these services, there are specialized offices in charge of project and distribution issues in central services dealing with liquid fuels, taxes, iodine content of salt, quality and reference warehouses.

As for the Division on Competition, Economic Conditions and Forecasts, it is in charge of:

- (a) Application of the legislation on competition and prices;
- (b) General inquiries as well as sectoral, permanent or seasonal studies;
- (c) Supervision of distribution and supply networks;
- (d) Supervision of price trends and trade in sensitive products;
- (e) Carrying out in-depth inquiries on the causes, nature of circumstances of excessive price increases which occur on certain product markets and formulating proposals as

- appropriate for remedial measures by the competent authority;
- (f) Ensuring the collection of data by sector of activity on the situation of domestic firms;
- (g) Centralizing and using all the economic information;
- (h) Ensuring the implementation of regulations on credit sales and usury;
- (i) Studying the files relating to administered prices;
- (j) Drafting reports on economic cycles to prevent undue price increases in sensitive products; and
- (k) Following up the programmes of insertion and promotion of economic actors.

The Division of Consumption and Quality is in charge of:

- (a) Supervising the implementation of the law and regulations on quality and inputs, production and distribution;
- (b) Control and sanctioning violations of quality standards and regulations;
- (c) Coordinating the activities of quality control;
- (d) Promoting quality in cooperation with specific bodies and services;
- (e) Ensuring the follow-up to the decisions of the National Council on Consumption (CNC);
- (f) Elaborating draft regulations on quality and consumption in cooperation with the legal services;
- (g) Studying in cooperation with competent bodies the methods of collection and analysis in view of improving and disseminating them;
- (h) Centralizing and analysing the declarations or licences authorizing the introduction of products on the market;
- (i) Participating in seminars, workshops and studies related to standards and quality management;
- (j) Establishing and following-up cooperation agreements with bodies

- and institutions operating in fields related to consumption and quality;
- (k) Implementing strategies protecting the safety of consumers;
 - (l) Surveying the quality of products at the distribution level; and
 - (m) Ensuring the respect of commercial standards and preparation of agricultural products.

In addition, the Division on Metrology can take on duties that can be related to competition files, for example as regards market access and discrimination.

The Directorate of Internal Trade disposes of regional trade services, which support its activities locally. These services are supported by civil servants “Commissioners for economic inquiries” whose status is defined by decree No. 84-1409 of 26 November 1984 as amended by decree 77-916 on the specific statute of civil servants in charge of economic control. These “commissioners” are civil servants of A-1 Grade recruited exclusively from among the graduates of the National School of Administration and Magistrature (ENAM), section “Economic Inquiries” in the same way as the Inspectors of the Treasury, Customs, Taxes, Lands, Employment and Social Security, and the Counsellors on Foreign Affairs and civil administration.

The selective character of recruitment at ENAM (renamed ENA) ensures that these civil servants are of a high level. The commissioners have a cross-cutting training adapted to the needs of an economic and commercial environment in constant change. Their training relates to all sorts of fields; administrative drafting, economic policy, international trade, administrative law, competition legislation, commercial law, customs law, fiscal law, transport law, etc. They are attached to the Ministry of Commerce to elaborate and implement economic laws and regulations. The field missions are performed by the controllers

of the economy recruited competitively from cycle B of ENA. They are responsible for the work of the Directorate at the regional and local levels.

Reforms are in progress within the administration in particular to:

- (a) Modernize the National Analysis Laboratory of the DCI including new equipment and capacity-building;
- (b) Adopt draft legislation based on competition, quality and metrology adapted to recent trends in the field of commercial activities and economic fraud (services trade, electronic commerce, counterfeit trade, unfair competition);
- (c) Upgrade the Directorate on Internal Trade into a General Directorate on Competition and Consumption, including the establishment of the main central services as National Directorates; and
- (d) Recruit commissioners for economic inquiries and responsible for economic control.

(b) The National Competition Commission

Established under article 3 of law 94-63 of 22 August 1994 on prices, competition and economic litigation, the commission was organized by decree No. 96-343 of 2 May 2006. It is an administrative body with a juridical character.

Its role has become essential in the context of price liberalization and globalization. It is the first time such a body was established in Senegal. (In fact, law No. 65-25 of 1965 envisaged the establishment of a Cartels Commission, but it never happened.)

The National Competition Commission is composed of six acting members and three deputies. It is presided by a judge. In accordance with articles 9 and 21.2, it has a double role, both consultative and

legislative. It can impose sanctions and issue cease and desist orders (articles 12 and 13 of the same law). It makes its decisions following two progressive stages. First it issues an order and if the order is not implemented, it can impose fines. This means that the commission is only empowered to impose sanctions after it has issued a cease and desist order which has been ignored.

Decree No. 96-343 provides for the organizational and functional rules of the Competition Commission. The administration, consumer associations, professional syndicates can make references to the commission, which can also initiate a case on its own initiative. Appeals against decisions of the National Commission are reviewed by the State Council.

(c) *The National Consumer Council*

Established by ministerial order (arrêt) of the Minister in charge of Trade (order No. 6315/MCAI/DCI/DESL of 17 June 1997), the National Consumer Council is in charge of coordinating and implementing consumer policy. It is a consultative body representing the collective interests of consumers, customers, representatives of producers and the public sector with respect to consumer issues. Its essential function is that of giving advice on the main orientations of consumer policy and on all that concerns quality of products due for consumption. This includes prices and generally all rules and regulations that might have an effect on consumers. A dialogue is also established between professionals and consumers for basic necessities such as bread and vegetable oil.

(d) *The Commission for the Control of Foodstuffs (CCPA)*

Created by decree No. 70-024 of 27 January 1970, the CCPA is an inter-ministerial consultative group bringing

together the administrations responsible for quality control, institutes and laboratories. It has a juridical section and a section on information. The commission, as well as its specialized sections, can organize consultative hearings on issues inserted in the agenda of meetings, to establish a dialogue with representatives of producer associations, consumers or their representatives.

(e) *The National Committee on the Codex Alimentarius*

The Committee was established by decree No. 83-1204 of 24 November 1983 with the object of protecting consumer health and ensuring that trade in food products would be exempt of unfair practices. It advises the Government on draft standards prepared by the mixed FAO/WHO Commission on Food Standards which are then submitted to the State. Consumers are closely associated with the activities of the commission.

3. *Specialized Regulatory Bodies*

(a) *ART*

The Agency for Regulation of Telecommunications (ART) is an independent body responsible, under direct authority of the President of the Republic, for guaranteeing fair and equitable competition for the benefit of consumers, suppliers and the national economy in general. Its duties include:

- (a) Establishing an efficient and transparent legal environment for telecoms;
- (b) Awarding licences, authorizations and confirmation to telecom operators;
- (c) Approving the service tariffs and the universal service of the monopoly;
- (d) Resolving disputes between the State administration and customers and suppliers of telecom services, as well as among the latter;

- (e) Handling complaints of consumer associations;
- (f) ensuring the planning, management and control of the range of frequencies;
- (g) Ensuring the management and control of the national numbering plan;
- (h) Ensuring State participation in regional and international organizations related to telecom issues; and
- (i) Favouring the creation of employment directly or indirectly linked to the telecom sector.

ART is managed by a Council of Regulation composed of 5 members and a Director General appointed by decree for a period of three years. It collects all the revenues from the fees for use of its resources and the granting of authorizations and other income, including a share of the income from licences.

The Telecommunications Code defines the fines that can be imposed for infringements (articles 56 to 71). In case of disputes, in particular those related to quality of service and connections, ART gives preference to out-of-court settlements, in particular by means of conciliation and arbitration. ART has made various decisions related to the harmonization of proceedings with respect to competition rules within the framework of WAEMU and /or CEDEAO. Common decisions were made in this respect.¹⁰⁹

The harmonization process takes into account regulation No. 002/2002/CM/WAEMU on anti-competitive practices within the WAEMU area, as well as regulation No. 003/2002/CM/WAEMU on applicable proceedings with respect to abuses of dominant positions within WAEMU.

Within the framework of CEDEAO, member States' regulators have established the Associations of Telecom Regulators of

West Africa, which has been renamed the Assembly of Telecom Regulators of West Africa. Moreover, CEDEAO is finishing the implementation of a common market for telecommunications (TIC) which involves the harmonization of policies and regulations of the sector, and a unified juridical system applicable to operators and providers of services.

(b) The Commission for the Regulation of the Electricity Sector

The commission is an independent authority in accordance with article 4 of law No. 98-29.

Article 4 also defines the role of the commission as being “*entrusted with the regulation of production, transport, distribution and sales activities of electric energy. Its decisions have the characteristic of an administrative order: they can be appealed for repeal.*”

The regulatory functions of the commission are undertaken within the framework of the policy determined by the Minister in charge of Energy, who:

- (a) Establishes a national plan for electrification;
- (b) Defines the zones of local countryside concessions which may be awarded under a process of competitive bidding;
- (c) Defines national preferences in terms of energetic resources for the production of electric power; and
- (d) Delivers licences and concessions upon recommendation of the commission for the Regulation of the Electricity sector.

The commission is composed of three members including a president named by decree on the basis of their moral integrity, intellectual honesty, neutrality and impartiality, and their qualifications in legal, economic, and technical fields with regard to electric power. The members of the commission cannot have double caps in

terms of other political positions, public employment or other conflict of interest in another energy supplying company, of electric power or otherwise. The commission has the following objectives:

- (a) To promote the national development of electric power supply;
- (b) To ensure the financial and economic balance of the electric power sector and to preserve the necessary means for its viability in time;
- (c) To preserve the interest of consumers and the protection of their rights in terms of prices, supply of power and quality of distribution;
- (d) To promote competition and the participation of the private sector in production, transportation and distribution of electric power; and
- (e) To guarantee financial viability for electricity companies, which constitutes an important security for private investors.

In the pursuit of these objectives the commission has decision-making and consultative powers. It handles applications for licenses and concessions; it ensures the fulfilment of the obligation of conformity of service in terms of quantity and quality; it ensures the application of technical standards imposed on electricity providers; it is also in charge of promoting competition by determining the structure and details of tariffs applied to operators which have received a licence or a concession. The commission may be consulted by the Minister in charge of Energy on all draft laws and regulations in the field.

B. PROCEEDINGS

Senegal's legal tradition gives special importance to proceedings in particular

with respect to the issue of exclusive modalities of application of community rules.

1. General principles

The legislators, lawyers, judges and civil servants of Senegal are already very respectful of the Senegal principles of law and proceedings in the application of national law (law of 1994); therefore, transposition of the principles defined by WAEMU law into national law will be easily achieved. A special attention is traditionally devoted to the guarantee of fundamental rights including: the principle of adversarial procedures, explanation of the motives leading to decisions, the principle of proportionality, respect of business secrets and confidentiality.

2. Proceedings before the administration and references made to the National Competition Commission

Any person or enterprise can lodge a complaint to the administration and to the ministers on any decision or practice. There are no specific modalities for lodging a complaint. However, the references made to the National Competition Commission, which is an independent administrative body having quasi-jurisdictional powers, are necessarily regulated. The 1994 Law and the decree of 2 May 1996 on the application of articles 3-4 and 16 to 22 of the law of 22 August 1994 define the specific conditions for a reference to be made to the commission for an Advice as well as for a decision relating to an anti-competitive practice.

On matters of advice, the reference is made in principle by the Minister of Commerce seeking advice from the commission on draft regulations for which it is mandatorily consulted. According to the law "all regulatory project having for effect the

establishment of restraints or uniform practices in terms of prices or sales conditions of a profession or for access to a market” must be referred to the competition commission for advice.

With respect to litigation leading to a decision, the commission can initiate a case on its own (ex-officio) or it can receive a complaint lodged by an enterprise or by a recognized consumer organization. The reference or complaint can be made in the form of a simple letter addressed to the commission, but it must include detailed elements of proof of its allegations. Upon receipt of the complaint, the proceedings engaged are contradictory in nature.

3. The powers of the commission

(a) *The investigation*

The investigation is conducted by the services of the Minister of Commerce. A decree of 2 May 1996 specifies the civil servants who are in charge of conducting these proceedings. The civil servants of the Directorate of Internal Trade are especially prepared for the techniques of inquiry since the 1994 law and previous texts already gave them competence to lead an inquiry in the field of price regulation and repression of frauds.

Article 15 of the decree, recalling the provisions of the 1994 law (articles 75 and further) establishes the powers of inquiry in the field of competition for cases that are to be handled by the commission (chapter 1 of the law).

An adaptation to the specific principles and rules of competition and hence an appropriate training in this field is essential in this respect.

The case handlers (rapporteurs) of the National Competition Commission have similar powers. In accordance with the

decree of 2 May 1996 they can be assisted by civil servants from the Ministry of Commerce. They can request information from any enterprise and professional body, including all documents required for the accomplishment of their duty. They can enter any premises with the support of the authorities on the condition they are assisted by a police officer having a search warrant. The powers of the WAEMU Commission, which have never been utilized so far, are similar.

(b) *The judicial examination*

Upon receipt of a complaint the commission examines whether the alleged practice is effectively prohibited by law. This means that once the inquiry has been made as described above, the commission is going to handle the judicial investigation of the case. A case handler is appointed, and is assigned a deadline to terminate the investigation. Hearings can be held and are then consigned in a formal statement. A report is transmitted according to proceedings and strict deadlines for interested parties. After that, the President of the commission organizes contradictory hearings to register the views of the plaintiffs, the case handler, the Government’s representative (the Minister of Commerce or his substitute) and the defendants.

As indicated earlier in the present review, the modalities of the judicial examination which have been instituted for the application of national law could be used in a similar way for the application of community law of WAEMU, as this phase would be under the responsibility of the Commission of WAEMU.

(c) *The decision, sanctions, transactions and damage actions*

The National Competition Commission, upon completion of the judicial examination described above deliberates

and makes a decision which is notified to the parties. In case of proof of the infringement, the decision consists of an order to cease and desist from the infringement in question. In case the defendant does not abide by the order, the commission imposes a fine. In any case, even if the infringement has not been established, the commission makes a decision. Obviously, as seen earlier, since the entry into force of the rules of WAEMU, the National Competition Commission is not entitled any more to make decisions.

The 1994 law provided for the decisions of the commission to be mentioned in its Annual Report of Activity, which was to be made public. Any restraint on the publicity of the decisions of the National Commission would hamper the objective of complete transparency and hence the efficiency of the National Commission's action. It is hoped that the decisions of the Commission of WAEMU will be immediately and fully publicized.

4. Control of decisions in the field of competition

According to the 1994 law, the decisions of the National Competition Commission must be placed before the State Council. The council could in case of doubt, pose a prejudicial question to the Court of Justice of WAEMU. The court could hence act as a bridge between the national and community authorities. It should also be mentioned that, although they are not empowered to judge competition cases, national civil courts can still play an important role in terms of civil and commercial actions to overrule a case.

V. EFFECTIVE IMPLEMENTATION

A first approach to evaluate the effectiveness of the system is to evaluate

the references that have been made and the decisions thereon in the last four years.

A. THE PERFORMANCE OF THE MINISTRY OF COMMERCE (DIRECTORATE ON COMPETITION)

1. Cases decided in the field of competition

The next table summarizes the cases filed since 2003 according to the nomenclature used by community law.

	Date	Origin	Case	Results	Reference to the National Commission, or specialized authorities
1- References					
11- Grievances: horizontal cartels	2003	Local case in the Dakar Region	Price-fixing cartel on rice; Complaint lodged by retailers against importers	Classified case: Cartel could not be proven	No
	2006	Local case in the Dakar Region	Predatory pricing; Sales below cost by a TV shop	Cease and desist order after inquiry	No
12- Grievances: Vertical agreement (exclusive distribution)	2006	Dakar	Exclusivity contract: A money transfer society complained that it was being cut off by correspondents because of exclusivity	Preliminary inquiry in process	No
	2006	Dakar	Exclusive distribution agreement ; Request for advice	In process	No
13- Grievances: abuse of dominant position	2006	Dakar	Abuse of dominance in a port; A dominant incumbent on the Durban-Dakar maritime line having a market share of 90 % forced the plaintiff to accept exorbitant costs, compared to the normal practices in the sector	Preliminary inquiry in process	No

2. Cases examined in related fields

These cases concern consumer protection, unfair competition and counterfeit trade, as well as anti-dumping actions.

	Date	Origin (country)	Subject matter		
Unfair competition	2005	Dakar	Misleading Advertising: Colgate Palmolive complained that SCD had made false claims about the curative virtues of its products	Unfounded complaint after inquiring a contradictory analysis by 2 known laboratories	No
	2006	Dakar	Complaint by MTOA (a tobacco manufacturer): Against Philip Morris for predatory action/and determination of publicity boards.	Transferred to a Civil Judge, complaint for this type of action	No
Counterfeit	2006	Dakar	Complaint in the textile sector for piracy of its designs abroad and sales on domestic market.	Investigation in process	No
	2006	Dakar	Complaint on trade-marks of cell-phone batteries	PV for misleading source of origin, on the basis of Senegal's National Code on Consumption (It should be noted that it is a limit qualification in the absence of a law on this type of issue. Goods were seized and destroyed.	No
	2006	Dakar	Complaint by a local manufacturer for counterfeit batteries	PV, seizure and destruction.	No

3. Notification to the Commission of WAEMU

To date, according to the information received from the Senegalese authorities, no notification file was transmitted to WAEMU in accordance with the provisions of directive 01/2002/CM/WAEMU. Therefore, the table below is empty:

	Dates	Origin	Case	Results	Reference to Commission or specialized Authorities
14- State aids					
15- “Anti-competitive practices emanating from States”					
16- Notifications seeking an exemption					
2-Formal or informal information of Commission of WAEMU 21- concerning vertical agreements (distribution-exclusivity commitments) 22- concerning abuse of dominance 23- concerning State aids 24- concerning anti-competitive practices emanating from States 25- notification seeking a negative clearance					
3-decisions or transactions by the ministry or by the Competition Commission or by a regulatory authority (ARTP, SRSE...). 31- upon complaint against a cartel 32- upon grievance of vertical restraint (exclusivity in distribution) 33-upon grievance for abuse of dominance.					

4. Interaction with other actors in the field of competition policy

The Ministry of Commerce and the Directorate of Competition have permanent relations with a large number of domestic and international bodies for the promotion of competition. These include, in particular:

- (a) The National Competition Commission;
- (b) The Commission of WAEMU (by participating in the Consultative Committee on Competition of WAEMU);
- (c) International organizations such as UNCTAD, the EU, etc;
- (d) Other national administrations;
- (e) Other specialized authorities;
- (f) Jurisdictions and professional organizations and consumer associations; and

- (g) Universities and academic circles.

The ministers in person and the members of his services have actively participated in numerous seminars and activities.

B. PERFORMANCE OF THE NATIONAL COMPETITION COMMISSION

1. References and decisions

These are indicated in the table below.

	Date	Origin	Subject	Result	Reference to the WAEMU Commission or to specialized agencies
1- References					
11- Decision upon complaint against horizontal cartel agreements. Decision N° 01-D-01	2001	Reference by the African Insurance Association versus the Central Insurance Broker Agency	Illegal cartel by the Senegal Federation of insurance companies aimed at eliminating a competitor from the insurance market	Cease and desist order against the boycott. Publication of the decision in the Press.	No
12- Decision on a complaint of abuse of Dominant Position, decision N° 02-D-02	2002	Reference by Syndicate of travel agencies of Senegal	ADP by Air France: Unilateral introduction of new (lower) commission rates for travel agencies	Cease and desist order under threat of fine of 20 Million FCFA	No
13- Decision on other individual practices, decision N° 03-D-02	2002	Complaint by SARL Micro Doses technologies, to the minister	Parallel practices by a competitor alleged “unfair competition”	Case was dropped: outside competency of the National Commission	No

	Date	Origin	Subject	Result	Reference to the WAEMU Commission or to specialized agencies
1- References					
2-Opinion 2-1 Note to the minister and recommendation concerning an order	2003	Director of Sokhina Bakeries	Government order (arrêt) defining the modalities of bread distribution in Ziguinchor commune	Recommendation to create conditions of competition by opening market to competition; abolishing monopoly which had affected consumers	Note to the Minister of Trade
2.2 Opinion on draft regulation by WAEMU, Advice N° 01 A 02	2003	Minister of SMEs and Trade			
2-3- Opinion on an OHADA act, Advice N° 01-A-03	2003	Minister of SMEs and Trade	Interpretation of provisions in articles 25 and 38 of uniform act of OHADA	Recommended action to facilitate free-access to market	No

Among the decisions made by the National Competition Commission, one was made against the Senegalese Federation of Insurance companies; and another against Air France. These two cases show how difficult it is to qualify practices and the consequence of proceedings when the National Competition Commission and the Council of State have divergent views.

The CIBA versus FFSA case

An insurance brokerage company (Central Insurance Broker Agency, CIBA) was active with various insurance companies in Senegal, including Assurances Générales Sénégalaises (AGS) and SOSAR AL AMANE, members of the Federation of Senegalese Insurance Companies (FFSA). Following disputes concerning the refusal to pay insurance premiums between CIBA and the two Senegalese companies, FFSA recommended to its members to refuse to deal with CIBA. CIBA referred the case to the National Competition Commission, which considered the case as a horizontal cartel by FFSA making a collusive decision to boycott CIBA. (“An agreement between moral persons (companies) of a same sector of activity, organized as a professional syndicate taking the form of a decision of the syndicate in question...”). The commission considered this case as being serious, because the syndicate had decided to exclude CIBA from the insurances market, in view of the fact that the quasi-totality of insurance companies were members of FFSA and had signed this decision, even those which had no problems with CIBA. CIBA’s position as an insurance broker on the market was in danger of disappearing.

In its decision of 27 June 2002 the National Commission ordered FFSA to abstain from its action on the basis of article 24 of the 1994 law. Upon appeal from FFSA, the Council of State overruled the decision of the National Commission arguing that the case had been referred to it “outside any matter of competition or anti-competitive practices...” and that the decision taken by FFSA “could not fall within the competences defined by law...because it had neither the intent nor the effect of distorting prices of the services provided by the insurance brokers”.

The Syndicat des agences de voyage versus Air France case

Air France decided unilaterally to reduce its commission to travel agents from 9 per cent to 7 per cent. The National Competition Commission considered that this unilateral action by Air France constituted an abuse of dominant position and decided to order it to cease and desist from this decision under the threat of a fine of 20 Million FCA in case of non-compliance.

From the Syndicate of Travel Agencies viewpoint it was a case of anti-competitive practice aimed at fixing uncompetitive commission rates. For Air France, it was simply a matter of following the market trends after deregulation of the market initiated by IATA. The National Commission considered that Air France had a dominant position in that market and that the travel agencies were in a state of dependency on Air France. The measure was considered to restrain free competition as other Airlines began to request similar commission rebates. An appeal has been lodged with the Council of State. The decision is still pending.

2. Relations with other actors in the field of competition policy

In the same way as the Ministry of Commerce, the National Competition Commission maintains excellent relations with many domestic and international organizations interested in the effective implementation of competition law. Among others:

- (a) The Minister of Trade and his Administration;
- (b) The commission and the Court of Justice of WAEMU;
- (c) International organizations such as UNCTAD, the European Union, etc;

- (d) Other national administrations;
- (e) Judges;
- (f) Professional organizations and consumer associations; and
- (g) University and academic circles.

The National Commission also participates actively in various seminars and workshops; its president and members are especially keen to participate in these activities and exchanging experience and making their authority known abroad.

C. THE REASONS FOR A LIMITED PERFORMANCE

To sum up, it seems that the activity of the ministry and the National Commission have been suspended by the introduction of the new community rules. Even if it was followed in the beginning, on the basis of the 1994 law, the performance of Senegal seemed promising. Some internal and external reasons can be found for these difficulties. Among the internal reasons, one can probably mention the need for further capacity building for the officials who work on promoting competition at the ministry and the National Commission.

First the national competition law, and then the community law have entered into force without ensuring sufficient training of the civil servants in charge of the inquiries. The National Competition Commission, as well as the Directorate on Internal Trade in charge of the competition inquiries, have not received sufficient resources nor the appropriate equipment needed to operate effectively. As a result, at the present time, their authorities are practically not functioning.

As for the external reasons, it is necessary to note that neither the professional organizations nor the consumer associations have changed their practice of lodging complaints directly to the

administration. Instead to refer cases to the National Competition Commission, many of them intervene directly with the highest authorities (President of the Republic, Minister of Trade), to obtain redress. It is also frequently the case that after a price increase in a liberalized market the Government is called upon to take action.

VI. QUESTIONS REGARDING CONSUMER PROTECTION

1. A few rules of material law

In general, economic law in Senegal aims at safeguarding the interests of consumers. Basic texts can be mentioned in this respect, among others:

- (a) Law 94-63 of 22 August 1994: this law already emphasizes that “the ultimate beneficiary of the law is the consumer”. Hence:
 - Article 24 of the law prohibits collusive practices “impeding price reductions for the sale or the resale of products”, and which “favour artificial price increases”;
 - Articles 32 to 37 institute the rules of commercial information necessary “to guarantee the buying power of consumers and their freedom of choice...”; and
 - Articles 42 to 47 permit State intervention to correct market distortions. Articles 42 and 43 have been used in this way for the distribution of rice (article 43) and flour and bread (article 42).
- (b) Law 66-48 of 27 May 1966: contains part of the provisions protecting the health of consumers as it is aimed at ensuring that only healthy products are sold on the market. Hence, article 1 imposes prior authorization for the production of foodstuff for human or animal consumption. A system of

control of foodstuffs imported called DIPA was adopted which is necessary if products are authorized entry by customs. Both domestic and imported products are subject to the control of validity of the laboratory of the Directorate of Internal Trade.

Legal amendments are expected to be made in order to integrate the mechanisms of consumer protection referred to in the “model law” of Consumers International as well as the Guiding Principles for the Protection of Consumers of the United Nations. Within the framework of WAEMU, a draft community regulation on information and consumer protection has been prepared.

2. An institutional organization

Article 26 of decree No. 95-77 of 20 January 1995 on the application of articles 44 and 64 of law No. 94-63 created “a National Consumer Council and Regional Councils”, responsible for issuing Advices on competition, consumption and price issues.

Article 4 of that decree requires the authorities to consult the National Consumer Council before homologating a price by order of the Minister of Trade.

Article 7 establishes the principle of general consultation of the National Consumer Council for any issue concerning the trade sector.

Also, article 8 requires the Minister of Trade, within the annual review of prices, to request the advice of the National Competition Commission, and the National Consumer Council.

Within the reforms under way at the Directorate of Internal Trade, a “Division of Consumption and Security of Consumers” as well as a “Division of

Assistance, Distribution and Commercial Urbanism” are being proposed. Finally, the introduction of a system of coordination, consultation and arbitration of consumer disputes is foreseen.

VII. CONCLUSIONS FOR THE PROMOTION OF A COMPETITION POLICY

Senegal has a few years’ experience in the field of competition. The instruments of a State of law are in place. Its internal rules include the main legal instruments necessary for the application of competition policy, as well as a comprehensive competition law.

This law, which has become essentially community law since the early 2000, is still not sufficiently publicized, recognized and integrated in the legal and political environment of Senegal. Some circles still express doubts as to the applicability of such a community level system and regret the shelving of a classical national system. However, there is a consensus on the positive role played by competition policy in the development of the country.

Useful improvements, which have been summarized as “recommendations” in part IV of the present review, refer to:

- (a) The diffusion and integration of “a competition culture”;
- (b) Specifying some basic rules;
- (c) Orienting competition authorities; and
- (d) Revising implementation proceedings of the rules on competition.

1. Strengthening the culture of competition

The first goal is ensuring a favourable environment for the promotion of competition. It is essential that citizens as

well as economic actors and representatives of the government have a clear understanding of the challenges surrounding competition policy. It is important to consolidate and to accelerate the momentum which is already at work. Two objectives can be proposed to make Senegal a model in this field, given its development in every aspect of competition law in Western Africa.

Firstly, it is important to convince the authorities that competition should be placed at the centre of the development instruments of the country, in interaction with other policies. It is important for the public institutions to understand that it is the role of the State to regulate the economy in accordance with market policies driven by private initiative.

Secondly, considering that compliance with competition rules serves the general interest, the right balance needs to be found between the general interest and the particular interests of those who seek waivers to protect their own entrenched privileges. In the final analysis, it is the welfare of the consumers which is at stake. Consumers, enterprises and government officials and hence, all citizens must be well informed about their rights and obligations in this respect.

Senegal is definitely integrated in regional economic and political communities such as WAEMU and CEDEAO, even if national considerations are strong. Hence, the national and community elements need to be reconciled.

The “competition culture” must evidently be developed in the sub-region. The efforts that have already been made in terms of exchanges, seminars and all kinds of workshops need to be continued, at both official level (international organizations and WAEMU in particular) and at the private and academic levels. It is clear that the Senegalese economy is about to

accelerate its development faster in an open-market environment of eighty million inhabitants of eight relatively homogeneous economies than if it were to pursue its development closed up behind its own borders.

Finally, the citizens of all subregions of the country must adopt the “competition culture” and not only those who live in Dakar. For those reasons, various measures should be undertaken:

- (a) Actions with the support of the media to reach populations in remote areas who should understand the benefits that competition can bring to them as consumers;
- (b) Informative seminars and workshops for students and open to all those interested about these practices should be organized; and
- (c) Documentation centres on competition should be opened in Dakar, but also in other big cities of the country.

2. Amendments and specifications concerning some basic rules

Senegal has experienced two fundamental trends in the last years: the introduction of a modern competition law in 1994 and the introduction of WAEMU community law. In the coming years this system should be better integrated rather than trying to make changes. Applying community rules and making them accepted by nationals is by itself a difficult challenge; stability is therefore preferable than trying to make further changes at Ouagadougou. This does not exclude efforts to make the rules more precise in order to better adapt their implementation to Senegal’s particularities. Such improvements could head towards various directions.

(a) Collusive practices, individual practices and unfair competition

First, it is worth adding specifications aimed at clarifying the differences between the core competition rules (contained in article 88 of the Treaty of WAEMU and derived community law) and the other rules outside this scope which could stand under national responsibility, namely the individual practices and those concerning unfair competition. There is no doubt that the control of cartel agreements and abuses of dominant position has been fixed by a community law system implemented by community authorities (except for what was explained earlier and will be repeated below in revision of proceedings). The same applies to State aids and practices emanating from States for which the competence obviously belongs to the community and does not require any changes at the national level.

- (a) It would, however be useful to make a clear difference between the so-called collective practices and individual ones (in other words, the difference between practices that affect the functioning of markets, hence which are of general interest, and those which only concern the relations between enterprises and are not in a situation of distorting competition overall.
- Hence, it would be useful first to avoid a possible confusion flowing from the fact that abuse of dominant position is included under “individual anti-competitive practices” in article 27 of the 1994 law.
 - It would also be useful to clarify the difference between refusals to deal and discriminatory practices on the one hand, which would fall under the scope of community rules on abuse of dominance (under articles 88, 89 and 90 of the treaty) and the same practices plus resale practice maintenance, loss-selling and other practices by

non-dominant firms on the other hand, which are found in articles 26, 28, 29 and 30, respectively in Senegal’s 1994 law. This is all the more important that the so-called individual practices fall under the powers of national authorities, while the others are under the scope of WAEMU rules and the community of WAEMU.

- (b) Concerning unfair competition practices, commercial information and production of invoices which are obviously of a national nature, it is better to make sure there is a synergy and transparency so that the whole of this system remains coherent since it aims at the common objective of regulating the economy and the action of economic agents.

(b) *General and specific regulations*

It is important to underline the complementarity between the general rules of the hard core of competition (contained in article 88 of the treaty) and the sector-specific regulations for network industries, which concern specific technical systems, belong to the same objective of transparency and non-discrimination as contained in the hard core rules. Specific national authorities exist to implement specific national regulations and this is not challenged by the entry into force of the community law. In both cases, it is more specifications within existing definitions which should be sought by way of guidelines elaborated by the National Competition Commission to distinguish the individual practices from those that fall within the purview of article 88 of the treaty.

General guidelines could also be elaborated by the sector regulators (ARTP and CRSE) and the National Competition Commission to distinguish the practices obstructing

access to markets (such as licenses, authorizations, etc.) which are usually within the competence of sector regulators, from those which belong rather to the national or community authorities.

3. Restructuring the competition authorities

(a) Organization

The internal organization of the Ministry of Trade should take into account the increased community responsibilities. Its organization should take into account the distinction between the practices covered by the Community of WAEMU and those covered by national authorities. For the former, the ministry has the responsibility of inquiries and the obligation to transmit its report to the community; for the latter, the ministry and the National Competition Commission are fully competent.

(b) Powers

More emphasis should be placed on the role of surveillance of markets belonging to the national competition authorities (ministry and commission). To this effect, in-depth inquiries on competition in different sectors of activity should be undertaken to give strong impetus to the market in favor of competition. Responsibilities could be shared between the ministry and the commission; the latter being referred to when the ministry's inquiry results on issues of principles or, on the contrary, when issues are at the starting point of the inquiry.

(c) Resources

The process of strengthening the capacities of the staff of both the ministry and the commission should be continued. It is also at the level of documentation and financial means (better material, better offices, in particular for the commission) that more resources are needed.

4. Review of proceedings

The main scope of the reflection should be devoted to the exclusive competence attributed to the Commission of WAEMU while it is well known that its means are extremely limited, while so far the national authorities (at least in Senegal) were organized to implement the 1994 law and a good deal of know-how had been accumulated both within the ministry and the National Commission. In addition to the technical elements, there are the "physiological" feelings of frustration of authorities that consider that they have been deprived of their mission. Such problems should to be taken into consideration and remedied.

The decision-making process, which consists of three phases (investigation, judicial examination and decision), could be reviewed to ensure each authority has its role to play. The first phase is carried out by the national administrative authorities when a file of the Commission of WAEMU is prepared by the minister who receives a complaint. When the case is filed directly with the commission, the investigation may be carried out jointly by the community and national services. The commission may also mandate the national services to carry out the inquiry on its behalf. The carrying out of joint investigations between national and community authorities should be encouraged.

The decision phase would not change much; the role of the Advisory Committee of WAEMU should be better defined and more effectively performed. The intermediary procedure – judicial examination – is the one that most needs to develop in national authorities. The work could, for example, be divided as follows: the investigation would be carried out by the administration, the judicial examination phase would be the responsibility of the National Competition Commission, and the decision would be made by the

Commission of WAEMU with close involvement and follow-up by the Advisory Committee of WAEMU.

Such a reform however, could be preceded by a study that could be made by the National Competition Commission on the basis of its own experience on this matter. A report could be presented before the end of the year to define precisely what would constitute the case handling proceedings compared to the inquiry. Such a system could be generalized for those member States of WAEMU which have already adopted a competition law and have experience in its implementation.

**PART THREE:
REVIEW OF THE COMPETITION
POLICY IN BENIN**

INTRODUCTION

Benin did not have a comprehensive competition law like Senegal at the time of entry into force of the community competition rules and still does not have one. However, in this case the participation of Benin in the voluntary peer review might be useful to help the authorities identify the distortions which occur in its domestic market, with a view to convincing them of the importance of adopting a competition policy as it stands, under the aegis of the Commission of WAEMU.

Situated in the tropical zone between Equator and Tropic of Cancer, Benin is located between river Niger to the north, which separates it from Niger, and the Atlantic Ocean to the south. On the north-east is Burkina Faso, on the west is Togo and on the east Nigeria. It has an area of 114,763 km² and the north is 700 km from the south. By its geography, Benin is a natural bridge from Nigeria on the one hand to Ghana and Côte d'Ivoire via Togo. Its Atlantic coast makes it also a transit country for the landlocked countries such as Niger, Burkina Faso and Mali.

With a population of 7.2 million in 2004, mainly rural, Benin is one of the eight Western African countries which are members of WAEMU. The share of the traditional tertiary sector has decreased to around 50 per cent of GDP. The primary sector is about 36 per cent, supported by growth of cotton. The secondary sector represents about 14 per cent. In terms of growth, the average trend is about 5.25 per cent annually since 1995 with an average inflation rate of 3 per cent. Benin ranks 161st among the 177 countries contained in

the UNDP index. Its GDP per capita is \$400.

The structural adjustment reforms are not finalized yet (as regards opening of markets in particular) but Benin is somewhat well regarded by international organizations (it conforms to the UEMOA criteria) and has received \$9.1 million as part of an IMF programme.

After a period of political instability, Benin has evolved pacifically towards democracy recently. Being called Dahomey at the time of colonization, Benin became a republic on 4 December 1958 and acceded to independence on 1 August 1960. Then started a period of political instability which saw six revolutions between 1960 and 1972, after which the military took power under commander Mattieu Kérékou. On 30 November 1975, Dahomey took the name of Popular Republic of Benin (PRB). Towards the end of 1989, crowds unhappy with the Government organized a "Conference of the lively forces of the nation", in February 1990, after the announcement by the President Matieu Kérékou, in December 1989, that he abandoned Marxism-Leninism after 17 years of implementing such a regime.

The 1989 "Conference" which was presided over by Mgr. Isidore de Souza, Archbishop of Cotonou, kept the president in place and established a high-level council of the Republic and a transitory government lead by the Vice-Minister, Nicéphore Dieudonné Sogolo who called a referendum on 2 December 1990 to adopt a new constitution. Since then, Benin has clearly opted for a democratic system, based on the rule of law, respect for fundamental freedoms, and economic liberalism. The constitution which was adopted by law No. 90-032 of 11 December 1990 established a presidential regime; the latest presidential election was won in April 2006 by Mr. Boni Yayi, who currently holds office. The constitution of 1990

opened the way to decentralization of powers to the advantage of local government. Benin is actually divided into 77 communes created to facilitate the management of localities and plan the national development.

I. HISTORIC BACKGROUND

A. THE ECONOMIC FRAMEWORK

1. General

After a deep recession at the end of the 1980s, Benin abandoned central planning and adopted market economy policies. The important reforms which took place for the transition of the economy created a more favourable environment for private investment.

The first structural adjustment plan of the IMF improved considerably the country's macroeconomic indicators. In this context, Benin sought a better integration in the international market and became member of the WTO and WAEMU, and signed a series of bilateral and multilateral investment agreements. The macroeconomic reforms led to accelerated economic growth. Since 1990, the GDP growth rate has accelerated by 5 per cent on average to 6.7 per cent in 2003, one of the highest of the region. Inflation was kept under control (2.3 per cent in 2002). However, these good results are tempered by a high birth rate of 3.25 per cent. Nevertheless, in 2005, there was an economic slowdown from 3.1 per cent in 2004 to 2.9 per cent compared to the outlook of 4.6 per cent which had been expected in the 2005–2007 pluriannual programme implemented within the framework of WAEMU to accelerate the convergence of economic performance of its member States. This slowdown was due to problems in the agricultural sector, which has seen a downturn of 0.3 per cent. At the same time, the higher costs of oil products reignited inflation, which reached

5.4 per cent in 2005 (against only 0.9 per cent in 2004).

At the same time, the budget was kept under control, with a shrinking deficit of 0.9 per cent in 2005 against 1 per cent in 2004. The external sector also, improved its current account deficit was reduced to 4.5 per cent of GNP (7.1 per cent in 2004). This progress stems from the improvement of the balance of trade and the balance of services. End 2005, the monetary situation improved overall. Money supply increased 26.4 per cent since December 2004.

Three criteria of convergence imposed by WAEMU were achieved: the net balance of the budget, the ratio of total public debt to current GDP and the non-accumulation of ancient debt during the current exercise. The inflation criteria, however, was missed.

2. Structural strengths and weaknesses of Benin

In terms of employment, 80 per cent of the active population is engaged in agriculture, which accounts for only 14 per cent of the GNP. Cotton is predominant in foreign trade: it represents between 70 per cent and 80 per cent of total exports and 35 per cent of fiscal revenue (excluding customs). Apart from cotton, palm oil and groundnuts have been major exports this year. Cattle breeding is relatively limited. Fishing is just sufficient for domestic consumption, although possibilities of expansion exist in this area, where there is plenty of rivers and water.

Industrialization is still in its infancy, mainly with some cement production, milling, textile and food processing. Industry is hampered by problems stemming from climatic, energy and world market uncertainties. Benin is well endowed with natural resources. In addition to mining (calcium in Onigbolo, thermal springs in Possotomé and Hétin-Sota, petrol in Sèmè...) there are still many unexploited

materials (iron ore in Lombou-Lombou, gold in Perma, phosphates in Mékrou, etc). The industrial sector, which is characterized by foreign direct investment, represents only a small share of GNP (14 per cent) while the services sector (48 per cent, of which 18 per cent in commerce) confirms the strong commercial position of a country which represents a trade platform for its neighbouring countries (Burkina Faso, Niger, Nigeria and Togo). In this the autonomous port of Cotonou plays a strategic role.

It is not surprising therefore, that the tertiary sector is heavily dominated by transport activities. Cotonou offers the ideal hub for merchandise being transported to and from Niger, Mali and Burkina, which have their own warehouses in the port of Cotonou. Trade is characterized by strong domestic markets for vegetables, and imports of manufactured products. The country also benefits largely from its ports of transit for exports from neighbouring countries like Nigeria. Data on the external sector is still relatively scarce because of the importance of the informal sector, which is estimated to represent some 25 per cent of imports and 50 per cent of exports, especially to Nigeria.

B. THE ROLE OF THE STATE IN BENIN'S ECONOMY

Like many West African countries, at independence Benin opted for capitalism linked to State-intervention. This ended in 1972 when the country turned to Marxism-Leninism. The "socialist" path of development which was adopted by Benin in 1972-1990 led to the overwhelming participation of the State in the economy to the detriment of the private sector. In many sectors (banking, sugar, cement, oil, fertilizers) nationalized enterprises were highly protected monopolies. Probably for that reason, they became less efficient and extremely costly for the taxpayer. As for the private sector it was restricted by very

heavy regulation. While the industrialization policy was expected to create jobs, in spite of the efforts of the State public and parastatal employment represented only 6.2 per cent of employment for the active population outside agriculture between 1971 and 1985.

After a brief period of relative prosperity (1977-1980) during which favourable world trends resulted in average growth of 5 per cent per annum, the economic situation took a downturn. The petrol boom in Nigeria and uranium in Niger, followed by the fall in prices of commodities and the depreciation of Nigeria's currency created a slowdown and a deterioration of the external sector. Income per capita fell on average 1 per cent every year from 1981 to 1990, increasing poverty and reducing final demand. This situation, added to mismanagement of projects resulted in a deep economic, political and social crisis. At the same time, public finances went out of control: the global budget deficit remained around 11 per cent of GDP in 1985-1988, which led the government to accumulate huge debt with foreign and domestic creditors. These problems meant that public sector was often short of cash for paying wages, which increased the downturn and political outrage. The debt ratio of Benin increased from 30 per cent to 48 per cent during 1980-1988 and the debt service reached 32 per cent of total exports in 1988. In 1989 the president decided to abandon Marxism-Leninism under the pressure of lenders.

C. ECONOMIC REFORMS

After the February 1990 conference, Benin clearly opted for economic liberalism. The government initiated the transition by stabilizing the economy and giving a larger share to the private sector. This led to a gradual reduction of the role of the State in the economy and to the dismantling of administrative rigidities which had strangled private initiative. As a result, the

package of economic, institutional, legal, fiscal and tariff reforms undertaken attracted both national and foreign investors.

1. Modalities

The 1990s were characterized by the implementation of vast reform programmes aimed at stabilizing and liberalizing the economy. The Constitution of 11 December 1990 established property rights, the principle of equality of treatment for all persons before the law, free rights of establishment without any distinction of nationality, and the principle of national treatment for investments. A new investment code was adopted and an Agency for Promotion of Investments, (CPI) was created. The impact of the investment climate and the vast programme of privatization undertaken by the government led to a boom of FDI in Benin.

Under law No. 92-023 of 6 August 1992, a vast program of privatization was initiated. In accordance with this law, different privatization proceedings were adopted, including concessions for management of State enterprises, cession of assets and equity participation. Foreign investors are in principle free to take over the total

capital of privatized firms. In some specific cases, for instance in the privatization of cement factories of SCB and SONACI or the brewery La Béninoise, a maximum 25 per cent stake was reserved for nationals while a maximum of 5 per cent was reserved for employees. The domestic private sector took an active part in the privatization process, especially after 1993, COBENAN (maritime transport), SOTRAZ (transport), cashew nut factory in Parakou, SONACOP (distribution of petrol products).

The performance of privatizations was mixed, however. Privatizations were mainly in the industrial sector (breweries, vegetable oil, sugar, cement, textile, tobacco, petroleum) and in the services industry (banks, tourism), while much remains to be done in public utilities (water, electricity, telecoms, ports, airports) and in cotton, the engine of the national economy. Privatizations allowed the State to improve public finances: the total income from privatization reached 33,561,507,666 FCFA (approximately \$64.5 million). A large number of State-owned enterprises (SOEs) which were not taken over in the privatization process had to be closed down¹¹⁰.

List of Privatized Firms

- In 1990, SOBETEX (Textile) was taken over by the Shaeffer Group (France) for \$521,949. Shaeffer took a 49 per cent share in the company, 20 per cent being reserved for the nationals;
- In 1990, MANUCIA (Tobacco) was sold to Rothmans International (United Kingdom) for \$2,546,816, which made a 100 per cent equity purchase;
- In 1991, SONACI (Cement) was purchased by SCANCEM (Norway) for \$7,857,000 in a complete privatization, in which a 20 per cent share was reserved for nationals;
- In 1991, SCB (Cement) was sold to the Amida Group (France) for \$2,035,972, a 50 per cent share for Amida and 25 per cent reserved for nationals;
- In 1991, les Abattoirs de Cotonou (Agrifood) was sold to Agroplus (France) for \$9,717,138;
- In 1992, la Béninoise (Breweries) was sold to Castel/BGI (France) for \$14,455,400 in the form of a cession of assets, with 20 per cent of the capital reserved to nationals, 5 per cent for employees and 8 per cent for the State;
- In 1994, SEB (Agrifood) was sold to Hydrochem (France) for \$666,318 in the form of a liquidation with cession of assets;
- In 1997, SONICOG (Vegetable Oils) was sold to SIFCA (Côte d'Ivoire) for \$9,265,471 in the form of a cession of assets, of five oil factories and one soap factory;
- In 1997, SONICOG (Vegetable Oils) was sold to L'Aiglon (Suisse) for \$1,860,138 as a cession of assets including the central depots and export manhandling of oils;
- In 1999 SCO (Cement) was ceded to SCB-Lafarge Group (France) under a contract of concession-management of an integrated sugar complex, for an annual price of \$3,331,590;
- In 2003, SSS (Sugar Factory) was ceded to the Complant Group (China) as a concession for management for the annual sum of 1,850,884;
- In 2003, Benin Marina Hotel was taken over by the BMD Group (France) in the form of a concession for management, at the price of \$925,442 per annum.

This first wave of privatizations was followed by a slowdown of the process, although the Government indicated it wished to continue. This was due in some cases to the fact that there were no interested buyers, or because the sale concerned a sensitive sector not only for strategic reasons but also because of social opposition.

2. Sectors involved in structural reforms

These include essential public utilities (telecoms, electricity, water, port authority), but also other sectors important for the Benin economy, such as cotton.

(a) Telecommunications

Ordinance No. 2002-002 of 31 January 2002 on the basic principles of the

telecommunications regime in Benin established a new regulatory and organizational framework aimed at increasing the competitiveness of the telecoms sector. The law envisages: (a) creation of a favourable environment for private investments; (b) definition of competition rules to be applied to the sector; (c) separation of the postal and communications administration from the Office of Posts and Telecommunications (OPT); (d) liberalization of the telecoms

market; (e) access to universal telecom services; and (f) opening of the historic incumbent's equity to investors.

The incumbent telecommunication firm obtained temporary exclusive operating license whose duration and size was fixed by a decree of the Council of Ministers. The exclusivity was to be terminated on 31 December 2005, after which all the telecommunication service networks were to be opened to competition. The law mentions in a very general way the access to universal services. According to the authorities, this service was to be offered by the Office of Posts and Telecoms (OPT) while the approval of the Regulator for Telecoms, (Organe de Régulation des Télécommunications) was set in place. After adoption of the decree of Dec. 2005, OPT was effectively separated into two distinct entities: Société Bénin Telecom SA and Poste du Bénin SA¹¹¹ but without being privatized. The 2002 ordinance sets out four possible systems for the service networks: (a) the authorization regime; (b) the permit regime; (c) the prior declaration; and (d) the regime of free networks and services.

In 1999, when initiating a public tendering process, the Government started the gradual liberalization of cell phones which until then was the responsibility of the cell phone network of OPT, in which three private companies (BENICELL, TELECEL and BBCOM) participated as well as a semi-public one (LIBERCOM-OPT). The contracts were signed for a period of 10 years. Until February 2004, it seems there was a tacit agreement among cell phone operators to fix similar prices. However, since 1 March 2004, the Government adopted a decree ordering price reductions of 20 to 40 per cent for cell phone communications. This can possibly explain in part the difficulties experienced by the sector until recently, as can be seen from the excerpts from the Council of Ministries of 18 January 2007 in which the Vice

Minister in charge of Telecommunications and New Technologies presented to the Government the report of the ad hoc committee established to control the legality of the activities of the telecommunication service operators in Benin. In that report the following criticisms were made:

- (a) 47 of 50 operators checked violated of all or part of their activities of their establishment and operation rules for the networks in question;
- (b) Access to international networks without any prior authorization from the competent authorities;
- (c) Utilization of frequencies in violation of the regulations;
- (d) Unauthorized supply of telecom equipment to the public;
- (e) Violation of the law, in particular of the decree on the installation and operation of cell radiotelephone as well as Ordinance No. 2002-002 of 31 January 2002;
- (f) Utilization without any counterpart of the equipments of Benin Telecom SA by some private operators;
- (g) Cases of bad governance at Benin Telecom SA;
- (h) Disorganization and unchecked opening of the market without any long-term vision, which created havoc in the Telecom and Information Technologies and Communication (TIC) sectors.

To that, one could add competition-related issues such as:

- (a) Development of corrupt practices which have ruined the wealth of the country in this field and considerably limited the development opportunities of the sector which could have created more employment opportunities;
- (b) Serious harm to the population and to the State of Benin, while at the

same time the operators themselves were permanently in difficulty.

This situation led to heavy debts for Benin Telecom SA and the whole country. Serious reforms have been prepared to redress the situation.

The decisions envisaged in the telecoms sector

These include:

- (a) Acceleration of Benin Telecom SA's audit and creation of the Telecommunications Regulatory Authority;
- (b) Immediate suppression of all international access apart from those by Benin Telecom SA;
- (c) Suspension of all authorization for telecom services such as : la Voix sur IP (VOIP), la Boucle Locale Radio (BLR), le WIFI, le WIMAX, l'ADSL, the prepaid cards, excepted for the suppliers of access to Internet and Cybercafé operators;
- (d) Dismantling of technical installations making possible unauthorized supply of satellite telecommunications (VSAT) utilized to provide services to the public, in violation of the law;
- (e) Suspending immediately all services still not opened to competition (fixed telephones, mobile phones, offered by private GSM operators and other violations of the law;
- (f) Repeal of the ministerial orders (arrêtés ministériels) authorizing direct interconnection of BELL BENIN COMMUNICATION by which it linked its own network to that of TELECEL; and
- (g) Check how the recent transfer of ownership between Telecel and Moov was operated.

(b) *The energy sector (oil, electricity and water)*

The dependence of Benin on foreign supply of energy is a major drawback for the development of the economy and weighs heavily on public accounts. The country had to import energy up to of 4.4 per cent of GDP in 2000, according to the Ministry of Mines, Energy and Water Power¹¹².

Biomass is by far the most utilized form of energy. Oil and electricity are second and third, constituting respectively only 31 per cent and 2 per cent of total energy consumption. The structure of energy consumption reveals the dominance of households (66 per cent), followed by transport (19 per cent) and industry (only 3 per cent).¹¹³

Oil products

Benin does not produce oil and fuels represented 12 per cent of imports in 2002 (\$60.1 million) according to the Ministry of Mines, Energy and Hydraulic Power (2003). However, drilling in search of oil reserves has permitted to discover potential oil fields (estimated around 4.58 billion barrels).

The price of oil products is fixed by decree. In 2000, illegal imports from Nigeria at considerably lower price was estimated to be around 18 per cent of total imports. Contraband oil from Nigeria has enormously increased in the last years not only because of the weakness of the Naira, but also because Nigerian oil is heavily subsidized by the Government of Nigeria. It is mainly gasoline for cars and heavy oil

that are imported illegally. Other estimates suggest that fraudulent oil imports are as much as 60 per cent or even 80 per cent of the fuel needs of Benin¹¹⁴.

The importance of the informal sector has led to frequent stock breakdowns. The small distributors who sell on the side of the road at very cheap prices doubtful quality fuels compete unfairly with the official gas stations, most of which belong to large oil companies like Total, Sonacop and Texaco, which have to cover higher operational costs.

The Ministry of Mines, Energy and Water is in charge of regulation, control, exploration and production of oil, while the Ministry of Industry and Commerce is in charge of the oil sector trade through its Directorate for the Promotion of Foreign Trade. Until 1995 the distribution and commercialization of oil products and their derivatives was operated exclusively by the State through the Société nationale de commercialisation des produits pétroliers (SONACOP). In accordance with the decisions of the 1990 "Conference of the Lively Forces of the Nation", the Government decided to liberalize the activities of distribution of oil products in 1995. Today, many companies are present on the market, including for example SONACOP, Shell, Total, Texaco, Aricoche Super Oil, Oryx, Agip, Afripetrol, Eao Petroleum, etc. Although they are numerous, the oil companies have not invested sufficiently for the maintenance of existing capacities. Oil reserve capacities seem to be insufficient and the supply of oil products is faced with structural problems.

Electricity and water

Electric power supply in Benin depended up to 86.84 per cent on imports of energy, local production covering only 13.16 per cent of total demand¹¹⁵. The access rate to electricity varied from 79.11 per cent (Atlantic coast) to 4.64 per cent (Atacora)

in 2004. The average rate for Benin is 22.05 per cent¹¹⁶.

Distribution was during a long time the monopoly of a State owned enterprise, Société béninoise d'eau et d'électricité (SBEE), which purchased electricity from a joint venture between Benin and Togo, called Communauté électrique du Bénin (CEB), who acted as importer of power, essentially from Ghana, Côte d'Ivoire and Nigeria. The Government has prepared new texts with a view to giving this sector an appropriate legal framework. These include the international Benin-Togo Agreement on electricity; the decree establishing the SBEE; the decree creating ABERME; the national electricity code, which is a basic orientation law for the sector; and the decree creating the regulatory Authority.

The construction of a gas-pipeline from Nigeria to Ghana should enable Benin and other countries of the region (Togo, Côte d'Ivoire and Ghana) to import natural gas from Nigeria for electricity production. In 2003 and 2004, SBEE was separated into two distinct entities: the Société Beninoise d'Énergie (SBEE) for electricity, and the Société Nationale des Eaux du Bénin (SONEB) for water.

As for rural electrification programs, the Rural Electrification Agency responsible for the implementation of the new rural electrification policy was established. Finally, with respect to SONEB, the new organic law provides for management by the communes, which means that management might be transferred to the local level.

The main impression is that the distribution of water and electricity is unsatisfactory throughout the country and that access to electric power and the water network is a barrier to private investment projects. In this environment, the question of privatization of these SOEs is being

discussed as a possible means of improving the quality of the service.

*(c) Production and distribution of cotton and textile*¹¹⁷

Cotton plays a strategic role in Benin's development policy and in its program for reduction of poverty (PFRP), and in the PFRP of its partners in WAEMU. The Government has tried to reform the cotton industry by introducing a partial privatization of the cotton trade and by liberalizing the distribution of inputs. Deregulation of the sector resulted in the formal abolition of the exclusive buying rights of the National Society for the Promotion of Agricultures (SONAPRA) for cotton seeds since the 2003-2004 harvest. At the same time, its monopoly on

distribution of cotton seeds negotiated within the profession was dropped. The price of cotton came closer to the export prices. Since 1993, the commercialization of the cotton (seeds) was transferred to the Farmer Organizations (OP).

Producer prices were fixed by the Government until the 2001-02 harvest, in order to "stabilize the production-distribution channel". During that harvest, world prices fell considerably and State subsidies amounted to 1 billion FCFA (some \$1,6 million) in order to support the price of cotton seed to 200 FCFA per kg (approx \$0.3). The State therefore contributed 35 FCFA to cover the gap between the farmer price of 200 FCFA and the selling price of 165 FCFA.

Reforms in the cotton industry and SONAPRA

Benin's cotton sector reforms are proceeding since 1988 with the object of ensuring the condition of sustainable development of the production-distribution chain as a whole, and to guarantee an optimal value for the privatized State facilities.

During phase I, which ended in 1999, the State put an end to its subsidies for inputs (1988), encouraged increased participation by the private sector (including farmer organizations) and (since 1993) transformed industrial and commercial operations of the Regional Action Centres for Rural Development (CARDER) to the public enterprise "Société nationale pour la promotion agricole (SONAPRA), which is in charge of diversifying agricultural output and developing new products for export. Since 1995, the capacity of stocking the production of Benin has increased, after 8 private factories were authorized to produce in addition to the 10 existing ones belonging to SONAPRA.

Since 1999, the reform has continued under a new institutional and regulatory framework. The new authorities created by the State are (a) the Committee for evaluating studies and opportunities to open the capital of SONAPRA to outside investors; and (b) the committee in charge of the reform of the cotton sector. Private sector associations were also established. These are (a) the Professional Cotton Association (AIC); (b) the Professional Society of Shellers of Benin (APEB); (c) the Professional Grouping of Agricultural Input Distributors (GPDIA); and (d) the Centre for Security of Payments and Reimbursements (CSPR).

The reforms also extended to SONAPRA, which since 17 November 1999 lost its exclusivity on supplies and distribution of inputs in favour of farmer organizations responsible since the 2001-02 harvest to follow-up the organization of consultations for obtaining inputs.

Since 2000, the monopoly SONAPRA had on the primary commercialization of cotton seeds was repealed. In January 2000 a "Plan to upgrade the profile" was set up to solve the financial

problems of SONAPRA in order to make it attractive for privatization. In 2002, the actors of the cotton supply chain agreed on a privatization scheme for SONAPRA as a single unit, of which the State would keep a 34 per cent stake and would sell the remaining 66 per cent to private investors under the following distribution scheme: 51 per cent as a “strategic bloc” (hard core) of investors; 10 per cent to producers; and 5 per cent to the employees of SONAPRA.

In 2003, as a result of a second tendering procedure (the first was cancelled due to lack of sufficient bidders), Banque Belgoise was chosen to assist the Government in privatizing SONAPRA.

The production of cotton seed has expanded considerably in recent years, from 161,000 tons in 1992/93 to 370,000 in 1998/99. The production of cotton fibre has followed the same trend, to 254,000 tons during the same period. Nevertheless, in spite of the low cost of production and the good quality of Benin’s cotton, few value-added activities have developed in the cotton industry in Benin. Unlike other countries of the region, Benin has not managed to develop a strong textile industry. Only 3 per cent of cotton fibre is transformed locally; the low level of industrialization and preference for short-term operations of local businessmen are probably the reasons for this situation.

Benin has only five cotton weaving and spinning factories: Label Coton Benin; Société Beninoise de Textile (SOBETEX); Compagnie Textile du Bénin (CTB), formerly Industrie Beninoise de Textile (IBETEX); and Marlan’s Filature SA. The oil production from cotton seeds is hardly exploited given the capacity of the national cotton industry¹¹⁸; it often suffers from fraudulent entry practices. This situation should be compared to the situation in other West-Africa and Central Africa Countries which have experienced high rates of growth in the textile industry, growing even faster than their counterparts of South-East Asia. In early 1980, some 40 textile enterprises were thriving on some important sub-regional markets. In 2004, only a few of these enterprises survived satisfactorily: UNIWAX and COTIVO in

Côte d’Ivoire and Coton du Cap Vert in Senegal; and FITINA SA, recently created in Mali produces good quality thread which it exports to Europe.

Some projects to revive this sector exist, for example with Indian or Chinese investors (Project INDOSEN). Many reasons are put forward to explain the difficulties of the textile industry in Benin, they include:

- (a) Tough competition on world market;
- (b) Unfair competition through illegal imports, counterfeit designs, etc. (for example, the price gap between local cloth and counterfeit imports in the region can be as much as 40 per cent);
- (c) Absence of a real regional market, each country trying to “preserve its own market for its local industries”;
- (d) Poor level of productive investment resulting in obsolete equipment;
- (e) Very high costs of certain factors (energy, transport);
- (f) Mismanagement: absence of competitiveness outlook, low productivity;
- (g) Unattractive business environment (political difficulties in certain countries, abusive practices by some authorities, weakness of legal protection; heavy tax rates in certain cases.

Conclusion: dozens of textiles factories have closed and large European groups (DMC, Willot) have left the region¹¹⁹.

The case of the Benin textile producer SOBITEX, which was visited during our audit and information mission to Cotonou on 26 January 2007 in the industrial zone of Akpakpa is illustrative in this regard:

This factory, which was previously owned by the State, was taken over by a private Group, and while it employed more than 600 workers at the time, it now only functions from time to time (3 days a months), with a maximum of 48 employees. It is awaiting a hopeful purchaser with its obsolete equipment dating from the 1970s in an environment of tough Chinese competition flooding the Benin market with all kinds of low-priced textiles against which domestic producers cannot compete.

To try to counter this unfortunate situation, the Council of Ministers of 31 October 2006 has adopted a Plan to refurbish the textile companies of Benin, (SITEX) of Lokossa and the Complexe Textile du Benin (COTEB) of Parakou, former Industrie Béninoise du Textile, (IBETEX). Also, to fight against “unfair competition” and counterfeit goods, the Ministry of Commerce adopted order No. 057/Micpe/De/SG/DCCI/Sre of 19 May 2005, on “Organization of trade of certain textile products in Benin”¹²⁰. This order prohibits any retail sales of cloth (only containers, with a minimum of 5 closed bales can be sold at a time). It is clear that apart of from local commercialization problems, the real problem originates from European and US subsidized cotton, which ends up competing with local textiles once it is transformed at much lower cost.

December 2003 containing an Agenda for improving the competitiveness of the cotton-textile production-distribution chain in WAEMU member States.

Cotton has a major economic importance for the sub-region, which was the second world exporter of cotton in 2002, just after the US. Cotton is now the third major African export after coffee and cocoa. West Africa and Central Africa export more than 90 per cent of their cotton production and are thus highly dependant upon the world market, of its cycles and the policies implemented by its competitors¹²¹.

For its part, WAEMU also adopted decision No. 15/2003/CM/WAEMU of 22

WAEMU's six strategic options

Option 1: Creation of a Regional Fund for the Promotion of Cotton Production and Incentives for transformation of cotton-fibre locally in order to:

- (a) Guarantee income for producers; and
- (b) Attract private investors in the transformation of cotton-fibre.

Option 2: Creation of a Regional Investment Fund for the Development of the Textile Industry in WAEMU.

Option 3: Launching of a permanent consultation procedure between States and the private sector to implement all necessary initiatives in order to increase the competitiveness of the cotton industry.

Option 4: Strengthening of a regional training program for textile workers through the Research and Training Centre for the Textile Industry (CERFITEX) (former Ecole Supérieure des Industries Textile ESITEX of Segou, in Mali).

Option 5: Establishing a Regional Technical Centre on Textiles.

Option 6: Launching an active communication campaign for the Agenda of Promotion of the WAEMU area, whose implementation presupposes the mobilization of all the actors (administration, regional and international institutions, international investors and private economic operators).

The 2006 Report of the Commission of WAEMU recorded the sectoral initiative in favour of cotton by three member States of WAEMU (Benin, Burkina Faso and Mali), which was joined by Tchad.

(d) Media and communication

After the political events of 1990 many new magazines and newspapers were launched, but most of them did not survive after the first few issues, essentially for economic reasons.

At present some have irregular publishing dates while other papers appear only during the elections. The first papers to appear at the end of the 1980 were La Gazette du Golfe, Le Forum de la Semaine and Tam-Tam Express. Today numerous daily newspapers exist. Among them, the most famous ones in Benin are La Nation, Le Matin (since 1994), Le citoyen and Les Echos du Jour (since 1996), Le Point au

Quotidien (since 1997) and Le Matinal (since 1998). Still others include La Dépêche du soir, le Congrès, L'œil du Peuple, Liberté l'Aurore, La Cloche and Benin -Presse Info.

For its part the liberalization of the audio-visual sector has been achieved and a number of media have appeared. After the adoption of a specific law, the High Authority on Audio visual and Communication was created. It is responsible for guaranteeing freedom and independence of the press, delivers licences for private radio broadcasters, as well as TV operators. In addition to the public service radios (Radio Cotonou, Atlantic FM, Radio Parakou), there are many private radios, such as Radio Star, CAPP FM, Golfe FM, Magic Radio, etc.

In the area of TV stations, there are private channels like Golfe TV, ATVS, LC2,

TELCO, TV+, and International TV in addition to the national channel ORTB.

II. GENERAL CONDITIONS FOR STRENGTHENING A MARKET ECONOMY IN BENIN

A. LEGAL ENVIRONMENT

The main objective so far has been that of establishing a national legal background favourable to the private sector.

1. Business law

Like other zone franc countries, Benin has since 1 January 1998 a modern business legislation flowing from the entry into force of the uniform acts adopted under the Treaty for the Harmonization of Business law in Africa (OHADA)¹²².

(a) Specific laws applicable to certain enterprises, cooperation or undertakings

Specific rules regulate public or semi-public (parastatal) enterprises, joint venture, Banks and credit institutions as well as insurance companies.

State-owned enterprises (SOEs) and parastatals are governed by law No. 88 - 005 of 26 April 1988, which amends previous laws concerning establishment, organization and management of public and semi-public enterprises. Joint - ventures are equity firms in which the State or any local authority is associated with national or foreign private or public investors.

Banks and credit institutions are governed by law No. 90 -018 of 27 July 1990 and by Convention of 24 April 1990 creating the Banking Commission of WAEMU. This law applies to banks and financial institutions active in Benin, irrespective of their legal status, the location of their headquarters, and the nationality of their

owners. The law makes a distinction between banks and financial institutions and gives a definition of the different types of activities that banks engage in. The law specifies in particular that in order to open a Bank certain conditions have to be met starting with the award of an authorization to practice a number of banking activities. Banking regulations also include all instructions and notes issued by the Central Bank of West African States as well as the prudential rules applicable to banks and financial institutions of WAEMU. Based on this legislation the Benin banking sector has become highly competitive with many banks active in the country¹²³.

Insurance Companies are governed by law No. 92 - 029 of 26 August 1992 fixing the rules applicable to insurance and capitalization institutions, insurance operations and professionals in the field. They are also subject to the Insurance Code of the Inter - African Conference of Insurance Markets (CIMA) enforced within member States since 15 February 1995. The CIMA Code was established by the Treaty of the Conference of Inter - African Insurance Markets, signed on 10 July 1992 in Yaoundé (Cameroun). Insurance Companies must obtain an authorization before they can begin to operate in Benin. The authorization is delivered by the Minister of Finance upon receiving advice from the Regional Insurance Control Commission.

(b) Taxation

Business taxes have been simplified and rationalized within the framework of harmonization of rules and regulations of member States of WAEMU in order to strengthen the West - African market. The fiscal pressure on Benin enterprises is on average equal to those of other countries of the region, but considering the level of development of the country, VAT in particular, and corporate taxes excessively penalize the private sector. Moreover, the

importance of the informal sector and the high level of tax fraud remain an obstacle to a reduction of taxes. It should also be noted that the reimbursement of VAT advances (drawbacks) occur quite exceptionally, and acts as a penalty on transnational corporations established in Benin.

The following taxes apply: Profit tax (BIC); Revenue tax on financial assets (IRVM); VAT; a wage tax (VPS) which is to be paid directly by employers; a one - time professional tax (TPU) and a one - time real - estate tax (TFU).

(c) *Foreign exchange regulations*

Like in all WAEMU countries, the FCFA is freely convertible and guaranteed by the French Central Bank (Banque de France). The Currency has a fixed rate of exchange with the euro which is 665,957 FCFA for one euro. (See box II.4). There is unrestricted freedom of movement of funds between member States of WAEMU. Outside the WAEMU area, transfer of funds between Benin and foreign countries is subject to a declaration, any demand for transfer having to be submitted to an authorized dealer, a bank or a financial institution.

Opening of an foreign-exchange account in Benin (or any other WAEMU member State) must be authorized by the Government as well as the Central Bank of the West African States (BCEAO) and many transfers of funds require related documents to be transmitted both to the Government and to the BCEAO.

(d) *Customs and trade regulations*

This regulation is being harmonized by WAEMU with respect to entry duty and free circulation of goods through a multitude of additional acts, of regulations and directives concerning the taxes and duties collected by the customs as well as

the control of imports and exports. Although imports are in principle free there are however some restrictions justified by issues of public morality, protection of health, protection of historic national heritage, archaeological treasures and intellectual property rights.

The control of quality of goods imported to Benin has been assigned to BIVAC (of the VERITAS group) in accordance with the system of inspection of imports of merchandise to Benin established by decree No. 91-23 of 1st February 1991.

Exports from Benin require a simple authorization provided by the Directorate in charge of Foreign Trade. However exports of gold, diamonds or any other precious metals need first to be submitted to the Minister of Finance for permission. Unlike imports, exports are not subject to a control by BIVAC. Since 1st February 1993 export duties and taxes have been abolished, but this facility does not cover exports of precious metals, non-refined oil, cocoa and beans. Since 1 January 2000, a special tax of 8 per cent is imposed on re-exported products. Enterprises have the possibility of requesting a preferential tax treatment under the Investment Code, or on the basis of the rules of the Free Industrial Zone.

(e) *The investment code*

According to law 90 - 002 of 9 May 1990 (the Investment Code) investors in Benin can benefit from a special regime for craft industry or other enterprises investing a certain amount, as well as three preferential regimes: on SMEs, large enterprises and Fiscal stabilization. It is stipulated that the same enterprise cannot take advantage of two different preferential regimes. The common conditions of application of the Investment Code are summarized below:

- (a) A newly created enterprise, in any sector of activity, can be accorded a preferential treatment if it presents a special interest or importance for the

realization of the goals of the National Economic and Social Development Plan and if it is not involved in the following activities: buying for resale to the State, refurbishing of manufactured or semi-manufactured products having a negative impact on the environment or on public health;

- (b) The activity created must also contribute substantially to the implementation of policies aimed at developing local communities by investing in less developed zones, creating employment, contributing to improvements in the balance of trade or in increasing the value of local resources;
- (c) In exchange for these advantages, the enterprise must make certain undertakings on: minimum duration of the investment, number of employees, wages, quality standards, environment, etc.

(f) *Employment legislation*

Law No. 98-004 of 27 January 1998 regulates employment conditions in Benin. Hiring is in principle free, on the condition that some rules are respected, such as the obligation that employees hold the work permit delivered by the Ministry of Employment.

(g) *Accountancy rules*

Auditing rules in Benin are in conformity with those of WAEMU for Banks, CIMA for insurance companies and OHADA for commercial firms¹²⁴.

(h) *Intellectual property*

Like Senegal, Benin is one of the African countries members of the Africa Intellectual Property Organization (OAPI), which has established a community regime for intellectual property rights¹²⁵.

(i) *Technical standards and certification proceedings*

Since October 1997 Benin has its own national system of standards, the Benin Centre for Standards and Quality Management (CEBENOR), which has been in operation since January 2000. CEBENOR is in charge of managing standardization and the national certification system of conformity to standards. These standards apply both to domestic and imported products. In addition, standards of reference exist (inspired by the Codex Alimentarius, the Senegalese standards and those of the International Electro-Technical Commission) for foodstuff and building materials. The conformity of imported products which is made obligatory by the technical regulations has to be certified by an institution recognized in Benin. (WTO report, 2004).

2. *Property law and environment law*

(a) *Property law*

Law No. 65-25 of 14 August 1965 governs land property in Benin. Ownership of urban land is free without any distinction of nationality. A registrar of land property and a property rights office has been established to guarantee private property in Benin. Once registered, a certificate of property can be used as guarantee to obtain a mortgage. In 2000 the legislation introduced in application of OHADA rules has totally reformed the community land property rights. This community legislation is also applicable in Benin. However, numerous cases of litigation occur because of the existence at the same time of a customary law in Benin.

(b) *Environment law*

Article 27 of the Constitution establishes the right for all to benefit from a "healthy environment, satisfactory and sustainable

and the obligation to defend it". The State is in charge of protecting the environment. The environment rules have been recently revised with the adoption of law No. 98 - 030 of 12 February 1999. Two institutions for the management and control of environment policy have been created: the National Commission for Sustainable Development and the Benin Agency for Environment. The latter is in charge of evaluating the implementation of environment policy with a responsibility to inform and suggest any necessary preventive and corrective measure. This new juridical system provides also for the imposition of heavy sanctions for violators (fines as well as jail sentences).

3. Government procurement code

Law No. 2004 - 18 of July 2004 amending Ordinance No. 96 - 04 of 31 January 1996 created control authorities (the National Commission on Regulation, the National Directorate in charge of Government Procurement and officers in charge of awarding tenders). The Code is based on the principle of free - competition.

4. Other rules

Certain aspects of competition are regulated by a few incomplete and incoherent laws which prohibit certain practices and prescribe obligations for professions engaged in competition. This is the case in particular of law No. 90 - 005 of 15 May 1990 regulating the conditions of commercial activities in Benin and the Ordinance No. 20/PR/MFAEP of 5 July 1967 regulating prices and inventories.

B. ECONOMIC ASPECTS

1. Monopolies and concentration of economic power

In spite of the liberalization and privatization policies implemented by the authorities, monopolies continue to exist,

perpetuating the concentration of economic power of the State as well as large Multinational Corporations in different sectors.

Although the import monopolies on fertilizers by SONAPRA and on crude oil by SONACOP have been abolished, numerous monopolies (cotton fibres, Post and telecommunications) and an oligopoly (cement) continue to operate. Exclusive importation rights continue to be accorded to certain specialized enterprises. This is for example the case of pharmaceuticals and fertilizers. Only certain public and private firms licensed by the State are authorized to import pharmaceuticals. This is the case for example of Société des Pharmacies du Benin (SOPHABE), the Centrale d'Achat (Purchasing Centre) of essential medicines, (CAME); the Groupement d'Achat (Purchasing Group) of pharmacies of Benin (GAPOBE); l'Union Beninoise des Pharmacies (UBPHAR), PROMOPHARM, etc. Generic drugs are supplied to public health centres by the "Centrale d'Achat des Medicaments Essentiels (CAME) at prices subsidized by external sources of finance. CAME has signed an agreement with the Government to define the modalities of application of its mission of supplying health centres. (WTO Report, 2004). A control of mergers and takeovers of former public enterprises as well as private firms would be necessary.

2. Problems of the informal economy.

All countries of the WAEMU subregion suffer from an important informal sector¹²⁶. In 1982, according to a study by the ILO, the informal economy was overwhelming in the manufacturing industry of Benin. It employed 95.7 per cent of the active population (more than 10 years of age) in the urban and rural areas (1,697.295 people).

The formal sector occupied 4.3 per cent of the population (76,757 persons). Excluding agriculture and commerce, informal employment had 140,000 individuals working in more than 87,000 enterprises. Formal employment in the same sector had only 72,000 employees, (half less than the informal sector).

Ten years later, the employees of the modern urban and rural sectors are still less than 76,000, while those active in subsistence activities and small merchant production are about 1,980,000. As a result the number of employees in the urban sector has decreased by around 20 to 25 per cent and its share at the national level would not be more than 3. per cent.

Among the cities of Benin, Cotonou is first, with 73,373 undertakings (54 per cent). Next is Porto Novo (24,890 undertakings or 98.2 per cent of the total). Nearly two thirds (72.2 per cent) of the informal undertakings of the country are located in these two cities. Concerning the dynamism of the labour market, and especially with respect to the informal sector, it is interesting to study the rate of creation of enterprises and their duration of activity. It can be seen that the recorded undertakings are relatively new. About four of ten (43.7 per cent) were established during the year the data was collected and nearly two of three have three years of existence¹²⁷.

These data are confirmed by a report of WAEMU on the informal sector in the seven member States including Benin. The data confirm that the informal sector is by far the main employer in cities, even if they are micro-enterprises of 1.53 people on average. The total employment by the informal sector is 2.3 million people.

The main characteristics of employment in the informal sector are the precariousness and the absence of any social protection. Some 31 per cent of those engaged in the informal sector are employees, but only 5

per cent have a written contract. In all the cities, the average income is higher than the legal minimum wage. The sector is also characterized by the absence of capital in the production process. The main sources of financing are personal savings, gifts or inheritance (between 65–95 per cent of the capital). Other modern sources of finance such as micro-credit and bank loans are still rare. Eighty-seven per cent of the commodities used by the sector are provided by the same informal sector. Downstream, the main market for the informal sector is constituted by households (66 per cent of the production).

The list of branches of activity subject to the informal sector is unlimited. They are related to the nature of the activity in question and to the rules and conditions imposed on them: sales of oil products, pharmaceuticals, mattresses, foodstuffs, construction materials, electro-domestic appliances, etc. One can divide the informal sector in two parts, even if the border between them is unclear:

- (a) An informal sector of subsistence, represented by small traders having very low financial means who distribute low-quality products, often contraband and counterfeit goods; and
- (b) All those who choose to evade their fiscal obligations, customs duties, and do not respect standards. This sector is managed by people who dispose of important financial means but who chose to act in complete illegality.

It is clear that the second category in particular should be sanctioned and eliminated; its existence is highly damaging to the competitiveness of the formal economy.

3. The autonomous Port of Cotonou

The port was opened to trade in 1965. Given the strategic position of Benin, in the reform the port rapidly gained a great importance for the countries of the region. The management of the infrastructure was given to the Authority of the Autonomous Port of Cotonou, a State-owned enterprise responsible for the management of the installations and equipment of the port in application of decree No. 89-306 of 28 July 1989 specifying the statutes of the Port authority; and decree No. 96-217 of 31 May 1996 consolidating the power of the Port Authority. Until 1998 manhandling operations on the Port were the responsibility of a public monopoly awarded to Société beninoise des manutentions portuaires (SOBEMAP). Since then, decree No. 98-156 of 28 April 1998 opened these activities to the private sector. Two private operators were admitted in 1998: Cotonou Manutention SA (COMAN SA) of the Maersk Group AP Moëller and the Société de Manutention du Terminal de Conteneurs (SMTC) of the Bolloré Group.

Today, these two private operators cover 85 per cent of the port activities (30 per cent for Maersk and 55 per cent for Bolloré) while the public sector (SOBEMAP) has a 15 per cent share. The activity of authorized customs commissioner in charge of transit and consignment was fully privatized in 1986. While there are some 100 transit companies operating in this sector, 90 per cent of the activities of the port are operated by three private firms: Maersk, Saga-Delmas and Getma.

Such a situation deserves a closer look in terms of possible abuses of dominance in the interest of the other operators, the competitiveness of the Port, and in the interest of its customers. The same scheme is reproduced in the other ports of the region (Dakar, Lomé, and Abidjan) where the same operators have a dominant market

position. In addition, the pricing of the port activities does not seem transparent, nor equitable or even in conformity with the principle of free-competition and free-price formation. It appears that with the end of maritime conferences the pricing of these operations has been liberated; it would be interesting to check whether these rules are respected¹²⁸.

The capacity of the port is now limited given the traffic growth, hence the need to increase existing capacities by building new harbours and equipment to be able to receive the additional load of containers. In addition the timing of different operations, in particular the customs operations is very long taking many days, sometimes weeks, while more performing ports such as Singapore complete such operations in a few hours, although it has to deal with much greater traffic.

4. The duty-free zones

Law No. 2005-26 of 8 September 2005 sets up the basic rules for the duty-free industrial zone in Benin and completes the 1999 and 2004 Budget laws establishing a legal framework for the zone. Enterprises that can benefit from the Duty-Free zone are: (a) industrial firms and zone supporters who produce mainly for exports, (b) service providers who serve exclusively the industrial firms benefiting from the duty-free regime; and (c) the enterprises producing inputs exclusively for the authorized export industries of the zone.

The zone support enterprises (Promoteurs de zone) are private or public corporations which have equipped a property they own in the zone and have received an authorization from the State. To obtain such a license, they have to reserve permanent posts in priority for Benin nationals and to utilize local inputs.

The enterprises authorized to be part of the zone have a number of advantages such as tax and duty exemptions¹²⁹ on imported machines, equipment and spare parts as well as building materials, fuel, and all products needed for the performance of their export operations. A discount of 60 per cent of the duties and taxes is offered for all business vehicles when they are imported. If bought in the country, they do not obtain these advantages and taxes are not reimbursed.

III. THE LEGAL FRAMEWORK OF COMPETITION

A. IDENTIFICATION OF POTENTIAL ANTI-COMPETITIVE PRACTICES

1. Government practices and measures

Most developing countries like Benin came to market economy after having gone through a transition period from centrally planned economy based on monopolies and administered prices. It is therefore still possible that old habits prove difficult to abandon and the will to keep going with monopolies and protected national champions persists. Therefore, waivers to free prices can be numerous and all sorts of subsidies or aids can continue to be granted to some enterprises. It is true that one can consider some of these waivers as permissible under competition law, such as for example the existence of monopolies for public utilities of general economic interest.

However, what is less in conformity with competition principles and especially WAEMU community competition rules is the fact that many countries offer tax holidays and other specific advantages aimed at attracting foreign investors through investment Codes and/or Duty-free zones. Hence, the actual Investment Code of Benin as well as its industrial duty-free

zone can be seen as contravening certain provisions of WAEMU law, in particular those aimed at prohibiting State aids.

2. Enterprise-level practices

An analysis of the actual situation of the economy of Benin shows that while important economic reforms have been undertaken to open the domestic market to competition in most sectors of the economy which were closed in the past, competition might still not be playing its full role in terms of the fixation of prices of certain goods and services. One can cite public transport or tariffs of lawyers or of doctors who all apply uniform conditions, revealing the possible existence of cartel agreements (especially transport syndicates agreeing to enforce minimum tariffs). In the same way it is clear that in certain important markets a limited number of firms are in a position to “dictate their will” by fixing prices and conditions of sale or supply of services which are not competitive.

This may also result from the fact that certain Benin enterprises feel threatened by foreign firms as a result of market liberalization by WAEMU and try to protect their market by creating cartels or abusing their dominant position of market power. For example *Plastique et Elastomère du Benin (PEB)*, the company visited during the audit and information mission in January 2007, which are the leaders of its branch and struggles to resist against the competition, especially unfair competition of contraband and counterfeit products, has itself adopted a model “distribution contract” in which notably article 5 looks like a resale price maintenance clause generally prohibited by competition law, when it provides that “the distributors are obliged to practice the prices indicated by the supplier. In case of non respect of this obligation, the supplier may repeal the contract without any prior warning”.

3. Anti-competitive practices originating from abroad

In the same way, as it came about during the interviews held, it seems that a number of anti-competitive practices exist in Benin which originate from abroad. This may be the case in particular of enterprises located in the common market which may in turn attempt to foreclose the market of their country of origin to Benin firms by applying various strategies, including anti-competitive practices. An example can be found in the tobacco industry where it has been often remarked that some companies operating in the sub-region, like American Tobacco, have a tendency to create different cigarette Trade-marks in each member State of WAEMU and prohibit the free-circulation of these makes in different countries, thus artificially segmenting the common market of WAEMU according to the national territories of member States. Moreover, foreign firms are also tempted to penetrate the market of Benin in violation of anti-dumping rules and through contraband and counterfeit products, as was disclosed above on the cotton industry.

4. The informal sector and unfair practices

As seen earlier in this review, the informal sector in Benin is hampered by numerous practices affecting free-competition. The subsistence sector, normally composed of micro-traders with limited financial means, usually constitute the distribution link for low-quality products mostly resulting from contraband or piracy. They often play the role of link between the public and enterprises established in the formal market as well as in the informal one, in order to avoid their professional obligations. In Benin, many cases can be found, in particular in the transport sector and in the retail sales of petroleum products on the side of roads in the outskirts of towns. It is frequently the case that these informal

market players meet to fix prices and impose fines on those who disobey.

However, the most damaging informal sector is that which is composed of enterprises having full of cash, but preferring to act illegally to evade taxes and avoid customs obligations, administrative hassle and standards, thus acting in perfect illegality and in full prejudice of other competitors who respect the rule of law. Unfair competition, should it be contraband, tax evasion, or counterfeit, affects not only competition but also consumers and the State. As they do not pay customs nor taxes, they are able to sell at very low cost and gain market shares to the detriment of the formal sector.

In conclusion, in both cases the consequences of informal activity damage formal markets, in particular through:

- (a) Affecting market exit: since competitors, are eliminated by extremely low prices, the formal sector is gradually pushed out of the market, which ends up in full control of the informal sector; “bad products chase away good ones”; and
- (b) A restriction to market access or entry: non-respect of intellectual property rights affects investors, with the result of limiting innovation and hence the slowing down or elimination of entry into the market of innovative products.

Hence, as a result of the preponderance of the informal market, formal market operators will renounce to enter into the market. Benin suffers particularly from the consequences of this situation in the field of oil products where the informal sector is dominant.

As a result, oil companies not only refrain from investing in upgrading of old distribution centres, but also in the construction of new modern gas stations.

Moreover, as soon as the formal sector breaks down in a given neighbourhood, the informal sector takes advantage by hoarding to speculate on prices¹³⁰.

B. LAWS AND REGULATIONS

So far, unlike some WAEMU member States like Senegal and Burkina Faso, Benin does not have a comprehensive competition law covering all the issues normally covered by such laws, including anti-competitive practices and unfair practices, usually controlled by a competition authority. In the absence of a comprehensive national competition law, the issue of competition may be regulated indirectly, in a haphazard manner by some existing laws.

This is the case of law No. 9-005 of 15 May 1990 fixing the conditions of operation of commercial outlets in Benin, as well as Ordinance No. 20/PR/MFAEP of 5 July 1967 regulating prices and inventories. To these two fundamental texts, one should add existing sectoral regulation concerning in particular telecommunications and medias and communication: Ordinance No. 2002-002 of 31 January 2001 on fundamental principles of the telecommunications sector in Benin and Ordinance No. 2002-003 of 31 January 2001 creating and organizing the regulatory authority of Posts and telecommunications, and decree No. 2003-476 of 1 December 2003 on the organization and composition of the Regulatory Authority of Posts and Telecoms, which has recently been transformed into a Transitory Council for the Regulation of Postal and Telecoms services.

It is important to add to these national regulations the international texts which constitute a fully integrated legal base in Benin, including in particular the Community Competition Code of WAEMU and the Bangui Agreement establishing an

African Organization for Intellectual Property able to combat both anti-competitive practices and counterfeit goods.

To bridge this juridical loophole and the shortcomings of the two texts mentioned above, a project of competition law was adopted by the Government and transmitted to the National Assembly in 1977. However, this text could not be adopted before the introduction in May 2002 of a community law on competition at WAEMU.

In 2003, a draft bill on consumer protection, elaborated, by the “Que Choisir Benin” association was transmitted to the Government for consultations with other bodies before submission to the National Assembly.

From the strict viewpoint of positive law a closer look at the two fundamental general texts that are the law of 15 May 1990 setting the conditions for starting a commercial business in Benin and Ordinance of 5 July 1967 regulating prices and inventories reveal first of all the principle of freedom of commerce (while facilitating entry procedures for foreign firms in Benin) and the principle of price liberty. While anti-competitive practices are not covered by legislation so far, there are certain rules concerning unfair competition and price controls.

1. Absence of any specific rules prohibiting anti-competitive practices

There are no specific rules prohibiting some anti-competitive practices such as cartel agreements and abuses of dominant positions. However, Ordinance of 5 July 1967 on price regulations and inventories deals partly with the notion of cartels and abuse of dominance. While dealing with illegal pricing where price controls need to be applied, article 39 of the Ordinance

states that the following acts are assimilated to illegal practices:

“...all collusion actions, conventions, or formal or informal agreements, coalitions under any form, and for any reason, practices aimed at restraining the free play of competition and opposing the formation of lower costs or resale prices, or by favouring artificial price increases.”

“...the activities of an enterprise or group of enterprises having a dominant position on the domestic market, which aim at or could have the effect of restraining the normal functioning of the market.”

“...except for cartels and dominant positions resulting from the application of legislation or regulation or which can be justified by an improvement of markets for outputs or assuring economic progress through the realization of specialization.”

The draft bill prepared in 1997 envisaged a full coverage of anti-competitive practices through the adoption of rules based on prohibition of cartel agreements and abuses of dominance. But with the passing in May 2002 of the community law on competition by the WAEMU and the subsequent confirmation of the exclusive competency of WAEMU in this field, the bill is presently being revised in this respect.

Hence in its present version, the revision of the competition bill will take especially into account WAEMU's competition law in its Part III on anti-competitive practices. The first of this part, article 6, provides that “are exclusively under community law on competition, which is uniformly applicable to all member States of WAEMU the following anti-competitive practices cited under article 11 below:

- (a) Anti-competitive cartel agreements;
- (b) Abuses of dominant position; and
- (c) State aids.

Articles 7, 8, 9 and 10 reproduce respectively, with examples in most cases, the community definition of cartels, abuses of dominant position, concentration operations and State aids.

Article 11 recalls that “irrespective of laws and further amendments thereof, the community law on competition includes” the three regulations and two directives of 23 May 2002 which are expressly mentioned”.

Finally, article 12 specifies that “implementation of the provisions on anti-competitive practices is exclusively of WAEMU's competence” but that “the national authorities however, cover the general inquiry upon national initiative or express mandate by the Commission of WAEMU in conformity with the powers and proceedings for investigation foreseen by the community and national laws”.

Hence the draft competition bill of Benin takes precedence with respect to any existing national competition law within the WAEMU area. National competition laws have not so far been revised and amended to take this into account; for example in Burkina Faso. Therefore, the present draft law in Benin could serve as reference for other member States in revising their laws in accordance to WAEMU competition law.

2. Provisions related to unfair competition

Provisions on unfair competition akin to fraud exist first in law No. 90-005 of 15 May 1990 on the conditions for commercial activities in Benin which prohibit and sanction such practices as defined in the law. Under the terms of article 41 of the

law, “any trader or industrialist found guilty of fraud or unfair competition shall be sanctioned according to provisions of article 40 not with standing the fines provided for by the customs code” and “the trade officials can proceed with seizure of merchandise which is subject to fraud until the defendant has accomplished his obligations”.

Article 42 of the same law provides that: “it constitutes a case of fraud or unfair competition, for an authorized industrialist to distribute his merchandise under conditions provided by article 16 above, by making use of discriminatory sales conditions to damage dealers wishing to sell these products”.

Article 16 provides that “with the exception of handicraft products and goods of primary necessity, direct sales, where the producer is in direct contact with retailers or consumers, can only take place under the conditions fixed by special Ordinance of the Minister of Trade”.

These provisions dealing with unfair competition are not fully clear as they do not satisfactorily correspond to the traditional definition of unfair practices which generally refers to well specified practices such as confusion with someone else’s products or services, disorganization of a competitor’s enterprise by precise actions such as head-hunting its employees. However, these deficiencies of law 90-005 of 15 May 1990 can be amended by referring to the Bangui Agreement which is fully integrated in Benin’s juridical statutes (see above description on intellectual property rights). Hence, the Bangui Agreement constitutes the second valid statute prohibiting and sanctioning unfair competition.

Under article 1 of annex VIII to the Bangui Agreement, “apart from acts and practices covered by articles 2 to 6, an unfair competition act is constituted by any act or

practice which, during industrial or commercial activities, is contrary to honest trade traditions”. This annex specifies precisely, with examples, the different types of practices or acts which constitute unfair competition, namely: “confusion with someone else enterprise or activities” (article 2), “damaging the image or reputation of another firm” (article 3), “misleading the public” (article 4), “disparaging someone else’s enterprises or activity” (article 5), “breaching confidential information” (article 5) or “disorganizing a competitor’s business or market” (article 7).

Clearly, these provisions of the Bangui Agreement provide a closer interpretation of “unfair competition” practices than the provisions contained in law No. 90-005 of 15 May 1990 on commercial activities in Benin. The definitions of the Bangui Agreement are closer to the definition of unfair competition made by most actual competition experts. The present version of Benin’s draft bill on competition also goes in the same direction as the Bangui Agreement. Its draft article 19 states that “the following unfair competition practices are prohibited:

- (a) False or misleading advertising;
- (b) Disparaging;
- (c) Disorganizing;
- (d) Confusion;
- (e) Cross-couponsing;
- (f) Tried-selling;
- (g) Pyramid-selling;
- (h) Lottery or tombola selling;
- (i) Forced-invoice selling;
- (j) Counterfeiting;
- (k) Sale of non-tradable or fraudulently imported goods”.

3. Price controls

In accordance with article 3 of the ordinance of 5 July 1967 on regulated prices inventories; “the price or sale,

import, production, holding, circulating, commercializing and consumption of goods and services are free. They can be regulated according to necessity". Hence, the Ordinance proclaims the principle of liberty of prices on all the territory of Benin, and indicates however that prices can be regulated if necessary.

More to the point, article 4 specifies that upon necessity "prices are fixed after consultation with the National Committee on Prices, which is created to this effect":

- (a) By inter-ministerial Ordinance for goods and services relevant to various ministries;
- (b) By Ordinance of the Minister of the Economy; and
- (c) By Ordinance of the Perfects acting upon special delegation of the Minister of the Economy, after receiving advice from the Prefectoral Prices Committee, created to this effect".

Article 6 of the ordinance specifies that the National Prices Committee, which has general competence, is headed by the Minister of the Economy and is composed of:

- (a) The minister or his representative;
- (b) A representative of the Minister of the Interior;
- (c) A representative of each ministry which might be interested;
- (d) The Director General of Economic Affairs;
- (e) The representative of Worker Unions;
- (f) Two representatives of the Chamber of Commerce;
- (g) The representative of agricultural cooperatives; and
- (h) The representative of consumers associations.

Article 7 stipulates that the secretariat of the National Prices Committee is assured by the Chief of Price Control, who is in

charge of preparing the files and the minutes of the sessions. In accordance with article 13 of the ordinance in question, "products and services can be subjected to:

- (a) Taxation;
- (b) Homologation;
- (c) Fixing of profit margins;
- (d) Price frameworks regime;
- (e) Price liberty subject to surveillance or control; and
- (f) Blocking or any other appropriate measures."

Article 20 provides that "commercialization of certain agricultural products including subsidization or producer-price stabilization can be organized by ministerial ordinance by the Ministry of Economy. For each harvest a ministerial ordinance fixes the producer buying price at the principal cotton production centres; it regulates the conditions of commercialization and eventually of subsidies and price stabilization".

It is by application of these provisions of the ordinance of 5 July 1967 on price regulation and inventories that even today in Benin, while many prices have been liberalized and are fixed by the free play of supply and demand in the market, there still are a small number of cases where certain prices and services are fixed or regulated by the State. The five products where State control exists are pharmaceutical products, oil products, water and electricity, school supplies and bread. Various texts specify the price-fixing proceedings for these products which are regulated. These include:

- (a) Decree No. 87-96 of 17 April 1987 on price-fixing of certain products;
- (b) Decree No. 96-25 of 23 January 1996 on the determination of public prices for medicines and pharmaceutical products in Benin;
- (c) Ministerial Ordinance (Arrêté) No. 84/MCT/CAB/DCP of 12 June 1995 on profit margins applicable to lawful prices for school and office

- supplies, and minimum rebates for retailers;
- (d) Ministerial Ordinance No. 97/MICPE/DC/SG/DCCI/DMCQ/S CSP of 31 August 2005 fixing the weight and the price of bread in Benin; and
 - (e) Ministerial ordinance No. 098/MICPE/DC/SG/DCCI/SCSP of 14 September 2005 on the modalities for bread distribution by bakers and cake shops in Benin.

For instance, the mechanism of price-fixing for oil products is subject to decree No. 2004-432 of 4 April 2004 on the price adjustment mechanism of oil products, and creation of the price adjustment commission for oil products.

Accordingly, ceiling prices for oil products are fixed every quarter on the basis of international price lists in United States dollars. New prices are fixed when average FOB prices during the month under consideration increase or decrease by more than 4 per cent.

Inter-ministerial ordinance (arrêté) of 8 January 1988 on resale prices and conditions for the distribution of cement produced in Benin, imposes on each cement factory (there are three in Benin) to fix a uniform price for each of their outputs on the whole territory of Benin. However, in practice, the three cement producers tend to have identical price lists.

Article 14 of the ordinance of 5 July 1967 on regulation of Prices and inventories stipulates that the legal cost price of imported merchandise is determined by taking into account a series of elements, all of which must be justified by an authentic bookkeeping document that can be requested at any time by the officials responsible for price surveillance¹³¹.

Article 36 of the same ordinance specifies that: “is considered an illicit price increase any infringement to the provisions of the present ordinance and to its application

orders” and that any attempt to circumvent the regulation may be sanctioned in the same way as the infringement itself.

The following are considered illegal price increases:

- (a) Offers, proposals, consultations made at a price above the authorized ceiling price; at a price below the authorized floor price or including in any form that may constitute, an illegal payment; and
- (b) Supply of products of lower quality or in smaller quantity, or which specifications do not correspond to those indicated on the invoice.

The following are also considered illegal prices:

- (a) Selling non-tradable products or goods that have not paid entry duties;
- (b) Selling goods, foodstuffs, before they have been homologated, for those goods that are subject to such an obligation;
- (c) The practice of tied-selling;
- (d) Refusal to deal if the buyer is in all good faith financially solvent; and if the demand is in conformity with normal commercial customs and practices;
- (e) Non-delivery of invoices, or delivery of fraudulent invoices;
- (f) The fact for any salesman not to inscribe the sale in his books;
- (g) Any characterized infringement to the advertisement rules, any false advertising;
- (h) The practice of resale price maintenance;
- (i) Discriminatory selling practices through price or qualities;
- (j) All collusive actions, conventions, formal or informal cartel agreements, coalitions of any form with the aim of distorting free competition by refraining from cost

- or selling price reductions or by encouraging price increases;
- (k) The activities of an enterprises or group of enterprises having a dominant position or its downstream market, with the aim of, leading to a distortion to the normal functioning of the market, except for cartels and dominant positions resulting from the application of a law or regulation or whose actors are able to justify the objective of improving and widening outlets for the production in question or to ensure the development of economic progress by rationalization or specialization;
- (l) Hoarding merchandise;
- (m) Infringing or trying to infringe price regulations;
- (n) Refusing to transmit documents at the first request of officials named to this effect;
- (o) Hiding official documents; and
- (p) Active or passive opposition to the action of officials in charge of price control, including any insults or actions committed against them, without prejudice to the sanctions provided for by the Criminal Code (article 39 of the ordinance of 5 July).

These texts deal with the possibility for the State to regulate certain prices and illicit prices which justify the control of prices by the State, in particularly by the Directorate on competition and action against fraud of the Ministry of Industry and Trade.

The provisions on price controls of the ordinance of 5 July vary with those of the draft competition bill, as far as the latter, which correspond to the rules normally found in modern competition law, such as in Burkina Faso, are characterized by more clarity.

In this respect article 4 of part II on liberty of prices provides that “prices of goods and services are freely determined on all the national territory by free competition”.

“However, for goods, products or services which can have a recognized social impact or when competition is limited because of a monopoly situation or because of durable difficulties in obtaining supplies, the Government can, by decree of the Council of Ministers, regulate prices or fix them after receiving advice from the National Competition Council.”

Article 5 of the bill stipulates that “the provisions of article 4 do not impede the minister in charge of competition to temporarily fix prices by ministerial order, in order to tamper excessive price rises resulting from a crisis or from exception circumstances, such as a public calamity or a manifestly abnormal market condition in a specific market

“The ministerial order is issued after receiving advice from the National Competition Council, which specifies the term of validity of the measures, which cannot exceed six months.”

4. Other rules

Other rules concern competition here and there. For example the law of 15 May 1990 which in itself is an important manifestation of economic liberalism, reaffirms the principle of non-discrimination between public and private economic undertakings and between domestic and foreign enterprises in terms of their creation and commercial activities.

This law has permitted the elimination of a number of restraints that weighed on commercial activities, including in particular :

- (a) The prior authorization by the Minister of Trade for the establishment of foreign firms or for the transfer of foreign exchange to a domestic bank of an amount exceeding 100 million FCFA; and
- (b) The obligation for importers to show that they have invested in

commercial real estate after three years of activity.

At present, both the domestic and foreign businessmen can establish themselves in Benin on the condition that (a) they are inscribed at the Registry of Commerce, which is maintained by the clerk of the court; (b) they hold the professional trader's card (delivered by the Directorate in charge of domestic trade); and (c) they are registered at the Chamber of Commerce and Industry of Benin.

In contrast with the ancient law, which required only foreigners to obtain the Professional Trader's card, the new law makes it an obligation for all traders and under the same conditions listed by the Council of Ministers¹³².

The law also prohibits a single distributor to act as wholesaler or semi-wholesaler and retailer at the same place or shop (article 14).

In addition, traders are obliged to abide by the laws and regulations on prices, foreign exchange, customs, taxes and economics; the obligation of warranties and after-sales services, as well as the prohibition to hold or to sell products banned from imports, and the prohibition of concealment or of engaging in collusive practices.

Article 40 of the law of 15 July 1990 defines "concealment and collusion as:

- (a) Giving false information to obtain the authorization to trade or provide a service;
- (b) Hiring a Benin citizen to cover up a commercial activity fully financed by a non-authorized foreigner;
- (c) Ceding or granting shares or social participations in a company by foreigners in irregular situation in Benin".

For its part the ordinance of 5 July 1967 regulating prices and inventories obliges

every transformer or user of commodities, products or foodstuffs subject to industrial and commercial profit tax to hold bookkeeping accounts showing inputs and outputs of consumed commodities, products or foodstuffs produced and indicating the location of their inventories. The same Ordinance also requests that price tags of goods and services on display are visible and clearly disposed.

Other texts also deal in a more remote way with a certain number of practices which can affect competition. These are in particular:

- (a) Ministerial order No. 86/MCT/CAB/DCP/SRC of 13 June 1995 on regulation of invoices and retail sales;
- (b) Ministerial order No. 87/MCT/CAB/DCP/SRC of 13 June 1995 on publicity of prices of goods and services; and
- (c) Ministerial order No. 278/MCT/CAB/DCP/SRC of 3 November 1996 on sales and liquidations.

In conclusion, the combination of the two general texts dealing with commercial activities in Benin (Ordinance of 5 July 1967 and law No. 90.005 of 15 May 1990) and all the other texts mentioned show that it is not easy to cover the scope of competition rules in Benin.

In a nutshell, these rules are characterized by:

- (a) Lack of distinction between anti-competitive practices and unfair competition;
- (b) Absence of legislation on restrictive practices;
- (c) Absence of a prohibition of certain anti-competitive practices;
- (d) Absence of regulation of other forms of restrictive practices such as sales with premiums, subordinated sales, tied sales, and loss-selling; and

- (e) Lack of protection against counterfeiting”.

The draft bill on competition in Benin would solve these lacunae and bring coherence on the one hand through its Part IV (“on Market Transparency and Unfair Competition”) and the rules on price publicity (articles 13 and 14); invoicing (articles 15 to 17); price schedules and sales conditions (article 18); except the provisions already analyzed above as unfair competition and on the other hand its Part V dealing with regulated individual restrictive practices (bait-selling, seasonal sales, liquidation, no-competition clauses and abusive clauses) or prohibited practices (premium sales, loss-selling, refusal to deal and discriminatory conditions).

Finally, part VI of the bill would provide for consumer protection rules.

C. THE INTRODUCTION OF COMMUNITY LAW OF WAEMU

(See part I of the Review on WAEMU.)

As discussed above, all remains to be done in Benin. Laws will not need to be repealed as in Senegal, but consolidation work to bring the draft bill being prepared in line, not on fundamental principles, but on procedures for an effective application of WAEMU law and to create an authority

responsible for the interface between the Commission of WAEMU and national authorities, will be needed.

IV. INSTITUTIONAL MECHANISMS AND PROCEDURES FOR THE IMPLEMENTATION OF COMPETITION RULES AT THE NATIONAL LEVEL

A. INSTITUTIONS IN CHARGE OF CONTROLLING THE APPLICATION OF COMPETITION RULES

1. Community bodies of WAEMU

(See part I of the Review of WAEMU)

2. The role of the Ministry of Industry and Trade and of the Directorate of Competition in Struggle Against Fraud

At the present time in Benin it is mainly the Ministry of Industry and Trade and its Directorate of Competition and Struggle Against Fraud which seem to be the national authority with a general responsibility applying daily the competition rules and controls, given there is no independent administrative authority such as a Competition Commission or a Competition Council.

Decree No. 2006-387 of 27 July 2006 on the responsibilities, organization and functioning of the Ministry of Industry and Trade provides that the ministry has the general mission of conceiving, organizing, programming and ensuring the application of the Government’s policy in the fields of industry and commerce (article 1), and to this aim comprises, in addition to the Departments directly attached to the minister, of the minister’s office, the general secretariat of the ministry, subsidiary bodies, national consultative authorities, central directorates, general and technical directorates, and departmental directorates of industry and commerce which intervene on daily matters to ensure the different tasks of the ministry are carried out. The technical directorates include:

- (a) The Directorate for Research and Industrial Strategies;
- (b) The Directorate for the Promotion of Industries;
- (c) The Directorate for the Promotion of Domestic Trade;
- (d) The Directorate on Competition and Struggle against Fraud;

- (e) The Directorate of Metrology and Quality Control;
- (f) The Directorate for the Promotion of External Trade;
- (g) The Directorate on relations with Regional and International Trade Organizations; and
- (h) The Permanent Secretariat for ACP and European Union.

Among these directorates, it is the Directorate on Competition and Struggle against Fraud which is responsible for competition issues.

The Directorate on Competition and Struggle against Fraud is a technical directorate, under the General Directorate of Domestic Trade. Its duties include:

- (a) Elaborating and implementing laws and regulations on competition, prices and domestic trade;
- (b) Ensuring the organization, control and development of the activities of internal trade and those related to competition and prices;
- (c) Conducting economic, financial and accountancy related research on distribution networks, commercial professions and services;
- (d) Following tax or tax-related problems of commercial firms and making appropriate recommendation thereon;
- (e) Conducting economic inquiries on price trends in national and international markets;
- (f) Following and remedying problems related to the commercialization of industrial and farm products;
- (g) Following problems related to price practices and inventories;
- (h) Launching, conducting and supervising all activities related to free competition on the national territory, in cooperation with the other technical directorates and the departmental directorates of industry and commerce;
- (i) Receiving the declarations of inventories and following national supply and demand of goods of primary necessity which list is determined by ministerial order of the Minister of Trade;
- (j) Informing and advising professional authorities and private sector

- organizations about all trade-related issues;
- (k) Encouraging the creation of consumer associations and supporting them with respect to ministries responsible for cooperative associations in their struggle for the defense of consumer interests;
- (l) Assisting enterprises, cooperatives and other associations or professional groupings working for the wealth of the population;
- (m) Ensuring the repression against infringements to the regulation on competition, prices and domestic trade;
- (n) Ensuring a general inquiry capacity upon national initiative or upon request of the Community of WAEMU, in conformity with the powers and proceedings of investigation provided for by community law and by national law on competition;
- (o) Participating in the deliberations of the Consultative Committee on Competition of WAEMU; and
- (p) Checking the Commission on Medicine Tariffs and the Secretariat of a number of committees and commissions.

This directorate works with the collaboration of field branches which are the Departmental Directorates of the Ministry of Industry and Trade. The tasks of these Departmental Directorates include:

- (a) Coordinating, controlling and following all actions aimed at promoting locally industries, commerce and employment;

- (b) Following the development of industries and channeling investment towards local communities and the development of promising sectors;
- (c) Ensuring the implementation of laws and regulations on industrial and commercial activities;
- (d) Assisting investors and local government in their search for partners and sources of finance for the implementation of their projects;
- (e) Guaranteeing a healthy legal environment for enterprises involved in industry and trade;
- (f) Encouraging activities creating employment;
- (g) Encouraging the creation of consumer associations and assisting them in their efforts in defending consumer interests;
- (h) Delivering the various professional cards except the importer card and holding a registry of industrialists, traders and sources of employment;
- (i) Advising and counseling the prefects and mayors; and
- (j) Participating in departmental administrative conferences.

3. Sectoral regulatory authorities

Currently in Benin there are two such authorities: the regulator of posts and telecommunications and that of media and communications.

(a) *Posts and telecoms*

The regulator was established in 2002 under Ordinance No. 2002/002 of 31 January on Telecoms in Benin. Articles 9 and 10 of the Ordinance prohibit practices which might restrain or distort competition in the telecommunications market, including abuses of dominant position.

The Regulatory authority is competent to settle disputes between economic operators. To this end, the officials of the Authority

are empowered to check infringements jointly with police officers, in line with the Code of criminal proceedings and the Ordinance. The Authority can also make reference to the competent jurisdictions for anti-competitive practices which it may discover (article 11).

Sanctions provided for infringements to competition are fixed between 5 and 50 million FCFA and include the possibility of imposing daily fines for non-implementation of a ruling requesting that an anti-competitive practice be brought to an end. In practice, this sector which is rapidly developing is difficult to control by the Regulatory Authority, especially after the many hesitations related to its establishment.

After the adoption of decree No. 2006-069 of 1st March 2006 on the organization, composition and functioning of the Regulatory Authority on Posts and Telecommunications in Benin, amending decree No. 2003-476 of 1st December 2003 on the same, the Authority has been suspended by the Council of Ministers, which decided to repeal all the texts implementing Ordinance 2002-02 and 2002-03 of 31 January 2002 establishing the fundamental principles of the regime of Telecommunications in the Republic of Benin, and creating the Regulatory Authority on Telecoms. The council also requested the private operators to repay their debts to the Public Treasury without delay.

The Council of Ministers decided to revise the authorizations delivered to the private operators and to proceed with a general evaluation of the partnerships established by Benin Telecom SA with private operators. The Council of Ministers of 26 February 2007 named by decree the members of a Transitory Council for the Regulation of Telecommunications.

The review of the Regulatory authority is in progress.

(b) *The media and communications sector*

The situation here is more stable, with the creation since 11 December 1990 by the Constitution, of a High-Authority of Audiovisual and Communications (HAAC). The High-Authority is in principle independent from any political authority, association or lobby-group. It has a five-year mandate, which is irrevocable and non-renewable. The High-Authority is composed of nine members: one President, one Vice-President, two Case handlers (Rapporteurs) and five members.

As enshrined in the Constitution, “the High-Authority on Audiovisual and Communications has the mission of guaranteeing and ensuring the freedom and protection of the press, as well as all the means of mass communication, in the respect of the law. It ensures the respect of the deontology in the field of information and equitable access to official information and communication channels by political practices, associations and citizens”.

Although this constitutional text existed since 1990, it is organic law No. 92-021 of 21 August 1992 which established the High-Authority, which finally was effective on 14 July 1994, after all its members were nominated. Concretely, the most important activities of the HAAC are the following: (a) managing media campaigns for legislative, presidential and municipal elections; (b) managing the access mechanisms to the public media services for political parties, associations and citizens; (c) managing the radio communication, private radios and TV channels; (d) delivering press cards; (e) managing State aids and credits to the private press; and (f) supervising the training programmes and work plans for journalists. In the competition field, the HAAC assures equal access to operators and awards wave lengths by way of tenders.

4. Civil and commercial jurisdictions

In line with law No. 2001-37 of 27 August 2002 on the organization of the judiciary in Benin, civil and commercial jurisdictions which intervene normally in the implementation of competition rules are built around the Supreme Court, jurisdiction of last resort, controlling the legality of lower courts, courts of appeals and courts of first instance.

The Supreme Court is the highest jurisdiction of the State in administrative and legal matters and for the accounts of the State. It makes the decisions of last recourse. It can be consulted by the Government on any administrative or legal matter. Upon request of the Head of State, it can elaborate and amend any law or regulation, before presentation to the National Assembly.

The courts of first instance competent in civil, commercial or criminal matters, can serve on competition issues, depending upon the case. In most cases an appeal can be lodged with the Court of Appeals. Member States of the OHADA have agreed to use the Common Court of Justice and Arbitrage of OHADA for their appeals of last resort for commercial cases.

B. PROCEEDINGS

1. Investigative powers

The Directorate on Competition and Struggle against Fraud (DCLF) and the Departmental Directorate of Industry and Commerce (DDIC) can initiate competition cases and/or unfair competition cases on their own initiative. They can also receive a reference from third parties.

2. Investigations

Under article 40 of Ordinance No. 20/PR/MFAEP of 5 July 1967 on price regulation and inventories, infringements

are established by official record (procès-verbal) at the request of the Director General of Economic Affairs by:

- (a) Officials of the Price Control Service;
- (b) Police officers;
- (c) Tax Directorate inspectors;
- (d) Customers Directorate officers;
- (e) Officials of the Service for the Repression of Fraud and Conditioning; and
- (f) Any other civil servants and representatives of the State especially commissioned by the Ministry of Economic Affairs.

Article 41 of the ordinance provides that the official records are established without delay by two authorized officials who stipulate the nature, date and place of the infraction or control and the detailed identity of the violators. Apart from the case where the violator is unknown, they must indicate that the delinquent has been informed of the date and place of establishment of the official record and that the violator was ordered to be present.

The official record must include the real or virtual seizure of the goods subject to an infraction – vehicles, instruments and animals – that were used to commit the violation, irrespective of who is the owner (article 43)¹³³. The officials listed by article 40 can upon presentation of their visit enter all professional premises to control the products, including during transportation or in the living quarters of the accused, on condition that they are accompanied by a legal officer. They can request transfer of information and seize any document or samples necessary for their inquiry from anywhere (article 48). They can consult any document held by the administration or State Offices, Departmental or Communal, public establishments or parastatals, and any enterprise under the control of the State, a Department or a Commune.

3. Decisions, sanctions and remedies

Article 5 of the ordinance of 5 July 1967 on price regulation and inventories provides that official records and related files are directly transmitted to the Director General of Economic Affairs. Depending on the nature and seriousness of the infringements observed, the official record involves financial sanctions or legal proceedings when the violation is considered too important by the Director General of Economic Affairs, or when the defendant has not paid the fine in due time.

The legal procedure related to an infraction to the price regulation is followed according to common law. However, the chief of price controls can submit the conclusions to be added to those of the public ministry and have them orally expressed by an authorized civil servant during hearings. The public prosecutor must inform the Director General of Economic Affairs about the decision he made, within a 60 days period after receipt of the file.

During closure of commercial or industrial undertakings, the defendant must continue to pay salaries, indemnities and any wages he owes to his employees. Any transfer of merchandise away from the closed undertakings is prohibited. The modalities of fixing the fine and the payment are determined by a ministerial order of the Minister of Economy who can decide on the publicity that must be given to each infringement of the law.

Importers who deliberately do not respect price regulations shall not be admitted to any new distribution of foreign exchange (article 56). Infringements to the Ordinance are sanctioned by imprisonment of one to two years and a fine from 10,000 to 1,000,000 FCFA or one of the two (article 57). As for infringements to the regulation on the display of prices, these are sanctioned by a jail sentence of 15 days to

two months and a fine of 2,000 to 50,000 FCFA, or one of the two.

In both cases, the infringement entails a closure of the premises and a prohibition to continue the commercial or industrial activity of the defendant until a decision has been made by the judge, unless the defendant pays a deposit or obtains a bank guarantee equal to three times the amount of the fine in the first case, or five times the goods seized in the second case.

In case of repeat offence within one year, the penalties are doubled and can entail a definitive prohibition from doing business. In case of refusal to communicate or concealment of documents, the defendant will also be ordered to pay a daily fine of 200 to 1,000 FCFA until he presents the required information. In case of condemnation, the court can order confiscation in favor of the State of all or part of the seized goods. The court can order a temporary or definitive prohibition to exercise any professional activity for the defendant.

During the temporary prohibition, the condemned person cannot be employed by the firm he exploited, even if he has sold it or rented it. When the prohibition to exercise the profession exceeds two years and if the firm belongs to the condemned person, the firm is sold by auction. In such a case, the court requests the Administration of Properties (Administration des Domaines) to organize the auction within the deadlines fixed by the decision of the court. The court may also order the decision to be published in whole or in part in designated newspapers;

announced by radio or posted in specific locations, such as main gates of professional buildings, all at the expense of the culprit.

Article 50 of the law of 15 May 1990 also stipulates that depending on the level of infraction, the official record may include payment of a fine to the Administration or coverage of legal proceedings. The amount of the fine is fixed and notified to the violator by the Directorate concerned of the Ministry of Commerce. It must be collected within one month after notification. In case of non payment within the deadline prescribed, the file is transmitted to the geographically competent public prosecutor who initiates criminal court proceedings.

V. EFFECTIVE APPLICATION

A. MEANS AND RESOURCES

1. The resources of the administration

At present, there are 53 officials of the General Directorate of Internal Trade of which the Competition Directorate is a section, who can intervene directly or indirectly in issues related with competition (anti-competitive practices, competition restraints, unfair competition, price control, etc).

The General Directorate has at its disposal certain material facilities and financial means both at its central and departmental Directorates in order to be able to accomplish its duties (vehicles, budget, etc);

These resources are distributed as follows:

Authority	Directorate on Competition and Struggle against Fraud	Dir. of Metrology and Quality Control	Dir. For Promotion of Domestic Trade	Dept. DIE* Atacora/Donga	Dept. DIC* Atlantic Coast	Dept. DIE* Borgou/Alibori	Dept. DIC* Mono/Couffo	Dept. DIC* Ouémé/Plateau	Dept. DIC* Zou/Hills
Officials	10	22	11	9	12	8	9	11	9
TOTAL DGCI : 101									

*Dept. DIC = Departmental Directorate of Industry and Commerce.

Financial resources:

Authority	DGCI	DDIC Atacora/Donga	DDIC Atlantic Coast	DDIC Borgou/Alibori	DDIC-Mono/Couffo	DDIC-Ouémé/Plateau	DDIC-Zou/Hills
Fin. 2007 Budget	30.94 million FCFA	8.7 million FCFA	8.7 million FCFA	8.7 million FCFA	8.7 million FCFA	8.7 million FCFA	8.7 million FCFA

DDIC = Departmental Directorate

DGCI = General Directorate

2. Relations with the Commission of WAEMU

Benin, represented by officials from the Ministry of Trade participated in the three meetings of the Consultative Committee on Competition of WAEMU, which took place in Ouagadougou, Dakar and Cotonou, the last in March 2007. It also took active part in the regional seminars on community competition law organized jointly by WAEMU and UNCTAD in Abidjan, Lomé, Bissau and Cotonou in 2006. The Cotonou Seminar on Community Competition Law took place in September 2006.

It should be noted that the familiarization programme with community competition law of the ministry for parliamentarians, high-level civil servants, consumer associations, and the public sector has not been launched so far, for lack of financial

resources. However, competition experts in Benin have managed to integrate a course on community competition law in the training programme of students in Commercial Management at the universities of Benin.

3. Relations between national authorities of Benin and other member States of WAEMU

Apart from the contacts established between Benin and other participants of member states of WAEMU at the Consultative Committee on Competition, there does not seem to exist specific contacts between the Directorate of Competition of the Ministry of Industry and Trade of Benin and the corresponding authorities of other member states of WAEMU.

B. CASES OF ANTI-COMPETITIVE PRACTICES

Competition-related cases in Benin can be traced through the number of references by the Administration and the type of cases; the number of references received by the Commission of WAEMU from national competition authorities of Benin, and the type of cases; and finally through exemptions and the application of sectoral regulatory activities.

1. Number of references by the administration and types of cases

Since 2003, date of entry into force of the community regulations on competition of WAEMU, various cases have been handled by the Directorate on Competition and Struggle against Fraud.

These cases include three cases of collusive price-fixing; two cases of counterfeit trade, many cases of fraud, one case of false advertising and cases of discriminatory sales.

The three price-fixing cases concern respectively transporters of hydrocarbon fuels (in 2003); consignees of maritime transport (in 2004); and cement producers (in 2005).

According to the information provided by the Directorate on Competition and Struggle Against Fraud, these different

sectors had colluded to fix prices in their respective fields of activity. Upon notification by the Competition Directorate that it would refer the cases to the Commission of WAEMU, these operators ceased their illegal activities.

The two cases of counterfeit goods concerned “Vachette” trade mark locks and Dutch WAX cloth “Vlisco”. In the absence of a competition law in Benin, the authority in charge of competition based its actions on different existing texts to sanction the violators, namely law 15/05/90 on the activities of Commerce; Ordinance of 5 July 1967 on price regulation and inventories; the French Code of Commerce and the revised Bangui Agreement.

The counterfeit goods were seized and destroyed, and the violators were sentenced to pay fines between one and ten million FCFA.

The third type of cases, fraud, seems to occur the most, but the exact number has not been indicated by the Directorate on Competition and Struggle against Fraud. The most common practice involves the sale of products which have evaded customs duties and taxes. Fines imposed vary between 500 000 and 10 million FCFA. The fourth type of cases, discriminatory sales, is mainly practiced by foreign traders.

Discriminatory conditions

This practice is mainly utilized by traders of Asian origin in the textiles sector. They often require unequal conditions from their clients although they are in the same market.

The most striking example is that of a cloth importer who distributes the same quantity of merchandise to two of his clients at different prices and under different conditions. This is a clear case of discriminatory sales. The Directorate on Competition took action against this practice on the basis of article 39 para. 9 of Ordinance No. 20/PR/MFAEP of 5 July 1967 regulating prices and inventories. The fines imposed vary between 500 000 and one million FCFA.

False advertising

The case of false advertising concerned the Benin brasseries (SOBEBRA), a subsidiary in Benin of the group CASTEL BGI, producer of soft drinks.

One of these is mineral water called “Possotomé” coming from a natural water spring. At the same time, SOBEBRA introduced on the Benin market another mineral water called “BULVIT”, which label indicates “natural mineral water with gas”. After inquiry, it was found that Bulvit is not natural spring water as indicated on the label. It is just a false advertisement. After discussion with the Competition Directorate the producer acknowledged that the label was inappropriate. SOBEBRA was fined in conformity with article 39 para. 9 of Ordinance No. 20/PR/MFAEP of 5 July 1967 on regulation of prices and inventories and paid a fine of one million FCFA.2. Number of references received by the Commission of WAEMU and types of cases

2. Number of references received by the Commission of WAEMU and types of cases

At present, it appears that two cases were referred to the Commission of WAEMU by Benin authorities.

The first case concerns GAZODUC de L’Afrique de l’Ouest (the West African gas pipeline) in which the States of Benin and Togo have signed an international convention with Ghana and Nigeria to install a gas pipeline financed and operated by oil multinationals jointly in a consortium. The Commission of WAEMU issued a negative clearance on 6 May 2004 for the creation of joint-ventures and decided not to object to the Convention and tax exemptions.

The second case concerns B.A.T. Burkina and B.A.T. Benin and then the Ministry of Finance and Economy of Benin which lodged a complaint against Burkina Faso. The State of Burkina was alleged to have illegally restrained imports of tobacco produced by B.A.T. Benin, accusing the local cigarette distributor of not respecting the tobacco monopoly in Burkina Faso. Against this anti-competitive action emanating from a State, the Commission of WAEMU addressed an injunction inviting the State of Burkina to cease restraining B.A.T. exports. As can be seen these two cases do not concern precisely references to the Commission of WAEMU by the national competition authorities of Benin.

Table of cases handled by the Commission of WAEMU concerning Benin

Case	Date	Sector and States concerned	Summary of cases	Decisions of the commission
GAZODUC de l’Afrique de L’ouest.	06 May 2004	State aids and cartel agreements among enterprises. Benin/Togo	Benin and Togo concluded an International Convention with Ghana and Nigeria for the construction and operation of a gas pipeline financed and operated by a consortium of oil multinationals	Negative Clearance authorizing the joint-ventures and no-objection to the tax exemptions involved

Case	Date	Sector and States concerned	Summary of cases	Decisions of the commission
B.A.T Burkina and B.A.T Benin vs. State of Burkina	24–25 January 2006	Anti-competitive practice originating from States	The State of Burkina Faso illegally restrained tobacco imports from Benin alleging the local distribution of cigarettes in Burkina was a monopoly.	Injunction of the commission inviting the State of Burkina to cease restraining imports of B.A.T.-cigarettes from Benin.
Ministry of Finance and Economy of Benin vs. State of Burkina Faso	30 January 2006			

3. Application of sectoral regulations

In Benin, this concerns essentially Post and Telecommunications, and Media and Communications.

With respect to post and telecommunications, as seen earlier in this review, the Government of Benin reviewed the legality of the activities of telecom service operators in Benin and the Council of Ministers has taken drastic measures to remedy the situation. The Vice-Minister in charge of Telecommunications and New Technologies in the presence of the President of the Republic gave a press conference to disclose in details the Review of the legality of the activities of telecom service operators in Benin.

As for media and communications, the established regulatory authority (HAAC) proceeds with its functions normally; it has made a number of decisions which can be found on its Internet website: <http://www.haac-benin.org>.

VI. ASPECTS RELATED TO CONSUMER PROTECTION

A. PROTECTION OF CONSUMER INTERESTS

One of the traditional objectives of competition policy is in particular, as in the case of WAEMU and of Benin, to protect the interests of consumers, as far as such a policy offers consumers a wide choice of products at lower prices.

Article 2 of the law of 15 May 1990 fixing the conditions for operating commercial activities in Benin illustrates this belief very clearly when it states that: “commercial activities aim at satisfying the needs of consumers both in terms of price and in terms of quality of the service or product offered. They must contribute to the improvement of quality of life, and at animating urban and rural life”.

The existence of various practices distorting free and fair competition, as shown in the review of the economic and legal environment in Benin, and the cases of anti-competitive practices handled by the Directorate of Competition and Struggle against Fraud of the Ministry of Industry and Trade (in particular cartels and abuses of dominant position by enterprises, unfair

practices by the informal sector, attempts to collude to fix prices, cases of counterfeit goods, frauds, false advertisements and discriminatory sales) can seriously affect the interests of consumers, in particular through products and services of bad quality which are offered to consumers, for example in the field of vegetable oil, food products, excessive prices for certain goods and services, hoarding and speculation on scarcity of certain products such as hydrocarbon fuels.

Under such circumstances, and more specifically in Benin and in most countries of the WAEMU area, it is essential to protect the interests of consumers by utilizing the various means, such as adopting specific legal provisions in favor of consumer protection or including such provisions in competition legislation and acting in favor of consumer organizations.

B. ADVANTAGES OF INCLUDING CERTAIN PROVISIONS DEALING WITH CONSUMER PROTECTION IN THE LAW

It should be noted that the central objective of competition law and policy is not to regulate the actions of economic operators and consumers in order to protect the latter. Such an objective is normally that of consumer laws and of the policy of consumer protection. However, available literature shows that while globalization and liberalization of trade in goods and services can contribute to improve the situation of consumers in most countries (for example by giving consumers access to a wider choice of goods and services of better quality at lower cost) it is clear that open trade also poses considerable problems with respect to the protection of consumer interests and the possibility of remedying damages they can suffer. As a result of liberalization, consumers such as those in Benin can easily be faced with dangerous products or services or with fraudulent or monopolistic practices.

It is therefore useful to protect consumers through a “multilateral” policy that competition law and policy should include directly provisions aimed at protecting the interests of consumers. This is precisely why the law of 15 May 1990 on conditions for commercial activities in Benin, through its articles 22 and 23 prescribing obligations for after-sale services and warranties by professionals in favor of consumers.

In this report, the draft bill on competition which is in preparation in Benin goes much further, as its drafters, while conscious of the fact that another draft bill is in preparation specifically on consumer protection, they still chose to include in the competition bill Part IV on “Consumer security” which includes articles 50 to 53. Among other things, draft article 50 would provide that “products and services must, under normal conditions of use, or under other conditions reasonably for seeable by the professionals, provide the security that the consumer can legitimately expect and must not be hazardous to human health”.

C. INSTITUTIONS ACTIVE IN FAVOUR OF CONSUMERS

Various institutions act in favor of consumers in Benin. There are as many public as private institutions in this field. Among the most active, the Directorate on Competition and struggle against Fraud is also mandated to encourage the creation of consumer associations and to support them with respect to competent ministries in their mission to defend consumer interests. Hence in its daily work, the Competition Directorate sanctions infringements that affect consumer interests and acts in a way to protect consumers. The consumer movement in Benin is new, like its counterparts in other countries of the WAEMU area.

The first consumer association in Benin, the Association for the Protection of

Consumers and his Environment in Benin (APCEB), was created in December 1989. Today, there exist 20 consumer protection associations in the country. Among the most active, in addition to APCEB, Que Choisir Bénin (QCB), the League for the Defense of the Consumer in Benin (LDCB), and the association ARAMBE KAFU-ATA, are recognized members of Consumers International (CI).

Consumer associations in Benin participate in their own way in the regulation of markets (in particular with respect to the prices of goods and services, their quality and access to market) through information campaigns for citizens and Government, actions of “economic and social surveillance”, and representatives active in the official decision-making process. This is the case for example of the active participation of consumer representative in the proceedings leading to administrative pricing of primary necessities such as food products, health services, education, transport, telecoms, petrol and cement.

For fuel oil products for instance, prices are fixed through deliberation of the commission for the adjustment of prices in the oil sector, which meets monthly, at which two representatives of consumer associations are present. The adjusted prices are then validated by the government which makes them public and effective for a duration of one month.

The regulation of the quality of goods by the organizations aims at avoiding food catastrophes for Benin consumers. Their action was essential during the crisis of the mad cow disease, dioxin-contaminated chicken and importation of toxic vegetable oils, and has protected Benin’s consumers. In this respect, the League for the Defense of the Consumer in Benin considers it has avoided a food catastrophe by its action of 8 November 2006 on the port of Cotounou, when it blocked the disembarkation of 4000 tons of rice which was unfit for human

consumption, after analysis made by the service of hygiene and food of the Ministry of Agriculture, Breeding and Fishing.

An effort is also made to enable consumers to have easy access to goods and services offered by producers and distributors. The accessibility is measured in terms of cost and geographical proximity of the product or service to their consumers. Their main actions in terms of accessibility have been with respect to water, electricity telecoms and cement. The intervention of consumer organizations in Benin has so far been made in the basis of international texts such as the United Nations Guidelines for Consumer Protection, which recognizes eight principal consumer rights worldwide, since so far there was no domestic legislation to this effect.

The Benin consumer associations intervene directly as members of official bodies. For example organizations such as *Que Choisir Benin* and the League for the Defense of the Consumer in Benin are members of the following commissions and councils of administration:

- (a) The National Council for Standards and Management of Quality;
- (b) The National Commission for Food and Nutrition;
- (c) The National Commission on the CODEX alimentarius;
- (d) The Commission for the Adjustment of Prices of Petroleum Products;
- (e) The National Commission for the Improvement of the Domestic Market of Oil Products and their Derivatives in the Republic of Benin;
- (f) The Management Board of Benin Telecom SA;
- (g) The Management Board of LA POSTE du Benin SA;
- (h) The Management Board of SONEB; and
- (i) The Management Board of SBEE.

VII. CONCLUSIONS AND RECOMMENDATIONS FOR THE PROMOTION OF A COMPETITION POLICY IN BENIN

As Benin does not have a domestic competition law as defined by international organizations and the implementation of community competition law by WAEMU is still recent, the review of competition in Benin shows that limited action has been taken in particular in legal action to challenge anti-competitive practices which are regulated by WAEMU law, as compared to action related to other practices which distort competition.

This limited action can be explained, in great part by the lack of knowledge of competition rules, even about their mere existence, and of the importance of adopting the competition policy in particular for economic actions and for consumers in Benin. Also, domestic expertise is still limited, even if it is progressing thanks to a number of seminars which have taken place in Benin and the sub-region.

Hence, to invert this tendency, it is important to develop a culture of competition, to consolidate the competition authorities in Benin and to reinforce the links between WAEMU and the competition authorities of Benin.

A. DEVELOPING A COMPETITION CULTURE IN BENIN

Knowledge about the principles of competition policy is essential for a country which is a newcomer in the field. Actions in favor of creating a competition culture needs to be developed not only for the highest level of leaders of the country, but also for official civil servants, judges and legislators who will be asked to draft the rules and to apply them. Also directly concerned are the consumers themselves as well as the economic operators – producers,

distributors and traders. The press, university and lawyers will also have to be mobilized.

To this effect, it would be useful to organize seminars such as those which have already taken place in recent years and to distribute explanatory and educational notes and documents.

B. CONSOLIDATING INSTITUTIONS AND THE COMPETITION LAW IN BENIN

In the specific case of Benin which is characterized first of all by the absence of a comprehensive national law on competition and of an autonomous or independent competition authority of general competence in this field, it is important to consolidate the competition institutions.

The first step in this respect consists in adopting a national competition law and creating an independent national competition authority, working in synergy with the Ministry of Industry and Trade, in particular with its Directorate in charge of competition. In this respect, adopting the existing draft bill on competition in Benin would be useful not only to enshrine coherent and comprehensive rules on competition in the country, but also to establish an independent administrative authority reinforcing existing competition authorities, such as the Directorate on Competition and Struggle Against Fraud.

The institutional consolidation should also include sector regulators and the creation of regulatory authorities in particular for electricity, energy and telecommunications. Specific and clear rules are necessary to determine the precise roles of the national competition authorities having general competence in this field, as compared to sector regulators having competence on competition matters in their specific sector.

Finally, the institutional consolidation requires adapting and specifying certain fundamental principles and adjusting competition institutions which already exist. In particular there is need for specifying the fundamental principles as enshrined in the core competition rules listed in article 88 of the Treaty of WAEMU and regulated in the community text of derived law, and the rules which remain outside WAEMU practice, and are under national responsibility, such as so-called individual practices and unfair competition which exist in Benin's legislation.

for decision-making after consultation with the Advisory Committee of WAEMU.

C. REINFORCING THE LINKS WITH WAEMU

This requires adjusting the proceedings, in particular between WAEMU and national competition authorities. In that respect, the main issue concerns taking into account the exclusive competence of the Commission of WAEMU in decision-making concerning cartel agreements and abuses of a dominant position, knowing that the resources are limited. Regulations which will be adopted will have to take into account the decision-making process which generally is needed and which is composed of three phases: investigation, judicial examination and decision-making.

Benin will have to create the means to contribute to the preparation of the first two phases in cooperation with the Commission of WAEMU. The investigation is in fact normally made by the national administrative authorities either on request of the community authority, by national authorities above or jointly with those of the commission. It would be useful to encourage joint investigation.

The judicial examination (case handling) phase could also be undertaken by the Benin authorities before the file is transmitted to the Commission of WAEMU

PART FOUR: ACTION TO BE TAKEN

The recommendations formulated, both by the system's participants themselves and by outside observers, in order to improve the system and make it quicker to respond can be grouped in a number of categories.

A specific programme with an appropriate timetable should be drawn up to ensure that the recommendations do not become a dead letter.

A. STRENGTHENING THE CULTURE OF COMPETITION

The first concern is how to develop an environment conducive to competition, so that citizens, traders and the public authorities clearly understand what is at stake, what is required and what rights derive from the legal and economic principles of competition. Obviously, a "culture of competition" must be nurtured not only at subregional level, but also by holding more meetings and discussions locally. A number of recommendations have thus been made:

Recommendation 1: Activities should be carried out in the media to raise public awareness of the concepts of the market and the regulatory role of the State, and to explain how consumers benefit from a

B. ADAPTING AND CLARIFYING SOME OF THE BASIC RULES

The question is not so much how to reform these community mechanisms as how to integrate them in practice. It is already difficult enough to apply community rules and ensure they are accepted by citizens. A

competition policy. This calls for: (a) dissemination of brochures and articles on CD, DVD and the Internet; and (b) interviews and reports broadcast by the authorities, professional associations and consumers' groups on radio and television, in all countries.

Recommendation 2: Information and training seminars should be held at subregional, national and local level for students, officials of all ministries, members and rapporteurs of authorities such as the National Competition Commission and the specialized authorities, academics and other practitioners. Teaching of this subject should be strengthened at schools of government and at universities.

Recommendation 3: Competition documentation centres should be set up at national level, and also in major cities.

Recommendation 4: Steps should be taken to mobilize all the advisory consular bodies of WAEMU and of member-States.

Recommendations 1, 2, 3 and 4 are addressed to the WAEMU Commission, to the Competition Authorities of Benin and Senegal and to those of all WAEMU member States.

stable process is therefore preferable to radical change. This is true for the two countries examined, in particular for Senegal, which has undergone two major changes in recent years: the adoption of a modern competition law in 1994 and the entry into force of WAEMU legislation, to a great extent replacing the national legislation.

This does not preclude making clarifications, if only to ensure appropriate enforcement of the rules (particularly in Senegal). First, the relationship must be clarified between the hardcore of competition rules (listed in article 88 of the WAEMU Treaty and governed by secondary community legislation) and the rules that fall outside this area and are under national remit, in particular those relating to so-called individual practices and unfair competition. Monitoring of so-called collective practices must be distinguished from monitoring of individual ones; the former affect the way the market functions, and thus the public interest, while the latter concern relations between companies, without necessarily disrupting competition in the market where such companies operate. This distinction is all the more important because practices qualified as individual remain under national supervision, while collective ones are monitored by the WAEMU Commission.

The general competition rules (article 88 of the treaty) should be recognized as being complementary to the rules relating to the special field of network industries (such as energy, telecommunications and transport). Specific national laws exist, as do the authorities to enforce them; unlike certain provisions of the 1994 Act in Senegal and the 1990 Act in Benin, such laws are not called into question by the entry into force of the new WAEMU legislation.

Recommendation 5: Under such bodies as the National Competition Commission in

Senegal and other independent authorities, national channels of communication should be established to explain the scope of individual practices and to distinguish them from practices addressed by article 88 of the treaty, in particular in respect of:

- (a) Refusal to sell;
- (b) Discrimination; and
- (c) Price maintenance.

Recommendation 6: Guidelines should be drawn up jointly by the specialized authorities (such as the Telecommunications Regulation Authority and the Electricity Sector Regulation Commission) and the national competition authorities to help to identify barriers to market entry (such as authorizations procedures or the issuance of licences) that are normally under the remit of such specialized authorities.

Recommendation 5 is addressed to member States such as Senegal and Benin which have and will continue to apply legislation in parallel, in areas which might be confusing with the rules on cartels and abuses of dominant positions.

Recommendation 6 is addressed to the member-States of WAEMU, but also to the Commission which for instance under the framework of the Advisory Committee on Competition will be in a position to coordinate the principles as defined in the basic objectives.

C. REORGANIZING COMPETITION INSTITUTIONS

The national administrations should reorganize so as to be able to handle the constantly growing community-related aspects of their work and to take account of the distinction between practices covered by the WAEMU Commission and those to be addressed by the national authorities.

Recommendation 7: Reforms of administrative structures should be undertaken, to reflect the new distribution of functions. It is indispensable for each State to have an independent administration and/or commission to act as a contact point for WAEMU bodies.

Recommendation 8: The role played by the national authorities in market surveillance should be emphasized.

Recommendation 9: Detailed sectoral studies should be conducted, incorporating competition analyses, thus strongly signalling the importance given to competition and underscoring that it is a crucial tool for economic development.

Recommendation 10: The number of trained staff should be increased to the extent possible, both regionally (a large increase is required at the commission) and nationally, and material support should be strengthened (documentation, networking)

Recommendations 7 and 8 are addressed to the national political authorities, for them to implement such institutional reforms as appropriate with the support of their Parliament.

Recommendation 9 is addressed to the Commission of WAEMU and to national administrations and commissions: sectoral inquiries must proceed swiftly in order to improve the detection of market distortions.

Recommendation 10 concerns the Commission and national authorities.

In order to strengthen institutions, requests for assistance could be presented to UNCTAD or the European Union, in particular.

D. ADAPTING PROCEDURES

The main focus should be on how to take account of the exclusive competence of the WAEMU Commission to take decisions relating to cartels and abuse of dominant position, it being understood that the commission has limited means, and that so far that role has been played by national bodies. In addition to these technical factors, there are “psychological” factors,

as those in the national bodies may feel frustrated at their loss of power.

Rather than taking an ideological approach to this question or raising the substantive issue of subsidiarity, it would be preferable to find a technical way forward. The decision-making process consists of three steps: investigation, judicial examination and decision. The first phase is carried out by the national administrative authorities when a WAEMU Commission file is prepared by a government minister who

receives a complaint; when the case is filed directly with the commission, the investigation may be carried out jointly by the community and national services. The commission may also mandate the national services to carry out the investigation on its behalf. The carrying out of joint investigations should be encouraged. The decision stage is not subject to debate; the Advisory Committee's role must be well defined and effectively performed.

The intermediate procedure – judicial examination – is the one that most needs to develop in national bodies. The work could be divided as follows: the inquiry would be carried out by the administration; the judicial examination would be done by the independent national bodies (in Senegal, the National Competition Commission) in cases with no community dimension; and the decision would be taken by the WAEMU Commission, with close involvement of and follow-up by the Advisory Committee.

Another area requiring adjustment relates to the need to specify cases where cooperation between the commission and the national authorities is mandatory, in both directions. It must be made clear in which cases the national authorities must report to the Commission on State measures, other than granting of aid, that are likely to affect community competition policy. Such exchanges should be facilitated by appropriate procedures. The commission is required to set up registers, in particular a “competition register”, to record all the cases brought before it. It would also be useful for it to draw up an annual report to review the cases handled, providing commentary thereon. The preparation of such an annual report by each of the national bodies would also be invaluable.

Recommendation 11: The principle whereby community and national services carry out joint investigations and investigations on behalf of, and coordinated by, the commission should be encouraged.

Recommendation 12: The Advisory Committee should function efficiently and effectively, vis-à-vis the WAEMU Commission.

Recommendation 13: The tasks should be divided as follows:

- (a) The investigation should be carried out by the administration;
- (b) The judicial examination should be done by the National Competition Commission in cases with no community dimension; and
- (c) The decision should be made by the WAEMU Commission, with close involvement of and follow-up by the Advisory Committee.

Recommendation 14: Such changes must not be improvised; they need to be carefully assessed. The Competition Commission could be assigned the task of carrying out a study, which could be based on examples taken from its own experience. A report could be ordered for the end of 2007. It would have to define the difference between the judicial examination procedure and the investigation. Such a system could be generalized to all States that already have established legislation and practice in this field.

Recommendation 15: The principle whereby annual reports are issued commenting on the decisions and opinions handed down by the commission and national bodies should be generalized, and the registers that are required by the instruments should be kept.

Recommendations 11, 12, 13 and 14 are addressed to both community and national authorities; it is the community which would initiate implementing the recommendations.

Recommendation 15 is addressed to all institutions of the union (both at the community and national levels); in fact only reminding an obligation already included in the law (at least in the case of the Commission of WAEMU and Senegal, and possibly other member States).

Of course, other measures too can be taken to make improvements. This is true for cooperation with third-party States and other regional organizations, including ECOWAS and the other organizations in which WAEMU member States take part.