

**UNITED NATIONS CONFERENCE ON  
TRADE AND DEVELOPMENT**

**VOLUNTARY PEER REVIEW OF COMPETITION POLICY:  
WEST AFRICAN ECONOMIC AND MONETARY UNION,  
BENIN AND SENEGAL**

**OVERVIEW**



**UNITED NATIONS**



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## **Introduction**

This overview summarizes the most important points of the voluntary peer review of competition policy in the West African Economic and Monetary Union (WAEMU), in particular in two of its member States - Benin and Senegal. These points apply to a large extent to all eight of the Union's member States. The report was drafted by Mr. Guy Charrier and Mr. Abou Saïb Coulibaly, UNCTAD and WAEMU consultants, on the basis of information gathered in January 2007 during an UNCTAD mission to the headquarters of the WAEMU Commission in Ouagadougou (Burkina Faso), Dakar (Senegal) and Cotonou (Benin), respectively.

The full version of the report is published under the title *Voluntary Peer Review of Competition Policy: West African Economic and Monetary Union, Benin and Senegal, 2007*.

The aim of this overview is to:

- Recap on the historical and economic context in which this community and national competition policy exists;
- Summarize the dual finding of the study on which the peer review is based: although the main legislative, institutional and procedural mechanisms of competition law are in place, at both community and national level, these mechanisms are still not widely used, for reasons that will be identified;
- Identify a number of steps that could be undertaken to finalize, facilitate and accelerate the implementation of this competition policy.

## I. POLITICAL AND ECONOMIC CONTEXT

### A. Creation and objectives of WAEMU: the Dakar Treaty

The West African Economic and Monetary Union (WAEMU) was established on 10 January 1994 by the Treaty signed in Dakar by seven West African countries sharing a common currency, the CFA franc: Benin, Burkina Faso, Côte d'Ivoire, Mali, the Niger, Senegal and Togo, who were joined by Guinea-Bissau on 2 May 1997.

Thus, WAEMU currently has eight member States, with a total surface area of approximately 3,509,600 km<sup>2</sup>; an estimated 80,340,000 inhabitants; growth rate calculated at 3 per cent; a gross domestic product (GDP) of 18,458.8 billion CFA francs; a real GDP growth rate of 4.3 per cent; and a 4.3 per cent annual rate of inflation.<sup>1</sup>

#### 1. Objectives of WAEMU

WAEMU is pursuing a number of specific objectives, which its member States endorsed after declaring, in the preamble of the Dakar Treaty, their commitment to the objectives of the African Economic Community and the Economic Community of West African States (ECOWAS).

These objectives, set out in article 4 of the Dakar Treaty, include:

(a) *Enhance the economic and financial competitiveness of member States;*

(b) *Achieve economic performance and policy convergence among member States through the institution of a multilateral monitoring procedure;*

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<sup>1</sup> According to the figures available on the WAEMU website [www.uemoa.int](http://www.uemoa.int), consulted on 5 March 2007.

*(c) Create among the member States a common market based on the free movement of persons, goods, services, capital and the right of establishment;*

*(d) Coordinate national sectoral policies in such areas as human resources, physical planning, transport, telecommunications, the environment, agriculture, energy, industry and mining.*

The transition from monetary cooperation (West African Monetary Union – WAMU) to economic and monetary integration (WAEMU) shows the member States' intention to achieve full liberalization and harmonize their economic policies.

In this respect, an open and competitive common market may be seen as a priority, one of the driving forces of which is competition.

## **2. Functioning of WAEMU**

In order to attain its objectives, WAEMU, as a regional integration organization, established a framework of operating rules, which encompasses the competition mechanisms, and set up the following bodies, all of which play a role in defining competition policy:

- Conference of Heads of State and Government;
- Council of Ministers;
- Commission;
- Court of Justice;
- Audit Office;
- Parliament;
- Regional Consular Chamber;
- Central Bank of West African States;
- West African Development Bank.

When implementing the legal instruments, these bodies are guided by two basic principles:

- The principle of immediate, direct applicability: community legislation is incorporated in domestic legislation as soon as it is published, requires no supplementary domestic legislation, and can be invoked directly by individuals;
- The principle of primacy of community law over domestic law: in the event of a conflict between the two, the former takes precedence over the latter (WAEMU Treaty, art. 6).

Taken together, these two principles bestow on WAEMU a “supranational” character; in other words, member States surrender part of their sovereignty to the subregional organization, including, in the case of competition rules. This differentiates the Union from a simple regional cooperation organization.

The Union’s operation is funded by dedicated financial resources, which are collected directly, mainly in the form of a portion of the income from the common external tariff (CET)<sup>2</sup> and indirect taxes collected in all WAEMU member States. The Union can also have recourse to loans, grants and external aid when compatible with its objectives.

The Union has always received – and continues to receive – help from a number of international organizations, including the European Union and UNCTAD, in funding its activities and policies in the area of competition policy.

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<sup>2</sup> The CET, which entered into force on 1 January 2000, is the sum of three permanent taxes: customs duty; the flat-rate 1 per cent statistical tax, for which there are no exemptions; and the flat-rate 1 per cent community solidarity contribution.

### **3. Activities carried out and policies implemented by WAEMU<sup>3</sup>**

Activities are being carried out in various fields, such as harmonization of legislation, common policies (monetary policy, economic policy, common trade policy, competition rules, free movement of persons, goods, services and capital) and sectoral policies.

Rules, directives and decisions have been adopted to harmonize the legal, accounting and statistical framework of public finances. A code of transparency in public finance management has been drawn up, as have plans for government procurement reform.

With a view to the coordination of macroeconomic policies, the Union has laid down criteria that must be respected by States in order to improve economic performance and policy convergence. In particular, rate ceilings have been set in the area of inflation (3 per cent) and tax pressure (17 per cent), and a range of budgetary and financial ratios established.

Through multilateral monitoring, States are able to exercise their mutual right of inspection of economic policies, so that any serious macroeconomic disharmony likely to adversely affect monetary stability can be remedied in a timely manner.

The sectoral policies provided for by the Treaty demonstrate the commitment of the Union's Governments to ensuring the conditions for balanced, sustainable development of WAEMU member States in various areas: mining, crafts, transport, agriculture, energy, and physical planning.

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<sup>3</sup> Despite the numerous indisputable achievements and successes of the different policies implemented by WAEMU, a number of obstacles or delays are hampering the current process of integration. The full version of the report will discuss these obstacles in greater detail.

## **B. Community competition rules as a means of creating and consolidating a genuine common market**

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

In its preamble, the Treaty affirms the determination of member States to comply with the principles of a market economy that is open, competitive and conducive to the allocation of resources, thus illustrating their acceptance of the need for a competition policy.

In section III of the Treaty (“Common market”), article 76 states:

*“With the aim of creating a common market ... the Union is working towards the gradual realization of the following objectives:*

...

*(c) The introduction of common competition rules that apply to public and private companies and to public subsidies;”.*

In common with the legislation of most States and international organizations, WAEMU instruments do not define what is meant by “competition” or, subsequently, “anti-competitive practices”, probably because these concepts have already been defined within organizations to which the member States belong, such as UNCTAD,<sup>4</sup> and are universally shared.

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<sup>4</sup> See, in this regard, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices; the model law on restrictive business practices; the *Handbook on Restrictive Business Practices Legislation*; and the *Manuel sur la mise en application des règles de la concurrence*.

This is clear from the statements made by representatives of WAEMU or its member States at the different sessions of the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy and the national and regional information and training seminars held by WAEMU.

What has emerged is that, in keeping with the liberal approach chosen by WAEMU, the prevailing concept of competition is based on allowing all economic actors the freedom to produce and sell what they like, on terms of their choosing. This view of competition, and the associated instruments, are based on the idea of practicable – rather than pure and perfect – competition.

Faced with the existence, or ongoing threat, of anti-competitive practices, it has proved necessary to draw up and implement a body of punitive or regulatory provisions: in other words, competition policy legislation.

## **2. Objectives of WAEMU competition policy**

The Union's competition policy is intended, above all, to protect the consumer, promote economic efficiency, combat inflation and promote international competitiveness. In addition to these traditional objectives, the Union seeks to influence market structures and distribute economic power more widely.

Community competition law also aims to facilitate integration in regional and globalized economies. In particular, in the context of building a common market, it seeks to improve the free movement of goods by means of a customs union and to support sectoral policies.





## **II. COMPETITION POLICY: THE LEGAL FRAMEWORK IS IN PLACE, BUT PRACTICE IS INSUFFICIENTLY DEVELOPED**

At both Union and national level, considerable work has been done over the past 10 or so years to establish basic rules, institutions and procedures. It is not easy, however, in the absence of detailed sectoral studies, to assess the state of competition in the area's economy. It is certain, nonetheless, that the limited number of convictions does not reflect the state of competition in the territory of the Union.

It seems likely, on the basis of numerous contacts with administrative, judicial and professional bodies and also with consumers' associations, that cartels and abuse of dominant position exist, but that those responsible are not prosecuted.

Thus, in the agro-food sector (flour, sugar, groundnuts, oil), there are regular complaints of apparent collusion. Similarly, in the building and public works sector (in Senegal) and in the cement sector, there are often alleged to be cartels. The transition from a State monopoly to liberalization and privatization of telecommunication, energy and other networks can lead to agreements to divide markets and abuse of dominant position by established companies to retain their market share, and in fact operators, business clients and final consumers do claim to be harmed by various practices: newcomers by predatory activities or discrimination, and client companies and consumers by abusive loyalty schemes or high prices.

To these practices, identified in industrial and commercial activities, may be added the unsettling effect of the informal economy, which has a detrimental impact on the general economy, undermining rather than stimulating its dynamism and threatening the survival of some sectors of the population that it could be helping.

Although there are rules on identifying and penalizing such practices, few formal complaints are made and few convictions are secured.

## **A. Legal framework**

At community level, the authority is the WAEMU Treaty; but apart from the principles contained in the Treaty, the basic framework consists of case law, including a crucial opinion by the Court of Justice and the legal texts deriving from it. Thus, although the Treaty entered into force, very quickly, on 1 August 1994, it was only on 23 May 2002, over seven years later, that regulations and implementation guidelines were adopted.

At national level, two kinds of action were taken: even before the Union was established, economic policies incorporating competition rules were drawn up, and then after 2002, new guidelines were proposed to take into account the new division of national and community responsibilities.

These developments are taking place in different ways in Senegal, which has a corpus of competition rules based on international standards, and in Benin, which does not. The same applies to the other member States, some of which (Burkina Faso, Côte d'Ivoire and Mali) have competition rules, while others have them only partially or not at all.

### **1. Basic rules**

As well as the basic rules on cartels and dominant positions, which exist at both community and national levels, there are specific provisions on State aid and State practices in community texts and on unfair competition and similar practices in national texts. Sectoral regulations relating to network industries have also been introduced.

#### *1.1 General competition rules*

(a) In section III, paragraph 4, of the Treaty (“Competition rules”), three articles relate to competition law and its implementation.

Article 88 prohibits:

*“(a) Agreements, associations and concerted practices among companies having the aim or effect of restricting or distorting free competition within the Union;*

*(b) Any practice by one or more companies amounting to an abuse of dominant position in the common market or in a significant part thereof;*

*(c) Public subsidies liable to distort competition by favouring specific companies or products.”*

Article 89 authorizes the Council of Ministers to draw up provisions on the implementation of these rules and to establish the rules to be followed by the Commission, especially as regards the details of the prohibitions listed in article 88 and the penalties for violating those prohibitions.

Article 90 gives responsibility for implementing the rules to the Commission, which answers to the Court of Justice.

In the context of this oversight role, the Court of Justice, responding to a question put by the President of the Commission, stated, in Opinion No. 003/2000, that member States did not have competence to regulate and monitor competition. It stated that:

*“The provisions of articles 88, 89 and 90 of the constituent Treaty of the West African Economic and Monetary Union pertain to the exclusive competence of the Union;*

*Consequently, member States cannot exercise any competence in the area of competition.”*

This interpretation is the basis for the principle whereby decision-making on this issue is restricted exclusively to community bodies. This exclusivity does not preclude cooperation; on the contrary, it requires close cooperation between the Commission and national structures to ensure the implementation of a policy based on these rules.

In this regard, a number of regulations<sup>5</sup> and directives<sup>6</sup> set out the principles for the implementation of these rules. They cover anti-competitive practices, procedures, State aid, transparency for public enterprises, and cooperation between the Union Commission and the national structures.

(b) The two countries chosen as examples have very different systems: whereas Senegal has a carefully drafted law on competition, accompanied by other legislation on associated issues, such as unfair competition, the only laws in force in Benin relate to so-called individual practices, unfair competition and price control. Benin has deferred bills on monitoring of cartels and dominant positions.

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<sup>5</sup> Regulations:

- Regulation No. 02/2002/CM/UEMOA relating to anti-competitive practices within the West African Economic and Monetary Union;
- Regulation No. 03/2002/CM/UEMOA relating to procedures governing cartels and abuse of dominant position within the West African Economic and Monetary Union;
- Regulation No. 04/2002/CM/UEMOA relating to State aid within the West African Economic and Monetary Union.

<sup>6</sup> Directives:

- Directive No. 01/2002/CM/UEMOA relating to transparency in financial relations between member States and public enterprises and between member States and international and foreign organizations;
- Directive No. 01/2002/CM/UEMOA relating to cooperation between the Commission and the competition structures of member States for the implementation of articles 88, 89 and 90 of the constituent Treaty of the West African Economic and Monetary Union.

The first Senegalese legislation on competition was a 1965 law on prices and breaches of economic legislation. The basic legislation today is Act No. 94-63 of 22 August 1994 on prices, competition and economic disputes, together with the decrees on its implementation. The principles of this new legislation are set out in the first article of the Act:

*“The aim of this Act is to define the provisions governing free competition, free pricing and the requirements for producers, traders, service providers, and all other intermediaries and to prevent any anti-competitive practices in order to ensure the fairness and lawfulness of transactions, including price transparency, and action against restrictive practices and price increases.”*

The objectives – economic freedom, the prevention of any measures threatening that freedom and the obligation of transparency – are thus clearly set out. Following the example of legislation in other countries (including a French decree of 1986), the Act is couched in general terms and its 91 articles cover a wide field: not only competition as such but also prices and individual practices.

Market freedom means that only free-pricing excesses are prohibited and that, in principle, administrative controls have been lifted, subject to certain loosely specified circumstances and some fairly widespread practices.

Market transparency involves a body of provisions governing commercial information as an essential condition for free competition. Such information concerns consumers, above all, but also some professionals, in such areas as price campaigning, poster advertising and penalties for misleading advertisements. Regulations governing invoicing are also set out.

The Act establishes a national competition commission and sets out rules on anti-competitive practices, covering collective practices

(cartels) and individual practices, which include not only refusal to sell, discrimination and resale at a loss but also abuse of dominant position.<sup>7</sup>

With regard to collective practices, the decision-making power lay, before the implementation of the WAEMU Treaty, with the National Competition Commission; other practices were the responsibility of the Ministry of Trade and, ultimately, of the courts.

In Benin, national legislation on competition corresponding to the model provided by the UNCTAD Set of Principles and Rules did not exist at the time that the community rules entered into force.

Two texts of a general nature govern commercial activities: the Decree of 5 July 1967 on the regulation of prices and stocks and the Act of 15 May 1990 establishing the conditions for engaging in commercial activities. These measures do not, however, cover the whole range of competition law. In particular, they make no distinction between anti-competitive practices and unfair competition, nor is there any regulation of restrictive practices. The country also lacks rules on such practices as sale at a loss, tied sales, premium sales and counterfeiting of goods. No competition authority independent of the Ministry has been established.

A decree of 27 July 2006, however, gave the Minister of Industry and Trade and the Ministry's competition and anti-fraud office the authority to introduce and enforce laws and regulations on competition, including the prohibition of cartels and abuse of dominant position and the promotion of market transparency, in

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<sup>7</sup> It is unusual to class practices of abuse of dominant position, which affect market functioning generally, with individual practices, which are punishable regardless of their effect on the market.

accordance with community regulations. A bill containing provisions taken from the Union's competition legislation is currently under consideration.

Of the other States of the Union, Côte d'Ivoire has all the necessary legislation and regulations in place. The same applies to Mali and Burkina Faso.

### *1.2 Sectoral rules*

Protocol II to the WAEMU Treaty provides for the development of sectoral policies, including policies on transport, telecommunications, the environment, agriculture, energy, industry and mining.

At the national level, sectoral measures – some more effective than others – have been developed in response to the liberalization of the sectors concerned. Thus, Senegal set up the Telecommunications Regulation Authority and the Energy and Electricity Regulation Commission, while Benin established the Press and Telecommunications Authority and the Electricity and Water Sector Regulation Authority, with a view to tackling problems of stabilization and regulation in their respective sectors. Among these bodies, the High Authority for Radio, Television and Communication in Benin is playing its role very successfully. These bodies, which are comparatively well funded, have the authority to undertake inquiries and take decisions. It remains to be seen whether they will also be able to take decisions concerning restrictive competitive practices in their respective fields.

## **2. Institutions**

The structure of the Union, under which the Council is in control of regulation but delegates some of its powers to the Commission, the executive body, and the Court is the instance of last resort, is such as to ensure that competition rules function properly. In

this connection, it is worth pointing out the important role played by the Advisory Committee, which acts as the necessary interface between the Commission and the member States.

### *2.1 The Commission, the principal community-level competition authority*

The Commission plays an essential role in the development and implementation of community competition law, since, as guardian of the Treaty of the Union, it has responsibility for three separate aspects of competition: regulation, policymaking and implementation.

- It exercises its regulatory function on the basis of authorization from the Council of Ministers. It adopts implementing regulations and measures for applying them, including exemptions for certain categories of restrictive agreement in recognition of their contribution to economic or technical progress. It also defines the categories of public subsidy that may be lawfully authorized.
- It is responsible for deciding on the Union's competition policy. It provides an annual report on its activities in that regard, as required by Regulation No. 03/2002, article 19. It also conducts sectoral studies and inquiries, with a view to extending its understanding of the workings of Union markets and initiates debates with professional organizations, consumers' associations and international organizations.
- In implementing community competition law, it acts on its own initiative or at the request of individuals or corporations to prosecute breaches of the regulations contained in articles 88 and 89. To that end, it is authorized not only to issue negative clearance or exemptions but also to apply the sanctions provided for in Regulation No. 03/2002, under the supervision of the Court of Justice.



With regard to public subsidies, including existing ones, the Commission, jointly with the member States, engages in continuous assessment with a view to making any necessary recommendations. Where States do not fulfil their obligations, it can take progressively stronger measures, beginning with a press release on the situation of the State concerned and moving on to the partial or total suspension of existing financial assistance by the Union to the State concerned and finally a recommendation to the West African Development Bank to review its operational policy for the State concerned.

The Commission is set up like an administration, with one of the eight commissioners having responsibility specifically for competition. Following a recent reorganization of its functions, the Commission comprises – apart from the President’s office – seven departments, one of which is the Regional Market, Trade, Competition and Cooperation Department.

The Department is responsible for “stimulating competition with a view to reducing prices and offering consumers greater choice and, more generally, for competition and administration of the anti-dumping code”. It incorporates a Competition Office.

The Commission currently has a limited number of staff,<sup>8</sup> particularly for competition issues (two persons).

## 2.2 *National competition structures*

The national systems, at least in Senegal, are based on those found in the countries of the North, which consist of two elements: a government body, with central and local machinery, and an independent commission.

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<sup>8</sup> According to the Commission’s 2005 report, “WAEMU bodies – the Commission, the Court of Justice, the Audit Office, the Interparliamentary Committee and the Regional Consular Chamber – employed a total of 220 staff in 2005, comprising 93 senior managers, 54 middle managers and 73 general service staff”.

(a) In Senegal, the Domestic Trade Department in the Ministry of Trade is responsible for applying the Government's trade policy and implementing pricing policy within the country. In this regard, it ensures that the population has access to reliable supplies of common consumer and other goods; it develops and implements appropriate measures for enhancing distribution channels; it protects consumer interests in respect of prices, weights and measures, and quality; it ensures respect for free competition; and it helps to promote consumers' associations and oversees chambers of commerce, industry and agriculture.

Within the Department, the Competition and Economic Analysis and Forecasting Division is tasked with applying the legislation on competition and pricing and has the main responsibility for conducting general and sectoral studies of both a continuous and a cyclical nature; monitoring distribution and supply; tracking price trends and actual flows of sensitive products; and centralizing all information pertaining to the economy. These offices have local units carrying out these functions within their respective geographical areas.

Senegal has established a national competition commission, an administrative body performing judicial functions; it plays a crucial role in the new era of price and trade liberalization. Chaired by a judge, it has six members and three alternates.

The 1994 Act conferred a dual function on this body: consultation and handling of disputes. It can impose penalties and issue injunctions. Its decisions involve two successive steps: issuance of an injunction and imposition of a fine; in other words, it cannot impose a fine unless it has previously issued an injunction that has not been complied with. Disputes may be referred to it by the Government or by consumers' associations or professional bodies, or it may act on its own initiative. Appeals against the decisions of the National Competition Commission are considered by the Council of State.

(b) In Benin, the Domestic Trade Department, a unit of the Ministry responsible for trade, comprises three offices, dealing respectively with:

- Promotion of domestic trade;
- Competition and fraud prevention;
- Weights and measures, and quality control.

Within its area of responsibility, the Department is tasked with initiating all action to ensure policy implementation. To date, no national competition commission has been established in Benin. It should be emphasized, however, that the new competition bill, currently before the Parliament, provides for the creation of a national competition council; its composition and modus operandi are to be fixed by decree.

(c) The other States of the Union have institutions resembling those of either Senegal – a ministry and a commission – as in Côte d’Ivoire, Burkina Faso and Mali, or Benin – a department with multiple functions – as in Togo; a somewhat different system exists in Nigeria, which has a non-independent commission under the authority of the Minister of Commerce.

In Côte d’Ivoire, decisions on cartels and dominant positions are taken by the Minister after consultation with the Competition Commission, which thus acts only in an advisory capacity.

One issue remains to be clarified in defining national competition structures: do such structures, governed by the principle of exclusivity established by the Treaty and the laws deriving from it, include specialized sectoral authorities, which, if that were the case, would lose their decision-making power on competition matters?

### **3. Procedures**

Regarding implementation of competition policy, the procedures provided for by community and national legislation are inquiries, judicial investigations and decisions.

### *3.1 Procedures at community level*

The procedures are intended to ensure legal certainty and protect those subject to the legislation. They also seek to guarantee the availability of quality information, so that market dysfunctions linked to the practices referred to in article 88 of the Treaty can be detected, and they allow interested parties to report illicit practices. The Commission has broad powers of investigation and inspection.

A second objective is to ensure uniform application of competition rules in all member States.

Regulation No. 03/2002 relating to procedures states that “the right of the interested parties to due process shall be fully guaranteed in proceedings”. Accordingly, in order to balance the extensive investigative and decision-making powers that the legislation confers on the Commission, procedures have been put in place to ensure a particular focus on due process requirements: respect for the adversarial principle, provision of reasons for decisions and application of the principle of proportionality.

Decisions issued at the end of, as well as during, proceedings, must be reasoned and be proportionate to the seriousness of the case, the scale of the damage done to the economy and the situation of the interested parties. Certain decisions must be issued within specified time frames, and terms of limitation are stipulated. Some decisions are made public.

Confidentiality is protected. Professional confidentiality is safeguarded by a rule stipulating that “information obtained by the Commission in the exercise of its fact-finding and oversight functions may be used only for the purpose for which it was requested”.

To obtain the information on market operation it needs to fulfil its mandate, the Commission’s investigative powers are threefold: it can request information from companies, carry out inspections and initiate sectoral inquiries.

Inspections of companies may be carried out by the Commission or by the competent authorities of a member State, if the Commission so requests. The inspection is carried out in accordance with an order issued by the Commission, which states the inspection's scope and purpose, how it is to be conducted and its consequences (for example, penalties in the event of refusal). The inspection is carried out in conjunction with the competent authority of the member State concerned, whose officials may assist the Commission's staff in performing their task.

The Competition Advisory Committee, which consists of representatives of member States, must be consulted before any decision by the Commission concerning cartels or abuse of dominant position. Consultation takes place during a meeting convened by the Commission. The Committee thus plays a fundamental role in the cooperation between the Commission and member States, and consequently in the effectiveness of the procedure. It is an essential organ for cooperation between the WAEMU Commission and the member States.

The Commission may issue a decision calling for an offending practice to be ceased or imposing a fine. It may decide to take provisional measures. Two categories of fine are provided for: fines for violating procedural provisions and fines for violating the basic rules.

Fines for violating the basic rules range from 500,000 to 100 million CFA francs; they may be set at 10 per cent of turnover for the previous financial year or 10 per cent of company assets. The Commission may impose periodic penalty payments on companies.

With regard to State aid, member States must notify the Commission of any planned new aid measure, which may only be implemented if subsequently authorized in a decision. If the aid measure is unlawful, the Commission may order the State concerned to take all possible measures to recover the aid from the beneficiary.

### 3.2 *Procedures at national level*

Procedures arising from competition rules, as they existed in the countries concerned before the introduction of community instruments, were based on the same principles in respect of guarantees of rights. This is the case for Senegal, Côte d'Ivoire, Mali and Burkina Faso.

The mechanism for inquiries, judicial investigations and decisions involved first the administration (in Senegal, for inquiries, the Department of Competition) and subsequently the competition authority (in Senegal, for decisions, the National Competition Commission). New ways of working have therefore been required since 2002.

#### **B. Much work is being done, but litigation is infrequent**

The extent to which a legal framework is “put into practice” is measurable in terms of a whole range of activities, and not simply the litigation per se that arises from a body of rules.

##### **1. Diverse work**

The work carried out by the community and national competition authorities is of a manifold nature. It is legislative; it is relationship-based (relations between the community and national authorities, on the one hand, and with the outside – in other words the economic operators – on the other); lastly, it involves consultation and decision-making, essentially relating to disputes.

In the early years of its existence, the work of WAEMU focused on legislation, and thus on relations with member States. In Benin and Senegal, too, efforts focused on legislation, including texts to complement those adopted by the Union.

This is illustrated by the many seminars held, particularly within the framework of capacity-building in the area of community competition law and policy (under the auspices of the steering committee set up for this purpose in conjunction with UNCTAD), and

the meetings and conferences at international and multilateral level, attended by the commissioner responsible for competition, ministers and their associates. Conferences were also held at regional level (for example with the Economic Community of West African States (ECOWAS) and the Organization for the Harmonization of Business Law in Africa (OHADA)) and multilateral level (for example the annual meeting of the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy).

The Court of Justice also organized a number of seminars for judges and public officials on community law in general, including competition rules.

## **2. Limited results**

It must be acknowledged that there has been little consultation or litigation with respect to anti-competitive practices per se at either community or national level, even in Senegal, which has legislation in this area.

Seven cases have been identified by the WAEMU Commission since 2001: one concerning a merger through acquisition of shares; three concerning State aid, in 2001, 2003 and 2004, respectively; two concerning State practices, in 2006; and one concerning fraud.

There were no cases involving the “hard core” of rules on cartels and abuse of dominant position. The sectors of activity concerned were the energy sector (oil and gas), and the cement, agro-food and tobacco industries. Companies from six WAEMU member States were implicated: Benin, Burkina Faso, Côte d'Ivoire, the Niger, Senegal and Togo.

Very few disputes were taken to the WAEMU Court of Justice, which is competent to rule on all aspects of decisions issued and penalties imposed by the Commission against companies that breach competition rules. In all, two cases were referred to the Court: one was declared inadmissible and the other was dismissed on the merits.

No actions for failure to fulfil an obligation were brought before the Court concerning non-compliance by a State with an opinion or recommendation calling for the amendment of draft domestic legislation that was likely to affect competition or was not consistent with community regulations.

The Court was asked once to deal with a preliminary question (procedure to ensure unity in the interpretation of community law, which is open to all judicial bodies); in this complex case, the Court ruled on the issue of the time of application of national regulations and community provisions, respectively.

In Senegal, the Government has reported on six cases brought between 2003 and 2006 concerning cartels and abuse of dominant position, none of which were referred to the National Competition Commission or the WAEMU Commission. According to its activity report, the National Competition Commission dealt with seven cases between 2001 and 2003 concerning draft instruments (one national decree, various community regulations and directives, and two OHADA acts), either for decision (before the entry into force of the new community rules) or for opinion.

In Benin, the Domestic Trade and Competition Department received a total of five complaints between 2003 and 2005. Three of these concerned attempts at concerted price-fixing by oil and gas transporters, ship's agents and cement producers, respectively. The two other complaints concerned practices of unfair competition (counterfeiting of goods and misleading advertising in the textile and beer industries).

By comparison, in Côte d'Ivoire, there were a greater number of cases between 1994 and 2001 (21 Commission opinions, on practices and instruments, and 8 ministerial decisions) but there have been virtually none since then.



These results, however, concern proven practices that can be prosecuted in accordance with the rules and procedures in force. A whole range of practices belonging to the informal economy remain beyond the scope of any monitoring or analysis of competition aspects. Both community and national authorities and economic operators (particularly chambers of commerce) are aware of this issue.

### **3. Multiple reasons**

Reasons must of course be sought to explain the lack of prosecution of anti-competitive practices.

It is possible that the “culture of competition” and expertise in this area are not yet sufficiently developed for economic actors, monitoring bodies, direct victims and consumers to realize the existence and extent of these practices.

Also, it is clear that developing countries have a great many policies to be implemented, and that priority has been given to other areas, in which competition can be seen from a different perspective (sectoral policies and free trade zones, for example). Structural adjustment obligations may not have taken competition policy sufficiently into account.

Lastly, a more sensitive argument is that the economy must reach a certain stage, in terms of production, trade and distribution, for these competition measures to be fully justified.

In addition to these arguments, the system has been strongly criticized by certain actors with regard to the relationship between the two legislative levels, particularly in countries where competition legislation and policy exist. These observations may also explain the reluctance to actually bring community legislation into force.

In Senegal, in particular, the fact that the principle of exclusivity is perceived as an obstacle to the emerging work in this area of both the Ministry of Trade and the Competition Commission in itself constitutes a psychological barrier. A number of observations tend to be made.

Anti-competitive practices do not have the same impact on national and subregional markets. Practices by Senegalese companies should only be dealt with by the community authorities if they have an impact on the relevant market within the community. A line could be drawn between the competence of the community authorities, who would monitor practices affecting trade in the subregion, and that of the Senegalese authorities, responsible for those with only a national scope.

A second set of considerations focuses on the distance – not just physical – of the community authorities from the people affected by the practices in question: the traders, the victims and the investigators. If the national authorities merely register and transmit complaints, the effect may be discouraging. Additionally, the distance of community officials from “the field” and their relative unfamiliarity with it can hardly improve their effectiveness. This makes a case for a new division of tasks and for better cooperation.

There is also a risk of seeing the focus shift to the development of other legal fields (such as unfair competition instead of competition) and other dispute settlement methods (such as arbitration), and of the concept of competition’s eventually being undermined.

Furthermore, the Senegalese Commission considers that its authority may be in jeopardy, as national objectives do not always fully coincide with those pursued at community level: “*A decision focusing only on a community objective could be challenged by economic operators of one of the member States.*”

The Commission is also apprehensive that the community bodies will be overwhelmed, resulting in procedural delays. It is concerned that procedural costs will soar because of distance and, above all, that these bodies lack the requisite knowledge of local economies. Lastly, it notes that technical expertise may not be given its due when decisions are made at community level, as the role of the national regulating authorities will be reduced to carrying out inquiries, while at community level such skills are lacking.

All these considerations must be taken into account, even if such obstacles can to a great extent be overcome through modifications, and even if it may be considered that the benefits of this kind of integration outweigh its drawbacks.

It is particularly important to work for uniform interpretation and application of community competition rules, so as to prevent the compartmentalization of national markets that would result from limiting disputes to their national scope. This also reduces the risk that only national interests will be taken into account when competition issues are addressed.



### III. 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.

#### 1. 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 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 the States.

## **2. 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 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:

- Refusal to sell;
- Discrimination;
- 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.

### **3. 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).

#### **4. 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: inquiry, judicial investigation 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 inquiry 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 inquiries 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 investigation – 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 investigation 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 inquiries and inquiries 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:

- The inquiry should be carried out by the administration;
- The judicial investigation should be done by the National Competition Commission in cases with no community dimension;
- 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 investigation procedure and the inquiry. 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.

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.

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