



PREPARATORY REPORT FOR THE EX POST REVIEW OF THE COMPETITION POLICY OF THE WEST AFRICAN ECONOMIC AND MONETARY UNION





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The present report was prepared by Frédéric Jenny, professor, ESSEC Business School and Chair of the Competition Committee of the Organization for Economic Co-operation and Development, and Amadou Dieng, independent expert and former Director for Competition at WAEMU – both consultants of UNCTAD and WAEMU – on the basis of information gathered during missions conducted by Mr. Dieng between September 2019 and November 2019, at the headquarters of the WAEMU Commission in Ouagadougou and in the capitals of the other WAEMU member States.

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I. INTRODUCTION

A. TERMS OF REFERENCE

1. Background and rationale for the report

At the Fifth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, held in Turkey from 14 to 18 November 2005, Benin, together with the other member States and the Commission of the West African Economic and Monetary Union (WAEMU), asked the United Nations Conference on Trade and Development (UNCTAD) to arrange for a voluntary peer review of the WAEMU competition policy.

WAEMU was the first regional grouping of developing countries to undergo this process, and its review took place at the meeting of the Intergovernmental Group of Experts on Competition Law and Policy held in Geneva from 17 to 19 July 2007.¹

By participating in the review, WAEMU aimed to:

- Spread awareness of its experiences at UNCTAD, the main forum for multilateral discussions on competition issues
- Find out how the international community viewed the substantive rules and institutional structure selected by WAEMU for implementing its competition policy
- Determine the technical and institutional capacity-building needs of the WAEMU Commission and member States

Implementing the set of recommendations yielded by the peer review called for a capacity-building programme to be carried out in partnership with UNCTAD, under a technical assistance agreement.²

Now, more than ten years later, an ex post assessment is needed, with a new review that will allow for:

- An assessment of the progress made by WAEMU in implementing its competition policy and the capacity-building programmes
- Determination of the improvements that should be made to the existing system, given the community competition framework put in place by the Economic Community of West African States (ECOWAS)³ and the potential adoption of continent-wide rules in connection with the African Continental Free Trade Area⁴
- Renewed cooperation with more experienced competition authorities and streamlined mobilization of technical assistance focused on building the operational capacity of the regional and national competition bodies

2. Objectives of the report

(a) Overall objective

The general aim of this report is to contribute to the development of new approaches and appropriate rules for the effective implementation of WAEMU competition policy, more than a decade after it underwent an UNCTAD voluntary peer review.

(b) Specific objectives

More specifically, the report aims to:

- Evaluate the WAEMU community structure and the performance of the bodies responsible for applying community competition rules during the period in question
- Put forward suggestions for improving the regulatory framework in the light of

¹ UNCTAD, Voluntary peer review of competition policies of WAEMU, Benin and Senegal (UNCTAD/DITC/CLP/2007/1).

² UNCTAD and WAEMU signed the agreement in March 2011. It was then implemented between 2011 and 2014 with financial support from the WAEMU Commission.

³ ECOWAS was established under the Treaty of Lagos on 28 May 1975 with the aim of creating an economic union of West African countries. It is headquartered in Abuja and has 15 member States: Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, the Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, the Niger, Nigeria, Senegal, Sierra Leone and Togo (www.ecowas.int).

⁴ S. Malz Coetzer, "Export Potential Opened Up by Africa's Continental Free Trade Agreement", Switzerland Global Enterprise, 18 July 2019. Available at <https://www.s-ge.com/en/article/news/20193-c5-africa-fta>.

internationally recognized best practices and the institutional environment of the region

- Ascertain the technical assistance needed by the WAEMU Commission and the national competition agencies to function more effectively
- Identify technical partners (competition authorities and specialized bodies) with which WAEMU could establish formal cooperation frameworks to mobilize appropriate external expertise
- Mobilize external resources to help finance the operations of the WAEMU Commission and of the national competition agencies.

B. METHODOLOGY

Unlike the first review, held in 2007 on the community structure and the national frameworks of two member States (Benin and Senegal), the ex post review considers the regional framework and all the national frameworks.

For the ex post review, all the countries were visited and a questionnaire was submitted to the main national agencies that work with the WAEMU Commission to apply the community competition rules.

1. Fieldwork

Based on lessons learned from other information-gathering missions and with support from the WAEMU Commission, the consultants sought to ensure that a point of contact was designated for each member State.

Once identified, the points of contact helped to schedule meetings with key agencies and, importantly, made certain that the questionnaires – the linchpin of the information-gathering effort – were processed on time.

In addition to meeting with the WAEMU Commission, the consultants met with the principal agencies responsible for implementing competition policy, in particular the national competition commissions or national directorates. Where possible, sectoral regulators were consulted, especially in the telecommunications sector.

Meetings were also held with consumer and professional associations in the member States.

2. Questionnaire

The questionnaire sent to the WAEMU Commission and member States⁵ covered the following points:

- The general framework (legislation addressing competition and the objectives of the competition law)
- The scope of the competition law
- The status of the authorities and their institutional characteristics
- The competition authorities' sphere of competence
- Secondary legislation (guidelines on assessing anticompetitive practices and exemptions)
- The allocation of authority between competition authorities and other sectoral regulators and the terms governing their cooperation
- The amounts of the applicable fines and the guidelines for calculating them
- Other remedies available in the event of a violation
- The treatment of State-owned enterprises under the competition rules (principle of competitive neutrality) and the relevant case law
- Derogations from the principle of free pricing
- Exemptions under the competition rules (for sectors, firms, public-law corporations, professions subject to special laws and so on)
- The resources of the competition authorities and how they are used
- The staff of the authorities, the number of staff in each type of position and their pay scale
- Staff training and productivity management
- The profiles of senior officials
- An assessment of the work carried out over the preceding five years
- Collaboration between general and sector-specific competition authorities
- International cooperation

⁵ The responses to the questionnaire sent to the WAEMU Commission were provided by the Competition Directorate. The responses to the questionnaires sent to member States were provided by competition authorities, administrative bodies, sectoral regulators and chambers of commerce.

C. SUMMARY OF FINDINGS

The present report has been prepared on the basis of quite extensive documentation and has been informed by productive exchanges with the heads of the community and national bodies, consumers and the heads of certain professional associations.

Its general findings relate to:

- An analysis of the Commission's performance and the evolution of its relationship with national competition agencies
- The reform of the national frameworks
- Changes in the status of the general competition authorities, which play a central role in the system for implementing the WAEMU competition policy
- The relationship between the national competition agencies and the Commission
- The outcomes of the Commission's work and the outlook for the future

- (1) Since the peer review of its competition policy in 2007, the Commission has implemented a series of programmes intended to improve its performance and that of the national competition agencies. Through these capacity-building programmes, a critical mass of officials who have assisted WAEMU in its oversight activities has been assembled within the entity.

The strengthening of human and financial resources, although still insufficient, has nevertheless allowed the Commission to achieve an appreciable increase in the amount of work it does.

As a result, the number of cases considered by the Commission has risen significantly in recent years.

However, the Commission, significantly constrained by the group decision-making rules that govern it, takes too long to adopt decisions and this threatens to compromise its effectiveness.

The Commission's working methods should therefore be revisited, at least with

respect to its decision-making process in competition cases.

- (2) The reform of national frameworks provided for under article 6 of Directive No. 2/2002/CM/UEMOA of 23 May 2002, on cooperation between the Commission and the national competition agencies of the member States in applying articles 88 to 90 of the WAEMU Treaty, has taken some time. The national laws were to be amended or adopted during the last six months of 2002, but that process only began in 2013, with the adoption of Ordinance No. 2013-662 of 20 September 2013 on Competition in Côte d'Ivoire.

This slow pace and the lack of coordination among member States in their efforts to align their national frameworks with the community rules significantly undermine the community dynamics, as their laws do not all take the same approach or provide for the control of anticompetitive practices using similar procedures.

The reforms undertaken in the five member States that have adopted new laws – Benin, Burkina Faso, Côte d'Ivoire, Mali and the Niger – have not adequately resolved the issue of how to align national mechanisms with the community rules.

Many of the new laws deal with the control of practices that are considered restrictive, seeking to protect professionals rather than to ensure suitable conditions for competition.

The laws also provide for the control of government measures (State aid and other State practices), which they do not need to address, as such control may be exercised only by the Commission.

- (3) The general competition authorities that have been established are not sufficiently independent and autonomous to serve as appropriate intermediaries between the WAEMU Commission and the member States, meaning that there is a significant risk of government interference in the control and sanctioning of anticompetitive practices. This risk is present in how the

heads of the authorities are appointed, how their staff are recruited, how their resources are allocated and how activities can be initiated.

On top of this, these national authorities lack decision-making power. Their primary role is to advise the government authorities, which is not conducive to a future sharing of power with the Commission.

- (4) WAEMU instruments (directives and circulars) do not formally define the relationship between the Commission and the national competition authorities: they do not indicate clearly how the regional competition authority and the national agencies responsible for receiving complaints are to communicate, how inquiries and studies are to be carried out and how agencies are to report their activities to the Commission.

As an example, Directive No. 2/2002/CM/UEMOA focuses mainly on the distribution of powers between the Commission and the national competition agencies rather than on the mechanics of cooperation between the two types of institution.

Regulation No. 3/2002/CM/UEMOA of 23 May 2002, on the procedures for addressing cartels and abuse of dominant position within WAEMU, also does not address the issue of cooperation; rather, it is mainly concerned with laying down the terms of operation of the Advisory Committee on Competition.

A better structured relationship between the regional body (the WAEMU Commission) and the national authorities (competition authorities and sectoral

regulators) would facilitate the sharing of information and joint control of anticompetitive practices.

- (5) The community rules dating from 2002 should be revisited, given the need to restructure the control of concentrations, which should be governed by specific rules distinct from those applicable to abuse of dominant position. The new rules will enable the Commission to find a new source of financing for its activities, particularly with respect to the a priori control of concentrations.
- (6) A framework needs to be put in place to allow for collaboration with the ECOWAS competition authority so that it may take action with respect to the same subject matter as the WAEMU Commission but under a different mechanism. In connection with this, WAEMU would need to ensure that the knowledge gained from its considerable experience in the African context is taken into account.

The present report consists of seven chapters. Chapter I provides an introduction; Chapter II, an overview of the WAEMU framework; and Chapter III, an assessment of the Commission's activities and prospects for reform. Chapter IV reviews the development of the national frameworks since the entry into force of the WAEMU instruments and analyses the relationship between the Commission and the national competition agencies. Chapter V deals with reforms to the institutional framework, Chapter VI covers collaboration with the ECOWAS competition authority and Chapter VII sets out the conclusions and recommendations of the report.

II. OVERVIEW OF THE WAEMU FRAMEWORK

A. FOUNDING PRINCIPLES

The treaty establishing the West African Economic and Monetary Union was signed in Dakar on 10 January 1994. WAEMU comprises eight member States – Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, the Niger, Senegal and Togo – all of which share a common currency, the CFA franc. They have a combined population of around 120 million and cover an area of 3,509,600 km².⁶

By joining together, the eight WAEMU member States were able to satisfy their needs for complementary production systems and reduce the disparities in their levels of development.

Leveraging their common currency and common monetary policy under the Central Bank of West African States, the member States have adopted the principles of an open, competitive market that promotes the optimal allocation of resources and is an established feature of the global economy.

In creating a common market, the cornerstone of their chosen model of integration, the member States have adopted programmes aimed at unifying their domestic markets and implemented common policies in key sectors of their economies, including manufacturing, agriculture, energy, mining, land development, transport, telecommunications and the environment.

The process is, of course, supported by the harmonization of tax, customs, trade and competition rules.

With respect to competition policy, the subject of the present report, the basic requirements are set out in the WAEMU Treaty and subsequent instruments, including articles 4 (a), 76 (c) and 87 to 90 of the amended WAEMU Treaty and article 3 of Additional Act No. 05/99 adopting the Common Industrial Policy of WAEMU.

B. ECONOMIC INFORMATION

The WAEMU zone is rich in raw materials (petroleum, gas, ores) and agricultural products, which undergo only minimal processing to meet the area's food needs.

Financial markets are opening but do not yet offer favourable financing terms for businesses and households.

Road and rail infrastructure remain extremely inadequate, but significant progress has been made in interconnecting telecommunication networks as the use of optical fibre becomes increasingly widespread.

The population of WAEMU member States is predominantly young – 66 per cent of the population of West Africa is under 25 years of age – and highly mobile. However, as a result of extremely rapid urbanization and one of the highest rates of rural-urban migration in the world, the unemployment rate is very high.

The WAEMU countries score low on the human development index, and around 60 per cent of their population lives on the equivalent of less than US\$ 1 a day.⁷

The debt ratio of the WAEMU zone was 47.8 per cent in 2018, compared to 45.4 per cent in 2017, in line with the trend observed in recent years in some member States.

Côte d'Ivoire and Senegal, the two most economically powerful member States, account for around 50 per cent of the gross domestic product (GDP) of the WAEMU zone.

The economy of the zone was on the upswing in 2019, growing at a rate of 6.6 per cent – the same rate it had achieved in 2018.

⁶ Knoema, "UEMOA", available at <https://knoema.com/atlas/UEMOA/topics/Demographics>. See also World Bank Group, *Africa's Pulse*, vol. 15 (April 2017), available at <http://documents1.worldbank.org/curated/en/348741492463112162/pdf/114375-REVISED-4-18-PMWB-AfricasPulse-Spring2017-vol15-ENGLISH-FINAL-web.pdf>.

⁷ Fondation pour les études et recherches sur le développement international, *Évaluation des gains attendus de l'intégration économique régionale dans les pays africains de la Zone franc*, a study conducted at the request of the Franc Area Finance Ministers (2012). Available at <https://ferdi.fr/en/publications/evaluation-des-gains-attendus-de-l-integration-economique-regionale-dans-les-pays-africains-de-la-zone-franc>.

Growth rates of at least 5 per cent are expected in all member States for 2019, with the following rates expected per country: 7.6 per cent in Benin, 6.0 per cent in Burkina Faso, 7.5 per cent in Côte d'Ivoire, 5.1 per cent in Guinea-Bissau, 5.6 per cent in Mali, 6.3 per cent in the Niger, 6.0 per cent in Senegal and 5.3 per cent in Togo.

In March 2019, the International Monetary Fund forecast growth of 6.6 per cent for the WAEMU zone in 2020, the same rate as in 2019.⁸

There are few manufacturing industries; the ones that exist are concentrated mainly in Senegal and Côte d'Ivoire.

The WAEMU member States account for around 0.1 per cent of world trade. Intracommunity trade accounts for around 15 per cent of trade in the WAEMU zone, with landlocked countries trading more actively with other WAEMU countries. The share of intracommunity trade in the total trade of WAEMU member States

remains low compared to the corresponding share in other regional groupings, such as the European Union. This weakness is due in large part to the many physical and administrative obstacles to trade and competition within WAEMU.¹⁰

Intracommunity trade centres primarily on hydrocarbons, cement, electricity, palm oil, fertilizer, edible preparations, fish, cigarettes, soap, iron and wire, wheat flour, wood and plywood, sea salt and cotton cloth.

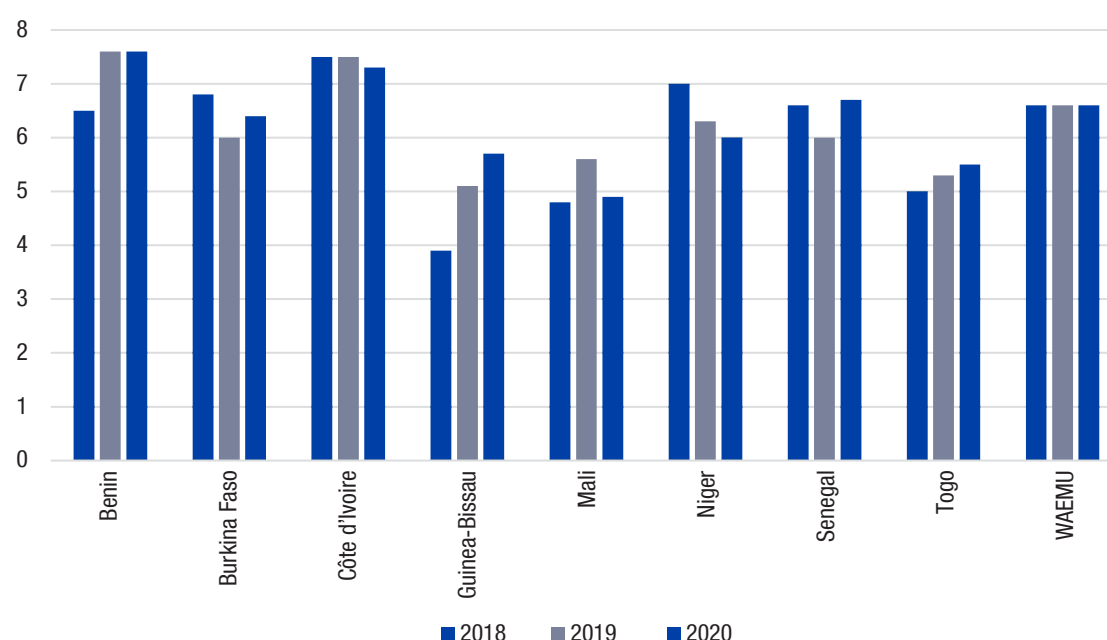
Most of the WAEMU member States' trade is conducted with Europe (around 87 per cent). Agricultural exports, including cocoa and cocoa derivatives, rubber, cotton, bananas, peanut oil, pineapples, mangoes and guavas, account for the largest share.

⁸ International Monetary Fund, Report No. 19/90, March 2019

⁹ Available at <https://www.marchedestitrespublics.com/zone-uemoa-vue-densemble-des-performances-%C3%A9conomiques-des-8-pays>.

¹⁰ I. Ba, "UEMOA: la faiblesse des échanges intracommunautaires au menu du Forum sur la libre circulation des personnes et des biens", *Le Journal de l'économie malienne*, 8 October 2019. See also WAEMU, *Rapport annuel 2018 sur le fonctionnement et l'évolution de l'Union*, available at http://www.uemoa.int/sites/default/files/bibliotheque/rapport_annuel_evolution_de_l_union_2018.pdf.

Figure II.1:
Rates of economic growth in the WAEMU zone



Source: Agence UMOA-Titres, "Zone UEMOA : vue d'ensemble des performances économiques des 8 pays", 9 January 2020. ⁹

The top mining exports are gold and uranium.¹¹

In 2019, real GDP growth in the WAEMU zone stood at 6.6 per cent. As in 2017 and 2018, growth was driven by all economic sectors in all the member States.¹²

C. INSTITUTIONS

WAEMU has set up the following bodies:

- Conference of Heads of State and Government
- Council of Ministers
- Commission
- Court of Justice
- Court of Auditors
- Interparliamentary Committee
- Regional Consular Chamber

Two independent specialized institutions have also been set up:

- Central Bank of West African States
- West African Development Bank

The WAEMU Treaty authorizes the Commission to:

- Submit recommendations and views conducive to the preservation and development of WAEMU to the Conference of Heads of State and Government and the Council of Ministers
- Implement, on the express authority of the Council of Ministers and under its oversight, the legal texts that the Council adopts
- Execute the WAEMU budget
- Gather all the information necessary for it to fulfil its mission
- Prepare an annual report on developments in WAEMU and its operations
- Publish the WAEMU Official Gazette

Under Additional Protocol No. 2 on WAEMU sectoral policies, the Commission is also given the power to implement common sectoral policies.

The WAEMU Commission, the body that develops and implements community policies, was established

in January 1995. It is headed by a President who is selected by the Conference of Heads of State and Government from among the eight Commissioners, who come from the eight member States. It comprises seven divisions, each of which is headed by a Commissioner.

In fulfilling its mission, the Commission first focused its efforts on harmonizing public finances and promoting the common market through the following priority measures:

- Operationalizing the customs union
- Establishing a preferential internal tariff regime and a common external tariff
- Implementing a common trade policy
- Implementing a community competition policy
- Promoting the free movement of persons, goods and services and the right of establishment

Various studies and assessments have been carried out in recent years with respect to the Commission's management capability.¹³

For example, a perception survey was conducted in 2010 to solicit the views of the governments of the member States, civil society, technical and financial partners, suppliers and Commission staff on the relevance and success of the Commission's interventions and the risks they entailed.¹⁴

The Commission has given thought to how it takes action and the key roles it plays in formulating and implementing reforms and community policies.

This has led to an identification of the roles that it considers essential for effective leadership, those that should be consolidated as a priority and those that should be left to other organizations that are either more specialized or have a more appropriate mandate.

The review has shown that, although the Commission addresses important regional needs in various fields, those fields are not all equally relevant under the WAEMU Treaty or in terms of the Commission's capabilities.

¹¹ WAEMU, *Rapport annuel sur la surveillance commerciale*, 2013 (March 2014). Available at http://www.uemoa.int/sites/default/files/bibliotheque/rapport_2013_de_la_surveillance_commerciale_version_finale_0.pdf.

¹² WAEMU, "Note de conjoncture économique régionale dans l'UEMOA", No. 452, third quarter 2019.

¹³ http://etudes.uemoa.int/index.php/site/index?Etude_sort=domaineid&Etude_page=2.

¹⁴ WAEMU, "Plan stratégique de la Commission de l'Union économique et monétaire ouest-africaine 2011-2020", October 2010.

The implementation of the community competition policy is one of the areas that have been recognized as a priority and that support the Commission's efforts to bolster the integration process.

There have therefore been numerous initiatives to improve the Commission's performance institutionally and in terms of capacity-building.

At the same time, different approaches have been tried out in order to achieve effective cooperation between the community body and the national agencies.

However, the question of how powers should be divided between the Commission and the national agencies remains unresolved, as there is no clear guidance from the Conference of Heads of State and Government or the Council of Ministers on how to resolve the practical difficulties involved in applying Opinion No. 003/2000 of 27 June 2000 of the WAEMU Court of Justice, on the interpretation of articles 88 to 90 of the Treaty.

Such guidance might have prompted the incorporation into national law of Directive No. 2/2002/CM/UEMOA, which requires that national competition laws be amended to reflect the primacy of community rules.

Such incorporation seems essential in order to build and reinforce a community framework based on the exclusive competence of the Commission and on cooperation between the Commission and the national competition agencies.

Indeed, member States, who must refrain from taking any measures that may hinder the application of community rules or cause them to be less effectively applied, need precise points of reference.

With such points of reference, the member States would be able to ensure that their national laws are compatible with community law and may not be invoked to justify derogations from community law, either by governments and the courts or by private individuals.

III. ASSESSMENT OF THE COMMISSION'S INTERVENTIONS AND PROSPECTS FOR REFORM

A. SUMMARY OF COMMUNITY COMPETITION RULES

The following three regulations and two directives were adopted on 23 May 2002 to implement articles 76 (c) and 88 to 90 of the WAEMU Treaty:

- Regulation No. 2/2002/CM/UEMOA on anticompetitive practices within WAEMU¹⁵
- Regulation No. 3/2002/CM/UEMOA on the procedures for addressing cartels and abuse of dominant position within WAEMU¹⁶
- Regulation No. 4/2002/CM/UEMOA on State aid within WAEMU and on the procedures for applying article 88 (c) of the Treaty¹⁷
- Directive No. 1/2002/CM/UEMOA on transparency in financial dealings between member States and either State-owned enterprises or international or foreign organizations¹⁸
- Directive No. 2/2002/CM/UEMOA on cooperation between the Commission and the national competition agencies of the member States in applying articles 88 to 90 of the WAEMU Treaty¹⁹

The community competition rules have not changed since the first peer review in 2007. No instrument has been adopted to implement the general framework constituted by articles 88 to 90 of the WAEMU Treaty or the three regulations and two directives adopted on 23 May 2002. There has been more legislative progress in the regulated sectors, sometimes occurring without reference to the community competition rules.

While the community competition instruments are largely consistent with international rules,

¹⁵ http://www.uemoa.int/sites/default/files/bibliotheque/pages_-_reglement_2_2002_cm_uemoa.pdf.

¹⁶ http://www.uemoa.int/sites/default/files/bibliotheque/pages_-_reglement_3_2002_cm_uemoa.pdf.

¹⁷ http://www.uemoa.int/sites/default/files/bibliotheque/pages_-_reglement_4_2002_cm_uemoa.pdf.

¹⁸ http://www.uemoa.int/sites/default/files/bibliotheque/pages_-_directive_01_2002_cm.pdf.

¹⁹ http://www.uemoa.int/sites/default/files/bibliotheque/pages_-_directive_02_2002_cm.pdf.

certain improvements are needed. In particular, the Commission should adopt decisions and implementing regulations to adapt the basic rules to specific sectors.

In particular, the Commission should put itself in a position to publish guidelines on key issues in the application of community competition law, including the definition of relevant markets, its approach to vertical restraints, its priorities in addressing violations and the criteria applied in determining sanctions. Such guidelines are extremely useful, both in terms of making enterprises aware of the substantive and procedural aspects of competition law being applied and for ensuring coherence in the enforcement of national competition law.

Consolidating the regulatory system and ensuring its effective implementation will require political impetus. While there is regular collaboration between Commission officials and member State experts during inquiries, seminars, workshops and diploma courses and in the Advisory Committee on Competition, their efforts cannot take the place of the guidance and decisions of community authorities.

1. Rules on cartels and abuse of dominant position

(a) Substantive rules

Article 3 of Regulation No. 2/2002/CM/UEMOA defining anticompetitive agreements provides that:

“The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices among undertakings which have as their object or effect the restriction or distortion of competition within the Union”.

The article then provides an indicative list of anticompetitive practices.

The wording of this article closely resembles that of article 101 of the Treaty on the Functioning of the European Union, except that the WAEMU regulation

includes a prohibition on production or distribution agreements relating to absolute territorial protection.

As under the European rules, any agreements or decisions prohibited pursuant to article 3 of Regulation No. 2/2002/CM/UEMOA are automatically void.

Article 4 of the Regulation addresses abuse of dominant position and states that:

“Any abuse by one or more undertakings of a dominant position within the common market or in a significant part of it shall be prohibited as incompatible with the common market.”

“Practices engaged in by one or more undertakings that are tantamount to abuse of a dominant position shall also be prohibited.”

This article is largely identical to article 102 of the Treaty on the Functioning of the European Union.

It should be noted that, under the third paragraph of article 89 of the WAEMU Treaty, the Council of Ministers may issue individual or block exemptions with respect to the articles mentioned above. According to article 89, the Council of Ministers “may also enact rules further specifying the prohibitions set out in article 88 or providing for limited exceptions to those rules in order to take account of specific situations”.

Article 7 of Regulation No. 2/2002/CM/UEMOA sets out the individual and block exemption regimes with respect to the practices described above.

(b) Types of decisions that the Commission may take

The WAEMU Commission may provide negative clearance, find infringement, adopt interim measures and exemption regulations and issue individual exemptions.

(i) Negative clearance

Pursuant to article 3.1 of Regulation No. 3/2002/CM/UEMOA, the Commission may, upon its own initiative or upon application by the undertakings or associations of undertakings concerned, certify that, on the basis of the facts in its possession, there are no grounds under article 88 (a) or 88 (b) of the WAEMU Treaty for action on its part in respect of an agreement, decision or practice.

Agreements, decisions and concerted practices of the kind described in article 88 (a) and (b) of the WAEMU

Treaty in respect of which the parties seek negative clearance must be notified to the Commission.

Applications for negative clearance in respect of article 88 (a) of the WAEMU Treaty may be submitted by any undertaking and any association of undertakings being a party to agreements or to concerted practices, an interested party or a member State.

Applications for exemption in respect of article 88 (b) of the WAEMU Treaty may be submitted by any undertaking which may hold, alone or with other undertakings, a dominant position within the common market or in a substantial part of it.

(ii) Finding of infringement

Complaints regarding an agreement, decision or practice may be filed with the Commission by any natural or legal person.

Where the Commission, upon application or upon its own initiative, finds that there is infringement of article 88 (a) or 88 (b) of the WAEMU Treaty, it may, in accordance with the procedure set forth in Regulation No. 3/2002/CM/UEMOA, compel the undertakings or associations of undertakings concerned to bring such infringement to an end.

In addition, pursuant to article 22 of Regulation No. 3/2002/CM/UEMOA, the Commission may by decision impose on undertakings or associations of undertakings fines of from 500,000 CFA francs (CFAF) to CFAF 100,000,000 or a sum in excess thereof but not exceeding 10 per cent of the turnover in the preceding business year of each of the undertakings participating in the infringement or 10 per cent of the assets of those undertakings where, either intentionally or negligently:

- They infringe article 88 (a) or 88 (b) of the WAEMU Treaty
- They commit a breach of any obligation imposed pursuant to article 7.3 (a) of Regulation No. 3/2002/CM/UEMOA

In fixing the amount of the fine, the Commission must take into account both the gravity and the duration of the infringement.

Such penalties imposed by the Commission are without prejudice to actions for damages brought before national courts, and national courts may

request information from the Commission for the purposes of assessing such damages.

Lastly, in accordance with article 23 of Regulation No. 3/2002/CM/UEMOA and after consultation with the Advisory Committee on Competition, the Commission may by decision impose on undertakings or associations of undertakings periodic penalty payments of from CFAF 50,000 to CFAF 1,000,000 per day, calculated from the date appointed by the decision, in order to compel them to:

- Put an end to an infringement of article 88 (a) or 88 (b) of the WAEMU Treaty, in accordance with a decision taken pursuant to article 4 of the Regulation
- Refrain from any act prohibited under article 7.3 (d) of the Regulation
- Supply complete and correct information which it has requested by decision taken pursuant to article 18.5 of the Regulation
- Submit to an investigation which it has ordered by decision taken pursuant to article 21.3 of the Regulation

Finally, it should be noted that the penalties mentioned above may be imposed only after consultation with the Advisory Committee on Competition. The Committee was created under chapter IX of Regulation No. 3/2002/CM/UEMOA, which covers relations with member States, and comprises two competition officials per member State.

(iii) Interim measures

Under article 5 of Regulation No. 3/2002/CM/UEMOA, the Commission may, upon its own initiative or upon application, after hearing the undertakings or associations of undertakings concerned within a period of fifteen days, adopt interim measures within five days of the hearing.

The adoption of an interim measure must be followed by a decision to initiate the adversarial procedure described in article 16 of the Regulation.

Such measures may be taken only if the practice reported causes serious, irreparable and immediate harm to the economy as a whole, to the economic performance of the sector concerned or to the interests of consumers or competitors.

Interim measures may include any measures needed to ensure that any decision ordering an end to

the infringement taken upon the conclusion of the procedure can be effectively implemented. They may, for example:

- Order that the previous state of affairs be restored
- Order that the practice in question be suspended
- Impose conditions necessary to prevent any possible anticompetitive effects

Interim measures must be strictly limited to what is necessary to address the urgency of the situation at hand. In the event of non-compliance with an interim measure, the Commission may impose pecuniary penalties and require periodic penalty payments.

Interim measures may remain in effect no longer than six months and, in any event, expire when the Commission adopts a final decision. The Commission may at any time, by decision, modify, suspend or rescind an interim measure. Appeals against interim measures may be brought before the WAEMU Court of Justice.

(iv) Block exemption regulations

Under the third paragraph of article 89 of the WAEMU Treaty and article 7 of Regulation No. 2/2002/CM/UEMOA, the Commission may adopt regulations granting block exemptions after soliciting comments from the interested parties and consulting with the Advisory Committee on Competition.

Such regulations, which may apply retroactively and may be rescinded or amended if there is a change in circumstances relating to a factor that was key to their adoption, must make clear the agreements to which they apply and, in particular, set out the restrictions and clauses that may not appear in the agreements and any limits on the market share of the parties to the agreement beyond which the parties may not claim the benefit of the block exemption.

Block exemption regulations may cover, for example, specialization agreements, research and development agreements and technology transfer agreements.

These three categories of agreements are defined in article 6 of Regulation No. 3/2002/CM/UEMOA.

Lastly, the Commission, either on its own initiative or at the request of a member State or of natural or legal persons, may find that, in a particular case,

agreements, decisions or concerted practices to which a block exemption regulation applies have nevertheless certain effects which are incompatible with the conditions laid down in article 7 of Regulation No. 2/2002/CM/UEMOA. In such a case, the Commission may withdraw the benefit of application of the block exemption regulation.

(v) Individual exemption decisions

Under the third paragraph of article 89 of the WAEMU Treaty, the Commission may, upon its own initiative or upon application by the undertakings or associations of undertakings concerned, declare:

- Article 88 (a) to be inapplicable to an agreement, decision or concerted practice meeting the conditions set under article 7 of Regulation No. 2/2002/CM/UEMOA, provided that the agreement, decision or concerted practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives or afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
- Article 88 (a) and (b) to be inapplicable to cartels and abuses of dominant position meeting the conditions set under article 6.2 of Regulation No. 2/2002/CM/UEMOA; that is, where the prohibitions would obstruct the performance, in law or in fact, of the particular tasks assigned to one or more undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly.

Applications for individual exemptions may be submitted by any undertaking and any association of undertakings being a party to agreements or to concerted practices and by any association of undertakings adopting decisions or engaging in practices which may fall within the scope of article 88 (a) of the WAEMU Treaty. Furthermore, the interested parties and/or their corresponding member States may submit notifications with a view to obtaining individual exemptions.

Individual exemptions are granted for a limited period, may have conditions attached, and may be renewed, upon the Commission's own initiative or upon application, if the conditions for granting an individual exemption continue to be met. The exemption may be revoked if the facts change with regard to a key factor in the decision to grant the exemption, if the interested parties fail to comply with an obligation or condition attached to the exemption, if the decision granting the exemption is based on inaccurate or incomplete information or was obtained fraudulently or, lastly, if the interested parties misuse the exemption.

(c) Procedures regarding anticompetitive practices

Two types of procedures are available with respect to cartels and abuse of dominant position: non-adversarial and adversarial.

Under the non-adversarial procedure, the Commission, upon receipt of a notification or application from one or more interested parties, publishes a short notice on the agreement, decision or practice in question to solicit third-party comments. Within six months of receiving the notification or application, the Commission may decide to grant negative clearance or an individual exemption if no objections are raised with respect to any interested party.

Where the Commission expresses doubts as to the compatibility of the agreement, decision or concerted practice with the common market, it may decide to employ the adversarial procedure.

The adversarial procedure is governed by article 16 of Regulation No. 3/2002/CM/UEMOA.

2. Control of concentrations

One of the points where WAEMU community law and European law differ is that, under WAEMU law, pursuant to article 4.1 of Regulation No. 2/2002/CM/UEMOA, concentrations of undertakings which create or strengthen a dominant position held by one or more undertakings and consequently significantly hinder effective competition in the common market are tantamount to an abuse of dominant position.

Article 4.3 of the Regulation sets out the acts that constitute a concentration for the purposes of the preceding provisions.

Except in the case of mergers or the creation of joint ventures performing on a lasting basis all the functions of an autonomous economic entity, a concentration is defined as one entity's acquisition of control over the whole or part of another entity.

When the Commission becomes aware of a concentration that is tantamount to an abuse of dominant position under the second paragraph of article 4.1 of Regulation No. 2/2002/CM/UEMOA, it may either order the enterprises not to proceed with the proposed concentration or to restore the legal status quo ante or require them to modify or supplement the transaction or to take any measure apt to ensure or restore sufficient competition.

In order to obtain negative clearance for an agreement that will bring about a concentration, the enterprises must notify the agreement to the Commission.

3. Control of State aid

The third category of anticompetitive practices defined in Regulation No. 2/2002/CM/UEMOA concerns State aid and State anticompetitive practices.

Article 5 of the Regulation states that "any aid granted by a State or through State resources in any form whatsoever which distorts or may distort competition by favouring certain undertakings or the production of certain goods shall be prohibited as incompatible with the common market".

Separate regulations were to be issued regarding State aid, and these took the form of Regulation No. 4/2002/CM/UEMOA.

After recalling the prohibition on State aid which may distort competition by favouring certain undertakings or the production of certain goods, article 2.2 of the Regulation states:

"In its examination of the impact of State aid on competition, the Commission shall take into account the needs of member States with regard to their economic and social development insofar as trade between member States and the interests of the Community in achieving its goal of integration are not undermined."

Under article 3 of the Regulation, the following forms of State aid are considered to be compatible with the

common market, without the need for a review under article 2.2:

- Aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned
- Aid to make good the damage caused by natural disasters or exceptional occurrences
- Aid to promote the execution of an important project of community interest or to remedy a serious disturbance in the economy of a member State
- Aid for research activities conducted by firms or by higher education or research establishments on a contract basis with firms if the aid covers not more than 75 per cent of the costs of industrial research or 50 per cent of the costs of pre-competitive development activity
- Aid to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance is a one-time non-recurring measure and is limited to 20 per cent of the cost of adaptation
- Aid to promote culture and heritage conservation where such aid does not restrict competition in a significant part of the common market

Article 3.2 of the Regulation further provides that the Commission may, after consulting with the Advisory Committee on Competition, issue an implementing regulation defining other categories of State aid that may be authorized by operation of law.

Conversely, the following types of aid, set out in article 4 of Regulation No. 4/2002/CM/UEMOA, are prohibited by operation of law:

- State aid that is contingent, in law or in fact, whether solely or as one of several other conditions, upon the performance of exports to other member States
- Aid that is contingent, whether solely or as one of several other conditions, upon the use of domestic goods over goods imported from other member States

There are four types of procedures that relate to State aid. They address, respectively, notified aid, unlawful aid, misuse of aid and, lastly, existing aid schemes.

Under the procedure regarding notified aid, any planned new aid must be notified to the Commission by the member State concerned, in accordance with article 5 of Regulation No. 4/2002/CM/UEMOA. The aid may not be put into effect before the Commission has taken, or is deemed to have taken, a decision authorizing such aid.

The Commission reviews any planned State aid notified in accordance with article 7 of Regulation No. 4/2002/CM/UEMOA.

Unless the aid is deemed to have been authorized by the Commission, the Commission must, within two months of the date on which the notification is completed, take a “decision not to classify as aid” (if the notified measure does not constitute aid), a “decision not to raise objections” (if, after review of a measure falling within the scope of article 88 (c) of the WAEMU Treaty, no doubts are raised as to its compatibility with the common market) or a “decision to initiate the formal investigation procedure” (if, after review, the Commission finds that doubts exist as to whether the notified measure can be classified as aid and/or is compatible with the common market).

The procedure regarding unlawful aid is triggered when the Commission has in its possession information regarding aid alleged to be unlawful.

According to article 9 of Regulation No. 4/2002/CM/UEMOA, the decision initiating the formal investigation procedure must summarize the relevant issues of fact and law, include a preliminary assessment by the Commission as to the aid character of the proposed measure and set out the doubts as to its compatibility with the common market. The decision must call upon the member State concerned and upon other interested parties to submit comments within a prescribed period which normally may not exceed one month. The comments received must be submitted to the member State concerned, which in turn is given the opportunity to respond within a prescribed period, normally not exceeding one month.

In accordance with article 14 of the Regulation, the Commission may, after giving the member State concerned the opportunity to submit its comments, adopt a decision requiring the member State to

suspend any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the common market (“suspension injunction”).

In addition, the Commission may, exceptionally, after giving the member State concerned the opportunity to submit its comments, adopt a decision requiring the member State provisionally to recover any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the common market (“recovery injunction”) so long as, according to an established practice, there are no doubts about the aid character of the measure concerned and there is a risk of serious harm to the economy as a whole, the economic performance of the sector concerned or the interests of consumers or competitors.

Under article 10 of the Regulation, the formal investigation procedure must be concluded within 18 months of the initiation of the procedure (except in cases of unlawful aid) by means of a decision that may be a “decision not to classify as aid” (if the Commission finds that the notified measure, where appropriate following modification by the member State concerned, does not constitute aid), a “positive decision” (if the Commission finds that, where appropriate following modification by the member State concerned, the doubts as to the compatibility of the notified measure with the common market have been removed), a “conditional decision” (if the Commission wishes to attach to a positive decision conditions subject to which an aid may be considered compatible with the common market) or a “negative decision” (if the Commission finds that the notified aid is not compatible with the common market). In the case of a negative decision, the Commission must issue a decision requiring that the member State concerned take all necessary measures to recover the aid from the beneficiary (“recovery decision”).

In cases of misuse of aid, the Commission may initiate a procedure similar to the procedure regarding unlawful aid.

With respect to the procedure regarding existing aid schemes, the Commission, in cooperation with member States, keeps such schemes under constant review and may recommend that appropriate measures be adopted.

Where the Commission considers that an existing aid scheme is not, or is no longer, compatible with the common market, it must inform the member

State concerned of its preliminary view and give the member State concerned the opportunity to submit its comments within a period of one month. Where the Commission, in the light of the information submitted by the member State pursuant to article 19 of Regulation No. 4/2002/CM/UEMOA, concludes that the existing aid scheme is not, or is no longer, compatible with the common market, it will issue a recommendation proposing appropriate measures to the member State concerned.

Where the member State concerned accepts the proposed measures and informs the Commission thereof, the Commission will record that finding and inform the member State thereof; the member State will then be bound by its acceptance to implement the appropriate measures. Where, on the other hand, the member State concerned does not accept the proposed measures and the Commission, having taken into account the arguments of the member State concerned, still considers that those measures are necessary, the Commission will initiate the formal investigation procedure.

Where the member State concerned does not comply with a decision taken by the Commission with respect to State aid or with a judgment of the WAEMU Court of Justice, the Commission may, after inviting the member State to comment, take progressively stronger measures, as follows:

- The publication, upon recommendation to the WAEMU Council of Ministers, of a communiqué, possibly accompanied by additional information on the situation with respect to the State concerned
- The publicly announced withdrawal of any positive measures that the member State may benefit from
- A recommendation to the West African Development Bank to reconsider its intervention policy in favour of the member State concerned
- The partial or total suspension of support and financial assistance from WAEMU to the member State concerned

Furthermore, enterprises continuing to benefit from the aid despite the Commission's decision may be fined up to twice the amount of the aid granted.

4. Anticompetitive practices on the part of member States

Article 6 of Regulation No. 2/2002/CM/UEMOA not only prohibits State aid that distorts or may distort competition by favouring certain enterprises or the production of certain goods, but also provides that:

“In accordance with articles 4 (a), 7 and 76 (c) of the WAEMU Treaty, member States shall refrain from taking any measures that may hinder the application of the present Regulation and subsequent instruments. In particular, they shall refrain from enacting or maintaining in force, with regard to public undertakings and undertakings to which they grant special and exclusive rights, any measure contrary to the rules and principles laid down in article 88 (a) and (b) of the WAEMU Treaty.”

“Member States shall further refrain from enacting measures enabling private undertakings to evade the constraints imposed by article 88 (a) and (b) of the WAEMU Treaty.”

Article 6 also sets forth the principle that “undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the competition rules contained in the Treaty” and specifies that, “in cases where the application of such rules obstructs the performance, in law or in fact, of the particular tasks assigned to them, the Commission may, in accordance with the third paragraph of article 89 of the WAEMU Treaty, grant them an exemption excluding them from the scope of article 88 (a) and, if applicable, article 88 (b) of the Treaty”.

Finally, the Commission has a general oversight function. It sends the member States, the Council of Ministers and the other WAEMU institutions opinions and recommendations on any draft national or community legislation that may have a detrimental effect on competition within WAEMU and suggests appropriate amendments.

5. Role of the Court of Justice

Besides the Commission, the WAEMU Court of Justice also plays a role with respect to competition. It does so by, for example, reviewing the Commission's application of the competition rules in accordance with article 90 of the WAEMU Treaty, which provides

that “the Commission shall, under the oversight of the Court of Justice, apply the competition rules set forth in articles 88 and 89”.

According to article 31 of Regulation No. 3/2002/CM/UEMOA, which addresses appeals, the legality of the decisions taken by the Commission is assessed by the Court of Justice pursuant to Additional Protocol No. 1 on the WAEMU oversight bodies.

Under article 8 of Additional Protocol No. 1, appeals to assess the legality of the decisions may be brought by member States and the WAEMU Council of Ministers. Any natural or legal person may also bring such an appeal against any act adversely affecting them. In accordance with article 15 (3) of Regulation No. 1/96/CM of 5 July 1996 on the rules of procedure of the WAEMU Court of Justice, the Court has full jurisdiction to hear appeals against Commission decisions that set a fine or periodic penalty payment. It may modify or annul a decision, reduce or increase the amount of a fine or periodic penalty payment, or impose specific obligations.

Actions for failure to fulfil an obligation may also be brought before the Court of Justice by the Commission.

This could arise in the context of disputes relating to State anticompetitive practices.

Indeed, under article 6 of Regulation No. 2/2002/CM/UEMOA, member States have a duty to refrain from taking any measures that may hinder the application of the community competition rules.

The Commission, which ensures that these provisions are applied, may send the member States, the Council of Ministers and the other WAEMU institutions opinions and recommendations on any draft national or community legislation that may have a detrimental effect on competition within WAEMU and suggests appropriate amendments.

Under article 6.4 of Regulation No. 2/2002/CM/UEMOA, “if the member State concerned does not comply with a decision, the Commission may bring the matter before the WAEMU Court of Justice, in accordance with articles 5 and 6 of Additional Protocol No. 1 to the Treaty”.

B. ASSESSMENT OF THE COMMISSION'S CASELOAD

The WAEMU Commission's caseload is characterized by the large percentage of cases that relate to government measures and by the very slow pace of the Commission's decision-making process.

A priori and a posteriori control of anticompetitive practices could be improved by revising substantive rules, for instance, by adopting separate regulations on the control of concentrations, and by modifying procedures, for instance, by defining procedures for addressing State anticompetitive practices.

1. Control of government intervention

Although the control of government intervention is not a key component of the control of anticompetitive practices, it plays an important role in WAEMU, where a culture of supranationality has not yet sufficiently taken root. Indeed, it is noteworthy that most cases concern State anticompetitive practices.

Member States often fail to notify the Commission of financial or non-financial measures that might distort competition.

Stronger a priori control of government intervention could improve compliance with community rules by States and their institutions. With this in mind, the Commission carries out an annual review of State aid. However, other types of government intervention fall outside this framework, even though they might restrict free competition to a much greater extent than State aid. Examples include quotas, bans on imports of products originating in WAEMU, price-fixing and restrictions on conditions for conducting economic activities.

The initiative taken by private firms, which show increasing readiness to seek the Commission's review of government measures that they consider to be inconsistent with community rules, is also helping to strengthen the regional framework. It is therefore no exaggeration to affirm that the introduction of the control of State aid and State anticompetitive practices is central to the

construction of the WAEMU common market, as it can help to remove barriers to intracommunity trade.

2. Examples of cases decided by the Commission

(a) *Société des Ciments du Togo SA v. WAEMU Commission*²⁰

On 15 June 2000, the Société des Ciments du Togo filed an application with the Commission against the preferential treatment granted by Togo to WACEM, a competing enterprise located in the export processing zone, which was marketing a product in WAEMU in respect of which the required customs duties were not payable.

No decision was rendered on the merits of the case, as the Commission declined to examine the application for lack of jurisdiction, and the Court of Justice, to which the case was referred, dismissed it on procedural grounds.

However, the principal interest of the case lies not in the decision reached in the proceedings, but in the merits of the dispute.

Indeed, the community authorities were called upon to examine the entire philosophy of export processing zones as they operate within the WAEMU zone.

Export processing zones are based on the principle that the enterprises authorized to operate in them enjoy extraterritorial status, which allows them to import their inputs and capital goods free of duties and taxes. They are also exempt from a large portion of domestic taxes and duties. In return, products manufactured in the export processing zone must be intended for export to countries outside the WAEMU zone.

A system of this kind should not create barriers to competition in the domestic market provided that all output is exported.

However, in a deviation from such a system, the member States with export processing zones allowed

²⁰ Commission Decision No. 1467/DPCD/DC/547 of 7 July 2000.

20 per cent of this output to be sold on the domestic market, after payment of the duties and taxes applicable to similar products from third countries.

The following issues thus needed to be resolved:

- What can be done to redress the imbalance between the costs of producing goods in an export processing zone, where there are exemptions on inputs, manufacturing equipment and some domestic taxes, and the costs of producing them under normal conditions?
- What market share is represented by the 20 per cent of the output of the export processing zone for which sale on the domestic market is allowed?
- What reliable mechanism can be used to monitor compliance with the authorized percentages in order to prevent the placement of larger percentages of output on the domestic market?

It is possible that the Commission was unable to answer these questions when it was examining the case because Regulation No. 4/2002/CM/UEMOA, on State aid control, had not yet been adopted.

Nevertheless, the fact remains that there was a need for a position of principle in the case, as competition had clearly been distorted as a result of State aid.

(b) The West African Gas Pipeline case²¹

On 19 April 2004, Benin and Togo notified the Commission of the special tax regime that they planned to apply to the activities of the West African Gas Pipeline Project.

This project, which was focused mainly on the transportation and distribution of gas produced by ChevronTexaco, Royal Dutch Shell and the Nigerian National Petroleum Corporation, all of which operated

²¹ Unpublished decision. See the commentary on the case in M. Bakhoun, *Étude sur la révision du cadre institutionnel de mise en œuvre des règles communautaires de concurrence de l'UEMOA* (Munich: WAEMU and the Max Planck Institute for Intellectual Property and Competition Law, 2012), pp. 33 et seq. Available at <http://etudes.uemoa.int/upload/rapport%20final%20etude%20uemoa%20pdf.pdf>.

in Nigeria, was financed from two sources: the multinational members of the consortium (79.7 per cent) and public law entities in Ghana, Benin and Togo (20.3 per cent).

The arguments put forward by Benin and Togo to justify the application of a special tax regime were essentially as follows:

- The major benefits that the States involved in the project stood to gain in terms of regular supplies of gas for industrial use
- The community interest of the project, which, by ensuring regular gas supplies, would secure greater energy independence for two WAEMU member States
- The high costs of the project, which could not be financed by any member State alone
- Uncertainty about the profitability of the project, particularly in its start-up phase, which justified a reduction in the operating costs of the enterprises operating the pipeline

After consulting all member States, the Commission decided that it had no objection to the application of the special tax regime set out in the notification.

However, the Commission did not accept the requested duration of the authorization, specifying that it should be reviewed in 5 rather than in 20 years, as the members of the consortium had requested.

Comments:

- (1) In this case, all the prerequisites were met to enable the Commission to give its approval, in particular the benefits that the community as a whole stood to gain from the project.

Indeed, it was vital to tackle the very high energy deficits that Benin and Togo were facing when the project was launched.

The possibility of extending the pipeline to Côte d'Ivoire was a further important factor in the analysis.

- (2) In general, in the field of public-private partnerships for infrastructure or other projects with high capital requirements, as in the field of privatizations, the Commission will be required to monitor agreements signed between member States and enterprises operating concessions that might give rise to State aid or restrict competition in other ways.

c) *SOCOCIM v. Senegal and Les Ciments du Sahel*²²

The enterprise SOCOCIM Industries filed an application with the Commission regarding distortions of the cement market in connection with the implementation of a mining agreement between Senegal and Les Ciments du Sahel, a competing enterprise.

The Commission's subsequent inquiry showed that Les Ciments du Sahel had been granted tax exemptions, which had given it a major competitive advantage over SOCOCIM Industries.

In observations submitted to the Commission, the Minister of Economic Affairs and Finance of Senegal argued that the WAEMU Community Mining Code, which, on a transitional basis, upholds all the mining agreements in force in member States, had been strictly applied. Although this legal argument was a strong one, it was rejected by the Commission, as the difference in the treatment of the two enterprises was so great.

In the cement sector, a distinction is made between integrated and grinding cement plants. An integrated cement plant is one whose activities range from extracting limestone and transforming it into clinker to packing the finished cement into bags. The most important step is the production of clinker, which accounts for around 80 per cent of the value added over the process as a whole. At grinding plants, production begins with the grinding of clinker and ends with the packing of finished cement into bags.

In the case examined by the Commission, although the competing enterprises in theory had identical production systems, they were not governed by the same type of agreement with the Government. Thus, under the guise of a mining agreement, Les Ciments du Sahel received exemptions on all its imports of inputs, capital goods and operating equipment, while SOCOCIM Industries qualified for lower taxation on only a portion of these components, since the duration and scope of the benefits provided for in its agreement with the Government were less favourable.

Consequently, during its start-up phase, Les Ciments du Sahel, operating as a grinding plant, was able to import tax-exempt limestone, gypsum and fuel in order to manufacture cement. Its lower costs enabled it to market a less expensive product.

²² Ibid.

Despite the potential beneficial effects on the market, such as greater supply and lower consumer prices, the Commission prohibited the continued granting of the exemptions for the following reasons:

- The enterprise granted the competitive advantage, Les Ciments du Sahel, did not have the same levels of investment as SOCOCIM Industries, an enterprise that had been in the sector for some 30 years longer, which seriously destabilized the market
- The exemptions on clinker placed competing imports at an advantage, to the detriment of the WAEMU output
- There was a risk that the activities of SOCOCIM Industries, which had a market share of at least 60 per cent, would be abnormally affected as a result of the unfair competition fostered by Senegal.

The conclusions that can be drawn from the Commission's position include the following:

- (3) In this case, absolute primacy was accorded to competition rules, such that the Commission was able to override the application of the Community Mining Code, which had been established by provisions of the same status and subsequent to Regulation No. 4/2002/CM/UEMOA.
- (4) The solution adopted is significant in a field in which agreements signed between States and mining enterprises can last 15 to 20 years or longer and contain clauses that prevent the market entry of new investors who might bring technological improvements to the sectors concerned.
- (5) The impact on intracommunity trade was not one of the specific criteria used to determine whether the State aid was prohibited, but the Commission could also have raised this issue, as cement manufactured in Senegal is sold in other countries in the WAEMU zone, where it competes with other cements produced in the area.
- (6) Nor did the Commission rule on the recovery of the aid, even though it came to a very large sum. As this was the first case of illegal aid examined by the Commission, this choice is understandable, as the decision was meant to be instructive.

(d) *RUF SAC v. Senegal*²³

This case involves competition between the production of bags manufactured locally by an industrial concern specialized in this field, RUF SAC, and imports by local cement plants.

In application of the mining conventions signed with the Government, cement plants in Senegal imported packing bags with zero or reduced taxation.

As the imported bags were cheaper, cement plants preferred to buy from their foreign suppliers, which resulted in the local manufacturer losing a significant share of the market.

In its decision, the Commission held that the exemptions in question were incompatible with the common market and requested Senegal to remove them. The Commission thus made clear that, in its assessment of market distortions resulting from State aid, it was not necessary that the competing enterprises should all be located in the territory of WAEMU.

In practice, however, the Commission will find it difficult to order the recovery of aid granted under a mining agreement.

(e) The ASKY case²⁴

Togo had signed a headquarters agreement under which the airline ASKY had been granted a number of tax privileges and advantages. Senegal, which had deemed these contrary to competition rules, referred the matter to the Commission.

In its decision, the Commission concluded that ASKY was a public limited company governed by the company law of the Organization for the Harmonization of Business Law in Africa and that, like other operators in the sector, it was bound by community competition rules. Consequently, Togo had been under an obligation to give notification of the proposed State aid, as provided for in the headquarters agreement. Togo had not fulfilled that obligation, which meant that

²³ Commission Decision No. 008/2010/COM/UEMOA of 11 August 2010.

²⁴ Commission Decision No. 002/2011/COM/UEMOA of 29 August 2011, available at <https://www.icao.int/sustainability/Compendium/Lists/CompetitionSurvey2015/Attachments/32/D%C3%A9cision-002-2011-du-29-08-11-ASKY.PDF>.

the tax privileges and advantages provided for in the agreement were illegal.

(f) *West Africa Commodities v. Senegal*²⁵

As Senegal had adopted standard NS 03-072 on edible oil, its customs authorities blocked West Africa Commodities from importing large quantities of refined palm oil from Côte d'Ivoire.

West Africa Commodities then referred the matter to the Commission, which, in its decision, requested Senegal to withdraw standard NS 03-072, as its application had prevented the entry of oil of community origin, from Côte d'Ivoire, to the Senegalese market, thereby harming trade among member States.

Table III.1 below lists all the cases decided by the WAEMU Commission

The decisions that the Commission has rendered, although few in number, concern sectors of major economic importance, such as cement, air transport, insurance, banking, telecommunications and maritime transport. It is therefore critical to monitor the implementation of these decisions in order to ensure they are having the intended impact. A system should be established to monitor the enforcement of the Commission's decisions.

In particular, the Commission should resolve to refer to the Court of Justice any cases in which a WAEMU member State persists in taking a national measure that is incompatible with community law.

It is also necessary to widen the dissemination of the Commission's decisions and pending cases in order to increase public awareness of its work.

3. Control of cartels and abuse of dominant position

Over the past three years, a limited number of cases have been decided in this area, although several others have been investigated and are awaiting decision:

- A case concerning abuse of dominant position by SONAPOST, which, under a monopoly granted in 1988, made seizures and fined

STAF, a competing enterprise, which it accused of unlawfully transporting and distributing mail²⁶

- A case in which the Commission imposed a fine of 50 million CFA francs on the enterprise SONABHY for discriminating in favour of SODIGAZ APC in the liquefied petroleum gas market (the decision of 2019 has been appealed to the Court of Justice)²⁷

There are institutional and operational factors that undermine the control of cartels and abuses of dominant position.

At the institutional level, it follows from the fact that the Commission has exclusive competence to investigate and impose penalties for anticompetitive practices that it should be able to examine even minor cases (limited to a small national market or a smaller locality).

In practical terms, this would require the Commission to have an increased presence in member States, with adequate human and financial resources for effective interventions. However, given the current state of its resources and functioning, the Commission is clearly unable to take on all cases, whether they concern negative impacts on trade among member States or disruptions to national markets.

At the member State level, there are no independent and financially autonomous national competition authorities. There is therefore no single point of contact with the Commission. The result is a dilution of market oversight responsibilities and controls of anticompetitive practices that are sporadic and inconsistent.

Resources are also insufficient, which makes regular interventions impossible.

Consequently, collaboration with the Commission can be initiated only at the regional level. National competition authorities, which, for want of resources, do not perform their oversight role in relation to anticompetitive behaviour, seem not to make this a priority.

At the operational level, although the Competition Directorate has examined cases in important sectors

²⁵ Commission Decision No. 007/2010/COM/UEMOA of 4 June 2010.

²⁶ Commission Decision No. 003/2013/COM/UEMOA of 13 February 2013.

²⁷ Commission Decision No. 08/2019/COM/UEMOA of 5 November 2019, available at http://www.uemoa.int/sites/default/files/bibliotheque/communiqu%C3%A9_d%C3%A9cision_08_gaz_vf.pdf.

**Table III.1:
Cases decided by the Commission**

	Type of dispute	Background	Decision
1	Concentration	Concentration of enterprises to allow them to manufacture soap (for Unilever) and produce and exploit crude and refined oil (for SIFCA and NAUVU).	Decision No. 009/2008/COM/UEMOA granting negative clearance for the proposed concentration.
2	State aid and distortion of competition in favour of third-party products <i>RUFSA v. Senegal</i>	RUFSA, a Senegalese enterprise, filed a complaint in which it alleged that Senegal was granting exemptions to imports of kraft paper bags for use in the cement sector, to the detriment of its own products certified as of community origin.	Decision No. 008/2010/COM/UEMOA of 11 August 2010 requesting Senegal to withdraw the exemptions granted to imports of kraft paper packaging.
3	State anticompetitive practices <i>West Africa Commodities v. Senegal</i>	The Commission received a complaint from the enterprise West Africa Commodities and a letter of protest from the Minister of African Integration of Côte d'Ivoire concerning new Senegalese standards on palm oil, which created a barrier to exports from Côte d'Ivoire to Senegal.	Decision No. 007/2010/COM/UEMOA of 4 June 2010 requesting Senegal to withdraw the amended standard NS 03-072 and the measures taken in implementation of its provisions.
4	<i>Senegal v. Togo</i> The ASKY case	By letter No. 001905/MEF/CT/IMO of 2 March 2010, the Minister of Economic Affairs and Finance of Senegal requested the Commission to rule against the headquarters agreement signed between Togo and the air transport company ASKY, which he considered contrary to community competition rules.	Decision No. 002/2011/COM/UEMOA of 29 August 2011 declaring certain provisions of the headquarters agreement between the community airline ASKY and the Government of Togo incompatible with community competition rules.
5	Abuse of dominant position arising from an administrative monopoly awarded by Burkina Faso <i>STAF v. SONAPOST and Burkina Faso</i>	Under a monopoly awarded in 1988, the enterprise SONAPOST carried out seizures and fined STAF, a competing enterprise, which it accused of unlawfully transporting and distributing mail.	Decision No. 003/2013/COM/UEMOA of 13 February 2013 requesting Burkina Faso to bring the monopoly awarded to SONAPOST in the mail and parcel transportation sector into conformity with community competition legislation.
6	Orange-Airtel Burkina Faso concentration	Orange and Airtel submitted an application for negative clearance and/or exemption for the concentration of the two enterprises	Decision No. 006/2016/COM/UEMOA of 25 October 2016 granting negative clearance for the agreement on the acquisition by the enterprise Orange Middle East and Africa SA of exclusive control over the enterprises Airtel Burkina Faso SA and Airtel Mobile Commerce Burkina Faso SA.
7	Unlawful and anticompetitive practices <i>Africa Steel v. SOTACI and Côte d'Ivoire</i>	Africa Steel, an enterprise that manufactured and distributed reinforcing steel, filed a complaint against the Société de Transformation des Tubes et Acier (SOTACI) for abuses of dominant position.	Decision No. 007/2016 on a procedure for the application of article 88 of the amended Treaty and its supplementary texts to anticompetitive practices in the reinforcing steel production and distribution market in Côte d'Ivoire.

Source: Competition Directorate of the WAEMU Commission.

such as brewing, flour, sugar, telecommunications, airport handling and funeral services, the Commission has rendered only two decisions on the control of cartels and abuses of dominant position.

Nevertheless, this is an essential component of the activities of the Commission, which has exclusive competence to carry out a priori and a posteriori controls on the practices of enterprises.

The following factors contribute to the Commission's scant case law in this area:

- The Commission has few opportunities to take action ex officio on the basis of evidence observed while monitoring the markets. Although sectoral studies or surveys may allow the Commission to identify evidence on the basis of which to initiate proceedings, its limited budget for such activities means that they cannot be carried out on a regular basis.
- Few referrals are made by national agencies, which prioritize disputes where they are competent to produce a settlement or impose a fine (practices deemed restrictive, unfair competition, etc.). This can be observed by comparing, for a given year, the number of cases that these agencies handle in the area of anticompetitive practices and the number of cases that they handle in other areas.²⁸
- Enterprises prefer to refer matters to national authorities rather than to the WAEMU Commission, particularly in regulated sectors, owing either to a lack of awareness or to the hope of obtaining a swifter solution at the national level.
- Sectoral regulators tend to grant themselves decision-making powers over anticompetitive practices, either by applying national laws or by characterizing such practices in other terms.
- The Commission operates on the basis of collective decision-making and generally holds periodic meetings to discuss matters within its competence. This is how it adopts decisions and draft proposals for submission to the Council of Ministers and the Conference of

Heads of State and Government. The President heads the Commission and is the sole signatory of its decisions. This concentration of power undermines the effectiveness of the Commission's procedures for the control of anticompetitive practices and the imposition of penalties for such practices.

There is a lengthy period between the finalization of a case by the Competition Directorate and the final decision by the Commission. This slow pace, which is related to the irregularity of the Commission's meetings and the mandatory intermediate stage of the meeting of cabinet directors, discourages enterprises and other stakeholders from raising matters at the community level. These delays have sometimes caused cases to lapse, and the Commission had to close them without further action on account of the time that had passed since they were opened or the lack of interest in carrying out an investigation.

Table III.2 lists the cases in respect of which draft decisions are pending before the Advisory Committee on Competition (first stage), the meeting of cabinet directors (second stage) or the Board of Commissioners (third and final stage).

4. Analysis of the Commission's caseload

First, between 2007 (when the Competition Directorate, tasked with the implementation of community competition policy, was established) and late 2019, a period of 12 years, the Commission has rendered only eight decisions, which amounts to less than one per year. It should be noted that the Commission has become significantly more active in recent years, with decisions in preparation in almost 15 cases.

Secondly, the nature of the cases handled by the Commission is changing. For example, of the cases that have been decided, five concerned State practices, only two concerned anticompetitive practices on the part of enterprises, and one concerned the control of concentrations. By contrast, of the cases that are pending, six concern State anticompetitive practices, three concern concentrations or the creation of joint ventures, and four concern anticompetitive practices on the part of enterprises. It therefore seems that the suppression of anticompetitive practices carried out by enterprises and the control of concentrations now

²⁸ The statistics for the last two years on cases that concern matters other than anticompetitive practices, as provided by Benin (500 cases), the Niger (700 cases) and Mali (40 cases), show clearly that control of anticompetitive practices have not been the first priority.

**Table III.2:
Cases pending before the WAEMU competition authorities**

NATURE OF DRAFT	
I – DRAFTS SUBMITTED TO THE ADVISORY COMMITTEE ON COMPETITION BETWEEN 7 AND 11 OCTOBER 2019	
1	Draft decision on anticompetitive practices in the cargo handling sector at the Autonomous Port of Abidjan
2	Draft decision on anticompetitive practices in the liquefied petroleum gas distribution sector in Burkina Faso
3	Draft decision on anticompetitive practices on the part of Mali in the confectionery sector
II – DRAFTS SUBMITTED TO THE BOARD OF COMMISSIONERS	
1	Draft decision on practices that restrict imports of cotton-based textile products into Mali
2	Draft decision on practices that restrict imports of wheat flour into Mali and its distribution in the country
3	Draft decision on abuse of dominant position and anticompetitive agreements in the sugar import and distribution sector in Mali
4	Draft decision on anticompetitive practices and State aid on the part of Burkina Faso in the medicines and laboratory reagents import and distribution sector
5	Draft decision on anticompetitive practices on the part of the Niger in connection with the establishment of a "single international gateway system to handle the transit of incoming and outgoing international communications traffic in the Niger"
6	Draft decision on anticompetitive practices on the part of the Niger in connection with the construction and operation of telecommunications infrastructure
7	Draft decision on anticompetitive practices in the brewing and sweetened soft drinks sector in Benin
8	Draft decision on anticompetitive practices in the funeral services sector in Côte d'Ivoire
III – DRAFTS SUBMITTED TO THE MEETING OF CABINET DIRECTORS	
1	Draft decision on the application for negative clearance for the transfer by Allianz Africa SA of its majority holdings in several enterprises to SUNU Participations Holding SA
2	Draft decision on the application for negative clearance or an individual exemption for the enterprises Orange and MTN in connection with the creation of a joint venture, called Mowali, to manage a platform for technical interoperability among mobile money transfer services
3	Draft decision to grant negative clearance for the proposed creation by Orange Abidjan Participations SA, NSIA Banque Côte d'Ivoire SA and Diamond Bank SA of a joint venture called Orange Abidjan Compagnie SA
4	Draft decision on anticompetitive practices in the airport ground handling sector in Abidjan, Côte d'Ivoire
5	Draft decision to initiate a formal investigation procedure in connection with the aid granted by Benin in the country's cement production and distribution sector
6	Draft decision on the procedures for allocating resources accruing from the proceeds of the financial penalties imposed by the WAEMU Commission in competition matters

occupy a more important place in the application of WAEMU competition law as a whole.

Thirdly, community competition law is enforced most actively in Côte d'Ivoire, Burkina Faso and Mali. In Côte d'Ivoire and Mali, only one case per country has been decided, and a number of cases are pending (four in Côte d'Ivoire and three in Mali). Concerning Burkina Faso, three cases have been decided and one is pending.

However, the nature of these cases differs from one country to the next.

One of the cases involving Côte d'Ivoire concerns an application for negative clearance for the creation of a joint subsidiary to provide services in several countries in the subregion (see the section below on appeals to the Court of Justice). All the other cases involving Côte d'Ivoire concern anticompetitive practices on the part of enterprises in the following sectors: reinforcing steel production and distribution, funeral services, cargo handling at the Autonomous Port of Abidjan and airport ground handling in Abidjan.

As for Burkina Faso, there are four cases concerning anticompetitive practices on the part of enterprises (cartels, abuses of dominant position and concentrations) and one concerning State aid. The Commission has decided three of these cases: the SONAPOST case (2013), the Orange-Airtel case (negative clearance decision of 2016) and the SONABHY case (the decision, of 2019, has been appealed to the Court of Justice). The remaining, pending cases concern anticompetitive practices and State aid by Burkina Faso in the medicines and laboratory reagents import and distribution sector.

There is only one pending case involving Mali: it concerns anticompetitive practices on the part of enterprises (a case involving abuses of dominant position and anticompetitive agreements in the country's sugar import and distribution sector). Three other cases concern State anticompetitive practices in the form of anticompetitive import restrictions: the suspension of imports of confectionery products (an anticompetitive State practice condemned by a decision of 2019), practices that restrict imports of cotton-based textile products into Mali, and practices that restrict imports of wheat flour into Mali and its distribution in the country (the latter two cases are pending).

There are fewer decisions involving Senegal, the Niger and Togo (two decisions for Senegal and the Niger and one for Togo), and they all concern State aid or State anticompetitive practices.

With regard to Senegal, as mentioned previously, the State was found by the Commission, in a decision of 2010, to have applied discriminatory exemptions to imports of kraft paper bags for use in the cement sector and, in another decision of 2010, to have introduced palm oil standards that created a barrier to oil exports from Côte d'Ivoire to Senegal.

Two pending decisions concerning the communications sector involve the Niger. One of these decisions concerns anticompetitive practices on the part of the Niger in connection with the establishment of a "single international gateway system to handle the transit of incoming and outgoing international communications traffic in the Niger". The other concerns anticompetitive practices on the part of the Niger in connection with the construction and operation of telecommunications infrastructure.

Togo had concluded an agreement with the air transport company ASKY under which the airline would establish its headquarters in Lomé in exchange for certain immunities and tax exemptions. In a 2011 decision, the Commission held that some of the provisions of the agreement were incompatible with community competition rules.

Two cases involve Benin: one concerns anticompetitive practices on the part of enterprises in the brewing and sweetened soft drinks sector, and the other concerns the aid granted by Benin in the country's cement production and distribution sector. Neither case has yet been decided.

Lastly, a number of the cases examined by the Commission concern concentrations (mergers, acquisitions or the creation of joint subsidiaries) in the telecommunications and digital economy sectors; these concentrations have the potential to harm competition in several States of the subregion. One example from the telecommunications sector is the application for negative clearance for the Orange-Airtel concentration, which involved the acquisition by Orange, together with its subsidiary Orange Côte d'Ivoire, of control over Airtel Burkina Faso SA (the second largest mobile operator in Burkina Faso) and Airtel Mobile Commerce Burkina Faso SA. This case was decided in 2016.

Another example is the application for negative clearance or an individual exemption submitted in 2018 by the enterprises Orange and MTN in connection with the creation of a joint venture, called Mowali, to manage a platform for technical interoperability among digital money transfer services. The proponents of this platform, which brought together over 100 million subscribers at the time of its creation, claim that, in the long term, it will create interconnectivity among the 153 mobile money services deployed across the continent, which have a total of 338 million subscribers. It will thereby open up opportunities in the money transfer, banking services and e-commerce sectors in Africa. The Commission's decision in the case remains pending.

One last example is the application for negative clearance (decision pending) for the proposed creation by Orange Abidjan Participations SA, NSIA Banque Côte d'Ivoire SA and Diamond Bank SA of a joint venture called Orange Abidjan Compagnie SA. This proposal concerns the provision of retail banking, microcredit and insurance services, initially in Côte d'Ivoire and Senegal and later in other countries in the subregion, including Mali.

Overall, the Commission's oversight activities are by no means negligible, although they are clearly insufficient in view of the scale of the competition problems in the WAEMU zone. Its activities are growing in intensity and involve increasingly complex competition issues, as is clear from the pending cases concerning the development of telecommunications and digital services.

Between two thirds and three quarters of the cases referred to the Commission concern practices on the part of enterprises or States that seek to restrict competition between economic operators located in different WAEMU States or concentrations with a transnational dimension.

Hence, most of the cases handled by the Commission do have a regional dimension, which also means that the number of cases concerning purely national anticompetitive practices that are brought before the Commission is very low (between five and seven over the entire period). As such practices cannot be addressed within the current framework by national competition authorities, there is clearly a shortcoming in the system for preserving competition in WAEMU member States.

The low overall number of cases examined and the relatively long time taken to investigate them are not due only to the limitations of cooperation between the WAEMU Commission and the competition authorities of member States. They are also due to the very limited resources made available to the Commission's competition department and to the fact that, unlike the commissioners of national competition authorities, the department is required to deal with many matters other than competition.

In response to the questionnaire sent by the rapporteurs, it was stated that the Commission's budget for competition matters was around 374 million CFA francs (just under €600,000) and that five persons were assigned to the competition department (one economist and four lawyers).²⁹ The response indicated that, with these limited resources, the Commission had begun to examine 18 cases over the last five years, which equates to 3 or 4 cases per year.

This figure confirms that, as suggested by the overview of the cases that have been decided or are pending, the Commission has significantly strengthened enforcement of competition law. It also suggests that the Commission's competition department maintains a relatively satisfactory level of activity, given its very limited resources.

However, this figure underscores the fact that the resources allocated to competition matters in the Commission are wholly inadequate to the task of dealing with local competition problems in the various countries of WAEMU, which has an internal market of 94 million people.

This lack of resources is regrettable, as a wide range of potential competition law violations concerning, for example, public contracts awarded by member States, distribution or construction contracts and local monopoly abuses largely evades penalties, even though such violations are often among the most directly detrimental to consumer welfare.

At the community level, aside from the control of State aid and State anticompetitive practices, the control of concentrations is relatively effective in relation to multinational enterprises. If they want legal certainty, such enterprises have every interest in giving

²⁹ Two lawyers with four years' higher education, two lawyers with five years' higher education and an economist with baccalaureate-level education.

notification of their ventures in order to obtain negative clearance.

However, with regard to anticompetitive practices on the part of enterprises, the very low number of cases handled by the Commission as a result of its lack of resources and the fact that penalties, albeit modest ones, have been imposed on an offender in only one case³⁰ mean that competition law does not have a dissuasive effect, one that would incentivize enterprises to provide notification of their practices in order to obtain negative clearance.

It also seems that the resources allocated to competition matters are insufficient to allow the competition department to devote time to publishing guidelines on various substantive aspects of the Commission's analyses, which would actually enable enterprises to better anticipate prohibited behaviour and the penalties for which they would be liable in such circumstances. However, the need for such guidelines will continue to grow while the Commission is called upon to deliberate on increasingly complex issues.

Overall, while WAEMU competition law is based on provisions that are generally satisfactory in both substantive and procedural terms, and on adequate investigative powers, the limited implementation of this body of law means that the expected benefits have yet to materialize and that its provisions are not properly understood by enterprises and consumers.

The obstacles stem, on the one hand, from insufficient cooperation between national authorities and the Commission's departments and, on the other hand, from a lack of political will, which results in the allocation of insufficient resources to the implementation of community law.

This ineffectiveness is also related to factors internal to WAEMU, which remains reluctant to make allowance in its organizational structure for the specificity of handling competition cases.

5. Appeals considered by the Court of Justice

The WAEMU Court of Justice has been called upon to rule on only three competition cases.

³⁰ Decision No. 08/2019/COM/UEMOA on anticompetitive practices in the liquefied petroleum gas sector in Burkina Faso.

(a) *Société des Ciments du Togo SA v. WAEMU Commission*³¹

In this case, the Société des Ciments du Togo alleged that, in December 1998, the enterprise WACEM had been authorized by Togo to operate in the export processing zone and that, under Interministerial Order No. 009 of 31 January 2000, this enterprise had been authorized to sell its cement on the Togolese domestic market, a part of the WAEMU common market, exempt from duties and taxes. The Société des Ciments du Togo argued that this order violated both Togolese law and community provisions. It therefore sought the annulment of Decision No. 1467/DPCD/DC/547 of 7 July 2000, by which the Commission had declared that it did not have jurisdiction to order the member State to take steps to comply with WAEMU competition rules.

In support of its application, the Société des Ciments du Togo invoked, inter alia, the provisions of article 7 of the WAEMU Treaty, according to which "member States shall contribute to the attainment of the objectives of the Union by taking all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty. To this end, they shall refrain from taking any measure that could impede the application of this Treaty and of the measures adopted in implementation of its provisions". It also invoked article 88, which stipulated that, "one year following the entry into force of this Treaty, any State aid that could distort competition by favouring certain enterprises or the production of certain goods shall automatically be prohibited".

In this case, the Court of Justice held that the appeal by the Société des Ciments du Togo was inadmissible, as it was submitted too late.

However, in his concluding remarks, the Advocate General noted that, although the application was inadmissible, if the Court had found it admissible, it would have been compelled to find against the WAEMU Commission. On this point, the Advocate General was in agreement with the applicant, stating that, within the scope of its powers, the Commission should give full effect to community rules, disregarding any legislation external to the common market, where appropriate. According to the Advocate General,

³¹ Judgment of the Court of Justice of 20 June 2001, available at http://www.uemoa.int/sites/default/files/bibliotheque/cimtogo_contre_commission.pdf.

it followed that “a complaint against practices that could undermine the homogeneity of the WAEMU market and distort competition warranted an analysis by the Commission; an inquiry would have provided the Commission with sufficient information and factual and legal grounds on which to base its decision, made the applicant aware of the basis of the decision and enabled the Court to carry out an informed review of legality”. Consequently, “by declaring that it did not have jurisdiction, when it should instead have made enquiries and, if necessary, carried out further checks on the Togolese enterprises and authorities and in the markets in question in order to ascertain whether the practices brought to its knowledge could affect intracommunity cement transactions and distort the common competition rules applicable to enterprises, the Commission had manifestly failed to act in accordance with the scope of its powers and had violated the provisions invoked in the pleas in law”.

(b) *Compagnie Air France v. Senegal Travel and Tourism Agents Association*³²

Judgment No. 02/2005 of the Court of Justice can be dealt with briefly, as it concerns a transitional law issue relating to the period when the community law regime was being established. The National Competition Commission of Senegal had rendered a decision in December 2002 (just before the entry into force of Regulation No. 2/2002/CM/UEMOA), and the Council of State of Senegal, to which the decision had been appealed in February 2003 (i.e. after the entry into force of the Regulation), requested the Court of Justice of WAEMU to issue a preliminary ruling to designate “the court competent to rule on the appeal filed on 17 February 2003 seeking the annulment of Decision No. 02/D-02 of the National Competition Commission of Senegal of 27 December 2002”.

The Court held that, as the decision of the National Competition Commission of Senegal had been rendered before the entry into force of Regulation No. 2/2002/CM/UEMOA, the WAEMU authorities could not rule on the case; it therefore declared that, for lack of jurisdiction, it could not designate the court competent to rule on the appeal seeking the annulment of Decision No. 02/D-02 of the National Competition Commission of Senegal.

³² Judgment of the Court of Justice of 12 January 2005, available at http://www.uemoa.int/sites/default/files/bibliotheque/renvoi_air_france.pdf.

(c) *SUNEOR-SA, SODEFITEX, SN-CITEC, NIOTO-SA and SOCOMA-SA v. UNILEVER CI, SIFCA-SA, COSMIVOIRE, PALMCI, NAUVU and SANIA*³³

The third case, which gave rise to Court of Justice judgment No. 002/2018 of 9 May 2018, warrants a more detailed exposition.

In this case, the enterprises SUNEOR-SA, SODEFITEX, SN-CITEC, NIOTO-SA and SOCOMA-SA challenged Commission Decision No. 009/2008/COM/UEMOA of 22 October 2008 granting negative clearance for the proposed concentration, in Côte d'Ivoire, of the enterprises UNILEVER CI, SIFCA-SA, COSMIVOIRE, PALMCI, NAUVU, SANIA, PHCI and SHCI, which had authorized them to effect the concentration. According to the Decision, the aim of the concentration agreement in question was to effect a concentration that would allow the parties involved to specialize in the palm oil sector in Côte d'Ivoire. The clearance covered the entire concentration and all its ancillary agreements apart from the stearin supply contract between UNILEVER-CI, SANIA and AFRICO-CI for the manufacture of packaging. After the concentration, UNILEVER-CI, SIFCA and NAUVU would continue operating: UNILEVER-CI would devote itself exclusively to soap-making activities and SIFCA and NAUVU would produce and exploit crude and refined oil.

In order to obtain this clearance, the enterprises involved in the concentration argued that their position was dominant neither before nor after the concentration. They based this argument on the respective market shares in the edible oil sector, where SIFCA and NAUVU claimed a market share of only 13 per cent, and in the soap-making sector, where UNILEVER claimed a market share of 24 per cent. Moreover, given the imports of palm oil, soybean oil and other fats into the region, it was unlikely that the enterprises involved in the concentration would be able to escape the forces of competition, especially as the regional oilseed sector was less competitive than imports, particularly those from Asia.

SUNEOR-SA and others considered that the Commission had failed to take into account, first, that locally produced soybean oil was losing ground

³³ Judgment of the Court of Justice of 9 May 2018, available at http://www.uemoa.int/sites/default/files/bibliotheque/arret_definitif_suneor_ndeg002.pdf.

to palm oil; second, that this palm oil was produced in Côte d'Ivoire by the enterprises involved in the concentration at a very low cost compared to oils produced in other WAEMU countries; and third, that, throughout the WAEMU zone, the enterprises involved were exporting not only the palm oil produced at low cost in Côte d'Ivoire, but also very inexpensive palm oil that they imported from South-East Asia, in violation of customs rules and at the risk of severely penalizing the Burkina Faso national cotton industry and forcing Burkina Faso enterprises such as SN-CITEC to cease their industrial and commercial activities. They reasoned that the Commission had wrongly considered that the enterprises involved in the concentration did not occupy a dominant position on the market and had not taken into account the fact that the proposed merger would strengthen that dominant position, thereby significantly harming competition in the WAEMU zone. Ultimately, they considered that they were victims of an abuse by the defendant enterprises of their dominant position. On this basis, they requested the annulment of Commission Decision No. 009/2008/COM/UEMOA, since it was prejudicial to them and unlawful. They added that, in granting clearance, the Commission had not initiated an adversarial procedure in accordance with the provisions of articles 15.3 and 16 of Regulation No. 3/2002/CM/UEMOA. They concluded that the concentration decision concerned all of them and that, as a consequence, their application was admissible.

However, the Court of Justice did not accede to the requests made by the complainants. It recalled that, in accordance with article 28.4 of Regulation No. 3/2002/CM/UEMOA, the Advisory Committee on Competition had been consulted by the Commission and that, in its Opinion No. 01/2008/CM/UEMOA of 10 October 2008, the Advisory Committee had held that the Commission could grant negative clearance, since the concentration would not create or strengthen a dominant position on the markets in question.

The Court of Justice recalled that, when examining concentrations, the Commission's analysis should be based on economic as well as legal criteria, as the former fall within the scope of the control of concentrations.

In this regard, the Court noted that the Commission was the designated institutional expert on competition matters in WAEMU and that its decision had been based on all the relevant information, including studies, the external trade statistics available to it, information

provided by States following the Commission's publication of the concentration proposal, relevant data from the West African Development Bank study of April 2008 and, lastly, consultations with the Advisory Committee on Competition.

The Court of Justice held that the Commission had no obligation to verify the claims made by the enterprises requesting negative clearance, as contained in the case file; it was for the Commission to assess the appropriateness of such clearance.

The complainants argued that the decision should be annulled because, following the reservations expressed by SUNEOR-SA, the Commission had failed to initiate an adversarial procedure in accordance with the provisions of articles 15.3 and 16 of Regulation No. 3/2002/CM/UEMOA. The Court of Justice held that this argument was not valid, as article 15.3 of the Regulation provides that, if the Commission has doubts as to the compatibility of agreements, decisions or concerted practices with the common market, the Commission may decide to initiate an adversarial procedure. The adversarial procedure provided for in article 16 of the rules of procedure is therefore not mandatory. The Commission merely has the option of applying this procedure and does so when doubts remain after the examination of the information provided in the case file.

In the case in question, the Commission had secured statistical and economic evidence and, on the basis of legal arguments, had rendered its decision in accordance with the provisions of Regulation No. 3/2002/CM/UEMOA.

With regard to the examination of the application for negative clearance submitted by UNILEVER CI and others, the Commission carried out checks in respect of the two fundamental issues in the control of concentrations, namely whether the enterprises involved in the concentration occupied a dominant position and whether the concentration would harm effective competition on the common market.

Ultimately, the Court of Justice held that the Commission's decision was objectively based on relevant evidence, as supplied by the applicant enterprises, the West African Development Bank study of 2008 and the opinion of the Advisory Committee on Competition, which was composed of two nationals from each of the eight WAEMU member States. It is therefore apparent that the decision was taken in

compliance with community provisions governing competition, in particular Regulation No. 3/2002/CM/UEMOA.

This judgment establishes the principle that, with regard to the economic assessment necessary in concentration cases, the Court of Justice should to

some extent defer to the Commission. The Court of Justice verifies that the Commission has properly taken into account and examined all relevant factors, but it limits itself to reviewing the lawfulness of the procedure without seeking to pass judgment on the validity of the Commission's substantive reasoning.

IV. THE DEVELOPMENT OF THE NATIONAL FRAMEWORKS AND AN ANALYSIS OF THE RELATIONSHIP BETWEEN THE COMMISSION AND THE NATIONAL COMPETITION AGENCIES

The harmonization of domestic laws with community law, intended to ensure the uniform interpretation and application of the rules, was supposed to be accomplished within six months, but that proved too optimistic, given the time frame for adopting legislation in the member States. The process of incorporating Directive No. 2/2002/CM/UEMOA into national law has been slow.

However, any changes in the institutional system of WAEMU involving either a redistribution of competences between the Commission and the national authorities or in-depth cooperation between the two will require the adaptation of national competition law systems in order to be fully effective. The countries' economic and legal contexts show some similarities, while also differing to a greater or lesser extent.

Economically, most countries in the WAEMU zone have a strong agricultural base, with numerous small farms, and a large mining sector. The processing of agricultural products and natural resources remains limited. The manufacturing and service sectors are generally characterized by the presence of many small and medium-sized enterprises, a significant proportion of which are informal businesses, and relatively few large companies. These characteristics point to a triple challenge for the competition authorities of WAEMU member States:

First, small and medium-sized enterprises tend to be less well informed about the requirements of competition law than larger companies, which are more likely to seek and obtain legal advice. It is therefore particularly important for the Commission and the competition authorities of the member States to carry out awareness-raising activities among industry to ensure that enterprises and their representatives understand the usefulness of competition law and are familiar with its requirements.

Secondly, the preponderance of the rural population (which accounts for 50 to 80 per cent of the total

population, depending on the country) and of informal sector activities suggests that it is particularly important to monitor competition at the local level, as anticompetitive practices can have a highly punitive effect on populations that are not very mobile and often on those that are poor. In such contexts, it is all the more important for the national competition authorities, which are in a better position than the Commission to identify and address distortions in local competition, to be able to effectively perform their role.

Furthermore, the crucial economic importance in WAEMU member States of the agricultural value chain, from the supply of inputs to the transport of harvests, the processing of products and their placement on local, national or international markets, also deserves special attention from the perspective of competition law.

Thirdly, experience shows that bidders for public procurement contracts frequently resort to anticompetitive practices and that such practices are particularly damaging to the economies of developing countries, since they drive up prices and diminish the quality of infrastructure and public services. It is essential that the national competition authorities address and remove these obstacles to the proper functioning of the markets. Competition authorities must work together with public procurement agencies to gain access to data enabling them to detect possible infringements. However, it appears that, in some WAEMU countries, such as Burkina Faso and Côte d'Ivoire, there has been no exchange of information between national competition authorities and public procurement agencies.

Notwithstanding the above-mentioned similarities, the differences between the economies of WAEMU member States are such that the competition problems most harmful to the local economy emerge in sectors that vary from one country to the next. For example, the development of landlocked countries such as Mali, Burkina Faso and the Niger is particularly

handicapped by the weakness of their logistics chains and inefficiency or lack of competition in the transport sector.

With regard to legal aspects, some countries (Benin, Burkina Faso, Côte d'Ivoire and the Niger) have brought their competition laws into conformity with WAEMU law, while others (Mali, Senegal and Togo) have not, or have not yet adopted a competition law (Guinea-Bissau).

Most of the competition laws of WAEMU countries establish the principle of free prices, while allowing the executive branch to control prices in exceptional circumstances or in sectors where competition cannot function. The degree of government discretion in fixing prices and the number of sectors in which prices are controlled varies from country to country.

A. ANALYSIS OF NATIONAL COMPETITION LAWS

One of the measures strongly recommended at the 2007 peer review was to reorganize the member States' competition authorities, in particular, by modifying the scope of authority of the national agencies to reflect the community context.

Of the eight WAEMU member States, five (Benin, Burkina Faso, Côte d'Ivoire, Mali and the Niger) have adopted new national laws and the other three (Senegal, Togo and Guinea-Bissau) have begun the process of amending their laws.

1. Purpose and practices covered by national competition laws

(a) National legal frameworks

Apart from Guinea-Bissau, all WAEMU member States have national laws with the stated objectives of improving economic efficiency and consumer welfare.

In most States, competition law has a much broader scope of application than European and United States competition law. National competition laws contain provisions prohibiting anticompetitive practices (cartels, abuse of dominant position, State aid and State anticompetitive practices), restrictive practices and unfair competition practices, as well as provisions on invoicing and price transparency.

Some national laws (Mali and Côte d'Ivoire) also cover the control of concentrations.

In Mali, Act No. 2016-006 of 24 February 2016 on Competition establishes control of operations that "risk creating a position of strength resulting in an effective reduction in competition within the domestic market". However, it should be noted that decision-making power over the control of concentrations resides with the minister responsible for trade, acting on the advice of the competition directorate, without the competition authority necessarily having been consulted.

In the law of Côte d'Ivoire, as in WAEMU community legislation, certain concentration operations are considered a form of abuse of dominant position. Such an approach makes little sense, because the purpose of control of concentrations is to prevent the weakening of competition, rather than to punish the abuse of dominant position after it has occurred. For that reason, in most countries that have a law on concentrations, it is substantially and procedurally distinct from the law on abusive practices.

Because of their vast scope of application and the multiplicity of their provisions and underlying objectives, national competition laws are not readily accessible. The confusion that can arise as to the purpose of competition law is compounded by the fact that, in practice, national competition authorities deal with anticompetitive practices only very rarely (in cases where they are requested to do so by the Commission).

As for the new laws (in Benin, Burkina Faso, Côte d'Ivoire, Mali and the Niger), while it is understandable that legislatures have taken care to respect the division of responsibilities established by community texts, the distinction between anticompetitive practices and restrictive practices is not always evident.

Indeed, the provisions on restrictive practices, inspired by French competition law, actually address infringements irrespective of their effect on competition. Their purpose, which is to create balance in commercial negotiations and in vertical relations between producers and distributors, is different to that of promoting competition in the market.

Restrictive practices may constitute anticompetitive practices, but only when they are carried out by

enterprises that individually or collectively have a certain degree of market power. This is the case with price maintenance, discriminatory sales, refusal to sell and resale at a loss.

Given that the laws give national agencies full jurisdiction over the control of restrictive practices, and that national agencies are not obliged to refer them to the WAEMU Commission or to the courts, it is understandable that cases relating to restrictive practices are given priority during the investigations carried out by authorized officials.

This means that the efforts of local administrations and competition authorities are centred on the application of provisions other than those designed to combat anticompetitive practices, i.e. the control of prices and transactions. In these circumstances, it is difficult, to say the least, to promote competition policy.

(b) Unfair competition

The inclusion of provisions on unfair practices in a competition law can lead to confusion. While the purpose of competition law provisions is to safeguard the proper functioning of the competitive process in the markets, provisions on unfair competition are intended to protect competitors against certain practices by other enterprises which may be prejudicial to them and which are considered unacceptable, regardless of whether or not they undermine the proper functioning of competition.

The protection of competition and the protection of competitors are two different things, and can sometimes be in conflict. For that reason, in many countries, unfair competition is the exclusive domain of the courts, whereas anticompetitive practices fall within the competence of a competition authority composed of economic and legal experts.

(c) State anticompetitive practices and State aid

Some national laws (those of Côte d'Ivoire, Benin, Burkina Faso and the Niger) cover State anticompetitive practices and State aid. However, here too national laws merely establish the principle of control of these government measures, and refer to community rules when it comes to review and penalty procedures. It is thus highly likely that national

agencies will overlook this area in their activities, unless a request is made at the community level.

Malian law is no exception to this observation, although there the Supplementary Acts of the Economic Community of West African States (ECOWAS) serve as the anchoring community framework.

2. Scope

All the national competition laws cover the activities of enterprises, whether privately or publicly owned, although in practice competition authorities conduct very few investigations of State-owned enterprises or of measures taken by the State.

Although no case law has been detected in this regard, it may occur that a national authority supports the WAEMU Commission in proceedings against a State-owned enterprise.

All the national competition laws, while prescribing free pricing and free competition, provide for derogations, including the possibility for the Government to approve or set prices for certain products and services. Lists of such products and services, which vary from one member State to the next, are established in regulations.

The reality of the situation does not favour the construction of a common market in which products and services are subject to the same rules. Government regimes for the approval and setting of prices should be subject to a mechanism of prior notification to the Commission and the periodic assessment of the situations justifying the administered pricing of a product or service.

This would make it possible to establish, at the community level, a single list of products and services whose prices or tariffs might be subject to approval or taxation measures, in order to:

- Keep administrative restrictions on free competition to an absolute minimum
- Limit the duration of the such regimes, to prevent inefficient enterprises from benefiting from entrenched vested interests
- Prevent administered pricing from being used to displace products that originate in other member States, and which compete

with those of domestic enterprises, from the market

Insofar as national competition authorities are not competent to sanction anticompetitive practices, laws adopted after the entry into force of community legislation should not provide for exemptions or exceptions.

However, article 12 of Act No. 2016-006 in Mali provides for an absolute exemption for certain agreements in the following terms: “Any agreement or category of agreements, any decision or category of decisions by undertakings or associations of undertakings, or any concerted practice or category of concerted practices, which contributes to improving production or product distribution or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, but not [...] imposing on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives [or] affording the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question, shall not be subject at the national level to the prohibitions contained in article 4 [of the Act].”

In practice, it will be difficult to apply this article in Mali unless the division of responsibilities decided at the community level changes.

The same observation applies to article 13 of Ordinance No. 2013-662 of Côte d'Ivoire, which contains the same terms as article 12 of the Malian Act.

All national laws that provide for exemptions are contrary to article 7 of Regulation No. 2/2002/CM/UEMOA, which establishes a special procedure for the review of agreements by the Commission, prior to any exemption.

The exceptional regimes introduced by the member States that are liable to hinder competition within the common market, should be managed in conjunction with the Commission. This is the case with special agreements, investment codes and export processing zones designed to promote and attract investment, including foreign investment.

The following excerpt from a 2017 report on the state of competition in WAEMU gives a clear indication of the problems presented by these special regimes.

1. Special agreements are a common practice in the member States, especially in the area of infrastructure and in the privatization of State-owned enterprises.

Article 87 of the Treaty on the West African Economic and Monetary Union (WAEMU) does not encourage such agreements: "Member States shall refrain from concluding new establishment conventions. They shall bring existing agreements into line with the legislation harmonization measures set forth in article 23 of Additional Protocol No. 2, as soon as possible and in accordance with the procedure laid down in articles 60 and 61 of the Treaty".

Article 23 of Additional Protocol No. 2 on the Sectoral Policies of WAEMU states that: "The Council shall define by regulation, at the proposal of the Commission and by a two thirds majority of its members:

- (a) the mutual information procedures in which the member States will participate with a view to coordinating their industrial and mining policies;
- (b) the conditions under which derogations from the Union's competition rules may be permitted in certain sectors."

2. The implementation of national investment codes has always posed problems related to the harmonization of advantages granted to beneficiary enterprises within the same common market.

This concern, clearly expressed in community competition legislation, can also be read in other founding texts of the Union, such as Additional Act No. 05/99 adopting the Common Industrial Policy of WAEMU, article 3 of which establishes competition between enterprises "in a State governed by the rule of law and strengthened by the respect for and application of competition rules" as a guiding principle.

Nevertheless, the Union has not yet been able to reach agreement on the adoption of a community investment code, despite the studies carried out and the many meetings held on the subject.

Member States continue to apply their national codes, without taking into account the rules on State aid control set forth under article 88 (c) of the Treaty and Regulation No. 4/2002/CM/UEMOA, the effective application of which should lead them to submit their State aid frameworks (laws) and ongoing individual State aid measures to the Commission for review.

3. Export processing zones are subject to customs regimes that allow the enterprises operating in them to enjoy special advantages in terms of customs duties, domestic taxation and social security contributions.

This system, whereby the countries that set up export processing zones seek to boost their export capacity, would not pose competition problems within the WAEMU market if the entire production of the enterprises operating in the zones was exported to third countries. However, the current rules permit these enterprises to sell 20 per cent of their production on the internal market. This disadvantages enterprises based outside export processing zones, even if the products coming from the zones are taxed as non-originating products before being released for consumption.

This situation raises at least three questions:

- Is the taxation of products arriving from export processing zones sufficient to cancel out the tax advantages enjoyed by beneficiary exporting enterprises vis-à-vis their competitors that are not based in such zones?
- Is the market share of the products sold in accordance with the 20 per cent quota so large that it absorbs the bulk of domestic demand for such products, thus running the risk of weakening supply from outside export processing zones?
- Is the production accounting system used by customs in export processing zones efficient enough to ensure that enterprises do not exceed their 20 per cent quota?

Better control of the system must be encouraged, to avoid the distortions of competition it could generate.

As is logical, national competition laws are not meant to be applied outside the territory of the State covered by the national competition authority, for at least two reasons:

- When an enterprise established in another member State resorts to an anticompetitive practice, there is likely to be harm to

intra-community trade and naturally the WAEMU Commission is then competent.

- When the practice is carried out by an enterprise established outside the community and the market concerned is a substantial part of the WAEMU market, it is community law that will be applied by the Commission – the only

body with the power to impose penalties for anticompetitive practices.

Therefore, it may be considered that in the WAEMU context, the geographical scope of a national law is the national territory.

3. Status of competition authorities with general powers

Most WAEMU States have set up an authority that, with the support of the competent agency, is responsible for enforcing competition law. However, these authorities have various limitations.

First, as mentioned above, under WAEMU rules they are not competent to sanction the anticompetitive practices that may come to their attention.

Secondly, they often have only an advisory role vis-à-vis economic actors, Governments or, in some countries (such as Côte d'Ivoire), the courts, while decision-making power is vested either in the minister responsible for competition or the courts. It is generally the rule that the competition authority must be consulted on any draft laws or regulations, but this advisory power is limited, as in Senegal, where the competition authority's opinions are not published when they are rendered and the Government is under no obligation to respond to them.

In principle, each national competition authority must publish an annual report on the state of competition in the country's economic sectors. In reality, very few do so under the terms set forth in Directive No. 2/2002/CM/UEMOA.

Thirdly, although these competition authorities may appear to be de jure independent, de facto that is not always the case. In their daily operations they are often dependent on the ministry responsible for trade. This is the case, for example, in countries where the secretary-general of the competition authority is appointed on the advice of the trade minister and attends the deliberations of the members of the commission.

In the countries where the competition authority has been instituted but is not yet in place, as in Benin, Mali, the Niger, Togo and – for some time – Senegal, a department within the ministry responsible for trade performs the role allotted to the competition authority.

(a) Appointment of members

In all member States with competition authorities, the heads of these authorities are appointed by the Government.

Chairpersons and other members are not always selected in a transparent manner that takes into account the candidates' respective qualifications for addressing competition issues. Rather, they are chosen on a discretionary basis, according to their membership of particular bodies or their professional qualifications in the general fields of law or economic activity. The individuals chosen to serve in national competition authorities are increasingly academics, judges and businesspeople. Some have already had experience of competition matters before being appointed to the authority.

This state of affairs is encouraging, insofar as it will contribute to increasing competition authorities' levels of expertise on competition issues. However, care should be taken to prioritize professionalism over other subjective criteria.

In Burkina Faso and Côte d'Ivoire, the appointment of representatives of industry and of consumers as competition commissioners may also enhance the consideration of economic and social aspects in the review of cases.

(b) Term of office, grounds for dismissal and incompatibilities

Chairpersons and other members of competition authorities are generally appointed for a renewable term of four or five years. They can be removed from office before the end of their term in the event of serious misconduct or incapacity.

Member States have not reported any dismissals or resignations of serving members of competition authorities. However, that does not mean that members' independence is assured.

Acts and decrees on the organization of competition authorities do not generally indicate incompatibilities between the functions of a chairperson or commissioner and the responsibilities of company directors, politicians or heads of government agencies. On the other hand, it is possible for members of competition

authorities to relinquish jurisdiction over cases in which they may have direct or indirect interests.

(c) Lack of functional and financial autonomy

Competition authorities are either attached to the ministry responsible for trade (in Benin, Mali and Togo) or are nominally independent (in Burkina Faso, Côte d'Ivoire, the Niger and Senegal). In both cases, they form part of the executive for at least three reasons:

- Their members are appointed by decree on the advice of the minister responsible for trade and possibly other ministers.
- Their budgets are determined by the parent ministries, which oversee budget implementation.
- Their staff is made up of government officials who work there on secondment or temporary assignment.

However, competition authorities enjoy a certain degree of effective independence when acting on a mandate from the WAEMU Commission.

It is true of almost all competition authorities that their members earn less than persons with the same qualifications and responsibilities in other institutions of equivalent rank. The benefits granted to the members of competition authorities are little or non-existent.

Competition authorities do not recruit their own staff members, who are provided by the ministries. Assigned or seconded officials do not receive compensation equivalent to that of customs or tax officials with the same level of training. Assignment to the competition authority is therefore unattractive.

With regard to financial autonomy, with the exception of the Commission for Competition and the Fight against the High Cost of Living of Côte d'Ivoire, the level of resources allocated to the member States' competition authorities is remarkably low, leaving them unable to fulfil the tasks assigned to them, let alone those that they would have to assume if the relationship between the WAEMU Commission and the national authorities evolved in a way that gave the latter greater responsibility to deal with anticompetitive practices. In general, national authorities have neither autonomous resources nor means of self-financing. In most cases, their budget depends on the goodwill of the minister responsible for trade.

On this point, it is noted that the Côte d'Ivoire Commission for Competition and the Fight against the High Cost of Living is funded by levying a share of the fines imposed on offenders. While there are no major difficulties when these fines are imposed by a court independent of the Commission, financing of this nature would be much more problematic if the fines for anticompetitive practices were imposed by the Commission itself. In such an arrangement, it might be feared that the competition authority lacked objectivity in its assessment of the facts.

4. Investigative powers

(a) Extent of investigative powers

The officials responsible for inquiries wield significant powers. They may:

- Compel companies or individuals under investigation to provide specific information or documents and may set deadlines for them to produce said information or documents
- Require complainants or third parties to make available any documents or information that they might be holding
- Enter the premises of companies or natural persons under investigation
- Conduct searches of company premises, subject to judicial oversight

Various laws provide for sanctions against persons in positions of responsibility and other persons who refuse to pass on formally requested information or who oppose routine visits or searches.

While the principle of respect for confidential information is accepted, national laws lack specific rules for the identification and handling of such information. This may complicate access to certain information.

Most national laws provide for adversarial proceedings before the national competition authority, although this procedure is not always well defined (in Côte d'Ivoire, for example).

(b) Authorities' structure and margin of discretion on priorities

The Burkina Faso and Côte d'Ivoire commissions are composed of a college of commissioners and a team of rapporteurs responsible for inquiries and studies.

In both countries, a clear distinction is made between the responsibilities of the respective investigation and decision-making structures.

This separation has not been established for the competition authorities of Mali, the Niger, Senegal and Togo, which are not yet operational. This situation creates a major impediment for the conduct of inquiries by the competition authorities, which are obliged to rely on the directorate from which the investigating officers are assigned. This dependence may even be detrimental to the substance of inquiries and the processing of reports when monitoring anticompetitive practices.

National competition authorities have the power to open inquiries and bring prosecutions on their own initiative, but they have little discretion regarding whether or not to process the cases brought before them or the criteria whereby they should prioritize such cases, for the following reasons:

- They are obliged to consider cases submitted to them by the Government.
- They have an obligation to carry out the actions prescribed by the community authority (the WAEMU Commission).
- They are normally required to inform the WAEMU Commission of the complaints referred to them and, consequently, they do not have the discretion not to follow up on such referrals.

Furthermore, national competition authorities often struggle to fulfil their role to monitor national markets, as they do not have sufficient resources or expertise to conduct the necessary studies. Yet conducting market studies is particularly important for new competition authorities, since it allows them not just to effectively perform their market monitoring role, but also to detect distortions likely to pertain to anticompetitive practices.

5. Decision-making powers

(a) Compatibility of national frameworks with community law

All member States except Guinea-Bissau have laws establishing a competition authority (a national competition commission or council) with jurisdiction over the main categories of anticompetitive practices.

Only Senegalese legislation – Act No. 94-63 of 22 August 1994 on Prices, Competition and Commercial Litigation – gives the competition authority the power to punish cartels and abuse of dominant position, which is understandable insofar as Senegal has not yet reformed its national framework to bring it into conformity with community standards.

National competition authorities are empowered to identify anticompetitive practices and to cooperate with the WAEMU Commission at all stages prior to the adoption of decisions.

Malian law (articles 22 and 25 of Act No. 2016-006) designates the head of the competition directorate as the authority responsible for sanctioning anticompetitive practices. It would appear that this official can even authorize a financial settlement in the event of an infringement of the competition rules. It is clear that in this respect the Act is not compatible with community competition rules, which grant the WAEMU Commission exclusive competence to sanction anticompetitive practices.

The same is true of Act No. 99-011 of 28 December 1999 on Competition in Togo, which lays down the criminal penalties that the courts are empowered to apply, as appropriate, on the basis of an opinion by the national competition commission.

(b) Sanctioning powers

Only the three countries (Mali, Senegal and Togo) that have not yet incorporated Directive No. 2/2002/CM/UEMOA into national law have established fines that specifically apply to violations of the rules on cartels and abuse of dominant position.

On the other hand, all national laws provide for the imposition of fines on enterprises that contravene the provisions banning restrictive practices.

Competition authorities (commissions and councils) do not have the power to sanction restrictive practices, except in Burkina Faso and Côte d'Ivoire. In the other countries, penalties for these practices are imposed by competition directorates under the supervision of the parent ministries. In the States where fines have been established, the applicable amounts are set in ranges that are not indexed to turnover.

In Senegal and Togo, these amounts are far from being a deterrent, given the turnover of the large enterprises

liable to be prosecuted in most sectors of activity. None of the national laws provide for the disqualification of prosecuted natural persons from the practice of commercial activities.

Togolese law provides for sentences of imprisonment, which can be imposed only on the managers or employees of enterprises that have organized or carried out anticompetitive practices.

The laws of Mali and Senegal provide that the authority with sanctioning power can issue prior injunctions, although there is nothing to indicate that these authorities have the power to impose remedies.

Nevertheless, in all national systems, the competition authorities' advisory power to issue opinions and recommendations includes the possibility of proposing remedies to Governments. It would be preferable, however, for these authorities to participate in determining both structural and behavioural remedies in the framework of their cooperation with the WAEMU Commission.

Financial settlements are commonly used in member States for the administrative resolution of disputes relating to administered prices and restrictive practices. Under this method, the competent administrative authority agrees to end any proceedings against the natural or legal person at fault in return for the payment of a given amount.

Only Malian law provides for the application of this method of dispute settlement in relation to anticompetitive practices. However, the head of the competition directorate will surely find it difficult to reach settlements on infringements that fall within the jurisdiction of the WAEMU Commission, while abiding by community standards.

6. Advisory powers

Competition authorities have broad advisory powers that allow them to issue opinions to Governments relating to competition. Indeed, most national laws provide for Governments to consult with the competition authority before adopting any measure that might have an effect on competition. The Government may request the opinion of the competition authority whenever it wishes.

For example, between 2017 and 2019, the Côte d'Ivoire Commission for Competition and the Fight

against the High Cost of Living, at the request of the Government, issued three opinions on the impact on competition of regulatory measures, which the Government was then forced to amend.

However, few national laws (as in Côte d'Ivoire and Mali) provide for bodies other than the Government – for example, the parliament, professional federations or local authorities – to refer to the competition authority for advice.

National competition authorities, in the framework of their monitoring functions, are also authorized to take action *ex officio* on all competition matters and to provide advice to the public authorities, including by suggesting measures to remove or reduce obstacles to competition caused by State-owned enterprises or public policies.

Nevertheless, the opinions of national competition authorities are purely advisory. Neither Governments nor enterprises are bound by them. Nor is there any obligation for the Government of a member State to respond publicly to advice or recommendations contained in an opinion issued by the competition authority with a view to removing or reducing a regulatory obstacle caused by the conduct of a State-owned enterprise.

When consultation is obligatory prior to the adoption of an act by the Government, the Government should mention this consultation in the act issued. Failure to carry out obligatory consultation should normally invalidate the act in question, if it is contested by businesses or other interested parties. In practice, however, failure to carry out obligatory consultation is never invoked as a ground for challenging an act adopted by a public authority.

7. Sectoral studies and advocacy

Competition authorities may, on their own initiative or at the request of the Government, carry out market studies to assess the state of competition in major sectors of the economy. None of the national laws have provisions establishing a framework for such studies, which may make it difficult to gather information from enterprises.

National competition authorities can also undertake advocacy activities with enterprises, consumers, the press, universities, civil society and the judiciary (judges, lawyers and court officers). However, such

activities are rare, owing to the lack of funds set aside for them.

8. Division of responsibilities between competition authorities and sectoral regulators

(a) Lack of clarity in the division of responsibilities

Neither community legislation nor the laws of member States give clear guidance on the division of responsibilities or the terms of cooperation between general competition authorities and sectoral regulators.

In the future, the WAEMU Commission and member States will have to agree on how to organize the control of anticompetitive practices in regulated sectors, according to one of the following two options:

- Establish a cooperation mechanism at the national level so that the handling of all cases related to anticompetitive practices in regulated sectors can be transferred to the general competition authority, on the understanding that the latter will interact with the WAEMU Commission as the only body empowered to take decisions in this area.
- Allow sectoral regulators to work directly with the WAEMU Commission to examine anticompetitive practices detected in the corresponding sectors.

Within the WAEMU Commission, the compartmentalization of the activities of different departments may have led to the adoption of rules governing regulated sectors that do not take account of community competition rules. The telecommunications sector is a case in point, as the sectoral authorities tend to resolve disputes through procedures other than those foreseen in community competition legislation.

In the sphere of public procurement, article 8 of Directive No. 5/2005/CM/UEMOA of 9 December 2005 on the control and regulation of public procurement and public service delegations in WAEMU allows regulators to penalize collusion between bidders by confiscating their deposits.

(b) Non-compliance of sector-specific national laws with the community framework

Some sector-specific national laws expressly derogate from the division of responsibilities established by community legislation. One such law is Senegalese Act No. 2011-01 of 24 February 2011, the Telecommunications Code, whose article 46 stipulates that:

“In the event of anticompetitive practices in the telecommunications sector, by derogation from article 9 of Act No. 94-63 of 22 August 1994 on Prices, Competition and Economic Disputes and without prejudice to the powers conferred on the WAEMU and ECOWAS community institutions, operators shall refer such practices to the Regulation Authority. The Regulation Authority shall render a decision on the nature of these anticompetitive practices after hearing the parties concerned. The decision of the Regulatory Authority may be challenged before the high administrative court and before any competent community institution once all domestic remedies have been exhausted.”

Act No. 2017-20 of 20 April 2018, the Digital Code of Benin, is another example of a national law establishing the telecommunications sectoral regulator's power to control and sanction anticompetitive practices, without taking community legislation into account.

Article 165 of this Act sets out the regulator's responsibilities in the area of competition law:

“The regulatory authority shall ensure respect for competition in the electronic communications sector and shall settle disputes pertaining thereto, including those related to anticompetitive practices.”

“The regulatory authority shall inform the National Competition Council of decisions taken by virtue of this section.”

This brief overview suggests that if the responsibilities of the WAEMU Commission and the national authorities in the area of competition law were to be reorganized in order to improve the implementation of competition policy in the WAEMU zone, such a change would have to be accompanied by a number of reforms within the member States to ensure that each had a sufficiently robust system for the prevention of anticompetitive practices and for concentration control. Otherwise,

any redistribution of responsibilities between the Commission and the member States would have little effect.

Moreover, given that the competition authorities currently have little experience in addressing anticompetitive practices or of concentration control, it would be advisable to introduce technical assistance programmes to prepare them for their new functions.

B. THE RELATIONSHIP BETWEEN THE COMMISSION AND THE NATIONAL COMPETITION AGENCIES

1. Legislative framework

Directive No. 2/2002/CM/UEMOA sets out the areas in which the Commission and the national competition agencies may intervene, but it fails to clearly indicate how they are to work together.

The role of national competition authorities is explained in article 3 of the Directive. First and foremost, they perform general investigative functions, on the basis of either a request made at national level or an express mandate from the Commission, in line with the powers of investigation and related procedures provided for under community and national law. For this purpose, they undertake constant market surveillance to detect market failures linked to anticompetitive practices.

In carrying out these functions, the national competition agencies accept applications for negative clearance, notifications for exemption and complaints from individuals and entities and forward them to the Commission. They prepare and transmit to the Commission quarterly reports and information notes on the competition situation in the economic sectors that they have investigated. They monitor, in cooperation with other competent authorities, the enforcement of decisions imposing financial obligations on persons other than the State, and they report periodically to the Commission in that regard. They catalogue and provide quarterly reports to the Commission on State aid. Finally, they produce an annual report on the state of competition in the country.

When national competition agencies conduct an inquiry on their own initiative, they inform the

Commission without delay. They also provide assistance to Commission officials when the Commission itself conducts inquiries.

Finally, national agencies also participate in the work of the Advisory Committee on Competition.

The role of the Commission is set out in article 5 of Directive No. 2/2002/CM/UEMOA. The Commission may open and conduct inquiries in all areas covered by articles 88 and 89 of the WAEMU Treaty, and has exclusive competence to deal with State aid, State anticompetitive practices as defined under article 6 of Regulation No. 2/2002/CM/UEMOA, and anticompetitive practices likely to affect trade between member States. It also has exclusive competence to conduct formal investigations and to take the decisions or measures foreseen in Regulations No. 2/2002/CM/UEMOA, No. 3/2002/CM/UEMOA and No. 4/2002/CM/UEMOA.

In the framework of its investigations, the Commission informs the member States' national competition agencies of any investigatory procedures undertaken in respect of enterprises located in their national territory, and sends them copies of certain important documents, such as: requests and notifications addressed to enterprises with a view to ascertaining infringements or granting negative clearance or an exemption decision; requests for information addressed to enterprises; and documents relating to checks that the Commission plans to carry out.

Under article 6 of Directive No. 2/2002/CM/UEMOA, member States are required to take all necessary steps to adapt their national competition laws, including sectoral laws, to the community legislation and to make adjustments to their national competition agencies so as to limit the powers of the agencies to the functions set out in the Directive.

Notwithstanding the fact that the WAEMU Commission has exclusive competence, national competition agencies can play an important and even decisive role in implementing community competition policy. The results of their cooperation with the Commission, which has intensified in recent years, can be seen in the delivery of capacity-building programmes and the joint management of activities for the control of anticompetitive practices.

**Table IV.3:
Analysis of national laws**

Country	Competition legislation	Practices regulated	Implementing authority	Year adopted
Benin	Act No. 2016-25 of 4 November 2016 on Competition in the Republic of Benin	Anticompetitive practices, including State aid Restrictive practices Infringements of consumer rules	National Competition Council National Competition Directorate	2016
Burkina Faso	Act No. 016-2017/AN of 22 April 2017 on Competition in Burkina Faso	Cartels Abuse of dominant position State aid State anticompetitive practices Restrictive practices Unfair competition Infringements of transparency rules Infringements of consumer protection rules	National Commission on Competition and Consumer Protection	2017
Côte d'Ivoire	Ordinance No. 2013-662 of 20 September 2013 on Competition	Cartels Abuse of dominant position Concentrations Restrictive practices Unfair competition practices	Commission for Competition and the Fight against the High Cost of Living	2013
Guinea-Bissau	No competition laws	No competition legislation	No competition authority	
Mali	Act No. 2016-006 of 24 February 2016 on Competition	Cartels Abuse of dominant position Concentrations State aid Restrictive practices Abuse of economic dependence Unfair competition	National Competition Commission National Competition Directorate	2016
Niger	Ordinance No. 92-025 of 7 July 1992 on Prices and Competition	Cartels Abuse of dominant position Concentrations Prices	National Competition Commission Directorate of Competition, Competitiveness and Consumer Protection	New Competition Act in 2019
Senegal	Act No. 94-63 of 22 August 1994 on Prices, Competition and Commercial Litigation	Cartels Abuse of dominant position Infringements of pricing and invoicing rules	National Competition Commission	1994 Implementing decree in 2018
Togo	Act No. 99-011 of 28 December 1999 on Competition in Togo	Anticompetitive practices (cartels and abuse of dominant position)	Competition Commission Competition Directorate	1999

2. Cooperation in capacity-building activities

Since the adoption of the three regulations and two directives implementing articles 88 to 90 of the WAEMU Treaty, one of the Commission's constant priorities has been to build up the capacity of WAEMU so that it can more effectively implement the competition rules.

An extensive capacity-building programme was implemented until 2018, sustained by a political momentum that is increasingly delivering results in terms of the incorporation of directives and reforms into member States' national laws.

(a) Information and awareness-raising activities

In parallel with the training of officials, information and awareness-raising seminars have been funded, mainly from the Union's own resources, since 2004. National agencies have been involved in identifying potential beneficiaries and organizing activities in different WAEMU capitals and abroad, and were responsible for directly selecting or proposing the selection of participants.

The target groups identified for participation in these seminars were officials from agencies involved in implementing community competition policy, judges and members of the bar, and members of civil society and professional associations.

Regional seminars with significant media coverage provided a framework for information and awareness-raising, but above all as a political bridge, enabling interaction between WAEMU Commission officials and ministers of member States.

National seminars, on the other hand, were much more geared towards enhancing the technical expertise and specialization of officials working in national agencies, including general competition authorities and sectoral regulatory authorities; judges and members of the bar; members of employers' associations; company legal counsel; print, radio and television media professionals; and members of consumer associations.

(b) Capacity-building

To strengthen the grasp of substantive rules and procedures of WAEMU officials directly involved in the application of community competition law, the Commission has organized study visits, diploma

courses and workshops on techniques for conducting inquiries and investigations.

As a result of these capacity-building activities, it has been possible to achieve a critical mass of officials who take part in activities for the control of anticompetitive practices undertaken by the Commission or national agencies, as shown in table IV.4.

3. Collaboration between national agencies and the Commission in the control of anticompetitive practices

(a) Role of national competition agencies

National competition agency officials have been allocated increasing responsibility during the inquiry and investigation phases. Initially, their role was confined to preparing inquiries, identifying enterprises to be visited and making appointments to accompany WAEMU Commission officials travelling to member States. They also gathered and transmitted the necessary information, but did not process it. They did not participate in the drafting of inquiry reports.

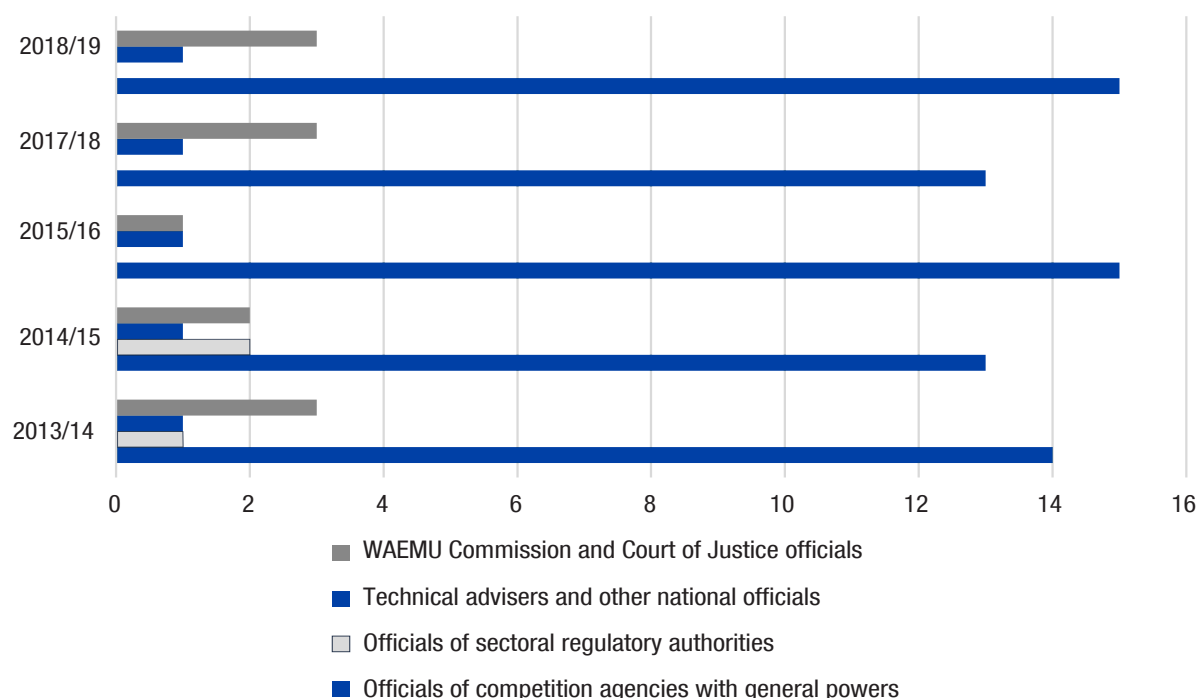
National experts appointed by the member States to the Advisory Committee on Competition give their opinion on the Commission's draft decisions prior to their adoption. Member States have always been concerned about the time frame for the consideration of cases and the limited number of sessions.

The first inquiries by experts from member States working under contract were conducted in the brewing and telecommunications sectors in 2011.

Since 2015, member State officials have consistently played a greater role in oversight activities by joining the team of the Commission's Competition Directorate on a part-time basis, as part of an innovative procedure. They are selected from national lists put forward annually by trade ministries and are assigned to cases that match their profile, as described in the curricula vitae that the member States provide at the Commission's request at the same time as the lists. In cases concerning regulated sectors, sector specialists are involved in the inquiries and hearings; the same is true of State aid reviews, in which case the Commission calls upon ministry of finance (tax and customs) officials to play a role.

Experts from the member States recruited in this way are put under contract and paid after they submit

Figure IV.2:
Officials trained, by sector of activity



Source: Latest report on the state of competition in WAEMU.

their inquiry reports, which are validated at workshops organized by the Commission.

(b) Necessary clarification of the relationship between the Commission and the national competition agencies

The involvement of experts from the member States in the Commission's activities has resulted in national

agencies' taking greater ownership of WAEMU competition policy and, to some extent, in the acceleration of reforms. Nevertheless, the framework for the involvement of national agencies ought to be clarified in terms of the applicable law when the initiative to open an inquiry is taken by the member State or by the Commission.

Table IV.4:
Officials trained in and assigned to competition inquiries

Sector and case	Country	Number of investigators trained in and assigned to the case
Funeral services sector, SIPOFU v. IVOSEP	Côte d'Ivoire	3
Airport services sector, ARC v. NAS IVOIRE	Côte d'Ivoire	3
Cement sector, SCB Lafarge v. NOCIBE	Benin	3
Large retail sector in Senegal (ex officio))	Senegal	3
Beer and soft drinks sector	Niger	3
Liquefied petroleum gas sector	Burkina Faso	2
Cement sector	Burkina Faso	3
Total		20

Source: 2017 report on the state of competition in WAEMU.

In non-contentious proceedings concerning requests for exemptions or negative clearance, a number of questions arise:

- Are national agencies authorized to receive these requests and to examine them, before forwarding them with an opinion to the Commission? If so, can the national agencies determine that a request is inadmissible, as the Commission can?
- If the request is submitted to a national agency, when does the Commission's deadline for responding start to run?
- When national laws establish the criteria for granting exemptions or negative clearance, can national agencies apply those criteria when examining the requests that they receive, given that the primacy of community law does not allow the application of contrary national provisions?
- In the event that the Commission is requested to give an opinion which is to be forwarded to the national agency, should this be addressed solely to the general competition agency, which will then, if necessary, involve the sectoral regulators in responding to the request, or can the Commission address the sectoral regulators directly?

Since the texts are silent on these issues, the Commission should clearly indicate how it intends to organize its cooperation with the national agencies in this area.

In contentious proceedings, it is clear that only community law should apply when the Committee initiates an inquiry ex officio or because of a complaint brought before it. However, the following questions arise when the procedure is initiated by a national agency:

- Do sectoral regulators have the same authority as general competition authorities with respect to the control of anticompetitive practices, or should the regulators hand over to the latter

any evidence that they find of violations of competition rules?

- In cases where the national agency initiates proceedings, what law should it apply? The answer to this question is not as clear as it is in respect of interlocutory matters, perquisitions and measures used to enforce Commission decisions, these being governed by national laws.
- When must the national agency forward the file to the Commission?
- Can national agencies decide to issue formal requests for information, given that they can initiate inquiries under domestic laws?
- Finally, can sectoral regulators apply sanctions for anticompetitive practices other than the sanctions laid down in Regulation No. 3/2002/CM/UEMOA?

On these and similar questions, it would be helpful if the Commission were to seek the opinion of the Court of Justice, as it did with respect to the distribution of powers between the Commission and the member States.

This brief overview suggests that if the responsibilities of the WAEMU Commission and the national authorities in the area of competition law were to be reorganized in order to better promote competition in the WAEMU zone, such a change would have to be accompanied by a number of reforms within the member States to ensure that each had a sufficiently robust system for the prevention of anticompetitive practices and for concentration control. Otherwise, any changes in the definition of the responsibilities of the Commission and the member States would be broadly ineffective. Moreover, given that the competition authorities currently have little experience in deterring anticompetitive practices or of concentration control, it would be advisable to introduce technical assistance programmes to prepare them for their new functions.

Specific recommendations on this point are proposed at the end of this report.

**Preparatory report for the ex post review of the competition policy of the
West African Economic and Monetary Union**

**Table IV.5:
Participation of national experts in Commission inquiries**

Inquiries			State aid reviews				Hearings	
Year	Sector and country	Number of investigators	Year	Country	Number of investigators	Year	Case file	Number of investigators
2011	Brewing and telecommunications, the 8 WAEMU countries	40						
2015	Telecommunications, Niger	3						
2016	Port handling, Côte d'Ivoire	3	2017	Côte d'Ivoire	2	2016	Société Orange (application for negative clearance)	2
	Flour, textiles and sugar, Mali	3		Senegal	3			
	Brewing, Côte d'Ivoire	3		Total	5	2017	SOBEBRA, Benin	4
	Brewing, Togo	3	2019	Burkina Faso	4			
	Total	12		Benin	4	2018	MTN and Orange	6
2017	Cement, Burkina Faso	3		Total	8			
	Cement, Benin	3				2019	SODIGAZ and SONABHY, Burkina Faso	3
	Airport services, Côte d'Ivoire	3					NAS IVOIRE	3
	Funeral services, Côte d'Ivoire	3					Concentration involving Orange Abidjan Participations SA, NSIA Banque Côte d'Ivoire SA and Diamond Bank SA	6
	Gas, Burkina Faso	3					APMT, Bolloré Africa Logistics and Bouygues (port handling in Abidjan)	3
	Total	15					Total	15
2018	Brewing, Niger	3						
	Large retail, Senegal	3						
	Foundry, Burkina Faso	3						
	Total	9						
2019	Cement, Senegal	3						
	Confectionery, Mali	3						
	Total	6						

Source: Competition Directorate of the WAEMU Commission.

V. REFORM OF THE INSTITUTIONAL FRAMEWORK

A. THE ISSUE OF REFORM

To address the practical issues highlighted in the previous chapter and the shortcomings identified in the community framework, achievable reforms need to be undertaken within a relatively short period of time.

The report on a study ordered by the Commission in 2011 strongly recommended putting in place a new institutional and legislative framework at the regional and member State levels so as to ensure the effective application of community competition policy.³⁴

The final report, which was shared with member States in April 2012, was discussed during national consultations held in October and November 2012 in seven member State capitals (Ouagadougou, Dakar, Abidjan, Lomé, Cotonou, Bamako and Niamey). The outcomes of the national consultations were then presented at the eighth session of the Advisory Committee on Competition, held from 10 to 12 October 2012, and at a regional competition forum organized by the Commission in Ouagadougou from 27 to 30 November 2012.

At each of these national and community-level meetings, the Commission presented a number of reforms to experts from the member States. Their proposals covered four major areas: substantive rules, the division of powers, procedures and institutions.

1. Revision of substantive rules

Member State experts and the Commission discussed two options for revising substantive rules:

- The establishment of a single system of law that would be applicable to the entire territory of WAEMU
- The establishment of a framework allowing both community law and national law to coexist, but in which community law would take precedence

³⁴ M. Bakhroum, “Cohérence institutionnelle et effectivité d’une politique régionale de la concurrence: le cas de l’Union économique et monétaire ouest-africaine (UEMOA)”, *Revue internationale de droit économique*, vol. XXV, No. 3 (2011), pp. 305–332. Available at <https://www.cairn.info/revue-internationale-de-droit-economique-2011-3-page-305.htm>.

(a) Single system of law

Based on the interpretation of the WAEMU Treaty by the Court of Justice, establishing a single system of law would seem to be the only true option. A single body of competition law applies when the rules of competition are infringed within WAEMU, regardless of whether trade between the member States is affected. Community law alone would apply to anticompetitive practices and government activities that restrict competition.

Under such a system, community rules are applicable to all anticompetitive practices, whether or not they have an impact on trade between the member States or on the operation of WEAMU. The Commission would have the authority to take decisions on all cases, no matter their importance.

This option is based on Opinion No. 003/2000 of the Court of Justice, issued in 2000, in which the Court, while urging cooperation between the community and national authorities, found that all cases involving anticompetitive practices fell under community jurisdiction.

With reference to that opinion, Directive No. 2/2002/CM/UEMOA defines the roles of the national authorities (commissions or councils, competition directorates and sectoral regulators) as follows:

- In the course of inquiries, the national authorities may exercise fully their powers of supervision and control.
- During investigations, the Commission may entrust certain tasks to the national authorities.
- At the decision-making stage, the opinion of the Advisory Committee on Competition, composed of two representatives from each member State, is required; the Commission alone has the power to request that opinion.

Such a system presents the advantages detailed below.

(i) Homogeneity of law

The establishment of a centralized system in the context of WAEMU and the other regional groupings in Africa is, generally speaking, more aligned with the objective of creating a single market. It does not

allow the principle of transfer of sovereignty to be undermined by centrifugal forces related to the weak appropriation of the integration process by agencies, courts and the people.

It also helps to curb negative competition among national laws, as for investment codes, mining codes and public procurement.

Centralization leads to the uniform treatment of enterprises, thereby providing greater legal certainty. A situation in which a business' activities are subject to various legal systems creates uncertainty for investors, and can also generate additional costs if investors are required to make notifications (applications for individual exemptions, negative clearance or decisions of non-objection to concentration proposals) to several different competition authorities within a single regional market.

A single legal system reduces the costs generated by the search for information on the rules in effect in each member State and the notification formalities regarding exemptions and the control of concentrations.

It also avoids the issue of staggered timelines in the drafting and adoption of national legislation, insofar as the application of community rules on competition is effective in all the member States, even in the absence of national laws.

(ii) Respect for the rule of law and the building of collective power

The centralization of decision-making at the regional level can provide an assurance of independence which the national competition authorities are sometimes lacking (many cases have been referred to the Commission because the complainants had not found a remedy at the national level).

The regional authority is required to observe the law applicable within WAEMU in order to be credible and garner the community's support. The Commission's experience shows that it is less at risk of regulatory capture by pressure groups and by national public authorities (see the assessment of the Commission's caseload in chapter III).

Furthermore, a single authority acting on behalf of the whole of WAEMU carries significant weight when dealing with multinational corporations, given

the economic importance of the WAEMU market as compared to that of a single State.

(iii) Better community integration

National agencies are not in a position to take into account the regional impact when carrying out studies; a centralized system makes it simpler to apply competition law in line with community objectives.

Many cases involving government action that distorts competition in the community construction market feature obstacles to integration that are attributable to States (State aid or other administrative measures that restrict competition).

(iv) Avoidance of a legal vacuum

If all the member States apply the same community rules, the lack of national legislation in any one member State will not create a legal vacuum.

In reality, unfortunately, this system has resulted in some member States' having national legislation that is inconsistent with the community framework and that has not been repealed, while others have actively sought to adapt their legislation.

Politically speaking, the involvement of governments and national parliaments has been slow-going, as competition-related issues were long within the purview of the Commission alone.

Nevertheless, there are four major disadvantages to a centralized system such as that applied by WAEMU.

Strain on the regional authority

The fact that many procedures involve the a priori review of concentrations and the control of anticompetitive practices and government intervention creates a major risk of stretching, or even exhausting, the resources of the regional authority when it is faced with numerous requests.

The situation is compounded by lack of staff, which can in turn further delay the processing of files and lead to a backlog of important cases. Delays in processing may dissuade enterprises from submitting requests to the regional authority.

In addition, the authority's efforts to satisfy the need for a prompt response may result in the hasty processing of cases.

Remoteness of the regional authority

The regional competition authority is likely to be distant from enterprises, making member States reluctant to refer requests to it, even if procedures are simple.

The costs involved in following proceedings may be substantial when enterprises have to be represented at hearings and formulate their conclusions at Commission headquarters.

An operational national authority would be better placed to communicate with local enterprises and would be better capable of gathering information within the national territory.

Slackening of the pace at which national legislation is adopted

Some member States tend to wait for the regional authority to make the expected changes to the institutional and legal framework, once all the preparatory work has been done by the Commission.

Consequently, national systems are brought into line with the community framework at a much later date. However, when establishing a new harmonized regional framework, it would be ideal to compare national approaches in order to better understand the issues at hand and to find the best means for enforcing community law.

Low buy-in from the heads of competition authorities in the member States

Transferring the jurisdiction of member States to the regional authority inevitably means that some agencies will be divested of certain prerogatives; this is seen by some as confirmation of the eventual demise of national competition authorities.

Given that community competition rules are more likely to be implemented effectively if the national agencies feel sufficiently involved, care must be taken to allocate the right amount of responsibility to these agencies.

(b) System allowing for the coexistence of community law and national laws

One advantage of a system allowing for the coexistence of community law and national laws is that it makes it possible to adapt competition rules to national systems. It would thus be possible to address localized anticompetitive practices that would be of little interest to the community authority.

However, such a system must provide clear criteria for determining the scope of application of community law and national law, based on the principle that community law takes precedence over national law.

National rules must be in line with community regulations, and their application must not hinder competition within the WAEMU market.

The first criterion is the territorial scope of the practice in question. In the case of a practice that has an effect only on competition within a State, it is the national law that is applicable. On the other hand, a practice that has a negative effect on the trade of at least two member States is subject to community law.

Under such a system, national law would apply to cartels and abuse of dominant position when their effects are limited to the territory of a single State.

However, there would be no need for national legislation to contain provisions on State aid or anticompetitive practices, insofar as national competition authorities would not be in a position to impose penalties.

The control of government measures that hinder competition requires robust legal means and a level of independence that would be unrealistic to expect from the national authorities, given the current state of development of competition culture in WAEMU. The substantive rules and the procedures set out in community law are sufficient for dealing with such practices.

Furthermore, exemptions must remain within the scope of community law, to ensure that practices forbidden under community law may not benefit from exemptions by virtue of a national law. The centralization of exemption-granting would also prevent discrepancies between national laws in this area.

The same is true for the control of concentrations, given the risk that a single operation would be subject to multiple procedures.

The criterion of territorial jurisdiction would not be absolute, in that a practice limited to the territory of a single member State may also be subject to community law if it raises issues of interest to the community.

Finally, a system in which community law exists alongside national law must be well coordinated, in order to avoid the following important risks:

- The adoption of laws further geared towards the control of prices and practices, the suppression of which is the responsibility of directorates that report to ministries
- The maintenance of national law that is inconsistent with community law
- Jurisdictional conflict between general national authorities and sectoral regulators which, under certain laws, have the power to sanction anticompetitive practices
- Divergent case law, if a regional coordination mechanism involving the competition authorities of member States is not set up

2. Division of responsibilities between the community authority and the national authorities

The application of community law will require action to be taken by the regional authorities (the Commission and the Court of Justice) and by national authorities (courts, agencies, independent competition authorities and regulators).

There are three ways that these authorities might share responsibilities, with each presenting certain advantages and disadvantages: (a) the decision-making power is held exclusively by the community authority; (b) the power is split among the community and national authorities; and (c) the community and national authorities have power in parallel.

(a) Exclusive competence of the community authority

This is currently the preferred option for WAEMU, where there is a single system of law and the Commission has exclusive competence, under the supervision of the Court of Justice (Opinion No. 003/2000).

This system presents at least two advantages, in theory:

First of all, since the community authority is by definition equidistant from the enterprises operating in the member States, it is unlikely that it will favour one enterprise over another in its activities.

Its operational independence vis-à-vis the political authorities and lobby groups in the member States makes it more likely that control procedures will be completed successfully.

Furthermore, the control of anticompetitive practices involves the mobilizing of considerable financial and human resources, which are practically non-existent in the member States. Centralization could offer a solution in that regard. However, that will depend mainly on the political will, at the community level, to step up resources devoted to promoting competition, as real progress on centralization is unlikely if the Commission is not allocated substantially more financial and human resources.

While the Commission has exclusive competence to impose penalties for anticompetitive practices, in practice, powers are decentralized during the inquiry and investigation phases. Inquiries are often assigned to national authorities, such as the administration of the Ministry of Trade, the national competition commission or sectoral regulators.

Increasingly, the Commission involves experts from the national agencies when carrying out investigations.

The decision-making stage requires the issuance of an opinion by the Advisory Committee on Competition, which is made up of experts from the national agencies; this is a way of involving the member States in the final stage of the control of anticompetitive practices. Nevertheless, this form of decentralization does not provide an adequate solution to the resource problem.

(b) Division of responsibilities for controlling and imposing penalties for anticompetitive practices

Since it seems generally accepted that community law and national law can coexist (all national laws include anticompetitive practices in their scope of application), the division of decision-making responsibilities should follow from that.

Accordingly, the community authority might have jurisdiction in the following cases:

- If the practices in question hinder the proper functioning of the common market
- In the absence of national regulations in line with community regulations that govern competition
- In the absence of a national competition authority that can provide guarantees of its independence
- If a national case raises issues of interest to the community

By the same logic, the national authorities would have competence to deal with practices that negatively affect the market in one State. National law would be applicable to those practices having only national or local consequences.

The division of responsibilities might instead imply the Commission's delegation of powers to national agencies, which would be competent to apply community law based on specific criteria, such as thresholds, territory, or types of practices.

Such a formula would work only if the Commission were empowered to delegate the powers granted to it under article 90 of the WAEMU Treaty.

Finally, the national authorities would remain fully competent to apply national law according to quantitative thresholds or other criteria.

(c) Parallel decision-making

The third option, which is practiced by the European Union, consists in granting national authorities the power to intervene and to apply community law and/or national law, either one at a time or both simultaneously.

The only limitation in this exercise of power is the principle of subsidiarity, which empowers the Commission to ensure that community law is applied when it considers that it is better placed to handle a case.

In any event, a national authority could not take up a case that was pending before the Commission unless the Commission first dropped the case. Finally, if a decision were taken by a national authority, applying WAEMU law to practices that hinder the proper functioning of the market, it could be challenged

before a national court, which, before handing down a final decision, would be required to request the Commission's opinion or to refer the question to the Court of Justice for a preliminary ruling.

In practice, this option poses certain risks:

- An inconsistent application of competition policy and rules by the national authorities, whose decisions are beyond the control of the Commission and the Court of Justice (it bears repeating that the Commission is not an appellate authority and it cannot quash decisions handed down by national courts)
- Protracted national procedures owing to the excessively heavy caseload of courts of common law, which are often overwhelmed with work, unless they specialize in a particular area
- The faulty application of competition regulations by poorly qualified authorities (such as heads of national agencies or judges)

3. Procedural reform

The efficient implementation of community-wide competition rules depends on effective collaboration between the Commission and the national competition authorities. In this regard, information-sharing is crucial.

A binding mechanism should be set up so that:

- The Commission is regularly informed of the referrals received at the national level, in order to decide on the proceedings to be initiated (prosecution at the national level or referral of the matter to the Commission).
- The national authorities are involved in the review of anticompetitive procedures carried out by the Commission.
- The sectoral regulators play an active role in control procedures and refer cases regarding anticompetitive practices to the appropriate competition authority, if they are the first informed.

If responsibilities are shared, referral procedures must be systematized between the national authorities and the Commission, both ways, on the basis of criteria for the allocation of responsibilities.

4. Institutional reform

The reform of substantive rules and procedures for controlling anticompetitive practices must be supported by institutions capable of enforcing community competition law.

(a) Regional level

The experts discussed the establishment, under the Commission, of an autonomous, independent regional competition agency.

This agency would be tasked with carrying out the entire control procedure (inquiry and investigation) regarding anticompetitive practices and submitting draft decisions (orders, penalties, fines) to the Commission, which would adopt them as final decisions.

The agency head would report directly to the President of the Commission and would be hired, as would all the agency's staff, through a transparent selection process, following a call for applications, on the basis of his or her qualifications and experience.

The agency would be responsible for obtaining the opinion of the Advisory Committee on Competition before submitting decision drafts to the Commission. It would work with the member States' agencies according to the set-up previously described regarding the division of responsibilities.

This option, attractive as it may be, did not seem realistic for the following reasons:

- Institutionally speaking, it did not seem advisable to place another agency besides the WAEMU bodies above the member States. Moreover, the multiplication of specialized agencies could weaken the technical departments.
- In terms of resources and staff, setting up an autonomous agency would require the mobilization of substantial resources, which current budgetary restrictions would not allow. It would therefore be wiser simply to consider restructuring the Commission so as to better manage procedures and adopt decisions.

In order to resolve the challenges relating to the limits on the number and duration of field missions required of senior officials, the Competition Directorate would need some autonomy within the Commission and an increase in the resources available to it. Such

changes would make it possible to handle cases more expediently, at least with regard to conducting inquiries.³⁵

(b) Member State level

The national competition authorities can play their roles only if they are independent and autonomous. They must enjoy a direct relationship with the Commission, free of interference from the administrative and political authorities. In that way, they will be able to substitute for the community authority when dealing with national cases, applying either national laws or community law.

The national authorities could meet at the regional level in order to align their practices, until they are able to establish an operational regional network.

B. SUBSTANCE OF THE REFORMS

The reforms recommended to be made to substantive law and to the institutional framework in order to improve the effectiveness of WAEMU in applying competition policy must be made at the regional level and at the member State level.

1. Reforms to be undertaken at the regional level

The community system should be reviewed, especially certain aspects of the substantive rules and of the institutional framework.

(a) Enhancement of substantive rules

While the terms of the community competition code are generally in line with international regulations, a number of adjustments are nonetheless necessary, particularly in the area of concentration control, within the regime of control of abuse of dominant position.

Regulations No. 2/2002/CM/UEMOA and No. 3/2002/CM/UEMOA establish a hybrid system that classifies certain types of concentration as practices amounting to abuse of dominant position and places the a priori control of such concentrations under the exemption regime for cartels.

³⁵ The senior officials of the Competition Directorate, like all those of the Commission, are subject to a limit of 60 days of field missions per year (inquiries, meetings, etc.), which reduces their ability to plan travel each time it is needed.

The ban on abuse of dominant position, however, is absolute, and no such practice may be granted an exemption; even where exemptions are granted by virtue of article 7 of Regulation No. 3/2002/CM/UEMOA, they are of limited duration, whereas mergers, acquisitions and joint ventures are capable of changing the structure of the market in a definitive manner. It would be difficult to associate them with decisions of limited duration, even if such decisions were renewable.

Furthermore, abuse of dominant position is an infringement of the law and is judged after the fact and may eventually result in compensation. Concentrations are proposals that are submitted for prior authorization. They are the subject of an ex ante assessment and therefore are not violations of the law to be found after the fact; moreover, concentration proposals cannot give rise to compensatory damages. These are therefore two different legal categories that are handled differently.

Given the limited human and financial resources available for the activities of the Commission and of the national agencies, it would be logical for the enterprises notifying concentration operations to pay the fees associated with the procedure. However, concentration control is currently funded by the local authorities, as are the Commission's other activities.

The adoption of a specific regulation on concentration control is therefore needed, as is the amendment of the provisions regarding abuse of dominant position in Regulations No. 2/2002/CM/UEMOA and No. 3/2002/CM/UEMOA. Clear criteria for assessing the possibility of concentration control and the related control procedures will thus be set out.

Furthermore, the current regulatory system should be updated, particularly with regard to the strengthening of the control of cartels by means of an appropriate leniency mechanism.

(b) Reform of the institutional framework for implementation

(i) Restructuring of the community system

In the light of the delays observed in the procedures for controlling anticompetitive practices and the challenges involved in adapting them to the Commission's organizational and operational rules,

the community system should be restructured, taking into account the specific aspects of the situation.

If an independent agency is not set up, the Competition Directorate could be given more autonomy in organizing its field missions, together with a sizeable budget.

In addition, as a remedy for the cumbersome, lengthy decision-making process, the President of the Commission might be allowed, on the authority of the Board of Commissioners, and when acting on a proposal from the Commissioner heading the Regional Market, Trade, Competition and Cooperation Division, to sign decisions without having to meet with the cabinet directors and the commissioners.

However, the President could decide to refer a case to the commissioners if he or she was not in agreement with the proposals of the Commissioner heading the Regional Market, Trade, Competition and Cooperation Division or if the case were of especial importance.

The Commissioner heading the Regional Market, Trade, Competition and Cooperation Division could also be empowered to sign procedural documents, such as requests for information, summons to attend hearings and claims notifications.

(ii) Involvement of national agencies in the application of community law

The national competition agencies need to be given more authority to deal with minor matters that are not of interest at the community level.

2. Reforms to be undertaken in member States

(a) Modification of national frameworks

Before more authority can be given to the member States, national frameworks need to be modified with a view to establishing independent national competition authorities with sole decision-making power in the control of anticompetitive practices. These authorities should have their own legal personality and the procedures for appointing their members should be made more transparent.

The national competition authorities must be functionally separate from the ministries of trade and must be allocated human and financial resources to use as they see fit. Their rapporteurs should be empowered to lead

**Table V.6:
Planning of reforms at the community level**

Instruments to be amended or new instruments to be adopted	Scope	Purpose
Regulation No. 2/2002/CM/WAEMU on anticompetitive practices within WAEMU	Definition of anticompetitive practices	To clarify once again the regime of abuse of dominant position by distinguishing it from that of concentrations
Regulation No. 3/2002/CM/WAEMU on the procedures for addressing cartels and abuse of dominant position within WAEMU	Procedures for controlling anticompetitive practices	To distinguish a priori concentration control procedures from the procedures involving the a posteriori control of cartels and abuse of dominant position
Regulation No. 4/2002/CM/UEMOA on State aid within WAEMU and on the procedures for applying article 88 (c) of the Treaty	Definition of and procedures for controlling State aid	To establish rules specific to the collection of information from enterprises that are different from the rules applicable to cartels and abuse of dominant position
Directive No. 1/2006/CM/UEMOA on the harmonization of policies for controlling and regulating the telecommunications sector	Powers of regulators and control procedures	To clarify once again the powers of regulators in respect of the control of anticompetitive practices
Directive No. 5/2005/CM/UEMOA on the control and regulation of public procurement and public service delegations within WAEMU	Powers of public procurement regulators in the member States	To make uniform the penalties applicable to cartels in public procurement
Community mining code	Relationships between States and enterprises in the sector (tax benefits)	To align the regime for granting benefits to enterprises with community competition rules
Decision on the organization of the Commission	Organization of departments	To address the cumbersome, slow process for organizing inquiries and the decision-making process within the Commission
Directive to be adopted	Cooperation between the Commission and the national competition agencies	To clarify the interface between the member States and the Commission and the powers of national agencies in contentious and non-contentious proceedings

inquiries, seize documents and conduct home visits. If possible, additional sources of funding outside the State's budget should be found to cover the costs of cases relating to the control of concentrations.

During the review of current laws, it became clear that competition authorities have decision-making power in very few member States. While that power structure may have been set up deliberately, in observance of the exclusive competence of the WAEMU Commission to impose penalties for anticompetitive practices, it may eventually prove incompatible with the decentralization of decision-making power.

This is true even in an ECOWAS context, where the regional authority has jurisdiction only over infringements that have an effect on intracommunity trade.

In addition, national laws should clarify the relationship between sectoral regulators and the competition

authority and should provide for cooperation mechanisms so as to avoid conflict between the two.

Given the intermediary role played by the national competition authority vis-à-vis the Commission, it would be more practical to grant that authority the power to control, investigate and perhaps even adopt decisions in respect of anticompetitive practices or concentrations in all sectors.

It would, then, be useful if the competition authority could refer to the sectoral regulator for an advisory opinion on the underlying technical aspects of the competitive process in the market, when considering a case related to the sector that it regulates.

According to the same consultation procedures, the competition authority's opinion would need to be obtained by the sectoral regulator before making any decisions likely to have an impact on competition, for instance, the identification of the relevant market or of

the alleged powerful operators in that market, which would be subject to particular restrictions.

The exchange of opinions should be transparent and public, but each authority would be free not to follow the opinion given it, so long as it provided a reasoned explanation for its decision.

In terms of cooperation, the pooling of resources dedicated to control activities would make such activities more effective. Since the human and financial means available to general competition agencies are already well below those of sectoral regulators, it might be worth introducing a contribution by sectoral regulators to the control of anticompetitive practices, as is the case in Portugal, for example.

(b) Coordination of future reforms

In terms of the substance of the law, it would be useful to more clearly distinguish between anticompetitive practices (i.e. those that are likely to restrict competition on a market) and restrictive practices, for which there are penalties regardless of their effect on competition and which are not assessed on the basis of the protection of competition. Only anticompetitive practices should be dealt with by competition authorities, whereas restrictive practices may be addressed by agencies or the courts.

National competition laws should be supplemented by rules on the control of concentrations. These rules should be in line with the next community framework, which is currently being prepared.

However, there does not seem to be a need for legislation on the control of State aid, which should be carried out solely at the community level.

As for the instruments available to the national competition authorities, it would be advisable to consider allowing such authorities to conduct market surveys and giving them the means to gather information in that connection, in order to assess the state of competition in the various markets. Such market surveys could provide a basis for the opinions issued by the Commission.

The Commission should oversee the work of adapting national laws to the community competition framework so as to ensure that community rules are properly

reflected and to avoid the shortcomings found in the new laws of Benin, Burkina Faso, Côte d'Ivoire and Mali. Table V.7 provides information on the reforms to be undertaken in the competition legislation of member States.

3. Capacity-building of national competition agencies

(a) Expansion of capacity-building programmes

Despite the significant efforts made by the WAEMU Commission to put in place the technical capacity needed to effectively and efficiently apply the community competition rules, the national agencies still have little experience in handling competition cases.

These agencies will have an important role to play in the future, however, both in supporting the Commission's activities and in exercising their own powers.

Training is needed in the following areas: data collection and analysis; drafting of quarterly and annual reports on the state of competition; techniques for conducting inquiries; investigation procedures; and preparation of draft decisions.

This training will take the form of workshops and work exchanges in agencies with significant experience.

(b) Support for reforms

Member States, which have primary responsibility for institutional reforms, should be given support to stay on schedule so that they do not fall out of step, with some States implementing reforms and others being slow to do so, as is currently the case.

The appropriate technical and financial assistance will make it possible for member States to successfully adopt the legislation required by the reforms.

Outreach activities regarding community and national instruments must be carried out regularly and involve the stakeholders concerned. Chambers of commerce, consumer and professional associations, and members of the Bar can be powerful resources in this regard.

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**Table V.7:
Reforms to be undertaken in member States**

State	Instrument to be amended	Scope	Purpose
Benin	Act No. 2016-25 of 4 November 2016 on Competition in the Republic of Benin	Status of the competition authority Control of concentrations	To establish an independent authority and grant it exclusive competence nationally to impose penalties for anticompetitive practices and to carry out concentration control, in collaboration with the WAEMU Commission
Burkina Faso	Act No. 016-2017/AN of 22 April 2017 on Competition in Burkina Faso	Status of the competition authority	To strengthen the independence of the authority through a more autonomous, transparent recruitment process for its members and staff To grant the authority the power to impose penalties for anticompetitive practices and to carry out concentration control, in collaboration with the WAEMU Commission
Côte d'Ivoire	Ordinance No. 2013-662 of 20 September 2013 on Competition	Status of the competition authority Adversarial procedure	
Guinea-Bissau	No competition law	Adoption of a competition law	To define the rules for controlling anticompetitive practices To establish an independent competition authority
Mali	Act No. 2016-006 of 24 February 2016 on Competition (Competition Act) Decree No. 2018-0332/P-RM of 4 April 2018 on the Implementation of the Competition Act	Status of the competition authority Control of concentrations Penalties for anticompetitive practices	To establish an independent authority whose members and staff are recruited in a transparent manner To grant the authority the power to impose penalties for anticompetitive practices and to carry out concentration control, in collaboration with the WAEMU Commission To place anticompetitive practices outside the scope of financial settlements
Niger	Act No. 2019-56 of 22 November 2019 on Competition in the Niger	Status of the competition authority Substantive rules	To establish an independent authority competent to impose penalties for anticompetitive practices To set up an investigative unit within the competition authority To recruit the members and staff of the unit in a transparent manner
Senegal	Act No. 94-63 of 22 August 1994 on Prices, Competition and Commercial Litigation	Status of the competition authority Definition of and penalties for anticompetitive practices	To strengthen the independence of the competition authority by setting up an autonomous investigative unit and by recruiting members on the basis of a call for applications To improve the substantive rules on anticompetitive practices and to introduce the control of concentrations
Togo	Act No. 99-011 of 28 December 1999 on Competition in Togo	Status of the competition authority Definition of and penalties for anticompetitive practices	To bring the national system into line with the community framework To establish an independent authority with an autonomous investigative unit and members recruited in a transparent manner

VI. COLLABORATION WITH THE ECOWAS COMPETITION AUTHORITY

A. CURRENT SITUATION

One of the major challenges in the regional integration process in West Africa is making institutional adjustments to facilitate the joint work of the WAEMU and the ECOWAS bodies.

The coexistence of these two organizations, which have identical objectives, has led to some duplication of legal instruments and, in many cases, the incompatibility of regulations and non-compliance with community legal texts.

Building on the guidance of the ECOWAS Authority of Heads of State and Government in 1999, WAEMU and ECOWAS signed a cooperation agreement on 5 May 2004 that serves as a basis for working together and that covers most of the areas of interest to the two organizations.³⁶

These cooperation efforts have created synergies in the mechanisms set up to consolidate the common market, for instance, the introduction of a common external tariff and plans for the introduction of a common currency by 2020.

Competition is one of the issues discussed by the executive bodies of the two commissions.

A discussion on the alignment of the two competition frameworks has been ongoing since the adoption of Supplementary Act No. A/SA.1/06/08 adopting Community Competition Rules and the Modalities of their Application within ECOWAS and Supplementary Act No. A/SA.2/06/08 on the Establishment, Function of the Regional Competition Authority for ECOWAS.

There has been renewed interest in this process since the establishment of the ECOWAS Regional Competition Authority in Banjul in 2019.

Without going into the details of the treaties that govern the two bodies, it can be said that WAEMU and ECOWAS have sought to achieve the same economic development goals for their member States by creating a common market, which is further supported by the implementation of competition rules.

As the substantive rules adopted on the matter are similar in many ways, the eight WAEMU member States, all of which are also members of ECOWAS, face the risk that national courts or the courts of justice may interpret the rules differently.

Owing to the delayed operationalization of the ECOWAS Regional Competition Authority, conflicts of jurisdiction and incompatibilities in regulations have not yet arisen; however, any such disagreement arising in the future will be difficult to resolve if a coordination mechanism is not set up between WAEMU and ECOWAS. The likely result would be a situation of uncertainty for the two competition authorities, national agencies and enterprises.

The current arrangement, in which the WAEMU Commission and the national competition agencies share jurisdiction, could lead member States to prefer the ECOWAS system, which would allow them to legislate and confer on their respective competition authorities full jurisdiction at all the stages of control and sanction of anticompetitive practices.

In such a scenario, the ECOWAS Commission could not be prevented from taking up a case already decided by a national agency, without giving consideration to the decision taken by that agency.

The same would be true if one of the regional authorities – the WAEMU Commission or the ECOWAS Regional Competition Authority – handed down a decision on a case that could be considered within the purview of both authorities, for instance, a practice that had an effect on intracommunity trade. Such situations can place enterprises in a situation of permanent legal uncertainty, with regard to the a priori control of concentrations and exemptions and disputes.

³⁶ See A.R. Krikpeu, "Coopération UEMOA-CEDEAO : un exemple de coordination au service de l'intégration régionale", presentation given at the fourth session of the Multi-year Expert Meeting on Trade, Services and Development, Geneva, 18-20 May 2016. Available at https://unctad.org/meetings/en/Presentation/c1mem4_2016_p121_S5_A%20Krikpeu_en.pdf.

B. GUIDELINES ON ESTABLISHING A COOPERATION FRAMEWORK

With respect to the movement towards convergence, it should be noted that ECOWAS has not yet adopted substantive rules or established an institutional framework.

Consequently, WAEMU must allow for a sufficient transition period when setting up a partnership framework to transfer certain powers from the Commission to the ECOWAS Regional Competition Authority, which, having been more recently set up, will need some time to become operational.

This will make it possible for WAEMU to safeguard the progress it has made in applying competition policy, even though the West African States have agreed, in keeping with the division of the African Union into five major blocs, that ECOWAS is the optimal framework for regional integration.

The establishment of a cooperation framework on competition might include the following options:

- (1) Define the common rules that are to replace or supplement current systems, for a uniform application of competition policy. This could even entail amendments to the WAEMU Treaty and to the ECOWAS Supplementary Acts.

An institution could be given express authority to apply the common rules; if that were the case, the staff of the WAEMU Commission's Competition Directorate would be redeployed to work in the ECOWAS Regional Competition Authority, which would take them on as staff.

Thus, the ECOWAS Regional Competition Authority would benefit from operational staff with considerable experience in the control of anticompetitive practices.

It is also possible for common rules to be adopted, but for each organization to work out the implementation of those rules, if the two regional competition authorities are to be maintained. The division of responsibilities in such a case would be based on specific criteria for assigning missions for objective control and effective cooperation.

- (2) Allow each organization to complete its reforms before setting up a cooperation mechanism.

This option, which seems to be the preferred one based on the first documents submitted by ECOWAS when establishing its Regional Competition Authority (appointment of an interim directorate, establishment of an advisory committee, beginning of the recruitment of staff), would involve resolving the following issues very quickly:

- The mechanism for consultations between the two regional authorities
- The recognition by each authority of the decisions handed down by the other
- The criteria for determining the jurisdiction of each authority
- The pooling of resources to carry out certain activities in the field, such as studies and inquiries
- The identification of common criteria for reviewing proposed concentrations and exemption applications
- The relationship with the national competition agencies, including coordinating how the agencies will participate in the activities of the two authorities (inquiries, meetings of the advisory committees on competition, etc.)

VII. CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSIONS

Progress has certainly been made in the application of the WAEMU common competition policy since the 2007 peer review.

Competition has been placed at the heart of efforts to eliminate obstacles to the consolidation of the common market.³⁷ The results obtained are significant, especially as concerns the control of government measures that distort competition. There has also been an increase in cases relating to the practices of private enterprises (disputes and a priori control of concentrations).

The Commission's activities have been carried out in close collaboration with the national competition agencies, where a number of officials have taken the lead in community competition policy.

In addition, thanks in large part to the capacity-building programmes introduced by the Commission, there is now a large pool of officials well trained in competition issues in member States.

Despite the Commission's renewed impetus, there remains the important question of the division of powers between the regional authority and national agencies, which continue to demand more authority in handling cases. It is true that, as part of its practice, the Commission has sought to involve member State officials in inquiries, investigations and the preparation of decisions; however, no changes have been made in that regard to the institutional framework for implementing community competition rules.

Moreover, the changes made by more than half the member States to their national laws have not been sufficient to align national laws with the community system. At the current stage of national reforms, it is unclear whether the newly established national authorities have the appropriate profile for the

independent exercise of decision-making power, which the member States have requested they have.

Consequently, if the institutional framework for implementing the community competition rules is to be modified, such a change should be accompanied by a realignment of national instruments.

The recommended improvements concern both substantive rules and the procedures set out in community law and national law.

In leading the wide-ranging reforms, the Commission, in its role as superintendent, will need to ensure that a cooperation framework is set up with the ECOWAS Regional Competition Authority, which will share the jurisdictional space with the Commission. This will necessarily entail potential incompatibilities of regulations and conflicts of jurisdiction.

The considerable experience of the WAEMU Commission in enforcing competition policy is a major asset; in seeking convergence with the ECOWAS Regional Competition Authority, care should be taken not to undermine it.

B. GENERAL AND SPECIFIC RECOMMENDATIONS

1. General recommendations

Recommendation No. 1: Update the community rules adopted in 2002

The community rules dating from 2002 should be revisited, given the need to restructure the control of concentrations, which should be governed by specific rules distinct from those applicable to abuse of dominant position.

The new rules will enable the Commission to find a new source of financing for its activities, particularly with respect to the a priori control of concentrations.

The recasting of the procedural law should also allow for the simplification and streamlining of the Commission's decision-making process.

³⁷ See the statement by the President of the Conference of Heads of State and Government, delivered in Ouagadougou on 10 January 2019, on the twenty-fifth anniversary of WAEMU.

Consideration could also be given to including novel concepts such as leniency and compliance programmes, in order to facilitate the identification of certain collusive practices and ensure better acceptance of competition rules by the private sector.

Recommendation No. 2: Restructure the relationship between the Commission and the national competition authorities

The relationship between the regional authority (the WAEMU Commission) and the national authorities (competition authorities and sectoral regulators) should be restructured to make the procedures for information-sharing and joint control of anticompetitive practices easier to administer.

The changes made in this regard could involve dividing up responsibilities in such a way that the national authorities would manage minor competition disputes.

Recommendation No. 3: Provide support for reforms

Member States, which have primary responsibility for institutional reforms, should be given support to stay on schedule so that they do not fall out of step, with some States implementing reforms and others being slow to do so, as is currently the case.

Recommendation No. 4: Expand the resources and capacity of the Commission and the national competition agencies

Despite the significant efforts made by the Commission to build up the technical capacity needed to effectively and efficiently apply the community competition rules, the national agencies still have little experience in handling competition cases. Training is required in:

- The collection and analysis of data to be sent to the Commission
- The drafting of quarterly and annual reports on the state of competition
- Techniques for conducting inquiries
- Investigation procedures
- The preparation of draft decisions

This training will take the form of workshops and work exchanges in agencies with significant experience.

Recommendation No. 5: Set up a regional network of competition authorities

Being in a regional network could help the regional competition authority and the competition authorities of the member States to coordinate their efforts and could facilitate a potential transfer of powers (at the inquiry, investigation or decision-making stages) to the national competition agencies.

Recommendation No. 6: Provide information on community and national regulations

In order to broaden understanding about community and national regulations, information about them should be regularly disseminated to all stakeholders, in particular, chambers of commerce, consumer and professional associations and members of the Bar.

Recommendation No. 7: Establish a cooperation framework with ECOWAS

A framework is needed for cooperation between WAEMU and the ECOWAS competition authority, which would be able to take action in respect of the same subject matter as the WAEMU Commission but under a different mechanism.

Such cooperation should cover both control and capacity-building activities.

WAEMU must ensure that its experience – which is considerable, in the African context – is properly taken into account.

Recommendation No. 8: Partnerships

As part of the technical assistance programme that will come out of the peer review, a targeted group of technical partners, including competition authorities and specialized bodies with more extensive experience, will be identified. The WAEMU Commission's Competition Directorate can then establish formal cooperation frameworks with these partners in seeking relevant external expertise to strengthen its competition regime and that of the member States.

Recommendation No. 9: UNCTAD support

UNCTAD could provide technical assistance for the implementation of the required legislative reforms and help the WAEMU Commission to identify development partners that could mobilize sufficient resources to

fund the technical assistance programme that will come out of the peer review.

2. Specific recommendations for improving national frameworks

Recommendation No. 1

Ensure that the WAEMU member States that have not yet adopted a competition law pass one as soon as possible.

Recommendation No. 2

Simplify national competition laws and make them easier to follow by setting out the rules on anticompetitive practices, control of concentrations, State aid and State anticompetitive practices separately from the other rules (on restrictive practices, unfair competition, transparency and price controls).

Recommendation No. 3

Give the national competition authorities sole responsibility for addressing anticompetitive practices, the control of concentrations and, where appropriate, the control of State aid and State anticompetitive practices. Give governments and the courts responsibility for the control of other practices, such as restrictive practices and unfair competition.

Recommendation No. 4

Give the national competition authorities the power to carry out market studies on their own initiative or at the request of the government. Provide them with adequate resources for that task, by ensuring that they may request and obtain information for market studies from business actors and government agencies.

Recommendation No. 5

Plan and make the necessary arrangements for the national competition authorities to have access to all data from bids tendered for government contracts.

Recommendation No. 6

Plan and make the necessary arrangements for sectoral regulators and national competition authorities

to exchange information regarding contentious proceedings in the area of competition.

Recommendation No. 7

Separate the procedures on the control of concentrations from the procedures for addressing abuse of dominant position in national laws.

Recommendation No. 8

Give national competition authorities the power to carry out concentration control and to impose penalties, in collaboration with the Commission, in cases involving anticompetitive practices and provide for the possibility of appeal.

Recommendation No. 9

Provide clarification on the elements of adversarial proceedings before national competition authorities.

Recommendation No. 10

Achieve transparency in the selection of the members of the competition authorities by publicly announcing applications and reinforcing the rules for dealing with members' conflicts of interest.

Recommendation No. 11

Ensure that the national competition authorities have their own budgets and are able to use their resources autonomously in recruiting staff.

Recommendation No. 12

Significantly increase the resources of the national competition authorities.

Recommendation No. 13

Strengthen the advisory power of national competition authorities by allowing them to issue opinions on their own initiative and to publish their opinions.

Recommendation No. 14

Develop a technical assistance programme to familiarize national competition authorities with best practices in the field and with the holdings of community case law.

**Table VII.8:
Summary of the capacity-building programme and of technical assistance needs**

	Subprogramme	Activity	Time frame for implementation	Purpose	Performance indicator	Partners
1	Overhaul of the community framework	Recruitment of experts to prepare project plans Organization of a retreat for Commission officials (Competition Directorate, Legal Affairs Directorate) Organization of a workshop to approve the plans	2021–2022	To set up a more appropriate community framework allowing for a more apt involvement of the national authorities in enforcing community competition policy	Community instruments that set out a new division of responsibilities between the Commission and the national competition authorities Community instruments on the control of concentrations	UNCTAD, European Union and others yet to be identified
2	Design and launch of a programme for amending member State laws	Recruitment of experts to prepare draft laws and implementing regulations Organization of national workshops to approve the drafts	2021–2022	To establish aligned national frameworks	Amended national legislation	UNCTAD, European Union and others yet to be identified
3	Operationalization of national competition authorities	Support for the recruitment of members and staff by the national authorities Specialized training for managers and staff Study visits	2022–2023	To ensure that national competition authorities are effectively operational	Number of officials trained, national commission progress reports Reports on sectoral studies Study visits	UNCTAD, European Union and others yet to be identified
4	With the support of UNCTAD, information-sharing and awareness-raising activities for professionals (small and medium-sized enterprises/ industries)	Organization of conferences Collaboration with chambers of commerce and professional organizations to provide enterprises with technical support Development of harmonization projects	2021–2022	Wide dissemination of national and community competition rules to stakeholders	Conference and workshop evaluation reports Training made available through professional organizations	UNCTAD, European Union and others yet to be identified
5	Development of an investigator's guide, designed for the staff of national competition agencies	Recruitment of two experts (one lawyer and one economist) to develop the guide Workshop to approve the guide	2022	To ensure that the staff of the national competition authorities have a good understanding of the rules and techniques for conducting investigations	Investigator's guide is available Number of staff trained to use the guide	UNCTAD, European Union and others yet to be identified
6	Support for the specialization of national judges in competition law	Specialized training Study visits to courts	2022–2023	Perfect command of competition issues by the competent courts	Number of judges trained	UNCTAD, European Union and others yet to be identified

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	Subprogramme	Activity	Time frame for implementation	Purpose	Performance indicator	Partners
7	Support for the adoption of a competition law in Guinea-Bissau	Recruitment of two experts to prepare bills Organization of a national workshop to approve bills	2021	To establish a legal and regulatory framework on competition	Bills submitted for the parliament's adoption	UNCTAD, European Union and others yet to be identified
8	With the support of UNCTAD, dissemination of the new rules to the institutions responsible for their implementation	Organization of national conferences		To ensure that the staff of the institutions responsible for implementing the community and national rules (sectoral regulator staff, ministerial advisors, etc.) have a good understanding of those rules	Number of officials who attended the conferences	UNCTAD, European Union and others yet to be identified
9	Support for the creation of a regional network of competition authorities			To establish a formal framework for collaboration among the competition authorities	Operational network	UNCTAD, European Union and others yet to be identified



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