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Agreed Equitable Principles and Rules for the
Control of Restrictive Business Practices**
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Preparatory report for the ex post review of the competition policy of the West African Economic and Monetary Union

Executive summary*

* The present document summarizes the report prepared for the United Nations Conference on Trade and Development by Frédéric Jenny, professor, ESSEC Business School, and Chair of the Competition Committee of the Organization for Economic Cooperation and Development, and Amadou Dieng, independent expert and former Director for Competition of the West African Economic and Monetary Union. The findings, interpretations and conclusions expressed herein are those of the authors and do not necessarily reflect the views of the United Nations or its officials or Member States.



I. Introduction

1. 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.

2. 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:

(a) Spread awareness of its experiences at UNCTAD, the main forum for multilateral discussions on competition issues;

(b) Find out how the international community viewed the substantive rules and institutional structure selected by WAEMU for implementing its competition policy;

(c) Determine the technical and institutional capacity-building needs of the WAEMU Commission and WAEMU member States.

3. 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

4. Now, more than ten years later, an ex post assessment is needed, with the new review allowing for:

(a) An assessment of the progress made by WAEMU in implementing its competition policy and the capacity-building programmes;

(b) 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 Area;⁴

(c) 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;

(d) Determination of the technical assistance needed by the WAEMU Commission and the national competition agencies to function more smoothly;

(e) Identification of the technical partners (competition authorities and specialized bodies) with which WAEMU could establish formal cooperation frameworks to mobilize appropriate external expertise;

(f) The mobilization of external resources to help finance the operations of the WAEMU Commission and of the national competition agencies.

5. Chapter II of the present summary of the preparatory report will discuss the WAEMU framework generally. Chapter III will describe the institutional framework and provide an assessment of the Commission's interventions. Chapter IV will look at the

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 on 28 May 1975 under the Treaty of Lagos with the objective 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 Simone Malz Coetzer, "Export Potential Opened Up by Africa's Continental Free Trade Agreement", Switzerland Global Enterprise, 18 July 2019.

development of national frameworks since the entry into force of the WAEMU texts and of the relationship between the Commission and the national competition agencies. The prospects for reform in the light of the new regional developments will be considered in Chapter V. Lastly, cooperation between WAEMU and ECOWAS will be discussed in Chapter VI, and Chapter VII will provide conclusions and recommendations.

II. Overview of the WAEMU framework

A. Founding principles

6. 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 – that share a common currency, the CFA franc. They have a combined population of around 120 million and cover an area of 3,509,600 km².⁵

7. By forming this grouping, the eight WAEMU member States were able to respond to their need for complementary production systems and reduce the disparities in their levels of development.

8. 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.

9. 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 industry, agriculture, energy, mining, land development, transport, telecommunications and the environment.

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

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

B. Economic information

12. 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.

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

14. 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.

15. The WAEMU member States have a population that is largely young – 66 per cent of the population of West Africa is under 25 years of age – and highly mobile. However, in a context 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

⁵ Knoema, "UEMOA". Available at <https://knoema.com/atlas/UEMOA/topics/Demographics>.

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.⁶

16. 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.

17. 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.

18. Economic activity increased in the zone in 2019, growing 6.6 per cent, as it had in 2018.

19. Growth rates of at least 5 per cent are expected in all the member States in 2019. The rates expected per country are as follows: 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 May 2019, the International Monetary Fund forecast growth of 6.6 per cent for the WAEMU zone in 2020, the same rate as in 2019.⁷

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

21. 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 (64.3 per cent in 2018). This weakness is due in large part to the many physical and administrative obstacles to trade and competition within WAEMU.⁸

22. 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.

23. Most of the WAEMU member States' trade is 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.⁹

24. The top mining exports are gold and uranium.¹⁰

25. In 2019, real GDP growth in the WAEMU zone stood at 6.6 per cent. As in 2017 and 2018, the growth was driven by all economic sectors in all the member States.¹¹

C. Institutions

26. WAEMU comprises the following bodies:

- (a) Conference of Heads of State and Government;
- (b) Council of Ministers;
- (c) Commission;
- (d) Court of Justice;

⁶ Fondation pour les études et recherches sur le développement international (Foundation for International Development Study and Research), *Évaluation des gains attendus de l'intégration économique régionale dans les pays africains de la Zone franc*, study conducted at the request of the Franc Area Finance Ministers (2012).

⁷ International Monetary Fund, Report No. 19/90, March 2019.

⁸ Ismaila 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.

⁹ WAEMU, *Rapport annuel sur la surveillance commerciale*, 2013 (March 2014).

¹⁰ Ibid.

¹¹ WAEMU, "Note de conjoncture économique régionale dans l'UEMOA", No. 452, third quarter 2019.

- (e) Court of Auditors;
 - (f) Interparliamentary Committee;
 - (g) Regional Consular Chamber.
27. Two independent specialized institutions have also been set up:
- (a) Central Bank of West African States;
 - (b) West African Development Bank.
28. The WAEMU Commission, the body that develops and implements community policies, was established in January 1995.¹² 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 has seven divisions, each of which is headed by a Commissioner.
29. In fulfilling its mission, the Commission first focused its efforts on harmonizing public finances and promoting the common market through the following priority measures:
- (a) Operationalizing the customs union;
 - (b) Establishing a preferential internal tariff regime and a common external tariff;
 - (c) Implementing a common trade policy;
 - (d) Implementing a community competition policy;
 - (e) Promoting the free movement of persons, goods and services and the right of establishment.
30. Various studies and assessments have been carried out in recent years with respect to the Commission's management capability,¹³ and the Commission has given thought to how it takes action and the key roles it plays in formulating and implementing reforms and community policies.
31. The review showed that, although it addressed important regional needs in various fields, those fields were not all equally relevant under the WAEMU Treaty or in terms of the Commission's capabilities.
32. 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 staff training and skills in order to enhance the Commission's performance institutionally and in terms of capacity-building.
33. In addition, efforts have been made to hold joint training sessions for officials and to share perspectives on the application of the rules, with a view to increasing cooperation between the Commission and the national agencies.
34. 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, interpreting articles 88 to 90 of the Treaty.
35. Such guidance could have prompted the incorporation into national law of Directive No. 02/2002/CM/UEMOA of 23 May 2002 on cooperation between the Commission and the national competition agencies in applying articles 88, 89 and 90 of the WAEMU Treaty,

¹² The Commission's powers are set out in article 26 of the amended WAEMU Treaty.

¹³ Specifically, 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 (WAEMU, "Plan stratégique de la Commission de l'Union économique et monétaire ouest-africaine 2011-2020", October 2010).

which required that national competition laws be amended to reflect the primacy of community rules.

36. 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.

37. 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 were compatible with community law and that the national laws could not be invoked to justify derogations from community law either by governments and courts or by private individuals.

III. The institutional framework and an assessment of the Commission's interventions

A. Institutional framework

38. In creating a common market, the cornerstone of integration, the WAEMU member States adopted programmes aimed at unifying their domestic markets.

39. The implementation of a common competition policy is one of the tools for achieving the objectives set out in the WAEMU Treaty. The basic requirements in this regard are set out in articles 4 (a), 76 (c) and 87 to 90 of the amended WAEMU Treaty and in article 3 of Additional Act No. 05/99 adopting the common industrial policy of WAEMU.

40. The Commission operates within an institutional framework that gives it exclusive competence to sanction anticompetitive practices observed in the common market, whether or not they affect trade.

41. The role of the WAEMU member States, through their national competition agencies, is to work with the Commission in applying the competition rules by monitoring how markets are functioning (preparing reports on the state of competition and quarterly notes on the functioning of markets, providing support to the Commission when it carries out enquiries or checks, cataloguing State aid, participating in the decision-making process).

42. Problems have arisen with the use of this model, which resulted from the interpretation of the Court of Justice, as certain States appear to have some reservations with respect to it, and this significantly compromises the effectiveness of the controls on anticompetitive practices.

43. The question of how to divide powers between the Commission and the national agencies remains unresolved, with no clear guidance from community authorities (the Conference of Heads of State and Government and the Council of Ministers).

44. The difficulties include:

(a) The low level of acceptance among national competition agencies of the principle, set out in the Court of Justice opinion, that the Commission has exclusive competence;

(b) The insufficient human and material resources of the Competition Directorate, a line department within the Commission;

(c) The slow pace of the Commission's decision-making process when handling competition cases.

45. Prohibited practices under Regulation No. 2/2002/CM/UEMOA of 23 May 2002 on anticompetitive practices within WAEMU include anticompetitive agreements, abuses of dominant position, anticompetitive practices emanating from member States and State aid likely to restrict competition.

46. It should be noted that one of the important features of the WAEMU Treaty is that it regulates the conduct of public authorities that are in a position to restrict competition in the WAEMU zone. Government aid is governed by Regulation No. 4/2002/CM/UEMOA on State aid in the WAEMU zone and on the procedures for applying article 88 (c) of the Treaty.

47. The Commission records violations, either upon the filing of a complaint or ex officio. It may adopt interim measures, grant individual exemptions or decide on block exemptions.¹⁴

48. Anticompetitive practices are handled using two types of proceedings:

(a) Simplified proceedings, under which the Commission may decide on an application for negative clearance or for an individual exemption six months after receiving the application if no grievances are raised with respect to any of the parties concerned;

(b) Contentious proceedings, in cases where the Commission expresses doubts as to whether the firms' practices are compatible with the common market.

49. The Commission is also responsible for the control of concentrations, which is carried out under a complex mechanism bringing together the rules on exemptions and the rules on abuse of dominant position.

50. For purposes of control, State aid is divided into four categories:

(a) Notified aid;

(b) Aid that is illegal and prohibited by law;

(c) Aid that has been misused;

(d) Existing aid.

51. WAEMU community law also defines a special category of practices, called "anticompetitive practices emanating from member States", that targets measures taken by member States that are likely to hinder the application of community competition rules.

52. The Court of Justice determines, under the terms set out in Additional Protocol No. 1 on the WAEMU oversight bodies, whether the Commission's decisions are legal. The Court also has unlimited jurisdiction over appeals filed against Commission decisions that impose a fine or penalty payment. It may modify or annul a decision, reduce or increase the amount of a fine or penalty payment, or impose specific obligations.

53. The Court of Justice also considers actions brought by the Commission against member States, in connection with anticompetitive practices emanating from them, for their failure to fulfil their obligations.

B. Assessment of the Commission's interventions

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

55. A priori and a posteriori controls on anticompetitive practices could be improved by modifying substantive rules (including by adopting separate regulations on the control of concentrations) and procedural ones (including by defining the procedures for addressing anticompetitive practices emanating from Member States and simplifying the decision-making process).

¹⁴ The Commission has the authority to impose fines ranging from 500,000 CFA francs (CFAF) to CFAF 100,000,000, or up to 10 per cent of turnover, on businesses and business associations. It may also require them to make penalty payments of CFAF 50,000 to CFAF 1,000,000 for each day of delay from the date set in its decision as a way to compel them to put an end to the violation or to provide in full the exact information requested in its decision.

1. Controls on government intervention

56. Although controls on government intervention are not the key component in the control of anticompetitive practices, they play an important role in WAEMU, where a culture of supranationality has not yet sufficiently taken root.

57. The Commission has investigated at least ten cases related to government interventions.

58. The Commission is working to strengthen a priori controls on government intervention through an annual survey of government aid. However, other types of government intervention are not subject to these a priori controls, even though they could be more detrimental to free competition.

59. The initiative taken by private firms, which are increasingly ready 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.

2. Controls on cartels and abuse of dominant position

60. A limited number of cases have been decided in this area, owing in part to institutional and operational weaknesses. However, in recent years, several cases have been investigated and are awaiting decision.

61. In terms of institutional weaknesses, the fact that the exclusive competence of the Commission neither enjoys broad acceptance among the Member States¹⁵ nor is sufficiently supported in terms of human and financial resources reduces the effectiveness of that body, as it is supposed to take action even in small, purely national disputes.

62. In terms of operational weaknesses, the Commission has scant jurisprudence, owing to the following factors:

(a) The Commission has few opportunities to take action ex officio on the basis of evidence observed while monitoring the markets;

(b) There are few referrals from national agencies, which give priority to disputes where there is a chance of settling or imposing a fine (practices considered restrictive, unfair competition, etc.);

(c) The Commission's decision-making process moves at a slow pace.¹⁶

3. Collaboration between the Commission and member States in capacity-building activities

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

64. An extensive capacity-building programme was implemented by the Commission until 2018. The programme included training sessions for officials and seminars to share information and raise awareness.

65. The programme targeted officials in the government bodies involved in implementing the community competition policy, judges and lawyers, business leaders and representatives of business associations, and members of civil society and professional associations.

¹⁵ Member States have repeatedly expressed their desire to have the authority to apply competition rules and act in the area, especially given the Commission's failure to intervene in cases where the impact is limited to the national market.

¹⁶ The process moves too slowly. To speed it up, the President of the Commission should, when acting on a proposal from the Commissioner heading the Regional Market, Trade, Competition and Cooperation Division, be allowed to sign decisions without first having to meet with the cabinet directors and the commissioners.

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

66. The Commission involves officials from the national competition agencies in the controls it carries out.

67. Since 2016, member State officials have been selected from national lists put forward annually by trade ministries to support the Commission in conducting competition enquiries. During each enquiry, experts from the member States are put under contract and paid after they submit their enquiry reports, which are validated at workshops organized by the Commission.

68. While this system does increase the involvement of national agencies in Commission interventions, the framework for their involvement should be clarified.

69. For example, the texts are silent on:

(a) Whether the national agencies can handle exemption requests and complaints in order to determine whether they are admissible;

(b) How the deadline for a response by the Commission is taken into account when an application is submitted to a national agency;

(c) Whether sectoral regulators have the same authority as competition authorities with general powers with respect to the control of anticompetitive practices;

(d) What the applicable law is when proceedings are initiated by a national agency;

(e) How quickly the national bodies must refer cases brought before them to the Commission;

(f) Whether the national agencies are competent to issue formal requests for information.

IV. The development of the national frameworks and an analysis of the relationship between the Commission and the national competition agencies

70. The link between domestic and community law, intended to ensure the uniform interpretation and application of the rules, was supposed to be established within six months, but that proved too optimistic, given the time frame for adopting legislation in the member States.

71. There were many inconsistencies in the laws of member States because of the slow pace of incorporating Directive No. 02/2002/CM/UEMOA into national law. This led to the adoption of general competition laws that conferred decision-making power on national agencies and sectoral laws that gave regulators the authority to monitor and sanction anticompetitive practices.

A. Analysis of national competition laws

72. One of the measures strongly recommended at the 2007 peer review was to reorganize the member States' competition authorities by, in particular, modifying the scope of authority of the national agencies to reflect the community context.¹⁷

73. 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 have begun the process of amending their laws (Senegal, Togo and Guinea-Bissau).

¹⁷ UNCTAD, Voluntary peer review of competition policies of WAEMU, Benin and Senegal (UNCTAD/DITC/CLP/2007/1). See also: <http://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=1437>.

B. The relationship between the Commission and the national competition agencies

74. Directive No. 02/2002/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.

75. Under article 3 of Directive No. 02/2002/CM/UEMOA, the national authorities 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.

76. 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 catalogue State aid, provide quarterly reports to the Commission on such aid and produce an annual report on the state of competition in the country.

77. The national agencies also participate in the work of the Advisory Committee on Competition.

78. Lastly, we note that, under article 6 of Directive No. 02/2002/CM/UEMOA, member States are 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.

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

(a) Do sectoral regulators have the same authority as competition authorities with general powers 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?

(b) What law is applicable in cases where the national agency initiates proceedings? The answer is not as clear as in cases where there are interlocutory matters, perquisitions and measures that are governed by national law but are used to enforce Commission decisions;

(c) When must the national agency forward the file to the Commission?

(d) Can national agencies decide to issue formal requests for information, given that they can initiate enquiries under domestic laws?

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

V. Reform of the institutional framework

A. The issue of reform

81. The report that came out of a study¹⁸ ordered by the Commission in 2011 strongly recommended that new institutional and legislative structures be put in place at the regional and member State levels so as to ensure the effective implementation of the community competition policy.

¹⁸ Mor Bakhoum, “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.

82. The many efforts that followed the adoption of the final report provided an opportunity for reflection on the various issues that would be raised by possibly reforming the institutional framework to allow for a new distribution of powers between the Commission and the national competition agencies.

83. The reforms considered should encompass substantive rules, the distribution of powers, procedures and institutions. They should be carried out at the regional and member State levels.

1. Reform of the control of economic concentrations

84. At the regional level, the reforms would, in part, involve improving the substantive rules on the control of concentrations. This would mean amending the provisions of Regulations No. 2/2002/CM/UEMOA and No. 3/2002/CM/UEMOA that put in place 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.

85. This mechanism is legally imprecise, which could create difficulties at the time of implementation. Moreover, under it, the Commission is currently unable to charge any fees to cover the costs of its interventions in this area.

2. Reform of the institutional framework for implementation

86. In order to address the slow pace and cumbersome aspects of the Commission's decision-making procedures, the rules governing its organization and operations should be reviewed.

87. Cases might be processed more quickly if signing authority were shared by the President of the Commission and the Commissioner responsible for competition matters. Similarly, the Competition Directorate would be better able to manage its work in the field if it were granted greater autonomy.

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

B. The need for reforms at the national level

1. Reforms to be undertaken at the member State level

89. Before more authority can be given to the member States, the national legal frameworks need to be reformed with a view to establishing independent national competition authorities with sole decision-making power in the control of anticompetitive practices. To achieve this, there must be a functional separation between the competition authorities and the trade ministries and, in particular, those authorities need to be given the necessary human and budgetary resources to be able to act with full independence from the executive branch.

90. Furthermore, there should be a framework for cooperation between sectoral regulators and competition authorities so that jurisdictional conflicts between the two types of bodies can be avoided. A system allowing the two bodies to consult with each other could be set up so that the competition authority could seek a regulator's views before adopting decisions affecting a regulated sector and vice versa. Such exchanges should be transparent and made public.

91. Lastly, 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 controls on State aid, as such controls should be carried out solely at the community level.

2. The role of the Commission in the reforms to be undertaken

92. The Commission should oversee the work of adapting national laws to the community competition framework so as to ensure that community rules are properly incorporated and, in particular, to bring the national laws of Benin, Burkina Faso, Côte d'Ivoire and Mali more into line with the community framework.¹⁹

C. Building the capacity of national competition agencies

1. The need for appropriate training

93. 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.

94. Training is required in:

- (a) The collection and analysis of data to be sent to the Commission;
- (b) The drafting of quarterly and annual reports on the state of competition;
- (c) Investigative techniques;
- (d) Investigation procedures;
- (e) The preparation of draft decisions.

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

2. Supporting the reforms

96. Member States, who have primary responsibility for the 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.

97. Lastly, information about the community and national texts should be regularly disseminated so as to promote communication with different stakeholders, in particular chambers of commerce and consumer and professional associations and members of the Bar.

VI. Collaboration with the ECOWAS competition authority

A. Description of the situation

98. One of the major challenges in the regional integration process in West Africa is the need for institutional adjustments to allow convergence between the interventions of the WAEMU and the ECOWAS bodies, which have similar objectives.

99. Building on the guidance given by 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 the process of convergence.

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

101. Since the establishment of the ECOWAS Regional Competition Authority in Banjul in 2019, there has been renewed interest in thinking about how the two competition frameworks can be harmonized.

¹⁹ These member States have adopted laws that may contravene the exclusive competence granted to the Commission under the WAEMU Treaty.

B. Guidelines on establishing a cooperation framework

102. With respect to the movement towards convergence, it should be noted that ECOWAS is now in the process of setting up its regional framework. WAEMU must therefore be sure to safeguard the progress it has made in implementing a 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.

103. The following points should be resolved:

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

VII. Conclusions and recommendations

A. Conclusions

104. 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 supervision activities has been assembled within the entity.

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

106. As a result, the number of cases considered by the Commission has risen significantly in recent years. However, it still takes too long for the Commission to adopt decisions, which may reduce the effectiveness of its efforts to implement the competition rules.

107. The Commission's working methods should therefore be revisited, at least with respect to its decision-making process in competition cases.

108. More generally, the efforts to improve the current community competition regime have fallen short in a number of ways. The reform of national frameworks provided for under article 6 of Directive No. 02/2002/CM/UEMOA on cooperation between the WAEMU Commission and the national competition agencies 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.

109. 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 movement towards a community, as their laws do not all take the same approach or provide for the controls on anticompetitive practices to be carried out using similar procedures.

110. The reforms undertaken in the five member States that have adopted new laws have not adequately resolved the issue of how to align national mechanisms with the community

rules. These laws deal in large part with controls on practices that are considered restrictive, seeking to protect professionals rather than to ensure suitable conditions for competition. The laws also provide for controls on government interventions (government aid and other practices emanating from the State), which they do not need to address, as this type of control can be carried out only by the Commission.

111. Furthermore, the competition authorities with general powers 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.

112. This risk is present in, for example, how the heads of the authorities are appointed, how their staff are recruited, how their financial and human resources are allocated and how the interventions they carry out can be initiated.

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

114. Moreover, the community texts (directives or circulars) do not provide a formal structure for the relationship between the Commission and the national competition authorities indicating clearly how the regional competition authority and the national agencies responsible for accepting complaints are to communicate, how enquiries and studies are to be carried out and how the agencies' interventions are to be escalated to the Commission.

115. As an example, Directive No. 02/2002/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.

116. Similarly, as far as cooperation is concerned, Regulation No. 3/2002/CM/UEMOA does not address the issue; rather, it is, for the most part, concerned with laying down the terms of operation of the Advisory Committee on Competition.

117. Remedying the shortcomings set out above requires corrective measures to be taken by the Commission and the member States so that the WAEMU competition mechanism can continue to be seen as a cornerstone of economic integration in the WAEMU zone.

B. General and specific recommendations

1. General recommendations

Recommendation No. 1: Update community texts

118. 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 interventions, particularly with respect to the a priori control of concentrations.

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

120. Consideration could also be given to including new concepts such as leniency and compliance programmes.

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

121. The relationship between the regional body (the WAEMU Commission) and the national bodies (competition authorities and sectoral regulators) should be restructured to make the procedures for information sharing and joint management easier to administer.

Recommendation No. 3: Provide support for reforms

122. Member States, who have primary responsibility for the institutional reforms, should be given support to stay on schedule so that they do not fall out of step with each other, as is currently the case.

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

123. Despite the significant efforts made by the Commission to develop the technical capacity needed to effectively and efficiently apply the community competition rules, the national agencies still have little experience in handling competition cases. Specific training should be organized to address this issue.

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

124. Being in a regional network could help the regional competition authority and the competition authorities of the member States coordinate their efforts and could facilitate a potential transfer of powers to the national competition agencies.

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

125. In order to help stakeholders learn about the community and national laws, information about the texts should be regularly disseminated to, in particular, chambers of commerce, consumer and professional associations and members of the Bar.

Recommendation No. 7: Establish a cooperation framework with ECOWAS

126. A framework needs to be put in place to allow for collaboration with the ECOWAS competition authority, which would be able to intervene with respect to the same subject matter as the WAEMU Commission but under a different mechanism.

Recommendation No. 8: Partnerships

127. As part of the technical assistance programme that will come out of the peer review, a targeted group of technical partners will be identified with whom the WAEMU Commission's Competition Directorate can establish formal cooperation frameworks.

Recommendation No. 9: UNCTAD support

128. UNCTAD could provide technical assistance in implementing 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 the national frameworks

Recommendation No. 1

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

Recommendation No. 2

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

Recommendation No. 3

131. Give the national competition authorities sole responsibility for the deterrence of anticompetitive practices, the control of concentrations and, where appropriate, the control of government aid and anticompetitive practices emanating from the State.

Recommendation No. 4

132. Give the national competition authorities the power to carry out market studies on their own initiative or at the request of the government and provide them with adequate resources for that task.

Recommendation No. 5

133. 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

134. 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

135. Separate the procedures on the control of concentrations from the procedures on the deterrence of abuse of dominant position in the national laws.

Recommendation No. 8

136. Give national competition authorities the power to impose penalties, together with the Commission, in cases involving anticompetitive practices and control of concentrations and provide for the possibility of review.

Recommendation No. 9

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

Recommendation No. 10

138. 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

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

Recommendation No. 12

140. Significantly increase the resources of the national competition authorities.

Recommendation No. 13

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

Recommendation No. 14

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