The Experience of West African Economic and Monetary Union (WAEMU) in the Field of Competition

By:

Ado Olivier Angaman

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Introduction

The Treaty establishing the West African Economic and Monetary Union (WAEMU) was signed in Dakar on 10 January 1994. WAEMU comprises of eight member States- Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal, and Togo. Its main objective is to build a harmonized and integrated economic area in West Africa.

To achieve this integrated area between member states, article 76 of the WAEMU Treaty expressly provides for the establishment of common competition rules for public and private undertakings and for public aid. These rules are laid down in Articles 88, 89, and 90 of the WAEMU Treaty. These

provide the basis for future legislation with the wording of prohibited anti-competitive practices, the setting of normative competence, and enforcement structures in the field of Competition.

Thus, in accordance with the provisions of the Treaty, the Council of Ministers of WAEMU adopted, in May 2002, a set of three Regulations and two Directives[1] which specify the substantive rules and procedures, the transparency of relations between public undertakings and States, and the division of powers between the WAEMU Commission and national competition structures.

Nearly twenty years after adopting the implementing texts of the UEMOA Treaty on Competition, it is worth considering the role of competition policy in the economic integration of UEMOA. What has been the *contribution* of the WAEMU Regional Competition to the construction of the common market?

In order to give some answers to these questions, it is necessary to recall the material and procedural rules of the Community competition policy (I) and then assess the level of implementation of this policy (II).

(I) Material and Procedural Rules in Accordance with International Standards

A - The Legal and Institutional Framework

Legal Framework

WAEMU competition rules were not adopted ex-nihilo. They deal with matters enshrined in international law and practice, namely anti-competitive agreements, abuse of dominant positions, and state aid which may affect the proper functioning of the market. Moreover, one of the peculiarities of the Union's Community competition law is the imposition of special Control over public interventions, which are characterized as anti-competitive practices attributable to the Member States.

Institutional framework

The institutional framework consists of all the Community and national structures involved in the design and implementation of Community competition legislation. It can be seen at three levels by the implementing

institutions at the Community level, the action of national competition structures, and cooperation between Community bodies and those of the Member States.

The main feature of these rules deriving from the WAEMU Treaty is the affirmation of a centralized institutional approach with almost exclusive competence of the Community bodies, namely the Council of Ministers, the Commission, and the Court of Justice. Further, it is accompanied by cooperation which is intended to be close between the Commission and the national competition structures.

This approach, it should be emphasized, is not clear from the founding text of the Union, namely the Treaty. Rather, it was enshrined in the UEMOA Court of Justice, mandated by the Treaty to monitor the Commission's various competition actions. Indeed, by Opinions in 2000 and 2020[2], this Court has twice defined the direction of Community law towards centralization.

Thus, the Council of Ministers exercises a regulatory function exclusively. At the same time, the decision-making role falls to the WAEMU Commission responsible, under the authority of the Court of Justice, for the implementation of Community competition legislation.

In the member states, we have national competition authorities and independent administrative authorities, which have a general investigation mission. The intervention of civil or commercial courts is limited to the pronouncement of nullity of its own right or the award of damages to the victim of the unlawful agreement.

In the implementation, the Commission involves member states officials at all stages of the procedure. Since 2016, these officials have been selected from national lists put forward annually by trade ministries to support the Commission in conducting competition inquiries.

B- Procedure Rules

The procedural mechanism is a set of measures that facilitate the application of Community competition law. They enable barriers to Competition to be detected and sanctioned, uniform application of competition rules in the Union,

and, above all, protection of the rights of interested parties and third parties to be ensured.

Moreover, in return for the important powers of investigation and decision conferred on the WAEMU Commission in the context of the implementation of competition rules, respect of defense rights is at the heart of the procedural mechanism. It embodies several main legal principles, including the principle of adversarial proceedings, the reasoning behind decisions taken, the principle of proportionality, and respect for business secrecy.

II- Review and prospects

A - Review

The nature of market regulation decisions and actions and the effects of these decisions will be highlighted.

1 - Assessment of the Commission's Interventions

The State of the Union's competition litigation, from 2003 to the end of 2020, shows that forty-nine (49) disputes were formally referred to the Commission or were referred to it. Of these 49 cases, twelve (12) final decisions have been made, the investigation of fourteen (14) cases has been completed and is pending the final decision of the College of Commissioners. Sixteen (16) cases continue to be investigated, and seven (07) cases are filed under prescribed or closed cases. See UNCTAD’s Preparatory report for the post review of the competition policy of the West African Economic and Monetary Union.

In addition, it should be pointed out that many of the Commission's decisions have focused on State aid and anti-competitive practices by the Member States. This direction is the result of the strong involvement of the member state Governors in economic activity. However, in recent years, the Commission has investigated a number of cases involving corporate practices, either for abuse of dominance or for anti-competitive agreements.

Mention may also be made of the cross-cutting and multisector nature of the Commission's actions in the field of Competition. More than twenty sectors of activity were covered, including airport ground handling, cement, telecommunications, food distribution, textiles, maritime transport, steel

processing, etc.

In terms of distribution by member States, all UEMOA Member States are involved in the dispute, except Guinea Bissau, which is in the process of adopting competition legislation and the establishment of a competition authority. Burkina Faso (the country with the headquarters of the Commission) and the two most economically advanced countries, namely Côte d'Ivoire and Senegal, have the largest number of cases.

Finally, in terms of the origin of the referrals, the Member States are the first to use the service of the Community competition authority. They are followed by businesses and consumer associations.

2 - Impact or Effects of WAEMU Competition Decisions on the Common Market

The Commission's decisions have made it possible, in the first instance, to accompany the implementation of certain projects of Community interest by authorizing certain aid measures which are considered compatible with the common market.

For example, in the GAZODUC case, the Commission authorized the implementation of fiscal measures taken by Togo and Benin. It considered that: "the West African Gas Pipeline is an infrastructure project which helps to meet the energy needs of the states concerned for their economic and social development without affecting trade between the states of the Union and jeopardizing the integration objectives as referred to in article 4 of the WAEMU Treaty".

On the other hand, in many cases, the Commission has ordered certain Member States to withdraw the measures taken in favour of certain undertakings that were liable to distort the Competition. For instance, in the ASKY case[3], the Commission also declared certain provisions of the headquarters agreement between that company and the Togolese government incompatible with the Community competition rules.

Also, it should be noted that the Commission's actions are also felt during the investigation phase of the cases. Indeed, during the investigation stage of the

procedure, the Member States and the undertakings concerned generally adjust their conduct to the practice in question. For example, the investigation in the cement industry in Benin enabled the Beninese government to adjust the exemptions granted to one of the players in the sector. Otherwise, in the airport ground handling case, at Abidjan airport, following the investigations, the Ivorian authorities reduced the cost of the concession holder's services, and the service dealer reimbursed its contractors the amounts wrongly received.

Over the past three years, only ***one abuse of dominant position case have been decided***. However, several others have been investigated and are awaiting a decision. Recently the Commission imposed fines on SONABHY, a Burkinabe state company, for abuse of a dominant position. 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 (See Decision No. 08/2019/COM/UEMOA of 5 November 2019).

Finally, the effectiveness of the implementation of Community competition law is no longer to be demonstrated. Better still, WAEMU is considered to be one of the most dynamic regional economic communities in implementing competition rules.

Despite these advances, many constraints limit the effectiveness of Community competition policy.

3. Constraints, Challenges, and Prospects

The design of the institutional framework has consequences for the effectiveness of Community law as follows:

a. The strong centralization of substantive law and the exclusive competence of the Commission does not allow all cases to be dealt with, whether those affecting trade between the Member States or those affecting national markets;

b. The limited cooperation of national competition structures, the absence or weakness of the autonomous national competition

institutions, and the insufficient resources of those institutions; and

c. The slow decision-making process and the insufficient human and material capacity of the WAEMU Competition Directorate.

To deal with these difficulties, the WAEMU Commission must:

a. Resolve the question of the division of powers definitively by revising the WAEMU Treaty, as stressed in the last opinion of the Court of Justice of the WAEMU;

b. Reinforce capacity building at Community and national level and establish a regional network of competition authorities to promote Competition;

c. Establish, in the context of regional cooperation, a framework for collaboration with the ECOWAS Competition Authority to avoid jurisdictional conflicts in the same area and to enhance the negotiating positions within the framework of the AfCFTA competition rules.

Conclusion

The WAEMU competition policy is, from the point of view of material and procedural law, in conformity with international standards, with certain specificities relating to the control of concentrations, the establishment of a special category of anti-competitive practices attributable to States and, above all, a centralized institutional approach with almost exclusive competence of the Community bodies.

Then, eighteen (18) years (2003-2021) after the adoption of the implementing texts, WAEMU competition policy has therefore contributed to the consolidation of the Customs Union, the free movement of goods and liberalization in several sectors of activity (telecommunications, communication, energy, etc.). Moreover, it has become an essential tool for promoting regional economic integration in the Union.

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[1] Regulation No. 2/2002/CM/UEMOA on anticompetitive practices within WAEMU

- Regulation No. 3/2002/CM/UEMOA on the procedures for addressing cartels and abuse of dominant position within WAEMU
- Regulation No. 4/2002/CM/UEMUA on State aid within WAEMU and on the procedures for applying article 88(c) of the Treaty
- Directive No. 1/2002/CM/UEMOA on transparency in financial dealings between member States and either agencies of the member States in applying articles 88 to 90 of the WAEMU Treaty.

[2] Opinions No 003/2000 of 27 June 2000 and No 01/2020 of 07 July 2020 of WAEMU Court of Justice

[3] Commission Decision No. 002/2011/COM/UEMOA of 29 August 2011.

[4] The *African Continental Free trade Area (AfCFTA)* founded by the African Union in 2018

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