

Unclassified

DAF/COMP/GF/WD(2010)60

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

15-Feb-2010

English - Or. French

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Global Forum on Competition

COMPETITION, STATE AIDS AND SUBSIDIES

Contribution from the Senegalese National Competition Commission

-- Session I --

This contribution is submitted by Mr. Diawara, Chairman of the Senegalese National Competition Commission, under session I of the Global Forum on Competition to be held on 18 and 19 February 2010.

Contact: H el ene CHADZYNSKA, Programme Manager of the Global Forum on Competition
Tel: +33 1 45 24 91 05; email: helene.chadzynska@oecd.org

JT03278708

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COMPETITION, STATE AIDS AND SUBSIDIES

-- Contribution from the Senegalese National Competition Commission --

1. Freedom of competition or free competition between enterprises supplying products or services tending to meet identical or similar needs in a given market must be guaranteed by the State in which public power is invested.
2. The State, however, has a variety of missions, one of which is to ensure the economic and social well-being of its population through the various policies which, in principle, it is free to choose.
3. Accordingly, in its role in allocating and redistributing resources, the State may well find itself providing different types of aid to economic actors.
4. These State aids or aid from State resources may take a number of forms: soft loans, tax breaks, exemptions, etc. They may consist in a subsidy, which should be treated as the financial contribution or “sum paid by the public authority to an economic unit or group of units (region, branch, sector, etc.) for a social or economic purpose”.
5. In themselves, these State aids may not be a bad thing and may be justified by a positive economic balance. They may even appear to be the best or sole choice possible or may even be a “necessary evil”, as demonstrated by the massive intervention by governments during the recent international financial crisis to keep their banks afloat or to relaunch the economy.
6. However, these State aids or subsidies may also have a downside, namely distortion of the free play of competition through the preference of “an enterprise, sector of production of goods or service” over its competitors. They may also be seen as unfair, discriminatory measures that are equally damaging to both the national economy and to the regional, community or international trade it is accused of impeding.
7. For all the above reasons, we feel that, provided that account of taken of the interests of developing countries, and particularly the LDCs, State aids and other State subsidies should be subject to competition law.
8. Moreover, such regulations already exist in regional economic union. The World Trade Organisation, for its part, prohibits specific subsidies.
9. In the case of West African States, these regulations are taken into account in the community legislation on competition of the West African Economic and Monetary Union (UEMOA-WAEMU) and the Economic Community of West African States (CDEAO or ECOWAS) composed of sixteen States, eight of which are members of WAEMU.
10. In the following paragraphs we shall briefly discuss State aids or subsidies in the UEMOA – CDEAO area (1), some of the issues that certain subsidies raise in the WTO (2) and, despite everything, in conclusion the need to regulate State aids and subsidies while taking account of the particular situation of LDCs (3).

1. Practices regarding State aids and subsidies and the account taken of such aid in community competition law of the WAEMU and ECOWAS

1.1 Practices regarding State aids and subsidies

11. All States make use, depending upon their circumstances, of subsidies and State aids.
12. West African countries are no exception to this rule. They intervene in the economy to help certain enterprises in a variety of way, in particular through tax exemptions to attract investors and in the event of increases in global commodity prices (flour, rice, etc.).
13. Without wishing to restrict the discussion to Senegal, Article 18 of Act number 2204-06 of the Senegalese investment code offers a good example of such aid. It provides for an exemption from the lump-sum employer's contribution for up to 5 to 10 years. Special facilities are also granted with regard to corporation taxes.
14. In reality, the idea uppermost in the minds of the various national economic operators in our young States is that national enterprises need to be protected from foreign competition and also require government support in the form of subsidies (formerly customs duties that gave national enterprises an advantage over imports in one major West African country).
15. Criticism was thus levelled within WAEMU against the tax exemptions some States granted their hauliers for "truck purchases" and the "credit lines" they allegedly extended to them, which had an adverse impact on competition. Such exemptions apparently exist in the telecommunications sector for new operators entering the market.
16. At the strictly national level, two complaints against States deserve mention.
- The first is that brought by a private press group which owns a radio station and a television station and which accuses the State of awarding exclusive television broadcasting rights, bought out of public funds, to matches from the 25th African Cup of Nations (Ghana 2008) to the sole publicly owned broadcasting channel.
 - The second relates to a guarantee of over a billion francs which the State apparently gave to a peanut marketing company, to the detriment of its competitor.
17. This case has been referred to the WAEMU Commission. As we shall see, both WAEMU and ECOWAS have issued regulations regarding State aids and subsidies.

1.2 Account taken of State aids and subsidies in WAEMU and ECOWAS community competition law

18. As in other regions of the world, national legislation makes no provision for State aids, even though the national Commission has been asked to give an opinion on an application for a subsidy addressed to the Senegalese government¹. This vacuum has been filled by community regulations on competition, such as those drawn up by WAEMU and ECOWAS.

¹ In its opinion No. 05-A-08 of 27 November 2008, the national competition commission of Senegal recalled that the State is obliged to respect the equality of treatment of enterprises that find themselves in similar circumstances and that if it wishes to accede to the application that has been made the State must first notify "the WAEMU Commission of the planned award of aid".

19. Article 8 of Additional Act A/SA-1/12/08 regarding the adoption of community regulations on competition and procedures for their application within ECOWAS has the same content as Article 2-1 of Regulation No. 04/2002/CM/UEMOA regarding State aids within WAEMU and the procedures for applying Article 88 (c) of the Treaty.

20. These two pieces of legislation enshrine the principle of the incompatibility of public aids (WAEMU text) or aids granted by States or provided from State resources (ECOWAS text) when such aids are liable to distort competition by favouring certain enterprises or types of production.

21. However, they also consider the case (Article 3 of the WAEMU regulation, Article 8 of the ECOWAS Additional Act) of public aids which would be compatible with the WAEMU or ECOWAS Common Markets (e.g. aids designed to promote a major project of interest to the community or to remedy serious disruption in the economy of a Member State).

22. Nonetheless, the ECOWAS Additional Act does not appear to be as comprehensive as the ECOWAS regulation with regard to aid.

23. By way of example, there is no provision in the ECOWAS Additional Act comparable to that made by the WAEMU, based on the subsidies banned by the WTO, whereby public aid in the form of subsidies that are “conditional ... on the export performance to other Member States ... or on the use of domestic products in preference to products imported from other Member States” (Article 4 of WAEMU Regulation 4) is banned *ipso jure* with no possibility of repayment.

24. The sanctions for offences are specified more clearly in the WAEMU legislation, which provides for the suspension or recovery of illegally awarded aid, than in ECOWAS legislation. .

25. Article 10 of the ECOWAS text on measures by the Authority² with regard to public aids and anticompetitive practices attributable to public enterprises states simply that: “any person or Member State who has suffered losses due to a prohibited anticompetitive practice in accordance with the provisions of the Additional Act regarding the adoption of community rules on competition pay subject a request for compensation to the Authority and the Authority may, if it is convinced that, in the event, it is justified by the facts, order the offender or offenders to pay compensation to the plaintiff.”

26. This sanction may seem woefully inadequate and doubtless ECOWAS community legislation on competition will have to be supplemented and improved in order to, at the very least, ease the difficulties that State aids and subsidies cause or will inevitably cause. This is the purpose of the following paragraph in which a number of issues relating to the WTO will also be discussed.

2. The issue of subsidies in WAEMU and ECOWAS legislation and in the WTO

2.1 *The problem with the implementation of State aids and subsidies within the framework of the WAEMU and ECOWAS*

27. Article 5.2 of Directive 02/2002/CM/UEMOA regarding co-operation between the WAEMU Commission and national competition structures recalls that the WAEMU Commission has sole competence to know about State aids.

28. ECOWAS considers that this competence is the prerogative of the “Competition authority directed by an Executive Director assisted by two Deputies and the staff the authority needs to function”

² This is the ECOWAS Competition Authority.

(Article 2 of Additional Act A/SA.2/12/08 on the creation, powers and functioning of the ECOWAS Regional Competition Authority.

29. The issue of the uniformity of the definitions and prohibitions set out in the two sets of legislation should be avoided.

30. The existence of two competition authorities could give rise to disputes over jurisdiction between the two bodies or problems relating to the perception or conception that each body might have of the role and relations to maintain with national competition authorities or structures.

31. At present, unlike the current situation in the European Union, there is very little disagreement over State aids, despite the fact that, as noted earlier, such aids do exist.

32. In fact, the ECOWAS Commission has already had experience of such disagreements. By way of example, in a case in which “Soccocim Industries” complained of distortion in the operation of the cement market due to a difference in treatment by the State in favour of “Ciments du Sahel”, which benefited from tax and customs advantages under a mining agreement, the ECOWAS Commission asked the Senegalese government to cease granting exemptions for clinker imports and stated that “since any failure to comply with this ban amounts to the granting of public aid, it would be examined in accordance with Regulation No. 04/2002/CM/UEMOA of 23 May 2003 on public aids (Decision No. 003/2005/COM/UEMOA).

33. In another case known as the “RUFSAAC” affair, the ECOWAS Commission apparently held that exemptions granted to cement manufacturers important paper packaging was responsible for distorting competition at the expense of locally manufactured packaging.

34. However, in our opinion, the main issue should be the efficiency of sanctions imposed on States and the will of the latter to comply with such sanctions.

35. The regulation of subsidies and application of legislation governing subsidies also raises issues in the WTO.

2.2 *The issue of subsidies in the WTO*

36. Manufacturing subsidies, which are tolerated by the WTO, and export subsidies, which are banned by that organisation, both have an impact on competition.

37. As everyone knows, export subsidies, which countries are committed to reduce in the agricultural sectors, seriously damage the interests of poor countries and are responsible for them losing substantial amounts of export earnings.

38. It has already been argued that European subsidies combined with direct aids allow European countries to practice dumping in world markets.

39. Even now, the losses observed in cotton production in certain African countries are apparently due to cotton support policies in the United States.

40. And yet nothing appears to be able to stop State aids or subsidies. Direct or indirect aids are given to car manufacturers. A few months ago the European Union apparently announced new export subsidies for butter, cheese and powdered milk.

41. Apparently, WTO regulations and the way in which they are applied are not sufficient to settle all the issues regarding State aids and subsidies. Admittedly a body does exist to settle disputes which can

secure the withdrawal of a subsidy or eliminate the adverse effects of a subsidy. However, it is also known that the cost to poor countries of initiating that organisation's procedures is prohibitively high, not to mention the ambiguity and difficulty in interpreting its regulations and, according to some commentators, the inconsistency of the latter.

3. Conclusion

42. These observations do not cast doubt on the usefulness of the WTO, which has in the past ruled against developed countries. What needs to be recognised is that the issue of State aids and subsidies is a complex one. Regardless of whether or not such aids are justified from an economic standpoint, they can always be justified by all countries in terms of policy. Given that they can distort competition and disrupt world trade, they need to be regulated in order to avoid the antagonism and fierce rivalries of the past. World peace demands this. In our opinion, the issue of State aids and subsidies can only be resolved within the framework of the new world governance made necessary and desirable by the international financial crisis.

43. This new world governance, within whose framework different competition policies will be co-ordinated, will combine a series of economic, legal and other rules in which ethics, equity and justice will play a major role. Above all, this new governance of State aids and subsidies in a more global framework of world governance must necessarily take account of the imperatives of development and the situation of permanent crisis in which certain developing countries and LDCs currently find themselves.