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DEVELOPMENT OF COMMUNITY COMPETITION LAW WITHIN WAEMU: THE ROLE OF TECHNICAL ASSISTANCE

By

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Ladies and Gentlemen,

Permit me, first of all, to thank the staff of the OECD, especially Mrs H el ene CHADZYNSKA of the OECD Competition law and policy division, for kindly inviting the Commission of the West African Economic and Monetary Union (WAEMU) to take part in the work of this Forum.

Ladies and Gentlemen,

As you know, the West African Economic and Monetary Union is made up of eight countries¹ which, after using a common currency, the CFA franc, for several decades, decided to strengthen their monetary cooperation by adding an economic component.

In this respect, the Union set itself four main objectives designed to achieve a wider aim, namely, to strengthen competitiveness in economic and financial activities in the member States, in the framework of an open, competitive market and a rationalised and harmonised legal environment.

One of these four specific objectives is the creation of a common market based on free movement of people, goods, services, capital and the right of residence, as well as a common external tariff (CET) and a common trade policy.

In bringing about this common market, WAEMU embarked on a series of reforms in May 1996, the date of the Conference of Heads of State and Government, which led, in particular, to the conversion of the area into a customs union on 1 January 2000.

To this end, the member States of the Union made enormous efforts, within the three and a half years from July 1996 to December 1999, to eliminate all tariff barriers on intra-community trade.

This internal liberalisation was accompanied by a major effort in favour of external liberalisation since, in relation to the rest of the world, the introduction of the WAEMU/CET led to external tariff reductions which brought the overall level of entry duties from a peak of 65.5%² to 22% and the average rate of taxation from 13.6% to 11.2%.

The regional market ushered in by the customs union and common trade policy allows businesses to produce on a large scale, introduce modern production methods and reduce their costs, to the benefit of consumers. These changes, which should result in a reallocation of resources within the community area,

¹ WAEMU consists of the following eight countries: Benin, Burkina Faso, C te d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo.

² Guinea-Bissau had a top tariff rate of 105% at 1 January 1998.

revolutionise the terms of supply and end the traditional customs and behaviour which led to the cloistering of national markets.

We have, of course, seen cases of companies that did not properly prepare themselves for the new competitive environment engaging in practices designed to maintain their profit levels, damaging both the competitiveness of community production and the welfare of consumers. Likewise, national legislations allow domestic companies to continue to escape competition from products originating in other countries of the Union. It was thus to ensure that the common market worked properly that article 76 of the Treaty provided for the institution of common competition rules applicable to public and private enterprises, and to government subsidies.

In this connection, the Commission has been engaged since 1999 in work preparatory to the adoption by the Council of Ministers of Regulations and Directives in application of the main treaty provisions on competition.

Support in the form of technical cooperation, particularly from the European Union, has played an important part in this task. That is why I thought it would be useful, in the light of the terms of reference which Mrs CHADZYNSKA sent me, to share with you the unique experience of the WAEMU Commission in developing community competition law within the Union.

I have planned my speech around two points:

- Analysis of technical assistance in preparing community competition law within WAEMU,
- WAEMU's current and future technical assistance needs.

ANALYSIS OF TECHNICAL ASSISTANCE IN PREPARING COMMUNITY COMPETITION RULES WITHIN WAEMU

The preparation of community competition rules within WAEMU was a particularly rewarding experience, both for the staff of the WAEMU Commission and the administrations of the member States of the Union.

The process comprised a number of phases:

- drawing up by the Commission of the terms of reference of the study on preparation of community law;
- execution of the study, with European Union financing, by a consortium³ of consultancy firms;
- determination by the Commission of the options to be retained in finalising the preliminary draft legislation;
- discussion with experts from member States;

³ The consortium consisted of a Belgian law firm, responsible for the legal aspects and an American consultancy firm, which dealt with the economic aspects.

- consultation with the WAEMU Court of Justice on the interpretation of articles 88, 89 and 90 of the Treaty on competition rules;
- involvement of other partners: World Bank, UNCTAD, etc.;
- adoption by the Council of Ministers.

This study, carried out with the support of the European Union, based on terms of reference prepared by the WAEMU Commission, resulted, in particular, in:

- an assessment of the state of existing provisions on control of competition in member States;
- preliminary draft community competition legislation, based on the strengths and weaknesses of national provisions, the competition rules laid down in articles 88 to 90 of the WAEMU Treaty, and considering the experiences of the European Union, Mercosur and the results of the work undertaken under the auspices of UNCTAD by the intergovernmental group of experts on competition law and policy.

It should be stressed at the outset that, among the several dozen technical assistance projects financed by the European Union since 1996, the study on the development of community competition law is regarded as one of the most satisfactory to the WAEMU Commission. Two main reasons have been put forward for this: the quality of the terms of reference drawn up by the Commission and the high level of professionalism of the consultancy firms involved.

The greatest benefit of this particular form of technical assistance was the on-going dialogue between the WAEMU Commission and the consultancy firm in choosing the options most pertinent in terms of the WAEMU Treaty, the European Union's experience and the constraints in the environment specific to the WAEMU member States.

This approach certainly strengthened the capacity of WAEMU Commission staff and experts from member States subsequently involved in the process of validating the results of the study.

However, the technical assistance provided nevertheless proved to have certain limitations:

- Firstly, selecting a consultancy firm was not easy because of the lack of private firms in the WAEMU member States with the right profile. This explains the choice of firms from the North which had to work with many time constraints. Consequently, some aspects of the actual application of national laws could not be covered in the study. Such information, of course, would have facilitated the compromises concerning the division of responsibilities between the Commission and the member States. This crucial issue had to be decided later by the WAEMU Court of Justice in its opinion no. 03/2000/CJ/WAEMU.
- The second limitation concerns the choice of the European competition regulation model, without properly evaluating the resources required to implement it. It should be noted that this weakness is also found in some member States which enjoyed considerable technical support from UNCTAD or French Cooperation in formulating their laws, but which ran into difficulties due to the mismatch between the volume of rules adopted and the domestic capacity to enforce them.

This last remark in no way detracts from the great value of the seminars organised by UNCTAD in the subregion, nor its technical advice on draft legislation submitted to it by our States. Likewise, it should

be stressed that the study tours financed by French Cooperation for African staff to the Directorate General of Competition and the French *Conseil de la Concurrence* are generally well regarded.

However, adjustments need to be made in connection with this technical assistance, which would be more effective if there was more emphasis on the prerequisites for implementation. These concern both personnel and equipment available to competition authorities.

In the case of personnel, the period of training should be longer, more detailed and practical. It is also essential to stabilise this personnel whose mobility from one department to another is a major factor in the loss of capacity to control competition. This is primarily a matter for States, which must ensure that people who are trained have a stable career, but donors are also concerned to a lesser extent.

With respect to equipment acquired from both external and domestic resources, it needs to be ensured that it is actually used by national competition authorities.

In concluding this first part, I think that the development of competition in African countries with the help of technical assistance can only be done effectively through well constructed projects, implemented over a period of at least three years.

These projects should clearly indicate all aspects of technical assistance, in particular:

- the number of beneficiaries of training programmes, their profiles and conditions for their future employment;
- temporary and transitional financing of the start-up of competition authorities over the period;
- arrangements for takeover by States, which should clearly identify in their budgets the amounts necessary for the operation of these authorities once the projects come to an end.

WAEMU'S TECHNICAL ASSISTANCE NEEDS

With the adoption of community competition rules, envisaged in March 2002, the WAEMU Commission will have to deal with several pressing issues, some concerning the formulation of provisions in application of the basic rules, others concerning the implementation of community legislation.

With this in mind, the Commission drew up an action plan covering three areas:

- the institutional and technical framework,
- sectoral studies,
- information, education and communication.

The institutional and technical framework

The co-operation necessary between the Commission and competition authorities in member States requires this issue to be addressed under a global programme with the following elements:

- finalising the standardisation of competition rules and procedures, especially monitoring of institutional reforms expected of member States;
- strengthening the human and logistical capacities of community and national competition authorities.

In the context of strengthening capacities, the emphasis should be on training consisting of modules on the principles and practices of competition, and relevant technical documentation. This training comprises seminars for staff, training of trainers and study tours to help familiarise beneficiaries with conducting investigations, producing reports and other administrative tasks to be carried out in a competition authority.

Apart from training, which must be continuous, community and national competition authorities must be provided with adequate operating resources. *The Commission's objective is to establish an interactive cooperation network between itself and national competition authorities.*

In addition, the draft economic partnership agreement between WAEMU and the European Union requires the legislation of both to be harmonised, especially in respect of concentrations. The current work in the WTO and the negotiations with the WTO under the Doha Development Round⁴ should form a good working basis.

Studies in priority sectors

To ensure effective implementation of community competition law, WAEMU must make strategic choices, examining as a priority those sectors which have a positive impact on the fight against poverty.

Priority sectors are those which cut across the market to a considerable extent and which perceptibly influence other sectors. Those which have specific features which might justify the adoption of exemptions for particular categories should also be included.

A good knowledge of these sectors and clearly identifying the trade practices that hold sway can facilitate the work of the Union's competition authorities. Financed by the EDF, the WAEMU Commission has programmed studies in the land transport sector, as well as banking and financial institutions in 2002. These two sectors, together with energy and telecommunications, are considered to be areas where the Commission's action will be rapidly visible, with a tangible impact on the cost of factors of production.

As can be seen, the value of these studies on priority sectors lies in the fact that they allow competition policy to be harmonised with other sectoral policies and social programmes such as combating poverty and good governance.

Information, education and communication (IEC)

Information plays a key role in the application of competition rules, a feature of which is that they involve government authorities, public or private enterprises and civil society. Indeed, to be sure that

⁴ It should be recalled that in the common negotiating positions decided by the WAEMU Council of Ministers for Seattle and Doha, the member States of the Union were in favour of opening negotiations on trade and competition.

market supervision and regulation mechanisms are understood by everyone, regular communication between them is essential.

The nature of competition rules, the application of which assumes compromises between not always convergent interests, requires adequate explanations to be given to all concerned, both business and consumers. Successful implementation of competition rules is dependent on this advocacy relating to the issues and objectives.

It may take the form of seminars or the use of audio-visual aids and periodical publications which help to create a framework of interactive communication through which, it is to be hoped, a culture of competition can be developed.

These activities, whose essential objective is to develop a culture of competition in the WAEMU area, require the mobilisation of technical and financial resources. The Union has high expectations of technical assistance in making these available.

CONCLUSION

The reforms undertaken in creating the WAEMU common market demand various adjustments from member States, affecting both their budgets and the competitiveness of their businesses. The customs union has exerted increased competitive pressure on enterprises in the Union in two ways, which has increased due both to companies in other member States of the Union and goods imported from the rest of the world.

To support the customs union and ensure that the WAEMU common market worked properly, it proved essential to equip the Union with good community legislation to implement a competition policy which must:

- guarantee the unity of the common market by preventing companies carving it up among themselves by means of illegal practices;
- avoid the monopolisation of some markets by preventing large companies from abusing their dominant position to impose conditions or absorb competitors;
- prevent governments from rigging the rules of the game through aid to private sector companies or discrimination in favour of public enterprises;
- encourage economic efficiency by creating a climate propitious to innovation and technical progress.

This legislation, which is expected to be adopted in March 2002, involves a new area, where the Treaty has given the WAEMU Commission its own decision-making power, including sanctions against private and public enterprises and States. It will certainly help to transform the WAEMU economic area into a "community of law" and increase transparency for the foreign investor.

The draft legislation envisages a mechanism for cooperation between the Commission and national competition authorities in member States, with a view to uniform application of community competition law throughout the territory of the Union.

In consequence, the Union's priority needs in terms of technical assistance and capacity building concern:

- establishment of an interactive and effective cooperation network between the Commission and national competition authorities;
- financing of studies on priority sectors to ensure that community competition policy has a tangible impact on combating poverty and reduction of the cost of factors of production;
- development of a culture of competition in the WAEMU area through the financing of integrated information, education and communication programmes (IEC).

Ladies and Gentlemen,

I would like to conclude my remarks by reiterating my concerns about the importance of issues of implementation. Competition law as practised in African countries has shown that they attach little weight to sanctions, even if laid down in the legislation.

However, the importance of sanctions should not be overlooked, since an economically justified law may be completely derailed and have perverse effects if guarantees of independence and procedure, which are an indispensable adjunct of competition law, do not exist.

It is for this reason that those who drew up the WAEMU Treaty gave the Commission a central role, giving it the widest powers, subject to control by the Court of Justice, to enforce community competition law. It is important for technical cooperation to provide support in strengthening the capacity of this supranational organ. So as to assure the system of these guarantees of independence and procedure.

Thank you for your attention.