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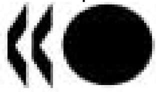

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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Contribution by WAEMU

-- Session II --

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SPEECH

Introduction

1. Where competition policy is concerned, the debate about incorporating the development dimension in the process of framing and implementing legislation has always asked the basic question as to how the rules of competition can be made to play a role in development.

2. Adopting legislation presupposes, importantly, that the capacity exists to ensure proper implementation. Then there are political and administrative pressures which can considerably restrict the effectiveness of the rules. To illustrate these points, I propose to summarise the main phases in the recent history of WAEMU and its member States.

3. Allow me, first, to remind you that WAEMU is an organisation for regional organisation comprising eight West African countries (Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo) which decided in 1994 to merge some of their policies and resources with the object of promoting the economic development of the area thus created.

4. The main new feature of this group, which is not the first such endeavour in the area, is the clearly stated intention to give trade the key role in developing member States' economic and financial activities.

5. The obstacles facing WAEMU are manifold, the most significant being:

- the myth of national self-sufficiency, which has the effect of reducing intra-community trade;
- the differences between national economic policies which take priority over community objectives; and
- the inadequacies of the road and rail infrastructure, which result in excess transaction costs.

6. To overcome these obstacles, WAEMU began b y launching a wide-ranging liberalisation programme, coupled with the following reforms:

- financial integration through adhesion to the CIMA Code (Inter-African Conference on Insurance Markets) and the creation of a BRVM (*Bourse Régionale des Valeurs Mobilières*, or regional securities exchange);
- the standardisation of business law under the Organsiation for Harmonisation of African Business Laws (OHADA).

7. With all these reforms aimed at setting up a common market, the WAEMU authorities established in the Treaty itself the principles of clear competition rules. In order to apply the said principles, it was necessary to consider the context in which existing national laws were established and in which they were to be incorporated in the new arrangement.

8. The first stage in the preparation of draft community legislation on competition was devoted to analysis of the real problems of competition policy in such key sectors of the WAEMU economy as energy, transport, finance, telecommunications, etc.

9. It became apparent that, in the specific context of WAEMU member States, which are poor developing countries, it is vital that special attention be given to a number of anti-competitive practices, employed by both public and private companies, that have been in existence for a very long time. In many sectors, an insufficient number of competitors and ineffective competition are distorting prices, this being especially true in the case of monopolies which restrict production and push prices up above competitive levels.

10. Then again, special attention needs to be given to cartels and the sharing of markets confined to national frontiers, the latter representing an obvious boundary for the purpose of establishing market sharing agreements. Such agreements are common and are not easy to combat, the reasons being the following:

- they are difficult to detect because they generally involve companies that are subsidiaries of parent companies based outside the WAEMU area;
- few companies are involved;
- their existence is facilitated by the simultaneous existence of other barriers between the countries concerned.

11. Legislative and administrative barriers to entry also need to be targeted, particularly when they are easy to put in place. Over and above practices that restrict competition, the WAEMU countries are subject to constraints inherited from the monopolistic sectors that governments seek to maintain even after their liberalisation, notably via quality controls, standards, rules of origin and informal barriers to entry.

12. Challenging vertical restrictions is a real priority in sectors dominated historically by a single company in a monopoly situation. Particular emphasis needs to be given to drawing up price and distribution agreements, to barriers to entry (including trade barriers), and to the behaviour of rent-seeking firms in a private monopoly situation. Measures to encourage the entry of new competitors are also vital as a back-up to measures aimed at penalising anti-competitive behaviour.

13. Analysis also shows that competition policy is just one of a number of policies that need to be implemented in order to increase the competitiveness of the WAEMU economies and enhance economic efficiency. Competition policy and the other common market policies appear altogether complementary in this respect.

14. By abolishing trade barriers and governmental privileges, the setting up of the common market encourages the opening up of markets and can bring competitive pressures to bear on long-standing companies, thereby reducing waste and costs by the same token.

15. Measures are also needed where production is concerned. What is required are policy decisions aimed at reducing production costs that are excessive because of monopoly-induced rigidities, corruption,

unwarranted administrative costs and the limited size of the markets. The same applies to the harmonisation of the rules governing the main infrastructure industries (electricity), the object being to expand production and thereby achieve greater cost efficiency.

16. Privatisation policies are also policy measures which could bring benefits in terms of productive efficiency, lowering costs by disciplining the market and asset-holders.

17. In this connection, considerable thought needs to be given to the application of competition rules in the WAEMU. The question is how to transfer to the private sector firms that used to be public utilities and, at the same time, guarantee the lowest possible prices for consumers whose purchasing power is very meagre.

18. There are two solutions, one being careful regulation of these sectors and the other the promotion of competition, which also has the effect of pushing prices closer to marginal costs. However, the uncontrolled introduction of competition in network industries can also have the unwanted effect of squandering the benefits of economies of scale by breaking the historical operator up to an excessive degree. These questions need to be addressed in detail during the other phases of framing community rules.

19. In short, all of the work involved in drawing up WAEMU's community competition law is centred on the two main issues of defining the rules (1) and organising their implementation (2).

1. Defining the rules

20. Taking into account the economic considerations, the legal context at national level and all the studies carried out, the fundamental aspects of community competition law in WAEMU were dealt with by looking at the extent of community control over anti-competitive practices and the implementation of that control.

21. The following points constitute the substance of the texts adopted:

1.1 Control over State operations:

22. Practices that restrict competition can derive from both private and public initiatives. Although applying competition rules to State activities can sometimes be problematical, there are a great many legal instructions which either implicitly or expressly provide that competition rules shall apply to both public and private entities.

23. The question arising in a community framework is that of member States' compliance - as regards their legislative and regulatory activities - with community competition rules. The WAEMU Treaty provides that competition rules shall apply to public entities. On the other hand, two more specific issues are not dealt with by the Treaty. First, there is no article devoted to the special – from the point of view of competition law - case of a company managing a service of general interest. Nor, moreover, does the Treaty address the question of member States' legislative and regulatory activity being subject to community rules, i.e. when companies are obliged to restrict competition.

24. It being established that States are prohibited from infringing competition law, the question of companies managing a general interest service was dealt with by a regulation establishing which categories of public or private entity providing a general interest service could be exempted from the bans imposed by Article 88 of the Treaty.

25. In view, however, of the variable and changing nature of the general interest concept, the regulation referred to could prove difficult to apply.

1.2 Control over State aid:

26. With the WAEMU Treaty banning State aid that restricts competition, it was not difficult to ensure that the subsequent legislation incorporated definitions of the concept of State aid and the criteria for assessing the anti-competitive nature of such aid. What was difficult, on the other hand, was to draw up rules of procedure adapted to the WAEMU context, some countries continuing to have the same reactions in financial matters – especially as regards relations between the State and public undertakings, where there is very little transparency.

1.3 Field of application:

27. Community law applies first of all to anti-competitive agreements and practices. Vertical agreements are subject to the legislation, but this is relaxed to take account of our markets' need to modernise distribution.

1.4 Establishing a non-exhaustive list of banned practices:

28. To promote clarity and legal predictability with regard to competition, it was deemed necessary that competition law should include a non-exhaustive list of banned practices. The content of the list was based partly on the practices most frequently encountered in any market economy, and partly on the distinctive features of WAEMU, particularly as regards vertical agreements.

29. With respect, more specifically, to abuses of dominant position, since Article 88 (b) of the Treaty is somewhat vague as to the significance of the concept of a practice "*comparable*" to an abuse of dominant position, it was considered that the concept should, under certain conditions, include merger operations.

1.5 Exemptions:

30. The nature and objectives of competition law require that exemptions from bans on anticompetitive practices should be possible. Such exemptions can be either individual or general.

31. In the case of WAEMU, however, at least as things stand, it was impossible to list all the exemptions by category because of the lack of information in many sectors of activity.

32. That said, competition law has given the Commission the legal means to adopt regulations covering exemptions by category in future. These powers vested in the Commission may enable it to adjust the way bans are applied on the basis of trends in the area's economy and the realities of the different sectors of activity.

1.6 Legal field of application:

33. The existence of national laws made it necessary to define rules by means of which to easily determine what law should apply in the case of a given practice. The criterion of "*affecting trade between Member States*" is used in a number of community legal rulings. Since, however, the WAEMU Treaty does not appear to refer to it, this criterion was not deemed necessary by the Court of Justice which, in its opinion 003/2000/CJ/UEMOA, gave the Commission exclusive authority to implement the Treaty provisions concerning competition.

34. This means that national laws are inoperative in areas covered by community rules.

1.7 Mergers:

35. Controlling merger operations is an essential aspect of competition law and, while the WAEMU Treaty does not refer to this expressly, competition law does not totally disregard this type of restraint of competition. WAEMU Article 88 (b), which bans practices "*comparable*" to an abuse of dominant position, served as a legal basis for a certain degree of merger control.

36. It has to be said that the scope of this control is not clearly defined in the legislation which, with respect to requests for exemption, includes a system of prior notification of merger operations.

2. Implementation

37. Where competition is concerned, the way legislation is implemented is probably just as important as the actual content thereof. No legislation can be applied if the people responsible for the material and legal appraisal of the facts and for implementing the decisions and penalties are not clearly identified.

38. The following questions had therefore to be addressed when establishing the way WAEMU community competition rules were to be applied.

2.1 Centralisation or decentralisation of responsibilities:

39. Implementation can be either centralised or decentralised. Although both approaches have legal and economic advantages that are relevant in the WAEMU context, the Union has opted for the time being for centralised implementation which it deems more appropriate. That said, it is expected that some form of decentralisation will be introduced in the context of co-operation between the Commission and national competition authorities.

2.2 Definition of procedures:

40. Procedures that take account of the characteristics of WAEMU should allow proper implementation of previously established competition law.

41. The first criterion, in defining the procedures, was the requirement that legal simplification should comply with legal security.

42. Secondly, account was taken of the constraints deriving from the capacity and means to intervene, which explains the efforts made to set up a network between the Commission and national competition authorities which will be working in combination throughout.

43. This will ensure that competition culture will develop uniformly throughout the Union, the same rules applying at all levels of the community market in an identical manner involving both member States and the Commission.

2.3 Identifying requirements

44. The following prerequisites were identified:

- staff training in the administration of competition;
- training for company representatives and lawyers;

- training for magistrates;
- an academic infrastructure such as to be able to analyse competition-related issues and shape a doctrine capable of guiding decision-makers in the future;
- sufficient resources to carry out surveys and studies and circulate the decisions taken by the competition authorities.

3. Conclusion

45. As we have seen, drawing up and implementing competition law against a background of under-development is a complex and long-drawn-out process.

46. I have not put much emphasis on the duration of the operations just described, but it is worth mentioning that it took the WAEMU Commission at least five months before it was able to have the first regulations and directives governing competition in the Union adopted. And the work is far from over, since it is now that most of the institutional adjustments of which the framework has been defined are going to take place.

47. It will also take a considerable time to restructure departments and retrain staff.

48. We are convinced, however, that a competition culture will in time begin to flourish in the area. It is worth emphasizing that the Commission has already had submitted to it cases concerning such sensitive areas as subsidies and privatisations.