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THE EXPERIENCE OF OVERSIGHT OF STATE AID IN WAEMU

-- Contribution by Mr. Amadou Dieng (UEMOA) --

1. The same Article 88 of the Treaty of the West African Economic and Monetary Union (WAEMU/UEMOA) prohibits cartels, abuse of dominant position and state aid that may distort competition in the common market.

2. This shows that the oversight of state aid occupies a significant place in WAEMU's competition policy.

3. It is clear that this oversight can play an important role in regional construction in the light of the many imbalances that public intervention generates within the Union.

4. In this regard, it should be recalled that the WAEMU rose from the ashes of the West African Economic Community (WEAC/CEAO), which in its last days was marked by a strong trend towards reintroducing tariffs and implementing domestic policies heavily geared towards protecting domestic industries that received considerable tax and financial benefits.

5. It was also during this period that investment codes were introduced and free industrial zones were created in order to promote foreign investment as a solution to the inadequate level of domestic savings.

6. The inconclusive results of these choices were among the reasons for the new directions taken and for reactivating a project to build a common market between the member states of the West African Economic and Monetary Union (WAEMU), strongly characterised by its supranational dimension, with its corollary of a transfer of sovereignty.

7. Regarding the application of a competition code, three major principles have been established by the Union's authorities:

- To ensure that Community interests and rules take precedence over all other considerations.
- To develop the solidarity of national economies.
- To make the system credible both inside and outside the common market, in particular to foreign investors who may be interested in the WAEMU market.

8. In this perspective, two categories of public intervention are targeted by the Union's regulations:

- Anti-competitive practices engaged in by states (the fact that these are defined in the regulations on competition is an original feature of the WAEMU system); these regulation target public measures that restrict free competition, even if they are not of a financial nature (setting of quotas in intra-Community trade, granting special rights to national companies, adopting restrictive standards, imposing discriminatory administrative formalities, etc.);

- "State aid which might distort free competition by favouring certain companies or the production of certain goods".

9. For this last category, a review procedure has been established by Regulation 04/2002/CM/UEMOA on the oversight of state aid, which distinguishes between existing aid and new aid, which is the same classification found in the regulations of the European Union.

10. One of the most significant lessons learned in the brief experience of applying these rules is that, at the current stage, much of state aid is of a structural nature and calling it into question constitutes a major shift to which the national authorities and the benefitting companies find it difficult to adapt.

11. This is because the oversight system established requires the states to reassess all the financial benefits that they have granted to companies under their national investment codes, mining codes and special establishment agreements.

1. An Overview of the Regulations

12. Regulation 04/2002/CM of 23 May 2002 on the oversight of state aid defines this aid as follows: "any measure that (1) generates a direct or indirect cost, or a decrease in revenues for the state, its departments or for any public or private body that the state establishes or designates to manage the aid and (2) thereby gives an advantage to certain companies or to the production of certain goods".

13. A procedure to examine any of the different kinds of state aid can be initiated in three circumstances:

- When the notification of aid is filed with the Commission, which is mandatory for all categories of aid.

- When the periodic review of authorised aid is conducted, at the initiative of the Commission.

- When a company or a state files a complaint regarding an illegal form of aid, i.e. one implemented without prior notification of the Commission.

14. Regulation 04/2002/CM of 23 May 2002 gives a list of the types of aid automatically recognised as being compatible with the common market, without there being any need to examine them, namely:

- Aid of a social nature granted to individual consumers, provided that it is granted without discrimination regarding the origin of the products.

- Aid intended to remedy the damage caused by natural catastrophes or other exceptional occurrences.

- Aid intended to promote the carrying out of an important project of common interest or to remedy a serious disturbance in the economy of a member state.

- Aid connected with research activities conducted by companies or higher education or research institutions that have signed contracts with private companies.

- Aid aimed at promoting the adaptation of existing facilities to new environmental requirements imposed by legislation that lead to greater constraints and a larger financial burden for companies.

- Aid aimed at promoting a country's culture and the preservation of its heritage, when it does not restrict competition in a significant part of the common market.

15. Similarly, Regulation 04/2002/CM CM of 23 May 2002 gives a list of the types of aid automatically recognised as being incompatible with the common market, without there being any need to examine them, namely:

- Aid that is contingent, in law or in fact, whether solely or as one of several other conditions, upon exporting to other member states.

- Aid that is contingent, whether solely or as one of several other conditions, upon the use of domestic goods over goods imported from other member states.

16. Notified aid may only be granted following a decision by the Commission authorising it or following expiration of the deadline after which this authorisation shall be deemed to have been granted.

17. If the aid is illegal, the Commission may order the suspension of its payment and the provisional recovery of the aid.

2. Examples of Cases Handled in WAEMU

18. Since the competition regulations entered into force, the Commission has more frequently examined cases involving public intervention that could cause market distortions than those involving cartels and abuse of dominant position.

2.1 In the Cement Sector, the Following Three Cases have been or are currently being Addressed by the WAEMU Commission or the Court of Justice.

2.1.1 The case of Ciments du TOGO SA vs. the Commission (September 2000):

19. On 15 June 2000, the Company CIMENTS du TOGO filed a complaint with the Commission denouncing the preferential treatment that the State of Togo was giving to its competitor, the company WACEM based in the free industrial zone, which was marketing a product within the Union that was not subject to the required customs taxation.

20. A substantive decision was not made on this case because the Commission held that it did not have jurisdiction to examine the complaint, and the Court of Justice, to which the case was referred, dismissed the case on procedural grounds.

21. However, the interest of this case lies less in the decision reached than in the substance of the dispute.

22. In fact, in this case it was entire philosophy of the free industrial zones as they function in the WAEMU that the Community authorities were asked to examine.

23. The principle of a free industrial zone is that the authorised companies have extraterritorial status that allows them to import, free from duties and taxes, their inputs and capital goods. They are also exempted from a substantial share of their domestic taxes.

24. In return, the products manufactured in the free zone must be made for export to third countries.

25. This type of system should not create difficulties regarding the functioning of competition in the domestic market as long as the totality of production is exported.

26. However, by derogation, the member states that have free zones have allowed 20% of this production to be sold on the domestic market after the duties and taxes applicable to similar products from third countries have been paid.

27. In this situation, the following problems need to be solved:

- How to correct the imbalances between the production costs of goods manufactured in a free zone and the production costs of goods manufactured under normal conditions, since the former have received exemptions on inputs, manufacturing equipment and certain domestic taxes?

- What are the market shares of the 20% of production in a free zone authorised for sale on the domestic market?

- What reliable mechanism can be used to monitor compliance with the authorised percentages to avoid exceeding the quantities authorised for sale on the domestic market?

28. The WAEMU Commission may not have been able to answer these questions at the time of this case since Regulation 04/2002/CM/UEMOA of 23 May on the oversight of public aid had not yet been adopted.

29. Nevertheless, the fact remains that this case called for defining a fundamental position, as it clearly involved a distortion of competition as a result of public aid.

2.1.2 The Case of SOCOCIM vs. the State of Senegal and CIMENTS du Sahel (April 2003)

30. The company SOCOCIM INDUSTRIES filed a complaint with the Commission regarding dysfunctions in the cement market related to the implementation of a mining agreement between the State of Senegal and the company "LES CIMENTS DU SAHEL", its competitor.

31. The Commission's investigation of this complaint showed that tax exemptions had been granted to the company CIMENTS du SAHEL, which thereby gained a significant competitive advantage over SOCOCIM.

32. In his comments, the Minister for Economic and Financial Affairs of Senegal argued that the agreement strictly applied the provisions of the WAEMU Community Mining Code, which upholds the validity of all the mining agreements currently in force in the member states during a transitional period.

33. Even though this was a strong legal argument, the difference in the treatment of the two cement companies was so great that the Commission did not follow it.

34. In the cement sector, a distinction is made between complete and incomplete cement companies.

35. A complete cement company is one whose activities range from the extraction of limestone and its processing into clinker to the packaging of the finished cement in bags. The most important stage in the chain ends with the production of clinker, which accounts for approximately 80% of the value added in the overall process.

36. In incomplete cement companies, the chain extends from the grinding of the clinker to the packaging of the finished cement in bags.

37. In the case examined by the Commission, the competing companies, although they both theoretically had identical production systems, were not governed by the same types of agreements with the government.

38. Thus, the company "les Ciments du Sahel", under the guise of a mining agreement, received exemptions on all of its imports of entrants, capital goods and operating equipment, while SOCOCIM only received a tax reduction on a portion of these components, since it had a less favourable agreement both in terms of its duration and the scope of the benefits.

39. This gave the company "les CIMENTS du Sahel", during its start-up phase, the opportunity to import tax-exempt limestone, gypsum and fuel in order to manufacture cement as an incomplete cement producer. The difference in its costs enabled it to market a less expensive product.

40. Despite the potential beneficial effects on the market, such as greater supply and lower consumer prices, the Commission prohibited the continued granting of the exemptions for the following reasons:

- The competitor receiving the benefits, CIMENTS du SAHEL, could not show that it had attained the same levels of investment as SOCOCIM, which had preceded it in this sector by at least 30 years; this seriously jeopardised the current balance of the market;

- The exemptions on clinker were more favourable to competing imports, to the detriment of production originating within the Union;

- The activities of SOCOCIM, which had a market share of at least 60%, might be abnormally affected due to the unfair competition generated by the State of Senegal.

41. The conclusions that can be drawn from the Commission's position are, *inter alia*, the following:

- Absolute priority was given to the rules of competition in this case, since the Commission ruled against the application of the Community Mining Code, which had been established by a text on a par with and subsequent to Regulation 04/2002/CM/UEMOA on oversight of public aid;

- The solution chosen is significant in a field in which the agreements signed between countries and mining companies can last 15 to 20 years or longer, with clauses that can lead to the market being closed to new investors who might bring technological improvements in the sectors involved;

- The adverse effect on intra-Community trade was not focused on particularly as a criterion for analysing the prohibited state aid, but the Commission could also have referred to it since the cement manufactured in Senegal is sold in certain countries of the WAEMU zone, where it is competing with other cements produced in the zone;

- The Commission did not decide that the aid should be recovered, even though very large amounts were involved;

- As this was the first case of illegal aid examined by the Commission, this decision is understandable, as it was meant to be instructive.

2.1.3 The Case of RUFSAC vs. the State of Senegal

42. A third case in the cement sector is currently being dealt with by the Commission, which must decide regarding the effects of mining agreements signed with Senegal's cement companies on the market for kraft paper bags used to package cement.

43. In this case, the competition is between bags manufactured locally by an industrial unit specialised in this field, RUFSAC, and bags imported by cement factories.

44. These imports, which are subject to little or no taxation, are less expensive for cement companies, which therefore tend to stop purchasing their supplies from the local manufacturer.

45. The Commission will have to answer at least two questions:

- In which category should these exemptions be placed, given that not all manufacturers of kraft paper bags are established within the territory of the Union?

- If the Commission were to define these exemptions as state aid, who would be required to return the funds to be recovered?

2.2. The case of West Africa Gas Pipeline Co. (WAPCO) (April 2004)

46. On 19 April 2004, the states of Benin and Togo notified the Commission about the special taxation scheme that they were planning to apply to the West African Gas Pipeline Company Project.

47. This project aimed primarily at transporting and distributing gas produced by the companies Chevron, Texaco, Royal Dutch Shell and the Nigeria National Petroleum Company (NNPC), all operating within Nigeria, is being financed by two sources: 79.7% by the multinationals belonging to the consortium and 20.3% by public entities of Ghana, Benin and Togo.

48. The arguments used by the notifiers to justify the taxation measures were essentially the following:

- The major benefits that the states participating in the project might reap in terms of the regular supply of gas for industrial use;

- The Community interest of the project, which will ensure greater energy independence for two WAEMU member states by providing a regular supply of gas;

- The high costs of the project, which none of the member states could finance alone;

- Uncertainty about the profitability of the project, particularly in its start-up phase, which implies the need to reduce the operating costs of the companies responsible for operating the pipeline.

49. After consulting with all the member states, the Commission decided that it had no objection to implementation of the special taxation notified.

50. However, it did not agree with the applicants regarding the duration of the authorisation requested, specifying that it should be reviewed in 5 rather than 20 years, as the consortium members had requested.

Comment:

1) In this case, all the conditions were met to enable the Commission to give a favourable opinion, in particular the benefits that the Community as a whole could derive from the project. In fact, at the time when the project was initiated, both Benin and Togo had a very high energy deficit that it was vital to correct. Similarly, the prospects for extending the pipeline to Ivory Coast were also a significant factor in the analysis.

2) In general, in the field of public-private partnership for building infrastructure or other projects requiring large amounts of capital, as in the field of privatisations, the Commission will monitor the agreements signed among member states and concession holders, since these agreements may generate more public aid than is required or create rent-seeking situations that hinder competition.

Conclusion

51. The different cases presented have not concerned economic contingency measures, but this does not mean that the member states have not taken steps to address situations such as the rise in prices caused by the crisis.

52. The support provided to companies has been short-term in most cases and has not raised any particular difficulties regarding competition, except for the flour and food oil sectors, in which complaints have just been filed with the Commission.

53. However, it should be noted in this regard that the member states have not complied with the requirement to notify the Commission of the measures that they have taken.

54. This tendency is not limited only to the current economic situation, but is characteristic of the application of the rules for monitoring public intervention within our states, where the culture of supranational governance has not yet sufficiently taken hold. This explains the efforts being made by Commission to conduct an annual census of the existing aid.

55. Nevertheless, the initiatives taken by private companies, which are increasingly willing to file complaints with the Commission so that it can examine public measures that they consider contrary to Community rules, are doing much to strengthen the regional framework. And it is no exaggeration to say that the work of monitoring state aid is playing a key role in the construction of the WAEMU common market, given the barriers to intra-Community trade that it can help to eliminate.