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ROUNDTABLE ON CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Contribution from Senegal

-- Session 1 --

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ROUNDTABLE ON CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Senegal [*] --

1. Is competition law adapted to the economies of developing countries? The doctrinal controversy over this issue now seems to be a thing of the past. Under the combined weight of the opening up of the economies of developing countries to the outside and growing globalisation, competition policy and law have finally become an integral part of the agenda of regional, bilateral and multilateral negotiations.

2. Accordingly, since the 1990s, most developing countries have adopted competition policies and legislation that are tailored to match their level of development, as well as their social, cultural and economic particularities. The outcome of this is that the competition law of States is now aligned more closely to their development strategies than it has been in the past.

3. In the 1960s in Senegal, for example, even though the principles of freedom of enterprise and free competition had been recognised in Act 65-25 of 4 March 1965 on prices and infringements of economic legislation, the Act did not regulate on anti-competitive practices. The Act provided solely for cartels and a cartel commission was supposed to examine and authorise, where appropriate, cartels that were beneficial for the market and the economy.

4. It was not until 1994 that anti-competitive practices, referred to at the time as being either collective (cartels, abuse of dominant positions, etc.) or individual (refusal to sell, discriminatory practices, etc.) were eventually defined and regulated.

5. However, this legislation, namely Act 94-63 of 22 August 1994 on prices, competition and economic disputes, did not regulate concentrations. The need to create and promote strong firms which would generate jobs and tax revenues, and also the will to establish national champions which could compete in the markets, were doubtless the main reasons for excluding concentration from the Act's scope of application.

6. At present, and more precisely since 2002, concentrations are governed by WAEMU Community competition law applicable in Member States and consequently in Senegal, in accordance with Regulations 02 and 03/2002/CM/UEMOA relating respectively to anti-competitive practices within the Union and to the applicable procedures.

7. The issue of international concentration operations is of major interest to the countries in the West African region whose market characteristics are relatively similar. Another interest lies in the fact that most firms operating in this market are either foreign or majority owned by nationals from developed countries. Consequently, merger, acquisition and share purchasing operations generally take place outside the area but nonetheless impact the regional market.

8. After providing a brief overview of the legal regime applicable to concentrations within the WAEMU, we shall attempt to take stock of the challenges that cross-border concentrations pose for the economies of developing countries and in particular for Senegal. We shall conclude by considering principles that might help advance the way in which such issues are dealt with at the international level.

1. Legal regime applicable to concentration operations in the WAEMU

9. Community competition law defines a concentration as:

- the merger between two or more previously independent enterprises;
- the operation whereby one or more persons who already have control of at least one enterprise, or of one or more enterprise, directly or indirectly acquire, either through acquisition of a stake in the capital or through the purchase of assets or through a contract or any other means, control of all or part of one or more other enterprises;
- the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity .

10. Any concentration operation which creates or strengthens a dominant position on the market that is likely to significantly impede normal competition on that market is considered to be an abuse of a dominant position.

11. Community competition law also provides for negative clearances or exceptions, either by category or on an individual basis, for concentrations which do not have an adverse impact on competition (see attached negative clearance in favour of a concentration of which foreign enterprises are a part). At all events, the Commission must be notified of any planned concentration.

2. Challenges and opportunities for developing countries in relation cross-border concentrations

12. One of the major opportunities that cross-border concentrations offer countries in the West African region in general, and Senegal in particular, is the possibility of attracting foreign direct investment. Over the past few years Senegal has introduced a programme to facilitate the creation and establishment of firms, which resulted in Senegal earning an honourable ranking in the 2009 and 2010 "Doing business" chart. Foreign investment works in a variety of ways, including the signing of contracts with national firms, acquisition of stakes in local firms by major foreign groups or the straightforward take-over of firms in difficulty, and concentration operations therefore represent an instrument for creating or strengthening certain firms in developing countries.

13. Against a background of economic difficulties marked by the economic and financial crisis, such opportunities for job and wealth creation are not necessarily viewed unfavourably by governments.

14. Another opportunity afforded by concentrations is the creation of major firms in the region which can compete effectively with foreign firms. By taking advantage of the competitive advantages of States, a number of firms in sectors such as the palm oil and sugar sectors (see the ruling attached in the annex) have merged in order to strengthen their market power. Such operations can be beneficial to consumers by lowering the prices of the products concerned.

15. Another opportunity afforded by international concentrations to developing countries is that of technology transfer operations, which can be highly rewarding in that signing contracts with major multinational groups can generate substantial benefits for national firms seeking new technologies and innovation.

16. Besides these opportunities for firms there are also many challenges that the competition authorities in developing countries will need to meet. These challenges consist in the prior review of concentration projects, the economic analyses that need to be performed to assess the potential effects of concentrations, control and penalty procedures, the search for relevant information in other jurisdictions, etc.

17. It is clear that after the failure of multilateral negotiations on competition, the lack of harmonised rules regarding the definition of good and bad concentrations and the criteria for judging between the two complicates the task of examining mergers and acquisitions for competition authorities. What is considered as a good concentration in Senegal, for example, may be seen as a bad concentration in France or another country. This situation is driving States into a madcap race to become competitive and attract foreign investment that is no longer the sole preserve of developing countries, as witnessed by the recent visits to China and India by the President of the French Republic.

18. Faced with this situation, the competition authorities in the WAEMU zone are encountering huge difficulties in examining concentration operations. By way of a reminder it is worth noting that, unlike the United States or the European Union which allow firms to assess the conformity of concentration or cartel operations directly so that they can be implemented without a need for notification, WAEMU Community competition legislation requires firms to give prior notification of any planned cartels or concentrations. As a result, the question arises as to the procedures that are applicable to concentrations carried out outside the zone whose impacts are felt within the Community market;

19. This raises the issue of international co-operation on compliance with competition law. To date, no bilateral co-operation agreements have been signed by the WAEMU Commission with competition authorities in developing or emerging countries. In addition, such co-operation, based on voluntary compliance, does not provide sufficient guarantees that proceedings will be taken to prosecute infringements of competition law and in particular concentrations in other jurisdictions.

20. Consequently, the WAEMU Commission must strengthen the prerogatives of national competition structures, which are sometimes the bodies best placed to monitor the market and detect any un-notified international concentration operations.

3. Conclusion

21. To sum up, the challenges relating to cross-border concentrations for developing countries lie firstly in their economic development needs and secondly in the need to protect small and medium-sized enterprises against the excessive power of foreign multinational firms. These occasionally conflicting objectives mean that competition authorities and States must strike a delicate balance in their actions.

22. In this respect, the competition authorities in developing countries must meet the following challenges:

- The continuation of multilateral negotiations to harmonise the rules governing concentrations in particular and anti-competitive practices in general;
- The creation of a supranational body, with substantial powers to prosecute infringements of competition law that go beyond national frameworks;
- The strengthening of international co-operation on competition through UNCTAD, the OECD, ICN, etc.;
- Revision of the United Nations Conference for the Review of the Set regarding the fair rules and principles agreed at the multilateral level for the control of restrictive business practices to transform it into an effective tool to combat cross-border anti-competitive practices.

ANNEX

WEST AFRICAN ECONOMIC AND MONETARY UNION

Commission

RULING NO. 009/2008/COM/UEMOA
GRANTING A NEGATIVE CLEARANCE REGARDING THE PLANNED CONCENTRATION BETWEEN UNILEVER-CI, SIFCA, COSMIVOIRE, PALMCI, NAUVU, PHCI, SHCI and SANIA

THE WEST AFRICAN ECONOMIC AND MONETARY UNION COMMISSION:

HAVING REGARD TO The UEMOA treaty, and in particular sections 88, 89 and 90;

HAVING REGARD TO Regulation No. 02/2002/CM/UEMOA of 23 May 2002 regarding anti-competitive practices within the West African Economic and Monetary Union;

HAVING REGARD TO Regulation No. 03/2002/CM/UEMOA of 23 May 2004 regarding the procedures applicable to cartels and abuses of dominant position within the West African Economic and Monetary Union;

HAVING REGARD TO The application submitted by the Law Firms EKDB and CMS, Bureau Francis Lefebvre, respectively located at Cocody II Plateaux, rue des jardins, 25 BP 1592 Abidjan 25, Côte d'Ivoire and 1-3 Villa Emile Bergerat 92522 Neuilly sur Seine Cedex, France, on behalf of the firms UNILEVER, SIFCA, COSMIVOIRE, PALMCI, NAUVU, PHCI, SHCI and SANIA;

After giving the Member States and the firms concerned an opportunity to present their comments and considering these comments;

Considering the opinion of the Competition Advisory Committee handed down at its fourth session held in Abidjan from 6 to 10 October 2008;

Considering the facts and grounds on which the Commission has based its decision and which are set out below:

A) Facts and procedure

1. By letter dated 25 June 2008, the law firms EKDB and CMS bureau Francis Lefebvre, both resident in Côte d'Ivoire, mandated respectively by Sifca, Cosmivoire and Palmci on the one hand, and Unilever CI on the other, jointly notified the WAEMU Commission of a planned agreement with a view to obtaining a negative clearance or, in the absence of the latter, an individual exemption.

The firms concerned were presented as follows:

Unilever Côte d'Ivoire SA, a company registered under Côte d'Ivoire law, with paid-up capital of 8 053 000 000 CFA francs, with head offices in Abidjan, Boulevard de Vridi, 01 BP 1751 Abidjan 01, specialised in the physical and chemical processing of all bodies of vegetable or synthetic origin with a view to obtaining detergent or industrial products based on fatty substances, as well as in the storage of oils, fatty substances and derivatives;

Sifca SA, a company registered under Côte d'Ivoire law, with paid-up capital of 3 000 000 000 CFA francs, with head offices in Abidjan, Boulevard du Havre, port zone, 01 BP 1289 Abidjan 01, whose corporate purpose is the design and performance of all kinds of operation aimed at the development of business, industrial and agricultural affairs in Black Africa;

Cosmivoire SA, a company registered under Côte d'Ivoire law, with paid-up capital of 4 254 470 000 CFA francs, with head offices in the Vridi industrial zone, 01 BP, whose corporate purpose is the procurement, storage, trading, representation, processing, formulation and commercialisation of all natural or artificial chemical and cosmetic products, all natural or artificial vegetable, animal or mineral oils, as well as all derivative products;

Palmci SA, a company registered under Côte d'Ivoire law, with paid-up capital of 20 000 000 000 CFA francs, with head offices on the Boulevard de Vridi, 18 BP 3321 Abidjan 18, specialised in the operation and development of palm oil plantations, land and agro-industrial establishment producing crude palm oil and palm kernels;

Nauvu Investments Pte Ltd (referred to hereinafter as **Nauvu**), a company registered under Singaporean law, with head offices at Temasek Boulevard – 29th floor – Suntec Tower Four – Singapore 038986, whose corporate purpose is wholesale business; a joint company consisting of the Wilmar Group, specialised in palm oil production and the Olam Group, which is active in the international trade in agricultural raw materials.

2. The aim of the agreement that is the object of the application is to carry out a concentration operation which should allow the parties to acquire a specialisation in the palm oil sector in Côte d'Ivoire.

It is therefore planned that on completion of the operation the following companies will remain in activity: Unilever Côte d'Ivoire, which will devote itself exclusively to activities relating to soap-making, and the companies Sifca and Nauvu which will specialise in the production and exploitation of crude and refined oil.

The notification filed by the companies involved in the operation comprises the following items:

- A letter signed by Ibrahima Bah and Soualiho Diomand from the EKDB law firm, and by Olivier Benoit and Benoît Philippe from the CMS bureau Francis Lefebvre law firm acting as the legal representatives of the applicant companies;
- Three copies of the mandates given respectively by the company Unilever to the Francis Lefebvre law firm, and by the companies Sifca, Cosmivoire and Palmci to the EKDG law firm;
- Three copies of the framework agreement signed by the parties to the operation;
- Three copies of the annual reports and accounts of the companies Sifca, Unilever, Cosmivoire, Palmci, Phci, Wilmar, Olam and Nauvu;
- Three copies of the West African Development Bank (BOAD) Study on the promotion and development of oil sector in the WAEMU area;

- Three copies of the Study by the CCA CY consultancy on the oil sector, commissioned by Cosmivoire and Unilever;
- Three copies of Internet articles regarding hand-made soap production..

Originals or certified true copies of all these documents were provided.

3. With regard to the provisions of Regulation No. 3/2002/CM/UEMOA of 23 May 2002 on the procedures applicable to cartels and abuses of dominant position, the Commission considered that the notification had been made in accordance with the requisite conditions. In order to open the notification review procedure, the Commission completed the following formalities in pursuance of articles 10.4 and 28.1 of the above-mentioned Regulation:

- Issuing of an acknowledgment of receipt to the applicants in the form of letters Nos 06571/PC/DMRC/DConc and 06572/PC/DMRC/DConc of 1 August 2008;
- Forwarding of a copy of the notification file to the competent authorities in Member States;
- Publication of the planned concentration on the WAEMU web site and in two legal announcement journals by Member States.

4. Within the period specified by the act of publication of the notification (one month), the Commission registered the written comments of the two Member States and a Senegalese firm, namely:

- Togo in letter No. 909/MCIAPME/DCIC of 5 September 2008;
- Niger in letter No. 0587/MCI/N/DCI/C of 10 September 2008;
- the firm Suneor in a letter dated 9 September 2008.

The Commission received comments by Burkina Faso on 16 September 2008.

5. In response to the reservations regarding certain sections of the accessory agreement formulated by the Commission in letter No. 07799/DMRC/DConc of 18 September 2008, the applicants provided additional information in a letter dated 23 September 2008.

B) <u>Explanation of issue</u>

6. The application made to the Commission is primarily aimed at obtaining a negative clearance regarding a concentration operation in the palm oil sector in Côte d'Ivoire.

A petition was therefore made for application of Article 88 b of the Treaty, of Article 4 of Regulation No. 02/2002/CM/UEMOA of 23 May 2002 regarding anti-competitive practices within the WAEMU, and Article 3 of Regulation 03/2002/CM/UEMOA of 23 May 2002 regarding the procedures applicable to cartels and abuses of dominant positions.

The issue at stake is to verify whether the market shares that are declared to be held by the firms party to the concentration operation places them individually or collectively in a dominant position in the oil and soap-making sectors.

7. The secondary and accessory purpose of the application by the parties to the operation is to seek to benefit from an exemption in the event that their application fail in its primary aim. In support of this request, they have cited the economic benefits that would accrue from implementation of the notified agreements.

In such an eventuality, the aim would be to apply Article 88 a) of the Treaty, of Article 3 of Regulation No. 02/2002/CM/UEMOA of 23 May 2002 regarding anti-competitive practices within the WAEMU, and Article 7 of Regulation 03/2002/CM/UEMOA of 23 May 2002 regarding the procedures applicable to cartels and abuses of dominant positions.

C) Analysis of the applicants' arguments

8. As presented in the concentration operation notification file, a distinction had to be drawn between the main agreement relating to the assets of the firms, and their governance, and the accessory agreements relating to the activities and business relations between these firms.

Since Community regulations did not specify the procedure for examining accessory agreements in the event of a concentration, such agreements had to be evaluated in accordance with the principles laid down for the review of cartels.

9. In the WAEMU system, *a priori* review of concentration operations is conducted indirectly, in accordance with the provisions of Article 89 b) of the Treaty which prohibits practices that are tantamount to abuse of a dominant position.

A definition of such practices is given in Article 4 paragraph 2 of Regulation No. 02/2002/CM/UEMOA of 23 May 2002 regarding anti-competitive practices within the WAEMU which states that: "concentration operations which create or strengthen a dominant position held by one or more firms, the outcome of which is to significantly impede effective competition within a common market, are deemed to constitute a practice that is tantamount to abuse of a dominant position."

Two conditions must be met in order to meet the above definition, namely: the creation or strengthening of a dominant position, and the significant hindering of effective competition within the Common Market.

10. With regard to the first of the above conditions, the applicant parties argued that no dominant position existed either before or after the concentration on the basis of their respective market shares in the edible oil sector, where Sifca and Navu would have a share of merely 13%, and in the soap-making sector where Unilever would have 24% of the market.

Such an argument is assessed on the basis of the following parameters: access to raw materials, the scale of trade within the Community, and imports from outside the Community.

With reference to the production of the crude palm oil (CPO) from which the refined oil and soap are obtained, a restrictive definition of the geographical market could limit the analysis solely to the Côte d'Ivoire market where approximately 89% of the regional total is concentrated (source: West African Development Bank (BOAD) study report of April 2008).

Moreover, since production in Côte d'Ivoire is largely consumed locally by industry and small-scale processing firms, there is not much trade in this product (CPO) within the Community. The parties to the notified operation account for around 70% of this production, either from plantations exploited on own account or from managed village-owned plantations.

Consequently, the planned operation will result in the companies Sifca and Nauvu becoming market leaders for local trade in the raw material.

11. However, it is difficult to deduce from this situation that these firms occupy a dominant position for at least the following reasons:

- if account is taken of imports of palm oil, soya oil and other fatty substances to the region, it is unlikely that the parties to the operation could free themselves from the constraints of competition, particularly in view of the fact that the edible oil sector in the region does not offer strong competition to imports from Asia in particular;
- there is a high degree of auto-consumption in the sector;
- raw material (CPO) prices are determined on the basis of world commodity prices and are regulated by the Association Interprofessionnelle du Palmier à l'Huile.

12. With regard to industrial edible oil and soap-making activities, the market shares declared by the notifying parties are smaller (13.9% of total consumption of edible oil in the regional market for Unilever and Cosmivoire together, and 28.6% for soap).

Without confirming the accuracy of the figures provided, it is nonetheless possible to note, from the official statistics, that the market power is highly dispersed both for soap and for edible oil in which there is considerable trade within the Community.

13. Imports of edible oils and soap from the rest of the world also account for a significant share of the regional market and exert very strong competitive pressure on the local edible oil sector.

14. Account must also be taken of the non-negligible share of cottage industry production of oil and soap which is aimed largely at local consumers but which is also traded informally within the Community. The markets shares of this sector are evaluated in the study provided by the notifying parties at around 21% for soap and 32% for edible oil.

In view of the above, the conclusion can be drawn that the notified concentration operation neither creates nor strengthens a dominant position and as a result is not prohibited under Article 88 b) of the Treaty.

15. Seen from this standpoint, the possibility that the outcome of the creation or strengthening of a dominant position might be a significant impediment to competition of the type that is banned under the Treaty should be dismissed *de facto*.

16. Consequently, the notified concentration operation should benefit from a negative clearance as provided for in Article 3 of Regulation No. 03/2002/CM/UEMOA of 23 May 2002 regarding the procedures applicable to cartels and abuses of dominant positions within the WAEMU.

17. However, it seems necessary to indicate the extent to which this negative clearance could cover the agreements notified by the parties, as accessories to the concentration operation.

In this respect, consideration must be given to the provisions of Article 88 a) of the Treaty which prohibits agreements between firms whose purpose is or might be to restrict or distort the free play of competition within the Union.

This prohibition is aimed, *inter alia*, at "agreements to divide up markets or procurement sources and in particular those relating to absolute territorial protection, agreements to limit or control production, outlets, technical development or investment, etc."

18. With regard to these provisions, the Commission has issued reservations regarding the following clauses which it considers restrict competition more than it is necessary to do so:

- article 5.3 b) of the stearine supply contract whose implementation could deny competitors all access to the raw material;
- article 21 of the supply contract between Unilever-CI and Africo-CI for the manufacture of packaging which would not be transferred as-is to the Sifca company in that its application could deny competitors access to services supplied by Africo-CI and its affiliates, without this restriction being justified under any industrial property rights.

19. The arguments presented by the applicants stress the fact that the non-competition agreements and stearine supply contract accompanying the concentration operation are necessary to ensure a proper transition for the firms, which need to adapt to their new environment and restructuring.

20. Since this point of view was not sufficient to justify the restrictions in question, the Commission felt that it would be helpful to amend the accessory agreements to remove the two clauses regarding which it had issue reservations from the scope of the negative clearance.

21. Moreover, in order to prevent the restrictions on competition from being prolonged for longer than was needed, it proved necessary to carry out an assessment of the impacts of accessory agreements on market operation at the end of the fifth year of their implementation.

Having made this recital, the Commission

Hereby rules as follows:

Article 1

A negative clearance is granted with regard to the planned concentration between the companies UNILEVER, SIFCA, COSMIVOIRE, PALMCI, NAUVU, PHCI, SHCI and SANIA.

Article 2

The present negative clearance shall cover the concentration operation as well as all accessory agreement notified, except for Article 5.3 b) of the stearine supply contract between Unilever CI, Sania, Unilever plc and Nauvu as well as Article 21 of the supply contract between Unilever CI and Africo CI for the manufacture of packaging.

Article 3

The intended recipients of the present decision are the companies Unilever CI, Sifca, Cosmivoire, PALMCI, Nauvu, PHCI, SHCI, Sania and their affiliates.

Article 4

An assessment shall be made of the implementation of the accessory contracts covered by the negative clearance five years after the date of notification of the present decision to the parties to which it is addressed.

Article 5

The present decision, which will enter into force on its date of signature, will be published in the Official Journal of the Union.

Done in Ougadougou on 22 October 2008
On behalf of the Commission
The Chairman

[Signature and official stamp of the Chairman of the West African Economic and Monetary Union Commission]

Soulaïla Cissé