

COURT OF JUSTICE
OF THE WEST AFRICAN ECONOMIC AND
MONETARY UNION (WAEMU)

PUBLIC HEARING OF 22 FEBRUARY 2012

Preliminary ruling no.
01/2012 of 22 FEBRUARY 2012

Case: SUNEOR SA & others

C/

- 1) UNILEVER CI & others
- 2) UEMOA Commission
(intervening party)

The Court of Justice of UEMOA sitting in ordinary session with :

- **Mr Ousmane DIAKITE, Chairman**
- **Mr Daniel LOPES FERREIRA,**
- **Mrs Ramata FOFANA,**
- **Mr Abraham D. ZINZINDOHOUE,**
- **Mr Hamidou Salifou KANE,**

Judges

In the presence of **Mr Dabré GBANDJABA, 1st Advocate General,**
With the assistance of **Maître Fanvongo SORO,**
Clerk

has given the following judgment before deciding the matter:

Between :

SUNEOR SA and the companies SODEFITEX, SN- CITEC, NIOTO-SA, and SOCOMA-SA, assisted by Maître François SARR, Avocat à la Cour at the Senegalese Bar, Maître Rasseck Bourgi, Avocat au Barreau de Paris - 10 Rue du Chevalier de Saint-George 75001 Paris, Maître Mamadou S. TRAORE, Attorney at Law at the Burkina Faso Bar, Villa Place Naba Koom, 11 BP : 721 OUAGADOUGOU 11 and Maître Mamadou SAVADOGO, Attorney at Law at the Burkina Faso Bar, 01 BP. 60412 OUAGADOUGOU 01;

on the one hand ;

Action for annulment of Decision No
009/2008/COM/WAEMU
of 22 October 2008

AND

1. UNILEVER Côte d'Ivoire, SIFCA, COSMIVOIRE, PALMCI, NAUVU and PHCI, represented by LEXWAYS, Société d'Avocats, Cocody 2 Plateaux, ENA, 25 BP 1592 ABIDJAN (Côte d'Ivoire) and CMS Bureau Francis LEFEBVRE, 1-3 Villa EMILE Bergerot, 92522 Neuilly-Sur-Seine Cedex, France

on the other hand ;

2. The UEMOA Commission, intervening party, represented by its Agent Mr Eugène KPOTA, Director of Legal Affairs, assisted by Maître Harouna SAWADOGO, Member of the Burkina Faso Bar, 01 BP : 4091 OUAGADOUGOU 01,

on the other hand ;

By application dated 02 July 2009, registered at the Registry of the WAEMU Court of Justice under number 06/09 of 06 July 2009, SUNEOR-SA, a public limited company with a Board of Directors, with a capital of FCFA 22,626,570,000, and SODEFITEX, SN-CITEC, NIOTO-SA, et SOCOMA-SA, through their counsel, Maître François SARR, Avocat à la Cour at the Senegal Bar and Maître Rasseck Bourgy, Avocat at the Paris Bar, seek the annulment of Decision No 009/2008/COM/UEMOA of 22 October 2008, granting a negative clearance to the defendants as being vitiated by illegality;

By various letters from the Registrar of the Court, the pleadings and procedural documents prescribed by the Additional Act establishing the Statute of the Court and its Rules of Procedure were communicated;

Following the closure of the written procedure, the case was raised in open court on Wednesday 02 November 2011, on which date it was adjourned to Wednesday 11 January 2012, on which date the report of the case was read by the Judge-Rapporteur and the case was argued by the parties, the First Advocate General presented his conclusions and the case was reserved for Wednesday 22 February 2012, on which date the Court ruled as follows:

THE COURT

HAVING REGARD TO the application dated 02 July 2009, registered at the Registry of the WAEMU Court of Justice under number 06/09 of 06 July 2009, submitted by Maître François SARR, Avocat à la Cour at the Senegal Bar and Maître Rasseck BOURGY, Avocat au Barreau de Paris on behalf of SUNEOR-SA, a public limited company with a Board of Directors, with capital of FCFA 22,626,570,000 and the companies SODEFITEX, SN-CITEC, NIOTO-SA and SOCOMA-SA;

HAVING REGARD TO the letters dated 9 July 2009 notifying the Chairman of the Commission, UNILERVER SA, PALM CI, NAUVU, COSMIVOIRE SA and SIFCA SA of the said request;

HAVING REGARD to Order No 16/2009/CJ granting additional time to Counsel for UNILEVER Côte d'Ivoire et al;

HAVING REGARD TO the statement of defence dated 08 September 2009, submitted by Cabinet d'Avocats Harouna SAWADOGO on behalf of the WAEMU Commission;

HAVING REGARD TO the statement of defence dated 08 October 2009 from LEX WAYS, counsel for UNILEVER et al;

HAVING REGARD TO the letters dated 28 September and 09 October 2009 notifying the defence ;

HAVING REGARD TO the reply briefs of 08 November 2009 and 19 November 2009 submitted by François SARR ;

HAVING REGARD TO the letters dated 5 and 20 November 2009 notifying the parties of the reply ;

HAVING REGARD TO the statement of case submitted by the law firm Harouna SAWADOGO, dated 23 December 2009 on behalf of the WAEMU Commission, entitled "Statement of Case";

HAVING REGARD TO the letters dated 11 January and 12 February 2010 notifying the submissions received;

HAVING REGARD TO the rejoinder of LEXWAYS dated 11 February 2010, counsel for UNILEVER & Autres;

HAVING REGARD TO the letter of incorporation from Mr Mamadou S. TRAORE on behalf of the applicants, notified to the Court on 17 March 2010;

HAVING REGARD TO summary brief No. 02 dated 12 March 2010 from Mr Mamadou S. TRAORE ;

HAVING REGARD TO the second rejoinder of LEXWAYS dated 21 July 2010, counsel for UNILEVER et al;

HAVING REGARD TO the other documents produced and attached to the file;

VU the Treaty of the West African Economic and Monetary Union dated 10 January 1994, in particular Article 38 ;

HAVING REGARD TO Additional Protocol I on the supervisory bodies of the WAEMU ;

HAVING REGARD T O Additional Act No. 10/96 of 10 May 1996 on the Statutes of the Court of Justice of the WAEMU ;

HAVING REGARD TO Regulation No. 01/96/CM of 5 July 1996 on the Rules of Procedure of the WAEMU Court of Justice;

HAVING REGARD TO Regulation No. 01/2000/CDJ of 6 June 2000 repealing and replacing Regulation No. 1/96/CDJ on the Administrative Rules of the WAEMU Court of Justice;

HAVING R E G A R D T O Additional Act n°03/CCEG/UEMOA of 20 January 2007 on the renewal, appointment and termination of the mandates of members of the Court of Justice of UEMOA;

HAVING REGARD TO Additional Act n°05/CCEG/UEMOA of 18 May 2007 appointing and ending the term of office of a member of the Court of Justice of UEMOA ;

HAVING REGARD T O Minutes No 01/2010 of 13 April 2010 on the appointment of the President and the allocation of functions within the Court of Justice of the WAEMU;

HAVING REGARD TO Order No 002 of 11 March 2011, composing the full Court to hear the case of SUNEOR and Others v. UNILEVER and Others;

HEARD Mrs Ramata FOFANA, Rapporteur, in her report;

WHEREAS Maîtres Ibrahima BAH and Soualiho DIOMANDE, lawyers with LEXWAYS, in their oral observations;

ORDERED Mr SAMA Issa, Avocat representing Cabinet Harouna SAWADOGO, Counsel for the WAEMU Commission, to give his oral observations;

HEARD Mr Mamadou SAVADOGO and Mr Vincent KABORE of Cabinet Mamadou SAVADOGO, Lawyers for SUNEOR SA and others, in their oral observations;

HEARD Mr BAYALA Rodrigue of the Mamadou TRAORE Law Firm, Counsel for SUNEOR SA and others, in his oral observations;

HAVING heard the Opinion of the First Advocate General, Mr Dabré GBANJABA;

Having deliberated in accordance with Community law :

Considering that in merger control matters, the WAEMU Commission is institutionally the legitimate expert in competition matters in the WAEMU, and that it took its decision on the basis of a set of elements, such as the study reports, the foreign trade statistics available to the Commission, the information obtained from the countries following its publication of the merger project, the assessment elements drawn from the BOAD study report of April 2008, and the consultation of the Advisory Committee on Competition;

That even if the WAEMU Commission was not obliged to carry out itself the investigations necessary for the verification of the assertions contained in the file of the companies requesting the concentration, and that even if the adversarial procedure provided for in article 16, is not an obligation, it had in a transaction of this scale which concerns a vital economic sector for the Member States of the Union, to implement the provisions envisaged by articles 19 and 20 of the Regulation n° 02/2002, i.e. to carry out verifications;

That the Commission only verified the information provided by the applicant companies, in particular the report drawn up by the associated consultancy firm COFFI and YAHAUT (CCA-COFFI).

CY) at their request, the BOAD 2008 report and the opinion of the Advisory Committee on Competition, composed of members who are nationals of the eight (8) States of the Union, two (2) from each State;

But considering that even if the report BOAD makes an analysis provided on the promotion and the development of the oleaginous field in the space UEMOA, it does not establish the specific share which each of the companies parties to the operation of concentration has within the Community market; With regard to the report CCA-CY, it a was

As for the report of the Advisory Committee on Competition, it contains the Committee's approval of the merger on the grounds that the transaction did not lead to the creation or strengthening of a dominant position, and that

"although it reduces the number of participants in each branch of activity, it does not have the effect of eliminating all competition in the sector". However, the report does not provide any evidence to support their assertions.

Even if, according to WAEMU competition legislation (see Annex 2 to Regulation 03/2002 on the specification of Form N), merger applicants must provide, in addition to the annual reports and accounts of their companies, a study of the market situation in support of their application, the Commission should not be content to accept the allegations made by merger applicants. It had to carry out the necessary verifications itself or through an independent expert;

Considering the foregoing, it appears that, as the case stands, the Court does not have sufficient evidence to assess the legality of the contested decision, and does not have the necessary powers to determine factors such as the price differentials between palm oil and palm oil.

and other substitutable oils, as well as the existence and scale of imports of crude palm oil from Asia, on the prices charged and, above all, to determine whether there is any abuse of the dominant position of the undertakings benefiting from the merger;

Whereas, in his Opinion, the First Advocate General suggested that the Court should :

Firstly: on the basis of Article 40 of the Rules of Procedure, to request the parties, in particular the WAEMU Commission, to produce all documents and provide all information needed to assess the consequences for competition of the implementation of the merger between the companies referred to in Article I of Decision No 09/2008 of 22 October 2008; and/or

Secondly, pursuant to Article 42 of the Rules of Procedure, the appointment of an expert to advise the Court on the impact of the merger, including in terms of market shares in the oilseed sector;

In order to be able to make an informed decision, it would appear necessary to have much more information, and to do this :

- request the WAEMU Commission to provide additional documents and information in order to enlighten the Court, in accordance with the provisions of Article 40 of Regulation No. 1/96/CM on the Rules of Procedure;
- appoint a qualified person, as provided for in Articles 40, 42 and 49 of the Rules of Procedure, to provide a report that will enlighten the Court.

FOR THESE REASONS :

The Court, sitting in open court, having heard all the parties, and in proceedings for annulment ;

FORE-RIGHT :

Requests the UEMOA Commission to provide the Court within two (2) months with all information and documents enabling a better assessment of the economic consequences of the implementation of the concentrations in terms of competition;

failing this, and on expiry of this two-month period, the Court will order :

the appointment of an expert, at the expense of the applicant companies, to carry out a study of the relevant EU market in order to determine whether or not the merger has led to the creation or strengthening of a dominant position;

The expert appointed must therefore :

1. determine the price differential between palm oil and other major oils;
2. determine the existence and importance of palm oil imports from Asia on prices;
3. determine whether there is any abuse of the dominant position of the beneficiary companies;

reserves the costs,

and signed by the Chairman and the Registrar.