JUDGMEN
T NO.
002/2018
09 MAY 2018

Action for annulment of a Competition Law Decision

SUNEOR-SA, SODEFITEX, SN-CITEC, NIOTO-SA, SOCOMA-SA

C/

The companies UNILEVER CI (UCI), SIFCA -SA, COSMIVOIRE, PALMCI, NAUVU, SANIA

Composition of the Court :

- **Mrs Joséphine Suzanne EBAH TOURE, President ;**
- **Mr Salifou SAMPINBOGO, Judge ;**
- **Mr Daniel Amagoin TESSOUGUE, Judge-Rapporteur, Judge;**
- **Mr Euloge AKPO, Judge ;**
- **Mr Augusto MENDES, Judge ;**
- **Mr Yaya Bawa ABDOULAYE, First Advocate General ;**
- **Me Boubakar TAWEYE MAIDANDA Registrar.**

EXTRACT FROM THE MINUTES OF THE REGISTRY OF THE COURT OF JUSTICE OF THE WEST AFRICAN ECONOMIC AND MONETARY UNION (WAEMU)

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PUBLIC HEARING OF 09 MAY 2018

The Court of Justice of the WAEMU, meeting in ordinary public session on the ninth day of May in the year two thousand and eighteen, in which were seated :

Mrs Joséphine Suzanne EBAH TOURE, President ;

Mr Salifou SAMPINBOGO, Mr Daniel Amagoin TESSOUGUE, Judge-Rapporteur, Mr Euloge AKPO, Mr Augusto MENDES, Judges; in the presence of Mr Yaya Bawa ABDOULAYE, Advocate General;

with the assistance of Mr Boubakar TAWEYE MAIDANDA, Registrar ;

has rendered the following judgment:

BETWEEN :

SUNEOR, Société de Développement des Fibres Textile (SODEFITEX), Société Nouvelle huilerie et Savonnerie (SN-CITEC), Nouvelle Industrie des oléagineux du Togo (NIOTO SA), Société Cotonnière du Gourma (SOCOMA-SA) acting through their counsel Maître François SARR, Avocat au barreau du Sénégal, Maîtres Mamadou TRAORE, Mamadou SAWADOGO, all avocats à la Cour, Ouagadougou-Burkina Faso, Maître Rasseck BOURGI, Avocat au Barreau de Paris, with an address for service at Cabinet François SARR

Plaintiffs, on the one hand ;

AND

UNILEVER CI (UCI), Société Ivoirienne de Financement du Café et du Cacao, COSMIVOIRE-SA (COSMIVOIRE), Palmier de Côte d'Ivoire (PALMCI-SA), Nauvu Investment Private Limited (NAUVU), SANIA et Compagnie (SANIA)

represented by Mr Ibrahim B. BAH, Cabinet LEX-WAYS Avocats à la Cour d'Appel d'Abidjan, and Mr Olivier Benoit and Pierre MARLY CMS, Bureau Francis LEFEVRE Neuilly sur seine, France

Defendants, on the other hand ;

Commission of the West African Economic and Monetary Union (UEMOA) represented by Mr Eugène KPOTA, Director of Legal Affairs of the Commission; assisted by Maître Harouna SAWADOGO, Avocat à la Cour, Ouagadougou-Burkina Faso;

Intervening party

THE COURT

HAVING REGARD TO the Treaty of the West African Economic and Monetary Union dated 10 January 1994, as amended on 29 January 2003;

HAVING REGARD TO Additional Protocol No. 1 on the supervisory bodies of the WAEMU ;

HAVING REGARD TO 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 05 July 1996 on the Rules of Procedure of the WAEMU Court of Justice;

HAVING REGARD **TO** Regulation n°01/2012/CJ of 21 December 2012 on the Administrative Rules of the Court of Justice of the WAEMU ;

HAVING REGARD to Minute No. 01/2016/CJ of 25 May 2016 on the appointment of the President of the Court and the distribution of functions within the Court;

HAVING REGARD TO Minutes No 02/2016/CJ of 26 May 2016 relating to the swearing-in and installation of the members of the WAEMU Court of Justice;

HAVING REGARD to Order N°11/2018/CJ on the composition of the plenary session to sit in ordinary public hearing of 14 March 2018 rectified by Order N°13/2018/CJ ;

HAVING REGARD TO the summonses of the parties ;

HAVING REGARD TO the application dated 02 July 2009, registered at the Registry of the Court of Justice of the West African Economic and Monetary Union (WAEMU) on 06 July 2009, under number 06/09 by which the companies SUNEOR SA, SODEFITEX, SN CITEC, NIOTO SA and SOCOMA, through their counsel, Maître François SARR, Avocat à la Cour at the Senegal Bar, brought an action for annulment of Decision No 009/2008/COM/UEMOA of 22 October 2008, granting a negative clearance to the defendants, as being vitiated by illegality;

HEARD the Judge-Rapporteur in his report;

HEARD Counsel for SUNEOR SA, SODEFITEX, SN CITEC, NIOTO SA and SOCOMA in their oral observations;

HEARD counsel for the defendants UNILEVER-SA, SIFCA-SA, COSMIVOIRE- SA and NAUVU Investissement PTE-LTD, PALMCI -SA in their oral observations;

HAVING heard the oral observations of the Council of the WAEMU Commission, intervener ;

HEARD the Opinion of the Advocate General ;

Having deliberated in accordance with Community law :

I. FACTS AND PROCEDURE

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 capital of FCFA 22,626,570.000 FCFA and the companies SODEFITEX, SN-CITEC, NIOTO-SA, and SOCOMA-SA, through their counsel, Maître François SARR, Avocat à la Cour at the Senegal Bar and Maître Rase Bourg, Avocat at the Paris Bar, are seeking 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.

The application was served on 09 July 2009 on the defendant companies UNILEVER-SA, SIFCA-SA, COSMIVOIRE-SA and NAUVU Investissement PTE-LTD,
PALMCI -SA and the WAEMU Commission.

In its application filed on 06 July 2009, SUNEOR explained that the WAEMU Commission's decision of 22 October 2008, granting a negative clearance to UNILEVER and others allowing them to concentrate, placed them in a dominant position with the consequence of significantly affecting competition on the WAEMU market.

By decision n°009/2008/COM/UEMOA of 22 October 2008, the UEMOA Commission issued a negative clearance concerning the proposed merger between UNILEVER-SA, SIFCA-SA, COSMIVOIRE-SA and PALMCI - SA,
NAUVU, PHCI, SHCI and SANIA. This certificate covers the entire merger and its ancillaries, with the exception of the contract for the supply of stearin between UNILEVER-CI, SANIA and AFRICO-CI for the manufacture of packaging; according to the terms of the decision, the agreement which is the subject of the application was intended to bring about a merger which should enable the parties involved to specialise in the palm oil sector in Côte d'Ivoire.

After the transaction, UNILEVER-CI is expected to remain in business, focusing exclusively on soap production, while SIFCA and NAUVU will specialise in the production and use of crude and refined oil.

In support of its decision, the Commission pointed out that the production of crude

palm oil (CPO), from which refined oil and soap are obtained, was a major concern for the company,

a restrictive definition of the geographic market could limit the analysis to the Côte d'Ivoire market alone, which accounts for around 89% of the regional total.

Moreover, as much of Côte d'Ivoire's production is consumed locally by industrialists and small-scale processors, there will be less intra-Community trade in the raw product (CPO). The parties to the notified transaction occupy around 70% of this production, either through plantations they operate themselves or through supervised village plantations.

The plaintiffs explained that the Commission wrongly considered that SIFCA and NAUVU were not market leaders and did not consider that the proposed merger would allow a dominant position to be inferred for the reasons that, taking into account imports of palm oil, and other fats in the region, it is unlikely that the parties to the merger would be able to avoid the constraints of competition, especially as the oilseed sector in the region is not very competitive compared with imports from Asia in particular.

Thus, even if the Commission considered, in the light of all the documents submitted to it, that the proposed merger did not place the undertakings involved in the merger individually or collectively in a dominant position in the oil and soap industries, its decision is vitiated by illegality, since the proposed merger constitutes a practice tantamount to an abuse of a dominant position which has the effect of significantly impeding competition within the WAEMU Community Market.

Consequently, they consider themselves to be victims of an abuse of a dominant position on the part of the defendant companies, which is the basis of their application to have the decision of 22 October 2008 annulled, insofar as this decision adversely affects them and is vitiated by illegality.

In reality, the effect of this certificate is to exclude all companies in the refined vegetable oil and soap sectors from the EU oilseed market.

On 08 July 2009, by order no. 12/09/CJ, the Court set the bond at the sum of FCFA 100,000, which was paid.

The application was served on the UEMOA Commission and the defendant companies on 09 July 2009.

By letter dated 21 July 2009, the WAEMU Commission appointed Mr Eugène KPOTA, Director of Legal Affairs, as its Agent.

Following service of the application, UNILEVER-CI and others filed a statement of defence on 06 October 2009, through their counsel, LEX-WAYS, Cabinet d'avocats, followed by the statement of defence of the WAEMU Commission produced by Maître SAWADOGO Harouna, Avocat constitué pour assister l'Agent de l'Union, on 08 September 2009.

On 28 October 2009, the plaintiff company SUNEOR filed a reply to the Commission's statement of defence, followed by another reply to UNILEVER's pleadings filed on 17 November 2009.

On 23 December 2009, Mr Harouna SAWADOGO filed a reply on behalf of the Commission in response to the various submissions of the plaintiffs.

On 10 February 2010, the defendant companies, UNILEVER-CI and others, filed a rejoinder, followed on 12 March 2010 by a summary brief filed by Maître TRAORE Mamadou, Avocat, who was appointed during the proceedings on 2 February 2010.

The parties were notified of this summary on 15 and 18 March 2010, prompting the defendants to respond by filing written submissions on 21 July 2010. These last submissions put an end to the exchanges and marked the end of the written proceedings.

By Order No 07/2016/CJ of 07 September 2016, Judge Daniel Amagoin TESSOUGUE was appointed Judge-Rapporteur.

II. PRESENTATION OF THE PARTIES' CLAIMS

A. The applicants' claims and arguments

In support of their claim, SUNEOR and others explain that the WAEMU Commission's decision confirms the dominant position of UNILEVER-CI and its partners in the Community market, since, under the terms of Article 4 of Regulation No 02/2002/CM/UEMOA of 23 May 2002 concerning anti-competitive practices within UEMOA, "it is incompatible with the common market and prohibited for one or more undertakings to abuse a dominant position in the common market or in a significant part of it .... ". According to the same article, "...concentrations which create or strengthen a dominant position held by one or more undertakings, as a result of which effective competition within the common market is significantly impeded, constitute an anti-competitive practice amounting to an abuse of a dominant position";

In issuing the certificate, the Commission did not initiate an adversarial procedure in accordance with the provisions of Articles 13 and 16 of Regulation 03/2002/CM/UEMOA of 23 May 2002 and did not follow up on the reservations expressed by SUNEOR regarding the proposed merger.

Despite the aforementioned reservations and many others issued by States or parties, SUNEOR is aware that on 06 May 2009 the Commission issued a decision granting negative clearance.

In order to obtain this certificate, the merging companies argued that they did not have a dominant position before and after the merger, basing their arguments on their respective market shares in the edible oil sector, where SIFCA and NAUVU would have a market share of only 13%, and in the soap sector, where UNILEVER would have a market share of 24%.

However, according to the plaintiffs, the defendants' dominant position can be demonstrated by several arguments. :

1. **Firstly, by analysing the market share of refined oils.**

This analysis of the oil market shows that from 2002 to 2006, the market was essentially made up of refined soya vegetable oil produced by local industries and imported refined palm oil.

While the first category has always occupied almost 70% of the market, it lost 33% of market share between 2003 and 2005 to palm oil imports, whose market share rose from 12% to 53% between 2002 and 2005.

Other oils, mainly table oils, account for 5 to 7% and groundnut oils for 2%, with the exception of 2002, when 20,000 tonnes of refined groundnut oils were marketed in Senegal due to the fall in world prices for crude groundnut oils.

2. **Secondly, by intra-WAEMU imports and exports.**

The intra-Community market for refined vegetable oil is monopolistically dominated by Côte d'Ivoire, which has sufficient quantities of the raw material, crude palm oil, produced in particular by PALM-CI;

Ivorian exports are made by the defendant companies (UNILEVER and COSMIVOIRE, through their DINOR and PALM d'OR brands).

The practices engaged in by the defendant companies have the effect of restricting and distorting free competition and destroying the agro-industrial oilseed sector, most of which is based in WAEMU member countries.

And given that the cost of producing crude palm oil is much lower in South-East Asia and Côte d'Ivoire, EU member countries are tempted to import palm oil, which costs less than peanut and cottonseed oils.

The applicants go on to state that Côte d'Ivoire, where the defendant companies are based, imports refined palm oil from third countries for

They also cite examples of practices by the defendant companies, such as SANIA, which under-invoices for its products in Burkina Faso, Niger and Mali. They also cite examples of practices by defendant companies such as SANIA, which under-invoices for their products in Burkina, Niger and Mali, with the consequent risk of putting an end to the industrial and commercial activities of Burkinabe companies such as SN-CITEC and others, with all the social repercussions that would ensue. By way of example: in Burkina Faso, a drum of palm oil from Côte d'Ivoire enters the Burkinabe customs cordon at FCFA 5,000, whereas the ex-factory price is between FCFA 9,500 and FCFA 10,000.
10,000 FCFA. Such actions are severely penalising the national cotton industry in Burkina Faso.

The applicant companies consider that, in addition to costing States such as Burkina Faso at least 50% in customs revenue, under-invoicing practices place SANIA in a de facto dominant position on the Burkina Faso market.

The applicants thus consider that massive imports of palm oil and an intentionally anti-competitive pricing policy have given the defendants a dominant position in the UEMOA market and that the contested concentration is intended only to strengthen that dominant position with the aim of further increasing the possibilities of controlling the market.

They therefore ask the Court to annul the Commission's decision of 22 October 2008 in so far as it adversely affects them, after allowing them to bring an action for annulment, and to order the defendant companies to pay the costs.

In conclusion, SUNEOR and others request that the Court:

- in limine litis: to declare itself competent ;
- declare that the action was brought within the prescribed time-limits and consequently reject all the pleas of inadmissibility raised by the Commission and the defendants;
- declare that the action is directed against the contested measure;
- declare that the Registrar has notified the request to the WAEMU Commission;
- declare that the Commission has intervened voluntarily in the proceedings;

- uphold the plaintiffs' action for annulment of decision no. 009/2008 of 22 October 2008 and consequently :

    - annul the decision;

    - order the defendants to pay the costs;

- in the alternative, appoint an expert to establish the evidence of the dominant position of the defendant companies as a result of the proposed merger.

B. <u>Defendants' claims and arguments</u>

In response to this request, the companies SIFCA-SA, UNILEVER-CI SA, COSMIVOIRE-SA, PALMCI-SA and NAUVU Investissement Private Limited, through their counsel Mr Ibrahim BAH, Cabinet LEX-WAYS, in their statement of defence dated 06 October 2009, rejected the arguments of the applicants and raised the lack of jurisdiction of the WAEMU Court of Justice, the inadmissibility of the request in form, the dismissal of the main action brought;

The agreement concluded by UNILEVER-CI on the one hand and SIFCA and NAUVU on the other aims to restructure the palm oil and soap industry in Côte d'Ivoire. Following the merger, the industrial and commercial activities of the companies involved in oil palm plantations and the extraction of crude palm oil will be operated by PALMCI, those relating to the refining of palm oil and the production of stearin will be operated by SANIA, while those relating to the manufacture and marketing of soap will be operated by UNILEVER-CI.

To this end, several businesses and shareholdings in subsidiaries were sold between UNILEVER-CI on the one hand, and SIFCA and NAUVU on the other.

Eight (8) industrial companies were substantially involved in the transaction: UCI, SIFCA, COSMIVOIRE, PALMCI, NAUVU, PHCI, SHCI and SANIA.

One of the conditions precedent to the completion of the transaction was the obtaining of authorisation from the WAEMU competition authorities.

Under Regulation 03/2002/CM/UEMOA on procedures applicable to cartels and abuses of dominant positions within t h e Union,

The transaction was notified by the companies involved to the Commission on 25 July 2008, with a view to obtaining negative clearance or, failing that, an individual exemption decision.

As part of this notification, the companies involved state that, on the basis of market observations, supported by independent economic studies, the transaction would not lead to the creation of a dominant position on any of the relevant markets concerned, namely :

- The Community edible oil market, where the operation has a market share of 13%;
- The Community soap market, on which the transaction would lead to a combined market share of 24%.

In August 2008, the Commission published on its website and in all the legal gazettes in each Member State, first on 12 August and then on 21 August 2008, a notice relating to this application for negative clearance or exemption, containing a brief description of the transaction and inviting interested third parties to submit their observations to the Commission by 10 September 2008, in accordance with the provisions of Article 28.4 of Regulation 03/2002 on restrictive practices and abuses of position.

Of the interested third parties, only three (3) submitted their observations, namely Togo, by letter dated 05 September 2008; the company SUNEOR by letter dated 09 September 2008 and Niger by letter dated 10 September 2008.

As required by Article 28.4 of Regulation 03/2002, the Competition Advisory Committee was consulted by the Commission. In its opinion No. 01/2008/CM/UEMOA issued on 10 October 2008, the Committee considered that the Commission could issue a negative clearance if the transaction did not lead to the creation or strengthening of a dominant position on the markets concerned.

The Committee considered that the negative clearance to be issued should cover the ancillary agreements, with the exception of two clauses in these agreements considered likely to restrict competition.

The WAEMU Commission therefore took the contested decision because it considered that Article 88 of the Treaty was not applicable, insofar as the transaction did not lead to the creation or strengthening of a dominant position. The decision was published in the Official Journal of the European Union under number 64 of the fourth quarter of 2008, and provides for an assessment of the implementation of the ancillary agreements covered by the decision at the end of a period of five (5) years from the date of notification of the decision to the addressees.

In support of their arguments, the defendants set out a number of defences:

1. **The Court's lack of jurisdiction**

According to the defendant companies, it is not within the jurisdiction of the WAEMU Court of Justice to deal with issues of "alleged price fraud and other alleged acts of unfair competition". Questions of fraud fall within the exclusive jurisdiction of the ordinary courts. This is why they consider that even if the adoption of the Commission's decision had the effect of giving rise to price fraud and unfair competition, these facts, which have not been proven by the applicants, would not affect the legality of the decision, which cannot be challenged on this ground.

They consider that the legality of the decision rests on two cumulative points:

- verifying whether a dominant position has arisen or is likely to be strengthened as a result of the operation;
- verification of the existence of a significant obstacle to effective competition within the Common Market as a result of the creation or strengthening of a dominant position.

The Court can therefore be called upon to exercise its jurisdiction only in relation to those two points. By failing to show how the Commission should not have taken the decision because of the existence of a dominant position or the strengthening of such a position as a result of the transaction, the applicants do not enable the Court to examine the facts falling within its jurisdiction, and it should therefore declare that it has no jurisdiction.

2. Inadmissibility of the application.

The defendants consider that the application is inadmissible for several reasons;

- **The application was lodged late:** on this point, the defendants explain that, pursuant to the provisions of Article 8 of Additional Protocol No. 01 relating to judicial review bodies and in application of Article 29 of Regulation No. 03/2002, the publication of the decision in Official Bulletin No. 64 of the fourth quarter of 2008 triggered the time limit for bringing an action, in the absence of a precise date, at the latest on the day of delivery to the Commission, i.e. 16 February 2009. This period expired on 1 March 2009 or 17 April 2009 at the latest. By bringing their action on 06 July 2009, the applicants have missed the deadline. Furthermore, SUNEOR, which took part in the drafting of the Commission's decision, could not have been unaware that a decision would be handed down within the time limits prescribed by the Competition Rules and Regulations.

- **The application was misdirected.** The defendants consider that the application insofar as it was brought against "the companies concerned by the negative clearance" is purely and simply misdirected. In fact, Article 15 paragraph 2, subparagraph 1er of Regulation No. 01/96 CM on the Rules of Procedure of the Court of Justice of the WAEMU, provides that "the action for assessment of legality is directed against binding Community acts: regulations, directives as well as individual decisions taken by the Council and the Commission...". Furthermore, it is a rule of law that actions for assessment of legality must be brought against the institution which adopted the contested measure and that such actions are inadmissible where they are brought against another institution or another person, a fortiori against the persons to whom the decision is addressed. This rule of law is based on the fact that only the institution that issued the contested decision is in a position to defend it.

  The action for annulment should have been brought against the Commission. If it was not directed against the body that took the decision, the action must be declared inadmissible as misdirected.

- **The application contains no grounds.** This argument is supported by the defendants because, apart from the vague allegation that the Commission's decision is "vitiated by illegality", the application is not based on any specific grounds for annulment. The applicant companies consider that the application has no legal basis whatsoever. It is clear from the rules governing the Court, in particular those governing actions for annulment, that in order to comply with Article 26(1) and (2) of Regulation No 01/96/CM, such an application must contain a statement, albeit a summary statement, of the grounds for annulment on which it is based and on which the Court must base its decision.

More than the simple petition of principle contained in their application, the applicants should have qualified the elements of the decision likely to constitute, in their view, a defect of form, a defect of lack of competence, a misuse of powers or a violation of the Treaty or of the acts adopted in application thereof. The application is therefore inadmissible because it contains no grounds for annulment, and is therefore devoid of any legal basis.

On the basis of these arguments, the defendants SIFCA and others claim that the Court should**:**

- in limine litis: declare that it has no jurisdiction to hear the action ;
- dismiss the action brought by SUNEOR and others insofar as it is inadmissible;
- declare that SODEFITEX, SN-CITEC, NIOTO and SOCOMA have no interest in bringing proceedings;
- dismiss the action as unfounded;
- reject the request for an expert opinion;
- order the plaintiff companies to pay a "folle action" fine.

In its statement of defence dated 07 September 2009, the WAEMU Commission responded to the application, concluding that the application should be dismissed on the merits and that it was inadmissible as a matter of form.

As regards inadmissibility, the Commission states that the application is inadmissible because, on the one hand, it was lodged out of time, on 09 July 2009,

against a decision taken by the Court of First Instance.

on 22 October 2008 and published in the Union's Official Bulletin in December 2008, and secondly, the application is inadmissible for failure to implead the WAEMU Commission.

The Commission stresses that it is a cardinal principle of administrative and Community procedural law that an action for annulment must be directed primarily against the author of the act whose annulment is sought.

The fact that the defendants have been joined by the applicants in an action for annulment of a measure addressed to them renders the application inadmissible.

3. The application is unfounded

In the alternative, the defendants and the WAEMU Commission submit that the application should be dismissed on the grounds that the contested decision is well-founded both legally and economically since, in the light of all the documents communicated to it, the proposed concentration would not place the undertakings involved in the concentration in a dominant position, either individually or collectively, in the oil and soap industries.

In conclusion, the Commission asks the Court to :

- declare the main action inadmissible on the grounds of foreclosure and failure to implead;
- in the alternative, reject all the applicants' claims and pleas in law as unfounded;
- order them to pay the costs.

C. Reply of the plaintiffs

On 28 October 2009, the plaintiff companies filed a reply in which they maintained their application for annulment and responded to the defendants' arguments on the Court's lack of jurisdiction and the inadmissibility of the application, as well as on its merits.

As to inadmissibility, the applicants, SUNEOR and Others, replied to the plea of foreclosure raised by the defendants (UNILEVER and Others) and the Commission, explaining that under Article 8(3) of Additional Protocol No. 1 and Article 15

of the Rules of Procedure, three conditions must be met for an application to be within the time limit: "the application must be lodged within two (2) months of the publication of the decision, of its notification to the applicant or, failing that, of the day on which the applicant became aware of it".

These three conditions are alternative and not cumulative, so much so that the Commission forgets to emphasise that the decision was never notified to the plaintiffs, but in the absence of service, Articles 8 and 15 above provide in this case that the plaintiff must lodge his appeal from the day on which he became aware of it. The defendants allege that they only became aware of this decision on 06 May 2009. By filing their application on 02 July of the same year, they were within the time limit. The application is admissible.

In response to the second argument of inadmissibility, SUNEOR and Others submit that, under the provisions of Additional Protocol No 1 and the Court's Rules of Procedure, actions for annulment may be brought against binding Community acts adversely affecting any natural or legal person. Nowhere is it stated that the action is directed against the author of the act. By voluntarily intervening in the proceedings, by taking written submissions on both form and substance, the WAEMU Commission intends to be a party to the proceedings. The argument is therefore inoperative.

On the merits, the plaintiffs persist and assert that the decision of the WAEMU Commission confirms the dominant position of the defendant companies in the WAEMU market, in the face of the evidence of their domination of the oilseed market, which means that the concentration authorised by the Commission places them in a dominant position, with the effect of significantly affecting competition on the UNION market and destroying other industrial and commercial activities (in particular the cottonseed, groundnut and soya oil market).

In a summary statement dated 07 November 2009, the plaintiffs confirmed their arguments already set out in the application and the statement of defence.

On 23 December 2009, the WAEMU Commission, in a reply to the plaintiffs' summary, maintained its arguments on the Court's jurisdiction, on the limitation period of the plaintiffs' action and, in the alternative, on the merits, on the rejection of the application as unfounded.

On 11 February 2010, in a rejoinder, the defendants submitted that the action was inadmissible, that the Court lacked jurisdiction and that the application was unfounded.

On 19 July 2010, in a rejoinder, UNILEVER-CI challenged the admissibility of the claimants' "new second reply" lodged after the proceedings had been closed, on the grounds that Articles 29 and 30 of the Rules of Procedure provide for two sets of exchanges that should have brought the proceedings to a close.

Consequently, the applicants' second reply must be declared inadmissible.

III. DISCUSSIONS

(1) On the jurisdiction of the Court :

In limine litis, the defendants argue that the Court of Justice does not have jurisdiction. In their view, it is not within the jurisdiction of the WAEMU Court of Justice to deal with issues of "alleged price fraud and other alleged acts of unfair competition". Questions of fraud fall within the exclusive jurisdiction of the ordinary courts.

That is why they consider that, even if the adoption of the Commission's decision had had the effect of giving rise to price fraud and unfair competition, these facts, which have not been proved by the applicants, would not affect the legality of the decision, which cannot therefore be challenged on that ground.

By failing to show how the Commission should not have taken the decision because of the existence of a dominant position or the strengthening of such a position as a result of the transaction, the applicants are not enabling the Court to carry out an examination falling within its jurisdiction, and it should declare that it has no jurisdiction.

However, although the defendants' arguments as to lack of jurisdiction could be understood if the action were in fact directed against unfair competition practices, they cannot succeed in the present case, because the subject-matter of the action is an application for annulment of a decision given by a Union body which would be prejudicial to one of the parties.

In this case, it is an individual decision aimed at one person that has had the effect of harming the interests of another person. It is therefore a direct action for annulment that falls within the jurisdiction of the WAEMU Court of Justice.

This argument of lack of jurisdiction must therefore be rejected, without it even being necessary to demonstrate the existence of anti-competitive practices such as abuse of a dominant position. The Court has jurisdiction under Article 8 of Additional Protocol No. 1 and Article 27 of Additional Act No. 10/96 on the Statute of the WAEMU Court of Justice.

2°) <u>Admissibility</u> :

The defendants argue that the application is inadmissible on three grounds

:First: - The application was filed late; Second: - The

application was misdirected;

Thirdly: - The application contains no grounds for annulment.

With regard to the first argument of inadmissibility, the defendants consider that the application was lodged out of time, since pursuant to the provisions of Article 8 of Additional Protocol No. 1 and in application of Article 29 of Regulation No. 03/2002, the publication of the decision in the Official Journal No. 64 of December 2008 caused the time limit for bringing the action to run, in the absence of a precise date, at the latest on the day of delivery of the Official Journal of the European Union to the Commission, i.e. 16 February 2009. This period expired on 1er March 2009 or, at most, on 17 April 2009.

By lodging their appeal on 06 July 2009, the applicants were out of time. Moreover, SUNEOR, which took part in the drafting of the Commission's decision, could not have been unaware that a decision would be handed down within the time limits prescribed by the Competition Regulations and texts governing competition.

However, it should be noted that, under the terms of Article 8(3) of Additional Protocol No. 1 relating to the Supervisory Bodies, as well as Article 15 of the Rules of Procedure, one of the three conditions must be met by an application in order to be within the time limit: "the application must be lodged within two months of the publication of the decision.

decision, of its notification to the claimant or, failing that, of the day on which the claimant learns of it".

In the present case**,** if we refer to the provisions of Article 8 of Additional Protocol No. 1 on the Union's supervisory bodies, the 2-month period runs either from the day of publication or, failing that, from the day on which the applicant learned of the decision.

As they were not the addressees of the said decision, the applicant companies could not have been notified of it.

Better still, although SUNEOR's participation in the preparation of the decision, by contradicting the granting of authorisation, should lead it to be aware of the decision taken, it is settled case law and unanimous doctrine that individual acts only take effect once they have been notified.

As notification is no longer an issue, the other two variants need to be analysed, i.e. the date of publication in the Official Journal of the European Union or, failing that, the date on which the applicant became aware of the decision.

What conclusions can be drawn from the relevance of these two alternatives?

What legal value does publication in the WAEMU Official Bulletin have?

Article 26 of the Treaty, as amended, sets the publication of the Official Journal of the Union as one of the Commission's tasks.

Chapter III, entitled "Legal arrangements for acts adopted by the organs of the Union", sets out the various values given to acts in force within the Union.

Article 43, paragraph 3, states that "decisions are binding in their entirety on those to whom they are addressed".

On the strength of this requirement, the obligation to give reasons for acts laid down in Article 44 is to some extent enshrined in Article 45, which draws a consequence from publication in the Bulletin: "additional acts, regulations, directives and decisions shall be published in the Official Journal of the Union. They shall enter into force following their publication on the date specified therein.

Decisions are notified to those to whom they are addressed and take effect from the date of notification.

Article 15, paragraph 2, subparagraph 3ème of Regulation n° 01/CM/UEMOA of 05 July 1996 on the rules of procedure of the Court of Justice of the UEMOA states that "an appeal for assessment of legality must be lodged within two (2) months of the publication of the act; of its notification to the applicant, or failing that, of the day on which the applicant became aware of it".

The Union Bulletin referred to here is No. 64 of 4ème quarter 2008.

From the moment that the means of publication of administrative acts taken by one of the Organs of the Union is the Official Bulletin, it is clearly stated in Article 45, paragraph 1er of the amended Treaty that "additional acts, regulations, directives and decisions shall be published in the Official Bulletin of the Union. They shall enter into force following their publication on the date specified therein".

From this point onwards, it is not possible to argue that the date of publication of the Official Journal in the Member States is imprecise, given that it concerns the territory of the Union, the characteristics and founding principles of which are the subject of Title I of the amended Treaty.

Article 5 of Decision No. 009/2008/COM/WAEMU issuing a negative clearance with regard to the proposed merger between UNILEVER-CI, SIFCA, COSMIVOIRE, PALMCI, NAUVU, PHCI, SHCI and SANIA dated 12 October 2008,
clearly states: "This Decision, which enters into force on the date of its signature, will be published in the Official Journal of the European Union", which is in line with the spirit and the letter of Article 45, paragraph 1er of the amended Treaty, which clearly states that additional acts, regulations, directives and decisions are published in the Official Journal of the European Union.

They come into force on the date they are published.

Thus, if the entry into force specified in the decision is 12 October 2008, in accordance with Article 45 of the Treaty, which is a higher standard than the decision, Official Bulletin 64 for the fourth quarter was published on 28 March 2009.

It was therefore after this publication that the decision came into force, and it was from this date that the two-month period began to run.

The addressees referred to in paragraph 2ème of article 45 are those interested in the act and not all of them, in which case publication would have had the effect of starting the period for bringing an action "erga omnes".

According to established doctrine and case law, unilateral administrative acts fall into two main categories:

- Regulatory acts**,** which have a general and impersonal scope. They come into force as soon as they are published and are binding erga omnes ;
- Individual decisions**,** acts by which an administrative authority decides to grant or refuse a benefit to a person, designated by name.

The rules governing these acts are significantly different from those governing regulatory acts.

If they are to be published, they must be notified to the interested party.

Therefore, while the right to bring an action for misuse of power is broadly available in the case of regulatory decisions, the conditions for admissibility are stricter in the case of individual decisions, since the applicant must have a specific interest in bringing the action.

This is the assumption made by SUNEOR, which, having made observations, intended to be kept informed of the consequences. As this was not done, publication cannot be invoked against it.

SUNEOR should have been notified of the decision, having expressed a reservation regarding the negative clearance of the proposed merger.

Otherwise, the claimants, including SUNEOR, are entitled to rely on the start of the period relating to "the day on which the claimant became aware of it".

Consequently, the defendant's plea that the application is time-barred is inoperative.

As regards the second argument that the application **is inadmissible** for failure to implead the Commission, the defendants argue that the WAEMU Commission, which took the contested decision, was never cited in the application, whereas it is a cardinal principle of both administrative and Community procedural law that an action for annulment must be brought against the institution which adopted the contested measure and that actions directed against another person, a fortiori against the persons to whom the contested decision was addressed, are inadmissible.

The appeal should be directed against the WAEMU Commission. Failing that, it must be declared inadmissible for breach of Article 10 of Additional Protocol No. 1, relating to the Supervisory Bodies.

But if, as the applicants maintain, according to the provisions of Article 15, paragraph 2 of Regulation No. 1/96/CM/UEMOA on the Rules of Procedure of the Court of Justice of UEMOA, an action for assessment of legality is available against any act of an organ of the Union which adversely affects it, While it is obvious that it is the author of the act who must be brought before the courts in the event of a violation of the rights of a natural or legal person, an appeal on grounds of legality is a legal action brought against an administrative act, as opposed to an appeal on grounds of full jurisdiction, which is brought against a public person, with the aim of obtaining compensation based on his liability for fault or risk.

However, it is clear from the applicants' application for annulment before the WAEMU Court of Justice that, although the beneficiary companies were mentioned by name, it is clearly noted "that the Commission's decision is vitiated by illegality, because contrary to the negative clearance issued by the Commission, the planned merger constitutes a practice tantamount to an abuse of a dominant position which has the effect of significantly hindering competition within the WAEMU common market".

In their statement of grounds, the applicants, relying on Article 15.2 of Regulation No. 1/96, which opens up the cases of appeal for assessment of legality, seek the annulment of Decision No. 009/2008/COM/WAEMU of 22 October 2018 on the grounds of its illegality and insofar as it enshrines the dominant position of the UNILER-CI companies;

SIFCA; COSMIVOIRE; PALMCI; NAUVU; PHCI; SHCI and SANIA; what appears clearly in the application for annulment before the WAEMU Court of Justice.

In addition, with regard to the major guiding principles that govern proceedings, particularly in civil matters, which have strongly inspired administrative matters, proceedings are initiated by the parties, and the Judge never takes matters into his own hands. The principle of the dispositif requires us to recognise that legal qualification is the function of the Judge and finally, the other side of this function is that the facts are brought by the parties, who set the framework for the proceedings (rule of immutability) on the one hand, which rule, on the other hand, requires the Judge to rule on everything that is requested and only on what is requested, hence the phrase "the Judge may rule only on what is requested", in other words, the Judge may not grant more than what is requested of him.

From an analysis of the procedural documents produced by the applicants, it is clear that the application for assessment of legality was made against Decision No 009/2008/COM/WAEMU of 22 October 2008.

The Commission was therefore rightly seised by the Court of Justice and intervened in the proceedings, following the notification made by the Court Registry, which led to the taking of written observations and conclusions both on the admissibility of the application and on the merits. This intervention, in addition to what is set out above, is tantamount to recognition of the Commission as the principal defendant, called upon to defend the legality of the act in question.

The Commission made submissions in the main proceedings to the effect that the application was inadmissible on the grounds that it was misdirected. The submissions on the merits were made in the alternative. Without ruling either infra petita or ultra petita, this is indeed an action on the legality of an act of the Commission. Accordingly, as this is an action for a declaration of legality against an act of the Commission, the said action must be declared admissible.

The plea of inadmissibility alleging that the Commission was not involved should be rejected;

The third ground of inadmissibility based on the absence of a plea for annulment :

According to the defendants, the application has no legal basis whatsoever because

it is not based on any specific ground for annulment, and in order to comply with the

Article 26, paragraphs 1er and 2 of Regulation 01/96/CM/UEMOA on the Rules of Procedure of the Court of Justice of the WAEMU states that "the application must contain the full name and elected domicile of the applicant, where applicable, the name and address of the agent and lawyer appointed to assist him, the submissions and a summary of the facts and pleas in law".

It follows from this provision that this statement, even if summary, must be sufficiently clear, precise and reasoned to enable the parties concerned to prepare their defence and to submit to the Court the information which will enable it to exercise its judicial review and to rule on the action by finding either a defect in form, a lack of competence, a misuse of powers or an infringement of the Treaty or of acts adopted in application thereof.

In accordance with the provisions of Articles 26(1)er and 2 of Regulation No 1/96, the application lodged by the applicant companies states that the annulment of the decision is sought on the grounds of infringement of Article 88 of the Treaty and 4 of Regulation No 02/2002 of 23 May 2003, and therefore infringement of the Treaty and the texts implementing it. These grounds on which they rely are pleas in law that justify an application for annulment.

The ground of inadmissibility is unfounded.

On the fourth argument, concerning the absence of an interest in bringing proceedings on the part of SODEFITEX, NIOTO, SN-CITEC and SOCOMA :

The defendants take the view that these companies should be excluded from the proceedings because they were ill-advised to intervene in the present dispute since they refrained from taking part in the proceedings before the Commission as permitted by Article 15(1) of Regulation No 03/2002 of 23 May 2002.

However, given that SN-CITEC and NIOTO have vegetable oil refining and refined oil packaging plants, and that SOCOMA and SODIFITEX market cottonseed, the value of which is based essentially on its crushing, which produces cottonseed oil and the associated animal feed, and that these companies also operate on the EU market, the merger decision concerns them all. And if this decision confirms the dominant position of the defendant companies, it goes without saying that

the abuse of this dominant position will be detrimental to all companies operating in the same sector, and they therefore have an interest in bringing an action, in application of the legal principle
"No interest, no action". In fact, the admissibility of any legal action is subject to proof of the existence of an interest, which must be born and present. Therefore, even the mere threat of a disturbance or harm to a legitimate interest is sufficient.

ON THE BACKGROUND

The plaintiffs argue that the decision of the WAEMU Commission confirms the dominant position of UNILEVER-CI and its partners in the Community market since, under the terms of Article 4 of Regulation No 02/2002/CM/WAEMU of 23 May 2002, "it is incompatible with the common market and prohibited for one or more undertakings **to abuse a dominant position in the common market** or in a significant part of it ....". And according to Article 88 of the EU Treaty, mergers which create or strengthen a dominant position held by one or more undertakings, as a result of which effective competition within the common market is significantly impeded, constitute an anti-competitive practice amounting to an abuse of a dominant position.

The defendants, who refute the arguments of the applicants, rely on various elements mentioned above in their arguments, namely that the merger of the industrial and commercial activities in question was conditional on obtaining authorisation from the WAEMU competition authority. Not only was this done, but the companies in question requested negative clearance from the WAEMU Commission. To do so, they submitted reliable economic studies confirming that :

- The Community edible oil market, to which the transaction relates, has a market share of 13%;
- The Community soap market on which the transaction is planned would lead to a combined market share of 24%.

The additional conditions relating to public information were met by the publication organised in August 2008 by the Commission on its website and in all the legal gazettes in each Member State, initially on 12 August 2008.

August and again on 21 August 2008. The notice relating to this application for negative clearance or exemption contained a brief description of the transaction and invited interested third parties to submit their observations to the Commission by 10 September 2008, in accordance with the provisions of Article 28.4 of Regulation 03/2002 on antitrust procedures.

Only three (3) legal entities submitted their observations, namely the Republic of Togo, through the Ministry of Trade, Industry, Handicrafts and Small and Medium-sized Enterprises, by letter No. 909/MCIAPME/DC/C of 05 September 2008 from the Minister in charge of the sector, which transmitted the observation of this country to the Commission.

The Republic of Niger, through the Ministry of Trade, Industry and Standardisation, by letter no. 0587/MCIN/DCI/C dated 10 September 2008.

The two States that responded did not express any reservations about issuing the negative clearance and therefore did not object to it.

By letter no. MBD/ksb no. 49/08 dated 09 September 2008, SUNEOR expressed its opposition to the proposed merger and said it was prepared "to provide any additional information requested pursuant to Article 17.3 of the aforementioned Regulation".

Pursuant to the requirements of Article 28.4 of the aforementioned Regulation 03/2002, the Competition Advisory Committee was consulted by the Commission. In its opinion No. 01/2008/CM/UEMOA issued on 10 October 2008, the Committee considered that the Commission could issue a negative clearance provided that the transaction did not lead to the creation or strengthening of a dominant position on the markets concerned.

The Committee considered that the negative clearance to be issued should cover the ancillary agreements, with the exception of two clauses considered likely to restrict competition.

On the basis of these elements, the WAEMU Commission took the contested decision, which in no way infringed Article 88 of the Treaty, insofar as the operation did not lead to the creation or strengthening of a dominant position. The said decision was published in the Union's Official Bulletin under number 64.

of the fourth quarter of 2008, and provided for an assessment of the implementation of the ancillary agreements covered by the decision, at the end of a quasi-monopolistic position (70% market share), which is far from being without impact on the rest of the WAEMU zone as a whole.

Thus, following a precise and rigorous examination of each of the conditions laid down in the applicable EU legislation, the Commission concluded that the transaction would not lead to the creation, let alone the strengthening, of any dominant position and should therefore be authorised.

From an analysis of the entire procedural file, it appears that the assessment of the merits of the request should be based not only on legal criteria but also on economic criteria, which are part of the merger control that the Commission should carry out.

Contrary to the defendants' assertion that "the legality of the decision must be assessed solely in the light of the legal criteria set out in the texts applicable to merger control within the WAEMU", economic criteria are essential in determining the dominant position of the undertakings involved in the merger.

On these aspects, it should be noted that the WAEMU Commission is institutionally the designated expert in competition matters in the WAEMU, and that it took its decision on the basis of all the relevant elements and in particular on the study reports and foreign trade statistics available to the Commission, the information obtained from the countries following the Commission's publication of the proposed merger and the assessment elements drawn from the study report of the West African Development Bank (BOAD) of April 2008, and the consultation of the Advisory Committee on Competition.

The WAEMU Commission is not obliged to carry out the necessary investigations itself, in order to verify the statements contained in the files of the companies requesting the possibility of carrying out investigations. It assesses whether it is appropriate to do so. According to the provisions governing merger control, the WAEMU Commission must base its decision on the file submitted by the companies in question. By acting as it did, it therefore did not violate the obligations of the UEMOA Commission.

which derive from Community provisions on merger control.

In fact, it had sufficient information to assess and determine whether or not the undertakings were in a dominant position and whether or not this dominant position had a significant impact on competition within the common market and, above all, on the impact of the authorised merger.

It is established that merger control is carried out a priori on the future state of the market to determine whether the merger is likely to harm competition, in particular by creating or strengthening a dominant position, or by creating purchasing power likely to place suppliers in a situation of economic dependence, and also to determine whether the transaction makes a sufficient contribution to economic progress to offset the harm to competition.

The argument that the decision should be annulled because the Commission failed to initiate an adversarial procedure in accordance with the provisions of Articles 15.3 and 16 of Regulation No. 03/2002/CM/UEMOA when SUNEOR expressed reservations, is not operative, because Article 15.3 of the Regulation provides that **the Commission may**, if it has doubts about the compatibility of agreements and decisions with concerted practices in the common market, decide to initiate an adversarial procedure. The adversarial procedure provided for in Article 16 is not compulsory. It is merely an option left to the discretion of the Commission, which only initiates it when it has doubts after examining the information provided in the file. In the case in point, the Commission has surrounded itself with both statistical and economic guarantees and, on the basis of legal arguments, has taken its decision in compliance with the provisions of Regulation No. 03/002/CM/WAEMU.

In examining the application for negative clearance filed by UNILEVER and others, the Commission verified the two fundamental aspects of merger control, namely the existence of a dominant position on the part of the undertakings involved in the transaction and the impairment of effective competition within the common market.

The Commission's decision is objectively based on relevant evidence provided by the applicant companies; the BOAD 2008 report and the opinion of the

the Advisory Committee on Competition, made up of members who are nationals of the eight (8) States of the Union, two (2) from each State.

For their part, the applicants did not provide sufficient evidence that differed from what the Commission had, nor did they put forward any relevant grounds for annulling the contested decision.

It therefore appears that the said decision was taken in compliance with the Community provisions governing competition and in particular Regulation No 03/2002 of 23 May 2002.

Lastly, the claim that the expert opinion previously requested by the applicants and carried out pursuant to a preliminary ruling was null and void, or even the relevance of a second expert opinion, was not sufficiently demonstrated by the applicants.

Indeed, under the terms of the assignment entrusted to Lazareff le Bars, the expert appointed by the order of 19 October 2012, concludes:

"It may state:

1- price differences between palm oil and other substitutable oils: the price of palm oil is lower than that of other substitutes.

2- On the determination of the existence and importance of Asian palm oil imports on practical prices: Asian palm oil imports are very significant and the majority in Côte d'Ivoire; however, these imports will remain relative to Senegal. It is difficult to measure the impact of these imports on prices, as there is no traceability of imported palm oil. In fact, there is no indication of whether the palm oil from Asia is refined for sale to consumers in the countries concerned or re-exported to other countries in the WAEMU zone, and at what price. The expert is therefore unable, on the basis of the data provided, to establish the impact of these imports from Asia on the prices charged.

3- Determining whether there has been abuse of any dominant position held by the beneficiary undertakings: in the light of the analysis of the beneficiary undertakings' share of the market, it is clear that there has been abuse of the dominant position held by the beneficiary undertakings.

On the basis of the market definition and additional criteria, the creation or strengthening of a dominant position is not established on the edible vegetable oil market in the WAEMU. There is no significant impediment to the exercise of effective competition in the UEMOA zone".

This conclusion supports all the defendants' submissions and, moreover, satisfies the judge in his assessment of the elements of the case before him.

It is also settled case law that "the irregularity of an expert assessment (relating to the conditions under which it was ordered or the manner in which it was carried out) does not prevent the expert's report from being retained by the Judge as evidence".

Moreover, the judge is in no way bound by the results of the investigative measures, particularly those of the expert reports, since he retains his freedom to assess the facts.

Both doctrine and case law agree on the judge's freedom of appreciation. This freedom,

without being arbitrary, requires the judge to comply with three obligations:

- if it is not bound by the outcome of the transactions, it cannot reject them as a result of their misinterpretation or distortion;
- it must order the measures necessary to ensure that the case is fully investigated;
- he must refuse or refrain from ordering measures, particularly expert assessments, that would be "frustrating" because they would be pointless.

In the light of these principles, the claims made by the applicants lack relevance. They should not be granted.

ON EXPENSES

Under Rule 60 of the Rules of Procedure, any unsuccessful party is to be ordered to pay the costs. As the applicants have been unsuccessful, they must be ordered to pay the costs.

P A RC E SM O T I F S

Ruling publicly contradictorily in in of and in actions for annulment ;

In form :

- **declares itself competent ;**
- **Declares the applications of SUNEOR Sa, SODEFITEX SA, SN CITEC SA, NIOTO SA and SOCOMA SA admissible;**

In the background:

- **declares that the application is ill-founded;**
- **orders the costs to be borne by the applicant companies pursuant to Article 60(2) of the Rules of Procedure of the Court.**

Thus made, judged and pronounced in public hearing in Ouagadougou on the days, months and year above.

And signed by the Chairman and the Registrar.

Illegible signatures follow.
Ouagadougou, 03 October 2018
The Deputy Registrar

Hamidou YAMEOGO