OPINION n°003/2000

Of 27 June 2000 on the interpretation of Articles 88, 89 and 90 of the Treaty on competition rules in the Union.

Summary of the opinion

- *WAEMU Community law on competition is a centralising body of law which includes within its scope all agreements, associations or concerted practices or abuses of dominant positions which have the effect of restricting or distorting competition within the Community. The only exception is where the Community authorities lay down formal requirements involving the Member States in the exercise of the powers devolved to them.*

- *Articles 88, 89 and 90 of the WAEMU Treaty confer exclusive competence on the Union.*

- *The Member States are only competent to adopt criminal provisions to punish competitive practices, infringements of the rules on market transparency and the organisation of competition.*

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

EXTRACT FROM THE MINUTES OF
THE REGISTRY

A V I SN° 003/2000

of 27 June 2000

File No. 01-2000

REQUEST FOR AN OPINION FROM THE UEMOA COMMISSION
ON
INTERPRETATION OF ARTICLES 88, 89 AND 90 OF THE TREATY ON
COMPETITION RULES IN THE UNION

The President of the WAEMU Commission referred the matter to the WAEMU Court of Justice by letter No 1886/PC/DPCD/DCC/499 of 26 May 2000, which reads as follows:

"Mr President,

Article 1 of Additional Protocol No. 1 on the supervisory bodies of WAEMU charges the Court of Justice with ensuring ***"respect for the law in the interpretation and application of the Treaty of the Union"****.*

During the work of the workshop on the draft Community competition legislation within the Union, which was held at the Commission's headquarters from 10 to 14 April 2000, differences of opinion emerged between the Commission and the Member States' experts on the interpretation of the Treaty provisions on competition rules as regards the coexistence of national and Community competition legislation.

On this issue, the Commission considers that, under Articles 88, 89 and 90 of the Treaty, the Union has exclusive competence to legislate in the three areas covered by the Treaty in the field of competition, namely cartels, abuses of dominant positions and State aid.

State. In its view, national legislation can only cover other areas of competition not covered by the Treaty, such as unfair competition.

Experts from the Member States believe that Community legislation must coexist with national legislation, provided that the provisions of the latter comply with Community law; in the event of conflict, Community legislation takes precedence.

I would therefore be grateful if the Court of Justice could rule on the scope of Articles 88, 89 and 90 of the Treaty on European Union in relation to this point of divergence, so as to enable the Commission to finalise the draft Community competition legislation.

Yours sincerely

Younoussi TOURE
Commissioner in charge of the interim "

The Court, sitting in Consultative General Assembly under the chairmanship of Mr Mouhamadou Moctar MBACKE, acting President of the WAEMU Court of Justice, on his report, in the presence of Messrs:

- Youssouf ANY MAHAMAN,Court Judge
- Martin Dobo ZONOU,Court Judge
- Daniel Lopes FERREIRA,Court Judge
- Malet DIAKITE, First Advocate General at the Court
- Kalédji AFANGBEDJI,General Counsel

and assisted by Mr Raphaël P. OUATTARA, Registrar of the Court, examined the above application at its sitting o f 27 June 2000.

L AC O U R

Having regard to the Treaty of the West African Economic and Monetary Union (WAEMU) dated 10 January 1994 ;

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

Vul'Acte Additionnel n° 10/96 portant Statuts de la Cour de Justice de l'UEMOA ;

Having regard to Regulation No. 01/96/CM on the Rules of Procedure of the Court of Justice of the WAEMU ;

Having regard to Regulation n° 01/2000/CDJ repealing and replacing Regulation n° 1/96/CDJ relating to the Administrative Rules of the WAEMU Court of Justice dated 6 June 2000;

Having regard to request n°1886/PC/DPCD/DCC/499 of 26 May 2000 from the President of the WAEMU Commission ;

The purpose of the consultation, as set out in the above-mentioned letter No 1886/PC/DPCD/DCC/499 of 26 May 2000, may be considered to be based on the provisions o f Article 27, last paragraph, of Supplementary Act No 10/96 on the Statute of the Court of Justice and of Article 15 7e of the Rules of Procedure of the Court of Justice, relating to the advisory jurisdiction of the Court to which a case has been referred by the organs of the Union when they encounter difficulties in applying or interpreting acts of Community law.

This application can therefore be validly examined, as all the conditions of admissibility prescribed by the aforementioned articles have been duly met.

I. PURPOSE OF THE CONSULTATION

If we refer to the terms of the aforementioned letter from the President of the Commission, this is essentially a difference of interpretation of Articles 88, 89 and 90 of the Treaty and more specifically the provisions of paragraphs a), b) and c) o f Article 88 of the WAEMU Treaty.

Relying on the terms of Articles 88, 89 and 90, the Commission maintains, without providing any proof, that the Union has exclusive competence to legislate in the three areas covered by the Treaty in the field of competition, namely :

88 a) : Agreements, associations and concerted practices
88 b): Abuse of a dominant position
88 c) : State aid.

According to the Commission's interpretation, areas not governed by the above legal systems fall within the residual competence of the Member States, such as unfair competition.

As for the experts from the Member States, again according to the Commission, their opinion is that :

1) Community legislation does not call into question the existence and application of national competition law, which will continue to apply.

2) There can be no exception to this coexistence unless there is a conflict between the two laws, which will lead to the application of the principle of primacy of Community law, before which national law will take a back seat.

II. DISCUSSIONS

In order to reach a reasoned opinion on the subject of the consultation, it would first be necessary, from a methodological point of view, to :

a) In order to grasp the similarities and differences that underlie their meaning and scope, carry out a comparative examination of the wording of the competition prohibition texts in the Treaty of Rome compared with those mentioned above in the Treaty of Dakar, which was, moreover, deeply inspired by European law.

   In both the Treaty of Rome and the Treaty of Dakar, these rules on infringements of competition by cartels, associations and concerted practices or abuses of dominance or state aid are the basic principles of competition law to which reference is made in order to characterise any anti-competitive act.

b) Describe the concept of competence in Community institutional law: what does it cover? What is its content and its various aspects? Once these preconditions have been met by consolidating their foundations, the adaptability of the divergent interpretations set out above to this framework will reveal the legal option that appears most compatible with the provisions of Articles 88 a), b) and c) of the Treaty on European Union.

A/ COMPARATIVE EXAMINATION OF THE PROVISIONS OF THE TWO TREATIES CONCERNING COLLECTIVE ANTI-COMPETITIVE ACTS AND ABUSE OF A DOMINANT POSITION

The provisions of Articles 85 and 86 of the Treaty of Rome (81 and 82 of the Treaty of Masstricht) read as follows:

Article 85: "All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States shall be incompatible with the Common Market and prohibited.

which have as their object or effect the prevention, restriction or distortion of competition within the Common Market...".

Article 86: "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States".

According to the Treaty, there are therefore two cumulative conditionsfor thatthe Community ban applies:

1) The voluntary or effective restriction of competition within the European Common Market as seen within the geographical limits of the Union.

2) The likelihood of affecting trade between Member States of the European Union. The agreement, decision, concerted practice or abuse must be capable of exerting an actual or potential direct or indirect influence on the pattern of trade between Member States.

It is the combination of these two criteria that materially limits the scope of Community competition law under the Treaty of Rome.

On the other hand, if we refer to the text of the Treaty of Dakar, Articles 88 a) and b) of which, unlike Articles 85 and 86 of the Treaty of Rome, read as follows:

"The following are automatically prohibited

a) Agreements, associations and concerted practices between undertakings which have as their object or effect the restriction or distortion of competition within the European Union.

b) Any practices by one or more undertakings which amount to an abuse of a dominant position within the Common Market or in a significant part of it".

The prohibition laid down in this Treaty differs fundamentally from that laid down in the Treaty of Rome in that, in this case, it is sufficient that the agreements, associations or concerted practices or the abuse of dominance have the purpose or effect of restricting competition within the Union, in other words, the Common Market within its geographical limits, and regardless of whether or not they affect trade between States, for Community law to apply. According to the WAEMU Treaty, the mere fact of restricting competition within the Union, whatever the market in question and its limits, constitutes a Community infringement of competition law.

In the light of the above, it can be seen that the Member States of the European Union may be governed by two sets of competition law:

1) Community law, which implies not only a restriction of competition within the Union but also a structural change in the state of trade relations between Member States.

2) The national law, which is applied only within the territorial limits and sovereignty of the Member State and which, because of its infra-Community nature, is subject to the principle of primacy in the event of conflict between the two laws, under the influence of which it is obliged to evolve.

As far as the Member States of the Dakar Treaty are concerned, an exegetical analysis of the provisions suggests that WAEMU Community law is a centralising law in the sense that it includes within its scope all agreements, associations or concerted practices or abuses of dominance whose object or effect is to restrict or distort competition within the Community. The Dakar Treaty thus establishes a levelling up of the EU market, where the various national markets are merged into a single market that ignores any stratification of national and Community markets; in short, there has been a process of phagocytosis of national competition law by Community law, which exercises its full primacy by pure substitution.

The conceptual context of this law reinforces the unequivocal option of the drafters of the Dakar Treaty, who clearly intended to break away from the concept of the double barrier adopted by European law. Thus, contrary to Article 92 of the Treaty of Rome on State aid, which includes the constitutive notion of "affecting trade between States", Article 88 c) of the WAEMU Treaty speaks simply of "aid likely to distort competition", and the Treaty of Dakar, contrary to Article 87, paragraph 2 e) of the Treaty of Rome, did not feel it necessary to entrust the Commission with the task of defining the relationship between national legislation and Community competition law, no doubt because of the exclusive competence reserved to the Union in matters of competition law understood as an integral part of the WAEMU Common Market.

There is no doubt that such an approach to Community competition law can have appreciable advantages. It is likely to simplify the relations that might arise between the Community authorities responsible for implementing competition law and the national authorities of the Member States in the event of competition law being applied on the territory of the State concerned.

The meaning and scope of two laws could be interpreted differently by the different authorities that apply them. In addition, the primacy of Community law and, above all, the Commission's exemption decisions could give rise to uncertainty as to the real effectiveness of the activities of national administrative authorities called upon to apply or even interpret national law and Community law separately, the limits of which are not always precise.

Manipulating the concept of infringement of competition law, which is considered to be of variable geometry, with its national dimension and its Community dimension concerning the same subject, can be a source of confusion or even dissension of interpretation, all of which is prejudicial to the smooth running of business, the first victims of which are the companies, exposed as they are to double control by administrations that differ both in the aims pursued and in the way they operate, especially when the penalties resulting from these controls may be cumulative.

The drafters of the Dakar Treaty undoubtedly drew lessons from the difficulties encountered in the European experience of the application of the double barrier theory, which was judicially enshrined by a ruling of the Court of Justice of Luxembourg in case 14/68 WALT WILHEM C/ BUNDESKARTELLANT of 13 February 1969 Rec.1.

In this decision, the Court of Justice of Luxembourg tolerates that national authorities may apply their national competition law "provided that such application of national law cannot prejudice the full and uniform application of Community law and the effect of the acts implementing it". In this law, the Union's competence is limited to competition law, including in its definition, as a constituent element, the effect on the flow of trade between Member States.

It should also be noted that, under the terms of Article 9 of Council Regulation 17 of 6 February 1962, these national authorities exercise, on a transitional basis, a precarious and revocable power to apply Community competition law, which they lose as soon as the Commission takes a decision to initiate an investigation into a case. In other words, the application of this double barrier, because of the subtleties in its operation, seems to pose more problems than it solves, even at the judicial level where the national courts are at the same time ordinary law judges of Community competition law because of the direct effect of its provisions. The existence or possibility of exemptions by Commission decisions, which may have the effect of "legitimising" certain anti-competitive behaviour even during legal proceedings, adds to the difficulties mentioned above. There is no doubt that the application of Community competition law presents a certain originality which can confuse administrative authorities and national judges. This is why a certain simplification or even homogenisation of competition law to make it clearer to read and easier to apply can only be desirable, especially at this initial stage when, even in domestic law, there is a certain syncretism in the conception and application of this law at Member State level.

B/ FROM THE COMPETENCE RESPECTFUL OF THE UNION AND OF MEMBER STATES IN UEMOA INSTITUTIONAL LAW.

The provisions of the WAEMU Treaty are not very explicit with regard to the division of powers between the Union and the States that have agreed to transfer part of their sovereign rights to the Community. The principles in this area are derived from the spirit and the letter of the various provisions of the Treaty, which in fact generally contented itself with highlighting certain basic principles and setting precise objectives for the Union, including in particular the realisation of the customs union, or more precisely the Common Market, economic union in an open and competitive market, etc.

To this end, the Treaty made available to the organs of the Union appropriate legal instruments and legal techniques such as directives and minimum requirements for the accomplishment of these tasks, while at the same time requiring the organs to act within the limits of the powers conferred on them and the States to assist in the attainment of the objectives defined and, above all, to refrain from taking measures which would inhibit the application of the Treaty and of acts adopted in pursuance thereof. It is from an assessment of all these provisions that it can be deduced that the Constitutional Treaty, the Constitutional Charter of the Union, granted the Community powers of attribution, alongside the powers retained by the Member States.

These powers of attribution may coexist with powers on the same subject recognised to the Member States, but exercised at national level because they are based on legal facts and legal techniques such as directives and minimum requirements, deemed to have no Community object or effect likely to influence relations between the Member States; in short, these are strictly and purely national areas which leave the Community authorities indifferent.

It is this principle of the coexistence of Community law and national law, which is of subsidiary and internal application, that European law has enshrined in competition law.

The Union's exclusive competence can be inferred from the provisions of the Treaty, such as Articles 89 and 90, which establish a legal regime specific to the competence conferred, determine the legal acts that may be used for that purpose, organise the mechanisms for exercising the competence it delimits by defining the subject matter to which it relates, and designate the Union bodies responsible for implementing that competence and the conditions under which they operate.

Exclusive competence therefore exists when knowledge of a certain area of legislation is reserved and arranged for a body or organisation that is the only one entitled to exercise it in a collective interest. It is of an exceptional nature, particularly in the Community context, where it is required whenever leaving the States free to take initiatives in the same area is incompatible with the unity of the Common Market and the uniform application of Community law. It thus removes from the Member States any right to legislate or regulate in the area of exclusive competence, unless they have been duly invested with this power by the Union. On analysis, the organisation of the Common Market appears to be the privileged area of exclusive competence under the terms of the WAEMU Constitutional Treaty, and competition law, as a constituent element of the Common Market, can only borrow its character as an area of exclusive competence of the Union.

III CONCLUSIONS

If we start from this principle of a simple barrier, which would correspond to the option of the Dakar Treaty, all the legal consequences will have to be drawn, particularly with regard to the relationship between existing national competition laws and emerging Community law. This exclusivist principle of competence does not allow Member States to legislate as of right in the areas covered by Article 88 of the Treaty, especially when the object or effect is to restrict or distort competition in the Common Market of the Union, with the exception of formal prescriptions from the Community authorities associating them with the exercise of this competence. Unfair competition, understood as wrongful conduct in the exercise of a commercial or non-commercial profession, tending either to attract customers or to divert them from one or more competitors, falls within this framework when it takes forms that fall within the scope of Article 88 a.b.

All in all, the Member States remain exclusively competent to take all criminal measures to punish anti-competitive practices, infringements of the rules of market transparency and even the organisation of competition.

From the perspective of the exclusive jurisdiction retained by the Treaty of Dakar, there are two possible scenarios:

1) Where there was a pre-existing national civil or commercial competition law in the Member State prior to the entry into force of Community law.

   In this case, competition law becomes inapplicable, even if it remains materially in force. A substitution mechanism is therefore created in favour of Community law, which is uniformly applicable in all Member States.

   The criminal competition law of these States, which have retained jurisdiction in this area, will therefore have to adapt to Community law in order to characterise punishable offences.

   Henceforth, any initiative by these States in the area of competition law becomes, by virtue of the Union's exclusive competence in this area of competition law as an integral part of the Common Market, contrary to the commitments of the Member State which, under the terms of Article 7 of the Treaty, require States to refrain from any measures which impede the application of the Union Treaty.

2) Where national civil or commercial competition law does not exist or is in the process of being developed.

   In this case, there is no reason in law or in fact to envisage or pursue the development of such a law, since Community law in force has come to govern in a mandatory and uniform manner this area, which has become the exclusive competence of the Union. However, the criminal prosecution of anti-competitive acts remains within the competence of the Member States, provided that it is compatible with EU competition law.

To sum up, if according to the principle of the double barrier, the legal system of the coexistence of national and Community law acting on the same subject but in different fields of action prevails, on the other hand the principle of the single barrier excludes the coexistence of the two laws in favour of the system of substitution which favours the solitary existence of Community law which absorbs national competition law in its uniform application. In any event, in the latter case, the administrative competition departments of the Member States will certainly be called upon to convert the purpose and methods of carrying out their new tasks of cooperation with the Community authorities.

In the light of the foregoing considerations, the Court is of the opinion :

- That the provisions of Articles 88, 89 and 90 of the WAEMU Constitutive Treaty fall within the exclusive competence of the Union

- Consequently, the Member States cannot exercise part of their competence in this area of competition.