

**RULING  
NO.  
02/2021  
FROM 19 May 2021**

**EXTRACT FROM THE MINUTES OF THE  
REGISTRY**

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

**PUBLIC HEARING ON 19 MAY 2021**

Action for annulment of a decision in a full-blown competition dispute

La **Compagny Nationale** **Burkinabé**  
**d'Hydrocarbures (SONABHY)**

**Against**

- **The Commission of the West African Economic and Monetary Union (WAEMU)**
- **Société de Distribution de Gaz-Africain Petroleum Compagny PC (SODIGAZ-APC)**
- **The Groupement Professionnel des Pétroliers (GPP)**
- **The State of Burkina Faso**

**Composition of the Court :**

- **Mr Daniel A. TESSOUGUE, Chairman**
- **Mr Euloge AKPO, Judge-Rapporteur**
- **Mrs Joséphine S. EBAH TOURE, Judge**
- **Mrs. Victoire Ms El. ALLAGBADA, 1<sup>er</sup> General Counsel**
- **Me Hamidou YAMEOGO, Court Clerk**

The Court of Justice of the WAEMU, meeting in ordinary public session on the nineteenth (19th) of May two thousand and twenty-one (2021), in which were seated :

**Mr Daniel Amagoïn TESSOUGUE, Chairman ;  
Mr Euloge AKPO, Judge-Rapporteur ;  
Mrs Joséphine Suzanne EBAH TOURE, Judge ;**

**in the presence of Ms Victoire Eliane ALLAGBADA, Advocate General;**

**with the assistance of Mr Hamidou YAMEOGO, Court Clerk ;**

**Delivers the following judgment:**

**BETWEEN**

**Société Nationale Burkinabé d'Hydrocarbures, abbreviated as "SONABHY", a public limited company with a Board of Directors and capital of three billion (3,000,000,000) CFA francs, registered in the Trade and Personal Property Credit Register of the Registry of the Commercial Court of Ouagadougou, under number OUA 11.298/B, having its registered office at Ouagadougou, quartier Pissy, Route de Bobo- Dioulasso, 01 BP 4934 Ouagadougou 01-Burkina Faso- Tel: (00226)25 43 00 01/25430034 Fax: (00226) 25 43**

**01 74, acting on behalf of its current Managing Director, assisted by Maître Ali NEYA, Avocat à la Cour, member of the Burkina Faso Bar, secteur numéro 14- Ancien de la ville de Ouagadougou, Quartier des 1200 logements, Rue TUEFFO AMORO, Porte numéro 346, 06 BP 10228**

**Ouagadougou 06-BURKINA FASO-, Tel: (00226) 25 36 36 71/Fax: (00226) 25 36 25 81, E-mail: cabaline@fasonet.bf, a.neya67@gmail.com, website: www ;cabinetneya.com ;**

**Plaintiff,**

**on the one hand ;**

**AND**

**The Commission of the West African Economic and Monetary Union (UEMOA), located at 380, Avenue du Professeur Joseph KI-ZERBO, 01 BP. 543 Ouagadougou 01 BURKINA FASO, Tel: (00226) 25 31**

**88 73 to 76, Fax: (00226)25 31 88 72, E-mail:  
commission@uemoa.int, websites:**

[www.uemoa.int](http://www.uemoa.int) and [www.izf.net](http://www.izf.net), represented by its agent Mr Oumarou YAYE, Technical Adviser to the President of the Commission in charge of Legal Affairs, and assisted by Maître Harouna SAWADOGO, Avocat à la Cour, member of the BURKINA FASO Bar, Bâtiment Espace Fadima, Avenue du Président Aboubacar Sangoulé LAMIZANA, 01 BP 4091 Ouagadougou 01, Tel (00226) 25306946- Fax (00226) 25 310852 E- mail: [cab.hsawadogo@live.fr](mailto:cab.hsawadogo@live.fr) ;

Société de Distribution de Gaz-Africain Petroleum Compagny PC, abbreviated as SODIGAZ-APC, a public limited company with a Board of Directors and capital of one billion (1,000,000.000 ) of CFA francs, registered in the Trade and Personal Property Credit Register of the Registry of the Commercial Court of Ouagadougou, under number BF OUA 2012 M 5694, having its registered office in Ouagadougou at quartier Pissy, Parcelle Nord-Est, Lot 241, 01 BP 1936 Ouagadougou, -BURKINA FASO, Tel: ( 00226) /25436828/25435546 Fax: (00226)25 43 68 29, acting at the request of its Managing Director, having as counsel Société Civile Professionnelle d'Avocats LOGOS (SCPA LOGOS), Office located in Ouagadougou, quartier 1200 logements, 11 BP 1631 OUAGA CMS 11, telephone: (OO226) 25 36 26 01/60 42 19 47, E-mail: [avocatlogos@gmail.com](mailto:avocatlogos@gmail.com) ;

Le Groupement Professionnel des Pétroliers, en abrégé (GPP), domicilié à 1080 Avenue KWAME N'KRUMAH, 01 BP 21 OUAGADOUGOU 01, Tél : (00226) 25 32 50 00- Fax: (00226) 25 32 50 01, BURKINA FASO, represented by its President, assisted by Maître Bouba YAGUIBOU (of SCPA le SAPHIR), Attorney-at-Law, member of the Burkina Faso Bar;

The State of Burkina Faso, represented by the Minister of the Economy, Finance and Development, with an address for service at the State Judicial Agency, c/o the Directorate General of the Treasury and Public Accounting, located at Sector 52 of the City of Ouagadougou, Avenue Mouammar KHADAFI, 01 BP 92 Ouagadougou 01, Tel: (00226) 25 66 20 17, fax: (00226) 25 30 57 61 ;

Defendants,

on the other hand ;

## **THE COURT**

**HAVING REGARD TO** the Treaty of the West African Economic and Monetary Union (WAEMU) of 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. 2019-08/AI/02 of 28 May 2019 on the appointment of the President of the Court and the distribution of functions within the Court;

**HAVING REGARD TO** Minutes No. 2019-09/AP/07 of 03 June 2019 relating to the installation of the President of the WAEMU Court of Justice;

**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°08/2021/CJ of 17 March 2021 on the composition of the plenary session to sit in ordinary public hearing on 07 April 2021;

**HAVING REGARD TO** order n°13/2021/CJ of 03 May 2021 on the composition of the plenary session to sit in ordinary public hearing on 19 May 2021;

**HAVING REGARD TO** the parties' subpoenas;

**HAVING REGARD TO** the application dated 12 February 2020, registered at the Registry of the WAEMU Court of Justice on 12 February 2020, under number 20 R 004, by which Société Nationale Burkinabè d'Hydrocarbure (SONABHY), a Société Anonyme d'Etat, acting on behalf of its Managing Director and having as its Counsel Mr Ali NEYA, Avocat à la Cour, member of the Burkina Faso Bar, brought an action for the annulment or modification of a decision imposing a sanction in the area of full competition litigation, namely Decision No 08/2019/COM/UEMOA of 05 November 2019 relating to anti-competitive practices implemented in the liquefied petroleum gas sector in Burkina Faso;

**HEARD** the Judge-Rapporteur in his report;

**HEARD** the oral observations of the SONABHY Board;

**HEARD** the oral observations of the Board of SODIGAZ APC;

**HAVING** heard the oral observations of the Council of the WAEMU Commission;

**HEARD** the counsel for the Groupement Professionnel des Pétroliers (GPP), constituted at the hearing, in his oral observations;

**HAVING** heard the Opinion of the First Advocate General;

Having deliberated in accordance with Community law :

## **I- FACTS AND PROCEDURE**

Whereas in 2001, to replace a system of cross-subsidies between petroleum products, i.e. a system under which products with a profit margin financed subsidised products, the Government of Burkina Faso instituted the reimbursement by the Public Treasury of subsidies granted on the price of certain petroleum products, either by payment by bank transfer or by payment by green cheques, which can only be used for payments to State revenue departments and can therefore be exchanged for cash at commercial banks;

That as part of the implementation of its policy to combat desertification, the Government of Burkina Faso has decided to extend these subsidies to the purchase of liquefied petroleum gas (LPG) or butane gas;

That the benefit of payment by bank transfer is subject to two cumulative conditions, namely on the one hand that this is only possible for the gas subsidy and on the other that the beneficiary must be unable to use green cheques;

That Société Nationale Burkinabè d'Hydrocarbures (SONABHY), a state-owned limited company with a legal monopoly on the import, storage and packaging of liquid and gaseous hydrocarbons, has a business relationship with STD-SODIGAZ (now SODIGAZ-APC), a private limited company, which receives payment by bank transfer;

That payment by green cheques is not appropriate for it, because it is the largest market and the amount of the refundable subsidy on its gas sales far exceeded the amount of its tax charges;

That the repayment period is in principle seventy-two (72) hours for all grants;

Given that the Treasury has exceeded this deadline, SODIGAZ- APC is beginning to experience cash flow problems;

To come to the company's aid, Burkina Faso's Minister of Trade instructed SONABHY to apply a special scheme to SODIGAZ-APC by concluding a pre-financing contract for the subsidy on 13 March 2001;

That as a result, gas purchases made by SODIGAZ-APC will be at a rate previously reduced by the amount of the subsidy;

That the portion corresponding to the amounts of the subsidy shall be borne by SONABHY, with SODIGAZ-APC being responsible for repaying the corresponding amounts to SONABHY when it is effectively reimbursed by the Public Treasury;

In practice, the cash flow problems of SODIGAZ-APC, the beneficiary of the special gas purchase scheme, were de facto transferred to SONABHY, which in turn accumulated payment arrears that were not repaid on time;

That in order to remedy this situation, by letter dated 17 June 2011, SONABHY requested from the Minister of Economy and Finance of Burkina Faso, the possibility to proceed with the payment of the butane gas subsidy of SODIGAZ-APC, by green cheques; which would allow SONABHY to monitor itself the reimbursement of the costs incurred under the SODIGAZ-APC subsidy,

following the example of the subsidies granted on products consumed by the electricity company SONABEL;

In response, on 19 July 2011, Burkina Faso's Minister of the Economy and Finance authorised a review of the procedure for reimbursing SODIGAZ-APC's gas subsidy by extending green cheques to SODIGAZ-APC, with effect from 1<sup>er</sup> January 2012;

On 16 September 2011, SONABHY informed SODIGAZ-APC of the loading of the processing method for this gas subsidy, creating a misunderstanding that the administration is trying to resolve;

Having been informed of these negotiations and having complained to the Minister of Industry, Trade and Crafts (MICA) about the fact that the SODIGAZ subsidy was being reimbursed by bank transfer, while the other markers, members of the group, were being reimbursed by green cheques, the Groupement Professionnel des Pétroliers (GPP), by letter dated 16 May 2014, lodged a complaint with Burkina Faso's National Competition and Consumer Commission (CNCC) alleging anti-competitive and discriminatory practices in the butane gas subsidy reimbursement process, committed by SONABHY, which allegedly favours SODIGAZ-APC to the detriment of the other markers in the group ;

On 18 May 2015, by decision no. 2015-001, the CNCC brought the matter before the WAEMU Commission, ordering SONABHY to put an end to the gas subsidy reimbursement process instituted by the Ministry of the Economy and Finance, SONABHY's technical and management supervisory ministry;

That on 05 November 2019, after preliminary examination, investigation and preparation of the case, the WAEMU Commission issued Decision No. 08/2019/COM/UEMOA against SONABHY, an excerpt of which follows:

*"DECIDES*

*Article 1: It is established that SONABHY has infringed the provisions of Article 88 (b) of the WAEMU Treaty and its implementing texts.*

*Article 2: A fine of fifty million (50,000,000) CFA francs is imposed on SONABHY.*

*Article 3: SONABHY is required to put an end to the discriminatory practice instituted in connection with the reimbursement of the gas subsidy, in particular by treating the various markers operating in the gas distribution sector in Burkina Faso fairly.*

*Article 4: This decision is addressed to SONABHY, SODIGAZ-APC, the Groupement Professionnel de Pétroliers (GPP) and the competent authorities of Burkina Faso.*

*Article 5: A summary of this decision shall be published at the expense of the Commission in one edition of a newspaper in each Member State. This publication will take place in a box in black lettering on a white background at least three millimetres high under the following title, in bold type of the same size: [Communication from the WAEMU Commission on a decision concerning anti-competitive practices implemented in the liquefied petroleum gas sector in Burkina Faso].*

*Article 6: This Decision, which comes into force on the date of signature, will be published in the Official Bulletin of the European Union;*

That by application dated 12 February 2020, registered at the Court Registry on 12 February 2020 under number 20 R 004, SONABHY brought an action against the UEMOA Commission, SODIGAZ-APC, the GPP and the State of Burkina Faso, seeking the annulment or modification of Decision number 08/2019/COM/UEMOA of 05 November 2019 relating to anti-competitive practices implemented in the liquefied petroleum gas sector in Burkina Faso;

That a bond of 100,000 francs, set by the Court by order number 016/2020/CJ of 06 February 2020, has been paid in full by the applicant, according to a receipt dated 11 March 2020, placed in the file;

SONABHY lodged an appeal for a stay of execution of the contested decision by application registered at the Court Registry on 11 March 2020 under number 20 R 0015; the said appeal was dismissed by order number 028/2020CJ of 19 May 2020.

That by letter dated 28 February 2020, received at the Court on 03 March 2020, the WAEMU Commission appointed Mr Oumarou YAYE, Technical Adviser to the President of the Commission in charge of Legal Affairs, as Agent to represent it;

Considering that in support of their claims :

- SONABHY, in addition to its application dated 05 November 2019, filed a statement in response dated 18 March 2020 and a statement in rejoinder dated 29 June 2020, together with exhibits ;
- the UEMOA Commission filed a response dated 07 April 2020 and a rejoinder dated 10 June 2020, together with exhibits ;
- Société de Distribution De Gaz African Petroleum Company (SODIGAZ APC) filed reply and rejoinder briefs dated 18 March and 29 June 2020 respectively;

On the other hand, the other defendants, namely the Groupement Professionnel des Pétroliers (GPP) and the State of Burkina FASO, to whom the application and the various pleadings were served, did not produce any pleadings;

That the written procedure is closed by order number 041/2020/CJ issued by the President of the Court on 1<sup>er</sup> July 2020;

Lastly, Judge Euloge AKPO is appointed Judge-Rapporteur in the present case, by Presidential Order No. 042/2020/CJ of 1<sup>er</sup> July 2020;

## **II. PRESENTATION OF THE PARTIES' CLAIMS**

### **A- THE APPLICANT'S CLAIMS AND ARGUMENTS**

Considering that on the form and in reply to the observations of the Commission, SONABHY, in its brief dated 08 May 2020, asserts that the WAEMU Commission has not taken any clear position or drawn any clear consequence, in the sense of the admissibility or inadmissibility of the Court ;

That his appeal is fully admissible because it was lodged within the time limit;

Considering that on the merits and in its application, dated 05 November 2019, its response, dated 18 March 2020 and then its rejoinder, dated 29 June 2020, SONABHY firstly refers to the error in the legal characterisation of the facts;

That, in its view, the Commission, misapplying Article 88b, imputed to it the infringement of abuse of a dominant position in the LPG sector, through the implementation of the abusive practice of applying unequal conditions to equivalent services vis-à-vis other distributors, through the exclusive pre-financing of the subsidy linked to the purchases of SODIGAZ-APC, thereby placing them at a competitive disadvantage;

That the characterisation of the facts thus adopted is erroneous, because Article 88-b makes no mention of the intervention of a person governed by public law and cannot therefore be the best illustration of the reproach levelled at SONABHY;

Having stated in its condemnation decision: "*considering, however, the strong involvement of the Burkina Faso authorities in the implementation of the offending practices*", the Commission should apply the provisions of Article 88-c of the WAEMU Treaty relating to public aid likely to distort competition by favouring certain undertakings or the production of certain goods;

That this sufficiently justifies the annulment of the decision, due to the fact that the mechanism prohibited by the law was, in reality, conceived and put in place by the State of Burkina Faso, SONABHY having only been an executor acting on the instructions and orders of the said State, through the Minister of Commerce, the Minister responsible for the technical supervision and management of SONABHY;

That the pre-financing of the subsidy for SODIGAZ-APC's gas purchases is more a matter of public aid likely to distort competition than of practices by one or more undertakings that are tantamount to an abuse of a dominant position on the common market;

Considering that SONABHY also maintains that the alleged inapplicability of Article 88(c) of the Treaty, raised by the Commission, and its idea that the practice is comparable to aid of a social nature granted to individual consumers, provided that it is granted without discrimination related to the origin of the products, are irrelevant;

That not only is the aid granted to undertakings and not to individual consumers, but that it is also likely to confer an advantage on an undertaking, namely SODIGAZ, and that the implementation of the butane gas subsidy, on the initiative of the State of Burkina Faso, would distort competition and would inevitably entail a direct and effective cost for a part of the State, namely SONABHY, a State company which has to bear the cost of the subsidy and be paid very late ; which causes real hardship to its treasury;



That the only party at fault in this case is the State of Burkina Faso and that there has been a violation of the principle of personal liability and the individual nature of penalties, which excludes any liability for the acts of others in criminal matters;

That pre-financing is equivalent to an interest-free loan granted by the Burkina Faso government;

That the Commission erred in its legal characterisation of the facts and misapplied the law;

That this is "a violation of the constitutional principle of the legality of offences";

That the Commission's decision should therefore not withstand annulment on the grounds of infringement of the provisions of Regulation No 03/2002/WAEMU of 23 May 2002 relating to the procedures applicable to cartels and abuses of dominant position within the WAEMU;

That SONABHY's act can be qualified as *sui generis*, requiring the enactment of specific legislation, a requirement of the principle of the legality of offences and penalties, which is violated by the WAEMU Commission, which sanctioned this new or unprecedented fact without any legislation;

Considering that SONABHY also claims that there is a contradiction of grounds, based on the disappearance of the object of the Commission's referral;

That the UEMOA Commission has condemned it for practices that it has invited it to cease, even though the said practices have ceased, the members of the GPP having decided unilaterally and on their own authority to pay their gas bills, previously reduced by what corresponds to the amount of the subsidy, since June 2016;

That prima facie evidence in writing can be provided by producing the invoices issued to the markers who benefit from contractual protection, together with the equivalent purchase orders received by SONABHY;

That it is not possible to put an end to discrimination that has disappeared;

That the determination of the amount of the fine of fifty million is justified by the seriousness of the infringement in terms of its duration and the damage caused to the economy, pursuant to the provisions of Article 22.2 of Regulation No 3 -2002-CM-UEMOA, whereas Article 22.1 does not appear to limit the determination of the said amount to these factors;

The requirement of proportionality also applies to the person who imposes a sanction to punish a particular breach;

Taking into account other undisputed factors may allow the said amount to be reduced to the legal minimum of five hundred thousand (500,000) CFA francs, namely that :

- SONABHY did not initiate the mechanism and is not responsible for it;
- SONABHY did not derive any benefit from the offending practice; the offending practice ceased in 2016;
- The Commission notes the strong involvement of the Burkina Faso authorities;

Considering that SONABHY finally maintains that, with regard to the exclusion of liability sought by SODIGAZ-APC, because of the infringement provided for in point a of Article 88 of the WAEMU Treaty, which prohibits by operation of law agreements, associations and concerted practices between undertakings the object of which is to restrict or distort competition within the Union, SODIGAZ cannot be excluded from liability;

That this infringement could not be held against either SONABHY or SODIGAZ-APC, because the agreement required for the application of the said article never existed and it is a question of State aid distorting competition by favouring the latter, as provided for by point c of Article 88;

That SONABHY therefore requests that the Court: In form :

- Declare SONABHY's application admissible as having complied with the relevant legal requirements;

In the background:

- Annul Decision No. 08/2019/COM/WAEMU of 05 November 2019 concerning anti-competitive practices in the liquefied petroleum gas sector in Burkina Faso, in order to :
  - error in the legal characterisation of the facts ;
  - Incorrect application of the provisions of Article 88 (a and b) of the WAEMU Treaty and Article 22.2 of Regulation No. 3-2002-CM-UEMOA on procedures applicable to cartels and abuses of dominant positions within the WAEMU;
  - Infringement of the provisions of Article 88 (a and b) of the WAEMU Treaty and Article 22.2 of Regulation No. 3-2002-CM-UEMOA on procedures applicable to cartels and abuses of dominant positions within WAEMU;
  - conflicting reasons ;
  - disappearance of the subject of the Commission's referral ;
- Ruling again, consider that :
  - SONABHY did not initiate the mechanism in question;
  - The Commission did not fail to note the strong involvement of the Burkinabe authorities in the practices in question;
  - SONABHY stated in its comments that the government of Burkina Faso is in the process of putting in place a mechanism that will guarantee fair treatment for all stakeholders;
  - SONABHY has not benefited in any way from the practice in question; on the contrary, it has had a very negative impact, having to endure and bear the long wait for repayment of the subsidies from SODIGAZ-APC and all the members of the GPP against its will;
  - The offending practice has ceased and, since June 2016, GPP members have been paying their gas bills, which were reduced by the amount of the subsidy;
- Consequently, reduce the fine to the legal minimum of five hundred thousand (500,000) CFA francs;

## **B. DEFENDANTS' CLAIMS AND ARGUMENTS**

### **1- REQUESTS AND ARGUMENTS OF THE UEMOA COMMISSION**

Considering that the WAEMU Commission, in its response of 07 April 2020 and in its rejoinder of 10 June 2020, seeks the outright rejection of SONABHY's claims, on the grounds that its pleas do not provide a basis for annulling or amending the decision to condemn;

It maintains that for more than ten years, GPP members have been the victims of discriminatory treatment in the reimbursement of the butane gas subsidy, because the SODIGAZ -APC subsidy is borne directly by SONABHY, unlike other distributors who must bear the cost of the subsidy and then wait many months, even years, before being paid;

That the information gathered revealed concordant evidence of a malfunction in competition on the LPG market;

That a survey of industry players and consumers by the WAEMU Commission, supported by national investigators, from 18 to 29 April in Ouagadougou, Bobo Dioulasso and Ouahigouya (cities in Burkina Faso), led to the initiation of adversarial proceedings, the notification of grievances and the receipt of written observations;

That the principle of the butane gas subsidy constitutes public aid governed by Article 88-c of the Treaty and Regulation No. 04/2002/CM/WAEMU, Article 3 of which recognises the compatibility with the common market of "aid having a social character, granted to individual consumers";

All consumers in Burkina Faso should benefit directly from the gas subsidy, regardless of the company distributing the gas, in the same way as for water and electricity;

That the dispute at the origin of the case concerns neither the subsidy nor its legality, but rather the mechanism for its reimbursement and its implementation by a company with a monopoly, and therefore in a dominant position;

State intervention in competition is not only covered by Article 88c of the Treaty on State aid;

Article 76c of the Treaty on the objectives of the common market refers to *"the introduction of common competition rules applicable to public and private undertakings and to public aid"*;

That Article 6 of Regulation n°02/2002/CM/UEMOA, which relates to anti-competitive practices attributable to Member States, prohibits, inter alia, the said States from enacting or maintaining, in respect of public undertakings, measures contrary to the rules and principles laid down in Article 88 a and b of the Treaty, and that undertakings having the characteristics of a fiscal monopoly are subject to the rules of the Treaty relating to competition;

It follows from these provisions that public intervention may be backed by an offence of anti-competitive agreement (88-a) or abuse of a dominant position (88-b);

In such cases, companies are prosecuted for infringements of Article 88(a) or (b) of the Treaty;

That the offence relating to public aid implies an obligation to quantify the aid received and to be able to demand that it be repaid to the State when it is manifestly illegal;

That the markers, i.e. SONABHY's gas distribution companies, are not beneficiaries of the subsidy for their own profit, but merely intermediaries in the granting of aid to individual consumers;

That there was no error in the characterisation of the facts, the beneficiaries of the subsidy being the consumers;

Nor is there any public aid granted to one or more companies, because in this case the practice in question, "pre-financing the subsidy", does not lead to a reduction in public revenue; the markers pre-finance the public expenditure and are subsequently reimbursed by the State;

That the subsidy mechanism creating an advantage for certain companies, such as SODIGAZ-APC, constitutes practices contrary to the rules and principles laid down in Article 88 (a) and (b) of the Treaty and the public intervention recorded could not be analysed from the angle of public aid, but rather from the angle of anti-competitive practices attributable to States;

That SONABHY, which participated in the implementation of this discriminatory measure, is rightly being prosecuted and punished for abuse of a dominant position;

Article 76-c of the Treaty refers to the establishment of common rules of competition applicable to public and private undertakings, whereas SONHABHY is a public undertaking which has engaged in abusive practices in the operation of butane gas;

That the infringement is constituted with regard to the anti-competitive object and effect of the agreement dated 13 March 2001, by which SONABHY undertook to bear the cost of the subsidy on SODIGAZ-APC's orders, with the latter being responsible for repaying the said subsidy, once reimbursed by the Burkinabe Treasury, into its accounts;

That between these two parties, there is an agreement of wills or the existence of a cartel which limits the other players' ability to conquer the market, in view of the financial costs borne by them and the cash flow pressure caused by delays in repayment of the subsidy;

That the situation has favoured SODIGAZ-APC by providing it with substantial resources enabling it to implement its development plan and maintain its dominant position in the LPG market, all possibilities not available to other distributors;

That SONABHY, the only player in Burkina Faso responsible for importing and storing hydrocarbons by virtue of its monopoly, by implementing the subsidy policy, applies differential treatment to its commercial partners;

SONABHY charges SODIGAZ-APC prices reduced by the amount of the subsidy and is reimbursed only when the subsidy is paid into its coffers by the Treasury, whereas other distributors pay the subsidy and are reimbursed several months or years later;

That SONABHY has not provided any document attesting to the formal cessation of the discriminatory practice, merely producing three letters relating to the procedures for implementing the discrimination in favour of SODIGAZ-APC;

SONABHY has admitted that the practice ceased in 2016, following a unilateral decision by GPP members to pay their gas bills, which had previously been reduced by the amount of the subsidy;

That the silence maintained by SONABHY in the face of this attitude cannot be construed as a formal and definitive acceptance, as the members of the GPP are not legally protected from a possible reversal by SONABHY;

That the supposed cessation of the said offence is merely a mitigating circumstance in determining the penalty;

That SONABHY's obligation to formally put an end to the incriminated practice is made with good reason and to ensure the legal protection of all parties;

That the strong involvement of government authorities cannot relieve a monopoly company of its responsibility to ensure that the relevant market functions properly;

That public intervention nevertheless constitutes a mitigating situation that has already been taken into account in setting the fine, which is why the amount of the fine was not set on the basis of SONABHY's turnover, but rather by retaining the amount of fifty million (50,000,000) CFA francs, which seems symbolic in view of the offence of abuse of a dominant position;

That it is not for the offending parties to determine the amount of the fine; That the amount set is reasonable and should be maintained.

That it pray the Court: In form :

- agree to be bound by the law as to the admissibility of the action; On the merits :

- have the action dismissed as unfounded;
- order SONABHY to pay all the costs;

## **2°- CLAIMS AND ARGUMENTS OF SOCIETE DE DISTRIBUTION DE GAZ AFRICAN PETROLUM COMPANY (SODIGAZ APC) SA**

Considering that Société de Distribution De Gaz African Petroleum Company (SODIGAZ APC), in its reply and rejoinder, dated 18 March and 29 June 2020 respectively, seeks to be exonerated from the proceedings by pointing out, on the one hand, that by relying on the provisions of Article 14.3 of Regulation No. 1/96/CM on the rules of procedure,

the Court of Appeal can only assess the merits of the decision handed down by the WAEMU Commission against SONABHY and the amount of the fine imposed and, secondly, that the WAEMU Commission did not impose a sanction on SODIGAZ- APC SA;

It also seeks the inadmissibility of the pleas in law and the dismissal of SONABHY's application to oppose its dismissal;

That it is not for SONABHY to seek its conviction, when the prosecuting authority has exonerated it;

It maintains that the present proceedings are concerned solely with the assessment of SONABHY's appeal;

It asks the Court of First Instance to be guided by the case law of the Court of Justice of the European Union, namely the *Groupe Danone v Commission of the European Communities* judgment of 08 February 2007, confirmed by the *Galp Energia Espana SA v Commission of the European Communities* judgment of 21 January 2016, which held that the full jurisdiction of the Community judicature relates solely to the assessment of the fine imposed, the amount of which may be reduced or increased;

That the period during which SONABHY applied differential treatment to SODIGAZ-APC and other markers runs from March 2001 to June 2016, whereas the WAEMU Commission has retained the period from 2001 to 2018, considering that the incriminated practice is still ongoing;

That SODIGAZ cannot be held liable for any agreement, insofar as it has not been proven that any agreement existed between SONABHY and SODIGAZ, as the parties merely complied with government instructions between 2001 and 2011 and SONABHY expressly opposed the derogatory treatment granted to SODIGAZ between 2011 and 2016;

That it was to avoid serious disruption of the market, due to the disappearance of the main player, SODIGAZ, that the State ordered SONABHY, a state-owned company, to sign the agreement in question, under which SODIGAZ receives the subsidy by bank transfer and not by green cheques, and to reimburse SONABHY only once the subsidy has been paid by the State;

That SODIGAZ has never requested or demanded discriminatory treatment from SONABHY, which is responsible for drawing up the agreement in question;

That the agreement reflects the implementation of a political and not a commercial agreement between its signatories;

A cartel can only be criminalised if it has an anti-competitive object or effect;

That this is not the case here, because the objective was not to drive competitors out of business or to harm them, but to comply with a government instruction aimed at ensuring the availability of gas on the market;

That the purpose of the cartel was not to ensure an advantageous situation for SODIGAZ, but rather to enable it not to advance the subsidy on behalf of the State, because it could not materially apply the green cheque subsidy system, given the volume marketed;

Competition comes into play at the level of the consumer's purchase of the gas cylinder, because consumers who have returned a gas cylinder to a marker are obliged to load their cylinder with that marker;

That, under these conditions, no penalties are applied to companies that are party to such agreements;

That the economic equilibrium of SODIGAZ depended entirely on the rapid repayment of the subsidy granted by the State to consumers;

Given the volumes marketed and the non-interchangeability of cylinders, SODIGAZ's inability to supply its customers could lead to a shortage on the market;

That the gas subsidy, as envisaged by the Burkina Faso government, which did not have sufficient financial resources to support its policy, would result in the definite closure of SODIGAZ-APC and serious disruption of the butane market;

That the practice of which SODIGAZ and SONABHY are accused is entirely attributable to the State of Burkina Faso, which imposed differentiated treatment in favour of SODIGAZ rather than aligning all markers on the same system of deferred reimbursement of the subsidy;

That this is not a cartel within the meaning of Article 3 of WAEMU Regulation No. 02/2002/CM/UEMOA, but a simple application of government instructions;

That it cannot be penalised for having applied an agreement required by the State and then maintained with its approval;

In the light of the pleadings and documents produced, it is clear that SONABHY will be ordered to pay the costs;

She therefore requests that the Court :

- to exonerate her;
- declare that there have been no anti-competitive practices ;
- exonerate it from sanctions due to the intervention of the Burkinabe State;
- rule on SONABHY's appeal;
- rule solely on SONABHY's appeal seeking to dismiss the case or to reduce the amount of the penalty imposed on it;
- order SONABHY to pay the costs.

### **III- DISCUSSION**

#### **A- ON THE COMPETENCE**

Considering that the case file does not reveal any particular concern about the jurisdiction of the court in question, which is a judicial review body of the WAEMU;

Nevertheless, it is important to note:

- That **Article 15.3** of Regulation No. 01/96/CM laying down the rules of procedure of the Court relating to full litigation on competition matters provides :  
*" ...] The Court may be called upon to rule on decisions and penalties which the Commission may have imposed on undertakings which have failed to observe the principle of free competition or which have abused their dominant position on the Union market. It may amend or annul such decisions, reduce or increase the amount of fines and periodic penalty payments, make findings and impose obligations on undertakings;*
  
- **Article 31** of Regulation n°3/2002/CM/UEMOA relating to procedures applicable to cartels and abuses of dominant position within the UEMOA, relating to judicial remedies, also provides that :  
*"...] The WAEMU Court of Justice shall assess the legality of decisions taken by the Commission pursuant to this regulation under the conditions laid down in Additional Protocol No. 1 relating to the Union's supervisory bodies.  
By virtue of Article 8 of the aforementioned Protocol, the action for assessment of legality is open to the Member States and to the Council. It is also open to any natural or legal person against any act adversely affecting them.  
In accordance with the provisions of Article 15 paragraph 3 of Regulation N° 1/96/CM/UEMOA of 05 July 1996, the Court of Justice has full jurisdiction to rule on appeals against decisions by which the Commission sets a fine or periodic penalty payment. It may amend or annul the decisions taken, reduce or increase the amount of fines and periodic penalty payments or impose specific obligations;*

That it is clear from these provisions that jurisdiction is perfectly conferred on the court of first instance, in the present case brought by an application seeking the annulment of a decision made by the WAEMU Commission in competition matters;

That it is appropriate to declare itself competent;

### **B- SURLA RECEVABILITY**

Considering that the WAEMU Commission has raised the question of the admissibility of the action, in relation to the date on which the application was lodged;

It should be noted that Article 31 of Regulation n°3/2002/CM/UEMOA of 22 May 2002, relating to the procedures applicable to cartels and abuses of dominant position within the UEMOA provides that :

*"...] The WAEMU Court of Justice shall assess the legality of decisions taken by the Commission pursuant to this regulation under the conditions laid down in Additional Protocol No. 1 relating to the Union's supervisory bodies.*

*By virtue of Article 8 of the aforementioned Protocol, the action for assessment of legality is open to the Member States and to the Council. It is also open to any natural or legal person against any act adversely affecting him...] ;*



According to Article 8 of *Additional Protocol No 1 on the Union's Supervisory Bodies*, which reads as follows: *"[?] An action for an assessment of legality shall also be available to any natural or legal person against any act of a Union body adversely affecting that person. The proceedings provided for in this Article shall be instituted within two (2) months of the publication of the act, of its notification to the appellant or, in the absence thereof, of the day on which it came to the knowledge of the latter"*;

The foregoing provisions read together to mean that a period of two years must be observed in order to be entitled to a claim.

(02) months shall be set for the lodging of an action for annulment of a penalty decision issued by the Commission, in the context of full-blown competition litigation;

Considering that SONABHY's application was received at the Registry of the WAEMU Court of Justice on 12 February 2020 and registered on the same day, whereas it was notified of the contested decision on 12 December 2019;

That the computation of time limits in WAEMU competition law is governed by Article 69 of Regulation No 1/96/CM laying down the Rules of Procedure of the Court of Justice of the WAEMU, which provides, inter alia, that *"[...] if a time limit expressed in days, weeks, months or years is to be counted from the moment when an event occurs or an act is carried out, the day during which that event occurs or that act is carried out shall not be counted as part of the time limit. [Where a period is expressed in months and days, the whole months shall be taken into account first, then the days; [...]"*;

In this case, the time limit is expressed in months;

That the day of notification of the contested decision being Thursday 12 December 2019, the first day of the period is then the following day, Friday 13 December 2019, while the last day is Thursday 13 February 2020;

It appears from the file that SONABHY's application was filed and registered at the Court Registry on 12 February 2020;

That the said application should therefore be declared admissible;

### **C- S U R L E F O N D**

Considering that SONABHY is requesting:

- t h e annulment of Commission Decision No. 08/2019/COM/WAEMU dated 05 November 2019;

Alternatively :

- implicating SODIGAZ-APC for the infringement provided for in Article 88(a) of the WAEMU Treaty, which automatically prohibits agreements, associations and concerted practices between undertakings aimed at restricting or distorting competition within the Union;
- reduction of the fine to the legal minimum of five hundred thousand (500,000) CFA francs;

## 1- ANNULMENT OF THE CONTESTED DECISION

Considering that SONABHY puts forward five pleas in law in support of its application for annulment, namely :

- an error in the legal characterisation of the facts ;
- misapplication of the provisions of Article 88 (a and b) of the WAEMU Treaty and Article 22.2 of Regulation No. 3-2002-CM-UEMOA relating to the procedures applicable to cartels and abuses of dominant positions within the WAEMU;
- infringement of the provisions of Article 88 (a and b) of the WAEMU Treaty and Article 22.2 of Regulation No. 3-2002-CM-UEMOA relating to the procedures applicable to cartels and abuses of dominant positions within WAEMU;
- conflicting reasons ;
- the disappearance of the purpose of the referral to the Commission ;

### **a) - The first plea alleging error in the legal characterisation of the facts**

Considering that SONABHY raises three grievances in this regard:

- **On the first complaint relating to the "erroneous application of Article 88-b"**

The applicant claims that the abuse of a dominant position in the LPG sector has been wrongly attributed to it on the ground that Article 88b makes no mention of the intervention of a person governed by public law;

Article 88b prohibits *"all 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"*;

Note 1 of Annex No. 1 to Regulation No. 03/2002/cm/UEMOA on procedures applicable to cartels and abuses of dominant positions within UEMOA provides, inter alia, that :

*"For the purposes of Community competition law, the concept of an undertaking is defined as a unitary organisation of personal, tangible and intangible elements engaged in an economic activity for pecuniary gain on a lasting basis, irrespective of its legal status, whether public or private, and of the way in which it is financed, and enjoying autonomy of decision..."* ;

It follows that SONABHY's status as a public undertaking does not exempt it from prosecution on the basis of Article 88-b of the amended WAEMU Treaty, which prohibits undertakings from all practices amounting to an abuse of a dominant position in the common market or in a significant part of it;

In the light of the foregoing, the applicant's complaint should therefore be rejected;

- **On the second complaint concerning the Commission's failure to apply Article 88c of the Treaty**

Considering that the applicant claims that the provisions of Article 88c of the WAEMU Treaty relate to public aid liable to distort competition, for having taken into account in its sentencing decision *"... the strong involvement of the Burkina Faso authorities in the implementation of the practices complained of"*;

That the pre-financing of the subsidy for SODIGAZ-APC's gas purchases is more a matter of public aid likely to distort competition than of practices by one or more undertakings that are tantamount to an abuse of a dominant position on the common market;

Considering that Article 88-c of the amended WAEMU Treaty provides that *the following are prohibited ipso jure: "public aid likely to distort competition by favouring certain undertakings or the production of certain goods"*;

That while in the present case it is undeniable that the State of Burkina Faso, in implementing its policy of combating desertification, grants price subsidies for purchases of the product "*liquefied petroleum gas*" (LPG) or butane gas, it is established that the true beneficiaries of the said subsidies are in reality the consumers of the said product and not the markers or companies distributing SONABHY gas, which are merely intermediaries in the granting of aid to the end consumer;

That it appears that the said price subsidies cannot be considered as  
The Commission considers that "*public aid likely to distort competition by favouring certain undertakings or the production of certain goods*" is such as to require application of the provisions of Article 88c of the Treaty as amended;

It is clear from the file that it is neither the subsidy of the price of gas by the State of Burkina Faso, nor its legality that is at issue, but rather the mechanism for reimbursing the subsidy and its implementation by SONABHY;

That SONABHY, being a company in a monopoly situation, and therefore in a dominant position, is the perpetrator of anti-competitive practices, all of which require the application of Article 88-b ;

That the Commission was therefore right to have recourse to Article 88b and not to Article 88c of the Treaty as amended;

It follows that this second complaint is irrelevant and should be dismissed.  
rejected ;

- **On the third grievance relating to the attribution to the State of Burkina Faso of the design and implementation of the prohibited mechanism**

Considering that the applicant claims that SONABHY was merely an executor having acted on the instructions and orders of the State of Burkina Faso, through the Minister of Trade, its technical supervisory and management Minister;

Whereas the fact that a company acts on the instructions of a third party, even its supervisory authority, cannot constitute immunity for acts in breach of its obligations in competition matters;

That it is up to the company in question to assess, in advance, in relation to its obligations, whether or not the said acts fall within the scope of the law, before carrying them out;

That the company should take responsibility for its actions if they were found to fall within the law;

In other words, a command from an authority, even a supervisory authority, cannot exonerate a company from compliance with Community obligations, in particular those relating to the prohibition of anti-competitive practices;

That this third complaint should therefore be rejected.

All in all, it is clear from the foregoing that the contested decision is not vitiated by an error in the legal characterisation of the facts; this first plea must therefore be rejected without question;

**(b) - The second and third pleas in law alleging misapplication and infringement of the provisions of Article 88 (a and b) of the WAEMU Treaty and Article 22.2 of Regulation No 3-2002-CM-UEMOA**

Considering that the applicant claims that the only party at fault in this case is in fact the State of Burkina Faso and that there has been a breach of the principle of personal liability and the principle that penalties must be individualised, which excludes any vicarious liability in criminal matters;

That the pre-financing is equivalent to an interest-free loan granted by the State of Burkina Faso within the WAEMU, which inspires "*a violation of the constitutional principle of the legality of offences*";

Considering that in support of these two pleas, SONABHY raises three grievances, namely that :

- the aid is granted to undertakings and not to individual consumers, but also that it is likely to confer an advantage on an undertaking, namely SODIGAZ, and that the implementation of the butane gas subsidy, on the initiative of the State of Burkina Faso, would distort competition;
- the only party at fault in this case is the State of Burkina Faso and that there has been a breach of the principle of personal liability and the individual nature of penalties, which excludes any vicarious liability in criminal matters; the pre-financing being equivalent to an interest-free loan granted by the State of Burkina Faso;
- the requirement of the principle of the legality of offences and penalties, violated by the WAEMU Commission, which sanctioned, without a text, a new or unprecedented fact, as the act of SONABHY can be qualified as *sui generis* and requires the enactment of specific texts;

Whereas it has already been concluded that the subsidy on the price of butane gas constitutes aid which in reality benefits gas consumers in Burkina Faso and not the companies distributing the said product, which are merely intermediaries in the granting of the aid;

Since the said distributors clearly do not derive any benefit from it, it follows that the subsidy of the price of gas by the State of Burkina Faso is not at issue and does not affect or distort competition;

Consequently, to assert that there has been a violation of the principle of personal responsibility, of the personality of penalties, or of the legality of offences, in relation to the proceedings brought against SONHABHY, lacks relevance;

All three complaints should therefore be dismissed;

It follows that these second and third pleas can only be rejected;

**(c) - The fourth and fifth pleas in law alleging, respectively, inconsistency of reasons and failure to have regard to the subject-matter of the referral to the Commission**

Considering that, in support of these pleas in law, the applicant raises the common grievance that the UEMOA Commission referred the matter to it and condemned it for practices that it is calling on it to cease, even though the said practices have already ceased, the members of the GPP having unilaterally decided on their own authority to pay their gas bills, previously reduced by what corresponds to the amount of the subsidy, since June 2016;

That it is not possible to put an end to discrimination that has disappeared;

Considering that, even if the conduct described as a competitive practice has disappeared over time, the perpetrator of the acts cannot claim that the conduct in question has disappeared in order to benefit from impunity;

That anti-competitive practices that have ceased are not immune from prosecution, provided that they constitute offences and are not time-barred;

The fourth and fifth pleas in law should be rejected;

Considering that, all in all, in relation to the examination of the request for annulment of the contested decision, it is clear from the file that SONABHY is a State-owned limited company which enjoys a legal monopoly on the import, storage and packaging of liquid and gaseous hydrocarbons;

Under these conditions, it is in a dominant position as regards the supply of liquid and gaseous hydrocarbons in Burkina Faso;

The file also shows that, as part of its commercial relations with its customers, SONABHY undertook to apply to SODIGAZ-APC prices reduced by the amount of the price subsidy granted by the State of Burkina Faso to consumers, and is reimbursed only if the amount is paid into the coffers of SODIGAZ-APC by the Public Treasury;

However, other distributors have to pay the subsidy and are reimbursed several months or years later;

That it appears that, through this behaviour, SONABHY has favoured SODIGAZ-APC by giving it access to significant resources on the LPG market, which other distributors, all competitors of SODIGAZ-APC, do not have;

Under these conditions, the latter are either forced to bear more or less high financial costs, or are deprived of resources corresponding to the amount of subsidies whose repayment is delayed, compared to them alone;

The application of differential treatment to business partners;

That this differential treatment is likely to distort competition on the LPG market within the European Union;

That it constitutes, for a company enjoying a monopoly in the supply of liquid and gaseous hydrocarbons in Burkina Faso, an anti-competitive practice, in this case the offence of abuse of a dominant position, prohibited by Article 88-b of the amended WAEMU Treaty;

That the WAEMU Commission was right to find and hold the applicant liable for this infringement;

In the light of the foregoing considerations, the application for annulment of the contested decision should be dismissed;

## **2- ON SODIGAZ-APC'S INVOLVEMENT IN THE CASE**

Considering that SONABHY has made an ambiguous request in this regard, claiming on the one hand that, because of the infringement provided for in Article 88(a) of the WAEMU Treaty, which prohibits by operation of law agreements, associations and concerted practices between undertakings whose purpose is to restrict or distort competition within the Union, "SODIGAZ cannot be exonerated";

On the other hand, it subsequently maintained that "this infringement could not, however, be held against either SONABHY or SODIGAZ-APC", because the agreement required for the application of the said Article never existed and that it constituted State aid distorting competition by favouring the latter, as provided for in Article 88(c);

That despite the ambiguity of the request, SODIGAZ-APC replied by asking the court to exonerate it from all liability and sanctions due to the intervention of the State of Burkina Faso;

Considering that, in the present case, the prosecution and conviction of SONABHY in the contested decision are based solely on the provisions relating to abuse of a dominant position, in this case *Article 88(b) of the WAEMU Treaty and its implementing texts*;

That by the application to implead SODIGAZ APC SA, the applicant is in fact asking the Court to initiate, instead of the Commission, new proceedings against that company on the basis of Article 88a;

Pursuant to Article 15(3) of Regulation No 01/96/CM laying down the Rules of Procedure of the Court of Justice relating to full-blown competition litigation, the task of the Court of First Instance is not to initiate proceedings in place of the Commission, but rather to "...] rule on decisions and penalties which the Commission may have imposed on undertakings which have failed to observe the principle of free competition or which have abused their dominant position on the Union market";

That, consequently, the application of SODIGAZ APC SA as a defendant in this case should be rejected;

## **3- REDUCTION OF THE FINE**

Considering that SONABHY requests, failing the annulment of the contested decision, the reduction of the amount of the fine to the legal minimum of five hundred thousand (500,000) CFA francs;

In support of this claim, the applicant raises four grievances, namely that :

- SONABHY did not initiate the mechanism and is not responsible for it;
- SONABHY did not derive any benefit from the practice in question;
- The practice in question has been discontinued since 2016;
- The Commission notes the strong involvement of the Burkina Faso authorities;

- **THE COMPLAINT THAT SONABHY DID NOT INITIATE THE MECHANISM AND IS NOT RESPONSIBLE FOR IT**

Whereas the applicant seeks a reduction in the amount of the fine on the grounds that it did not initiate the mechanism and was not responsible for it;

Considering that while it is true that the file shows that it was the Ministry of Trade of the State of Burkina Faso which instructed SONABHY to apply a special scheme to SODIGAZ-APC by concluding, on 13 March 2001, a contract for the pre-financing of the subsidy ;

It is also true that SONABHY is not supposed to ignore the law or the WAEMU community standard, in particular its provisions prohibiting anti-competitive practices;

That before executing an instruction from the supervisory authority, SONABHY should first ensure that the said instruction does not violate the WAEMU community standard, in this case the rules relating to free competition;

That for not having done so, and for having voluntarily implemented the subsidy mechanism thus decided by its supervisory authority, SONABHY cannot plead its own turpitude in order not to assume the consequences of its behaviour, which distorts competition within the Union;

That this first complaint is therefore irrelevant and should be rejected;

- **THE COMPLAINT THAT NO ADVANTAGE WAS DERIVED FROM THE PRACTICE COMPLAINED OF**

Considering that SONABHY is requesting a reduction in the amount of the fine, claiming that it did not derive any benefit from the offending practice;

Considering that, in the present case, the fine is the penalty for the offence of abuse of a dominant position for which SONABHY is liable;

For this infringement to be established, two conditions must be met: on the one hand, the dominant position resulting from SONABHY's monopoly and, on the other hand, the abuse, in this case the differential treatment of commercial partners, distorting competition on the LPG market within the Union;

That the abuse is assessed objectively and concretely and is sufficient in itself if it infringes the rules of free competition;

That it is therefore detached from any other consideration;

That this second grievance should therefore be dismissed;

- **THE THIRD GRIEVANCE RELATING TO THE CESSATION OF THE PRACTICE COMPLAINED OF**

Considering that SONABHY is requesting a reduction in the amount of the fine imposed on it, on the grounds that the practice of which it is accused has ceased since 2016;

Considering that even though the Commission, in its pleadings, objected to this reduction, stating that "*contrary to its allegations, SONABHY has not placed in the Court's file any document attesting to the formal cessation of the discriminatory practice...*";

Nevertheless, point 136 of the contested decision states: "*Considering that the period from 2001 to June 2016 has been chosen as the reference period during which the offending practices were carried out*";

It is therefore clear that there is in fact a correspondence between the year of cessation referred to by the applicant and the upper limit of the temporal scope of the infringement found in the contested decision;

It follows that this third complaint is irrelevant and should be rejected;

- **ON THE FOURTH GRIEVANCE RELATING TO THE HEAVY INVOLVEMENT OF THE BURKINABE AUTHORITIES**

Considering that SONABHY is requesting a reduction in the amount of the fine imposed on it because of the strong involvement of the Burkina Faso authorities, as noted by the Commission;

Whereas it is true that the applicant acted on the instructions of its supervisory authority and that this does not exonerate it from responsibility for the offence of abuse of a dominant position for which it is liable ;

It is also true that SONHABY is a state-owned company that would not have been guilty of this offence in the absence of instructions from its supervisory authority;

That in the contested decision, the WAEMU Commission noted at point 137 "*... the strong involvement of the Burkina Faso authorities in the conduct complained of*" and that it took this into account, according to its written submissions, in setting the amount of the fine at fifty million (50,000,000) francs;

According to Article 22.2 of Regulation n°3/2002/CM/UEMOA relating to the procedures applicable to cartels and abuses of dominant position, within UEMOA, a fine may be imposed on a company guilty of abuse of a dominant position, in the amount of 500,000 CFA francs to 100,000,000 CFA francs and that this amount may be increased to ten per cent of the turnover achieved during the previous financial year of the said company or ten per cent of its assets, when the offence is committed deliberately or through negligence;

In determining the amount of the fine, account must be taken not only of the seriousness of the offence but also of its duration;

That according to the provisions of Article 15.3 of Regulation No 1/96/CM laying down the Rules of Procedure of the Court of Justice of the WAEMU, the Court of Justice may "*rule on decisions and sanctions which the Commission may have taken against undertakings which have failed to observe the principle of free competition or which have abused their dominant position on the Union market. It may amend or annul such decisions ...] reduce or increase the amount of fines [...]*" imposed on an undertaking guilty of abuse of a dominant position;



Having regard to the evidence in the file, in particular the fact that the practices complained of were facilitated by a foreign factor, in this case the instructions of the applicant's supervisory authority, the court finds that the amount of the fine set by the Commission at fifty million (50,000,000) CFA francs is reasonable;

That the application for a reduction of the fine should be

rejected; **4- ON THE NATURE OF THE DECISION**

Considering that, in accordance with Article 80 of Regulation No. 1/96/CM laying down the Rules of Procedure of the Court, where a "*defendant, duly summoned, fails to reply to the application in the prescribed form and time*", the Court shall give a default judgment against him;

That in the present case, two defendants, namely the Groupement Professionnel des Pétroliers (GPP) and the State of Burkina FASO, to whom the application and the various pleadings of the other parties were duly served, did not produce any pleadings;

That it is appropriate to rule by default against them;

#### **5- ON EXPENSES**

Considering that under the terms of Article 60 of Regulation No. 1/96/CM on the Rules of Procedure of the Court, any unsuccessful party shall be ordered to pay the costs;

Since the applicant has been unsuccessful, it should be ordered to pay the costs.

### **PARCE SMOTIFS**

**Ruling publicly and adversely against Société Nationale Burkinabé d'Hydrocarbures (SONABHY), the Commission of the West African Economic and Monetary Union (UEMOA) and Société de Distribution de Gaz-Africain Petroleum Compagny PC (SODIGAZ APC), then by default against the Groupement Professionnel des Pétroliers (GPP) and the State of Burkina Faso, in matters of Community law and in actions for annulment of decisions on full contentious competition matters;**

**IN THE FORM :**

- declares itself competent ;
- declares the application of Société Nationale Burkinabè d'Hydrocarbures (SONABHY) admissible;

**IN THE BACKGROUND :**

- Dismisses all the claims of Société Nationale Burkinabè d'Hydrocarbures (SONABHY);
- order Société Nationale Burkinabè d'Hydrocarbures (SONABHY) to pay the costs.

Thus made, judged and pronounced in public hearing in Ouagadougou on the day, month and year above.

And signed by the Chairman and the Registrar.

Illegible signatures follow.

Ouagadougou, 21 May 2021

For the Registrar  
The Deputy  
Registrar

**Hamidou YAMEOGO**