IS THERE POTENTIAL FOR COMPETITION POLICY IN THE ECOWAS?

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Abstract

The main objective of this study is to discuss competition law and policy in regional integration with the aim of identifying whether or not effective competition law can be furthered within the Economic Community of West African States (ECOWAS) integration plan. The study argues that the ECOWAS region should establish an independent competition law capable of addressing public and private anti-competitive practices that can detrimentally affect the trade between the member countries. Further, it argues that the ECOWAS requires a regional body to promote the regional law. The study identifies a number of different options for a regional competition law, ranging from a highly centralized to a highly decentralized system of regional action. The study concludes that the policy option with the most potential is the 'middle road', which allows for regional complaints and investigations but still relies primarily on the enforcement mechanisms of the Member States.

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Executive summary

- Preferential trade liberalization should facilitate increased competition in the regional market but national or regional competition policies may also be necessary to provide recourse for injurious firm behaviour emerging after the removal of governmental barriers.

- There is a stronger argument for an independent regional law and a centralized authority in the case of export restraint behaviours that affect trade between the members. The problem of dumping can be resolved by effective national laws. Intergovernmental approaches involving cooperation may be satisfactory except in the case where exporting members refuse to pass and implement national laws that can address those practices.

- Two major elements are at play in the design of competition policy in regional integration:

    1. Whether or not the region will create an independent law, together with the mechanisms by which this law would be made effective within the members' domestic legal orders.
    2. Whether the region should establish a separate authority that would be able to treat individual cases, either alone or in conjunction with the Member State authorities and courts.

- Where the objectives of an integration agreement involve a customs union or common market formation, it would be somewhat logical to favour a more centralized approach.

For the Economic Community of West African States (ECOWAS), a tension exists where the objectives of integration are set at high levels (customs union/common market) but the institutional powers are set 'low' to function by primarily intergovernmental cooperation. It is therefore questionable whether the present institutional design can give meaningful effect to the integration objectives of the

treaty. Institutional changes to the ECOWAS structure are necessary if the integration objectives of the treaty are to be met. There is no simple resolution to this other than to locate a middle ground of accommodation and compromise between the ECOWAS objectives and the institutional design in the treaty.

This study therefore recommends:

- Setting firm benchmarks for the establishment of an independent regional law and, following that, to raise the implementation aspects for an 'organic' system of enforcement within the Member State legal orders. This is based at the outset upon the superiority of the regional law (for which the ECOWAS Treaty does provide), and then to institute certain guarantees that might render a system of private rights effective.

- An independent regional authority should also be established that has certain granted powers. Here several alternatives are discussed but what is ultimately recommended is to establish a regional authority with the power to:

    - receive individual complaints
    - independently investigate complaints
    - refer cases to the national authorities and courts for action
    - apply for an alternative case-hearing mechanism if national authorities are unable to act.

- The study recommends establishing an independent regional competition law with general application throughout the region and superiority over inconsistent national laws and acts. Conflicts of jurisdiction between regional and national law are not a major barrier to the creation of a regional law. The delimitation for the jurisdiction of a regional law should ultimately reside with the highest regional court. A Council Regulation can prescribe the minimum thresholds and other exemptions that would also describe the jurisdictional application of a regional law.

- A core proposal is therefore that either the treaty provisions or

an ECOWAS Council Regulation provide for an express declaration of direct effect. For competition law, this would mean that the treaty practices listed as subject to the prohibitions could be raised by a private party in a national court in a lawsuit against other private parties or against the state and its agencies. This would allow a national authority or court ruling that an anti-competitive practice is inconsistent with the treaty and that all agreements formed to give effect to such practices are void and non-enforceable within that national legal system. The Council has this power incumbent in its authority to establish Community acts in the form of regulations.

- This recommended system of regional competition law enforcement relies, at least in part, on individual claims and cases, and includes:

    - the use of direct effect before the national courts and authorities for ECOWAS competition
    - a procedure for preliminary opinions to promote consistent interpretations and uniformity
    - a final private right of appeal from the highest national court (or final national court of jurisdiction) to the regional court
    - the West African Economic and Monetary Union (WAEMU) system should function as a single entity within the larger customs union structure.

1. Introduction: the elements of a competition law

This study refers to competition law as the set of rules and remedies that governments can adopt to prohibit and challenge practices by private enterprises and public authorities that restrict or distort the contestability of a territorial market[444]. There is no single harmonized expression of a competition law and not all competition law is formalized into statutory schemes[445]. A number of common-law-style legal systems recognize and redress a range of unfair and anti-competitive trading practices. Many of these overlap with competition law and policy considerations.

Where competition law is provided by statutory/legislative expression, all or nearly all of these provisions recognize that certain types of cartels (collusion among firms) that injuriously fix prices, restrict output or allocate portions of the market are unlawful (void) or are made actionable. This category is also known as 'hard-core cartels' and these are generally understood to be without any possibility of legality or redemption[446]. Cartels constitute the most common '*per se*' prohibition within a competition law, where the law itself does not recognize any pro-competitive effects to these arrangements that might outweigh the injury to competition.

Other agreements among firms may also 'on balance' be injurious to competition in the market but are not injurious '*per se*'. These may be subjected to an assessment by a rule of reason, which is a balancing determination made by an agency or by a court, or both. Most distribution arrangements (vertical restraints) fall within this group. Authorities deal with determinations on 'competition effects' by adopting exemption rules that recognize the pro-competitive nature of certain arrangements when they meet certain qualifications. For laws following the European Community (EC) approach, this is normally a test of

444 On the theory of contestable markets and the function of competition laws, see, for example, Whish, R. (1993), Competition Law, 3rd Edition, Butterworths, pp. 13–16.

445 There are of course 'models' for competition laws. See UNCTAD Model Law on Competition, TD/RBP/CONF.5/7, at http://www.unctad.org/en/docs/tdrbpconf5d7.en.pdf.

446 See OECD (1998), Recommendation of the Council Concerning Effective Action Against Hard Core Cartels C(98)35/Final, adopted 25 March, 1998.

stated positive and negative conditions[447]. Both the West African Economic and Monetary Union (WAEMU)[448] and the draft Nigerian competition law include positive and negative conditions for establishing exemptions from the application of a prohibition on certain types of agreements[449].

A second common element of a competition law provides for treatment of dominant positions or more commonly, abuses of dominance. These are practices engaged in by a single or collective enterprise, within or outside of the territory, with sufficient market power upon the territory to restrict the contestability of the market by other suppliers. These practices are also normally assessed by a balancing test where certain pro-competitive effects of a dominant position may also be taken into account. Some developing countries apply market share criteria to initially capture a dominant position within the purview of its law, and then proceed to analyse it in regard to the abuse.

A number (but not all) of regional systems also seek to address public practices that distort competition in the market by the application of state aid or subsidies. Some require pre-notification regimes with thresholds whereby members are obliged to notify a central authority to further determine the legality of the proposed subsidy[450]. It is also possible, as in the UEMOA arrangement, to have a stated prohibition on subsidies that are conditioned on exports or that require domestic local content. The World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures also considers that subsidies directly targeting trade are actionable by countervailing duties or by the suspension of bound concessions.

1.1. Unilateral and preferential trade liberalization

From a competition policy perspective, multilateral or unilateral trade liberalization may be most desirable when the tariff cuts made to all other countries admit the broadest range of competitors to the local market from the widest array of sources. This would tend to minimize the risk of firms making new collusions to set cartel prices, or in the case

447 As contained in Article 81 of the EC Treaty.

448 Union Economique et Monétaire Ouest Africaine (UEMOA) in French.

449 As based on the authors' field survey reports conducted in the spring and summer of 2006.

450 The EC state aids regime, for example.

of a dominant firm, the risk of a single dominant foreign firm abusing the market. This is not to say that inefficient domestic firms should survive this new competition, but that the resulting firms in the market should trade more competitively. Competition law plays a role in guaranteeing that new entrants to the market play by the rules of fair competition and in respect to the existing domestic firms as purchasers and consumers.

In a regional trade agreement (RTA), the tariff cuts are not made on a unilateral or multilateral basis and the possibility of a larger number of foreign producers contesting the market may also be reduced. This of course depends on the structure of the regional market and the profiles of the producing firms. In a case where two highly protected countries form a preferential bilateral tariff cut (to each other only), whether the resulting market is more or less competitive (contestable) would seem to require more information on the positions of the firms and the markets in the region. Preferential trade liberalization should not be viewed as automatically giving rise to a more contestable market overall. An assessment is needed, *inter alia,* of the number of firms operating in the regional market and whether they can combine effectively to set prices or restrict output or segment the market. This would also include identifying whether there is a single dominant firm from one of the territories that may be capable of extending that position across the regional market[451].

Thus, the basic argument for regional competition provisions in a free-trade area or customs union arrangement is, therefore, that while most of the traditional economic literature on welfare gains in regional trade liberalization presumes that markets commence and end with perfect competition, in the real world this is not necessarily the case. For a customs union, the core rationale for a regional competition law extends to incorporate the detrimental impact of anti-competitive practices on the trade liberalization commitments made by the members to achieve free trade. This further emphasizes the elimination of trade measures (and their future potential to be used) within a formed single customs territory. Since a customs union has the capacity to provide for

451 Generally, Nicolaides, P. (1997), "The Role of Competition Policy in Economic Integration and the Role of Regional Blocs in Internationalizing Competition Policy", in O. Hosle and A. Saether, (eds), Free Trade Agreements and Customs Unions, European Commission and EIPA, Brussels, pp. 37–39. "But it is also possible that preferential trade liberalization may stimulate cartelization even if an industry of at least one partner country does not have an oligopolistic structure at the moment of liberalization.", at p. 39.

the free internal movement for goods of origin, as well as duty-admitted third-country goods, the focus is more on eliminating the underlying trade distortions caused by anti-competitive practices.

1.1.1. Prices too high

If prices on export trade from one market to another are 'too high' due to export cartel activity or a cross-border abuse of dominant position, this affects the trade between the regional members. The tariff cut made by the importing country is allocated not to the import country consumers, but to the export country producers. The import country can take lawful action against these foreign practices – if it has a functioning domestic competition law. Usually, however, investigative information gathering and enforcement against foreign actors are very difficult for domestic agencies when the evidence lies outside the enforcing territory. The more centralized the investigative and enforcement mechanism, the more likely it is to capture these practices for a remedy. The most 'decentralized' approach to this problem relies wholly on national laws and agencies, and cooperation between them, in order to pass information and other investigatory assistance. A more centralized arrangement containing a separate regional law for competition, as well as an independent agency, would bypass national authorities altogether and independently assert any violation of a regional competition law.

1.1.2. Prices too low

'Too low' prices upon export trade, as in the case of dumped goods, can also be the result of anti-competitive exclusionary practices in the export country. If these firms can successfully dump (price below normal value), then they may be operating in a 'closed' market whereby those dumped goods cannot be re-imported to challenge the local prices. If there are no trade barriers in place, this 'closure' may be operated by a private set of exclusionary practices, perhaps in the form of vertical restraints in the distribution system from the producer to the ultimate consumer. In such a case, the 'trade solution' of 'parallel imports' cannot be made effective, and this is then a competition law problem that affects trade between the Member States. This problem can be addressed in the producing territory by the affected foreign firms

if there is a competition law that can be invoked against anti-competitive vertical restraints and which also guarantees a non-discriminatory right of action on behalf of all complainants[452].

This remedy is also available in a decentralized scheme relying only upon national laws that have a provision to address anti-competitive exclusionary practices. However, there is an obvious tension when there is no competition law in the producing market if the other regional members do have competition laws. The overall result is potentially highly damaging for both the free-trade regimes and economic integration. Firms from those countries without laws can effectively dump goods on the other regional members without being challenged, other than by the use of a trade remedy. Yet firms from regional members with functional competition law can always be challenged if they are dumping from behind exclusionary vertical restraints. The conflicts caused by the lack of reciprocity in competition law remedies may result in some members utilizing destabilizing trade measures (such as anti-dumping duties or safeguards), irrespective of the tariff-cutting schedule and commitments in the RTA.

Most softer integration systems (non-supranational free-trade areas) make some reference to the contribution competition policy can make in achieving the objectives of the free-trade commitments. National competition laws can contribute to reducing trade frictions even when most agreements at this lower level do not seek expressly to formulate a competition law remedy for dumping, nor do these arrangements even seek to eliminate any or all internal trade measures in the form of contingent measures, anti-dumping or safeguards. Most stronger or 'higher-level' arrangements (customs unions) make some attempt to address intra-regional dumping and attempt some link to competition law regimes, such as the European Economic Community (EEC) Treaty.

There is a stronger argument for an independent regional law with a separate regional enforcement authority that can operate without relying upon national laws at all, where a customs union has members

[452] The EEC Rome Treaty, Article 91 treated dumping practices whereby protective measures were permitted during the transition period until the EC competition policy was in effect. Member States were also not permitted to impose trade restrictions on the re-importation of goods.

with strong export potential but these exporter members refuse to enact competition law. Nevertheless, it is possible that cooperation between national authorities can be sufficient to support a customs union plan. If the stronger export members are all willing to operate with a functional national competition law, the more decentralized and intergovernmental approach to ensuring that trade measures do not undermine the proper functioning of the customs union is workable, although some institutional overview by some overarching authority might also be necessary to keep this lower level of cooperation functioning for the benefit of the union.

1.2. Regional approaches, centralized, decentralized and 'mixed'

It has become almost the universal practice for both free-trade areas and custom union plans to declare that certain anti-competitive practices are incompatible with the proper functioning of the agreement or contrary to its free-trade objectives. These treaty expressions obviously range from 'very soft' to 'very hard' law. It is doubtful whether the softer expressions enunciate any regional principle at all that can generate actual legal effects. An example of such a 'soft' provision would recognize that certain anti-competitive practices will undermine the objectives of the RTA members to the treaty, and that the members should make (best) efforts to address anti-competitive practices. As it stands, this is an aspirational expression; while it may or may not have political effects on the behaviour of the members and their laws, it does not have legal effects. Other customs unions and common market plans contain far stronger expressions that establish an independent regional law and then institutional regional power to enforce it. For those modelled on the original EEC customs union plan, this is nearly a 'boilerplate' approach.

A 'mixed' harmonization model can be identified in some of the newer free-trade area plans (north–south in particular). Here the trend is to substitute the role of an independent regional law, with more provisions on the criteria and performance of the domestic laws. In some cases this explicitly requires the establishment of national competition laws that can treat cross-border anti-competitive practices according to certain substantive and institutional performance standards.

This study now surveys the range of possibilities available with reference to these categories.

1.2.1. A regional law and a centralized authority

Where a regional treaty states a legal expression for anti-competitive practices that affect trade between the members or distort competition within the region, this establishes an independent law and a distinct regional jurisdictional scope. This law may overlap with domestic competition law (both laws may be applicable in a given case), but has its own sphere where it is limited only to treating practices that affect the trade between members or injure a portion of the territory beyond the boundaries of a single Member State.

This regional law should be directly applicable in the laws of the Member States and have a position of superiority to the member's inconsistent legal acts or administrative and court judgements. Such a law may or may not be 'directly effective' in allowing individual firms or citizens to invoke the regional law in the domestic courts of the member countries. Where an institutional mechanism is also provided at a regional level to conduct investigations, enforce actions and assess and levy penalties, then these two features together would describe a fully centralized regional system.

Among developing country (customs union) regional arrangements, the Common Market for Eastern and Southern Africa (COMESA) and the WAEMU Treaties appear to provide the basis for centralized systems. Their approaches are modelled somewhat on the EEC Rome Treaty. The Andean Pact also has strong centralizing elements for both regional law and authority. The more centralized approaches tend to appear in customs union/common market plans, although this may be an historical accident caused by modelling on the EEC provisions.

1.2.2. A regional law and a partially centralized authority

In this model, the independent regional law is established with the elements of direct applicability and superiority, and a central authority is also created. However, that authority either does not have the full range of powers or is not able to exercise those powers with full independence. For example, it may have the power to receive complaints and initiate independent investigations, but then be required in the first instance to rely upon the Member State authorities and their national courts for processing case actions leading to enforcement and remedies. The Caribbean Community (CARICOM) arrangement as it has evolved appears to follow a similar approach. This has a clear regional law expressed by treaty provisions dealing with cross-border anti-competitive practices. It provides for a regional authority, but this authority operates together with Member State authorities. In the case where a Member State cannot take action or disagrees with the regional authority, a resolution is made after referral to a higher body.

1.2.3. A regional law but no central authority – intergovernmental cooperation

Here the independent regional law is expressed by treaty or protocol, but the application of the law is left entirely to the Member States. Cases can be brought by their authorities, as they also receive complaints dealing with regional law violations. The national courts may also receive private complaints for violations of regional law. The regional level may have an expression of common principles laying out the minimum requirements for the domestic laws and procedures, and may also prescribe some conditions for encouraging cooperation between the Member States. There may also be an intergovernmental committee formed to assist the cooperation and attempt to allocate investigations and cases among the members. The Mercado Común del Sur (MERCOSUR) competition protocol is a possible example of this approach where Member State authorities act together on an intergovernmental basis. This approach requires the existence of Member State authorities operating under domestic competition laws that have been passed and implemented.

1.2.4. No regional law but criteria for national law and/or a duty to cooperate

Several free-trade areas describe the practices that are detrimental to the functioning of the RTA and then call upon Member States to implement effective national laws to address these practices as they affect trade between the members. This approach does not establish a separate regional law at the level of treaty commitments. An example of such an approach is found in the Canada–Costa Rica Free Trade Agreement, whereby the substantive practices to be covered by a satisfactory domestic law are detailed, including procedural matters around transparency and due process (the right to be heard, the right to appeal) and national treatment requirements. No cooperation mechanism is expressly established, although the potential to engage in cooperation among authorities is suggested. A sort of political review mechanism (by a free-trade council or association) may be provided to occasionally examine the overall functioning of the agreement and its provisions. There are some examples of explicit timelines to have national laws that can operate to treat certain practices. The EC–South Africa agreement provides that the national law shall be made operational within three years of entry into force of the agreement. It further provides a sort of safeguard or recourse mechanism in the event that the national law cannot be implemented.

Another African example of this approach is found in the Southern African Customs Union (SACU) Treaty, although with far less detail then those above. Here the two-sentence Article 40 states that the members shall have competition policies (a treaty obligation) and that they shall cooperate in the enforcement of competition laws and regulations. While this provision does not establish an independent regional law, it does allow for some additional development by protocol or otherwise to outline the characteristics of Member State cooperation. And while it does not allow for the establishment of a regional authority, it does not exclude the possibility of Secretariat assistance to facilitate cooperation.

2. Minimum requirements: establishing a regional law

2.1. Independent regional law and jurisdictional scope

For a customs union, it is noteworthy that the Economic Community of West African States (ECOWAS) Treaty does not contain any expression whatsoever regarding anti-competitive practices that either affect trade between the members or distort competition in the regional market[453]. The treaty is silent on competition. A core recommendation here is that a treaty (protocol) expression should be established that includes a distinct substantive law for dealing with anti-competitive practices as they affect trade between the Member States. This law should have the capacity to operate within its own jurisdictional scope of application.

2.1.1. Affecting trade and/or affecting regional territory standards

This regional law can be expressed either by reference to practices "*affecting trade between the members*" and/or "*affecting all or a substantial portion of the region*". There is a difference between the two. This study recommends that an 'affecting trade standard' is essential to set a jurisdiction for applicable regional law, and that the desirability of the second standard depends upon the longer-term objectives of the ECOWAS. If the Community eventually intends to have a centralized apparatus to review mergers or take action against foreign practices that affect the region overall (or a substantial portion of it), then the second standard would be desirable since it expresses a single territory treatment. In this scenario both standards should be stated. If the ECOWAS commences implementing common economic and monetary policies, then this is also a stronger argument for stating a 'territory-wide' jurisdictional standard in addition to one 'affecting trade'.

[453] The Economic Community of West African States (ECOWAS) Treaty was signed by the 15 Member States on 24 July 1993 and is available at http://www.sec.ecowas.int/index.html. It was circulated to other WTO members by communication to the Committee on Trade and Development on 6 July 2005 as WT/COMTD/54, 26 September 2005.

This broader scope of jurisdiction is already seen in the WAEMU arrangements where the region is treated as a whole (as a single territory), just as this would be expressed in a single national law where practices affecting competition 'in the territory' are commonly treated[454]. The EC Treaty applies the more traditional 'affecting trade' expression although this has also been explicitly expanded to an 'affecting territory' dimension for the purposes of merger control. The EC external agreements uniformly apply the 'affecting trade' standard. An expression treating practices affecting the 'territory as a whole' is not a prerequisite for a regional competition policy. A standard based upon 'affecting trade between the members' is a prerequisite for a regional legal expression that sets a field of play for a regional law and legal action against any anti-competitive practices affecting trade.

In order to have effects in the Community legal order, the expression of jurisdictional power has to be made at the level of treaty obligation. For the ECOWAS, this would be accomplished by a protocol that added treaty articles within a section dealing with and entitled 'competition policy'. It is believed here that the independence and jurisdictional basis for a regional competition law cannot be promulgated by a Community regulation, directive or decision. These legal acts would be used to implement substantive standards and institutional features, but the legal basis of the law itself should be generated at the treaty-making level. For the ECOWAS, this suggests a protocol that provides amendments to the existing treaty delineating the addition of competition law articles to the treaty.

2.1.2. Zones of jurisdiction – Member States and Community

It is clear that the jurisdictional lines between regional and state territory have to be clear and well prescribed. However, in a number of regional and federal systems this jurisdictional line has also evolved

[454] 1994 Agreement for the West African Economic and Monetary Union, signed by eight Member States, and as revised in 2003 (UMOA and UEMOA). The 1994 Agreement was circulated to WTO members via the Committee on Trade and Development as WT/COMTD/23, 23 February 2000. The 2003 revised treaty is dated 29 January 2003 and is provided on the WAEMU web site (French) available at http://www.uemoa.int/index.htm.

over time as a result of the cases and interpretations made by the authorities and the courts. There are always cases where an 'affecting trade' and an 'affecting the national territory' standard both apply. And there are a number of jurisdictions (regional and domestic) where remedies taken in one system do not preclude action and remedies being taken in the other. The United States is one example where there is often a concurrent action taken by an individual state (affecting competition in the territory of the state) while the federal power is also being applied according to either an 'affecting trade between the states' standard or with respect to the larger US territory.

The original EEC construction provided for a first enforcement regulation, 17/62, and attempted to define several types of cases that could not be considered as 'affecting trade' between the members, for example where the subject firms were all based within a single Member State and the practices did not relate directly to imports or exports. Over time that expression did not serve so well for court interpretations dealing with the rise of the 'internal market' concept. In legal practice, the court has tended to grant quite a broader scope for 'affecting trade'. While this has assisted the development and application of regional law, it has not tended to stimulate the Member States in applying their own national laws. Over time this situation has also evolved as the Member States have more actively pursued actions also contemplated by the Community, but in regard to their own unique legal effects upon the Member State territories.

There are inevitable overlaps between the two levels of competition law. Rather than attempt to prescribe a precise line between them, it is more important to recognize that concurrent jurisdiction is not necessarily a problem to be avoided. What is recommended is for both a final arbiter of the Community's regional scope of application in the event of clear conflicts of application, and a cooperation mechanism that can help allocate cases between regional and national levels. The initial management of conflict can be addressed by a Commission or regional authority in respect of any particular case (if so empowered), but there must also be an ultimate arbiter to rule in the event of conflicts between laws. This function is traditionally held by the superior court, in the case of the ECOWAS – the Community Court of Justice – either on the basis of preliminary opinions, appeals, or cases of original jurisdiction. This standard, as with any standard, calls upon the court to interpret the

scope of a regional zone of jurisdictional action for regional competition law application.

This is not so much a delimitation between state and region, since the Community Court does not have the jurisdiction to instruct the state law as to its proper scope of application. This is an issue that is for the national court to determine. The only matter of issue before the Community Court is the proper definition of the zone of authority for the regional law. If this results in overlap and concurrent exercise of power, then no matter.

Identifying the zone of authority of a regional legal expression can also be prescribed by a Council Regulation that sets out the powers and activities undertaken according to the regional treaty law (protocol). This regulation can set *de minimis* levels of turnover (below which trade between the states is not deemed to be affected) and it can also establish the exemptions from regional law for small and medium-sized enterprises (by which their agreements are deemed to not appreciably affect trade between the Member States).

2.2. Prescribed anti-competitive practices: stated prohibitions applying to private and public practices

Practices that are recognized by members as injurious to trade between the states must be enunciated at the level of treaty law (protocol); however, a regional law is chosen to be made enforceable within the Community. As a basic point of departure and recommendation, the private practices listed both in Nigeria's proposed law and the existing WAEMU law also reflect current EC Treaty practice and the EC external relations (trade agreements) practice. These are the obvious candidates for a regional statement of prohibited and actionable practices. The argument being made here is to set the listing of practices as close as possible to the existing WAEMU and the draft Nigerian laws. Since any competition provision likely to emerge in an EC–ECOWAS Economic Partnership Agreement will also contain a listing for cartels, abuse of dominant position, and possibly a rule of reason for pro-competitive vertical restraints, the use of these

expressions for the anti-competitive practices to be treated should be a 'given'[455].

There can be an issue over whether the standard details that the practices are 'prohibited' or 'incompatible' or 'actionable'. The recommendation here is that a prohibition against injurious practices be clearly stated, as in the EC Treaty formulation. This establishes a stronger basis for the superiority of Community law and the obligation for the national courts and authorities to apply it. Agreements that fall within the prohibition should be stated as being 'void' and without legal effect in the Community either in the treaty or the supplementing regulation. The 'agreements' and 'practices' covered within the listing should be broad enough to cover any and all agreements or practices that detrimentally (or appreciably) affect trade between the states. Any further delineation to excuse practices should be undertaken according to negotiated exemptions for a Council Regulation. A common exemption made for this purpose is a labour agreement. It is not common practice for a regulation to exempt industry association agreements and it is not a common treaty expression to see any particular reference to association agreements being 'less actionable' in principle than any other restrictive agreement. The better principle is for the treaty to cast a clearly stated but 'wide net' as to the practices to be treated.

The listed practices and prohibitions should be applied without distinction, at the treaty level, to both private and public practices. Public practices present a myriad of complexities that have to be resolved as an ongoing activity of the Community and its Member States. However, in principle, they should be fully captured by the primary treaty expression when they fall within the legal standard of affecting the trade between the members. Otherwise, there is no legal basis to raise and assess public practices *via* a Community apparatus, and even cooperative approaches to dealing with public practices will not likely move forward. For these areas, there is a risk of distorting the field of play where one type of practice or agreement is singled out for some better treatment (as in the form of an immunity) at the treaty level. The

[455] Nigeria summary drawn from HB 70, as published in the Nigeria Official Gazette, Vol. 92, Vol. 42, 10 June 2005. An English summation of the WAEMU competition law can be found at, OECD, Global Forum on Competition, Submission by WAEMU, 13 February 2004, CCNM/GF/COMP/WD(2004)31.

treaty should not distort the field between private or public practices and nor should it distort it between cartels and associations.

2.3. Community measure of damages

The regulation giving effect to a regional law should enunciate the legal effect of agreements that violate the treaty provisions. This regulation should make it clear that such agreements are not enforceable within the national courts, i.e. that they are 'void' in respect of the listed practices. In addition to this, the regulation should include criteria for assessing injuries and calling for fines and penalties for anti-competitive practices. These penalties should be set in such a manner that they provide guidance to a national court in forming orders. The measure of damages established should ensure that wrongdoers are penalized for past practices in a manner that would not reward them or where they are able to 'break even' for the rents they have secured from the practices.

2.4. Rule-of-reason considerations

2.4.1. Vertical restraints

There are detailed theoretical arguments that can be made over the advisability of stating any prohibition for vertical restrictions and exclusionary practices, and various tests can be raised that apply to dominance and the nature of its abuse. The two more comprehensive laws in place (WAEMU and the legislation as proposed for Nigeria) currently apply the 'negative and positive' criteria approach for rule-of-reason assessments for pro-competitive vertical restraints. And for the treaty expression, it is recommended that this is the better approach. The practices themselves are covered by the prohibition, but then can be validated by consideration of the rule of reason. This follows the 'wider net' for regional law. The 'formula' for the negative and positive criteria to revalidate contractual restrictions has permitted decision makers and the courts to develop a respectable body of law regarding vertical restraints, which is available for reference in the ECOWAS context. This approach also sets a clear legal basis for a regulation to come forward over time to enunciate block and group exemptions meeting the criteria of these listed tests.

2.4.2. Dominance and abuse

Issues on dominance in the market and abuse are also constantly debated among developed and developing authorities. The most developed jurisdictions recognize that even highly concentrated monopoly firms may not be engaging in abuse if complex markets for technology innovations can render a determination of abuse redundant even before it is finalized. Developing countries can examine the earlier approaches applied to abuse of dominance by those same developed country authorities and courts. These allowed for market share expressions and particular practices that in combination with high concentrations indicated an initial finding of abuse. To attempt any more in a developing country arrangement, where the national courts will also be playing a role, may overextend the capacity of a regional competition law at the outset. A regulation can enunciate the criteria and can be amended over time to reflect the status of the evolution within the Community and its capacity to assess efficiencies generated by dominant firms. The developmental and resource dimension is clearly a consideration in this field and it does not seem appropriate here to prejudge the evolution of law in this context.

2.5. Governmental practices

Two areas that require further consideration are state aids and public practices, including government enterprise schemes and governmental grants of special and exclusive rights. Unfortunately, they are beyond the scope of this study and there is no shorthand prescription to deal with the considerations for any of these subjects. The issues that would have to be taken into account in the relationship between a regional law and domestic industrial policies include enterprise activities (special and exclusive rights) and state aids.

2.5.1. Enterprise activities – special and exclusive rights

Governmental grants of monopolies and the variety of joint enterprise schemes between government and private firms should be captured by the general treaty expression. That is, injurious public practices affecting trade between the Member States are as actionable

as purely private practices. Any other treatment at the treaty level will distort the types of measures and practices being undertaken in the Community where private arrangements can be shifted to governmental and quasi-governmental arrangements. By clearly providing application of Community law at the treaty level from the outset to all practices and agreements, the legal basis is clarified for later regulations to reflect the considerations of the members regarding exemptions and exceptions. These can be developed in a process of transparent inventory (disclosure) and classification of what activities the Member States are engaged in that may actually detrimentally affect trade within the region. This is essentially a negotiating terrain that also touches directly upon economic development activities. However, it should be engaged within the context of Community law application at the outset. Public and private practices should be equally addressed without distinction in the law of the treaty.

2.5.2. State aids

For state aids, a WAEMU legal prohibition provides an initial, sensible expression so that a member's subsidy falls within the prohibition when granted upon (made conditional upon) exportation to other members, or made conditional upon the purchase of local content. Both of these types of subsidies are so trade distorting that they clearly also fall within the actionable provisions prohibitions in the original General Agreement on Tariffs and Trade (GATT). The members should proscribe these practices as prohibitive in the treaty.

An additional complementary approach is also suggested by reference to the WTO Subsidies Agreement. While this only applies to trade in goods, there is no reason why it cannot be incorporated at the regional level for its standards, and also extended to apply to services as well. By a Council Regulation, the ECOWAS can 'reference' its Community law to the WTO Agreement on Subsidies and can state the WTO articles that are being adopted for the purposes of Community law. This provides a definitional set of terms for what constitutes actionable subsidies and provides the elements for tests dealing with specificity and injury. The WTO regime is closely modelled on EC state aid practice and has been found to be workable in the panel and appellate body cases that have come through since the WTO agreement entered into force. Where the members understand that

there is a need for greater flexibility for exempting subsidies (in relation to regional development, poverty alleviation, environmental concerns, etc.), than is currently provided for in the WTO agreement , then the Council Regulation can define the terms of agreement between the members as to the types of subsidies that should be made non-actionable or adjust the burden of proof in such cases as they wish.

The EC state aids system provides for value thresholds and an obligation of notification of subsidies to a central authority. That authority has the power to make a decision, which can be appealed to the Community Court i.e. the European Court of Justice (ECJ). Since the EC Member States are also members of the WTO, their notifications to the EC Commission are also compiled and notified to the WTO. EC Member States have had little difficulty in managing the two applicable regimes. ECOWAS members are also members of the WTO and have the same notification obligations. Developing countries are no longer exempt from the Subsidies Agreement, although differential provisions still remain for least-developed countries (LDCs).

A Council Regulation for state aids should therefore be established that can incorporate the primary elements of the WTO system (by reference), apply it to services as well as goods, and establish a Community notification and decision-making instrument. Provisions should also be made for LDCs and for non-actionable subsidies.

2.6. Merger control

There is a good argument for regional merger control and for a system of pre-notification and clearance as the region develops a territorial identity and attracts investment from firms doing business ‘in the market’. While many criticisms are made of developing countries operating pre-notification systems, the value of pre-notification is also noted for developing country and regional authorities that receive (without having to investigate) ‘free’ information on proposed concentrations and the markets upon which they operate. Developed country practitioners are critical of the proliferation of notification systems. But for developing countries, there is a potential windfall in market information generated by notices. Moreover, since developing country (or regional) authorities are actually responsible for the quality of competition upon their territories, notification systems allow them to

respond to new concentrations that affect their legitimate legal domains in the same manner as such systems operate to inform developed country authorities.

Where a pre-notification and clearance system operates in line with accepted international principles (as enunciated by members of the International Competition Network (ICN) for example), there can also be an extended benefit for regional and international firms that can exercise a single notice system for the region when their arrangements affect more than one Member State. Similarly, a regional system allows the smaller states to have access to a set of remedies for mergers substantially restricting competition in their national markets without the necessity of establishing a domestic control apparatus. A final positive effect for regional merger control is that it allows the region itself to defend its territorial interests in the external competition policy arena.

To provide for the possibility of regional merger control over time, the jurisdictional standard in the treaty should refer to agreements 'affecting the territory' or a substantial portion of it, as discussed in the section above. The administrative load on a pre-clearance system is high and a decision to adopt merger control strongly suggests the necessity of a centralized authority at the Community level capable of working in very short time frames. However, it is also conceivable that some elements of regional merger control can be facilitated by an intergovernmental group of existing national authorities (or advisory group) in cooperation with the Commission. Although there are confidentiality issues presented by these approaches, in principle it is also possible for a single member that already has a notification and clearance system to share the non-confidential components of a concentration with the other members, and then either cooperate on the review of a concentration to the extent that it affects the other members, or possibly to vet the merger in respect of the other territories. This is a high form of intergovernmental cooperation and requires structured intergovernmental or agency arrangements. An intergovernmental group of existing authorities can also be established to consider and recommend a more detailed approach to regional merger control for the Community that can form the basis for a regulation at a later time[456].

[456] For a similar proposal as applied to MERCOSUR, see Mathis, J. (1998), *Issues in Regional Merger Control*, Journal of World Competition, 21/3, pp. 29–44.

Although a regional merger control approach may not be viewed as a first priority within a regional competition law, the groundwork should be laid by cooperative action of the Member States that is both substantive for dealing with current mergers that affect the region, and that works prospectively with a view to recommendations for a regional system of merger control.

3. Minimum requirements – Application of community law

3.1. Introduction – a system of private rights enforcement

This section examines the application of ECOWAS law within the legal regimes of the Member States, with an emphasis on application of the law by private rights of action and recourse. While this discussion is closely related to that of a regional institutional mechanism, such as establishing an ECOWAS authority or advisory grouping, the focus of this section is on the application of the regional law as it relates to the Member States.

The 1993 ECOWAS Treaty and the revisions undertaken by decision and protocol in 2006 together clearly establish the superiority of ECOWAS Community law. This indicates that the treaty provisions and the regulations drawn up by the Council according to the ECOWAS Treaty are already 'generally applicable' within each of the Member State legal regimes, and are therefore binding upon the agencies and the national courts of the members. Thus, where a national court or authority is presented with a question of Community law, Community law should be applied. Where an authority or court is presented with a possible conflict between national and Community law, it should resolve that conflict in light of the superiority of Community law[457].

These points of general application and superiority of regional law appear clear from the ECOWAS Treaty as it stands. However, these

[457] ECOWAS Treaty as cited above. Binding effects on Member States are set out in Article 9 for Authority Decisions, Article 12 for Council Regulations, and Article 15 for Court judgments.

two aspects also raise questions on the application of a regional competition law:

1) Who can invoke the law within the national systems?
2) Before which national authorities can the law be invoked?
3) How can a uniform application of regional law be guaranteed by the Member State courts and authorities?
4) What ultimate rights should be accorded at regional level to redress improper applications or non–applications of Community law?
5) What is the position of UEMOA competition law in the ECOWAS legal order for these purposes?

This discussion focuses on the application of law without reference to a regional authority except where the absence of a regional authority has a bearing on the issue or the recommendation.

3.2. The argument for direct effect of regional competition law before national courts and authorities: who can invoke the law?

Superiority and general application are not the same as granting an individual direct effect in the legal order of the Member States. Because the existing treaty indicates the superiority of Community acts, it is clear that national courts are obliged to apply the law. However, this is not the same thing as granting a party the right to invoke the Community law as expressed within the treaty articles before the national court or authority. The legal basis to invoke the law directly within a national court stems from the nature of the treaty rights and obligations and their implications for affecting and conferring individual rights, but there is no expression in the ECOWAS Treaty stating that its regional laws shall have direct effect.

The EC Treaty does not provide for direct effect of its regional competition law either. This development occurred (early on for competition law provisions) by the action of the European Court of Justice interpreting the treaty provisions as they were raised in actual

disputes, and then ruling that the competition provisions conferred direct rights for individual action. The ECOWAS Community Court has this incumbent (inherent) power to interpret the treaty and reach the same result. Arguably, so do the national courts, which also have a duty to apply Community law and could rule on an issue of direct effect if and when presented in a case.

However, the ECOWAS structure has two differences that may delay a court interpretation granting direct effect for regional competition law. Since access to the ECOWAS Court is limited to actions brought by states, such an interpretive issue may be avoided by the states in their decision to press a case. Similarly, since the ECOWAS Commission cannot bring an action to the court, this avenue for raising direct effect also may not be utilized. Nevertheless, the issue is still likely to arise in private contractual enforcement actions in the Member States. The example would be where a respondent in a private contract action defends against the enforceability of the contract terms by asserting its illegality under ECOWAS regional law. At this point a national court will refer to the superior ECOWAS regional law, and will have to decide whether or not a respondent has an individual right to invoke the treaty provisions or the terms of a Council Regulation. While the rights to seek a preliminary opinion from the ECOWAS Court are also not settled by the treaty or the Council/Court Regulation either, there is the possibility of inconsistent rulings on this point from different national courts. The possible absence of a regional authority that can receive private complaints and can rule on cases pushes the argument more strongly in favour of a clear declaration of direct effect in the national systems.

3.3. Before which state authorities can the law be invoked?

As noted above, the issue of direct effect can arise in a private contract dispute before a national court. It can also arise in an agency enforcement action under national law where the respondent pleaded an inconsistency with Community law, or sought to make a counterclaim against the moving complainant as based solely on Community law. There are states that have no competition laws, and the states themselves choose the means by which to implement their national laws – either by using an agency model exclusively or by installing a regulation that is to be mainly applied by the national courts.

The various combinations possible suggest that the level of direct effect that is to be granted to individuals within the region should be done without regard to the existence of national competition laws, or the means by which they are implemented by the national systems. This would mean that where a state has not passed a national law whatsoever, a private party could still assert (and defend) a claim based on an ECOWAS regional law in the courts of that state. Similarly, where a state has chosen to have an exclusive agency model (all competition complaints must be made solely to the authority), one can still not discount the possibility of defences being raised in private national court actions that seek to invoke Community law. That is, direct effect should be granted in respect of all courts and authorities within the Member States and not be limited solely to competition authorities alone or to those states that have competition authorities.

3.4. Can a uniform application of regional law among the Member States be guaranteed?

If the Community law is generally applicable – which it is – and the national courts have an obligation to apply it (irrespective of who can invoke it), then the national courts will also be required to interpret the Community law. The uniformity of this application, which is the ability to apply it consistently from one court to another and from one Member State to another, is an absolute priority for the legitimate grounding of a regional legal system. Without uniformity of application of the regional law, the system cannot be made functional and it cannot be relied upon to distribute rights and obligations according to the treaty provisions.

There are several means by which uniformity can be promoted, and all are relevant for any regional system that has established a regional court. A first one is to allow a right of appeal to the regional court from a national court ruling, normally from the highest national court. A second is to provide the right of a national court to request and receive a preliminary opinion from the regional court on matters of interpretation and application of the regional law. A third is to allow certain actions to have original jurisdiction before the regional court. A final area is more ‘guidance oriented’ where a regional agency or body issues papers and notices expressing its understanding for points of interpretation of the regional law.

The ECOWAS Treaty does not provide for a right of access to the regional court for any party other than a Member State acting individually or collectively by the Authority. If this limitation cannot be revisited in the context of developing regional competition law, then the emphasis has to be placed on a preliminary opinion procedure. The ECOWAS Council already has this right secured by the treaty (for the purpose of 'advisory opinion'), and what is proposed here is that this should be extended to the national courts for any case where a treaty article or a Council legal act is raised in a national proceeding. For the purposes of judicial efficiency, this power to request preliminary opinions should not be limited to the highest national court but the lower courts should also be able to obtain the regional court's interpretation and then insert that opinion into the domestic legal proceeding. A preliminary opinion procedure within the ECOWAS is therefore a minimum requirement to ensure the uniform application of regional law.

3.5. What ultimate rights should be accorded to redress incorrect application or non-application of Community law?

The ECOWAS Treaty confers a right of action before the regional court to the Member States or to the Authority[458]. It also may appear that a state can bring an action on behalf of a private party before the regional court. There is no other regional institutional entity that can bring an action before the ECOWAS Court against a state or a private individual[459]. This final question opens the door to a discussion on a regional enforcement mechanism and the balance between institutional power and private rights that may be set under a regional competition law. It can be argued that where there is no regional authority that can form a claim against a Member State to enforce compliance with Community law, that the final acts of securing legal remedies should be strengthened at the level of appeal from the highest national court. Where there is an independent enforcement mechanism established at the Community level, then an alternative and final remedy to challenge a state would be available.

[458] ECOWAS Treaty as cited above, Article 76, Settlement of Disputes.
[459] The Council is given the right by the ECOWAS Treaty to request advisory opinions from the court. Article 10(3)(h).

This existing structure strongly suggests that the substantive treaty rights being created by the ECOWAS are essentially only being granted to the Member States and not to the firms that are seeking to trade in the ECOWAS regional market, nor to the ECOWAS institutions that have some limited mandate to make effective the treaty rules and the Council Regulations[460]. While this approach preserves the maximum amount of sovereignty for the members in the execution of the ECOWAS regional plan, it does not bode well for the ability of ECOWAS law to obtain a sufficient degree of independence from national law or to develop a system of recourse for continuing violations of the regional law.

The situation appears to be even less conducive to the interests of foreign firms who do business within the ECOWAS, since those firms would have to convince a Member State to bring the action on its behalf before the regional court. In addition to the possibility that this might be discriminatory in any external agreement (the EC and an Economic Partnership Agreement (EPA), or even under WTO rules for national treatment), it is also a serious defect in the structure of the treaty and the institutional powers of its high court. The value of this limitation on actions is questionable, if the preservation of Member State sovereignty is balanced against the functioning of the market rules for the customs union and the political downside of having these disputes forced to be generated at such a high political level. The evidence suggests that there is little likelihood of resetting the ECOWAS Court authority to hear original claims or appeals by any party other than a state in respect of a potential ECOWAS competition law. Other possibilities must be considered for a competition regime because the limitation of actions before the ECOWAS Court will cause problems both internally for the Member States and externally for the trading partners as the customs union becomes more complete. Thus, a right of final appeal for issues dealing solely with ECOWAS law should be granted from the national

[460] The powers of the ECOWAS Commission (formerly entitled the Executive Secretary) are provided in Article 19 of the ECOWAS Treaty. Subsection 3(a) states that the Commission has the duty of 'execution of decisions taken by the Authority and application of the regulations of the Council'. We do not read this provision as granting the Commission the power to make a claim against a Member State in the regional court. The Council itself (the higher legislative authority) is only granted power to request an advisory opinion from the court. We do not offer an opinion on whether a regulation that did convey such a power to the Commission would be in violation of the Treaty provisions.

court of final jurisdiction to the Community Court. This should be provided by a treaty provision or by a decision of the authority of the Heads of State.

3.6. The position of WAEMU competition law in the ECOWAS legal order

Within the ECOWAS arrangement, the WAEMU is also a regional grouping. From a territorial perspective, the WAEMU is a distinct customs territory within the larger (forming) customs territory of the ECOWAS. For competition law, the WAEMU has all the characteristics of a single national territory, with its own high court providing for the superior application of its regional law in respect of its own members and as applicable across the entire WAEMU regional territory. This structure appears to be so identical to the position of a single Member State (with full state territorial powers) within a regional grouping, that for all practical purposes the WAEMU should be treated as a single state (customs territory) entity in respect of a created ECOWAS regional law. Just as ECOWAS law would be superior and binding on the individual Member States, so would it also be applied to the customs territory of the WAEMU. ECOWAS law already has superiority over the individual Member State laws within the region and must be applied by the courts and agencies of the states. This same general applicability and superiority of ECOWAS regional law would apply to the WAEMU territory just as it applies to the state territories of the WAEMU members. Any other interpretation of the ECOWAS Treaty would nullify its provisions stating that ECOWAS law has a binding effect on the Member States.

4. Regional bodies and institutional control

4.1. The argument for regional authority

A diffuse system of treaty law application by individuals before national courts and authorities can underpin an operational and functional regional legal order, just as private rights of action operate to ensure the legal security of law and remedies in many domestic legal systems. In competition law, this area of private action is probably most

effective in addressing exclusionary practices and abuses of supply chain dominance where complainants can more easily identify the contractual practice that is affecting their commerce and bring that practice before a court or authority for a legal assessment and action. A system of private rights can also capture many of the minor actions that otherwise fall below the 'radar screen' of competition authority attention. This is positive for building and reinforcing a set of market rules and principles that contribute to economic development where smaller players and markets create local economic and commercial growth. Many developing (and developed) countries have long provided for such types of private actions at the lowest possible court levels where claims for the 'refusal to supply' or 'unfair contract terms' overlap the subject areas of competition law.

In different subject areas and within larger regional or international markets, private rights of action are also understood to be insufficient to provide a reasonable prospect of implementing and enforcing competition law. Private actors find it difficult to obtain information on anti-competitive practices generally, but on cross-border cartel activity in particular. Cartels do not operate in public for obvious reasons and the information needed to bring them to the surface for remedial action requires investigatory power, expertise and resources. It is a rare case where a cartel is disclosed by the investigatory efforts of a private individual or firm. The vast majority of these cases are the result of agency investigations, and increasingly those with the power to operate amnesty and whistle blower programmes.

A similar gap occurs in anti-competitive practices which, while affecting the downstream purchasing firms, are also able to be passed along to the ultimate consumer who is ultimately the injured party. Where cartels or abusive practices can be relayed to the largest national and regional consumer markets, the losses to the consumer are high and yet the capacity of individual injured consumers to identify the practices and develop complaints before national courts is low.

4.2. Competition authorities and core powers

A brief examination of the types of powers granted to independent competition authorities provides some insight into the implications of considering an independent regional authority. The

enumerated powers listed below are drawn from the original enforcement regulation of the EEC, Regulation 17/62. According to the regulation and operation of Community law, all powers enumerated are made subject to review on appeal by the European Court of Justice.

- Investigations:

  - to issue written requests for information to be received from the Member States, private firms and associations
  - to assess penalties in the event of non-compliance with the Commission's request for information
  - to initiate independent investigations within the Member States upon notice to the member. The right to obtain the cooperation of the member's own domestic search and warrant system is specified. This includes the power to enter business premises according to national law and to examine books and records, and to request explanations on the spot
  - to assess penalties for providing misleading or false information to the investigators

- Decision making and adjudication:

  - to conduct hearings and compel testimony according to due process rights to submit and to be heard
  - to issue a decision that a practice infringes the treaty and to order that the practice be brought to an end
  - to determine that a practice does not fall within the treaty prescriptions and the power to issue exemptions on a case-by-case basis

- Remedies:

  - to determine and assess fines for infringements of the treaty according to the governing regulation,

There are important differences between a regional competition regime and a regional trade regime where practices being addressed in competition have a strong private nature (as addressing private firms and private behaviour), and where the interaction between a regional enforcement system and private economic actors is brought directly into

play. Another difference shown between a competition and a trade regime is that the realm of investigatory power is enlarged in the competition field. For governmental trade measures that may violate the commitments of the treaty, there is not the same need to build evidence of the practices involved or for the need to compel documents or testimony in order to disclose the practice and prove a case.

4.3. Policy proposals

4.3.1. For a fully functional and independent competition commission

The establishment of an independent institutional power considers the balance to be set between a regional authority and the Member States as they are represented in the regional legislative domain of the Council. This is fundamentally a question of balance between executive enforcement power and legislative oversight power. As such, while the questions addressed are 'legal' to the extent that they deal with institutional design, they are also obviously political in determining the degree of independence of a regional executive enforcement authority and the degree of residual sovereignty to be held by the Member States controlling the pace of regional integration. What is 'best' for integration and what is 'possible' for integration present mixed questions of law and politics.

The case for a fully functional and independent regional competition authority to deal with the functions that are enumerated above is based in a large part on the nature of competition law enforcement itself. This presents unique issues in cross-border cases that cannot be easily resolved by sole reference to national authority power and private actions. Recognizing that the existing ECOWAS Treaty structure cannot accommodate this degree of independence, the functions of a competition commission should be based outside the existing commission structure, in a separate commission or authority. This is similar to many national competition authorities where the mix of functions for investigation, decision making and adjudication renders them somewhat different from many other executive branch activities. In this sense, a competition commission is more of a complete or 'closed'

system touching upon elements that also include rule making (legislative) as well as judicial (adjudication) aspects.

While the lower ECOWAS institutions do not have any direct access to the regional court, the review or appeal of the authority's decisions should be located in the apparatus of the Council. This power should be exercised by majority voting or by a reverse consensus procedure. The Council does have the power to seek advisory opinions from the court in its operations and this power can also be used in dealing with the review of an independent commission's activities on particular cases. If the review power is to be held by the Council, then the voting aspect of this regional system is critical. If the Member States insist on retaining individual veto power over the decisions and proposed actions of a regional authority, then a functional regional authority cannot emerge with any sufficient independence to perform the tasks necessary to give effect to a regional competition law. An authority should not be established if a single member veto is retained.

4.3.2. For an advisory panel with power to refer actions

At the other end of the spectrum, the already intergovernmental character of the ECOWAS structure allows for the creation of an 'advisory panel' of individual experts or representatives of the national authorities to receive complaints by referral from the existing Commission. The panel would then refer matters to the Member State competition authorities for legal action. The minimum performance characteristics of national laws would be set out by the ECOWAS (probably by Council Regulation) and there would be minimum requirements imposed for convergence regarding the practices to be treated by the laws and the definitions for exemptions.

In this approach, the power to receive complaints and to refer to national authorities would be (more or less) the extent of the regional authority power with respect to the prosecution of individual cases. A failure of a member to address an action referred to it by the authority could be the subject of an advisory panel's follow-up report to the Council and the Council would have the power to address the Member State or to make an additional report that serves as information to the Heads of State. The advisory panel could have some power of coordination with the national authorities and there could also be some

recognized potential to assist in the allocation of particular cases or to facilitate cooperation (information sharing) instruments as these may be developed.

Additionally, the remaining functions of the advisory panel would be more similar to a system of peer review. This would include the ability to survey the functioning of the Member State laws in a manner that would isolate the points where the law was not being implemented or applied, or was not adequately applying or addressing Community law violations, or where the law was not being accorded on the basis of national treatment (in respect to the rights of foreign complainants or granting more favourable treatment of domestic firms).

4.3.3. Small economies and LDCs

The approach suggested above relies upon national law and authority to render case action effective. The contentious issue here is whether or not LDCs and the smallest economies should be required to have any competition law at national level. The resource drain for implementing national laws is demanding and some countries' resources are possibly better spent either in dealing with localized unfair trading practices or in promoting higher levels of consumer protection. Furthermore, the current emphasis is on regulatory policies that have a more direct relationship to meeting the demands of poverty alleviation and the other millennium goals. Any system that requires a Member State to have a national law should be examined in this context, since the recommendation to have a law is establishing a national regulatory priority, and obviously at the expense of some other priority.

While these smaller LDCs are also clearly affected by domestic and external anti-competitive practices, their best opportunity for recourse lies in a regional authority that can take care of their interests, especially those anti-competitive practices originating in the other Member States or internationally. Similarly, where their own firms may be engaging in exclusionary practices to the detriment of other regional member firms, a regional authority can also deal with those issues according to the treaty law without the need for an LDC to create a separate national law. Also, as a practical matter, in the smallest of markets where consumption and production levels are low, it may well be the case that most of the exclusionary practices engaged in within

these LDCs would fall below the regional turnover thresholds for application of Community law or fall within the exemptions for small and medium-sized enterprises.

4.3.4. Large economies and non-implementation

The smallest territories can be significantly hurt in an intergovernmental referral apparatus if the largest territory markets do not create functional laws that allow the regional law to be applied in their jurisdictions. Here the referral apparatus has to have a stronger mechanism to ensure either that the establishment of national competition laws takes hold in the first place, or, in the event that it does not, that cases can proceed anyway. It is not clear at all that a soft law 'name-and-shame' approach is going to be successful in the ECOWAS for these purposes. This approach has been used in various forms for aspects dealing with the trade liberalization regime of the ECOWAS, and the record of implementation with an intergovernmental Council apparatus is not very good. For matters involving trade, where the treaty also calls for Council or Heads of State actions to 'address Member States', as in the case of dumped goods for example, one wonders if any state has ever been addressed by the intergovernmental bodies in a manner that has stimulated compliance or a change of behaviour in favour of meeting the treaty objectives.

If intergovernmental recourse has not stimulated compliance with the core free-trade and compensation commitments, which have been in place since the 1970s, then what countervailing consideration would argue that this same approach should work for a competition law regime – a regulatory area for which many African, Caribbean and Pacific (ACP) foreign ministers are also on active record as opposing for inclusion in the EC–EPA Cotonou construction? Even between only the larger members, the intergovernmental route also has some significant pitfalls. In the absence of a central authority, whatever promise has been generated for a 'customs union' construction can be undermined where differences emerge between the implementation pace of national laws, or worse, by decisions taken by national authorities that others see to be reflecting industrial and trade policy interests rather than competition policy interests.

Here the MERCOSUR example is unfortunately but necessarily raised. This intergovernmental ministerial approach to regional competition law has not been implemented, due to the failure of individual members to pass national laws, and the absence of effective regional competition remedies has contributed to a degrading of the free-trade schedules for this common market. This example is too close in point to the ECOWAS situation, and far more so than the other ACP arrangements that are operating with higher degrees of institutional treaty independence such as the COMESA or possibly the CARICOM.

4.3.5. Proposal for alternative case mechanism

The primary consideration is that while a referral concept has solid value and can form the core of a regional approach, there has to be an alternative to a national case referral in the event that the referral cannot be effectively made or acted upon. This is a minimum requirement for achieving an implemented regional strategy for competition law, and without it the risk of non-implementation of regional law is too high.

The argument here is to grant the advisory panel a clear right to petition the Council in the event that a case referral cannot be responded to either because of non-implementation, or because of a substantive or procedural defect in the national legal provisions. This is similar to the criteria applied by the EU–Euro-Med and EU–South Africa free-trade area arrangements for instituting recourse on a request for action that cannot be fulfilled. In the ECOWAS, the Council, by a majority vote, would then decide whether or not the advisory panel, with the support of the Commission, can either bring the case directly before the ECOWAS regional court, or alternatively, be taken up by the Council itself for a majority decision on the merits of the case[461]. The Council would, of course, have at its disposal the power to request an advisory opinion from the court on the legal interpretation of ECOWAS law.

This alternative to national referral is a minimum loss of prospective sovereignty of the Member States given the objectives of

[461] EU–South Africa Trade, Development and Cooperation Agreement, http://europa.eu.int/eur-lex/en/archive/1999/l_31119991204en.html. Article 37, ‘Appropriate Measures’.

the ECOWAS Treaty, and in view of the benefits that flow to all members if the implementation system was made effective. If this recourse procedure is included in the scheme, the likelihood of successful implementation of national laws should be increased and it is possible that the alternative procedure need not be utilized or only be called upon in rare cases.

4.3.6. Other requirements for national referral – investigatory powers and preliminary hearing

Even in a system where referral by an advisory panel is being made functional, there are two other points of weakness that should be addressed. First, the advisory panel is not being given a clear basis to engage in investigations of the complaints referred to it by the Commission. Second, the advisory panel does not appear to be empowered to commence investigations in the absence of a complaint being referred. Both are important aspects and discussed briefly in turn.

Whether or not a regional body should exercise all the investigatory powers enumerated above for a centralized authority is not determined here, but clearly the power to collect or compel information from authorities and private firms is a priority. It is clear that without the power to investigate, a regional advisory panel cannot make intelligent referrals in the first place. The panel needs to be able to determine if a referral should or should not be made, and investigatory powers to inquire and receive information are needed to facilitate this.

One possibility is that the advisory panel could establish a ‘preliminary hearing’ procedure prior to referral that would allow parties to submit information and be heard. The standard for making such a referral would be based upon a ‘probable cause’ standard, i.e. that there is a probable cause to believe that an infringement has occurred and that the infringement can be addressed by a referral to a particular Member State enforcement system. Investigatory power is also necessary if the advisory panel seeks to fulfil its function of reporting to the Council those cases that are not adequately treated by the national authorities. Otherwise, it is not clear how the panel can compare the outcomes of cases actually handled by the national authorities with the expectations that an infringement could be determined and corrected.

The call for regional investigatory power also relates to developing the capacity to address international practices that are beyond the visible purview of domestic firms in the ECOWAS region. It would allow the regional mechanism to survey international cartel enforcement actions being taken abroad and consider the possibilities of information collection within the ECOWAS. An authority with this power can also derive the basis to extend its investigatory powers abroad, including the potential to develop international cooperation arrangements with other developing regional authorities (within the African Union or the ACP group for example) and with other developed country authorities. The international dimension also supports the argument that the investigatory powers of an advisory panel should not be limited to dealing only with actual received complaints. There is no reason why an advisory panel should not be able to follow its own leads and determine its own basis for referrals. Rather, limiting the panel to investigate only received complaints would seem to inhibit the potential for the ECOWAS to deal with international anti-competitive practices – an area where no single Member State is likely to have sufficient power to successfully play.

An advisory panel should therefore be established with the power to receive complaints dealing with ECOWAS law and to refer action to the Member State authorities. Where a relevant national law is not implemented or cannot address the referred practice, that advisory panel should have the power to refer the matter to the Council for a decision (by majority voting) as to how the case will be heard and decided. The panel should be given reasonable investigatory powers that can be exercised in its referral determination, and the panel should be permitted to exercise its investigatory powers without the receipt of an individual complaint. A further recommendation is that the panel should be constituted to have the power of conducting a preliminary hearing on the question of infringement and referral, and that parties to the proceedings are guaranteed a right to be heard and to submit information. If the panel does not have the right to compel the provision of information and appearances at a preliminary hearing, then it should have the right to rule that a probable cause is found as a matter of default on the basis of a failure to provide requested information or to appear.

4.4. Other considerations, notification systems and cooperation instruments

4.4.1. Notifications

This study has not raised the question of whether or not a regional authority should have the power to declare exemptions in respect of individual agreements, or as to classes of agreements. Nor has it, in tandem, raised the question of whether private parties should be able to notify their private agreements for which, while falling within the treaty prohibitions, they would also be seeking to have an exemption applied based upon the balancing criteria of pro-competitive effects. The value of notification systems, either mandatory or voluntary, is that information flows to the regional body and the authority can learn the nature of the distribution markets that affect cross-border trade and can gradually determine the patterns that can form the basis for handling cases and developing regional block exemptions.

4.4.2. Cooperation instruments

This study has started from the position of assessing the prospects for decentralized administration of a regional law by the use of Member State authorities acting in cooperation. There is a role for cooperation between authorities in any regional system whether or not there is a centralized authority in position and whether or not a system is operating in tandem with private rights of enforcement. There are obvious benefits to cooperation where existing authorities can establish working relationships and render each other's enforcement efforts more viable. Cooperation can occur both in respect of Community law but also in the application of national territorial laws.

The common mechanism for enforcement includes:

- coordination, by agencies on common fact patterns with effects upon both jurisdictions
- investigatory assistance, upon a request by one agency to another seeking information on possible practices that may be occurring in the requested country that have effects on the

requesting country

- positive comity, a request by one agency for another to assess and take action on a possible anti-competitive practice that is occurring in the requesting" country's territory[462].

The record of cooperation instruments in existing RTAs that have included these provisions is not positive. Surveys by the Organisation for Economic Co-operation and Development (OECD) and the Centre for Economic Policy Research suggest that little cooperation actually occurs according to the RTA provisions. There are some cases where countries are actively requesting and notifying, but not consistently, and not in a manner that appears to be generating consistent responses from the regional partners. These are tentative characterizations because it is difficult to confirm how much informal cooperation may be actually going on beneath the cover of these cooperation provisions. Many of the agreements utilizing cooperation instruments are fairly new, as are the authorities working with them.

ECOWAS competition law cannot be given effect by the sole use of a cooperation approach. Nevertheless, there are clear benefits to using cooperation as a supportive set of instruments to facilitate enforcement of the domestic competition laws of the members. Irrespective of the regional body ultimately proposed for the ECOWAS, this body should also be given some coordination capacity to promote intergovernmental cooperation to facilitate the application of the national laws. This could be accomplished by the named regional body itself, or as an alternative, a separate intergovernmental body composed of representatives of the national competition authorities.

5. Conclusions

This study has aimed to identify a feasible middle path – between pure intergovernmentalism and absolute supranationality – that can resolve the deficiencies of the ECOWAS Treaty structure with its

[462] These instruments as drawn from OECD (1995), Recommendation and Guiding Principles for Anti-competitive Practices Affecting International Trade, C(95)130/Final, Revised Recommendation, 27 & 28 July, 1995. These techniques are commonly recited in bilateral cooperation agreements and in RTAs.

rather ambitious integration objectives, and in light of a regional competition law. An independent law at the regional level can and should be established at the treaty level. Furthermore, this law should have a general applicability and be binding upon the authorities and the courts of the Member States. These elements are the fundamental building blocks of regional integration that can act simultaneously as a point of balance between state sovereignty and regional authority. It is clear that these elements also underlie a system of diffuse individual rights of action that relies upon a regional authority to address infringements of regional law.

A system of private rights can be built upon this structure if direct effect is made clear and if the national courts have the ability to obtain regional court preliminary opinions. In addition to this, an ultimate arbiter for appeal should be considered as a reasonable extension of standing before the ECOWAS regional court. If these elements are accomplished, then the ECOWAS can say legitimately that it has installed an effective system of private action for regional law. A pure system of private rights enforcement would not be adequate to give effect to regional law; some level of regional authority action is necessary for the regional law to operate. The differences in approaches have been discussed above, but all regional proposals build upon the same building blocks of independent law, general application and superiority. This is even more so in the case of the referral system.

It is tempting to seek to avoid the pitfalls of a referral system that relies upon Member State implementation of national authorities. The alternative of a completely independent commission with full powers is simple, effective and attractive. However, the lack of institutional tolerance for full independent executive powers cannot be ignored when this describes what the Member States may be willing to actually tolerate. Thus, this study argues for regional action that adopts a referral model but is modified to avoid the intergovernmental pitfalls that can render such a system inoperative. These include an alternative case-handling approach if a referral cannot be effectively made, and a clear investigatory power granted to the advisory panel as it attempts to determine referrals and monitor the merits of a case.

The competition law issue in ACP regional integration arrangements is not a home-grown phenomenon. There are external factors raising the competition agenda. This is particularly noticeable in

the ECOWAS setting where the treaty does not even accord competition policy the status of a regional activity. In contemplating the likely requirements that will emerge in the negotiation framework for the EPA agreements, it is perhaps helpful to identify the interests of foreign firms in the establishment of regional competition law for the ECOWAS. From the perspective of the EC, any foreign firm trading or doing business in the Community has the individual right to complain and seek redress for a violation of regional competition law. From a narrow and more mercantilist perspective, the reciprocity that can be expected from an ECOWAS arrangement is for a legal structure capable of responding to similar complaints when raised by an EC firm. In other words: "*How will OUR firms address private and public exclusionary practices that threaten to undermine the market access commitments that have been bargained for in the EPA tariff schedules?*".

A completely intergovernmental system of enforcement cannot make this EPA exchange on a reciprocal basis. Consequently, the modifications proposed here are for a referral system and the institution of private rights of action. Obviously the beneficiaries are not only foreign firms. Consumers are the main beneficiaries and welfare gains may also be generated by contestable markets. The argument put forward in this study may not necessarily lead to the best or most efficient institutional outcomes. However, the proposals aim to create an outcome that can effectively implement a regional law for competition policy in the ECOWAS. While ECOWAS Member States may not welcome encroachments on national sovereignty, it is hoped that these proposals are considered on the merits of how they meet these wider objectives.