

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

Judicial perspectives on competition law

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7-8 December 2017

This paper by Mouhamadou Diawara, President, Competition Commission, Senegal, was submitted as background material for Session II at the 16th Global Forum on Competition on 7-8 December 2017.

The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

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JT03425869

**JUDICIAL PERSPECTIVES ON
COMPETITION LAW**

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I. INTRODUCTION: JUDICIAL?

The subject “Judicial Perspectives on Competition Law” may seem rather odd to judges from countries with very limited human, material and financial resources that operate on the principle of unity of jurisdiction. As members of the judiciary with many possibilities open to them, they are accustomed to adjudicating matters of fact and law in all areas of judicial science, including civil law, business law (commercial, banking, maritime and tax law), criminal law, labour law and sometimes even, in the context of full jurisdiction, administrative law. How then could they have other perspectives or different conceptions when addressing matters raised by the application of competition law? In performing their function, do they not encounter, and with expert help consistently resolve, difficult and complex technical issues in sectors which are not theirs, such as construction, for example?

Could it be that lurking behind such a choice of subject is the argument about the judiciary’s competence to apply competition law correctly? Or could it just be the expression of “slight unease” or “real or latent” incomprehension between what Max Weber called the upholders (judges and economists) of two different orders: “a judicial order of a normative, logical and systematic nature” and an economic order based on the division, circulation and distribution of goods and services. From this standpoint, “abstract, theorising law” may be contrasted with a “pragmatic economy rooted in fact”. The consequences drawn from their difference of logic, method and reasoning would in that case ultimately lead to Mr. Justice Spence’s assertion that “a court is not trained to act as an arbitrator of economics” (cited by William P. McKeown and Marshall E. Rothstein in *Policy Roundtable on Judicial Enforcement of Competition Law*, OECD, October 1996).

However, experience shows that such fears are groundless. Legal theory and economic theory co-exist. Judges adjudicate facts and judge people and conduct not from an ivory tower but in contact with reality. Their role is

summed up in the old maxim *jura novit curia*, even if these days the parties are required to formulate the legal arguments on which they base their claims and, according to their position in the process, prove their allegations.

These assertions, which cannot be dismissed a priori or en bloc, are of course counterbalanced by findings that competition law could be effectively applied just as much by specialist as by generalist judges. There are judicial judges who are thoroughly familiar with competition-related issues.

However, it is also true that competition law is a specific type of law and, as Claude Champaud says in *Caractères du Droit de la Concurrence*, “the true laboratory of economic law”. Inspired by economic theories, it is a type of law that conveys “particular” concepts, uses an arguably specific form of reasoning (so-called economic reasoning) and puts forward or establishes facts and evidence that may be brought before the court in offences involving cartels or abuse of dominant position or in the context of merger control.

The argument goes that this type of reasoning and these methods of proof have serious consequences and could change the terms of a trial. They need to be integrated into the legal reasoning of the judge responsible for hearing and adjudicating disputes relating to allegations of anti-competitive practices, but this has to be accomplished with great caution, taking care to observe the fundamental principles of court proceedings. These ideas consequently imply genuine scrutiny by the courts, a matter we shall return to in Section III.

Before that, however, we need to address another ambiguity or oddity. As we shall see in Section II, judicial judges may perceive the chosen subject to be somewhat “odd”, insofar as there seems to be little scope, when a window of opportunity opens, for them to apply the law against anti-competitive practices, since that prerogative lies with the administrative courts.

In conclusion (Section IV), we shall advocate and argue the need for specialist jurisdictions and constant cooperation between the various institutions involved, making use of a range of resources.

II. The judicial role in the application of competition law in West Africa: the examples of Senegal, WAEMU and ECOWAS

Why specify the “judicial role” in a context of “judicial perspectives on competition law”, given that the judicial perspective should permeate the whole subject?

In his *Vocabulaire Juridique*, Gérard Cornu defines “judicial” as “what is proper to justice in contrast to legislative and administrative”, and more specifically what relates to justice rendered by judicial courts.

The Community jurisdictions – the WAEMU and ECOWAS Courts of Justice – which hear appeals in competition-law matters against decisions of the WAEMU Commission and the ECOWAS Regional Competition Authority, are administrative by nature. The same applies to Senegal’s former Conseil d’État, the supreme administrative court which hears appeals in matters concerning abuse of power and, inter alia, used to hear appeals against Competition Commission decisions concerning anti-competitive practices at a time when the Commission was still able to take them.

Although administrative by nature, however, the Community jurisdictions, like Senegal’s former Conseil d’État, mostly comprise senior judges from their countries’ highest courts¹. As was seen in the application of administrative rules at the beginning of independences, there is no doubt that their reflexes will continue to be judicial, at least for a while.

In legislative terms, the courts seem to have been given short shrift in terms of the application of competition law. As far as decisions are concerned, apart from two judgments of the Senegalese Conseil d’État, now abolished and incorporated into the Supreme Court, there are none from the WAEMU or ECOWAS Courts of Justice. After considering the case of Senegal (Section 2.1),

¹ There is a Judicial Council within ECOWAS, made up of the presidents of the Member States’ highest courts, which is responsible for recruiting judges and has disciplinary powers over them. Law professors with at least 20 years’ service can be members of the court. Senegal’s current representative is a university professor.

we shall go on to look at what the Community jurisdictions, in the light of Community legislation, could bring to competition law in their task of scrutinising decisions of the WAEMU and ECOWAS regional competition authorities (Section 2.2), and then the role of the judicial courts (Section 2.3).

2.1. The case of Senegal

As the Conseil d'État has been abolished and competence in competition matters lies entirely with the WAEMU Competition Commission, we shall consider here, for purely didactic reasons, only the two judgments rendered by the Senegalese Conseil d'État, before looking at the role of the Senegalese courts.

2.1.1. Judgments of the Senegalese Conseil d'État relating to anti-competitive practices

The Conseil d'État rendered two judgments in the following cases:

- *Syndicat des Assureurs Conseils Africains (SACA) and Central Insurance Broker Agency (CIBA) v. Fédération Sénégalaise des Sociétés d'Assurances (FSSA)*;
- *Syndicat des Agences de Voyages et de Tourisme du Sénégal (SAVTS) v. Compagnie Air France*.

a) The Conseil d'État judgment in SACA and CIBA v. FSSA

Following a dispute between Central Insurance Broker Agency (CIBA), a member of the Syndicat des Assurances Conseils Africains (SACA), a trade body, and two insurance companies called Assurances Générales du Sénégal and SOSAR Al Amane, the latter referred the matter to the Fédération Sénégalaise des Sociétés d'Assurances (FSSA), the Senegalese insurance industry federation, which, after various meetings, advised all its members to break off all business

relations with the CIBA brokerage.

The case was referred to the Senegalese Competition Commission which, finding that the agreements of the insurance companies grouped together in the FSSA constituted a cartel, described their behaviour as “a blacklisting or boycott decided jointly and in concert with the intention of excluding CIBA from the insurance market, insofar as almost all insurance companies signed the letter of 22 December 1997, thus following the FSSA’s advice, even though some of them had no dispute with CIBA or, even more inexplicably, had never had any business relations with it”.

Sanctions were ordered against FSSA for unlawful agreement on the grounds of Article 24 of Act 94-63 of 22 August 1994 on prices, competition and economic disputes.

However, the Conseil d’État overturned that decision, finding that the case involved neither competition nor anti-competitive practices and that the Competition Commission was not competent to hear it.

The Conseil d’État explained its reasoning as follows: the FSSA’s decision “[...] reflects a reaction of a specific kind, in the context of a dispute that is extraneous to both competition and anti-competitive practices insofar as it is not intended in any way to achieve a concerted or parallel movement of prices, margins or any discriminatory conditions of sale”.

Ultimately, for the Conseil d’État the FSSA’s decision could not fall within the scope of anti-competitive practices because neither its purpose nor its effect was to distort the price of services provided by insurance brokers.

Observation: But wasn’t the boycott in fact sufficient per se? Whatever the allegations against CIBA, shouldn’t a boycott be an anti-competitive practice by nature, regardless of its effects on the market?

b) The Conseil d'État judgment in *Syndicat des Agences de Voyages et de Tourisme du Sénégal (SAVTS) v. Compagnie Air France*

On the grounds of Article 27 of Act 94-63 of 22 August 1994 on prices, competition and economic disputes, which prohibits abuse of dominant position and of economic dependence, the Union of Senegalese Travel and Tourism Agencies (SAVTS) and its affiliated agencies complained of anti-competitive practices by Air France which, interfering with the freedom to set rates of commission through the free play of market forces and taking advantage of the agencies' economic dependence, cut its commission to them from 9% to 7%.

The Competition Commission found that following the disappearance of Air Afrique and for various reasons, some of them “of a psychological and historical nature”, Air France, which had a very large share of the market on the Dakar-Paris route, had a dominant position.

Likewise, taking account of the sales generated by travel agencies with Air France, the Competition Commission added that “taking advantage of its economic power to impose on agencies deprived of any other option of the same quality a measure that is likely to restrict free competition, given the alignment begun by other companies, Air France infringed the provisions of Article 27, paragraph 2 of Act 94-63 of 22 August 1994”.

The Conseil d'État, after a preliminary application to the WAEMU Court of Justice (the Community texts had already entered into force), dismissed Air France's appeal against the Competition Commission's decision.

The matter did not stop there, since there was a judicial sequel. The Conseil d'État having upheld the Competition Council's decision, according to the findings of the Dakar Court of Appeal in its judgment of 24 April 2012, the SAVTS and certain travel agencies acting on their own behalf made an application for damages in a case which culminated before the Supreme Court.

2.1.2. Applications for damages before the courts

The Competition Commission having found and sanctioned the existence of anti-competitive practices, the first issue was to determine what authority its decision could have over the civil courts. The rule that criminal matters take precedence over civil matters did not apply. The sanctions imposed by the Competition Commission are administrative, not penal. But the Appeal Court's judgment made the Commission's decision final, even stating that "the fault of Air France is established according to the above-mentioned decisions of the Commission and the Conseil d'État".

That raised the question whether the Court of Appeal would uphold the judgment of Dakar District Court of 16 March 2010, which awarded the travel agencies damages of 1,193,893,695 CFA francs (approx. €1,817,190).

That step was not taken, since the Court of Appeal, on the grounds of Article 118 of the Code of Civil and Commercial Obligations (equivalent to Article 1382 of the French Civil Code) and Article 134, paragraph 2 of the same Code relating to the conditions for setting the amount of damages, overturned the appealed judgment and dismissed the travel agencies' application on the grounds that they had "produced only statements of commission differentials without tax returns or properly-kept accounting records, pursuant to Article 69 of the Uniform Accounting Act, certifying the real nature of their gross sales of airline tickets in favour of Air France, at the rate of 7% during the years 2002-2008, such as to prove the real nature of their financial prejudice, Air France having rightly pointed out to them that their argument was solely that of projected earnings, whereas they ought to establish the real nature of their loss of earnings through the tickets sold".

Judgment no. 02 of 2 January 2014 of the Civil and Commercial Division of the Supreme Court made that decision final, taking more of a disciplinary than a normative stance in its scrutiny of the arguments put forward.

Observations

- The Dakar Court of Appeal judgment is not ultimately favourable to the victims of Air France. However, it is worth taking a closer look at it because, although it was rendered on 16 March 2010, i.e. before the viewpoint expressed by the European Union, it may be compared in certain regards with Article 9 of Directive 2014/104/EU of 26 November 2014, according to which “Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law”.
- On this matter, a presumption of prejudice is not established as is the case in the European Union.

The judges of the WAEMU and ECOWAS Courts of Justice will have an important role to play in all the areas and means of legal action opened up by the application of competition law.

2.2. The application of competition law by the WAEMU and ECOWAS courts and the role of national courts

Subject to a more detailed comparative examination of the WAEMU and ECOWAS texts, this study² lays no claim to scientific rigour and has no purpose other than to stimulate thinking for a discussion by mostly highly qualified and experienced senior members of the WAEMU and ECOWAS courts which, as Michel Troper has said, are ultimately the real creators of the legal norm insofar as they have a monopoly on authentic interpretation of the kind that produces

² This study is merely an essay or limited introduction that may provide the basis for a more extensive, rigorous and critical examination of WAEMU and ECOWAS legislation.

legal effects³.

Article 14 of Regulation no. 01/96/CM regulating the procedures of the WAEMU Court of Justice states that “the Court of Justice shall ensure respect of the law in relation to the interpretation and application of the Treaty”. This is echoed in the parallel provisions relating to ECOWAS: “The Mandate of the Court is to ensure respect of the law and of the principles of equity, in the interpretation and application of the provisions of the Revised Treaty and all other subsidiary legal instruments adopted by Community”.

A brief review of the texts shows that the Community jurisdictions can scrutinise the decisions of other Community bodies, especially those responsible for competition, and that the judicial courts are not left out.

2.2.1. The scrutiny exercised by Community jurisdictions

Article 31 of Regulation no. 03/2002/CM/WAEMU on the procedures applicable to cartels and abuse of dominant position states that “the WAEMU Court of Justice shall assess the lawful nature of Decisions taken by the Commission [...]” and “shall rule, with unlimited jurisdiction, over appeals against decisions whereby the Commission imposes a fine or a period penalty payment”. Likewise, Article 7 of Supplementary Act A/Sa.2/12/08 on the establishment, functions and operation of the regional competition authority for ECOWAS states: “The Authority’s Decisions may be appealed to the Court of Justice of the Community”. Thus, the Courts assess whether decisions are lawful and have full jurisdiction.

a. The WAEMU Court of Justice’s review of the lawful nature of decisions

Article 8, paragraph 2 of Additional Protocol no. 1 on WAEMU oversight bodies states that “applications for a preliminary ruling on legality

³ Though Prof. Troper’s very seductive formulation is open to and has indeed come in for criticism, its use here is entirely intentional.

may be brought [...] by any natural or legal person against any act of a body of the Union that causes them prejudice”. Under Article 9 of the same Protocol, such appeal entails “the total or partial nullity of acts flawed by procedural irregularity, non-competence, misuse of powers, breach of the Treaty of Union or measures taken in application thereof”.

It is the place for the Court to perform a limited review in the event of a manifest error of appreciation. As the WAEMU Commission has extensive powers to grant or refuse negative clearance or individual exemptions, adopt implementing regulations for category exemptions, notify complaints, take interim measures, impose period penalty payments, order inquiries or investigations of economic sectors and impose fines, the Court of Justice, in addition to its normative review, should certainly ensure that proper procedure is followed in all these matters.

The Court of Justice should therefore ensure observance of the principles of a fair hearing, the rights of the defence, equality of arms, the admissibility and taking of evidence, and legal justification – matters which will be discussed below –, starting with the power of full jurisdiction which it is considered to hold with the ECOWAS Court of Justice.

Before looking at this point, we should remember that the review of legal justification is very important, since the Community or regional authorities are required to furnish the issues of fact and law on which their decision is based and avoid contradictory arguments.

b. Full jurisdiction

The procedural rules of the WAEMU and ECOWAS Courts of Justice give them vast powers to discover the truth. No distinction seems to be made between the different matters that can be referred to them, whether they rule in last resort or on appeal. In competition law matters, in addition to the facts and evidence on which the competition authorities base their decisions, assembled

from requests for information, checks, inquiries (including sectoral investigations) and hearings of the parties, witnesses and even third parties that may help to settle the dispute, the Courts of Justice seem to have their own powers to order new investigatory measures, admit new evidence and even admit a new legal argument beyond the normal procedural time limits, albeit with the restriction that the decision on its admissibility remains “reserved for the final judgment” (Article 31, last paragraph, of Regulation no. 01/96/CM regulating the procedures of the WAEMU Court of Justice).

The advantage of this provision or this competence is that appellate judges will not be distracted by issues of fact and law. They are the judges of fact and law. Article 31 of WAEMU Regulation no. 02 of 23 May 2002 says on this point that the Court of Justice may “amend or annul decisions taken, reduce or increase the amount of fines and period penalty payments and impose specific obligations”. Thus, it may right a wrong interpretation of facts or an erroneous interpretation or application of the law.

In our opinion, it is this full jurisdiction that underpins the power of the ECOWAS Court of Justice to hear appeals against decisions of the Regional Competition Authority ruling on applications for compensation from victims of anti-competitive practices (Article 7).

That is not the viewpoint of WAEMU, which in this regard opens the door to national courts.

2.2.2. The role of national courts in applying competition law in the WAEMU/ECOWAS areas

Attention has just been drawn to a first divergence between WAEMU and ECOWAS rules. Where the award of damages is concerned, Article 22.4 of WAEMU Regulation 02 of 23 May 2002 states that “the sanctions imposed by the Commission are without prejudice to appeals to national courts relating to compensation for damage suffered”.

Another question remains: the WAEMU Commission, after the opinion of the Court of Justice, has exclusive competence to rule on anti-competitive practices. That would not be the current viewpoint with regard to ECOWAS rules.

Cartels and abuse of dominant position are prohibited within WAEMU and prohibited agreements or decisions are declared null and void as of right (Article 2 of Regulation 02). Article 5(2) of ECOWAS Supplementary Act A/Sa.1/12/08 institutes the same prohibitions and nullities for agreements and concerted practices.

Both institutions make provision for collaboration with national courts, since some investigations or searches may be performed only under the oversight of national courts, which can receive letters rogatory. The ECOWAS Court of Justice even adds: “the Court may apply directly to the judicial authorities where it wishes to make findings or gather evidence on-site or cause others to do so...”

In all events, it is for the appellate courts, observing the rules of law, to define the powers they hold by law and the limits of their oversight of the acts of administrative authorities entrusted with a public policy mission to ensure that the market operates smoothly.

In conclusion, let us note that States are not prohibited from imposing criminal sanctions on persons guilty of anti-competitive practices. WAEMU does not prohibit States from bringing in legislation to that effect.

However, one mission among others of any judicial authority is to reveal the truth which opposes the parties by means of evidence furnished by them or obtained through other procedures or processes. Discovery of the truth in order to justify the imposition of sanctions takes on a particular meaning in competition law because of its specific nature, its complexity and its roots in economic law.

III. The Community courts and the economic problems of competition law

After noting that the WAEMU and ECOWAS Courts of Justice have not to date heard any cases involving competition law (Section 3.1), we shall then look at the outlook (Section 3.2) and the scrutiny issues they will face (Section 3.3).

3.1. Situating the problem

As the WAEMU and ECOWAS Courts of Justice have not yet, as far as we are aware⁴, had to deal with the economic issues raised by the application of competition law, it would be difficult to define the standards of scrutiny and proof they will use when hearing final appeals against decisions taken by administrative competition authorities.

3.2. The WAEMU and ECOWAS Courts of Justice will inevitably have to confront economic rules and application of the rule of law

The WAEMU and ECOWAS Courts will necessarily face issues of an economic nature, especially with regard to reasoning and evidence, for the simple reason that, as has been clearly established, competition law has economic foundations. Concepts like the market, the substitutability of products, a substantial reduction in competition, the cross-price elasticity of demand test, the hypothetical monopolist test, the beneficial or negative effects of the cartel on the market, efficiency gains in the context of abuse of dominant position, the likely future effects of a business concentration on the market and so on can only properly be grasped through economic rules and theories.

Although the economic element is all-pervasive, the question arises whether trust in economics for the purposes of applying competition law is

⁴ The only case pending before the WAEMU Court of Justice concerns a merger, while cases involving anti-competitive practices cannot yet be brought before the ECOWAS Court because the Regional Competition Authority has not yet been created.

absolutely well-founded to the extent that the courts, in performing their duties, must blindly or meekly rely on economic reasoning and evidence. Is there not an economic problem in economic competition law? We shall see for ourselves below, briefly because of the limits of this study, and as such eminent figures as Guy Canivet and André Potocki have pointed out, the importance of economics in the “manipulation” of competition law, without the role of the courts being reduced to that of a “puppet”.

a) **The application of economic theories and rules in competition law: how far can economic theories be trusted?**

The question boils down to this: why trust economics, an uncertain if not occult science which can lead to different results depending on how a question is framed? Denis Clerc, quoted by Michel Musolino in *La Nouvelle Imposture Economique*, writes: “If all the economists who have got it wrong were to be strung up, not a single one would be left alive, starting with the author of these words”.

In response to this quip, let us simply say that being wrong, whether averred or not, is not a crime. As Gaston Bachelard said, “there are no first truths, only first errors”.

However that may, the fact is that competition law at present is extensively governed by economic rules and, as it has been said, “the solutions found are directly ordered by economic data”. As Guy Canivet rightly put it, “economic reasoning must be integrated into legal reasoning”.

b) **The necessary application of economic theories and rules: the integration of economic reasoning into legal reasoning**

Economic analysis is an essential input and, whether descriptive or predictive, should not theoretically pose a problem for the courts. Positive economics, which describes how things are, and normative economics, which

describes how things should be, have their use.

It is the normative function of economics, considering that the law should serve the economy and making the courts a “servant” whose role is to robotically apply the solutions recommended by economic analysis, that arguably poses a problem.

Much has been said, it is true, about the obstacles to the courts accepting economic reasoning, the differences in method between legal and economic science, a judge’s deductive reasoning based on legal syllogism and an economist’s inductive reasoning. It is an established fact, however, firstly that competition law has economic foundations, and secondly that, whether an identified or unidentified legal object, as has been argued, it is indeed a branch of law. It is as a hybrid that competition law must come into existence and find its way. We may recall the words of Guy Canivet – “the judge must conceptualise economic notions in order to integrate them into legal reasoning” – and André Potocki, who has said that in competition law, “the judge applies the law to economics [...]. The prohibition of abuse of dominant position may be understood and applied only in its economic sense. However, it should be emphasised that in that case these economic concepts become legal rules.”

Judges, performing their now multifarious duties, have a number of concerns, including those relating to evidence and to elements resulting from the integration of economic reasoning into legal reasoning.

3.3. The problem of scrutiny: the issue of evidence in competition law and the function of the court

Although some judges assert that “economic knowledge is sometimes less important than the rules of evidence”, nonetheless, without entirely endorsing that proposition, two facts remain: firstly, the issue of evidence, whether economic or other (and why draw the distinction anyway, since evidence is evidence, whatever form it might take?) raises vast and interesting questions about its nature, admissibility and administration, and secondly, in all

events the courts have an important function.

3.3.1. Evidence in competition law

This is a complex issue. A brief study of the texts shows that, in addition to economic questions, it stands at the junction of several types of law and procedure (civil law and civil procedure, criminal law and criminal procedure, commercial law and administrative law; more generally, competition law is arguably governed as much by rules of private law as by those of public law).

This has the following consequences.

a. What rules and principles should be applied as regards both the burden of proof and the admissibility of evidence?

We know that methods of proof differ according to the matter at issue. There is documentary evidence and free proof.

Where the burden of proof is concerned, the primary rule remains *actori incumbit probatio* (the burden of proof is on the plaintiff) or *ei incumbit probatio qui dicit non qui negat* (the burden of proof is on the one who declares, not on one who denies), but *reus in excipiendo fit actor* (the defendant in objecting becomes a plaintiff).

Let us take a few examples. Who must prove the existence of a cartel or of prohibited conduct? The complainant? The competition authority? Who should establish the restriction of competition? Who should justify the efficiency gains generated by the effects of a practice or the benefit of an exemption? How should the existence of concerted practices be established? What methods of proof are admissible? Everything depends on a party's position in the proceedings and the allegations that are made. The party that alleges the existence of a right in its favour must prove it in fact and law or else lose the case. A real evidentiary risk exists.

In both sets of Community law, the parties must provide evidence of their claims. They establish the facts in their various submissions, supported by their evidence and the legal basis for their claims. There is nothing to prevent them

from calling on an expert. The competition authorities also have extensive powers, including the option of ordering investigative measures and expert assessments. The same applies to the Community courts, which should ensure the observance of certain rules in the admission of evidence.

Like their colleagues in other courts, faced with the difficulties of direct proof, Community judges will rely on indirect proof arising from serious, reliable and consistent evidence. They will call on simple and irrefutable presumptions where provided for, or presumptions that may be derived from economic analysis or reasoning. Where necessary, they will use rules of inference or experience. However, they have a duty to scrutinise the evidence.

b. What principles should be applied or used in scrutinising evidence?

There are many principles, some of them complementary or even contradictory. Choices should perhaps be made, taking account of the difficulties of detecting infringements of competition rules. Without going into detail, they include:

- the principle of proportionality,
- the principle of the reliability of evidence,
- the equality of arms,
- the presumption of innocence (*in dubio pro reo*),
- the adversarial principle.

It will be for the Community courts to establish standards of scrutiny and evidence.

Again, everything has to be accomplished in observance of the rights of the defence and the adversarial principle. The same applies to all the elements induced by economic reasoning which, in performing their duties, judges integrate into their legal reasoning, as mentioned earlier.

3.3.2. The judge's role

In this sort of transmutation whereby economic reasoning may play an

important part in determining the relevant facts, in the transition from fact to law implied by the legal classification of those facts and in the evidence, judges must always remain in control of their role, which also includes the predictability of their findings and the principle of legal security, which are fundamental criteria of the right to judge.

We should not forget that judges are bound by the principle of disposition. However, legal analysis or reasoning could reveal relevant facts which should be brought to the parties' attention. Likewise, the current tendency in the settlement of disputes is to make efficiency the primary purpose of competition law. To that extent, it is almost no longer the parties' known and prohibited conduct that is sanctioned. The competition authority seeks out or places much greater emphasis on the effects of the conduct on the market – for reasons of efficiency, it is said. But that also impacts on the predictability of judgments and the principle of legal certainty.

Under their rules of procedure, the two Community courts (the WAEMU and ECOWAS Courts of Justice) have extensive powers in both the written and the oral phases.

Their task is to define, through Community laws, the standards of scrutiny they intend to use in order to overturn the decisions of Community competition authorities and the attitude to take towards complex evidence.

We already know that Courts of Cassation exercise certain forms of scrutiny (which some, rightly or wrongly, describe as heavy or light). Unlike distortion of evidence, the materiality of facts is not scrutinised. Likewise the value and conclusive nature of evidence is left to the sovereign appreciation of the lower courts.

The administrative courts exercise two types of scrutiny: limited (in particular where discretionary power is concerned) and so-called normal.

The WAEMU and ECOWAS Courts of Justice assess the lawful nature of the decisions brought before them as they have the possibility of “reformatting”

them, as appropriate, availing themselves of full jurisdiction.

As judges of law and fact they will be best placed, in some circumstances, to modulate their scrutiny according to the objectives to be achieved, in particular the goals or purposes of the competition policies defined by WAEMU and ECOWAS, the arguments of the administrative competition authority (in connection with issues relating to the admissibility of evidence arising from the existence of new digital and other technologies) and the complexity of anti-competitive practices that are not easy to detect.

Using legal, economic and hybrid concepts and integrating them into their reasoning, and referring to established economic theories in order to substantiate and justify their judgments, they would not, in our opinion, lack economic knowledge. That knowledge will contribute to the legitimacy of their judgments.

This idea is well expressed by Jean-Louis Bergel: “the court’s decision is legitimate only on completion of the procedure it is required to respect in order to guarantee a fair and just trial. Its authority is deserved only insofar as it is consistent with the law, both procedural and substantive. Ultimately, the court is only the servant of the law and the guarantee of litigants”⁵.

IV. CONCLUSION: What or who to choose; generalist or specialist judges? (A brief outline)

4.1. Community judges will not lack economic knowledge to determine and oversee the mission of experts who, in our legal systems, merely issue an opinion which is not binding on the judge.

In our two Community systems, the expert works under the oversight of the appointed reporting judge. What value could such oversight have if the judge had no knowledge of the expert’s work?

But the expert’s work must also be “questioned”. In competition law, it is

⁵ Jean-Louis Bergel, *L'office du juge*, Proceedings, Senate Conference held on 29 and 30 September 2006, p. 18.

not about appointing the first expert who comes along. It is not as though any old economist could do this particular job.

Experts, chosen because of their independence and impartiality, must be up to speed on competition issues and must be able to report the results of their assessment simply, in clear and precise terms.

The parties may also retain their own expert. Community law allows it⁶.

Everything must be done in observance of the principles of a fair hearing, contradiction and the rights of the defence.

4.2. Senegal's Supreme Court has already initiated a debate about *amicus curiae*. The presence of this "friend of the court", in both meanings, seems acceptable because of the complexity of competition law and its solutions. The *amicus curiae* issue is close to the requests for opinions that may be made to it. Previously, the Supreme Court had included a professor of administrative law in the administrative division.

4.3. Competition law is taught as part of the economic law syllabus, in particular at Gaston Berger University in Saint-Louis.

4.4. The preamble of Senegal's Act 2017-24 of 28 June 2017 on the creation, organisation and operation of commercial courts and commercial divisions of appeal courts paves the way, stating that it is "an important step towards the specialisation of judges in the economic sphere, thus contributing to a better administration of justice in this domain".

4.5. Judges do not have to be economists. But they must, in Sartre's words, "get their hands dirty", i.e. get down to work in order to keep abreast of all the "revolutions" taking place in a fast-moving field of law in which practitioners need to be wide awake at all times. This viewpoint is a suggestion or call for the training of specialist judges to deal with competition law issues.

⁶ The judge must exercise constant oversight in order to forestall delaying tactics.