

**THIRTY FIFTH ORDINARY SESSION OF THE AUTHORITY OF  
HEADS OF STATE AND GOVERNMENT**

Abuja the 19th December 2008

**SUPPLEMENTARY ACT A/SA.1/06/08 ADOPTING COMMUNITY  
COMPETITION RULES AND THE MODALITIES OF THEIR  
APPLICATION WITHIN ECOWAS**

**THE HIGH CONTRACTING PARTIES**

**MINDFUL** of Articles 7, 8 and 9 of the ECOWAS Treaty establishing the Authority of Heads of State and Government and defining its composition and functions;

**MINDFUL** of Article 3 of the said Treaty that provides for the harmonization and coordination of National Policies in the area of trade as a means of maintaining and enhancing economic stability within the sub region;

**RECOGNIZING** that the economy in the ECOWAS Common market must be efficient and competitive in order to promote and facilitate conditions necessary for economic growth in the region;

**CONVINCED** that an effective regulatory environment is advantageous for the promotion and sustainability of a vibrant economy within the Common market and the domestic economies of ECOWAS Member States;

**NOTING** that the promulgation of Community Competition Rules is consistent with the economic development objectives of ECOWAS Member States;

**RECOGNIZING** also that the protection of market conditions through the effective implementation of competition rules is consistent with international best practices and is in the interest of economic integration within the ECOWAS region;

**DESIROUS** of endowing ECOWAS with competition rules that are consistent with international standards in order to promote fairness in trade and effective liberalization of trade;

**HAVING CONSIDERED THE OPINION** of the ECOWAS Parliament;

**ON THE RECOMMENDATION** of the Sixtieth Ordinary Session of the Council of Ministers, held in Abuja on the 17th to 18<sup>th</sup> May 2008.

**AGREE AS FOLLOWS:**

## ARTICLE 1: DEFINITIONS

(1) In this Supplementary Act, unless the context otherwise requires-

- (a) **“acquire”** in relation to-
  - i) goods: means to obtain by way of gift, purchase or exchange, lease, hire or hire purchase;
  - ii) services: means to accept benefit from or to perform the service;
  - iii) intellectual property rights: means to obtain by license, assignment or government grant;
- (b) **“agreement”** means any agreement, arrangement or understanding, whether oral or in writing and whether or not it is intended to be legally enforceable;
- (c) **“anti-competitive practice”** any practice coming from a physical or moral person the object or effect of which is to restrain competition to the disadvantage of the common market;
- (d) **“Authority”** means the ECOWAS Competition Authority established under Article 13 of this Supplementary Act;
- (e) **“authorized officer”** means any person appointed as such by the ECOWAS Competition Authority for the purposes of this Supplementary Act;
- (f) **“concerted practice”** means a practice involving direct or indirect contacts between competitors falling short of an actual agreement;
- (g) **“consumer”** means a person, partnership or body corporate or incorporate acquiring goods or services;
- (h) **“economic activity”** means economic activities involving:
  - i) manufacturing, producing, transporting, acquiring, supplying, storing, distribution and otherwise dealing in goods for gain or reward; and
  - ii) acquiring, supplying and otherwise dealing in services for gain or reward;
- (i) **“control”** in relation to a company means the power of a physical or moral person to secure by means of:
  - i) the holding of shares or the possession of voting power in relation to that company; or
  - ii) any other power conferred by the company’s constituent documents or other documents regulating the company,

- iii) the effective exercise of power of decision within the company; so that the company's business is conducted in accordance with that individual's wishes.
- (j) "**Council**" means the ECOWAS Council of Ministers, the composition of which is defined in the new Article 10 of Supplementary Protocol A/SP.1/06/06;
- (k) "**document**" means written information including electronic records;
- (l) "dominant position" is as defined in Article 6 (i) of this Supplementary Act;
- (m) "**enterprise**" means any person or group of persons engaged in business;
- (n) "**Executive Director**" means the Executive Director of the ECOWAS Competition Authority, appointed in accordance with Article 13 of this Supplementary Act;
- (o) "**goods**" means all kinds of property other than real property, money, securities or intangible property;
- (p) "**Member State(s)**" means any Member State or Member States of ECOWAS as defined in Article 2, paragraph 2, of the Revised ECOWAS Treaty;
- (q) "**person**" means an individual, partnership, body whether corporate or not or any association of persons;
- (r) "**price**" means any charge or fee or valuable consideration of any description;
- (s) "**products**" includes goods and services;
- (t) "**relevant market**" means the supply, to a geographical area, of products which the consumer regards as substitutable in terms of price and use;
- (u) "**service**" means a performance of any description, whether industrial, commercial, professional or otherwise;
- (v) "**supply**" means, in relation to:
  - i) goods: to sell, rent, lease or otherwise dispose of goods or an interest therein or a right thereto, or offer so as to dispose of such goods, right or interest;
  - ii) services: to sell, rent or otherwise provide services or offer to provide such services;
- (w) "**trade**" means any business, industry, profession or occupation relating to the supply or acquisition of products.

(2) For the purposes of this Supplementary Act:

- (a) any two companies are to be treated as interconnected companies if one of them is an affiliate of the other or both are subsidiaries of the same company; and
- (b) a group of interconnected companies shall be treated as a single enterprise.

(3) For the purposes of this Supplementary Act, a company is a subsidiary of another company if it is controlled by that other company;

(4) Every reference in this Supplementary Act to the term “market” is a reference to a market within the ECOWAS Community for products as well as other articles that, as a matter of fact and based on reasonable commercial practice, may be substituted for them in terms of price and use;

(5) In this Supplementary Act, any reference to the terms “common market” means the ECOWAS common market being established.;

(6) References in this Supplementary Act to the “lessening of competition” shall, unless the context otherwise stipulates, include references to hindering or preventing competition in the Common Market, or in a national market when such lessening of competition has a demonstrable effect on the Common Market;

(7) For the purposes of this Supplementary Act, the effect on competition in a relevant market shall be determined by reference to all factors that affect competition in that market, including competition (actual or potential) from products supplied or likely to be supplied by any person not resident or carrying on business in the ECOWAS Common Market.

## **ARTICLE 2: ADOPTION OF THE COMMUNITY COMPETITION RULES**

The Community Competition Rules and the modalities for their implementation, as defined in this Supplementary Act, are hereby adopted.

## **ARTICLE 3: OBJECTIVES**

The purposes of this Supplementary Act are to:

- (a) promote, maintain and encourage competition and enhance economic efficiency in production, trade and commerce at the regional level;
- (b) prohibit any anti-competitive business conduct that prevents, restricts or distorts competition at the regional level;
- (c) ensure the consumers’ welfare and the protection of their interests;
- (d) expand opportunities for domestic enterprises in Member States to participate in world markets.

#### **ARTICLE 4: SCOPE**

(1) This Supplementary Act applies to agreements, practices, mergers and distortions caused by Member States which are likely to have an effect on trade within ECOWAS. The Rules shall concern notably acts, which directly affect regional trade and investment flows and/or conduct that may not be eliminated other than within the framework of regional cooperation.

(2) The under-listed agreements and activities may be excluded from the scope of this Supplementary Act:

- (a) labour-related issues, notably activities of employees for the legal protection of their interests;
- (b) collective bargaining agreements between employers and employees for the purpose of fixing terms and conditions of employment;
- (c) agreements and trade practices approved by a regional competition organ of ECOWAS where these trade practices are authorized under this Supplementary Act;
- (d) activities expressly exempted by virtue of any treaty or any instrument or agreement in relation thereto or flowing therefrom, so long as the activities are not inconsistent with the purposes of this Supplementary Act;
- (e) activities of professional associations designed to develop or enforce professional standards of competence reasonably necessary for the protection of the public;
- (f) such other activity declared, after consultation with the ECOWAS Competition Authority, by the Council of Ministers.

(3) The Community rules on competition shall also be applicable to state enterprises.

#### **ARTICLE 5: AGREEMENTS AND CONCERTED PRACTICES IN RESTRAINT OF TRADE**

(1) The following shall be prohibited as incompatible with the ECOWAS Common Market: all agreements between enterprises, decisions by associations of enterprises and concerted practices which may affect trade between ECOWAS Member States and the object or effect of which are or may be the prevention, restriction, distortion or elimination of competition within the Common Market, and in Particular those which:

(a) directly or indirectly fix purchase or selling prices, terms of sale, or any other, trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets, customers, or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties; thereby placing them at a competitive disadvantage; or

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(2) Any agreement or decision prohibited under the sub-paragraph 1 of this Article shall be automatically void and of no legal effect in any Member State of the ECOWAS Community.

## **ARTICLE 6: ABUSE OF DOMINANT POSITION**

(1) For the purposes of this Supplementary Act, one or more enterprises hold a dominant position in a relevant market if, singularly or collectively, it/they possess a substantial share of the market that enables it/them to control prices or to exclude competition.

(2) Any abuse, or acquisition and abuse of a dominant position by one or more enterprises within the ECOWAS Common Market or in a substantial part thereof shall be prohibited as incompatible with the Common Market in so far as it may affect trade between Member States. Such abuse may, in particular, consist of:

(a) limiting access to a relevant market or otherwise unduly restraining competition;

(b) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(c) limiting production, markets or technical development to the prejudice of consumers;

(d) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

## **ARTICLE 7:        MERGERS AND ACQUISITIONS**

(1) Every merger, takeover, joint venture, or other acquisition or business combination including interconnected directorships whether of a horizontal, vertical, or conglomerate nature between or among enterprises are prohibited where the resultant market share in the ECOWAS Common Market, or any significant part thereof, attributable to any good, service, line of commerce, or activity affecting commerce shall result in abuse of dominant market position resulting in a substantial reduction of competition.

(2) Any merger prohibited by paragraph (1) of this Article shall be automatically void and of no effect in any Member State of ECOWAS.

(3) Mergers, acquisitions or concentrations of enterprises prohibited by virtue of paragraph 1 of this Article may be authorized or exempted if the transaction concerned is in the public interest.

## **ARTICLE 8:    STATE AID**

(1) Except as otherwise provided in this Supplementary Act, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain enterprises or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the ECOWAS Common Market.

(2) The following shall be compatible with the Common Market:

- (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; and
- (b) aid to remedy the damage caused by natural disasters or exceptional occurrences.

(3) The following may be considered to be compatible with the ECOWAS Common Market:

- (a) aid to promote the socioeconomic development of areas of the Community where the standard of living is exceptionally low or in which there is serious underemployment;
- (b) aid to promote the execution of an important project of Community interest or to remedy a serious disturbance in the economy of a Member State;
- (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

- (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest; and
- (e) such other categories of aid as may be specified by a decision of the Authority of Heads of State and Government on the recommendation of the Council of Ministers acting on a proposal from the ECOWAS Competition Authority.

## **ARTICLE 9: PUBLIC ENTERPRISES**

(1) In Case of public enterprises and enterprises to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Supplementary Act.

(2) Enterprises entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Supplementary Act, in so far as the application of rules contained herein does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must be affected to such an extent as would be contrary to the interests of ECOWAS Community.

## **ARTICLE 10: COMPENSATION FOR VICTIMS OF ANTI-COMPETITIVE PRACTICES**

(1) A person or Member State who has suffered losses as a result of any anti-competitive practice prohibited under this Supplementary Act may, upon application to the Authority, receive compensation for such losses.

(2) The conditions for granting the compensation stipulated in paragraph (1) above shall be defined in a subsidiary Regulation.

## **ARTICLE 11 AUTHORISATIONS AND EXEMPTIONS**

(1) The Regional Authority referred to under Article 13 (1) of this Supplementary Act may declare inapplicable the provisions of Article 5 of this Act in the case of:

- (i) any agreement or category of agreements between enterprises,
- (ii) any decision or category of decisions by associations of enterprises,
- (iii) any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the concerned enterprises, restrictions which are not indispensable to the attainment of these objectives;



(b) afford such enterprises the possibility of eliminating competition in respect of a substantial part of the products in question.

(2) Mergers, acquisitions, or other business combinations prohibited under Article 7 of this Supplementary Act may be authorized by the ECOWAS Competition Authority if the transaction in question is in the public interest.

(3) Subject to conditions to be defined in another Supplementary Act, the Authority may authorize any person to conclude or execute an agreement or engage in business practices likely to violate provisions imposed by this Supplementary Act.

## **ARTICLE 12: AGREEMENTS CONCLUDED BY THE MEMBER STATES**

(1) The ECOWAS Commission shall conclude on behalf of the Member States other international agreements on competition.

(2) Where, prior to the entry into force of this Supplementary Act, Member States had concluded agreements or adopted national legislation on competition that are inconsistent with the provisions of this Supplementary Act, they shall take all necessary measures to eliminate the inconsistencies observed in the shortest time possible.

## **ARTICLE 13: APPLICATION AND IMPLEMENTATION OF THE COMMUNITY COMPETITION RULES**

(1) A structure to be known as the Regional Competition Authority responsible for the implementation of the present Supplementary Act within ECOWAS shall be established.

(2) The organizational and operating rules of the Authority shall be defined in a Regulation.

(3) In the implementation of the Community Competition Rules, the Regional Authority shall collaborate with other existing competition agencies. (UEMOA)

(4) A Consultative Competition Committee composed of members who are experts in the area of competition is hereby set up. Each Member State shall be represented by two of such members who can be replaced by other members in case of incapacity. The operation of the Committee shall be governed by rules of procedure adopted by the Commission after consultation with the Committee.

(5) When the Committee has to deal with an issue related to an important economic sector, the delegation from each Member State shall include a representative of the national Regulatory Agency of the relevant sector or at least a representative of the professional association of the said sector.

(6) For the purposes of application of the Community Competition Rules, the Member States shall adopt all measures they deem appropriate, on condition they are not inconsistent with the provisions of this Supplementary Act.

(7) The modalities for the implementation of this Act shall be defined in a Regulation to be adopted by the Council of Ministers.

#### **ARTICLE 14: AMENDMENT AND REVISION**

(1) Any Member State, the Council of Ministers, the ECOWAS Parliament and the ECOWAS Commission may submit proposals for the amendment or revision of this Supplementary Act.

(2) Proposals not emanating from the ECOWAS Commission shall be submitted to it. The Commission shall communicate all proposals for amendment and revision to the Member States not later than thirty (30) days after their receipt. Upon expiration of the thirty (30) days notice given to Member States, the Authority of Heads of State and Government shall examine the proposals for amendment or revision of the Supplementary Act.

(3) The amendments or revisions shall be adopted by the Authority of Heads of State and Government in accordance with the provisions of Article 9 of the ECOWAS Treaty. The adopted amendments and revisions shall enter into force upon their publication in the Official Journal of the Community.

#### **ARTICLE 15: PUBLICATION**

This Supplementary Act shall be published by the Commission in the Official Journal of the Community within thirty (30) days of its signature by the Chairman of Authority of Heads of State and Government. It shall also be published by each Member State in its Official Gazette within the same time frame.

#### **ARTICLE 16: ENTRY INTO FORCE**

1. This Supplementary Act shall enter into force upon its publication. Consequently, signatory Member States and the Institutions of ECOWAS undertake to commence the implementation of its provisions on its entry into force,
2. This Supplementary Act is annexed to the ECOWAS Treaty of which it is an integral part.

#### **ARTICLE 17: DEPOSITORY AUTHORITY**

This Supplementary Act shall be deposited with the Commission which shall transmit certified true copies thereof to all Member States and shall register it with the African Union, the United Nations and such other organizations as Council may determine.

**IN WITNESS WHEREOF, WE, THE HEADS OF STATE AND GOVERNMENT OF  
THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES, HAVE SIGNED  
THIS SUPPLEMENTARY ACT**

**DONE AT ABUJA THIS 19th DAY OF DECEMBER 2008**

**IN SINGLE ORIGINAL IN THE ENGLISH, FRENCH AND PORTUGUESE  
LANGUAGES, ALL THREE (3) TEXTS BEING EQUALLY AUTHENTIC**