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WEST AFRICAN POWER SECTOR REGIONAL REGULATION PROJECT

DIAGNOSTIC REPORT ON THE INSTITUTIONAL AND REGULATORY INTERFACES OF THE ECOWAS REGIONAL ELECTRICITY REGULATORY AUTHORITY

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LIST OF ABBREVIATIONS

AFD	Agence Française de Développement
CCJA	Common Court of Justice and Arbitration
CEB	Communauté Electrique du Bénin
CEET	Compagnie Energie Electrique du Togo
CEMAC	Communauté Economique et Monétaire d'Afrique Centrale
CET	Common External Tariff
CTPI	Comité Technique Permanent de l'Interconnexion
ECOWAS	Economic Community of West African States
EDM	Electricité du Mali
EEM SA	Eskom Energie Manantali
ERERA	ECOWAS Regional Electricity Regulatory Authority
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
NEC	National Electricity Companies
OHADA	Organization for the Harmonization of Business Law in Africa
OMVG	Organisation pour la Mise en valeur du fleuve Gambie
OMVS	Organisation pour la Mise en valeur du fleuve Sénégal
SENELEC	Société Nationale d'Electricité (Sénégal)
SONELEC	Société Nationale d'Electricité Mauritanienne
SOGEM	Société de Gestion de Manantali
UEMOA	Union Economique et Monétaire Ouest Africain
WAGP	West African Gas Pipeline
WAPP	West African Power Pool
WTO	World Trade Organisation
UNCITRAL	United Nations Commission on International Trade Law

FOREWARD

This study follows from the report on the missions and powers of the regional regulatory body in which the principles and rules of operation of ERERA were developed. ERERA was created by the Authority of Heads of State and Government of ECOWAS in January 2008.

The legislations of creation of ERERA, while granting it a status which guarantees the independence and legitimacy required for the exercise of its missions and powers, also determines the relationships ERERA could have with the various regional community and national institutions likely to participate in the regional electric power market within the existing regional institutional framework.

It is therefore necessary to specify the interactions between ERERA and other regional institutions in order to anticipate or resolve potential risks of overlapping powers and conflicts of authority.

The main objective of this report is to analyze the regional institutional and regulatory framework within which ERERA will function, identify potential conflicts of authority which could arise in its interactions with other regional institutions having similar jurisdictions, and outline a solution which will allow efficient operation of the whole institutional system within the operating environment.

This objective also includes the harmonization of the rules governing electric power exchanges at the regional and national levels, in order to promote their development.

INTRODUCTION

The ECOWAS Regional Electricity Regulatory Authority (ERERA) was created by Supplementary Act A/SA.2/01/08 of the 18 January 2008. It is also governed by Regulation C/REG.27/12/07 dated 15 December 2007 which states the composition, organization, responsibilities and operations of the authority. The adoption of these two legal instruments marks the beginning of the transition phase during which the activities of the institution will commence and the on-going demonstrative regulatory actions started during the implementation of the ECOWAS Regional Electricity Regulation Project will be continued.

ERERA is specifically empowered to:

- create and ensure the maintenance of suitable conditions for the development of the regional market and regional infrastructures for energy transmission ;
- supervise operation of the regional market specifically by warning and sanctioning anti-trust practices;
- settle disputes between stakeholders (mediation, conciliation, arbitration) and ;
- support and assist national regulators

Given the multitude of regional institutions, the exercise of the above powers involves a real risk of overlapping rules and even conflict of authority with certain institutions including amongst others the competition commissions, the Courts of Justice of UEMOA and ECOWAS, the institutions of OHADA, OMVS, OMVG and WAPP.

It is expected that these problems will be specifically identified during the transition phase and the various stakeholders will be approached in order to discuss and agree on appropriate solutions.

This report intends to deepen the analysis on these issues through the:

- examination of the areas of intervention of ERERA by an exposition on the legal and regulatory mechanism and the regional institutional context prevailing in area of activities of ERERA;
- analysis of conflicts on material and territorial rules which could occur during its operations, and its relations with other regional institutions having similar scope of authority;
- proposal of measures of prevention or mitigation of these risks of overlapping powers with the aim to initiate dialogue with the other stakeholders concerned, and establish lines of communication between ERERA and these institutions.

1. Area of intervention of ERERA

1.1 Recap of the objectives and responsibilities of ERERA

1.1.1 Need for regional regulation

In order to confront the deficit in the power generation capacity suffered by the majority of West African countries and sustainably respond to the growth in demand, the ECOWAS Member States have committed themselves to develop electricity interconnections which will allow the pooling and sharing of energy resources of the region. The execution of these interconnection projects presents several technical and economic advantages. It allows each operator to optimize generation costs through the diversification of primary sources of energy and the emergence of a competitive regional market. It equally serves to secure supply while strengthening the stability of the electrical network.

The development of electric energy exchanges however comes up against the challenges of insufficient infrastructure and inadequate institutional and regulatory frameworks. To cope with this situation, ECOWAS has set up a framework intended to promote the development of infrastructure, improve governance of the sector and attract private capital. The significant investments involved will require Member States to resort to private investment participation. Public and private interests are often in contradiction and the short-term policy goals of governments may sometimes compromise these regional objectives and endanger the sustainability of projects and the security of investments. To arbitrate the conflict existing between short term and long term interests, it is therefore necessary to put in place an autonomous regulatory authority to protect stakeholders against arbitrary policies and abuses by national monopolies and which is suited to promote the development of an adequate institutional and regulatory environment.

If the sector liberalization policies at the national level were implemented to facilitate the creation of national regulators to develop national markets and implement service concession agreements, then the distinctive nature of cross-border electricity exchanges between countries and the long-term prospects of development of a regional market convinced ECOWAS to opt for the establishment of a regulator at the regional level.

To this effect, studies and projects conducted by the ECOWAS Commission culminated in the creation by the Heads of State and Government on 18 January 2008 of the ECOWAS Regional Electricity Regulatory Authority (ERERA) with the status of a specialized institution of ECOWAS.

1.1.2 Outline of the missions and powers of the regional regulator

The mission of ERERA is to introduce regulation of cross-border electricity exchanges and support national regulatory mechanisms. It was established to play a central role in the setting up a normative institutional and harmonized contractual

framework to promote cross-border electric energy exchanges within the region. ERERA must thus ensure the creation of a sustainable electricity market and its gradual opening up to competition, capacity building for national regulators and the establishment of efficient procedures for the resolution of disputes between stakeholders.

The responsibilities attributed to ERERA are therefore defined around some main points which are:

1. development and supervision of the application of uniform technical rules for management of the exchanges carried out between interconnected systems so as to maximize their technical efficiency ;
2. supervision of wholesale electricity transactions between the various buyers in Member States, analysis of their efficiency especially by warning and sanctioning anti-trust practices;
3. development of procedures for dispute resolution and oversee adherence to commercial rules and contractual undertakings by the partners involved;
4. establishment of effective lines of communication between governments, regulators and electricity services providers of Member States on issues of mutual interest.

The powers assigned by the legal instruments creating ERERA empower it to enact, fix, specify or interpret technical and commercial rules on cross-border electric energy exchanges through the transmission network existing between the ECOWAS Member States.

Within the framework of realising its objectives and its assigned missions, ERERA may also make any recommendation to the various national and regional participants in the power sector.

With regard to the technical regulation of cross-border power exchanges, ERERA is also empowered to authorize, approve and supervise the activities of the various participants of the regional power market.

Finally, ERERA can initiate investigations, request for audits to be conducted, issue any injunction or protective or safeguard measure and sanction any breaches or violations of rules governing cross-border electric energy exchanges.

Actions taken by ERERA in the performance of these different duties will be by way of **regulations** aimed at defining community regulation on cross-border electricity exchanges. Similar to the existing laws, such regulations shall be binding on those to whom they are intended, once they are adopted and they will also applicable on all participants on the regional market.

The **opinions** and **recommendations** initiated by ERERA or issued at the request of the national or regional stakeholders of the power sector will only be advisory in nature.

Finally, ERERA can take decisions on cases of mediation, conciliation or dispute resolutions which are submitted to it or sanction observed breaches or violations. These decisions would be enforceable on those to whom they are intended. Member States guarantee the application of the decisions of ERERA on their territory.

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All of these actions and decisions of ERERA are subject to appeal before the ECOWAS Court of Justice which intervenes in the process as the jurisdiction of appeal. These appeals are limited to cases involving the failure of ERERA to respect its legal mandate or errors committed by ERERA in the application of its procedures. The Court of Justice may therefore re-examine the substance of the decision and substitute it with its own judgement. Furthermore, ERERA can take any protective measures automatically at its own instance or at the request of one of the parties involved provided a risk of irreversible damage exists

1.2 Legal and regulatory structure of the community on electric energy

The creation of an open and competitive electricity market at the regional level requires the existence of an appropriate institutional and regulatory framework, including amongst others, national legislations and harmonized technical and commercial standards and rules for the promotion and protection of investments. It is as a result of this that an Energy Protocol was signed after the adoption of the ECOWAS Revised Treaty and the energy policy. This protocol served as the general outline for the adoption of the different legislations required for the development of the West African Power Pool (WAPP).

1.2.1 The ECOWAS Treaty and Energy Protocol

Articles **3, 36, 28 and 55** of the **ECOWAS Treaty** states the basic principles relating to promotion, cooperation, integration and development of the energy sector of Member States.

It was in 1982 that the Authority of Heads of State and Government adopted **Decision A: DEC.3/5/82** relating to the energy policy of ECOWAS. This policy aims mainly to ensure energy security, diversify primary energy sources and promote increased access to energy. Even though the objectives of this policy remain real, there is a need for it to be adapted to technological changes, energy resource constraints and the global environment. In concrete terms, the application of this policy has been resulted in the implementation of regional projects such as the West African Gas Pipeline Project (WAGP), WAPP and the Project on Energy Access to Rural and Peri-urban populations. These projects and programmes were accompanied by institutional arrangements at the regional level to promote cooperation between Member States.

In order to facilitate the development of regional energy projects, the ECOWAS Executive Secretariat therefore developed a reference text specific to the Energy Sector which goes beyond the principles contained in the Treaty. This is the **Energy Protocol A/P4/1/03** that was adopted and signed by the Heads of State in January 2003 and has entered into force through ratification by at least nine Member States. Annexed to the Treaty, it establishes the legal framework intended to promote long-term cooperation between ECOWAS Member States in the field of energy. According to article 2 of this Protocol, cooperation in the field of energy is *« based on complementarity and mutual benefit with a view to augment investment in the energy sector and develop trade of energy within the West African region»***.**

The Protocol was inspired by the European Energy Charter, and is essentially based on the existing principles and rules of the World Trade Organisation (WTO). The

provisions of the Protocol were designed to guarantee free exchange of energy, energy equipment and products between Member States, define non-discriminatory rules for exchanges and dispute resolution, protect private investments and ensure environmental protection and development of energy efficiency.

The provisions having a direct influence on the operation of the regional electricity market are mainly Articles 6, 7 and 18 relating respectively to competition, wheeling, and access to resources. The electricity market will be structured according to these principles even though Member States would have to agree on a timeframe for implementation. On the one hand, Member States have committed to fight against market distortions and hindrances to competition in the economic activities of the energy sector by adopting the appropriate legal provisions. And on the other hand, Member States also have also committed themselves to ensure open and non-discriminatory access to energy generation sources and transmission equipment situated in their respective territories. Access to energy resources will be ensured by granting authorisations, licences and other contractual documents required for the exploitation of these resources in a transparent and non-discriminatory manner.

More generally through the Protocol, Member States have committed to facilitate free wheeling of energy flows on their territories by treating them in the same or in a more favourable manner than their own products and by cooperating in the establishment of new wheeling arrangements.

Finally, the Protocol encourages appeal by arbitration in the event of failure to reach an amicable resolution for disputes between the parties to the Protocol, or between one of the parties and an investor. Therefore in the event of a dispute between an investor and a contracting party to the protocol, the following options are envisaged:

- appeal to national jurisdictions ;
- appeal to the agreed proceedings foreseen in their contract ;
- appeal to international arbitration and conciliation proceedings.

The arbitration proceedings mentioned by the Protocol are the conventions of the International Centre for the Settlement of Investment Disputes (ICSID), the arbitration settlement of the United Nations Commission of International Trade Law (UNCITRAL), that of the Institute of Arbitration of the Stockholm Chamber of Commerce and the arbitration proceedings of the Organization for the Harmonization of Business Law in African (OHADA) maintained by the Common Court of Justice and Arbitration (CCJA).

1.2.2 Laws governing the West African Power Pool (WAPP)

The commitment of ECOWAS Member States to develop electric power interconnections for the optimal pooling and sharing of energy resources of the region has translated into the gradual setting up of an energy market. The Heads of States and Government adopted a certain number of provisions which laid out the organisational and operational principles of the regional electricity market, and created two institutions: the West African Power Pool (WAPP) and the Regional Regulatory Body.

(i) *WAPP* was established on December 10, 1999 by **Decision A /DEC.5/12/99** of the Authority of Heads of States and Government of ECOWAS. The Executive Secretariat, presently the ECOWAS Commission, spearheaded the development process, which in 2006, culminated in the creation of an organisation uniting all public or private power generation, transmission and distribution companies in the Member States. The agreement of establishment of this organisation was adopted by **Decision A/DEC.18/01/06 of 12 January 2006 of the Authority of Heads of State and Government of ECOWAS** and during the same occasion was also granted the status of an ECOWAS Specialised Institution (**Decision A/DEC.20/01/06).**

The Agreement of Establishment institutes the managerial structures of WAPP and defines their organisation and modes of operation in order to establish a viable cooperation mechanism between its Members. These structures are: the Assembly General, the Executive Council, the WAPP General Secretariat, the Specialised Committees (Engineering and Operations Committee, Strategic Planning Committee (SPC) and the Finance and Human Resource Committee (FHRC).)

The WAPP General Secretariat, which commenced activities in February 2006, is responsible for ensuring the sustainability of electric energy in the region essentially through the development of regional generation and transmission projects and the definition of technical and commercial rules for cross-border electric energy exchanges.

(ii) *The regional electricity market* itself is organised and regulated according to the principles and rules mainly defined in **Supplementary Act A/SA.2/01/08 of January 2008** and **Regulation C/REG.27/12/07 of 15 December 2007** which establishes and governs the regional regulatory body.

These pieces of legislation provide for the regional electricity market to be organised on the principles of free exchange between Member States within a competitive framework founded on the application of non-discriminatory rules of exchange and dispute resolutions, the protection and promotion of private investments as well as environmental protection and the promotion of energy efficiency.

Commitment was obtained from all the Member States on the application of these principles so as to encourage:

- eventual interconnection of all Member States ;
- free wheeling of electric energy on the basis of non-discriminatory, transparent and available network access at fair price ;
- gradual introduction of a regional wholesale electricity market within an open and competitive framework ;
- adaptation of rules for operations, safety and transmission tariffs to allow cross-border electricity exchanges ;

- harmonisation of the rules for the organisation of national markets in conformity with the rules and principles defined in the above-mentioned Regulation;
- application of the principles of national treatment and those of most favoured nation treatment in the cross-border electricity exchanges ;
- gradual elimination of technical, administrative and other barriers to the trade of electricity ;
- fight against distortions and hindrances to competition in the regional electricity market.

Finally, the following provisions are the principles which will guide the regulation of the regional electricity market:

- independence of the regional regulator (ERERA) from public authorities, private interests and all participants in the electricity sector ;
- transparency in the regulation process, with the development of the rules and procedures of regulation through a process involving all institutional, state and regional stakeholders ;
- rationality, predictability, coherence and stability of decisions and actions of the regional regulator ;
- effectiveness and efficiency of regulatory actions through the provision of an observation and information system and adequate expertise at the disposal of power sector participants ;
- collectiveness in decision-making by the regional regulatory.

Hence ERERA, which should operate according to the above-mentioned rules and principles, is required to play a vital role in the establishment of a sustainable regional electricity market and to ensure its gradual opening up to competition. It is for this reason that it is composed of a Council of Regulation, which is the managerial authority supported by a team of Technical Staff. The Council of Regulation comprises of five members, of which one is the Chairman of ERERA. They will be appointed to work full-time for a non-renewable term of five years and with full independence and collectiveness required in their decisions. The team of Technical Staff is a structure composed of experts responsible for the provision of technical and administrative support to the Council of Regulation.

Furthermore, in the performance of its duties, ERERA may establish the following consultative committees:

- a committee composed of representatives of national regulators and representatives of national administrations in charge of the power sector ;
- a committee composed of representatives of ECOWAS power sector operators ;
- a committee composed of representatives of electricity end-use consumers in the ECOWAS region.

1.3 The Regional Institutional Environment

ERERA is required to operate in a regional environment already characterised by the existence of institutions, both within the ECOWAS region itself or within its territorial space, whose functions and activities could have an impact upon its own. It is important to briefly present these institutions and their functions in order to facilitate the examination of the issues of overlapping and conflicting powers which shall be treated in the second part of this report. This presentation is however limited to regional institutions[1].

1.3.1 The ECOWAS Institutions

Among the ECOWAS institutions whose responsibilities and operations may have a direct impact on the activities of ERERA, we can mention:

1.3.1.1 <u>The ECOWAS Commission</u>

The Commission is the main institution essentially responsible for the implementation of the decisions and policies of the governing bodies of the Community and is composed of nine commissioners including a President and a Vice-President. In general, the Commission oversees the promotion of community development projects and programmes, organisation of Ministerial meetings for various sectors to examine the sectoral issues which contribute to the realisation of the objectives of the Community, preparation of draft laws and work programmes. For these purposes, the powers conferred on it by the **Supplementary Protocol A/SP.1/06/06 of 14 June 2006** notably include the powers to:

- make proposals to the Authority of Heads of State and Government and the Council of Ministers to enable them to declare their rulings on the main direction of the policies of the Member States and the Community, and formulate recommendations and opinions
- issue Regulations to implement the laws of the Community, collect useful information and engage in consultations with Community institutions and bodies.

The Commission is therefore involved in the development of draft laws which must be submitted for adoption by the Authority of Heads of State or the Council of Ministers whose meetings it is also responsible for organising.

[1] National structures (national regulators and competition authorities) and jurisdictions will be treated in the second section of the report, during the analysis of overlapping powers and conflicts of jurisdiction.

1.3.1.2 The ECOWAS Court of Justice

The only judiciary body of the Community, it is governed by Protocol A/P. 1/7/91 of July 6, 1991 which was amended by Protocols A/SP1/1/05 of January 19, 2005 and A/SP2/06/06 of June 14, 2006. It is the only jurisdiction of appeal for decisions taken by Institutions of the Community, including ERERA.

Notably, it possess extensive authority over disputes arising from the application or interpretation of laws, acts and decisions of the Community or breaches by Member States of their obligations stemming from these laws. This authority extends to all issues concluded in any agreement between Member States, or with ECOWAS and those which give it jurisdiction, as well as any other matters entrusted to it by subsequent Protocols and Decisions of the Community. Furthermore, the Authority of Heads of State and Government has the power to refer cases to the Court on any dispute other than those cited in the Protocols relating to the Court of Justice,.

Finally, the Court of Justice, which is empowered to hear cases on human rights violations in any Member State, can receive cases not only from Member States, but also from any individual or legal entity for appeal on the judgement of the legality of any act of the Community causing grievance.

1.3.1.3 The Competition Authority of ECOWAS

This Institution is in the process of being created. Although it is yet to be established, it could have significant impact on the activities of ERERA (given that one of its core activities will be the fight against anti-trust practices) and this renders it important to consider since its creation process has reached the stage of signature of the enabling legislation by the Heads of States.

Three draft supplementary acts have already been adopted by the ECOWAS Council of Ministers:

- a Supplementary Act on the adoption of community rules on investments and their mode of application within ECOWAS ;
- a Supplementary Act on the adoption of community rules on competition and their mode of application within ECOWAS ;
- a Supplementary Act on the creation, responsibilities and operation of the Regional Authority on Competition of ECOWAS.

The general objective of these pieces of legislation is to promote the development of investments in the region, preserve and stimulate competition by prohibiting and fighting against anti-trust practices.

The Competition Authority of ECOWAS will be responsible for the implementation of community rules on competition. Its responsibilities mainly include the supervision of commercial activities within the common market with a view to detecting anti-trust activities, conducting investigations at its own instance or at instance of the Member States, the Court of Justice and any other person, developing the scheme for applicable fines.

To this effect, it is endowed with extensive powers including the power to issue injunctions against anti-trust practices ranging from prohibition against entering into agreements to their cancellation, the power to sanction and to authorise mergers and acquisitions.

These acts and decisions are likely to appealable before the ECOWAS Court of Justice which is the instance of appeal and of last resort.

The Competition Authority will be managed by an Executive Director assisted by two deputies. Each will have a non- renewable term of four years.

The Authority will be assisted by a Consultative Committee composed of civil servants with expertise in competition from each Member State.

1.3.2 The UEMOA Institutions

Created in 1994, UEMOA brings together eight (8) Member States[2] sharing a common currency, the FCFA. All these eight countries are also members of ECOWAS. Both UEMOA and ECOWAS have the objective of creating a common market. Their complementarity and common vision means that these two institutions have adopted laws or established institutions with the same area of authority. This is the case in competition issues where UEMOA is more advanced in terms of setting up a legal framework. Hence, its competition related institutions that could have an impact on the activities of ERERA are:

1.3.2.1 The UEMOA Commission

It is the community's main authority on competition related issues. The Commission is a collective decision-making body comprising eight members, called Commissioners of which one is specifically responsible for competition issues. The Commission plays a central role in the design and application of community competition laws. To this effect it performs a triple function: it is responsible for the definition of the competition policy of the Union; it also performs a legal/regulatory role delegated by the Council of Ministers (such as the adoption of the regulations for the execution of Acts and their method of application; finally for the implementation of the community law on competition, it has, under the supervision of the Court of Justice, the authority to institute legal proceedings and issue sanctions.

[2] Benin, Burkina Faso, Cote d'Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo

1.3.2.2 The UEMOA Court of Justice

As the custodian of the law within the Union, it has the task of overseeing respect of the rule of law in the interpretation and application of the Union's Treaty. It has double authority on the subject of competition: it hears appeals brought against actions taken by the institutions of the Union (notably regulations for the execution of Acts of the Commission), and it also hears appeals against contentious administrative decisions within the Commission. Within this framework, it may repeal or reverse the decisions of the Commission.

1.3.3 Other regional institutions operating within the ECOWAS region

The other institutions whose functions and powers pose risks of overlapping and conflict of authority with those of ERERA are:

1.3.3.1 The Common Court of Justice and Arbitration (CCJA) of OHADA[3]

The objective of OHADA is to harmonize the business laws within its signatory states though the design and adoption of common rules, implementation of appropriate judiciary proceedings and encouragement of resort to arbitration for the resolution of disputes. Within this organisation, Member States transfer the legislative and regulatory powers to adopt uniform acts to the Council of Ministers. The rules produced thereof are immediately applicable in the Member States, and supersede the internal rules of these Member States. These uniform rules center on business laws that encompass regulation of the various components of economic life such as the legal framework (especially on the regulation of debt and competition), the participants/stakeholders (businessmen, companies, commercial intermediaries); goods and services (including energy materials) and the industry value-chain (production, distribution and consumption).

OHADA[4], amongst other institutions has established a Court of Justice whose jurisdiction extends over the entire territory of the Member States in relation to disputes relating to the interpretation and application of uniform Acts. It performs an administrative and jurisdictional role: the administrative role consists of a center for arbitration while its jurisdictional duties make it to takeover the role of the Supreme Court of the signatory states on harmonised issues.

On jurisdictional matters, it gives its opinion on decisions taken by the jurisdiction of appeal of Member States on any affair bordering on the application of Uniform Rules

[3] L'Organisation pour l'Harmonisation du Droit des Affaires en Afrique (OHADA) unites members of the franc zone which are Benin, Burkina Faso, Cote D'Ivoire, Guinea, Guinea Bissau, Mali, Niger, Senegal and Togo which are also all ECOWAS members. But the treaty is open to members not only from any AU member state but also non AU members may be invited to join the common agreement of countries which are already members.

4 These are the Council of Ministers of Finance and Justice of Member States (legislative body), the Permanent Secretariat and the Ecole Régionale Supérieure de la Magistrature

and Regulations (except decisions involving penal sanctions). The origin of the foregoing is that the Court of Justice has equal footing to recall and give a ruling when a dispute is brought to its attention.

Its decisions are binding on the entire territory of the Member States.

1.3.3.2 OMVS

The Organisation pour la Mise en Valeur du fleuve Sénégal (OMVS) brings together the four riverside countries of River Senegal (Guinea, Mali, Mauritania and Senegal) for the rational control and exploitation of the resources of the river and its valley.

OMVS is under the guardianship of its Authority of Heads of State and Government, the supreme authority which determines the cooperation and development policies of the Organisation. It comprises of five (5) permanent bodies including the Council of Ministers (the Conceptual and Supervisory body) and the High Commission (the Executive body of the Organisation).

In the energy component of its activities, OMVS has identified close to ten sites for dams, representing an evaluated hydroelectric potential of more than 4,000 GWh/year. The Manantali dam is the first stage of this hydroelectric generation complex, with an installed capacity of 200 MW (operational since 2000) and a network of 1500km of transmission lines interconnecting three Member States (Mali, Mauritania and Senegal). On behalf of these countries, OMVS has the responsibility of supervising the optimal utilisation of these infrastructural facilities, notably with assistance from the Société de Gestion de l'Energie de Manantali (SOGEM), an inter-state public company belonging to the three countries, and Consultative bodies such as the Regional Planning Committee (Comité Régional de Planification (CRP).

A private operator, ESKOM (a South-African company) presently responsible for the operation and distribution of energy, was recruited in July 2001 for a one time renewable period of 15 years.

1.3.3.3 OMVG

This sub-regional organisation, bringing together The Gambia, Guinea, Guinea-Bissau and Senegal, is responsible for the integrated development programmes of its four country members towards the rational and harmonious utilisation of the joint resources of the Rivers Gambia, Kayanga-Geba and Koliba-Corubal. It has almost the same constitutive legislations and institutional architecture as OMVS.

OMVG is presently in the process of implementing an Energy Project on the construction of two hydroelectric power stations totalling a nominal capacity of 225 MW (Sambagalou and Kaleta) and a high voltage transmission network (225kV) of approximately 1723km in length, which will interconnect the power system of the four Member States.

2. Identification of the risks of overlapping powers and conflicts of authority

The multiple memberships by West African countries in several regional organisations pursuing the same objectives of economic and legal integration is likely to pose difficult legal problems especially in terms of the application of community rules adopted by the various institutions. The establishment of ERERA will not fail to further exacerbate this problem because very often the regulations issued by these regional institutions govern the same matters and have almost the same area of implementation.

2.1 Problems related to the existence of several community judicial systems in the region[5]

The Supplementary Act on the creation of ERERA states in subsections 2 and 3 of article 4 that*: « the authority of ERERA extends over the whole territory of ECOWAS Member States within the framework of their relations on cross-border electricity exchanges through the transmission network.*

The regulations, resolutions, decisions, and any other community act taken by ERERA in the implementation of these missions will be binding on all ECOWAS Member States».

As a specialised institution of ECOWAS dedicated to a given sector (it will only operate in the power sector), the spectrum of the area of activity attributed to ERERA will affect all the West African countries (except Mauritania which is not a member of ECOWAS, but whose case should be considered due to its inclusion in OMVS[6]).

To this effect and taking into account its area of activity and the powers granted to it, all the acts that will be taken by ERERA or which ERERA will instruct to be taken[7] will fall under the general framework of the community legal system which ECOWAS is in the process of setting up. This legal system is characterised by the rule of **supra-nationality** which allows the community to be favoured in relation to national interests.

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[5] This analysis is limited to the examination of Economic Communities (E.C) in West African which have a general objective and have an impact on the activities of ERERA: ECOWAS, UEMOA and OHADA. The two other E.Cs are the Council of agreement and the River Mano Union of which all the member countries are also members of ECOWAS.

[6] A study should be conducted to determine the modalities for the extension of the jurisdiction of ERERA to Mauritania, a co-owner of the OMVS interconnected network.

[7] This is the same for the Regulations and directives which will be issued by the Council of Ministers for the organisation, and management of the regional electricity market.

This rule exhibits itself in the power to enact community standards which are immediately applicable and have direct effects on Member States of the community and which are superior to national legal rules[8].

UEMOA and OHADA, whose zones cover part of the ECOWAS zone[9], are equally engaged in a process to create legal systems presenting the same characteristics: both of them may emit standards which are immediately applicable and which have direct effect on the internal systems of Member States. These two regional organisations expressly state the supremacy of the rules they issue over internal rules of Member States.

This is one of the main causes of possible incompatibility or coexistence of rules governing the same subject-matter and having the same binding force over the same territory, as will be seen below during the examination of relations between ERERA and the institutions or the arms of each of these regional organisations. It is for this reason, that it is important to first examine the problem in terms of what prevails between the legal systems of the communities in the area of competition within the same region.

In reality, the **objectives** and **areas of activity** of the various regional organisations in question must be totally or partially identical for an extensive conflict of rules to exist. It is noticeable that the general objective of the three organisations for integration cited above is to contribute to the economic development of Member States. The objective is therefore common even through there are some differences in approach:

- Thus at first glance it is OHADA which has the objective of harmonising business law through drafting and adoption of common rules on the subject. However, this unification of business law is only a way to reach an objective of economic development and integration of its members, as stated in its constitutive Treaty.
- It is the same for UEMOA and ECOWAS. The objectives of UEMOA center on strengthening competiveness of economic and financial activities of Member States within the framework of an open and competitive market and a rationalized and harmonized legal environment. ECOWAS also expressly aims at economic development and integration by the creation of a common market.

The main and common characteristic of the steps adopted by all these regional organisations is that the objective of economic development is centred on the private initiative and investments. All the rules enacted aim, among other key objectives, at **the creation of an open and competitive common market**.

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[8] This principle of supra-nationality was adopted by ECOWAS through supplementary protocol A/SP.1/06/06 of 14 June 2006 on the amendment of the ECOWAS Revised Treaty which also formulates the different types of acts which can be issued: Regulations, Decisions and Directives.

[9] All West African countries which are members of OLHADA and members of UEMOA also belong to ECOWOAS

In addition to this similarity of economic objectives and legal methods, is the identical area of activity.

The area of application or operation of the community law of ECOWAS, and that of UEMOA is both vast and vaguely defined due to the extensive nature of the tasks (cooperation or integration) given to them. The community law of these two institutions centers on the organisation of economic activities within the market in particular, and all areas, in general, provided the pursuit of the objectives of the community are tenable.

The unified law of OHADA covers the topic of business law. This is defined in Article 2 of its Treaty which states a group of laws relating to "company laws and the legal status of businessmen, debt recovery, guarantees and their method of execution, receivership and legal liquidation of companies, arbitration law, work laws, accounting laws, laws on sale and transport etc". However, at the same time it indicates that "any other matter" may be included in the business law so far as the Council of Ministers of OHADA unanimously decides to include it. Given this variable content without precise boundary, this issue could therefore encompass all the rules of law relating to a company, ranging from production to distribution of economic wealth. It also proposes to include several other issues such as antitrust laws, consumption law and certain special contract laws. This possibility of extension of the issues covered by OHADA is another source of conflict between common rules enacted by OHADA and the community rules of other regional organisations such as ECOWAS and UEMOA and their sector-specific arms such as ERERA.

To date, a satisfactory legal solution to this discussion on the prevalence of overlaps between these various community judicial systems in the event of a conflict is yet to be identified.

It can only be observed that the areas of intervention of these regional organisations are far from being well-defined and this encourages the duplication of certain rules on the same subject-matter. The overlapping and conflicts of rules are further exacerbated by the fact that each organisation defines the sphere of applicability of the law it enacts, as well as the roles and powers of the institutions it creates to implement these rules.

The field of cross-border electric energy exchange which ECOWAS intends to regulate does not escape this observation. And ERERA which is the institution responsible for this regulation, shares these areas of authority with several other regional institutions, both with regards to technical regulation and management of the regional market as well as competition and dispute resolution.

2.2 ERERA and Regional Institutions with competing areas of authority

2.2.1Technical regulation and management of the regional electricity market

2.2.1.1 Relations with WAPP

WAPP and ERERA emerge from the same judicial and institutional community system, namely that of ECOWAS.

WAPP is a specialised institution of ECOWAS composed of national (electricity utility companies of Member States) and multinational electricity operators (CEB, SOGEM) who are the principal participants in cross-border electricity exchanges that ERERA will have the task of regulating. The purpose of WAPP is to encourage cross-border electricity exchanges through regional investment in energy generation, transmission and interconnection and through the establishment of an operative framework furthering regional energy exchanges.

At the regional level, ERERA is therefore to WAPP what the national regulators are to national electricity operators. Furthermore, with reference to the community judicial system to which they both belong, it is important to recall that the legal nature of the acts and decisions of the two institutions differ. The powers conferred on ERERA are both statutory and quasi-judiciary. ERERA issues **regulations** and **decisions** that are binding, directly applicable in the ECOWAS zone and their application is guaranteed by Member States on their territory. All these regulations and decisions of ERERA are subject to appeal before the ECOWAS Court of Justice which intervenes in the process as the jurisdiction of appeal.

Contrarily, the acts of WAPP are the outcome of agreements between its members, which are only applicable between the signatory members, and consequently obey the judicial system of common contract law between private persons. Therefore taking their conventional nature into account, the rules and acts issued by WAPP during the operation of the market might not have binding force on Member States (and any non-WAPP member market participant), except through their approval and adoption by ERERA. These rules fall within the framework of the community law of ECOWAS. Moreover, in the event of violations of market rules which are approved and adopted by ERERA, violators may be sued automatically or by any party considered a victim.

Examination of the WAPP Convention signed in July 2006, however reveals certain risks of overlapping between the responsibilities of ERERA and those of WAPP, particularly with regards to aspects related to planning and rules of the market, and collection of information. However the concerted application of the provisions stated in the constitutive texts of ERERA would resolve several of these risks of conflict, quite apart from the fact that according to the provisions of the Convention on the organisation and operation of WAPP, ERERA has the possibility of participating fully

in all the activities of WAPP, including the General Assembly meetings with the same rights as the operators but with the exception of the right to vote[10].

i. Planning and rules of the market

By virtue of article 6.4 of the WAPP Convention, WAPP has the task of operational planning and investment promotion. It will recommend planning criteria and its proposals on infrastructural development (preparation of a master-plan) must be endorsed by the ECOWAS Commission, after receiving the opinion of ERERA on the matter.

At this level, it is important to note that ERERA approves the selection criteria of operators involved in the development of facilities in order to avoid all anti-trust practices. It is also consulted on any request/application for authorisation on construction of regional transmission lines beyond those included in the master-plan.

With regards to the management of the market, the documents do not permit WAPP to develop market rules, except technical rules for which there is provision for specific committees composed of representatives of WAPP operators. These technical rules of operation and access to the regional electricity transmission network are submitted to ERERA for approval.

On the subject of transmission tariffs and ancillary services, although ERERA will determine or revise the cost accounting rules and the tariff structure, approve tariff proposals submitted by operators, publish applicable tariffs and control their application, it is necessary that this is done by means of dialogue on the definition and implementation of the methodology of transmission tariff and commercial rules for the regional market.

The WAPP General Secretariat is the best appointed entity to develop the initial version of these rules in collaboration with its members. ERERA should focus on examining and subsequently approving them. Revision of the rules would follow the same process.

ii. Collection of information

A risk of confusion of roles also exists regarding the collection, analysis and publication of information giving a global view of the actual situation of WAPP and proposals for its future development. In accordance with its constitutive texts, ERERA will organise a system for the collection and management of information on exchanges and performance of the participants of the power sector in collaboration with national regulators, WAPP, transmission network managers, market operators and other sub-regional and regional institutions.

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[10] Article 23 of the Convention on the organisation and operation of WAPP

Hence, pursuant with article 8 of the WAPP convention, the Information and Coordination Centre of the WAPP General Secretariat is also responsible for the collection, analysis and publication of information on the present situation of WAPP and its future development.

It is important to avoid the duplication of collected information so that operators do not supply ERERA information which is already in the possession of WAPP. For this reason an agreement on the process of sharing and communication of information must be defined in order for WAPP to promptly communicate necessary information to the RBB and vice-versa.

The Information and Coordination Centre could therefore ensure operational cooperation between the owners and operators of the transmission network through daily exchange of information between the individual centres of operational coordination of WAPP members. It would therefore be responsible for the collection and transmission of daily or short-term information.

On its own part, ERERA will collect information from WAPP and additional information from operators and national regulators in order to cross-check and provide reliable information. It will also subject information supplied or published by WAPP to critical analysis so as to ensure that the decisions taken by regional network operators are in conformity with the Energy Protocol, regional market principles and directives adopted for its operation by the Council of Ministers. For other specific information, each organisation will set up its own method for collection and its own protocols for selection and safety.

Close cooperation shall be necessary especially on the structuring of the databases of WAPP and ERERA with the aim to exchange information and documentation on the institutional arrangements foreseen for projects being developed by WAPP, analysis and supervision of the execution of existing cross-border exchange contracts, tariffs, system performance, etc.

2.2.1.2 Relations with OMVS and OMVG

Electricity exchanges that develop within sub-regional areas such as OMVG and OMVS are governed by the particular rules of management and operation of these sub-regional organisations[11]. The electricity infrastructural facilities belonging to these organisations will eventually become a part of the regional interconnected network. The creation of ERERA to have exclusive authority over all cross-border exchanges existing within the ECOWAS zone will bring out overlapping powers and conflicts of authority with the bodies set up by these organisations to manage their interconnected networks.

[11] Recall that the OMVG energy project is still in the implementation phase

The case of OMVS could be cited as an example of planning and management of exchanges and dispute resolution. The main participants in the operation of the interconnected system of OMVS, apart from the Member States are:

- SOGEM (Société de Gestion de Manantali), a company which is responsible for the management of the assets comprising of the Dam, the power generation station and the joint transmission network (linking the power station to the national transmission systems);

-EEM (ESKOM Energie Manantali) is a private operator delegated by SOGEM to oversee the operation and maintenance of the facilities, sale of energy to the National Electricity Companies and billing for the supplied energy;

-National Electricity Companies (NEC) which refer jointly to EDM (Mali), SENELEC (Senegal) or SOMELEC (Mauritania);

-and the various coordination or decision institutions established by the Protocols and Regulations on tariffs and interconnection, and/or sale of energy contracts.

The rules governing interconnection are contained in a draft Protocol on Interconnection and a Regulation on the association of interconnection founded on three principles namely:

-transparency towards the NECs concerning the delimitation of the generation programme of the Manantali dam;

-efficiency of the dialogue process between NECs, EEM, and sub-regional committees;

-mutual assistance in operation (continuity and quality of supply), even though each member of the interconnection partnership retains the full responsibility for supplying its customers

It is noteworthy that at the level of WAPP, these rules are stated as principles in the WAPP convention and, in the case of operations, in the Manual of Procedures for the Technical Operation of the Interconnected Network, whereby the rules are developed in collaboration with all the electricity companies in the region and are submitted to ERERA for approval.

For the implementation of the operational rules of OMVS, a Steering Committee on Interconnection assisted by a Permanent Technical Committee on Interconnection was established. The Steering Committee organises the development and the general operational framework of the interconnected system (the OMVS network and three NECs). It comprises the NECs, EEM and SOGEM and must take all its decisions in unanimity, otherwise such outstanding issues are to be settled by the Council of Ministers of OMVS.

The role of the CTPI is to:

- define and propose common rules and procedures for operation and provisional planning to the Steering Committee while ensuring that they conform with the protocol on interconnection ;

- adopt and propose modification of rules and procedures deemed necessary to the Steering Committee;
- request the Steering Committee where necessary to implement additional operational methods and provisional planning;
- ensure the coordination by the operators between the provisional planning and real-time in a manner to allow optimal utilisation of the resources of SOGEM;

- oversee coordination in long-term planning between EEM and the NECs

The despatch centres of EEM and the NECs, by means of a Coordination Committee, are in charge of the coordinated and real-time operation of the interconnected system.

For WAPP, the above-mentioned functions are performed by Committees[12] which support and advise the WAPP Executive Committee on all issues relating to the formulation of a common policy for the development, maintenance and updating of the joint rules of operation of WAPP on the technical, planning, operational and environmental aspects. The Information and the Coordination Centre of the WAPP General Secretariat is responsible for encouraging operational coordination between the owners and operators of the transmission network through daily exchange of information between the operations coordination centre that will be established for the WAPP members.

Having approved the technical rules of operation and access to the regional electricity transmission network, the role of ERERA will be to oversee their application and periodically evaluate them and suggest improvements to the Commission. It possesses the power to sanction defaulting operators for failure to abide by the applicable regulations.

Still at the level of the OMVS, the applicable rules for the sale of energy on the interconnected network may vary based on whether the energy is produced or not by the facilities of Manantali as follows:

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-where the energy is produced by these facilities, the EEM bills the NECs for delivery and transmission on the joint interconnection network, taking into account the sharing formula agreed between the countries.

-when the NECs exchange energy not produced by the Manantali facilities between themselves and on the joint interconnection network, the EEM does not request for any remuneration. The NECs are free to negotiate between themselves all aspects, especially financial, of these energy exchanges.

Nevertheless, irrespective of the source of the energy in question, no operator can complain of damages inflicted on its network or generation facilities, after the occurrence of an event on the network or generation facilities of a third-party,

[12] See paragraph 1.2.2 above

provided that the provisions of the Protocol on interconnection or the rules and procedures defined by the CTPI are respected.

Moreover, the methods of dispute resolution, interpretation or execution of the major contracts or protocols of OMVS vary according to their subject-matter:

-In the case of difficulties encountered in the interpretation or execution of contract on the transfer of energy between the EEM and the NECs, the contracting parties commit to seek for the solution to the disputes through amicable negotiation. Once these means of amicable resolution are exhausted the contracting parties submit their dispute to the rules of conciliation and arbitration of the International Chamber of Commerce of Paris by appointing one or more arbitrators according to this regulation.

-In the case of disputes relating to the interpretation or execution of the Tariff Protocol in force between the Member States of OMVS, SOGEM, EEM and the NECs, the parties should first try to settle amicably. Failure of the amicable methods will lead to the submission of the case to the Council of Ministers of OMVS.

However, for WAPP and ERERA, there is no provision for any political interference in the dispute resolution process.

As observed, the organs of OMVS established to manage the interconnected network have some common functions and responsibilities with WAPP and ERERA. This is a potential source of conflict of responsibilities, considering the fact that these networks will be integrated into the regional network by 2010 and that technical and commercial obligations will tie them to other participants in the region. Furthermore, the future integration of organisations such as OMVS into the regional market could equally pose the problem of the treatment of rights acquired during a change of system. The United States of America and Europe resolved these problems and invented the concept of«stranded cost» to collectivize the compensation costs resulting from modifications of long-term contracts (e.g. PPA) or the forced sale of assets.

Within the context of establishment of the regional market, this problem must be treated in terms of extension of free access to networks and review of the institutional and commercial provisions which closely govern these exchanges. This is so important that it is envisaged that the role of a controller of a control area will be entrusted to OMVS or a manager of the transmission network linked to the Manantali power station.

In summary, the organisation and current operational rules of the electricity market in these zones must be reviewed in order to integrate them into a regional vision (especially the existence of monopolies, separation of accounts of activities, third party access for wheeling of energy, tariffs, planning for development of interconnection infrastructures).

The means of intervention, consultation or even transfer of authority must be discussed, defined and agreed upon between ERERA and these organisations and their structures.

It could be envisaged that these regional organisations reorganise their structures for management of the interconnected network to incorporate the role of WAPP and ERERA and relegate some of their prerogatives in the power sector to the latter organisation. To this effect, it will be necessary to isolate the electricity related activities and their present procedures of supervision and regulation so as to integrate them into the regional framework of ECOWAS.

2.2.1.3 Relations between ERERA and national regulators.

The majority of ECOWAS Member States have created national regulators to supervise the national power market in order to ensure transparent operation and financial viability of the sector through tariff regulation[13]. Their powers are presently limited to their national territories through issuing licences, tariffs, arbitration etc. No specific authority has been granted to them on regional exchanges though some of them are consulted by government authorities on the issuance of electric energy import/export authorisations.

However, although their area of authority is limited to national power sectors, some of the responsibilities of these national regulators could overlap those of ERERA, because separation between the national and regional activities of an electricity operator is not always easy. Moreover, the regional transmission network does not yet exist. Electricity is exchanged between countries through national transmission networks which are under the jurisdiction of national regulators. Thus there is a problem of overlapping, especially in the planning of facilities and investments of electrical infrastructures. Some national regulators give their opinions, sometimes even their approval on the planning criteria though granted concessions on the infrastructure development projects of electricity operators. ERERA will have the power to approve the planning criteria and the master-plan proposed by WAPP. Thus, by supervising the application of the provisions of article 7 of the Energy Protocol on wheeling, ERERA defines the criteria of selection of the operators involved in the development of projects in order to avoid the creation of dominant positions on the regional market. Furthermore, it is responsible for supervising the respect of the development plan of the regional network by concerned national operators. This plan at the regional level has an impact on national networks and vice versa. There is therefore a need for dialogue and coordination which can only be attained through close collaboration with national regulators.

[13] To date, only Cote d'Ivoire, The Gambia, Ghana, Mali, Niger , Nigeria, Senegal and Togo have operational regulators.

2.2.2 *Anti-trust Regulations*

One of the main tasks assigned to ERERA by its constitutional texts in the general field of regulation of the regional electricity market, is the warning and sanction of anti-trust practices, abuse of dominant positions and high-risk situations which could affect the proper functioning of the regional market. Although this authority is sectoral, its still infringes on the jurisdiction of other regional organisations with wider scope such as the UEMOA Commission. Moreover, in some countries there are two categories of national authorities which could act on the same matter: the administrative authorities and the judicial authorities.

2.2.2.1 The Competition Laws of UEMOA

i. Regulatory and institutional framework:

UEMOA has a policy and legislation on competition and intervenes in the competition laws of Member States irrespective of the sector of activity. Article 88 of the Treaty of the Union and its Regulations of implementation assign exclusive authority to **the UEMOA Commission to handle all anti-trust practices in all sectors of economic activities (including the energy sector**). Three Regulations of the Union specify the extent and conditions for implementation of this exclusive authority:

- Regulation n°2/2002/CM/UEMOA relating to anti-trust practices: It generally states the idea of anti-trust practices and more specifically the concepts of concentration, anti-trust cartels, abuse of dominant positions and Government subsidy affecting community competition laws.
- Regulation n°3/2002/CM/UEMOA relating to proceedings applicable on cartels and abuses of dominant position within the UEMOA. This regulation states the proceedings applicable before the Commission for the suppression of cartels and abuses of dominant positions.
- Regulation n°4/2002/CM/UEMOA relating to government subsidy within UEMOA. This document specifies the proceedings applicable before the Commission for the prevention and suppression of government subsidy.

The UEMOA Commission possesses a general right of inquiry and has the possibility of requesting for any document or contract any expertise it considers useful.

Concerning abuses of dominant positions and anti-trust agreements, defaulting companies are required to obtain consent of non-objection from the UEMOA Commission to ensure the regularity of a project of concentration of market powers.

On government subsidy, Member States must notify to the UEMOA Commission of any measure which present its characteristics, so as to pronounce a ruling of its legality.

For the suppression of anti-trust offences, the UEMOA Commission, **under the supervision of the UEMOA Court of Justice**, holds a power to impose incremental penalty on court order defaulters and may issue rulings of substantial monetary sanctions. It is however important of note that the Community Law of UEMOA coexists with the national laws of competition of its Member States.

ii. Application of Competition laws of UEMOA and relations with ERERA

In principle, the area of application of the community rules of competition of UEMOA is the community space which corresponds to the territory of the eight Member States of the Union and concerns all sectors of economic activity.

The area of activity of ERERA on the matter of competition of cross-border exchanges of electricity equally encompasses the same area. Therefore the question which presents itself is that of the applicable law and the organisation authorised to handle a possible litigation caused by the violation of competition rules for example by a cartel or abuse of dominant position by operators on the regional power market when at least one of the parties is a Member State of UEMOA. There may also be disputes on access to the regional market or tariffs. The examples are numerous because the powers of ERERA are vast including technical and commercial supervision of exchanges; management and planning the development of the regional market, which are all subject to anti-trust practices.

This issue of applicable law and the authorised organisation is even more important because as mentioned above, the UEMOA Commission has exclusive authority over the matter within its zone, and in practice this is evident in the Member Countries of the Union as the jurisprudence below demonstrates.

In fact, within the framework for implementation of these rules and supervision of the practices in Member States, UEMOA enacted Directive n°02/2002/CM relating to cooperation between the Commission and the national structures of competition in Member States. This Directive states that for the application of article 88 and beyond of the UEMOA Treaty (which states competition rules), the "*national competition agencies*" can only play an additional or assistive role to the Commission which is the only body which can enforce compliance to article 88 of the Treaty. The Senegalese national authorities of competition (obeying a national regulation in force well before the adoption of these community provisions) took decisions on anti-trust practices and were called to order.

In this particular instance, the decisions of the National Commission of Competition (one relating to the insurance sector, the other on the air-transport sector) were annulled by the Senegalese Council of State. The case had been referred to the Council in respect of the possession of excessive powers and it ruled that the national commission was not competent to sanction an anti-trust practice. This position of the Council found its justification in the existence of a community regulation on competition, and a community commission on competition, which in principle is the only organ authorised to henceforth handle issues relating to this

subject-matter, given the principle of direct and immediate application of community law in the Member States of the Union.

Though there is no doubt over the exclusive jurisdiction of the UEMOA Commission on the subject of competition within the UEMOA region, this jurisprudence still evokes several questions: What would happen for example if it were ERERA which takes the decisions sanctioning the electricity companies who were perpetrators of anti-trust practices but who also fell within the ambit of UEMOA laws? Would it be competent to act? Would its decisions be binding? How would the UEMOA Commission react in response to the same disputes? What would be the consequences of this double jurisdiction? Which rules should apply?

Concerning the rules of jurisdiction, the jurisdiction of neither of the two regional bodies can be questioned since both of them emerge from two different community legal systems from which they derive their responsibilities and which determine their area of activity[14]. In principle, each one would logically uphold the provisions of its own applicable community law on the matter and would implement the rules which apply. Thus, the risk would arise only if the same dispute had enforceable decisions emanating from different bodies because they do not belong to the same community legal system. This would be an irrational outcome give the common objective sought by the two regional organisations. Hence, there is need to search for rules and principles to avoid this type of situation.

On the application of material rules, a less restrictive approach could be adopted if we refer to the provisions of article 60 of the Union. This article states that "in the performance of its duties to harmonize the legislation of Member States, the Authority of Heads of State and Government should take into account the progress realised in the reconciliation of the legislations of the countries in the region, within the organisational framework pursuing the same objectives as the Union)". The general interpretation of this provision, in application of community rules of competition, is that organs of the union could consider it as a guiding principle towards consideration of relevant rules stated in other Treaties ratified by the Member States of UEMOA. There could therefore be two cases:

- when the rules of competition of UEMOA are compatible with those of another Treaty, anti-trust practices are assessed using these rules which could also help in the analysis of the facts of the case;
- when there is a contradiction between them, it is nevertheless important for the organs of UEMOA to consider them so as to facilitate understanding of the problem or find mitigating circumstances of the anti-trust behaviours when they are based on these rules.

In cases involving the Member States of UEMOA and non Members States of UEMOA, the general rule of international law drawn from article 30, paragraph 4 b) of the Vienna Convention could be applied, which states that "*in relations between a country party to two (incompatible) treaties and a country party to only one of these*

[14] See paragraph 2.1 above

treaties, the treaty to which both countries are party to governs their reciprocal rights and obligations".

The path of dialogue would be preferable in all cases, especially when there is overlapping jurisdiction. In this sense, we can note the first interesting steps of cooperation which arose during the treatment of a case related to the implementation of the Gas Pipeline Project of ECOWAS, involving two UEMOA Member States (Benin and Togo) and two non-UEMOA Member States (Ghana and Nigeria). These countries signed a specific treaty only to define the framework for the implementation of the Gas Pipeline Project which also involves multinational companies for the funding of investments. In this agreement, Benin and Togo wanted compliance to the rules of UEMOA on the matter of competition to be mentioned in respect to all issues concerning agreements between the companies and those between the countries and these companies. The Project included government measures awarding tax benefits to the companies responsible for project implementation and contracts of creation of joint companies by the consortium members of the project. It was for the reason that the UEMOA Commission was summoned to issue a ruling on the conformity of these actions to the rules of competition of the Union. It was agreed that the decisions issued by the UEMOA Commission were decisions recognised by all signatory States of the Gas-pipeline Project Treaty.

Thus, ECOWAS which considers the Gas-Pipeline project as a community project recognised the possibility of applying the rules of competition of the UEMOA on companies participating on its market. This new form of cooperation demonstrates that it is possible to refer to the rules of UEMOA as the basis of cooperation on control of antitrust practices within the ECOWAS market, the reverse should also be possible. There are a range of solutions to explore. However institutional adjustments will be necessary as discussed in the third part of this report.

iii. Impact of the fiscal regulation of UEMOA on the regional power market

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The notable difference in the degree of success of the respective policies of UEMOA and ECOWAS on the harmonisation of the customs regime and the removal of internal custom barriers is a source of distortion within the regional power market.

In fact no custom duty is levied on the import or export of electricity between Member States of UEMOA. However, in principle import or export of electricity by a UEMOA Member State coming from or going to a non member country is subjected to customs duties.

Customs duties on petroleum products imports were also harmonised within UEMOA[15] and were subjected to a Common External Tariff (CET). The fact that numerous electricity companies within the UEMOA zone benefit from comparative advantages in terms of subsidies on the purchase of petroleum products is likely to influence the price of electricity exchanges within the ECOWAS zone.

[15] By virtue of directive n°06/2001/CM

This difference in the treatment of the same products between ECOWAS Member States participating in the same market constitutes a distortion to which a solution should be found that will enable all ECOWAS Member States to benefit from the same tax regime, but also to facilitate the intervention by ERERA. The provisions of the ECOWAS Energy Protocol already opens a possible solution by forcing contracting parties to fight against market distortions and obstacles to competition in economic activities of the energy sector. In 2000, this step was more generally endorsed with the adoption by the Head of States and Government of ECOWAS of a decision aiming to implement the necessary mechanisms for the extension of the CET to ECOWAS countries which are non-members of the UEMOA. A process negotiated between ECOWAS, UEMOA and Member States is currently being implemented in order to establish an internal market and a Common External Tariff by virtue of the agreements of cooperation and partnership of May 5, 2004 and August 22, 2005.

2.2.2.2 Regional Competition Authority of ECOWAS and ERERA

This institution, which is in the formation process, is responsible for the implementation of the community rules on competition of ECOWAS which will soon be adopted through supplementary acts. These laws will generally contain the main principles and rules concerning the promotion and stimulation of competition, as well as the prohibition of anti-trust practices in commercial exchanges in the region. These rules focus essentially on agreements and practices devised to restrain trade, abuses of dominant positions, mergers and acquisitions and government subsidies.

There is no choice but to observe that the creation of a new Competition Authority in the ECOWAS region will further exacerbate, with regards to cross-border electricity exchanges, the overlapping of powers and risks of conflicts of authority with other regional institutions of competition such as the UEMOA Commission. However, certain provisions of the draft law envisage measures for reduction of these risks because they anticipate the possibilities of cooperation and correction of potential incompatibilities.

It is stated that « *when prior to the entry into force of this Supplementary Act, Member States concluded agreements or adopted national legislations on competition which are incompatible with this Supplementary Act, they will take all necessary measures to eliminate observed incompatibilities as soon as possible*"

Another provision directs the Competition Authority to *« cooperate with Authorities of Competition at the national and regional level in order to take the necessary measure to respect obligations stemming from the Supplementary Act on adoption of community rules of competition».*

In relation to UEMOA, the draft laws expressly state that « *the Regional Authority, in the implementation of community rules on competition will take into account the experience of the West African Economic and Monetary Union (UEMOA) "*

ERERA is not mentioned anywhere in the draft legislations nor any earlier dispositions of ECOWAS on competition. This is an indication that the community laws relating to the energy sector on the matter of competition will remain in force (the energy protocol, laws on regional regulation of electricity) and that ERERA will also maintain its prerogatives provided that they are not incompatible with the new general rules on competition.

Furthermore, even in the event of contradictions or incompatibilities, dialogue remains open and possible. Since the two institutions belong to the same legal framework, it is possible for lines of communication to be set up between them through sharing of areas of authority or a preliminary consultation process.

This sharing could be organised according to the British model. In the United Kingdom, there is the Office of Gas and Electricity Regulation (OFGEM) which is the regulator of gas and electricity which intervenes in the fields of tariffs, award and supervision of licences, promotion and surveillance of competition on electricity generation and supply, protection of consumer interests and treatment of complaints specifically concerning licences and those between suppliers and consumers etc. On the other hand, the Competition Commission intervenes on all aspects of antitrust practices. To counter the risks of overlapping powers, a “scheme of arrangement” was decided upon, where the Competition Commission is only responsible for operations of mergers, acquisitions and sales in the power sector, but within this field, the OFGEM provides advice and assistance to the Competition Commission since a restructuring exercise would have effects on licensing.

In Norway, some of the activities of the competition authority, the NCA, cover certain aspects of regulation which fall into the jurisdiction of the energy regulatory authority, the NVE. The two entities have succeeded in reaching an agreement which consists of entrusting only the regulation of network services and the fight against antitrust practices not anticipated by the Norwegian competition laws to the NVE and all other aspects of competition to the NCA. The two institutions also agreed to regularly engage in discussions so as to avoid risks of conflict or overlapping powers.

These examples reinforce the need for the ECOWAS region to harmonize community competition laws enacted by the regional organisations.

2.2.3 Dispute resolutions

The constitutive laws of ERERA confer on it the responsibility to establish and implement efficient procedures for the resolution of disputes between participants of the regional market and supervise the proper application[16] of these procedures.

[16] Articles 16 to 18 and 26 to 21 of Regulation C/REG.27/12/07 on the composition, organisation, responsibilities and operation of ERERA

ERERA is empowered with the authority to resolve disputes between all public or private participants provided the dispute concerns the application or interpretation of any law relating to the regional electricity market or on facts or behaviours affecting the organisation or operation of cross-border electricity exchanges. It may act on its own instance or cases may be referred to it by any natural or legal person with vested interest, and it may take decisions on mediation, conciliation or sanction of the breaches or violations observed. However, these laws also require ERERA to inform the ECOWAS Commission, WAPP, national regulators and any other person with legitimate interest, in the disputes which it is hearing.

The decisions of ERERA are obligatory and binding, subject to appeals before the ECOWAS Court of Justice. The Court of Justice issues its decision on the supervision of respect of the legality and application of community laws by ERERA.

In each Member State, the decisions of ERERA are implemented according to the rules of proceedings in force. The Signatory States guarantee the application of ERERA's decisions on their territory. In the case where a country or one of its states fails to take necessary measures to ensure the implementation of the decisions taken, ERERA can refer the case to the ECOWAS Commission to implement the provisions of the ECOWAS Treaty relating to applicable sanctions on the failure of respect of the obligations by Member States[17].

2.2.3.1 Relations with the WAPP General Secretariat on dispute resolutions

It is important to mention that WAPP also has a procedure for dispute resolution. The WAPP Convention institutes a dispute resolution proceeding between WAPP members, disputes between WAPP and non-members, disputes between WAPP and consenting non members. These proceedings mainly consist of setting up arbitration panels, within WAPP which operate according to the specific rules defined in the Convention. These rules are based on methods of conciliation and meditation. The WAPP General Secretariat plays the role of the administrative body and is responsible for the secretariat and the supervision of the resolution process. This procedure is different from that of ERERA and the decision of these panels though imposed on the parties, are not enforceable or directly applicable or restrictive on countries like the decisions of ERERA.

However, since electricity exchanges are governed by agreements, it is important to note that contractually the parties to a contract are free to agree on the method of resolution and the jurisdiction that it will refer to in the event of dispute. Hence, regional market operators cannot be forced to introduce clauses into their exchange contracts which restrict them to referrals to ERERA in the event of conflict. Furthermore, the WAPP convention has the commitment of all its members to utilise the procedures which it has set up for resolution of their disputes before commencing any other arbitration or any other dispute resolution proceedings.

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[17] Article 77 of the Revised Treaty of 24 July 1993

If a problem arises in the harmonisation of the rules for dispute resolution on the regional market, a prejudicial appeal to ERERA could be introduced into these methods of resolution of WAPP, in terms of preliminary consultations with the aim of amicable resolution of disputes which present difficulties in interpretation or implementation of laws or acts relating to the regional electricity market. The opinion of ERERA could therefore be considered during amicable resolution of these types of disputes by WAPP.

2.2.3.2 Relations with the community jurisdictions of UEMOA and OHADA

In the community mechanism of ECOWAS on resolution of disputes relating to the regional electricity market, ERERA intervenes as a sort of jurisdiction of the first instance, the legality of its acts and decisions can be challenged through appeal before the ECOWAS Court of Justice.

Recall that on the issue of competition, this same process guides the resolution of disputes within the UEMOA region where the application of competition laws is assigned to the UEMOA Commission under the supervision of the UEMOA Court of Justice.

At OHADA, the Common Court of Justice and Arbitration (CCJA) gives its verdict on the decisions taken by national authorities in all cases relating to the application of uniform rules. The CCJA replaces the **Cours de Cassation des Etats** (Supreme Courts) on these cases and may issue a ruling on the substance of the case. Some disputes linked to cross-border electricity exchanges fall under the ambit of commercial law for example or some liable or non-existent actions (that are judged by the jurisdictions of common national laws and treated by the laws of OHADA). This means that the CCJA could examine issues relating to the regional electricity market.

Moreover, nothing should prevent victims of antitrust practices to pursue their civil rights in order to obtain damages for the harm inflicted. There may also be criminal actions: when the personal responsibility of representatives of the companies is evident in these antitrust practices, the competition authority must be able to submit the case to the prosecutor for criminal prosecution.

As a whole, there is no choice but to accept that all these regional organisations (ECOWAS, UEMOA, OHADA) each created a Court of Justice responsible for the supervision of its own community legal system. This brings about a serious risk that the acts and decisions emanating from these community jurisdictions on the same issues may occur in an ECOWAS Member State with the same rank of execution, and at the same time foster confusion within the national legal system[18]. Given the similarity in economic objectives and legal methods as well as the area of activity of

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[18] Although the risk of this type of conflict is real, no such case has yet to be reported.

these regional organisations[19], it is evident that difficulties in co-existence would exist between these courts of justice: not only concerning the nature of the laws produced by the organisations (rule of supra-nationality), but also the methods of jurisdictional control put in place in each of these legal systems, bearing in mind that the national judge is the common law judge of all these community laws.

The extensive authority allocated to each of these three community jurisdictions make the resolution of certain disputes very complicated each time these disputes simultaneously involve the application of the community law of ECOWAS in which appeal is to the ECOWAS Court of Justice, redress by UEMOA which normally fall under the authority of the Court of Justice of UEMOA, and the uniform rules of OHADA which are the responsibility of the CCJA.

Thus, the membership of some ECOWAS countries to several of these regional organisations, the laws of a country or the actions or behaviours of its citizens may infringe on several treaties at the same time, thereby causing a situation in which the jurisdiction of each of these organisations are concurrently valid. The violation in a UEMOA country of a competition rule of the regional electricity market is a good case in point: the decisions issued by ERERA and the UEMOA Commission, on which both are authorised could both be appealable before the ECOWAS Court of Justice and the Court of Justice of UEMOA.

The consequence of this situation is that there is a risk of dividing up the case, with a strong possibility that irreconcilable decisions will be taken that lack coherence or harmony.

Unfortunately and in the current state of the community laws of ECOWAS, UEMOA and OHADA, no solution has been found to these conflicting situations. There is a great risk of ending up in a situation where "[...] the interpretation and application of one of the integrated laws is performed by a court which is not empowered to do so or that the decision issued by the supra-national courts that presided over the whole case will be subjected to review by another[20]".

Another risk is that it may result in the construction of a maze of procedures and rules in which the judge and the parties under trial become lost and this could lead to a denial of justice.

Where there is a strong need for rationalisation arising from these inconsistencies, it must be done if the overall aim is to harmoniously develop the integration process in sub-region.

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[19] Cf. supra paragraph 2.1

[20] D.M. BA, « The problem of compatibility UEMOA-OHADA », *op.cit.*, p.181

3. Framework of cooperation for mitigation of risks or the resolution of conflicts of authority

Examination of the overlapping responsibilities and conflicts of authority that will emerge as a result of the entry of a specialised institution of ECOWAS, ERERA, into the scene of the integration of legal system in West Africa, demonstrates the need to harmonise all the rules governing electricity exchanges, both on the national and regional levels, in order to encourage their development. Beyond these sectoral issues which concern the West African electricity sector, it is also a question of streamlining the institutional provisions for the integration of West Africa. One solution to handling these conflicts in the community is to harmonise the standards/rules emitted by the various regional organisations and the jurisprudence of common courts. All these measures are only feasible through the creation of a cooperative framework between these institutions, which could meet the specific needs of regional regulation of the electricity sector.

3.1 Basis for cooperation

The need for cooperation between West African regional organisations is explained by the practical questions that lead community legislators to include provisions for such in their formative laws.

3.1.1 Legal basis for cooperation

The formative Treaties of all these regional organisations contain provisions to address these risks of incompatibility of rules and conflicts of authority or at the very least open ways to establish partnerships to eliminate or reduce them.

Article 14 of the UEMOA Treaty states that *« after the entry into force of this Treaty, Member States will dialogue within the Council in order to take all measures intended to eliminate incompatibilities or duplications between the laws and jurisdictions of the Union on the one hand and the agreements reached by one or more Member States on the other hand**, in particular those establishing specialised international economic organisations".***

This provision is completed by the terms of article 60 subsection 2 which confirms that *« ...the Authority takes into account progress achieved in the matter of reconciliation of the legislations of the countries of the region, in the framework of the organisations pursuing the same objectives as the Union".*

The ECOWAS Treaty, with the same type of idea, states in article 5 subsection 1 that « Member States commit [...] in particular *to take all measures required to harmonise their strategies and policies* and to abstain from commencing any action likely to compromise their implementation".

As for the OHADA Treaty, article 8 also offers a preventive solution in the situation where according to this article « the adoption of uniform rules by the Council of Ministers *requires unanimity* of present and voting countries. *Adoption of the uniform rules is only valid if at least two-thirds of the countries are represented*. Abstention is not an obstacle for the adoption of uniform laws".

This provision of the primary law of OHADA opens to its Member States, of which currently 9 out of it 16 members are equally members of UEMOA and ECOWAS, the possibility to influence discussions or prevent the adoption of any uniform rule which appears incompatible with the community law of the region applicable to them, either by voting against so as to fall short of the requirement of unanimity or by being absent so as to prevent the attainment of the required quorum of two thirds.

In general international law, article 30, paragraph 4 b) of the Vienna Convention provides that "*in relations between a country which is party to two (incompatible) treaties and a country party to only one of these treaties, the treaty which the two countries are parties to governs their reciprocal rights and obligations*".

Finally, it is important to note that in the domain of the energy sector of the region and more specifically in the matter of competition, article 6.4 of the ECOWAS Energy Protocol states that *« all Contracting Parties may cooperate in the application of their competition laws by consultations and information exchanges".*

Though, the solutions proposed by these texts are indeed only partially strong or very weak, they however open the path to search for alternative solutions through cooperation based on practical considerations.

3.1.2 Practical considerations

Besides the need to avoid overlapping and intermingling of responsibilities, establishment of cooperation between various community bodies of the region who would be involved in the management and regulation of the common market would be equally justified by the difference in their levels of development (whether in terms of material, human and legal resources or practical experience).

Cooperation would therefore allow other advantages including among others, to:

- avoid conflicts of jurisdiction, even sovereignty if possible by sharing tasks prior to any intervention by high ranking government authorities;
- cover the entire region, for example on competition where the whole zone affected by an antitrust practice can be identified and whose effect may extend to several countries ;
- encourage mutual technical assistance and exchange of experiences between these organisations that are at different levels of development.

This is the reason why the complementarities of objectives (creation of a common market) between ECOWAS and UEMOA have led them to reconcile the conduct of some of their activities. In general, UEMOA is considered as the most advanced organization in terms of practical integration within the African region and is

considered as the bed rock of ECOWAS. Presently, the two organisations have put together their efforts in several sectoral activities, within the framework of permanent dialogue in conformity with the decision of their highest authorities.

The two institutions regularly hold high-level meetings to agree on the modalities for the extension of reforms initiated by UEMOA to all ECOWAS Member States. Such is the case with the Customs Union (where for example the Common External Tariff can be cited), the fight against poverty, creation of single monetary zone, sectoral policies, negotiation for conclusion of Economic Partnership Agreements (EPA) and management of certain resources.

Therefore, in the field of energy, besides the UEMOA/ECOWAS cooperation and partnership agreement of 5th May 2004 which states the main principles behind this partnership, the two institutions concluded an agreement on 22nd August 2005 on the joint implementation of programmes and activities in the energy sector.

Though some areas of the harmonisation process were not difficult, the opposite is the case for competition policies and rules on which many issues were raised as discussed in the second part of this report. However, here also the premise of cooperation is important as the above-cited example of the implementation of the Gas-pipeline project, involving four ECOWAS Member States (Benin, Ghana, Nigeria and Togo) but two of which are members of UEMOA. Moreover with regard to competition which is the main subject of overlapping and conflict with ERERA, dialogue will necessarily surpass the community framework which will nevertheless serve as the core, because negotiations of the Economic Partnership Agreement with the European Union which contain a special point on the competition policy must be taken into account.

It is important to also note that the community courts are aware of the risks of conflict of authority arising from this non-streamlined co-existence. A high level inter-jurisdictional meeting between the Courts of Justice of UEMOA, ECOWAS, OHADA and CEMAC was held in May 2008 in Cotonou, in order to lay the foundations for sustainable cooperation between these community high courts. The rules of principle confronting the conflicts on rules in the respective regions considered were defined and the meeting concluded with a set of concrete proposals recorded in a document entitled “the Cotonou Declaration” and intended for the Heads of State and Government of the Member States of UEMOA, ECOWAS, OHADA and CEMAC[21].

[21] Cf. infra, paragraph 3.2.3

3.2 Areas of Cooperation

By taking the above-mentioned examples into account, it is evident that cooperation between regional organisations should be approached from a sectoral angle.

At the level of the regional electricity market, examination of overlaps and conflicts of responsibilities between ERERA and other regional institutions operating in the same sector shows that the main problems will result predominantly from the implementation of competition rules which govern the market and dispute resolution involving the organs of the three regional organisations such as the Commission and Court of Justice of ECOWAS and UEMOA and the CCJA of OHADA.

Cooperation must therefore be established between these organisations, on the one hand on the material rules to adopt and on the other hand on the procedures to follow to ensure compliance of the joint implementation of these rules.

3.2.1 Harmonisation of material rules on competition

This harmonisation aims to adopt the main principles and common material rules governing competition within the whole region. The implementation of a corpus of uniform material rules on competition in the whole region would be more efficient and adapted to the objective of creating a common, open and competitive regional market for all these regional organisations.

Harmonisation should primarily result in a system in which all the organisations of the region that are responsible for supervising compliance to competition rules would directly apply the same community rules and principles. A consultation process at the community level could be added to this system through the mechanisms for appeal and prejudicial issues, which would be the lines of communication between the institutions involved in order to also ensure harmonised jurisprudence.

In concrete terms, consideration could be initiated from the most developed community legal system on competition rules wherefrom the other community rules will be adapted. Furthermore the increasingly universal character of definitions of antitrust practices brings homogeneity in prohibitions and definitions. This circumstance constitutes a factor of uniformity of material rules applicable to these practices. The example cited of the West Gas pipeline project is a good case in point on this subject-matter, ECOWAS authorities easily included the idea of *"harmony and public subsidy"* raised by the UEMOA Commission during the examination of requests for attestation submitted to it. It is important to note that this submission of the draft for examination by the UEMOA Commission was done informally. However, this example could serve to suggest that common uniform competition rules should be adapted to the community code of UEMOA which seems to be better developed.

These common material competition rules are extensive in terms of the definition of antitrust practices and the principle of their prohibition and definition of targeted commercial operations and exemptions.

In this plan, the UEMOA Member States will retain their community rules without having to adopt national laws whereas the ECOWAS Member States who are not members of UEMOA (the English speaking countries whose national laws do not have such) will be invited to create them within a given timeframe. The community competition rules in the process of adoption by ECOWAS should also take them into account and be strongly based on them. To this effect, the main principles and rules of competition adopted for the regulation of the regional electricity market, which ERERA has the responsibility of implementing are to be the same as those of the UEMOA.

In order to avoid disparity in judgements and to ensure that sanity of the legal system in the common market is put in place, it would be desirable to have a central authority charged with supervising compliance to the rules of the regional framework and their uniform application. However, this centralisation might not be efficient in that it would create more institutional, material and human problems.

This role will therefore be held by the various High Courts of Justice of the Community (i.e. ECOWAS/CJ, UEMOA/CJ. CCJA) during appeals presented before them, and which by having the same interpretation of rules, would supervise the **standardisation of jurisprudence.**

Also considering the multiplicity of community organisations which could be involved in this harmonisation process, it is important to envisage a system of dialogue between these various organisations, through the appeal mechanisms and interlocutory issues mentioned above, or assistance in the proceedings of investigations.

3.2.2 Cooperation on procedures

For the moment, there are only two authorities of competition and market supervision : the UEMOA Commission which has exclusive jurisdiction and whose area of activity extend to all economic activities, and ERERA which is a specialised authority in the sense that it would intervene only in the regional electricity market.

Before the establishment of any mechanisms for dialogue, sharing of responsibilities should be introduced between these two authorities. Development of this line of demarcation could be discussed with the UEMOA authorities on the basis of the distinction between issues concerning general rules of competition and those specific sectoral rules on electricity regulation, and equally in terms of territorial authority. Also the aspect of competition relating to access to the market (issuing and supervising licences), tariffs, generation, transmission and sale of electricity etc in cross-border exchanges within the UEMOA region would fall under the jurisdiction of ERERA. Further, all the other aspects of anti-trust practices (cartels, mergers and

acquisitions and sale, government subsidy) having an impact on the regional electricity market within the UEMOA region, would be treated by ERERA but only after having obtained the opinion of the UEMOA Commission.

The two institutions will therefore need to dialogue regularly to avert risks of conflicts or overlapping powers, on the basis of the mechanism of prejudicial issues[22]: Before any decision, ERERA would consult the Competition Commission of UEMOA for its opinion on certain issues of which it is involved, in return the UEMOA Commission could inform ERERA on any cases entering into its area of authority and receive its opinion on the antitrust practices in the power sector, particularly on interconnections.

Furthermore, ERERA could use the procedures of UEMOA and request assistance from the authorities of UEMOA in the search for proof, recognised capability of investigation officers, resolution of objections on legal issues, etc...[23]

The general framework of this cooperation on procedures should contain principles guaranteeing transparency, promptness in handling cases and confidentiality, which are standards that any competition law must respect.

3.2.3 Cooperation on dispute resolution

As mentioned above, the risks of overlapping powers and conflicts of authority on dispute resolution exists mainly with regards to appeals presented before the community high courts of the region (i.e. the Courts of Justice of the UEMOA, ECOWAS and OHADA). Subsequent to their high-level meeting held on this subject-matter in Cotonou (in May 2008), these institutions agreed to establish the foundations for sustainable cooperation between themselves. They defined the rules of principles which will help to cope with the conflicts of standards in the respective regions and issued concrete proposals recorded in a document entitled the “Cotonou Declaration”.

Thus, at the institutional level, while respecting the areas of authority and responsibility assigned to each of the institutions, they propose two options : either a merger of the organisations of integration pursuing the same objectives ; or encourage the specialisation of these same organisations by taking into account of experiences acquired in the following fields : economic and monetary integration on the one hand, harmonisation of business law on the other, and finally human rights, good governance, security and peace, and prevention and resolution of conflict.

At the legal level, they recommend closer coordination and collaboration between the various economic and legal organisations with a view to preventing any risks of conflicts of standards.

Finally, at the jurisdictional level, they propose the creation of a jurisdictional structure or regulation mechanism intended to prevent possible conflicts of

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[22] Cf. infra, paragraph 3.3.3

[23] Cf. infra, paragraph 3.3.2

jurisdiction between high courts of the community. And the establishment of a permanent dialogue framework between high courts of the community, legislators, practitioners and academicians of law so as to share their thoughts on the possible difficulties related to the application of community laws and propose appropriate solutions.

Although these proposed measures are general in nature, they could be considered and also serve as a framework during the handling of possible overlapping powers and conflicts of authority which would emerge in the regulation of the regional electricity market.

3.3 Instruments and modalities for cooperation

3.3.1 Legal instruments of cooperation

The form that this type of cooperation may assume could be many and varied, because it can be structured or empirical. In order to create a solid foundation, it should be organised through laws, taken from the legal community system of ECOWAS or elsewhere, that will vary based on the institution or organisation in question.

3.3.1.1 Agreement of cooperation

In the case of institutions which are not within the community legal system of ECOWAS, cooperation would be established though **agreements** which would be concluded between ERERA and each of the authorities or community organisation concerned.

This possibility is open to ERERA by mean of the ECOWAS Revised Treaty, the Energy Protocol as well as the Regulation on the organisation and operations of ERERA which empowers it to enter into agreements of cooperation. Article 37 of the Regulation, *states that "ERERA shall negotiate and enter agreements of cooperation with regional and sub-regional institutions with which it shares areas of jurisdiction in investment, competition, arbitration and international trade."* It specifies that the agreements of cooperation have the objective to harmonise and reinforce regulation of the regional market.

On this basis and from the areas and methods of cooperation defined below, ERERA could discuss and sign agreements which will serve mainly to establish the cooperation framework by defining the subject-matters which will require partnership and collaboration.

With regards to institutions such as OMVS and OMVG, these agreements could possibly include modalities of integration of the electrical infrastructures of OMVS and OMVG into the regional framework of ECOWAS. They must establish links between the decision-making authorities of these two organisations and ERERA, by recognising the superiority of the laws of ERERA over their internal rules relating to the matters covered by the missions and powers of ERERA.

3.3.1.2 Regulatory acts and directives

In matters that concern institutions which are within the same community legal system as ERERA (namely ECOWAS), these cooperative relations with ERERA could be organised through the various legal clauses stated in its constitutional texts to enable it to execute its mission (regulations and directives). These acts would specifically be aimed at the national institutions of ECOWAS Member States in which two types of authorities are likely to participate in the implementation of the community legislation on market supervision: the administrative authorities (notably national agencies of competition and national regulators) and judicial authorities. Their association in the missions of ERERA are even more justified because they have better knowledge of national markets and the treatment of antitrust practices. It is therefore important for ERERA to capitalise on their experience on this matter.

The nature of the law will depend on the level of enforceability that it is intended to have during the execution of its mission. Thus, the definition of material competition rules and procedures, relations of ERERA with other national bodies could be organised by way of a **directive** which would determine the targeted conditions and areas of harmonisation, in order to effectively implement the regulations, acts and decisions intended to govern the regional electricity market. This would allow Member States to harmonise their internal rules of procedures with those existing at the regional level.

As a whole, the methods of cooperation which would be determined by these agreements and directives could consist of sharing of information, joint conduct of some procedures such as inquiries and prior consultation in the decision making process.

3.3.2 Sharing of Information

ERERA may agree with the institutions concerned (notably the UEMOA Commission) to exchange information on the regional market or for competition, indices of antitrust practices or market distortions. They can also agree to jointly undertake the process of information collection by sending joint questionnaires to operators.

As well, it is to have cooperation with the WAPP Secretariat and national regulators with whom sharing and exchange of information is needed in order to avoid the duplication of collected information, and especially on the analysis and supervision of the execution of existing cross-border exchange contracts, tariffs, system performance etc.

ERERA could organise the same system of collection, management and sharing of information relating to exchanges and performance of operators in the electricity sector with the national regulators, and the other sub-regional and regional institutions (OMVS, OMVG).

3.3.3 *Joint inquiries and investigations*

During supervision of market operations, it is necessary to undertake inquiries whether technical or in the fight against antitrust practices or dispute resolution, which may lead to simultaneous researches on several sites or several countries.

These inquiries more often fall back on the implementation of national procedures. Thus in UEMOA for example, according to the laws presently in force, investigations by designated inspectors of the community are only undertaken with the effective support of national inspectors.

Although community legislations allow ERERA to issue regulations (applicable in all countries) on procedures on the performance of its duties of supervising the operations of the regional electricity market, a joint conduct of these procedures could contribute to increased efficiency and avoid risks of conflict. Agreements and directives may therefore establish the framework for this, especially with support from the national and community organisations involved.

Furthermore, depending on the case or the matter, there could be provisions allowing for inquiries to be carried out by inspectors of an authority on behalf of another community authority or institution if necessary. This is easily envisaged with national regulators and national authorities for competition. In certain cases such as violations of market rules or antitrust practices extending to several countries, ad hoc *committees of cooperation* could also be created. These committees would comprise representatives of the national authorities of the countries concerned and responsible for conducting such investigations.

The search and sanction of these violations and practices may prove difficult without the coordinated conduct of procedures. This may therefore be the case of an agreement implemented by a large number of companies with headquarters in many countries. It is also the case in the abuse of dominant position where the influence extends over several national territories, or abuse of assets on a market different from the one in which the operator involved holds its dominant position. It would be easier to put an end to these types of practices of distortion if all the authorities involved, both national as well as community, would cooperate in coordinated manner: firstly to detect the practice (by linking the market distortion observed with the practice emanating from several operators spread out in several countries); then to conduct investigations in order to compile proofs and issue the necessary sanctions.

In any case, these investigation procedures in each country should be carried out in close cooperation with national electricity regulators or national agencies to ensure their efficiency. ERERA could therefore inform national authorities of the procedures concerning operators situated on the territory, by communicating a copy of the request for information sent to the operators as well as notifications or any necessary document on the report of the violation of market rules. This would serve not only to inform Member States on the community proceedings against operators, especially those operating on their territory, but also to provide proper information to ERERA to allow it to crosscheck them with the information supplied to it by the operators.

Collaboration by these agencies in the process of inquiries and investigations would also allow them to more easily supervise the implementation of the decisions and laws that emerge at the end of the exercise.

It is understood that on its own part, ERERA would provide any assistance required by these national authorities within the scope of its responsibilities and resources.

3.3.4 Prejudicial issues

Within the framework of the missions assigned to ERERA, cases may specifically be referred to it for its opinion as in the case of regional policy, and the harmonisation of national policies, legislations and regulations of the power sector or generally when it has the obligation to ensure proper communication between the various stakeholders of the sector and advise those who request for it[24].

ERERA may give advice and recommendations, either on request or at its own initiative, to different regional or national participants in the power sector within the ECOWAS region if such matter falls within the implementation of its objectives and mission. These opinions and recommendations are only advisory in nature.

There is thus advisory referral within reach of all operators in the power sector, whether national or regional. This avenue of advisory/consultative referrals can be used in cooperation with national or regional institutions, having shared jurisdiction with ERERA so as to avoid conflicts of authority and, furthermore, to ensure the harmonisation of jurisprudence at the regional level.

For this purpose, ERERA could agree with them that in cases referred to one of the institutions on issues that fall under the scope of the missions and powers of ERERA, the institution would in an interlocutory manner, pass any question on the interpretation of community law or assessment of the substance of the case to ERERA so as to assist its decision making process. In return, ERERA would do this same. This type of relationship could be established between ERERA and the UEMOA Commission, national regulators, the interconnected network managers of OMVS, OMVG and WAPP. It is important to mention here that this mechanism does not aim to establish any hierarchical relation between ERERA and the said institutions: their relation will only be horizontal.

With regards to national or regional judicial bodies, it seems difficult to create a prejudicial jurisdiction for ERERA in a due process without an enabling legislation. Nevertheless, the authority of these courts in the area of contractual and criminal matters relating to the regional electricity market means that it may be necessary to require expertise from specialised institutions such as ERERA. It is necessary to note, however, that the existence of prejudicial appeal to the Courts of Justice of

[24] Cf. Articles 16 and 17 of Regulation C/REG.27/12/07 of 15 December 2007 on its composition, organisation, responsibilities and operation.

UEMOA and ECOWAS provides for national courts to interrogate these Community High Courts on any points of the community law raised in a dispute pending before them. These may also form a means of harmonisation in cases where collaboration is established between these Community High Courts.

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In summary, this mechanism of the prejudicial issue constitutes a sure means of ensuring effective cooperation between ERERA and institutions with which it has shared jurisdiction. Furthermore this mechanism would facilitate harmonisation of the regional community laws in the relevant subject-matters by encouraging the development of joint jurisprudence.

An effective line of communication would therefore be established between the different community legal systems in the region, thereby opening a means of real legal and regional integration on cross-border electricity exchanges.

Conclusion

This examination of the institutional and legal framework of intervention of ERERA in the region facilitates the better appreciation of the reality of overlapping rules and risks of conflicts of jurisdiction between regional institutions with practically the same responsibilities.

These problems mainly originate from the existence of numerous regional economic organisations pursuing the same objectives of economic integration, having the same goal for the West African region and to which West African countries simultaneously and severally belong. Each of these organisations sets up a community legal system, and these legal systems produced rules with, in most cases, the same area of activity and the same enforceable power. Consequently, this situation could only generate conflicts of rules and jurisdictions between the community structures they created. This is the situation with ERERA and all the regional institutions identified in this report with which it shares some areas of jurisdiction.

However, harmonisation of legislation is part of the objectives sought by these organisations. Each of them has included provisions in its main laws to prevent risks of incompatibility of rules and conflicts of authority. Examination of these provisions reinforce the view that these conflicts can only be eliminated or mitigated through the establishment of dynamic and permanent dialogue in the absence of an institutional mechanism to resolve these disputes. Cooperation therefore needs to be established between these institutions with competing jurisdictions, on the material rules to adopt and/or apply and on procedures to follow to ensure concerted implementation of these rules.

This collaboration will aim to harmonise the various community and national rules (at least within their principles), as well as permanent dialogue on conducting proceedings and in the resolution of disputes. To this effect, it is important that a mechanism for the exchange of information should be put in place and processes must be found to involve all relevant actors in investigative proceedings and treatment of disputes especially through joint inquiries and interlocutory issues.

Cooperation between the institutions should therefore be organised and formalised through **agreements** between institutions or **community directives** which will determine the framework of cooperation, by fixing the conditions and defining the matters on which it will apply and the procedures to apply.

In the attempt to prevent conflicts related to these overlapping jurisdictions, it is important to immediately approach the various regional institutions having the similar areas of authority as ERERA in order to expose the various risks identified, discuss the problem with them and present the range of possible solutions. Additionally, after having jointly defined a framework of cooperation, the instrument of implementation (i.e. agreements and/or directives) will be drafted, discussed and agreed upon by the governing bodies of ERERA.