

**INTEGRATION BY PUBLIC PROCUREMENT: HARMONIZATION OF  
PUBLIC PROCUREMENT POLICIES IN ORDER TO PROMOTE THE  
REGIONAL INTEGRATION**

**THE EXPERIENCE IN PUBLIC PROCUREMENT POLICIES REFORM IN  
WEST AFRICA AND MONETARY UNION (WAEMU) IN THE AIM TO  
PROMOTE THE REGIONAL TRADE BETWEEN THE MEMBER'S STATES**

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*« Concerning the awarding of public procurement contracts, the member's states must implement them respectfully towards the principles of economy, transparency and efficiency, by encouraging WAEMU's enterprises participation. »<sup>2</sup>*

**[Thus]**

*« The benefits of WAEMU's public procurement reform are multi sectorial [...] he will permits to reinforce the economic integration by strengthening the common market through an outline legal framework of public procurement».<sup>3</sup>*

**[However]**

*Public procurement will transcend the frontier, the day when bidders could really compete to open bids process in the whole members states while residing in theirs proper's country, and while being perfectly submerged in the regional economy ».<sup>4</sup>*

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<sup>2</sup> Section A-2-1-2.2 of the Directive n° 02/2000/CM/UEMOA, June 29th 2000 about "Public finance and transparence Code in WAEMU"

<sup>3</sup> Ministers Council of WAEMU in "Conception Document of public procurement project reform in WAEMU" adopted in Dakar june 29th 2000, p. 4.

<sup>4</sup> P. BRUNELLI, « Public procurement and European Union », col. *Références européennes*, Ed. Continent Europe, p.98.

## CONTEXT

At the end of Abidjan meeting on African public procurement in 1998 which has launched the waste process of public procurement reform on the continent, it was mainly retained the following recommendations in the aim to enhance the efficiency of the national public procurement systems of African States<sup>5</sup>:

- ✓ The institution of a public procurement legal framework which is conform with the international standard such as the outline law of public procurement of the United Nation International Conference on Trade Law (UNICTRAL);
- ✓ The creation of the civil services and other public bodies procurement employments at the central, local and decentralized level;
- ✓ The creation of the National Public Procurement Relation Authorities (NPPRA) which permits to define the policies and the efficient audit of the procurement process;
- ✓ The creation of National Public Procurement Control Authorities (NPPCA);
- ✓ The professionalization of the actors of the procurement process by an updated human resource policies creating the profiles of employment of civil servants specialized in this matter;

Towards these basic standards, none african State has reach these objectives and finalized integrally his public procurement reform. The divergence, confirmed by audits are an indicator of this strong idea according to which, through public procurement there is a manifestation of something related State sovereignty.

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<sup>5</sup> Report of the african conference on public procurement organized from 30 november to 04 december 1998 in Abidjan in Côte d'Ivoire by AFDB, WB, CCI, de la CNUCED, UNDP and l'OMC, p. 12. international : <http://www.intracen.org/ipsms/tools/abidjan.pdf>. Read also V. WAYNE A. WITTIG, *Building Value trough the procurement: focus on Africa*, UNCTAD/WTO, 1999, p. 8 on [www.intracen.org](http://www.intracen.org) (UNICTRAL).

About this, none have qualified public procurement like “the last rampart of the States protectionism”<sup>6</sup>.

These properties are, evidently, contrary to the main objective of a free economic circulation which is research by the integration process of West African Economic and Monetary Union (WAEMU).

Indeed, based on a historical monetary community between members States, WAEMU have the major objective the institution of a common market through the progressive suppression of the barriers to the free circulation and the trade and others measures which have the effect of quantities restrictions by the harmonization of the legislation and the coordination of sectorial policies between members States.

The members' States of WAEMU represents 10% of public procurement passed annually in Africa which is equivalent to 4.5 billion of US dollars. This represents 10% of the GDP of the members States.<sup>7</sup>

The table below gives the statistics of public procurement in the members States of WAEMU.

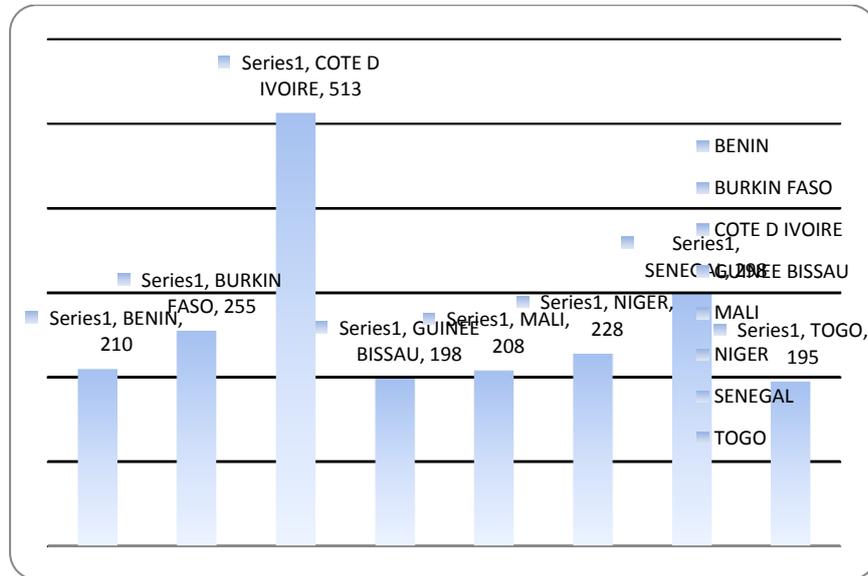
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<sup>6</sup> Alphonse MATTERA, « *Public procurement : the last rempart of the states protectionism* », RMUE, 1993, n°3, p.5.

<sup>7</sup> Source: Commission of WAEMU « *Community strategy of capacity building in public procurement document* » p.08 and « *Report of the multilateral inspection and performance indicators in public procurement in WAEMU* ».

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THE RATE OF PUBLIC PROCUREMENT IN WAEMU		IN BILLION OF XOF
SCORE	MEMBERS STATES	
1	COTE D'IVOIRE	513
2	SENEGAL	298
3	BURKINA FASO	255
4	NIGER	228
5	BENIN	210
6	MALI	208
7	TOGO	195
8	GUINEE BISSAU	198
<b>TOTAL WAEMU</b>	<b>2105 Milliards FCFA (4.5 Billion USD)</b>	



*As far as concerning specifically the sector of public procurement, the Regional Public Procurement Enhancing Project (RPPEP) has the aim to harmonize the members' states legislation in this matter.*

*He subscribes entirely in the objectives of the section 67 of the WAEMU's treaty signed in Dakar which have the aim to harmonize legislations and budgeting process, financial Act and public accounting between the member's states.*

This program proceeds from the proposal done in April 2000 by the Department of Financial Policies of WAEMU and adopted by the Minister Council through the decision N° 01/2000/CM/UEMOA on June 29<sup>th</sup> 2000 relative to the Document of conception of the *Regional Public Procurement Enhancing Project (RPPEP)*.

The RPPEP is mainly articulate around two (02) technical components which are:

- **Component I : Development and promotion of the WAEMU's legal framework of public procurement** (financed mainly by the AFDB) :
  - 1) **The Reinforcement of the community's legal cadre of public procurement**
    - The transposition of WAEMU's public procurement directives ;
    - The definition of a non-jurisdictional mechanism of appeal ;
    - The elaboration of the standard bidding documents of each type of public procurement contracts ;
    - The definition of the thresholds of the obligation of advertising of public procurement opportunities ;
    - The definition of the regional indicators of public procurement audit.
  - 2) **The institution of the national mechanism for fighting fraud and corruption in the process of awarding the public procurement contracts and the increasing the integrity of the procurement system.**

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- The institution of a legal apparatus of penalization and anti-corruption in public procurement ;
  - The writing of a code of deontology for the public procurement actors ;
  - The conception and management of a media « Information Education Campaign (IEC) » for fighting corruption in procurement.
- **Component II : The Reinforcement of human and institutional capacities**
    - 1) The institution of an information system ;
    - 2) The financial and institutional support of the Regional Public Procurement Observatory (RPPO) of WAEMU ;
    - 3) The institutional capacity building and logistic support of members states ;
    - 4) The dematerialization of the public procurement process ;
    - 5) The Interface between the informatics program system and the national budgeting process ;
    - 6) The writing an adoption of the guideline of Administration, public bodies and the bidders ;
    - 7) The capacity building by forming **12.600** actors of the procurement chain ;
    - 8) The writing of the syllabus for the definition of the community strategy of formation in procurement.

The WAEMU's Council of Ministers, through the directive n° 02/2000 on June 29<sup>th</sup> 2000 relative to the transparence code in the management of public finance has consider that the *« heterogeneity of the procurement rules in WAEMU are prejudicial to the integration process and that it will be convenient to harmonize them »*.

Thus, beyond the objective of the efficiency of the public action, the public procurement reform process in WAEMU has also the aim the building of the common market and the pursuit of the economic performance, regional trade promotion through the reinforcement of the effectiveness of free circulation, mainly those who are economic character.

At this effect, the *RPPEP* was created and has permitted to institute a new legal order of public procurement in WAEMU through the adoption of the basics outline laws such as:

- *The Directive n° 04/2005/CM/UEMOA on december the 9th 2005 relative to the process of attribution, execution and payment of public procurement contracts in WAEMU ;*
- *The Directive n° 05/2005/CM/UEMOA on 9th december 2005 relative to the control and regulation in public procurement in WAEMU ;*

This normative activity is totally in conformity with the result of the Paris Declaration on march 2005 relative to *the efficiency and harmonization the development Aid*. This Declaration has 12 indicators among which 2 are respectively the aim:

- To institute in the borrowers countries and the beneficiaries of the Grants a national procurement system which is fair and adhere to the best practices generally agreed by the international community;
- To promote the using of the national system of procurement in the process of passing of contracts financed by the development Aid.

In stand into the legal order of the community of WAEMU since January the 1th 2006, these directives gave a deadline of two years to the members states for conforming themselves towards his principles.

#### **THE TRANSPOSITION OF THE WAEMU'S PROCUREMENT DIRECTIVES**

The process of transposition of these directives into the national legal order of the members' states is current in order to permit them to pursuit and reach their majors objectives which are the best economic governance specifically in the matter of public procurement.

The transposition was done through the following approach.

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**A) Method of transposition as far as concerning the principle of hierarchic of the legal norms**

The Dakar Treaty defines the objective of a directive at his section 43:

**« The Directives binds all the members' states towards the results to reach ».**

So, at the step of a transposition of a Directive into the interne legal order, it is most important to respect the "spirit" of the Directive, but not necessary his "letter".

**B) Method of transposition of the directives according to the form****✓ PRINCIPLE 1 :**

The respect of the principle of coherence of the new procurement Code towards the passing chain for the needs of:

- **Clarity**
- **legibility**
- **Logic**

**✓ PRINCIPLE 2 :**

It is necessary to proceed at the transposition by beginning from the plan of the old procurement code by doing adaptation in the aim to keep a good appropriation by the users (familiarity matter)

**✓ PRINCIPLE 3 :**

It is necessary to respect the principle of legality block by avoiding, if possible, the multiple sending back to the application rules to be taken by the government in order to precise the sections of the code (Decrees and ordinances...)

**✓ PRINCIPLE 4 :**

Respect of the principle of extension the procurement code to the whole categories of procurement contracts such as:

- Classic procurement contracts ;
- The contracts of public services delegation ;
- The contracts of Build Operate Transfer (BOT);
- The contracts of Public- Private Partnership (PPP).

### C) Method of transposition according to the substance

Section of procurement code	Assessment of the conformity towards the objectives of the similar sections in the WAEMU directives			Impact of the directive transposition on the treatment of the section		
	Conform	Non-conform	Incompatible	Maintained	Amended	Suppressed
Section 1	x			x		
Section 2		x			x	
Section 3			x			x
Section n	--	--	--	--	--	--

**NB :** During this assessment of conformity, the non- existed provisions of the old code but which exist in the WAEMU directives must be transposed systematically and integrally. For example the provision relative to the treatment of bids abnormally low, the provisions about the pledging in public procurement...

At this day, all the member states have transposed the WAEMU procurement directive.

And towards this, we have two groups of countries:

- **GROUP I :** The states which have adopt a new procurement code conformed to the WAEMU directives before the deadline fixed of december the 31th 2007 :

**Burkina Faso and Senegal;**

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- **GROUP II:** The states which have adopted their new procurement code after the deadline of December 31st 2007:

**Benin, Côte d'Ivoire, Guinée Bissau, Mali, Niger, Togo.**

For this, the Republic of Guinea BISSAU has benefited of a direct technical support from the WAEMU Commission.

None of the member States have not still received the quietus of the Commission about the sincerity of their transposition of these directives.

The process of verification is current in order to assure if there is no gap from the spirit of the community procurement directives.

The Commission has sent observations to the member States about their lack during this exercise of directives' transposition in their own internal legal framework.

The directives have instituted a new procurement institutional order.

#### **THE NEW INSTITUTIONAL PROCUREMENT FRAMEWORK OF WAEMU**

The new procurement institutional cadre in WAEMU is suggested by the Directive N°05/2005/CM/UEMOA relative to the procurement control and regulation.

#### **A) Consecration of the principle of separation the activities of REGULATION from those of CONTROL and from those of procurement PASSING**

The member States are engaged to institute a process and mechanism which assure the separation and the independence of the **mission of control and the mission of regulation** (Section n° 3 of the directive n°05).

- ✓ **REGULATION MISSION : EXERCED BY THE NATIONAL PUBLIC PROCUREMENT RELATION AUTHORITY (NPPRA)**
  - independent regulation ;
  - definition of policies;
  - formation ;
  - information system ;
  - audits ;
  - non jurisdictional settlement of litigations
  -
- ✓ **CONTROL MISSION : EXERCED BY THE NATIONAL PUBLIC PROCUREMENT BUREAU (NPPB)**
  - Control the respect of the public procurement code ;
  - Provide advices, give authorizations and derogations foreseen by the code ;
  - Assure, in relation with the National Public Procurement Regulation Authority (NPPRA), formation, information and advice to the whole actor of the procurement chain and the rules in stand ;
  - Contribute in relation with the NPPRA the information collect and the documentation in order to build a data base.
- ✓ **PASSING MISSION : EXERCED BY THE PERSON RESPONSIBLE OF THE PROCUREMENT (PRP)**

The PRP is the representant duly mandated by the contractor authority for his representation during the process of passing and execution of procurement contract.

  - responsabilization of the chain implementation of procurement : creation of PROCUREMENT PASSING JOB into the organogram of each contractor authority ;
  - Professionalization of human resources of procurement passing chain.

**B) The mechanism of multilateral inspection of procurement :  
Regional Observatory of Public Procurement (ROPP)**

In the order to assure a mechanism of a multilateral inspection between the members States, the directives have foreseen provisions about a legal baseline of a multilateral control specifically in the matter of procurement.

Indeed, the directive of procurement N°05, as far as concerning the final provision, precise at the section 13 that the Commission will define, in dialogue with the members states, the organism, mechanism and the modalities of a multilateral inspection's mechanism in public procurement.

In the cadre of such mechanism the Regional Observatory of Public Procurement have been established in WAEMU space.

Placed near the Commission according to the provision of section 13 of the directive n° 05/2005/CM/UEMOA, the ROPP have, among his attributions, the supporting of WAEMU's Commission in the matter of regional inspection of the respect of the procurement rules. He has the following function:

- ✓ assure the multilateral inspection in the matter of procurement ;
- ✓ the implementation of the reform of regional and national procurement system ;
- ✓ the guarantee of the best functioning of the non-jurisdictional mechanism of litigation ;
- ✓ the assessment of the quality and the performance of the national procurement system of the members states ;
- ✓ the capacity building of human resource of public procurement chain ;
- ✓ the best execution of the annual activity program of national regulation authorities ;

To assure these missions, ROPP is composed with 24 members divides as following:

- tree (03) representants per members states, whose two (02) delegates of public administration coming from

NPPRA et the ministry of finance and one (01) delegate from private sector ;

- three (03) representants of the WAEMU Commission ;
- One (01) representant of the West African Development Bank (WADB).

He has meet twice time each year and this frequency permits him to play his inspection attribution.

The ROPP is a veritable institutional cadre of multilateral inspection because he gives a real assessment of the national procurement system of the member's states and is a pole of impulse and orientation of these reforms.

At this effect, it is foresee, in the project's appraisal report in WAEMU, an indicator system and the reference norms for assessment the national procurement system. These indicators are inspired from the OECD model elaborated for the international community.

The regional mechanism of inspection done in the cadre of ROPP mission contributes for the efficiency of the new legal procurement order.

This is fundamental as far as concerning the convergence and the harmonization of the policies, rules and practices of procurement of the member's states in conformity with the section 70 of the Dakar Treaty relative to inspection mechanism and the Directive N°01/96/CM relative to the implementation of this inspection mechanism of macroeconomics policies between the member's states.

- *Thus, she contribute to the effectiveness of the realization of the objectives of common market define at the section 64 of the Treaty of Dakar such as the growth of the medium income, the best redistribution of the products of growth, the bearable payment balance and the amelioration of the international competitiveness of the Union economies.*

### **C) The extension of the organic field of the competition**

The Directives has retained a listing of the entities which must comply with the procurement code. They were:

**States<sup>8</sup>,**

**Territorial collectivities<sup>9</sup>,**

**Public enterprises<sup>10</sup>,**

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<sup>8</sup> Sur cette question, v. S. BRACONNIER, *Droit des marchés publics*, Imprimerie nationale, Ed. Techniques, col. Essentiels-experts, 2002, p. 43. CJCE, 17 sept. 1998, Commission C/ Royaume de Belgique. Aff. C-323/96 : BJCP n°2/1999 p. 209, Rec. 276437, 1998, p. I-5063. CJCE, 17 sept. 1998, Commission C/ Royaume de Belgique, op. cit., p. I-5064. CJCE, 20 sept. 1988, Gebroeders Beentjes BV, aff 31/87, Rec. p. 4635, p.p.11-13. CJCE, 17 sept. 1988, Commission C/ Royaume de Belgique, op. cit., point 28.

<sup>9</sup> F.-X. FORT, « La coopération intercommunale et le principe de libre administration » in *Dr. adm. Ed. du Juris-classeur*, Fév. 2003, p. 12. <sup>9</sup> CJCE, 20 sept. 1988, Gebroeders Beentjes BV, aff 31/87, Rec. p. 4635, p.p.11-13. CJCE, 17 sept. 1988, Commission C/ Royaume de Belgique, op. cit., point 28. A ce sujet v. A. LOADA « La décentralisation en Afrique francophone, où en est-on ? » in *Marchés tropicaux* n° 3000, du 9 mai 2003, p. 979. Sur les grands principes de la privatisation en Afrique lire Groupe de la Caisse française de développement, *Privatisation et développement*, La documentation française, col. Les notes, Paris, 1997, p. 49 et s. V. A. LOADA « La décentralisation en Afrique francophone, où en est-on ? » op. cit. p. 979. V. sur ce point l'art. de F. BAMBOU, « Le financement et la gestion des services de base en question » (en Afrique) in *Marchés tropicaux* du 19 déc. 2003, p. 2649. CE, Ass. 5 mars 2003, *Ordre des avocats à la Cour d'appel de Paris*, *Juris-Data* n°2003-064978, *Dr. adm.* Mai 2003, p.23, note A. MENEMENIS.

<sup>10</sup> J.-P. THERON « Etablissements publics », *J.Cl. adm. Fasc. N° 35, n° 1* et « recherches sur la notion d'établissement public », *LJDG*, 1976, p. 99 et s. Au sujet des crises devancières de la notion d'établissement public, v. notamment, la thèse de R. DRAGO, *Les crises de la notion d'établissement public*, Pédone, 1950. Pour plus de détail sur la question, v. F. MELLERAY, « La nouvelle crise de la notion d'établissement public, la reconnaissance d'autres personnes publiques spécialisées », op. cit., p.714. Au sujet de la controverse jurisprudentielle quant la qualification de la Banque de France, v. F. MELLERAY, op. cit., p. 713. Le CE affirme que « ne pouvant être classée dans aucune des catégories d'établissements publics, la Banque de France est une personne sui generis », v. CE, Ass. Avis n°363934, EDCE 2000, n°51, p.

**Public bodies, agencies and organisms<sup>11</sup>,**

211, *Les grands avis du Conseil d'Etat*, Dalloz 2<sup>ème</sup> éd., 2002, n° 43, comm. Y. GAUDEMET ; v. aussi CE, 22 mars 2000, *Syndicat national autonome du personnel de la Banque de France*, in AJDA 2000 , p. 410 et s. chron. En revanche la Cour de cassation affirme la qualité d'établissement public administratif de la Banque de France (Cass. 1<sup>ère</sup> civ. 5 fév. 2002, *Banque de France c/ Société Edition Catherine Audval*, note C. TOUBOUL). CE, Sect., avis, 8 nov. 2000, *Société Jean-Louis Bernard Consultant*, RFDA 2001, p. 112, Concl. BERGEAL, AJDA 2000, p. 1066, chron. COLLIN et GUYOMAR, CJEG 2001, p. 58, note DEGOFFE et DREYFUS ; G. ECKERT, v. Note LACHAUME sous CE, Sect., avis, 8 nov. 2000, *Société Jean-Louis Bernard Consultant*, in *Droit administratif : les grandes décisions de la jurisprudence*, PUF, Thémis, 13<sup>ème</sup> éd., p. 381 et s.

<sup>11</sup> V. par exemple article 1<sup>er</sup> b) de la directive 93/37/CEE du juin 1993 portant coordination des procédures de passation des marchés publics de travaux. V. par exemple art. 1<sup>er</sup> sous b) de la directive 93/37 dite Directive Travaux, préc. Synthèse des a), b) et c) du point 9 de l'article 1<sup>er</sup> de la directive européenne unifiée des marchés publics. (Art. 1<sup>er</sup> sous b) des anciennes directives européennes des marchés). Concl. S. ALBER sur CJCE, 10 mai 2001, Aff. C-223/99 et C-260/99, Agorà et Excelsior Rec. p. I-3605, point 70.

<sup>11</sup> Sur l'application du principe de la liberté du commerce et de l'industrie en droit des marchés publics, v. notamment CAA de Bordeaux, 18 février 2003, *Commune de Bayonne*, op. cit. CJCE, 12 déc. 2002, *Universale-Bau AG*, aff. C-470/99, *Droit adm.* 26 fév. 2003, p. 26, note MENEMENIS, *Contr. et march. publ.* mars 2002, p. 22 note ECKERT. Dans le même sens v. CJCE, 15 janvier 1998, Aff. C-44/96, *Mannessmann Anlagenbau Austria e. a. c/ Strohal Rotationsdruck GesmbH*, R. p. I-173, points 25. Dans cette affaire était indifférent à la qualité d'organisme de droit public la circonstance que la part des activités industrielles ou commerciales dans l'activité de l'imprimerie nationale autrichienne « Ös » représentaient 80 à 85 % du total de son activité. V. note MENEMENIS sous CJCE, 12 déc. 2002, *Universale-Bau AG*, aff. C-470/99, *Droit adm.* 26 fév. 2003, p. 26. CJCE, 19 mai 1993, *Paul Corbeau*, aff. C-320/91, Rec. p. 2533, AJDA 1993, p. 865. Conseil de la concurrence, Avis n°94-A-15 du 10 mai 1994, rapp. d'activité 1994 ann. 92, p. 632. CJCE, 27 février 2003, Aff. C-373/00, *Adolphe Truley GmbH in AJDA* du 23 juin 2003, p. 1228 et s. CJCE, 15 janvier 1998, Aff. C-44/96, *Mannessmann Anlagenbau Austria e. a.*, Rec. p. I-173, points 21 et 38, v. aussi *Le droit des marchés publics : dix ans de jurisprudence, 1988-1998. Une sélection de 600 arrêts commentés* par S. BRACONNIER, Ed. du juris-Classeur, n° hors série déc. 1998, p. 29. CJCE, 10 novembre 1998, Aff. C-360/96, *Gemeente Arnhem et Gemeente Rheden c/ BFI Holding*, Rec. p. I-6821, point 29. CJCE, 1<sup>er</sup>

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- ✓ The private bodies mandated by public bodies<sup>12</sup>.

Besides these classical adjudication power bodies, the directives have created a new category of public bodies whom must comply with the procurement code. It's the "**organism of public law**" defined at the section 1th of the Directive by the following cumulative criteria's:

- a) Created specifically for the satisfaction of a general interest need which have a non-industrial and non-trading character;
- b) Endowed of the legal personality, and
- c) whether his activity is **finance** in the majority part by the State, the territorial collectivities and others public bodies or his **management** is under the **control** of them or the administration organ, steering inspection is composed by members which are designated in the majority part by the states, the territorial collectivities and others public bodies.

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*fév. 2001, Aff. C-237/99 , Commission c/ France, Rec. p. I-939, point 40. CJCE, 10 mai 2001, aff. jointes C-223/99 et C-260/99, Agorà s.r.l. et Excelsior s.n.c. c/ Ente autonomo Fiera internazionale di Milano et CIFTAT soc. Coop. a.r.l., Rec. p. I-3605, concl. S. ALBER, BJDCP n° 18.*

<sup>12</sup> « Les contrats de mandat et la mise en concurrence » in AJDA du 14 avril 2004, p. 724. CE, 5 mars 2003, Union nationale des services publics industriels et commerciaux (UNSPIC), concl. D. PIVETEAU, n° 233372, AJDA du 14 avril 2003, p. 724 et s.

« Quatre cercles » selon le Commissaire de gouvernement D. PIVETEAU : le mandat dans son acception civiliste (représentation dans l'accomplissement d'actes juridiques), le mandat définis par la loi ou les règlements (par exemple la loi MOP ou l'article R. 321-20 du code de l'urbanisme en France), le quasi-mandat (hypothèse dans laquelle le mandataire agirait pour le compte de la collectivité publique mais non nécessairement en son nom), v. CE, Sté d'équipement de la région montpelliéraines, op. cit., ou TC, 11 juin 1975, commune d'Agde, Rec. p. 797, le faux mandat (catégorie résiduelle de mandat définie négativement comme les mandats ne répondant à aucune des caractéristiques des trois autres).

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This provision has the aim to avoid that any entity must note able to invoke the fact of that the field of procurement code not name or designate him expressly for refuse to comply with the obligations foresee in the code.

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**LEGEND**

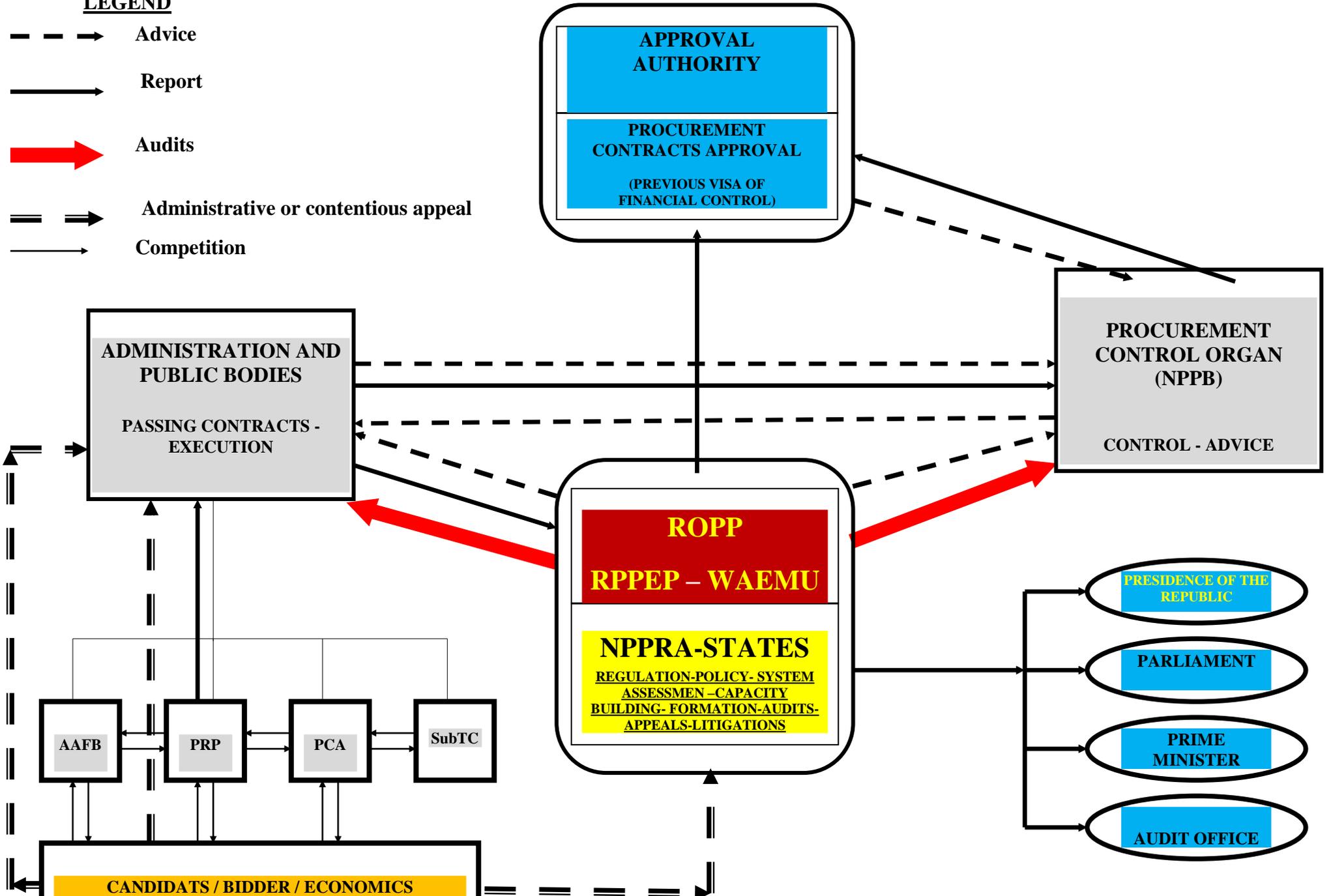
- - - - -> Advice

————> Report

————> Audits

====> Administrative or contentious appeal

————> Competition



The reform of public procurement in WAEMU proceed essentially in the logic of financial, economic and trading efficiency in the aim of the achievement, strengthening and consolidation of the common market.

Indeed, placed in the confluent of two analogous logics otherwise complementary,

administrative efficacy and economic performance, public procurement in Africa constitute the major lever of the public action and the good governance, through the effectiveness of the great principle of public procurement commonly recognized by the international standards:

- ✓ **FREEDOM** access in public procurement <sup>13</sup>;
- ✓ **EQUALITY** treatment of bidders<sup>14</sup> ;

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<sup>13</sup> Directive n°02/2000/CM/UEMOA portant adoption du code de transparence dans la gestion des finances publiques au sein de l'UEMOA, op. cit. Pour une étude comparative avec l'Union européenne sur cette question et débouchant sur des conclusions similaires, v. A. LAGUERRE « Marchés publics et concurrence », Thèse, Paris X, 1984, p. 23., G. GUILLERMIN et C. HEN « Le droit communautaire des marchés publics », Revue du marché commun et de l'Union européenne n° 373 déc. 1993, p. 852. CJCE, aff. C-380/98, 3 octobre 2000, University of Cambridge, Rec. p. I-8035, point 16. Dans le même sens v. aff. C-360/96, 10 novembre 1998, BFI Holding, op. cit., point 41, aff. C-237/99, Commission c/ France, point 41, Rec. p. I-939, CJCE, 18 juin 2002, HI, C-92/00, Rec. p. I-5553, point 43, CJCE, 12 déc. 2002, aff. C-470/99, Universale-Bau e.a. point 51, CJCE, 25 avril 1996, concl. LENZ sur aff. C-87/94 Commission des Communautés européennes c/ Royaume de Belgique, Rec. p. I-2052, point 30. G. GUILLERMIN et C. HEN « Le droit communautaire des marchés publics », Revue du marché commun et de l'Union européenne n° 373 déc. 1993, p. 854. V. CJCE, 4 mai 1995, Commission c/ République hellénique, Dr. adm. 1995, comm. n° 479. et Le droit des marchés publics : dix ans de jurisprudence, 1988-1998. Une sélection de 600 arrêts commentés, S. BRACONNIER, op. cit., n° 74, p. 27. Directive 93/36 préc.

<sup>14</sup> Sur la notion de mesures d'effet équivalent à des restrictions quantitatives (MEERQ) v. notamment, CJCE, 20 fév. 1979, Rewe-Zentral,

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- ✓ **TRANSPARENCE process and** <sup>15</sup>;
- ✓ **EFFICACY of public expenditure** <sup>16</sup>.

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*aff.120/78*, Rec., p. 649., affaire dite des «cassis de Dijon», B. MONGIN, H. CHAVRIER et E. HONORAT in *Rev. du march. com. et de l'UE* n° 376, mars 1994, p.p. 196-200 et R. WAINWRIGH et U. MELGAR « Bilan de l'article 30 après vingt ans de jurisprudence : de Dassonville à Keck et Mithouard », *Rev. du march. com. et de l'UE* n° 381, sept.-oct. 1994, p. 535. CJCE, 11 juil. 1974, aff. 8/74, Dassonville, *Rev. du march. com. et de l'UE* n° 381, p. 534. L. RICHER, *Droit des contrats administratifs*, LGDJ, 3<sup>ème</sup> éd., 2002, p. 328, n° 494.

<sup>15</sup> V. sur cette question G. ISAAC, M. BLANQUET, *Droit communautaire général*, 8<sup>ème</sup> éd., A. Colin, Paris, 2001, p. 98 et s. V. préambule de la Directive Transparence dans l'UEMOA préc. V. CJCE, Beentjes, op. cit. point 21. et *Telaustria* op. cit. point Rec. p. 10747, v. aussi CJCE, 3 déc. 2001, aff. C-59/00, Bent Moustén Vestergaard c/ Spøttrup Boligselskab, points 20 et 21. CJCE, *Unitron Scandinavia*, op. cit. point 31. Directive n° 02/2000/CM/UEMOA portant adoption du code de transparence dans la gestion des finances publiques au sein de l'UEMOA op. cit. V. art. 1<sup>er</sup> al. 2 de la décision n° 01/2000/CM/UEMOA portant adoption du document de conception du projet de réforme du droit des marchés publics dans l'UEMOA. V. concl. de l'Avocat général G. TESAURO du 17 novembre 1994 sur CJCE 24 janv. 1995 aff. C-359/93 Commission des Communautés européennes c/ Royaume des Pays-Bas, op. cit., point 8. R. HERNU, *Principe d'égalité et principe de non-discrimination dans la jurisprudence de la Cour de justice de communautés européennes*, LGDJ, 2003, p. 163, n° 167. P. MALHIÈRE, *Le langage des marchés publics*, Ed. Méthodes et stratégies, Col. Connaître et parler, Poitiers, 1995, p. 84. CJCE, 26 sept. 2000, aff. C-225/98, Commission c/ France, Rec. p. I-7471, point 34.

<sup>15</sup> P. BRUNELLI, *Marchés publics et Union européenne : les nouvelles règles communautaires*, op. <sup>15</sup> S. BRACONNIER, *Droit des marchés publics*, op. cit., p. 185. CJCE, 26 sept. 2000, aff. C-225/98, Commission c/ France, Rec. p. I-7471, et s. point 34. V. CJCE, 26 sept. 2000, aff. C-225/98, Commission c/ France, op.cit., point 43.

<sup>16</sup> La bonne utilisation des deniers publics, qui n'est rien d'autre que l'efficacité de la commande publique, constitue selon F. LINDITCH « le principe des principes », LINDITCH, « Comment sauver la règle des trois

The role of the new community order in the strengthening of common market and regional trade depends mainly on the pertinence of the mechanisms, material and organic methods consecrated by the directives towards the extension of the field of competition of public procurement but as well as far as concerning the growth of the number of contracts and those of public bodies complied under the procurement code.

### THE EXTENTION OF THE SUBSTANCE FIELD OF THE COMPETITION

#### 1) The obligation of advertising thresholds of the community

The obligations of advertising of the procurement are formalities which served the transparence of the passing process and permits a control of the obligations prescribes by WAEMU's procurement directives. <sup>17</sup>Indeed, by the respect of this formality, WAEMU's Commission is able to verify if the member's states are respectful of their obligations in the matter specifically of procurement. The process of the definition of these different Thresholds permits to adopte by the Commission the following rates:

Procurement contracts	States, Territorial collectivities	Organisms of public law, public enterprises financed in majority by public funds
Procurement of works	1.000.000.000 FCFA (USD 2.000.000)	1.500.000.000 FCFA (USD 3.000.000)
Procurement of goods	500.000.000 FCFA (USD 1.000.000)	750.000.000 FCFA (USD 1.500.000)

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devis ? », *JCP-La Semaine juridique Administration et Collectivités territoriales*, n° 6, 2 fév. 2004, p. 152.

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Procurement of services	500.000.000 FCFA (USD 1.000.000)	750.000.000 FCFA (USD 1.500.000)
Procurement of consultants	150.000.000 FCFA (USD 300.000)	200.000.000 FCFA (USD 400.000)
Public service delegation contracts	1.500.000.000 FCFA (USD 3.000.000)	2.000.000.000 (USD 4.000.000)

Tree kinds of obligations are impose to the members states :

## 2) The advertising of an indicative announcement of procurement

(Section 39 directive n° 04)

It is prescribe by the directives, the obligation to the administrative entities responsible of the procurement control to publish through an indicative announcement, the essential characteristic of procurement of works, goods, services, consultants and public services delegation convention which they envisage to pass during the year and whose the amounts reach the WAEMU's procurement thresholds of the obligation of advertising.

Also denominated as "**announcement of preinformation**" this formality impose to the public bodies to announce at the attention of the public the whole procurement of the community thresholds which they envisage to pass during any period and thus to "**put in alert**" the potential candidates.<sup>18</sup>

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<sup>18</sup> P. MALHIÈRE, *Le langage des marchés publics*, Ed. Méthodes et stratégies, Col. Connaître et parler, Poitiers, 1995, p. 84. CJCE, 26 sept. 2000, aff. C-225/98, Commission c/ France, Rec. p. I-7471, point 34. P. BRUNELLI, *Marchés publics et Union européenne: les nouvelles règles communautaires*, op. cit., p. 92. S. BRACONNIER, *Droit des marchés publics*, op. cit., p. 185. CJCE, 26 sept. 2000, aff. C-225/98, Commission c/ France, Rec. p. I-7471, et s. point 34. V. CJCE, 26 sept. 2000, aff. C-225/98, Commission c/ France, op.cit., point 43.

The thresholds of the obligation to publish a preinformation announcement coincide with the thresholds of the community advertising obligation because the preinformation announce, upstream, a future competition at the community level.

The rules relatives to the preinformation obligation has the aim to promote the development, at the community level, of an effectiveness competition in the matter of procurement by assuring that the potential bidders of the members states will be able to answer at the different tenders, in the same conditions comparable to the conditions of the national bidders.

This formality has the aim to reduce the negative incidents of the “administrative distance” of the candidates and permits them to appreciate a long time by advance the importance of procurement opportunities which are able to be launched at the community level.

- *The incidences on the common market are the growth of the intra-regional trade by the suppression of the negative effect on the competition of the administrative and geographic distance of the enterprises in the community's space.*
- *The alert of bidders as far as concerning the regional business opportunities.*
- *The reinforcement of the respect of the principle of equality of candidates and bidders concerning the business opportunities informations.*

### 3) **The thresholds of the procurement obligation of community advertising** (Section 40 of the Directive N° 04)

In the open and restricted tender process, the deadline of reception of applicants and bids cannot be inferior to 45 calendar days.<sup>19</sup> For

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<sup>19</sup> P. BRUNELLI, *Marchés publics et Union européenne : les nouvelles règles communautaires*, op. cit., p. 92. V. TMP n° 190, nov. 1994, p. 3 ; CE, 15 nov. 1996 *Sté Guadeloupe entretien maintenance*, Rec. tables, p. 1010, RD imm. 1997, 73, obs. F. LLORENS et P. TERNEYRE. V. aussi TA Rennes, 16 déc. 1992, *Préfet du Morbihan c/ Cne de Cléguérec*, req. n° 91-1433, *Courrier des Maires ou CCM in March. publ.*, n° 234, juin 1988, p. 6. V. rép.

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the procurement contracts which are reach the community thresholds it is from the first publication of the announcement in the official journal of WAEMU (JO.UEMOA).

In any case, the national announcement of procurement must not be anterior of the date of sending the relative publication at the WAEMU's Publication Office (WPO) and that advertising cannot contain others informations more than those which are published in the community's official journal.<sup>20</sup>

This mechanism permits to the Commission to verify if the contractors authorities are respectful of the advertising formalities of procurement and constitute a tool in the hands of Commission.

The impact of this formality of the common market is that he gives at the attention of the whole community the informations about the business opportunities. At this effect, the thresholds of that obligation must be at a high level in order to be attractive for the economic operators. Indeed only the procurement contracts which are financially important will able to arouse the interest of the community's enterprises and permits to assure a mobility of the

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*min. n° 28074 in JO Sénat (Q) 13 février 1986 , p. 271 ; March. Publ. 1986 n° 217, avr.-mai 1986, p. 9 ; rép. min. n° 35386 in JOAN (Q), 14 mars 1988, p. 1173 et March. publ., n° 234, juin 1988, p. 6. CE, 4 avr. 1997, Département d'Ille-et-Vilaine, Rec. CE, p.136, RD imm. 1997, 434, obs. F. LLORENS et P. TERNEYRE, D. 1998, SC, p. 229. Dans le même sens v. CCM in March. Publ., n° 7/95-96, p. 4. et TMP, n° 197, sept.-oct. 1995, p. 2. V. sur ce point CJCE, 26 sept. 2000, aff. C-225/98, Commission c/ France, Rec. p. I-7471, point 40.*

*20 Pour ce qui concerne le cas du Burkina Faso, v. Y. SOURA « La publicité dans les marchés publics au Burkina Faso », in Revue des marchés publics du Burkina Faso, n° 104, p. 4 et s. Sur la question v. CJCE, 26 sept. 2000, aff. C-225/98, Commission c/ France, Rec. p. I-7471, point 35. Sur ce point v. Y. SOURA « La publicité dans les marchés publics au Burkina Faso », in Revue des marchés publics du Burkina Faso, op. cit., p. 4 et s. CJCE, 10 mars 1987, Commission c/ Italie, Rec. p.1060. CJCE, 28 oct. 1999, Commission c/ Autriche, BJCP, 2000, n° 9, p. 145. CJCE, 1<sup>er</sup> fév. 2001, Commission c/ France, D. 2001, n° 8, inf. rap., p. 673. V. CJCE, 26 sept. 2000, aff. C-225/98, Commission c/ France, Rec. p. I-7471, point 7. V. sur la question S. BRACONNIER, Droit des marchés publics, op. cit., p. 185.*

tender of service and the capital in conformity with the objectives of the economic freedom circulations of the treaty of Dakar.

- *The effectiveness of advertising business opportunities which will growth the regional trade exchanges, the best mobility and the meeting of the public consumption and private tender.*

#### **4) The obligation of information the bidders**

(Section 65 of the directive n° 04)

The directives impose to the contractors authorities the obligation to respect a minimum delay of 15 days from the publication of the attribution advertising, before to proceed to the signing of the contract and to submit him to the approval authorities.<sup>21</sup>

The bidders which consider that there is a serious doubt of fraud or corruption during the passing process that conduct to his eviction from this process, has 15 days to introduce either an administrative or an non jurisdictional appeal.

This formality to publish the attribution result is impose to the contractors authorities as far as concerning the procurement of national thresholds and the procurement of regional thresholds.

The publication of the advertising of procurement of community threshold permits to the evicted bidders to launch the community jurisdictional control by the seisin of the non-jurisdictional organ placed near the WAEMU's Commission.

This organ will have to verify the exactness of the complaint and the settlement in law and equity the appeal introduce by bidders.

- *This obligation permits to assure an appropriate degree of transparence of the circuits of public expenditure of member's states, by comforting the credibility and the integrity of national procurement system, sine qua non condition for a best participation of the economic operators to the community trading.*

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<sup>21</sup> V. CJCE, 26 sept. 2000, aff. C-225/98, Commission c/ France, op. cit., point 91.

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- *To give more credibility to the national procurement system towards the economic operators of the Union by assuring reliable information on public procurement which is pledge of the effectiveness of the principle of transparence foresee at the section 2 of the directive n°04.*

#### **5) The principle of mutual recognition obligation**

This principle is based on the section 2 of WAEMU procurement directive which prescribes that the process of passing procurement contract, despite the amount fixed in the budget, must be respectful of the principle of *“mutual recognition.”*

This principle involves that the members states must agree together to give a credit to their own administrative system concerning notably the formalities of production the administrative justificatives documents required from the bidders by the national procurement code coming from the WAEMU’s directives transposition.

Indeed, this principle order the contractors authorities to prevails a presumption of authenticity of administrative certificates, fiscal and social attestations and professional and technical registration documents delivered by official organism based in the members states and are evidence as far as concerning the proof of their administrative regularity and their technical capacity.

Evidently, the incidence of this mechanism on the building of WAEMU’s common market is several.

This principle of mutual recognition permits a best celerity of the passing process of procurement, by growthing the credit capacity absorption of the contractors authorities, in the extent that it is ask to the community’s enterprises to justify their administrative regularity towards the legislation of their own national state and based on the authentic certificates delivered by the official organism of their origin countries. It is no more required to the bidders to produce the bidding documents of the member’s states in which they envisage to bid but only those of their own origin country. This accelerates considerably the passing process.

This principle reduce, or even eliminate the barriers to trade exchanges and freedom of circulation, because each enterprise installed in WAEMU's space is admitted to participate at the competition for win a procurement contract in the whole members states by staying in their origin country. It is no more require creating an affiliated firm in the member's state where they expect to bid.

- *The mutual recognition participates at the elimination of the measures which are able to shackle the free economic circulation consecrated by the treaty of Dakar ;*
- *The celerity of passing process of procurement contracts ;*
- *The growth of credit absorption capacity of contractor authorities by elimination the shackle to the economic and trading exchange.*

#### **6) The principle of community preference in public procurement**

The principle of community preference foresee at the section 2 of the directive N° 04 impose to the members states the interdiction of any measure based on the nationality of the bidders which can constitute a discrimination against the ressortissants of a members state of WAEMU.<sup>22</sup>

However, a positive discrimination is authorized at the benefit of the community's enterprises during the assessment of bids.

Indeed, the section 62 of the procurement directive dispose that during a process of passing procurement contracts, a preference of an amount maximum of 15% must be given to a bid presented by a community entrepreneurship.

This principle was transposed in the new procurement code of the member's states and has the aim to give an advantage enterprises

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<sup>22</sup> *Rapport de la conférence sur les marchés publics en Afrique, op. cit., p. 81. V. P. BRUNELLI, op. cit. p. 99. V. en ce sens CJCE, 15 janvier 1998, Aff.C-44/96, Mannesmann Anlagenbau Austria e. a., Rec. p. I-173, points 33 et Le droit des marchés publics : dix ans de jurisprudence, 1988-1998. par S. BRACONNIER, op. cit., p. 29, n° 76, CJCE, 22 juin 1993, Commission c/ Danemark, op. cit. p. I-3397, CJCE, 18 juin 1985, P. Steinhäuser c/ Ville de Paris, March. publ., 1986, n° 218, p. 6.*

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installed in any member's state in relation to the foreigner enterprises.

She constitute an increase in value for the common market because could permits to favor the intracommunities exchanges by promoting the regional enterpriship.

- *Primacy of the intracommunity trading exchanges and the promotion of the regional enterprises by a best redistribution of the growth of products.*

#### **7) Incidences of the reform on the field of competition**

The outputs of the procurement rules harmonization are several.

Beyond the increasing of the exchanges between the regional actors, the effectiveness of the legal framework will permit, through the reinforcement of the respect of the fundamental principle of procurement, to suppress anti-competitive arrangements and agreed practices between the enterprises which have the objective to shackle the free competitive game of the competition in the WAEMU's AREA in conformity to the Section 88 of the treaty of Dakar.

This avoids also the practices of several enterprises on the market which can be assimilating to an abuse of dominant position.

- *Suppression the anti-competitive arrangements and agreed practices between the enterprises which have the objective to shackle the free competitive game of the competition in WAEMU ;*
- *Avoid the practices of abuse of dominant position from enterprises.*

#### **8) The regional mechanism of community appeal in procurement**

The appraisal report of the project of reform of public procurement in WAEMU, have the main objective in the medium term, to create at a regional level a mechanism of non-jurisdictional appeal traced, in the

great line, on the model which is exist near the National Regulation Public Procurement Authorities (NRPPA).<sup>23</sup>

It is a matter to institute a technic of precontractual appeal which is suspensive of the passing process during a certain delay, in order to permits to the WAEMU's Commission to take a decision for the settlement of the litigation.

It will consist to institute an appeal possibility from of this non jurisdictional organ of appeal in the Commission for the procurement contract which reach the community's thresholds.

It's a matter of respect the exigency of the parallelism of form and principle. Indeed, if a procurement contract have been published at the community level, his litigation must also been settle at such level by the Commission's organ.

This obligation gives to the economic operators of the members an appreciable way of complaint which is an important pledge of more important participation to the trade and a free and fair competition at the community level necessary for the consolidation of the common market of WAEMU.

- *Credibility of the national procurement system which is able to growth the intracommunity private investment by giving to the bidders evicted from the passing process a non-jurisdictional way of appeal in order to explain their complaints.*

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<sup>23</sup> CJCE, 19 sept. 1996, aff. C-236/95, Commission c/ République hellénique, op. cit., p. 4459. V. par exemple CE, Ass., 10 juin 1994, Cne de Cabourg, RFDA 1994, 728, concl. LASVIGNES. V. CJCE, 28 octobre 1999, aff. C-81/98, Alcatel Austria AG e. a. c/ Bundesministerium für Wissenschaft und Verkehr, Rec. p. 7671. V. aussi TA de Besançon, 14 avril 1994, Groupement d'entreprises Bigoni-SMBT-Livera, RFDA 1994, 747, concl. F. MALLOL.

### OUTLOOK

The reform of public procurement is a pertinent illustration of the beginnings of the raising of the public business of law in WAEMU's space which, in addition to classic public procurement contract, will apprehend the contract of PPP in order to growth the regional trade exchange between the members states.

This ultimate result will be measured according to the capacity given to an regional enterprise to bid in a procurement process in the whole members states countries, by being in the similar conditions or not worse than the conditions of his origin country.

Indeed, the public procurement will transcend the frontlines the day when really, could bid at the open tenders enterprises implanted at home, in the whole members states of WAEMU, by being perfectly immerged in the local or national economic network.

## REFERENCES

1. Directive n°02/2000/CM/UEMOA, June on 29th 2000 about “*Public finance and transparence Code in WAEMU*”;
2. Ministers Council of WAEMU in “*Conception Document of public procurement project reform in WAEMU*” adopted in Dakar june 29th 2000;
3. P. BRUNELLI, « *Public procurement and European Union* », col. *Références européennes*, Ed. Continent Europe ;
4. *Report of the african conference on public procurement organized from 30 november to 04 december 1998 in Abidjan (Côte d’Ivoire)* by AFDB, WB, CCI, de la CNUCED, UNDP and l’OMC, international : <http://www.intracen.org/ipsms/tools/abidjan.pdf>;
5. V. WAYNE A. WITTIG, *Building Value trough the procurement: focus on Africa*, UNCTAD/WTO, 1999, p. 8 on [www.intracen.org](http://www.intracen.org) (UNICITRAL).;
6. Alphonse MATTERA, « *Public procurement : the last rempart of the states protectionism* », RMUE, 1993, n° 3;
7. *Commission of WAEMU « Community strategy of capacity building in public procurement document » 2011.*
8. S. BRACONNIER, *Droit des marchés publics, Imprimerie nationale, Ed. Techniques, col. Essentiels-experts*, 2002, p. 43. CJCE, 17 sept. 1998,
9. *Commission C/ Royaume de Belgique. Aff. C-323/96 : BJCP n°2/1999 p. 209, Rec. 276437, 1998, p. I-5063. CJCE, 17 sept. 1998,*
10. *Commission C/ Royaume de Belgique, op. cit., p. I-5064. CJCE, 20 sept. 1988,*

11. *Gebroeders Beentjes BV*, aff 31/87, Rec. p. 4635, p.p.11-13.
12. CJCE, 17 sept. 1988, *Commission C/ Royaume de Belgique*, *op. cit.*, point 28.
13. F.-X. FORT, « La coopération intercommunale et le principe de libre administration » in *Dr. adm.* Ed. du *Juris-classeur*, Fév. 2003 , p. 12. <sup>1</sup> CJCE, 20 sept. 1988,
14. CJCE, 17 sept. 1988, *Commission C/ Royaume de Belgique*, *op. cit.*, point 28.
15. A. LOADA « La décentralisation en Afrique francophone, où en est-on ? » in *Marchés tropicaux* n° 3000, du 9 mai 2003, p. 979.
16. Groupe de la Caisse française de développement, *Privatisation et développement*, *La documentation française*, col. *Les notes*, Paris, 1997, p. 49 et s.
17. F. BAMBOU, « Le financement et la gestion des services de base en question » (en Afrique) in *Marchés tropicaux* du 19 déc. 2003, p. 2649.
18. CE, Ass. 5 mars 2003, *Ordre des avocats à la Cour d'appel de Paris*, *Juris-Data* n°2003-064978, *Dr. adm.* Mai 2003, p.23, note A. MENEMENIS.
19. J.-P. THERON « Etablissements publics », *J.Cl. adm.* Fasc. N° 35, n° 1 et « recherches sur la notion d'établissement public », *LJDG*, 1976, p. 99 et s.
20. R. DRAGO, *Les crises de la notion d'établissement public*, Pédone, 1950.
21. F. MELLERAY, « La nouvelle crise de la notion d'établissement public, la reconnaissance d'autres personnes publiques spécialisées », *op. cit.*, p.714

22. CE, Ass. Avis n° 363934, *EDCE* 2000, n° 51, p. 211, *Les grands avis du Conseil d'Etat*, Dalloz 2<sup>ème</sup> éd., 2002, n° 43, comm. Y. GAUDEMET ;
23. CE, 22 mars 2000, *Syndicat national autonome du personnel de la Banque de France*, in *AJDA* 2000 , p. 410 et s. chron.
24. Cass. 1<sup>ère</sup> civ. 5 fév. 2002, *Banque de France c/ Société Edition Catherine Audval*, note C. TOUBOUL).
25. CE, Sect., avis, 8 nov. 2000, *Société Jean-Louis Bernard Consultant*, *RFDA* 2001, p. 112, Concl. BERGEAL, *AJDA* 2000, p. 1066, chron. COLLIN et GUYOMAR, *CJEG* 2001, p. 58, note DEGOFFE et DREYFUS ; G. ECKERT,
26. v. Note LACHAUME sous CE, Sect., avis, 8 nov. 2000, *Société Jean-Louis Bernard Consultant*, in *Droit administratif : les grandes décisions de la jurisprudence*, PUF, *Thémis*, 13<sup>ème</sup> éd., p. 381 et s.
27. Directive 93/37/CEE du juin 1993 portant coordination des procédures de passation des marchés publics de travaux.
28. Concl. S. ALBER sur CJCE, 10 mai 2001, Aff. C-223/99 et C-260/99, *Agorà et Excelsior Rec.* p. I-3605, point 70.
29. CAA de Bordeaux, 18 février 2003, *Commune de Bayonne*, *op. cit.*
30. CJCE, 12 déc. 2002, *Universale-Bau AG*, aff. C-470/99, *Droit adm.* 26 fév. 2003, p. 26, note MENEMENIS, *Contr. et march. publ.* mars 2002, p. 22 note ECKERT.
31. CJCE, 15 janvier 1998, Aff.C-44/96, *Mannesmann Anlagenbau Austria e. a. c/ Strohal Rotationsdruck Gesmbh* , R. p. I-173, points 25.
32. CJCE, 12 déc. 2002, *Universale-Bau AG*, aff. C-470/99, *Droit adm.* 26 fév. 2003, p. 26.

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33. CJCE, 19 mai 1993, *Paul Corbeau*, aff. C-320/91, Rec. p. 2533, *AJDA* 1993, p. 865.
34. Conseil de la concurrence, Avis n°94-A-15 du 10 mai 1994, rapp. d'activité 1994 ann. 92, p. 632.
35. CJCE, 27 février 2003, Aff. C-373/00, *Adolphe Truley GmbH in AJDA* du 23 juin 2003, p
36. CJCE, 15 janvier 1998, Aff.C-44/96, *Mannesmann Anlagenbau Austria e. a.*, Rec. p. I-173, points 21 et 38, v. aussi *Le droit des marchés publics : dix ans de jurisprudence, 1988-1998*. Une sélection de 600 arrêts commentés par S. BRACONNIER, Ed. du *juris-Classeur*, n° hors série déc. 1998, p. 29