
OPINION N°01/2018

**Request for an opinion from the President of the WAEMU
Commission on Additional Protocol No I/2009/CCEG/UEMOA of 17
March 2009 amending Additional Protocol No III/2001 establishing
rules of origin for WAEMU products, registered at the Registry under
number 17/DA002 of 27 June 2017.**

The President of the WAEMU Commission referred the matter to the WAEMU Court of Justice by letter No. 03-815/PC/DMRC/DMRUD of 21 June 2017, registered in the Cabinet of the President of the Court under No. 206 on 27 June 2017, which reads as follows:

Madam President,

With a view to improving the rules of origin and increasing intra-Community trade, a study has been carried out by the WAEMU Commission. In its conclusions, the study recommends, among other things, improving the regulatory framework by amending Article 8 of Additional Protocol III/2001 establishing the rules of origin for WAEMU products. This article excludes goods manufactured under economic suspensive arrangements from Community origin and the associated benefits.

In response to this recommendation, Additional Protocol No I/2009/CCEG/UEMOA of 17 March 2009 amending Additional Protocol No III/2001 establishing rules of origin for UEMOA products was adopted on 17 March 2009. Article 1 of the Protocol states:

Article 8 new :

- a) *"Goods processed under special arrangements involving supervision or partial or total exemption from import duties on inputs cannot, under any circumstances, benefit from the status of originating industrial products and the advantages attached thereto.*
- b) *goods processed under customs procedures with economic impact or suspensive arrangements do not benefit from originating industrial product status and the associated advantages.*

However, they will be able to benefit from originating industrial product status and the associated advantages if the duties and taxes payable on the materials used in the manufacturing process have been paid.

c) *an implementing regulation will determine, after consulting the experts, the detailed rules for applying the above provisions relating to products obtained under suspensive arrangements.*

d) *The provisions of Article 8 a) and 8 b) do not apply to goods benefiting from the procedures laid down for products obtained from inputs that are more heavily taxed than their finished products".*

During the examination of the draft implementing regulation provided for in the new Article 8 c) by the Commission's Directors of Cabinet, irregularities were pointed out with regard to this new Article 8 and Article 3 of Additional Protocol No. I/2009/CCEG/UEMOA of 17 March 2009.

1°) *The new Article 8-c) provides for the adoption of Implementing Regulations, after consulting the statutory experts, to determine the procedures for applying the new Articles 8 a) and 8 b). The irregularity lies in the fact that the Additional Protocol, which is the responsibility of the Conference of Heads of State and Government, instructs the Commission to adopt Implementing Regulations without going through the Council of Ministers.*

This opinion is based on the understanding that Implementing Regulations fall exclusively within the competence of the Commission.

However, another viewpoint is that the Implementing Regulations

do not fall within the exclusive competence of the Commission since Article 24 of the Treaty states that "the Council may delegate to the Commission the adoption of regulations for the implementation of acts adopted by the Council".

This is therefore an option open to the Council of Ministers, which may also adopt Implementing Regulations if it so wishes. It should be noted, however, that to date the Council of Ministers has never adopted any Implementing Regulations.

2) Article 3 provides that "this Additional Protocol, which shall enter into force as from the adoption of the Implementing Regulation referred to in the new Article 8 above, shall be published in the Official Journal of the Union".

The irregularity would consist in making the entry into force of Additional Protocol No I/2009/CCEG/WAEMU, a higher-ranking text, conditional on the adoption of a lower-ranking Implementing Regulation. Another view is that the Additional Protocol may allow itself the conditionality provided for its entry into force, by virtue of its rank.

In view of the above, the opinion of the Court of Justice is required to determine the legality of Additional Protocol No I/2009/CCEG/UEMOA of 17 March 2009".

The Court sitting in General Consultative Assembly under the chairmanship of Mrs Joséphine Suzanne EBAH-TOURE, President of the Court, on the report of Mrs Victoire Eliane ALLAGBADA JACOB, Judge-Rapporteur, in the presence of :

- Mr Salifou SAMPINBOGO, Judge ;
- Mr Daniel Amagoin TESSOUGUE, Judge ;
- Mr Euloge AKPO, Judge ;
- Mr Augusto MENDES, Judge ;

And assisted by Maître Boubakar TAWEYE MAIDANDA, Registrar of the Court, at its sitting of 13 March 2018, following those of 28 February and 06 March 2018, considered the above application:

THE CONSULTATIVE GENERAL MEETING

Having regard to the Treaty of the West African Economic and Monetary Union (WAEMU) dated 10 January 1994 as amended on 29 January 2003;

Having regard to Additional Protocol No. 1 relating to the supervisory bodies of the WAEMU ;

Having regard to Additional Act n° 10/96 on the Statute of the WAEMU Court of Justice dated 05 July 1996 ;

Having regard to Regulation n°01/96/CM on the Rules of Procedure of the WAEMU Court of Justice dated 05 July 1996;

Having regard to Regulation n°01/2012/CJ of 21 December 2012 repealing and replacing Regulation n°01/2010/CJ on the Administrative Rules of the Court of Justice of the WAEMU ;

Having regard to the letter requesting an opinion No. 03/845/PC/DMRC of 21 June 2017 from the President of the Commission;

Having regard to the observations of the Ministry of the Economy, Finance and Planning of the Republic of Senegal dated 23 August 2017;

Having regard to the observations of the Ministry of the Economy, Finance and Planning of the Republic of Mali dated 23 August 2017;

Having regard to the observations of the WAEMU Court of Auditors dated 19 July 2017;

Having regard to BCEAO's comments dated 11 September 2017;

IN THE SHAPE

The request for an opinion addressed to the Court of Justice, as it results from the letter from the President of the WAEMU Commission, is based on the provisions of Article 27 in fine of the Statutes of the said Court and Article 15.7 of the Rules of Procedure of the WAEMU Court of Justice.

This request, duly submitted, is admissible in form.

AT THE BOTTOM

I. SUBJECT OF THE CONSULTATION

It follows from the letter from the President of the Commission that the Court's opinion is requested in order to clarify the divergent positions of the Directors of Cabinet when examining the draft implementing regulation provided for in the new Article 8(c) of Additional Protocol No 1/2009/CCEG/UEMOA amending Additional Protocol No 11/2001 of 17 March 2009 establishing rules of origin for UEMOA products.

The differences are twofold:

1. the first divergence relates to the understanding of the new Article 8-C), where two points of view have emerged. The first view is that implementing regulations fall exclusively within the remit of the Commission, so it is normal for the Conference of Heads of State and Government to instruct the Commission to adopt implementing regulations. The second view is that implementing regulations do not fall within the exclusive remit of the Commission, since Article 24 of the Treaty states that "the Council may delegate to the Commission the adoption of regulations for the implementation of acts which it issues";
2. the second difference relates to the entry into force of the Additional Protocol. Article 3 of the said Protocol states in extenso: ***"this Additional Protocol, which shall enter into force as from the adoption of the Implementing Regulation referred to in the new Article 8 referred to above, shall be published in the Official Journal of the European Union"***. The Commission notes an irregularity in that a lower-ranking text conditions the entry into force of a higher-ranking text.

II. DISCUSSION

The Commission seeks the opinion of the Court of Justice on the differing views on the interpretation of Articles 8(c) (new) and 3 of the Treaty.

Additional Protocol No. I/2009/CCEG/UEMOA of 17 March 2009 amending Additional Protocol No. III/2001 establishing rules of origin for UEMOA products.

Examination of the letter requesting an opinion gives rise to the following observations:

2.1. INTRODUCTORY REMARKS

The additional protocols are instruments annexed to the WAEMU Treaty. They have the same legal nature as the latter in that they are an integral part of the said Treaty. As such, the Commission cannot submit to the Cour de céans, even through a request for an opinion, the assessment of the legality of an Additional Protocol enacted by the Conference of Heads of State and Government.

2.2. EXAMINATION OF THE FIRST POINT OF THE REQUEST FOR AN OPINION

Additional Protocol No. I/2009/CCEG/UEMOA of 17 March 2009 forms a whole with that of 19 December 2001 (No. III/2001 establishing the rules of origin for UEMOA products).

The Court draws the Commission's attention to the fact that the Protocol was amended following the recommendations of the Council of Ministers at its meeting on 15 March 2009 (see last citation of the Protocol).

The Court notes that nowhere in the Protocol is it stated that the Commission is instructed to adopt an Implementing Regulation. Article 8(C) provides that: ***"An Implementing Regulation shall determine, after obtaining the opinion of experts, the detailed rules for the application of the above provisions relating to products obtained under suspensive arrangements"***.

Article 24 of the Treaty states that: ***"The Council may delegate to the Commission the adoption of regulations for the implementation of acts which it issues. Such implementing regulations shall have the same legal force as***

the acts for the execution of which they are made". It is clear from the last citation of the Protocol that it was on the recommendation of the Council of Ministers that the Conference of Heads of State and Government adopted the Protocol. It is therefore for the Council to refer the matter to the Commission in accordance with Article 24 of the Treaty with a view to delegating competence. The Commission does not act on its own initiative. The second indent of Article 26 of the Treaty states that "it shall exercise, by express delegation from the Council and under its supervision, the power of implementation of acts adopted by the Council". Thus the legal procedure for adopting the Implementing Regulation is in no way called into question by the new Article 8-c) of the said Protocol.

2.3. EXAMINATION OF THE SECOND POINT OF THE REQUEST FOR AN OPINION

It emerges from the Commission's letter that the second divergence relates to the entry into force of the additional protocol insofar as it is conditional on the adoption of a lower-ranking text, in particular an implementing regulation.

In the Court's view, there is no irregularity in making the entry into force of the Protocol conditional on the adoption of the Implementing Regulation, since Article 45 of the Treaty gives this possibility by providing that ***"additional acts, regulations, directives and decisions shall be published in the Official Journal of the Union. They shall enter into force following their publication on the date specified therein. Decisions shall be notified to those to whom they are addressed and shall take effect from the date of notification"***.

In the Court's opinion, the date will be that of the adoption and publication of the Implementing Regulations.

CONCLUSION

Consequently, the Court, acting as a Consultative General Assembly, is of the opinion that :

In form :

The Commission's request for an opinion is admissible;

Background:

1. The Commission may not submit to the Court, even by way of a request for an opinion, the assessment of the legality of an Additional Protocol enacted by the Conference of Heads of State and Government;
2. Under the terms of Article 26 of the Treaty, the Commission shall exercise, by express delegation from the Council and under its supervision, the power of implementation of the acts adopted by the Council;
3. legal instruments enter into force after their publication on the date specified in them (see Article 45 of the Treaty). There is no need to analyse the hierarchy of norms as set out in the letter requesting the opinion.

And signed by the President, the Judge-Rapporteur and the Registrar.

Illegible signatures follow.
Ouagadougou, 24 April 2018

The Registrar

Boubakar TAWEYE MAIDANDA