

**EXTRACT FROM THE MINUTES OF THE
REGISTRY**

UEMOA COURT OF JUSTICE

PUBLIC HEARING OF 12 JANUARY 2005

Ruling no. 02/05

Case

Composition:

Mr Yves D. YEHOUESSI, Chairman
Mrs Paulette B. EZOUEHU, Judge-Rapporteur
Mr Mouhamadou NGOM, Judge
Mr Malet DIAKITE, First Advocate General
Mr Raphaël P. OUATTARA, Registrar

Le Groupement de Développement Economique d'Intervention et de Réalisation des Investissements GDEIRI-SA sis à la place Naba Koom Ouagadougou, 01 BP 4402, représenté par son Administrateur Monsieur Mamadou SANFO, ayant pour conseil Maître SERE/SANFO Ramata, Avocat à la Cour - 05 B.P. 6098 OUAGADOUGOU 05

on the one hand ;

Application for assessment of legality

And

The Commission of the West African Economic and Monetary Union (UEMOA), whose registered office is at Ouagadougou, 01 B.P. 543, represented by its legal representative Mr Soumaïla CISSE, its President, represented by Mr Eugène KPOTA, assisted by Maître Harouna SAWADOGO, Avocat à la Cour - 01 B.P. 4091 Ouagadougou 01

on the other hand ;

L A C O U R

HAVING REGARD TO the application dated 13 October 2003 submitted on behalf of Groupement Economique d'Intervention et de Réalisation des Investissements (GDEIRI/SA) by Maître SERE/SANFO Ramata, Avocat à la Cour, application registered at the Court Registry on the same day under No 05/03;

HAVING REGARD TO correspondence No 3783/PC/CJ of 11 August 2003 from the President of the WAEMU Commission;

HAVING REGARD TO the letter dated 22 December 2003 appointing Mr Eugène KPOTA as Agent of the WAEMU Commission in the case of ;

HAVING REGARD TO the letter dated 22 December 2003 appointing Mr Harouna SAWADOGO to represent Mr Eugène KPOTA before the Court;

HAVING REGARD TO the statement of defence of the WAEMU Commission dated 9 February 2004;

HAVING REGARD TO the applicant's reply of 13 April 2004;

HAVING REGARD TO the defendant's rejoinder dated 29 April 2004 ;

HAVING REGARD TO the applicant's rejoinder dated 25 June 2004 ;

HAVING REGARD TO the other documents produced and attached to the file;

HAVING REGARD TO the WAEMU Treaty, in particular Article 38 ;

HAVING REGARD TO Additional Protocol I on the supervisory bodies of the WAEMU, in particular Articles 1, 8, 9 and 10 ;

HAVING REGARD TO Additional Act n° 10/96 of 10 May 1996 on the Statutes of the WAEMU Court of Justice;

HAVING REGARD TO Regulation No. 01/96/CM of 5 July 1996 on the Rules of Procedure of the WAEMU Court of Justice;

YES Mrs Paulette BADJO EZOUERU, Judge-Rapporteur, in her report ;

YES Maître SERE/SANFO Ramata Lawyer for GDEIRI/SA, in her oral observations;

YES Mr Issa SAMA, deputising for Mr Harouna SAWADOGO, Counsel for the Commission, in his oral observations;

YES Mr Malet DIAKITE, First Advocate General, in his Opinion ;

Having deliberated in accordance with Community law :

Whereas by application dated 13 October 2003, registered on the same day at the Registry of the WAEMU Court of Justice under No 05/03, the Groupement de Développement Economique d'Intervention et de Réalisation des Investissements (GDEIRI/SA), through its counsel Me SERE/SANFO Ramata, Avocat à la Cour de Ouagadougou, Burkina Faso, brought an action for assessment of the legality of Decision No 3783/PC/CJ of 11 August 2003, seeking, firstly, annulment of that decision by which the Commission refrained from intervening in the dispute between GDEIRI/SA and the State of Niger and, secondly, an order from the Commission requiring the State of Niger to comply with its contractual obligations;

I. FACTS AND PROCEDURE

Whereas the facts and arguments put forward by the parties during the written procedure can be summarised as follows:

The Groupement de Développement Economique d'Intervention et de Réalisation des Investissements (GDEIRI/SA) represented by its Director, El Hadj Mamadou SANFO and his Counsel Maître Mamadou SAWADOGO on the one hand and the Government of the Republic of Niger on the other hand represented by its Minister of Finance and Planning, Mr Almoustapha SOUMAILA and the Counsel of the State of Niger, Maître Marc le BIHAN, have signed respectively :

- on 19 May 1995, an agreement to finance and build five thousand five hundred (5500) social housing units for the Republic of Niger;
- on 22 June 1997, a Memorandum of Understanding for the supply of 2,500 metric tonnes of rice to the State of Niger.

GDEIRI/SA, explains that since the signature of these two agreements, all attempts to approach the Administration of the Republic of Niger have been in vain and that the highest authorities of Niger, the President of the Republic, the Prime Minister and the Minister of Finance and Planning of the Republic of Niger, have been unable to reach an

agreement.

of Niger, have so far not deigned to reply to the various letters sent to them.

On 27 June 2003, by letter no. MS/SAT/001/U.BF/03, the President of the WAEMU Commission with a complaint s e e k i n g , on the one hand, to set up a meeting between the contracting parties in difficulty as a result of the silence of the State of Niger so that the latter breaks its silence and implements the two agreements binding them and, on the other hand, in the event that the State of Niger fails to comply with these agreements, to be able, through the intermediary of the President of the Commission, to set out its claims as follows:

a) Agreement of 19 May 1995, payment of :

- 5% of the total amount of the Agreement to cover design and architectural costs;
- 25% of the amount of the Agreement signed on 19 May 1995, defined as the profit that GDEIRI/SA was entitled to expect if the Agreement were applied;
- 17.5% business development loss on the total amount of the Agreement from the date of signature to the date of resolution of the dispute;
- 12% interest on arrears on :
 - 1) the expected benefits of the Agreement ;
 - 2) business development damages from the date of signature of the Agreement until the date of resolution of the dispute;

b) On 22 June 1997, GDEIRI/SA signed a memorandum of understanding claiming payment of the balance of sales and the application of 17.5% in damages for loss of value on business development;

on the outstanding balance and its commercial development damages, the application of 12% default interest from the date of signature of the Memorandum of Understanding until the date of resolution of the dispute.

The claimant points out that his complaint dated 27 June 2003 was based on the following legal provisions: articles 3, 4, 7, 64 76, 79, 83 88, 92, 93, 96, 97, 99, 100 of the WAEMU Treaty.

He added that, despite the above provisions, he had received a reply on 11 August 2003 by letter no. 3783/PC/CJ from the President of the Commission declining jurisdiction over the case.

According to GDEIRI/SA, the President should have taken the necessary measures to ensure that the State of Niger complied with Community rules. Although Niger had signed two agreements, it had not yet taken any steps to comply with them.

According to GDEIRI/SA, this attitude on the part of the State of Niger constitutes a breach of Community law, which is why it is seeking the annulment of the contested decision, which it considers to be illegal.

The application was served on the President of the WAEMU Commission by letter from the Registrar of the Court dated 08 December 2003.

By letter dated 22 December 2003, the President of the Commission informed the Court of the appointment of his Agent in the person of Eugène KPOTA, Legal Adviser to the Commission.

By letter dated 26 December 2003, Mr Harouna SAWADOGO informed the Court of his appointment to defend the Commission's interests.

II. SUBMISSIONS OF THE PARTIES

GDEIRI/SA claims that the Court should:

*** in the form**

- declare his action for annulment admissible as having been brought within the legal time limits;

*** at the back**

- declare founded the action for annulment of Decision No 3783/PC/CJ of the WAEMU Commission;
- purely and simply annul the decision taken on 11 August 2003;
- declare that the dispute falls within the scope of Community law and therefore within the competence of the Commission;
- order the Commission to enjoin the State of Niger, a High Contracting Party of the Union, to comply with the provisions of the Treaty and its subsequent texts;
- invite the State of Niger to continue to implement the contract binding it to GDEIRI/SA;
- failing this, invite the State of Niger to terminate the contract binding it to GDEIRI/SA with all the financial consequences set out in letter no. MS/SAT/001/U.BF/03 dated 27 July 2003, pages 4 and 5 under the heading "claims and demands", addressed to the President of the WAEMU Commission;

The Commission claims that the Court should:

*** In the main
proceedings**

Declare the action brought by GDEIRI/SA inadmissible by reason of the nature of the contested measure;

alternatively

declare the said action inadmissible on grounds of foreclosure;

*** In the alternative**

dismiss GDEIRI/SA's claim as unfounded.

III. PLEAS AND ARGUMENTS OF THE PARTIES

A. Admissibility of the action

a) Pleas in law and arguments of the Commission

By memorandum dated 9 February 2004, the Commission argued that the present action was an action for assessment of legality governed by Article 8 of Additional Protocol I and Article 15(2) of the Rules of Procedure.

It maintains that this remedy is based on principles relating to the status of the applicants, the nature of the contested measure and criteria relating to the means and time limits.

In the present case, it notes first of all that Decision no. 3783/PC/CJ of 11 August 2003 cannot be challenged because it has no legal effect, i.e. it does not alter the existing legal system.

It then points out that GDEIRI/SA's action for annulment is still inadmissible as time-barred because it was brought on 13 October 2003, i.e. more than two months after the decision was notified on 11 August 2003.

In this respect, the Commission would point out that under the terms of Article 8 paragraph 3 of Additional Protocol I relating to the supervisory bodies of the WAEMU, appeals must be lodged within two (2) months of the publication of the act, its notification to the applicant or, failing that, the day on which the applicant became aware of it.

b) Pleas in law and arguments of the applicant

In her reply dated 13 April 2004, Maître SERE/SANFO Ramata, on behalf of the applicant, stated that the appeal was admissible until 13 October 2003, given that the last day of the deadline, 12 October, was Sunday.

She explains that under the provisions of article 69 paragraph 1, e) of the Rules of Procedure of the Court of Justice, when the time limit expires on a Saturday, Sunday or public holiday, the expiry date is postponed to the end of the next working day.

It considered that in the present case, as the time-limit had expired on Saturday 11 October 2003, the applicant was entitled to lodge his appeal on the next working day, which was 13 October.

As regards the second plea of inadmissibility relating to the nature of the contested measure, the applicant maintains that letter No 3783/PC/CJ of 11 August 2003 from the WAEMU Commission is a measure that can be challenged by an action for annulment as being prejudicial to his interests; the Commission having, according to him, the power to intervene in the dispute between him and the State of Niger.

It considers that the provisions of Article 18 of the agreement between GDEIRI/SA and the State of Niger do not provide sufficient justification for the Commission's refusal to interfere in a dispute between two subjects of Union law in areas in which the Union has exclusive competence to intervene and in which the Commission has decision-making powers.

B. Background

a) Pleas in law and arguments of the applicant

The applicant submits that the Commission's decision is unlawful in that it infringes various provisions of the Treaty relating to fundamental rights, the common economic policy, freedom of movement and competition.

In his view, the Commission should have taken steps to ensure that the State of Niger complied with the provisions of the Treaty that it had breached.

With regard to the principle of free competition, the applicant relies on the provisions of Article 88(b) of the Treaty to claim that the State of Niger, by virtue of its conduct characterised by unjustified silence, is indulging in a dominant position.

In fact, GDEIRI/SA believes that the State of Niger unquestionably has a leading role in the implementation and execution of the agreement that binds them; the State of Niger being the only legal entity under public law authorised to undertake and promote such a project.

extensive housing programme and to define in this programme the housing needs of Niger's armed forces (article 3 of the agreement).

b) Pleas in law and arguments of the Commission

The Commission notes that the applicant has not put forward any legal arguments on which to base his appeal.

It adds that, on analysis, no plea of illegality, whether external (incompetence of the body that took the contested decision, formal defects that vitiated the contested decision) or internal (misuse of powers, infringement of the Treaty and of the acts adopted to implement it), can be validly raised.

It also asserts that the plea of abuse of a dominant position is inoperative and that this concept in no way meets the criteria defined by Article 88 of the WAEMU Treaty and Regulations Nos 02 and 03/2002/CM/UEMOA of 23 May 2003.

Finally, it considers that the solution to the dispute lies in Article 18 of the agreement for the financing and construction of 5,500 social housing units, which stipulates that *"Any dispute concerning the performance or interpretation of this agreement shall be settled amicably. Failing amicable settlement, the dispute shall be finally settled by arbitration of the International Chamber of Commerce"*.

Whereas at the hearing on 15 December 2004, the parties developed the arguments set out during the written procedure;

Whereas the First Advocate General delivered his Opinion at the same sitting;

In law

Considering that the Court must first rule on its jurisdiction to hear this case, and then on the admissibility of the action, before examining whether the pleas of the parties as to the substance of the case are admissible;

Considering that the jurisdiction of the Court, in the case of an action for annulment of an act of the Commission, is enshrined in Article 8 of Additional Protocol No. 1 relating to the supervisory bodies of the WAEMU and Article 15 paragraph 2 of Regulation No. 01/96/CM on the Rules of Procedure of the Court of Justice of the WAEMU;

Admissibility

Whereas the Commission maintains that its decision cannot be challenged because it does not create legal effects in the Community legal order;

Considering that it appears from the documents submitted that GDEIRI/SA brought an action for assessment of the legality of the Commission's correspondence rejecting its application to intervene in the dispute between it and the State of Niger;

That the Commission's response to this correspondence was definitive but unsatisfactory for GDEIRI/SA;

Considering that under the terms of Article 15 paragraph 2 of the Rules of Procedure of the Court, "an action for assessment of legality shall be brought against binding Community acts: regulations, directives and individual decisions taken by the Council and the Commission. Such proceedings shall be open to any natural or legal person against any act of a body of the Union adversely affecting that person...".

Considering that it is clear from GDEIRI/SA's request that the Commission's act adversely affects it;

In view of the foregoing, GDEIRI/SA's action based on the illegality of a Community measure is admissible;

The objection raised by the Commission should therefore be dismissed;

Considering that the Commission further maintains that the applicant is barred from bringing an action brought more than two months after notification of the contested measure;

To this end, it is important to recall the provisions of Articles 15(2) and 69(1)(a) and (2) of the Rules of Procedure of the Court:

Article 15 paragraph 2: "An application for review of legality must be made within two (2) months of the publication of the act, its notification to the applicant or, failing that, the day on which the applicant became aware of it".

Article 69

Paragraph 1,a: "If a period expressed in days, weeks, months or years is to be counted from the moment when an event occurs or an act is carried out, the day during which this event occurs or this act is carried out shall not be counted in this period";

Paragraph 2: "If the period ends on a Saturday, Sunday or public holiday, the expiry date is postponed to the end of the next working day.

Considering in this case that the correspondence of the President of the Commission dated 11 August 2003 was notified on the same day to GDEIRI/SA ;

Since the two-month period expired on Sunday 12 October 2003, GDEIRI/SA could validly bring the matter before the Court on 13 October 2003, the next working day;

That the action is therefore admissible because it was brought within the legal time limits;

At the back

Whereas GDEIRI/SA seeks the annulment of the Commission's decision on the grounds that it infringes certain provisions of the Treaty relating to fundamental human rights, the Union's commercial policy and competition;

Considering that the applicant argues to this effect that the complaints made against the State of Niger constitute violations of the Treaty on European Union as provided for in Article 88 and subsequent texts and for which Article 90 of the Treaty empowers the Commission to take decisions;

It maintains that the State of Niger used its dominant position in its contractual relations with GDEIRI/SA, thereby compromising the latter's interests;

Whereas Community competition law, as enshrined in Articles 88 et seq. of the Treaty, applies to undertakings ;

Considering that this concept is spelt out in Annex No. 1 to Regulation No. 03/2002/CM/UEMOA on procedures applicable to cartels and abuses of dominant position within UEMOA, which defines an undertaking as "a unitary organisation of personal elements,... carrying on an economic activity, for remuneration, on a lasting basis, irrespective of its legal status, whether public or private... and enjoying autonomy of decision";

Thus, within the meaning of the EU competition rules, "undertakings may be natural persons... or legal entities not taking the form of a company";

Considering in this sense that the capacity of the State of Niger as a company in its contractual relationship with GDEIRI/SA is not debatable;

Considering that the applicant denounces the abuse of a dominant position by the State of Niger with reference to Community competition law, without providing proof of this;

If we refer to the aforementioned Annex 1, the concept of a dominant position, the abuse of which is sanctioned by the Treaty (Article 88), is defined as the situation where an undertaking has the capacity on the relevant market to avoid effective competition, to free itself from the constraints of the market by playing a leading role in it;

Considering that, in the case in point, the applicant appears to be confusing the concept of public authority constituted by the State of Niger with that of a dominant position under Community competition law;

In any event, only abuse of a dominant position is punishable under Community law;

Considering that the conduct complained of by GDEIRI/SA in its contractual relationship with the State of Niger does not constitute "unilateral practices by undertakings in a dominant position" over which the Commission has supervisory powers;

Consequently, the applicant's claim should be declared unfounded;

Considering further that the applicant requests the Court to order the Commission to enjoin the State of Niger to comply with its contractual commitments;

Considering that it is common ground that the obligations of the parties in this case are covered by two agreements signed on 19 May 1995 and 22 June 1997 respectively;

Article 17 of the agreement of 19 May 1995 states that "this contract is subject to Niger law", while Article 18 of the same agreement states that "any dispute concerning the performance or interpretation of this agreement shall be settled amicably. Failing amicable settlement, the dispute shall be finally settled by arbitration by the International Chamber of Commerce in Paris. The arbitrators shall rule as amiables compositeurs and in accordance with the general principles of international law in matters of international commerce. The arbitration shall take place in Paris, France;

Whereas, therefore, the contract provides for an arbitration clause which is not only binding on the parties but is also binding on the Court and the Commission as regards the free expression of the will of the parties;

Considering the foregoing, it should be said that the Commission rightly declined jurisdiction to hear the dispute between GDEIRI/SA and the State of Niger;

Considering that, in any event, it is not within the competence of the Commission to intervene in an area not covered by WAEMU Community law;

GDEIRI/SA's claims should therefore be dismissed as unfounded;

Costs

Considering that the applicant has been unsuccessful on these grounds ;

Pursuant to Article 60 of the Rules of Procedure of the Court, any unsuccessful party shall be ordered to pay the costs;

GDEIRI/SA should therefore be ordered to pay the costs.

FOR THESE REASONS

The Court, sitting in open court, having heard all the parties, in proceedings for the assessment of legality :

- Declares the action brought by GDEIRI/SA admissible in form;
- Basically, I declare it unfounded;
- Dismisses all of GDEIRI/SA's claims;
- Orders it to pay the costs.

Delivered in open court on the day, month and year indicated above.

And signed by the Chairman and the

Registrar,

For a certified copy Ouagadougou, 25 January 2005

Raphaël P. OUATTARA