

**EXTRACT FROM THE MINUTES OF THE
REGISTRY**

UEMOA COURT OF JUSTICE

PUBLIC HEARING OF 05 APRIL 2006

Ruling No. 01/2006

Case

Composition:

Mr Yves D. YEHOUESSI, Chairman
Mr Youssouf ANY MAHAMAN, Judge-
Rapporteur
Mr Daniel LOPES FERREIRA, Judge
Mr Mouhamadou NGOM, Judge
Ms Ramata FOFANA née OUEDRAOGO,
Judge
Mr Malet DIAKITE, ^{1st} Advocate General
Ms Diénaba WINKOUN née GNANOU,
Deputy Registrar

Mr Eugène YAÏ, UEMOA Commissioner, of
Ivorian nationality, residing in Ouagadougou, who
has elected domicile in the office of Maître Issouf
BAADHIO, Avocat à la Cour, 01 BP 2100
Ouagadougou 01,

on the one hand ;

AND

*Action to assess the legality of Additional
Act No. 01/2005 of 11 May 2005 adopted in
Niamey by the current President of the
Conference of Heads of State and
Government of the WAEMU.*

The Conference of Heads of State and Government
of WAEMU and the WAEMU Commission, each
in the person of its legal representative,
represented by Agent Eugène KPOTA, assisted by
Maître Harouna SAWADOGO and Maître Abdoul
Wahab BERTHE,

on the other hand ;

THE COURT

HAVING REGARD TO the application dated 23 May 2005, lodged on behalf of
Mr Eugène YAÏ, WAEMU Commissioner, of Ivorian nationality, with
an address for service at the Chambers of Maître Issouf BAADHIO,
Avocat à la Cour, registered at the Court Registry on 24 May 2005 under
No 03/05, requesting the Court to annul Additional Act No 01/2005 of 11
May 2005 adopted by the current President of the Conference of Heads
of State and Government;

HAVING REGARD TO Additional Act n° 01/2005 of 11 May 2005 appointing Mr Jérôme BRO GREBE as a member of the WAEMU Commission;

HAVING REGARD TO letters No 18/2005 and No 19/2005 dated 25 May 2005 from the Registrar of the Court, serving the application on the President of the Commission and on the Conference of Heads of State and Government, acting through its legal representative;

HAVING REGARD TO letter No 2744/PC/CJ of 30 May 2005 from the President of the WAEMU Commission appointing Mr Eugène KPOTA as Agent;

HAVING REGARD TO letter No 2745/PC/CJ dated 30 May 2005 from the President of the WAEMU Commission, appointing Mr Harouna SAWADOGO and Mr Abdoul Wahab BERTHE, Avocats respectively at the Court of Ouagadougou and the Court of Bamako;

HAVING REGARD TO the statement of defence of the Conference of Heads of State and Government and the WAEMU Commission dated 22 July 2005;

HAVING REGARD TO the applicant's reply of 25 August 2005;

HAVING REGARD TO the rejoinder of Maître Harouna SAWADOGO dated 28 October 2005;

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

VU the WAEMU Treaty, in particular Article 38 ;

VU the Additional Protocol No. 1 on the supervisory bodies of the WAEMU ;

HAVING REGARD TO Additional Act No. 10/96 of 10 May 1996 on the Statutes of the Court of Justice of the WAEMU ;

HAVING REGARD TO Regulation n° 01/96/CM dated 05 July 1996 on the Rules of Procedure of the WAEMU Court of Justice;

HEARD Mr Youssouf ANY MAHAMAN, Judge-Rapporteur, in his report;

HEARD Mr Issouf BAADHIO, Counsel for Mr Eugène YAÏ, in his oral observations;

HEARD Mr Issa SAMA in place of Mr Harouna SAWADOGO, Counsel for the defendants, in his oral observations;

HEARD Mr Eugène KPOTA, Agent of the Commission, in his oral observations;

HAVING heard the Opinion of the First Advocate General, Mr Malet DIAKITE;

Having deliberated in accordance with Community law ;

The Court hereby gives judgment :

I - FACTS AND PROCEDURE

The facts of the case, as set out by the applicant and not contested by the defendants, are as follows:

By application dated 23 May 2005, registered at the Court Registry on 24 May 2005, Mr Eugène YAÏ, through his lawyer, Maître Issouf BAADHIO, brought an action for assessment of legality against Additional Act No 01 of 11 May 2005 of the Conference of Heads of State and Government of the West African Economic and Monetary Union, which appointed Mr Jérôme BRO GREBE as a member of the WAEMU Commission to replace the applicant.

It should be recalled that Mr Eugène Yaï was appointed Commissioner to the WAEMU Commission following Additional Act n° 01 of 29 January 2003 of the Conference of Heads of State and Government.

By Additional Act No 06 of 15 November 2004 of the same body, his duties were terminated and he was replaced by Mr Jérôme BRO GREBE. This Act was the subject of an appeal for assessment of legality by the applicant and was annulled by the WAEMU Court of Justice by judgment No 03 of 27 April 2005.

Notwithstanding this decision by the Court, the Conference of Heads of State and Government relieved Mr Eugène YAÏ of his duties for a second time by Additional Act No 01/2005 of 11 May 2005.

Following his action for annulment, Mr Eugène YAÏ applied to the Court for a stay of execution of the contested Additional Act. This

The application for a stay was rejected by order no. 05 dated 25 June 2005 of the President of the Court of Justice.

Mr Eugène YAÏ argues in his appeal that his term of office is in progress, that he has not resigned and that no proceedings have been brought before the Court of Justice to have him removed from office in accordance with Article 30 of the Treaty. He therefore considers that the Conference of Heads of State and Government cannot provide for his replacement and that, in the present case, the contested Additional Act constitutes a pure and simple dismissal and a blatant assault.

It seeks the annulment of Additional Act No 01/2005 of 11 May 2005 on the grounds that it infringes Articles 16, 27, 28 and 30 of the WAEMU Treaty.

The action was served on the defendants on 25 May 2005 by the Registrar of the Court.

By letter dated 30 May 2005, the President of the WAEMU Commission informed the Court of the appointment of its Agent in the person of Mr Eugène KPOTA, Legal Adviser to the Commission.

By letters dated 31 May and 16 June 2005 respectively, Maître Harouna SAWADOGO and Maître Abdoul Wahab BERTHE informed the Court of their appointment to defend the interests of the defendants.

On the report of the Judge-Rapporteur, the Advocate General having been heard, the Court decided to open the oral proceedings without prior investigative measures.

II - SUBMISSIONS OF THE PARTIES

Mr Eugène Yaï claims that the Court should:

- In form :
 - declare itself competent,
 - receive him in action.

- Background:
 - declare that its action is well-founded and consequently annul Additional Act No 01/2005 of 11 May 2005 on the grounds that it infringes Articles 16, 27, 28 and 30 of the WAEMU Treaty;
 - order the defendants to pay all the costs.

The defendants claim that the Court should:

- in principal and in form:
 - agree in limine litis to declare that the WAEMU Court of Justice does not have jurisdiction to assess the legality of Additional Act No 01/2005 of 11 May 2005 appointing Mr Jérôme BRO GREBE as a member of the WAEMU Commission;
 - declare Mr Eugène YAI's application inadmissible on the grounds of infringement of Article 9 of the Treaty and Articles 26 and 29 of the Rules of Procedure of the Court of Justice.

- in the alternative, on the merits :

declare the application for assessment of legality to be unfounded;

- as a result :
 - Dismiss all of Mr Eugène YAÏ's claims and pleas in law;
 - order it to pay all the costs.

III - PLEAS AND ARGUMENTS OF THE PARTIES

A. Competence and form

a) Pleas in law and arguments of the defendants

By memorandum dated 22 July 2005, registered at the Court Registry under no. 06/05 on the same day, the Conference of Heads of State and Government and the WAEMU Commission pointed out that an action for assessment of legality against an Additional Act falls outside the jurisdiction of the Court since it is binding on the Court within the meaning of Article 19 of the Treaty. The Additional Act is an act falling within the discretionary power of the Conference of Heads of State and Government which is binding on the organs of the Union and on the authorities of the Member States.

The defendants consider that the Court cannot assess the legality of an act that has authority over it without running the risk of violating the WAEMU Treaty.

They assert that the Additional Act is excluded from the scope of acts subject to an action for assessment of legality and that only "regulations, directives and decisions of an organ" may be challenged before the Court of Cassation.

They point out that while the Court of Justice ensures that the law is observed when interpreting the Union Treaty, it does so on condition that it does not itself violate the Treaty.

The defendants further contend that in the institutional system of the West African Economic and Monetary Union and in accordance with Article 9 of the Treaty, only the Union has legal personality and therefore legal capacity. Consequently, the said action initiated against an Organ of the Union must be directed primarily against WAEMU, represented by the Commission. By having taken action against the Conference of Heads of State and Government of WAEMU represented by the Commission and not against the Union, Mr Eugène YAÏ has not met the requirements of article 9 of the WAEMU Treaty, which renders his application inadmissible.

They also consider that the application contains no details of the persons of the legal representatives of the Conference of Heads of State and Government and of the Commission, and that it has therefore infringed Article 26(2) of the Rules of Procedure of the Court of Justice.

Finally, they point out that the application was not served on the Conference of Heads of State and Government in Niamey, the elected domicile of its current President, and that the Court must declare the application inadmissible for breach of Article 29 of the Court's Rules of Procedure.

b) Pleas in law and arguments of the applicant

Mr Eugène Yaï concludes that the WAEMU Court of Justice has jurisdiction and points out that it is responsible for applying the rules of law when a dispute is brought before it. According to him, this is the substance of Article 9 of Additional Protocol No. 1 relating to the supervisory bodies, which states that "when an action is brought before it for an assessment of legality, the Court of Justice shall declare null and void, in whole or in part, acts that are vitiated by formal defects, lack of competence, misuse of powers, or infringement of the Union Treaty or of acts adopted pursuant thereto".

Thus, any act that does not comply with the Treaty may be annulled or declared invalid; even if the Additional Acts are binding on the Union's bodies, they cannot enjoy jurisdictional immunity.

Mr Eugène Yaï considers that both on the basis of the texts defining the jurisdiction of the Court and on the basis of Article 19 of the Treaty, the Additional Act cannot escape the jurisdiction of the Court of Justice. This is because the Additional Act in question is an individual act, and it is a general principle common to all WAEMU Member States that any individual act that gives rise to a complaint may be referred to the administrative courts for censure. Any act of a WAEMU body that gives rise to a complaint against an individual may also be referred to the WAEMU Court of Justice.

c) Defendants' Reply

In their rejoinder dated 28 October 2005, the defendants point out that, contrary to the applicant's claims, there is no analogy between them.

cannot be established between the Additional Act and the other categories of acts provided for in the WAEMU Treaty.

The provisions of Article 19 of the Treaty, according to which "the Additional Acts shall be annexed to the Treaty ... and their observance shall be a duty incumbent on the organs of the Union and on the authorities of the Member States", have not been included in any provision relating to the other acts of the organs of the Union.

It follows that while the Regulations, Directives and Decisions may produce their full effects, while being subject to possible actions for annulment before the WAEMU Court of Justice, the Additional Act is not. It is unassailable by nature, because it is binding on the Organs of the Union, and therefore on the Court itself.

The defendants further state that the application of Mr Eugène YAÏ must be declared inadmissible for lack of standing of the Conference of Heads of State and Government, because the Additional Acts being by essence acts of the Union, any recourse against such acts must be directed against the Union represented by its implementing body which is the WAEMU Commission.

They maintain that the Additional Acts fall outside the jurisdiction of the Court of Justice because, in accordance with the provisions of Articles 19 and 44 of the Treaty, they are binding on the organs of the Union and on the Member States; that they are comparable to acts of government and enjoy genuine jurisdictional immunity.

They also state that, under Article 27 of the Court's Statutes, "the Court shall have jurisdiction in particular to hear actions for annulment of

Regulations, Directives and Decisions of the WAEMU Organs, as provided for in Articles 8 et seq. of Additional Protocol No. 1".

They consider that by not listing the Additional Act among these acts, Article 27 of the Court's Statutes expressly exempts it from the review of legality by the WAEMU Court of Justice.

d) Applicant's response

In his reply dated 25 August 2005, the applicant explained that he had not brought the Conference of Heads of State and Government and the Commission before the Court of Justice but had instead challenged Additional Act No. 01 of 11 May 2005 on the grounds of illegality.

He said that he had clearly indicated the defendant in his application and that he had also complied with the requirements of article 26 paragraph 2 of the Rules of Procedure.

He considers that the plea alleging failure to serve the application at the defendant's elected domicile is inoperative, since this is the responsibility of the Registrar of the Court and he cannot be held responsible for the Registrar's ministry.

He maintains that the Additional Acts are binding on the organs but must be in conformity with the Treaty.

B. Background

a) Pleas in law and arguments of the applicant

Mr Eugène Yaï points out that the Additional Act in question violates the texts governing the appointment and dismissal of members of the WAEMU Commission, in particular Articles 27(2) and 30 of the Treaty.

He pointed out that he had not resigned, that his term of office had not expired and that he had not been the subject of any proceedings before the Court for incapacity; that in dismissing him the Assembly of Heads of State and Government had exceeded its powers.

He therefore asks the Court to declare Additional Act No 01/2005 of 11 May 2005, which is an identical renewal of Additional Act No 06/2004 of 15 November 2004, the fate of which was settled by judgment of the Court of Justice on 27 April 2005, null and void.

In his latest response, the applicant reiterates the arguments already developed and asks for them to be applied.

b) Pleas in law and arguments of the defendants

The defendants consider that the contested Additional Act was adopted in strict compliance with the WAEMU Treaty before concluding that the applicant's claims should be dismissed.

They argue that Articles 27 and 30 of the Treaty provide two grounds for dismissal, one based on gross misconduct and the other on incapacity.

Furthermore, in their oral observations, they point out that Article 27 of the Treaty allows the Conference of Heads of State and Government to modify the number of Commissioners.

Finally, they ask the Court to apply the same grounds as those used in Order No 05 of 02 June 2005 of the President of the Court, who balanced the interests of the applicant against those of the Union in order to avoid blocking the regular functioning of the latter.

IV - GROUNDS FOR THE JUDGMENT

A. Jurisdiction of the Court

The defendants consider that the Court of Justice does not have jurisdiction to assess the legality of an Additional Act because Article 19 of the Treaty makes it a special category of acts which is binding on all the organs of the Union and on the authorities of the Member States, and therefore on the WAEMU Court of Justice.

It should be remembered that in Judgment No. 3 of 27 April 2005, in which the same parties brought the same claims, the Court held that "the purpose of an action for annulment is to ensure that the law is observed in the interpretation and application of the Treaty and that it would be contrary to that objective to interpret the conditions of admissibility of the action restrictively by limiting its scope to Community Regulations, Directives and Decisions and that the Court must ensure that the Community legality to which the Act in question is subject is observed".

The Court specified that the Conference of Heads of State and Government is an organ of WAEMU, and that the individual acts it takes that give rise to complaints may be challenged before it.

With regard to the Additional Act, a distinction should be made between two categories of acts: the Additional Act of a general or regulatory nature, such as the Acts establishing the Statute of the Court of Justice, and the Additional Act of an individual nature, such as those appointing Commissioners and Judges.

An individual Additional Act must in any event comply with the Treaty. And as soon as it affects the legal position of a third party, it remains in conformity with the Treaty.

subject to the control of the WAEMU Court of Justice, which alone "ensures compliance with the law as regards the interpretation and application of the Union Treaty". For the same reasons as those given in Judgment No. 3 of 27 April 2005, which has become *res judicata*, the Court considers the defendants' arguments to be inoperative. It should also be noted that Article 8 of Additional Protocol No. 1 on the Review Bodies distinguishes between two categories of initiators of actions for assessment of legality.

Thus, when an action is brought by a Member State, the Council of Ministers or the Commission, it may only be brought against Regulations, Directives and Decisions. In the case of an action open to any natural or legal person, such action may be brought against "any act of an organ" of the Union adversely affecting that person.

In addition, under the terms of Article 8 paragraph 4 of Additional Protocol No. 1, the legislator has added to this remedy a fine of "folle action" against any natural or legal person governed by private law, in the event of a manifestly abusive or dilatory remedy.

It follows that the plea of lack of jurisdiction is inoperative and must be rejected. The Court of Justice therefore has jurisdiction to rule on the legality of the contested measure.

B. Admissibility of the action

The defendants plead lack of standing of the Conference of Heads of State and Government and failure to comply with the formalities prescribed in Articles 9 of the Treaty and 29 and 26 of the Rules of Procedure of the Court of Justice, namely failure to identify the defendants, irregularity of service and lack of security.

It is true that Article 9 of the Treaty gives the Union legal personality and provides that it shall be represented in legal proceedings by the Commission; the same Article gives the Union in each Member State the most extensive legal capacity accorded to Member States under national law. As such, the Commission is answerable for the Union and for wrongful acts committed by its organs, as stipulated in Article 15 of Additional Protocol No. 1, without, however, taking their place before the Court.

Furthermore, it is clear from the provisions of Article 29(1) of the Statute of the Court of Justice and Article 22(1) of the Rules of Procedure that the Union's Organs are subject to the jurisdiction of the Court. The same is true of the provisions of Article 10 of Additional Protocol No. 1, which oblige the Organ whose decision has been annulled to "take the measures necessary to comply with the judgment of the Court of Justice".

By naming as defendants the Conference of Heads of State and Government of WAEMU, in the person of its legal representative, and the WAEMU Commission, in the person of its legal representative, the plaintiff has not violated the provisions of Article 9 cited above. This plea should therefore be dismissed as unfounded.

As for the plea alleging infringement of Article 29 of the Rules of Procedure of the Court of Justice, in that the application was not served on the elected domicile of the President of the Conference of Heads of State and Government, it should be pointed out that the Registrar of the Court's writ of service No 19/2005 of 25 May 2005 was sent to its addressee under cover of the President of the WAEMU Commission, supported by a letter of transmission No 05/041 of 25 May 2005 from the President of the Court.

In any event, even if there is an irregularity in the formalities of service, these must still be formalities whose non-compliance vitiates the written procedure to such an extent as to jeopardise the rights of the defence; in the case in point, the defendants were able to appoint their Agent to represent them and were able to appoint Lawyers who presented their defence in both the written and the oral proceedings.

It follows that the alleged formal defect had no influence on the proper conduct of the proceedings and in no way prejudiced the rights of the defence to such an extent as to influence the decision to be taken.

Finally, with regard to the alleged breach of Article 26 of the Rules of Procedure, it is established that the applicant deposited a bond of thirty thousand francs (30,000 F CFA) at the Court Registry against a receipt dated 03 June 2005, following Order No 03/05 of 31 May 2005 of the President of the Court of Justice setting the said bond.

It follows from the foregoing that the pleas alleging inadmissibility of the action are unfounded and must be rejected.

C. At the back

The lack of power of the Conference of Heads of State and Government and the violation of articles 16, 27, 28 and 30 of the Treaty.

On this point, it should be noted that Commissioners are appointed by the Conference of Heads of State and Government for a renewable term of office of four (04) years. This mandate may only be interrupted in the event of gross misconduct, incapacity or resignation.

Article 30 of the Treaty stipulates that the Court of Justice may, at the request of the Council, dismiss a Member of the Commission "for failure to comply with the duties attaching to the performance of his duties as a Member of the Commission". Even in the case of proven incapacity of a Commissioner, whether professional or physical, the dismissal of that Commissioner must follow the procedure prescribed by Article 30.

It is clear from the documents in the file that the applicant took office on 05 March 2003. His term of office was therefore due to expire in principle on 04 March 2007; by unilaterally interrupting it before term, the Additional Act of the Assembly of Heads of State and Government was taken in breach of the provisions of Articles 16, 27, 28 and 30 of the Treaty.

In fact, there is no provision in the Treaty giving the Assembly of Heads of State and Government the power to dismiss a Commissioner. And Article 27, in stipulating that the Assembly of Heads of State and Government could change the number of Commissioners, did not add the power to dismiss them.

It is clear from the foregoing that Additional Act No 01 of 11 May 2005 was adopted in breach of the relevant provisions of the Treaty.

As regards the argument based on the case-law of Order No 05 of 02 June 2005 on the need to balance the interests of the applicant against those of the Union in order to avoid blocking the operation of a Department or Body, it should be pointed out that that case-law is applicable only in urgent proceedings. As regards the present case, which is a main proceedings, the question of the preservation of the Union's interests is governed by Article 10 of Additional Protocol No 1, which provides that :

The Court of Justice may indicate the effects of annulled acts which are to be regarded as definitive". The Court of Justice may indicate the effects of the annulled acts which are to be regarded as final".

Consequently, it must be held that the contested Additional Act does not comply with the provisions of the Treaty and must therefore be annulled.

However, if that annulment were to produce its full effects, it would affect the acts adopted by the incoming Commissioner; therefore, in accordance with the provisions of Article 10 cited above, it should be held that the effects of the annulment run from the date of the present judgment in order to protect the interests of the Union in relation to the acts already adopted.

V - ON EXPENSES

It follows from the provisions of Article 60 of the Rules of Procedure of the Court that any unsuccessful party shall be ordered to pay the costs.

However, under the terms of Article 61 of the said Rules, in disputes between the Union and its agents, the costs incurred by the Bodies of the Union shall be borne by them, without prejudice to the provisions of paragraph 5 of Article 60 of the said Rules.

As the defendants have been unsuccessful in their submissions, they should be ordered to pay all the costs in accordance with the above provisions.

FOR THESE REASONS

La Court ruling publicly, contradictorily in in of
Community law :

In form :

- declares itself competent to assess the legality of Additional Act No 01/2005 of 11 May 2005;
- declares Mr Eugène YAÏ's appeal admissible.

Background:

- Declares that Additional Act No 01/2005 of 11 May 2005 appointing Mr Jérôme BRO GREBE was adopted in breach of Articles 16, 27, 28 and 30 of the WAEMU Treaty;
- consequently declares it null and void;
- Declares that this nullity takes effect from the date of the present judgment;
- order the defendants to pay all the costs;

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

And signed by the Chairman and the Deputy Registrar.

Illegible signatures follow.

A certified copy of which has been deposited at the Court Registry on 12 April 2006.

Diénaba WINKOUN/GNANOU