

**JUDGMENT NO.  
04/2017  
OF 18 APRIL 2017**

*Actions for annulment Actions  
for damages  
compensation*

**Mr El Hadji Abdou SAKHO C/**

**The WAEMU Conference of Heads of State  
and Government  
The WAEMU Commission**

**Composition of the Court :**

- **Mrs Joséphine S. EBAH TOURE, Chairman, Rapporteur**
- **Mr Salifou SAMPINBOGO, Judge**
- **Mr Mahawa S. DIOUF, Judge**
- **Mr Euloge AKPO, Judge**
- **Mr Augusto MENDES, Judge**
  
- **Mr Bawa Yaya ABDOULAYE, First Advocate General**
  
- **Mr Hamidou YAMEOGO, Registrar**

**COURT OF JUSTICE OF THE WEST  
AFRICAN ECONOMIC AND  
MONETARY UNION (WAEMU)**

**PUBLIC HEARING OF 18 APRIL 2017**

The Court of Justice of the WAEMU, meeting in ordinary public session on the eighteenth of April two thousand and seventeen, in which were seated :

**Mrs Joséphine Suzanne EBAH TOURE, President ;**

**Mr Salifou SAMPINBOGO, Mr Mahawa Sémou DIOUF, Mr Euloge AKPO, Mr Augusto MENDES, Judges ;**

**in the presence of Yaya ABDOULAYE, First Advocate General;**

**with the assistance of Maître Hamidou YAMEOGO, Deputy Registrar ;**

**has rendered the following judgment:**

**BETWEEN :**

**Sieur El Hadji Abdou SAKHO** acting through his Counsel, Maître Boukounta DIALLO, Lawyer registered at the Bar of Senegal,

**Applicant, on the one hand ;**

**AND**

**The Conference of Heads of State and Government and the WAEMU Commission**, represented by Mr Ibrahima SAMBE, Technical Adviser on Legal Issues to the President of the WAEMU Commission, and by Mr Harouna SAWADOGO, Attorney at Law, member of the Burkina Faso Bar,

**Defendants, on the other hand ;**

## **THE COURT**

**HAVING REGARD TO** the Treaty of the West African Economic and Monetary Union dated 10 January 1994, as amended on 29 January 2003;

**HAVING REGARD TO** 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 No. 01/96/CM of 05 July 1996 on the Rules of Procedure of the Court of Justice of the WAEMU ;

**HAVING REGARD TO** Regulation n°01/2012/CJ of 21 December 2012 on the Administrative Rules of the Court of Justice of the WAEMU ;

**HAVING REGARD TO** Minute No. 01/2016/CJ of 25 May 2016 on the appointment of the President of the Court and the distribution of functions within the Court;

**HAVING REGARD TO** Minutes No 02/2016/CJ of 26 May 2016 relating to the swearing-in and installation of the members of the WAEMU Court of Justice;

**HAVING REGARD TO** the request by Mr El Hadji Abdou SAKHO, dated 15 November 2011, for an assessment of legality, registered on 17 November 2011, under number 11R006 ;

**HAVING REGARD TO** Mr El Hadji Abdou SAKHO's claim for compensation dated 02 April 2012, registered on 05 April 2012 under No. 12R001;

**HAVING REGARD TO** Order No 003/2017/CJ of 20 January 2017, joining proceedings ;

**HAVING REGARD TO** Order No. 13/2017/CJ of 20 March 2017 on the composition of the plenary panel due to sit in ordinary public session on 28 March 2017;

**HAVING REGARD TO** the parties' subpoenas;

**HAVING heard** the report of the Judge-Rapporteur;

**HEARD** counsel for Mr El Hadji Abdou SAKHO, in his oral observations;

**HAVING CONSIDERED** the oral observations of the Agent and the Council of the

Conference of Heads of State and Government and of the WAEMU  
Commission;

**ORDERED** the First Advocate General to deliver his Opinion;

**Having deliberated in accordance with Community law :**

## **I. FACTS AND PROCEDURE**

Whereas Mr El Hadji Abdou SAKHO was appointed by Additional Act No 04/2004 of 22 March 2004 as a Member of the Commission of the West African Economic and Monetary Union (WAEMU), on behalf of the State of Senegal;

At the end of his first term of office, he was reappointed Member of the WAEMU Commission, still in respect of Senegal, by Additional Act No. 01/2007/CCEG/WAEMU;

That the second term of office of Mr El Hadji Abdou SAKHO was renewed by Additional Act n°03/2011/CCEG/UEMOA, dated 26 August 2011, before the intervention, on the proposal of the State of Senegal, of Additional Act n°06/2011, dated 21 October 2011, replacing him;

Whereas by application, dated 15 November 2011, registered at the Registry of the Court of Justice on 17 November 2011, under number 11R006, Maître Boukounta DIALLO, Avocat inscrit au barreau du Sénégal lodged, in the name and on behalf of Mr El Hadji Abdou SAKHO, of Senegalese nationality, an action for annulment of Additional Act No 06/2011/CCEG/UEMOA dated 21 October 2011, appointing Mr Cheikh Hadjibou SOUMARE as Member of the WAEMU Commission in his stead;

That by another application, dated 25 November 2011, registered at the Court Registry on 28 November 2011, Mr El Hadji Abdou SAKHO, through his counsel, Maître Boukounta DIALLO, requested the Court to issue a stay of execution of Additional Act No 06/2011/CCEG/UEMOA, dated 21 October 2011;

By Order No. 022/2011 of 30 November 2011, the Court dismissed the said application;

Considering that by another application, dated 02 April 2012, registered at the Court Registry on 05 April 2012, under No. 12R001, filed by Maître Boukounta DIALLO, Mr El Hadji Abdou SAKHO, brought an action for liability for compensation ;

Considering that, in support of its application for annulment, it argues that Additional Act No 06/2011/CCEG/UEMOA of 21 October 2011 was adopted in breach of Articles 16, 27, 28 and 30 of the WAEMU Treaty;

It explains that the mandate of Commissioners is irrevocable, subject to the exceptions provided for in Article 30 of the aforementioned Treaty (cases of gross misconduct, incapacity or disregard of the duties associated with the exercise of the functions of a Member of the Commission) and that the power to remove Commissioners from office is expressly and exclusively reserved for the WAEMU Court of Justice, and not for the Conference of Heads of State and Government of the WAEMU;

It therefore concludes that she unlawfully interrupted her term of office as Commissioner of the WAEMU Commission;

As regards his claim for compensation, he argues that the Conference of Heads of State and Government committed a fault engaging its responsibility by adopting the Additional Act in question;

That he considers that he has suffered not only material damage (loss of earnings resulting from remuneration, rights, benefits and incidental expenses for the remainder of his term of office) but also moral damage ("profound and serious attack on his honour and dignity");

That he assesses his material loss at seven hundred and thirty-five million six hundred and forty-seven thousand four hundred and twenty (735,647,420) CFA francs, all material losses combined, and his non-material loss at fifty million (50,000,000) CFA francs, i.e. a total loss of seven hundred and eighty-five million six hundred and forty-seven thousand four hundred and twenty (785,647,420) CFA francs;

He therefore asks the Court of Justice :

- declare and rule that Additional Act No 06/2011/CCEG/UEMOA dated 21 October 2011 was adopted in breach of Articles 16, 27, 28 and 30 of the WAEMU Treaty and annul it;
- declare that the interruption of his term of office constitutes misconduct;
- declare UEMOA liable for the damage it has suffered as a result of this fault;
- order UEMOA to pay him the sum of seven hundred and eighty-five million six hundred and forty-seven thousand four hundred and twenty (785,647,420) CFA francs for all causes of damages combined;
- order UEMOA to pay the costs;

Whereas, for their part, the Conference of Heads of State and Government and the WAEMU Commission, defendants, claim that the Court of Justice has no jurisdiction;

They maintain that the Court lacks jurisdiction to rule on the legality of an Additional Act on the ground that Article 19 of the WAEMU Treaty makes it a special category of acts which is binding on the authorities of the Member States and on all the organs of the Union, including the Court of Justice;

In addition, they argue that the actions for annulment and compensation brought by Mr El Hadji Abdou SAKHO are inadmissible because, on the one hand, he did not suffer any grievances and, on the other hand, he should have brought his action against the Union, which alone has legal personality, within the meaning of Article 9 of the Treaty, and not against the Conference of Heads of State and Government and the WAEMU Commission, which are bodies that do not have the capacity to act;

Considering that, on the merits, the defendants consider that the assessment of the legality of the Additional Act at issue must take account of the exceptional circumstances which governed its adoption;

That they consider that these exceptional circumstances, which consist of *"an abnormal situation imposing on the administration the obligation to act on pain of compromising the public interest and not allowing compliance with the ordinary rules, either because it is materially impossible or because, by delaying the necessary action, it risks rendering it ineffective"*, have the effect of exempting the administrative authority from compliance with the legal rules that would compromise its action: rules of jurisdiction, rules of form and procedure, rules of substance;

They submit that these exceptional circumstances, which led the Union's highest authorities to place the integration process above individual interests, are such as to exonerate the Union from any non-contractual liability for fault;

That it is earlier on the ground of strict liability, based on breach of the principle of equality of citizens before public burdens, that the Court could uphold this action for damages brought by the applicant;

They conclude by asking the Court :

- declare that the applicant's action for assessment of the legality of Additional Act No 06/2011/CCEG/UEMOA of 21 October 2011 is unfounded;
- to dismiss the action as ill-founded on the grounds of extra-contractual liability for fault;

- rule on the merits of the action on the basis of the Union's strict liability;
- order the applicant to pay the costs;

Considering that the amount of the security, provided for in Article 26(6) of the Rules of Procedure of the WAEMU Court of Justice, was set at fifty thousand (50,000) CFA francs by Order No 10/2012 of 17 April 2012 for the action for annulment and at one hundred thousand (100,000) CFA francs by Order No 12/2012 of 17 April 2012 for the action for damages;

That the applicant has paid the two (02) amounts;

Considering that after the completion of the formalities of the written procedure in each of the two appeals, the President of the Court ordered the closure of the written procedure and appointed Mrs Ramata FOFANA, Judge-Rapporteur, in the two appeals, following orders N°003/2012/CJ of 26 March 2012 and N°024/2012/CJ of 16 October 2012;

Considering that the Judge-Rapporteur filed his report on 5 March 2013 concerning the action for annulment, the second report not having been delivered, before his departure from the Court;

That following the partial renewal of the Court, Mr Maty ELHADJI MOUSSA was appointed Judge-Rapporteur in the two appeals by Orders No. 013/2013/CJ of 25 June 2013 and No. 015/2013/CJ of 25 June 2013;

That this second Judge-Rapporteur filed his report on 12 March 2014, for the action for compensation and on 28 March 2014 for the action for annulment ;

Considering that when the Court was renewed on 26 May 2016, the previous orders appointing Judge-Rapporteurs were reported and Mrs Joséphine Suzanne EBAH TOURE, President of the Court, was appointed Judge-Rapporteur in the two appeals, pursuant to orders N°022/2016/CJ of 08 December 2016 and N°023/2016/CJ of 08 December 2016;

That the Judge-Rapporteur filed her report on 03 March 2017;

## **II. OF THE DISCUSSION**

### **A. THE SHAPE**

#### **1. The jurisdiction of the Court of Justice**

a) The Court's jurisdiction to hear the action for assessment of the legality of Additional Act No 06/2011/CCEG/UEMOA of 21 October 2011

Considering that the defendants maintain that the Court of Justice lacks jurisdiction to assess the legality of an Additional Act on the ground that Article 19 of the Treaty makes it a special category of acts which is binding on the authorities of the Member States and on all the organs of the Union, including the Court of Justice;

It should, however, be borne in mind that, under Article 15(2) of the Rules of Procedure of the Court of Justice, an action for an assessment of legality "*shall be open to any natural or legal person against any act of a body of the Union adversely affecting that person*";

On the subject of grievances, it is not possible to distinguish, at the stage of examining jurisdiction, between the alleged or alleged grievance and the actual grievance without prejudicing the merits of the case;

That, in fact, Article 15(2) of the Rules of Procedure cannot be interpreted as making proof of a grievance by the applicant a condition of the Court's jurisdiction;

Rather, it is a matter of ensuring that the applicant's situation at the time of his application, compared with his previous situation, is such that he can legitimately claim to have suffered a grievance as a result of the act in question;

Considering that, in the case in question, it is not disputed that the applicant is a natural person, that the Conference of Heads of State and Government is an organ of the Union and that, according to the applicant, the Additional Act in question, replacing him with Mr Cheikh Hadjibou SOUMARE, causes him moral and financial prejudice;

Considering that it has, moreover, already been ruled by the WAEMU Court of Justice that additional Acts of individual scope, adopted by the Conference of Heads of State and Government of WAEMU, and which give rise to a complaint, may be challenged before the Court of Justice (Cf. judgments No. 3/2005 of 27 April 2005, No. 1/2006 of 5 April 2006 and No. 1/2008 of 30 April 2008);

That, consequently, the Court has jurisdiction to assess the legality of the contested Additional Act;

b) The Court's jurisdiction to hear actions for damages arising from liability

Considering that it follows from Article 15-5 of the Rules of Procedure of the Court of Justice that the Court of Justice alone has jurisdiction to declare non

contractual and order the Union to pay compensation for damage caused either by material acts or by legislative acts of the Union's bodies ;

In the present case, the applicant maintains that the Additional Act, adopted by the Conference of Heads of State and Government, an organ of the Union, causes him financial and moral prejudice;

Furthermore, none of the parties raised any particular objection to these provisions, on which the claimant based his action for compensation;

It follows that the Court has jurisdiction to hear the action for damages brought by Mr El Hadji Abdou SAKHO against the Conference of Heads of State and Government and the WAEMU Commission;

## 2. Admissibility of the two actions

### a) Admissibility of the action for assessment of the legality of Additional Act No 06/2011/CCEG/UEMOA of 21 October 2011

Considering that the defendants conclude that Mr El Hadji Abdou SAKHO's action is inadmissible because, on the one hand, he did not suffer any grievance and, on the other hand, he should have directed his action against the Union, which alone has legal personality within the meaning of Article 9 of the Treaty, and not the WAEMU Conference and Commission, which are bodies without the capacity to act;

As regards the ground of inadmissibility on the grounds of the defendants' incapacity, it should be pointed out that, under Article 9 of the Treaty, the Commission represents the Union in legal proceedings;

In the application, the Conference of Heads of State and Government is referred to as the body that adopted the act and the Commission as the representative of the Union;

That it therefore appears that by citing as defendant the Conference of Heads of State and Government of WAEMU as the organ of the Union which adopted the contested legal act and the Commission as the legal representative of WAEMU, the applicant has not infringed the provisions of the aforementioned Article 9;

Furthermore, by providing that *"States and the organs of WAEMU shall be represented before the Court by an agent appointed for each case; they may appoint a lawyer ..."*, Article 29 of the Statutes of the Court and Article 22 of the Rules of Procedure of the Court expressly recognise the capacity of the organs of WAEMU to act before the Court;

That plea should therefore be rejected;

Considering that, as regards the ground of inadmissibility for lack of a grievance, it should be pointed out that this question of a grievance has already been examined in relation to jurisdiction, taking the view that, at the referral stage, there can be no question of the applicant proving a grievance, but rather of being in a situation in which he can legitimately claim to invoke a grievance as a result of the act in question;

Considering that Mr El Hadji Abdou SAKHO claims in his application that the Additional Act causes him a double moral and financial prejudice;

That therefore Mr El Hadji Abdou SAKHO can legitimately invoke a grievance as a result of the adoption of the contested Additional Act, thereby justifying his interest in bringing proceedings;

That the argument of inadmissibility for lack of prejudice must be rejected;

b) Admissibility of liability claims for compensation

Considering that, as in the action for annulment, the defendants raise the inadmissibility of the action of Mr El Hadji Abdou SAKHO, who allegedly directed his action against Bodies lacking the capacity to act instead of the Union, the sole holder of legal personality within the meaning of Article 9 of the Treaty and Article 15 of Additional Protocol No. 1 relating to the supervisory bodies of the Union;

That this plea should be dismissed on the same grounds as those relied on to reject the plea of inadmissibility of the action for annulment and to declare the action for damages admissible;

**B. FROM THE BOTTOM**

1. Application for assessment of the legality of Additional Act No 06/2011/CCEG/UEMOA

Considering that the applicant seeks the annulment of Additional Act n°06/2011/CCEG/UEMOA, of 21 October 2011, because it was adopted in violation of Articles 16, 27, 28 and 30 of the WAEMU Treaty;

That it maintains that the mandate of Commissioners is irrevocable, subject to the exceptions provided for in Article 30 of the Treaty (cases of gross misconduct or incapacity or failure to comply with the duties associated with the exercise of the functions of a member of the Commission) and that the power to remove Commissioners from office is expressly and exclusively reserved for the WAEMU Court of Justice and not for the Conference of Heads of State and Government;

Considering that it is not disputed that the additional act replacing Mr El Hadji Abdou SAKHO (n°06/2011/CCEG/UEMOA of 21 October 2011) was adopted without any gross

misconduct or incapacity having been established against the person concerned, and

without referral to the Court of Justice as required by Articles 27 and 30 of the Treaty;

Considering, however, that by stipulating in the following terms that *"during their term of office, the members of the Commission shall be irrevocable except in the case of gross misconduct or incapacity"*, Article 27 of the Treaty, which enshrines the irrevocability of the Commissioner's term of office, makes the benefit thereof conditional on the existence of a valid mandate;

That, consequently, the question that arises is whether Mr El Hadji Abdou SAKHO had an irrevocable mandate at the time of the adoption of the Additional Act in question;

In this respect, it should be remembered that Article 28(2) of the Treaty provides that *"At\_ , on taking up their duties, the members of the Commission undertake, on oath before the Court of Justice, to observe the obligations of independence and honesty inherent in the exercise of their office....."*;

It should also be noted that the same article stipulates that *"during their term of office, they shall not engage in any other professional activity ....."*;

It follows from the foregoing that the term of office runs from the date of swearing-in;

That the taking of the oath by the newly appointed or reappointed Commissioner, which takes place when he takes up his duties, constitutes an essential and substantial act of his taking up his duties, such as to give them their official and regular character;

That, moreover, it should be emphasised that, even if Additional Act n°03/2011/CCEG/UEMOA, of 26 August 2011, of the Conference of Heads of State and Government specified that the mandate of the Members of the Commission referred to in its Article 1<sup>er</sup> , including Mr El Hadji Abdou SAKHO, would run from 1<sup>er</sup> September 2011, this Additional Act did not intend to derogate from the mandatory requirement of Article 28 of the Treaty as the Additional Acts are annexed to the Treaty, they complete it without however amending it;

That, as Mr El Hadji Abdou SAKHO had not taken the oath of office, as provided for in the aforementioned Article 28(2), he had not officially and regularly taken up his duties as Commissioner of the Commission, despite his reappointment as Commissioner by Additional Act No 03/2011/CCEG/UEMOA, dated 26 August 2011, until the intervention of Additional Act No 06/2011/CCEG/UEMOA;

That consequently Mr El Hadji Abdou Sakho cannot legitimately invoke, for his benefit, the provisions of Article 27 paragraph 2, relating to the irrevocability of the mandate, in that the benefit of these provisions presupposes on the part of the commissioner who invokes it an official and regular entry into office which establishes the starting point of the mandate;

That, consequently, the applicant is not entitled to seek the annulment of Additional Act No 06/2011/CCEG/UEMOA, dated 21 October 2011;  
His claim should be dismissed;

## 2. The claim for compensation

Whereas it follows from Article 15.5 of Regulation No. 01/96/CM on the Rules of Procedure of the Court of Justice of the WAEMU that the non-contractual liability of the Union may be engaged by normative acts of its organs causing damage;

That in the present case, the Additional Act n°06/2011/CCEG/UEMOA, of 21 October 2011, undertaken, does not cause any prejudice to Mr El Hadji Abdou SAKHO since he could not rely on an irrevocable mandate;

His claims for compensation should be dismissed;

## 3. Costs

Whereas each of the parties has requested that the other be ordered to pay the costs;

It should be remembered that under Article 60(2) of the Rules of Procedure of the Court: *"Any unsuccessful party shall be ordered to pay the costs"*;

However, under the terms of Article 61 of the same Rules, *"In disputes between the Union and its servants, the expenses incurred by the organs of the Union shall be borne by them..."*;

Since the applicant has been unsuccessful in the present proceedings, he should be ordered to pay the costs, it being specified, however, that the costs incurred by the bodies of the Union in connection therewith are to be borne entirely by them;

## **For these reasons :**

**Ruling publicly and adversarially in matters of Community public service at first and last instance:**

**IN THE SHAPE**

- Declares itself competent ;
- Declares admissible the actions for annulment and compensation brought by Mr El Hadji Abdou SAKHO;

**AT THE BOTTOM**

- Dismisses all the claims of Mr El Hadji Abdou SAKHO;
- Orders the costs to be borne by the applicant in accordance with the provisions of Article 60 paragraph 2 of the Rules of Procedure of the Court;
- Resolves that the costs incurred by the Conference of Heads of State and Government and the WAEMU Commission shall be borne by them in accordance with the provisions of Article 61 of the Rules of Procedure.

Thus made, judged and pronounced in public hearing in Ouagadougou on the days, months and year above.

And have signed :

The

PresidentThe Registrar

**Joséphine Suzanne EBAH TOURE**

**Hamidou YAMEOGO**