Case n° 01/2001

Société des Ciments du Togo, SA v.

WAEMU Commission

"(Action for annulment of a Commission decision - Compliance with the competition and trade rules governing the Union - Infringement of the rules governing the bringing of an action for annulment - Time-limit for bringing an action - Character)

Summary of the judgment

Time limits for appeals are a matter of public policy and are not a matter for the discretion of the parties or the judge.

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REPORT BY THE JUDGE-RAPPORTEUR

I. THE FACTS

By application dated 6 September 2000, registered at the Registry of the UEMOA Court of Justice on 19 September 2000 under No 01/2000, Maître Georges Komlanvi AMEGADJE, Avocat à la Cour d'Appel de Lomé, with an address for service at the Chambers of Maître Benoît Y. SAWADOGO, Avocat à la Cour de Ouagadougou (Burkina Faso), acting in the name and on behalf of Société des Ciments du Togo SARL, whose registered office is at Route d'Aneho, Lomé, brought an action for annulment of Decision No 1467/DPCD/DC/547 of 7 July 2000 of the WAEMU Commission, which declared itself incompetent to enjoin Member States to take the necessary measures to ensure compliance with the competition rules governing the Union.

In its application initiating the proceedings, it states that in December 1998 a company called WACEM (West African Cimento) was approved by the Togolese Republic as a free zone undertaking. Under Togolese law relating to the free zone, a company approved for the free zone and which carries out its activities there is a company which is in reality foreign to the economy and geographical territory of Togo and therefore of the WAEMU. Under Article 27 of the said Togolese law, sales made by undertakings established on Togolese territory to undertakings in the free zone are exports. It adds that Article 26 of the same law provides that the products of a free zone company released for consumption in the customs territory of the WAEMU countries are exports, which can only be carried out by a third party importer duly established in the customs territory of Togo.

The applicant continues to state that WACEM exports its cement production to the territories of the WAEMU Member States, availing itself of the authorisation granted to it by the ECOWAS Executive Secretariat.

It claims that these actions by WACEM constitute serious violations of the provisions of Articles 76 et seq. of the WAEMU Treaty establishing a common market for Member States and establishing the principle of a Common External Tariff for the benefit of companies that are nationals of the customs territories of each of the Member States.

It therefore considers that the Commission's refusal to order the Togolese Republic to take appropriate measures to put an end to WACEM's actions, which are seriously prejudicial to the interests of economic operators legally established in the customs territories, is in breach of the provisions of the WAEMU Treaty.

It therefore seeks the annulment of the Commission's decision as vitiated by illegality.

Lastly, it asks that the Court state and rule :

- that an authorisation granted by ECOWAS to a company from one of the Member States of this organisation does not entitle it to the preferential customs tariffs in force in the WAEMU common market;

- that only products from companies legally established in the customs territories of each of the WAEMU Member States will be considered as products originating in that State and will be the sole beneficiaries of the Common External Tariffs, to the exclusion of any product that would qualify as a product of origin.

The Commission, for its part, concludes in its defence in the main proceedings:

- the application by Ciments du Togo is inadmissible on formal grounds;

- or that the action for annulment is inadmissible on the grounds of the nature of the contested act;

- in the alternative, dismiss Société des Ciments du Togo's action as unfounded;

- order the applicant to pay the costs.

II. Procedure followed

By decision no. 1467/DPCD/DC/547 dated 7 July 2000, the Commission refused to take steps to put an end to WACEM's actions.

It considers that UEMOA has no competence in the implementation, by its Member States, of the commitments made under the ECOWAS Treaty.

By faxed application dated 5 September 2000, Société des Ciments du Togo, through its counsel, Maître AMEGADJE, avocat at the Lomé Court of Appeal, brought an action before the WAEMU Court of Justice for annulment of Commission Decision No 1467/DPCD/DC/547.

In its application, Société des Ciments du Togo further requests that the Court rule :

- that an authorisation granted by ECOWAS to a company from one of the Member States of this organisation cannot entail the benefit of the preferential customs tariffs in force in the WAEMU common market;

- that only the products of companies legally established in the customs territories of each of the WAEMU Member States will be considered as products originating in that State and will be the sole beneficiaries of the Common External Tariffs, to the exclusion of any product that would qualify as a product of origin.

By DHL courier of 27 March 2001, three copies of the application reached the Court Registry on 29 March 2001.

On 4 April 2001, the original and three copies of the application were received at the Registry.

On 9 February 2001, a copy of the applicant's statement of defence was sent to the Registry.

On 29 March 2001, the original and two copies of the same pleading were sent to the Court Registry.

On 5 April 2001, two originals and three copies of the said pleading were sent to the Registry.

With regard to the reply, it should be noted that a signed original and two unsigned copies arrived at the Registry on 28 March 2001.

On 4 and 5 April 2001, counsel for the Commission sent three originals and five copies of its reply to the Registry.

This is the procedure followed in this case.

What about the parties' pleas and arguments?

III. <u>Pleas in law and arguments of the parties</u>

a) Pleas as to form relating to inadmissibility and foreclosure

In its first plea in law, contained in its defence dated 16 February 2001, the Commission, acting through its counsel, submitted that the action for annulment was inadmissible on the grounds that :

- on the one hand, the certified copy of the fax of the application before the Court of Appeal cannot be treated as an original within the meaning of Article 16 paragraph 3 of the Rules of Procedure;

- secondly, the contested decision is not such as to create any change in the pre-existing legal system; the decision, which is neither a regulation nor a directive, is not capable of producing legal effects.

In its reply of 26 March 2001, the applicant submits that the objections of inadmissibility raised by the Commission are in no way founded.
It points out that:

- on the one hand, even if it is certain that paragraph 3 of Article 26 of the Rules of Procedure states that the application shall be drawn up, in addition to the original, in as many copies as are necessary, and

certified as there are parties involved, it is nowhere written in this text that the provisions of paragraph 3 are made ad validitatem of the referral to the Court.

It adds that nowhere is it stated that it is the originals of the documents (application or compromise) alone that can be referred to the Court; that it is a general principle of law that there is neither inadmissibility nor nullity without a text.

The applicant further states that, by DHL letter dated 10 November 2000, it sent the original and two copies of its application to the Registrar of the Court, who found it sufficient to notify the Commission of a certified copy of the fax of the application.

It also argued that it had based its action on Article 8(2) of Additional Protocol No. 1, which provides that any natural or legal person may also bring an action for review of the legality of any act of the Union adversely affecting that person.

It also maintained that the contested decision, signed by a Commissioner, is an act of the Union which is prejudicial to it.

Lastly, it considered that the Commission's assertion that, in order to be subject to an action for annulment, the act must be such as to create a change in the pre-existing legal system, constituted an unlawful addition to the legal conditions for bringing such an action.

b) Substantive pleas relating to the merits of the claim

By an amplifying memorandum dated 2 February 2001, changing the subject-matter of the dispute, the applicant supplemented and clarified the conclusions already reached in its application initiating proceedings dated 5 September 2000.

It points out that it was by a clerical error that it had asked the Court to rule that "only the products of undertakings lawfully established in the customs territories of each of the WAEMU Member States shall be considered to be 'goods'".

products originating in that State and will be the sole beneficiaries of the Common External Tariffs, to the exclusion of any product qualified as a product of origin".

It maintains that, in reality, its request consisted of "a ruling that only the products of companies regularly established in the customs territories of each of the WAEMU Member States will be considered as products of origin of that State and will be the only beneficiaries of the Common Preferential Tariffs, to the exclusion of any product that would be qualified as a product of origin".

The applicant further points out that, under Article 90 of the WAEMU Treaty
"The Commission is responsible, under the supervision of the Court of Justice, for applying the competition rules laid down in Articles 88 and 89. In carrying out this task, it shall have the power to take decisions".

The applicant thus asserts that, in the light of these provisions, the Commission was legally competent to examine the facts which it had submitted to it on 15 June 2000 and that, by declaring that it had no jurisdiction, it manifestly infringed supranational texts.

The applicant also pointed out, again in its supplementary submission, that, like all the High Contracting Parties to the WAEMU Treaty, Togo had, under the terms of the Preamble, proclaimed and affirmed its desire to promote the economic and social development of Togo by means of, in particular :

1. The WAEMU is committed to "unifying its internal market with those of the other Member States in such a way that the internal markets of each of the Member States are integrated, merged into one another and form a single common market, that of the WAEMU";

2. "to harmonise its legislation with that of other Member States".

The applicant also invoked the provisions of Articles 6, 7 and 88 of the WAEMU Treaty:

- Article 6: "Acts adopted by the organs of the Union in pursuit of the objectives of this Treaty and in accordance with the procedural rules established by it shall be

applied in each Member State notwithstanding any previous or subsequent national legislation to the contrary".

- Article 7: "Member States shall contribute to the achievement of the objectives of the Union by adopting all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty. To that end, they shall refrain from any measures which would impede the application of this Treaty and of acts adopted in implementation thereof".

- Article 88: "One year after the entry into force of this Treaty, the following shall be prohibited ipso jure :

  - Public aid likely to distort competition by favouring certain undertakings or the production of certain goods".

The applicant added that Interministerial Order No 009 of 31 January 2000 authorising WACEM to sell its cement on the Togolese domestic market, part of the WAEMU common market, free of duties and taxes, infringed the supranational provisions of the WAEMU Treaty.

In the light of all these observations, the applicant asked the Court to call attention to and do what the Commission should have done in order to :

- Declare that WACEM, which operates in the geographical territory of the Togolese Republic, is an undertaking outside the common market of the European Union by virtue of its status as a free zone;

- To rule that finished or semi-finished products manufactured by WACEM may only enter the WAEMU common market or the domestic markets of other Member States after payment of the Common External Tariff in force in that market;

- To declare that the Government of the Togolese Republic is bound to enforce the Implementing Regulations issued by the WAEMU Commission in respect of non-Community products manufactured in the free zone that it has established.

In its statement of defence dated 16 February 2001, the WAEMU Commission contests the merits of the applicant's action, as presented in the application and in the supplementary statement of 2 February 2001.

The Commission considers that a direct infringement or error of law consists of taking a measure that could not be taken because it is contrary to or incompatible with one or more higher legal standards.

This is a direct application of the principle of legality.

The Commission also specified that there is an error of law when the act is adopted on the basis of a higher standard that is illegal or repealed or still in force or which is alien to the subject matter of the contested act; the act is then said to lack a legal basis.

Again according to the Commission, an error of law may lie in the fact that the author of the act relies on a text that is applicable in the given context but to which he has given a meaning or scope that the text does not have; this is referred to as a misinterpretation or misapplication of the law.

The Commission also maintained that in the present case no measure contrary to the provisions of Articles 76 et seq. of the Treaty had been taken and that, moreover, UEMOA could not be criticised for not issuing injunctions to ECOWAS in respect of an authorisation granted by that institution.

Lastly, the Commission considered that, in any event, as the letter in question did not contain any injunction to the effect that WACEM should apply the provisions of Articles 76 et seq. of the Treaty, its content could not legally infringe those provisions and be tainted by illegality.

These are the various pleas and arguments of the parties.

The Judge-Rapporteur :

Daniel Lopes FERREIRA

OPINION OF THE ADVOCATE GENERAL

A. THE FACTS

In its action alleging breach of Articles 76 et seq. of the WAEMU Treaty, Société des Ciments du Togo (hereinafter SCT) asked the Court to annul Decision No 1467 DPCD/DC/1547 of 7 July 2000 of the WAEMU Commission, by which the Commission declared itself incompetent to implement commitments entered into within the framework of ECOWAS.

The facts can be summarised as follows:

In December 1988, the Togolese Republic granted West African Cement (hereafter WACEM) a free zone to produce clinker and cement.

The documents in the file, Togolese law n°89-14 of 18/09/1989 on the free zone and its implementing decree n°90-40 of 4/04/1990 establish that WACEM is a company under Togolese law (SARL) with its registered office in Togo. Ministerial Order n°009 of 31/01/2000 of the Minister of the Economy, Finance and Privatisation and the Minister of Industry, Trade and Development of the Free Zone, authorises the company to sell its cement in the customs territory of Togo; This authorisation is valid until 30 January 2001 and may be renewed; the company's products (2) Clinker Cement and Portland Cement also benefit from an approval issued by ECOWAS in 1999 and ECOWAS tariff heading n°252310-00 for the first product and n°25232-900 for the second.

These various authorisations have enabled WACEM to market and export its cement duty-free in the WAEMU member states (Togo, Benin, Niger and Burkina Faso), which are also members of ECOWAS. Ciments WACEM and SCT therefore operate in the same geographical area, which is home to two overlapping but distinct markets (WAEMU and ECOWAS), each governed by its own legislation.

In the context of the liberalisation of Community trade, the WAEMU market is open to ECOWAS industrial products, provided they are accompanied by a certificate of origin; they therefore circulate freely and penetrate this market; the problem that concerns us is not the circulation, the interpenetration, but the implementation of the sale of products which would have caused a distortion of competition in respect of which the Commission has declined jurisdiction.

SCT alleges that the ECOWAS tariff position enjoyed by WACEM on its products (deemed to be of foreign origin) has enabled that company to flood part of the WAEMU market, to create unfair competition in cement transactions within the Union and to distort the common rules of competition applicable to Community companies, even though only they should benefit from the Community's preferential trade tariff rules (Common External Tariff); it referred the matter to the WAEMU Commission, but the latter refused to enjoin the Togolese Republic to put an end to WACEM's anti-competitive behaviour, which was prejudicial to WAEMU economic operators, and dismissed his request in the above-mentioned decision on the grounds that it did not have jurisdiction over the implementation by its Member States (UEMOA) of the commitments entered into under the ECOWAS Treaty, and invited him to refer the matter to the ECOWAS authorities.

The applicant considers that this decision is unlawful and should be annulled; it relies on the infringement of Articles 76 et seq. of the Treaty as a plea in law.

It also asks the Court to declare and rule :

1°) that an agreement granted by ECOWAS to a company from one of the Member States of that organisation cannot include the benefit of the preferential customs tariffs in force in the WAEMU market. (First ancillary application) ;

2°) that only the products of companies regularly established in the customs territories of each of the WAEMU Member States will be considered as products of origin of these States and will be the only beneficiaries of the Common External Tariff, to the exclusion of what will be qualified as a product of origin. (Second ancillary request).

By an amplifying memorandum dated 2/02/2001 and received at the Registry on 9/02/2001, the applicant supplemented the conclusions of her application initiating the proceedings.

She pointed out that due to an error, the terms Common Preferential Tariffs had to be substituted for Common External Tariffs (see second ancillary request).

She concludes and again asks the Court to rule that :

- WACEM is not part of the WAEMU common market;

- Finished and semi-finished products manufactured by WACEM may only be sold on the WAEMU Community market after payment of the Common External Tariff;

- The Togolese Republic must apply the implementing regulations issued by the WAEMU Commission in respect of non-Community products from the free zone set up by that State.

In order to provide a legal basis for these new submissions, the applicant relies on the provisions of Articles 4, 5, 6, 7, 9, 12, 16, 88, 89 and 90 of the Treaty and those of interministerial Decree No 009 of 31/01/2000 and Decree No 90-40 of 4/04/1990 of the Togolese Government.

In its statement of defence, the Commission retorts that the application initiating the proceedings did not comply with the formalities prescribed in Article 26 of the Rules of Procedure of the Court, as it was not submitted in the original form and in several certified copies;

That the application before the Court is a facsimile which cannot be substituted for the original, and that the action must therefore be declared inadmissible;
That, by reason of the very nature of the contested measure, which is neither a regulation, nor a decision, nor a directive (the only acts of the Community legal order producing legal effects), the action is still inadmissible;

On the merits, the legality of the deed is not affected by any error of fact or law (mischaracterisation or misinterpretation liable to vitiate it);

Moreover, there is nothing to reproach UEMOA for not having issued injunctions to ECOWAS in relation to an approval issued by the latter.

The defendant claims that the applicant should be dismissed and ordered to pay the costs.

Against the statement of defence, and by reply received at the Registry on 28/3/2001, the applicant submits that the action is manifestly admissible and well founded;

The inadmissibility alleged by the Commission on the basis of Article 26 of the Court's Rules of Procedure is not based either on general principles of law or on those Rules, whereas "there is neither inadmissibility nor nullity without a text";

That the Commission is not entitled to complain that the Registrar duly served the certified copy of the fax of the application;

As regards the plea relating to the nature of the contested measure, this is also irrelevant and must be rejected, insofar as the action for annulment is directed against a measure of the Union and is based on Article 8(2) of Additional Protocol No. 1; moreover, it does not follow from the Treaty and the Rules of Procedure; in order to be challengeable, a measure of the Union must produce legal effects; such an additional condition for the exercise of the right of appeal is the result of an arbitrary judgment;

That, in substance, the contested decision must be annulled, having regard to the powers conferred on the Commission by Articles 88, 89 and 90 of the Treaty, under the terms of which the Commission, under the control of the Court of Justice, is responsible for the application of the competition rules and is required in the context of that task to take decisions, in particular to prevent undertakings which are not nationals of the WAEMU market from marketing their products on that market and benefiting from a preferential customs tariff and creating a situation of unfair competition vis-à-vis Community undertakings;

That by declining to exercise its powers under the texts cited, the Commission infringed the provisions of Articles 76 et seq. of the Treaty.

It should be noted that the reply sent by the applicant and received at the Registry on 5/4/2001 and registered under no. 006/2001 is in fact merely a copy of the reply of 28/3/2001; it does not therefore need to be examined.

B. LEGAL DISCUSSION

The purpose of the action is to assess legality (annulment). The Court has jurisdiction because the Treaty gives it the right to apply and interpret Community law (Article 1er of Additional Protocol No. 1) and to assess the legality of Community acts (Article 9 of the same Protocol and Article 27(3) of the Court's Statute).

But is the act referred to a decision that can be challenged? The Commission contests this; in its view, the action is inadmissible on the grounds that the nature of the act does not allow it to be included in the Community legal framework which creates legal effects and which is made up of regulations, directives and decisions.

This opinion cannot be supported; the Commission has given a definitive ruling declining its jurisdiction; it thus confers a decisive and irrevocable character on the letter, which therefore becomes challengeable.

The alleged complaint is therefore unfounded and must be rejected.

The Court of Justice of the European Communities defined the concept of decision in two famous judgments:

"... the act at issue, by which the Commission has unequivocally adopted a measure having legal effects which affect the interests of the undertakings concerned and are binding on them, constitutes not a mere opinion but a decision".

(ECJ judgment of 15/3/1967.S.A. Cimenteries CBR and others v Commission)

"A letter sent by the Commission to the Swedish authorities informing them of a penalty it has imposed in the exercise of its competence and discretion in respect of a Swedish vessel constitutes a decision which may be challenged by way of an action for annulment by the owner of the vessel to which it relates directly and individually. .....

(ECJ, judgment of 29/06/1994, FISCANO AB v Commission, action for annulment, ECR page 2886)

The Commission raises a second plea of inadmissibility alleging infringement of Article 26(3) of the Rules of Procedure, arguing that the Court was not properly seised of the matter by a faxed application in place of the original.

Article 26 of the Rules of Procedure, which reproduces article 31 of the Statutes of the Court, stipulates peremptorily that the application before the Court must be drawn up, in addition to the original, in as many certified copies as there are parties to the proceedings.

The only exception to this rule is the filing of the application by fax, which the applicant must regularise by filing the original at the Registry within two months of the lodging of the appeal, in accordance with the provisions of Article 32 of the Court's Statutes.

This regularisation never took place, with the result that the Registrar was ultimately obliged to serve the certified copy of the fax on the defendant on 22 December 2000, i.e. three months and 16 days after the fax was lodged on 7/9/2000, but registered at the Registry on 19/9/2000.

By failing to put its action in order within two months, the applicant demonstrated gross negligence which must deprive it of its right to bring an action. Since the plea alleging infringement of the aforementioned Article 26 is well founded, the SCT's action must be declared inadmissible.

In support of the inadmissibility of the introductory application, it is worth referring to the judgment of the Court of Justice of the European Communities of 12/7/1984 in the case of Valsabbia v Commission (see ECR p. 3098).

Valsabbia is an Italian metallurgical company which, following an inspection by Commission inspectors in 1981, was fined for infringement of the ECSC Treaty (regulation of product prices). The company was notified of the penalty and had one month in which to challenge the decision before the Court, but it failed to do so within the time limit, arguing that force majeure had not been established.

The Court then ruled that :

"It should be noted in this respect that the applicant did not exercise the necessary diligence...

Finally, it should be noted that the applicant could have availed herself of Article 38(7) of the Rules of Procedure, which allows an application to be lodged even if it does not comply with the formal requirements, provided that it is put in order within a reasonable period set by the Registrar...

It follows that... the action is inadmissible".

The Commission did not reply to the statement of objections sent to it on 28 February within the one-month time limit, but it nevertheless makes the following observations:

The applicant requests that the Court consider WACEM to be a foreign company whose products may only be marketed within the WAEMU after payment of the CET and that it decide that the Togolese Republic must apply the WAEMU implementing regulations concerning non-Community products originating from the free zone created by that State.

It should be noted that the statement of case was lodged at the Registry on 9/2/2001, even though the defendant had already been served with the originating application.
Its submissions go beyond and modify the legal framework set out in the application; the pleas in law relied on in support are new in relation to those in the originating application and are based on facts that were well known to the applicant before the action was brought; they infringe the principle of proportionality.

the principle of immutability of the dispute, which the Court is bound to respect and which also safeguards the rights of the defence.

For these legal reasons and pursuant to Article 31 of the Rules of Procedure, the pleading is inadmissible and must therefore be dismissed.

The inadmissibility of new pleas in law is referred to in the same judgment in Fiscano AB v Commission [2003] ECR 2908. This was a new plea raised at the reply stage.

"This plea must be declared inadmissible under Article 42(2) of the Rules of Procedure, which prohibits the submission of new pleas in law in the course of proceedings unless they are based on matters of law or fact that have come to light in the course of the proceedings".

The formal inadmissibility of the originating application should bring this case to a close, but for the convenience of the proceedings, let us examine the merits.

In a letter dated 15 June 2000, SCT complained to the Commission of practices by WACEM which were hindering intra-Community trade in cement and distorting the rules of healthy competition between undertakings. It concluded that WACEM had engaged in unfair competition in breach of the provisions of the Treaty, in particular Articles 76 et seq., and that the Commission should take all necessary measures to put an end to such behaviour; the applicant did not ask the Commission to issue injunctions against the Togolese State, it should be pointed out.
For this reason, the Commission decided that it was not competent to implement commitments made within the framework of ECOWAS.

Is that lack of jurisdiction justified in the light of the pleas in law relied on by the applicant?
Article 76 sets out the objectives of the Community's economic policy, namely the abolition of customs barriers, the establishment of a Common External Tariff, the introduction of common rules on competition between undertakings as specified in Article 88 of the Treaty, which automatically prohibits :

- Agreements between undertakings restricting or distorting competition within the Community market ;

- Any practices by one or more undertakings which amount to an abuse of a dominant position within the common market or in a significant part of it;

- State aid likely to distort free competition between companies.

A combined interpretation of Articles 26 (paragraphs 1 and 6) and 90 of the Treaty establishes that the implementation of WAEMU Community policies, in particular competition policy, falls within the remit of the Commission; in exercising its prerogatives, this body must gather all relevant information from Governments, Member State authorities and companies.

In the area of competition, it may act on its own initiative or on the basis of informal, anonymous complaints, information received either from a Member State or from consumers, or as a result of economic investigations.

The Commission's jurisdiction extends to any anti-competitive practice located in the Community area consisting of the territory of the Member States. This jurisdiction is exclusive and cannot be assessed in the light of the law of another Community or the status of a Community or foreign undertaking.

Location (deduced from the provisions of Article 88 of the Treaty) makes it possible to situate the Commission's jurisdiction and the effects of companies' illicit practices on Community territory.

"... The Community authorities must consider the conduct complained of in all its consequences for the structure of competition in the common market, without distinguishing between products intended for sale within the common market and those intended for export; where the holder of a dominant position established in the common market tends, by abusing that position, to eliminate a competitor also established in the common market, it is immaterial whether that conduct relates to the latter's export activities or to its own activities.

in the common market, since it is common ground that this elimination will have repercussions on the structure of competition in the common market".

(Opinion of Advocate General WARNER in Commercial Solvens v Commission - Judgment of 6/03/1974 ECR page 255)
This position was reinforced by the ECJ ruling of 5/10/1988 in Société Alsacienne et Lorraine de Télécommunication et d'Electronique v S.A. Novassam (Receuil page 5988).

Interpreting the concept of abuse of a dominant position and effect on trade between Member States, the Court held that it was necessary to consider its purpose **"which is to determine the field of application of Community competition law... and to identify any practice liable to influence directly or indirectly, actually or potentially, the flow of trade between Member States and thus to impede the economic interpenetration sought by the Treaty".**

The Commission must, within the scope of its powers, ensure the full effect of Community rules, ignoring any foreign legislation where appropriate.
It follows from the foregoing considerations that a complaint against practices which are likely to distort the homogeneity of the WAEMU market and to create distortions of competition deserves to be analysed by the Commission; an investigation would have enabled the Commission to be sufficiently informed and to have the factual and legal elements on which to base its decision, for the applicant to know the basis for its decision and for the Court to exercise its review of legality with full knowledge of the facts.

By disregarding its jurisdiction, when it ought instead to have sought information and, if necessary, carried out checks with the Togolese undertakings and authorities and in the markets in question in order to ascertain whether the practices brought to its attention could affect intra-Community cement transactions and distort the common rules of competition applicable to undertakings, the Commission manifestly disregarded the scope of its powers and infringed the provisions referred to in the pleas in law.

It follows that the contested decision must be annulled.

As regards the first ancillary application :

Additional Act No. 04 of 10 May 1996 lays down the Community's preferential trade arrangements. The customs regime applicable to approved and non-approved industrial products originating in the Community, as set out in articles 12, 13 and 14 of these regulations, provides for reduced import duties in the Member States of the Union compared with products of the same type imported from third countries. But is an ECOWAS company, in any case, a foreign company to the WAEMU, therefore not likely to benefit from a privileged Community taxation (Community preferential tax). We believe that the answer to this question is irrelevant to the resolution of this dispute.

Moreover, the application seeks to assess an ECOWAS decision in relation to UEMOA regulations; as ECOWAS is a foreign authority, the assessment of an ECOWAS act falls outside the jurisdiction of the Court as defined by the provisions of Article 1er of Additional Protocol No. 1.
It follows from the foregoing that this application is inadmissible.

As regards the second ancillary application :

The applicant's interpretation of the concept of an originating product is incorrect, in that, first, an industrial product is considered to be an originating product if 60% of the raw materials used in its manufacture come from the Community, or if the product is obtained from raw materials imported entirely from third countries, or if the raw materials used in its manufacture account for less than 60% of all the raw materials used, where the added value is at least equal to 40% of the factory cost price of the product, exclusive of tax, less than 60% of all the raw materials used, when the added value is at least equal to 40% of the factory cost price of the product, excluding taxes, and secondly the Common External Tariff, a customs tariff common to the Member States, only applies to products imported from third countries.

The request does not meet an objective procedural need; moreover, it is one of the grounds for the application (see page 2, paragraph 7).

In these circumstances, it is inadmissible.

To sum up, we conclude that the appeal is inadmissible, but that if the Court were to decide otherwise, it would have to annul the decision; in the first case, the applicant must be ordered to pay the costs and the security returned to UEMOA (Article 60 paragraph 2 of the Rules of Procedure and 31 paragraph in fine of the Court's Statutes); in the second case, the costs must be shared between the parties who have been unsuccessful on the various heads of claim, by application of Article 60 paragraph 3 of the Rules of Procedure.

The Advocate General :

Malet DIAKITE

JUDGMENT OF THE COURT

20 June 2001

Between

Société des Ciments du Togo, SA

And

The WAEMU Commission

The Court, composed of Yves D. YEHOUESSI, President; Daniel L. FERREIRA, Judge-Rapporteur; Mouhamadou NGOM, Judge; Malet DIAKITE, Advocate General; Raphaël P. OUATTARA, Registrar;

delivers this judgment :

Whereas by application dated 5 September 2000, received at the Court on 6 September 2000 and registered at the Registry of the said Court under number 01/2000, Société des Ciments du Togo, through its counsel Maître G. K. AMEGADJIE, Avocat à la Cour d'Appel de Lomé Togo, brought an action for annulment of Decision No 1467/DPCD/DC/547 of 7 July 2000 of the WAEMU Commission which declared itself incompetent to enjoin Member States to take the necessary measures to ensure compliance with the trade and competition rules governing the Union;

Considering that the applicant states that in December 1998, a company called West African Cimento (WACEM) was approved by the Togolese Republic as a free zone company which the Togolese State had just created;

Under Togolese law relating to the free zone, a company approved for the free zone and which carries out its activities there is a company which is in reality foreign to the economy and geographical territory of Togo and therefore of the WAEMU;

That's why:

- firstly, under the terms of Article 27 of the said Togolese law, sales made by companies established on Togolese territory to companies in the free zone are exports;
- secondly, under the terms of article 26 of the same law, the products of a company in the free zone released for consumption in the customs territory of the WAEMU countries are exports, which can only be carried out by a third party importer legally established in the customs territory of Togo;

Considering that the applicant further contends that, relying on the authorisation allegedly granted to it by the ECOWAS Executive Secretariat, WACEM exports its cement production to the territories of the WAEMU Member States;

It points out that these actions by WACEM constitute serious violations of the provisions of Articles 76 et seq. of the WAEMU Treaty establishing a common market for Member States and establishing the principle o f a Common External Tariff for the benefit of companies that are nationals of the customs territories of each of the Member States;

It therefore considers that the Commission's refusal to enjoin the Togolese Republic to take appropriate measures to put an end to the actions of WACEM, which are seriously prejudicial to the interests of economic operators legally established in the customs territories, is in breach of the provisions of the WAEMU Treaty;

It therefore seeks the annulment of the Commission's decision as vitiated by illegality;

Whereas at the hearing on 13 June 2001, after the reading of the final report by the Judge-Rapporteur, the applicant pointed out in oral proceedings :

- after having referred the matter to the Court by fax, she was invited by the Registrar, by telephone, to put her case in order;

- that it has never been given formal notice to regularise its appeal in accordance with the provisions of Article 32 of the Court's Statutes;

- it requests that the Court declare that it renounces the new claims contained in its statement of claim;

Finally, she asked the Court to:

- declare the action admissible in form;
- annul the Commission's decision of 7 July 2000;

Whereas the Commission concluded, principally, that the applicant's action for annulment was inadmissible and, in the alternative, that the applicant's case should be dismissed on the merits.

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 Court's jurisdiction in this case is enshrined in Articles 1, 8 and 9 of Additional Protocol No. 1 on the supervisory bodies of the WAEMU and therefore calls for no particular comment;

As regards the admissibility of the action, it should be noted first of all that the applicant fulfilled her obligation to provide security on 5 December 2000;

However, as regards compliance with Article 26 of the Rules of Procedure and the legal nature of the contested decision, it should be noted that the Commission raises two objections to admissibility which must be examined;

Whereas, against this action, the Commission :

- on the one hand, submits in a statement of defence dated 16 February 2001 that the certified copy of the fax of the application before the Court of Appeal cannot be treated as an original within the meaning of Article 26(3) of the Rules of Procedure;

- secondly, considers that the contested decision is not such as to create any change in the pre-existing legal system; the decision, which is neither a regulation nor a directive, is not capable of producing legal effects;

Considering that, in its reply dated 26 March 2001, the applicant maintains, on the contrary :

- that, on the one hand, even if it is certain that paragraph 3 of Article 26 of the Rules of Procedure states that the application shall be drawn up, in addition to the original, in as many certified copies as there are parties to the proceedings, it is nowhere written in that text that the provisions of paragraph 3 are made ad validitatem of the referral to the Court;

- on the other hand, nowhere is it stated that it is only the originals of the documents (application or compromise) that can be referred to the Court; it is a general principle of law that there is neither inadmissibility nor nullity without a text;

It adds that, by DHL letter dated 10 November 2000, it sent the original and two copies of its application to the Registrar of the Court, who found it sufficient to notify the Commission of a certified copy of the fax of the application;

Considering that the applicant also pointed out that she had based her action on Article 8(2) of Additional Protocol No. 1, which provides that an action for assessment of legality shall also be open to any natural or legal person against any act of the Union adversely affecting that person;

That, again according to the applicant, the contested decision, signed by a Commissioner, is an act of the Commission which causes it damage;

Lastly, **it** considers that the Commission's assertion that, in order to be subject to an action for annulment, the measure must be such as to create a change in the pre-existing legal system constitutes an unlawful addition to the legal conditions for bringing such an action;

Considering that the applicant should first be given notice that it is abandoning its new claims contained in its amplifying statement.

Considering that it should then be specified that the contested decision does indeed constitute an act of a Union body within the meaning of Article 8(2) of Additional Protocol No 1 on supervisory bodies;

Under the terms of this provision, "an action for assessment of legality shall also be open to any natural or legal person against any act of a body of the Union adversely affecting that person";

Considering that the terms of the Commission's letter constitute a statement of position on the complaint of Société des Ciments du Togo;

Considering that by this letter the Commission unequivocally adopted a measure with legal effects affecting the interests of Société des Ciments du Togo and binding on it;

In the light of these observations, the Commission's attempt to argue that the decision is not subject to an action for annulment is in vain.

Whereas, however, it should be noted that Article 26 of the Rules of Procedure, which merely reproduces Article 31 of Additional Act No. 10/96 on the Statute of the Court of Justice, provides, in paragraph 2, that the application shall be drawn up, in addition to the original, in as many certified copies as there are parties to the proceedings;

Article 32 of the said Additional Act provides that, if the application does not comply with the provisions of Article 31, the Registrar shall invite the applicant to put her application in order within a period which may not exceed two months;

Considering that the question to be asked is whether these provisions have been complied with;

Considering that it emerged from the proceedings that the applicant stated that she had been invited by the Registrar, by telephone, to put her application in order, before subsequently denying this and stating that she had never been given formal notice to put her application in order;

In this state of uncertainty and contradiction, the applicant vainly attempts to maintain that the provisions of Article 32 have not been complied with;

Considering that the applicant did not send the original of her application to the Court until 04 April 2001, i.e. more than two months after the expiry of the statutory time-limit for lodging an application;

Considering that, in addition, it is a rule that the original of the application must be lodged within the time limits, particularly when the action for annulment is brought;

Considering that, as a result of the foregoing, the admissibility of the appeal depends solely on the original application being duly lodged with the Court within the two-month time limit (2) months ;

That, moreover, the time-limits laid down in Article 32 of the Statutes of the Court of Justice and in Article 15 of the Rules of Procedure are a matter of public policy; that it is not for the court or the parties to dispose of them as they wish, since they were introduced with a view to ensuring the clarity and certainty of legal situations;

That, consequently, the late appeal lodged by Société des Ciments du Togo by fax, which was not rectified within the time limits laid down in Article 32 of the Articles of Association, must be declared inadmissible;

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

Whereas the applicant has been unsuccessful in its pleas; whereas it should be ordered to pay the costs;

FOR THESE REASONS

Ruling publicly and adversely on actions for annulment :

- Acknowledges that the applicant renounces the new claims contained in its statement of defence;

- Declares the appeal inadmissible for failure to comply with the provisions o f Article 31(3) of Additional Act No 10/96 on the Statute of the Court of Justice;

- Orders Société des Ciments du Togo to pay the costs.