

# COMA DE JHsTlck

OF AN ECONOMIC ION AND MjNETA IRE  
ourS2 AFRICA r (UEMOAj

**AVLS N° 002/99**

Dossier n° 1 - >9

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The President of the WAEMU Commission referred the matter to the Court of Justice, pursuant to the provisions of Article 27(8) of Additional Act No 1 0/96 on the Statute of the WAEMU Court of Justice, by letter No 99-053 of 8 June 1999, registered at the Court's Registry on 8 June 1999 under No 01/99, which reads as follows:

*"The draft organic texts of the UEMGA Court of Auditors have just been drawn up and will be examined by the Union's Council of Ministers next July.*

*It would be very useful for us to have your Court's comments on these draft texts. In addition to the general observations which the Court would like to make, it would be desirable to quote those which would be inspired by the following specific points.*

*Article 26 of the Protocol additionnel n° 1 prévoit que les modalités de contrôle devraient être exercées par la Cour des Comptes. Les modalités de contrôle sont arrêtées par le Conseil, mais restent inchangées sur les énonciations de l'article 38 du Traité de l'UEMOA, qui dispose que "le statut, la composition, les compétences ainsi que les règles de procédures et de fonctionnement de la Cour de Justice et de la Cour des Comptes sont énoncées dans le Protocol additionnel n° 1."*

*Les Conseillers à la Cour des Comptes estiment qu'il y a une omission ou un vide dans le Protocol additionnel n° 1, qui mériterait d'être comblé afin d'avoir des textes organiques complets pour l'organe de contrôle juridictionnel de la Cour.*

*On the basis of Article 19 of the Treaty, which provides that an additional act may be adopted to supplement the Treaty, the Councillors propose that the fundamental provisions of the Statutes, the competence, and the rules of procedure and operation of the Court of Auditors, should be the subject of an additional act, while the modalities would be set out in the Rules.*

*They also believe that a judicial review body should enjoy genuine independence from the bodies it reviews, that it should therefore enjoy financial autonomy, and that its chairman should be the financial controller of its budget.*

The Court, sitting in Consultative General Assembly, under the chairmanship of Mr Yves D. YEHOUESSI, President of the Court of Justice of the WAEMU, on the report of Mr Malet DIAKITE, First Advocate General, in the presence of Messrs:

- Mouham don Moctar MBACKE       Judge of the
- Martin Dobo ZONOU                 Court Judge of
- "Yousseuf ANY MAHAMAN         the         Court
- "Kalédji AFANGBEDJ1            Judge of the
- Court
- Advocate
- General

and assisted by Mr Raphaël P. OUAITARA, Registrar of the said Court, examined at its sitting of 25 June 1999 the above-mentioned request for an opinion dated 8 June 1999.

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

Having regard to    Additional Act No. 10/96 on the Statutes of the Court of Justice of the WAEMU ;

Regulation No. 01/96/CM on the Rules of Procedure of the Court of Justice of the European Communities.

UEMOA ,

Having regard to    the Administrative Rules of the WAEMU Court of Justice dated 9 December

1996; Having regard to    the request for opinion n° 99-053 of 8 June 1999 from the President of the WAEMU Commission;

The case has been brought before the Court in accordance with the provisions of article 15 - 7' of the Rules of Procedure and, as the application is in due form, it is therefore admissible.

## **I - GENERAL COMMENTS**

It follows from the provisions of Article 38 of the WAEMU Treaty creating the so-called judicial supervisory bodies, namely the Court of Justice and the Court of Auditors, that the status, composition, powers as well as the rules of procedure and operation of these two bodies are provided for in Additional Protocol No. 1, a standard-setting instrument of the Organisation and an integral part of the 'founding treaty', a higher standard in the hierarchy of Community acts of the Union and which are mainly covered by the international law of the Treaties, which are subject to a constitutional procedure for acceptance in the Member States.

On the other hand, the Additional Act, as a unilateral act, although adopted by the Conference of Heads of State and Government and annexed to the Treaty, is nonetheless an act of secondary legislation hierarchically inferior to the Treaty, and can in no way replace the latter but rather supplement it in its application without modifying it in letter or in spirit.

This means, therefore, that the Additional Act cannot make provision in a field reserved for the Treaty or the Additional Protocol; it can only apply the principles which these norms have already laid down.

The present draft Additional Act seems to encroach on the scope of the Treaty by extrapolating the interpretation of its spirit and letter: Articles 23 to 25 of the Additional Protocol set out definitively and exhaustively the statutory principles of the Court of Auditors, namely its composition, the independence and professional standing of its members, the duration of their term of office and the way in which they are appointed; As to its competence, it is specified that its control shall relate in particular to the regularity and efficiency of the use of the Union's resources, and any subsequent provisions can therefore only concern the implementation of these guidelines, including the5 practical arrangements for the operation of the Court as provided for in Article 26 of the Additional Protocol.

From this point of view, the control referred to in Additional Protocol 1 makes the Court of Auditors, despite its title of judicial control, a body for verifying the regularity and efficiency of the accounts of the Union and its other organs, but does not seem to make it a judge of the accounts of the organisation's accounting officers, who are subject to the jurisdiction of the Court.

It is important to distinguish between a body responsible for verifying the regularity and efficiency of an organisation's accounts and a body responsible for judging those same accounts and punishing those guilty of accounting mismanagement. Such an interpretation of the powers of the Court of Auditors cannot under any circumstances be covered by an Additional Act; only the Constitutional Treaty or an Additional Protocol can provide for this.

Moreover, the Court of Auditors of the European Union, whose texts have profoundly inspired those of the WAEMU, is only competent to audit the accounts of the Union. Its reports are sent to the competent bodies of the Union, which make use of their content. Consequently, this Court is no more than a body invested with a mission of external and a posteriori control (see article 188 c of the Treaty of Rome of 25 March 1957).

It appears from the draft text that the drafters were somewhat misled by the term "organ of jurisdictional control", curiously given to the Court of Auditors, as stated by Messrs Cerexlie and Beaulieu of the Centre d'Etudes Européennes et de l'Intégration (CEEI), on page 61 of their book "Introduction à l'UEMOA".

To sum up, in the absence of the relevant provisions contained in the Constitutional Treaty and its Additional Protocol, the implementing texts organising the Court of Auditors cannot, without being in full conformity with the supreme act of the Union, transform the Court of Auditors into a judicial institution of a repressive nature, pronouncing fines, injunctions and imposing penalties.

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On reading the current texts of the organisation, in particular Article 23 of Additional Protocol No. 1, the Court is responsible for auditing the administrative and accounting management of the Union's accounts, in terms of their regularity and even their legality and quality, its status being determined by Article 24; moreover, Article 51 of the Treaty provides that the rules for the presentation and auditing of the accounts are contained in the financial regulations (which may be more than one) or a regulation as provided for in Article 26. The Additional Act may intervene within the limits of Community competence to perfect the functioning of the audit body as provided for in the Constitutional Treaty.

In short, the audit reports of the Court of Auditors should be sent, together with their findings, observations and recommendations, to the competent intergovernmental body of the Union, i.e. the Council of Ministers, so that disciplinary or even criminal proceedings can be instituted as a result of the findings and recommendations contained in the Court's conclusions.

These are the spirit and the letter of the aforementioned provisions of the Constitutive Treaty and its Additional Protocol, any other competence having to come under the reform of these texts whose limits cannot be exceeded by the acts which intend to supplement or apply them.

As the provisions of Article 16 of the Treaty so aptly prescribe, the bodies shall act within the limits conferred on them by the Treaty and under the conditions laid down therein.

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## II - SPECIFIC COMMENTS ON THE DRAFT TEXTS

### A. The draft Articles of Association

The structure of the text submitted to us does not clearly and precisely show the areas in which the Court is organised, operates and has jurisdiction. The text would have been clearer if it had been dis]30se as follows:

- a) The organisation of the Court
- b) The status of Court Advisers
- e) Jurisdiction of the Court.

In the light of the foregoing observations, an examination of the draft also calls for the following comments, article by article :

Article 3: Paragraph 2 of this article is contrary to the provisions of the Treaty set out in paragraph 1.

Articles 8, 9 and 10 should be worded in such a way that the Court does not encroach on the remit of Ja Commission's internal auditor.

Article 11: The last paragraph of this article, which stipulates that all draft regulations of a financial nature must be submitted to the Court for prior approval, comes under the WAEMU Financial Regulations.

Article 12This article only makes sense if the Court of Auditors is a criminal court.

Articles 13, 14, 15, 16, 17, 18 and 19 may be included in the Statute of the Members of the Court.

The end of article 23 seems incomplete.

The following words should be added to Article 24: "within the limits set by the corporate budget, UEMOA".

Article 25: As regards the dismissal of the Councillor, it would be more appropriate to apply to him the provisions of Article 30 of the Treaty relating to the dismissal of Commissioners.

Article 26: The solemnity of the swearing-in ceremony is governed by the texts of the Court.

Article 27: The method of appointing the President of the Court should be specified.

Articles 24 and 31 should be read in conjunction with the operating procedures.

Article 28: The question of financial autonomy and the authorising officer is governed by the appropriate texts, in particular Article 26 of the Treaty and Articles 1, 2 and 12 of Financial Regulation No 03/95/CM of 1/0g/1995, which provide as follows:

Article 1<sup>\*^</sup>.

*For the purposes of these Regulations, :*

Organs of the Union. ' the organs of the West African Economic and Monetary Union hereinafter referred to as .

- the Conference of Heads of State and Government,
- the Council of Ministers,
- \* the Commission
- the Court of Justice
- the Cpur des Comptes
- the Interparliamentary Committee
- \* the Regional Consular Chamber.

Article 2. This Regulation shall govern the administration of all the financial activities of the bodies of the Union as defined in Article 1 below, notwithstanding the specific financial and accounting rules governing the operations of the Structural Funds and the Compensation Fund provided for in Articles 59 and 78 of the Treaty. These rules are laid down in the texts implementing these regulations.

Article J2 The President of the Commission shall be the chief administrator of appropriations and the chief authorising officer for the budget, in respect of both the commitment of expenditure and the validation and authorisation of revenue and expenditure. He may delegate his powers to the Chairmen of the other bodies of the Union and to the other members of the Commission.

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Article 20: The creation of a registry presupposes that the Court is a contentious court which holds hearings and delivers judgments.

Article 31 must comply with the provisions of *article 25 of the Protocnlc- addiiionnel ri° 1* which states:

*"Councillors may **be assisted** by associates. In the performance of their duties, they may have recourse to an external audit system".*

## **B. Draft regulation on the presentation and auditing of accounts**

If we confine ourselves to general observations, Chapters III (Fines), IV (Judgement of accounts) and V (Court judgements and appeals) become superfluous.

Some articles need to be revised:

In article 6, the word "Councillor" should be deleted, as the collaborator is attached to the Court of Auditors and not to a Councillor.

Article 8: Experts may not be remunerated in any manner other than that provided for in the texts in force in the Member States.  
relating to this type of activity.

Articles 9 and 10: The comments made under Article 28 of the draft Statute apply to these articles (see the Financial Regulation and Article 26 of the Treaty, which gives the Commission responsibility for implementing the budget).

Article 21 Is there a difference between a certificate of conformity and a certificate of concordance? The persons subject to the obligation to produce these documents are different according to Article 21 of the draft Regulation and Article 32 of the draft Statute.

Article 22: There is no reason for it insofar as all the persons subject to the eontrôle are the subject of general or special reports.

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These are the general and specific observations that we have drawn from examining the draft texts submitted.

Ouagadougou, 25 June 1999

And signed by the Chairman, the Judge-Rapporteur and the Registrar


The Judge-  
Rapporteur

The Registrar

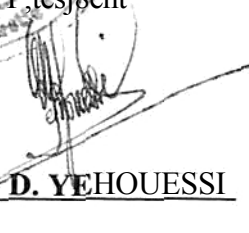


Male DIAKITE

Raphaël P. OUATTARA



The  
President



Yves D. YEHOUESSI