OPINION N° 01/2022
from 31 MARCH 2022
Request for an opinion from the President of the WAEMU Commission on the difficulties of applying the Community provisions governing the Community Solidarity Levy (CSL)

The President of the WAEMU Commission referred to the WAEMU Court of Justice by correspondence No. 05451/2021/PC/DMRC/DUDLC dated 20 August 2021, registered on 24 August 2021 under No. 21 D 005 and regularised by correspondence No. 07456/2021/PC dated 26 October 202, a request for an opinion on difficulties in the application of Community provisions governing the Community Solidarity Levy (CSL), as follows:

"Mr President,

Article 54 of the West African Economic and Monetary Union (WAEMU) Treaty states that "The resources of the Union shall come in particular from a fraction of the proceeds of the common external tariff (CET) and indirect taxes levied throughout the Union. These resources shall be collected directly by the Union".

Faced with the difficulties of implementing this provision, a special financing mechanism known as the Community Solidarity Levy (CSL) was set up under Additional Act No 04/96 of 10 May 1996, establishing a transitional preferential trade regime within the WAEMU and its financing arrangements. This financing mechanism served as a model for the Economic Community of West African States (ECOWAS) and then the African Union (AU).

To ensure the implementation of Additional Act No.^{0} 04/96 of 10 May 1996, the WAEMU Commission adopted Implementing Regulation No. 07/96/COM/UEMOA of 28 June 1996 determining the modalities for the collection of the Community Solidarity Levy (CSL). This was repealed and replaced by Implementing Regulation No. 008/2020/COM/UEMOA of 17 June 2020, determining the modalities for recovery of the Community Solidarity Levy (CSL).

In accordance with the provisions of Article 17 of the said Additional Act, the following are excluded from the basis of assessment of the PCS :

- products originating in the Union, products manufactured or obtained in a Member State of the Union which do not fulfil the conditions of origin set out in Articles 4, 5, 6, 7, 8 and 9 of this Act

- products originating in third countries that have been nationalised by being released for consumption in one Member State and redispatched to another Member State.

Article 18 of the same Additional Act defines the PCS exemptions, namely :

- grants and donations to the State or to charitable organisations;
- goods in transit ;
- assets acquired as part of financing granted by foreign partners, subject to an express clause exempting them from any tax or parafiscal levy;
- goods originating in the customs territory of a Member State and returning in the same condition;
- goods declared for the bonded warehouse ,
- goods which have already paid C.S.P. under a previous procedure ;
- goods imported by companies benefiting from a stabilised tax regime in force on the date of entry into force of this act;
- goods benefiting from diplomatic exemptions ;
- petroleum products.

During inspections of Community Solidarity Levy (CSL) operations carried out in the Member States, the Commission noted anomalies in the application of the provisions of the Additional Act governing the CSL.

In fact, two main concerns have been raised by the various inspection missions in the Member States. These concern the interpretation of the concept of a stabilised regime and its date of entry into force, as well as the application of the PCS to goods imported from the seven (07) ECOWAS States that are not members of the UEMOA.

I. Interpretation of the concept of a stabilised regime and its course

As mentioned above, Article 18 of Additional Act No. 04/96 of 10 May 1996 establishing a transitional preferential trade regime within the WAEMU and its method of financing stipulates that "... goods imported by companies benefiting from a stabilised tax regime in force on the date of implementation of this Act ..." are exempt from the PCS.

The WAEMU Commission therefore understands that, in the wording of this provision, when a company benefits from a stabilised scheme in force on 1 July 1996,
On the date of entry into force of Additional Act No.^{0} 04/96 of 10 May 1996, the goods it imports are exempt from PCS.

However, checks on the liquidation of the PCS in Côte d'Ivoire in 2016 revealed unliquidated amounts relating mainly to additional codes for consumption tax for mining and oil exploration and exploitation. These benefits were granted both to companies existing in 1996 and to those that set up after 199 .

In response to these observations, the Direction de la Réglementation et du Contentieux (DRC) of the Direction générale des douanes de Côte d'ivoire informed the mission that these releases for consumption related to stabilised regimes, provided for by the national Mining and Petroleum Codes since 1996. Accordingly, Côte d'Ivoire considers that any company eligible under the Mining Code, the Investment Code or the Petroleum Code ipso facto benefits from a stabilised regime, as all these Codes existed before 1er July 1996.

By letter n°03104/PC/DMRC/DMRUD dated 27 April 2016, the WAEMU Commission drew the attention of the Minister attached to the Prime Minister, in charge of the Economy and Finance of the Republic of Côte d'Ivoire, to this state of affairs.

Interpreting the provisions of Article 18 of the Additional Act 04/96, the Commission stated that the exemption referred to under a stabilised tax system concerned only companies which had signed agreements with Côte d'Ivoire which were in force on 1er July 1996, the date on which the said Act entered into force.

The Commission also pointed out to Côte d'Ivoire that, in the other EU Member States, the PCS was liquidated when goods imported by companies established after the date of entry into force of the Additional Act were released for consumption. It pointed out that the failure to liquidate the PCS in Côte d'Ivoire could distort competition between Member States and undermine the common market.

It therefore asked the Côte d'Ivoire Minister for the Economy and Finance to take all necessary steps to put an end to the non-liquidation of the PCS at the time of release for consumption for mining and oil exploration and exploitation, which the Côte d'Ivoire authorities considered to be stabilised schemes under their mining and oil codes, even though the beneficiary companies did not exist in 1996.

In addition to the arguments developed during the inspection missions and with reference, for example, to the Ivorian Petroleum Code of 31 May 1996, which was in force on 1 July 1996, the Commission notes that Article 18 of the said Code stipulates that :

"In particular, the oil contract must set out :

m) Legal conditions concerning applicable law, stability of conditions, force majeure and dispute resolution".

This confirms that the Stability Clause expressly stipulated in the Agreement or Contract signed with the company is conferred by the said Agreement or Contract and not by the Code itself.

Finally, the Commission notes that this situation has hardly changed and that Côte d'Ivoire continues to exempt these companies from the PCS.

It. The application of the PCS to goods imported from the seven (07) ECOWAS States that are not members of the UEMOA

In some EU Member States, inspections of PCS operations have found that customs administrations exclude products originating in the seven (07) non-WAEMU ECOWAS Member States from the PCS base. This is the case, for example, in Senegal where, in 2017, inspection missions found that the PCS was not applied to goods imported from non-WAEMU ECOWAS Member States.

Further to the conclusions contained in the report of the second mission
Community Solidarity Levy (PCS) operations carried out in Dakar (Senegal) from 24 July to 1 August 2017, the technical departments of
The Commission examined the issue in greater detail and also noted that, as specified in Service Note No 1709/DGD/DRCI/BNF/dt of 20 June 2017 from Senegal's Directorate General of Customs attached to the Minutes, with the implementation of the ECOWAS Trade Liberalisation Scheme by Senegal, since 1er January 2004, the option has been taken not to apply the PCS to goods originating in ECOWAS and released for consumption.

However, again with reference to Additional Act No. 04/96, "The following are excluded from this basis of assessment :

- products originating in the Union, products manufactured or obtained in a Member State of the Union which do not fulfil the conditions of origin set out in Articles 4, 5, 6, 7, 8 and 9 of this Act ;

- products originating in third countries that have been nationalised by being released for consumption in one Member State and redispatched to another Member State.

Nowhere is it stated that products originating in ECOWAS Member States are excluded from this base. This option is only expressly made by Senegal and is shared by Côte d'Ivoire.

This tendency to apply Community provisions on the basis of a so-called spirit of the texts has today prompted the African Union to request that the WAEMU PCS and the ECOWAS Community Levy (PC) not be applied to goods originating in the African Union.

In view of the foregoing, the opinion of the Court of Justice is sought in order to definitively establish the position of the various parties.

I you request the assurance Yours faithfully Mr to Chairman, of my the assurance of my highest consideration.

P.J.

Copy of the Additional Act n°04/96 of 10 May 1996
Copy of Implementing Regulation n°008/2020/COM/UEMOA of 17 June 2020 Copy of Service Note n°1709/DGD/DRCl/BNF/dt of 20 June 2017
Copy of Letter n°0Jf04/PC/DMRC/D/\4RL/D *of 27 April 2016*

The Chairman

Abdoulaye DIOP

The Court, sitting in Consultative General Assembly under the chairmanship of Mr Daniel Amagoin TESSOUGUE, President of the Court of Justice of the WAEMU, in the presence of :

- Mr Salifou SAMPINBOGO, Judge ;
  Ms Victoire Eliane ALLAGBADA JACOB, First Advocate General ;
- Mr Mahawa Sémou DIOUF, Judge ;
- Mr Euloge AKPO, Judge ;
  Mrs Josephine Suzanne EBAH-TOURE, Judge; Mr Kuami Gaméli LODONOU, Advocate General; Mr Ladislau Clemente Fernando Embassa, Judge;

A\/with the assistance of Maîtres Boubakar TAWEYE MAIDANDA, Registrar and Hamidou YAMEOGO, Deputy Registrar, acting as secretary, In the presence of Mr Ervé DABONNE, Auditor at the Court; examined the above application at its sitting of 31 March 2022.

THE CONSULTATIVE GENERAL MEETING,

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

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

HAVING REGARD TO Additional Act n°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 of 05 July 1996 on the Rules of Procedure of the Court of Justice of the WAEMU, in particular article 7 ;

HAVING REGARD TO Regulation No 01/2012/CJ of 21December 2012on the Administrative Rules of the Court of Justice of the WAEMU;

HAVING REGARD TO the 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 Procës-Verbal n°2019-08/Al/02 of 28 May 2019 relating to the appointment of the President of the Court and the distribution of functions within the Court;

HAVING REGARD TO the minutes n°2019-09/AP/07 of 03 June 2019 relating to the installation of the President of the WAEMU Court of Justice;

HAVING REGARD TO Minutes No 2021-02/AP/02 of 25 February 2021 relating to the swearing-in of a Member of the WAEMU Court of Justice;

HAVING REGARD TO the minutes n°2022-02/AP/01 of 09 February 2022 relating to the swearing-in of a Member of the WAEMU Court of Justice;

HAVING REGARD TO Decision n°001-2013/CJ of 21 June 2013 on the Statute of Auditors of the WAEMU Court of Justice;

HAVING REGARD TO the request for an opinion from the WAEMU Commission dated 20 August 2021, received at the Registry on 24 August 2021 and registered under number 21 DA 005;

HAVING REGARD TO letter n°2021-230/CJ/DAT/ceri from the President of the Court of Justice dated 06 October 2021;

see letter no. 07456/2021/PC from the President of the Commission dated 26 October 2021 ;

HAVING REGARD TO the written observations of the Cour des Comptes dated 14 September 2021 VU the written observations of the Togolese Republic dated 18 October 2021 VU the written observations of the Republic of Côte d'Ivoire dated 29 October 2021 ;

HAVING REGARD TO the written observations of the Republic of Niger dated 08 November 2021

VU Ordinance n°32/2021/CJ of 10 October 2021 bearing appointment a

Rapporteur ;

HAVING REGARD TO the other documents in the file ;

I. **COMMENTS FROM THE** BODIES AND MEMBER STATES

The eight Member States and the Court of Auditors of the European Communities were notified of the request for an opinion.
UEMOA.

The WAEMU Court of Auditors, the Republic of Côte d'Ivoire, the Republic of Niger and the Togolese Republic responded to the notification.

Niger, Togo and the WAEMU Court of Auditors made the same observations and argued that the provisions relating to PCS exemptions set out in Article 18(7) of Additional Act No. 04/96 of 10 May 1996 only concern goods imported by companies benefiting from a stabilised regime in force on 1e July 1996, the date on which the said Act came into force; that the non-liquidation of the PCS on goods and products released for consumption by these companies on Ivorian territory creates a distortion of competition between Member States and will weaken the Union.

With regard to the application of the PCS to goods from other ECOWAS States that are not members of UEMOA, Togo, Niger and the Union's Court of Auditors, point out that "as long as *an* express provision has not been adopted *by* the competent bodies of *the Union in* the sense of an exemption, *none* of the Member *States* can *legally* exempt the *seven other ECOWAS Member States from payment of the PCS* by *relying on the spirit of the* texts.
In **doing so,** *the State concerned is in breach of* Article J7 of *Additional* Act *No. 04/1996 of 10 December 1996.*
mai Y996 ***et*** **ses règiemenfs** z/'app/icafion "

By way of background, Côte d'Ivoire states that the discrepancy relating to the point concerning "the stabilised tax regime" dates back to the first verification missions of the PCS operations in 2006 and concerns the former mining code of 17 July 1995 and the petroleum code of 29 August 1996.

With the advent of loi 2014-138 of 24 March 2014 on the mining code, replacing the mining code of 17 July 1995, most mining companies no longer benefit from the stabilised tax regime, with the exception of Société TONGON, which still remains subject to this code.

In response to the Commission's request for an opinion on Article 18(7), the Republic of Côte d'Ivoire said that it did not share the Commission's understanding.

After this reminder, Côte d'Ivoire states that the mining and petroleum codes adopted on 17 July 1995 and 29 August 1996 respectively serve as the legal basis for companies operating in these sectors;

Thus the exemption provisions in customs and tax matters contained in the two codes constitute the stabilised tax system provided for in point 7 of Article 18 of the Additional Act No 04/96 of 10 May 1996.
Côte d'Ivoire concludes that "*the exemption from PCS resulting from the l'iscal regime* ***stabilised*** **concerns** ***all companies in the mining*** and ***oil*** **sectors,** *including* **cei/es created** ***after*** **the entry into** ***force of the aforementioned*** *text*".

As regards products from ECOWAS countries that are not members of UEMOA, Côte d'Ivoire maintains that they should not pay the PCS on the grounds that the provisions of Articles 3 and 4 of Protocol A/P1/7/96 on the conditions of application of the ECOWAS Community levy (PCC) and those of Article 17 of Additional Act No 04/96 of 10 May 1996 have the same meaning, Finally, all UEMOA countries are members of ECOWAS and have undertaken to comply with the relevant provisions of that organisation; Finally, the provisions of WAEMU do not apply.

Senegal, although it has not replied to the Court, and as is clear from the documents attached to the Commission's request for an opinion, shares the same position as Côte d'Ivoire in relation to Article 17 of the above-mentioned Additional Act (see Service Note No 1709/DGD/DRCI/BNF/DI of 10 June 2017 from Senegal's Directorate-General for Customs).

II. EXAMINATION OF THE APPLICATION

In form

The request for an opinion is based on the last paragraph of Article 27 of the Court's Statutes and on Article 15.7 of the Court's Rules of Procedure.
As the referral complies with the above provisions, it is admissible.

At the back

The request for an opinion relates, on the one hand, to the interpretation of Articles 17 and 18 point 7 of Additional Act 04/96 of 10 May 1996 establishing a transitional preferential trade regime within the WAEMU and its method of financing by setting up a financing mechanism known as the "Community Solidarity Levy (CSL)", and more specifically to the concept of a stabilised tax regime and its course; and on the non-application of the PCS to other ECOWAS countries that are not members of the UEMOA.

The Commission then asked the Court to interpret :

- the concept of a stabilised tax system and the starting point for the entry into force of the Additional Act establishing it (Article 18.7.);

- application of the PCS to goods imported from the seven (07) ECOWAS States that are not members of the WAEMU.

A. The concept of a stabilised tax regime and the date of entry into force of the text establishing it

In order to attract investors, governments grant oil and mining companies stabilisation of all or part of their taxes and duties, for all or part of the life of the mine or operating licence.

Accordingly, no tax, duty or fee other than those provided for under the existing mining tax regime and payable on the date of entry into force of the mining or exploitation title may apply or be payable by the investor during the period of validity of the title.

In general, there are two mechanisms for granting this preferential treatment: either legislative or contractual.

In the legislative framework, the guarantee is provided directly in the legislative texts and therefore benefits any company setting up in the country.
In the contractual framework, the State takes care not to include the guarantee in the loi, but chooses to negotiate it within the framework of agreements or contracts in return for financial and economic benefits.

In the light of these explanations, it is necessary to examine the mining code and the petroleum code of the Republic of Côte d'Ivoire in force at that time in order to examine its interpretation of the concept.

Articles 17 and 18 g) of the Ivorian Petroleum Code of 29 August 1996 provide for the negotiation of a petroleum contract in which the tax, customs and financial clauses must be set out.

Article 88 of the same code states that "*This law* applies *to* petroleum *contracts signed from the date* of *its promulgatione ation.* Petroleum contracts in *force on the date of promulgation* of this law*, as well as mining* titles and *related authorisations, remain valid* for the *duration* of *the granting* and renewal of **exploration** *or exploitation* licences *under* these contracts".

The former law 95-553 of 18 July 1995 on the Ivorian mining code grants a stabilised tax regime to mining companies holding an exploration licence or a mining permit.

However, Article 87 paragraph 5 of the Ivorian Mining Code stipulates that *"exemption from* import duty *during the period of realisation of* investments may not exceed *four (4) years* from the date of *the deed* establishing *the* export permit and *two* (2) *years for extension applications".*
This paragraph introduces an exception to the stabilised regime that companies benefit from when goods are imported as part of an investment.

Thus, the provisions of Article 18(7) of the Additional Act mean that requests for import exemptions granted before 1er July 1996, the date of entry into force of the Additional Act, continue to run for the period for which they are granted without deduction of the PCS; this is in order to respect existing agreements; the word agreement here is taken in its broadest sense and implies any agreement between parties.

In order not to jeopardise these mining agreements, the States have decided to exempt only goods imported under an agreement in existence before 1 January 2009. July 1996.

The provision is clear in both letter and spirit.
It was this spirit that guided the Ivorian legislator in adopting the mining code intervened on 24 March 2014 (law n°2014-138) and which quite simply internalised the additional act by providing in article 157 of the loi that: "... the holder of the mining title remains subject to the payment of Community royalties on all imports, both in the exploration and exploitation phases".

***The PCS exemption only applies* to companies that have** *signed* av'ec.
l'Etat de Côte cf'/voire des *conventions qui étaient* **en *vigueur* ao *mer*** *uillet* **f996**; le
The term "*agreement" must* be understood in *a broad* sense. *It is a* "**party *agreement provision"*.**

Finally, the national guarantee provided by the stabilised tax regime does not change vis-à-vis the investor during the period of validity of his title, but in compliance with Community provisions, as stated in Article 6 of the WAEMU Treaty: "The **acts *adopted by* the organs of the *Union* to *achieve*** the ***objectives of the* present *Treaty* and in accordance with *the* rules and *procedures* laid down therein *shall be applied in* each *Member State, notwithstanding any*** *prior or subsequent* **national *legislation*** *to the contrary*".

B. The application of the Community Solidarity Levy (CSL) to goods imported from the seven (07) ECOWAS States that are not members of the WAEMU.

The Commission explains that Senegal and Côte d'Ivoire have decided to exclude products originating in the seven (07) ECOWAS Member States that are not members of UEMOA from the PCS base.

In memo n°1709/DGD/DRCI dated 20 June 2017, Senegal's Director General of Customs stated that "with the implementation *of the* trade liberalisation scheme of *the* Economic *Community of* West African States *(ECOWAS) by* Senegal, *since*r January *2004, the option has been taken* not to apply the PCS to ECOWAS-origin goods released for consumption":/*not to apply* the *PCS to goods* originating in *ECOWAS* and *released for* consumption'.

In its reply to the Court's notification, Côte d'Ivoire maintains that products originating in ECOWAS countries and released for consumption do not have to pay the PCS, that products originating in ECOWAS countries and released for consumption do not have to pay the PCS on the ground that Article 17 of the UEMOA Additional Act cited above and Articles 3 and 4 of Protocol A/P1/7/96 on the conditions of application of the ECOWAS Community Levy have the same meaning and concludes that it is the ECOWAS provisions in force in the fifteen member countries, including those of UEMOA, which are applicable; that contrary WAEMU provisions do not apply.

Senegal's and Côte d'Ivoire's interpretation of Article 17 of the above-mentioned Additional Act 04/96 is not consistent with the objectives pursued by the WAEMU Treaty and the commitment entered into by the Member States under Article 7 of the Treaty, which provides that "Member *States* shall contribute to *the achievement of the* objectives of *the Union by adopting any* general *or* specific measures, *to ensure fulfilment of the* obligations arising out of this *Treaty.* To this end, f/S *shall refrain from* any measures *which* would *impede the application of* this *Treaty* and of *acts adopted* in implementation thereof.

Au vu de cette disposition, l'acte additionnel 04/96 du 10 mai 1996, objet d'avis et en ces articles 17 et 18 doivent être appliqués à la lettre tant qu'un autre acte n'est pas intervenu pour les annuler.

Consequently, the Court, acting as a Consultative General Assembly, is of the opinion that :

1- any company benefiting from a mining agreement with the benefit of a tax regime stabilised on 1 July 1996, the date of entry into force of Additional Act 04/96 of 10 May 1996, is exempt from the levy
On the other hand, after the entry into force of the Act, i.e. from 1er July 1996, any new agreement signed by a mining company and the latter's imported goods are subject to payment of the PCS;

2- As long as a Community provision has not called into question or annulled Article 17 of Additional Act 04/96 of 10 May 1996, no WAEMU Member State may decide on its own to exempt third countries from payment of the PCS, including ECOWAS countries that are not members of WAEMU, pursuant to Article 7 of the WAEMU Treaty.

And signed by the Chairman, the Reporter and the Registrar.
Illegible signatures follow.
Ouagadougou, 14 April 2022

The Registrar

Boubakar TAWEYE MAIDANDA