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AVIS N° 003/99

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Officiers de l'audit de la Cour des Comptes de l'UEMOA
statuant sur la demande de l'Assemblée Générale de la Cour des Comptes de l'UEMOA

By letter No 99-047/PC/CJ of 2 November 1999, the President of the WAEMU Commission applied to the Court for an interpretation of Article 38 of the WAEMU Treaty and Article 26 of its Additional Protocol No 1.

He explained that in application of the provisions of Article 26 of Additional Protocol No. 1, which stipulates that *"the terms and conditions of the audit to be carried out by the Court of Auditors shall be decided by the Council acting by a two-thirds (2/3) majority of its Members on the recommendation of the Councillors"*, the Councillors had drawn up a preliminary draft Additional Act laying down the Statutes of the Court of Auditors and a preliminary draft Regulation laying down the terms and conditions for the presentation and auditing of accounts.

The Commission made a number of observations on these drafts, two of which it considered fundamental and which were not accepted by your Councillors.

These two observations relate, on the one hand, to the lack of a legal basis for the preliminary draft Additional Act and, on the other, to the scope of the Court's powers.

On the first point, the Commission considers that the preliminary draft additional act lacks a legal basis, being provided for neither in the Treaty itself nor in Additional Protocol No. 1, the latter referring to the Council of Ministers, which cannot enact an additional act to lay down the arrangements for the audit to be carried out by the Court of Auditors; it has pointed out that the only appropriate legal act in accordance with Additional Protocol No. 1 is the Regulation.

On the second point, the Commission would point out that the preliminary draft Additional Act confers on the Court of Auditors powers to hand down judgments with the possibility of imposing fines ; that such powers exceed those conferred on the Court of Auditors by Additional Protocol No. 1, which principally entrusts it with the task of monitoring the regularity and effectiveness of the use of the resources of the Union's bodies; that, moreover, it is provided that the Court of Auditors may refer cases to the national courts in order to have irregularities penalised

-Article 9 of the Treaty states that the Union is represented in the courts by the Commission.

The Court, sitting in Consultative General Assembly under the chairmanship of Mr Yves D. YEHOUESSI, President of the WAEMU Court of Justice, on the report of Mr Martin Dobo ZONOU, Judge at the Court, in the presence of Messrs.

- Mouhamadou Moctar MBACKE, Judge of the
- Youssouf ANY MAHAMAN, Court Judge of
- Kalédji AFANGBEDJI, the Court
Advocate
General

and assisted by Mr Raphaël P. OUATTARA, Registrar of the Court, examined the above-mentioned application at its sitting of 24 November 1999.

THE COURT

The Treaty of the West African Economic and Monetary Union (WAEMU) of 10 January 1994;

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

Considering Additional Act No. 10/96 on the Statutes of the Court of Justice of the UEN\OA ;

See Regulation No. 01/96/CM on the Rules of Procedure of the Court of Justice of the WAEMU;

See Administrative Rules of the WAEMU Court of Justice dated 9 December 1996;

Having regard to request No 99-047/PC/CJ of 2 November 1999 from the President of the WAEMU Commission;

I - GROUNDS FOR REFERRAL AND ADMISSIBILITY

The Commission's letter No 99-047/PC/CJ reads as follows: "*Referral to the Court for interpretation of the provisions of the WAEMU Treaty and its ad hoc Protocol No 1*". This wording immediately suggests that the case is a direct application for interpretation with a view to obtaining a ruling from the Court of Justice.

to give a ruling. Such an action is manifestly inadmissible because it has no legal basis, the Treaty having provided for interpretative judgments only in the context of preliminary rulings, which are reserved to the national courts; but in the light of the factor which determined the Commission in its approach and consisting of a difficulty in the application of the Treaty arising from a persistent divergence of interpretation of certain provisions of the Treaty and its Additional Protocol No 1 between the Commission and the Court of Auditors, it is appropriate to place this reference within the framework provided for in Article 27(4) of the Statute of the Court of Justice and Article 15-7^e of its Rules of Procedure even if these are not expressly referred to by the Commission; in such a case, the Court may only give an opinion on the meaning and scope of the provisions concerned.

Au plan de la forme, la Commission ayant satisfait aux prescriptions de l'article 15 - 7^e, sa demande doit être déclarée recevable.

- II - ON THE FOMD

From the file submitted to the Court, it appears that the opinion sought relates to the questions of whether :

- 1) the provisions of the Treaty and of Additional Protocol No 1 relating to the Court of Auditors allow an Additional Act to be adopted for its application;
- 2) by conferring new powers on the Court of Auditors, the preliminary drafts do not have the effect of amending Additional Protocol No. 1.

Before proposing any answers to these questions, it is important to remember that the Court was consulted by the Commission on the preliminary drafts concerned and issued Opinion No 002/99 of 25 June 1999, a copy of which is in the file.

In that opinion, and by way of general observations which it felt it had to make before examining the preliminary drafts article by article, the Court had already stated that : "*The Additional Act, as a unilateral act, although adopted by the Conference of Heads of State and Government, 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, which is to say that the Additional Act cannot make provision in a field reserved for the Treaty or the Additional Protocol*".

It added that "...Additional Protocol No 1, in Articles 23 to 25, laid down *definitively and exhaustively the statutory principles of the Court of Auditors, namely its composition, the independence and professional status of its members, their term of office and their method of appointment; as regards its competence, it is specified that its control shall relate in particular to the regularity and effectiveness of the use of the Union's resources, and any subsequent provisions to be adopted may therefore relate only to the implementation of these guidelines, including the practical arrangements for the operation of the Court as provided for in Article 26 of the Additional Protocol*".

Properly understood, this opinion, which moreover concurs with the Commission's point of view, would suffice to render the present referral devoid of purpose. Given, however, that the difference in interpretation at issue has the effect of creating a kind of blockage in the process of adopting the texts initiated, and in the light of the Court's primary task of *"ensuring that the law is observed with regard to the interpretation and application of the Treaty on European Union"*, it is important to carry out a fresh analysis of the data, even if that analysis must appear iterative in certain respects. Indeed, a closer reading of the case reveals that the resolution of the difficulty referred to lies not only in the interpretation of Article 38 of the Treaty and Article 26 of Additional Protocol No. 1, but also in Article 19 of the Treaty, which the Councillors present as the legal basis for their option.

"- Based on the premise that there is a gap in the Treaty and Additional Protocol No. 1 in that the "Statute of the Court, its jurisdiction and its rules of procedure and operation have not been set out in Additional Protocol No. 1", the Advisers consider that this gap should be filled. Statute of the Court, its jurisdiction and its rules of procedure and operation have not been set out in Additional Protocol No. 1, the Advisers consider that this gap should be filled.

by an additional act.

In fact, in the note presenting the projects, the Councillors state that

"The audit arrangements do not exactly cover all the provisions that should appear in the Statute, the competence and the rules of procedure and operation of the Court of Auditors. It would appear that, as far as the Court of Auditors is concerned, its statute, jurisdiction and rules of procedure and operation have not been set out in Additional Protocol No. 1. This gap needs to be filled in order to have organic texts complete".

"Thus, the organic texts of the Court of Auditors would include an Additional Act on the statutes of the Court and a Regulation on the modalities of rendering and auditing accounts".

By virtue of Article 19 of the WAEMU Treaty, which provides that an additional Act may be adopted to supplement the Treaty, it is proposed that the fundamental provisions of the statutes, powers, and rules of procedure and operation of the Court of Audit be the subject of an additional Act, while the modalities are laid down in a Regulation".

The Court has already given its assessment of this premise in its opinion referred to above. Nevertheless, it seems necessary to return to the jurisdictional nature of the Court of Audit, which is the primary basis of the divergence of interpretation. As the term jurisdictional means relating to a court, it is necessary to specify what this term may include. Etymologically, jurisdiction means the power to judge, the right to judge and, more broadly, the body holding this power to judge. But there are a whole variety of jurisdictions: judicial, administrative, regulatory, disciplinary, etc., each with its own remit, powers, procedures, ceremonial, etc.

In the judicial system, there are even courts without the right to impose penalties, such as investigating courts.

This means that the term jurisdictional does not cover an identical reality in all cases.

If the Treaty was intended to make the Court of Auditors a court of audit through control and verification, as is apparent from its provisions, the mere reference to the Court of Justice cannot justify conferring new powers on the Court of Auditors. The fact remains that there is nothing to prevent the competent bodies of the Union from investing the Court of Auditors with new powers. In that case, however, an Additional Protocol would have to be drawn up rather than an Additional Act.

Indeed, if Article 19 of the Treaty stipulates that "the Assembly of Heads of State and Government shall, as necessary, adopt Acts additional to the Treaty on European Union...they shall supplement it without, however, amending it...", there is reason to wonder about the meaning and scope of the verb "supplement".

In its literal and common meaning, the word "complete" is indeed synonymous with "fill", in that it means to make something full or whole. This meaning, which seems to be that of the Councillors of the Court of Auditors, cannot be validated in the case in point, if one looks at the entire WAEMU normative system; in fact, a combined reading of Articles 19 and 42 of the Treaty of the Union shows that the Additional Act is the normative instrument rnis to the

_____The Additional Protocol provides for the Conference of Heads of State and Government to carry out the tasks assigned to it by the Treaty; as such it complements the Treaty in a vertical process of application from the general to the specific. The Additional Protocol, which

- i s part of a horizontal process at the same normative level as the original act, whose possible gaps it can fill; consequently, if there is a gap in the Treaty and Additional Protocol No. 1 in the sense of the absence in these basic texts of provisions that should necessarily have been included, it is not an Additional Act that can remedy it but an


"i Additional Protocol; this is a matter for the initiative of any Member State or of the Commission in accordance with Article 106 of the Treaty.

"Lastly, and insofar as the Treaty and Additional Protocol No. 1 do not provide for the intervention of the Conference of Heads of State and Government for their application with regard to the Court of Auditors, the adoption of an additional act for this purpose would be in violation of the very provisions to be applied.

In these circumstances, only the Council of Ministers' regulation provided for in Article 26 of Additional Protocol No. 1 can be validly adopted in this case, which cannot confer new powers on the Court of Auditors.

Ouagadougou, 25 November 19s9

And signed by the Chairman, the Reporter and the Registrar



Yves D. YBHOUESSI

Martin Dobo ZONOU



Raphaël P. OUATTARA