



A V I S N° 01/2007

OF 19 OCTOBER 2007

File No. 01-2007

REQUEST FOR AN OPINION FROM THE PRESIDENT OF THE UEMOA
COMMISSION ON
THE POSSIBILITY FOR MEMBER STATES TO CONCLUDE INDIVIDUAL INVESTMENT
AGREEMENTS WITH THIRD COUNTRIES

By letter No 06056/PC/DMRC/DCE dated 15 May 2007, the President of the Commission referred the following question to the Court of Justice:

"Mr President,

By the present request, the Commission seeks the opinion of the WAEMU Court of Justice on the extent of the Union's competence in the field of negotiating and concluding investment promotion and protection agreements with third countries.

I. REMINDER

One of the objectives of the WAEMU Treaty is to strengthen the competitiveness of the economic and financial activities of the Member States, within the framework of an open and competitive market.

To this end, Article 84 states that the Union shall conclude international agreements as part of its common commercial policy.

The implementation of this provision means that Member States are no longer entitled to conclude individual trade agreements with third countries. In addition, with the entry into force of the WAEMU Customs Union, which has been operational since ¹ January 2000, there has been a de facto suspension of the bilateral trade agreements that certain WAEMU States had signed with third countries. The latter are now obliged to approach the Commission to explore the possibility of establishing new formal trade frameworks.

In accordance with this provision, the Council of Ministers has adopted several directives mandating the Commission to open and conduct negotiations with a view to concluding Trade and Investment Agreements with :

- *the United States of America: Directive No. 07/98/CM/UEMOA of 22 December 1998, mandating the Commission to open and conduct negotiations with a view to concluding an Agreement between the United States of America and the UEMOA on the Development of Trade and Investment Relations;*
- *the Kingdom of Morocco: Directive N° 01/99/CM/UEMOA of 06 August 1999, mandating the Commission to open and conduct negotiations with a view to concluding a Trade Agreement between UEMOA and the Kingdom of Morocco;*
- *the Republic of Tunisia: Directive No. 07/99/CM/UEMOA of 21 December 1999, mandating the Commission to open and conduct negotiations with a view to concluding a trade agreement between UEMOA and the Republic of Tunisia;*
- *the Arab Republic of Egypt: Directive N° 04/2003/CM/UEMOA of 26 June 2003, mandating the Commission to open and conduct negotiations with a view to concluding a Trade and Investment Agreement between UEMOA and the Arab Republic of Egypt;*
- *the People's Democratic Republic of Algeria: Directive No. 03/2003/CM/WAEMU of 26 June 2003, giving the Commission a mandate to*

to open and conduct negotiations with a view to concluding a Trade and Investment Agreement between the WAEMU and the People's Democratic Republic of Algeria;

- *The Republic of Lebanon: Directive No. 05/2003/CM/UEMOA of 26 June 2003, mandating the Commission to open and conduct negotiations with a view to concluding a Trade and Investment Agreement between UEMOA and the Republic of Lebanon.*

Following the first rounds of negotiations between the EU and the Kingdom of Morocco on the one hand and the Republic of Tunisia on the other, the EU Member States clearly requested an impact study of the Agreements, and at the same time called for greater consideration to be given to investment-related aspects.

It is because of these new demands from Member States that the last three directives adopted for negotiations with the Arab Republic of Egypt, the People's Democratic Republic of Algeria and the Republic of Lebanon concern the negotiation and conclusion of trade and investment agreements.

At the end of the eighth round of negotiations on the WAEMU-Morocco Agreement, held in Rabat from 21 to 23 February 2007, the Moroccan party wished to introduce a provision relating to the possibility of concluding separate agreements on the promotion and protection of investments between Morocco and each WAEMU member state.

The UEMOA party has specified that this issue can only be resolved in the context of a Community provision and should be the subject of a decision by the UEMOA Court of Justice, which would rule on the relevance of the conclusion of such agreements by individual Member States.

II. THE PROBLEM OF THE COMPETENCES OF THE UNION AND THE MEMBER STATES IN THE NEGOTIATIONS ON THE INVESTMENT COMPONENT

Article 84 of the Treaty explicitly recognises the Union's competence to negotiate and conclude bilateral trade agreements with third countries.

Examining the question at the time, following a challenge to this competence by certain Member States, the Court of Justice implicitly confirmed the Union's exclusive competence in this area in its Opinion No. 02/2000 of 02 February 2000.

On the other hand, no provision of the Treaty expressly mentions the Union's powers to conclude investment promotion and protection agreements.

Questioned on several occasions by Member State experts on the issue, the Commission has been unable to provide a definitive answer, other than to refer to the draft Community Investment Code currently being adopted.

However, on the express recommendation of the Trade Ministers at the end of one of their meetings, as well as the conclusions of a session of the EU Council of Ministers, the Commission has been instructed to take into account the promotion and protection of investments in the context of trade agreement negotiations, with a view to turning these agreements into genuine partnership and development agreements.

This explains why the negotiating mandates received for Egypt, Lebanon and Algeria explicitly mention trade and investment agreements.

However, if the Union is thus able to negotiate and conclude trade agreements and investment promotion and protection agreements on behalf of the Member States with full competence, the question arises as to whether this competence is conferred on it exclusively.

In other words, does the power now given to the Union to negotiate investment promotion and protection agreements rule out the possibility of Member States taking such steps individually?

III. DOOR OF THE REQUEST

Given that the Union receives directives to open and conduct negotiations with a view to concluding trade and investment agreements with third countries, the Commission wishes to obtain the opinion of the Court of Justice on the Union's competence to pursue negotiations relating to the investment aspect and also on the nature of this competence.

Finally, the Commission would like the Court to give its opinion on the following concerns:

- Does the EU have exclusive competence to conduct negotiations with a view to concluding agreements on investment in the same way as on trade?*
- Can Member States continue to individually negotiate and conclude agreements on the promotion and protection of investments with third countries, in parallel with the agreements negotiated by the Union on their behalf, under a mandate from the Council of Ministers?*
- If Member States were also able to exercise this power individually, would the Community Agreement prevail in the event of a dispute or difficulty in implementing two types of investment agreement?*

- *If the Community Investment Code is adopted, what will happen to the agreements of promotion and and protection of investments concluded by individual Member States?*

Yours sincerely

*For the President of the Commission,
The Acting Commissioner*

Jérôme BRO GREBE

The Court sitting in Consultative General Assembly under the chairmanship of Mr Abraham D. ZINZINDOHOUE, President of the Court of Justice of the WAEMU, on the report of Mrs Ramata FOFANA/OUEDRAOGO, Judge at the said Court, in the presence of Messrs :

- Daniel LOPES FERREIRA, Judge at the Court ;
- Salifou Hamidou KANE, Judge at the Court ;
- Jérôme Konan ALLOU, Judge at the Court ;
- Dabré GBANDJABA, First Advocate General;
- Mrs Seynabou Ndiaye DIAKHATE, Advocate General;

And assisted by Mrs Diénaba WINKOUN/GNANOU, Deputy Registrar of the Court, examined the above application at its sitting of 19 October 2007.

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 ;

Vul'Acte additionnel n° 10/96 portant Statuts de la Cour de Justice de l'UEMOA en date du 10 mai 1996 ;

Regulation n°01/96/CM on the Rules of Procedure of the Court of Justice of the WAEMU of 5 July 1996;

Vula demande d'avis n° 06056/PC/DMRC/DCE en datedu 15mai 2007 du Président de la Commission de l'UEMOA ;

Having regard to the written observations of the President of the WAEMU Council of Ministers dated 19 June 2007 ;

Having regard to the written observations of the current President of the Conference of Heads of State and Government of WAEMU dated 01 August 2007;

ON THE SHAPE

The application seeks the opinion of the Court of Justice on the Union's competence to conclude agreements on investment in the same way as on trade, in accordance with the provisions of Article 84 of the Treaty.

This request may be considered to be based on the provisions of article 27 paragraph 4 of the Additional Act n°01/96 on the Statutes of the Court and article 15-7 of the Rules of Procedure relating to the advisory jurisdiction of the Court, which provide that when the organs of the Union encounter difficulties in the interpretation or application of provisions of Community law, they may consult the Court for its opinion.

The application by the President of the Commission to resolve difficulties relating to the application of Article 84 of the Treaty must be declared admissible as having fulfilled the formal requirements laid down by the aforementioned texts.

ON THE BACKGROUND

I. PURPOSE OF THE CONSULTATION

On examination of the letter from the President of the WAEMU Commission, it appears that there is a difficulty for the Commission to assess the possibility for Member States to conclude separate agreements on the promotion and protection of investments.

At the end of the eighth round of negotiations on the WAEMU-Morocco Agreement, held in Rabat from 21 to 23 February 2007, the Moroccan side wanted to introduce a provision on the possibility of concluding separate agreements on

the promotion and protection of investments between Morocco and each WAEMU member state. The UEMOA side, without giving an opinion, believes that this issue can only be settled within the framework of a Community provision and should be the subject of a "decision" by the UEMOA Court of Justice.

The Court is asked to answer the following questions:

1. Does the EU have exclusive competence to conduct negotiations with a view to concluding agreements on investment in the same way as on trade?
2. Can Member States continue to individually negotiate and conclude agreements on the promotion and protection of investments with third countries, in parallel with the agreements negotiated by the Union on their behalf, under a mandate from the Council of Ministers?
3. If it were possible for Member States to exercise this power individually, would the Community Agreement prevail in the event of a dispute or difficulty in implementing the two types of investment agreement?
4. If the Community Investment Code is adopted, what will happen to the investment promotion and protection agreements concluded individually by the Member States?

II. DISCUSSION

- **With regard to the first question: "Does the EU have exclusive competence to conduct negotiations with a view to concluding agreements on investment in the same way as on trade?"**

It should be noted that the WAEMU Commission has general and exclusive powers to build the common market.

On this subject, it should be noted that in Opinion No. 2/2000 of 2 February 2000, the Court concluded, at the request of the Commission, that :

- *the Union's common commercial policy, both internal and external, falls within the exclusive competence of the Union ;*
- *on pain of infringement of the provisions of Article 7 of the Treaty, Member States may not individually or collectively negotiate or conclude international agreements on commercial matters, except in the case provided for in Article 85 of the Treaty or in the case of "mixed" agreements covering areas falling within the exclusive competence of both the Union and the Member States.*

This opinion, which is only advisory like all opinions issued by the Court, has enabled the WAEMU Commission to take measures confirming its exclusive competence as set out in Article 84 of the Treaty.

Does this exclusivity in commercial matters apply to investment agreements?

To answer this question, we need to analyse the problem from two angles:

- firstly, in terms of the Union's general competences;
- then in terms of its specific skills.

1) The Union's general powers

By signing the Treaty of Dakar, the Member States have created a legal entity that is distinct from the States of which it is composed and which has its own powers.

As a subject of international law, WAEMU has the capacity to conclude international agreements, which may be defined as "any binding commitment made by a subject of international law", just as Member States may also conclude agreements with third States or international organisations. Through its organs, in particular the Commission, the WAEMU may exercise the powers conferred on it by the Treaty establishing the Union (article 16 of the Treaty) and by secondary legislation

in sectors relating to the harmonisation of national legislation, common policies and sectoral policies covered by Additional Protocol II.

In principle, all these areas fall within the remit of the Union. However, these competences are shared with the Member States and the distribution of areas of action varies according to the subject matter.

2) Specific skills

In matters where the Union benefits from a transfer of sovereignty, it has exclusive competence enabling it to act alone to the exclusion of the Member States, which are thus deprived of all power.

This mainly concerns monetary policy (Article 62), economic policy (Articles 63 to 75), the Common Market, competition policy (Articles 88, 89 and 90 of the Treaty) and common sectoral policies defined by the Conference of Heads of State and Government, pursuant to Article 24 of Additional Protocol II.

On the other hand, in areas where the Union merely has the power to harmonise or provide guidance, its powers are shared with the Member States, which continue to exercise their prerogatives in accordance with Community principles and rules.

More specifically, in the area of commercial policy, the Union has exclusive competence to conclude agreements, as laid down in Article 84 of the Treaty and confirmed by the Court's aforementioned Opinion No. 02/2000.

In the field of competition, too, the Union's exclusive powers are well defined and confirmed by an opinion of the Court of Justice (opinion no. 3/2000 of 27 June 2000).

But can these legal exclusivities be extended to investments?

The EU Treaty does not contain a specific provision on investment. No article of the Treaty provides for a transfer of sovereignty from the Member States to the European Union.

Community bodies in concluding investment agreements. Admittedly, Article 21-d of Additional Protocol II provided for the drafting of a Community Investment Code, and at its first session in May 1996, the Conference of Heads of State and Government defined as a priority the adoption of a Community Investment Code which should govern the Union's investment policy in order to help achieve the Union's objectives. However, as the Community Investment Code can only be a secondary instrument, it cannot in itself confer exclusive competence on the Union, preventing Member States from concluding international agreements in the absence of an express transfer of sovereignty agreed to by them; limitations on sovereignty cannot be presumed.

Furthermore, the fact that the Council of Ministers signs directives which, although they empower the Union to conduct negotiations with a view to concluding agreements on trade matters and on the promotion and protection of investments, cannot confer exclusive competence which can only result from the Treaty or from Additional Acts which fall within the powers of the supreme organ of the Union.

Thus, by virtue of the transfer of sovereignty expressed by the Member States, the Union has acquired the power to conduct the common commercial and economic policy for the completion of the Common Market through Community legal acts. In particular, it determines the Common External Tariff (CET), trade defence measures (competition legislation), the Customs Union, negotiation policies for the conclusion of bilateral and multilateral agreements, and so on.

In the light of the various directives that have been signed, the Union has deduced that this exclusive competence could logically be extended to the field of investment, since is it possible to dissociate investment from commercial policy?

However, caution must be exercised in this area, since, apart from the fact that the subject of investments has not been the subject of a specific provision in the Treaty, there is no other legal basis on which the Union can claim exclusive competence. Article 84 of the Treaty unequivocally establishes the Union's competence in the area of common commercial policy, but this article cannot ipso facto cover investments, which fall within the scope of industry and also encompass a wide variety of sectors such as mining and quarrying, agriculture, construction, etc.

There can be no exclusive competence without a legal text, because article 16 of the Treaty specifies that "the organs of the Union may only act within the limits of the powers conferred on them by the WAMU Treaty and the WAEMU Treaty and under the conditions laid down in those Treaties".

Clearly, if economic integration is to be consolidated and an open and competitive market gradually established in the sub-region, the role of the Union must be increased and that of the Member States reduced.

As a result, Member States that so wish must initially be allowed to negotiate and conclude investment protection and promotion agreements. But in the very short term, the Union will have to define the sectors in which they can act alone, and will also establish precise rules for doing so.

In conclusion, from a legal point of view, the answer to this question is negative as the law currently stands.

It follows that the Union does not have exclusive competence to conduct negotiations with a view to concluding agreements on the promotion and protection of investments in the same way as on trade.

- For the second question: "Can individual States continue to negotiate and conclude investment promotion and protection agreements with third countries in parallel with the agreements negotiated by the Union on their behalf under a mandate from the Council of Ministers?"

In view of the need to protect the Union's interests and in view of the specific field of investments which, although they contribute to commercial development, are nonetheless part of a wider field, Member States must be allowed to conclude certain agreements on investments, but within a well-defined framework and in accordance with very precise Union directives.

It will be up to the Union to determine the matters for which the Member States can negotiate on their own and those for which the Union's competence is required.

For the benefit of the above, the areas of intervention of each party shall be precisely defined and delimited by decision of the competent bodies of the Union. These areas may be subject to readjustment as the economies of the States evolve and the integration process progresses.

This implies that the Member States, pending the delimitation of areas of competence between them and the Union and the definition of the legal framework, will be able to continue to negotiate and conclude Agreements on the promotion and protection of investments individually, while respecting the Community framework and drawing inspiration from the principle of subsidiarity which exists in European Community law in Article 5 of the Maastricht Treaty and which consists of reserving for the higher level (the Union) that which the lower level (the Member States) could only carry out less effectively.

In short, competence is shared according to the issues and priorities of the Union.

- **As for the third question: "If Member States were also able to exercise this power individually, would the Community Agreement prevail in the event of a dispute or difficulty in implementing the two types of investment agreement?"**

In the event of contradictions arising between these two types of Agreements or difficulties in their implementation, the principle of the primacy of Community law over the domestic law of the States should apply, and the Agreements concluded by the Union would take precedence over those concluded individually by a Member State. It will be up to the States concerned to harmonise the agreements concluded by them with those of the Union before they are implemented.

- **Finally, the fourth question: "If the Community Investment Code is adopted, what would be the fate of the agreements on the promotion and protection of investments concluded individually by the Member States?"**

The Community Investment Code has been in the pipeline since 1997 and has still not been adopted. This delay reflects the difficulty of harmonising an area as complex and varied as investment, which affects the prerogatives of Member States whose sovereignty in this area has not been expressly entrusted to the Union.

For the Community Investment Code to be applied uniformly in each of the Member States, it should be drawn up in the form of an "Investment Charter" which should define the Union's legal framework and fundamental principles with regard to investment. This framework and these principles should serve as a basis for all Member States in drawing up their national codes in accordance with Community principles. The main objective of the Community Investment Code (CIC) will be to establish a secure legal and judicial environment in the Member States in order to make their economies more competitive internationally.

With regard to agreements concluded individually by Member States, the Community Investment Code should include transitional provisions to govern the fate of agreements concluded before its entry into force.

In conclusion

The Court was of the opinion that :

- In view of the fact that no provision of the Treaty confers powers on the Union to conduct investment negotiations, it cannot be recognised as having exclusive competence to negotiate and conclude agreements for the promotion and protection of investments in the Union in the same way as for trade agreements under Article 84 of the Treaty.

- Until such time as these competences are conferred upon it by the competent body, the Union will have to concede a sharing of competences. To do this, it will have to define the areas in which the Member States must be able to negotiate individually and those in which the Union has competence.

Consequently, Member States may continue to conduct negotiations with a view to concluding investment agreements in compliance with the directives issued and the Agreements concluded by the Union.

- In the event of conflicting provisions between agreements concluded individually and those concluded by the Union, priority shall be given to agreements concluded by the Union by virtue of the principle of primacy of Community law over national law and the principle of cooperation laid down in Articles 6 and 7 of the Treaty respectively.
- The Community Investment Code will have to include transitional provisions to deal with agreements concluded prior to its adoption.

And signed by the President, the Reporter and the Deputy

Registrar,

For a certified copy, Ouagadougou, 24 October 2007

The Deputy Registrar,

Diénaba WINKOUN/GNANOU