Opinion n° 03/96

Opinion delivered pursuant to Article 16 paragraph 4 of the Additional Act No. 10/96 on the Statutes of the Court of Justice of the West African Economic and Monetary Union.

Summary of the opinion

Jurisdiction of the Court to give opinions :

Article 15, paragraph 7, 1er of the Rules of Procedure empowers the Commission, the Council of Ministers and the Member States of the Union to refer cases to the Court for an opinion. The Court considers that any body of the Union may refer a matter to it for an opinion, provided that the action emanates from a competent body.

- *The WAEMU single regional market = an economic area characterised essentially by the free movement of goods, services, people and capital.*

- *A single authorisation for any credit institution to carry on a banking or financial activity in a WAEMU Member State without having to apply for a new authorisation. The effect of this principle is to promote a unified sub-regional banking market in which the banks and financial institutions of the Member States will be able to operate freely throughout the Union.*

COURT OF JUSTICE
From
THE WEST AFRICAN ECONOMIC AND
MONETARY UNION (WAEMU)

EXTRACT FROM THE MINUTES OF
THE REGISTRY

A V I SN° 003/1996

of 10 December 1996

File no. 03-1996

REQUEST FOR THE ECB'S OPINION
ON THE DRAFT SINGLE AUTHORISATION
FOR BANKS AND FINANCIAL INSTITUTIONS

Referred to by the Director of Legal Affairs of the BCEAO pursuant to the provisions of Article 16(4) of Additional Act No 10/96 on the Statute of the Court of Justice of the WAEMU, by letter No 3955/ADJ/PER/408 of 19 August 1996, registered at the Secretariat of the Court under No 62 of 4 September 1996, and which reads as follows

"With a view to redefining the new institutional framework within which banking activities will be carried out, the Heads of State and Government of the West African Economic and Monetary Union have decided to set up the WAEMU single regional market. This new economic area will essentially be characterised by the free movement of goods, services, people and capital.

In order to achieve this aim, it has been decided to introduce a single authorisation under which any credit institution, duly authorised to carry on a banking or financial activity in a Member State, may establish itself or offer its services under the freedom to provide services throughout the Union without having to apply for a new authorisation. In this context, we have the honour to request a legal opinion from the Court of Justice on the draft single licence and on the possible implications and its adoption for the monetary and supervisory authorities and for banks and financial institutions.

For your information, we are providing you with proposals based on legal opinions formulated by Professor SOURANG of the University of Dakar and the BCEAO Legal Affairs Department.

Please accept, Sir, the assurance of our highest consideration.

The Director of Legal Affairs

Elisabeth DIAW POTIN *"*

The Court, sitting in Consultative General Assembly, under the chairmanship of Mr Yves YEHOUESSI, President of the WAEMU Court of Justice, on the report of Mr Mouhamadou Moctar MBACKE, Judge at the said Court and in the presence of Messrs :

- Youssouf ANY MAHAMAN,Court Judge
- Martin Dobo ZONOU,Court Judge
- Arégba POLO, First Advocate General
- Malet DIAKITE,General Counsel

examined the above-mentioned request for an opinion dated 19 August 1996 at its meeting of 10 December 1996.

THE CONSULTATIVE GENERAL MEETING

HAVING REGARD TO the Treaty of the West African Monetary Union (WAMU) signed on 14 November 1973;

HAVING REGARD TO the Treaty of the West African Economic and Monetary Union (WAEMU) signed on 10 January 1994;

HAVING REGARD TO Additional Act No. 10/96 on the Statutes of the Court of Justice of the WAEMU ;

HAVING REGARD TO the Convention establishing the WAMU Banking Commission;

HAVING REGARD TO Regulation No. 01/96 on the Rules of Procedure of the WAEMU Court of Justice

HAVING REGARD TO the WAMU Uniform Banking Act ;

HAVING REGARD TO the Administrative Rules dated 9 December 1996 of the WAEMU Court of Justice

I. <u>ON THE SHAPE</u>

As the Community legislation on legal advice from the Court stands, the first subparagraph of Article 15(7) of the Rules of Procedure empowers the Commission, the Council of Ministers and the Member States of the Union to consult the Court for an opinion on a text at the draft stage; under the terms of Article 16, paragraph 4 of the Statutes of the Court, the matter must be referred to the Court by a competent organ; however, the present request for an opinion comes from the Director of Legal Affairs of BCEAO and not from the representative of the organ of the Union competent to act on its behalf in its relations with the other organs of the Union.

These two grounds could have been sufficient for the Court to decline to examine the request for an opinion. However, at the time when the request for an opinion was referred to the Court, i.e. on 4 September 1996, only Additional Act No. 10/96 on the Statutes of the Court had been published in the Official Bulletin of the WAEMU, and even the Administrative Rules of the Court were in the process of being drawn up.

Moreover, in its advisory jurisdiction, in which it is called upon to rule on non-contentious matters and performs a purely administrative function of providing legal assistance within the Union, the Court cannot, at the risk of compromising the effectiveness of its task, be absolutely rigorous in certain conditions of referral. Accordingly, it is in the light of the legal context referred to above and the nature of the jurisdiction of the Court in question that the

However, it draws the attention of the latter to the importance attached by the Court to the status of the representative of the body entitled to consult the Court.

II. ON THE BACKGROUND

It should be noted at the outset that the request submitted, relating to the principle of a single licence for banks and financial institutions within the WAEMU, concerns a legal opinion on a draft single licence and its possible implications, which have been the subject of studies contained in two documents entitled : one entitled "Principle of the single licence within the framework of the WAEMU Treaty" and the other entitled "Supplementary sheet on the single licence project". However, the specific points of these studies and opinions have not been the subject of specific questions to be submitted to the Court.

In these circumstances, the Court is tempted to interpret the request as a global consultation on the content, conclusions and recommendations of the studies submitted, which amounts to issuing an opinion on opinions.

A. THE CONTENTS OF THE ABOVE DOCUMENTS CAN BE SUMMARISED AS FOLLOWS:

As part of its efforts to create a single regional market, the WAEMU is required to ensure certain prerequisites within its borders, including the freedom of establishment and the freedom to provide services, as well as the freedom of movement of persons, goods and capital, as set out in articles 91 and 94 of the Treaty establishing the WAEMU.

However, as far as credit institutions are concerned, i.e. banks and financial institutions, it is noteworthy that although the supervision of their professional activities is the responsibility of a Community body, i.e. the Banking Commission, the fact remains that when it comes to issuing licences authorising the establishment of these entities, domestic law is applicable in the sense that the licence is evidenced by a ministerial decision subject to the assent of the Banking Commission, which limits the validity of the licences issued to national borders.

This means that credit institutions governed by national law can only set up branches or subsidiaries in other Member States on the basis of a new authorisation issued by the host country, which constitutes a serious handicap to the exercise of :

- freedom of establishment, which means that the above-mentioned financial institutions may open new subsidiaries or branches without prior authorisation in any Member State;

- freedom for these establishments to provide services and for individuals to use the services of a bank or financial institution even if it is not established in the individual's country of residence, and vice versa freedom for banks and financial institutions to offer their services to customers in a Member State, wherever they may be, even if they have no branch or subsidiary in that country.

- freedom of movement of capital, i.e. the freedom for these institutions to invest their capital wherever they wish in the Member States of the European Union.

To remedy this situation, which runs counter to the Union's integrationist objective, it is proposed that credit institutions be granted a single authorisation, the principle of which is that "any credit institution duly authorised to carry on a banking or financial activity in its country of origin (a member of the Union) may establish itself or offer services throughout the Union under the freedom to provide services without having to apply for a second authorisation".

This principle of "single authorisation" will have the effect of promoting a unified sub-regional banking market where, without discrimination on the basis of nationality, the Banks and Financial Institutions of the Member States will be able, in a healthy competitive environment, to carry out their activities freely by setting up branches where necessary or by providing services directly, by receiving deposits from the entire territory of the Union regardless of the origin of the customers of the Member State in which the Bank is established. As for the procedure for granting the single licence, it will consist of maintaining the current forms and conditions in force as provided for by the provisions of article 9 of the banking law and articles 12 and 32 of the Convention creating the Commission.

Banking, i.e. authorisation by ministerial decree, after receiving the assent of the Banking Commission, which examines authorisation applications beforehand.

However, a nuance is introduced when the Institution, once holding a single authorisation in a Member State, intends to extend its activities by creating a branch in one or more Member States; In the latter case, the draft single authorisation requires the Institution to submit a "declaration of activity" to the host Member State, which refers the matter to the Commission Bancaire for investigation and opinion. The Commission Bancaire may object to the extension of activity within a period of two (2) months from the date of submission of the declaration (if the Institution's financial and organisational structures are inadequate).

It is understood that after this mandatory period of two (2) months without any reaction from the Banking Commission, the Institution is deemed to be legally authorised to carry out its new activities. It should also be emphasised that the draft submitted does not exclude the possibility of t h e Commission Bancaire having exclusive competence to grant the Single Authorisation.

In the case of credit institutions from non-WAEMU Member States, or rather having their head office in a non-WAEMU Member State, it has been proposed that an application for a single authorisation should be admissible in the form of a subsidiary. Once approved, the subsidiary may set up in the form of a branch under the same conditions as institutions from Member States. The legal instrument favoured by the authors of the draft authorisation to formalise the principle of single authorisation is the regulation as defined by article 92, paragraph 4 of the WAEMU Treaty, which reads as follows: "The Council of Ministers, acting by a two-thirds majority of its members and on a proposal from the Commission, shall, from the entry into force of this Treaty, adopt by means of a regulation or directive, the provisions necessary to facilitate the effective use of the right of establishment".

The study of the project did not fail to point out the economic, financial and even legal consequences of adopting this principle of a single authorisation, particularly with regard to :

1) Savings in the various States; in fact, only the harmonisation of tax legislation as an accompanying measure can prevent the draining of savings from States with less attractive tax regimes to States with more attractive tax regimes.

2) Banking monopolies; to avoid the quasi-monopolistic domination of certain large banks in this enlarged banking market, it is suggested that the relevant provisions of the WAEMU Treaty on competition, which prohibit practices of abuse of a dominant position, be applied.

3) Supervision of credit institutions where, with the advent of a single licence, it will be necessary to set up an appropriate internal control system for authorised institutions and to strengthen cooperation between the banking supervisory authorities within a legal framework that is more operational because it is more vigilant.

4) The management of Institutions in difficulty, particularly with regard to their bankruptcy, the liability of the parent company or even of the State of its head office, where there are insufficient assets or no mechanism for solidarity between Institutions, to compensate depositors identified in the various branches, subject to the single authorisation. In this case, pending a more detailed study by the Banking Commission, the trend seems to be towards the parent company being liable as principal debtor to depositors, with the guarantee of the State in which the said company is headquartered, in the event of the latter's default due to the aforementioned conditions. As for the repayment of refinancing amounts by the Central Bank, liability is determined according to the amounts granted in each State.

5) The legal regime for the winding-up of credit institutions with a single authorisation and branches in different Member States. In this case, given that the branches do not have legal personality or legal capacity, only the parent company can be declared bankrupt before the competent authorities in the country in which it has its registered office, leaving it to the appointed liquidator to organise the liquidation of the branches in the legal context of the host countries.

The supplementary information sheet on the single authorisation project attached to the request for an opinion supports the proposals and suggestions contained in the draft submitted and supplements them with an account of the legal regime relating to authorisation in the European banking market where, after harmonisation of their respective legislation in this area, the Member States have agreed to reciprocal recognition of harmonised national laws, so that any institution authorised in one Member State may operate or establish itself in the other Member States, subject to notification to the supervisory authority in its home Member State, which will inform the supervisory authorities in the host Member State of the conditions for carrying out its activities within a specified period; failing this, the branch may establish itself or commence its activities. Where a subsidiary is to be set up, the prerequisite under European Community law is consultation with the supervisory authorities of the States concerned.

B. OBSERVATIONS AND RECOMMENDATIONS

The principle of a single authorisation, as set out and analysed in its various aspects, has given rise to the following observations and recommendations:

1) On the principle of single authorisation

The single licence is a fundamental means of creating an integrated banking market that consolidates the financial market, which, along with the WAEMU regional stock exchange, is the foundation on which the entire economic and monetary process of the WAEMU integration organisation rests. Through the openness it allows, this legal instrument is a step forward compared to the law previously in force, which was confined to the national management of banking activities. However, the establishment of the single licence, which enshrines the liberalisation of the banking market, calls for the effective application of the freedoms of movement of goods, services and persons, in particular the freedom of establishment of commercial and liberal professions, the principles of which are solemnly announced in the WAEMU Constitutive Treaty, but without the relevant implementing provisions being taken. In principle, the exercise of these freedoms, which are essential in the Union's economic market, precedes the creation of the banking market, which is merely a supplementary measure to facilitate business activities. In any event, the adoption of a single licence, which liberalises banking and financial activities in the organised area of the Union, constitutes

an essential act of integration in the development of the organisation's common policies.

2) <u>On the procedure for granting single authorisation</u>

First of all, it should be noted that the current regulations governing authorisation, based on both the Banking Act and the Agreement establishing the Commission Bancaire, already need to be designed to be legally more consistent and, in particular, more coordinated. Indeed, if we refer to the disparate provisions of article 9 of the banking law, a domestic law even if it is uniform, and articles 12, 24 and 32 of the aforementioned Convention relating to the Banking Commission, a non-personalised body of the BCEAO and therefore a sub-body of the WAEMU, it appears that authorisation is issued by the national supervisory authority, i.e. the Minister of Finance of the State in which the applicant institution is located, after examination of the application by the BCEAO, whose assent is required. On the other hand, when it comes to the withdrawal of authorisation, the parallelism of forms is no longer de rigueur, and it is the Banking Commission that takes the decision alone after examining the disciplinary file, has no right of appeal under the terms of the two aforementioned texts, since only the supervisory body may lodge a political appeal with the WAEMU Council of Ministers, the notification of the Commission's sanction to the party concerned being deemed to constitute an irrevocable decision for the party concerned. With regard to the refusal of authorisation by ministerial decree, an administrative act under national law, one wonders whether it might not pose problems of a constitutional nature for certain States such as Senegal, whose fundamental law enshrines the right to appeal to the Council of State on grounds of ultra vires as a constitutional principle.

In other words, unlike withdrawal decisions taken by the supra-national body that is the Commission Bancaire, can ministerial decisions refusing authorisation be challenged before the competent national courts of the Member States? Apparently, as things stand in national law, there is nothing to prevent this.

Moreover, the provisions of the Convention setting up the Commission Bancaire blocking appeals against its decisions at the level of the Council of Ministers have become illusory since Article 8 of Additional Protocol No. 1 relating to the organs of the Commission Bancaire has been repealed.

In other words, in the event of a political appeal by the supervisory bodies to the Council of Ministers, the decision obtained by this body may still be challenged before the WAEMU judicial control body.

The above assessments of the regulation of authorisation demonstrate, if proof were needed, the need to amend the legislation in this area, particularly when combined with the need to adopt a single sub-regional authorisation to ensure the contours of a WAEMU banking market.

It would seem more appropriate to favour the granting of a single authorisation by an act of the Commission Bancaire, despite the fact that it is a supervisory body, as this authority, exercised by a supra-national body, can dispense with all the considerations of domestic law mentioned above, especially as the ministerial supervisory bodies do not actually exercise any significant power in this area, the case being investigated by the Commission Bancaire, whose intervention is decisive unless there is an arbitration appeal before the Council of Ministers, it should be added that the decision of the Commission Bancaire under Community law may be directly challenged before the judicial body of the Union, under the terms of Article 8, paragraph 2 of Protocol No. 1 referred to above.

In addition to the option of granting a single licence by decision of the Banking Commission, a contractual method of issuing a single licence may also be envisaged, with a contract accompanied by specifications covering the management and organisational requirements to be met by the licensee.

As for the procedure for making a declaration of activity in the event of an application to expand by setting up a branch in another Member State, subject to the Commission Bancaire not objecting, this appears to call into question the substance of the single authorisation and can be interpreted as a sort of "right of veto" by the Commission, since a declaration, being in law a simple act of information, is in principle not subject to objection.

3) <u>On the regime applicable to credit institutions from non-WAEMU member states</u>

With regard to establishments that are nationals of non-WAEMU member states, granting a single authorisation on the condition that they constitute one or more subsidiaries seems appropriate. However, it may be appropriate to use the criterion of the nationality of the Establishment, as the criterion of the place of the registered office alone may seem insufficient. In general, the nationality of a commercial company is determined by the location of its registered office and the nationals who control it.

4) <u>The legal nature of the single authorisation instrument</u>

Based on the provisions of Article 92(4) of the WAEMU Constitutive Treaty, which empowers the WAEMU Council of Ministers to take appropriate measures to facilitate the effective use of the right of establishment by means of a regulation or directive, the draft text has chosen to regulate the single authorisation by means of a regulation under Community law. However, it is important to note that the West African Economic and Monetary Union is legally based on the two Treaties, which are distinct autonomous legal frameworks, even if they are complementary, with competences and powers specific to each Treaty:

a) WAMU, which mainly covers the financial and monetary aspects of integration, and

b) WAEMU, which covers the complementary aspects of integration that are essentially economic in nature.

This is why, as long as the WAEMU Treaty has not enshrined, by means of an additional act of the Heads of State and Government, the merger of the two aforementioned Treaties, thus putting an end to the coexistence and respective autonomy of these two legal frameworks, the legal instruments in the respective fields of the two Treaties will remain distinct. Thus, since Article 22 of the WAMU Treaty provides for the adoption of regulations in the form of a uniform law for all matters relating to the general rules governing the exercise of the banking profession and related activities, it does not seem consistent with this text to

to have recourse to secondary Community law of the WAEMU, in this case the regulation of the Council of Ministers, to legislate on the conditions for exercising banking law within the Union, since the provisions of Article 92, paragraph 4 of the WAEMU Treaty referred to can only be interpreted as governing activities including the right of establishment, professions other than banks and financial establishments whose conditions and procedures for exercising their profession are governed exclusively by the WAEMU Treaty, as specified by the provisions of Article 22 of that Treaty, unless the introduction of the single licence is achieved by amending the provisions of the Convention creating the Banking Commission relating to the licensing of banks and financial establishments.

5) <u>On the legal regime in the event of a crisis in the management of Establishments benefiting from a single authorisation</u>

Subject to an in-depth study, the parent company's liability to reimburse depositors in the event of the liquidation of a branch seems acceptable; on the other hand, the liability of the State in which the parent company has its registered office in the event of insufficient assets may be disputed, especially in a context of economic and financial integration; in this case, the development of a solidarity mechanism seems more judicious, even with r e g a r d to the reimbursement of the amount of the Central Bank's refinancing loans.

As for the procedure for winding up credit institutions with a single authorisation, it is rightly recommended that they be opened in the State in which the head office of the parent company has its registered office, whose law is applicable subject to compliance, where applicable, with the legislation of the State in which the branch is located, even though such a legal system entails significant de facto and de jure burdens. For this reason, the creation and promotion, as accompanying measures, with the advent within the WAEMU, of freedom of establishment for industrial, commercial, craft or even liberal professions of Community law civil and commercial companies, legal entities governed by this Community law, in their rules of constitution, operation and dissolution and evolving within the territorial and institutional framework of the Union, seems to constitute, in the more or less short term, the appropriate solution that could efficiently ensure an integrated WAEMU banking market.

Thus, within the Union, alongside companies governed by national law, even uniform companies with national authorisation whose activities are limited to the territory of the Member State, there will appear companies governed by Community law with a sub-regional vocation for which a single authorisation is reserved.

III. CONCLUSIONS

Accordingly, the Court, acting in an advisory capacity, is of the opinion that :

The Court of Justice considers that any body of the Union may refer a request for a legal opinion to it, provided that the action is brought by the authority competent to represent it in its relations with the other bodies of the Union.

The principle of a single licence is likely to encourage the creation of a sub-regional banking or financial market, by ensuring the freedom to establish branches in Member States and the freedom to provide services for credit institutions, which will be able to freely receive deposits and provide loans from a Member State. Achieving this objective, however, presupposes the simultaneous achievement of freedom of establishment, freedom to provide services and freedom of capital movements.

The competence of the Commission Bancaire to decide on the granting and withdrawal of authorisation would make it possible to draw up legislation that is more homogeneous, less dispersed and more consistent. It is also possible to envisage a contractual form of single authorisation accompanied by specifications.

The legal regime for the authorisation of credit institutions from non-WAEMU member states should be perfected by classifying these institutions according to the criteria of the nationality of commercial companies.

As a result of the application of the relevant provisions of article 22 of the WAEMU Treaty, the legal standard for drawing up the single authorisation is the uniform law or the inter-State convention. The provisions of article 92, paragraph 4 of the WAEMU Treaty relating to the regulation of the Council of Ministers apply to establishments other than those belonging to the Monetary Union.

Over and above the provisions calling on private international law in the management of institutions benefiting from the single authorisation with branches in another Member State and subject to liquidation measures, the solutions recommended, in particular the liability to compensate depositors and in the event of insufficient assets and the absence of a solidarity mechanism, as well as the principle of repayment of the amounts of the Central Bank's refinancing loans, can only constitute avenues of research which a subsequent in-depth study would confirm or invalidate.

In short, all the above considerations speak in favour of :

1) the need to merge the two constitutive Treaties of the WAMU and the WAEMU to enable the authorities of the WAMU to have recourse to the more effective legal instruments of the WAEMU because they have direct effect and take precedence over the domestic law of the Member States. Indeed, this two-speed legal system is not likely to promote a homogeneous law of the Union;

2) the importance to be attached to drawing up, in the near future, a Community law on civil and commercial companies in the WAEMU, the scope of which will extend to all the activities of these economic entities, from their creation to their dissolution.