

Opinion n° 01/2003

Opinion of the Court of 18 March 2003 on the creation of a Court of Audit in Mali

Summary of the opinion

The WAEMU Treaty enshrines the primacy of Community legislation over that of the Member States.

Primacy applies to all Community rules, whether primary or secondary, and over all national rules, whether administrative, legislative, jurisdictional or even constitutional, because the Community legal order takes precedence in its entirety over national legal orders.

Directive n°02/200/CM/UEMOA of 29 June 2000 adopting the code of transparency in the management of public finances within the UEMOA, must be fully applied in the Republic of Mali as soon as it comes into force.

A V I SN° 001/2003
of 18 March 2003

**REQUEST FOR AN OPINION FROM THE UEMOA COMMISSION ON
THE CREATION OF A COURT OF AUDITORS IN MALI**

The President of the WAEMU Commission referred the matter to the WAEMU Court of Justice by letter No. 829/PC/CJ of 7 February 2003, registered under No. 01/03, which reads as follows:

"Mr President,

I have the honour to inform you that by letter dated 7 January 2003, a copy of which is attached, the Minister for the Economy and Finance of the Republic of Mali requested the Commission's legal opinion on the creation of a Court of Auditors in that country.

The request states that a constitutional revision project initiated by the Malian government in 2002 has not been successful.

The concerns of the Malian authorities are based on the apparent contradiction between the constitutional standards of their country and the provisions of positive law of the WAEMU, which require the establishment of autonomous Courts of Audit in the Member States of the Union.

Article 83 of the Malian Constitution establishes a Supreme Court comprising a Judicial Division, an Administrative Division and an Audit Division.

Article 68 of the WAEMU Treaty stipulates that: "(1) in order to ensure the reliability of budgetary data necessary for the organisation of multilateral surveillance of budgetary policies, each Member State shall, if necessary, take the necessary steps to ensure that, no later than one (1) year after the entry into force of this Treaty, all its accounts can be audited in accordance with procedures offering the required guarantees of transparency and independence.

In particular, these procedures must make it possible to certify the reliability of the data appearing in the initial and amending Finance Acts, as well as in the Settlement Acts.

2) *The procedures open to each Member State for this purpose are as follows:*

- *have recourse to the control of the Court of Auditors of the Union ;*
- *set up a national Court of Auditors which may, if necessary, call on an external audit system. This Court shall forward its observations to the Court of Auditors of the Union...".*

*These provisions are reinforced by those of Directive n°02/200/CM/UEMOA of 29 June 2000, adopting the Code of transparency in the management of public finances within the UEMOA, article E-2-2 of which states that "**Member States shall create autonomous Courts of Audit by 31 December 2002 at the latest**", after emphasising that "There can be no sound management of public finances without effective a posteriori control by an independent financial court with extensive powers and investigative capacity".*

The attention of the Governments of the WAEMU Member States has been drawn on various occasions to the need for diligent implementation of the above-mentioned standards of Community law.

The principle of creating autonomous Courts of Audit in the said States was thus raised at the session of the WAEMU Council of Ministers held on 23 May 2002 and at various meetings organised by the Presidents of the financial jurisdictions and the Councillors of the Court of Audit of the Union.

It was also the subject of a letter sent by the Commission to the Minister of Economy and Finance of the Republic of Mali on 08 May 2002.

These various steps culminated in the unsuccessful constitutional revision project mentioned by the aforementioned Minister in his letter of 7 January 2003.

Therefore, in the context of Article 27, in fine, of the Court's Statutes and Article 15-7° of its Rules of Procedure, I would like to ask your Court's opinion on the question of creating a Court of Audit in Mali.

Yours sincerely

Moussa TOURE

The Court, sitting as a Consultative General Assembly under the chairmanship of Mr Yves D. YEHOUESSI, President of the WAEMU Court of Justice, on the report of Mr Youssouf Any MAHAMAN, Judge at the said Court, in the presence of Ladies and Gentlemen :

- Ramata FOFANA née Ouédraogo, Court Judge
- Paulette BADJO EZOUEHU, Court Judge
- Daniel Lopes FERREIRA, Court Judge
- Mouhamadou NGOM, Court Judge
- Malet DIAKITE, First Advocate General at the Court
- Kalédji AFANGBEDJI, General Counsel

and assisted by Mr Raphaël P. OUATTARA, Registrar of the Court, examined the above-mentioned application at its sitting of 18 March 2003.

THE CONSULTATIVE GENERAL MEETING

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

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

Having regard to Additional Act n° 10/96 on the Statutes of the WAEMU Court of Justice of 10 May 1996 ;

Having regard to Regulation No. 01/96/CM on the Rules of Procedure of the WAEMU Court of Justice of 5 July 1996;

Having regard to Regulation n° 01/2000/CDJ repealing and replacing Regulation n° 1/96/CDJ relating to the Administrative Rules of the WAEMU Court of Justice dated 6 June 2000;

Vula request for opinion n°829/PC/CJ of 7 February 2003 from the President of the WAEMU Commission;

I. ON THE SHAPE

The last paragraph of Article 27 of the Statutes of the Court of Justice and Article 15 - 7^e paragraph 3 of the Rules of Procedure provide that *"where a matter is referred to it by the Commission, the Council of Ministers, the Conference of Heads of State or Government or a Member State, the Court may give an opinion on any difficulty encountered in applying or interpreting acts governed by Community law"*.

As the request of the President of the Commission seeks to resolve the difficulties linked to the application of Article 68 of the WAEMU Treaty, and as it meets the formal requirements of the aforementioned articles, it should be declared admissible.

II. ON THE BACKGROUND

It should first be noted that the question raised by the application relates to the introduction into the legal system of the Malian State of Directive No. 02/2000/CM/UEMOA of 29 June 2000 of the WAEMU Council of Ministers concerning the implementation of the provisions prescribed by Article 68 of the Treaty of the Union.

This article states:

"1) In order to ensure the reliability of the budgetary data necessary for the organisation of multilateral surveillance of budgetary policies, each Member State shall, if necessary, take the necessary steps to ensure that, no later than one (1) year after the entry into force of this Treaty, all its accounts can be audited in accordance with procedures offering the necessary guarantees of transparency and independence. These procedures must in particular make it possible to certify the reliability of the data appearing in the initial and amending Finance Acts, as well as in the Settlement Acts.

2) The procedures open to each Member State for this purpose are as follows:

- *have recourse to the control of the Court of Auditors of the Union ;*
- *set up a national Court of Auditors which may, if necessary, call on an external audit system. This Court will forward its observations to the Court of Auditors of the Union.*

3) Member States shall keep the Council and the Commission informed of the measures they have taken to comply with this obligation without delay. The Commission shall verify that the procedures chosen are effective.

4) The Council shall adopt, by a two-thirds (2/3) majority of its members, the regulations and directives necessary for the implementation of these provisions".

It was on the basis of this provision that Directive n°02/2000/CM/UEMOA of 29 June 2000 was issued, requiring each Member State to set up an autonomous Court of Audit by 31 December 2002 at the latest.

To achieve this, Mali decided to revise its Constitution, in particular Articles 81 et seq. on the organisation of the judiciary.

In Malian positive law, the conditions for the applicability in domestic law of international standards and, within these, of Community standards, as well as their authority in relation to national standards, are defined by the Constitution.

The primacy of the WAEMU Treaty and its derived norms is expressly enshrined not only in Article 6 of the Treaty, but also in Article 116 of the Constitution of the Republic of Mali, which provides as follows:

"Treaties or agreements that have been duly ratified or approved have, from the time of their publication, an authority superior to that of laws, subject, for each treaty or agreement, to its application by the other party".

Under the terms of this article, there are three conditions for the introduction of international standards into Malian domestic law. A convention must have been duly

ratified or approved and published in the Official Journal of the Republic; finally, it will only be applicable in domestic law to the extent that it is applied by the other party.

In addition, in 1994 the State of Mali joined the WAEMU, whose Treaty defines the relationship between Community law and the national laws of the Member States, stipulating in Article 43:

"Regulations are of general application. They are binding in their entirety and directly applicable in all Member States.

The directives are binding on all Member States as to the results to be achieved.

Decisions are binding in their entirety on those to whom they are addressed.

Recommendations and opinions are not binding".

Primacy applies to all Community rules, whether primary or derived, whether immediately applicable or not, and over all national administrative, legislative, jurisdictional and even constitutional rules, because the Community legal order takes precedence in its entirety over national legal orders.

States have a duty to ensure that a provision of national law that is incompatible with a provision of Community law that meets the commitments they have entered into cannot be validly invoked against the latter. This obligation is the corollary of the superiority of Community law over national law.

Thus, where there is a conflict between Community law and a rule of national law, the national court must give precedence to the former over the latter by applying the former and disregarding the latter.

CONCLUSION

The Court was of the opinion that :

- The WAEMU Treaty establishes the primacy of Community legislation over that of the Member States;

- Directive n°02/2000/CM/UEMOA of 29 June 2000 adopting the Code of transparency in the management of public finances within the UEMOA, must, as soon as it comes into force, be fully applied in the Republic of Mali;
- it is therefore up to the Malian State to take all the necessary measures to apply this directive by transposing it immediately into domestic law, as the transposition period has expired, or risk incurring an action for failure to fulfil obligations.

