

OPINION n°002/2000

Opinion of the WAEMU Court of Justice of 2 February 2000 on the interpretation of article 84 of the WAEMU Treaty.

Summary of the opinion

The application seeks the Court's opinion on the exact meaning of Article 84 of the Treaty on European Union following the difficulties caused by the fact that the Commission and the Committee of Experts did not have the same interpretation of that article.

- *Under the terms of articles 9 and 13, paragraph 2 of the WAEMU Treaty, both the Union and the Member States have the capacity to conclude international agreements as subjects of international law.*

In addition to the external competences of the Member States, the exercise of which is guaranteed by their institutional autonomy, the Union has exclusive competence, particularly in the area of the common commercial policy.

- *In accordance with 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.*

AVI SN° 002/2000

of 2 February 2000

File No. 07-1999

REQUEST FOR AN OPINION FROM THE UEMOA COMMISSION
ON
INTERPRETATION OF ARTICLE 84 OF THE UEMOA TREATY

The President of the WAEMU Commission referred the matter to the WAEMU Court of Justice by letter No 99-145/PC/CJ of 19 November 1999, which reads as follows:

"Mr President,

Article 1 of Additional Protocol No. 1 on the Supervisory Bodies of the WAEMU charges the Court of Justice with ensuring "the observance of the law in the interpretation and application of the Treaty of the Union".

During discussions on draft trade and/or investment agreements between the EU and third countries, a divergence emerged between the Commission and the Committee of Experts, set up under Article 25 of the Treaty to prepare the deliberations of the Council of Ministers. This divergence has become persistent.

The difference relates to the scope of Article 84 of the Treaty, which states that "the Union shall conclude international agreements within the framework of the common commercial policy..."

In the Commission's view, this provision confers exclusive competence on the Union to conclude the agreements referred to in the said article in order, inter alia, to avoid the implementation of the common commercial policy being rendered difficult, or even impossible, as a result of bilateral agreements concluded by Member States with third countries.

According to the Committee of Experts, the wording of the article does not support such a position. In its view, the use of the article "of", instead of "the", before "international agreements" leaves an area of competence, alongside that of the Union, with the Member States, which will have to bring the agreements they conclude into line with the Union's commercial policy.

As the Commission maintained its position on the Union's exclusive competence to conclude the agreements provided for in Article 84, the Council of Ministers invited the Commission to refer the matter to the Court of Justice with a view to obtaining an interpretation of this article, so that a single understanding of its provisions could be established within the Union.

I would therefore be grateful if the Court could rule on the scope of Article 84 of the Treaty, as regards the power to conclude international agreements in the context of the common commercial policy.

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 Kalédji AFANGBEDJI, Advocate General at the said Court, in the presence of Messrs:

- Mouhamadou Moctar MBACKE, Court Judge
- Youssef ANY MAHAMAN, Court Judge
- Martin Dobo ZONOU, Court Judge
- Malet DIAKITE,

First Advocate General at the Court

and assisted by Mr Raphaël P. OUATTARA, Registrar of the Court, examined the above application at its sitting of 2 February 2000.

L A C O U R

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 ;

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

Vule Règlement Administratif de la Cour de Justice de l'UEMOA en date du 9 décembre 1996 ;

Viewed at the request No 99-145/PC/CJ of 19
November 1999 from President of the
WAEMU Commission;

ON THE SHAPE

As this is an application seeking the Court's opinion on the exact meaning of Article 84 of the Treaty on European Union following the difficulties arising from the fact that the Commission and the Committee of Experts did not have the same interpretation of that Article, this request should be considered as being of the type provided for in Article 27 paragraph 4 of Additional Act No. 10/96 on the Statutes of the Court or in Article 15 - 7^e of the Rules of Procedure of the said Court for the Conference of Heads of State and Government, the Council of Ministers and the Commission of the WAEMU when they encounter any difficulty in the application and interpretation of acts of Community law.

The application is therefore admissible because it meets all the formal requirements laid down by the provisions of the two aforementioned articles.

ON THE BACKGROUND

The Court is asked to rule on whether the Union has exclusive competence to conclude international agreements with third countries or international organisations within the framework of the common commercial policy established by the Treaty.

Under the terms of articles 9, which endows it with legal personality, and 13 paragraph 2 of the Treaty, which empowers it to conclude cooperation and assistance agreements with third States or international organisations, both the WAEMU and the Member States have the capacity to conclude international agreements as subjects of international law, an international agreement being defined as any binding commitment made by a subject of international law.

However, the Community system of agreements generally comprises several categories of agreement, the typology of which governs the legal effects of these agreements and even the process of negotiating and concluding these agreements. A distinction can therefore be made between :

- 1) external agreements, i.e. those that the Community may conclude with third countries, alone and represented by the Commission acting under the instructions of the Council (see Article 12 of the Treaty) or jointly with the Member States (agreements commonly known as "mixed agreements");
- 2) inter-state agreements to which the Union is not a party but which are concluded by the Member States either with third countries or between themselves.

These inter-State agreements may have been concluded before the entry into force of the Union Treaty or may be concluded after that entry into force. Their legal effects vis-à-vis the Community and vis-à-vis the co-contracting parties will vary according to the situations described above and in accordance with the relevant provisions of Articles 14 and 16. 15 of the WAEMU Constitutive Treaty.

As the subject of the consultation relates exclusively to external agreements, it is appropriate to examine the scope of the consultation, i.e. the cases in which the Community is empowered to conclude agreements on its own and the procedure to be followed.

It is important to emphasise first of all that the Union is an organisation of unlimited duration, with its own institutions, personality and legal capacity, and above all powers derived from a limitation of competences and a transfer of attributions from the Member States, which have deliberately conceded part of their sovereign rights to it in order to create an autonomous legal order applicable to them and their nationals.

Thus, alongside the competences retained by the Member States, the exercise of which is guaranteed by their institutional autonomy, there exists, with the same principle of institutional autonomy, an exclusive competence of the Union, highlighted by perfectly identifiable provisions, including those of Articles 82, 83 and 84 of the Treaty relating to commercial policy, which prescribe, with a view to achieving the objectives of the Treaty, a common commercial policy including, in particular, the determination by Community legal acts of the Common External Tariff, commercial defence measures, export policy, and the negotiation and conclusion of bilateral or multilateral commercial agreements with States or international organisations.

These external provisions are implemented in the unequivocal terms of Article 84 of the Treaty, which in no way envisages the intervention of the Member States at the negotiation stage, as they can only intervene at the stage of drawing up the Council's recommendations to the Commission and possibly as members of the ad hoc committee set up by the Council of Ministers.

The only exceptions allowed by the Treaty to the exercise of the Union's exclusive competence in this area of the common commercial policy are :

- 1) those of Article 85, where the Union cannot have its own representation within an international organisation (certain international organisations do not admit other organisations as members), which means that the case falls into the category of inter-State agreements;

2) those relating to so-called mixed agreements where the Union and the Member States coexist.

These cases are not predefined by the Treaties and are more a matter of Community practice.

These cases of mixed agreements depend in principle on competences shared between the Member States and the Union; they are therefore exclusive of the reserved competences of the Union and the retained competences of the Member States. These are agreements whose subject matter in some way exceeds the competence of the Community and encroaches on the competence of the Member States. European examples include the Yaoundé and Lomé ACP-EEC Agreements, which are aimed at development cooperation, and the United Nations Convention on the Law of the Sea, which covers all economic policy relating to the exploitation of the sea; as for the GATT Agreement (agreement on trade policies), the mixed nature of which can be explained by the fact that it predates the Treaty on European Economic Integration. In principle, it falls within the exclusive competence of the Union, which is why the EEC has subsequently completely replaced the Member States in terms of their respective rights and obligations.

These mixed agreements, like all Community agreements, can in no way affect the Constitutional Treaty or the acts adopted to implement it.

To sum up, it can be said that in the case of exclusive competences where the Union has adopted common provisions by Community acts for the implementation of a common policy, the Member States are no longer entitled, either individually or collectively, to enter into contracts, let alone negotiate obligations with third countries in this area. Article 7 of the Treaty requires Member States to refrain from taking any measure which could jeopardise the application of the Treaty.

This is the case for the negotiation and conclusion of agreements relating to the Union's common commercial policy, the rules for which, under the terms of Article 82 of the Treaty, are laid down in a Community regulation, the conclusion of which is the responsibility of the Union's Council of Ministers and the negotiation of which is the responsibility of the Commission, by virtue of the provisions of Article 84 of the Treaty. Once these exclusive competence agreements have entered into force, they become binding on the Member States by virtue of their nature as derived Community acts of a conventional nature.

In principle, they are ranked higher in the hierarchy of Community standards than unilateral Community acts such as regulations, directives and decisions.

The use of the article "des" instead of "les" can in no way call into question the legal basis of the Union's exclusive competence in this area of common policy, as set out in Articles 13(2), 14, 15, 82, 83 and 84 of the Treaty establishing the European Community.

CONCLUSION

The Court is of the opinion that, by virtue of the provisions of the aforementioned articles of the WAEMU Treaty :

- 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.

