Opinion n° 02/2003

Court opinion of 20 June 2003 on the renewal of the terms of office of members of the Court of Auditors

Summary of the opinion

- The purpose of the request is to obtain the Court's opinion on the interpretation of the provisions governing the composition of and arrangements for the renewal of the terms of office of the members of the Court of Auditors of the European Union.
- According to the Commission, as the terms of office of the advisers appointed on 17 February 1998 on the proposal of the first three Member States of the Union (Benin, Burkina Faso and Côte d'Ivoire) expire in 2004, the renewal should be based on the principles defined by Articles 1 and 2 of the Additional Act No. 09/96 of 10 May 1996.
- If we refer to the Union's Community provisions, it is clear that the two councillors from Benin and Burkina Faso, who are nationals of the first two countries on the alphabetical list of Member States, cannot have their mandates renewed.

A V I S Nº 002/2003 From 20 June 2003

REQUEST FOR AN OPINION FROM THE UEMOA COMMISSION ON THE RENEWAL THE TERM OF OFFICE OF MEMBERS OF THE COURT OF AUDITORS

By letter No 03-005/PC/CJ dated 22 May 2003, the President of the WAEMU Commission made a request to the Court of Justice as follows:

"As you know, the composition of the WAEMU Court of Auditors and the procedures for appointing its members are governed by Additional Protocol No. 1 on the Union's Auditors and Additional Act No. 09/96 of 10 May 1996.

Article 24 of the aforementioned Additional Protocol stipulates that "the Court of Auditors shall consist of three (03) Councillors. The Councillors shall be appointed for a term of six (06) years, renewable once (1) only, by the Conference of Heads of State and Government, from among persons proposed by the Council and offering all the necessary guarantees of competence and independence".

Additional Act No. 09/96 of 10 May 1996 states:

- in article 1^{er}, that "the Councillors of the WAEMU Court of Auditors are appointed in alphabetical order of the Member States, so as to call, successively to the functions of Councillors, nationals of all the Member States"; and
- in article 2, that "at the end of each term of office, two thirds (2/3) of the members of the Court of Auditors shall be re-elected, following the alphabetical order of the Member States".

In application of these provisions, Benin, Burkina Faso and Côte d'Ivoire were the first countries to submit candidates for the position of Councillors to the WAEMU Court of Audit.

On 30 March 1998, the Court began operating with Councillors who were nationals of the three

aforementioned States.

The persons concerned were appointed by Additional Act No. 02/98 of 27 February 1998, on the

recommendation of the Union's Council of Ministers.

The Commission's interpretation, based on the principles set out in Articles 1 and 2 of the

above-mentioned Additional Act No 09/96 of 10 May 1996, is that for the 2004 renewal of the

terms of office of Councillors to the WAEMU Court of Auditors, Guinea Bissau and Mali should

propose candidates to replace the current Councillors representing Benin and Burkina Faso.

With this in mind, Côte d'Ivoire, Guinea Bissau and Mali are expected to submit their next

candidatures.

I would like - in the context of Article 27, in fine, of the Statute of the Court of Justice of the

WAEMU and Article 15-7e of its Rules of Procedure - to ask your Court's opinion on the

interpretation to be given to the various aforementioned texts.

Please let me know of any other interpretations of the aforementioned texts that, in your Court's

opinion, may apply in this case.

Yours sincerely

Moussa TOURE "

The Chairman of the Commission explained that, with a view to the forthcoming nominations, the Commission would like to know the opinion of the Court of Justice on the interpretation to be given to the various texts cited in the application.

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 Mrs Ramata FOFANA OUEDRAOGO, Judge at the said Court, in the presence of Mrs and Messrs

- Paulette BADJO EZOUEHU, Court Judge
- Youssouf ANY MAHAMAN, 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 application at its sitting of 20 June 2003.

THE CONSULTATIVE GENERAL MEETING

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

Having regard to the request for opinion n°03-005/PC/CJ of 22 May 2003 from the President of the WAEMU Commission;

I. ON THE SHAPE

As regards form, it should be noted that cases are referred to the Court in accordance with the provisions of Article 27 of the Statutes of the Court of Justice and Article 15-7(3) of Regulation No 1/96 laying down the Rules of Procedure, which provide that "where a case 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".

The request from the President of the Commission is for an opinion on the interpretation of the provisions governing the composition of and arrangements for renewing the terms of office of the members of the Court of Auditors of the European Union.

Copies of the following documents are attached to this request:

- Additional Protocol No. 1 on the supervisory bodies of the WAEMU,
- Additional Act No. 09/96 of 10 May 1996 laying down the procedures for a p p o i n t i n g Councillors to the WAEMU Court of Auditors,
- Additional Act No. 02/98 of 17 February 1998 appointing the Councillors of the Cour des Comptes,
- Recommendation 09/97 of 16 December 1997 of the Council of Ministers on the appointment of Councillors to the Cour des Comptes.

It follows from the foregoing that the application satisfies all the formal requirements laid down by the Rules of Procedure and the Administrative Rules of the Court.

It can therefore be examined.

II. AT THE BOTTOM

The President of the Commission requests the Court to give an opinion on the interpretation to be given to the following texts:

- Article 24 of Additional Protocol No. 1 relating to the WAEMU Audit Bodies, which stipulates that: "The Court of Auditors shall be composed of three (3) Councillors. The Councillors shall be appointed for a term of six (6) years, renewable once only, by the Conference of Heads of State and Government, from among persons proposed by the Council and offering all the necessary guarantees of competence and independence";
- Article 1 of Additional Act No. 09/96 of 10 May 1996, which stipulates that "the Councillors of the WAEMU Court of Audit are appointed in alphabetical order of the Member States, in such a way as to successively appoint to the post of Councillor nationals of all the Member States";
- Article 2 of the same Act, which stipulates that "the renewal of the Councillors of the Court of Auditors is carried out at the end of each term of office, by 2/3 of the members of the Court in alphabetical order of the Member States".

The Commission explains that in its view, as the terms of office of the Councillors appointed on 17 February 1998 on the proposal of the first three (3) Member States of the Union (Benin, Burkina Faso, Côte d'Ivoire) expire in 2004, renewal should be based on the principles defined by Articles 1 and 2 of the above-mentioned Additional Act, i.e. by 2/3 of the members and in alphabetical order of States. It is therefore up to Côte d'Ivoire, Guinea Bissau and Mali to make proposals for the next candidates.

This interpretation is not confronted with any other interpretation or contrary opinion that could justify an application for intervention by the Court of Justice. It must therefore be assumed that the Commission simply wants to know how the Court understands and interprets these provisions.

III. OPINION

Before addressing the question posed, it is necessary to clarify the following:

Under the terms of Article 19 of the Treaty, additional acts shall supplement the Treaty without, however, amending it; they shall be annexed to the Treaty.

Does Additional Act No. 09/96 of 10 May 1996 meet these conditions?

Article 24 of Additional Protocol No. 1 on the Court of Auditors specifies the composition of the Court, the term of office of its members, the criteria for their appointment and the appointing body, which is the Conference of Heads of State and Government.

However, Additional Protocol No. 1 is silent on the modalities for appointing members, which would pose problems insofar as the Court of Audit is made up of three (3) members whereas the WAEMU is made up of eight (8) Member States.

How would the three members be appointed?

This question was answered by Additional Act No. 09/96, which merely supplements Additional Protocol No. 1 without changing its substance.

Under the terms of article 2 of the Additional Act n° 09/96 of 10 May 1996, the renewal of the Councillors of the Court of Auditors is carried out at the end of each mandate by 2/3 of the members of the Court, in alphabetical order.

This method of renewal was provided for the appointment of the members of the Court of Auditors and not for those of the Court of Justice, another judicial control body created by Additional Protocol No. 1.

While the Judges of the Court of Justice are appointed for a renewable term of six (6) years on the proposal of all the Member States, the Councillors of the Court of Auditors, three (3) in number, are appointed for a term of six (6) years renewable once only. This appointment shall be made in the alphabetical order of the States and shall be made in such a way that nationals of all the States may perform the duties of Councillor.

Although these provisions lay down more complex conditions than those governing the Court of Justice, they are no less easy to interpret both in spirit and in letter. If we therefore consider that the Additional Protocol, a primary law, is at the top of the hierarchy of Community norms and that, with the Treaty, it forms the constitution of the Community, it is understood that the provisions it sets out serve as a foundation for the institutions and for the drafting of other Community legal norms, such as the Additional Act. The Additional Act can only supplement the Treaty or the Additional Protocol, in a vertical process of application from the general to the specific (see Opinion No. 003/99 of 25/11/1999).

While Article 24 of Additional Protocol No. 1 stipulates that Councillors to the Court of Auditors are appointed for a term of six (6) years, renewable once, Articles 1^{er} and 2 of the Additional Act specify the practical arrangements for appointing these Councillors and renewing their term of office.

In strict application of these texts, the first three Member States proposed candidates; three (3) Councillors were selected and appointed in accordance with Additional Act No. 02/98 of 17 February 1998.

In February 2004, these Councillors will have used up their term of office and will either have to be replaced or have their term of office renewed once and for all.

However, this renewal is carried out by 2/3 of the members. As the Court is composed of only three (3) Councillors, this renewal will only concern two (2) members.

If we refer to the aforementioned provisions, it is clear that the two (2) Councillors from Benin and Burkina Faso, nationals of the first two countries on the alphabetical list of

Member States, cannot have their mandates renewed, since they form part of the 2/3 of the members to be renewed. Only Côte d'Ivoire, whose nationals make up the remaining 1/3, may reappoint their former representative, whose term of office is renewable once only, or propose a new candidate. The other candidates must come from the following countries, in alphabetical order: Guinea Bissau and Mali.

This is the only understanding one can have of the provisions governing the renewal of the members of the Cour des Comptes, as long as the texts are not modified. Thus, after Côte d'Ivoire, Guinea Bissau and Mali, the renewal will take place after the six (6) years of office of these three countries, by 2/3. Côte d'Ivoire and Guinea Bissau will no longer be able to present candidates. It will be up to Mali, Niger and Senegal to propose candidates; Mali may renew the mandate of its former representative or propose another candidate.

At the third renewal, after a further six (6) years, the representatives of Mali and Niger will leave, and Senegal, Togo and Benin will have to propose new candidates. Senegal may, in turn, renew the mandate of its former representative or propose another candidate.

This method of renewal is common in institutions or bodies where members are elected or appointed for fixed terms, whether at national or international level.

For example, Article 4 of Protocol A/P - 1/7/91 on the ECOWAS Court of Justice provides that the members of the Court of Justice are appointed for five (5) years, renewable once. However, for members of the Court appointed for the first time, the term of office of three (3) members expires after three (3) years and that of the other four after five (5) years.

The members of the Court whose term of office expires at the end of the initial periods of 3 years and 5 years are chosen by lot by the President of the Assembly, immediately after the first appointment (the ECOWAS Court of Justice is composed of 7 judges).

We can therefore say that the system of renewal, by thirds or by another predefined portion of the members of the institutions, is a common practice whose implementation mechanism works without any major obstacle.

The difficulty that could arise in this case would arise from the fact that instead of being chosen by lot, 2/3 of the Councillors are chosen according to the alphabetical order of their States.

This suggests that the renewal does not concern the councillor intuitus personae, but in his capacity as representative of his country.

This choice is not in fact a difficulty, but rather an effective means of ensuring rotation and alternation within the institution, so that all Member States can have a national serve as Councillor at least once.

IV. CONCLUSION

Consequently, the Court is of the opinion that the next proposals for candidates for the renewal of the Councillors of the Court of Auditors in 2004 should come from Côte d'Ivoire (1/3 remaining), Guinea Bissau and Mali (2/3 renewed).