

**JUDGMENT
T NO.
02/2024
FROM 17 JANUARY 2024**

**ACTIONS FOR ASSESSMENT OF
LEGALITY AND FOR ANNULMENT**

**Mr Omolola Selom Paul- Harry
AITHNARD**

C/

**Regional Council for Public
Savings and Financial Markets
(CREPMF)**

Composition of the Court :

- **M. Mahawa Sémou DIOUF, Chairman ;**
- **Mrs Joséphine Suzanne EBAH-TOURE, Judge ;**
- **Mr Abdourahamane GAYAKOYE SABI, Judge ;**
- **Mr Jules CHABI MOUKA, Judge ;**
- **Mr Ladislau Clemente Fernando EMBASSA, Judge-Rapporteur ;**
- **M. Kuami Gameli LODONOU, First Advocate General ;**
- **Mr Hamidou YAMEOGO, Court Clerk.**

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

PUBLIC HEARING ON 17 JANUARY 2024

The Court of Justice of the WAEMU, meeting in ordinary public session on eighteen (18) May two thousand and twenty-two (2022), in which were seated :

Mr Mahawa Sémou DIOUF, Chairman; Ms Joséphine Suzanne EBAH-TOURE, Judge; Mr Abdourahamane GAYAKOYE SABI, Judge; Mr Jules CHABI MOUKA, Judge; Mr Ladislau Clemente Fernando EMBASSA, Judge-Rapporteur;

In the presence of Mr LODONOU Kuami Gameli, First Advocate General;

With the assistance of Mr Hamidou YAMEOGO, Court Clerk ;

has rendered the following contradictory

judgment: BETWEEN :

Mr. Omolola Selom Paul-Harry AITHNARD, a financial executive residing in Abidjan, Cocody les deux plateaux, having as its lawyer SCPA LES DIRABOU ET ASSOCIES, a professional partnership of lawyers registered with the Côte d'Ivoire Bar, represented by Maitre DIRABOU Ericson Hermann, lawyer, whose registered office is at Rivera-Attoban, quartier BAD, carrefour situé entre la polyclinique Sacré Cœur et la pharmacie Saint Bernard, **Plaintiff, on the one hand;**

AND

Conseil Régional de l'Épargne Publique et des Marchés Financiers (CREPMF), advised by Société Civile Professionnelle d'Avocats N'GAN, ASMAN & Associés, Avocats près la Cour d'Appel d'Abidjan, 37 rue de la Canebière, 01 BP 3361, Abidjan 01 - Tel: +225 27 20 21 90 00, **Defendant, on the other hand ;**

THE COURT

HAVING REGARD TO the Treaty of the West African Economic and Monetary Union (WAEMU) of 10 January 1994, as amended on 20 January 2007;

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

HAVING REGARD TO Additional Act No. 10/96 on the Statutes of the WAEMU Court of Justice dated 05 July 1996;

Having regard to Additional Act n°01/2023/CCEG/UEMOA of 10 January 2023 renewing the term of office and appointing members of the Court of Justice of UEMOA ;

HAVING REGARD TO Regulation n°01/96/CM of 05 July 1996 on the Rules of Procedure of the WAEMU Court of Justice;

HAVING REGARD TO Regulation n°01/2022/CJ of 15 April 2022 repealing and replacing Regulation n°01/2012/CJ of 21 December 2012 on the Administrative Rules of the Court of Justice of the WAEMU ;

HAVING REGARD TO Minutes No 2023-01/AP/01 of 1^{er} February 2023 relating to the swearing-in of the members of the WAEMU Court of Justice;

VU Minutes No. 2023-02/AI/01 of 1^{er} February 2023 concerning the appointment of the President of the Court and the distribution of functions within the Court ;

HAVING REGARD TO Minutes n°2023-03/AP/02 of 02 February 2023 relating to the installation of the President of the WAEMU Court of Justice;

HAVING REGARD TO application No 21R003 of 15/03/21, for assessment of legality and annulment of a decision, between Mr Omolola Selom Paul-Harry AITHNARD, the Conseil Régional de l'Epargne Publique et des Marchés Financiers (CREPMF) and WAEMU;

HAVING REGARD TO the summonses of the parties ;

HEARD the Judge-Rapporteur, in his report ;

ORDERED Counsel for the applicant, in its oral observations; **ORĪ** the defendant's Counsel, in its oral observations; **OUI** the First Advocate General, in his Opinion;

Having deliberated in accordance with Community law :

I. FACTS AND PROCEDURE

Considering that by request dated 15/03/2021 registered at the Court under n° 21R003 of 15/03/21 Mr Omolola Selom Paul-Harry AITHNARD, financial executive residing in Abidjan, Cocody les deux plateaux, having as lawyer the SCPA LES DIRABOU ET ASSOCIES, professional partnership of Lawyers registered at the Bar of Côte d'Ivoire, represented by Maitre DIRABOU Ericson Hermann, Avocat, whose registered office is at Rivera-Attoban, quartier BAD, carrefour situé entre la polyclinique Sacré Cœur et la pharmacie Saint Bernard, has lodged an application for the annulment of Decision No 227/2020/CREPMF of 10/12/2020, concerning the compulsory resignation of the Chairman of the Board of Directors of SGO EDC ASSET MANAGEMENT (EAM), with immediate effect;

That after several exchanges of correspondence between the applicant and the respondent, who produced an application and a statement of defence, supplemented by a reply from the applicant and a rejoinder from the respondent, the President of the WAEMU Court of Justice, by Orders No 24/2021/CJ of 22 July 2021 and No 25/2021 of 09 August 2021, declared the written procedure closed and appointed the Judge-Rapporteur;

That in accordance with Order No 07/2021/CJ of 16 March 2021 setting the security deposit and pursuant to Article 26, paragraph 6, of the Rules of Procedure of the WAEMU Court of Justice, the applicant has paid an amount of fifty thousand (50,000) CFA francs, as attested by the receipt dated 14 June 2021;

II. CLAIMS AND PLEAS OF THE PARTIES

2.1. Claims and means of the applicant

Considering that in support of his application, the applicant states that in 2012 he was appointed Chairman of the Board of Directors of SGO EDC ASSET MANAGEMENT (EAM); that the Conseil Régional de l'Épargne Publique et des Marchés Financiers (CREPMF), as part of its duties, carried out an inspection of the company and produced a report;

That following this report, by correspondence dated 1^{er} December 2020, the CREPMF invited the applicant, in his capacity as Chairman of the Board of Directors of the company, to take part in a hearing to be held on 16 December 2020;

That the summons specifying that the CREPMF inspection mission, which took place from 23 to 25 September 2020, had noted a certain number of breaches, eleven (11) in total, contained in the report; That, however, none of these breaches were attributed directly to Mr AITHNARD, so that the applicant did not know whether the breaches noted were attributable to EDC ASSET MANAGEMENT, to its Managing Director or even to the Chairman of the Board of Directors; That, contrary to all expectations, on 16 December 2020, the CREPMF proceeded to hear the applicant and issued decision no. 227/2020/CREPMF of 16 December 2020 ordering, inter alia, the compulsory resignation from the position of Chairman of the Board of Directors of EDC ASSET MANAGEMENT.

That he is therefore lodging this appeal against the CREPMF's decision;

He submits that under Article 8(2) of Additional Protocol No 1 on the supervisory bodies of the WAEMU: "*Any natural or legal person may also lodge an appeal for an assessment of legality against any act of an organ of the Union that is prejudicial to him or her*"; That it adds that in accordance with the provisions of Instruction 56/2018 relating to the taking of sanctions by the Regional Savings and Financial Markets Council, the decisions of the Regional Council in matters of sanctions may be appealed before the WAEMU Court of Justice; That it deduces that in the light of the foregoing, there is no doubt that the Court has jurisdiction to hear the present appeal;

It also states that, in accordance with Article 8, paragraph 2 of Additional Protocol No. 1 relating to the WAEMU Supervisory Bodies, "*the appeals provided for in this Article must be lodged within two (2) months of the publication of the act, of its notification to the applicant, or failing that, of the day on which the applicant became aware of it*"; Similarly, article 50 of the appendix on the composition, operation and powers of the Conseil Régional de l'Épargne Publique et des Marchés Financiers states that appeals against CREPMF decisions must be lodged within two months of notification of the decision; the applicant received notification on 13 January 2021; That he therefore had until 13 March 2021 to lodge his appeal; That 13 March 2021 being a Saturday, the applicant had the option of lodging his appeal on the next working day, i.e. 15 March 2021; That he therefore concludes that the Court will declare the present appeal admissible;

The **applicant** submits that the contested decision is vitiated by a number of irregularities of both form and substance;

A. Illegality of form

Considering that the applicant cites the provisions of Article 7 of Instruction No 56/2018 relating to the sanction procedure by the Regional Council on the WAMU regional market: "*Serious breaches formally established by the competent departments of the General Secretariat are recorded in an inspection report (...). The Regional Council may decide to proceed directly to the hearing, before the members, of the persons implicated*"; That he further invokes the provisions of article 8 of the same instruction relating to the sanction procedure by the Regional Council, which states that the summons must bring to the attention of the person implicated the facts of which he is accused; That the summons of 1^{er} December inviting the applicant to a hearing did not expressly refer to grievances formulated against the Chairman of the Board of Directors; That, moreover, the claimant criticises the General Secretariat of the CREPMF, which had him questioned without complying with the procedure set out in Article 8 of instruction 56/2018 relating to

the sanction procedure by the CREPMF, which requires notification of a decision to initiate the procedure together with the investigation report, the inspection report or the flagrante delicto report in writing with acknowledgement of receipt or by hand-delivered post against receipt to the accused person; That the applicant states that he never received the decision to initiate the proceedings; That, in his view, the absence of a decision to initiate the proceedings and of notification of the grievances against him did not allow the applicant to fully exercise his right of defence; That he concludes that the contested decision should be annulled on this point;

B. On the substantive illegality

Considering that the penalty imposed by the decision that is the subject of this appeal arises from the provisions of article 35 of the appendix relating to the Composition, Organisation, Functioning and Duties of the CREPMF, which states that: "*When the CREPMF finds that the regulations have been infringed, and without prejudice to any criminal or other penalties incurred, it shall impose one or more of the following disciplinary penalties:*

(i) a warning, (ii) a reprimand, (iii) a temporary or permanent ban on all or part of the activities, (iv) the suspension or compulsory resignation of the managers responsible";

That the reason given in the operative part of the decision, namely the lack of supervision of the Managing Director, does not in itself constitute grounds for the sanction, since the Chairman of the Board of Directors of a public limited company is not the supervisor of the Managing Director; that there is no hierarchical link between the two; that according to the provisions of article 480 of the Uniform Act on commercial companies: "*The Chairman of the Board of Directors presides over meetings and general meetings. He must ensure that the Board of Directors assumes control of the management of the company from the Chief Executive Officer*"; That the function of controlling the management of the company is vested in the Board of Directors of the company as a whole; That this is not a personal responsibility of its Chairman; That the latter's task is, however, to ensure that control of the general management is effectively exercised; That this control is exercised through the regular holding of meetings of the Board of Directors; That on this point, the CREPMF's mission did not formulate any grievance against the Chairman of the Board of Directors; That consequently, the CREPMF's decision is ill-founded in that it is based on a non-existent legal foundation (supervision of the Chief Executive Officer by the Chairman of the Board of Directors);

Considering that the applicant notes that the sanction could not be applied to him, because he does not have the status of manager within the meaning of the CREPMF texts because according to circular n° 02-2016 relating to the holding of professional cards within the central structures of the WAMU regional financial market, the Chairman of the Board of Directors does not appear on the list of persons qualified as managers and subject to the professional card; That, consequently, the applicant could not incur a sanction on the basis of Article 35 of the aforementioned Annex; That he asks the Court to annul Decision No 227/2020/CREPMF insofar as it pronounced the compulsory resignation of Mr Omolola Selom Paul-Harry AITHNARD from his duties as Chairman of the Board of Directors of EDC ASSET MANAGEMENT;

2.2. Defendant's claims and pleas

Considering that in its statement of defence, the defendant submits that the arguments developed by the applicant, namely the absence of an opening decision and notification of the grievances against him, lack relevance and deserve rejection because Article 8 of Instruction No 56/2018 provides: *"When the General Secretariat of the Regional Council decides to have a respondent heard before the members of the Regional Council, the opening decision together with the investigation report, inspection report or flagrante delicto report are notified in writing with acknowledgement of receipt or by hand-delivered post against receipt to the respondent. The respondent must be notified of the summons to appear before the Regional Council at least fifteen (15) calendar days before the date and time of the appearance. This summons must indicate the link, date and time of the appearance. The summons must inform the defendant of the charges against him or her,*

That the defendant points out that Article 8 does not require the CREPMF to comply with any specific formal requirements regarding the decision to open a hearing; That in the practice applied to all the Regional Council's hearing procedures, it is the summons letter that informs the respondent of the Regional Council's decision to open a hearing; That the summons to a hearing systematically includes the following points: the decision to open the hearing taken by the authorised body and notified by the Secretary General of the CREPMF; the possibility open to the person summoned to challenge the decision; the possibility for the person summoned to be assisted by counsel of their choice; the failings, shortcomings and/or grievances raised;

Considering that the defendant points out that, in the present case, the decision to open the procedure was made by means of a home consultation of the members of the Regional Council, as indicated in the first paragraph of the letter inviting Mr Paul HARRY AITHNARD to a hearing, dated 1^{er} December 2020;

With regard to the notification of grievances, the defendant states that the summons of 1^{er} December 2020 sent to the claimant, after listing all the main breaches and shortcomings, states: *"You may, in accordance with the regulations in force, be assisted by counsel of your choice. You may also submit written observations in response to the complaints made against you, to be sent to the Company Secretary no later than five (5) calendar days before the date set for your hearing";*

That the applicant, having not submitted any observations, cannot therefore invoke the absence of a notification of grievances against him; That consequently, this plea based on the irregularity in the form of Decision no. 224/2020/CRPMF of 16 December must be rejected;

Failure to state reasons for the decision

Considering that the respondent points out that all the grievances and breaches in respect of which the applicant was summoned and heard were included in the Sanction Decision; that, moreover, during the hearing, the applicant and the new Managing Director acknowledged the breaches and their seriousness, even if they attributed them to the former Managing Director; that, better still, the breaches referred to had been brought to his attention since the 2016 verification mission;

That with regard to the absence of a legal basis for the Sanction Decision, the Respondent recalls the non-exhaustive provisions of the Annex to the Convention and the provisions of the Uniform Act relating to the law of commercial companies of the GIE (Uniform Act); That it indicates that under the terms of Articles 30 and 35 of the Annex to the Convention, it is clear that the Sanction Decision was adopted in strict compliance with the texts governing the regional financial market and therefore has a legal basis; That it indicates that the Applicant's argument cannot therefore prosper;

He maintains that, under the Uniform Act, the obligation to supervise the Chief Executive Officer derives from Article 480, since the Chairman of the Board of Directors must ensure that the Board of Directors supervises the management entrusted to the Chief Executive Officer;

Considering that the defendant points out that in the letter of 24 February 2017 transmitting the final report of the 2016 inspection mission to Mr Paul-Harry AITHNARD, the CREPMF and the SGO's Statutory Auditor had already drawn his attention to the conduct of illegal operations by the Managing Director of the SGO ;

Moreover, Article 457 of the Uniform Act provides that: "*The Chairman of the Board of Directors shall organise and direct the work of the Board and report to the General Meeting. He shall ensure the proper functioning of the organs of the company*"; Since it was his duty to ensure the proper functioning of the organs of the company, particularly with regard to the activities of the Chief Executive Officer, it was the duty of the Chairman of the Board of Directors to question the Chief Executive Officer; There is every reason to believe that the Chairman of the Board of Directors was also consenting and favouring, with the former Chief Executive Officer, the illegal transactions that he had the power to put a stop to in his capacity as Chairman of the Board of Directors; Moreover, in his reply dated 11 December 2020, the former Chief Executive Officer states: "*To the question that you will no doubt ask yourself as to whether the Board of Directors was fully informed of the conduct of this activity, I would answer in the affirmative insofar as detailed monthly reports were drawn up by myself for the Board of Directors in the person of its Chairman in order to inform it of the development of the activity, including the development of the management mandates*";

That by failing to perform his duties as Chairman of the Board of Directors as provided for by the Uniform Act and the relevant provisions of the appendix to the agreement, Mr Paul-Harry AITHNARD exposed himself to the sanctions provided for by the texts governing the regional financial market;

Finally, the applicant maintains that the sanction could not apply to Mr Paul-Harry AITHNARD because he is not a manager within the meaning of Circular No 2-2016 on the holding of professional cards within the central structures of the WAMU Regional Financial Market;

The defendant points out that article 1^{er} of the SGO's articles of association provides that it is governed by :

- the provisions of the Uniform Act relating to Commercial Companies and Economic Interest Groups adopted on 17 April 1997, as revised on 30 January 2014 hereinafter referred to as the "Uniform Act" within the framework of the OHADA Treaty;
- the provisions of the CREPMF applicable to management companies.

That the status of director must be sought in the provisions of the Uniform Act. In accordance with article 415 of the Uniform Act, *"a société anonyme with a Board of Directors shall be managed either by a Chairman and Chief Executive Officer or by a Chairman of the Board of Directors and a Chief Executive Officer"*.

That SGO is a public limited company with a Board of Directors managed by a Chairman of the Board of Directors and a Chief Executive Officer; That the company is managed by Mr. Paul-Harry AITHNARD as Chairman of the Board of Directors; That it is in this capacity that mission reports have always been sent to the Chairman of the Board of Directors and to the Managing Director in accordance with Article 26 of the Annex to the Agreement; That with regard to Circular No 2-2016 referred to by the applicant, the respondent notes that it only deals with central structures, namely the Bourse Régionale des Valeurs Mobilières (BRVM) and the Central Depository/Settlement Bank;

That the defendant concludes that Mr Paul-Harry AITHNARD, in his capacity as Chairman of the Board of Directors, is indeed an officer of the SGO and deserves to be sanctioned on the basis of Article 35 of the Annex to the Agreement;

He asks the Court: As to

the form :

- Rule on the admissibility of the application for annulment.

Background:

- To declare and rule that the compulsory resignation of Mr Paul-Harry AITHNARD from his duties as Chairman of the Board of Directors of SGO EAM with immediate effect on account of the shortcomings identified in the supervision of the Chief Executive Officer is in no way illegal;
- Declare Mr Paul-Harry AITHNARD ill-founded in his application to annul Decision No 2027/2020/CREPMF dated 16 December 2020;
- Order Mr Paul-Harry AITHNARD to pay the costs;

2.3. Pleas in law and the defendant's rejoinder

Considering that the appellant replied in his statement of case dated 26 May 2021 to the effect that the arguments put forward by the respondent to justify the regularity of the contested decision as regards both form and substance could not convince the Court;

That, according to the applicant, the irregularity in the form of the contested decision stems essentially from the failure of the CREPMF to allow Mr Paul-Harry AITHNARD to defend himself by not specifically notifying him of the complaints against him; That the CREPMF should have first identified and communicated to Mr Paul-Harry AITHNARD the failings of which he was accused, as this is the meaning of Article 7 of Instruction No 56/2018; That this information was not provided to him in the letter of notification; That the CREPMF should have first identified and communicated to Mr Paul-Harry AITHNARD the failings of which he was accused. That the CREPMF should have first identified and communicated to Mr Paul-Harry AITHNARD the failings of which he was accused, as this is the meaning of Article 7 of Instruction No. 56/2018; That this information was not provided to him in the letter notifying him of the summons to a hearing, nor did it appear in the inspection report; That, consequently, he asks the Court to find that Mr Paul-Harry AITHNARD was not put in a position to fully exercise his right to defence.

Considering that, on the merits, the applicant's reply concerns the lack of a statement of reasons and legal basis for the decision; that he points out that Mr Paul-Harry AITHNARD was sanctioned for inadequacy in the supervision of the Managing Director; that he notes that in the reasons for the contested decision on the ten

(10) grievances raised, none of which relate to the lack of supervision by the Director General; **That** the CREPMF furthermore maintains that Mr Paul-Harry AITHNARD acknowledged the failings; That in his reply, the applicant notes that this assertion has no connection with the reasoned or unmotivated nature of the decision and, above all, that he never acknowledged having failed to supervise the Director General;

With regard to the decision's lack of a legal basis, the applicant's reply consisted in asking whether the Director's lack of supervision constituted an infringement of the market regulations for which the CREPMF is the guarantor. He replied in the negative; that by relying on article 35 of the annex to the Convention to sanction the applicant, the CREPMF had not demonstrated that Mr. Paul-Harry AITHNARD was a member of the CREPMF. Paul-Harry AITHNARD is a director of EDC ASSET MANAGEMENT, because his capacity as Chairman of the Board of Directors alone is not sufficient to justify his status as a director; That this definition of director is used by the Autorité des Marchés Financiers (the French regulator); Finally, in its reply, the applicant refutes the defendant's arguments, which consist in invoking Articles 480 and 457 of the Uniform Act on Commercial Companies to provide a legal basis for sanctioning Mr. Paul-Harry AITHNARD. Paul-Harry AITHNARD; That in fact, according to the terms of the aforementioned article 480, it is indeed the Board of Directors that oversees the management of the Managing Director and not the

Chairman of the Board of Directors; That the Chairman of the Board of Directors does not therefore replace the Board of Directors in the context of the control of the Managing Director; That he ensures that the control of the Board of Directors is effective; That to this end, the applicant has produced several resolutions of the Board of Directors and concluded by asking the Court to

Court to annul decision no. 227/2020/CREPMF dated 16 December 2020 issued against it;

Considering that in its rejoinder dated 27 July 2021, the defendant maintains that the arguments developed by the applicant concerning the illegality of the form and substance of the decision are irrelevant and should be rejected;

That he recalls that at the start of the process, Mr Paul-Harry AITHNARD, in his capacity as Chairman of the Board of Directors, received on 24 February 2017 a copy of the final report of the inspection mission carried out from 19 to 27 September 2017 in order to question him about the shortcomings identified and to lead him to use his legal prerogatives to ensure the implementation of the injunctions and recommendations contained in the said report;

That as the breaches persisted despite the CREPMF's injunctions and the denunciations of the Statutory Auditors, the CREPMF was obliged, in order not to fail in its responsibilities as guarantor of the proper functioning of the financial market, to open disciplinary proceedings against the perpetrators of this situation; **That** in this context, Mr Paul-Harry AITHNARD, in his capacity as Chairman of the Board of Directors of SGO EAM, was summoned to a hearing to explain himself and answer for the breaches observed of which he had been notified;

Considering that the defendant observes that the final report of the inspection carried out from 23 to 25 September 2020 places particular emphasis on the continuation of unauthorised activities and therefore the persistence of breaches despite injunctions from the CREPMF and correspondence received from the SGO on 1^{er} April 2018 stating the cessation of activities under mandate ;

That the letter of summons sent to the Chairman of the Board of Directors on 1^{er} December 2020 emphasised the persistence of the breaches; **That** the applicant cannot objectively claim to have been unaware that, during his hearing, he was going to have to give an account of the exercise of his responsibilities as Chairman of the Board of Directors; **That** companies, which are legal entities and cannot act directly on their own, have been endowed with bodies embodied by natural persons responsible for ensuring their operation, i.e. for taking material action to carry out the company's activities; **That** the infringements and breaches found are thus the result of the actions of the directors, who are thereby held liable;

That the Chairman of the Board of Directors was aware that the purpose of his hearing was to explain himself and to answer for his actions and his responsibilities as Chairman of the Board of Directors in the occurrence, repetition and persistence of the breaches identified; **That** the contested decision cannot be accused of any illegality of form and this plea can only be rejected;

With regard to the illegality of the substance of the decision, the defendant in its rejoinder rejects the plea on the grounds that a reading of the sanction decision shows that

although the CREPMF, after ruling on the reality of the breaches of market regulations, addressed the correlative question of the liability of the Board of Directors and its Chairman; That the decision noted the following:

"It should be noted, however, that the responsibility of the Board of Directors, the body responsible for the activities of the SGO and the management of the Managing Director, cannot be ruled out in the commission of this illegal activity, since this body should have had the means to ensure that its decisions were implemented.

"It should be noted that the Chairman of the Board of Directors must ensure that the Board of Directors assumes control of the management entrusted to the Chief Executive Officer, in accordance with article 480 of the OHADA Uniform Act on Commercial Companies.

"It should be said that the Board of Directors cannot be held liable in the light of its legal prerogatives, since not only has the activity not ceased, but new operations have been initiated despite the Regional Council's questioning";

That, in light of the foregoing, the defendant in its rejoinder concludes that it is incorrect to allege that the decision to impose a penalty on the applicant was not reasoned; That, consequently, it requests that this plea be rejected;

Lack of a legal basis for the decision

Considering that the respondent in its rejoinder points out that article 35 of the annex to the Convention provides for disciplinary sanctions that may be applied by the CREPMF in the exercise of its disciplinary powers,

"That this sanction means that in the event of breaches of financial market regulations, as established in the present case and acknowledged by Mr Paul-Harry AITHNARD, the directors may incur liability for failings and inadequacies in the performance of the duties with which they are legally entrusted That this sanction means that in the event of breaches of financial market regulations, as established in the present case and acknowledged by Mr Paul-Harry AITHNARD, the directors may be held liable for failures and inadequacies in the performance of the duties with which they are legally entrusted; That under the terms of articles 457 and 480 of the Uniform Act relating to the law on commercial companies, the Chairman of the Board of Directors has broad powers to organise and direct the work of the Board of Directors; That "He shall ensure that the company's bodies function properly and, in particular, that the directors are in a position to fulfil their duties";

All in all, Article 35 of the Annex to the Agreement means that if the SGO commits breaches of financial market regulations, its directors may be sanctioned;

Considering that, in the applicant's view, *"it is not sufficient to hold the position of Chairman of the Board of Directors in order to be an executive"*; that, to this end, he refers to a recommendation of the French Autorité des Marchés Financier ;

Considering that the defendant, in rejoinder, replies that this document has no force of law in the legal environment of our financial market and cannot prevail over the relevant legal provisions in our law; that in fact, the legal form of Société Anonyme is imposed on SGOs by

Article 3 of Instruction 45/2011 on the Organisation and Management of UCITS;

That article 415 of the Uniform Act relating to the law of commercial companies provides: "*A public limited company with a Board of Directors shall be managed either by a Chairman and Chief Executive Officer or by a Chairman of the Board of Directors and a Chief Executive Officer*"; That the capacity of the Chairman of the Board of Directors of a public limited company as a manager is indisputably established in our positive law by the aforementioned article 415 of the Uniform Act; That the second part of this plea deserves to be rejected;

Considering that the applicant argues that Articles 457 and 480 of the Uniform Act cannot be invoked by CREPMF because these texts do not confer on the Chairman of the Board of Directors the power to supervise the Managing Director;

Considering that, in rejoinder, the defendant asserts that, as it is not disputed that the Managing Director is an Organ of the Company, the plaintiff must admit that it was his duty to ensure that the Managing Director's activities functioned properly; that, in other words, this expression means "*supervising his activities*"; that, admittedly, the control of the Managing Director's management is entrusted to the Chairman of the Board of Directors, but the Chairman is responsible for ensuring that this mission is accomplished; That Articles 457 and 480 mentioned above establish a direct link between the Chairman of the Board of Directors and the Chief Executive Officer; That it will not escape the applicant that he is first and foremost a Director and that, as such, he also assumes, albeit collegially, but in a prominent position, the task of supervising the Chief Executive Officer; That, in his view, the third part of the plea deserves to be rejected;

Considering that the petitioner argues that the Board of Directors did not remain inert in the face of the actions of the Managing Director and refers to this effect to various resolutions that were allegedly taken by this body; That CREPMF objects in this respect that it is not enough to take resolutions; That what is important is to ensure that these resolutions are actually applied; That on this point, the petitioner's observation is damning; That the real will and determination of the Directors (including the Chairman of the Board of Directors) to enforce the resolutions and put an end to the illegal activities, which were so profitable because of the considerable profits they generated, is questionable;

That, by way of reminder, the book value of illegal operations reached an amount of more than seventy-one billion (71,000,000,000) CFA francs in 2018 and was more than sixty-three billion (63,000,000,000) CFA francs in 2019; That these activities generated income of 4.16 billion and 3.54 billion respectively over the years 2018 and 2019;

In any event, the resolutions of the Board of Directors have not been implemented and the applicant must admit the inadequacy of its action, its powerlessness and its failure;

Consequently, the defendant asks the Court to declare Mr Paul-Harry AITHNARD unfounded in his action and to dismiss all his claims;

That he asks the court to order the applicant to pay the CREPMF the sum of fifty million (50,000,000) CFA francs by way of recoverable costs.

III. GROUNDS FOR THE JUDGMENT

3.1. Jurisdiction of the Court

Considering that jurisdiction is a matter of public policy, so that the court of first instance must ascertain whether it has jurisdiction to hear the action for assessment of legality brought before it, even if none of the parties to the proceedings has declined jurisdiction;

Considering that article 8 paragraph 2 of the Additional Protocol n° 1 relating to the control organs of UEMOA provides that *"the recourse in appreciation of legality is opened, in addition, to any natural or legal person, against any act of an organ of the Union causing him prejudice"*; That paragraph 1^{er} of article 27 of the Additional Act n°10/96 of 10 May 1996 relating to the statutes of the Court of Justice of UEMOA provides that

"the Court shall have jurisdiction to hear and determine, in particular, applications for the annulment of regulations, directives and decisions of the organs of the WAEMU as provided for in Articles 8 et seq. of Additional Protocol No 1";

Pursuant to Article 1 of the Convention establishing CREPMF, CREPMF is an organ of UEMOA, so that its acts, which may be prejudicial to any natural or legal person, may be referred to the Court of Cassation for review of their legality;

That, however, article 49 paragraph 2 of the annex to the said Convention provides that *"appeals against acts of the Regional Council which are regulatory in nature or which relate to the approval of market participants shall be submitted to the WAEMU Court of Justice.*

Appeals against other acts of the Regional Council shall fall within the jurisdiction of the judicial courts of the States;

That it follows that the Convention establishing the CREPMF, a special and subsequent norm, having the same legal value as the Additional Protocol, restricted the general provisions of Article 8 paragraph 2 of the Additional Protocol No. 1 relating to the organs of the WAEMU;

It follows that appeals against acts of the Regional Council which are regulatory in nature or which relate to the authorisation of market participants are submitted to the WAEMU Court of Justice, whereas appeals against other acts fall within the jurisdiction of the judicial courts of the Member States;

In the present case, the applicant, Paul-Harry AITHNARD, brought an action before the Cour de céans for the annulment of CREPMF Decision N°227/2020/CREPMF of 16 December 2020, automatically resigning the Chairman of the Board of Directors of SGO ASSET MANAGEMENT (EAM) and imposing a financial penalty on him;

On analysis, the contested measure is neither a regulatory measure because it is not general in scope, nor a measure relating to the approval of market participants within the meaning of the provisions of Article 49 paragraph 1 of the Annex to the above-mentioned Convention;

That the contested decision of the CREPMF, No 227/2020/CREPMF of 16 December 2020, imposing a sanction on the applicant, falls within the category of acts referred to in paragraph 2 of Article 49 of the Convention establishing the CREPMF which fall within the jurisdiction of the judicial courts of the Member States;

That it follows that the action for assessment of legality against the decision taken by the CREPMF against Paul-Harry AITHNARD cannot be brought before the UEMOA Court of Justice on the basis of the aforementioned provisions.

Considering that under the terms of article 16 of the WAEMU Treaty "*... the organs shall act within the limits of the attributions conferred upon them by the WAEMU Treaty and the present Treaty and under the conditions provided for by these Treaties...*";

That, consequently, the WAEMU Court of Justice cannot hear the action for assessment of legality brought against Decision N°227/2020/CREPMF issued on 16 December 2020, against Paul-Harry AITHNARD in his capacity as Chairman of the Board of Directors of SGO ASSET MANAGEMENT (EAM);

3.2. On Expenses

Considering that under the terms of Article 60 paragraph 1^{er} of the Rules of Procedure of the Court, "*a decision on costs shall be made in the judgment or order which brings the proceedings to an end*";

According to paragraph 2 of the Rules of Procedure of the Court, "*Any unsuccessful party shall be ordered to pay the costs*";

Since Mr Omolola Selom Paul-Harry AITHNARD was unsuccessful, he should be ordered to pay the costs;

FOR THESE REASONS

The Court, sitting in open court, having heard all the parties to the proceedings, at first and last instance, in assessing the legality of Community law :

- Receives the application of Paul-Harry AITHNARD ;
- Declares itself incompetent;
- Refers Paul-Harry AITHNARD to appeal and orders him to pay the costs.

Thus made, judged and pronounced in public hearing in Ouagadougou on the day, month and year above.

And have signed :

The

ChairmanThe Registrar

Mahawa Sémou DIOUF

Hamidou YAMEOGO