

**UEMOA COURT OF JUSTICE**  
—  
**PUBLIC HEARING OF 12 JANUARY 2005**

Ruling no. 02/2005

**Case**

***Composition:***

Mr Yves D. YEHOUESSI, Chairman  
Mr Daniel Lopes FERREIRA, Judge  
Rapporteur Ms Ramata FOFANA, Judge  
Mr Malet DIAKITE, First Advocate General  
Mr Raphaël P. OUATTARA, Registrar

Compagnie Air France represented by Maîtres  
GENIE, SANKALE & FAYE, Avocats à la Cour  
- B.P. ....

on the one hand ;

***Preliminary ruling***

And

Syndicat des Agents de Voyage et de Tourisme  
du Sénégal, represented by Maîtres TOUNKARA  
et ASSOCIES

on the other hand ;

**THE COURT**

**HAVING REGARD TO** Decision No 12 of 25 September 2003,  
registered at the Court on 10 November 2003, by which the  
Conseil d'Etat (Council of State) of Senegal referred to the Court  
for a preliminary ruling, pursuant to Article 12 of Additional  
Protocol No 1 relating to the supervisory bodies of the WAEMU,  
a question on the interpretation of Article 7-2° of Directive No  
02/2002/CM/UEMOA of 23 May 2002 relating to cooperation  
between the Commission and the structures of the WAEMU.

national competition authorities of the Member States for the application of Articles 88, 89 and 90 of the WAEMU Treaty;

**HAVING REGARD TO** the letter dated 30 December 2003 appointing Mr Eugène Kpota as agent of the WAEMU Commission in the case of ;

**HAVING REGARD TO** the letter dated 30 December 2003 appointing Mr Harouna SAWADOGO to represent Mr Eugène Kpota before the Court;

**HAVING REGARD TO** the Commission's written observations of 23 March 2004 ;

**HAVING REGARD TO** the written observations of Compagnie Air France, represented by Gabriel GENI, Sylvain SANKALE & Christian FAYE, Avocats à la Cour, B.P. 14 392- Dakar, Senegal, dated 31 May 2004;

**HAVING REGARD TO** the other documents produced and attached to the file;

**VU** the WAEMU Treaty, in particular Article 38 ;

**VU** Additional Protocol No. 1 on the supervisory bodies of the WAEMU, in particular Articles 1, 8, 12 and 20 ;

**HAVING REGARD TO** Additional Act n°10/96 of 10 May 1996 on the Statutes of the Court of Justice of the WAEMU ;

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

**YES** Mr Daniel Lopes FERREIRA, Judge-Rapporteur, in his report ;

**YES** Mr Issouf BAADHIO in place of Mr Sylvain SANKALE, Counsel for Compagnie Air France in his oral observations;

**YES** Mr Issa SAMA replacing Mr Harouna SAWADOGO, Counsel for the WAEMU Commission in his oral observations;

The First Advocate General, Mr Malet DIAKITE, in his Opinion;

Having deliberated in accordance with Community law :

By judgment of 25 September 2003, received at the WAEMU Court of Justice on 10 November of the same year and registered under no. 06/2003, the Conseil d'Etat of Senegal referred to the Court for a preliminary ruling, pursuant to Article 12 of Additional Protocol no. 1, a reference for a preliminary ruling on the interpretation of Article 7-2° of Directive No. 02/2002/CM/UEMOA of 23 May 2002 on cooperation between the Commission and the national competition authorities of the Member States in the application of Articles 88, 89 and 90 of the WAEMU Treaty.

This question was referred for a preliminary ruling in the proceedings between Compagnie Air France and the Syndicat des Agents de Voyage.

and Tourism of Senegal, following the appeal in cassation lodged by Compagnie Air France before the Conseil d'Etat.

## **LEGAL FRAMEWORK**

Under the terms of article 88 of the WAEMU Treaty, "one (1) year after the entry into force of this Treaty, the following shall be prohibited ipso jure :

- a) agreements, associations and concerted practices between undertakings which have as their object or effect the restriction or distortion of competition within the Union ;
- b) any practice by one or more undertakings which amounts to an abuse of a dominant position within the common market or in a significant part of it ;
- c) public aid likely to distort competition by favouring certain undertakings or the production of certain goods".

In accordance with Article 89 of the Treaty, the WAEMU Council of Ministers has, on a proposal from the WAEMU Commission, adopted by means of a regulation the appropriate provisions to facilitate the application of the prohibitions set out in Article 88.

The said provisions are contained in the aforementioned Regulation n°02/2002/CM/UEMOA of 23 May 2002. This regulation came into force on 1<sup>er</sup> January 2003.

According to Article 90 of the Treaty, "The Commission shall be responsible, under the supervision of the Court of Justice, for applying the rules on competition laid down in Articles 88 and 89. In carrying out this task, it shall have the power to take decisions".

The UEMOA Council of Ministers issued Directive n°02/2002/CM/UEMOA of 23 May 2002, in which it defined the areas of intervention of the UEMOA Commission and those of the national competition structures.

Article 7-2 of the Directive states in its transitional provisions that "Cases pending investigation or decision must be closed by 30 December 2002 at the latest, failing which they will become time-barred".

#### **i. FACTS OF THE MAIN PROCEEDINGS**

In a decision dated 5 February 2001, Compagnie Air France reduced the commission payable to travel agents to 7% with effect from 1 January 2002.

On appeal by the Syndicat des Agents de Voyage et de Tourisme du Sénégal, the Commission Nationale de la Concurrence du Sénégal, in Decision No. 02-D-02 dated 27 December 2002, found that Compagnie Air France had violated the provisions of Article 27 of Senegalese Law No. 94-63 of 22 August 1994 on prices, competition and economic disputes and ordered it to put an end to these practices.

within one month of notification of the decision, subject to a fine of 20,000,000 francs.

In response, Compagnie Air France brought an action before the Conseil d'Etat seeking the annulment of Decision No. 02-D-02 of the Commission Nationale de la Concurrence.

According to Air France, the Commission Nationale de la Concurrence (National Competition Commission) violated article 10 of law no. 94-63, in that it retained jurisdiction and ruled that the case could not be referred to it by the Syndicat des Agents de Voyage et de Tourisme du Sénégal (Senegalese Travel and Tourism Agents' Union) because the latter did not have legal capacity and consequently the capacity to act.

Again according to Air France, under the terms of article 10 of the aforementioned Senegalese law no. 94-63, the National Competition Commission may be seized of its own motion or be referred to by the Minister in charge of Internal Trade or by companies or, for any matter concerning the interests for which they are responsible, by consumer organisations approved by the Minister in charge of Trade under the conditions laid down by decree.

Air France adds that the referral to the Commission Nationale de la Concurrence (National Competition Commission) was made neither on its own initiative, nor by the Minister for Internal Trade, nor by the companies concerned which were not parties to the proceedings, nor by the professional consumer associations which had a legal existence; the decision of the Commission Nationale de la Concurrence (National

Competition Commission), which was not made on its own initiative, did not have any legal effect.

de la Concurrence which followed is therefore procedurally flawed and null and void.

Air France considers that the Commission Nationale de la Concurrence has not established that it held a dominant position on the domestic market or a substantial part of it and that it abused this position, and that the travel agents were in a state of economic dependence and had no equivalent solution.

Air France also points out that the change in commission rates is the consequence of a collective decision by an international body to which all the parties in question have voluntarily adhered and agreed to abide by the rules laid down. This change does not concern Compagnie Air France alone, nor Senegal alone, and it predates the alleged dominant position of Compagnie Air France and the economic dependence of travel agencies.

Lastly, Air France considers that the National Commission, by ignoring or bypassing these objective factors, has clearly distorted the facts submitted for its assessment, and its decision should therefore be annulled.

The Conseil d'Etat of Senegal, the referring court, noted that Directive 02/2002/CM/UEMOA on cooperation between the UEMOA Commission and national competition bodies



of the Member States for the application of articles 88, 89 and 90 of the WAEMU Treaty, which came into force on 1 July 2002, provides, in article 7- 2°, for transitional provisions from which it emerges that cases under investigation or decision in the Member States must be closed by 30 December 2002 at the latest on pain of prescription.

The referring court points out that the present case does not fall within the limitation period laid down by the aforementioned text because it was decided on the merits and during the transitional period, and that this decision was duly the subject of an appeal in cassation on 17 February 2003, after the date of entry into force of Regulation No 02/2002/CM/WAEMU on 1 January 2003.

The Conseil d'Etat of Senegal therefore referred the matter to the WAEMU Court of Justice for "designation of the court having jurisdiction to rule on the action brought on 17 February 2003 for the annulment of decision no. 02/D-02 of the Senegalese National Competition Commission dated 27 December 2002".

Before answering the question put to the Court by the Conseil d'Etat of Senegal, it should be noted that, in accordance with Article 86(2) of the Rules of Procedure of the WAEMU Court of Justice and Article 16(4) et seq. of Regulation No 01/2000/CDJ on the Administrative Rules of the Court, the parties shall

The Commission and the Member States of UEMOA were notified of the referral judgment and invited to submit their written observations, but the Member States and the Syndicat des Agents de Voyage et de Tourisme du Sénégal did not submit any observations.

**ii. SUMMARY OF WRITTEN OBSERVATIONS SUBMITTED to THE COURT**

Compagnie Air France, represented by Maîtres Geni, Sankalé & Faye, points out that this case was heard by the National Competition Commission of Senegal, under the terms of Senegalese law no. 94-63 of 22 August 1994 and pursuant to article 14 thereof. The only possible recourse against the decisions of this National Competition Commission is an action for annulment before the Council of State.

According to Air France, since 1 January 2003, the National Competition Commission has been abolished and its powers assigned to the WAEMU Commission pursuant to the combined provisions of Regulations 02/2002/CM/WAEMU and 03/2002/CM/WAEMU.

For Air France, the mechanism introduced by the new Community regulations is completely different from the previous one, which contained no transitional provisions; the regulations

Community law did not provide for a second instance in proceedings relating to anti-competitive practices and that it could not appeal to a Community instance against a decision given by a national instance prior to the entry into force of new Community legislation, on pain of infringing the rules of national jurisdiction.

Lastly, Air France requests that it be informed that it is deferring to the wisdom of the Court of Appeal on the question submitted to it.

The Syndicat des Agents de Voyage et de Tourisme du Sénégal (SAVTS) and the Member States did not submit their written observations.

The UEMOA Commission, through its Council, considers that, from a reading of the transitional provisions, the ultimate objective was for it to be able, as from 30 December 2002, to exercise in full its exclusive competence in competition matters in accordance with Article 90 of the UEMOA Treaty.

According to the Commission, both the Treaty and subsequent texts allow it to exercise investigative and decision-making powers, which may be accompanied by fines or periodic penalty payments.

Lastly, it points out that it takes over without delay for investigations in progress, whereas the National Commissions were given a deadline of 30 December 2002 to dispose of cases pending investigation or decision; that the Court of Justice must accept its jurisdiction and declare admissible the preliminary question referred by the Council of State of Senegal, which must declare that it lacks jurisdiction and refer the parties to the WAEMU bodies for further proceedings.

### **iii. ANSWER to THE QUESTION PUT TO THE COURT**

The Court must first rule on its jurisdiction before answering the question posed by the Conseil d'Etat of Senegal.

The Court derives its jurisdiction from the provisions of Article 12 of Additional Protocol No. 1 relating to the supervisory bodies of the WAEMU.

It has jurisdiction to give a ruling on a reference for a preliminary ruling from a national court ruling at last instance. However, the question in the form in which it has been submitted is not a traditional type of preliminary ruling provided for in Article 12 of Additional Protocol No. 1. However, the Court may reserve the right to supplement or amend the question referred in order to determine what falls within its jurisdiction so that it can give the answer expected of it.

What is the question posed by the Conseil d'Etat?

The Council of State of Senegal considers that neither Regulation n°02/2002/CM/UEMOA of 23 May 2002, nor Directive n°02/2002/CM/UEMOA of the same date provide, in the absence of functional relations between the National Competition Commissions of the Member States and the Court of Justice of UEMOA, provisions empowering national courts to hear appeals initiated after the date of entry into force of the regulation and directed against decisions of the National Competition Commissions relating to cases not time-barred for having been finally decided before 30 December 2002, during the transitional period.

The Conseil d'Etat concludes from this that national courts may have to determine, as in this case, which court has jurisdiction to rule on such appeals.

The Conseil d'Etat points out that the risks of inconsistency can only be completely ruled out by an extensive application of Article 12 of Additional Protocol No. 1 on the supervisory bodies of the WAEMU.

It decided to "refer the matter to the WAEMU Court of Justice for the designation of the court having jurisdiction to rule on the action brought on 17 February 2003 for the annulment of the decision of the Senegalese National Competition Commission of 27 December 2002".

Does the Cour de céans have jurisdiction to answer the question as formulated by the Conseil d'Etat?

The answer to this question is no.

Under the terms of Article 12 of Additional Protocol No. 1 on the supervisory bodies, "the Court of Justice shall give preliminary rulings on the interpretation of the Union Treaty, on the legality and interpretation of acts adopted by Union bodies, and on the legality and interpretation of the statutes of bodies set up by an act of the Council, when a national court or tribunal or an authority having a judicial function is called upon to give a ruling in a dispute.

National courts of final instance are required to refer cases to the Court of Justice.

Referral to the Court of Justice by other national courts or authorities with judicial functions is optional".

Article 15-6 of Regulation No. 01/96/CM on the Rules of Procedure of the Court of Justice reproduces the provisions of the aforementioned Article 12.

It follows from an examination of these various texts that the Conseil d'Etat can only ask the Court of Appeal to interpret the provisions of Community law, or to assess their validity; that the question put to it can be understood as a request for interpretation of the provisions of Directive no. 02/2002/CM/UEMOA of 23 May 2002, in its article 7-2 concerning cases pending investigation or decision.

The power conferred on the Court of Justice by the WAEMU Treaty in the context of the referral procedure is expressly to give preliminary rulings. The question thus referred by the Conseil d'Etat to the Court of Justice may be examined by the latter. In the present case, however, it is not for the WAEMU Court of Justice to designate any court to rule on the action for annulment of the decision of the Senegalese National Competition Commission of 27 December 2002. Indeed, as the decision of the Senegalese National Competition Commission was taken and appealed before the entry into force of Regulation n°02/2002/C M of 23 May 2002, the WAEMU bodies cannot rule on this case.

Consequently, it is necessary to declare that it does not have jurisdiction to designate the court which must rule on the action seeking the annulment of Decision No 02/D-02 of the Commission Nationale de la Concurrence du Sénégal of 27 December 2002.

#### **IV. COSTS**

As the preliminary ruling procedure is in the nature of a procedural issue, it is for the Conseil d'Etat to rule on costs, in accordance with the provisions of Article 86 in fine of the Court's Rules of Procedure.

Compagnie Air France and the WAEMU Commission, which have submitted observations to the Court, shall each bear their own costs.

**FOR            THESE**

**REASONS;    THE**

**COURT,**

In answer to the question referred to it by the Conseil d'Etat du Sénégal by judgment of 25 September 2003, hereby rules that :



(1) THE COURT OF JUSTICE OF THE WAEMU DECLARES ADMISSIBLE THE REFERENCE FOR A PRELIMINARY RULING MADE BY THE CONSEIL D'ETAT OF SENEGAL ON 10 NOVEMBER 2003.

2°) THE WAEMU COURT OF JUSTICE DOES NOT HAVE JURISDICTION TO DESIGNATE THE NATIONAL COURT TO HEAR THE APPEAL LODGED BY COMPAGNIE AIR FRANCE.

3°) THE COUNCIL COUNCIL SHOULD RULE ON THE COSTS OF THE PRELIMINARY RULING PROCEDURE.

(4) AS REGARDS THE PRESENT PROCEEDINGS, AIR FRANCE AND THE COMMISSION SHALL BEAR THEIR OWN COSTS.

Delivered in open court in Ouagadougou on 12 January 2005.