

**JUDGME
NT NO.
01/2010
OF 16 JUNE 2010**

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

PUBLIC HEARING OF 16 JUNE 2010

The Court of Justice of the WAEMU, sitting in ordinary session, with the following members in attendance :

**1) SONITEL SA
2) SAHEL - COM SA
C/
THE STATE OF NIGER**

**Mr Ousmane DIAKITE, President of the Court, Chairman
Mr Daniel LOPES FERREIRA,
Mr Abraham D. ZINZINDOHOUE,**

Judges

**in the presence of Mr Dabré GBANDJABA, 1^{er} Advocate
General**

**with the assistance of Maître Fanvongo SORO,
Registrar, delivered the judgment set out below:**

Present:

- Mr Ousmane DIAKITE, Chairman
- Mr Daniel LOPES FERREIRA, Judge
- Mr Abraham D. ZINZINDOHOUE, Judge
- Mr Dabré GBANDJABA, 1^{er} Advocate General
- Me Fanvongo SORO, Registrar

Action for annulment

BETWEEN :

1. Société Nigérienne de Télécommunication known as SONITEL, a public limited company with a Board of Directors, located at avenue du Général De Gaulle BP 208 Niamey (NIGER), represented by Maîtres Guy DOSSOU and Jean Claude GBOGBLENOU, lawyers at the Benin Bar, with an address for service at the chambers of Maître Fanta SANGARE, lawyer at the Burkina Faso Bar - Immeuble SANA HAROUNA porte n° 943, Avenue de la Cathédrale - 01 BP 6777 OUAGADOUGOU 01;
2. Société Sahélienne de Communication dite SAHEL COM, a public limited company with a Board of Directors, whose registered office is at 60 Rue de l'Uranium, BP 849 Niamey (NIGER), represented by Maîtres Guy DOSSOU and Jean Claude

GBOGBLENOU Avocats au Barreau du Bénin,
having elected domicile at the Office of Maître
Fanta SANGARE, Avocat au Barreau du Burkina
Faso - Immeuble SANA HAROUNA porte n°
943, Avenue de la Cathédrale - 01 BP 6777
OUAGADOUGOU 01 ;

on the one hand ;

AND

THE STATE OF NIGER, having as its Counsel
the law firm I. DJERMAKOYE, 4 rue de la
Tapoa, BP 12651 NIAMEY- Niger, belonging to
the Niger Bar Association, with an address for
service at the chambers of Nongoba Antoinette
OUEDRAOGO, President of the BURKINA
FASO Bar Association;

on the other
hand ;

By applications dated 03 April 2009 lodged by Maître Guy DOSSOU and Jean Claude GBOGBLENOU, Attorneys at the Benin Bar, on behalf of Société Nigérienne de Télécommunication known as SONITEL and Société Sahélienne de Communication known as SAHEL COM, received and registered at the Court Registry on 06 April 2009 under numbers 01/2009 and 02/2009, An action has been brought before the WAEMU Court of Justice for the annulment of Decrees No 006//MC/DPT/TN of 12 February 2009, No 007/MC/DPT/TN and No 008/MC/DPT/TN of 13 February 2009, issued by the Minister for Communication, which impose sanctions against them;

By various letters from the Registrar of the Court, the pleadings and procedural documents prescribed by the Additional Act establishing the Statute of the Court and its Rules of Procedure were communicated;

Following the closure of the written proceedings, the case was heard in open court on Wednesday 12 May 2010 and then reserved for judgment on 16 June 2010; on that date :

THE COURT

HAVING REGARD TO the applications dated 03 April 2009, submitted by Guy DOSSOU and Jean Claude GBOGBLENOU, lawyers at the Benin Bar, on behalf of Société Nigérienne de Télécommunication (SONITEL) and Société Sahélienne de Communication (SAHEL COM);

HAVING REGARD TO the letters dated 17 April 2009 serving the said requests on the State of Niger;

HAVING REGARD TO the statements of defence dated 1^{er} June 2009, submitted by the Ibrahim DJERMAKOYE Law Firm on behalf of the State of NIGER;

HAVING REGARD TO the reply briefs submitted by Maîtres Guy DOSSOU and Jean Claude GBOGBLENOU on behalf of SONITEL and SAHEL COM ;

HAVING REGARD TO the rejoinders submitted by the Law Office of Ibrahim DJERMAKOYE on behalf of the State of NIGER;

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

VU the Treaty of the West African Economic and Monetary Union dated 10 January 1994, in particular Article 38 ;

VU Additional Protocol I on the supervisory bodies of the WAEMU ;

HAVING REGARD TO Additional Act No. 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 of 5 July 1996 on the Rules of Procedure of the WAEMU Court of Justice;

HAVING REGARD TO Regulation No. 01/2000/CDJ of 6 June 2000 repealing and replacing Regulation No. 1/96/CDJ on the Administrative Rules of the WAEMU Court of Justice;

HAVING REGARD TO Additional Act n°03/CCEG/UEMOA of 20 January 2007 on the renewal, appointment and termination of the mandates of members of the Court of Justice of UEMOA;

HAVING REGARD T O Additional Act n°05/CCEG/UEMOA of 18 May 2007 appointing and ending the term of office of a member of the WAEMU Court of Justice;

HAVING REGARD T O Minutes No 01/2010 of 13 April 2010 on the appointment of the President and the allocation of functions within the Court of Justice of the WAEMU;

HAVING REGARD t o Order No 19/2009/CJ of 20 November 2009 on the composition of the full Court to hear the cases of SONITEL and SAHEL COM against the State of NIGER;

HAVING REGARD TO the decision of the Court of Justice of the European Communities at the public sitting held today ;

WITNESS Mr Ousmane DIAKITE, Chairman-Rapporteur, in his report ;

HEARD Maîtres Guy DOSSOU and Jean Claude GBOGBLENOU, Lawyers for SONITEL and SAHEL COM, in their oral observations;

HEARD Cabinet I. DJERMAKOYE, represented by Mr Ibrahim DJERMAKOYE, lawyer for the defendant, in his oral observations;

WITNESS the Opinion of the First Advocate General, Mr Dabré GBANJABA;

H a v i n g deliberated in accordance with Community law :

I - Facts and procedure

Considering that by applications dated 03 April 2009, registered at the Registry of the Court of Justice on 06 April 2009 under numbers 01/2009 and 02/2009, Maîtres

Guy DOSSOU and Jean Claude GBOGBLENOU, members of the Benin Bar, on behalf of Société Nigérienne de Télécommunication dite SONITEL and Société Sahélienne de Communication dite SAHEL COM, have brought an action before the WAEMU Court of Justice for the annulment of Orders No 006/MC/DPT/TN of 12 February 2009, No 007/MC/DPT/TN and No 008/MC/DPT/TN of 13 February 2009, issued by the Minister for Communication, imposing sanctions against them in breach of Articles 6 and 43 of the WAEMU Treaty, 14 of Regulation No 1/96/CM laying down the Rules of Procedure of the Court, and Articles 4, 8 and 12 of Directive No 01/2006/CM/UEMOA on the harmonisation of supervisory and regulatory policies of the telecommunications sector and of the Decision No 09/2006/CM/WAEMU creating the Committee of Regulators of the Member States ;

Considering that the applicants point out that, on the basis of specifications and a memorandum of understanding signed on 19 and 20 December 2001, establishment licences were granted to them for a period of 15 years after a tendering procedure;

That, according to the applicants, since the start of their activities, they have undertaken to modernise and digitise the telecommunications sector even beyond what is set out in the deeds signed between the parties;

That despite their willingness to collaborate with the State of NIGER, their partner, they have been the victims of assaults maintained and encouraged by the latter, which has not refrained from interfering in their operations, in particular by appointing their directors in the Council of Ministers, by injunctions to their Chairmen of the Board of Directors and by orders to convene a General Meeting, even though they are Public Limited Companies governed by the OHADA Uniform Act relating to the law of Commercial Companies;

They conclude that, by relying on Internal Order 99-45 of 26 October 1999, article 4, paragraph 3 of which provides that "the Minister shall issue, suspend and withdraw licences on the recommendation of the regulatory authority", in order to reduce the duration of their establishment licences, before subsequently withdrawing them, the

administrative acts issued by the Minister for Communication of Niger be annulled;

Considering that following the filing of the application, Order No 01/09 was issued on 17 April 2009 to set the amount of the security to be paid by SONITEL and SAHEL COM, pursuant to Article 26(6) of Regulation No 01/96/CM laying down the Rules of Procedure of the WAEMU Court of Justice, at one hundred thousand (100,000) CFA francs;

Considering that the sureties were paid on 27 April 2009, as attested by the surety receipts on file;

Considering that the State of Niger was also served with the appeals by letter dated 17 April 2009 from the Registry of the WAEMU Court of Justice; that the law firm I. DJERMAKOYE filed, on 02 June 2009 under numbers 09/001 and 09/002, statements of defence on behalf of the State of Niger;

Whereas by Order No. 003/2009/CJ of 15 May 2009, the President of the Court appointed the Judge-Rapporteur in the cases in question;

II - Claims of the parties.

Considering that it is clear from the applications initiating the proceedings that SONITEL and SAHEL COM base their actions on the following provisions:

- Articles 6 and 43 of the WAEMU Treaty, which set out the legal regime for Community standards;
- Article 14 of Regulation No 1/96/CM laying down the Rules of Procedure of the Court, which provides that "the Court of Justice shall ensure that the law is observed in the interpretation and application of the Treaty";

- Article 4 of Directive n° 01/2006/CM/UEMOA relating to the harmonisation of policies of control policies and regulation of the sector Articles 8 and 12 of the Directive;
- Decision No 09/2006/CM/WAEMU creating the Committee of National Telecommunications Regulators of the Member States;

Considering that the applicants consider that, having regard to the provisions of the aforementioned Community rules, Decrees No 006/MC/DPT/TN of 12 February 2009, No 007/MC/DPT/TN and No 008/MC/DPT/TN of 13 February 2009 imposing alleged sanctions on them are in every respect unlawful in relation to Community law and the general principles of law for the following reasons:

- incompetence of the authority signing orders imposing penalties ;
- illegality of the sanctions taken against them;
- procedural irregularity for failure to obtain the opinion of the Committee of National Telecommunications Regulators ;
- failure to give reasons for decisions taken by the Government of Niger ;
- failure to approve orders ;
- non-compliance with article 10 of the Protocol of 20 December 2001 ;
- violation of the principle of non-retroactivity of laws ;

Whereas the State of NIGER has, in the main proceedings and as a matter of form, submitted that the applicants' actions are inadmissible and that the Court lacks jurisdiction to hear the case;

As regards inadmissibility, the State of Niger gave the following reasons:

- **firstly**, it maintains that insofar as the applicants consider that the purpose of their actions is to ensure compliance with the WAEMU Treaty and to assess the legality of Ministerial Decrees No 006/MC/DPT/TN of 12 February 2009, No 007/MC/DPT/TN and No 008/MC/DPT/TN of 13 February 2009, they are actions for failure to fulfil obligations, although access to this legal remedy is limited,

under the terms of Article 15.1 of Regulation No. 01/96/CM laying down the Rules of Procedure of the Court of Justice, to the Community institutions, namely the Commission and the Member States, to the exclusion of individuals;

- **secondly**, it points out that the appeals were initiated by the Chairmen of the Boards of Directors of SONITEL and SAHEL COM, whereas under Articles 414(1)^{er} and 487(1)^{er} of the Uniform Act on Commercial Companies, and Articles 21(3) and 19(2) of the applicants' Articles of Association, only the Chief Executive Officers have the power to represent them vis-à-vis third parties and to take legal action on their behalf;
- **lastly**, it submits that SONITEL is the company in which the State of Niger was the sole shareholder before privatisation and has nothing to do with SONITEL S.A., which is the target of the sanctions imposed by the orders whose annulment is sought; and that SAHEL COM is a single-person limited company in which SONITEL, which is the sole shareholder, has a different chairman of the board of directors from the one who claims to represent it in that capacity, according to the articles of association in the case file; .

As regards the Court's lack of jurisdiction to hear the case, the State of Niger points out that SONITEL and SAHEL COM are seeking the annulment, in the light of the provisions of the WAEMU Treaty and the acts adopted by its organs, national administrative decisions taken by the Minister of Communication of the Republic of Niger, whereas the provisions of Chapter II of Regulation No 1/96/CM on the Rules of Procedure of the WAEMU Court of Justice show that the dispute submitted for the Court's consideration does not fall within any of the Court's powers;

Considering that, in the alternative and on the merits, the State of NIGER intends to respond to each of the eight (8) pleas in law put forward in the applications initiating the proceedings:

He believes that

- as regards the lack of competence of the signatory authority, the illegality of the sanction imposed on SONITEL and SAHEL COM, the procedural defect based on the absence of an opinion from the Committee of National Telecommunications Regulators in accordance with the requirements of Decision No 9/2006/CM/UEMOA and the failure to state reasons for the decisions taken by the State of Niger in accordance with the requirements of Directive No 1/2006/CM/UEMOA, they are unfounded in that Directive No 01/2006/CM/UEMOA of 23 March 2006 on the harmonisation of policies for monitoring and regulating the telecommunications sector has not yet been transposed;
- as regards the failure to approve the decrees issued by the Minister for Communication, the absence of transposition means that on 12 February 2009, the competent Nigerien authorities who issued decrees penalising the defaulting strategic partner were bound only by Order No 99-45 of 26 October 1999 on the regulation of telecommunications;
- as regards the failure to comply with Article 10 of the Protocol of 20 December 2001, which requires an amicable settlement prior to any litigation, SONITEL and SAHEL COM are ill-founded to invoke a failure to attempt an amicable settlement before the WAEMU Court of Justice, which has no jurisdiction to hear the present dispute;
- as regards the violation of the principle of the non-retroactivity of laws, there was never any question of challenging the operation of fixed and mobile licences between 03 December 2001 and 12 February 2009, which means that the decrees in question only have effect for the future;
- with regard to the unilateral amendment of the specifications, the acts whose annulment is sought are not intended to amend the specifications, but to impose penalties, following several formal notices between 2004 and 2006 ;

Considering that the applicants reiterated, in their replies, their position on the admissibility of their actions initiated by the chairmen of their boards of directors and on the jurisdiction of the Court of Justice, as regards the form and also

requested the rejection of the pleas put forward by the State of Niger and the annulment of Decrees Nos 006, 007 and 008/MC/DPT/TN dated 12 and 13 February 2009, as regards the substance;

Considering that the rejoinder submitted by the Law Office of Ibrahim DJERMAKOYE on behalf of the State of NIGER seeks, as regards form, to further demonstrate the inadmissibility of the actions and the lack of jurisdiction of the Court of Justice and, as regards substance, to request that it declare the applications inadmissible for lack of standing and lack of interest, to rule that there is no need to refer the case to the Court and, in the alternative, to dismiss the actions;

III - Reasons for the judgment.

Considering that it is sufficiently clear from the documents in the file, and in particular from the guarantee receipts produced by the court registry, that the applicants have complied with the formal conditions required by law;

That the proceedings initiated by SONITEL and SAHEL COM, although brought by different applications to institute proceedings, are in fact closely linked, in particular because they have the same subject matter; that there is such a link between the two proceedings that it is in the interests of justice to hear and determine them against the common defendant, in this case the State of Niger;

Considering, however, that an analysis of the merits of the case shows that the plaintiffs brought proceedings before the Community courts against the State of Niger for the purpose of obtaining the annulment of the decrees issued by the Government of that country through its Minister for Communication;

That the actions for annulment in question are based on requests for assessment of the legality of national administrative acts adopted by the Minister for Communication of Niger, whereas the Community texts in particular

Article 8 of Additional Protocol No. 1 on the supervisory bodies of the WAEMU, Article 27 of Additional Act No. 10/96 on the Statute of the Court of Justice and Article 15 of Regulation No. 01/96/CM on the Rules of Procedure of the Court of Justice of the Union are sufficient to state that the provisions on the procedure for assessing equality may apply only to binding Community acts;

Accordingly, the ministerial acts relied on and adopted at national level by the Government of the Republic of Niger are excluded from the scope of this procedure; consequently, the Court's lack of jurisdiction in this case is manifest;

For these reasons :

The Court, sitting in open court and hearing all the parties, in proceedings for annulment :

As to the form: to receive the applications brought by Société Nigérienne de Télécommunication (SONITEL S.A) and Société Sahélienne de Communication (SAHEL COM S.A) against the State of Niger;

Orders that the two proceedings be joined;

On the merits: declares that it has no jurisdiction and orders the plaintiffs to pay the costs.

And have signed, the President and the Registrar Following the illegible signatures,
For a certified copy, Ouagadougou, 22 December 2010

The Registrar

Fanvongo SORO