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Introduction

In our earlier piece, we examined the role of national courts and tribunals in the enforcement of Community law at national level (see <https://www.thenewsguru.com/regional-economic-community-the-role-of-national-courts-and-tribunal-in-the-enforcement-of-community-law>).

We observed that one of the reasons for the slowness of the process of regional economic integration in Africa is the non-enforcement at national level of the legal instruments adopted within the framework of the Regional Economic Communities (RECs). We concluded that the process will be accelerated and intra-African trade and investment ultimately boosted if national courts and tribunals in the RECs exercise the responsibilities incumbent on them in terms of the enforcement of the Community legal instruments, guaranteeing the effectiveness of the latter. In the present paper we shall examine briefly the role of the Community Court of Justice, that is, the judicial organ of the Institution, in the enforcement of Community law. Like the previous paper, this paper will be based on the practices of the European Economic Community/European Union Court of Justice (ECJ). The reason is simple: the European Economic Community/European Union is globally considered the most advanced and most successful regional economic bloc; it created the basic rules of what is known as “community law” which differs in some aspects from the ordinary international law. Every regional “economic community”

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must follow these time-honoured basic rules if it wants to function properly.

At a time when African business leaders are calling for the strengthening of the regional economic blocs created to foster economic integration, when continental political, economic and financial institutions make regional economic integration one of their priorities^[i], when African governments are gearing up to implement an intra-African free trade agreement, it would be helpful to take a look at the EEC/EU model and see if anything can be borrowed from it in terms of the enforcement of the rights and obligations granted within the framework of a regional economic bloc. For it makes no difference how many rights and obligations an institution creates or how many rules it adopts, if they cannot be enforced one can hardly claim that they actually exist and the noble objectives of the institution can hardly be achieved. We shall make reference to the practices of the African Community Courts of Justice where this is necessary to emphasise a point.

Enforcement of Community Law by the European Court of Justice

One of the functions of the European Economic Community/European Union Court of Justice (ECJ)^[ii] is to ensure that the provisions of the Treaties and the legal instruments adopted pursuant to the Treaties are interpreted and applied properly by all the Member States. Where the law is not complied with the Court intervenes and delivers a ruling to remedy the situation. It thus controls the conduct of the national courts in the areas which fall within the scope of application of the Treaties. Membership of the Community/Union entails acceptance of its jurisdiction. But the Court does not intervene on the basis of its own investigations; it intervenes on the basis of complaints from “some persons”, which brings us to the question: Who can file a complaint to the Court, or rather who has access to the Court?

Access to the Community Court of Justice

In the African context access to the Community Court of Justice poses a problem, not least because some of the Courts also function as human rights courts. Coupled with the issue of jurisdiction it appears to be one of the factors that hinder the proper functioning of the Regional Economic Communities (RECs). In the EEC/EU Member States, on the other hand, access to the Court of Justice does not seem to be an issue as the rules are quite clear: the concept of party to proceedings, the grounds and the conditions for action, the procedure before the Court and the remedies are spelt out, and in some areas there are some guidelines based primarily on the experience gained in the course of implementing various instruments. According to the texts, the following can bring an action before the ECJ: national courts and tribunals, Member States, other Community Institutions, and, in very limited instances, natural or legal persons.

(i) **National courts and tribunals:** National courts and tribunals are responsible for the application of the Community law within their domestic legal order. However, if a case pending before a national court or tribunal raises a question concerning the interpretation of a Treaty provision or the validity and interpretation of a Community act, that court or tribunal may – and in some cases must – submit a request to the Community Court for a preliminary ruling on that question. This is known as the preliminary ruling procedure. It is an **indirect action**. A good percentage of the work of the ECJ is in this type of action. The mechanism having been dealt with in our earlier papers, albeit briefly, we do not think it is necessary to examine it in this paper. It should be noted however that, whereas under the EEC/EU law the request for a preliminary ruling is initiated exclusively by the national court or tribunal concerned, under ECOWAS law any of the parties can also initiate the request. The ECOWAS rule seems to be more favourable, but there are some valid reasons why individuals are not allowed to request a preliminary ruling by themselves under the EEC/EU law, which may be discussed in another

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paper. The East African Community rule seems to be aligned with that of the EEC/EU (see Article 34 of the EAC Treaty – 1999).

(ii) **Member States:** EU Member States have unlimited access to the Court. In fact a Member State can bring an action to the Court even when it has no particular interest in the proceedings. Under Article 259 of the Treaty on the Functioning of the European Union (ex Article 227 of the Treaty establishing the European Community), if a Member State considers that another Member State has failed to fulfil its Treaty obligations it can initiate what are known as **infringement proceedings** against that Member State, working closely with the Commission. If the Court finds that there is an infringement, it delivers a judgment requiring the State concerned to put an end to it. In the event of non-compliance with the judgment of the Court a financial penalty may be imposed by the Court, the amount of which is specified by the Commission. This type of action is however rare as, for understandable political reasons, Member States are reluctant to sue themselves for non-compliance with Community/Union law. So far, only a few such cases have occurred: France against United Kingdom (1978); Belgium against Spain (1995); Spain against United Kingdom (2004); Hungary against Slovak Republic (2012).

A Member State can also bring an **annulment action** against an EEC/EU institution for exceeding its powers, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, and misuse of powers (Article 263 TFEU, ex Article 230 TEC). If the action is successful, the instrument through which the institution acted unlawfully will be declared void by the ECJ. Furthermore, under the terms of Article 265 TFEU, if an institution fails to take a measure it is required to take thereby infringing the Treaties, a Member State can bring an action for **failure to act** against that institution; the action is however admissible only if the institution concerned has been called upon to act.

It may not be unnecessary to point out at this stage that while a Member State can bring proceedings against another Member State for infringing its

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Community obligations, individuals do not have the *locus standi* to bring a **direct action** before the EEC/EU Court to compel a Member State to comply with Treaty obligations. The Court is firm on this. It is also the position adopted by the ECOWAS Court of Justice. With regard to the latter Court, a distinction must be made between its human rights mandate under the Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice, and its mandate as the judicial organ of ECOWAS charged with the responsibility of overseeing the interpretation and application of the legal instruments relating to ECOWAS economic integration agenda.

Under the terms of Article 10 (d) of the Supplementary Protocol individuals have direct access to ECOWAS Court for an action against a Member State **for violation of their human rights**. They do not even have to exhaust internal remedies before taking their complaint to the Community Court. However, it emerges from Article 10 (a) of the same Supplementary Protocol that only Member States and the Commission have access to the Court **where action is brought for failure by a Member State to fulfill an obligation** under the Community Treaties. The ECOWAS Court of Justice recalled this position when it said in a judgment that the Protocol on the Court does not empower individuals with the *locus standi* to sue a Member State for violation of obligations flowing from the Community texts (please see our piece on *The Role of National Courts and Tribunals ...* cited earlier).

(iii) **The Commission and other institutions:** One of the functions assigned to the Commission by the Treaties is to oversee the application of the EEC/EU law under the control of the Court of Justice. It is thus the guardian of the Community/EU law. Accordingly, if it considers, on the basis of its own inquiry or following a complaint from an individual, that a Member State has failed to fulfil a Treaty obligation as a result of its action^[iii] or inaction^[iv], it can institute infringement proceedings before the Court against that Member State following the procedure laid down in Article 258 TFEU, ex Article 226 TEC. Also like a Member State, the Commission - as well as the European

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Parliament and the Council - can bring Article 263 TFEU action against an EEC/EU institution for exceeding its powers, infringement of essential procedural requirements, etc (as mentioned above). The Court of Auditors and the European Central Bank also have access to the Court, but only for the purpose of protecting their prerogatives. Furthermore, an institution can file an action for failure to act against another institution.

It is interesting to note in passing that under the EEC/EU law no institution other than the Court of Justice has the power to impose a sanction on a Member State for failure to fulfil a Treaty obligation. In other words, judicial function is exercised exclusively by the Court. This is different from the situation in the West African economic bloc where a political institution, namely the Authority of Heads of State and Government, is empowered, under the terms of Article 77 of the ECOWAS Revised Treaty, to impose a sanction on a Member State which fails to fulfil its Treaty obligation; the Authority may suspend the imposition of a sanction if it is satisfied, on the basis of a well-supported and detailed report prepared by an independent body and submitted through the Commission, that the non-fulfilment of the obligation is due to causes and circumstances beyond the control of the said Member State. This ECOWAS provision seems to make it difficult, if not impossible, for breaches of the Community law to be actually sanctioned.

(iv) **Natural or legal persons:** In “community law”, there are a few instances in which an individual can bring a direct action before the Community Court of Justice, and the conditions are very strict. According to Article 263 TFEU cited above, any natural or legal person may institute annulment proceedings before the Court against a Community act addressed to them or which, although not addressed to them, is of direct and individual concern to them. Any such proceedings must be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or in the absence thereof, of the day on which it came to their knowledge. Under Article 265 TFEU (ex Article 232 TEC), individuals may complain to the Court if an EEC/EU institution, body, office or agency has failed to address to them any binding Community

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act which they are entitled to. Furthermore, in the case of non-contractual liability, any individual can bring an action for damage caused to them by Community institutions or its servants in the performance of their duties.

Thus, natural or legal persons can bring proceedings before the Community/EU Court only against a Community/EU institution but not against a Member State.

Conclusion

It follows from the foregoing that the EEC/EU Court of Justice plays a very crucial role in the enforcement of Community/EU law. As part of its role it clarifies the basic Community concepts and the applicable rules, harmonizing national practices in the areas concerned; it lays down principles which are necessary for the attainment of the objectives of the Community/Union. For instance, the principle of direct effect according to which some Treaty provisions are capable of creating individual rights which can be enforced before national courts, or the principle of the supremacy of the Community/EU law over any rule of national law inconsistent with it in the areas covered by the Treaties, were established by the ECJ. The Court thus ensures the effectiveness of the Community/Union legal instruments without which the Community/Union cannot function properly, contributing tremendously to the advancement of the economic bloc. It can in fact be said to be the prime mover of the integration process. It is important to mention that the Court is able to achieve this thanks to the cooperative and harmonious relationship that exists between it and the national courts and, by extension, the Member States.

It is hoped that African decision makers will draw inspiration from the EEC/EU model in terms of the enforcement of the Community law in their efforts to strengthen the African Regional Economic Communities. The acceleration of the process of regional economic integration and the boosting of intra-regional trade and investment depend to a large extent on the effectiveness of the relevant rules.

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[i] For example, regional integration is one of the High 5 priorities of the African Development Bank (AfDB)

[ii] It comprises the Court of Justice itself, the General Court and specialized courts established to hear and determine at first instance certain classes of action or proceeding brought in specific areas.

[iii] For example by adopting measures or engaging in conduct incompatible with Community law

[iv] For example by not taking all necessary measures to put an end to obstacles to free movement of goods caused by private individuals

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