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Overview of EEC/EU Practices

Under "economic community law" (and here we base ourselves on the practices of the European Economic Community (EEC) which can be said to represent international best practices not least because the EEC, which developed into the European Union, is globally regarded as the most advanced and most successful regional economic community), several decisions of the European Community Court of Justice (ECJ) underline the role of national courts in the enforcement Community law. For example, in case *Van Gend en Loos* the Court ruled that:

"...the Community constitutes a new legal order of international law (...) the subjects of which comprise not only Member States but also their nationals... Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage (...) Article 12 [of the founding Treaty] must be interpreted as producing direct effects and creating individual rights which national courts must protect ... "

Likewise, in case *Costa v ENEL (1964)* the Court decided:

"By contrast with ordinary international treaties, the Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. (...) Article 53 [of the EEC Treaty] constitutes a Community rule capable of creating individual rights which national courts must protect."

The ECJ uses words like "must protect", "are bound to apply", "must apply" or

similar expressions, indicating that national courts are under a duty to act. It is important to note that the fact that the Commission of the EEC/EU, or Member States, can bring enforcement proceedings before the Community Court against a Member State which fails to comply with Community obligations does not prevent individuals from bringing an action before a national court against that Member State if the latter's behaviour infringes their Community rights. This position was laid down by the Court in case *Van Gend en Loos*. It has been adopted by several other regional economic communities. For example, under the terms of Article 24 of the Treaty Creating the Court of Justice of the Andean Community, if a Member Country considers that another Member Country has failed to comply with its Community obligations, it can take its claim to the General Secretariat, initiating enforcement proceedings at the Community level. At the same time, Article 31 of the same Treaty states that "Natural or artificial persons shall have the right to appeal to the competent national courts, as provided for by domestic law, should Member Countries fail to comply with Article 4[i] of this Treaty in the event that the rights of those persons are affected by that noncompliance." The two procedures, however, cannot be used simultaneously.

It is clear from the foregoing that national courts play a vital role in the enforcement of the law of an economic community. In fact, the community might not function properly if enforcement of its law were left exclusively to the judicial organ set up under the founding treaty, which may be located thousands of miles away from several member states, making access to it excessively costly, or unaffordable, for the nationals of these member states, and therefore preventing them (those nationals) from exercising their fundamental human right to seek 'an effective remedy' if their community rights are violated. However, for national courts to exercise their jurisdiction in the realm of community law, the latter must be integrated into the national legal system of the member states; hence the question, when and how does community law enter the national legal order or, simply put, when does it become part of the national law enforcement of which falls within the jurisdiction of national courts and tribunals? To answer this question, it is

necessary to examine very briefly the major sources of the EEC/EU law, namely (i) Treaties and Protocols attached to them (ii) Binding community acts and (iii) Case law of the Community Court of Justice, particularly with regard to their date of entry into force.

(i) Treaty

The Treaty is the basic legal instrument, the primary source of law, which underpins all other pieces of Community legislation. Designed to establish a common market through the abolition of all obstacles to the free movement of persons, goods, services and capital, and of obstacles to the rights of residence and establishment, it affects, not only the Member States, but also individuals (natural and juridical persons), for whom it creates rights and obligations. Consent to be bound by it is expressed through ratification which must be done in accordance with the constitutional requirements of the signatory States – referendum, parliamentary approval etc. Since it must be fully and uniformly applied across the Community the Treaty must be ratified by all the signatory States before it enters into force.[ii] It comes into force on the date specified in it following the deposit of the instrument of ratification by the last signatory State to take this step (see, for example, Article 52 of the Treaty on European Union and Article 357 of the Treaty on the Functioning of the European Union). Unlike an ordinary international treaty, it becomes part and parcel of the domestic legal orders of all the Member States – including those which have a dualist approach to the incorporation of international treaties into the domestic legal system – on its entry into force; no further enactment is required for it to be given effect domestically.

(ii) Binding Community Acts

Community institutions have power to enact binding secondary legislation in pursuance of the provisions of the Treaty. This legislation takes the forms of regulation, directive and decision. Article 288 TFEU (ex 249 of the Treaty establishing the European Community) defines a r*egulation* as having general

application, binding in its entirety and *directly applicable* in all the Member States. Thus it enters the domestic legal orders of the Member States upon its coming into force, without any national measure being needed to "receive" it into national law. A d*irective* is defined as binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods. In other words, a directive is used for a particular purpose and is binding only as far as that purpose is concerned; it stipulates a time-frame within which its provisions will have to be brought into the domestic legal order; however, national authorities are free to choose, "in accordance with their national circumstances and legal systems" (Article 6, Directive 75/117/EEC), the appropriate national legal instrument to achieve this. Thus, unlike a Treaty or a regulation, a directive is not directly applicable: it enters the legal orders of the Member States through the national implementing instrument. A d*ecision* is binding in its entirety upon those to whom it is addressed (Member States, natural or legal persons). It takes effect upon its notification to the addressees or on the date specified in it.

(iii) Case Law of the Community Court of Justice

The ECJ plays a crucial role in the process of economic integration in the EEC/Union. In fact, it can be said to be the prime mover of the process. When considering cases, it also takes into account what it calls the general principles of law, including respect for fundamental human rights, derived from various sources. Its case law has considerable impact in the Member States. Some of its decisions lay down principles which are deemed to be necessary for the effective functioning of the Community. Examples of these are the decisions in the cases cited above *(Van Gend en Loos, Costa v ENEL)*. Like the treaties and Community acts, the decisions of the ECJ constitute an important source of law in the Member States from the date of the ruling.

Primacy or supremacy of Community law

This is the idea that, once it enters the national legal system by means, or by virtue, of the legal instruments examined above, Community law takes precedence over any rule of national law inconsistent with it in the area covered by the Treaty. Member States are therefore obliged to amend existing laws accordingly and to enact laws in future in such a way that they do not conflict with Community law. In case *Simmenthal* (1978), the ECJ re-affirmed the idea which it had developed earlier, in these words:

"It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule (…) it is not necessary for such courts to request or await the actual setting aside by the national authorities empowered so to act of any national measures which might impede the direct and immediate application of Community rules…"

Thus, a Member State cannot, for instance, refuse Community nationals from other Member States the right to set up and manage a business within its territory under the same conditions as for its citizens basing itself solely on its own legislation which subjects non-native Community nationals to the conditions laid down for 'foreigners' in terms of access to commercial activities. Such domestic legislation which is incompatible with the Community law – the right of establishment includes the right to set up and manage enterprises, in particular companies, under the same conditions as for nationals of the host Member State (Art. 49 TFEU (ex 43 TEC)[iii], subject to some derogations authorized by the Treaty – must be set aside, or rather 'disapplied', by the national court.

Initially, several courts of the EEC Member States found it very difficult to accept the primacy of Community law, not least because it was not contained

in any provision of the Treaty; they resisted it vigorously. In France, for instance, whereas the *Cour de Cassation*, the highest court in the 'ordinary' legal system, accepted the idea in 1975 (case *Société des Cafés Jacques Vabre*) on the basis of Article 55 of the Constitution which provides that ratified and published international treaties take precedence over national law, the *Conseil d'Etat*, the highest court in the administrative legal order, continued to reject it for a long time, arguing that a judge could neither review nor ignore a law enacted by the legislature. It however dropped its restrictive approach in case *Nicolo* in 1989. In the United Kingdom, where the principle conflicted with the age-old doctrine of Parliamentary Sovereignty, although the *European Communities Act 1972* recognized the supremacy of the Community law over conflicting provisions of domestic law of the Member States, it was only in 1990 that the principle became entrenched in the UK legal system following the decision in case Fa*ctortame (no.2)*. It is today one of the cornerstones of the Community law. It is a creation of the ECJ, which goes to show how crucial the work of the Community Court is to the advancement of the integration process

Preliminary ruling procedure

National courts have competence to deal with cases involving directly effective community rights within their domestic legal order. However, this does not necessarily mean that the community court has no say in such cases. According to the EEC Treaty, the primary role of the Court is to ensure that the law is adhered to in the interpretation and application of Community legal instruments. It achieves this through, *inter alia*, a very important mechanism known as the preliminary ruling procedure (Article 267 TFEU ex Article 234 TEC). Under this mechanism, if a case being heard by a national court raises a particular question of Community law (such as a question concerning the interpretation of a Treaty provision or the validity and interpretation of a Community act) a decision on which is necessary for the case to be determined, that particular question can – and in some cases must – be

referred to the Community Court for a preliminary ruling; upon receipt of the decision of the Community Court on that particular question, the national court resumes proceedings to give final judgment, applying the ruling of the Community Court. Thus the latter is able to ensure the proper application of the provisions of Community legal instruments, to further clarify a Community concept, to formulate principles which are necessary for the full realization of the objectives of the Treaty, in short, to drive the integration process.

Following in the footsteps of the EEC/EU several other regional economic communities adopt the same solution. For instance, Article XIV of the Agreement Establishing the Caribbean Court of Justice states as follows:

"Where a national court or tribunal of a Contracting Party is seised of an issue whose resolution involves a question concerning the interpretation or application of the Treaty [establishing the Caribbean Community and amendments there to], the court or tribunal concerned shall, if it considers that a decision on the question is necessary to enable it to deliver judgment, refer the question to the Court for determination before delivering judgment".

Article 10 (f) of ECOWAS Supplementary Protocol A/SP.1/01/05 and Article 34 of the East African Community Treaty contain similar provisions.

The mechanism has the advantage of preserving the right of the judicial authorities of the Member States to adjudicate over disputes involving rights and obligations within their domestic legal order while at the same time ensuring that the provisions of Community law are fully respected, and are interpreted uniformly, across the region. It thus contributes to the effectiveness of Community law. It is noteworthy that many of the landmark decisions of the ECJ – including those mentioned earlier – which laid down some of the principles of Community law were made through this mechanism. In case *Van Gend en Loss,* for instance, a dispute between the Dutch company and the Dutch Customs and Excise led to the national court before which the

matter was pending requesting a preliminary ruling from the ECJ on whether a particular provision of the Treaty of Rome conferred rights on individuals which could be enforced in national courts. The ECJ used the opportunity to lay down one of the doctrines of Community law referred to earlier. It was also through the mechanism of preliminary ruling – and not through a direct action involving human rights – that the protection of fundamental human rights was brought into the Community legal system (see *Stauder v City of Ulm (1969)* and *Internationale Handelsgesellsschaft (1970)*). It is important to note that the preliminary ruling procedure is not an appeals procedure nor is it conditional on the exhaustion of internal remedies. In fact, under this mechanism the Court does not deliver judgment: it gives a preliminary ruling on the question of Community law concerned while the national court or tribunal which made the reference delivers judgment taking into account the ruling of the Court. In Costa v. ENEL (1964), the ECJ stated that the procedure "is based upon a clear separation of functions between national courts and the Court of Justice (and) cannot empower the latter either to investigate the facts of the case or to criticize the grounds and purpose of the request for interpretation."

TO BE CONTINUED

READ ALSO: The Role of National Courts and Tribunals in the Enforcement of Community Law [3]

[i] Article 4 of the Treaty deals with the obligation of the Member Countries to take such measures as may be necessary to ensure compliance with the provisions of the Andean Community law and to refrain from adopting or employing any measure that may be contrary to those provisions or that may in any way restrict their application.

[ii] Under ECOWAS law a treaty enters into force after being ratified by a certain number of signatory States (see for instance Article 89 of the Revised Treaty and Article 11 of the Supplementary Protocol A/SP,!/01/05). This is in

line with global practice in ordinary international law; however, in community law it leads to the treaty not being fully and uniformly applied across the community, jeopardizing the attainment of the common objective i.e. market integration. It is worth noting that under the East African Community law a treaty enters into force upon ratification and deposit of the instrument of ratification by **all** the Partner States (Article 152 EAC Treaty).

[iii] See also the definition of the Right of Establishment in the ECOWAS Supplementary Protocol A/SP.2/5/90 on the implementation of the Third Phase of the Protocol on Free Movement of Persons, Right of Residence and Establishment. In principle, the right of establishment also concerns liberal professionals such as doctors, lawyers etc. However, the activities of these professionals are highly regulated in terms of titles, educational requirements, professional training etc, in order to protect the interests of clients and the overall public interest. Besides, they are governed by deontological rules. This makes the taking-up and pursuit of such activities by non-native community nationals much more difficult than the taking-up and pursuit of commercial or industrial activities. There are thus specific conditions governing access to liberal professions within the context of regional economic integration.