Lóránt Havas:[1]: To apply or not to apply, that is the question The inter-temporal applicability of EC Law in the 'new' Member States after accession

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Introduction

The accession of a new State to the European Union always brings up legal problems and uncertainties one of which is linked to the applicability of Community law. From which moment in time and to which cases do we apply Community law? As a general principle, the Concept of Immediate Effect of EC law is enshrined in the various Accession Treaties. "From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act"[2]. Thus, Community law is subject to immediate and full application from the first moment of accession, allowing only for expressly provided derogations.

This principle may sound convincing, however, it is not so evident to apply. In certain legal situations, which arose before accession, the preceding legal régime needs to be applied.[3] In other pending situations the Community law prevails over pre-existing national rules.[4] The delimitation between the two situations is regulated by the so called inter-temporal principles of Community law.

The Court of Justice has recently held in its Ynos judgement[5] that the application of a Directive on the territory of a newly acceded Member State is with effect only from the date of the State's accession to the European Union. Therefore, the Court does not have jurisdiction to interpret the Directive in a case where the facts of the dispute to the main proceedings occured before the date of accession of the said State.

In view of the prior jurisprudence of Luxembourg on the inter-temporal effect of Community law the judgement seems perplexing. The aim of this paper is to point out the existing contradictions between Ynos and the former judgements of the Court on the matter by providing a review on them. Furtehrmore I will try to give possible explanations of the motivating factors, which led the judges when delibering their ruling.

The Westzucker[6] case

This case concerned the amendment of a Regulation on the grant of export refunds on sugar. Westzucker, a company to which a refund had been accorded under the original Regulation, claimed that its right to the protection of legitimate expectations had been violated by applying the meanwhile changed wording of the Regulation as amended to a situation that had arisen before the amendment.[7]

The Court rebutted this argument by referring to the principle of immediate application of the new law to subsequently emerged situations.[8] Although the Westzucker case did not concern an "accession situation", the Court laid down this very important principle here.

The Metallurgiki[9] case

In this case, decided in 1982, a year after the accession of Greece to the European Community, the Court had the opportunity to apply the principle of Immediate Effect of Community law to an "accession situation". A Greek company, Metallurgiki, was claiming the non-application of certain Community quotas, adopted due to a severe crisis in the metallurgy sector, to Greek companies active in the same field. They based their claim on the general nature of the transnational provisions contained by the Acts of Accession. These provisions, according to Metallurgiki, were intended to protect the Greek industry,

consequently the application of certain secondary Community law provisions (the quota system in this case), which would have had the effect of reducing the production of certain Greek companies, would have been contrary to the principle of the protection of legitimate expectations.

However, the ECJ was not in favor of this argument and pointed out that after accession Community law must apply "ab initio and in toto to new Member States, derogations being allowed only in so far as they are expressly laid down by transitional provisions".[10] As no express derogations could be found in the transitional provisions, the ECJ rejected the argument of the applicant founded on legitimate expectations. The quota system had to be applied in its entirety to Greek companies.

The Data Delecta[11] and Saldanha[12] cases

Both cases came before the Court after the 1995 Enlargement to Austria, Finland and Sweden; both concerned the same kind of provision of national law imposing the obligation on non-nationals to furnish a cautio iudicatum solvi in case they wanted to initiate proceedings before a national court. Both of the judgments reached the same outcome, yet in different ways in terms of the application of inter-temporal principles.

MSL, an English company brought an action against Data Delecta, a Swedish company before a Swedish court primary to the State's accession to the European Union. Although Data Delecta reasoned, relying on Swedish law, that security must be furnished by the applicant, it was refused by the national court on the grounds that Sweden and the United Kingdom were both parties to the Lugano Convention on the enforceability of civil proceedings, thus, the caution was not to be regarded as necessary.

The case then went on appeal and in the meantime Sweden became a member of the European Union. The court of appeal halted the procedure and referred questions to the Court of Justice relating to the application of Article [12] (ex 6) EC and the principle of non-discrimination on grounds of nationality. The national court did not address the problem of application ratione temporis of Community law and contrary to the Opinion of AG La Pergola the ECJ also left the matter untouched, though implicitly acknowledged the applicability of EC law to a case the substantial elements of which related to the pre-accession period.

In Saldanha, a case with a very similar factual background concerning an Austrian provision of cautio iudicatum solvi, AG La Pergola advocated that the ECJ finally clarify its position on the issue of immediate applicability. He argued that the reference was inadmissible, as the doctrine of immediate effect prevents Community law to apply to a situation already settled before the State's accession.[13]

But, the Court was of a different opinion. Contrary to what the Advocate General and the defendant in the main proceedings seemed to suggest, it ruled that Community law was applicable. It went back to its Metallurgiki judgment and restated the law. Derogation from the immediate and full application of EC law is only possible in so far as it is expressly referred to in the Acts of Accession. In the case at hand nothing precluded the immediate application of Article [12] (ex 6) EC, consequently, it was binding on Austria, therefore the system of procedural security could not be upheld.

The Andersson[14] case

Until this point the Court of justice could have been accused of dealing in a really relaxed way with the temporal applicability concept of EC law; having no problems to recognise the immediate effect of the acquis even to cases where the facts clearly arose in the pre-accession time. This impression, however, might be somewhat incorrect.[15]

The main case concerned two employees, the employer of whom (a Swedish company, owned by their close family member) declared insolvency in November 1994. The claim of these two employees for obtaining compensation from a solidarity found was refused on grounds of national law provisions denying compensation in the case of close family relations between the employer and the employee. However, under Community law[16] no such a condition could be detected. Sweden became member of the EU in 1995, as a result of which the applicants claimed damages on the Swedish State for its breach of EC law by not providing them indemnities.
AG Cosmas made two important distinctions in his Opinion. Firstly he distinguished retroactive effect from immediate effect; the second distinction is being that between definitively settled situations (situation définitivement fixée) and pending or not yet settled situations (situation continue en cours). In his view Community rules do not have retroactive effect after accession, which means that they cannot be relevant in situations already settled, unless it is stated by way of express derogation. Immediate effect calls Community rules into play only in those situations, which had not been settled at the time of the accession (e.g. at the time of coming into force of EC law).[17]

It is therefore imperative to know the point in time when a situation becomes settled. In the present case the definitive moment is the declaration of insolvency, from that moment in time the legal situation must be regarded as fixed. Thus, as AG Cosmas argues, for the situation of the applicants in the main proceedings Community law does not apply.

The Court accepted the reasoning of the Advocate General and rejected the claim for damages. I think that the Court had no difficulties to turn down the argument of immediate application also because the main case concerned an action in damages against a new Member State and the judges did not want to take risk of generating political tension.

The method of reasoning stemming from the jurisprudence of the Court of Justice
The fact that the inter-temporal jurisprudence of the Court can hardly be described as consistent, did not prevent authors finding rules of general nature relating to the reasoning of the judges. Let me rely on one of them here.[18] The following structure can be adopted when analyzing the case law on the matter.

Firstly the ECJ would give priority to express transitional provisions determining the temporal effect. In the lack of these provisions attention must be given to general principles.

One of these principles is the presumption against retroactivity. It requires that Community law should be applied to established situations only in so far as it clearly stems from specific provisions or from the nature of such rules.

The principle of immediate application is a general rule, under which new rules apply ab initio from accession to all existing situations not yet settled. The situation is not settled as far as it has not exhausted its legal effects before the entry into force of the new rules.

Lastly and exceptionally the principle of the protection of legitimate expectations may prevent recourse to immediate effect as well as the use of retroactive effect.

The Ynos case

The principle question raised by this case was whether the Court of Justice has jurisdiction to interpret a Directive in a legal situation of which the substantial elements related to the pre-accession period.

Ynos is a company established in Hungary, operating as an estate agent. In 2002 the company entered into an agency contract with Mr. Varga who wanted to sell a house. The contract

contained numerous general clauses, one of which stipulated that the agent was entitled to a commission even where the owner rejected a written offer to purchase or lease the property for a price equal to or above that specified in the agency contract.

Further in 2002 Mr. Varga entered into an agreement on the future conclusion of a sales contract with a would-be purchaser. The contract had never been signed; however, Ynos claimed its commission arguing that it had fulfilled its commitment. Varga contested this argument and pointed out that the clause on which Ynos had been relying constituted an unfair contractual term.

The case went before the first instance court, but in the meantime, Hungary became a Member State of the European Union. The national court referred three questions to the ECJ, the third of which dealt with the temporal application of EC law to the case. The first two questions mainly concerned the compatibility of national provisions on unfair contractual terms in consumer contracts with the Community Directive that regulated the matter.[19]
AG Tizzano was of the opinion that this situation falls out of the temporal scope of Community law, and accordingly the request has to be declared inadmissible. He argued that all substantial elements of the case related to the pre-accession period. It thus follows that there is no room for Community rules to apply; consequently, it is out of the ECJ's competence.[20]
The Court, after a short assertion of the facts, found that the Advocate General was right and the case was out of Community competence.[21]

Concluding remarks

In the Ynos case the question whether the relevant situation had been settled or not at the time of accession was not raised expressly, nevertheless, both the Advocate General and the Court seemed to implicitly say that this was the case. However, the outcome sounds scarcely convincing.

I would not dare to say that both of them got it wrong, but one could validly counter-argue, I believe, that the situation had not been settled even at the time when the preliminary reference had been decided. This might be deduced from the fact that the contractual relation would have come to its end only if there had been a payment from one party to the other. Unless this payment is made, the relation cannot be regarded as closed, therefore the situation remains pending, and therefore, Community law applies to it.

There can be objection made as to this point as well. The specific nature of contractual relations may require the legal system to prevent the new law to apply to these kinds of relations even after accession. This reasoning can be derived from the contractual certainty argument that protects the unity of the law of the contract throughout the life of it.[22] By any means I would have difficulties to assume that the factual setup of Ynos is to be regarded as evident from a point of view of temporal applicability of Community law.
As it was formerly argued, in such situations, where the case concerned citizens of the same Member State and where the EC law applicability ratione temporis was at least questionable, the Court of Justice, nevertheless, accepted the reference as falling in its competence.[23] Judgments, such as Saldanha, articulated the Court's policy to encourage the judiciary of the new Member States to turn to Luxemburg whenever they feel they need to.
A valuable point could also be that that was raised by the Latvian Government in the case. They argued that even though the situation in question was completely a pre-accession situation, thus, out of the scope of Community law, nevertheless, the judgment of the Court was necessary in order to guarantee the uniform interpretation of the Community rules and the relevant national rules intended to reproduce them.[24] This argument is also upheld by the

fact that the Court was ready to accept to give a ruling in cases the admissibility of which had been doubtful to say the least.[25]

In this regard the ECJ's ruling in the Ynos case seems disappointing. Striking is the fact that the genuine part of the ECJ's judgment in Ynos, the so called 'Findings of the Court' is not more than five paragraphs; "We don't want this here!" Why has the Court changed its former attitude?

One possible answer is that the future prospect of a flow of cases coming from the 'freshmen' was enough to discourage the otherwise brave judges, who, for this reason, decided to apply a stricter scrutiny when accepting preliminary reference requests from the newly joined States in connection with intra-temporal applicability of Community law.

A second argument could be found in the peculiar nature of the case that could underline the exceptional character of the Court's decision. If this was true, we must wait for the next ruling given in a similar case to see the "real" position occupied by the Court of Justice. I do not, however, believe that this can be the case here.

Be as it may, while awaiting the next preliminary reference to come in this subject matter, one can only hope for even more clarity in the Court's case law in the field of inter-temporal applicability of Community law.

Havas Lóránt[1]: "Alkalmazni vagy nem alkalmazni, az itt a kérdés" avagy Az Európa-jog időbeli alkalmazhatóságának kérdése az újonnan csatlakozott tagállamokban

Az Európai Unióhoz való csatlakozás számos jogi kérdést vet fel, amelyek közül az egyik az acquis communautaires időbeli alkalmazásához köthető. Pontosan melyik pillanattól és mely ügyekre alkalmazzuk az új jogrendet? A Csatlakozási Szerződésekben ez a kérdés a következő módon nyert szabályozást: „A csatlakozás időpontjától kezdődően az eredeti szerződések rendelkezései és az intézmények (…) által a csatlakozást megelőzően elfogadott jogi aktusok az új tagállamok számára kötelezőek, és az említett szerződésekben, illetve az ebben az okmányban megállapított feltételekkel alkalmazandók ezekben az államokban."[2]

Az így kimondott alapelv alkalmazása azonban nehézségekbe ütközhet, mégpedig az olyan jogi szituációkban, amelyek a csatlakozást megelőző periódusban jöttek létre és jogi hatásaikat vagy azok egy részét már a csatlakozás utáni közegben fejtik ki. Az ilyen helyzetek egy részére még a csatlakozást megelőző jogrend szabályait kell alkalmazni (C-321/97 Andersson vagy C-302/04 Ynos), míg más esetekben (C-43/95 Data Delecta vagy C-122/96 Saldanha) a Közösségi jog alkalmazandó a csatlakozás időpontjától kezdődően. Az ezen esetek közötti különbségtételt szolgálják az Európa-jog időbeli alkalmazhatóságának szabályai, amelyeket az Európai Bíróság ítélkezési gyakorlatából szűrhetünk le.

A dolgozat sorra veszi az általam fontosnak tartott jogeseteket az 1973-ban eldöntött Westzucker ügytől egészen a 2006. januárjában, az Ynos v Varga János ügyben hozott ítéletig.

A Metallurgiki-ban kimondott tétel szerint „a Közösségi jog ab initio és in toto alkalmazandó az új tagállamokra a csatlakozás időpontjától, ettől eltérni csak az átmeneti intézkedésekben előírt módon lehet". A már említett Data Delecta vagy Saldanha esetekben úgy tűnhet, hogy az EB kiterjesztő módon értelmezi az alapelvet és olyan helyzetekre is előírja a Közösségi jog alkalmazandóságát, amelyek tényállásbeli elemei egytől-egyig a csatlakozás előtti

periódusban valósultak meg; azonban az eljárás elhúzódása folytán a nemzeti procedurális szabályokat már a Közösségi jog fényében kell vizsgálni.

Az Andersson ügy jelentős hozadéka a különbségtétel a már véglegesen rendezést nyert esetek (situation définitivement fixée) valamint a függő szituációk (situation continue en cours) között. Az előbbi esetekre a csatlakozás előtti szabályok, míg az utóbbira a csatlakozás utáni (európa-jogi) szabályok érvényesek.

Az egyik első magyar döntéshozatali kérelem nyomán született Ynos ítéletben az EB úgy találta, hogy a kérdéses esetre nem a Közösségi jog az alkalmazandó. A Bíróság ítélete egyfelől illeszkedik az Andersson által meghatározott csapásirányba, másfelől azonban intő jelként is lehet értelmezni az "új fiúk" irányába. A minden korábbi csatlakozási hullámnál nagyobb léptékű 2004-es kibővülés után az Európai Bíróság talán nem véletlenül óvatosabban bánik az acquis alkalmazandóságának kérdésével.

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[2] "A Cseh Köztársaság, az Észt Köztársaság, a Ciprusi Köztársaság, a Lett Köztársaság, a Litván Köztársaság, a Magyar Köztársaság, a Máltai Köztársaság, a Lengyel Köztársaság, a Szlovén Köztársaság és a Szlovák Köztársaság csatlakozásának feltételeiről, valamint az Európai Unió alapját képező szerződések kiigazításáról szóló okmány" – 2. cikk

Bibliography

1. Articles:

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2. Cases:

1. Case 1/73 Westzucker, [1973] ECR 723,
2. Case 258/81 Metallurgiki Halyps, [1982] ECR 4261,
3. Case C-415/93 Bosman, [1995] ECR I-4921
4. Case C-43/95 Data Delecta v MSL, [1996] ECR I-4661,
5. Case C-122/96 Saldanha and MTS v Hiross, [1997] ECR I-5325,
6. Case C-321/97 Andersson & Wåkerås Andersson v Sweden, [1999] ECR I-3551,
7. Case C-355/97 Beck and Bergdorf, [1999] ECR I-4977,
8. C-302/04 Ynos v Varga, nyr.

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[2] For example: Act of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, Article 2 (OJ C 241 29 August 1994); Act of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic, Article 2 (OJ L 236 23 September 2003). This latter version contains also reference to the legal acts of the European Central Bank.

[3] For example the cases C-321/97 Andersson or C-302/04 Ynos.

[4] Cases like C-43/95 Data Delecta or C-122/96 Saldanha.

[5] Case C-302/04 Ynos v Varga, nyr.

[6] Case 1/73 Westzucker, [1973] ECR 723.
[7] The amendment consisted of a minor changement, yet of great importance. Article 12 of the original version of the Regulation read: ”If an alteration in the intervention price occures during the interval between the fixing of the refund under a tender and the actual exportation, the amount fixed for the refund is to be adjusted on the basis of that alteration” (emphasis added). The new version altered the phrase in italic to ”refund may be made”.
[8] Case 1/73 Westzucker, para 5.
[9] Case 258/81 Metallurgiki Halyps [1982] ECR 4261.
[10] Case 258/81 Metallurgiki, para 8.
[11] Case C-43/95 Data Delecta v MSL [1996] ECR I-4661.
[12] Case C-122/96 Saldanha and MTS v Hiross [1997] ECR I-5325.
[13] Opinion of AG Pergola in the Saldanha case, paras 9 and 10.
[14] Case C-321/97 Andersson & Wåkerås Andersson v Sweden, [1999] ECR I-3551.
[15] Opinion of AG Cosmas in the Andersson case, para 61.
[16] Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23).
[17] Opinion of AG Cosmas in the Andersson case, para 57.
[18] This part of the paper is largely relying on the article written by Saulius Lukas Kaleda: Immediate Effect of Community law in the New Member States: Is there a Place for a Consistent Doctrine?, ELR [2004] Vol. 10, No. 1, January, pp 102-122.
[19] Article 6(1) of the said Directive (Directive 93/13/EC to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer) reads: “Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer”(…) (emphasis added), whereas Article 209(1) of the Hungarian Civil Code (Ptk.) disposes that if any general condition of the contract is unfair, the party prejudiced may contest it. The objection must be notified to the other party in writing within one year.
[20] Opinion of AG Tizzano given in the Ynos case, para 41.
[21] Case C-302/04 Ynos, paras 35-37.
[22] Kaleda: opt. cit. page 115
[23] Kaleda: opt. cit. page 111, referring to the Court’s judgement in Case C-355/97 Beck and Bergdorf [1999] ECR I-4977.
[24] Opinion of AG Tizzano given in Ynos, point 36.
[25] See for example the Bosman case (Case C-415/93 Bosman [1995] ECR I-4921) and the Opinion of AG Lenz, in particular points 86-119 of the Opinion.