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Case Note: *Ynos* – Intertemporality and the Jurisdictional Jurisprudence of the ECJ

The case *Ynos Kft. v János Varga*,¹ decided by the European Court of Justice (ECJ) on the 10th of January 2006 carries both symbolic and interpretative value. It is symbolic, in the sense that the case relates to the very first reference for preliminary ruling ordered by a court of one of the ten new Member States that acceded in 2004. On the other hand it is also extremely significant from the overall perspective of the new Member States' judiciaries, as the ruling relates to the temporally defined limits of the jurisdiction of the ECJ. The relevance of the ruling may also be further underlined by the fact that a large number of both old and new Member States intervened in the case.² The ECJ—probably much to the surprise of many³—declined its jurisdiction to answer the questions raised by the Hungarian City Court of Szombathely. Indeed, according to Advocate General Tizzano delivering the Opinion⁴ on the case: the ECJ could have declined its jurisdiction on three separate grounds. The interesting feature of the judgement however is exactly *choice* of grounds by the Court of Justice to decline its jurisdiction, as I will try to highlight in the following.

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¹ Judgement of the Court on the 10th of January 2006, C-302/04, *Ynos* (Judgement).

² Apart from the Commission, the governments of Austria, the Czech Republic, Spain, Poland, Latvia and Hungary intervened.

³ See for example: Zegnál J.: Hungarian property dispute goes to European Court, Budapest Business Journal, 07. 22. 2005. Nemessányi Z.–Kovács B.: Esélylatolgtatás az első magyar előzetes döntéshozatal iránti kérelem sorsáról (közösségi jogi és polgári jogi gondolatok), www.jogiforum.hu/publikaciok/215.

⁴ Opinion of Advocate General Tizzano, delivered on 22 September 2005, Case C-302/04 (Opinion).

Admissibility

The main proceedings pending before the City Court of Szombathely related to civil claims of Ynos Ltd. based on a standard form agency contract concluded with Mr. Varga in 2002, that is two years before Hungary's accession to the EU. In the course of the proceedings, the defendant Mr. Varga raised the objection that the relevant clause of the contract, on which Ynos' claim was based, constituted an unfair contractual term and the claim must therefore be dismissed.

On the 10th of June, 2004, just one month after the accession of the ten new Member States to the EU the Szombathely City Court referred three questions to the European Court of Justice for a preliminary ruling.⁵ The first two questions related to the compatibility of a certain article of Council Directive 93/13/EEC (Directive) on unfair terms in consumer contracts⁶ and the relevant article of the Hungarian Civil Code,⁷ which had already been enacted in 1997⁸ exactly in implementation of the said Directive. The Szombathely City Court took the view, that in so far as the Hungarian norms relevant to the dispute constituted an implementation of the Directive, and in so far as there is a possible conflict between the two norms, the dispute must be resolved in the light of the Directive. Finally, the third question related to the applicability of Community law to a dispute which arose before Hungary acceded to the EU.

Although the Advocate General affirms, that the said Hungarian provisions are incompatible with the Directive in question, the central part of his Opinion deals in essence with the absence of the jurisdiction of the ECJ to rule on the reference submitted by the Hungarian court. Advocate General Tizzano indicates three separate grounds for ruling the reference to be inadmissible:

1. First, and foremost, for reasons of the temporal reach of Community law;⁹
2. Second, for reasons of inadequate statement of facts in the reference submitted;¹⁰
3. And third, for the questions' lack of relevance to the settlement of the dispute at hand, that is: for reasons of posing a hypothetical question.¹¹ As the

⁵ Order of the Szombathelyi Városi Bíróság, No. P.20.231/2004/19., filed under 706.879 by the European Court of Justice on the 19. 07. 2004.

⁶ Art. 6 (1) of Directive 93/13/EEC.

⁷ Art. 209 (1) of the Hungarian Civil Code.

⁸ Law No CXLIX/97.

⁹ Opinion, Items 40–44.

¹⁰ Opinion, Items 52–57.

¹¹ Opinion, Items 38–39, 63.

Court of Justice ruled the reference inadmissible only on grounds of the temporal reach of Community law, I shall restrict my analysis to this issue.

The temporal reach of Community law: contesting the “*Dzodzi line of cases*”

In his analysis, Advocate General Tizzano reversed the order of the questions, contending, that the answer to the third question, namely the applicability of Community law to disputes arising before accession, might render answering the first two questions redundant. The Advocate General considers the third question to be of a more general reach. In fact, it relates not only to the temporal scope of Community law in Candidate Countries before accession, but—intrinsically linked to this issue—also the preliminary question regarding the jurisdiction of the ECJ to answer questions related to disputes arising under the pre-accession regime.

Reframing the question of the Szombathely City Court on applicability as one of jurisdiction, the Advocate General goes on to delimit the *facts* of the dispute from the *decision* on the dispute in a temporal aspect. Drawing on the principle established by the ECJ to exclude its jurisdiction in cases where the provision of Community law referred for interpretation was “manifestly incapable of applying”,¹² he concludes, that as Hungary was not bound by the Directive at the time the facts of the case occurred, the ECJ has no jurisdiction to interpret the provision. Contrary to allegations, that Hungary could be bound by Community law in the pre-accession period due to its implementative obligations under the pre-existing Association Agreement,¹³ the Advocate General stresses, that the Association Agreement between Hungary, the EU and the Member States which came into force in 1994 must be interpreted in the light of the Treaty of Accession of 2004.¹⁴ As the Treaty of Accession provides that provisions of the founding Treaties and acts adopted by the institutions shall be binding upon the date of accession, it is only from that time that the new Member States are to be considered addressees of Community law. The fact that Hungary, under the Association Agreement undertook to approximate its legislation to Community law, and that Hungary implemented the said Directive

¹² Opinion, Item 40, referring to C-85/95, *Reisdorf*.

¹³ Association Agreement of 16. 10. 1991.

¹⁴ Treaty of Accession of 16. 04. 2003.

already in 1997, does not mean, that Hungary was bound by Community law before the date of accession.¹⁵

Here, Advocate General Tizzano follows the classic line of arguments long put forward by other Advocates General in relation to the temporal scope of Community law and the respective limitations to the jurisdiction of the ECJ inherent therein. But Tizzano was also cautious to point out that the Court could interpret the Directive on grounds of an overriding Community interest in future uniform application of EC law in the new Member States. On this point he refers to the so-called *Dzodzi*¹⁶ line of cases, where the ECJ in opposition to the opinions of the Advocates General did not decline its jurisdiction where “the facts of the cases were outside the scope of Community law but where these provisions had been rendered applicable by domestic law.”¹⁷ As Lenaerts¹⁸ points out, the Ynos case may be seen to fit into this category. The Hungarian Law of 1997 implementing the said Directive clearly refers to the Directive itself.¹⁹ Delgado and Muñoa suggest that the ECJ “as the supreme interpreter of the Community legal order, could not remain impassive to the development of different interpretations by the national courts of the same Community provision”.²⁰ But Advocate General Tizzano, opposing the *Dzodzi* line of cases goes on to state:

“[However, I must say that such] a conclusion would leave me somewhat perplexed.

If that conclusion were accepted, it would lead to a further extension of a precedent which, I feel, should only be the exception, since, as has been the subject of objection both in the legal literature and by some Advocates General (...) it stretches the scope of the Court’s jurisdiction to its limit (...) allowing the Court to give a ruling in cases where Community law clearly does not apply to the main action and there is only a *future*, and therefore purely hypothetical interest in its uniform application.”²¹

¹⁵ Opinion, Items 41–44.

¹⁶ C-197/89, *Dzodzi*.

¹⁷ Lenaerts, K.: Unity of European Law and Overload of the ECJ—the System of Preliminary Rulings Revisited, *The Global Community. Yearbook of International Law and Jurisprudence* 2005. New York, 2006. 225.

¹⁸ *Ibid*, 228.

¹⁹ Art. 11 (5) of Law No CXLIX/97.

²⁰ Delgado, Muñoa (1992) 29 *Common Market Law Review*, 159.

²¹ Opinion, Items 49–50, referring to: C-197/89 *Dzodzi*; C-231/89 *Gmurzynska-Bscher*; C-88/91 *Federconsorzi*; C-73/89 *Fournier*; C-130/95 *Giloy*; C-28/95 *Leur-Bloem*; C-7/97 *Bronner*; C-1/99 *Kofisa Italia*; C-267/99 *Adam*; C-43/00 *Andersen og Jensen*.

The judgement: temporal delimitation of jurisdiction

In its Findings the Court laconically states:

“In this case, as the facts of the dispute in the main proceedings occurred prior to the accession of the Republic of Hungary to the European Union, the Court does not have jurisdiction to interpret the Directive.”²²

The only available precedent the ECJ draws on to substantiate this reason for declining jurisdiction is the case *Andersson* from 1999.²³ In its ruling on *Andersson*, the ECJ stressed: “The fact that the EFTA State subsequently became a Member of the EU (...) cannot have the effect of attributing to the Court of Justice jurisdiction to interpret the EEA Agreement as regards its application to situations which do not come within the Community legal order”.²⁴ Implying that the case underlying *Ynos* does not come within the Community legal order, the ECJ discards the further reasons for declining jurisdiction set forth by the Advocate General and delimits the temporal scope of its own jurisdiction establishing a clear temporal framework for future references.

The innovative feature of this judgement lies in a departure of the ECJ from its previous, flexible approach to references of pre-accession background. This judgement, delivered on the first reference ever submitted by a new Member State court marks a new era of jurisdictional jurisprudence of the ECJ. Without explicitly touching upon the temporal reach of EC law as regards applicability, the Court certainly clarifies its jurisprudence related to the temporal aspects of its jurisdiction. It was obvious, that the first references from the new Member States would be linked with temporal aspects of Community law. Therefore, the ECJ probably saw fit to decide this question on the very first possible occasion perhaps to channel these future references. That this judgement is based on a premeditated decision to limit a possibly great number of inter-temporal references may further be supported by the fact that it does not necessarily follow from the hitherto existing case-law of the ECJ. To name just a few examples:

In *Data Delecta*,²⁵ the Court disregarded temporal concerns put forward by the Advocate General and delivered a ruling on a question of a Swedish appellate court submitted just after accession. Obviously, all facts of the case as well as

²² Judgement, Item 37.

²³ C-321/97, *Andersson*.

²⁴ *Ibid*, Item 30.

²⁵ C-43/95, *Data Delecta*.

the first instance judgement had occurred before accession, but the ECJ refrained from addressing the question. Similarly, in *Konle*,²⁶ the Court of Justice accepted its jurisdiction, although the facts of the underlying Austrian case and the respective contested decision occurred before accession. It must be pointed out however, that contrary to the Hungarian court in *Ynos*, the referring Austrian court did not raise this temporal aspect in its reference.

In *Saldanha*,²⁷ the Austrian court in its reference stated, that in accordance with Austrian procedural law, Community law had mandatory effect to pending cases from the date of accession. The Advocate General objected that the temporal scope of Community law cannot be determined by reference to national law. The ECJ however, overruled the Advocate General's opinion, and ruled on the immediate applicability of Community law for future effects of situations arising prior to accession.

Finally, in *Beck and Bergdorf*,²⁸ as well as in *Stefan*,²⁹—two cases concerning pre-accession contractual relationships—the ECJ affirmed its' jurisdiction as well as the immediate effect of Community law.

Conclusion: possible motivations of the Court

Why, then, has the ECJ departed from this broad approach to the temporal scope of Community law and its respective jurisdiction? The relevant literature points out, that most of the above cases related to rules of judicial and administrative procedure and not substantive law; although, as also noted, this perspective would mean that the application of Community law could be divergent in the Member States, depending on the respective national distinctions between substantive law and procedural law.³⁰

Another point raised, is that the only other case, namely *Andersson*, where the ECJ expressly dealt with temporal aspects *and* declined its jurisdiction, related to a situation that had been completely settled and therefore also would not have had any further legal effects. The judgement reflected the Opinion of Advocate General Cosmas suggesting a delimitation between settled or “fixed”

²⁶ C-302/97, *Konle*.

²⁷ C-122/96, *Saldanha*.

²⁸ C-355/97, *Beck*.

²⁹ C-464/98, *Stefan*.

³⁰ Kaleda, S. L.: Immediate Effect of Community Law in the New Member States: Is there a Place for a Consistent Doctrine? *European Law Journal* (2004) 111–112.

situations involving true retroactivity and “existing” situations still producing legal effects involving quasi-retroactivity and immediate application.³¹

Most probably the ECJ wishes to introduce a coherent framework for the temporal scope of EC law, and would like to affirm its jurisprudence put forward in the *Andersson* case. Possibly facing a great number of comparable references from the new Member States, the Court of Justice seized the opportunity to ascertain the limits of its jurisdiction. All in all, the judgement bears great relevance for the new Member States. If the ECJ was willing to give rulings in previous inter-temporal cases based on a favourable attitude toward references from new Member States, these times are over. The sole guidance the new Member States judiciary may seek from the Court in such inter-temporal cases lies in its established case-law, which they are bound to know.

³¹ For a detailed discussion, see: Kaleda (2004), 104.