

APPLICATION OF THE EU LAW IN LATVIAN COURTS

Abstract

This article outlines the main changes that the system of Latvian courts faced after Latvia's accession to the EU. In the legislative field Latvia has added in its procedural laws general provisions that incorporate EU law into Latvia's legal system, as well as the possibility of national courts to apply preliminary rulings procedure. During Latvia's EU membership, Latvian courts have adapted to their role in the application of the EU law, especially in the area of administrative law. Latvian courts have referred to the Court of Justice of the EU for preliminary rulings in over 100 cases, mostly from administrative courts. This corresponds with general tendencies in other new EU Member States. However, the fact that there are very few requests for preliminary rulings from courts that are not the courts of the last instance in Latvia, suggests that Latvian courts of first instances are somewhat unwilling to make use of the preliminary rulings procedure and do not see the benefits in its use.

Keywords: *application of EU law, national courts, EU enlargement, preliminary rulings.*

1. Introduction

European integration so far has always been a process, a series of changes and developments, reflecting ever changing realities of our sub-continent. That process is irrevocably linked not only to the institutional and substantive developments of the European Union (hereinafter: EU) but also to the EU's enlargement. Some authors contend (Archick & Garding, 2021, p. 1) that the carefully managed process of enlargement is one of the EU's most powerful policy tools, and that over the years it has helped to transform many European states into functioning democracies and improved their standard of living.

According to Article 49 of the Treaty on European Union (hereinafter: TEU), which constitutes the legal basis for the accession of new member states, the EU is open to all European countries. However, the process of the accession is complex and requires lengthy legislative as well as institutional preparatory work on the part of the accessing country (see Schewe, 2016), which must be able to meet the whole of the EU's *acquis* once it joins the EU. The main part of that work is concerned with the executive and legislative

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branches adjusting the national legal system and preparing for participation in the work of EU's institutions. Yet national judiciary is also fundamentally affected by EU membership (see Dyevre, 2009).

To outline some of the challenges that national courts of the new EU Member States face, this article will provide an overview of the experience of Latvian courts from the moment of preparation to join the EU until the present day, when Latvia has been a Member State for 17 years. The article consists of three parts. The first part outlines the basics of EU's judicial order – the relationship between the Court of Justice of the EU (hereinafter: CJEU) and national courts. It briefly introduces some of the core concepts of EU law that national courts are obliged to adhere to, such as supremacy of the EU law, direct and indirect effect of the EU law. It also concisely explains the preliminary rulings procedure and its crucial role in the interaction between the CJEU and the national judiciary. The second part, drawing specifically on Latvia's experience, will illustrate possible options for amendments of national procedural laws that aim to incorporate duties imposed on national courts as well as accommodate preliminary rulings procedure. Finally, the third part of the article will assess the practice of Latvian courts 17 years after accession, with a particular emphasis on the use of the preliminary rulings procedure.

2. EU Law in National Courts: The Basics of EU's Judicial Order

Since CJEU's 1963 judgment in the *Van Gend & Loos* case the individuals are entitled to invoke much of the EU law directly before national courts. Accordingly, national courts have a duty to give full effect to provisions of EU law as well as to protect rights of individuals under EU law (see Weiler, 1991, p. 2413). Although it is the CJEU which has the authority to interpret EU law, it is only the national courts that hold monopoly on adjudication of the dispute before them. It is also the national courts that will decide on the facts of the case and will ultimately apply the EU law to the dispute. Thus national courts are an integral part of the EU's judicial order and the key element in the implementation of the EU law (see Prechal, 2006, p. 429; De Witte *et al.*, 2016).

To ensure that individuals can meaningfully invoke EU law before national courts, the CJEU in its case law has elaborated a range of duties incumbent on national courts. A pivotal role in what is often described as European 'constitutional legal order' (Stein, 1981, p. 1) is played by the right of individuals to protect their EU rights in national courts and a corresponding duty of said courts to protect those rights and therefore to allow EU law provisions to have direct effect (*C-26/62 Van Gend & Loos*). The second crucial element in the EU's legal structure is the principle of primacy of EU law, which as elaborated by the CJEU in cases *Costa and E.N.E.L.* and *Melloni (Stefano Melloni v Ministero Fiscal)*, requires that in cases of conflict between national law and EU law, the EU law should be applied. Then further building on *Van Gend & Loos* and *Costa and E.N.E.L.*, in *Simmenthal* the Court proceeded to spell out the role of national courts in upholding this new legal order. According to *Simmenthal* national courts of all levels must set aside any national law that conflicts with the EU law and Member States must

not limit the power of any national court to immediately disapply national provisions that are incompatible with the EU law.

Thus *Simmenthal* provided for a fundamental shift in the competences of national courts. Courts of all levels were to apply EU law directly and if they found a national provision that was contrary to EU law, they were to set it aside by themselves, without first turning to the constitutional court. This shift was to have a twofold effect. Firstly, it empowered national courts of all levels by strengthening their capacity as EU law courts. Secondly, it also gave the power of judicial review of national law, which in many member states was reserved only for constitutional or supreme courts, to all national courts. In subsequent cases the CJEU clarified and somewhat softened the original pronouncement – the supremacy of the Community law did not require annulment of conflicting national rules – the courts merely had to disapply the national rule. In *Melki and Abdeli* the CJEU elaborated on *Simmenthal* and further encouraged a certain dismantling of national judicial hierarchies. According to the *Melki and Abdeli* case, in order to ensure the primacy of the EU law, any national court is free to refer to the CJEU any question at any stage of proceedings, even at the end of an interlocutory procedure with a national constitutional court, thus opening a possibility that CJEU could override the conclusions reached by the constitutional court.

However, the practical importance of *Simmenthal* over time seems to have decreased with national courts increasingly opting to focus on another strand of CJEU case law, namely the duty of consistent interpretation, i.e. the so-called indirect effect of EU law. According to cases, such as *Von Colson* (C-14/83), *Marleasing* (C-106/89) and *Pfeiffer* (Joined cases C-397/01 to C-403/01) all national law must be interpreted ‘in the light of the wording and the purpose’ of EU law. This in effect requires national courts to read EU law provisions into national laws and in cases of conflicting national rules to afford precedence to those national rules that comply with EU law. The development of indirect effect has also significantly increased the role that directives play in litigations between individuals since it circumvents the absence of horizontal direct effect of directives.

Another foundational element in the EU’s judicial order is the preliminary rulings procedure. The procedure has been present in the founding treaties from the moment of their conclusion in what is now Article 267 of the Treaty on the Functioning of the European Union (hereinafter: TFEU). The procedure is premised on the idea that EU law must be applied in national courts (see Broberg & Fenger, 2014). Whenever a national court is to adjudicate a case in which EU law is applicable and the judge finds that the EU law seems ambiguous or complicated, the judge has a right (and for the courts of final instance – a duty) to suspend the proceedings at national level and to make a reference with a question to the CJEU. The CJEU does not adjudicate the case on substance, but merely makes a preliminary ruling by answering questions that the national court has put forward in the preliminary reference. After the CJEU delivers its preliminary ruling, the case goes back to the national court, which passes judgment on the substance of the case by using the interpretation that the CJEU gave in its judgment. The main function of this procedure is to ensure uniform application of EU law, which is one of the core principles of the EU’s judicial order – importance of which has been emphasized by the CJEU starting from the judgments such as C-283/81 *CILFIT* till present day (see, e.g., C-561/19 *Conorzio Italian Management*).

3. Enabling the Application of the EU Law in Latvian Courts

With the accession to the EU Latvia had to decide how to regulate application of EU law in Latvian courts so that, on the one hand, efficient and proper functioning of EU law would be ensured in accordance with requirements of EU law as elaborated by the CJEU. On the other hand, application of EU law had to be integrated into Latvian law so that it would fit into the established framework of Latvian legal system, such as hierarchy of sources and competences of the courts. The simplest option was based on the monism doctrine as it is known in the public international law (see Starke, 1936). According to this doctrine international law and national law are parts of the same legal system (and international rules have primacy over domestic law). For monists, international treaties become the law of the land, an integral part of the national legal system.

Latvian legal system generally adheres to the monist conception. Although Latvian constitution does not explicitly recognize international law as being part of the Latvian legal system, Latvian procedural laws acknowledge international law as a source of law (Latvian Civil Procedure Law, Art. 5(1); Latvian Administrative Procedure Law, Art. 15(1); Latvian Criminal Procedure Law, Art. 2(1)). In the context of Latvia's accession to the EU it meant that in principle it was not mandatory to provide particularities on the application of the EU law in Latvian procedural laws, since from the moment of the ratification of the Accession Treaty, all legal norms of the EU law became part of the Latvian legal order (Kerikmae & Joamets, 2017, p. 172). Accordingly, any Latvian court should be able to use EU law on the basis of the Accession Treaty and, therefore, apply EU law correctly without any additional provisions in the texts of national procedural laws. Such an approach has been used, for example, in the Netherlands in the context of administrative courts (see Prechal & Widdershoven, 2008).

However, Latvian legislators instead opted for addition of some general references to the EU law in the texts of Latvian procedural laws. Such an approach recognized the legal force of EU law (from the moment of coming into effect of the Accession Treaty), but simultaneously provided some procedural guidelines within the texts of the Latvian procedural laws on the application of EU law. Thus, for example, the legal basis for the use of the preliminary rulings in Latvian courts still is the EU law itself, but at the same time the Latvian procedural laws contain provisions, which inform judges as to the existence of the preliminary rulings procedure and the possibility to refer questions to the CJEU (Latvian Civil Procedure Law, Art. 5.1; Latvian Administrative Procedure Law, Art. 104.1; Latvian Criminal Procedure Law, Art. 478(2)). As an illustration to this, the Latvian Civil Procedure Law, Article 5.1 states: "In accordance with the legal norms of the European Union a court shall make a request to the Court of Justice of the European Union regarding the interpretation or validity of legal norms for a preliminary ruling".

This approach of the Latvian legislator involves a certain degree of overlap of EU law and national law. However, it also encouraged Latvian judges, who initially were used to working almost exclusively with national law, to see clearly the main changes that the EU law brought into the system of national law and to see national law in the context of the EU law. Similar approach has been used by several other EU Member States as well, for example, by Czech Republic and Slovakia (see Bobek, 2008).

4. Practice of Latvian Courts in Application of EU Law

Over the years of Latvia's EU membership the attitudes of Latvian courts towards application of EU law have steadily improved (see Buka & Bērziņa, 2016). Partly this has been due to extensive education programmes on EU law for judges and partly due to the increased confidence of judges as over time they gained experience engaging with the EU law and with the CJEU. Amongst Latvian courts it is the administrative courts, particularly in areas such as tax law, which provide the bulk of the practice on the application of EU law. Administrative courts are also the ones that are frequently faced with cases involving more complex secondary law including directives on taxation, public procurements, company law and environment. Thus administrative courts are leading in the application of EU law not only in quantity but in quality as well, particularly the Supreme Administrative Court which often makes the effort to tackle the relevant CJEU case law (see Judgment of the Administrative Department of the Supreme Court, March 24, 2010 in the case SKA-293/2010). The Supreme Administrative Court also is leading in terms of initiated preliminary rulings procedures (Buka & Bērziņa, 2016).

In comparison to Latvian administrative courts, the courts of general jurisdiction (which under Latvian law deal with private law issues) engage EU law to a lesser extent than administrative courts. The cases will most often be on private international law issues that are governed by EU regulations (see Kačevska *et al.*, 2015). As a general rule, Latvian courts in civil cases tend to avoid express usage of terms "direct effect" or "indirect effect" but merely use directives in conjunction with relevant Latvian law (see Judgment of the Civil Department of the Supreme Court of 28 November 2012 in case SKC-392/2012).

In criminal law courts so far the influence of EU law can be seen as marginal at best – it is rare to find even indirect reference to EU law in criminal law cases. Those few judgments that mention EU law, do so with a certain degree of cautiousness and uncertainty, especially in judgments from the first decade after Latvia's accession (see Judgment of the Criminal Department of the Supreme Court of the Republic of Latvia of 9 May 2013 in case SKK-165/2013).

As for preliminary rulings, an overview of case law in the post-2004 new Member States reveals that in the initial years after the enlargement the procedure was used in relatively few cases. From 2004 till 2007 there were only 35 requests for preliminary rulings from ten new Member States in total, which is considerably lower than the average number of references from older Member States (Bobek, 2008, p. 1611). This initial lack of willingness from national courts was at least partly due to the restrictive approach of the CJEU on admissibility of requests for preliminary rulings in cases where factual circumstances related to the period before the state's accession to the EU. Compared to previous enlargements where CJEU's attitudes were rather liberal (see C-43/95 *Delecta Aktiebolag* in context of the accession of Sweden, and C-122/96 *Saldanha* in context of Austria's accession) to a rather restrictive one for countries acceding in 2004 (see C-302/04 *Ynos*).

The first request for preliminary ruling from a Latvian court was made almost four years after Latvia's accession to the EU in 2007. However, since then Latvian courts have steadily increased their requests and are now making them on a regular basis. In total,

Latvian courts have made over 100 requests for preliminary rulings. As already noted, these are mainly from administrative courts and among these it is the Supreme Administrative Court that makes the majority of references (see Report of the Ministry of Justice, 2019). A very similar trend has also been observed in other new Member States (Bobek, 2008, p. 1612). Research suggests (Kačevska *et al.*, 2015, pp. 28-29) that Latvian judges of lower courts admit that they are overloaded with cases and therefore are hesitant to take time to delve deeper into the problematic issues and to engage with CJEU. This contrasts with other findings (Broberg & Fenger, 2014, p. 45) which suggest that the courts of lower instances in many countries are quite willing to obtain preliminary rulings from the CJEU. Also in some new Member States courts of lower instances seem to be far more active than their Latvian counterparts (e.g., in Poland the first seven references were all from the courts that were not the courts of last instance (Miqsik, 2008, p. 120)). Thus Latvian courts of lower instances seem to be comparatively less willing to make use of the preliminary rulings procedure.

5. Conclusions

To accommodate the merging of Latvia's legal system with the EU law and cooperation of Latvian courts with the CJEU, Latvia opted to explicitly restate in Latvia's three major procedural laws, what was anyway binding on the basis of EU law itself. Thus Latvian law now explicitly provides that EU law is a part of Latvian law and that administrative, civil and criminal law courts are to apply EU law. Similarly all three procedural laws expressly describe what is anyhow the right and sometimes the duty of national courts on the basis of Article 267 of the TFEU. These national provisions in no way seek to narrow the effect of the EU law, but rather were intended to dispel any doubts that national judges (particularly in the early years after the accession) might have had.

As for the practice of Latvian courts, they seem to have adapted to their role in the application of the EU law, especially in the area of administrative law. Latvian courts have asked the CJEU for preliminary rulings in over 100 litigations, mostly in administrative law cases. This corresponds with trends in other EU Member States; even more, Latvian courts are more active than other countries of comparable size. However, the fact that very few requests for preliminary rulings are done by courts that were not the courts of last instance in Latvia, signifies that Latvian courts of the first instances are slightly sceptical in regards to the preliminary rulings procedure and do not see the benefits in its use.

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PRIMENA PRAVA EVROPSKE UNIJE PRED LETONSKIM SUDOVIMA

Sažetak

U radu se ukazuje na ključne promene sa kojima su se suočili letonski sudovi nakon pristupanja Letonije Evropskoj uniji. U zakonodavnom domenu, Letonija je u svoje procesne zakone unela opšte odredbe kojima se pravo Evropske unije unosi u pravni sistem Letonije, zajedno sa mogućnošću da letonski sudovi primene postupak upućivanja prethodnog pitanja. Tokom članstva Letonije u Evropskoj uniji, letonski sudovi su se prilagodili svojoj ulozi u primeni prava Evropske unije, naročito u oblasti upravnog prava. Letonski sudovi su Sudu pravde Evropske unije uputili preko sto prethodnih pitanja, a uglavnom se radilo o pitanjima koja su uputili upravni sudovi. To je u skladu sa opštim tendencijama u novim državama članicama Evropske unije. Ipak, činjenica da je vrlo mali broj letonskih sudova koji nisu sudovi poslednje instance uputio prethodno pitanje Sudu pravde Evropske unije ukazuje da su letonski prvostepeni sudovi donekle nevoljni da koriste ovaj postupak i da još uvek ne prepoznaju koristi koje mogu imati od njega.

Ključne reči: primena prava EU, nacionalni sudovi, proširenje EU, prethodno pitanje.

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