The German Federal Constitutional Court At the Intersection of National and European Law: Two recent Decisions

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I. Introduction

[1] In two recent decisions(1) , the German Federal Constitutional Court [*Bundesverfassungsgericht* - FCC] has clarified important issues of the interaction of national and European law. While both decisions deal with the obligation of German courts to refer questions of European law to the ECJ, one of them particularly addresses the crucial question whether national laws implementing European directives can be challenged before the FCC.

[2] The preliminary ruling mechanism under Art. 234 EC Treaty has been a cornerstone of European integration, as it provides a procedure for referring cases in which individuals invoke European law before national courts to the ECJ (2) . A number of foundational concepts of European law have thus been laid down by the ECJ in Art. 234 EC-cases. It is against this background that we can now perceive principles such as direct effect, supremacy or state-liability as structuring the relationship between the European and national legal orders.

[3] Although the preliminary reference procedure gives individuals a possibility to raise European law issues before their national courts, they are still dependent on the willingness of the national court to actually refer the case to the ECJ. In most Member States, there is no mechanism to control the national judge\'s decision not to refer an issue. Studies even suggest that judges might be reluctant to refer politically sensitive issues, for example in the area of environmental protection (3) . In this respect, one can say that Germany is somewhat an exception. The ECJ is considered a lawful judge. The decisive provision of the German Basic Law - (*Grundgesetz*) reads:

Article 101 [Ban on extraordinary courts]

(1) Extraordinary courts are inadmissible. No one may be removed from the jurisdiction of his lawful judge.

(2) Courts for special fields of law may be established only by Legislation.

Therefore it is, under German constitutional law, considered to be a denial of one\'s lawful judge, if a court, in arbitrarily failing to submit a case to the ECJ, violates its obligations under European law(4) . This threshold for a constitutional violation, however, is relatively high and as the FCC\'s recent jurisprudence suggests, the FCC does not engage in a detailed review.

II. Enforcing the obligation to refer: The right to a legal judge

[4] The decision of 9 January 2001 concerned a constitutional complaint brought by of a female physician from Hamburg who sought recognition as general medical practitioner. After she had completed a part-time training in a general medical practice, her original application was denied on the grounds that - in accordance with Council Directive 86/457/EEC and Council Directive 93/16/EEC (5) - the relevant statute of Hamburg required that the training in a general medical practice included a six-month full-time period.

[5] Petitioner argued that the full-time requirements of the Council Directives 86/457/EEC and 93/16/EEC were in conflict with Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. The *Bundesverwaltungsgericht* [Federal Administrative Court], here being the Court of last instance in administrative law cases, declined to refer this question to the ECJ and instead held that according to the general principle of *lex specialis* the Council Directive 86/457/EEC had to prevail.

[6] The Second Chamber of the First Senate, a three judge panel of the FCC, held that the Federal Administrative Court, in failing to refer petitioner\'s case to the ECJ, had denied petitioner her lawful judge under Art. 101 para. 1 Sent. 2 Basic Law. The FCC found that the Federal Administrative Court fundamentally had misjudged its obligation in two ways.

[7] First, the FCC held that the Federal Administrative Court had not taken notice of the relevant case-law of the ECJ

concerning the collision of directives. Instead, it had decided the question according to national standards. Such a failure to transparently discuss relevant European law generally constitutes a violation of the obligation under Art. 234 EC Treaty (para. 21). Convincingly, the FCC includes methodological approaches in its concept of European law and thus acknowledges that different legal orders utilize different methods of interpretation.

[8] Secondly, the Federal Administrative Court had not taken into account that the ECJ has accepted the equal treatment of women and men as a fundamental principle of EC law and that this principle binds the Institutions when enacting secondary legislation (para. 23/24). Furthermore, considering that this principle includes the prohibition to discriminate part-time workers, a reference would have been necessary under this aspect as well.

[9] This reasoning underlines that the FCC will readily review cases where the lower court has not taken account of an already existing ECJ jurisprudence or has ignored the European implications. Such fairly extreme examples fall under the arbitrariness standard. If one now contrasts this decision with a case where the FCC did not see a constitutional violation, the limits of review will become more transparent.

[10] The decision of 10 May 2001 concerned a constitutional complaint and an application for interim relief by two environmental groups which seek to protect the valuable ecosystem of the freshwater wetlands „Mühlenberger Loch\", which is home to priority (i.e. highly threatened) species, against the enlargement of a production plant of Airbus Industries, a large Aircraft manufacturer. The area is protected under the Wild Birds-Directive 79/409/EEC and has also been declared a potential area under the FFH-Directive 92/34/EEC. The EU-Commission issued an opinion in which it accepted that compelling reasons of public interest may qualify to justify the adverse impact of the project on the protected area (6) . Hereafter the local authorities adopted a plan authorizing the project. Due to the high level of economic and environmental interests at stake, the project drew attention by politicians as well as the media.

[11] Petitioners\' requests for provisional measures against the project were denied by the Local Administrative Court as well as the Appellate Administrative Court. In the opinion of the Courts, petitioners did not have standing. Petitioners\' claim whereafter the applicable EC-directives constituted individual rights and that petitioners thus fulfilled the standing requirements, was not accepted by the Courts.

[12] Notably, the FCC did not express its opinion on the question whether there existed an obligation to seek a preliminary reference during interim relief proceedings (para. 20). As a fact, earlier decisions had either explicitly or implicitly denied such an obligation (7) . At least in cases where a denial of interim relief would have grave and irreversible consequences, such a limited obligation to refer certain questions to the ECJ would be ineffective and meaningless. The more careful approach taken in this new decision is, thus, a step into the right direction.

[13] The FCC points to the fact that it was not an additional appellate court and therefore could and would not engage in a general review of all procedural details. It underlined, instead, that a) if a question of EC-law had not been clarified through the ECJ\'s case law or b) a development of the case-law in a particular direction is not only a far fetched possibility, the right to a lawful judge is only violated in those cases where the court of last instance used its discretion in an unreasonable way. It is only unreasonable if legal opinions contrary to the opinion taken by the court of last resort are clearly preferable (para. 21). In the opinion of the FCC, petitioners did not meet that standard in their argument. Although they referred to a possible alternative interpretation that European law would provide them with a basis for standing, they did not demonstrate that their reasoning was clearly preferable to the position taken by the Courts (para. 22).

[14] The standard presented by the FCC is convincing if it is in question that the ECJ might develop its jurisdiction and adjust it to new circumstances. In cases, however, where there is only little case-law such a deferential standard reveals some weakness.

[15] A compelling case can be made that the Wild Birds Directive and the FFH-Directive have direct effect (8) . So far, however, the ECJ has made no explicit statement if the directives at issue create individual rights. On the other hand, it has not ruled to the contrary. Considering the general willingness of the ECJ to read individual rights into a directive, there is a plausible case for assuming that these directives in fact create individual rights. The restrictive interpretation of the Administrative Courts is not convincing. They try to argue that in environmental matters the ECJ has only construed individual rights, if the directive also protected the health of individuals. In case of the Wild Birds-Directive and the FFH-Directive, the Administrative Courts did not recognize that they are concerned with the protection of human health (9) . Interestingly enough, it was not clear if other environmental directives aim at protecting human health until the ECJ explicitly ruled so. Arguably, this controversial issue should have been decided by the ECJ in the present case as well.

[16] One ought to bear in mind, however, that it is altogether not likely that the case of the \"Mühlenberger Loch\" will still reach the ECJ. The possibility for the Commission to bring an infringement proceeding is, indeed, merely

theoretical. The Commission is generally reluctant to enforce the Art. 234 EC-obligation because of the independence of the judicial branch. In this case, it is even more unlikely that the Commission will act after it has given a positive opinion on the project.

[17] What constitutes the main difference between the two cases considered? Certainly, in the medical practice-case there was more ECJ case-law to build on. Another aspect should not be neglected. The medical practice-case primarily involved a conflict of norms which both originated within the EC legal order, whereas the case brought by the environmental groups concerned a conflict between norms of different legal orders.

[18] Apparently, the FCC is rather unwilling to find a constitutional violation in a non-referral if the impression prevails that petitioners primarily seek legal innovation. So it can be assumed, that the FCC is reluctant to encourage an overly active role of the ECJ in that respect. While this is, in and by itself, already worthy of deeper investigation, what is, at first sight, even more disturbing is the fact, that the creation of individual rights by EC-directives still - in the FCC\'s eyes - seems to be viewed as such an innovation.

[19] Consequently, as regards the Wild Birds-Directive and the FFH-Directive, the question of direct effect and the creation of individual rights remains undecided. It might well be then, that in one of the Member States there will eventually be a court that decides to refer a seemingly unspectacular case to the ECJ.

III. Implementing EC-directives: The Scope of Judicial Review

[20] There is, however, more to the FCC case of 9 January 2001. Beyond the case\'s importance under the aspect of Art. 101 Basic Law and the ECJ as \"lawful judge\" under German constitutional law, the FCC case also addresses general principles concerning the relationship between European and national legal orders.

[21] Insofar the constitutional complaint alleged a violation of Art. 12 Basic Law (freedom of occupation) and Art. 3 Basic Law (equal treatment), the FCC held the complaint to be inadmissible (para. 15). In this respect the FCC can be seen to be reinforcing its reasoning in the *Solange II*(10) - and *Banana* (11) -decisions. In light of this jurisprudence, EC law is principally not controlled by the FCC irrespective of the type of legislation at issue. Consequently, constitutional complaints and references to the FCC are inadmissible, unless the level of protection of fundamental rights generally sinks below the level which is demanded by the Basic Law. The decision is a further example displaying the decline of fears (or hopes) that the FCC would intensify its scrutiny on this aspect of European integration following the controversial *Maastricht*-decision in 1993. (12)

[22] More importantly, the decision underlines that the claim against the domestic law implementing the directive in question is also inadmissible insofar the national legislature is bound by the directive. Constitutional review by the FCC is only admissible, if and insofar the national legislator has any discretionary power in implementing a directive (para. 16). This statement seems to be uncontroversial in light of conventional wisdom that national laws implementing an EC-directive in principle take part in the EC-directive\'s supremacy (13) . Not surprisingly, the decision can cite to an earlier case which already had prepared the ground for its analysis (14) . This impression changes somewhat, however, if one notes the remarkable contrast to the approach of the FCC\'s Second Senate in a post-*Maastricht* decision concerning tobacco-labeling (15) . In that case, the Second Senate reviewed the German government\'s regulation implementing Council Directive 89/622/EEC (16) solely on the basis of German basic rights. Although it did not find a violation, the methodology raised criticism (17) . And in fact, such an approach could undermine the recognition of the ECJ\'s protection of fundamental rights (18) .

[23] Arguably, the Second Senate in its tobacco-labeling decision only engaged in this kind of review as it assumed that there was no alternative procedure to a constitutional complaint (19) . Then the decision to accept the complaints admissibility despite its European background would secure the possibility of a reference to the ECJ. Unfortunately, the Second Senate did not mention that it might consider a reference (20) . This somewhat fuzzy argument resulted in slight irritation about the FCC\'s standard of review for the national rules implementing EC-directives. Now the Second Chamber of the First Senate has clarified the issue in an unspectacular but laudable fashion.

For more information: Decision of the Bundesverfassungsgericht [FCC] (BVerfG), 2nd Chamber of the First Senate, 1

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BvR 1036/99 of 9 January 2001, online under Error! Bookmark not defined.

Decision of the Bundesverfassungsgericht [FCC] (BVerfG), 1st Chamber of the First Senate, 1 BvR 481/01 of 10 May 2001, online under Error! Bookmark not defined.

The German Basic Law [Grundgesetz] on-line:
http://www.uni-wuerzburg.de/law/gm00000_.html
(1) BVerfG, 2nd Chamber of the First Senate, Decision 1 BvR 1036/99 of 9 January 2001 and BVerfG, 1st Chamber of the First Senate, Decision 1 BvR 481/01 of 10 May 2001.
(2) *See J.H.H. Weiler*, The Least Dangerous Branch: A Retrospective and Prospective of the ECJ in the Arena of Political Integration, in: The Constitution of Europe, p. 188, at 193.
(3) *J. Golub*, The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the ECJ, West European Politics 19/2 (1996), p. 360-385; see also *K. Alter*, The European Union\'s Legal System and Domestic Policy: Spillover or Backlash, International Organization 54 (2000), p. 489, at 506.
(4) BVerfG 73, 339, 366 et seq. (*Solange II*).
(5) Council Directive 86/457/EEC on specific training in general medical practice. This directive was replaced but not changed in the here relevant substance by Council Directive 93/16/EEC to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications.
(6) *See* the Commission\'s Press Release, IP/00/401.
(7) BVerfG, 3rd Chamber of the Second Senate, 2BvR1642/91 of 29 November 1991, in: NEUE ZEITSCHRIFT FÜR VERWALTUNGSWISSENSCHAFT (NVwZ) 1992, p. 360; BVerfGE 82, 159, 195.
(8) *S. Kadelbach*, Der Einfluß des Europarechts auf das deutsche Planungsrecht, Festschrift Hoppe (2000) , p. 897, 906.
(9) *See* the judgment of the Oberverwaltungsgericht of 19 February 2001, 2 Bs 370/00, II B 2 b, .
(10) BVerfGE 73, 339, 378-381.
(11) BVerfG, Decision of the 2nd Senate of 7 June 2000, 2 BvL 1/97, para. 62 , Error! Bookmark not defined.
(12) *See* Bundesverfassungsgericht, Decision of 12 October 1993 - 2 BvR 2134, 2159/92, published in: BVerfGE 89, 155; the commentary to this case is simply abundant. For a first orientation, *see, e.g. F. Mayer*, Kompetenzüberschreitung und Letztentscheidung (2000), p. 98-120; *M. Zuleeg*, The European Constitution under Constitutional Constraints: The German Scenario, European Law Review 22 (1997), p. 19.
(13) *I. Pernice*, Art. 23, in: Dreier, Grundgesetz-Kommentar, para. 30.
(14) BVerfG, 3rd Chamber of the Second Senate, 2 BvR 1096/92 of 9 July 1992, NVwZ 1993, p. 883. The Chamber incorrectly cites to another decision on the same page.
(15) BVerfGE 95, 173.
(16) Council Directive 89/622/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products.
(17) *T. Stein*, Etikettierung von Tabakerzeugnissen und Warnhinweise, Europarecht 1997, p. 169, at 171; *U. Di Fabio*, Produkte als Träger fremder Meinungen, NJW 1997, p. 2863, at 2864.
(18) *See* already *Chr. Tomuschat*, Aller guten Dinge sind III?, Europarecht 1990, p. 340.
(19) BVerfGE 95, 173, 180. This assumption, however, is questionable. Arguably, one can seek a declaratory jugdment before the Administrative Courts against the validity of a governmental regulation, see BVerwG, NJW 2000, 3584 and the case note by *F. Hufen*, Juristische Schulung 2001, p. 406-408.
(20) There was only a vague statement that it need not be considered „if the directive was valid under EC law\", see BVerfGE 95, 173, 181. In other words, even if the directive violated European fundamental rights, the German government would have been entitled to enact such a regulation. European fundamental rights and a reference to the ECJ would only have been considered, if such an independent German regulation would violate the German constitution.