German Federal Constitutional Court

Constitutional *Ultra Vires* Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06, *Honeywell*

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Introduction

After the German Federal Constitutional Court's[1] (FCC) issuance of the *Lisbon* decision, a judgment that is generally considered to be a verdict critical of European integration[2] as well as a measure to widen the scope of constitutional review of EU acts, many observers wondered what would happen next. Would the German court finally begin to look for an open conflict with the EU, or would the court's bark once again be worse than its bite?[3] This had already seemed to be the case after the *Maastricht* decision,[4] the slimmer and legally more coherent predecessor of the *Lisbon* judgment, after which the court deliberately missed the opportunity to take a shot at the Banana conflict between the EU and the WTO.[5]

At first glance, indeed, *Honeywell* (also referred to as the German court's *Mangold* decision) relates to *Lisbon* in the same way in which *Banana* relates to *Maastricht*. A fundamental attack on European integration without many legal consequences is followed by the careful avoidance of any effective control of EU acts, going back to a standard of review dating from the 1980s.[6] To anticipate the result, the appearances are not deceiving. But despite this simple conclusion at the beginning, some aspects of the decision might deserve a more careful analysis.

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[1] BVerfGE 123, 267 – Treaty of Lisbon (2009).

[2] For comments *see* contributions in Issue 8, Volume 10 (2009) of the *German Law Journal*.

[3] Weiler, 'Editorial. The "Lisbon Urteil" and the Fast Food Culture', 20 *European Journal of International Law* (2009) p. 505; Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigones at Sea', *German Law Journal* (2009) p. 1201.

[4] BVerfGE 89, 155 – Treaty of Maastricht (1993).

[5] BVerfGE 102, 147 (163), Banana Market (1999).

[6] BVerfGE 73, 339 (387) *Solange II*.

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The context of the recent EU case law of the *Bundesverfassungsgericht*

Two other decisions of the court are of interest before we take a look at *Honeywell*. Firstly, it is a regularly neglected fact that the *Lisbon* decision, though it reads like a manual for Eurosceptics, does not contain any elements of critique of the European Court. One of the most pressing legal problems of European integration, the reluctance of the ECJ to review European acts with regard to European human rights, is not mentioned in the decision. And some of the most contested recent judgments of the ECJ, like *Viking,*[7] are even named as positive examples of the ECJ case law.[8] In *Lisbon*, the German court engages with the political organs of the EU, but not with its courts. One reason may lie in the fact that *Lisbon*, like the other mentioned cases, was decided by the Second Senate of the FCC. This body is not mainly in charge of fundamental rights, but rather is responsible for the political part of constitutional review, the control of separation of powers and the federal structure. *Lisbon* did not prepare a tightened standard of review of the FCC towards the European courts. The *ultra vires* review developed in this decision seems to be directed against European and German political organs.

The second relevant decision makes the picture considerably more complicated. In its recent judgment on the Federal statute that transformed the EU Data Retention Directive[9] into German law, the First Senate of the FCC performed a de facto fundamental rights review of European secondary law, though consolidated case law of the court did not allow for it. The traditional doctrine stated that German statutes that result from the transformation of compulsory European law cannot be reviewed by the court. Only discretionary elements of German implementation legislation are under review.[10] Without even mentioning its divergent approach, the fundamental rights Senate departed from this settled jurisprudence and reviewed all elements of the directive against Article 10 Basic Law, the freedom of telecommunication. It mentioned, for the first time, the possibility of making use of the European preliminary ruling procedure, but it remains an open question whether it would have used it if it had found the directive to be in violation of German constitutional law, given the fact that the Senate seemed to be split on this issue.

Seen together, both decisions give a mixed, if not confusing impression: the First Senate is nominally respectful towards European law but applies de facto a

[7] ECJ C-438/05, *Viking*, 2007, S. I-10779.

[8] BVerfGE 123, 267 (430).

[9] BVerfGE 2 March 2010 - 1 BvR 256/08 - 1 BvR 263/08 - 1 BvR 586/08, Data Retention (2010), *see* Kaiser, 6 *ECon* (2010) p. 503-517.

[10] BVerfGE 113, 273 European Arrest Warrant (2005); BVerfGE 118, 79 European Climate Certificates (2007).

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full review of a European directive. The Second Senate is quite critical of the political process of European integration, but does not engage in any review of European acts.

The decision

Case story

The judgment at hand decides an individual complaint of a German branch of the business enterprise Honeywell against a judgment of the German Federal Labour Court of 26 April 2006[11] in which this German court applied the *Mangold* case law of the Court of Justice.

In 2003 Werner Mangold, born in February 1950, was employed for a limited period of time. German statutory law explicitly allowed for such contracts for workers older than 52. The same year, Mangold sued his employer in the labour court of Munich. He grounded his suit in particular on the Directive 2000/78/EC, which prohibits any discrimination for the reason of age in labour relations. At the relevant moment, the Directive had not been transformed into German law. The deadline for the implementation expired a little later, in December 2003 and the European Charter of Fundamental Rights, which prohibits discrimination for the reason of age, had not yet entered into force. In answer to preliminary questions of the Munich labour court, the Court of Justice in 2005 declared the relevant rule of German statutory law to be in violation of Article 6(1) of the Directive and the general principle of anti-discrimination.[12] According to the Court of Justice, national courts were obliged to secure the implementation of the general prohibition of discrimination because of age. Even before the end of the deadline member-states were not allowed to take actions incompatible with the aims of the Directive. Though the German statute aimed at integrating older people into the workforce, an aim expressly allowed for by the Directive, the Court found in the regulation a disproportionate discrimination.

This reasoning of the European Court of Justice is generally considered weak.[13] The Court has been accused of inventing a general principle of EU law against age discrimination and also accused of lawmaking from the bench, since such a principle existed neither in the treaties nor in the practice of most member states at that point in time. The European Court, moreover, horizontally 'applied' a directive that was not yet in force. Finally, it was far from clear how individual contracts

[11] Bundesarbeitsgericht, 26 April 2006 - 7 AZR 500/04.

[12] ECJ, *Case* C-144/04, 2005, I-9981.

[13] Even by its General Advocates: *Mazák*, Case C-411/05, 2007, I-8531, para. 87; *Geelhoed*, Case 13/05, 2006, I-6471, para. 52.

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were able to contravene the effectiveness of a coming directive once it entered into law. On the other hand, as always, this critique was in itself not completely uncontested. Germany knew that a new directive was going into force and was already obliged to report on its future transformation.

In the decision from April 2006, the German Federal Labour Court applied the *Mangold* case law in a dispute between Honeywell and another employee. The employee lost his suit in the first two instances in March and June 2004. Both labour courts involved stated that German statutory law provided an unequivocal solution, and that direct horizontal application of a not transformed and not yet to be transformed European directive was not possible. However, the employee's appeal to the Federal Labour Court was successful. The priority of European law and the legitimate task of the European Court of Justice to develop general principles let the German Court, in its own observation, no other choice than to apply the *Mangold* case law. The clear statement of the European Court of Justice in *Mangold* did not make it necessary to request a new preliminary ruling. The employee thus won the case and Honeywell brought an individual complaint for the infringement of its freedom of profession and freedom of contract to the *Bundesverfassungsgericht*, the German Federal Constitutional Court. From the beginning, the case was widely perceived as a possible point of conflict between the *Bundesverfassungsgericht* and the Court of Justice.

Methodology

Perhaps the most remarkable fact about our decision lies in its methodological approach. The German Constitutional Court is in most of its decision quite categorical about the definition of its standard of review and tries to draw neat limits between the national and the European legal order. One of the standard critiques of the *Lisbon* decision was precisely that the court ignored the intertwinement between European and German institutions as well as between European and German levels of law. It was the more surprising to find the highly embedded reading of German constitutional law the court delivered in this decision. In *Honeywell,* the court stresses the co-operative structure between the European and the German legal orders, and it especially underlines the role of the ECJ in determining European law and developing general principles. Though it stresses in different parts of the reasoning the principle of limited authorization, and underlines the necessity to draw a line between judicial lawmaking by the European courts and the political Treaty amendment procedure, this distinction leaves still much room for flexibility.

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Preliminary ruling

The German Constitutional Court has never sent a request for a preliminary ruling to the ECJ. But it is obvious that the court is approaching this possibility. It has expressly mentioned it in the *Data Retention* decision and it is taking another step forward in *Honeywell*. The principle of prior application of European law leads the court directly to its first conclusion: before a German court may come to the result that a EU body acted *ultra vires,* the German court has to give the ECJ the opportunity to deliver its legal opinion by means of a preliminary ruling. This means that German courts are only permitted to review European acts on their own after the ECJ has issued a decision on the matter. This approach may explain the strict scrutiny applied in the Data Retention Case: The ECJ had already decided upon the directive.[14] Though a closer look shows that the ECJ had in application of its procedural standards only the opportunity to judge upon the matter of competences, not upon a possible infringement of European basic rights.

Ultra vires standard of review

Without much further ado, the court states that any *ultra vires* review of European acts has to focus itself on 'evident or 'obvious' cases of an infringement of competences. For the first time, the court recognizes that its invention of *ultra vires* control can only take place in a particular institutional context. To claim that the German Constitutional Court could annihilate any act of the EU that goes beyond its explicit powers would mean that that Court had assumed the role of the ECJ. The German court explicitly recognizes the duty of the ECJ to develop the law of the European Union, in particular its general principles. Therefore, the German court may only use its own standard of review in a 'restrained' way. In addition to the evidence requirement the decision stipulates a second prerequisite to apply *ultra vires* standards. *Ultra vires* review applies only in cases in which an obvious lack of competence leads to a grave shift of the power structure between the EU and the member states. The court does not give any reasons for this additional criterion.

This standard of review bears strong resemblances to the fundamental rights standard of review after *Solange II* and *Banana*. It requires not only an individual breach of the applied constitutional rule but a structural deficit, a gap in the system of fundamental rights control in the one case, respectively a shift in the vertical distribution of powers within the European polity in the other case. It is one of the cumbersome curiosities of the FCC's case law that the difference between both standards, after all the decisions, still remains unclear. In the categories of German

[14] ECJ, C-301/06, *Ireland* v. *Council*, 2009, I-593.

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law one might draw a line between 'Kompetenznormen', i.e., norms that define competences, and fundamental rights standards. But the expression *ultra vires,* coming from public international law, does not know such a difference. It is just a rule that encompasses every empowerment and limit of an international organization. It is, therefore, to assume that we are now dealing with two versions of one and the same standard of review.

The German Federal Constitutional Court, like other member state courts, is obviously caught in a dilemma: on the one hand it cannot simply apply its own standards to European acts without endangering the unity of the European system of jurisdiction. Therefore, the Court invents meta-standards like the one in *Honeywell*. But on the other hand, there is almost no chance that this standard will ever be met. Even the *Mangold* decision of the ECJ, a judgment widely seen as unfortunate and wrong, is not a completely evident misjudgement, given the obligations the German legislator had to meet even before the directive in question entered into force. In addition to that, the second requirement of the *Mangold* standards seems to be even more demanding. When will a decision of the ECJ lead to a shift of the powers between the EU and the member states? It may very well be the case that this will never happen. In *Honeywell,* the FCC explicitly leaves the question open of whether the ECJ has 'obviously' acted *ultra vires*. In any case, the Court does not see a structural shift. Caught in the dilemma between destruction and inaction the Court has chosen the second horn.

The question remains: which practical implications could the decision have? One answer might be: the decision tries to make the ECJ be more sensitive to member-states' constitutional grievances. The preliminary ruling procedure may in this context be interpreted as a warning sign. When we send one of our cases to you we are ready to fight, therefore, you should better take care of the problem yourself.

The dissenting opinion

Judge Landau's dissenting opinion forcefully stresses the divergence between the majority opinion and the *Lisbon* decision. He reminds the senate of the role of the member states as the 'Masters of the Treaties'. Given the complexity of the Treaty amendment procedure, there are, according to Landau no other players to correct the ECJ than the member states' constitutional courts. While the *Lisbon* decision merely required an 'obviously' *ultra vires* act to trigger the review of the FCC,[15] the additional requirement of a 'structural shift' seems problematic to Landau for two reasons: first, any action of the EU needs a legal basis in the European Treaties in order to claim democratic legitimacy. There is no room for a further differen-

[15] BVerfGE 123, 267 (353-354).

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tiation between serious and less serious *ultra vires* acts. Secondly, the very process of the European integration beyond Treaty amendment is incremental. The loss of competences of the member states goes step by step. Therefore, the dramatic breach of the European Treaties required by the *Honeywell* test will never take place. It is just not how European integration works. Therefore, the review will remain useless. Landau remarks that the *Honeywell* test contains nothing more than *Solange II* and *Banana Market*, and he is absolutely right in this. The whole detour via the *Maastricht* and *Lisbon* decisions remains fruitless.

Conclusion

One of the most remarkable facts of this case is its age. The judgment of the Federal Labour Court dated from April 2006, the plaintiff had one month of time to address the Federal Constitutional Court, and it took that court five years to decide the case. When the complaint arrived in Karlsruhe, the 'period of reflection' after the failure of the constitutional treaty was still ongoing. When the *Lisbon* case arrived at the FCC, *Mangold* was already two years old. There may be many reasons for that, from the internal organization of the senate to the need to swiftly decide the *Lisbon* case. However, it is also clear that this timing indicates some internal suffering on the part of the Court of how to treat the process of the European Union. Ultimately, the Court's strategy remains puzzling. On the one hand, it is far from clear whether the process of European integration would have been heavily disturbed if the Court had vacated the judgment of the Labour Court and sent this case to Luxembourg. On the other hand, the epic *Lisbon* judgment is still an irritant to at least the German political process, e.g., with regard to the rescue package for bankrupt member states. The Second Senate seems to be more ready to rhetorically fight the European political process than to effectively review the European courts – to do it the other way round might have been the better strategy.

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