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Stop the European Court of Justice

Competences of Member States are being undermined. The increasingly questionable judgements from Luxemburg suggest a need for a judicial watchdog.

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Judicial decision-making in Europe is in deep trouble. The reason is to be found in the European Court of Justice (ECJ), whose justifications for depriving Member States of their very own fundamental competences and interfering heavily in their legal systems are becoming increasingly astonishing. In so doing, it has squandered away a large part of the trust it used to enjoy.

Hence, it is only logical that the German Federal Constitutional Court recently decided to intervene. Very soon it will have to render a judgement which will be of fundamental importance for the further development of European jurisdiction, since it concerns the question of whether the excessive legal practice of the ECJ should in future once again be subject to stricter controls by the German Federal Constitutional Court, or whether the Federal Constitutional Court should resign once and for all from its watchdog position.

What triggered this decisive case was a lawsuit staged by two lawyers. In the course of the labour market reforms established under the red-green coalition (Social Democrats with the Alliance 90 and the Green Party), at the end of 2002 the age limit at which employees are entitled to enter into temporary employment contracts without restrictions had been temporarily reduced from 58 to 52 years. The aim was to increase the chances for older unemployed people to find a job. The high level of protection against unwarranted dismissal in Germany combined with the concern of many employers that the performance of older people might weaken, meant that people over fifty often had no real opportunity for reintegration into the labour market.

In 2000, the European Union (EU) passed a non-discrimination directive which prohibited the unequal treatment of people in "employment and occupation" on account of age. Of course this EU directive also contains an explicit provision that Member States may discriminate against people due to age if such practice serves to foster employment. The manner in which this provision is realised is largely left to the Member States' decision.

However, two lawyers in Munich held the view that this reduction of the age limit constituted an infringement of the said EU directive, and so they brought the case to court in 2003. The ECJ judged as follows: The German labour market reform was in fact deemed incompatible with the EU's non-discrimination directive, since it could not be "proved" that the German reform provisions were "objectively required" for the stimulation of the employment of older employees. This so-called "Mangold Judgement" is disputable for various reasons.

Firstly, both labour market policy and social policy are still core competences of the Member States. However, this case clearly demonstrates to what extent EU regulation and EU jurisdiction nevertheless interfere in the governing of these core competences.

For even though the EC Treaty allows for a European regulation of non-discrimination, the question of why the EU regulates age discrimination on the labour market at all is raised in all its seriousness. According to the principle of subsidiarity, the EU may take action only if it really has a better solution to a problem than the Member States. According to law as it exists, a basic criterion for such a situation is that the problem must concern an issue of transboundary impact. However, unlike the question of nationality, age discrimination does not have any transboundary relevance and can therefore be easily dealt with by the Member States themselves. Yet, the Court ignored it blithely.

At least, the EU directive does declare unequal treatment on account of age as expressly admissible for the purpose of promoting employment in the Member States, but even this did not concern the ECJ. Notwithstanding, it overthrew the German employment promotion measure.

Secondly, EU directives do not apply to Member States directly, but first have to be transposed by the national legislative, which may resolve on the form and methods of the relevant measure independently. Germany had to transpose the aforementioned non-discrimination directive by 2. December 2006. Therefore, there was no obligation to transpose it. Moreover, the lowering of the age limit was due to expire anyway by 31. December 2006, in other words a few days after the expiry of the enforcement deadline. This was also ignored by the ECJ.

Thirdly, to justify its judgement the ECJ resorted to a somewhat adventurous construction. The ECJ believed it had found a ban on age discrimination within the "constitutional traditions common to the Member States" and "various international treaties". So it was not actually the non-discrimination directive (as yet to be enforced) which caused the German

reform provision to breach EU law, but a "general principle of community law".

However, this "general principle of community law" was a fabrication. In only two of the then 25 Member States – namely Finland and Portugal – is there any reference to a ban on age discrimination, and in not one international treaty is there any mention at all of there being such a ban, contrary to the terse allegation of the ECJ. Consequently, it is not difficult to see why the ECJ dispensed with any degree of specification or any proof of its allegation. To put it bluntly, with this construction which the ECJ more or less pulled out of a hat, they were acting not as part of the judicial power but as the legislature.

Fourthly, in its judgement the ECJ ordered the German reform provision to remain "not applied" with immediate effect. In fact, it was declared null and void. This also constitutes a highly questionable paradigm shift. The EC Treaty stipulates that Member States are not directly bound by EU directives. This means that it is not the EU directives but the national transposition laws that must first create rights and duties for citizens.

The ECJ used to respect this, too: if national law of a Member State was not compatible with an EU directive, the ECJ confined itself to pointing out the inconsistency. Although the Member State concerned then had to revise its law, the former version (incompatible with EU law) remained in effect until that was done. Hence, citizens could rely on the binding effect of their national laws. This has now changed: As a consequence of the ECJ judgement, all temporary employment contracts concluded during the German labour market reform were converted into regular employment contracts overnight – resulting in the subsequent material damage incurred by the affected companies.

With these four dubieties, the "Mangold Judgement" provoked almost unanimous and massive criticism among legal experts.

A change of scene: again in 2003, a company based near Hamburg entered into a temporary employment contract with a 53-year old employee under the German labour market reform. Shortly before his contract expired, the employee took legal action. He claimed that the reform was not compatible with EU law. The responsible labour court dismissed the case, as did the court of appeal. Thereupon, the complainant took his case to the German Federal Labour Court. Meanwhile, the Mangold Judgement had been passed. The German Federal Labour Court adopted the reasoning given therein and, despite the questionable nature of the judgement, denied the right to resubmit the judgement either to the ECJ in order to clarify it, or to the German Federal Constitutional Court, and further annulled the lower court judgements. Then the company filed a constitutional complaint against this decision. It asserted several infringements of the German Constitution.

The German Federal Constitutional Court has been dealing with this constitutional complaint for quite a while. This alone should be taken by the ECJ as a warning. For in 1986, the court virtually delegated the assessment of whether European acts are compatible with fundamental rights to the ECJ ("Solange II" Judgement"): It had assumed that on a European level the compliance of fundamental rights would be safeguarded through the ECJ to a similar extent as in Germany. It only wanted to intervene if the protection of fundamental rights was being weakened in general and not just in single cases. How important that explicit reservation is will be shown when the Federal Constitutional Court passes judgement on the "Mangold Judgement", which, in many respects, has created a fundamentally changed legal situation.

Irrespective of this, the "Mangold Judgement" also has to be viewed in light of the "Maastricht Judgement" by the German Federal Constitutional Court of 1993. There it is of vital importance that the institutions of the EU, including the ECJ, adhere to the limits of competences granted by the EC Treaty – namely, the EC Treaty version approved by the German national Parliament (Bundestag). Any action, and in particular any development of the law by judicial interpretation that exceeds such limits is not covered by the act of assent of the German Bundestag and therefore has to be deemed null and void in Germany.

In the present case the ECJ acted as legislator. With reference to alleged international treaties and constitutional traditions of the Member States, the ECJ invented EU law. Within the time limit for the transposition of an EU directive it ordered the inapplicability of an existing national regulation to citizens. It is obvious that there is an inadmissible extension of the EC Treaty, inherent in a "fulminating court order", so to speak.

The "Mangold Judgement" of the ECJ is only one of many judgements significantly interfering with competences of the Member States and thus provoked massive criticism by irritated experts. Here are only three recent examples:

First example: In 2006 the ECJ adopted a statutory tobacco ad ban in the EU that applies in

particular to local papers. The EU had banned tobacco ads in papers in the light of health care policy. However, since the EU does not have sufficient legislative competence in the field of health care, a way round it was thought out. According to the EU the Single Market would be impeded if there was no such EU-wide ban. For a national tobacco ad ban in one single Member State would lead to foreign newspapers containing tobacco ads not being allowed to be sold in that state. The Federal Republic of Germany, deeming that argument artificial, asserted an infringement of competences by the EU and sued. However, the ECJ dismissed the case, reasoning that different tobacco ad rules in the Member States actually impede the Single Market. The fact that local papers are hardly ever sold abroad and therefore an actual impediment does not exist was not considered by the ECJ. The vital German counter-argument that all tobacco ad bans hitherto existing in the Member States expressly excluded foreign newspapers and thus could not impede the free sale of foreign newspapers containing tobacco ads was simply "turned upside down". The fact that national ad bans contained such exemptions demonstrated that national legislators also considered the issue as being a real problem.

Second example: In 2005 and 2007, two judgements of the ECJ established an EU competence in the field of criminal law. With reference to what are in actual fact unmistakable provisions in the EC Treaty, almost all Member States had firmly stated that such a competence did not exist. However, the ECJ argued quite the opposite.

The ECJ's argumentation was as follows: "As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence. However, the last-mentioned finding does not prevent the Community legislature from taking measures which relate to the criminal law of the Member States which it considers necessary" in order to enforce EU law, here in the field of environmental policy, and to oblige the Member States "to introduce such penalties." So that is what the ECJ has to say on the relationship between the European Union and the still so-called "Masters of the Treaties".

Third example: In 2006 the ECJ granted the right of residence to a deported Tunisian, although the Euro-Mediterranean-Agreement between Tunisia and the EU Member States excludes this explicitly. Amongst other things, the Agreement provides that Tunisians in the EU and EU residents in Tunisia may not be treated unequally in terms of working conditions for employees. Warned by an earlier judgement of the ECJ, the EU Member States unmistakably defined in the Agreement that the right of residence for foreigners is exclusively within the Member States' competence and, in particular, that the non-discrimination principle may not apply to labour conditions in order to extend any residence permits. Thus discrimination suits should be excluded where labour permits would be played off against limited rights of residence.

However, the ECJ overturned the unambiguous wording of the agreement and argued the opposite: according to the ECJ, the non-discrimination principle of the agreement also applied to issues of the right of residence. The arrogance the ECJ demonstrated in the process culminates in the reasoning of the judgement: "It would be quite unacceptable for the Member States to deal with the principle of non-discrimination by using provisions of national law to limit its effectiveness." That option would "jeopardise the uniform application of that principle."

What would happen in Germany if, for instance, the Federal Labour Court imposed such regulations upon the legislator? Yet, at the European level, such incapacitation of the "Masters of the Treaties" appears to go unresisted!

The fact that this is not the only case where the ECJ turns the will of the legislator into the opposite is proved by the judgement on the EU Students Directive, which granted Belgian welfare aid to a French studying in Belgium, although the entire EU law expresses the non-existence of such claims, which is even excluded in the EU Students Directive itself: Pursuant to Article 1 of the Directive students may study abroad solely if they provide evidence of enough means of subsistence to secure that "he and his family have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence." The ECJ said: "On the other hand, there are no provisions in the directive that preclude those to whom it applies from receiving social security benefits."

And that is what the ECJ has to say on the value of legal wording.

In its Maastricht judgement the Federal Constitutional Court refers to an interpretation of EU law "guided by the *effet utile* principle, i.e. the broadest possible interpretation of Community powers". So far so good. But the latest settled case-law of the ECJ reinforces the im-

pression that the ECJ long since left such limitations behind them.

The cases described show that the ECJ deliberately and systematically ignores fundamental principles of the Western interpretation of law, that its decisions are based on sloppy argumentation, that it ignores the will of the legislator, or even turns it into its opposite, and invents legal principles serving as grounds for later judgements. They show that the ECJ undermines the competences of the Member States even in the core fields of national powers.

The conclusion one comes to is clear: The ECJ is not suitable as a subsidiarity controller in the last instance and a protector of the Member States' interests. This is not surprising, as first of all, according to Articles 1 and 5 of the EU Treaty, the ECJ is obliged to participate in the "process of creating an ever closer union". Secondly, an EU-biased jurisdiction of the ECJ leads to the situation that the areas where the ECJ may judge are also growing, thereby displacing Member States' courts, which means that the ECJ is constantly gaining influence. This general tendency is not modified by the occasional deliberately cautious ECJ judgements passed in order to serve as a sedative to the growing resentment of the Member States. Against this background and in light of the achieved integration level in the EU, it is absolutely vital that an ECJ independent court for competence issues be set up.

The ECJ was created with the aim of providing a arbitrator to mediate in the interests of the EU and those of the Member States. In assigning the ECJ with comprehensive rights of decision-making, the assumption was that they could be trusted to take on this responsibility in an unbiased way and in compliance with the rules of the judiciary. If the ECJ abuses this confidence, it need not be surprised when it breaks down.

Against this background, the question the Federal Constitutional Court now has to answer regarding the *Mangold* Judgement is crucial: if decided in favour of the litigants, the ECJ would be restrained. This would also mean that the ECJ Judgement would not be applied in Germany so that the precedence of EU law over national law would be overturned. But this would be acceptable. Not only because the non-discrimination directive is now in force and thus the non-applicability of the ECJ Judgement would not entail any significant impacts on the legal unity in the EU, but even more because a judgement which dismissed a constitutional complaint would make it much more difficult, probably impossible, for the Federal Constitutional Court to control the ECJ in the future.

It will be interesting to see what the German Federal Constitutional Court decides.

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