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EDITORIAL COMMENTS

The Court of Justice in the limelight – again

Criticism of the European Court of Justice, there is nothing new in that! Discussions on the techniques of interpretation, on sufficiently reasoned judgments, and on respect for national sovereignty of Member States have taken place continuously, in legal circles as well as political ones, right from the beginning of the Court's activity. Recently, however, the criticisms at high political and legal levels have been particularly vocal. In the present context of large-scale popular suspicion towards recent trends in the European Union – constitutionalism and enlargement – expressed in particular through the three negative referenda in France (29 May 2005), The Netherlands (1 June 2005) and Ireland (12 June 2008) on the Constitutional Treaty and its twin brother the Lisbon Treaty, certain critical observations should be looked at carefully. There may be a great deal of exaggeration and some very unbalanced opinions; however, the accumulation of criticism concerning poor reasoning, on the one hand, and extensive interpretation of competences beyond what seems to have been the intention of the Treaty, on the other, might be a sign that the European Court must remind itself that justice must also be felt to be just.

Former German President attacks the ECJ

In an interview published by *Süddeutsche Zeitung* on 31 December 2005[1] Wolfgang Schüssel, the then Chancellor of the Austrian Republic and at the time president of the Council of the European Union, declared that the role of the ECJ needed to be re-examined, as the Court had systematically extended European competences to include domains in which EC law did not apply. He mentioned a series of examples, among them the question of the access of foreign students to Austrian universities.[2] As reported in the French *Le Monde*, he found attentive ears in Germany and Denmark.[3]

On 8 September 2008, the former German President Roman Herzog – who has also held the position of President of the Federal Constitutional Court of

1. Frank and Cornelius, "300 Sprachen und 500 Dialekte – das ist mein Europa". Interview in *Süddeutsche Zeitung* 31 Dec. 2005: www.suedeutsche.de/ausland/artikel/256/67189/, quoted by D. Simon, "Retour du mythe du gouvernement de juges?", (Feb. 2006) *Revue Europe*, 1.

2. Case C-147/03, *Commission* v. *Austria*, [2005] ECR I-5969.

3. Ferenczi, "La Cour de justice est accusée d'outrepasser ses competences", *Le Monde*, 12 Jan. 2006, quoted by Simon, op. cit. *supra* note 1.

Germany, and who chaired the Convention drafting the European Union Charter of Fundamental Rights – together with Lüder Gerken, Director of the Freiburg Centre for European Policy, published an article in the *Frankfurter Allgemeine Zeitung* entitled "Stop the European Court of Justice". In this article, they argue that the competences of the Member States are being undermined and that increasingly questionable judgments from Luxembourg suggest a need for a judicial watchdog. They cite a number of examples, but most decisively the judgment of the ECJ in *Mangold*[4] – which is presently the object of a complaint to the German Federal Constitutional Court. The authors draw the following conclusion in their article: "The ECJ is not suitable as a subsidiarity controller and a protector of the Member States' interests. This is not surprising as, first of all, … 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 growing, thereby displacing Member States' courts, which means that the ECJ is constantly gaining in influence. This general tendency is not modified by the occasional deliberately cautious ECJ judgments passed in order to serve as a sedative to the growing resentment of the Member States".[5] They go on to say: "It is absolutely vital that an ECJ independent court for competence issues be set up. The ECJ was created with the aim of providing an arbitrator to mediate in the interests of the EU and those of the Member States.… The assumption was that [the Court] 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".[6] According to Herzog and Gerken, against this background, "the question the federal Constitutional court now has to answer regarding the *Mangold* Judgment is crucial: if decided in favour of the litigants, the ECJ would be restrained.… But a judgment 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".[7] The challenge is placed very high indeed.[8]

4. Case C-144/04, *Werner Mangold* v. *Rüdiger Helm*, [2005] ECR I-9981; see Editorial comments, "Horizontal Direct Effect – A law of diminishing coherence?", 43 CML Rev. (2006), 1; Tobler, Correspondence, in 44 CML Rev. (2007), 1177–1183.

5. Taken from the English version available at http://eurobserver.com/9/26714; also available from the Centrum für Europäische Politik, Freiburg.

6. Ibid.

7. Ibid.

8. Critical letters were sent to the editor by former judge Ulrich Everling, published in FAZ of 23 Sept. 2008, and by the former member of the Advisory Board of the Common Market Law Review Ernst Steindorff, published in FAZ of 30 Sept. 2008; there were many more, including Norbert Reich who said that it is interesting to observe that the former president of one of the most activist courts in Europe criticizes the ECJ for activism!

In the meantime, the German Minister of Justice, Mrs Zypries, has also joined President Herzog in his criticism of the Court of Justice. Though in more moderate terms, she expresses the same "concern that the ECJ reaches decisions that lead to an expansion of the Commission's [sic] competence"; in response to a question to her as to the need for more judicial self-restraint, she answers positively.[9] It is an interesting situation where, in the perspective of a forthcoming decision of the *Bundesverfassungsgericht*, a member of the government of a Member State aligns itself with rough criticism expressed by the former president of that court!

President Herzog's comments come at the same time as a growing frustration amongst Danish leaders regarding the ruling of the Court in the *Metock* case[10] which concerns Irish legislation covering the residence rights of non-EU citizens who are spouses of EU citizens. It is feared that the decision might have a knock-on effect on similar Danish legislation. In July, Ralf Pittelkow, an adviser to former Social Democratic Prime Minister Poum Nyrup Rasmussen, used language similar to that of President Herzog to describe the Court: "The judges are crafting a lot of policies because the politicians allow them the margin to do so", he wrote in the *Jyllands-Posten*, adding "Political decisions that ought to be the responsibility of elected representatives are left with the Court". In fact the *Metock* affair developed into strong criticism of the Court for what is seen by dominant sections of the media, politicians and also some academics in Denmark as an unnecessary, self-promoting appropriation by the Court of a competence never transmitted by the Member States to the EU. The sharpness of the reaction from Danish political and public opinion to the judgment of the Court is to be understood against the backdrop of the top priority linked to Denmark's ability to regulate immigration.

Is the Court really to be blamed?

The more sensible way of answering this question is to try to judge on the basis of evidence. If there is an obvious amount of exaggeration for political purposes, it is also true that some decisions of the Court may incur criticism for lack of convincing and clear motivation, and may create uneasiness when at the same time they relate to sensitive issues of competence. Among the many examples quoted by the learned authors who have criticized the Court so bluntly, we will deal with a handful of them which are illustrative of serious problems of interpretation in areas concerning competences.

9. This interview, which covers many other topics, was published in FAZ of 23 Sept. 2008; an angry letter against Mrs Zypries by the former Advocate General Carl-Otto Lenz was published in FAZ of 1 0ct. 2008.

10. Case C-127/08, *Metock and others*, judgment of 25 July 2008, nyr.

The first example given by Herzog and Gerken is the judgment of the Court of 12 December 2006 on the new Tobacco Advertising Directive.[11] It is recalled that in 2000, in its judgment on the first Tobacco Advertisement Directive, the European Court of Justice for the first time annulled a directive on the grounds that the Community exceeded its powers to approximate national laws as laid down in Article 95 EC.[12] In 2006 the Court, questioned again by Germany, dismissed all the pleas against the new Directive, in particular the allegedly incorrect choice of Article 95 EC as legal basis. Despite the fact that the new Directive, saved from annulment, contributes to a high level of protection of human health, this – according to shared opinion – "should not obscure the fact that the decision leaves serious doubts as regards the Community's competence in this field. This applies particularly with regards to the low standards the ECJ has set out for the establishment of the probability of the emergence of obstacles to trade".[13] The Court accepted the probability of obstacles to trade without any concrete evidence of trade-restrictive national action, existing or planned. Therefore it ran the risk "that Article 95 ultimately grants – contrary to the principle of conferred competences as laid down in Article 5(1) EC – the Community legislature a general power to regulate the internal market, a consequence the Court itself tried to avoid when formulating specific limits to harmonization in the first tobacco advertising judgment".[14] To sum up, the Court evolves in its interpretation of Article 95, departs from previous settled case law without taking the trouble to give a convincing explanation or to define criteria for the identification of barriers to trade as regards the tobacco advertising ban applicable in particular to local papers. Clearly, the Court may be criticized, first, for extending EC competences beyond what seems to have been the intention of the Treaty, and, second, for doing it on the basis of poor reasoning.

The same criticism of insufficiently substantiated reasoning is incurred by the Court in the second example, which concerns Community competence to require criminal sanctions in the area of environmental law.[15] In its judgment of 23 September 2005, which is another well-known story, the Court of Justice held that criminal enforcement of EC environmental law may fall under Com-

11. Case C-380/03, *Germany* v. *European Parliament and Council (Tobacco Advertising II)* [2006] ECR I-11573; Ludwigs, case note in 44 CML Rev. (2007), 1159–1176.

12. Case C-376/98, *Germany* v. *Parliament and Council (Tobacco Advertising I)*, [2000] ECR I-8419; Editorial Comments, "Taking (the limits of) competences seriously", 37 CML Rev. (2000), 1301; Usher, case note, 38 CML Rev. (2001), 1519

13. Ludwigs, op. cit. *supra* note 11, at 1176.

14. Ibid.

15. Case C-176/03, *Commission* v. *Council*, [2005] ECR I-7879; Tobler, case note, 43 CML Rev. (2006), 835–854; Herzog and Gerken also refer to Case C-440/05, *Commission* v. *Council*, [2007] ECR I-9097.

munity law (first pillar). The Court admits that nowhere in the Community Treaty is criminal law mentioned as a Community competence. This does not mean that the Community legislature cannot under certain circumstances "take measures which relate to the criminal law of the Member States" and, according to the Court, this includes the specification of the type of penalties. One commentator expressed general reservations which were widely held, observing that when speaking about Community's competence in the criminal field, the Court should have explained in a clear manner the extent of such competence in order to rule out doubts. In fact, the Court based its findings on the concept of effective, proportionate and dissuasive sanctions, and on that of full effectiveness of environmental law (*effet utile*) – for which the judgment does not propose any objective test. The fact that subsequently the Commission issued a Communication on the implications of the Court's judgment[16] in which it suggested that this judgment could have practical consequences going far beyond the specific area of environmental law certainly contributed to the strong reaction, mentioned above, against an approach that might be seen as "a new type of doctrine of implied powers".[17] It must be acknowledged that in the subsequent ship source pollution case of 23 October 2007,[18] the Court does indeed seem to have adopted a significantly more restrictive approach of the Community criminal competence, apparently taking into account the double criticism concerning extensive interpretation of competences and insufficient reasoning.

As for the *Mangold* judgment, which is at the heart of German criticism, it is difficult to disagree with those who expressed their dissatisfaction as to the reasoning given by the Court. One may recall that the Court, unable to accord horizontal effect to the Employment Equality Directive, which prohibited unequal treatment of people in "employment and occupation" on account of age, because the date of transposition had not elapsed, found an equivalent ban on age discrimination within the "constitutional traditions common to Member States" and "various international treaties". So it was not actually the non-discrimination directive (as yet to be enforced) which caused the German labour market reform provision to be in breach of EU law, but a newly discovered "general principle of Community law". Yet, following *Mangold* came *Palacios de la Villa*.[19] On a similar question of discrimination on grounds of age, Advocate General Mazàk critically revisited the Court's judgment in *Mangold* and did not regard as particularly compelling the conclusion drawn as to the

16. COM(2005)583 final.
17. Tobler, op. cit. *supra* note 15, at 852.
18. Case C-440/05, *Commission* v. *Council*, [2007] ECR I-9097.
19. Case C-411/05, *Félix Palacios de la Villa* v. *Cortefield Servicios SA*, [2007] ECR I-8531, case note by Waddington, 45 CML Rev. (2008) 895–905.

existence of a general principle of non-discrimination on grounds of age. The Court itself in its judgment in *Palacios de la Villa* hardly mentioned the *Mangold* case. The question whether the Spanish court could disapply the national law at issue, either because the Directive had direct effect or as a result of the general principle of EC law which prohibits age discrimination, was not addressed, since the Court found the measure in question to be compatible with the Directive. As one commentator observed: "reading the Court's judgment in *Palacios de la Villa*, one could easily be forgiven for assuming *Mangold* was simply a figment of the imagination"; and she adds "given the stream of cases coming before the court with regard to the age provisions of the Employment Equality directive, the Court will have plenty of other opportunities to revise *Mangold*".[20] A recent example of sound reasoning on the question of discrimination on grounds of age is the *Bartsch* ruling.[21] In *Bartsch*, there was an infringement by the Member State of the principle of equal treatment, but any application of *Mangold* was rejected on the ground that the legal effects of the principle were restricted to issues falling within the scope of the Treaty, and the situation in *Bartsch* did not fall within such scope

Herzog and Gerken mention another example of insufficient justification of extensive interpretation of EC competences in a sensitive area: a case in which, according to them, "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".[22] This example underlines the sensitivity of public opinion on questions of immigration, a matter which is also at the heart of the Danish reactions to the *Metock* affair. This last case, which raises difficult questions, was dealt with for reasons of urgency under the accelerated procedure of Article 23 bis of the Statute of the Court. The Minister of Justice, Equality and Law reform of Ireland refused to grant a right of residence to a third country national married to an EU citizen residing in Ireland, for the reason that the said third country national could not prove that before moving to Ireland he had been a lawful resident in another Member State and could thus take advantage of the Directive. What was in question was the interpretation of the Directive 2004/38 on Union Citizens' rights. The Court, referring to the effectiveness of free movement of EU citizens, ruled that the conditions imposed by Irish authorities were not compatible with EC

20. Waddington, op. cit. at 904–905.

21. Case C-427/06, *Bartsch*, judgment of 23 Sept. 2008, nyr.

22. Case C-97/05, *Mohamed Gatoussi*, [2006] ECR I-11917. In fact the Court did not grant a right of residence to Tunisian national; it ruled that the Member States could not limit the *effet utile* of the principle of non-discrimination of Art. 64(1) of the Association Agreement by domestic law provisions.

law. This judgment overrules *Akrich*[23] and *Jia*[24] which also have to do with prior lawful residence. The reasoning could be the subject of critical discussion, true enough, but it certainly does not warrant provoking an anti-court revolution. However this over-reaction underlines the sensibility of Member States as to the extent of transfer of their sovereign competences; most Member State consider that they have not transferred to the EU their most sovereign power, namely to decide which unlawful aliens to expel.

A hard task for the ECJ

These various examples, which tend to support a one-sided point of view, in fact cover criticisms of different kinds. The criticism concerning the unexpected discovery of a new general principle of Community law is legally seriously founded, but is already redressed in subsequent case law. Others mostly concern the use of a principle of effectiveness, without sufficient care for the definition of limitations and reference to objective tests, with the consequence that the principle of conferred powers appears to be shaken. In all cases, poor reasoning does not help to make the Court judgments acceptable in Member States, especially in areas of high political sensitivity: immigration is one of them, but equally criminal law or labour law. It does not mean that the Court is in any sense disqualified, but that it has to ensure even more than before a blameless reasoning, however difficult that exercise may be.

The context in which the Court takes decisions has evolved tremendously in comparison with the original situation.[25] The number of judges has increased as a result of the successive enlargements, making plenary sessions of judgment impossible. The cases are distributed between chambers of three or five judges or the Grand Chamber of thirteen. The Court of First Instance decides normally without the assistance of an Advocate General and, in the new accelerated procedure, even if the Advocate General is heard, he/she does not deliver a proper written Opinion. There is also the question of language; a growing number of judges find it difficult to adapt to a *délibéré* in French. All of these developments make it harder for the Court to produce convincing reasoning and coherent case law. Above all, the substance of EU law has become at the same time more technical and more political, including environment, health, criminal law, immigration, prevention of terrorism and many other topics, with a permanent risk of contradiction between concurring obli-

23. Case C-109/01, *Akrich*, [2002] ECR I-9607

24. Case C-1/05, *Jia*, judgment of the Grand Chamber, 9 Jan. 2007, nyr; case note by Elsmore and Starup, 44 CML Rev. (2007), 787–801.

25. See Rasmussen, "Present and future European judicial problems after enlargement and the post-2005 ideological revolt", 44 CML Rev. (2007), 1661–1687.

gations. It is clear that the recent initiative taken at EU level to react to the world financial crisis will push a step further the area of responsibility of EU institutions and may at some stage be reflected in the case law of the Court.

Facing challenges of that scale, the Court has on occasion proved that it was able to cope with its responsibilities, even in the absence of strict political guidelines, that it had the will and the tools to proceed to a convincing balance of interests. Of that positive attitude rooted in sound reasoning, we will give two examples: the *Viking*[26] and *Laval*[27] cases in which the Court duly balanced the respect of social rights, including the right to collective action and the right to strike, with the freedom to provide services and the freedom of establishment. The *Kadi*[28] case is another example where the Court, redressing a judgment of the Court of First Instance, gave a carefully reasoned basis for its view concerning the respect of EU fundamental rights in the EU legal order, including in situations of prevention of terrorism at world scale. Therefore, if properly argued criticism is sound, and often deserved, there is no reason to doubt the usefulness of the EU judiciary. We would be tempted to take over the observation of Robert Lecourt: what would EC law be without the Court? This remains true for EU law.

There is little doubt that the Court of Justice is in favour of integration. Given the historical development of the EC/EU, this has meant that on occasion the Court was loath to declare a situation outside the scope of the Treaty, or to annul legislation adopted as being *ultra vires*. Yet, if there is a widespread perception that the borders of EC/EU competence are not being respected, this can indirectly have a negative effect on a wider scale, bringing unnecessary justifications for lack of cooperation at government level, or popular rejection of treaties. The problem is how to achieve a fair and workable control of competence, also bearing in mind the extreme problems of achieving Treaty reform. In our view, the idea to set up another EU independent court for competence issues[29] creates more problems than it solves. For one thing, the question of conferred competences is so deeply rooted that such a court would attract the entire substance of EC/EU law. The question of composition of such a court would need to be analysed, to see whether a new court could be expected sys-

26. Case C-438/05, *Viking Line*, [2007] ECR I-10779.

27. Case C-341/05, *Laval*, [2007] ECR I-11767. However many trade unions and specialists of labour law do not see this judgment as positive, but damaging to fair labour relations.

28. Case C-402/05 P, *Kadi*, judgment of 3 Sept 2008, nyr. Though in *Kadi* the Court gave a carefully reasoned basis on the fundamental rights aspects of the case, the reasoning regarding the legal basis question is less convincing.

29. The idea of a specific jurisdiction for competence issues was also discussed already by Jacqué and Weiler in "On the road to European union – A new judicial architecture: An agenda for the intergovernmental conference", 27 CML Rev. (1990), 185–208.

tematically to deal with such issues better or differently from the current ECJ. Moreover, if it meant an added layer in the EC judicial system, the problem of delay in passing final judgment would be unacceptably exacerbated. At all events, constructive criticism of the ECJ continues to be needed. It is another question whether this should be in the form of strongly worded interviews in the press from politicians at the highest level.