

Judge-made 'Europe à la carte': Some Remarks on Recent Conflicts between European and German Constitutional Law Provoked by the Banana Litigation

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I.

The foreign reader will wonder what the banana litigation has to do with the constitutional law of the European Union (EU) and the Federal Republic of Germany (FRG). The story we want to tell concerns the defying by German courts of EC Regulation 404/93 of 13 February 1993 on the common organization of the market in bananas.¹ On this matter, the German Constitutional and administrative courts have voiced their open distrust not only of EC regulations, but also of the legal protection of fundamental rights offered by the ECJ to their citizens – namely German banana importers who lost considerable business after the enactment of the EC regulation of 1 July 1993.

II.

The grounds for the conflict were laid in two completely different and seemingly unrelated areas: German constitutional law, and EC intervention in the banana market. This latter point will be dealt with in section III.

1. German constitutional law, due to the high rate of activity of its Constitutional Court (BVerfG), has over the years developed a finely-knit network of fundamental rights granted not only to individuals but also to businesses. The foundations of the German Constitution – the *Grundgesetz* (GG) – are Articles 12, 14 and 19(4); the first protecting the freedom to pursue a trade or business, the second defending the

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¹ OJ L 47/1 of 25 February 1993.

right to property, and the third granting effective protection of fundamental rights before courts of law. There is of course agreement among German constitutional lawyers that these rights are not granted without limits, as is made clear by the GG itself, but any restriction must be made by a formal act of the legislature and must respect their substance according to Article 19(2). These rights are granted not only to individuals but also to legal entities, within the limits laid down by Article 19(3) GG.

The borderlines of these rights are of course subject to much debate and sometimes confusion, but German courts have in general been more generous in protecting business rights than have other jurisdictions in the EC. In this short note we cannot go into details of the intricate case-law of the BVerfG.

2. German courts, especially the BVerfG have viewed with some suspicion the increasing encroachment of EC law upon German business. Many German lawyers have regarded this process, especially with respect to agriculture as amounting to 'illegitimate' intervention, .

The conflict was first highlighted in the well-known *Solange I* decision of 29 May 1974 of the BVerfG,² where the Court criticized the EC Treaty for not having a codified catalogue of fundamental rights. It therefore insisted on retaining power to control not only German implementing legislation, but also EC secondary law itself with regard to the question of whether or not it violated fundamental principles of the German Constitution. This case concerned the freedom to pursue trade by a company which right was, however, not regarded as having been violated by the EC regulation under attack.

As is well known, this judgment provoked substantial opposition, especially among Community law scholars, and was partially overruled by the so-called *Solange II* decision of 22 October 1986.³ It recognized that the Community, especially the case-law of the European Court, had developed its own system of fundamental rights which were 'adequately guaranteed at the present stage'. It further held that '[S]o long as (in German: *solange...*) an effective protection is ensured...' (at 265), the defence of fundamental rights against European acts could be entrusted to the European Court. Jurisdiction of the German Constitutional Court would not be exercised and complaints against Community acts on grounds that they violated fundamental rights had to be reviewed by the ECJ and not by German courts.

3. This decision was welcomed by most constitutional and EC lawyers as a convergence between two seemingly different approaches to the protection of fundamental rights, especially of businesses. It was however overlooked by many observers that the BVerfG did not give up its jurisdiction entirely, but made it dependent upon an important condition – namely the principle of equivalence –

2 37 BVerfGE 271, English translation [1974] 2 CMLR 540 – *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*.

3 73 BVerfGE 339, [1987] 3 CMLR 225 – *re the application of Wünsche Handelsgesellschaft*.

which might eventually be controlled by the BVerfG in cases of doubt. It at no point fully embraced a theory of supremacy of Community law over German constitutional law, as had been developed by the European Court.⁴

Therefore, the *Maastricht* judgment of 12 October 1993⁵ insisted that the German Constitutional Court still had jurisdiction to challenge Community acts on the basis that they extended Union competence or violated the essence of fundamental rights. The BVerfG wrote:

The ... Court by its jurisdiction guarantees that an effective protection of basic rights for the inhabitants of Germany will also generally be maintained as against the sovereign powers of the Communities and will be accorded the same respect as the protection of basic rights required unconditionally by the Constitution, and in particular the Court provides a general safeguard of the essential content of the basic rights. The Court thus guarantees this essential content as against the sovereign powers of the Community as well... However, the Court exercises its jurisdiction on the applicability of secondary Community legislation in Germany in a 'relationship of co-operation' with the European Court, under which that Court guarantees protection of basic rights in any particular case for the whole area of the European Communities, and the Constitutional Court can therefore restrict itself to a general guarantee of the constitutional standards that cannot be dispensed with (at 79).⁶

It also allowed

review [of] legal instruments of European institutions and agencies to see whether they remain within the limits of the sovereign rights conferred on them or transgress them [...oder aus ihnen ausbrechen] (at 89).⁷

Apart from making various other qualifications in the *Maastricht* judgment, which were both severely criticized⁸ and also cautiously applauded⁹ in legal scholarship, the BVerfG made clear that it would serve as a 'long stop' to control Community law under principles of German constitutional law. It explicitly, and not only implicitly as in the *Solange II* decision, rejected the theory of precedence and supplemented it by its theory of 'co-operation'. The conflict arena which it set out in theory came into existence in the banana litigation.

4 For a discussion cf. S. Weatherill, P. Beaumont, *EC Law* (2nd ed., 1995) 367-82

5 89 BVerfGE 155, [1994] 1 CMLR 57 – *Manfred Brunner et al v. The European Union Treaty*.

6 See page 175 of the official version where the last phrase is worded somewhat more narrowly than in the English translation: '... das BVerfG (kann) sich deshalb auf eine generelle Gewährleistung des *unabdingbaren* (italics mine, NR) Grundrechtsstandards (BVerfG 73, 339, 387 = *Solange II*) beschränken'.

7 Page 188 of the German edition.

8 Herdegen, 'Maastricht and the German Constitutional Court: Constitutional Constraints for an "ever closer Union"', 31 *CML Rev.* (1994) 235-70; Zuleeg, 'Die Rolle der rechtsprechenden Gewalt in der europäischen Integration', *Juristenzeitung (JZ)* (1994) 1-7 (Zuleeg served as judge on the bench of the European Court); Weiler, 'Der Staat "über alles" – Demos, Telos und die Maastricht-Entscheidung des BVerfG', *Jahrbuch des öffentlichen Rechts* (forthcoming).

9 Streinz, 'Das Maastricht-Urteil des BVerfG', *EuZW* (1994) 329-35.

III.

1. EC Regulation 404/93 is certainly not the wisest piece of EC legislation, and it defies all theoretical discussion on 'deregulation' and 'competition between legal' orders.¹⁰ There is a long story of special-interest lobbying behind Regulation 404/93 which established an EC common organization of banana markets in favour of ACP growers closely attached to French, Spanish and Portuguese importers. This was to the detriment of 'third country', mostly US owned, growers established in Central America, from where German importers had enjoyed a regime of tariff-free imports.

The regulation, on the one hand, sets up a system of assistance to ACP-banana producers, and on the other hand establishes quotas and tariffs for third country bananas with a view to restricting their import or making them more costly to consumers. Preferential quotas were allocated to importers according to prior sales during a period of three years before the entering into force of the regulation, under Article 19(2). A special mechanism was provided to adapt quotas to 'exceptional circumstances' and to overcome difficulties 'of a sensitive nature', monitored by a Management Committee composed of EC and Member State representatives (Article 16 in connection with Article 30 of Regulation 404/93). The regulation did not contain explicit transitory provisions to allow importers to adapt their business to the new market organization.

There is no doubt that the regulation hit German importers particularly hard. They were de facto banned or severely restricted from importing third country bananas at the preferential tariffs which had made them particularly popular with German consumers. Prior to this point there had been little or no restrictions on such imports.

2. Both the German importers and the German Government on their behalf lodged complaints against the EC banana regulation with a view to obtaining interim relief under Article 185/186, and to declaring void the regulation according to Article 173 of the EC Treaty. The European Court regarded the complaints of the importers as inadmissible. In its view, the importers lacked standing to sue because they were not directly and individually concerned by the regulation¹¹ – a regrettably narrow interpretation of the *locus standi* requirement under EC law.¹² It would only allow recourse under Article 215(2) of the EC Treaty to recover damages in case of illegality of Community action.¹³

Insofar as the German Government acted as *parens patriae* for the German importers, the complaint was admissible, but interim relief was not granted by order

10 Cf. my own reflections in Reich, "Competition between Legal Orders" – a New Paradigm in EC Law?, 29 *CML Rev.* (1992) 861-96.

11 ECJ, *EuZW* (1993) 487.

12 For a thorough discussion cf. Arnulf, 'Private Applicants and the Action for Annulment under Article 173 of the EC Treaty', 32 *CML Rev.* (1995) 7-49, at 20.

13 ECJ *EuZW* (1993) 486.

of 29 June 1993.¹⁴ In its carefully worded judgment of 5 October 1994,¹⁵ the Court finally dismissed the German complaint, especially insofar as it charged the EC regulation with having infringed upon fundamental rights granted by EC law, or upon provisions of GATT insofar as they were binding upon the Community. It referred to earlier case-law which had decided that Community law must not violate fundamental rights, and that the ECJ has jurisdiction to review the constitutionality of Community acts with regard to defending EC citizens' rights of non-discrimination, property and freedom to pursue a trade or business.¹⁶ However it could not find such a violation because objectives of 'general interest' were pursued by the regulation, and the act did not constitute 'a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed' (No. 78). Importers could not claim a right 'to property in a market share' (No. 79). An eventual infringement of GATT provisions would not void acts of the Community because these were not sufficiently precise (No. 109).¹⁷ The Court did not look at the absence of transitory arrangements to help German importers adapt to changing market situations, but the German Government had not really raised this point.

IV.

1. If the litigation had ended with the Court judgment of 5 October 1994, this would have been regarded by doctrine as a recognition of fundamental rights theory in EC law and perhaps would only have provoked a debate on whether the European Court takes rights theory seriously or uses it just for the sake of rhetoric.¹⁸ The German importers, however, continued their litigation by turning to the German courts. They were surprisingly successful here, despite the clear wording of the *banana* judgment of the European Court. Their main argument was, on the one hand, that European law violated their right to protection of private property because it did not provide for a transitory regime to make adaptation possible without risk of bankruptcy to the new market organization for bananas, especially for those importers who had done little business with third countries in the three years prior to the regulation coming into force. On the other hand, they insisted on the priority of GATT obligations over Community regulations under Article 234 and charged the EC institutions, including the ECJ, with 'transgressing' jurisdiction in not considering the

14 ECJ *EuZW* (1993) 483.

15 Case C-280/93, *Germany v. Council*, [1994] ECR I-4973.

16 An overview is given by Reich, 'The European Economic Constitution – A Charter for Citizens?', *VIAEL* (1995, forthcoming).

17 Confirmed by judgment of 9 November 1995, Case C-466/93, *Atlanta-Fruchthandelsgesellschaft v. Bundesamt für Ernährung*, *nyr – Atlanta II*.

18 Cf. the controversy between Weiler and Lockhart, "'Taking Rights Seriously'" Seriously: The European Court and its Fundamental Rights Jurisprudence', 32 *CML Rev.* (1995) 51-94, 529-627, criticizing Coppel and O'Neill, 'The ECJ – Taking Rights Seriously?', 29 *CML Rev.* (1992) 669-95.

obligations of the German Government under GATT;¹⁹ therefore, Regulation 404/93 should not be applicable in Germany because it should be regarded as 'ausbrechender Rechtsakt'.

2. The importers first turned to German administrative courts to grant them in interim proceedings supplementary licences above the quota allocated under Regulation 404/93 and later implementing regulations. At first they lost, but were more successful with a constitutional complaint before a panel composed of three judges of the 2nd chamber of the BVerfG, which had handed down the *Maastricht* judgment.²⁰ The Court, in its order of 25 January 1995, insisted that German courts must protect the property rights of an importer if the latter risks going bankrupt because of an EC regulation. Without referring the case to the European Court under Article 177(3) of the EC Treaty, it found EC Regulation 404/93 to be 'open' enough to allow for a transitory regime, and instructed the administrative court of appeal to grant effective legal protection to the applicant under Article 19(4) GG. Interestingly enough, it did not cite its own *Maastricht* judgment, but the wording of the order made it clear that it viewed its 'judicial co-operation' theory as conferring jurisdiction to German and not to European courts – quite contrary to what it had said twenty years before in its *Solange I* judgment where it mentioned the eventual need to refer interpretations of EC law to the European Court.

3. The Hessian administrative court of appeal, in a carefully balanced judgment of 9 February 1995,²¹ referred the case to the ECJ under Article 177. It used its powers to grant interim relief under the *Zuckerfabrik Süderdithmarschen* doctrine²² whereby a court of a Member State may suspend the execution of a measure based on a Community act if it has serious doubts as to its legality, if it balances the applicants' interest with the Community interest in uniformity of law enforcement, and if it refers the case to the European Court which has exclusive jurisdiction to decide on the legality of the Community act.²³ The court applied the *Zuckerfabrik* ruling also to applications asking for an interim grant of licences by a state agency,²⁴ and therefore obliged the competent German agency to grant additional yet limited import licences to the plaintiff. At the same time the importer was obliged to have his quota reduced in case the European Court should uphold the legality of the regulation insofar as its absence of transitory provisions was concerned.

19 This line of argument was developed in more detail by a German Government official, Kuschel, 'Die EG-Bananenmarktordnung vor deutschen Gerichten', *EuZW* (1995) 689-700 who also refers to the 'subsidiarity' principle even though the EC enjoys exclusive jurisdiction in the areas covered by Regulation 404/93!

20 BVerfG, *NJW* (1995) 950; comment Reich, *Entscheidungen zum Wirtschaftsrecht (EWiR)* (1995) 471.

21 *EuZW* (1995) 222; comment Reich, *EWiR* (1995) 473.

22 Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen v. Hauptzollamt Itzehoe*, [1991] ECR I-415, at 541 No. 19.

23 Case 314/419, *Foto-Frost v. Hauptzollamt Lübeck*, [1985] ECR 4199, at 4232 Nos. 15/16.

24 This is now confirmed by the ECJ judgment of 9 November 1995, Case C-465/93, *Atlanta Fruchthandelsgesellschaft v. Bundesamt für Ernährung und Forstwirtschaft, nyr – Atlanta I*,

The Hessian court was certainly in a dilemma because it was caught between the principle of precedence voiced by the European Court in its *Foto-Frost* and *Zuckerfabrik Süderdithmarschen* judgments, and the insistence of the German Constitutional Court on fundamental rights protection under the GG made possible by having found *lacunae* in Regulation 404/93 which could be used to protect the right to property of the importer.

V.

1. Unfortunately this somewhat complex story is not yet finished. The importer who had had partial success in administrative proceedings used still another legal pathway to make imports at preferential tariffs possible. First they called again upon the Constitutional Court to grant them a preferential quota. The Court rejected this claim by insisting that the importer ask first relief from German (and not European) courts.²⁵

2. This time the Financial Court of Hamburg (FinG Hamburg, a special but separate branch of administrative courts competent in proceedings on taxes, tariffs and the like) was seized with taking action. The importer had shipped bananas to Germany without having a licence to import at preferential tariffs and refused to pay the regular tariffs. They demanded these licences from the competent administrative authority which could only refuse them. However, the FinG Hamburg overturned this refusal. In its order of 19 May 1995²⁶ it uses the second line of argument mentioned above, which had already been brought forward but rejected in former proceedings before the European Court, and refers the case back to it again. It voices serious doubts about the conformity of Regulation 404/93 with GATT. Since the German Government is bound by GATT and the Community must respect this obligation according to Article 234 EC Treaty, the FinG wants to know from the European Court whether the prohibitions on imports of third country bananas can really have effect in Germany, or whether GATT provisions enjoy priority over secondary Community law, notwithstanding their direct effect in favour of importers. The FinG supports its own theory by referring to two (!) authors of legal doctrine. It knows very well that its order is an overt challenge to ECJ case-law where the question posed by the FinG had already been answered in the negative.²⁷

At the end of its order, the FinG reserves to itself the right to ask for constitutional review before the BVerfG against an eventual judgment of the European Court as expected under the reference proceedings. The FinG refers to the

adding the important qualification that national courts must pay due respect to judgments of the ECJ and CFI.

25 BVerfG, *EuZW* (1995) 412.

26 *EuZW* (1995) 413. Confirmed by order of the *Bundesfinanzhof* of 9 January 1996, not yet published.

27 Cases 21-24/72, *International Fruit Co v. Produktshap voor Groenten en Fruit*, [1972] ECR 1219, at 1228 (No. 27), repeated by the *banana* judgment. Case C-280/93, Nos. 108-11.

competence of German courts to review Community acts exceeding its jurisdiction (*'ausbrechende Rechtsakte'*). It writes:

According to its case-law, the BVerfG has power to overturn transgressing Community acts [*ausbrechende Gemeinschaftsrechtsakte*]. This jurisdiction to declare void [Community acts by German jurisdictions]²⁸ cannot be put into doubt with the argument that this would violate the uniformity of Community law. '*Ultra vires*' secondary Community law cannot claim uniform validity [*Denn kompetenzwidriges sekundäres Gemeinschaftsrecht kann keine einheitliche Geltung beanspruchen*].

VI.

'Ausbrechende Rechtsakte' – a new phrase in constitutional and legal theory, created by the BVerfG and practically applied by the FinG which can hardly be translated into English without eliminating the note of defiance which it strikes. This challenge to jurisdiction is not, as in the past, directed against Member States who do not fulfill their obligations under Article 5 of the EC Treaty, but against measures of the Community; it is not voiced by a European but by a national court.

Rarely in the history of Community law after the Single Act has a higher court of law defied so overtly the precedence and uniformity of Community law as well as the exclusive competence of the European Court to review it. The confidence which the European Court, in its *Zuckerfabrik Süderdithmarschen* judgment, displayed in national courts, whereby the latter may suspend the application of Community law in limited circumstances despite its supremacy, will be frustrated in cases of open refusal by national courts to follow earlier precedents of the European Court, and of abuse of the Article 177 procedure to ask preliminary questions which have already been answered.

The order of the FinG Hamburg is a direct consequence of the *Maastricht* judgment of the BVerfG which created the term *'ausbrechende Rechtsakte'*. The Hamburg judgment, if other jurisdictions follow suit, could encourage Member States to proclaim supremacy of their specific theories on fundamental rights and on the relationship between international and European law over Community action. The idea of fundamental rights' protection risks being transformed into a tool for the protection of the property rights of special groups, whose interests take priority over the 'objectives of general interest pursued by the Community', as the Court has so clearly said in its *banana* judgment. The control of Community jurisdiction by the ECJ under its general mandate of Article 164, namely to guarantee the observance of 'the law', would be seriously impaired if national courts could install a parallel jurisdiction controlling the legality of Community acts under fundamental rights

28 Author's addendum.

theory or international law according to Article 234.²⁹ The banana litigation may, if the Hamburg order finds recognition, than indeed lead to a Europe of 'banana republics à la carte', each viciously defending their own fundamental rights theory and competences, and rejecting the idea of 'an ever closer union among the peoples of Europe...', as proclaimed in Article A of the Union Treaty.

To paraphrase Goethe in his well-known poem *Der Zauberlehrling*: 'Die ich rief, die Geister, werd' ich nun nicht los!'

It remains to be seen whether the BVerfG, which still has to hear another constitutional complaint lodged against the banana regulation, can put the genie it created back into the bottle where it belongs. It may be that the ECJ has already done so by insisting, in its *Atlanta I* judgment, that national courts may suspend Community acts and grant 'interim relief only when 'respecting' the judgments of the ECJ or the CFI on the legality of Community acts.

VII. (addendum)

After having written these lines, the author received the full text of the order of the *Bundesfinanzhof* of 9 January 1996 (1996 *Europäisches Wirtschafts- und Steuerrecht (EWS)*, 49). The order concerned an appeal brought by the Hamburg customs authorities against the *Finanzgericht Hamburg*. The latter had allowed interim relief against a decision of the customs authorities which demanded securities (*Sicherheitsleistung*) from German third country banana importers if they wanted to receive a waiver to pay customs duties. The *Bundesfinanzhof* rejected the appeal because there were serious doubts as to the legality of the banana regulation upon which the decision of customs authorities was based. It insisted on the priority of German international law obligations under GATT according to Article 234 of the EC Treaty which could not be set aside by EC regulations. This question, in the opinion of the *Bundesfinanzhof*, had not yet been decided by the European Court. Even if it were to be decided against the German theory of priority of international law obligations over EC law, this could be regarded as an *ausbrechender Rechtsakt* according to the Maastricht judgment of the *Bundesverfassungsgericht* of 12 October 1993. Article 234 allows Member States the defence (*Einrede*) that EC institutions had violated international law obligations and that these acts were therefore not binding, a question which had eventually to be determined by Member State courts of law, not by the European Court. If the opinion of the *Bundesfinanzhof* were followed, Article 234 would be a way out of Member State obligations under Article 5. This conflict, in my opinion, eventually has to be decided by the European, not the German courts.

29 For a recent discussion see Petersmann, 'Proposals for a New Constitution for the European Union - Building Blocks for a Constitutional Theory and Constitutional Law of the EU', 32 *CML Rev.* (1995) 1123-75.