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The CJEU – German Constitutional Court Debate and Impact on Achmea and the Termination Agreement

Nikos Lavranos (NL-Investmentconsulting) · Thursday, May 21st, 2020

On 5 May 2020, which tellingly was the day before the last day in office of the President of the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) Voßkuhle, the Bundesverfassungsgericht rendered its judgment on the constitutionality of the participation of the German Central Bank (Bundesbank) and the German Government in the European Central Bank (ECB)'s programme for the purchase of government bonds.

The judgment follows upon preliminary ruling questions in which the BVerfG essentially asked the Court of Justice of the EU (CJEU) whether the ECB violated the EU Treaties by exceeding its mandate and powers through the buying up of government bonds at the magnitude of more than € 2 trillion.

In *Weiss and Others* the CJEU simply concluded that there were no indications that the ECB went beyond its mandate. Indeed, the CJEU emphasized several times that the ECB enjoys a broad discretion when it implements its monetary policy.

In contrast, the BVerfG ruled – in summary – that the CJEU acted *ultra vires* because it failed to actually review the ECB's decisions, thereby giving the ECB a complete card blanche, which the BVerfG considered to be in violation of the principle of conferral and democratic control.

This is not the first time that the BVerfG asserted its power to review acts of EU institutions, as I will explain below. However, this judgment is particularly interesting because it involves the ECB, the CJEU and the German Bundesbank – all institutions, which consider themselves to be completely independent from any (political and/or judicial) interference and whose decisions cannot – in principle – be reviewed and overturned by the BVerfG.

The *Solange* approach of the BVerfG vis-à-vis the CJEU

To cut a long story short, the *Solange* (German for "as long as") approach of the BVerfG dates back to 1974 when it first was confronted with the question what domestic courts should do if they are confronted with perceived conflict between EU legislation and German fundamental rights.

The BVerfG held in the so-called *Solange I* decision that it did not deem the level of fundamental rights protection at the EU level to be sufficient, in particular, because no EU catalogue of

fundamental rights comparable to those in the German Constitution existed at the EU level at that time. Consequently, since fundamental rights had not been explicitly recognized in the jurisprudence of the CJEU at that time, the BVerfG considered itself unable to relinquish its jurisdiction regarding fundamental rights protection in lieu of exclusive CJEU jurisdiction.

The CJEU subsequently picked up on the BVerfG's signal and began to develop jurisprudence on fundamental rights protection. In recognition of that development, the BVerfG conceded parts of its jurisdiction under certain conditions when it issued its second *Solange II* judgment in 1986.

In its *Solange II* judgment, the BVerfG held that as long as the case law of the CJEU offered effective protection of fundamental rights against the acts of public organs (i.e., EU organs), which is comparable to the minimum level of guarantees by the German Constitution, the BVerfG will not exercise its jurisdiction in reviewing EU law measures. In other words, the BVerfG determined that the CJEU's interpretation of EU law was authoritative and final, thereby binding all German courts –including the BVerfG itself.

But in 1992, the Maastricht Treaty came onto the European stage and introduced new tensions on the CJEU – BVerfG relationship. Among other things, the Maastricht Treaty contained many novel and far-reaching components such as the creation of the European Monetary Union (EMU) and the Euro, which affected the competences of the Member States.

In its *Solange III* judgment, the BVerfG made clear that the future development of the EU remains under conditional approval of the BVerfG while allowing the ratification of the Maastricht Treaty by Germany. More specifically, the BVerfG reasserted its "reserve jurisdiction" by stating that in case of an *ultra vires* EU act ("ausbrechender Gemeinschaftsakt") the BVerfG would exercise its jurisdiction to review EU acts, thereby setting aside the supremacy of EU law and consequently, the final authority of the CJEU.

In short, the *Solange* approach enables the BVerfG to limit its jurisdiction in favor of the jurisdiction of the CJEU on a flexible basis – depending on whether EU institutions and their acts comply with the principle of conferral of powers and the core values of the German Constitution. This was also confirmed again in its judgment regarding the constitutionality of the Lisbon Treaty in 2009.

Seen in this perspective, the most recent judgment of the BVerfG regarding the ECB and the CJEU is not surprising or novel but rather logical since it follows the *Solange* approach it had developed in the past.

The EU Derives its Powers From the Member States

The origin of the tension between the BVerfG and the CJEU is the difference in opinion as to the basis on which the EU and its organs derive their powers.

Whereas in its seminal *Van Gend & Loos* and *Costa ENEL* judgments, the CJEU established that the EU Treaties are *sui generis* treaties that entail – quasi naturally – the supremacy of EU law over all domestic law – including constitutional law – of the Member States, the BVerfG has always been of the view that the powers of the EU and all its organs derive their powers from the constitutions of the Member States. More precisely, their powers are limited to the extent that these

constitutions allow for the specific transfer of powers to the EU (principle of conferral of powers).

According to the BVerfG, the German Constitution provides only for a limited transfer of specific powers, which respects the core constitutional principles such as the principle of democracy and adequate judicial review over decisions of EU organs. As far as the German Constitution is concerned, the BVerfG considers itself to be – naturally – the final authority. In that sense and as explained above, the BVerfG never accepted the principle of supremacy of EU law in its totality but rather only a relative one, that is, as long as.

Achmea Judgment and Termination Agreement Before the BVerfG

Could the above be relevant in the context of the *Achmea* judgment of the CJEU and the termination agreement regarding the intra-EU BITs, which was signed by 23 Member States on 5 May this year?

As is well-known, in *Achmea* the CJEU ruled that the investor-State dispute settlement provision in the Netherlands-Slovakia BIT is incompatible with EU law. Subsequently, the large majority of Member States adopted political Declarations in which they announced their intention to terminate all their ca. 190 intra-EU BITs by 6 December 2019, which was followed by the recent signature of the termination agreement, discussed previously on the blog.

According to that agreement, not only will most intra-EU BITs be terminated but also the effect of the sunset clauses is retroactively removed. This means that no ISDS claims could be initiated any longer by investors who have invested before the termination of the respective BITs and thus assumed that they could rely on both the respective BIT's and the sunset clauses therein in order to protect their investments.

In this context, it should be noted that Achmea, following the German Federal Civil Court's confirmation of the CJEU's *Achmea* decision, has filed a constitutional complaint before the BVerfG.

In addition, *Achmea* had applied to the BVerfG for an injunction decision that would prevent the German Government from signing the termination agreement in order to preserve its rights resulting from the arbitration award, which awarded Achmea more than €22 million plus interest rates in compensation. However, the BVerfG rejected that request because it concluded that it was premature when it was filed. Nonetheless, this decision does not prejudge the outcome of the main proceedings.

In any event, the BVerfG is now in a position to review the CJEU's *Achmea* judgment and the German Federal Civil Court's confirmation thereof along the same lines as it did regarding the CJEU's judgment concerning the ECB.

Thus, the BVerfG could conclude that CJEU went beyond its powers and thus acted *ultra vires* when it ruled that the investor-State dispute settlement provision of the Netherlands-Slovakia BIT is incompatible with EU law, which effectively annulled the *Achmea* award of the arbitral tribunal that was established on the basis of the BIT that was – and still is – fully valid under public international (treaty) law. Consequently, the BVerfG could conclude that the CJEU violated the rights of Achmea stemming from the BIT and the German Constitution, in particular since the seat

of the arbitration was Frankfurt a.M., Germany.

In addition, the BVerfG could also come to the conclusion that – as a consequence of an *ultra vires* act that formed the basis of the termination agreement – the consent of the German Government to sign the termination agreement constituted a violation of the German Constitution.

Hence, the BVerfG could decide that the CJEU's *Achmea* judgment cannot have a legal effect in Germany and thus could reinstate the arbitration award.

The Push Back by the EU Institutions

On a more general level, the judgment of the BVerfG should be considered as a reminder to the EU institutions that their powers derive from the Member States and thus need to be based on their consent and support. The EU is not a federal state yet – something that is often forgotten in the bubbles in Brussels and Luxembourg.

However, the reactions of the EU institutions show that they are deaf to this warning. In an unusual move and in reaction to the judgment of the BVerfG, the CJEU issued a press release, essentially stating that its judgements are binding on all courts of the Member States and that EU law is the only 'supreme law of the land'.

In addition, the European Commission has stated that it considers the option of initiating infringement proceedings against Germany because of the judgement of the BVerfG.

In other words, the EU institutions continue ignoring the fact that a significant minority of the EU population is critical towards the EU and that in the past the Maastricht Treaty and the European Constitution were rejected in several Member States.

Indeed, many EU citizens are increasingly becoming aware of the negative impact which the ECB's low interest policy and massive bonds purchasing programmes have on their savings and pensions, which will be further amplified by the new corona bonds programme.

Seen in this perspective, it would seem more appropriate for the EU institutions to change their attitude in order to avoid a further backlash against the EU in the long term.

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