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The German Federal Constitutional Court and European Judicial Politics

ARTHUR DYEVE

With its decision on the ratification of the Lisbon Treaty, the German Federal Constitutional Court (FCC) has handed over another landmark ruling on European integration. The ruling made Germany's ratification of the Treaty conditional upon the passage of a new law giving the Bundestag greater oversight of European affairs. This and the consequences of stronger parliamentary oversight for the German government and the way it conducts negotiations at European level have been the focus of most early comments on the decision. No less important, however, are the ruling's potential repercussions on European judicial politics. Coming after a series of highly controversial judgments by the European Court of Justice, the FCC's Lisbon decision is clearly meant as a warning to Brussels and, above all, Luxembourg. The decision could undermine the Court of Justice's authority and encourage non-compliance on the part of national courts, thus bringing about a constitutional crisis at European level. Alternatively, the decision may compel the Court of Justice to reconsider some of the most controversial aspects of its activist jurisprudence and to exert more restraint in the foreseeable future.

Many expected the judgment of the German Federal Constitutional Court (FCC) on the ratification of the Lisbon Treaty¹ to be a landmark decision. On that score, at least, the mammoth 150-page ruling did not disappoint. From the nature of the European Union and the sovereignty of its member states to the role of national courts and parliaments in keeping European institutions in check, the decision addresses a wide range of issues and provides enough material for legal scholars and others to gloss over for years. The fact that the Karlsruhe Court made an English translation available on the very day it issued its decision² also suggests that it was well aware of its likely impact beyond German borders.

The Court did not declare the Lisbon Treaty contrary to the German Constitution, as some applicants had requested. Still, it held that Germany could not ratify the Treaty until the passage of a new law giving the German

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parliament more say in the direction of European affairs. Some hoped, and others feared, that the ruling would force Germany to adopt the Danish model, where national MPs vote on pending European bills and ministers go to Brussels with their hands tied (see Blichner 2000: 144; Auel and Rittberger 2006: 136; Sousa 2008). In the event, while carefully complying with the requirements spelled out by the Court, the bill rushed through parliament and signed into law at the end of the summer did leave the executive a good deal of flexibility.³ So much for the verdict on the merits and the issue of parliamentary oversight. However, the decision was obviously meant to convey a broader message. And, in fact, the ruling will most likely be remembered more for what it says about national sovereignty and the limits of European integration than for effectively delaying Germany's ratification of the Lisbon Treaty. The Court's dense, carefully penned opinion invokes a state-centric conception of democracy to lay out, with a measure of details, a list of competences whose surrender to Brussels is deemed constitutionally unacceptable unless ratified by a national referendum. Democracy is also appealed to in several *dicta* pertaining to the interpretation of various Treaty provisions – *dicta* that read as just as many warnings addressed to the EU and its activist institutions.⁴ Taking a rather defiant tone, the FCC makes it clear that it is ready to fight a turf war if Brussels and Luxembourg dare venture beyond the mandate given by the new Treaty. The fact that the *Lisbon* decision comes after the European Court of Justice (ECJ) issued a string of rulings that have proved highly controversial in Germany and beyond suggests that the FCC is serious about the threat. Because non-compliance at national level puts both the effectiveness of EU law and the ECJ's authority at risk, the FCC's warning may prompt the ECJ to reconsider the most activist aspects of its recent jurisprudence. If so, it would move the relationship between the ECJ and national courts to a new equilibrium, restricting the scope for supranational judicial policy-making.

A New Chapter in a Long Story: European Integration before the FCC

Judges and judicial institutions have played a central role in European integration. Without the ECJ's doctrines of supremacy and direct effect and without national courts willing to enforce the doctrines against recalcitrant state officials, the chances are that the EU would not enjoy the level of integration it does at the beginning of the twenty-first century. The judicial construction of Europe (Stone Sweet 2004) was made possible by a negotiation process between the ECJ and national judges. The negotiation ultimately led all national courts to accept the doctrines of direct effect and supremacy, thus securing the effectiveness of European laws and policies at the domestic level (Weiler 1991: 2425–6, 1994: 518–21; Alter 2001; Mancini 1989).

EU scholars often describe this negotiation process as a 'judicial dialogue' (see e.g. Dehousse 1998: 66; Lukaszewicz and Oberdorff 2004), a

characterisation which may suggest that legal integration proceeded without tensions or resistance through courteous exchanges among urbane lawyers. The suggestion, however, is wrong. Indeed, while accommodating the doctrines of supremacy and direct effect, national courts – supreme and constitutional courts in particular – have resisted the more federal implications of the ECJ's jurisprudence (Weiler 1994: 518; de Witte 1999; Craig and De Burca 2007: 344–78). Far from behaving like surrogates of the tribunal from the Duchy of Luxembourg, some have displayed more than a measure of readiness to confront the ECJ. The Italian Constitutional Court and the French *Conseil d'Etat*, for example, have repeatedly defied the ECJ's authority (Cartabia 1998; Alter 2001).

Of all national players, the FCC has undoubtedly been the most assertive and influential in the European judicial game. Over five decades, from the late 1960s onwards, it has issued several landmark rulings challenging the absolute supremacy of EU law; questioning the protection of fundamental rights at EU level; and asserting the authority of national courts to keep EU institutions in check (Kokott 1998). The Court's general attitude towards European integration has waxed and waned. Some rulings struck an overtly rebellious tone. As in 1974, when the Court held that, as long as the European Communities lacked a bill of rights comparable to that of the German Constitution, litigants could challenge European laws before the FCC.⁵ Known as '*Solange I*' ('as long as' in German), the decision is credited for spurring the ECJ to develop a human rights jurisprudence (Stone Sweet 2004: 88–91).

Twelve years later, appreciating the ECJ's efforts to remedy the absence of a European bill of rights, the FCC ruled that it would no longer review European laws and decisions at least as long as the level of fundamental rights protection afforded by the European Communities remained equivalent to that guaranteed by the German Constitution (hence the judgment is referred to as '*Solange II*').⁶ At the time, many believed the Court had finally come to terms with European integration and would henceforth prove fully cooperative with Brussels and Luxemburg (Alter 2001: 96). This was in the heyday of Euro-optimism. Member state governments and the Delors Commission were busy working towards the establishment of the single market. And the same year the Court issued its conciliatory ruling saw the adoption of the Single European Act. However, Judge Paul Kirchhof was waiting in the wing. And the Court's enthusiasm for the cause of integration soon cooled off.

The FCC's 1993 ruling on the ratification of the Maastricht Treaty was full of threats and warnings, some veiled, others explicit, directed at the European legislative bodies and at the ECJ in particular.⁷ According to the Court, given the limited scope for democratisation at EU level, the German *Bundestag* had to retain a substantial number of competences. For the same reason, the competence to decide upon the allocation of competences – the competence-competence (*Kompetenz-Kompetenz*)⁸ – had to remain a

prerogative of the German state and could not be transferred to the EU. The same line of reasoning led the Court to declare that EU acts not covered by the German act of ratification would be denied validity within Germany. Openly defying the ECJ, which had reserved for itself the power to set aside European legislation,⁹ the FCC went on to assert its authority to invalidate European laws found to lack a legal basis in the European Treaties. On top of this assertion of authority, the Court warned Brussels and Luxemburg that, in the future, the boundary line between the revision and the interpretation of Treaty provisions should be drawn up more clearly: a ‘Treaty interpretation should not amount to a Treaty revision’.¹⁰ Many had seen the hand of the conservative and Eurosceptic Paul Kirchhof, who had acted as *rapporteur* for the case, behind the ruling. Hence, when the FCC issued a more conciliatory decision in 2000,¹¹ several commentators put it down to the departure of Kirchhof, who had left the Court a couple of months before (Alter 2001: 115). Refusing to review an EU regulation on the market for bananas, the Court did not explicitly overrule its *Maastricht* judgment. However, its decision implied that the Court was willing to take the edge off *Maastricht*’s more antagonistic *dicta* to make peace with the ECJ.

Barring the Route to the Federalisation of Europe

Against this backdrop, a look at the FCC’s *Lisbon* decision suggests that the Court is reverting to the attitude of defiance that characterised its *Maastricht* ruling. The Court deploys the same constitutional doctrines and rests its reasoning on the same conceptions of sovereignty and democracy elaborated on in *Maastricht*. Parallel to *Maastricht*, the Court’s dense argumentation is ultimately premised on the view that the room for democratic legitimisation at EU level is limited:

Even though, as a consequence of successful European integration, there is evidence of an emerging European public sphere with citizens engaging transnational issues and debates from within the political forums of their state . . . , there is no gainsaying that factual issues and political leaders are still understood through the lens of patterns of identification that are rooted in the language, history and culture of the nation-state.¹²

This conception of democracy is used first to deny German authorities the power to surrender German sovereignty to the EU:

The Basic Law does not allow German authorities to transfer sovereign powers the European Union to such an extent that the European Union would then be in position to expand its competences autonomously. The Basic Law prohibits the transfer of the competence-competence [*Kompetenz-Kompetenz*].¹³

The Court makes further use of its democracy argument to mark out five policy areas where German authorities are barred from transferring competences to Brussels:

The principle of democracy, just as the principle of subsidiarity ... commands that determinate, predictable limits be placed on the exercise and transfer of sovereign powers to the European Union, particularly in those key political areas where policies delimit the sphere of personal development and structure the environment in which social life takes place. In these areas, it is especially important to draw limits as to where the coordination and harmonisation of policies with cross-border dimension is objectively required. Among the decisions that have always been regarded as essential for the ability of a constitutional state to govern itself democratically are: policy choices regarding the content and procedure of criminal law (1), policing and the state's monopoly of military coercion both domestically and against external threats (2), basic decisions over taxation and public expenditures, especially when expenditures pursue social ends (3), the provision of welfare (4) and cultural issues of primary importance such as, for instance, family law, the school system and the place of religious communities (5).¹⁴

The Court continues this exercise in line-drawing in subsequent paragraphs, where the five policy areas are given sharper contours, although it is careful not to say too much, to keep a measure of flexibility for future cases.¹⁵

One would be inclined to play down the significance of judicially created limits to European integration if they could be overcome through the ordinary constitution-amending process. But Article 79(3) of the German Constitution elevates enshrined democracy to the status of immutable constitutional principle. So, by deriving limits to integration from the principle of democracy, the FCC creates a hurdle that even a two-fifths majority in the Bundestag – the normal requirement for a constitutional amendment in Germany – cannot override. The Court stresses that the only way to overcome constitutional limitations grounded in Article 79(3) is through a referendum establishing a new constitution.¹⁶ Thanks to the pro-European outlook of the German political elite and mainstream parties, gathering enough parliamentary support for the passage of a constitutional amendment is a relatively straightforward affair. But winning over a majority of the German public to the cause of further and deeper integration is an altogether different thing. Elites across Europe tend to be more favourably disposed towards European integration than ordinary citizens. Yet nowhere is the gap between elites and the rest of the population as wide as in Germany (Hix 2005: 165–6). Thus, in the medium, if not the longer term, an important consequence of the FCC's *Lisbon* ruling is to block, as far as Germany is concerned, any evolution towards a European federal state.¹⁷

Mounting Tensions with the ECJ

The FCC delivered its *Lisbon* decision in the context of a raging debate over the limits of EU policy-making and the division of powers between the EU and its member states. The debate had been re-ignited by a string of controversial ECJ rulings. In Germany, in particular, sharp criticism had been levelled at the Court of Justice ruling in the *Mangold* case, going back to 2002. The coalition of Greens and Social Democrats then in power had lowered the age limit at which employees and employers are allowed to enter into temporary contracts from 58 to 52. Aimed at bolstering the employment opportunities of older workers, the new law gave employers a measure of flexibility in an otherwise rigid labour market. Thus a 53-year-old worker could have her fixed-term contract renewed an indefinite number of times without ever being offered a permanent position. In the meantime, the EU had adopted a directive prohibiting discrimination among workers on account of age. But there were two reasons to think that the antidiscrimination directive¹⁸ and the German legislation were fully compatible. For one thing, Article 6(1) of the directive provided that ‘differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy’. For another, member states had until December 2003 to transpose the directive and could claim an additional three-year extension.¹⁹ As Germany made use of the extension, the deadline for transposition was put off to 2 December 2006. Hence, when, in November 2005, the ECJ was about to announce its ruling on the case brought by the 56-year-old Werner Mangold, it was expected that the Luxemburg Court would stop short of finding the German legislation in breach of EU law. Not only did the scheme seem to fit the exception carved out by the directive. But the directive transposition period had not expired.

All the same, the ECJ held that the German employment scheme constituted unacceptable age discrimination.²⁰ Brushing aside the objection that a directive whose transposition period had not expired could not possibly bind a member state, the Court of Justice took the view that the principle of non-discrimination on grounds of age enunciated by the directive was a general principle of community law. The principle was supposed to have its source ‘in various international instruments and in constitutional traditions common to the Member States’.²¹ Which international instruments and constitutional traditions it had in mind the ECJ did not bother to say. As the ruling meant that all fixed-term agreements concluded under the legislation struck down had to be instantly converted into regular employment contracts, the Court’s rather offhand justification attracted considerable criticism from both legal scholars and German policy circles (Gerken *et al.* 2009).

The polemic did not stop there. Just about as controversial as *Mangold* was the ECJ’s ruling on the tobacco advertising directive.²² The directive

banned advertisement for tobacco products on radio, over the internet, and in print media. Since the EU did not have any competence in the area of health care, the directive was re-packaged as a single market measure harmonising national legislation on advertisement. But Germany challenged the directive's legality on the grounds that it applied to products, local newspapers in particular, that hardly ever cross national borders. All the same, the ECJ, apparently unmoved by the argument, readily dismissed Germany's legal action.

The ECJ's willingness to endorse, or at least to turn a blind eye to, the self-aggrandisement tendency of European institutions was also perceived to be at work in two rulings that granted the EU the authority to legislate over criminal law matters.²³ The letter of the Treaty establishing the European Community, as amended by the Nice Treaty did not seem to provide any basis whatsoever for such an assertion. Nonetheless, the ECJ went on to affirm that this did not 'prevent the Community legislature from taking measures which relate to the criminal law of the Member States' and oblige them 'to introduce such penalties' as deemed 'necessary' for the enforcement of EU law.²⁴

Those judgments came on top of other rulings where the ECJ had seemed to take some liberty with received canons of legal interpretation. EU students had been given the right to apply, under certain conditions, for benefits in their host country despite clear language to the contrary in the relevant directive.²⁵ And a Tunisian national facing deportation had been granted a right of residence under the Euro-Mediterranean Agreement, although a provision of the Agreement explicitly ruled out such a possibility.²⁶

But the ECJ's most controversial jurisprudential move of late is doubtless the radical interpretation of the freedoms of establishment and service delivery it articulated in its *Viking*, *Laval*, *Rüffert* and *Luxembourg* decisions (Reich 2008; Scharpf 2009: 191–2; Adrián Arnáiz 2008). In *Viking*,²⁷ a Finnish shipping company had tried to reflag its loss-making ferry as an Estonian vessel to escape the terms of a Finnish wage bargaining agreement. This, of course, did not please Finnish sailors. And, as could have been expected, a Finnish seamen union threatened the company with a strike. The Court of Justice framed the case as a conflict between the company's freedom of establishment and the seamen's right to strike. At the risk of being accused of promoting social dumping, the Court considered the strike a violation of the company's freedom of establishment.

In *Laval*,²⁸ the ECJ appeared equally prepared to subject labour relations to the same strict regime of negative integration and mutual recognition it has applied to the free movement of goods ever since the 1970s (see Stone Sweet 2004: ch. 3). A Swedish trade union had tried to stop a Latvian company which had refused to pay its employees the minimum wage set by collective bargaining agreements from building a school on Swedish soil.

One would have thought that the country of origin principle had been thrown out following the demise of the Bolkenstein Directive, leaving national governments free to impose their labour standards (see Höpner and Schäfer 2007: 14). The Court of Justice nonetheless ruled the union's industrial action a violation of the Latvian company's right to deliver its services across the member states.

In *Rüffert*,²⁹ the Court struck down a law of the *Land* of Lower Saxony which required businesses working for public administrations to pay the local collective bargaining wages. *Luxembourg*³⁰ had similarly libertarian overtones. The legislature of Luxembourg had transposed the posted worker directive in a statute that required companies operating within the Duchy to apply local employment conditions, including the automatic adjustment of salaries to changes in the cost of living. Yet, construing the directive as setting maximum rather than minimum standards, the Court decided that the statute asked too much of foreign businesses and unduly restricted their freedom to provide services.

This activism has been fuelling a growing discontent with the ECJ. In September 2008, Roman Herzog, both former federal President and former FCC President, published a piece in the *Frankfurter Allgemeine Zeitung* bearing the title 'Stop the ECJ'.³¹ He accused the Luxemburg judges of grabbing ever greater competences at the expense of the member states. Pointing to the ECJ's *Mangold* ruling as exemplifying the Court's increasing tendency to behave like a super-legislature, he urged the FCC to stop the ECJ's activism by invalidating its *Mangold* decision. Not only in Germany but throughout Europe, the ECJ's radicalisation of the freedom of establishment and free movement of services has caused consternation on the left as well as in union circles (Dehousse 2008; Blanpain and Swiatkowski 2009; Erdmenger *et al.* 2009; Höpner 2009; Mayer 2009; Schulz 2009). To many, the Court's case law is an all-out attack on the institutions of the welfare state. Pitting the old member states against the new, it runs the risk of triggering a race to the bottom that could eventually undermine the social model of the more economically advanced member states. Even one of Germany's foremost political scientists, Fritz Scharpf, who can hardly be suspected of anti-EU sympathies, has questioned the ECJ's legitimacy to displace long-standing national policies by judicial fiat (Scharpf 2009).³²

It can hardly be a coincidence that most of the ECJ rulings that had been the subject of intense criticism before the FCC's *Lisbon* decision related to matters of welfare policy, labour relations, criminal law, and education – the very policy areas the FCC now vows to defend against European encroachments. How to interpret this if not as a warning addressed to the ECJ? The FCC took issue explicitly with the power-grabbing tendency of EU institutions. Those institutions, the decision says, 'follow a path at the end of which they will hold power over the Treaty foundations of their own competences, that is to say over the competence of their competence'.³³

This peril calls for the FCC to act as watchdog of the division of powers between the EU and its member states:

The principle of conferral [i.e. principle that the EU has only those powers explicitly enumerated in the Treaties] and the principle that it is primarily for the Member States to determine the course and pace of integration would be exposed to the risk of transgression if the institutions of the European Union could decide without any restriction, i.e. without any external control – as moderate and exceptional as this control might be – how the Treaties are to be interpreted.³⁴

In other words, the FCC claims for itself the ultimate power to decide whether the EU has acted within the limits of its competences – a claim clearly at variance with the ECJ's jurisprudence.

The FCC's Eurosceptic Turn and the Equilibrium Point of European Judicial Politics

The law authorising the ratification of the Lisbon Treaty was brought before the FCC by four complaints from an assorted group of Eurosceptic individuals and political factions. Among the claimants were MPs from the Left Party, Peter Gauweiler – an EU-basher from the Christian Social Union – and a group led by Franz Ludwig von Stauffenberg – the son of Hitler's failed assassin Claus Schenk Graf von Stauffenberg.³⁵

When hearings took place in February 2009, there were already some signs that the FCC was going to harden its line on European integration.³⁶ First, the leader of the conservative wing of the FCC's second Senate, judge Udo di Fabio, had been designated as rapporteur. Not exactly known for his reverence of the EU, di Fabio will probably be remembered as the instigator of the FCC's *Lisbon* decision just as Paul Kirchhof has been for *Maastricht*.³⁷ Second, there were good reasons to think that the FCC would seize the occasion to defend its turf against the ECJ. The Lisbon Treaty further extends the EU's remit and, thereby, the ECJ's jurisdiction. As more powers are transferred to Brussels and Luxemburg, the FCC's control and influence over many policy areas is bound to decline. So the judges might have thought that it was time to send a clear warning sign to EU officials and institutions that the Lisbon Treaty does not give them *carte blanche* to pursue any kind of activist policy.³⁸

Even though the FCC did not find the Lisbon Treaty unconstitutional, the ruling is viewed as a victory by politicians and scholars of a more Eurosceptic persuasion (Grosser 2009). The fact that the Court ordered the federal treasury to reimburse the complainants a significant share of the costs incurred for the proceedings (up to one-half for Mr. Gauweiler) can only comfort them in this belief. This fact and the warnings addressed to the

ECJ could encourage more litigants to challenge EU laws and policies before the FCC. Whether more lawsuits will effectively translate into the FCC annulling directives or ECJ rulings remains to be seen, however. A constitutional complaint – still pending before the FCC at the time of writing – against a judgment of the Federal Labour Court that made application of the ECJ's *Mangold* jurisprudence may well provide a good test of the FCC's resolve.³⁹

One way of thinking about the relationship between the FCC and the ECJ is as a hawk–dove game. Both courts want to preserve and, if possible, to expand their jurisdiction. That is why each court is loath to yield to the other. On the other hand, they know that, by refusing to yield, they may endanger their own institutional authority. If both courts play hawk, the result may be mutual destruction.

The ECJ would have a lot to lose from an all-out turf war with the FCC. Unlike the federal government in the United States, the EU does not have a judiciary of its own complete with district and appeals courts. Hence the enforcement of EU law and the application of ECJ decisions depend, ultimately, on the cooperation of national courts. To be sure, some judges in domestic courts, those sitting on lower courts in particular, have an interest in cooperating with the ECJ (Alter 2001: 49). And this partly explains why they were willing to accept the doctrines of supremacy and direct effect in the first place (Weiler 1991: 2425, 1994: 523). But this does not mean that domestic judges are ready to accept everything the ECJ may possibly want to impose upon them. Nor does it mean that they will always side with the supranational body in case of a clash with a national constitutional court. A single case of overt non-compliance by a national court might be enough to damage the ECJ's authority and undermine the effectiveness of its rulings. And this is all the more likely if the court defying its jurisprudence is of the FCC's calibre. The FCC's judgments are highly regarded and have proved influential throughout Europe. In old and new member states, many constitutional courts have looked to the *Solange* precedent for inspiration in spelling out the limits of EU law supremacy in their own legal system (Sadurski 2006). Empirical studies have shown that the ECJ does care about compliance (Kilroy 1999; Carruba *et al.* 2008). The evidence suggests that the Luxembourg Court avoids ruling against national policies when it has reasons to believe that doing so would result in a public backlash and the risk of non-compliance outweighs the gain from what would otherwise be its preferred outcome.

The FCC, too, is aware that putting its threat to execution could trigger adverse public reaction. As for the ECJ, the existing empirical evidence shows that the German Court behaves strategically on the basis of what it believes will be the response of other political actors to its rulings (Vanberg 2005). Now, the Court knows that setting aside an EU act in defiance of the doctrine of EU law supremacy is by no means an inconsequential move. In any case, it would face strong criticism, both from within and from outside Germany. But the worst scenario would be if politicians and the media were

able to cast the Court's attitude as detrimental to Germany's interests and leadership in the EU. In such a situation, MPs and the government may feel safe enough to ignore or to punish the Court by passing legislation to roll back its jurisdiction. Actually, some observers have speculated that the judges who reviewed the Lisbon Treaty really wanted to strike down the Treaty but refrained from doing so because of the government's likely reaction. Angela Merkel and her Grand Coalition had worked hard to re-launch integration and to bring other member states back to the negotiation table after the rejection of the Constitutional Treaty by Dutch and French voters. Had the FCC killed the Lisbon Treaty it would have been a huge setback for the *Kanzlerin*, the government and the main parties. The stakes were so high that it was reasonable to assume they would not give up without a fight. In fact, even though the Court eventually chose to allow the German government to proceed with the ratification, its *Lisbon* decision has proved highly controversial. It has been widely criticised in the mainstream media and in legal journals, both in Germany and abroad (see Grosser 2009; Halberstam and Möllers 2009; Bogdandy 2010).⁴⁰ Moreover, in September 2009, a group of academic lawyers and legal practitioners presented a petition calling for a modification of the statute on the Federal Constitutional Court to oblige the Karlsruhe judges to send a reference for a preliminary ruling to Luxemburg in all proceedings involving EU law.⁴¹

There is no stable equilibrium in a hawk-dove game (Hargreaves and Varoufakis 2004: 214), but one player may try to induce the other to acquiesce to her demands by hinting that she is ready to risk a fight, even at a high cost for her. This, in reality, may be mere bluff. But it may work if the threat seems credible. Even in repeated interactions, it will work as long as the player's behaviour does not betray that she is bluffing. Similarly, even if the FCC's threat to disapply *ultra vires* EU legislation is just bluff, it may look credible enough to prompt the ECJ to exercise more restraint in reviewing national policies for their compatibility with EU law, especially in the five areas delineated by the FCC in its *Lisbon* decision. The FCC may actually never have to set aside an EU act or an ECJ judgment if the ECJ believes that the risk of non-compliance is real. If, in the coming months or years, we see the Court of Justice retreating from its expansive interpretation of the freedoms of establishment and service delivery or taking a more restrictive view on the EU's powers over criminal law matters, this will be a strong indication that the ECJ takes the FCC seriously. It will also be a strong indication that the relationship between the ECJ and FCC has moved to an equilibrium less favourable to the ECJ.

Conclusion: National Courts and the Balance of Powers in the European Union

The controversy sparked by the ECJ's recent case law and the questions it raises about the legitimacy of judicial policy-making cast light on the

peculiar makeup of the balance of power in the EU. At the supranational level, the horizontal balance of powers works to the ECJ's advantage. To override an ECJ ruling interpreting a Treaty provision, it takes no less than a unanimous agreement and ratification by all 27 Member States. So, in principle, the Court only needs to ensure that its ruling is aligned with the preferences of one member state to thwart any override amendment. As one scholar puts it 'the threat of treaty revision is essentially the 'nuclear option' – exceedingly effective, but difficult to use – and is therefore a relatively ineffective and non-credible means of Member State control' (Pollack 1997: 118–19). Passing secondary legislation is easier than amending the Treaties, but still a tall order. Even under the qualified-majority rule, the EU legislative process has many veto players. Reversing an ECJ decision interpreting a directive or a regulation requires no less than a Commission proposal, the agreement of the Council and, at least under the co-decision procedure, that of the European Parliament. Thus, to the extent that it enjoys the support of the Commission, the Parliament, or a blocking minority in the Council, the Court may safely ignore the threat of override legislation. This, some scholars have argued, favours the Court's activism (Tsebelis and Garrett 2001). At the national level, however, the situation is quite different. Even when EU institutions are unable to reverse policies enacted by the ECJ, a member state government may still be able to block the enforcement and implementation of those policies at national level if it has the support of its own judiciary. National courts are in a better position to exert pressure on the ECJ than EU institutions, which means that it is easier to defeat the Court's policies by refusing compliance at the implementation stage than by pushing for the adoption of override legislation at EU level.

This discrepancy between the horizontal and vertical dimensions of the division of powers in the EU is especially important in light of enlargement and its impact on the ECJ. With the enlargement to the east, the ECJ – just as the EU itself – has become a large and heterogeneous body. Eleven out of the Court's 27 judges now hail from member states where GDP per capita is less than 80 per cent the EU average.⁴² And one may reasonably believe that a Polish or Latvian judge will be less likely to object to the idea of wage competition between poor and rich member states than a French or German one. Of course, due to the secrecy of its internal decision-making process, it is virtually impossible to document the jurisprudence of each separate member of the ECJ. But even so there are some reasons to think that enlargement may have pushed the Court towards economic liberalism in some areas. While *Viking* and *Laval* were decisions of the Court's grand chamber in which judges from poorer member states were clearly in the minority, *Rüffert* and *Luxembourg* were both issued by a five-judge chamber in which judges from poorer member states sat as a majority. *Rüffert* had judges Jerzy Makarczyk (Poland), Pranas Kuris (Lithuania) and Camelia Toader (Romania) facing Jean-Claude Bonichot (France) and Christian

Timmermans (Netherlands). *Luxembourg* saw judges Anthony Borg Barthet (Malta), Marko Ilesic (Slovenia), and Egils Levits (Latvia) sitting along Peter Jann (Austria) and Antonio Tizzano (Italy). One might dismiss this as anecdotal evidence. But the fact remains that, as the ECJ's jurisprudence becomes more polarising, the member states that fear for their social model or their protective labour laws could choose to refuse compliance rather than seek renegotiation at EU level as the more effective way to respond to ECJ rulings they regard as unacceptable. As noted by Scharpf (2009: 200), this could expose the EU to a constitutional crisis of potentially destructive character.

Notes

1. Second Senate of the Federal Constitutional Court, Decision of 30 June 2009, text of the ruling available on the Court's website http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html
2. See http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html
3. Tighter parliamentary oversight, in general, means less bargaining power for the executive in conducting negotiations with other member state governments. Aware that parliamentary meddling may have the effect of weakening Germany's overall influence in EU policy-making, the FCC did not require that German MPs retain a veto on every single vote or action of the executive (see Kiiver 2009). In the summer parliamentary debate, however, some German politicians, most notably from the Christian Democratic CSU, propounded a variant of the Danish model under which the Bundestag would have held a veto in every policy area. A proposal that would have gone beyond the FCC's pronouncements, see 'Halteseile, keine Handschellen', *Rheinischer Merkur*, 16 July 2009; and 'Lissabon-Urteil: Ein Arbeitsreicher Sommer in Berlin', *Frankfurter Allgemeine Zeitung*, 1 July 2009.
4. See the analysis of Martin Höpner in 'Spitzen gegen Brüssel', *Frankfurter Rundschau*, 2 July 2009.
5. Decision of 29 May 1974, 37 BVerfGE 271.
6. Decision of 22 October 1986, 73 BVerfGE 339.
7. Decision of 12 October 1993, 89 BVerfGE 155.
8. The concept of 'competence-competence' (*Kompetenz-Kompetenz*) refers to the supreme power of a polity or legislative body to define autonomously the limits of its law-making authority. Used by the FCC and German legal scholars to operationalise sovereignty, it goes back to the work of German jurist Paul Laband (1901: 64–7 and 85–8).
9. *Firma Foto-Frost v. Hauptzollamt Lübeck-Ost*, Case 341/85, [1987] ECR 4199.
10. 89 BVerfGE 155 [210].
11. Decision of 7 June 2000, 102 BVerfGE 147.
12. Para. 251 (translation is mine).
13. Para. 233 (translation is mine).
14. Para. 252 (translation is mine).
15. Para. 253–60.
16. Para. 263.
17. On this see the interview of Paul Kirchof in *Frankfurter Allgemeine Zeitung*, online edition, 30 June 2009.
18. Directive 2000/78/EC of 27 November 2000.
19. Article 18 of the directive.
20. Decision of 22 November 2005, Case C-144/04, *Werner Mangold v. Rüdiger Helm*.
21. Para. 74.

22. Decision of 12 December 2006, Case C-380/03, *Germany v. Parliament and Council*.
23. Judgment of 13 September 2005, Case C-176/03, *Commission v. Council*; and Judgment of 23 October 2007, Case C-440/05, *Commission v. Council*.
24. Case C-176/03, at 47–8.
25. Judgment of 20 September 2001, Case C-184/99 *Grzelczyk v. Centre public d'aide sociale* [2001] ECR I-6193.
26. Judgment of 14 December 2006, Case C-97/05, *Gattoussi v. Stadt Rüsselsheim*.
27. Judgment of 11 December 2007, Case C-438/05, *International Transport Worker's Federation and Finnish Seamen's Union v. Viking Line ABP*.
28. Decision of 18 December 2007, C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet*. Here again the ECJ seemed to make light of received canons of textual construction. Indeed, Article 2 of the Posted Worker Directive (96/71 EC) explicitly provided that member states had to guarantee dispatched workers the terms and conditions of employment laid down by laws and collective agreements in the member state where they carry out their work.
29. Decision of 3 April 2008, Case C-346/06, *Dirk Rüfert v. Land Niedersachsen*.
30. Decision of 19 June 2008, Case C-319/06, *Commission v. Luxembourg*.
31. 'Stoppt den EuGh', *Frankfurter Allgemeine Zeitung*, 8 September 2008.
32. See also his interview to the German weekly *Die Mitbestimmung*, 7 August 2008.
33. Para. 238.
34. *Ibid.*
35. Those groups were represented before the Court by academic lawyers from the more Eurosceptic side of the German legal community, namely, Karl Albrecht Schachtschneider, Andreas Fisahn, and Dieter Murswiek. Meanwhile, the noted Europhiles Christian Tomuschat, Franz Mayer, and Ingolf Pernice argued the case on behalf of, respectively, the Bundestag and the federal government.
36. 'German Court to Hear Case against EU Treaty', *Financial Times*, online edition, 10 February 2009.
37. See the article 'Udo di Fabio: Ein Verfassungsrichter ringt ums europäische Ganze', *Frankfurter Allgemeine Zeitung*, 30 June 2009.
38. In an interview to the *Frankfurter Allgemeine Zeitung*, the FCC's President, Hans-Jürgen Paper, had characterised the tendency of the ECJ to rely on 'general principle of community law' to strike down national policies as 'not unproblematic', *Frankfurter Allgemeine Zeitung*, 27 July 2007. Some scholars dispute the view that the FCC's *Lisbon* decision was meant to send a warning to the ECJ (see Ziller 2009).
39. Constitutional complaint 2 BvR 2661/06.
40. See also the former ECJ's advocate-general Otto Lenz, *Frankfurter Allgemeine Zeitung*, 20 July 2009; and Swiss law Professor Roland Bieber, *Süddeutsche Zeitung*, 8 August 2009.
41. See the petition on the webpage of the Walter Halstein Institute: <http://www.whi-berlin.de/documents/whi-material0109.pdf>. Among the petition's signatories were the legal representatives of the government and the Bundestag before the FCC (Profs. Mayer, Pernice and Tomuschat) as well as other prominent academics such as Prof. Armin von Bogdandy, director of the prestigious Max Planck Institute for International Law.
42. Figures from Eurostat: <http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home>

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