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The Force awakens - The Schrems case from a German perspective

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> *„It has also been confirmed that Solange Episode III is set about 30 years after the events of Solange Episode II, and will star a trio of new young leads along with some very familiar faces. No further details on casting or plot are available at this time.“*

(Press release)

Sometimes, a story and its happy ending have become so successful over time that it becomes almost impossible to imagine that one day this story may turn out to be far from over. The legendary Star Wars movie series is such a story that rather unexpectedly will have a sequel, Episode VII, in 2015.

Didn't we also think that the issue of fundamental rights protection in the European legal order was more or less settled, with EU fundamental rights offering protection even against the UN Security Council? And then came Snowden and we realized that the dark side of the force is still around.

The German constitutional order's approach to fundamental rights protection in the context of European integration likewise appeared as a story told and settled. More than 20 years ago, the narrative of the German Constitutional Court's ruling in *Solange Episode II (1986)* was enshrined in Article 23 of the German constitution: as long as (*solange*) the EU provides for a level of protection of basic rights essentially comparable to that guaranteed by the German constitution, there will be a happy ending.

But there have been rumours for some time that in Germany *Solange Episode III* was in the making, with a release date 30 years later, around 2016. Apparently, pre-production has already begun, although not much is known about the plot or the cast.

The ECJ's *Schrems* decision will bring some turmoil to the *Solange Episode III* production in Germany. Here are some elements of what the German production team may consider noteworthy:

- The overall topic and its setting will probably reassure those Germans who believe that there is room and maybe even need for *Solange Episode III*. The Safe harbour mechanism (see the description in recital 85) proves once more that life writes stories that, were they invented, would be considered too far-fetched to be realistic. The idea to consider fundamental rights protection as sufficient if the potential perpetrator simply states "It's ok" appears so absurd – legal-intellectual slapstick so to speak – that, arguably, the fundamental rights credibility of the entire EU legal order is tarnished. Fundamental rights are serious. This is not about comedy. If a legal order – here the EU legal order – comes up with such an absurd mechanism as the "safe harbour" mechanism, it is easy to argue that fundamental rights protection in the EU is only a shallow tale and cannot be trusted. This is why it is important that the ECJ proves the contrary in the Schrems case, appearing once more as a modern fundamental rights court.

- Recital 48: International trade is important, but fundamental rights are even more important – this is what the ECJ basically says here. That may play a role in another major project currently underway, the TTIP and CETA saga, which has the potential to become another modern classic in terms of constitutional court and/or ECJ decisions. Details are still sketchy,

but script writers are busy on both court levels, EU and national, and there are competing plot versions; some involve a strong ECJ imposing limits on international trade, but there may also be a national constitutional court version of the story. There is also a possibility of a joint production "national/EU". Not much is heard from the other side of the Atlantic, but maybe this is just a marketing trick.

- Recital 60: "*a union based on the rule of law*" – This recital comes across much better in the German language version: "Rechtsunion", reminiscent of the "Rechtsgemeinschaft", the community of law, which was tremendously successful. There is a risk in altering or even giving up established brands such as "Rechtsgemeinschaft" – if the *Rechtsunion* is not a Union with a capital "u", that may be read as a sign of weakness. The plot of *Solange Episode III* could react to that.

- Recital 61: "*...the Court alone has jurisdiction to declare that an EU act... is invalid, the exclusivity of that jurisdiction having the purpose of guaranteeing legal certainty by ensuring that EU law is applied uniformly (see judgments in Melki and Abdeli...)*" – Well, so far this is nothing new, rather, the same old storyline all over again. But there is room here for more plot and character development: national courts may scrutinize EU acts without declaring EU law invalid, the national courts may simply declare EU acts to be *inapplicable* (not addressing the issue of validity). The ECJ does not address the issue of interim relief at all (see the ECJ in Süderdithmarschen). With the reference to Melki, the ECJ emphasizes once more that any national court must have the possibility to submit preliminary references to the ECJ at any time. There is no exclusivity for national high and constitutional courts to tell a story. If lower national courts simply bypass their respective constitutional and high courts, there may simply not be much room for *Solange Episode III*.

- Recital 73: "*...a third country cannot be required to ensure a level of protection identical to that guaranteed in the EU legal order*" – Wait a minute, that's OUR script! That's more or less the approach of the German legal order vis-à-vis EU fundamental rights. Germany is allowed to join the EU "*as long as* " (solange) the EU provides for an "*essentially comparable*" standard of protection. Not "identical", it is just an "essentially comparable" protection (*im wesentlichen vergleichbare[r] Grundrechtschutz*). The difficult question is how to define the necessary minimum of protection.

Recital 94 gives the answer, and again, some may be tempted to say that they simply use the German approach: "*the essence of the fundamental right*", that is the threshold; this is the minimum protection that must not be given up. In the German version of the ECJ ruling in Schrems, essence is "Wesensgehalt", which is clearly copyright of the German fundamental rights doctrine. It is also the wording of Article 52 of the EU Charter of Fundamental Rights, though.

Anyway, the overall approach seriously endangers a German *Solange Episode III* project: according to rumours, the plot of *Solange Episode III* could be built around the idea that the essence (!) of fundamental rights is part of national constitutional identity in the Member States, which in turn is respected by the European Union under Art. 4 para 2 TEU.

Put differently: *Solange Episode III* may stand and fall with the idea that the Member States' constitutional courts may defend "the essence" or the core of fundamental rights guaranteed under their respective constitutional orders. If the ECJ already defends "the essence" of fundamental rights – even against the US –, there may be not much room left for the national courts to justify why they would want to scrutinize EU acts.

The only plot hole that could be filled with *Solange Episode III* would be the respective national specificities, e.g. in Germany the specific understand-

ing of human dignity. One may doubt whether this is enough substance for another full-fledged "Episode".

- In Recital 104, the ECJ *en passant* takes away another extremely successful plot device the German constitutional court kept using in its productions: the ultra vires-tool. The stories told by the German court and lots of German critics start from the more or less explicit assumption that the ECJ is simply not capable of declaring an EU act without a legal competence and thus illegal (ultra vires) – hence the necessity to have a national constitutional court patrol the competences of the EU and oversee the ECJ. With the Schrems case, the ECJ once again proves this story wrong.

So what's the overall assessment, is the *Solange Episode III* production doomed because the ECJ in Schrems takes away whatever could be important or even just original in *Solange Episode III*? It depends, of course, on the details of the *Solange Episode III* script and its overall undertone. If *Solange Episode III* came across as simply preparing Episodes IV, V, VI… it could turn out to be received by its audience as a selfish marketing operation of a project that used to be successful but that has outlived itself. If on the other hand the plot included a significant role for the ECJ, in the spirit of a cooperative constitutional pluralism, it could become a new success.

One is tempted to use dramatic words: "The fight for becoming the leading fundamental rights court in the European Union has only begun." This may be a little over the top, but still in essence good news for fundamental rights, not only in Europe; bad news for the dark side of the Force. And, I repeat, potentially another interesting plot underway.

What is even more important is to realize that the Schrems case leaves a lot of room for national productions totally different from a *Solange Episode III* in Germany.

After Schrems, a significant part of data processing by US based companies is essentially illegal. The ECJ is not terribly interested in distinguishing the private from the public side of the threat. And the ECJ is not explicitly trying to impose obligations to protect (*Schutzpflichten)* on the EU or on the Member States (see recital 72 though), which is one of the tools German constitutional thought suggests in the present context. They just look at the result; "the essence" of fundamental rights must be protected.

It is now the task of the national data protection agencies to act. The irony is that the very requirement that EU law introduced, the complete independence of these agencies, makes it difficult to coerce them into action. But the ECJ seems to be willing to make it easier for them to get hold of companies, as the Weltimmo-case decided just days before Schrems seems to indicate once again.

In Germany, federalism takes its toll: data protection is decentralized, comprising a federal agency with limited powers and 16 *Länder* agencies. It is easy for companies to play the game they also play at the European level: with a threat to move to another place where authorities are less zealous to protect data which includes the explicit or implicit threat to take jobs and taxes away, the agencies will face political pressure to think twice before they fine companies.

The major centralized Member States such as Spain and France with their powerful data protection authorities will be decisive. The CNIL (Commission nationale de l'informatique et des libertés) can issue fines up to 300.000 Euro, the AEPD (Agencia Española de Protección de Datos) up to 600.000 Euro. This may be peanuts for a multi-billion dollar company – depending on the number of cases.

The European Commission can also play an important role, and the Commission is not an independent agency. It can be held responsible politically and legally for non-action. On a larger scale, the reaction to and the implementation of the ECJ's ruling should also be a political one, by means of legislation, national and European, but also in TTIP negotiations, which may also mean to insist on more territoriality. It is too easy to simply discard fundamental rights standards as technically impossible to implement. If the threat to fundamental rights is manmade, there will always be a solution. It depends on the political will to implement it.

And there are the Union citizens, of course, who can try and force their respective data protection agencies to act, this is simply what Max Schrems did. In Germany, this would be a *Verpflichtungsklage* against the competent *Datenschutzbehörde*. If there were hundreds and thousands of Schrems-cases, it would reveal the ultimate power of (continental) European data protection ideals: the market power. The US companies in question need the European market. We – more or less – need their outstanding hard- and software products. A genuine agreement instead of self-certification – but don't forget "the essentials" – should be possible.

"Don't underestimate the Force!" – a famous quote that can have many distinct meanings in the present context…

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