How To Make Courts Refer Cases Even If They Don't Want To

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How do you translate "Europäischer Verfassungsgerichtsverbund"? This humungous term is a creation of Andreas Voßkuhle, the president of the FCC. It denotes the joint effort of the FCC, the ECJ and the ECHR to cooperate and respect each other's contribution to European right protection.

Today's decision by the FCC (First Senate) seems to be a paragon of what this "Verfassungsgerichtsverbund" means in practice:

A financial court had doubts about the constitutionality of a law about government aids. It called upon the FCC to decide about that issue according to Art. 100 I GG. The thing was, the contested part of the law was a direct transposition of a EU directive, without any margin of appreciation for the national legislators. In that case the FCC has, according to Solange II, no jurisdiction: It is for the ECJ to decide if that law infringes fundamental rights or not.

That is all well known, so far. The new part about today's decision is this: Whether or not the directive leaves a margin of appreciation in its transposition has to be absolutely clear before a court can refer a case to the FCC. If it isn't sure it has to call upon the ECJ first. They have to do that, even lower-level courts – not due to European law, but due to German constitutional law. And they will get their ears twisted by the FCC if they fail to comply.

Senate scuffle

Speaking of the duty to refer to the ECJ: Wasn't there a quarrel between the two senates about that issue?

The FCC traditionally gave courts lots of leeway in handling that duty. In the Honeywell decision the Second Senate wholeheartedly confirmed that point of view and emphasized that the FCC should not function as a "supreme referral control court". Only if the courts screw up completely in interpreting EU law, their refusal to refer the case to the ECJ will be unconstitutional and the FCC has to get involved.

Before, the First Senate had tried a slightly more comprehensive approach in a chamber decision: A refusal to refer violates the court's constitutional duties also if it shrugs off the ECJ's requirements, regardless how it handles material EU law issues. With Honeywell the Second Senate tried to knip that advance in the bud.

Just a few months ago, the First Senate made a decision that might be read as an attempt at reconciliation: Nominally, it confirmed its advance from the chamber decision, but it brushed over the face-off with the other senate by claiming that both positions amount to the same thing, practically.

At the same time it came up with some interesting lines about how a court can get into constitutional

trouble when it prematurely thinks that a EU directive binds national legislators completely without margin of appreciation (the reversed constellation of today's case). In that case, as mentioned, the Grundgesetz doesn't apply and the FCC has no jurisdiction. The First Senate made it very clear that the courts better ask the ECJ first before they come to such a conlusion on their own.

So, let's add up: In today's ruling the First Senate says it will kill every referral to itself that should have gone to the ECJ first. In the decision from July it seems to imply that it will kill every court decision that claims no margin of appreciation without asking the ECJ first. What is the Senate up to?

Oh, and by the way: The FCC just announced that it will hand down its decision in the case about the 5% threshold in European Parliament elections on November 9th. Suspense!

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