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Limits to national sovereignty and new possibilities for EU citizens: the role of the Court of Justice of the European Union

(Summary)

Most of the European Union's achievements, but also much of the criticism addressed to it rely on, or pertain to, the limitations that it has brought to the national sovereignty of its Member States. The Court of Justice of the EU, through its case law, has been instrumental in endowing the European Union with competences and powers which inevitably curtail the corresponding ones of the Member States, but which are necessary for achieving goals that the Member States themselves have set for the Union.

The Court of Justice consists of 28 Judges and 11 Advocates General. It is a truly independent international court with noticeable federal elements. One of them is that, contrary to what happens in most international courts, judges can, but do not necessarily, participate in cases relating or affecting their country of origin. Another such element is the preliminary reference procedure, the Court's most important competence, which allows any national court or tribunal, without any requirement that national remedies be exhausted, to refer to the Court of Justice any issue of interpretation or validity of EU law that arises before it.

Concepts that allowed the Union and the Court to be more efficient: The principle of direct effect was set out by the Court in its **Van Gend & Loos** judgment, in 1963, and that of primacy in **Costa v. ENEL**, in 1964. The ambit of this latter principle, however, became clearer in **Internationale Handelsgesellschaft** (case 11/70), where the Court ruled that Community law should take precedence over any national rule, even of constitutional rank. In later case law, most notably **Simmenthal** (case 106/77), the Court has held that a national judge has to interpret national rules in conformity with EU law provisions and, if this is not possible, the national rule must set aside, without waiting that it be formally abolished.

Examples of what can be achieved through the wide reach of the Court of Justice's competence and as a result of the primacy of EU law:

In **Cassis de Dijon** (case 120/78), the Court established the principle that all goods that have been lawfully marketed in one of the Member States can be freely introduced and

marketed into any other Member State. The practical result of this was that free movement of goods was very largely achieved within a single day.

In **Google Spain and Google** (C-131/12) the Court established a right to be forgotten by search engines such as Goggle. More precisely the Court held that a person has the right to see erased, from the list of results displayed following a search made on the basis of his name, the links to web pages containing true information relating to him personally if, at the point in time when the request for erasing the information is made, having regard to all the circumstances of the case, that information appears to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine.

In **Schrems** (C-362/14), which relates to the storage by Facebook of all its data in the United States, the Court held that it did not appear that the United States secured the right of respect for private life, the right to protection of one's personal data and the right to an effective remedy at a level of protection essentially equivalent to that guaranteed in the EU. It therefore annulled the European Commission decision which recognised that the United States ensured an adequate level of protection of personal data.

Through its case law, the Court establishes itself as a central guarantor of the fundamental rights of both EU citizens and individuals finding themselves under the jurisdiction of an EU Member State. By carrying out this role, the Court solidifies its changing nature towards becoming a constitutional Court of the EU, but also touches upon issues that were hitherto considered to be purely national.

Article 51 of the Charter of Fundamental Rights of the EU provides that the Charter is binding on Member States only when they are implementing Union law. The Court interpreted this provision in **Akerberg Fransson** (C-617/10), stating that: "Since the fundamental rights guaranteed by the Charter must […] be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter".

An important take away lesson from this judgment should be understood in the following three steps. First, the legal framework is circumscribed by a combined reading of

Articles 19 TEU and 47 of the Charter. On the one hand, Article 19 TEU prescribes an obligation for Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. On the other, Article 47 of the Charter enshrines the right to an effective remedy for persons whose rights and freedoms guaranteed by EU law are violated. Second, the fact that Member States put in place substantive and procedural rules, especially maintaining a court system that responds to the essential requirements of the rule of law and offering real and effective legal remedies, for the effective realisation and enforcement of EU law obligations is a sufficient element permitting the Court of Justice to establish its jurisdiction. And third, once such measures come under the Court's jurisdiction, national measures come under the purview of the Charter and may then be examined under that lens.

This judgment in Akerberg Fransson can be seen as a first stepping stone which led the Court to its recent string of judgments concerning the judicial systems of Member States.

The first of these cases is that of **Associacao Sindical dos Juizes Portugeses** (C-64/16), where the Court asserted its competence to control, on the basis of article 19 TEU, the independence of national courts.

In **Minister of Justice and Equality v. LM** (C-216/18 PPU), the Court clarified the conditions under which, where there are systemic or generalised deficiencies to the independence of a Member State's judiciary, a judicial authority called upon to execute a European Arrest Warrant issued in that Member State may refrain from doing so on the grounds that there is a real risk of infringement of the right to a fair trial of the requested person if he were to be surrendered.

Still pending, are the infringement proceedings brought by the **European Commission against Poland** (C-619/18), on account of the lowering of the retirement age of the Polish Supreme Court judges and of the granting to the President of the Republic of Poland of the discretion to extend the period of judicial activity of these judges. Pending its judgment as to the substance, the Court granted interim measures last December, requiring Poland to suspend part of its relevant law, to ensure that judges affected may carry out their duties as they did before the entry into force of the same law and to refrain from appointing new judges in their stead. As a result, Poland abolished the said law.

Two pending cases which also illustrate the broad reach of the Court's competence in areas where one who is not very familiar with EU law would have expected cases to be brought before the national courts:

The first relates to nationality and to the conditions under which a person may be deprived of it. In 2010, in **Rottmann** (C□135/08), the Court dealt with a situation where a Member State had withdrawn its nationality from one of its nationals who had acquired that nationality by naturalisation, having employed deceitful means to this effect. The Court held that this withdrawal could be examined under EU law given that it exposed the person concerned to the risk of losing the status of citizen of the EU and the rights attached to it by the treaties. It ruled that the withdrawal decision must observe the principle of proportionality and that, for so doing, it is necessary to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union.

This requirement for a proportionality test is at the heart of the pending **Tjebbes** case (C-221/17). The two important differences with Rottmann are that, in this case, the individuals concerned are nationals of the relevant Member State by birth and not by naturalisation and that, according to the national law in question, an adult loses his nationality by operation of law, without any decision actually being taken, if, for an uninterrupted period of 10 years, that person has his or her principal residence outside the European Union. The Advocate General considers in his Opinion that EU law does not oppose such legislation, given that respect of the proportionality principle is achieved by the law itself, in particular through the possibilities that the law provides for interrupting that 10-year period. The Court's judgment will be handed down on the 12th March.

Finally in **Rimsevics and European Central Bank v Latvia** (joined cases C-202/18 and C-238/18), the Court is called upon, for the first time, to directly examine the legality of a measure taken by a national authority. It is a decision suspending from office, by way of a provisional security measure, the Governor of the Central Bank of Latvia on suspicion of influence peddling. The judgment will be delivered on the 26th February.

This presentation shows that the role of the Court of Justice is a multi-facetted one, in that it controls the powerful economic actors that are active within the European Union, but also controls the Union's institutions themselves as well as the Member States.