

CLIENT ALERT

German Constitutional Court Declines to Rule on National Legislation Strictly Implementing European Law

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On 26 October, 2011, the German Constitutional Court (*Bundesverfassungsgericht*) published a decision on the scope of its jurisdiction with regard to national legislation implementing European law. In line with previous case-law, the court held that as a general rule and as long as the EU provided for an effective protection of fundamental rights against its acts, it is only competent to assess whether national legislation transposing European law complies with the fundamental rights enshrined in the German constitution if the German legislator had some discretion how to transpose European law. In its decision, the court now laid down some procedural criteria in order to ensure that cases revolving around national legislation strictly implementing European legislation are not brought before him. The court held that

- a national court has to make an own assessment whether the German legislator had any discretion when transposing European into domestic law
- and, if necessary, has to refer that question for a preliminary ruling to the European Court of Justice ("ECJ"), even if there were no obligation to institute such proceedings under European law.

This ruling will foster the cooperation between German and European courts and contribute to the uniform application of European law.

Background

The decision was handed down in a case concerning subsidies for agricultural investments in certain parts of Germany.

In 1998, the European Commission decided that those subsidies violated EU state aid laws and demanded their abolition. Subsequently, the relevant laws have been amended to accommodate the European Commission's concerns. In 1999, the claimant applied for subsidies contending that they should be awarded on the basis of the laws initially in force and not on the basis of the law as it stood after their amendment since the claimant had started to invest before the relevant provisions were changed. The authorities did not accept that argument and declined to award the subsidies as applied for. The claimant challenged this decision before the *Finanzgericht* (finance court) Sachsen-Anhalt which held that the German legislator was not obliged to deny subsidies to investments that have already been started before the law has changed and referred the case to the *Bundesverfassungsgericht*.

The parties' arguments focused on the question whether the authorities' denial resulted in the relevant laws being applied retrospectively thereby possibly violating the claimant's fundamental rights. The German government claimed that even if there were such an effect, it would be justified since the legislator had no choice but to comply with the European Commission's decision. However, the *Bundesverfassungsgericht* declined to decide on the merits of the case and ruled that the claim was inadmissible.

The court reiterated that, as a general rule, it will not assess whether national law transposing an EU directive or a decision of the European Commission complies with fundamental rights, provided that the German legislator had no discretion when transposing European law and as long as the EU provided for an effective protection of fundamental rights against its acts which is similar to the protection granted by the German constitution. To decide whether there has been such discretion is incumbent upon the relevant national court which – in case of doubt as to the correct interpretation of the relevant European legislation – is under a duty to refer the question for a preliminary ruling to the ECJ. According to the *Bundesverfassungsgericht*, this duty stems from national law and does therefore not require that the conditions of Art. 267 TFEU (which only obliges courts against whose decisions there is no judicial remedy under national law to request a preliminary ruling) are met. The *Bundesverfassungsgericht* emphasized, however, that it will exercise detailed reviews with regard to decisions of lower courts whether to refer cases to the ECJ.

Based on these principles, the court held that the referring *Finanzgericht* did not comply with its duty to thoroughly assess whether the European Commission's decision obliged the German legislator to refuse subsidies for investments for which the decisions had been taken before the laws have been changed. Ultimately, the *Bundesverfassungsgericht* also held that the referring court was not in a position to decide upon that question without referring the case to the ECJ. Since that reference to the ECJ has not been made, the court dismissed the case as inadmissible while stressing that itself was not required to institute such a reference at the current stage of the proceedings.

With this decision the German *Bundesverfassungsgericht* has further strengthened the position of the ECJ by acknowledging unequivocally the latter's competence to authoritatively interpret the scope of European legislation. This will further improve the cooperation between German courts and the ECJ. It will likely also increase the pressure on the European courts to ensure adequate protection of the citizens with regard to their fundamental rights.

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