The Right Question about the FCC Ultra Vires Decision

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The language of EU law is often dull and incomprehensible, especially in the eyes of its students. The practice of EU law and policy is too often dressed up in the eurospeak of eurocrats, who are more than elevated above the daily problems and concerns of EU citizens. But sometimes, the EU language and its practice are colorful and exciting too. Sometimes they draw from the military arsenal. Such was the metaphor employed by Barroso, according to whom the application of the now notorious Art. 7 TEU was a nuclear option. The launch of the procedure contained in it had been thus likened to dropping an atomic bomb on a country. As we know, the bomb has already been thrown twice, and not only is the EU still standing, the nuclear option has so far, unfortunately, also had little effect. If any at all. However, yesterday, in the eyes of many, another nuclear bomb exploded in the EU. It was launched from Karlsruhe. The German Federal Constitutional Court (FCC) declared the decision of the CJEU in the case C-493/17 (Weiss and others) *ultra vires*, finding it insufficiently justified and hence objectively arbitrary (*nicht nachvollziehbar und daher objektiv willkürlich*). Let us, encouraged by 'our friend' Vladimir, ask: What is to be done?

First, we should look at the reactions. These are, at least, twofold. First, there is a domestic, internal German debate about the EU (un)friendliness of the FCC 2nd Senate. As always, the closer you are to the actual decision-makers, the juicier is the debate. No matter how much me and other outsiders would like to indulge in it, for the lack of socialization in the German legal environment we are, unfortunately, prevented from it. So, on the one hand we can follow the really interesting exchange on this blog about the German constitutional particularities, while on the other hand we can also actively seek refuge in our common legal-political space of the supranational realm. There, in the community of EU lawyers, I hypothesize that the FCC decision will have spurred a typical reaction.

It is an affront to the core of EU constitutionalism. In pure legal terms, the FCC decision violates the grand principle of supremacy. It derogates from the principle of uniform application of EU law. It thus presents an assault on the virtuous law of integration, which might be the last fiber that holds the Union together. Furthermore, in broader democratic-political terms, the FCC will be, again, seen as imposing German constitutional (and other) values on the Union as a whole. By undermining the authority of the CJEU and the uniform EU law, FCC provides good reasons, indeed ammunition for its captured counterparts in the constitutionally-backsliding proto-autocratic states. If the FCC can do it, why not also the Polish and the Hungarian constitutional courts? Beware of double-standards, right? Finally, the FCC decision comes at a completely inappropriate time, in the midst of a ravaging pandemic, in which the ECB should more than ever do whatever it takes to save

the Euro and hence the Union. In short, from a particular, maybe mainstream supranational perspective, the FCC decision could be seen as an affront to the heart of EU law, carrying profoundly negative rule of law, democratic, political and economic implications for the fate of the Union.

I have never been convinced by this mainstream supranational, supremacist, monist conception of the European Union. In the protracted debate on the, so far basically just theoretical, constitutional conflicts in the EU, I have instead been won over by Neil MacCormick's argument, made at the occasion of the *Maastricht-Urteil*, that the constitutional practice of the 'defiant' national constitutional courts indeed has "a sound basis in legal theory." This theory has since been known as constitutional pluralism. Accordingly, the European Union is a pluralist legal and political community. In legal terms, it consists of a plurality of 28 autonomous legal orders: 27 national territorial legal orders and a supranational functional one. This plurality builds pluralism through a dense network of structural principles, which make possible and facilitate the functioning of the pluralist EU legal order as a whole. Among those principles, the main role is played by the relational principle of primacy, which should not be equated with supremacy, that dictates how the conflicts between EU law and national law should be resolved, shall they arise. In principle, in such conflicts the EU law should be applied, while the contravening national law should be disapplied. This principle has exceptions, both national, as the FCC decision now demonstrates (but recall also *Ajos*, *Landtova*), but also supranational (recall *Taricco II*). As a matter of constitutional pluralism, which I regard as the most accurate descriptive account of the present EU legal and political structure, the 'nuclear' decision of the FCC is thus nothing peculiar, rather it is an inbuilt systemic feature. Something to be reckoned with and scrutinized closely, whether it passes the normative requirements of the very theoretical premise on which it is based.

However, this is not what this post will eventually finish with. Its argument is that instead of re-opening the old debate on the merits and demerits of constitutional pluralism, using the example of the FCC decision, this decision should be actually taken up as an opportunity to concentrate on another systemic feature of the EU constitutional governance. The decision of the FCC is not a sign that we have a problem with constitutional pluralism in Europe – the decision is a confirmation of the EU's pluralist character – but the ruling warns us that we have a major constitutional problem with the constitutional role of the ECB. In a nutshell, in a context depending manner, in an ad-hoc improvised fight against the financial and economic crisis, in which the hybrid national-supranational political process has been unable to deliver in fiscal terms to save the European economy, to ensure its viability, this role has been taken up by the ECB. In other words, fiscal means and objectives have been monetarized. In doing whatever is necessary to save the Euro, the Draghi agenda was successful and we are now reaping its benefits, luckily so, even during the Covid19 natural disaster. However, in a constitutional democracy, which is, to paraphrase Habermas, a paradoxical union of contradictory principles: rule of law and democracy, both of these principles need to be respected, including by the ECB. The ECB can do whatever is necessary only within the confines of the rule of law. Hence the requirement of proportionality that the FCC built its present decision

on. But, on the other hand, the fiscal policy, which has always been at the heart of every democratic contestation (no taxation without representation), cannot be simply monetarized, taken over by stealth (even out of necessity) by the independent and entirely democratically unaccountable ECB. In so doing, by way of monetarizing fiscal policy on the EU level, the supranational and national democratic processes are further emptied out, and can be essentially stripped of their essence, to be eventually conducted in Frankfurt.

So, what is to be done? Rather than defending the (anyhow inexistent) supremacy of EU law against the assaults of an unruly 2nd Senate, we should concentrate on establishing the veritable fiscal union on the supranational level and ensuring its democratic underpinning. If the EU fiscal union existed and if it was based on a meaningful EU budget, legitimated by a vibrant EU democracy, there would be no, or much less, need of ECB venturing with its monetary mechanisms into fiscal and hence democratic domains, for which it is neither competent nor accountable. Also, the EU institutions would be relieved of a pressure of stretching the relevant Treaty provisions beyond recognition, just because that is 'necessary'. The Covid19 stress-test could be used as a trigger for the incremental establishment of the EU fiscal union. The FCC decision, too, could be another impetus for it.

At the same time, the FCC 'rebellion' should be taken seriously by the Court in Luxembourg, which should – particularly in the context sketched above –reconsider its lax and deferential scrutiny of the ECB. The latter has in recent years acquired great powers, which have not been matched with a great (judicially) enforced responsibility. To the contrary, to defend the independence of the ECB, the CJEU in the *Rimsevics* case even went as far as invalidating national laws, breaching its own dogma of mutually recognized autonomy of national and supranational legal orders. And the Court will soon face another case, in which it will deliver a judgment on whether the ECB, despite its massive constitutional powers in the EU economic legal order, can indeed avail itself of the broad privileges and immunities typically granted to the fragile international organizations and their institutions. In short, beyond the obvious question of judicial constitutional conflicts in the EU, much more important questions lurk. It is them that should really merit our attention.
