

Federal Constitutional Court Concedes the Applicability of European Community Law in the Banana Case.

Suggested Citation: *Federal Constitutional Court Concedes the Applicability of European Community Law in the Banana Case*, 1 German Law Journal (2000), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=9>

[1] In a decision taken by the Federal Constitutional Court (FCC) early last summer the FCC added to its line of cases that address the applicability of European Community law to Germany, reaffirming the Court's previous rulings regarding integration.

[2] Known as the Banana Case, the matter came to the FCC from the Administrative Court of Frankfurt am Main pursuant to Article 100.1 of the Basic Law which requires Germany's state and federal courts to stay all proceedings and seek resolution from the FCC of determinative constitutional questions (and, pursuant to Article 100.2, determinative international law questions). In the Banana Case the local Administrative Court was confronted with questions regarding the constitutionality of applying to German transactions European Community regulations regarding the import and sale of bananas. If the FCC, as in this case, refuses consideration of the referred constitutional or international law question the lower court is to proceed as though the questioned principle is compatible with the Basic Law.

[3] The FCC found the Administrative Court's referral inadmissible. Taken as the broadest possible brush stroke, the FCC's ruling on inadmissibility constituted an affirmation of the general constitutionality and therefore applicability of E.C. Law in Germany. In this sense, coming from one of the Community's most respected and notoriously Euro-skeptical domestic legal institutions, the FCC's decision represents yet another of the innumerable similar and necessary steps along path to a united if not yet *federal* Europe. But the FCC's decision traces its own evolution on the question and in so doing merely reasserts the now well established limitations it has imposed on the force of E.C. Law in Germany.

[4] In its first "As Long As" decision, issued on May 29, 1974 (37 BVerfGE 271), the FCC ruled that German courts were to implement E.C. Law only as long as the German courts tested the compatibility of the E.C. Law (the application of which was sought in Germany) against the Basic Law. The FCC concluded that the integration process of the Community had not progressed so far as to provide adequate assurances that law emerging from the Community enjoyed democratic legitimacy and was consistent with the fundamental rights guaranteed by the Basic Law. In its second "As Long As" decision, issued on October 22, 1986 (73 BVerfGE 339), the FCC held that a measure of protection of fundamental rights had, in the time since the first "As Long As" decision, been established in the Community. The FCC ruled that, in their conception, substance and manner of implementation, the fundamental rights functioning in the Community system were essentially comparable to the standards established by the Basic Law. In view of the implementation of such a system of rights the FCC ruled that E.C. law was applicable within Germany as long as German courts remained satisfied that the European Communities, and in particular the case law of the European Court of Justice, generally ensured effective protection of fundamental rights. In its Maastricht decision from 1993 (89 BVerfGE 155), the FCC drew Germany a step closer to the European Community, stressing that it shared with the European Court of Justice the mission of effectively protecting the fundamental rights of Germans. The FCC concluded that fundamental rights guaranteed and applied by the E.C. were substantially similar to the protection of fundamental rights provided by the Basic Law.

[5] The Basic Law has been amended to conform to the principles announced in the FCC's Maastricht decision. Article 23.1 requires Germany's participation in the development of the European Union that is committed to democratic, social and federal principles. Thus, in the landscape marked by the Maastricht decision and Article 23 of the Basic Law, all German court referrals to the FCC requesting a determination of the constitutional compatibility and applicability of E.C. law are from the outset inadmissible. E.C. law only merits the review of the FCC if the German court asserts that the evolution of European law, including the rulings of the European Court of Justice, has fallen below the required standard of fundamental rights.

[6] In the Banana Case the FCC refused to admit the referral of the local Administrative Court on the grounds that the Administrative Court failed to assert that the E.C. jurisprudence on the matter at stake fell below the required standard for the protection of fundamental rights. The Administrative Court, focusing on a single passage in the FCC's Maastricht decision, claimed that it was no longer necessary to make such representations to obtain FCC review of the applicability of E.C. Law because the FCC's Maastricht decision had reasserted the FCC's authority to review E.C. Law. The FCC unequivocally dismissed the Administrative court's interpretation of the Maastricht decision thereby reaffirming the co-operative and equal nature of the two bodies of jurisprudence.

For More Information:

The FCC's "As Long As (I)" decision on the web:

<http://www.uni-wuerzburg.de/dfr/bv037271>">www.uni-wuerzburg.de/dfr/bv037271

The FCC's "As Long As (II)" decision on the web:

<http://www.uni-wuerzburg.de/dfr/bv073339>">www.uni-wuerzburg.de/dfr/bv073339

The FCC's Maastricht decision on the web:

<http://www.uni-wuerzburg.de/dfr/bv089155>">www.uni-wuerzburg.de/dfr/bv089155

The FCC's Banana decision on the web:

<http://www.bundesverfassungsgericht.de/>">www.bundesverfassungsgericht