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Grigolli, Stephan

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would not like to have any new organs for this group, except for a secretariat, perhaps.[71]

In actual fact, the EU will have to consider after its next round of expansion whether at all times all members must take part in all integration steps. Admittedly, at the meeting of the European Council in Nice, as the French presidency frequently pledged, they would succeed in getting rid of the "left overs" that have been carried around for years.[72] However, the result has not been entirely satisfactory since neither the size of the Commission nor the weighting of votes has been solved in a way which would have made the EU better capable of expanding. As was expected, it was not possible to agree on a transition to basic majority vote decisions in the EU either. But without such a step, pressure will increase, especially in the area of secondary Community law, for moving forward in a small group. The expansion of reinforced cooperation decided upon in Nice is basically only in a position to prevent such a "core" from forming outside of the treaty structure.[73]

However, if this core should lead the way in a "final step" towards a European federation, then this raises objections in regard to the EU as a community of solidarity. Whether or not it gets to that point will also depend on the accession candidates' enthusiasm for integration.

71 Cf. *Chirac* in the German Bundestag on 27 June 2000.

72 Cf. *Chirac*, speech before the German Bundestag on 27 June 2000; *Védrine* (*supra* note 45), at 138.

73 Cf. *Védrine* (*supra* note 45), at 138.

Free Movement of Workers versus Protection of Minorities - Has the European Court of Justice Toppled One of the "Pillars" of South Tyrolean Autonomy?

Also: A Note on ECJ 6 June 2000 – C-281/98 – *Angonese*

Dr Stephan Grigolli[*]

The core point in the case based on the judgment of 6 June 2000 was the issue of the "Europe-worthiness" of a national regulation that has to be seen in the context of a more extensive problem which has increasingly come into the focus, not only of legal interest but of general political interest as well, since the political upheavals in central and eastern Europe at the end of the 1980s, more precisely the issue of minority protection. Before going into the Court's remarks and their tangible effects, several brief introductory remarks should explain the relevant situation in the province of Bolzano/South Tyrol on the territory of which regulations now held by the Court to be incompatible with EU law apply.

I. South Tyrolean autonomy, in particular the language regime

Currently, more than ten different linguistic minorities live on Italian territory and which, as such, enjoy constitutional protection. Article 6 of the Constitution states, more precisely, that the "Republic protects linguistic minorities with special regulations." The territory of the present-day province of Bolzano/South Tyrol that has belonged to Italy since the treaty of Saint-Germain-en-Laye (10 September 1919) is home to three different linguistic groups of which the German-speaking South Tyroleans with about 65 % of the total form the most consistent group.[1] Seen from the State's overall vantage point, they are admittedly not the largest but for all that the most "lively" minority and the one most intensely interested in the maintenance and constant extension of their special status.[2]

This special status lies in far-reaching autonomy in many areas which the country enjoys and which was established by the Second Statute of Autonomy of 1972 (for the entire region of Trentino-South Tyrol).[3] Besides other essential characteristics, those regulations which are indispensable for a multilingual territory concerning the use of language constitute one of the "pillars" of autonomy. In regard to the use of language,

[*] *Attorney with the law firm of SIMONS Rechtsanwälte, Munich (D).*

1 The calculations are based on the most recent census of 1991 according to which of a total of 440,508 inhabitants, 18,434 (4.2 %) were Ladins, 116,914 (26.5 %) were Italian-speaking and 287,503 (65.3 %) were German-speaking South Tyroleans. 17,657 (4.0 %) were either foreigners or persons temporarily absent.

2 On the entire issue of minority protection, see *Grigolli*, Sprachliche Minderheiten in Italien, insbesondere in Südtirol, und in Europa. Der Gebrauch der Sprache vor Behörden und Gerichten und die Vergabe öffentlicher Stellen, Frankfurt a/M (D), 1997.

3 The first underpinning of protection for the German-speaking minority living in South Tyrol goes back to the protective treaty for South Tyrol, the so-called Gruber-Degasperi Agreement, concluded on the periphery of the Paris Peace Conference on 5 September 1946 and later incorporated as Annex IV to the Allies' Peace Treaty with Italy of 10 February 1947 (see hereon *Ermacora*, Die Stellung des Pariser Abkommens im System europäischen Minderheitsschutzes, in: Autonome Region Trentino-Südtirol (ed.), Vom internationalen Konflikt zum gemeinsamen Einsatz für Europa, 50 Jahre Gruber-Degasperi Abkommen, Trient, 1993, at 123). In 1948 the first Statute of Autonomy for the Region of Trentino-South Tyrol region was approved by the nation's legislative assembly.

Article 99 of the Statute of Autonomy stipulates that "the German language in the region (i.e. Trentino-South Tyrol - author's note) enjoys equal status with the Italian language which is the official State language." According to Article 100(1), all German-speaking citizens of the province of Bozen/Bolzano are entitled "to use their language in contacts with courts and bodies and offices of public administration located in the province or having regional jurisdiction, as well as with concessioned enterprises providing public services in the province." In order to invest these rights with practical validity, it must be ensured that the persons employed in the relevant institutions can also speak and understand the languages in question. In the administration, in public bodies and agencies, in courts and schools, demonstrated proof of a knowledge of both languages, certified by the successful passing of the so-called "bilingualism test", is the prerequisite for employment.[4]

Along side of this, the so-called concessioned enterprises providing public services must likewise organise their work in such a manner that the use of Italian and German is ensured. The personnel required for this must be in possession of the certificate of the bilingualism-test.[5]

II. The ECJ decision: Community law aspects

The focus of the case decided by ECJ was an arrangement of the Südtiroler Landessparkasse/Cassa di Risparmio (savings bank) according to which the latter required from every applicant for admission to the recruitment procedure submission of certification of having passed the bilingualism test. In doing so, it based itself on a regulation of the national collective bargaining agreement for savings banks which said that a company is entitled to decide whether hiring according to internal applicant selection procedures is to be conducted on the basis of certification of skills and/or tests or on the basis of selection criteria decided by the company. Mr Roman Angonese, an applicant of Italian nationality, who was not admitted to the selection process for lack of such certification, objected to the saving bank's regulations and claimed they were incompatible with Article 39 of the EC Treaty.

1. Applicability of Community law

In his final pleadings, Advocate General Fennelly, after a thorough comparison of various ECJ decisions and the claim that Mr Angonese's university education which was completed in another EU country without a degree had no connection to the professional work he was seeking in Italy, came to the conclusion that the facts in the case did not fall within the ambit of Community law. With reference made to its jurisprudence[6] the ECJ held that there was no obvious lack of a connection between the interpretation of Community law requested and the subject of the selection process and thus very consequently affirmed the applicability of Community law. But the Court did follow the Advocate General in agreeing that Article 3(1) and Article 7 of the Regulation (EEC) No. 1612/68 of the Council on freedom of movement for workers within the Community[7] were not pertinent.[8]

2. Is Article 39 of the EC Treaty also valid for private companies or contracts between private parties?

The ECJ had already held in previous decisions that the ban on discrimination based on nationality applied not only to State authorities but also extended to other measures containing collective regulation in the field of work and services.[9] In addition, it had also decided that the ban on discrimination in Article 141 of the EC Treaty was, due to its mandatory character, also applicable to all contracts between private parties.[10] This must then apply all the more, said the Court for the first time, to the ban on discrimination contained in Article 39 of the EC Treaty. Previously, it had not been unambiguously clarified whether the ban on discrimination in Article 39 of the EC Treaty also encompassed private law and autonomous action forms going beyond collective bargaining agreements collectively regulating salaried employment or State-approved contract terms of private companies.

This court decision, described by some as "pioneering", basically reflects the process of consistent further development of protection against discriminatory action based on the general ban on discrimination (Article 12 of the EC Treaty) and its outgrowths in Articles 39 and 141 of the EC Treaty. It thus ultimately leads to recognition of an extensive and complete direct third-party effect of the basic freedoms, in particular that of the free movement of workers.[11]

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4 Cf. hereon, DPR (Decree of the President of the Republic) No. 72 of 26 July 1976 ("Implementation Rules on the Special Status of the Trentino-South Tyrol Region in the Field of Proportional Equality in State Offices in the Province of Bozen/Bolzano and Knowledge of Both Languages in the Public Service").

5 Thus Article 2 of DPR No. 574 of 15 July 1988 ("Implementation Regulations on the Special Statute for the Region of Trentino-South Tyrol on the Use of German and Ladin in Contacts of Citizens with the Public Administration and in Judicial Proceedings").

6 *Inter alia*, ECJ 30 April 1998 – C-230/96 – *Carbour*.

7 OJ 1968 L 257, at 2.

8 The ECJ maintains in view of Article 3(1) that the latter only encompasses legal or administrative regulations or administrative practices of the Member States (which are not unambiguously present here); Article 7 was not pertinent since the regulation which the savings bank based itself on (the collective bargaining agreement) had neither explicitly nor expressly allowed it to establish discriminatory criteria in relation to employees which violate Article 7.

9 ECJ 12 December 1974 – 36/74 – *Walrave*.

10 ECJ 8 April 1976 – 43/75 – *Defrenne*.

11 The view taken by the ECJ of a direct third-party effect of basic freedoms is not without its detractors. Thus *Streinz/Leible* (Die unmittelbare Drittwirkung der Grundfreiheiten, EuZW 2000, at 459, 466) speak out in favour of indirect third-party effects: Direct interference in the national private law systems could be avoided and thus their coherence preserved if it were left to national legislators to reshape private law by incorporating norms appropriate for preventing any mitigation of the basic freedoms. The ECJ even explicitly emphasised that it is not the business of Community bodies to substitute themselves for the Member States and to tell them which measures they may enact and actually apply in order to guarantee basic freedoms on their territory (ECJ 9 December 1997 – C-265/95 – *Commission* v *France*). The order to act is "clearly" incumbent upon the national legislatures and not upon European courts.

3. Extension of the scope of applicability of Article 39 of the EC Treaty by the ECJ

It should first of all be emphasised that the Plaintiff that actually initiated the case was not violated in his own rights. The ECJ concluded more specifically that the obligation to submit the bilingualism certificate put citizens of *other* member States at a disadvantage in relation to the inhabitants of the province of Bolzano and by doing so assumed a case of indirect discrimination without explicitly saying so. Such discrimination always obtains if by linking it to other prerequisites than nationality itself the same result is achieved as in the case of explicit differentiation by nationality criteria.

A peculiarity of the case lies moreover in the fact that Italian citizens not living in South Tyrol or due to geographical distance to their place of residence in Italy are not in a position, under reasonable conditions, to take and pass the language test which is only given in the province of Bozen/Bolzano, are subject to the same restrictions as are the citizens of other member States. The requirement of unequal treatment of nationals of different States or the application of different regulations to the same factual circumstances (ultimately necessary to have discrimination) are admittedly not met in such a constellation. Yet, the ECJ steeplechased this hurdle and then concluded that it was not necessary for the measure in question to entail that "all national employees are favoured or that only employees from *other* member States and not *national* employees be put at a disadvantage." The concomitant extension of the scope of application of Article 39 of the EC Treaty can have significant ramifications in the future: it would thus actually be possible that a citizen of one State via the circular route of claiming the existence of purported discrimination of nationals of *another* EU can press a claim for protection against discrimination before the ECJ concerning his "own" discrimination state (in this way made relevant in Community law) in the State of his nationality. A truly interesting perspective!

III. Bilingualism certificate "light"?

The ECJ found the previous practice of proving language skills must be considered disproportional if it is "impossible to provide proof of such skills in any other way, in particular by means of other *equivalent* qualifications acquired in other member States." In this regard, several constituencies fear that the previously existing requirements for obtaining the bilingualism certificate would be diluted if the language certifications to be submitted in South Tyrol, in contrast to previously, could be obtained anywhere in the world. Wide opportunities would be opened up to cheating and inadequate verification. But such reservations, not entirely without some justification at first glance, can be cleared up if clear and unambiguous criteria for determining and clarifying the *equivalent* qualifications could be determined by appropriate authorities in order to create, by so doing, immediate legal clarity and certainty.

IV. Final remarks

The position taken by a political party in South Tyrol of classifying the ECJ decision as hostile to minorities must be most emphatically countered.[12] The considerations advanced in the judgment, on the contrary, reflect the consistent further development of the principle of free movement of labour while taking careful consideration of minority protection. The ECJ has not toppled over a pillar of South Tyrolean autonomy but has undertaken an adjustment to the realities of the EC Treaty.

The ECJ hardly had any opportunity in the past to take a position on such issues, i.e. protection of minorities (this task has almost without exception been exercised by the Court of Human Rights in Strasbourg). But, in ending, it remains germane to point out that the ECJ's "decision potential" in matters of minorities is by no means exhausted and that it in future will certainly continue to deal with cases of this type.[13]

ECJ 6 June 2000 – C-281/98 – Roman Angonese v Cassa die Risparmio di Bolzano S.p.A.
Freedom of movement for persons Article 48 of the EC Treaty (now, after amendment, Article 39 EC); Council Regulation (EEC) No. 1612/68 – Access to employment – Certificate of bilingualism issued by a local authority

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Article 48 of the EC Treaty (now, after amendment, Article 39 EC) precludes an employer from requiring persons applying to take part in a recruitment competition to provide evidence of their linguistic knowledge exclusively by means of one particular diploma issued only in one particular province of a Member State.

Facts: *The question has been raised in the proceedings whether a requirement imposed by a private institution for admission to a recruitment competition of this institution is compatible with Community law. According to this requirement all applicants must be in possession of a certificate of bilingualism (in Italian and German) issued by the public authorities of the province of Bolzano after an examination which is held only in that province. The plaintiff, an Italian national whose mother tongue is German and according to the national court perfectly bilingual, applied to take part in a competition for a post with a private banking undertaking in Bolzano, the Cassa di Risparmio. Due to the fact that the plaintiff had not produced the certificate in question, which the Cassa di Risparmio required as a condition for entry to the competition, he was not admitted to this competition. The requirement*

[12] Thus the UfS (Union für Südtirol) that goes on to explain that the ECJ pulled the rug from out under the protection of minorities and reinforced the nation States.

[13] Cf. hereon *Grigolli*, op. cit., for analysis of possible regulations of minority protection that violate applicable EU law.