THE RECOVERY PLAN UNDER THE SCRUTINY OF THE GERMAN CONSTITUTIONAL COURT: INSTITUTIONAL IMPLICATIONS AND A LESSON FROM THE PAST

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Abstract

The article offers a critical analysis of the German Constitutional Court's decision of 15 April 2021 on the law ratifying the Own Resources of the European Union Decision. Two central problems are highlighted. The first has institutional implications: the case at issue not only highlights a potential conflict between the European institutions and a national court but also an ongoing conflict between two constitutional bodies of the German State, in which one — the BVG — appears to challenge (or at least check the actions of) the other, namely the Bundestag, for exercising its authority in breach of the fundamental Constitutional norms protecting citizens' rights and national identity. The second regards the two opposing visions of Europe that have always been in dialectical contrast on this point, specifically, an ever-closer union between the peoples of Europe on the one hand and an expanding but less cohesive one on the other. Lastly, the article suggests some lessons from the past, recalling how the League of Nations rescued Austria in the aftermath of World War I.

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1. Introduction

Less than a year after the resolution of the dispute on Quantitative Easing – the monetary policy programme adopted by the European Central Bank (ECB) in 2015 in response to the financial crisis of 2010 — the *Bundesverfassungsgericht* (the Federal Constitutional Court, from now on BVG) also examined (in the interim) the new European programme to overcome the current economic crisis resulting from the COVID-19 pandemic: the Next Generation EU (NGEU), which allows implementation of the National Recovery and Resilience Plans (NRRPs).

The judgment examined here[1] is somewhat problematic in terms of the intrinsic coherence of the decision and — above all — from the institutional point of view. In its dialogue with the Court of Justice of the European Union, the Court appears to envisage a referral for a preliminary ruling in the course of the main proceedings while suggesting that, if necessary, it will carry out an *ultra-vires* review of the European decision at issue.

Here — and unlike in previous cases — the BVG also comes

[1] BVerfG, Beschluss des Zweiten Senats vom 15. April 2021-2 BvR 547/21.

up against a federal constitutional body, the Bundestag. The German Parliament had ratified the European decision with a significant majority. Thus, the Court's review, allegedly aiming to protect the prerogatives of the Parliament as a whole, actually appears to be a form of *ex-post* control over the exercise of that prerogative, also in defence of the parliamentary minority, as opposed to *ex-ante* protection of decision-making authority.

Moreover, as this case concerns financial matters, for which a discretionary assessment is par for the course, the Court does not appear to intend to limit itself to censuring hypothetical cases of manifest unreasonableness and illogicality, which suggests robust control over the merits of the decision.

From the European Union's point of view, the BVG's Judgment of April 2021 highlights — once again — some problematic aspects affecting European integration[2], especially in terms of the two opposing visions of Europe that have always been in dialectical contrast on this point, namely an ever-closer union between the peoples of Europe on the one hand, and an expanding but less cohesive one on the other[3].

Lastly, taking its cue from an analysis of the possible developments following the decision examined here, the article concludes with a past example of international lending to revive a national economy; one that worked well and from which lessons may be drawn, i.e. how The League of Nations rescued Austria in the aftermath of World War I.

2. The decision of 5 May 2020 on Quantitative Easing and its developments

With a judgment of May 2020[4], the BVG stated that the ECB's decisions on the Public Sector Purchase Programme were unlawful, observing that they were contrary to the *Verhältnismaβigkeitsprinzip*. However, it considered that this unlawfulness could be remedied

[2] L. Rapone, *Storia dell'integrazione europea*, (9o ed. 2015).

[3] G. della Cananea, *Differentiated Integration in Europe after Brexit: A Legal Analysis*, in European Papers, 2/2019, 447.

[4] The judgment of the *Bundesverfassungsgericht* of 5 May 2020 gave rise to a wide-ranging debate and several commentaries. See, among many, issue 2/2020 of DPCEonline, which contains a whole section (Cases and Questions) on this decision and includes several contributions, and P. Dermine, *The Ruling of the Bundesverfassungsgericht in PSPP– An Inquiry into its Repercussions on the Economic and Monetary Union*, 16 Eur. Const. L. Rev., 525 (2020).

through an *ex-post* supplementary statement of reasons, which was to be rendered within 90 days. Less than two months later, the ECB submitted a series of documents to the German Government in which it examined in greater depth the proportionality of previous measures, thus concluding in a positive and conciliatory manner the potential crisis triggered by the BVG judgment of May 5, 2020.

Indeed, on 26 June 2020, the German Finance Minister sent the President of the *Bundestag* a note (to which the documents received from the ECB were annexed), stating that 'We have come to the conclusion that the proportionality assessment undertaken by the ECB Governing Council, as evidenced by the documents provided, demonstrates the required balancing of interests in a comprehensible manner'[5].

Concluding the brief summary of the May 2020 judgment — which can be regarded as the last of a long series of precedents relating to the decision analysed here — it should be pointed out that the BVG recently rejected an application for an enforcement order by way of 'compliance'.

Article 35 of the Law on the Constitutional Court (*Bundesverfassungsgerichtsgesetz* – BVerfGG) provides that in its decision, 'the Federal Constitutional Court may specify who is to execute it; in individual cases it may also regulate the manner of execution'[6]. However, according to the applicants, the ECB had not yet complied with the Judgment of May 2020, considering the documents produced to be insufficient. They therefore referred the matter to the Court once again, requesting enforcement. On 29 April 2021, the Second Senate declared this request inadmissible[7] as it sought adjudication on measures adopted after the May 2020 ruling.

Measures implementing judgments may concern only the factual and legal situations examined in the decision to be enforced since they may not supersede those limits and must comply with the principle of the separation of powers. Although the BVG resolved the dispute in purely procedural terms and declared the application inadmissible, the grounds for the rejection decision

[5] The letter of the Federal Ministry of Finance is cited in the BVerfG, Order of the Second Senate of 29 April 2021 - 2 BvR 1651/15, § 6.

[6] Article 35 of *the* Bundesverfassungsgerichtsgesetz — BVerfGG "*Das Bundesverfassungsgericht kann in seiner Entscheidung bestimmen, wer sie vollstreckt; es kann auch im Einzelfall die Art und Weise der Vollstreckung regeln*".

[7] BVerfG, Beschluss des Zweiten Senats vom 29 April 2021-2 BvR 1651/15.

contained an *obiter dictum* clarifying that, in relation to the substance, the decisions of the Council of the ECB would, in any event, be sufficient to comply with the judgment[8].

As indirectly confirmed by the large number of judgments brought before the BVG and elsewhere, the tensions and potential conflicts between European bodies and national courts are not likely to disappear, at least as long as a number of inconsistencies remain in the overall European design, as we claim here.

3. Context: The Council's Decision on the Own Resources of the European Union and the Recovery Plan

At the July 2020 European Council, the EU's Heads of State and Government agreed to adopt an extraordinary plan to respond to the economic and social consequences of the COVID-19 pandemic. In particular, the European Council approved the "European Recovery Plan" presented by the Commission with some amendments[9]. The Plan is based on the EU's multiannual budget, namely the Multiannual Financial Framework for the years 2021-2027 and the key Next Generation EU recovery programme, a temporary and exceptional instrument to help the economies of the Member States. A reform of the Union's own resources has been envisaged to finance the Next Generation EU[10] in accordance with the Treaty of Lisbon.

On 14 December 2020, the Council of the EU therefore adopted the Own Resources Decision, which sets out the arrangements for financing the EU budget[11].

Reorganisation of the EU's own resources must follow three guidelines introducing or amending the same number of instruments.

Firstly, an additional category of own resources is

[8] Ibid., esp. § 86.

[9] https://ec.europa.eu/info/strategy/recovery-plan-europe_it.

[10] On the EU budget in the light of the Lisbon reforms see A. Brancasi, *Il bilancio dell'Unione dopo Lisbona: l'apporto delle categorie del nostro ordinamento nazionale alla ricostruzione del sistema*, in *Diritto Pubblico*, 3/2010, 675. For an outline of the EU budgetary system with a view to reforming the Own Resources system, see A. Somma, *Il bilancio dell'Unione europea tra riforma del sistema delle risorse proprie e regime delle condizionalità*, in DPCEonline, 4/2018, 873.

[11] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of Own Resources of the European Union and repealing Decision 2014/335/EU, Euratom.

introduced from scratch, contributing to supporting the circular economy and tackling climate change: these are national contributions calculated according to the weight of non-recycled plastic packaging waste (at a uniform rate of EUR 0.80 per kilogram of non-recycled plastic)[12].

Secondly, Article 5 of the Decision authorises the Commission to borrow on the financial markets on behalf of the European Union up to a maximum of EUR 750 billion. These funds will be used to implement the 'Recovery Plan', thus financing the National Recovery and Resilience Plans. Loans taken out by European Union may be allocated for grants (up to a maximum of EUR 390 billion) and lending (up to a maximum of EUR 360 billion).

Thirdly, to provide an adequate guarantee that the debts incurred can be regularly repaid, the Decision raises the own resources ceilings that the EU may request from the Member States. To maintain budgetary discipline, paragraph four of Article 310 TFEU stipulates that it must be possible to finance the expenditure provided for in the budget within the limits of the own resources. With the Decision of December 2020, the maximum amount of funds that EU may obtain from the Member States was raised to 1.40 %[13] of the gross national income (GNI) compared with the previous limit of 1.23 %.

As laid down in Article 311 TFEU, the Council Decision on the European Union's own resources must follow a special legislative process. First, it is necessary to act unanimously after consulting the European Parliament. In addition, in order to enter into force, the Decision must be approved in advance by all the Member States "*in accordance with their respective constitutional requirements*."

This means that the NRRPs, which are decisive for the recovery of the real economy, can only be financed once the fundamental Own Resources Decision is ratified by the Member States themselves.

Under their various circumstances, all the Member States approved the decision according to their respective constitutional systems. The decision therefore entered into force on 1 June 2021 (i.e. the first day of the first month following receipt of the last notification relating to the procedures for adopting the decision, as

[12] Article 2(1)(*c)* Council Decision 2020/2053 of 14 December 2020.
[13] Article 3(1) of the Decision.

provided for in Article 12 of the decision). Interestingly, the last notifications came in from Austria, the Netherlands, Poland, and Hungary on 31 May 2021[14].

Germany finalised its adoption procedure on 29 April, following a complex process that once again saw the involvement of the BVG, with two successive rulings, and on which the last word is yet to be written.

4. The ratification procedure in Germany and the grounds for appeal

The Federal Act ratifying the Own Resources Decision (*Eigenmittelbeschluss-Ratifizierungsgesetz* - ERatG) was presented on 19 February 2021 and was predictably debated at length in Parliament.

The Bundestag passed the law on 25 March 2021 with 478 votes in favour, 95 against, and 72 abstentions[15]. The following day, the Bundesrat (Federal Council) also unanimously approved the ratification[16].

On 26 March 2021, over two thousand German citizens (2,281 to be precise), members of the *Bündnis Bürgerwille* organisation led by Bernd Lucke, filed an appeal for a constitutional judgment (*Verfassungsbeschwerde*) on the law ratifying the European Own Resources Decision.

There are two main grounds of appeal: one regarding national law and the other concerning EU law.

With regard to the *Grundgesetz* (Basic Law), the citizens complained that their constitutionally guaranteed rights had been infringed, namely those deriving from the democratic principle of self-determination and the budgetary sovereignty of the Bundestag[17]. According to the applicants, the 2020 Own Resources

[14] The dates and summary of the procedures for adopting the Own Resources Decision can be found online at https://www.consilium.europa.eu/it/documents-publications/treaties-agreements/agreement/?id=2020025&DocLanguage=en

[15] See the results of the vote on https://www.cducsu.de/abstimmungen/eigenmittelbeschluss-ratifizierungsgesetz-eratg, also providing information on the distribution of votes by parliamentary group.

[16] https://www.bundesrat.de/SharedDocs/beratungsvorgaenge/2021/0201-0300/0235-21.html

[17] In particular, the applicants alleged infringement of the constitutional rights provided for under Article 38(1) (Members of the Bundestag are elected by

Decision undermines German constitutional identity as it affects the Bundestag's overall responsibility for the budget (§ 13).

As for EU law, German citizens argue that the ratification law — and thus also the Council's Own Resources Decision as a ratified act — infringes Article 311 TFEU and the bail-out prohibition set out in Article 125 TFEU.

The point is crucial: once again, an act of a European institution is censured as *ultra-vires* since it does not merely introduce a new category of own resources but authorises an EU indebtedness programme not provided for under Article 311.

On the same day, 26 March, in a separate application, the applicants asked the BVG for urgent interim protective measures to prevent completion of the legislative ratification procedure, thus making it impossible to notify the European Union that the decision had been ratified (and preventing the decision from entering into force).

5. The provisional interim decision of 26 March 2021 preventing the President of the Republic from enacting the law

Paragraph 32 of the Federal Law on the Federal Constitutional Court *(Bundesverfassungsgerichtsgesetzt – BVerfGG*) provides for interim measures in proceedings on constitutionality. The conditions for issuing a protective measure are linked to the urgency of protecting the common good (*Gemein Wohl*).

Specifically, the three cases where precautionary claims may be upheld are: to prevent serious negative consequences for the common good, to prevent threats of violence to the common good, or for some other significant and urgent reason relating, once again, to the common good. An interim measure expires after six months and may be reconfirmed only by a two-thirds majority of the adjudicating panel.

The adoption of interim protective measures is also

universal, direct, free, equal, and secret suffrage. As representatives of the whole population, they are not bound by mandates or Directives, and are subject only to their conscience) in conjunction with Article 20(1) (The Federal Republic of Germany is a democratic and social federal State) and 2 (All State power emanates from the people. It is exercised by the people by means of elections and votes, and by special bodies vested with legislative, executive, and judicial powers), and Article 79(3) (No amendment to this Basic Law concerning the organisation of the Federation in the *Länder*, the principle of participation of the *Länder* in the legislation or the principles set out in Articles 1 and 20, is permitted).

envisaged pending the plenary hearing of the petition, an institution very similar to Article 56 of the Italian Code of Administrative Process[18], with the fundamental difference that it must always be a collegial (rather than a monocratic) decision, albeit in 'reduced ranks'. Under Article 15(2) BVerfGG, the constituent quorum for the Second Senate of the BVG is six judges (out of eight). If the quorum is not reached when the application for interim relief is filed with the Senate, in cases of particular urgency, a provisional precautionary measure may still be adopted, if at least three judges are present and adjudicate unanimously. In this case, the interim protective measure lapses after one month and may be reconfirmed by the panel in its ordinary composition for a further six months (§ 32(7) BVerfGG).

This is precisely what happened on 26 March 2021, thanks to a decision adopted by five judges ordering the President of the Republic not to complete the legislative process relating to the challenged provision until the BVG had expressed its views on the interim application presented by the applicants[19].

Despite its great media impact and significance in terms of claiming the power to prevent a European legislative act from coming into force, the decision to provisionally suspend implementation of the German law ratifying the Own Resources Decision is, on closer examination, less extreme in terms of its effects.

On 26 March 2021, when the BVG granted the application for interim protective measures, only 10 of the 27 Member States had completed the ratification process. A further 16 Member States besides Germany would have to ratify the Council Act before it could come into force.

As mentioned above, interim suspension lapses after one month, and, in any event, the BVG would have ruled on the application for interim measures after 20 days.

The Karlsruhe Court suspended entry into force of the law as a provisional precautionary measure so as not to frustrate the outcome of the ruling on the application for interim measures, also sending a strong signal to the Government and Parliament (which had approved the law by a large majority), as well as the European institutions.

[18] The Italian Code of Administrative Process has been adopted with Legislative Decree 2 July 2010, n. 104.

[19] BVerfG, Beschluss des Zweiten Senats vom 26. März 2021-2 BvR 547/21.

However, the actual practical impact of the decision was not disruptive, considering that when the Court later denied final interim protection – thus allowing the law to enter into force – 10 Member States had not yet completed the process of ratifying the decision.

6. The decision of 15 April 2021 rejecting the application for interim measures

In its decision of 15 April 2021[20] rejecting the definitive application for interim measures to suspend the entry into force of the ERatG, the BVG first sets out the conditions for issuing an interim order, clarifying that it has always applied strict criteria in its case law, especially on suspending the entry into force of a law, because this represents a significant infringement of the legislature's original jurisdiction (§ 67).

6.1. The assumptions and criteria for issuing precautionary measures

Firstly, the BVG clarified that there is generally no examination of the merits of the pleas put forward for the unconstitutionality of the contested measure unless the main proceedings relating to the action are inadmissible or manifestly unfounded from the outset (§ 68). To use the Italian categories, we might say that there is no examination of the *fumus boni iuris*, limiting the analysis to a weighing of the negative consequences of the decision and their possible irreversibility (considering both scenarios, in granting the precautionary measure with a subsequent ruling on constitutionality and the rejection of the application for a protective measure with a subsequent ruling on unconstitutionality).

However, if the application for interim relief concerns an act of consent to an international treaty, and if a breach of the interests protected by Paragraph 79(3) of the *Grundgesetz* is alleged, then a summary examination of the legal situation is required. Indeed, in this case, according to the Court, it is appropriate not to confine itself to a mere assessment of the consequences but to carry out a summary examination (*summarische Prüfung*) of the degree of probability that the main proceedings might lead to a finding of

[20] BVerfG, Beschluss des Zweiten Senats vom 15. April 2021-2 BvR 547/21.

unconstitutionality at the precautionary stage.

If there is a high degree of probability (*mit einem hohen Grad*) that the law ratifying an international treaty may be declared unconstitutional for breaching fundamental principles and German constitutional identity, the precautionary application may be accepted so as to ensure that the Federal Republic of Germany does not conclude any binding international legal agreement incompatible with the Basic Law (§ 69).

Lastly, if the summary examination of the question remains open, and in the absence of a high degree of probability, the BVG need only assess the consequences. In particular, the Court must make a comparative assessment of the disadvantages that would arise from failure to adopt the protective measure if the constitutional appeal were deemed well founded, compared with the disadvantages that would result from adopting the protective measure if the constitutional appeal were subsequently deemed unfounded.

6.2. Assessments of the specific case

After clarifying the fundamental coordinates and requirements, the BVG applied the assessment standards to the specific case on which it was asked to issue a ruling.

a) Not declared manifestly inadmissible or unfounded

Firstly, the Court assessed whether the main referral appeared to be inadmissible from the outset or manifestly unfounded, answering in the negative.

In substantiating this assessment, the Court expressed serious concerns about the Council's decision — and consequently the German ratification law. In particular, the courts of Karlsruhe deemed that the law of ratification may affect the constitutional identity of the GG under Paragraph 79(3) since the right to democratic self-determination not only grants citizens protection from substantial erosion of the Bundestag's power to draw up general policies but also that EU bodies may exercise only the powers conferred on them under Paragraph 23 GG[21].

[21] According to article 23(1) of the GG provides that "With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that

During its *Identitätskontroll*, the BVG claimed the power to verify that no sovereign powers are transferred (and that European bodies introduce no measures) that will undermine the fundamental rights under Paragraph 79(3) GG (§ 83). Based on this argument, the Court clarified that the European institutions might well cross the threshold set in Article 79 if they substantially restrict the budgetary power of the Bundestag, since this power, together with its general financial and budgetary responsibility, is 'protected as a non-negotiable element in the fundamental democratic principle' (*Sind als unverfügbarer Teil des grundgesetzlichen Demokratieprinzips geschützt*, § 84).

The crux of Paragraph 20 GG is that the *Bundestag* 'shall be accountable to the people and decide on all essential revenue and expenditure' (§ 84).

In summary, the Court considers it plausible that (*a)* the Own Resources Decision goes beyond the limits of the powers conferred by Article 311(3) TFEU; (*b*) the European Union's authorisation to raise EUR 750 billion on the capital market, for which Germany may be responsible under particular circumstances, affects the Bundestag's overall responsibility for the budget, safeguarded under Art. 79 GG in conjunction with Art. 20(1) and (2). In such a case, the *Bundestag* would no longer be the master of its own decisions (*Herr seiner Entschlüsse*, § 90).

However, moving towards an assessment of the degree of probability of such breaches, the Court considered that it could not be said that the high degree of probability required for the precautionary measure to be adopted was reached.

b) Assessment of the degree of probability that a situation of unconstitutionality had occurred

Several factors contribute to uncertainty as to the outcome of the main proceedings.

First of all, the BVG states that it has not yet consolidated its case law on 'whether and to what extent the democratic principle gives rise to directly and immediately protectable limits to the assumption of obligations concerning payment or liability'. Thus,

afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79."

the Second Senate probably intends to calmly and thoughtfully address this critical issue carefully in its own time, which will have consequences, and on which it has not yet had the opportunity to clearly and definitively express its opinion.

Secondly, on examining the Council Decision in detail, the BVG considers that the amount, duration, and purpose of the Commission's loans are limited, as is Germany's possible liability. The possibility of further liability is considered unlikely.

Given the still uncertain outcome of the main proceedings, as the necessary high probability of unconstitutionality has not been reached — the Court must decide on the application for interim measures, weighing up only the consequences of its decision.

c) Weighing up the consequences

The Court considers the consequences of adopting the anticipatory measure to be particularly serious if, upon the conclusion of the main proceedings, the law is found to be constitutional. Furthermore, suspending the entry into force of the German ratification law would prevent entry into force of the Council Decision. This would make it impossible to finance Next Generation EU and all the NRRPs for the time required to decide on constitutionality, which would be two or three years.

A suspension would ultimately frustrate the Recovery Plan, with potentially irreversible economic and financial consequences. The Court clarifies that this is especially true with regard to the major beneficiaries of the Recovery Plan, with an aside that appears to be addressed to Italy albeit without naming it explicitly (§ 106). Fulfilment of the economic objectives pursued through NGEU requires measures to be adopted quickly, which is irreconcilable with the requested suspension.

The Court also considered the consequences in terms of Germany's foreign policy and credibility on the international level. The BVG pointed out that the Decision of December 2020 stems from an agreement between Germany and France. In its submission, the Federal Government had expressed concerns over substantial tension in its relations with France, a decrease in the credibility of Germany's foreign and European policy, and a further threat to cohesion between the Member States of the European Union. The Second Senate endorses the Government's considerations, observing that the GG gives the Government ample

margin to assess the consequences of international policies, including those of a prognostic nature.

On the other hand, the Karlsruhe Court considered that the negative consequences of bringing the law into force immediately would be significantly lower if the main proceedings subsequently found the law unconstitutional.

In fact, any additional burden on Germany would materialise over a relatively long period and only after a series of eventualities which the Federal Government considered *unrealistisch* (§ 109).

Finally, with a very brief but equally significant aside, the Court concluded by declaring that if the European decision were found to have been adopted *ultra-vires* due to an infringement relating to the European integration project, it could be annulled *erga omnes* by the Court of Justice of the European Union in its preliminary referral, which is already envisaged as a sure means of adoption in the future.

What is more, in its final discussion, the Court reiterates that if, in the main proceedings, the BVG (regardless of the CJEU judgment) considers the Own Resources Decision to be an *ultra-vires* act, or if it deems that constitutional identity has been affected by the Own Resources Decision, 'the Federal Government, the Bundestag, and the Bundesrat should adopt the measures at their disposal to restore constitutional order' (§ 111).

Thus, in listing the measures available to neutralise or limit the adverse effects (in terms of liability for obligations) arising from the Council decision if found unconstitutional *ex-post*, the BVG hinted that it would use the referral for a preliminary ruling but that it would then assess the possible *ultra-vires* nature of the European decision.

7. Some incongruities

In the judgment of May 2020, some contradictions in the BVG's decision had already been noted[22]. Among the various points highlighted, it is worth mentioning that the BVG had claimed that it had exercised *ultra-vires* control also in the interest of all other Member States. Indeed, if no State were to do so, EU

[22] A. Ferrari Zumbini, *Some contradictions in the Bundesverfassungsgericht judgment on Quantitative Easing of the ECB,* 12 Italian Journal of Public Law 259 (2020).

bodies would have exclusive control over the Treaties, thus excluding the Member States.

However, the other Member States had never given Germany any such mandate; indeed, some had joined proceedings before the CJEU to defend the ECB's actions in this case.

In the judgment in question, the BVG considers admissible the appeal to assess compliance with democratic principles and the budgetary responsibility of the German Parliament in general. However, the Act ratifying the Council Decision on Own Resources was approved by the *Bundestag* with a vote of more than 74 % and was approved unanimously by the *Bundesrat*. Thus, the Court stated that it wished to protect the prerogatives of the German Parliament, which had already expressed its view with a significant majority.

Moreover, the *Bundestag* entered an appearance in proceedings on constitutionality, submitting that the application for interim measures was inadmissible, as was the underlying constitutional appeal, which in any event is manifestly unfounded[23].

This is tantamount to saying that the Court seems to ignore Parliament's position, which it reiterated by becoming a party to the proceedings on unconstitutionality.

The Court, it would seem, considers itself entitled not only to protect the prerogatives of Parliament but also to carry out an external review of their proper and appropriate exercise (i.e. respecting the constitutional rights of German citizens), even entering into a disagreement with it.

Therefore, we are not only witnessing a potential conflict between the European institutions and a national court but also an ongoing conflict between two constitutional bodies of the German State, in which one — the BVG — appears to contest (or at least check the actions of) the other, namely the *Bundestag*, for exercising its authority in breach of fundamental Constitutional norms protecting citizens' rights and the national identity.

There is also a risk of another incongruity, already highlighted in the May 2020 decision. The BVG had requested a preliminary ruling from the CJEU, asking the European Court of Justice whether the ECB's decisions had infringed the Treaties. The

[23] The judgment of 15 April 2021 summarises the position of the referring German Constitutional Bodies, including the *Bundestag*, in §§ 43-62.

CJEU ruled that the decisions were lawful in a judgment that the German Court subsequently disregarded.

In this case too, the pleas in law include the infringement of Treaty rules, whose interpretation is the exclusive jurisdiction of the CJEU.

The applicants claim that the Own Resources Decision infringes Article 311(3) TFEU. It is therefore not unlikely — indeed it is *very* likely — that, in order to decide on the merits, the BVG will refer the case to the CJEU for an opinion on the interpretation of Article 311 TFEU, thus reserving the final judgment on the unconstitutionality arising from the breach of German constitutional norms to itself.

The contradiction inherent in the German Court requesting a preliminary ruling from the CJEU, but then disregarding its conclusions if they are not in line with its own interpretation, could repeat itself.

As mentioned above, in a somewhat brief but very significant passage in the decision on the interim measure, the German Court states that if, in the main proceedings on constitutionality, the Council's decision were considered *ultra-vires*, instruments are available to counteract the consequences, as the European Court can quash the decision, 'or the Constitutional Court could declare it inapplicable in Germany'[24].

The BVG thus confirmed its case law from last year, in which it stated its competence, under certain circumstances, to declare *ultra-vires* acts of the European institutions inapplicable in Germany.

8. Two visions of Europe

The BVG ruling of April 2021 once again highlights developments in European integration[25] and the two opposing visions of Europe that have always been dialectically opposed on this issue.

The context is one in which only a year ago the BVG pronounced both the ECB's decisions and a preliminary ruling of

[24] "*Sollte sich eine solche Maßnahme im Hauptsacheverfahren als Ultra-vires-Akt herausstellen, kann sie durch den Gerichtshof der Europäischen Union für nichtig oder durch das Bundesverfassungsgericht für in Deutschland unanwendbar erklärt werden*" § 72.

[25] L. Rapone, *Storia dell'integrazione europea*, cit. at 2.

the CJEU to be *ultra-vires*, refusing to comply with them.

As a result, the Commission opened infringement proceedings against Germany for breach of the fundamental principles of EU law, in particular the principles of autonomy, primacy, effectiveness, and uniform application of EU law, as well as failure to respect for the jurisdiction of the European Court of Justice under Article 267 TFEU. The Commission sent a letter of formal notice on 9 June 2021 requesting explanations regarding the BVG's Judgment of 5 May 2020[26]. The Commission referred to the order rejecting the enforcement measures adopted by the BVG on 29 April 2021 but deemed that the order did not alter the substance of the 2020 decision.

Thus, the BVG now essentially subjected the entire Recovery Plan to its review on constitutionality, stating that the violation of the democratic principle "appears at least possible", although not highly probable.

A new clash is to be expected[27] not only between courts (the CJEU and BVG) but also with EU bodies in the relationship between supranational and national interests, or rather, between the interests of the individual Member States and those of the community of Member States.

The decision must not only be read in the wake of the precedents of the German Constitutional Court, however.

It is also necessary to consider a very recent article published jointly by the President of the Austrian Constitutional Court, a member of the Second Senate of the BVG, the President of the Constitutional Court of Slovenia, and the former President of the Constitutional Court of Latvia (now a member of the CJEU)[28].

The article clearly states that domestic constitutional courts must address and solve three main questions. The first regards transfer review, verifying that the transfer of sovereign powers under the European Treaties complies with the conditions and limits laid down in the constitutional systems of the Member States. The second is the *ultra-vires* review, ascertaining that the acts of the

[26] https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743

[27] For an Italian perspective on the constitutional clash in Europe see, G. Martinico and G. Repetto, *Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath*, in Eur. Const. Law Rev., 4/2019, 731.

[28] C. Grabenwarter, P.M. Huber, R. Knez, I. Ziemele, *The Role of Constitutional Courts in the European Judicial Network*, in Eur. Publ. Law, 1/2021, 43.

European institutions do not exceed the limits imposed by the Treaties. The third is identity control, which protects the fundamental core of national constitutional identity.

In order to overcome possible criticism of the CJEU's exclusive competence over the interpretation of the Treaties, the four authors argue that when the European Court does not exercise its powers seriously and in full, it is then up to the national courts to exercise those powers.

As for protecting constitutional identity, the authors propose introducing a reverse referral for a preliminary ruling, i.e. from the CJEU to the national courts when the European Court has to rule on acts that may interfere with national identities.

It should be noted that the national identity clause[29] is not a matter solely or mainly for the founding States; apart from Germany, it is also relevant to other countries that have recently joined the EU[30]. On the other hand, the French *Conseil d'Etat* (Council of State) has recently rejected the idea that national courts (supreme or constitutional) can carry out an *ultra-vires* review of acts of the European institutions[31].

The fundamental underlying question of the growth of European integration cannot — and should not — be resolved by courts.

If one agrees with these premises, it must be concluded that underlying the conflicts between European bodies and the national courts is a purely political Gordian knot.

Returning to the challenged decision, the applicants before the BVG claim that the EU's Own Resources Decision set up a fiscal union between the Member States that had not been envisaged in the Treaties, drawing national budgets into a kind of joint and

[29] There is an extensive bibliography on the national identity clause. We merely refer to E. Cloots, *National Identity in EU Law* (2015) and, for an Italian perspective, to G. Di Federico, *L'identità nazionale degli stati membri nel diritto dell'Unione europea. Natura e portata dell'art. 4, par. 2, TUE*, (2017).

[30] Regarding the Hungarian case, see G. Halmai, *Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E (2) of the Fundamental Law*, in Rev. of Centrl. East Europ. Law, 1/2018, 23, critically set out the 2016 Hungarian Constitutional Court ruling that evoked constitutional identity to justify the non-implementation of the European refugee relocation scheme.

[31] J. Ziller, *Il Conseil d'Etat si rifiuta di seguire il pifferaio magico di Karlsruhe*, in *Ceridap*, 2/2021 available online https://ceridap.eu/il-conseil-detat-si-rifiuta-di-seguire-il-pifferaio-magico-di-karlsruhe/.

several liability for the next 38 years, considerably reducing the scope for autonomous budgetary choices.

Leaving aside the desirability (or otherwise) of this development, and stripping these statements of the exaggerations and hyperbolic reconstructions used in the application, some specific aspects call for consideration.

The financial crisis that hit Europe from 2010 onwards[32] has been counteracted (though not with entirely positive results) through the European Stability Fund, later transformed into the European Stability Mechanism[33]. This mechanism was, and still is, in place outside the European Union, having been produced by an international treaty and sets strict conditions for granting loans.

Almost 10 years later, the instrument adopted to respond to the economic and financial consequences of the COVID-19 pandemic is very different. This time it relies on a decision of the European Council and an EU Council Decision to decide on new own resources, increasing the previous ones and authorising the Commission to borrow on the capital markets on behalf of the EU.

We can welcome the new European response to crises, which is now timelier and more decisive. However, it is precisely the evident intrinsic and institutional differences between these instruments that show an evolutionary path of integration to be shared by all.

Of course, the temporary and exceptional nature of the current Recovery Plan plays a fundamental role in maintaining a difficult balance. However, the dialectic between an ever-closer union among the peoples of Europe and an ever-wider but less cohesive[34]one will sooner or later have to find common ground, and this will certainly not be through the activities of one or more national courts.

Moreover, if the May 2020 emergency mainly concerned Italy, as Germany had not yet been hit so drastically, which meant that the 2020 ruling could be interpreted as the expression of a strict policy towards southern European countries with suboptimal debt

[32] M. Ruffert, *The European debt crisis and European Union law*, in Comm. Mkt Law Rev., 6/2011, 1777.

[33] C. Holer, *The European Stability Mechanism: The Long Road to Financial Stability in the Euro Area*, in Germ. Yearb. Int'l Law, 2011, 47.

[34] On the difficult relationship between unity and difference, with an analysis of the two opposing visions referred to in the text, see G. della Cananea, *Differentiated Integration in Europe After Brexit: A Legal Analysis*, cit. at 3.

management. Unfortunately, Germany too would be dramatically affected by the pandemic in 2021.

Thus, the heart of the problem lies precisely in the vision of the future of European integration and how it is implemented, which must be clear, explicit and grounded in legislation.

9. Possible developments

It will take some time before the Court decides on the merits. During this period, the BVG will probably follow the developments and processes of implementing the various NRRPs closely, especially that of Italy, which has benefited most from European funds. Italy also recorded a significant increase in the public-debt-to-GDP ratio during the pandemic, rising from 135 % in 2019 to an estimated 160 % by the close of 2021 compared with an average growth in Europe of about 15 percentage points[35].

These are not purely political or economic considerations. The practical arrangements for implementing the NRRPs — together with the control methods adopted by the States and European bodies — may influence the legal configuration of the Recovery Plan, especially in terms of verifying compliance with democratic principles and that of the general budgetary responsibility of the Bundestag as stated by the BVG in its case law.

European Union debts will have to be repaid. In order to make repayments sustainable, these debts will have to be used to foster growth: indebtedness must consist of 'good debt', not 'bad debt'[36]. Therefore, how the resources received are used is crucial not only on the economic and social levels but also makes the debt plan legally sustainable. The individual Member States will only have to respect the planned repayments (approved by each parliament in accordance with its own constitutional requirements).

If a country misuses the funding it receives from Europe and does not ensure sufficient growth to support repayment, the problems will not be purely economic as the other Member States cannot be required to contribute more than was budgeted for. The case law of the BVG is adamant on this point, seeing such an

[35] The data given are the Commission's estimates, quoted by Mario Draghi, the Italian President of the Council of Ministers during his speech at the Accademia dei Lincei on 30 June 2021.

[36] President Draghi underlined the distinction between good and bad debt in his speech to the Accademia dei Lincei, cit. at 35.

eventuality as a breach of the democratic principle and that of the German Parliament's responsibility for the budget.

Moreover, in its judgment of May 2020, which obviously could not have borne any relation to the funds allocated to address the outbreak at the time, the Court outlined the coordinates for possible future verifications of constitutionality regarding new purchase programmes. The Court expressly stated that "an assumption of responsibility for decisions taken by third parties with potentially unforeseeable consequences" would be unconstitutional[37].

In its judgment of April 2021, despite rejecting the application for interim measures, the BVG stated that "No permanent mechanisms may be created under international treaties which would essentially entail an assumption of liability for decisions taken by other states, especially if they have potentially unforeseeable consequences" (§ 85)[38]. The BVG's assessment in the main proceedings revolved around the characteristic of 'permanence'. It is no coincidence that in the Council Decision on Own Resources of December 2020, the term "exceptional" occurs eight times, and the term "temporary" is repeated 16 times in a summary text of only 12 articles.

10. International loans and their conditions, an example from the past

The Recovery Plan was preceded by an intense debate in all Member States, covering the fundamental economic component of the instrument and any related conditions.

The Recovery Plans adopted by supranational bodies to help individual States in severe economic and financial difficulties are certainly not an innovation of the European Union. Suffice it to recall the work of the League of Nations[39]. Regarding the League of Nations, it may be helpful to mention a successful example of a

[37] Judgment of 5 May 2020, § 227.

[38] '*Es dürfen keine dauerhaften Mechanismen begründet werden, die auf eine Haftungsübernahme für Willensentscheidungen anderer Staaten hinauslaufen, vor allem wenn sie mit schwer kalkulierbaren Folgewirkungen verbunden sind*'.

[39] Still valid on this matter is C. Schmitt, *Die Kernfrage des Völkerbundes* (1926), republished in Italian *La Società delle Nazioni. Analisi di una costruzione politica* (2018). More recently, S. Mannoni, *Da Vienna a Monaco (1814-1938). Ordine europeo e diritto internazionale* (2019).

Recovery Plan, not only at the economic level (allowing the economic recovery of the country that received the loans) but also and above all at the institutional level, boosting the modernisation and efficiency of the entire bureaucratic apparatus and thus helping reduce the costs of the administration while increasing its efficiency. Ultimately, an efficient public administration is a fundamental and indispensable prerequisite for a thriving economy.

The example in question is Austria's rescue by the League of Nations after World War I, which allowed the newly formed republic to recover economically and set up a particularly efficient administrative system (also thanks to the conditions for the loan).

Indeed, after the war and the dissolution of the Austro-Hungarian Empire, Austria entered a deep economic crisis with an exceptionally high inflation rate. In May 1922, slightly under 350 billion kroner in banknotes (*Papierkrone*) were in circulation, while there were nearly 600 billion in July, and in August there were over 800 billion kroner in circulation. Wages were paid every 3-4 days because the purchasing power of the Krone had already halved by then[40].

An enormous loan from an international body was the only way to deal with this challenging situation, but, to access this funding, it was necessary to ensure that a series of economic, financial, and budgetary reforms would be put in place. In addition, the State's administrative apparatus had to be reformed as these factors were inseparable if there were to be a thoroughgoing and lasting reduction in public expenditure allowing repayment of the loan.

These considerations — and others of a more political nature — led to the international treaty known as the *Genfer Reformbeschlüsse* on 4 October 1922. England, Italy, France, and Czechoslovakia would act as guarantors so that Austria could obtain a total loan of approximately 690 million gold kroner *(Goldkrone*) from the League of Nations over 20 years[41]. With these

[40] These economic data are provided by L. Kerekes in *Österreichs Weg zur Sanierung (1922)*, *Acta Historica Academiae Scientiarum Hungaricae,* 1-2/1977, 75 et seq., esp. p. 78.

[41] It is not certain exactly how much was disbursed by the League of Nations, but there is no doubt that Austria received at least 650 million gold kroner. See G. Strejcek, Vor *90 Jahren flossen Österreich aus einer Völkerbund-Anleihe rund 650*

guarantees, Austria assumed a number of obligations.

The Austrian State was required to undertake a comprehensive economic-financial and budgetary reform, drastically reducing costs. Furthermore, to reduce expenditure, it had two years to present Parliament with a comprehensive plan to reform the administration, simplifying and making administration and administrative procedures more efficient[42].

To fulfil this duty, in 1924, Austria submitted a package of laws to streamline its administration. These were passed in 1925, including the famous *Allgemeine Verwaltungsverfahrensgesetz* (AVG), the first general law on administrative procedure. The origins of the AVG are actually somewhat older[43], as it is based on the rich case-law of the Austro-Hungarian Empire's Administrative Court and the reworking carried out by Tezner[44]. However, the final and decisive push to adopt the Law on Administrative Procedure stems precisely from post-conflict requirements. The AVG proved to be a straightforward law leading to greater administrative efficiency[45]. It proved so effective that it was taken as a model and transposed into several legal systems.

In this example, the conditions attached to the international loan helped the beneficiary State recover across the board in terms of both the economy and its administrative system. Of course, success of this kind always depends on the type of conditions envisaged, the clarity and method of laying down such conditions,

Millionen Goldkronen zu. Die folgende Sanierung des Staatshaushaltes brachte aber keine nachhaltige politische Stabilität, *Wiener Zeitung*, 13-14 October 2012.

[42] The text of the International Treaty signed in Geneva on 4 October 1922 is very difficult to find online. A copy of the text is contained in A. Feiler, *Das neue Österreich*, (2015) (unaltered reprint of the original of 1924), pp. 101-118.

[43] For a more complete reconstruction of the origins of the 1925 Austrian Law on Administrative Procedure, please refer to A. Ferrari Zumbini, *Alle origini delle leggi sul procedimento amministrativo. Il modello austriaco* (2020).

[44] F. Tezner, *Das österreichische Administrativverfahren, dargestellt auf Grund der verwaltungsrechtlichen Praxis, Mit einer Einleitung über seine Beziehung zum Rechtsproblem, (*1922).

[45] Obviously, merit was not only due to the adoption of the law on proceedings. For example, one of the reforms adopted by Austria to fulfil its international obligations was the reform of the railways, which started as early as November 1922, separating ownership of the railway network and the railway service operator (the latter transformed into a company, an economic entity with legal personality, independent from the State apparatus, since 1923). See S. Solvis, *Der Weg zur Neuordnung der Österreichischen Bundesbahnen*, (1933), esp. pp. 18 et seq. However, the AVG made up an important part of the overall reform system.

the monitoring system, and the beneficiary State's ability to fulfil its obligations in substance and not merely on paper.