Of Winners and Losers: A Commentary of the Bundesverfassungsgericht *ORD* Judgment of 6 December 2022

Cases 2 BvR 547/21 and 2 BvR 798/21, *Own Resources Decision* Judgment of 6 December 2022

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Introduction

'Alle sind Gewinner'[1] is how the German Tagesschau described the judgment of the Bundesverfassungsgericht upholding the EU's post-Covid recovery plan, NextGeneration EU.[2] On the one hand, the applicants succeeded because the German court imposed conditions on German participation in the programme, ensuring that it never turns into a genuine 'transfer union'. On the other hand, the German government, and its European partners, with the traumatic experience of *Weiss* still fresh in their minds, could celebrate the fact that NextGeneration EU survived, and rejoice that the Bundesverfassungsgericht was apparently retreating

[1]'Everyone is a Winner', available at https://www.tagesschau.de/kommentar/kommentar-eu-coronafonds-bverfg-101.html, visited 12 March 2024.

[2]Cases 2 BvR 547/21 and 2 BvR 798/21 *Own Resources Decision* Judgment of 6 December 2022 (*ORD* judgment). For a first assessment (in German), *see* M. Goldmann, 'Langfristige Bindungen – Zum Urteil des BVerfG vom 2.12.2022 – NextGenEU – 2 BvR 547/21 und 2 BvR 798/21', *NVwZ* (2023) p. 791.

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doi:10.1017/S1574019624000117

from its confrontational attitude. As is often the case when the German court scrutinises EU acts, everyone who was holding their breath while awaiting the judgment could now arguably sit back and relax.

Still, the fact that both sides could find reason to celebrate calls for a more nuanced analysis of the judgment. One might ask whether, instead of framing the outcome as everyone winning something, we might conclude that through its findings, the Bundesverfassungsgericht made everyone lose. The applicants most directly, as they lost their case. In our view, two other major losers stand out: (1) the EU and the Member States, because a single national court interpreted provisions of the Treaties dealing with the fundamentals of how EU finances (should) work; and (2) judicial cooperation, because there was none.

In this piece we will explore these two topics by critically assessing the main findings of the Bundesverfassungsgericht. First, we turn to the constitutional framing of NextGeneration EU under the Treaties and the German court's findings; and second, we look into the behaviour of the Bundesverfassungsgericht as a national and EU court and the consequences the judgment holds for its role in the EU's judicial system. To do so, we start by briefly describing NextGeneration EU and its constitutional backing, after which we present the procedural run-up to the judgment and the main findings of the German court. In the fourth section we turn to EMU matters, analysing how the German court dealt with Articles 311, 122, and 125 TFEU. Next, we look at the judicial perspective, addressing in particular the lack of a preliminary reference, and the use of identity review. We close this contribution with conclusions.

The NextGeneration EU in a nutshell

Much has already been written about the recovery plan, its adoption, structures, functioning, and its significance for the integration project.[3] Suffice it to remind here that NextGeneration EU stands as the cornerstone of the Union's economic response to the pandemic crisis. It constitutes a macroeconomic recovery plan of Keynesian inspiration, designed to stimulate public and private spending and investment, and is thereby aimed at helping European economies recover from

[3] *See* B. De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift', 58 *CML Rev* (2021) p. 635; P. Leino and M. Ruffert, 'Next Generation EU and its Constitutional Ramifications – a Critical Assessment', 59 *CML Rev* (2022) p. 433; F. Fabbrini, *EU Fiscal Capacity – Legal Integration after COVID-19 and the War in Ukraine* (Oxford University Press 2022); P. Dermine, 'The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe – Between Continuity and Rupture', 47 *Legal Issues of Economic Integration* (2020) p. 337; P. Dermine, *Le plan de relance "Next Generation EU" de l'Union européenne – Analyse constitutionnelle d'une initiative historique* (Bruylant 2023).

https://doi.org/10.1017/S1574019624000117 Published online by Cambridge University Press

the pandemic shock, and preparing them for the twin challenges of the green and digital transition. The plan is a major policy initiative, which presents a number of innovative features. First, the plan stands as a significant new source of funding for the Union (€806.9 billion in current prices to be mobilised over a five-year horizon). These new monies are the product of massive borrowing operations conducted by the European Commission, in the name of the Union, on the capital markets. Following a clear logic of solidarity, these European funds are to be redistributed to all Member States, following proportions which depend on their macroeconomic needs (and vulnerability), as loans and, most significantly, as grants (borrowing for spending). The NextGeneration EU is thus based on joint European debt, which is later to be reimbursed through new own resources which the Union commits to establishing in the coming years. The plan's funds will be channelled through formal budgetary programs of the Union, either pre-existing or newly established. Their disbursement is thus subject to a complex set of substantive and procedural requirements, and dependent on the satisfactory fulfilment of detailed milestones and targets, compiled in strenuously negotiated 'national recovery and resilience plans'.

The recovery plan relies on a complex, almost baroque, legal architecture which is schematically comprised of three major components. The first is the European Union Recovery Instrument,[4] a technical tool, adopted on the basis of Article 122 TFEU, which organises the financing of NextGeneration EU and the allocation of its funds. The second is the new Own Resources Decision adopted pursuant to Article 311(3) TFEU,[5] which most notably empowers the European Commission to borrow the funds of NextGeneration EU and increases the own resources ceilings to ensure sufficient financial space for the full coverage of EU's liabilities. Finally, the Recovery and Resilience Facility[6] was established based on Article 175(3) TFEU as a new, *ad hoc* budgetary program through which the vast majority of NextGeneration EU funds would be disbursed and managed. The constitutional complaints before the Bundesverfassungsgericht challenged the national ratification of the Own Resources Decision.[7] Nevertheless, in its judgment, the German court carried out an analysis of the entire NextGeneration EU package.

[4]Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ 2020 L433.

[5]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, OJ 2020 L424.

[6]Regulation (EU) No. 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ 2021 L57.

[7]As it is the only element of NextGeneration EU that, following Art. 311(3) TFEU, required national ratification in line with national constitutional requirements, rendering it a perfect target for a constitutional complaint.

The judgment

The constitutional complaint against the ratification act of the Own Resources Decision was led by the Bündnis Bürgerwille initiative, chaired by the founder of the Alternative für Deutschland (AfD), Bernd Lucke. The constitutional complaint was submitted by 2,279 applicants in total. They argued that NextGeneration EU, and the Own Resources Decision specifically, breaches Germany's constitutional identity protected under Article 38(1) of the Basic Law, read in conjunction with its Articles 20(1)-(2) and 79(3). They claimed furthermore that it amounted to an *ultra vires* act in contravention of Article 23(1) of the Basic Law. They argued that this is so because the programme and its financing exceed the competences conferred upon the EU in a manifest and structurally significant manner.

Primarily, the applicants sought a preliminary injunction to prevent the President from certifying the Act ratifying the Own Resources Decision.[8] On this, the standard employed for awarding an injunction is 'if this is urgently required to avert severe disadvantage, prevent imminent violence or for other important reasons in the interest of the common good'.[9] On 26 March 2021, the Bundesverfassungsgericht issued an order that the Ratifying Act was not to be certified until the preliminary injunction was decided on.[10] On 15 April 2021, the preliminary injunction was rejected.[11] In the final judgment of 6 December 2022, the constitutional complaint was found admissible, but unfounded.

In terms of admissibility, the Bundesverfassungsgericht maintained the liberal approach from its earlier decisions. For example, in its decision on the constitutionality of the ESM Treaty, the Bundesverfassungsgericht addressed the criticism in the literature that the standing requirements, allowing every citizen a constitutional complaint when it comes to the right to vote, are too liberal.[12] It

[8]Who is empowered to do so under Art. 59(1) of the Basic Law.

[9]Case 2 BvR 547/21 Order of the Second Senate of 15 April 2021, para. 65. These conditions are set out in s. 32 of the Bundesverfassungsgerichtsgesetz (Law on the Federal Constitutional Court).

[10]Case 2 BvR 547/21 Decision of the Second Senate of 26 March 2021.

[11]For a short analysis, *see* M. Nettesheim, 'Greatness and Tragedy – On the Interim Decision of the German Federal Constitutional Court in the Constitutional Complaint Procedure against the New EU Own Resources Decision', *Verfassungsblog*, 23 April 2021, https://verfassungsblog.de/greatness-and-tragedy/, visited 12 March 2024.

[12]C. Tomuschat, 'Die Europäische Union unter der Aufsicht des BVerfG', *Europäische Grundrechte-Zeitschrift* (1993) p. 489 at p. 491; B.-O. Bryde, *Das Maastricht-Urteil des Bundesverfassungsgerichts – Konsequenzen für die weitere Entwicklung der europäischen Integration* (Graduiertenkolleg Europ. Integration 1993) p. 4; D. König, 'Das Urteil des Bundesverfassungsgerichts zum Vertrag von Maastricht - ein Stolperstein auf dem Weg in die europäische Integration?', 54 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1994) p. 17 at p. 27-28; U.M. Gassner,

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stated that, regardless, its approach will remain unchanged, as citizens must be able to 'defend themselves in a constitutional court against a relinquishment of competences which is incompatible with Article 79.3 of the Basic Law'.[13] That standard was applied to the challenge against the Own Resources Decision as well.[14] The applicants in this case, according to the Bundesverfassungsgericht, demonstrated that it is at least possible that the constitutional organs breached the applicants' right to self-determination and the democratic decision-making process.[15]

Moving to the merits, the Bundesverfassungsgericht first conducted *ultra vires* review, and found that the Own Resources Decision did not amount to a manifest violation of the European integration agenda.[16] It started by examining the Decision's compliance with its main legal basis, Article 311 TFEU. The German court favoured a broad reading of the provision: 'under exceptional circumstance, it does not appear (completely) implausible that the measure could be based on Article 311(2) TFEU, with the borrowed funds constituting a category of "other revenue" within the meaning of that provision'.[17] The Bundesverfassungsgericht made such finding conditional upon four requirements, analysed *infra*, pertaining to the authorisation of such borrowings, their use, their size, and their limits.

Although the German court was not able to conclude definitively that these conditions were all met in the Own Resources Decision, it likewise shied away from finding that the chosen Treaty legal basis was manifestly insufficient. This was due to NextGeneration EU's temporary nature;[18] on the fact that borrowing for this purpose is, although contested, not explicitly prohibited, so long as it does not fund the general EU budget;[19] and finally, because of the limited size and timespan of NextGeneration EU.[20]

'Kreation und Reprasentation. Zum demokratischen Gewahrleistungsgehalt von Art. 38 Abs. 1. S. 1 GG', 34 *Der Staat* (1995) p. 429 at p. 439-440; H.-J. Cremer, 'Rügbarkeit demokratiewidriger Kompetenzverschiebungen im Wege der Verfassungsbeschwerde?', 49 *Neue Justiz* (1995) p.1 at p. 5 ff.; C. Schönberger, 'Die Europäische Union zwischen "Demokratiedefizit" und Bundesstaatsverbot. Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts', 48 *Der Staat* (2009) p. 535 at p. 539 ff.; M. Nettesheim, 'Ein Individualrecht auf Staatlichkeit? Die Lissabon-Entscheidung des BVerfG', *Neue Juristische Wochenschrift* (2009) p. 2867 at p. 2869.

[13]2 BvR 987/10 *ESM Treaty* Judgment of 7 September 2011, para. 101. *See also* P. Huber, 'The Federal Constitutional Court and European Integration', 21 *European Public Law* (2015) p. 83 at p. 97-98.

[14]Although it should be added that in the *ORD* judgment, the Bundesverfassungsgericht calls the standing requirements 'particularly strict': *ORD* judgment, *supra* n. 2, para. 107.

[15]ibid, paras. 105, 107, and 113.

[16]ibid, para. 149.

[17]ibid, para. 149.

[18]ibid, paras. 135 and 152.

[19]ibid, paras. 155-161.

[20]ibid, para. 162.

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In examining whether the funds borrowed would be used for the exercise of competences conferred upon the EU,[21] the German court analysed the Own Resources Decision's relationship to Article 122 TFEU. It offered a narrow interpretation of the provision, and found that aims such as digital transformation, climate neutrality, or financing of existing programmes of the EU are difficult to reconcile with the purpose of NextGeneration EU.[22] It nevertheless concluded that, first, the exact contents of Article 122 TFEU have not been settled;[23] and second, that the Council and the Commission have a wide margin of discretion in interpreting Article 122 TFEU.[24] This was enough for the Bundesverfassungsgericht to find that Article 122 TFEU was a valid legal basis.

The Bundesverfassungsgericht also considered the Own Resources Decision's relationship with the no-bailout clause and found, not without reservations, that Article 125 had not been manifestly circumvented.[25]

Turning to identity review, the German court found that the Own Resources Decision did not affect Germany's constitutional identity.[26] Considering the various safeguards built into NextGeneration EU, it concluded that the Own Resources Decision does not impair by itself the Bundestag's overall budgetary responsibility.[27] Although the structure of NextGeneration EU holds a number of risks for the federal budget, they do not exceed the margin of appreciation the Bundestag enjoys in budgetary matters,[28] but imply an ongoing duty for the assembly to monitor the use of NextGeneration EU funds and possible liability risks arising therefrom.[29] In light of that assessment, and without deeming it necessary to submit a preliminary reference to the Court of Justice,[30] the Bundesverfassungsgericht concluded that the applicants' right to democratic self-determination had not been violated.[31]

On Economic and Monetary Union matters

The Bundesverfassungsgericht's ruling stands as the first judicial assessment of NextGeneration EU adopted in the aftermath of the Covid-19 pandemic. It offers

[21]ibid, para. 172.
[22]ibid, paras. 172-187.
[23]ibid, para. 174.
[24]ibid, para. 183.
[25]Ibid, para. 210.
[26]ibid, para. 211.
[27]ibid, paras. 212-219.
[28]ibid, paras. 220-231.
[29]ibid, para. 233.
[30]ibid, paras. 236-237.
[31]ibid, para. 235.

an in-depth analysis of the initiative, making a number of important findings as to the legal architecture of the plan, and its relationship with the EU Treaties, most significantly the framework governing the competences of the EU in economic policy and the structure of its finances. This section critically assesses the Court's reasoning and findings on three core issues: NextGeneration EU's relationship with EU budgetary law, and more specifically, the system of own resources organised by Article 311 TFEU; the mobilisation of Article 122 TFEU as a legal basis; and the recovery plan's compliance with the no-bailout clause enshrined in Article 125 TFEU. It also offers a few general reflections about the ruling's impact on the future of EU fiscal integration.

The EU's budgetary galaxy and the system of own resources (Article 311 TFEU)

The Court's first major set of findings related to NextGeneration EU's budgetary structure, and its relationship with the system of own resources set up by Article 311 TFEU. The Court ruled that while the EU Treaties do not provide for a specific power to borrow,[32] they do not expressly or absolutely prohibit borrowing either.[33] If it is beyond doubt that borrowing cannot be considered a permanent source of financing for the EU's general budget,[34] the Bundesverfassungsgericht found that it was not '(completely) implausible' that specific borrowings such as that authorised in the context of NextGeneration EU could be based on Article 311(2) TFEU, with the borrowed funds considered as 'other revenue'. That, provided that certain conditions are met:[35] (1) borrowing must be explicitly authorised in the Own Resources Decision; (2) the funds subsequently borrowed can be used exclusively for specific tasks for which the EU has competence; (3) borrowing operations must be subject to clear limits in terms of duration and volume; (4) the amount of funds obtained as 'other revenue' through borrowing cannot exceed the total amount of own resources. The court went on to apply its test to NextGeneration EU and found that each of these conditions were met.[36]

It is a euphemism to state that NextGeneration EU has brought to light new possibilities and new challenges in the field of EU public finances. The budgetary architecture of the plan is, in many respects, unprecedented. Never had the EU

[32]ibid, paras. 150-154.

[33]ibid, para. 155.

[34]*See* most notably, ibid, paras. 152 and 158.

[35]ibid, para. 149.

[36]ibid, paras. 162-202. Next to extended discussions about the second condition, and NextGeneration EU's compliance with Art. 122 TFEU (*see infra* next section), the fourth condition was also subject to close examination. The Court favoured a multiannual perspective (for a different perspective, *see ORD* judgment, *supra* n. 2, dissenting opinion of Justice Müller, para. 13), and considered that it was fulfilled.

engaged, in its own name, in such massive borrowing operations, whose proceeds are to be used to finance loans but also, more innovatively, spending. To bear the liabilities resulting from such operations, the new Own Resources Decision provides for an extraordinary and temporary increase in the own resources ceilings[37] and, more fundamentally, consecrates the commitment to reimburse the debt generated by NextGeneration EU through new own resources.[38] Finally, clearly breaking away from past practice, the monies of NextGeneration EU were formally placed off budget, and treated as 'external assigned revenue'.[39]

The many novelties of NextGeneration EU's financial construction raise important questions, and real concerns, as to its relationship with the Treaty provisions governing EU finances. From the outset, it should be clear, as rightly highlighted by the Bundesverfassungsgericht,[40] that any Own Resources Decision constitutes a legal act adopted by the EU, which must therefore comply with primary law. Unlike what has sometimes been implied by the Commission and the Council in the advent of NextGeneration EU, the special, 'quasi-constitutional' nature of the procedure established by Article 311(3) TFEU,[41] while it indeed contributed to the political legitimacy of the plan, cannot by itself guarantee the constitutionality of the initiative.

On the financial side, the Bundesverfassungsgericht's ruling focuses solely on two issues:[42] the existence of an EU power to borrow ; and the compatibility of the borrowing operations with the system of own resources and Article 311 TFEU. On the first matter, if the ruling gives some credit to the thesis of the

[37]Art. 3 of the Own Resources Decision.

[38]To be set up in the context of a wider overhaul of the EU's financing system: Recitals 6-8, 18 and 19 of the Own Resources Decision. *See also* European Council, conclusions of the special meeting of 17-21 July 2020, EUCO 10/20, point A29, points 145-150.

[39]This budgetary category, foreseen by Art. 21 of the Financial Regulation, makes it possible to assign specific revenues to specific expenditure, in derogation of the principle of budgetary universality. They do not appear on the annual budget and are not covered by the annual budgetary procedure.

[40]*ORD* judgment, *supra* n. 2, para. 159.

[41]Unanimity in the Council followed by approval by all Member States according to their constitutional requirements.

[42]For reasons which do not appear clearly in the ruling, other relevant issues, such as NextGeneration EU's compliance with the principles of budgetary balance, unity and universality (enshrined in Art. 310 TFEU), the use made of the budgetary category of 'external assigned revenue', or the undeterminacy of the new own resources to be set up to reimburse the debt generated by the recovery plan, were left aside by the Bundesverfassungsgericht. While they undoubtedly raise important questions, they are not further analysed in the context of this contribution. For more, *see* R. Crowe, 'The EU Recovery Plan – New Dynamics in the Financing of the EU Budget', in G. Barrett (ed.), *The Future of Legal Europe – Will We Trust in It?* (Springer 2021) p. 117; Dermine, *supra* n. 3, p. 77-94.

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general prohibition of EU borrowing,[43] it ends up conceding that the EU may assume debt of its own under certain conditions. Such a position, which has been defended by the Commission[44] and the Council[45] throughout the legislative process, is supported by the Union's ample institutional practice, whereby borrowing has progressively become a common feature of the EU's financial operations, although in limited amounts and for 'back-to-back lending'.[46]

We moreover consider that the lack of an express legal basis for an autonomous borrowing capacity is not as crucial as the Bundesverfassungsgericht seems to suggest. First, as recently suggested by Steinbach and Grund, we consider that, if the Treaties neither explicitly deny nor consecrate a power to borrow, a number of legal provisions tend to indicate that such power must exist.[47] More fundamentally, we take the view that such power to borrow may find clearer constitutional grounding if derived from the doctrine of implied competences.[48] Although not expressly stated in primary law, it is a necessary accessory of the EU's conferred powers, as a condition for their effective exercise. Similarly to how that doctrine has been used to establish and empower agencies,[49] it could be relied upon to justify supranational borrowing operations to finance initiatives in its fields of attributed competences. This approach is corroborated by a systemic reading of Article 311 TFEU, which indicates that in order to 'provide itself with the means necessary to attain its objectives and carry through its policies', the EU shall be endowed with a budget which, in principle, is to be 'financed wholly from own resources', without prejudice to 'other revenue'. As aptly observed by the Bundesverfassungsgericht itself,[50] this residual category can

[43]*See ORD* judgment, *supra* n. 2, paras. 150-154.

[44]European Commission, 'Q&A: Next Generation EU – Legal Construction', 9 June 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1024, visited 12 March 2024.

[45]Council Legal Service, 'Opinion on the Proposals on Next Generation EU', 9062/20, 24 June 2020, para. 70 (CLS Opinion).

[46]Consider, for example, the activities of the European Financial Stabilisation Mechanism.

[47]S. Grund and A. Steinbach, 'European Union Debt Financing – Leeway and Barriers from a Legal Perspective', *Bruegel Working Papers*, 2023/15. For example, Art. 318 TFEU requires the Commission to forward to the Parliament and to the Council 'a financial statement of the assets and liabilities of the Union', thus implying that the EU can indeed incur liabilities. Along similar lines, Art. 17(2) of the Financial Regulation, which forbids that loans be raised by the Union 'within the framework of the budget', would be devoid of any added value if there were a general prohibition on EU borrowings.

[48]The doctrine has been most famously deployed in the area of external relations: *see*, seminally, ECJ 31 March 1971, Case 22/70, *Commission* v *Council (ERTA)*, ECLI:EU:C:1971:32.

[49]The Court confirmed explicitly that this power exists outside Arts. 290 and 291 TFEU on implementation and delegation, in ECJ 22 January 2014, Case C-270/12, *ESMA*, ECLI:EU:C:2014:18, paras. 77-87. *See*, most notably, M. Chamon, *EU Agencies – Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press 2016) p. 136-153.

[50]*ORD* judgment, *supra* n. 2, paras. 162-170.

include the proceeds of borrowing operations conducted by the EU in the framework of initiatives such as NextGeneration EU.[51]

But if the EU enjoys a power to borrow, its use is far from unconstrained, as it must comply with primary law, and the many provisions which organise the EU's public finances. In that regard, borrowing under EU budgetary law is subject to a central limit: it cannot become a permanent source of funding feeding the general budget of the EU, but must remain exceptional and dedicated to specific purposes.[52] It is pretty clear that the Own Resources Decision and NextGeneration EU adhere to this crucial constraint, as best evidenced by the various material and temporal limits that frame borrowing under the recovery plan. For example, Article 5(1) of the Own Resources Decision specifies that borrowing is to be conducted '[f]or the sole purpose of addressing the consequences of the Covid-19 crisis', while its Article 4 provides that '[t]he Union shall not use funds borrowed on capital markets for the financing of operational expenditure'.

Interestingly, the Bundesverfassungsgericht has used this case to provide its own blueprint, by introducing a detailed set of conditions applicable to the EU's borrowing operations and try to set the tone of the Union's future fiscal and budgetary trajectory. Such detailed judicial law-making on the part of the German court strikingly contrasts with a quasi-absolute lack of relevant case law from the Court of Justice, most notably on Article 311 TFEU and EU borrowing. Among the conditions established by the Bundesverfassungsgericht, that according to which EU borrowing and other revenue should not exceed own resources is the most decisive. A purposive reading of Article 311 TFEU clearly supports the idea that own resources should remain the main source of financing the EU budget. To preserve the Union's institutional balance and financial autonomy, and support the integrity of the budgetary process and the system of own resources, 'other revenue' and borrowing should retain an additional or accessory character. Such a requirement has already been highlighted during the legislative process, most notably by the Council Legal Service.[53] Interestingly, in assessing compliance with this requirement, the latter had openly rejected the strictly quantitative approach that the Bundesverfassungsgericht would later favour, and instead endorsed a more open, qualitative approach, naturally based on numbers, but also relying on contextual and policy elements.[54] This approach has our preference, as it enables a better-informed, and less categorical assessment of exceptional budgetary programs.

[51]On this point, *see also* CLS Opinion, *supra* n. 45, paras. 53-57.
[52]*ORD* judgment, *supra* n. 2, para. 152; CLS Opinion, *supra* n. 45, paras. 37 and 63.
[53]CLS Opinion, *supra* n. 45, paras. 57 and 62.
[54]Ibid., paras. 63-69.

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The use of Article 122 TFEU

Article 122 TFEU is what comes closest to an emergency clause in the EU Treaties.[55] It contains two distinct legal bases: Article 122(1) TFEU is a general solidarity clause, allowing a diverse set of emergency measures; Article 122(2) TFEU, which is more specific, enables the granting of financial assistance to member states which are 'in difficulties or [are] seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond [their] control'. Until the Covid-19 crisis, recourse to Article 122 TFEU had been relatively limited.[56] The interpretation of the provision was left fairly open given that, except for a few *obiter dicta* in *Pringle* and *Anagnostakis*,[57] the case law on the matter remained scarce.[58]

In its ruling, the Bundesverfassungsgericht has devoted significant attention to the relationship between Article 122 TFEU and NextGeneration EU.[59] While the action before it targeted only the ratification of the Own Resources Decision, the Court also examined the legality of the European Union Recovery Instrument Regulation, based on Article 122 TFEU, to determine if the funds borrowed on the basis of the Own Resources Decision would be used 'for the exercise of competences conferred upon the European Union'[60] and were 'strictly assigned' to addressing the consequences of the Covid-19 crisis.[61] Interestingly, the Court did not (but in our view could have) follow the same logic in respect of the Recovery and Resilience Facility Regulation and examine its legal basis (cohesion policy under Article 175(3) TFEU).[62] The Bundesverfassungsgericht ultimately took the view that compliance of the European Union Recovery Instrument and by extension of the Own Resources Decision,[63] with Article 122 TFEU could not be ruled out. Thus, a manifest exceeding of the competence set out in that provision could not be sufficiently established.[64]

[55]On this provision, *see* L. Flynn, 'Article 122 TFEU', in M. Kellerbauer et al. (eds.), *Commentary on the EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) p. 1282-1284. *See also* M. Chamon, 'The Use of Article 122 TFEU – Institutional Implications and Impact on Democratic Accountability', Study requested by the AFCO committee, PE 753.307, September 2023.

[56]Most notably, it had been relied upon to set up the EFSM (Regulation No. 407/2010) and to establish a framework for emergency support in case of disasters (Regulation No. 2016/369).

[57]ECJ 27 November 2012, Case C-370/12, *Pringle*, ECLI:EU:C:2012:756, paras. 65, and 115-122; ECJ 12 September 2017, Case C-589/15 P, *Anagnostakis*, ECLI:EU:C:2017:663, paras. 69-81.

[58]As aptly noted by the Bundesverfassungsgericht: *ORD* judgment, *supra* n. 2, para. 174.

[59]*ORD* judgment, *supra* n. 2, paras. 171-188.

[60]Ibid., para. 171.

[61]Ibid., para. 172.

[62]The issue of the Recovery and Resilience Facility's compliance with its legal basis, and its characterisation as a cohesion policy instrument has been widely discussed in the literature, and would have certainly called for critical reflections from the German court.

[63]*ORD* judgment, *supra* n. 2, para. 173.

[64]Ibid., para. 182.

At the same time, the Karlsruhe court did not hesitate to voice serious doubts on NextGeneration EU's compatibility with Article 122 TFEU. First, it suggested that a literal reading of that article, and its second paragraph, would oppose arrangements such as NextGeneration EU, under which financial assistance is provided to all member states.[65] More decisively, the German court questioned the plan's overall adequacy, and the genuineness of the ties between NextGeneration EU and the Covid-19 pandemic. The Bundesverfassungsgericht questioned the strength of the connection between the pandemic shock and the reforms, measures, and projects it finances. In essence, because the recovery plan was designed to contribute to 'a transformation of the Member States' economies that goes far beyond the immediate effects of the pandemic',[66] it largely overshot its initial objective. For the German court, this was most blatantly demonstrated by the requirement that 37% of the recovery funds be allocated to climate change-related action,[67] a policy area whose ties with the immediate repercussions of the pandemic were not clear. The length of the period over which NextGeneration EU funds were to be distributed (2021-2026)[68] and the criteria used for the distribution of recovery funds between member states, which relied primarily on pre-pandemic indicators, were for the Bundesverfassungsgericht equally symptomatic of the tenuous ties between NextGeneration EU and the pandemic.[69]

Taking a definite stance on NextGeneration EU's relationship with Article 122 TFEU is certainly no easy task. The lack of clarity as to the exact legal bases used,[70] and the limited certainties provided by the case law of the European Court of Justice, further complicate that endeavour. It is hardly contestable that the recovery plan embodies a highly ambitious, far-reaching, and unprecedented use of Article 122 TFEU. As such, it initiated a wider institutional trend, marked by a 'rediscovery' of Article 122 TFEU and a heavy reliance of the institutions on its

[65]Ibid., para. 175.

[66]Ibid., para. 178. *See also* para. 176.

[67]Art. 18(4)(e) of the Recovery and Resilience Facility Regulation.

[68]*ORD* judgment, *supra* n. 2, para. 179.

[69]Ibid., para. 177.

[70]The European Union Recovery Instrument Regulation is indeed founded on Art. 122 TFEU *tout court* and does not specify which specific paragraph of the provision constitutes its legal basis. This has prompted discussion in institutional and academic circles, some commentators arguing that the wording and content of the Regulation indicated that both paragraphs had been mobilised as legal bases, others contending that the first paragraph of Art. 122 TFEU was the only genuine legal basis. As defended elsewhere, we consider that the language, legislative history and logic of the Regulation indicate a combination of both legal bases: paragraph 1 to enable the Union to borrow the recovery funds, and paragraph 2 to redistribute them to the member states, as financial assistance, in the form of grants and loans. *See further* Dermine, *supra* n. 3, p. 61-63. On this point, *see also* CLS Opinion, *supra* n. 45, para. 119.

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two clauses to pass major policy initiatives, first in the context of the health crisis, and then concerning the Ukrainian war and the resulting energy crisis.[71] It is clear that by requiring a strict connection between the measures funded under NextGeneration EU through Article 122 TFEU and the emergency situation justifying its activation, the Bundesverfassungsgericht closely echoes the narrow reading favoured by a portion of legal scholarship,[72] only to save the plan from an *ultra vires* finding thanks to its exceptional nature.

We argue that a more generous reading of Article 122 TFEU is possible. The breadth of the measures and investments financed by the plan does not necessarily entail a violation of Article 122 TFEU.[73] All the categories of measures and initiatives funded under NextGeneration EU can more or less directly be connected to the repercussions of the Covid-19 pandemic and the macroeconomic answer the EU has considered it called for. In essence, NextGeneration EU is a recovery plan responding to a major macroeconomic shock (a pandemic that affected both demand and supply) with a commensurate public spending shock, to support private consumption and investment, thereby preserving the integrity of the single market and the common currency. Against this background, the amounts allocated to NextGeneration EU seem far from excessive considering the macroeconomic objective it pursues.[74]

Turning to the use of these funds, the choices of European authorities do not seem unreasonable either. Next to reform and investment projects in areas directly affected by the pandemic (e.g. employment and job protection, crisis preparedness, healthcare systems), NextGeneration EU has several other key objectives: green

[71]During the pandemic, Art. 122 was most notably relied upon to establish the European Union Recovery Instrument and, before it, Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE). In the aftermath of the outbreak of the war in Ukraine, Art. 122 served as the legal basis for a number of instruments designed to adress the energy consequences of the conflict (Regulations Nos. 2022/1368, 2022/1854 and 2022/2577). On this trend, *see* M. Chamon, 'The Rise of Article 122 TFEU – On Crisis Measures and the Paradigm Change', *Verfassungsblog*, 1 February 2023, https://verfassungsblog.de/the-rise-of-article-122-tfeu/, visited 12 March 2024.

[72]*See*, most notably, Leino and Ruffert, *supra* n. 3, p. 444-448.

[73]Along these lines, *see* De Witte, *supra* n. 3, p. 655; Fabbrini, *supra* n. 3, p. 82-83; A. Iliopoulou-Penot, 'L'instrument pour la relance Next Generation EU: "Where there is a political will, there is a legal way"?', *Revue trimestrielle de droit Européen* (2021) p. 534-536.

[74]As a point of comparison, the 'Covid-19 Stimulus Package' adopted by the American authories in March 2021 amounted to $1.9 trillion. More generally, on the consequences that NextGeneration EU's size has for its legality, *see* C. Wutscher, 'When Size Matters – On the Legality of the Recovery Instrument Next Generation EU in Light of its Unprecedented Volume', in R. Weber (ed.), *The Financial Constitution of European Integration – Follow the Money?* (Bloomsbury 2023) p. 131-144.

transition and fight against climate change; the digitalisation of European economies; and the EU's socio-economic cohesion. These are deeply rooted in the Treaty system and match some of the most fundamental political and societal challenges of our time. This seems like a rational and justifiable approach.[75] Not only is it consonant with the principle of consistency of Union policies (Article 7 TFEU),[76] it also stands as the outcome of a political process marked by meaningful, transversal involvement of EU and national institutions. Moreover, political authorities such as the Commission and the Council must enjoy a wide margin of discretion in the conduct of economic affairs through emergencies and in their use of Article 122 TFEU.[77] That discretion should, in turn, be controlled by the Court of Justice, in cooperation with national courts (a point we address further below).

The Bundesverfassungsgericht's ruling epitomises the ambiguity of Article 122 TFEU as a legal basis, which was rather skilfully exploited by the EU institutions to turn the provision into the cornerstone of their crisis strategy, first during the pandemic, then in the context of the war in Ukraine. The use of Article 122 TFEU has been one of the main points of contention in the commentaries dealing with the constitutionality of NextGeneration EU. If the Bundesverfassungsgericht does not conceal its reservations as to the plan's overall adequacy and its preference for a strict reading of Article 122 TFEU, the ambivalence of its findings, coupled with its choice not to refer to Luxembourg (*see* below),[78] further add to the confusion. Against this background, a preliminary reference to the Court of Justice would have added much needed clarity to an increasingly used provision, which we consider a significant error on the part of the German court.

The NextGeneration EU and the no-bailout clause (Article 125 TFEU)

The no-bailout clause established by Article 125 TFEU prohibits that the Union, or the member states among themselves, assume liability for each other's commitments, thereby consecrating the principle of national budgetary

[75]Our conclusion would have certainly been different had NextGeneration EU monies been primarily used to finance investments less in line with those objectives (for example, in favour of fossil fuels or intensive farming or leading to more land artificialisation).

[76]For a recent use of the principle of consistency, *see* ECJ 16 February 2022, Case C-156/21, *Hungary* v *Parliament and Council*, ECLI:EU:C:2022:97, para. 128.

[77]This is an important consideration in the reasoning leading the Bundesverfassungsgericht to conclude that Art. 122 TFEU has not been manifestly violated: *ORD* judgment, *supra* n. 2, paras. 183-184.

[78]A few cases (C-675/22, T-759/22, T-775/22, T-802/22, T-803/22) where Art. 122-based instruments adopted in the context of the energy crisis are being challenged, are currently pending and should provide EU courts with an opportunity to clarify further the scope of the provision.

https://doi.org/10.1017/S1574019624000117 Published online by Cambridge University Press

responsibility. While the Bundesverfassungsgericht concedes that the new Own Resources Decision does not manifestly circumvent the no-bailout clause,[79] it underlines a number of circumstances suggesting that NextGeneration EU might be 'at odds' with the clause.[80] Most notably, NextGeneration EU might 'alleviate the pressure of market logic' on highly indebted member states and provide them with 'favourable lending conditions'.[81] Furthermore, the plan relies on a complex system of liabilities,[82] which might ultimately compel some member states to cover others' financial commitments.[83]

From the outset, we should stress that the premise of the Bundesverfassungsgericht's reasoning, that NextGeneration EU falls within the scope of Article 125 TFEU, is one we share.[84] Although it fundamentally differs from other forms of assistance, such as that provided by the European Stability Mechanism, the support provided by the recovery plan to national authorities does constitute financial assistance, provided as loans or grants.[85] It clearly affects, through its redistributive effect, their position on the financial markets, and their subjection to the market logic.[86] As such, it could thus constitute an assumption of national liabilities in lieu of the market, conflicting with Article 125 TFEU.

That said, the scepticism voiced by the Bundesverfassungsgericht seems largely unwarranted. In our view, a number of features tend to guarantee NextGeneration EU's compliance with the no-bailout clause as interpreted by the Court in *Pringle*: Article 125 TFEU 'is to ensure that the Member States follow a sound budgetary policy' and guarantees 'that the Member States remain subject to the logic of the market when they enter into debt', thereby only prohibiting financial assistance which results in diminishing 'the incentive of the recipient

[79] *ORD* judgment, *supra* n. 2, paras. 203 and 210.

[80] Ibid., para. 210.

[81] Ibid., para. 208.

[82] In a nutshell, the funds borrowed in the framework of NextGeneration EU are to be reimbursed, in priority, through new own resources to be established by the Union. Art. 9, paras. 4-6, of the Own Resources Decision however foresee that, should the authorised appropriations entered in the Union budget not be sufficient to cover liabilities arising from those borrowings, the Commission will be able, as its last resort, to call an increase of national GNI-based contributions, on a 'pro rata' basis. In this situation, should a member state not be able to honour that call, the Commission will be entitled to make additional call on the other member states, thereby compelling them to remedy such failure.

[83] *ORD* judgment, *supra* n. 2, para. 209.

[84] For a different perspective, *see* CLS Opinion, *supra* n. 45, points 156-164, according to which NextGeneration EU does not constitute 'a mechanism for assuming the liability of Member States before or in lieu of the markets' and thereby falls outside the scope of application of Art. 125 TFEU.

[85] *See* our analysis *supra* on Art. 122 TFEU, and the mobilisation of its two enabling clauses (including Art. 122(2) TFEU).

[86] *See* A. Steinbach, 'L'union budgétaire et de transfert sans limites juridiques?', *Revue trimestrielle de droit Européen* (2023) p. 681 at p. 688.

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Member State to conduct a sound budgetary policy'.[87] First, since its funds are to be managed and disbursed through various budgetary programs of the Union, in accordance with the procedural and substantive requirements imposed by EU law, and pursue collective goals set supranationally, NextGeneration EU might be seen as 'mutual financial guarantees for the joint execution of a specific project', *a priori* compatible with the no-bailout clause.[88] Second, NextGeneration EU relies on a liabilities system under which the ultimate financial responsibility lies with the member states, but strictly in proportion to their contribution to the EU budget. If the new Own Resources Decision enables the Commission, in case of one member state's failure, to make additional calls on the others, this is only, as conceded by the Bundesverfassungsgericht, an 'interim financing' arrangement, which merely constitutes a 'provisional commitment' for the member states concerned.[89] As explicitly provided by Article 9(5) of the Own Resources Decision, 'the Member State which failed to honour a call shall remain liable to honour it'. As a consequence, such a system does not result in an assumption of liabilities for the commitments of other member states.[90] Last but not least, NextGeneration EU remains largely imbued with a logic of conditionality, and is firmly embedded into the wider economic and fiscal governance system of the Union.[91] As a consequence, it rather tends to strengthen, instead of diminishing, the incentive for member states to conduct a sound economic and budgetary policy, compliant with the Union's orientations and recommendations.

On judicial matters

The *ORD* judgment necessarily needs to be read as the next significant EU law decision since the Bundesverfassungsgericht's infamous judgment in *Weiss*.[92] No

[87] *Pringle*, *supra* n. 57, paras. 135-136.

[88] *See* F. Martucci, 'La crise de la COVID-19 et le changement de paradigme financier induit par le plan de relance', in E. Dubout and F. Picod (eds.), *Coronavirus et droit de l'Union européenne* (Bruylant 2021) p. 506. Along similar lines, the Council Legal Service has also underlined that all legal legal bases drawn from the Treaties ought to be deemed harmonious and compatible with each other, suggesting that funding through EU programs, such as as cohesion policy and the Recovery and Resilience Facility, are 'by essence compatible' with the no-bailout clause: CLS Opinion, *supra* n. 45, point 163.

[89] *ORD* judgment, *supra* n. 2, para. 209.

[90] Ibid., point 218. It is on the basis of similar considerations that the German court considered that the new Own Resources Decision did not impair the Bundestag's overall budgetary responsibility, and did therefore not affect German constitutional identity (paras. 211-234).

[91] *See*, most notably, Arts. 10, 17(3), 18(4)(b) of the Recovery and Resilience Facility Regulation.

[92] In the meantime, the Bundesverfassungsgericht dismissed a challenge against an act approving the amendment to the European Stability Mechanism Treaty (2 BvR 1111/21 Order of the Second

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wonder, then, that the EU law community was on its feet[93] when the German court, without explanation,[94] issued a prohibition on the German Federal President signing the act ratifying the Own Resources Decision. The fears of another rejection of an EU programme were first allayed by the rejection of the request for a preliminary injunction and then by the final judgment. In this section we will focus on the lack of a preliminary reference by the German court from the perspective of EU law and also from a broader constitutional perspective. Overall, we are of the view that a preliminary reference should have been submitted. Lastly, we will analyse the role of identity review in the case law of the German court, specifically in the context of risk-sharing.

The obligation to submit a preliminary reference: the EU law perspective

From the perspective of EU law, we consider that the purpose of the preliminary reference procedure is different from how it is understood and used by the German court.[95] It seems to us that the Bundesverfassungsgericht is less interested in what EU law means, and more in whether it can impose its own interpretation as the right one. In that context, the German court appears to use the preliminary reference procedure as an EU-wide platform for disseminating its views on what is (not) allowed under the Treaties. We consider, however, that the Court of Justice is not there to try to convince the Bundesverfassungsgericht that the principle of conferral was not breached, but to give authoritative meaning to, *inter alia*, Treaty provisions.[96] Under the well-established case law of the Court of Justice, the preliminary reference procedure is:

> . . . the keystone of the judicial system established by the Treaties, sets up a dialogue between one court and another, specifically between the Court of Justice and the courts of the Member States, having the object of securing uniform

Senate of 13 October 2022) and the agreement of the German representative in the Council and the German Bundestag to the conclusion of the CETA Agreement (2 BvR 1368/16 Order of the Second Senate of 9 February 2022).

[93]R. Repasi, 'Karlsruhe, Again: The Interim-Interim Relief of the German Constitutional Court Regarding Next Generation EU', *EU Law Live*, 29 March 2021, https://eulawlive.com/analysis-karlsruhe-again-the-interim-interim-relief-of-the-german-constitutional-court-regarding-next-generation-eu-by-rene-repasi/, visited 12 March 2024.

[94]The order merely stated: 'Die Begründung wird nachgereicht' ['The justification will be given later']: Case 2 BvR 547/21 Decision of the Second Senate of 26 March 2021.

[95]There is no information in the judgment on whether any participant in the procedure made an argument in favour of submitting a preliminary reference.

[96]In the words of Justice Müller, the Court of Justice is 'the definitive interpreter of EU law': *ORD* judgment, *supra* n. 2, dissenting opinion of Justice Müller, para. 26.

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> interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties ....[97]

A cooperation mechanism between the referring court and the Court of Justice, the preliminary reference procedure has EU-wide effects, because the interpretative findings of the Court of Justice become binding in all member states.[98] Judicial cooperation and uniformity of EU law are thus the two aims of the preliminary reference procedure: national and EU courts, within their spheres of jurisdiction, 'make direct and complementary contributions to the working out of a decision'.[99] While ordinary national courts may submit a preliminary reference, courts of last instance are, under Article 267(3) TFEU, obliged to do so. Exceptions to that obligation of referring a preliminary reference are far and few between, best known as the '*CILFIT* criteria', revisited recently in *Consorzio Italian Management*.[100]

Specifically, that case law provides for three situations where there is no obligation to refer.[101] First, that is the case 'when the question is materially identical with a question which has already been the subject of a preliminary ruling in a similar case'.[102] Second, in the situation of an *acte éclairé*: 'where established case-law of the Court already resolves the point of law in question, irrespective of the nature of the proceedings which led to that case-law, even if the issues in dispute are not strictly identical'.[103] Finally, there is no obligation to refer

[97]ECJ 22 February 2022, Case C-430/21, *RS*, ECLI:EU:C:2022:99, para. 73; ECJ 6 October 2021, Case C-561/19, *Consorzio Italian Management and Catania Multiservizi*, ECLI:EU:C:2021:799, para. 27; ECJ 18 December 2014, Opinion 2/13 *(Accession of the European Union to the ECHR)*, ECLI:EU:C:2014:2454, para. 176. *See also* ECJ 16 January 1974, Case 166/73, *Rheinmühlen-Düsseldorf*, ECLI:EU:C:1974:3, para. 2; ECJ 12 June 2008, Case C-458/06, *Gourmet Classic*, ECLI:EU:C:2008:338, para. 20; ECJ 8 March 2011, Opinion 1/09, ECLI:EU:C:2011:123, para. 83.

[98]*Consorzio Italian Management and Catania Multiservizi*, *supra* n. 97, para. 28.

[99]ECJ 1 December 1965, Case 16/65, *Schwarze*, ECLI:EU:C:1965:117, p. 886.

[100]In the latter judgment, the Court of Justice did not follow the Opinion of A.G. Bobek, who argued that the *CILFIT* criteria are unworkable in practice and proposed their reform. Rather, the Court doubled down on their application, adding an obligation of a duty to state reasons when a referral is not made by the court of last instance. For a discussion on these points, *see* I. Maher, 'The *CILFIT* Criteria Clarified and Extended for National Courts of Last Resort under Art. 267 TFEU', 7 *European Papers* (2022) p. 265.

[101]K. Lenaerts et al., *EU Procedural Law* (Oxford University Press 2015) p. 98-99.

[102]ECJ 6 October 1982, Case C-283/81, *Cilfit*, ECLI:EU:C:1982:335, para. 13; ECJ 18 July 2013, Case C-136/12, *Consiglio Nazionale dei Geologi*, ECLI:EU:C:2013:489, point 36. The national court is nevertheless allowed to submit a reference in such a case, in particular if it is seeking that the Court amend its previous case law: *Cilfit*, para. 15.

[103]*Cilfit*, *supra* n. 102, point 14; *Consorzio Italian Management*, *supra* n. 97, para. 36.

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in the situation of an *acte clair*: 'where the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved'.[104] In availing itself of any of those situations, the national court or tribunal against whose decisions there is no judicial remedy must provide a statement of reasons.[105]

Before entering the discussion on *CILFIT*, it should be said that when the validity of an EU act is in question, the *CILFIT* criteria do not apply, and the national court must submit a preliminary reference, given that it has no jurisdiction to declare an EU act invalid.[106] Conversely, there is no duty to refer a preliminary reference if the national court considers the EU act to be valid.[107] One may, therefore, argue that the Bundesverfassungsgericht was not under an obligation to refer to the Court of Justice as it did not doubt the validity of the Own Resources Decision. Two points may be raised in response. First, on a more formal level, the German court was reviewing the national ratifying act, rather than the Decision itself,[108] and was therefore arguably not in a position to discuss the validity of the Own Resources Decision itself.[109] Second, the obligation to refer a preliminary reference when the interpretation of EU law is necessary for the national court to resolve a case would be rendered meaningless if it were narrowed down only to situations when a national court doubts the validity of an EU act. As we will show in what follows, the German court explicitly confirmed the need for an interpretation not of the Own Resources Decision, but of the Treaty provisions used as the legal basis for the three instruments constituting NextGeneration EU.

The Bundesverfassungsgericht invoked *CILFIT* only in respect of Article 125 TFEU, considering it an *acte éclairé*, because the Court of Justice sufficiently interpreted that provision in *Pringle*.[110] On that basis, it did not consider it necessary to request from its Luxembourg counterpart an assessment of NextGeneration EU's compliance with the no-bailout clause. We have addressed above the reasons why we consider that NextGeneration EU complies with Article

[104] *Cilfit*, *supra* n. 102, para. 16; *Consorzio Italian Management*, *supra* n. 97, paras. 39 and 40.

[105] *Consorzio Italian Management*, *supra* n. 97, para. 51.

[106] ECJ 22 October 1987, Case C-314/85, *Foto-Frost*, ECLI:EU:C:1987:452, para. 18; ECJ 6 December 2005, Case C-461/03, *Gaston Schul Douane-expediteur*, ECLI:EU:C:2005:742, para. 17.

[107] ECJ 3 July 2019, Case C-644/17 *Eurobolt*, ECLI:EU:C:2019:555, para. 30.

[108] On this point more specifically, *see further infra*.

[109] This is a typical situation in which national courts do not refer a preliminary reference. A good example is the compatibility of the European Arrest Warrant Framework Decision with national constitutions. In that situation, a number of national courts examined the constitutionality of the implementing acts, rather than the framework decision itself. On this, *see* J. Komárek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles"', 44 *CML Rev* (2007) p. 9.

[110] *ORD* judgment, *supra* n. 2, para. 237.

125 TFEU, as interpreted by the Court in *Pringle*. That notwithstanding, the German court's reasoning is marred by uncertainty: it found that a circumvention of Article 125(1) TFEU 'cannot be ruled out', but at the same time, that 'it is also not manifestly evident'.[111] It then went on to state that the Own Resources Decision 'might lead to a circumvention of the no-bailout clause in Art. 125(1) TFEU'[112] and that '[s]uch a circumvention of Art. 125 TFEU cannot be ruled out completely in the present case'.[113] The German court concluded that the Decision's rules on repayment 'appear somewhat at odds with the no-bailout clause'.[114]

In our view, these statements go against the very logic of the *acte éclairé* doctrine, as they demonstrate the national court's lack of certainty concerning the interpretation of the no-bailout clause in the context of NextGeneration EU. The Court of Justice's interpretation of the clause in the context of the European Stability Mechanism proved of limited value, and could not have led the German court to establish with absolute certainty NextGeneration EU's compatibility with Article 125 TFEU. Thus, Article 125 TFEU could not have been considered *éclairé* and the Bundesverfassungsgericht should have submitted a preliminary reference to the Court of Justice.

In respect of Articles 122 and 311 TFEU, the German court does not make any reference to *CILFIT*, but instead offers its own reason for not making a preliminary reference: 'There is no reason to assume that the Court of Justice of the European Union would interpret the competences in Art. 122 and 311(2) TFEU more narrowly'.[115] This curious standard was already used in the *Banking Union* judgment,[116] where the German court likewise decided to preserve for itself the final say on the matter. It finds no support in EU law nor in the case law of the Court of Justice. Moreover, such an approach results in a national court assuming what the Court of Justice would have decided, without allowing the latter court to express itself on the matter. Such a standard disregards the purpose of the preliminary reference procedure as a device ensuring the uniform interpretation of EU law, and the duties of national (supreme) courts under this mechanism. In other words, just because the Own Resources Decision did not breach those articles, a reference would help us better understand what these articles in fact allow.

[111]Ibid., para. 203.
[112]Ibid., para. 206.
[113]Ibid., para. 208.
[114]Ibid., para. 210.
[115]Ibid., para. 236.
[116]Cases 2 BvR 1685/14 and 2 BvR 2631/14 *Banking Union* Judgment of 30 July 2019, para. 317.

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In its judgment, the Bundesverfassungsgericht repeatedly demonstrated the need for uniform interpretation of EU law and its consistency: at multiple places, it expressly refers to the fact that the interpretation of Articles 122 and 311 TFEU is not clear.[117] The German court even concluded that Article 122 TFEU 'must be interpreted narrowly',[118] and yet found that 'the wording admittedly does not necessarily exclude the possibility of providing parallel assistance to each individual Member State'.[119] It should also be said that even if the Bundesverfassungsgericht had been certain of the correct interpretation of the Treaty provisions at issue, as we explained above, it would still have been under an obligation to submit a preliminary reference, as a 'court against whose decisions there is no judicial remedy' (Article 267(3) TFEU).

This lack of certainty was clear to Justice Müller in his dissent, where he explained that the Bundesverfassungsgericht, without submitting a preliminary reference, was in fact not able properly to resolve the case before it.[120] In his view, the German court was wrong to conclude that the Own Resources Decision did not breach the principle of conferral merely because that was not manifestly evident.[121] Rather, the obligation of the Bundesverfassungsgericht to provide to the applicants the effective protection of their right to democracy would have demanded certainty as to the meaning of the Treaty provisions involved.[122] This argument offsets the fact that a preliminary reference is not required when it is clear that it would not affect the outcome of the case before the referring court.[123] According to the dissent, the lack of a preliminary reference and certainty about the meaning of the relevant Treaty provisions significantly altered the standard of *ultra vires* review before the Bundesverfassungsgericht.

Overall, then, we are of the view that under EU law, the Bundesverfassungsgericht was under an obligation to submit a preliminary reference to the Court of Justice.

[117] *ORD* judgment, *supra* n. 2, paras. 149, 155, 161, 162, 171, 173, 176, 177, 179, 180, 182, 193, and 194.

[118] Ibid., para. 174. *See also* para. 176.

[119] Ibid., para. 175.

[120] *ORD* judgment, *supra* n. 2, dissenting opinion of Justice Müller, paras. 26, 41, and 45.

[121] Ibid., para. 2. Justice Müller even calls the reasoning of his colleagues in the majority 'objectively incomprehensible': ibid., para. 9.

[122] Ibid., point 41. It should also not be forgotten that under German constitutional law, the right to a lawful judge includes the obligation of national courts to refer a preliminary reference. *See*, for example, Cases 2 BvR 615/09 and 2 BvR 535/09 Judgment of the Second Senate of 21 November 2011. On this obligation, *see* R. Valutytė, 'Legal Consequences for the Infringement of the Obligation to Make a Reference for a Preliminary Ruling Under Constitutional Law', 19 *Jurisprudencija/Jurisprudence* (2012) p. 1171.

[123] *Cilfit*, *supra* n. 102, para. 10; *Consiglio Nazionale dei Geologi*, *supra* n. 102, para. 26; ECJ 15 March 2017, Case C-3/16, *Aquino*, ECLI:EU:C:2017:209, para. 43.

The obligation to submit a preliminary reference: the broader constitutional perspective

In EU constitutionalism broadly understood, the national perspective cannot be disregarded.[124] Unlike in national systems, in the EU, the ultimate authority of EU law (and the Court of Justice) competes with that of national law (and national apex courts).[125] We therefore find it necessary also to analyse the decision of the Bundesverfassungsgericht not to refer from that broader constitutional perspective, which also includes constitutional laws of the member states.[126] So let us turn to the German constitutional approach to EU law:

> *Ultra vires* review and identity review are exercised with restraint and in a cooperative manner that is open to European integration. This requires – when necessary – that the Federal Constitutional Court request a preliminary ruling from the Court of Justice of the European Union in accordance with Art. 267(3) TFEU and, in the course of its own review, interpret the measure in question in accordance with the understanding determined by the Court of Justice.[127]

The self-imposed obligation to submit a preliminary reference to the Court of Justice was introduced in the *Honeywell* standard of *ultra vires* review,[128] in which the German court ensured that before any finding of a breach of the principle of conferral, the Court of Justice have a say in the matter. In his dissenting opinion, Justice Müller introduced the German constitutional perspective on the possibility of submitting a preliminary reference: the Own Resources Decision is in his view an *ultra vires* act, a finding that means a preliminary reference should have been submitted.

From a broader constitutional perspective, which takes into account national constitutional traditions and the practice of constitutional courts, the decision of

[124]M. Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition* (Hart Publishing 2003) p. 502-503.

[125]N. Walker, 'The Idea of Constitutional Pluralism', 65 *Modern Law Review* (2002) p. 317; I. Pernice, 'Multilevel Constitutionalism and the Crisis of Democracy in Europe', 11 *EuConst* (2015) p. 541.

[126]Spieker refers to this broader perspective as the *Verbund*, in L. Spieker, *EU Values before the Court of Justice: Foundations, Potential, Risks* (Oxford University Press 2023) Ch. 8. The broader constitutional perspective has also been analysed as the normative core of constitutional pluralism in A. Bobić, 'Constructive versus Destructive Conflict: Taking Stock of the Recent Constitutional Jurisprudence in the EU', 22 *Cambridge Yearbook of European Legal Studies* (2020) p. 60.

[127]*ORD* judgment, *supra* n. 2, para. 139.

[128]Case 2 BvR 2661/06 *Honeywell* Order of 6 July 2010, paras. 60-61. For a further analysis of how *Honeywell* narrowed down the standard of review in comparison to the one introduced in the *Maastricht Treaty* judgment, *see* A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press 2022) p. 99-100.

https://doi.org/10.1017/S1574019624000117 Published online by Cambridge University Press

the Bundesverfassungsgericht not to submit a preliminary reference does not depart significantly from the overall practice of national constitutional and/or supreme courts. These courts rarely submit preliminary references,[129] for at least three reasons. First, they are most commonly tasked with resolving competence disputes between state organs as determined by national constitutional law, issues that seldom touch upon EU law. Second, the traditional role of constitutional courts is also the protection of fundamental rights enshrined in national constitutions, a task they are traditionally reluctant to share with the Court of Justice.[130] In fact, national constitutional courts appear to be 'reasserting themselves'[131] by taking up the protection of fundamental rights as a matter of EU law, but without submitting a preliminary reference.[132]

Third, the national act ratifying the Own Resources Decision is technically not EU, but national law, and therefore bears some resemblance to a situation where national constitutional courts review ratifying acts of treaty revisions. According to Article 311(3) TFEU, the Own Resources Decision 'shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements'. The ratification of the Decision therefore does not become EU law until it passes the approval stage determined exclusively by national constitutional law. In such situations, a preliminary reference is not necessary, as the Court of Justice does not have jurisdiction to interpret national law. It may also be the case that national constitutional law does not empower a court to determine the constitutionality of the Own Resources Decision, but rather another body.[133] While apex courts across member states vary in terms of their powers and role in the national system, these three reasons certainly apply to the Bundesverfassungsgericht and its powers in the German system.

[129]For example, a number of national constitutional courts reviewed the constitutionality of the implementing acts of the now annulled Data Retention Directive, without submitting a preliminary reference. *See* Bobić, *supra* n. 128, p. 223-227. The famous exception is the Belgian Constitutional Court, which regularly submits preliminary references, having submitted 46 references in total: Annual Report 2022 Statistics concerning the judicial activity of the Court of Justice p. 25.

[130]Bobić, *supra* n. 128, Ch. 7.

[131]J. Zglinski, 'The New Judicial Federalism: The Evolving Relationship between EU and Member State Courts', 2 *European Law Open* (2023) p. 345 at p. 365.

[132]BVerfG, docket no. 1 BvR 276/17, decision of 6 November 2019 – *Right to be forgotten II*. For an analysis of this point, *see* A. Bobić, 'Developments in The EU-German Judicial Love Story: *The Right To Be Forgotten II*', 21 *German Law Journal* (2020) p. 31.

[133]As was the case, for example, in Finland, where this is within the competence of the Constitutional Law Committee of the Parliament. *See* P. Leino-Sandberg, 'Between European Commitment and "Taking the Law Seriously"', *Verfassungsblog*, 29 April 2021, https://verfassungsblog.de/between-european-commitment-and-taking-the-law-seriously/, visited 12 March 2024.

From the perspective of judicial politics, there are several directions for speculation as to why no reference was submitted in the present case. It could be that the submission of a reference would signal that the German judges are dangerously close to an *ultra vires* finding; it could also be that they preferred not knowing what the Court of Justice would say and thereby retaining control; we may also speculate about the lack of consensus in the Second Senate, who thus decided to minimise the problem of too many hands. Finally, it may be argued that not submitting a preliminary reference had the aim of preventing the Court of Justice from rubber-stamping whatever the institutions set their mind on doing. This might be seen as a response to a new trend in EU judicial interactions, one of centralisation and increase in hierarchy in favour of the Court of Justice.[134]

Is the lack of a preliminary reference in this case a cause for concern? Could it lead to yet another *Commission* v *France*[135] based on the breach of Article 267(3) TFEU? We see three considerations of relevance for answering that question. First, given the Commission's supervisory role in the implementation of the National Recovery and Resilience Plans and approving further disbursements of moneys under the Recovery and Resilience Facility, it seems to us unlikely that it would use the discretion it enjoys in the infringement procedure[136] to pursue litigation against a decision favourable to NextGeneration EU package. Moreover, considering how controversial infringement actions against national courts are, and the inequality they create between national and EU courts,[137] such an initiative would not appear prudent.

Second, we consider it at least plausible to argue that Article 267(3) TFEU does not apply to situations when EU law refers to national approval under 'national constitutional requirements', as is the case in Article 311(3) TFEU. Member states are to ratify the Own Resources Decision in line with their constitutional requirements, the review by a constitutional court being one possible step in that process. Indeed, a number of constitutional courts reviewed the Lisbon Treaty,[138] without any preliminary reference having been submitted to the Court of Justice. While it is therefore possible that the Court of Justice would have interpreted the relevant Treaty provisions differently from the Bundesverfassungsgericht, this conflict remains constructive,[139] something that may be seen as business as usual in judicial interactions in the EU.

[134]Zglinski, *supra* n. 131.

[135]ECJ 4 October 2018, Case C-416/17, *Commission* v *France*, ECLI:EU:C:2018:811. *See also* ECJ 14 March 2024, Case C-516/22, *Commission v United Kingdom*, ECLI:EU:C:2024:231.

[136]Case C-575/18 P, *Czech Republic* v *Commission*, ECLI:EU:C:2020:530, para [80].

[137]*See* A. Turmo, 'A Dialogue of Unequals: The European Court of Justice Reasserts National Courts' Obligations under Article 267(3) TFEU', 15 *EuConst* (2019) p. 340 at p. 348.

[138]M. Wendel, 'Lisbon before the Courts: a Comparative Perspective', 7 *EuConst* (2011) p. 96.

[139]Bobić, *supra* n. 126.

https://doi.org/10.1017/S1574019624000117 Published online by Cambridge University Press

Third and finally, the relationship between the Court of Justice and constitutional courts is arguably different from that of the Court of Justice and ordinary courts and entails different power relations.[140] This is particularly the case in competence control,[141] over which both the Court of Justice and constitutional courts claim ultimate authority. It is a relationship based on mutual respect, sincere cooperation, and the commitment of national constitutional courts to an EU-friendly interpretation.[142] It is precisely this third consideration that we think should have led the German court to submit a preliminary reference. It would have assuaged some of the undeniable damage done by its *Weiss* judgment. Rather than seeing this as succumbing to the ultimate authority of the Court of Justice, a view untenable under German constitutional law, the Bundesverfassungsgericht's reference in this case would have meant bringing back the relationship of two courts to one of mutual respect, with reservations to primacy being used with utmost restraint.

Risk-sharing and identity review

The applicants in this case also argued that the Own Resources Decision breaches Germany's constitutional identity, as it infringes the Bundestag's overall budgetary responsibility. According to the Bundesverfassungsgericht, a violation of constitutional identity is irremediable:[143] not even a change of the Treaties would be able to overrule the eternity clause of the German Basic Law, which prohibits any measure of integration ever to interfere with the Bundestag's budgetary sovereignty. Introduced in the judgment reviewing the German ratification of the Lisbon Treaty, identity review means that it must remain possible for constitutional organs to 'preserve the inviolable core content of the Basic Law's constitutional identity by means of an identity review'.[144] The

[140]Bobić, *supra* n. 128, Ch. 8.

[141]J. Weiler and D. Sarmiento, 'The EU Judiciary After Weiss. Proposing A New Mixed Chamber of the Court of Justice', *Verfassungsblog*, 2 June 2020, https://verfassungsblog.de/the-eu-judiciary-after-weiss/, visited 12 March 2024.

[142]A. Bobić, 'Constitutional Pluralism is Not Dead: An Analysis of Interactions between the European Court of Justice and Constitutional Courts of Member States', 18 *German Law Journal* (2017) p. 1395 at p. 1416.

[143]*ORD* judgment, *supra* n. 2, para. 113. The German court is not the only national court conducting identity review of EU acts, but it is the only one where a breach of constitutional identity would be without remedy. *See* Bobić, *supra* n. 128, p. 130-156; L. Spieker, 'Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi between the Court of Justice and National Constitutional Courts', 57 *CML Rev* (2020) p. 361.

[144]Case 2 BVerfG 2/08 *Lisbon Treaty* Judgment of 30 June 2009, para. 240. Core areas that are not subject to integration are: criminal law (substantive and procedural); the monopoly on the use of force by the police and by the military; fundamental fiscal decisions on public revenue and expenditure; the social state, the school and education system; and the relationship with religious communities: paras. 252-260.

budgetary autonomy of the Bundestag was added to the list of core areas in 2011.[145]

The Bundesverfassungsgericht has now collected a streak of judgments[146] where it threatened with this almighty weapon without a remedy, but refrained from using it. In *Weiss*, it used constitutional identity to impose a red line for what the Basic Law would allow in terms of economic integration: any scheme of allocation of risks may not amount to redistributing sovereign debts among member states.[147] After stating that such a redistribution would represent an assumption of liability illegal under the Basic Law,[148] the German court found that the European Central Bank's decisions cannot violate Germany's constitutional identity. The Bundesverfassungsgericht, in its order for reference, also asked the Court of Justice whether primary law prohibits risk-sharing, but the latter court found that question hypothetical and thus inadmissible.[149] The Bundesverfassungsgericht understood that to mean that risk-sharing is prohibited by primary law.[150] It reiterated that prohibition in the *ORD* judgment,[151] thereby maintaining the identity review weapon in its arsenal.

In his dissent, Justice Müller warned that although NextGeneration EU is temporary, there is nothing to prevent it from incrementally becoming permanent, once the established practice results in the member states accepting such changes to the EU's financial architecture.[152] Would this outcome force the Bundesverfassungsgericht to make good on its promise (threat?) that a fiscal capacity for the EU would go against Germany's constitutional identity? We are of the view that identity review of the German court, in its current absolutist and irremediable form, is an empty vehicle. Even by its *Weiss* standards of (relative) openness to conflict, it would be difficult to imagine the Bundesverfassungsgericht blocking a development to which all member states agreed. Identity review may seem like a strong deterrent, but ultimately, we consider it a bluff.

[145]Case 2 BVerfG 987/10 *Aids for Greece and EFSF* Judgment of 7 September 2011, para. 126. *See also* P. Huber, 'The Federal Constitutional Court and European Integration', 21 *European Public Law* (2015) p. 83 at p. 92.

[146]Case 2 BVerfG 2/08 *Lisbon Treaty*; Case 2 BVerfG 2735/14 *Mr. R* Order of 15 December 2015; Case 2 BvR 2728/13 *Gauweiler*; Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss*.

[147]Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss*, para 222.

[148]Ibid., para. 227.

[149]Case C-493/17, *Weiss*, ECLI:EU:C:2018:1000, paras. 165-166.

[150]Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss*, para. 228.

[151]*ORD* judgment, *supra* n. 2, para. 135.

[152]Ibid., dissenting opinion of Justice Müller, para. 31.

https://doi.org/10.1017/S1574019624000117 Published online by Cambridge University Press

Conclusion

The core message of the Bundesverfassungsgericht's ruling is clear: NextGeneration EU is a mere deviation from the *status quo*, a parenthesis justified by the exceptional severity of the pandemic crisis. Only under such a premise may it be considered constitutional, and under no circumstance should it be considered a first step towards a 'transfer union'. As such, the ruling seeks to temper the enthusiasm of those who approach NextGeneration EU as a template that could indefinitely be replicated from one crisis to the next,[153] and as a transformative, Hamiltonian initiative,[154] paving the way for a permanent debt capacity at the supranational level. The tone is often critical, and the entire decision seems guided by a willingness to limit initiatives such as NextGeneration EU and the quantum leap it might represent for EU integration. Most crucially, the exceptionality of NextGeneration EU, its strictly targeted and temporary nature, as well as its many constraints were made essential to its constitutionality.[155] From a judicial cooperation perspective, the decision leaves much to be desired: under EU law, the German court resorted to a misplaced standard and breached its obligations under Article 267(3) TFEU, while from a broader constitutional perspective, it missed out on an opportunity to re-establish the relationship of mutual respect with the Court of Justice that undoubtedly suffered after *Weiss*.

Whether the Bundesverfassungsgericht will achieve its goal remains to be seen. Social sciences have long shown that the EU is a path-dependent polity, and that crises act as critical junctures, structurally changing and deepening the integration process.[156] Legal theory similarly suggests that new legal constructions and interpretations born in times of emergency tend to sediment beyond the crisis situation that brought them about.[157] In a way, Justice Müller says exactly that in his dissenting opinion. He claims that by its ruling, the majority 'opens the door to a fundamental change in the financial architecture of the European Union, as it allows the European Union to permanently move to a system that relies on both own resources and borrowing on a nearly equal footing', thereby visibly tilting the budgetary structure of the European Union 'in the direction of a fiscal and

[153]For example, in the context of the Ukrainian crisis, *see* F. Fabbrini, 'Funding the War in Ukraine: The European Peace Facility, the Macro-Financial Assistance Instrument, and the Slow Rise of an EU Fiscal Capacity', 11 *Politics and Governance* (2023) (pre-print).

[154]*See*, for example, De Witte, *supra* n. 3, p. 678-681; Fabbrini, *supra* n. 3, p. 127-153.

[155]*See*, most notably, *ORD* judgment, *supra* n. 2, paras. 186-192.

[156]*See*, most notably, P. Pierson, 'The Path to European Integration: A Historical Institutionalist Analysis', 29 *Comparative Political Studies* (1996) p. 123.

[157]J. White, *Politics of Last Resort – Governing by Emergency in the European Union* (Oxford University Press 2019).

https://doi.org/10.1017/S1574019624000117 Published online by Cambridge University Press

transfer union'.[158] Without a final interpretation by the Court of Justice on the possible limits attached to NextGeneration EU, EU institutions may indeed proceed incrementally to change the fundamentals of the EU budget. Coupled with the Bundesverfassungsgericht granting the Commission and the Council wide discretion,[159] it may well be that the German court lost the control it sought to preserve. Or to paraphrase the German Tagesschau, 'Alle sind Verlierer'.

Acknowledgements. We are grateful to Fabian Amtenbrink and Mark Dawson, as well as to the three anonymous reviewers for useful feedback on earlier versions of this draft.

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[158] *ORD* judgment, *supra* n. 2, dissenting opinion of Justice Müller, para. 33.
[159] *ORD* judgment, *supra* n. 2, para. 183.