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Acquitted on the Benefit of Doubt . . . but not Proven Innocent! The Judgment of the German Federal Constitutional Court on the Next Generation EU Program

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Abstract

Until recently, the recognition by the European Union of the capacity to borrow from capital markets for spending purposes was considered almost inconceivable without a treaty amendment. When borrowing for spending was authorized under the Next Generation EU program to support the recovery of member states from the unprecedented consequences of the coronavirus, it was immediately faced with the suspicion that the pandemic was being used as a pretext to promote the creation of a fiscal and transfer union by the back door in violation of the principle of conferral. In its NGEU judgment, the German Federal Constitutional Court concluded that the authorization to borrow under the program could not be considered *ultra vires*. However, the ambiguous and controversial reasoning of the Constitutional Court gives rise to uncertainty as to whether the funding and financing model introduced by the recovery program could be used again in the future, beyond the exceptional circumstances of the pandemic. At the same time, it appears that, in this case, the Constitutional Court applied a considerably more restrained version of its *ultra vires* review compared to its recent case law on the asset purchase programs of the European Central Bank.

Keywords: Next Generation EU; borrowing for spending; Article 122 TFEU; coronavirus pandemic; *ultra vires* review; principle of conferral; EU emergency competences; pandemic recovery programme; EU Own Resources Decision

A. Introduction

The outbreak of the coronavirus pandemic and the catastrophic effects it had on the national economies highlighted the absence in the treaties of an express supranationalized economic and fiscal capacity that could allow the EU to intervene timely and effectively in case of a need to stabilize the economies of its member states. Indeed, the EU has been attributed exclusive competence in monetary policy regarding the eurozone countries.¹ However, the exercise of economic policy continues to belong to the member states, and the role of the EU in this area is restricted to adopting coordinated measures.²

The problems arising from this apparent asymmetry in the structure of the EU monetary and economic governance system were evident during the eurozone crisis. In the absence of a centralized economic and fiscal competence at the EU level that could be relied upon to assist affected eurozone countries, it was considered necessary to introduce new financial support mechanisms based on international agreements and intergovernmental cooperation between the

¹Article 3(1)(c) TFEU and Article 282(1) TFEU.

²Article 2(3) TFEU and Article 5(1) TFEU.

member states that take place outside the EU legal order.³ Under those mechanisms, loans provided to the affected eurozone countries were subject to strict conditionality. At the same time, the European Central Bank (ECB) announced and implemented unconventional monetary policy measures to maintain price stability by supporting aggregate consumption and investment spending in the euro area.⁴ Although those measures contributed considerably to stabilizing the eurozone and its common currency, they were nevertheless accused of producing serious economic policy effects in violation of the principle of conferral and the mandate of the ECB.⁵

At the beginning of the pandemic, the initial response of the EU was to temporarily suspend the application of many of its core legal rules to make it easier for member states to adopt the necessary measures to address the adverse consequences of the crisis on their economy and their people.⁶ In particular, in the eurozone countries, a special credit line for cheap and almost unconditional loans specifically earmarked for financing healthcare costs was made available under the Pandemic Crisis Support program.⁷ In addition, the EU adopted a new legal instrument to provide back-to-back loans to its member states to mitigate temporary employment risks arising from the pandemic.⁸ As part of its quantitative easing policy, the ECB announced a massive new pandemic emergency asset purchase program of private and public sector securities.⁹ Also, the European Investment Bank created a new European Guarantee Fund to help businesses recover.¹⁰

However, given the unprecedented socioeconomic effects of the crisis, it soon became apparent that more radical solutions were required. Under these circumstances, the necessary political consensus was reached by the European Council to authorize the Commission to borrow from capital markets on behalf of the EU to finance the recovery of the national economies of member states from the adverse consequences of the pandemic.¹¹ That eventually led to the adoption of the

³The principal instrument used in this respect was the European Stability Mechanism. The competence of the member states to proceed to the establishment of that mechanism was confirmed in Case C-370/12, *Thomas Pringle v. Government of Ireland*, ECLI:EU:C:2012:756. See Vestert Borger, *The ESM and the European Court's Predicament in Pringle*, 14 GERMAN L.J. 113 (2013); Paul Craig, *Pringle and Use of EU Institutions Outside the EU Legal Framework: Foundations, Procedure and Substance*, 9 EuConst 263 (2013); Bruno de Witte and Thomas Beukers, *The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: Pringle*, 50 CMLRev 805 (2013); Gunnar Beck, *The Court of Justice, Legal Reasoning, and the Pringle Case-Law as the Continuation of Politics by Other Means*, 39 ELRev 234 (2014).

⁴The first such program announced was the Outright Monetary Transactions Program (OMT) but it was never implemented in practice. The European Central Bank later implemented the Secondary Markets Public Sector Asset Purchase Program (PSPP). Regarding this program, see Sebastian Grund and Filip Grle, *The European Central Bank's Public Sector Purchase Program (PSPP), the Prohibition of Monetary Financing and Sovereign Debt Restructuring Scenarios*, 41 ELRev 781 (2016).

⁵For example, German Federal Constitutional Court (OMT Reference), January 14, 2014, 2 BvR 2728/13, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html; German Federal Constitutional Court (PSPP), 5 May 2020, 2 BvR 859/2015, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html.

⁶The most remarkable move in this respect was certainly the activation of the general escape clause of the Stability and Growth Pact. See the Communication of the Commission to the Council on the activation of the general escape clause of the Stability and Growth Pact, COM (2020) 123.

⁷Press Release of 8 May 2020, *Eurogroup Statement on the Pandemic Crisis Support*, available online at <https://www.consilium.europa.eu/en/press/press-releases/2020/05/08/eurogroup-statement-on-the-pandemic-crisis-support/>.

⁸Council 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) following the COVID-19 outbreak, [2020] OJ L 159/1.

⁹Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase program, [2020] OJ L 91/1. See in this respect Annelieke Mooij, *The legality of the European Central Bank's Pandemic Emergency Purchase Program*, 45 ELRev 713 (2020).

¹⁰Press Release of May 26, 2020, *EIB Board approves €25 billion Pan-European Guarantee Fund in response to COVID-19 crisis*, available online at <https://www.eib.org/en/press/all/2020-126-eib-board-approves-eur-25-billion-pan-european-guarantee-fund-to-respond-to-covid-19-crisis>.

¹¹European Council Conclusions, EUCO 10/20, www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf.

Next Generation EU (NGEU) program based on a complex legal construction that purports to overcome the absence of a clear treaty basis by presenting the program as a one-time instrument connected explicitly to the exceptional emergency of the pandemic.¹² The program has certain essential and innovative characteristics. Most notably, it allows the EU to raise large amounts of money from capital markets and transfer those funds to its member states as loans and non-repayable expenditures.¹³ As a result, borrowing for spending was introduced for the first time under EU law, making the EU the final debtor regarding that part of the funds transferred as expenditure. Furthermore, it provided that all funds would be raised and used for the sole purpose of addressing the consequences of the pandemic.¹⁴ However, the specific spending programs and policy objectives these funds have been assigned to are largely cohesion-based, and the allocation criteria used do not always manifest an immediate connection to the effects of the coronavirus crisis.¹⁵

As expected, those novel characteristics attracted considerable attention in legal scholarship. For some, the program is solidly based on the provisions of primary law and proves the ability of the treaties to accommodate new innovative instruments under the current legal bases.¹⁶ For others, it constitutes an unacceptable change of a paradigm that introduces fiscal integration by the back door in clear violation of the principle of conferral.¹⁷ Others have taken a more nuanced position, pointing out the program's potential impact on the EU constitutional architecture and the possibility to serve as a template for a more permanent legal construction.¹⁸

Given this controversy, it is unsurprising that the recovery program soon made its way to the German Federal Constitutional Court through a legal action seeking the annulment of a national act of ratification. The complainants argued that borrowing for spending was prohibited under the treaties and that the authorization of the Commission to borrow from capital markets on behalf of the EU constituted an *ultra vires* act violating national constitutional identity. The part of the claim related to the alleged violation of national constitutional identity had limited chances of success from the outset, as the Constitutional Court itself clarified in the interim order rejecting the application for a preliminary injunction against the challenged act.¹⁹ Inevitably, all attention was concentrated on the other part of the claim, which alleged that an *ultra vires* act existed.

¹²For a very detailed analysis of the legal architecture of the program see Federico Fabbrini, *Next Generation EU: Legal Structure and Constitutional Consequences*, 24 CYELS 45 (2022).

¹³The authorization is to borrow funds of up to EUR 750 000 million in 2018 prices. Up to EUR 360 000 million of the funds may be used for providing loans and up to EUR 390 000 million of the funds may be used for expenditure.

¹⁴Article 4 (1) of Council Decision (EU, Euratom) 2020/2053 of December 14, 2020 on the system of own resources of the European Union, [2020] OJ L 424/1.

¹⁵The vast majority of the borrowed funds are allocated on the basis of cohesion policy considerations under Regulation (EU) 2021/241 of the European Parliament and of the Council of February 12, 2021 establishing the Recovery and Resilience Facility, [2021] OJ L 57/17. Cohesion policy aims at removing the economic and social disparities between the member states by supporting job creation, business competitiveness, economic growth, sustainable development, and general improvements to the quality of life of the people.

¹⁶Bruno de Witte, *The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift*, 58 CMLRev 635 (2021); Federico Fabbrini, *The Legal Architecture of the Economic Responses to COVID-19: EMU beyond the Pandemic*, 60 JCMS 186 (2022).

¹⁷See particularly Päivi Leino-Sandberg and Matthias Ruffert, *Next Generation EU and its Constitutional Ramifications: A critical Assessment*, 59 CMLRev 433 (2022).

¹⁸Paul Dermine, *The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture*, 47 LIEI 337 (2020); Antonio-Martín Porrás-Gómez, *The EU Recovery Instrument and the Constitutional Implications of its Expenditure*, 19 EuConst 1 (2023).

¹⁹German Federal Constitutional Court (NGEU Preliminary Injunction), April 15, 2021, 2 BvR 547/21, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/04/rs20210415_2bvr054721en.html. On this case, see Hanno Kube, *The Interim Decision of the German Federal Constitutional Court in the Procedure against the 2020 Own Resources Decision*, VerfBlog, 2021/4/27, <https://verfassungsblog.de/a-relieving-decision>; Mattias Wendel, *Next Generation EU and the German Federal Constitutional Court – The Decision on Preliminary Injunctions of 15 April 2021*, available online

In its *NGEU* judgment, the Constitutional Court concluded that the funding and financing modalities of the program could not amount to the classification of the authorization to borrow as an *ultra vires* act.²⁰ However, it arrived at this conclusion without recourse to the preliminary reference procedure based on ambiguous and often contradictory legal reasoning that leaves many crucial questions unanswered. This Article argues that despite the surprisingly open language used by the Constitutional Court, its judgment should not be understood as authorizing the raising of funds from capital markets without the need to establish the existence of an emergency. However, the judgment opens the road to replicating the funding and financing model introduced by the recovery program beyond the exceptional circumstances of the pandemic. It allows the allocation of the borrowed funds to a broad range of cohesion-driven policy objectives that are only loosely connected to the nominal reason for the borrowing and the urgency requirements that this allegedly serves. Consequently, an emergency could be used to indirectly pursue a secondary economic policy agenda despite the absence of a conferred EU competence in the economic area (B). This Article also examines the intensity of the *ultra vires* review performed in this case. It compares it to the much more restrictive standard that the Constitutional Court has applied in its recent case law on the asset purchase programs of the ECB. It concludes that the application by the judgment of a more relaxed version of *ultra vires* review can be explained by reference to the particular circumstances of the case, the unanimity requirements attached to the authorization to borrow from capital markets, and the political sensitivity of contesting a pandemic recovery program approved by all of the member states according to their respective constitutional requirements. Although welcome in principle and amounting to a European-friendly exercise of the *ultra vires* review, the judgment cannot be interpreted as a permanent change of course and as an unreserved recognition by the Constitutional Court of the broad margin of appreciation that must be afforded to the EU institutions in the performance of their competences (C).

B. Not A One-Time instrument? The Inconclusive Reasoning of the Constitutional Court

To better understand the reasoning of the Constitutional Court, it is first necessary to provide a brief overview of the legal architecture of the recovery program. The latter operates on three interlinked levels.²¹ At the bottom level, there are a number of spending programs to which the borrowed funds are eventually allocated. The most important of these is the Recovery and Resilience Facility (RRF), which was established through a regulation based on economic and social cohesion.²² This sets the policy objectives that must be pursued by the funded member states and provides specific criteria for the allocation and use of available resources.²³

At the intermediate level, there is the European Union Recovery Instrument (EURI), which is based on the emergency clause of Article 122 TFEU.²⁴ This provides the authorization to use the money raised by the EU from capital markets for the economic recovery from the pandemic and allocates it to specific measures and programs.²⁵ Its intervention between the borrowed funds and

at <https://dcubrexitinstitute.eu/2021/05/next-generation-eu-and-the-german-federal-constitutional-court-the-decision-on-preliminary-injunctions-of-15-april-2021/>.

²⁰German Federal Constitutional Court (NGEU), 6 December 2022, 2 BvR 547/21, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/12/rs20221206_2bvr054721en.html.

²¹Because its legal structure, the recovery program has been vividly compared to a nesting doll. See Armin Steinbach, *The Next Generation EU, Are We Having a Hamiltonian Moment?*, EU Law Live, June 23, 2020, at 3, available online at <https://eulawlive.com/long-read-the-next-generation-eu-are-we-having-a-hamiltonian-moment-by-armin-steinbach/>.

²²Article 175 TFEU.

²³Regulation (EU) 2021/241, *supra*, note 15.

²⁴Council Regulation 2020/2094 of December 14, 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, [2020] OJ L 433 I/23.

²⁵*Id.*, Articles 1 and 2.

their eventual allocation to individual spending programs was considered necessary to justify the new financing model based on the exceptional situation of the coronavirus crisis.²⁶ Finally, the amended Own Resources Decision (ORD) exists at the upper level.²⁷ This allows the Commission to borrow funds from capital markets on behalf of the EU and specifies the overall volume of borrowing and the amount of borrowed funds that will be used for loans and non-repayable expenditures, respectively.²⁸ It also provides for the temporary increase of the own resources ceilings for the sole purpose of covering the liabilities of the EU resulting from the borrowing, meaning that member states undertake the obligation to increase their regular contributions to the EU annual budget until repayment of the borrowed funds has been made.²⁹ While the repayment of the money raised from capital markets takes place through the EU budget, the borrowed funds are given the status of externally assigned revenue and are placed off-budget.³⁰ This was necessary to ensure that the principles of budgetary balance and budgetary discipline were formally respected.³¹

It was against that background that the Constitutional Court was called upon to examine the alleged *ultra vires* character of the authorization given to the Commission to borrow from capital markets on behalf of the EU. It concluded that the following requirements had to be met for such an authorization to be valid. First, borrowing funds as a category of other revenue must be directly authorized in a Decision on own resources.³² That is because the treaty expressly mentions this category and allows therefore to consider that proceeds from borrowing may constitute such other revenue, but it makes it incumbent upon the member states to provide financing for the EU and to have the final say over the allocation of its financial resources. To ensure respect for the budgetary powers of the member states and their national legislatures when providing financing to the EU, it is consequently required to specify any such other revenue in a Decision on own resources.³³ Provided this is so, the authorization to borrow must ensure that the financial means obtained must be used exclusively for the tasks for which the EU has competence, in accordance with the principle of conferral. It must also subject the borrowing to limits as to the duration and the amount of the commitments assumed. Finally, the other revenue should not exceed the total amount of the EU's own resources.³⁴

Although it expresses considerable reservations about whether the above requirements are satisfied in the case at issue, the Constitutional Court concludes that it cannot be ruled out.³⁵ However, that still leaves us to ascertain whether this conclusion is based on the exceptional circumstances of the pandemic or whether it can be interpreted as an indication that borrowing for spending may constitute a legitimate financing model in other future occasions.

²⁶See for example European Commission, *Next Generation EU - Legal Construction*, available online at https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1024.

²⁷Council Decision 2020/2053, *supra*, note 14.

²⁸*Id.*, Articles 4 and 5.

²⁹*Id.*, Article 6.

³⁰Article 3 (1) of Council Regulation 2020/2094, *supra*, note 24.

³¹Article 310 (1) and (4) TFEU. That has been nevertheless characterized as a controversial accounting trick of gigantic proportions. See in this respect, Paul Dermine, *supra*, note 18, at 348.

³²German Federal Constitutional Court (NGEU), *supra*, note 20, at paras 163–66.

³³Article 311 (2) TFEU provides that the budget shall be financed wholly from own resources without prejudice to other revenues. Article 311 (3) TFEU provides then that the Council shall unanimously and after consulting the European Parliament adopt a decision laying down the provisions relating to the system of own resources of the EU. In order for that decision to come into force, it has to be approved by all member states in accordance with their respective constitutional requirements.

³⁴German Federal Constitutional Court (NGEU), *supra*, note 20, at para. 149.

³⁵*Id.*, at para. 162.

I. The requirement that the borrowed funds be used for the exercise of a conferred competence

Interestingly, the only type of borrowing the Constitutional Court explicitly considers to be prohibited under the provisions of primary law is borrowing that provides general financing for the EU budget. Such a borrowing requires specific EU competence and violates the principle of conferral, regardless of the nature of the policy objectives pursued.³⁶ However, the legality of all other types of borrowing is left open by the Constitutional Court, based on the rationale that no express provision in the treaties sets out an absolute prohibition.³⁷ In this respect, it is characteristic that even borrowing funds as a category of other revenue to balance the budget is not considered by the Constitutional Court to be a clearly illegal practice.³⁸

At first reading, the approach of the Constitutional Court seems to contradict the position the EU institutions traditionally adopted before the introduction of the recovery program. It is reported that, until recently, the Council and the Commission websites explained that the EU could not borrow to finance itself.³⁹ However, on closer inspection, it appears that the above statement refers to borrowing for the general financing of the EU budget and relates to the principle of budgetary balance and the prohibition of running an operating budget deficit. That also seems to be the meaning of the relevant provision of the Financial Regulation that prohibits the EU from raising loans within the budget framework.⁴⁰ That interpretation is also confirmed by past public statements of EU officials, clarifying that the EU is not prohibited from borrowing but is not allowed to borrow for the purpose of balancing its budget.⁴¹

Seen from this perspective, the Constitutional Court considers that attributing the borrowed funds to a specific purpose does not automatically constitute a violation of the principle of conferral, but the legality of this borrowing requires a more sophisticated review. The Constitutional Court places particular emphasis on the purpose of the borrowing under the recovery program. It underlines that the money raised from capital markets cannot be used to finance operational expenditures.⁴² Nevertheless, it is surprising that the judgment makes only a passing reference to the principle of budgetary balance, simply to conclude that an absolute prohibition on borrowing cannot be assumed from the mere requirement of the treaty that the revenue and expenditure shown in the budget be balanced.⁴³ That is because one of the most controversial aspects of the recovery program was whether the classification of the borrowed funds as other external revenue circumvented the principle of budgetary balance by employing an imaginative accounting trick that miraculously turned expenditure into revenue.⁴⁴ Although that principle was not specifically relied upon by the complainants, one could assume that because very little attention was paid to it in the judgment, this might imply that the Constitutional Court considered convincing the explanations provided by the EU institutions and their legal services.⁴⁵ Even so, one would still expect the Constitutional Court to take this opportunity to express its position on the scope and operation of such an important principle.

³⁶*Id.*, at paras 158–60.

³⁷*Id.*, at para. 155.

³⁸*Id.*, at para. 170.

³⁹Päivi Leino-Sandberg and Matthias Ruffert, *supra*, note 17, at 451.

⁴⁰Article 17 (2) of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of July 18, 2018 on the financial rules applicable to the general budget of the EU, [2018] OJ L 193/1.

⁴¹Answer given by Vice-President Georgieva on behalf of the Commission to Parliamentary Question E-005201/2015, https://www.europarl.europa.eu/doceo/document/E-8-2015-005201-ASW_EN.html.

⁴²German Federal Constitutional Court (NGEU), *supra*, note 20, at para. 169.

⁴³*Id.*, at para. 155.

⁴⁴Päivi Leino-Sandberg and Matthias Ruffert, *supra*, note 17, at 450–54; Paul Dermine, *supra*, note 18, at 347–48.

⁴⁵Council of the European Union, Opinion of the Legal Service, paras 11–47, available online at <https://data.consilium.europa.eu/doc/document/ST-9062-2020-INIT/en/pdf>.

Turning specifically to the requirements imposed by the Constitutional Court for authorization to borrow from the capital markets as other revenue to be considered valid, one of the applicable conditions is to ensure that the financial means obtained will be used exclusively for the exercise of conferred competences and will be strictly assigned from the outset to such specific purposes. According to the Constitutional Court, it is necessary to ensure that the funds will be used within the European integration agenda's limits and prevent the EU from borrowing for tasks for which it lacks competence under the principle of conferral.⁴⁶

That is a surprisingly open statement that seems to accept that borrowing can be used for the exercise of any conferred competence, regardless of the existence of the pandemic and any other emergency.⁴⁷ According to this interpretation, it is possible to authorize the borrowing of funds as a category of other revenue by relying on a regular treaty basis so long as the financial means obtained are assigned to a specific purpose connected to the exercise of any conferred competence. For example, it is possible to introduce a similar funding program based purely on cohesion policy considerations simply by invoking the relevant treaty basis.⁴⁸ This creates numerous funding opportunities contrary to the assumption that the recovery program is intended to be an exceptional answer to an unprecedented situation.

The obvious counterargument to this interpretation is that the Constitutional Court refers several times to the exceptional nature of the pandemic recovery program and examines whether the authorization to borrow exceeds the competence conferred to the EU by the emergency clause of Article 122 TFEU.⁴⁹ However, it is submitted that this could be because that Article constitutes the legal basis for adopting the EURI that eventually allocates the borrowed funds to various specific measures and programs.⁵⁰ Therefore, it is natural that the Constitutional Court examines whether those funds will be used for that specific conferred competence. Had another legal basis been used to adopt the EURI, the Constitutional Court would have concentrated on whether the borrowed funds were explicitly assigned to purposes connected to exercising that other conferred competence.

It is also interesting to examine the reasoning employed by the Constitutional Court to establish that the considerable volume of the resources obtained as other revenue under the contested program does not exceed the total amount of the own resources recorded in the EU budget. The judgment relies on a purely quantitative assessment without referring to any qualitative elements that would underline the existence of an emergency calling for the adoption of extraordinary action. That approach contrasts markedly with the one followed by the EU institutions. The basic argument used by the latter to demonstrate that the unprecedented amount of externally assigned revenue obtained under the recovery program still respects the integrity of the system of the EU's own resources is that this assessment needs to occur based on not only quantitative but also qualitative criteria. Those criteria include, in particular, the exceptional and temporary nature of the program, the extraordinary economic circumstances that led to its adoption, the specific safeguards that have been introduced to prevent it from becoming a permanent mechanism and a paradigm change in the EU budgetary procedure.⁵¹ Although not perfectly convincing in its entirety, that approach has at least the advantage of making the raising

⁴⁶German Federal Constitutional Court (NGEU), *supra*, note 20, at para. 171.

⁴⁷See also in this respect the Dissenting Opinion of Justice Müller, at paras 25 and 39.

⁴⁸Article 175 TFEU. The use of this Article as the legal basis for the introduction of programs of financial assistance has been proposed in the past by the Commission. In this respect, see European Commission, Proposal for a Regulation of the European Parliament and of the Council on the establishment of a European Investment Stabilization Function, COM (2018) 387. Similar proposals have also been made in the legal literature. See for example, Bruno de Witte, *supra*, note 16, at 658. For a critical approach on the use of cohesion policy see Päivi Leino-Sandberg and Tuomas Saarenheimo, *Fiscal Stabilization for EMU – Managing Incompleteness*, 43 ELRev 639 (2018).

⁴⁹German Federal Constitutional Court, *supra*, note 20, at paras 172–88.

⁵⁰Under Council Regulation 2020/2094, *supra*, note 24.

⁵¹Council of the European Union, Opinion of the Legal Service, *supra*, note 45, paras 48–68.

of very substantial sums from capital markets conditional on the existence of an emergency and the introduction of sufficient guarantees that borrowing will not effectively turn into a second regular pillar of financing. On the contrary, the Constitutional Court makes no reference to the exceptional nature of the program and to the emergency clause that had been used as the legal basis for the adoption of the EURI. It simply compares the volume of the borrowing and the amount of the EU's own resources, basing its legal analysis primarily on the multiannual financial framework rather than the budget of a specific year.⁵² That seems to suggest that borrowing funds as other revenue is acceptable even beyond emergency crises, provided that the overall volume of the financial means thus obtained remains below the amount of own resources shown in the budget over a multiannual term.⁵³

However, there are valid reasons to conclude that the Constitutional Court did not intend to accept that borrowing for spending can be authorized regardless of the circumstances of the case based on any conferred competence. Despite its open language and often contradictory reasoning, it is nevertheless submitted that the general tenor of the NGEU judgment is that such authorization can only be provided in an emergency. This is not only because the Constitutional Court explicitly states that adopting the contested legal act cannot be considered as amounting to a manifest exceeding of competences given the exceptional circumstances of the pandemic.⁵⁴ It is primarily because it emphasizes the need to ensure that financing through own resources is not undermined by revenue obtained from other sources.⁵⁵ In this respect, it explains that the treaty clearly makes any recourse to other revenue the exception in relation to the own resources of the EU to protect, *inter alia*, the institutional prerogatives of the European Parliament in the adoption of the budget.⁵⁶ It concludes that it would be impermissible to inflate the category of other revenue and reduce the amount of the own resources, changing the fiscal system of the EU through the back door and removing power from the European Parliament.⁵⁷ Therefore, the exception to the rule relationship must be maintained between other revenue and the EU's own resources.⁵⁸ Given the above, it would be irrational to assume that the Constitutional Court considers that recourse to other revenue must remain the exception but turns this exception into the rule by accepting that borrowing can be authorized based on any conferred competence.

This conclusion is reinforced by considering the Constitutional Court's reliance on the arguments provided by the EU institutions and their legal services about the nature of the recovery program and the reasons for its adoption.⁵⁹ In the oral hearing and their relevant documentation, those institutions underlined that it would require a treaty amendment for borrowing to be recognized as a permanent source of financing and become a regular mechanism in the EU financial system.⁶⁰ They also explained that the use of the emergency clause of Article 122 TFEU

⁵²German Federal Constitutional Court (NGEU), *supra*, note 20, at paras 193–202.

⁵³See also in this respect the Dissenting Opinion of Justice Müller, at paras 24–25.

⁵⁴German Federal Constitutional Court (NGEU), *supra*, note 20, at para. 149.

⁵⁵*Id.*, at para. 162.

⁵⁶Article 14 (1) TEU and Article 314 TFEU. See also Articles 39–55 of Regulation 2018/1046, *supra*, note 40. On the contrary, Article 22 of that latter Regulation provides that the appropriations corresponding to assigned external revenue shall be made available automatically when the revenue has been received by the institution concerned. That limits a lot the possibility of effective parliamentary oversight, compared to the situation under the regular budgetary procedure. The risk of the European Parliament being sidelined by an increased reliance on other external revenue has not escaped the attention of legal scholarship. See, for example, Päivi Leino-Sandberg and Matthias Ruffert, *supra*, note 17, at 454–55; Bruno de Witte, *supra*, note 16, at 668–69.

⁵⁷German Federal Constitutional Court (NGEU), *supra*, note 20, at para. 195

⁵⁸*Id.*, at paras 200 and 202.

⁵⁹*Id.*, particularly at paras 120, 152, 184.

⁶⁰See especially Council of the European Union, Opinion of the Legal Service, *supra*, note 45, particularly at paras 64, 67, 70, and 169. That has also been underlined by the Director of the Legal Service of the Council of the European Union. See Alberto de Gregorio Merino, *The Recovery Plan: Solidarity and the Living Constitution*, EU Law Live, March 6, 2021, at 9–10, available at <https://eulawlive.com/long-read-the-recovery-plan-solidarity-and-the-living-constitution-by-alberto-de-gregorio-merino/>.

for the adoption of the EURI was necessary to allow the borrowing of significant amounts from capital markets in addition to the EU budget and outside of the annual budgetary procedure, an action that is justified only in the circumstances of the coronavirus crisis.⁶¹ Consequently, the connection made by the Constitutional Court between the authorization to borrow and the use of the funds raised from capital markets for the exercise of a conferred competence can only be understood and interpreted in the light of those explanations. It cannot be reasonably assumed that the judgment made all those references with a legal construction in mind that would effectively elevate borrowing to a regular financing method contrary to the submissions of the EU institutions. Furthermore, it should not escape attention that the exceptional nature of the recovery program was forcefully underlined in the oral proceedings by both the Federal Government and the *Bundestag*. Those national actors stressed that the program was meant to be a one-time instrument in reaction to an unprecedented crisis and not a step towards creating a transfer and fiscal union marked by institutionalized financial equalization.⁶² The Constitutional Court explicitly references the above statements, clearly adhering to the logic that any resort to borrowing presupposes the existence of an emergency and can only take place to address pressing and unexpected needs.

II. The existence of an emergency and its connection to the allocation of the borrowed funds

Arguably, the requirement that the borrowed funds be used to exercise a conferred competence has, according to the Constitutional Court, the narrower meaning of a competence that allows the adoption of emergency action to address the consequences of the pandemic. Consequently, the examination needs to concentrate on the emergency clause of Article 122 TFEU, the concrete legal basis for adopting the EURI that serves as the intermediate floor between borrowing funds from capital markets and their eventual allocation to specific objectives and spending programs. There are two crucial questions arising in this respect. The first is whether the reasoning of the Constitutional Court implies that this Article can also be relied upon in future occasions to justify borrowing in other emergencies beyond the exceptional circumstances of the coronavirus crisis. The second concerns the proximity of the connection between an emergency and the specific purposes to which the borrowed funds are ultimately assigned.

Recent years have seen an increasing reliance on Article 122 TFEU as the legal basis for adopting secondary EU legislation.⁶³ The Article contains two individual legal bases for action at the EU level in case of emergencies, one that appears to be more generic and another that seems to be more specific.⁶⁴ Its first paragraph allows the Council to decide, in a spirit of solidarity between member states, the measures appropriate to the economic situation, particularly if severe difficulties arise in the supply of certain products and, notably, in the area of energy. Its second paragraph allows the Council to provide, under certain conditions, EU financial assistance to a member state that faces severe difficulties caused by natural catastrophes and other exceptional occurrences beyond its control. One of the most vividly debated topics around the pandemic support program was whether the EURI could have been adopted based on any of the paragraphs of Article 122 TFEU mentioned above. The other immediately relevant question was, which legal basis should have been preferred over the other?

⁶¹European Commission, *supra*, note 26.

⁶²German Federal Constitutional Court (NGEU), *supra*, note 20, at para. 187.

⁶³See, for example, Merijn Chamon, *The rise of Article 122 TFEU: On Crisis Measures and the Paradigm Change*, VerfBlog, 2023/2/01, <https://verfassungsblog.de/the-rise-of-article-122-tfeu/>; Leigh Hancher, *Solidarity on Solidarity Levies and a Choice of Energy Mix: A Sound Legal Basis for Emergency Action in the EU's Energy Markets*, VerfBlog, 2023/2/08, <https://verfassungsblog.de/solidarity-on-solidarity-levies-and-a-choice-of-energy-mix/>.

⁶⁴Bruno de Witte, *EU Emergency Law and its Impact on the EU Legal Order*, 59 CMLRev 3 (2022), at 8–10.

At first reading, Article 122 (2) TFEU seems more suitable for introducing an instrument to support national economies recovering from the pandemic.⁶⁵ After all, that legal basis had been used at the beginning of the eurozone crisis to introduce the European Financial Stabilization Mechanism.⁶⁶ However, *Pringle* underlined that this provision allows financial assistance only to individual member states and cannot be used for measures concerning the totality of the member states.⁶⁷ Turning then to the more generic legal basis contained in Article 122 (1) TFEU, the authorization provided to the Council to adopt the measures appropriate to the economic situation is so open-ended that its scope of application could be understood to mean almost anything. However, *Pringle* clarified that this provision is not an appropriate legal basis for financial assistance from the EU to member states experiencing severe economic problems.⁶⁸ As a result, a literal reading of *Pringle* would conclude that none of the above legal bases could be used to adopt the EURI.

Eventually, the EURI was based on Article 122 TFEU without specifying the exact paragraph that served as its legal basis.⁶⁹ At the same time, the argument was advanced that the aim of the EURI was not to provide financial assistance to member states but to make general arrangements for the use of the proceeds from borrowing in the specific spending programs to which the money will ultimately be allocated. According to this interpretation, the EURI is based on Article 122 (1) TFEU, which only contains some indicative examples of the situations that may give rise to its application and leaves open both the nature and the content of the measures that the Council is authorized to adopt.⁷⁰ However, that provision must be read in light of the urgency requirement explicitly introduced in the second paragraph of Article 122 TFEU to ensure its systematic coherence properly.⁷¹

The Constitutional Court starts from the premise that Article 122 TFEU sets out clauses to address exceptional situations and must, for that reason, be interpreted narrowly.⁷² It concludes by stating that it is not untenable to qualify the allocation of the borrowed funds as measures appropriate to the economic situation covered by the first paragraph of that Article. This is because the argument that Article 122 (1) TFEU merely illustrates some typical examples of measures that may be adopted under this treaty competence finds some support in the wording of that provision. This view is also supported by the fact that the EU legislator relied on the urgency rationale underpinning Article 122 (2) TFEU, preventing an excessive reading of Article 122 (1) TFEU and giving effect to the standards introduced by the *Pringle* case law. The Constitutional Court means, in essence, that the bringing into play of the specific emergency requirements of Article 122 (2) TFEU effectively rules out an extensive interpretation that would allow to authorize borrowing for spending simply by invoking any general need to take the measures appropriate to the economic situation under Article 122 (1) TFEU. Commenting on the *Pringle* case law, the Constitutional Court concluded that this refers to the provision of financial assistance to member states experiencing severe financial problems, and it is not meant to include cases of member states experiencing difficulties caused by natural catastrophes and other exceptional occurrences beyond their control.⁷³

By accepting reliance on Article 122 TFEU to allocate proceeds from borrowing to specific spending programs to support the national economies, the Constitutional Court also opened the

⁶⁵See Päivi Leino-Sandberg and Matthias Ruffert, *supra*, note 17, at 444–45.

⁶⁶Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilization mechanism, [2010] OJ L 118/1.

⁶⁷*Pringle*, *supra*, note 3, at para. 65.

⁶⁸*Id.*, at para. 116.

⁶⁹On the possibility of combining the two legal bases, see Bruno de Witte, *supra*, note 16, at 654.

⁷⁰Council of the European Union, Opinion of the Legal Service, *supra*, note 45, at paras 119–20.

⁷¹*Id.*, at para. 121, note 68.

⁷²German Federal Constitutional Court (NGEU), *supra*, note 20, at paras 174 and 176.

⁷³*Id.*, at paras 184–85.

door to replicating this model in future emergencies.⁷⁴ Certainly, it attempts to conceal this reality by referring to the historically exceptional case of the pandemic and the adoption of the recovery program as a one-time instrument.⁷⁵ However, the fact remains that its interpretation amounts, in essence, to a recognition that borrowing and allocating to the member states the resources thus obtained as a category of other revenue constitutes, as a matter of principle, one of the measures appropriate to the economic situation the Council is entitled to adopt in cases of an emergency. Of course, the measure and nature of the urgency and the severity and scale of the ensuing economic consequences will always constitute relevant factors to be considered. Given the broad margin of appreciation and assessment recognized to the EU institutions in determining the prerequisites of an emergency under Article 122 TFEU, it is imaginable that there will be a considerable temptation to resort to borrowing in other future crises.⁷⁶

That being so, it is essential to understand the position the Constitutional Court seems to adopt as regards the connection that must exist between the emergency and the purposes for which the borrowed funds will be used. As explained, the EURI only sets the general conditions for using the proceeds from borrowing but does not specify the actions and objectives for which these funds should be employed.⁷⁷ The specific rules relating to the management and disbursement of the funds are provided in a number of individual spending programs to which the proceeds are eventually allocated, most notably the RRF.⁷⁸ However, the latter was adopted based on Article 175 TFEU, which allows the legislative action necessary to enhance the social and economic cohesion of the EU outside structural funds. Hence, the obtained financial resources are eventually channeled almost in entirety to a spending program based on a cohesion policy through an instrument based on an emergency competence.

This complex construction and the combined reliance on both emergency and cohesion competences under the common legal roof of the recovery program raises the suspicion that the pandemic may have been used to pursue a surreptitious economic policy agenda. That suspicion is reinforced by looking at the allocation of the borrowed funds to specific policy areas and objectives under the RRF. Many of the objectives pursued by the RRF cannot be seen as being immediately connected to the consequences of the pandemic, particularly those relating to the attainment of climate neutrality and the promotion of digital transition.⁷⁹ It has even been argued that they exceed the scope of cohesion policy, stretching its limits to pursue concealed economic purposes.⁸⁰ In addition, the criteria used for allocating funds to member states are primarily based on their economic situation and unemployment rate before the pandemic.⁸¹ This could be interpreted as an indication that the recovery program is not confined to addressing the consequences of the pandemic; rather, it creates a redistributive mechanism. This mechanism favors the member states that will accrue a net profit from the borrowed proceeds because of their feeble economic situation when compared to the more

⁷⁴See also the Dissenting Opinion of Justice Müller, at paras 14–16.

⁷⁵German Federal Constitutional Court (NGEU), *supra*, note 20, at paras 186–87.

⁷⁶*Id.*, at para. 183. The potential of the recovery program serving as a template for similar future constructions has been highlighted in legal scholarship. See, for example, Federico Fabbrini, *supra*, note 16, at 194–95; Päivi Leino-Sandberg and Matthias Ruffert, *supra*, note 17, at 448; Antonio-Martín Porrás-Gómez, *supra*, note 18; Paul Dermine, *supra*, note 18, at 358.

⁷⁷Article 1 (2) of Council Regulation 2020/2094, *supra*, note 24.

⁷⁸Regulation (EU) 2021/241, *supra*, note 15.

⁷⁹*Id.*, Articles 3 and 4. It is nevertheless submitted that even those measures can ultimately be connected to the objective of supporting structural reforms and investments that aim at restoring the economic soundness of member states especially affected by the crisis. In this respect, see Council of the European Union, Opinion of the Legal Service, *supra*, note 45, at paras 129 and 143.

⁸⁰Päivi Leino-Sandberg and Matthias Ruffert, *supra*, note 17, at 449; Paul Dermine, *supra*, note 18, at 346. For a more nuanced position, see Bruno de Witte, *supra*, note 16, at 658.

⁸¹Article 11 of Regulation (EU) 2021/241, *supra*, note 15. Nevertheless, it could be argued that the economic situation of a member state before the pandemic is a relevant indication of its potential exposure to its consequences. See in this respect Council of the European Union, Opinion of the Legal Service, *supra*, note 45, at paras 144–47.

economically robust member states that will receive less than the amount of the extra contributions they will be obliged to make to the EU budget for the repayment of the loans.⁸²

Against this backdrop, the Constitutional Court stresses that Article 122 TFEU must be interpreted in a manner that requires a connection between the harmful effects of the emergency and the objectives pursued by the assistance measures adopted to counteract them. This is necessary to avoid turning the provision into a blanket clause that could be invoked to authorize virtually any measure without involving the European Parliament, violating the principles of democracy and institutional balance.⁸³ The Constitutional Court expressed serious reservations regarding such a connection between the NGEU recovery instruments and the endeavor to counter the effects of the pandemic. It noted that the objectives pursued by the spending programs, the nature of the criteria used to allocate the proceeds to the member states and the long allocation period of the borrowed funds raise the suspicion that the recovery program could merely constitute a general stimulus package.⁸⁴ Despite those concerns, the Constitutional Court concluded that the legislative framework used to assign the authorization for borrowing to specific purposes was based on an at least tenable interpretation of Article 122 (1) and (2) TFEU.⁸⁵

Although the Constitutional Court does not explicitly admit it, this conclusion legalizes reliance on an emergency provision to channel proceeds from borrowing to attain very generously understood cohesion policy objectives that are only loosely connected to the nominal reason for the borrowing. That is not the same as authorizing direct borrowing for spending based on cohesion policy since it is still necessary to prove the existence of an emergency.⁸⁶ From this perspective, it is an exaggeration to conclude that the Constitutional Court allows borrowing to be elevated to a second pillar of financing of near equal importance to the one provided under the treaties, bringing about a paradigm shift and a fundamental change in the financial architecture of the EU.⁸⁷ It is nevertheless accurate to say that a legal template has now been introduced that allows to invoke the existence of an emergency to resort to borrowing for the attainment of objectives that seem to serve a secondary economic policy agenda, even though the EU competences in the economic area are limited to a coordinating role.

It should not escape attention that attaining those objectives will be pursued without making the support provided to the member states subject to strict macroeconomic conditionality similar to the one introduced in the years of the eurozone crisis.⁸⁸ It has been argued that the support made available to the national economies under the recovery program cannot be compared to the one provided to eurozone countries in the past. There is no intention to assume the liability of the member states before the capital markets and replace their financing from those markets in any respect.⁸⁹ It is not therefore necessary to subject that support to strict macroeconomic conditionality since the purpose of the latter is to prevent the violation of the no-bailout clause by ensuring that the incentive of member states to conduct a sound budgetary policy is not reduced.⁹⁰ Albeit in much less categorical terms, the Constitutional Court seems to be making the same point by concluding that the no-bailout clause does not rule out the allocation of recovery program funds based on the competence conferred by Article 122 TFEU under primary EU law.

⁸²For a very interesting analysis of the financing of the EU budget and its future potentials, see Richard Crowe, *An EU Budget of States and Citizens*, 26 ELJ 331 (2020).

⁸³German Federal Constitutional Court (NGEU), *supra*, note 20, at para. 176.

⁸⁴*Id.*, at paras 177–81.

⁸⁵*Id.*, at para. 182.

⁸⁶That also serves as a political argument to present the borrowing as an exceptional circumstance. See also in this respect Bruno de Witte, *supra*, note 64, at 10.

⁸⁷Dissenting Opinion of Justice Müller, at paras 11, 28, 33, and 37.

⁸⁸That is not to say that some form of conditionality is not present in the recovery program. See particularly in this respect Alberto de Gregorio Merino, *supra*, note 60, at 10–11; Armin Steinbach, *supra* note 21 at 4–6.

⁸⁹Council of the European Union, Opinion of the Legal Service, *supra*, note 45, at paras 159–64.

⁹⁰Article 125 (1) TFEU. On the objective pursued by that provision, see Pringle, *supra*, note 3, at paras 133–43. On the relationship between Article 122 (2) TFEU and Article 125 (1) TFEU, see Jean-Victor Louis, *The No-Bailout Clause and Rescue Packages*, 47 CMLRev 971 (2010), at 983.

It underlines that the value judgments underpinning that Article do not fall short of the ones enshrined in the no-bailout clause. Consequently, a manifest circumvention of that clause cannot be established.⁹¹

C. The Restrained Application of *Ultra Vires* and the Respect of the Legislative Choices

Another important characteristic of this case is that the Constitutional Court seems to apply a much more lenient version of its *ultra vires* review than its recent case law. Arguably, the reasons for this relaxed application of *ultra vires* are more pragmatic than legal and can be explained by the reference to the particular circumstances of the case and the existence of a pressing political and economic reality that made it practically impossible for the Constitutional Court to question the validity of the recovery program and the unanimous approval by the member states of its financing and repayment modalities. Consequently, this case stands as a welcome example of a European-friendly application of the *ultra vires* review and a reminder of the Constitutional Court's past promises made in this respect. However, it cannot be interpreted as marking a permanent turn towards a more receptive approach that recognizes priority to the complex policy choices made by EU institutions in the performance of their powers and acknowledges, in practice, the need to exhibit considerable self-restraint as regards the exercise of judicial control over the validity of their acts.

In its seminal *Maastricht* judgment, the Constitutional Court proclaimed for the first time its capacity to review whether EU institutions respect the limits of their conferred competences and to pronounce all legal instruments adopted by them in the transgression of these boundaries inapplicable at the national level.⁹² Since then, the Constitutional Court has repeatedly reaffirmed its role as the ultimate protector of constitutionality against the *ultra vires* introduction and interpretation of EU law.⁹³ This *ultra vires* doctrine inspired the case law of several other national Constitutional Courts, which announced their intention to operate as an *ultima ratio* against the violation of the principle of conferral by EU institutions.⁹⁴ However, it was not until the eurozone crisis that the Constitutional Court was given the opportunity to apply this case law in practice in relation to the asset purchase programs of the ECB.

The Constitutional Court expressed in unambiguous terms its position that those programs produced very serious economic policy effects, exceeding EU competences and the monetary policy mandate of the ECB. In *Gauweiler*, the Constitutional Court made a preliminary reference that openly indicated its intention to consider the Outright Monetary Transactions program of the ECB as *ultra vires* unless the preliminary ruling accepted a restrictive interpretation that would

⁹¹German Federal Constitutional Court (NGEU), *supra*, note 20, at paras 203–10.

⁹²German Federal Constitutional Court, Judgment of 12 October 1993, 2 BvR 2134/92, 2 BvR 2159/92.

⁹³See, for example German Federal Constitutional Court (Lisbon), 30 June 2009, 2 BvE 2/08 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html; German Federal Constitutional Court (Honeywell), 6 July 2010, 2 BvR 2661/06, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html.

⁹⁴There have also been isolated instances of national constitutional and supreme courts applying this doctrine on the preliminary rulings of the Court of Justice. See, for example, the Czech Constitutional Court's Decision of January 31, 2012, Pl. ÚS 5/12. In that case, see Robert Zbiral, *A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed Ultra Vires*, 49 CMLRev 1475 (2012); Jan Komarek, *Czech Constitutional Court Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires*, 8 EuConst 323 (2012); Georgios Anagnostaras, *Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court*, 14 GERMAN L.J. 959 (2013). For a more implicit application of *ultra vires*, see the Danish Supreme Court, Judgment of December 6, 2016, Case 15/2014 Dansk Industri (DI). See in that case Urška Šadl and Sabine Mair, *Mutual Disempowerment: Case C-441/14 Dansk Industri*, 13 EuConst 347 (2017).

confirm its supportive nature with regard to the economic policies in the EU and would not undermine the conditionality of the then applicable reform programs.⁹⁵ However, it eventually refrained from exercising its reserve power even though the preliminary ruling plainly rejected the restrictive interpretation of the program advocated in its preliminary request.⁹⁶ Four years later, the Constitutional Court gave practical effect to its *ultra vires* review in relation to Secondary Markets Public Sector Asset Purchase Program (PSPP) of the ECB.⁹⁷

Besides the obvious concerns this judgment gave rise to regarding its consequences on the ability of the ECB to exercise its powers effectively and its potential adverse impact on interinstitutional relationships, its timing was extremely unfortunate because it coincided with the outbreak of the COVID-19 pandemic. Therefore, the “million-euro” question was what the Constitutional Court’s reaction to the coronavirus support measures, already being adopted at the EU level, would be. Although the Constitutional Court stressed (in a press release) that its ruling did not concern any financial assistance measures taken by the EU and its institutions in the context of the pandemic, it was evident that a strict application of its *ultra vires* review had the potential to imperil the viability of those measures seriously.⁹⁸

These concerns have now been proven to be unfounded. In its *NGEU* judgment, the Constitutional Court confirmed the basic principles that inform the exercise of its *ultra vires* review.⁹⁹ However, it applied them in a restrained manner that recognized a broad margin of appreciation for the EU institutions performing their emergency functions. That amounted to a European-friendly exercise of the *ultra vires* review corresponding to the relevant promise provided by the Constitutional Court in its earlier *Honeywell* case law.¹⁰⁰ At the same time, this approach contrasts markedly with the one this very same court had adopted in the recent past in relation to the asset purchase programs of the ECB.

⁹⁵German Federal Constitutional Court (OMT Reference), *supra*, note 5. See on that preliminary request Mattias Wendel, *Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court’s OMT Reference*, 10 *EuConst* 263 (2014); Ingolf Pernice, *A Difficult Partnership Between Courts: The First Preliminary Reference by the German Federal Constitutional Court to the CJEU*, 21 *MJ* 3 (2014). See also all the contributions in the Special Issue of 15 *GERMAN L.J.* 108 (2014).

⁹⁶German Federal Constitutional Court (OMT Judgment), 21 June 2016, 2 *BvR* 2728/13, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621_2bvr272813en.html. See on that case Asteris Pliakos and Georgios Anagnostaras, *Saving Face? The German Federal Constitutional Court Decides Gauweiler*, 18 *GERMAN L.J.* 213 (2017); Mehrdad Payandeh, *The OMT Judgment of the German Federal Constitutional Court*, 13 *EuConst* 400 (2017).

⁹⁷German Federal Constitutional Court (PSPP), *supra*, note 5. This ruling gave rise to an immense amount of academic literature. See, amongst others, Paul Dermine, *The Ruling of the Bundesverfassungsgericht in PSPP – An Inquiry into its Repercussions on the Economic and Monetary Union*, 16 *EuConst* 525 (2020); Franz C. Mayer, *The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court’s PSPP Decision of 5 May 2020*, 16 *EuConst* 733 (2020); Ana Bobic and Mark Dawson, *Making Sense of the “Incomprehensible”: The PSPP Judgment of the German Federal Constitutional Court*, 57 *CMLRev* 1953 (2020); Georgios Anagnostaras, *Activating Ultra Vires Review: The German Federal Constitutional Court Decides Weiss*, 6 *European Papers* 801 (2021); Bodo Herzog, *Judgment of the German Federal Constitutional Court (2 BvR 859/15) on the Public Sector Purchase Program of the ECB: An Interdisciplinary Analysis*, 27 *EPL* 653 (2021). See also the contributions in the Special Issue of 21 *GERMAN L.J.* 944 (2020).

⁹⁸Press Release No. 32/2020 of May 5, 2020.

⁹⁹German Federal Constitutional Court (*NGEU*), *supra*, note 20, at paras 124–32.

¹⁰⁰German Federal Constitutional Court (*Honeywell*), *supra*, note 93. On that case, see Christoph Möllers, *Constitutional Review of European Acts Only Under Exceptional Circumstances*, 7 *EuConst* 161 (2011); Asteris Pliakos and Georgios Anagnostaras, *Who is the Ultimate Arbiter? The Battle over Judicial Supremacy in EU Law*, 36 *ELRev* 109 (2011); Mehrdad Payandeh, *Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice*, 48 *CMLRev* 9 (2011).

1. The lowering of the bar of ultra vires review and the revival of the sleeping spirit of Honeywell

Honeywell had clarified that an *ultra vires* review may only be exercised in a manner that is open to European law.¹⁰¹ It also explained that a violation of the principle of conferral presupposes a sufficiently qualified exceeding of competences that is at the same time manifestly evident and of structural significance for the allocation of competences between the EU and its member states. Before establishing an *ultra vires* act, the Constitutional Court must provide the Court of Justice of the European Union (Court) the opportunity to rule on the questions of EU law that had arisen.¹⁰² The introduction of those restrictive criteria created the impression that it would be an almost impossible task to bring a successful *ultra vires* claim, especially since a prior preliminary reference would be required on the relevant points of law.¹⁰³

The *Honeywell* promise of a European-friendly application of the *ultra vires* review was progressively abandoned in the following years. The Constitutional Court continued to refer to the sufficiently qualified violation requirement but, at the same time, appeared to be very receptive to *ultra vires* allegations and even attempted to preoccupy the outcome of its preliminary references, implying that it would otherwise exercise its reserve power.¹⁰⁴ That approach reached its apex in the *PSPP* case, in which the Constitutional Court concluded that both the contested bond purchase program of the ECB and its legal interpretation by the Court violated the proportionality requirements by not examining in a comprehensive and substantiated manner the economic policy effects that its practical implementation inevitably entailed.¹⁰⁵ According to the Constitutional Court, that amounted to a violation of the principle of conferral, given the corrective function of proportionality and its pivotal importance as regards the allocation of competences.¹⁰⁶

One would expect that such an important *ultra vires* ruling would be supported by references to a number of bibliographical and other sources attesting to the existence of the manifestly evident and structurally significant violation required by *Honeywell*. However, there was no such reference in the entire judgment.¹⁰⁷ Instead, the Constitutional Court noted that the mere fact that commentators in legal scholarship and politics have argued for the permissibility of a specific

¹⁰¹*Id.*, at para. 58.

¹⁰²*Id.*, at paras 60–61.

¹⁰³See also in this respect the Dissenting Opinion of Justice Landau, at paras 101–03.

¹⁰⁴German Federal Constitutional Court (OMT Reference), *supra*, note 5. In this respect, see Franz C. Mayer, *Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference*, 15 GERMAN L.J. 111, at 118–20 (2014); Mattias Kumm, *Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of Chicken and What the CJEU Might do About It*, 15 GERMAN L.J. 203, at 204–06 (2014); Asteris Pliakos and Georgios Anagnostaras, *Blind Date Between Familiar Strangers: The German Constitutional Court Goes Luxembourg!*, 15 GERMAN L.J. 369, at 375–76 (2014).

¹⁰⁵The contested program had already been considered valid in Case C-493/17, Heinrich Weiss and Others, ECLI:EU:C:2018:1000. In this respect, see Ana Bobic and Mark Dawson, *Quantitative Easing at the Court of Justice – Doing Whatever it Takes to Save the Euro: Weiss and Others*, 56 CMLRev 1005 (2019); Marijn Van Der Sluis, *Similar, Therefore Different: Judicial Review of Another Unconventional Monetary Policy in Weiss*, 46 LIEI 263 (2019); Asteris Pliakos and Georgios Anagnostaras, *Adjudicating Economics II: The Quantitative Easing Program Declared Valid*, 45 ELRev 128 (2020).

¹⁰⁶German Federal Constitutional Court (PSPP), *supra*, note 5. Nevertheless, it is submitted that the connection made by the Constitutional Court between proportionality and conferral is manifestly mistaken. See, for example, Mattias Wendel, *Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception*, 21 GERMAN L.J. 979, at 985–86 (2020); Georgios Anagnostaras, *supra*, note 97, at 814–17; Diana Urania Galetta, *Karlsruhe über alles? Il ragionamento sul principio di proporzionalità nella pronuncia del 5 maggio 2020 del BVerfG tedesco e le sue conseguenze*, (May 13, 2020), <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=42380>; Sara Poli, *The German Federal Court and its first ultra vires review: A critique and a preliminary assessment of its consequences*, (June 11, 2020), <https://rivista.eurojus.it/the-german-federal-court-and-its-first-ultra-vires-review-a-critique-and-a-preliminary-assessment-of-its-consequences>; Gareth Davies, *The German Constitutional Court Decides Price Stability May Not Be Worth Its Price*, (May 21, 2020), <https://europeanlawblog.eu/2020/05/21/the-german-federal-supreme-court-decides-price-stability-may-not-be-worth-its-price>.

¹⁰⁷Franz C. Mayer, *supra*, note 97, at 752–53; Georgios Anagnostaras, *supra*, note 97, at 809–10.

measure does not generally rule out that this measure can be found to constitute a manifest exceeding of competences. An exceeding of competences may be regarded as evident, even where this finding derives only from a careful and meticulously reasoned interpretation.¹⁰⁸ In other words, the Constitutional Court insinuated that an act of EU law can be considered *ultra vires* even if the existence of a qualified infringement of the principle of conferral is based exclusively on its own legal interpretations. That is so even if the legal proceedings relate to matters that are, by their very nature, susceptible to subjective appreciation, such as the quality of the statement of reasons required in order to substantiate the proportionality of a policy measure and the rigorousness of the judicial control that should be exercised in that regard.

Had the Constitutional Court applied the same measure of judicial review over the pandemic recovery program, one could expect that this would most likely have been pronounced as *ultra vires*. Indeed, the Constitutional Court expressed serious reservations about the program's important characteristics, including its financing and the allocation of the borrowed proceeds based on the combined application of emergency competences and cohesion policy considerations.¹⁰⁹ This time, there was considerable support in legal scholarship to the effect that the program had indeed been adopted in violation of the principle of conferral.¹¹⁰ However, the Constitutional Court addresses all these concerns by noting the existence of an alternative interpretation that is not completely implausible and manifestly untenable. That allows it to conclude that the respect of the principle of conferral cannot be clearly ruled out.¹¹¹

The bar of the Constitutional Court was lowered considerably in its *ultra vires* review of this case compared to the recent past. Unsurprisingly, this has already been seen as a signal of retreat and a failure of the Constitutional Court to honor its own standard of careful and meticulously reasoned interpretation of the law – supported by its own case law.¹¹² However, on closer inspection, it looks more like a revival of the *Honeywell* spirit that had remained dormant for years rather than the break of a legal obligation to perform the *ultra vires* review on the presumption that every suspicion of an exceeding of competences provides evidence of a qualified violation of the principle of conferral. That being so, the crucial question is whether that revival is only temporary and confined to the exceptional circumstances of the pandemic. Some indications may have already been provided in this respect by references made by the Constitutional Court to the broad margin of appreciation that needs to be recognized by EU political institutions in the performance of their emergency competences. One possible interpretation is that these references indicate the Constitutional Court's intention to move towards applying more lenient standards of judicial review, as regards specifically acts adopted by the political institutions of the EU. However, it will be argued that the complexity of the policy choices those institutions are obliged to make in exercising their powers is comparable to the one encountered by the ECB in the performance of its own competences. It will also be argued that the democratic legitimacy issues, often raised by the Constitutional Court in relation to the ECB, also arise as concerns the measures adopted by the political institutions in the context of their emergency treaty competences. Consequently, any general relaxation of the applicable standard of *ultra vires* review should also extend to the acts of the ECB. However, there is no suggestion in the judgment that this was indeed the intention of the Constitutional Court. Hence, a more likely interpretation is that the judgment must be read in the light of its specific factual and legal background and should not be understood as introducing a permanent change of course in the *ultra vires* case law.

¹⁰⁸German Federal Constitutional Court (PSPP), *supra*, note 5, at para. 113.

¹⁰⁹German Federal Constitutional Court (NGEU), *supra*, note 20, at paras 149, 171, 173–81, and 193–98.

¹¹⁰See particularly the relevant references made in paras 153 and 154 of the judgment.

¹¹¹German Federal Constitutional Court (NGEU), *supra*, note 20, at paras 149, 162, 171, 173, 177, 182, 184, and 202.

¹¹²Dissenting Opinion of Justice Müller, at paras 1, 6, 42–47.

II. The recognition of a broad margin of appreciation in the exercise of the emergency competences

Another striking characteristic of the judgment is the reliance of the Constitutional Court on the explanations provided by the EU institutions as regards the legality of the recovery program. In this respect, it is stressed that the authorization to borrow cannot be considered *ultra vires* in the understanding affirmed in the legal proceedings by the Commission.¹¹³ Several other references are made to the Commission's views and the Opinion of the Council's Legal Service.¹¹⁴ Most importantly, though, the Constitutional Court underlines the broad margin of appreciation and assessment afforded to the Commission and the Council under the emergency clause of Article 122 TFEU. It relies on this fact and concludes that it is not manifestly untenable to qualify the allocation of the borrowed funds as a measure appropriate to the economic situation despite its rather tenuous connection to addressing the pandemic's consequences.¹¹⁵ Albeit implicitly, the Constitutional Court seems to accept that it is not, in principle, the role of the courts to question the merits of the economic and political assessments made by EU institutions in the performance of their emergency powers, so long as they are not manifestly unreasonable.¹¹⁶

According to this interpretation, the Constitutional Court applied a test similar to the one traditionally used at the EU level as it concerns the exercise of judicial review over the acts of the EU legislature. In that area, the legality assessment is based on the so-called "manifestly inappropriate test." This test aims to respect the complex policy choices that the EU legislature must make in exercising its rule-making powers. Accordingly, these choices will only be contested if its actions are evidently erroneous in relation to the objectives it pursues. That leaves a considerable margin of appreciation for the EU legislature, taking into account that it is usually called upon to undertake intricate assessments in an area that necessarily entails various political and economic choices.¹¹⁷

That contrasts markedly with the relevant position adopted by the Constitutional Court in the past regarding the bond purchase programs of the ECB. In that area, the Constitutional Court underlined the need to exercise a comprehensive judicial review over the policy acts of that institution. This is necessary because the independence of the ECB diverges from the constitutional requirements in relation to the democratic legitimation of political decisions. Consequently, its mandate should be interpreted narrowly in order to meet these requirements.¹¹⁸ That construction allowed the Constitutional Court to contest the announced monetary policy objectives of the programs pronounced by the ECB and to read into them an intention to produce economic policy effects.¹¹⁹ It was precisely on the basis of that comprehensive judicial review that the Constitutional Court rejected the interpretation of the PSPP made by the Court and concluded that the predictable and purposely accepted economic policy effects of that program could no longer be considered as indirect and, should, therefore, have been properly balanced against the benefits linked to its primary monetary policy objective.¹²⁰

One can argue that the position and the role of an essentially technocratic institution such as the ECB cannot be compared to that of the Commission and the Council. Nevertheless, a couple of observations need to be made in this respect. In the performance of its powers, the ECB is called

¹¹³German Federal Constitutional Court (NGEU), *supra*, note 20, at para. 120.

¹¹⁴*Id.*, particularly at paras 152, 165, 169, and 184.

¹¹⁵*Id.*, at para. 183.

¹¹⁶See also in this respect Council of the European Union, Opinion of the Legal Service, *supra*, note 45, paras 129 and 143.

¹¹⁷See Case C-343/09, *Afton Chemical Limited v. Secretary of State for Transport*, ECLI:EU:C:2010:419, paras 28–42; Case C-58/08 *Vodafone and Others v. Secretary of State for Business, Enterprise and Regulatory Reform*, ECLI:EU:C:2010:321, para. 52; Case C-482/17 *Czech Republic v. European Commission and Council of the European Union*, ECLI:EU:C:2019:1035, para. 77.

¹¹⁸German Federal Constitutional Court (OMT Reference), *supra*, note 5, at paras 58–60.

¹¹⁹*Id.*, at paras 70–72 and 95–98.

¹²⁰German Federal Constitutional Court (PSPP), *supra*, note 5, at paras 127–163.

upon to make choices of a technical nature and to undertake forecasts and intricate assessments that require a preference for one course of action over the other. In order to be able to live up to its obligations, it must be afforded a broad margin of appreciation that can only be contested if a manifest error of assessment vitiates its policy measures.¹²¹ Furthermore, subjecting this institution to a comprehensive judicial review imposes upon the judiciary a responsibility that is virtually impossible to carry out effectively. This is because the courts lack the necessary expertise to adjudicate economics successfully, given the complexity and the technicality of the issues that need to be assessed in that area.¹²² Suppose the Constitutional Court accepts that it should not, as a matter of principle, contest the highly contentious but ultimately plausible policy choices made by the Commission and the Council in the exercise of their emergency competences. In that case, it is not immediately apparent why it considers that it is better equipped to perform a more extensive review over the acts of the ECB.

Turning to the democratic legitimacy issues raised by the Constitutional Court, one cannot help noticing that the measures under Article 122 TFEU were adopted without the formal involvement of the European Parliament. This leaves the EURI with fragile democratic foundations in terms of parliamentary legitimation.¹²³ That problem has not gone unnoticed by the Constitutional Court.¹²⁴ Equally importantly, it appears that effective parliamentary participation in the preparation and monitoring of the national recovery and resilience plans at the member state level has not counterbalanced the absence of adequate parliamentary involvement at the EU level.¹²⁵ It should also be recalled that the qualification of the borrowed proceeds as other external revenue allows them to be treated completely off-budget, once again, without proper parliamentary control and supervision.¹²⁶ Given the above, there were undoubtedly serious democratic and institutional considerations that could have been relied upon by the Constitutional Court for the exercise of a stricter *ultra vires* review.

Perhaps the principal reason for the judicial restraint exhibited by the Constitutional Court in this case is more pragmatic than legal. It would have been politically unacceptable to strike a blow at the pandemic recovery program, which was introduced based on an amended Own Resources Decision adopted unanimously by the Council following a consensual political decision by the European Council, providing for financing and repayment conditions that all member states approved of according to their respective constitutional requirements. This is even more so since the memories are still fresh from the infringement proceedings instituted by the Commission for the previous *ultra vires* ruling of that Constitutional Court.¹²⁷ Those proceedings were eventually

¹²¹See particularly Case C-62/14, Peter Gauweiler and Others, ECLI:EU:C:2015:400, at para. 68. See on that preliminary ruling Paul Craig and Menelaos Markakis, *Gauweiler and the Legality of Outright Monetary Transactions*, 41 ELRev 4 (2016); Georgios Anagnostaras, *In ECB We Trust . . . The FCC We Dare! The OMT Preliminary Ruling*, 40 ELRev 744 (2015); Vestert Borger, *Outright Monetary Transactions and the Stability Mandate of the ECB: Gauweiler*, 53 CMLRev 139 (2016); Alicia Hinarejos, *Gauweiler, and the Outright Monetary Transactions Program: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union*, 11 EuConst 563 (2015).

¹²²Matthias Goldmann, *Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review*, 15 GERMAN L.J. 265, at 271-272 (2014); Heiko Sauer, *Doubtful it Stood . . . : Competence and Power in European Monetary and Constitutional Law in the Aftermath of the CJEU's OMT Judgment*, 16 GERMAN L.J. 971, at 979-80 (2015).

¹²³See in this respect Päivi Leino-Sandberg and Matthias Ruffert, *supra*, note 17, at 446-48; Bruno de Witte, *supra*, note 64, at 10.

¹²⁴German Federal Constitutional Court (NGEU), *supra*, note 20, at paras 176 and 233.

¹²⁵Bruno Dias Pinheiro and Cristina Sofia Dias, *Parliaments' involvement in the Recovery and Resilience Facility*, 28 Journal of Legislative Studies 332 (2022).

¹²⁶See *supra*, note 56.

¹²⁷Press Release, June 9, 2021, https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743. On the need to initiate such an infringement action, see particularly Sara Poli and Roberto Cisotta, *The German Federal Constitutional Court's Exercise of Ultra Vires Review and the Possibility to Open an Infringement Action for the Commission*, 21 GERMAN L.J. 1078 (2020).

terminated, but only following official commitments undertaken by the Federal Government to use all means at its disposal to avoid the repetition of such an *ultra vires* pronouncement.¹²⁸

D. Conclusion

The *NGEU* judgment of the Constitutional Court certainly comes as a relief. It allows the pandemic recovery program to be executed as planned and prevents the creation of legal and economic uncertainty about its viability. The Constitutional Court also conveys a message of a potentially more receptive attitude as regards the intensity of its *ultra vires* review, although there are valid reasons to believe that this does not actually indicate the beginning of a more permanent change of course that will extend beyond the specific circumstances of the case. However, it is regretted that the Constitutional Court considered it appropriate to decide such an important and potentially far-reaching case without making a preliminary reference.

Technically, the Constitutional Court was entitled not to make recourse to the preliminary reference procedure. A reference on validity issues is mandatory only if the national court considers the contested EU act invalid.¹²⁹ Furthermore, it is correct that the preliminary ruling would most likely not have adopted a more restrictive interpretation on the scope of the relevant EU competences.¹³⁰ However, because of the absence of such a preliminary request, the Court will probably not be afforded the opportunity to elucidate if and under what circumstances a similar support program may be replicated. It did not have the chance to explain, on this occasion, the scope of the emergency competences of the EU and the proximity of the connection that must be established between an emergency and the policy measures adopted to address its consequences. Finally, from an institutional point of view, the refusal of the Constitutional Court to make a preliminary reference could be interpreted as an indicator of mistrust about the neutrality and objectivity of the Court and its capacity to exercise its powers in an impartial and unbiased manner.¹³¹ That would indeed be regrettable, especially since this case could have provided the perfect opportunity to engage in cooperative judicial intercourse and to build a closer institutional relationship.

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¹²⁸Press Release, https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201.

¹²⁹Case 314/85, Foto-Frost v. Hauptzollamt Lübeck-Ost, ECLI:EU:C:1987:452, paras 11–20.

¹³⁰German Federal Constitutional Court (*NGEU*), *supra*, note 20, at paras 236–37.

¹³¹The refusal to make a preliminary reference is criticized in the Dissenting Opinion of Justice Müller, at paras 41 and 45. It appears though that the Dissenting Opinion considers that the Constitutional Court would be in a position to conduct its own independent review of the case without being bound by the preliminary ruling. See particularly in this respect para. 26 of the Dissenting Opinion.