Greatness and Tragedy

Martin Nettesheim 2021-04-23T13:45:34

The “Next Generation EU” project (NGEU) will lead to a fundamental change in the architecture, political structure, and “finalité” of the integration process. In its scope and depth, it is even comparable to the Maastricht reform. The EU’s claim of being able to borrow EUR 750 billion on capital markets and to pass it on to the Member States purely on the basis of existing competences changes the EU’s financial constitution more than the EU institutions are willing to admit. There is no doubt that this is an “extraordinary” step, as the proposal to amend the Own Resources Decision states.[1)]COUNCIL DECISION (EU, Euratom) 2020/2053 of 14 December 2020 on the system of the European Union’s own resources and repealing Decision 2014/335/ EU, Euratom, OJ 2020 L 424/1. But it will neither be a temporary nor a singular step. One should not be blinded by the political “spin” with which the measure is being sold. There are already calls for another debt-financed support program to follow NGEU.

The decision to increase the Union’s financial volume (which is normally managed by parliament via the EU budget) through a mechanism that bypasses the EU budget raises a multitude of questions, both with regard to questions of integration policy and of law. So far, there has been little, perhaps too little, talk about them. Since, due to the pandemic, action must be taken quickly; some thorny issues have been avoided so far. Pushing ahead with the issue of bonds, the European Commission’s attitude seems to be that the ratification of the amended Own Resources Decision by the EU member states is only a (tiresome) formality. This is regrettable. However, it is clear that “NGEU” is supported by a broad political majority both in Member State’s political institutions and populations.

Yet another violation of Constitutional identity?

Against this background, should and could the German Federal Constitutional Court (BVerfG) step in to protect Germany´s “constitutional identity”? Is this really yet another case of German political institutions forgetting about the constitution and violating its identity? Attacking European policy as a violation of Article 79 (3) of the Basic Law has become a sometimes tiring ritual that possibly does more damage to the constitution than it adds to its validity and normativity. Be that as it may: taking into account the amorphous and flexible nature of constitutional identity as developed by the BVerfG, the NGEU could (at least in principle) be easily accused of being unconstitutional. And indeed, in its decision of 15 April 2021 the Court opens the door to a lengthy review process.

It is a consistent continuation of procedural case law when the BVerfG does not declare the constitutional complaint against the Legislative Act approving the Amended Own Resources Decision to be manifestly inadmissible (paras. 74-93). Here, the Court consistently follows its case law on the protection of the

constitutional identity, the defense against *ultra vires* acts, the protection of the budgetary sovereignty of the German Parliament and the safeguarding of the Parliament's overall budgetary responsibility, as developed by the Court since 2011.

On the one hand, the BVerfG sees the possibility that the 2020 Own Resources Decision might be an *ultra vires* act (paras. 92-93). The Court does not see any transfer of competences from Germany to the EU in the German Legislative Approval Act itself (para. 80). It is possible, however, that the German legislature might help the EU to act in violation of EU competences. Indeed, not only do considerable parts of German legal literature assume that the EU is prohibited from incurring debts (citations in para. 92; however, without evidence for the opposing view). Until recently, EU institutions, too, have expressed this view. Yet, those statements disappeared overnight from the EU Commission's website when the idea to develop debt-based instruments came up in spring 2020. This is where several open legal questions lie—even if it can be safely assumed that the ECJ, dealing with the matter via Art. 267 TFEU, would not see any obstacles under EU primary law.

The question that the BVerfG – probably due to the interim nature of the decision – does not address is how the EU's indebtedness could lead to a structurally significant shift in competence to the detriment of an EU member state such as Germany. It is probably well known in this circle that the Court reclaims to declare only those acts ultra vires that entail a structurally significant shift in the relationship between the EU's and member states' competences. A more creative, less competence-oriented and more financial policy-oriented approach would possibly be able to recognise such shifting effects as a consequence of adopting the new Own Ressources Decision. Yet, it would require closer discussion if such an approach would lead to a (further and unacceptable) softening of the requirements of *ultra vires* control as instituted by the German Court and based on the principle of democracy (!). It is striking that these central questions are only touched upon in an otherwise rather detailed decision.

Possible, but not likely

On the other hand, the Federal Constitutional Court sees the possibility that the new EU Own Resources Decision and the German Ratification Act could violate the overall budgetary responsibility of the German Bundestag and thus might constitute a violation of Article 79 (3) of the Basic Law (paras. 87-91). The basic problem of this decision's aspect is that the Court, on the one hand, does not want to cut off the possibility of an open-ended examination of the complaint on the merits (according to the announcement: in a multi-year proceeding). On the other hand, asserting that the overall budgetary responsibility of the German Bundestag is actually impaired would be simply implausible. The only way out for the Court is to emphasize on various occasions that the Own Resources Decision 2020 *could* impair the overall budgetary responsibility of the Bundestag and thus might violate the constitutional identity (paras. 87, 103). Since the raising of capital by the EU does not lead to a direct financial liability of the Federal Republic of Germany, as the BVerfG recognises (para. 99), the obligation to make additional contributions provided for in Article 9

(4) of the Own Resources Decision 2020 gains central (but, in terms of fiscal or integration policy, grotesquely exaggerated) significance.

More generally, the Court finds itself forced to stress the importance of the same observations at one point and to devalue them at another: While the Court still considers the applicants' diffuse factual argument in the context of dealing with the admissibility of the appeal in the main proceedings to be viable (paras. 87-91), it rejects precisely this factual argument when it states at a later point that there is no high probability that the Own Resources Decision-Ratification Act violates Article 79 (3) of the Basic Law (paras. 95, 98-103). One cannot help but wonder how even a low probability of a constitutional violation (after all: against the politically untouchable and unchangeable core contents of the German constitution according to Article 79 (3) GG) can be possibly claimed. At one point, the Court even feels compelled to point out that the applicants did not take into account central fiscal and budgetary circumstances—however, even this is said to "not a priori preclude" the possibility of a violation of constitutional identity (para. 91). As a result, the Court concludes that it is not likely that Article 79 (3) of the Basic Law is violated. It remains "possible", however, that the admissibility requirements of the constitutional complaint are still fulfilled.

If the Court would have denied the admissibility of the constitutional complaint on the merits because no sufficient possibility of a violation of constitutional identity was discernible, this should have led to a quick dismissal in the interim proceedings. However, the Court would also have deprived itself of the possibility to deal with the matter for the years to come.

Under pressure from the pandemic

The Karlsruhe Court is carrying out its judicial control of European integration in the shadow of major EU politics—and against the background of a pandemic whose economic and socio-political consequences are causing serious damage in EU member states and might even become an existential danger for the EU. NGEU is not an act of political discretion, but a necessary reaction forced by the pandemic. The BVerfG is aware of this, as it shows when weighing of consequences as required under § 32 Bundesverfassungsgerichtsgesetz (Law on the German Constitutional Court) (paras. 105-107). Even though some political uncertainty had arisen in recent weeks: No one could seriously expect the BVerfG to stand in the way of implementing the political decision of July 2020.

However, the temporary order issued on 26 March 2021 against the German President, temporarily prohibiting ratification (reference in para. 63), made it clear that the BVerfG intends to deal with the matter in greater depth. The decision of 15 April 2021 now openly states that a lengthy procedure with the possibility of referral to the ECJ is to be expected (para. 105). Yet, by the time a decision will be reached, the NGEU funds will have been already raised and passed on to EU member states by the Commission. Even if the BVerfG will find a violation of Article 79 (3) of the Basic Law, it will not be possible to reverse this development. The Court is aware of this fact and reacts by repeating the well-known sentences according

to which the German constitutional institutions would then have to oppose the further implementation, oppose any further steps and work towards eliminating any consequences (para. 111). In such a case, according to the Court, there could also be a duty to oppose an update of the Own Resources Decision and not to agree to a decision on a new Multiannual Financial Framework. How this is supposed to help in a situation where the EU financial commitments have already been made and the money borrowed has disappeared into the Member States' national budgets is not entirely clear.

Like under a burning glass, the decision of 15 April 2021 exemplifies the greatness and tragedy of the BVerfG's claim to protect a German constitutional identity (which it has always had to define first) against the European Union's and Germany's political institutions. Even supporters of integration must be baffled by the way in which central principles of the EU treaties, basic assumptions of integration policy and longstanding consensual interpretations of EU law have been repeatedly denounced or even broken in the shadow of a crisis in order to realise what seemed opportune at the time. If the BVerfG would counter this and make clear that a fundamental restructuring of the EU financial architecture is only possible on the basis of a primary law revision, this would be a great gain in terms of integration policy. However, the BVerfG will only be able to act at such a late stage that its intervention will probably do more harm than good. If the BVerfG would qualify the EU decision as ultra vires in the main proceedings, this would be much more serious than the minor accusation of faulty reasoning that it raised against the ECB in the decision of 5 May 2020; and the clash with the ECJ, whose decision on the EU law compatibility of the 2020 Own Resources Decision is probably already set, would be much more brutal.

And there is another point worth considering: If the BVerfG were to declare the German Legislative Approval Act for the 2020 Own Resources Decision null and void in the main proceedings, this would have an ex tunc effect under German state law. However, the validity of the Own Resources Decision under EU law would not be called into question. This is because such a court decision would not eliminate the ratification act of the Federal Republic of Germany. To do so, the applicants would also have to challenge the declaration of the German President. Moreover, it is unclear under EU law whether a subsequent repeal of a Member State's ratification act would affect the validity of an EU own resources decision once it has been established pursuant to Article 311 (3) TFEU. It is certain that it would be irrelevant under EU law if the Member State body responsible for giving "consent" (Art. 311 (3) TFEU) would later decide to withdraw its consent again for political reasons – this would not affect an own resources decision once it has entered into force. Would it be different if a member state court revoked the consent on legal grounds? The legal assessment is difficult, not least because the adoption of the Own Resources Decision does not constitute consent to an amendment of the Treaty. The general principles of international law on the relationship between the external binding nature of an act of ratification and internal violations of law cannot be directly applied to this situation.

What then is the value of the main proceedings now pending? At least it seems possible that the BVerfG will decide that any future renewal or extension of the EU powers to raise financial funds may no longer be possible on such a shaky construction as the NGEU but would require a Treaty amendment. And it also seems possible that the Court will insist that financial resources of the size in question must be comprehensively managed by the EU parliament in an EU budget. In this case, the Karlsruhe Court would have made an important contribution to the future development of the EU.

References

- COUNCIL DECISION (EU, Euratom) 2020/2053 of 14 December 2020 on the system of the European Union’s own resources and repealing Decision 2014/335/ EU, Euratom, OJ 2020 L 424/1.
