

Erasmus
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Law

What next from Karlsruhe?

Europe Calling Webinar

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upon invitation by **Sven Giegold MEP** and **Franziska Brantner MdB**

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Prologue: Bundesverfassungsgericht and EMU

- 2011: Greek Rescue Package and the EFSF
- 2012/2014: European Stability Mechanism (ESM)
- 2014/2016: OMT (incl. preliminary reference: Case C-62/14)
- 2017/2020: PSPP (incl. preliminary reference: Case C-493/17)

Pending

- PSPP II: Were the reactions by Bundesregierung, Bundestag and Bundesrat sufficient? (7 August 2020)
- PEPP: Violation of Article 123 TFEU (4 March 2021)
- NGEU (22 March 2021)

Background

- **The indissoluble conflict between EU law's primacy and the national limitations of EU Treaties**
 - Starting point: The EU is no federation. The EU legal order and the national legal orders are autonomous legal orders that co-exist within the same territory
 - EU law: Claim of primacy of all EU law over all national law (including national constitutional law)
 - National law: Recognising the claim of primacy of all EU law (including the possibility to limit this recognition)
 - National ratification laws gave birth to EU law and approved its limits (cf. principle of conferral)
 - Limitations to EU law (according to BVerfG)
 - Protection of fundamental rights ('Solange' case law)
 - Protection of distribution of competences ('ultra vires' case law)
 - Protection of the constitutional identity (protection of national democracy)

BVerfG on NGEU

- Hängebeschluss (interim-interim relief) of 26 March 2021 regarding the approval of the new Own Resources Decision 2020/2053
- Decision rejecting interim relief of 15 April 2021
 - Assessment of the consequences of a successful interim relief (German approval of ORD) as compared to not granting interim relief (no entry into force of ORD) against the background of the accuracy of the legal arguments put forward by claimants
 - Do the payment obligations and assumptions of liability under the ORD have the effect of ‘essentially negating’ the budgetary autonomy of the German Parliament?
 - Overall ‘worst case’ liability for the entire 750 bn Euro programme under Article 9(5) and (6) ORD [constitutional identity]
 - Is the empowering of the COM to borrow funds ‘ultra vires’?
 - Article 311(3) TFEU does not cover ‘borrowing’ as a potential ‘own resource’
 - Are additional calls under Article 9(5)(2) ORD ‘ultra vires’?
 - Violation of Article 125(1) TFEU

BVerfG on NGEU

■ Consequences of the rejection of ‘interim relief’

- Germany is allowed to approve the ORD
- COM is empowered by the ORD to enter into borrowing operations on behalf of EU
 - Funds generated by these borrowing operations are qualified as ‘external assigned revenue’ to specific Union programmes (outside the Union budget)
 - Allocation of funds in accordance with EURI Regulation 2020/2094 (based on Article 122 TFEU)
- Use of funds is regulated by specific Union programmes
 - ‘Recovery and Resilience Facility’ under RRF Regulation 2021/241 (based on Article 175(3) TFEU)

■ Main proceedings of the BVerfG

- Creation of permanent instruments that essentially amount to an assumption of liability for decisions by other MS
- Potential liabilities structurally affecting the budgetary powers
- Sufficient Parliamentary influence on decisions how the funds provided will be used

BVerfG on NGEU

■ Potential involvement of the CJEU

- Ultra-vires elements of the proceedings
- Are Articles 4 and 5 ORD in line with Article 311 TFEU and Article 310 TFEU (revenue and expenditure shall be in balance)?
- Is Article 9(5)(2) ORD violating Article 125 TFEU?

■ Consequences of potentially successful main proceedings

- German government, Bundestag and Bundesrat must limit the negative effects on the internal legal order as much as possible
- Reclaiming any payments made under Article 9 ORD
- Refusing any future calls on the German budget
- Vetoing future MFFs

BVerfG and the ECB

■ PSPP II

- Issue: Lack of a new decision by the ECB (instead of the discussion of the proportionality at the ECB Governing Council meeting of 4/5 June 2020 and confirming the PSPP decisions in the protocol)
- If sufficient, are the PSPP decisions proportionate against the requirements set by the BVerfG?
 - Rather likely, given that BVerfG speaks itself of an ‘overall assessment and appraisal’ of the economic effects of monetary policy decisions (without limiting the effects to be assessed to the ones explicitly discussed by the BVerfG) [see para. 139]

■ PEPP

- Issue: Violation of Article 123 TFEU
 - Distribution of purchase flows in a flexible manner (above the capital key)
 - No limitation of purchases of individual asset classes
 - Lifting collateral requirements (Greece)

BVerfG and the ECB

■ Involvement of the CJEU

- Preliminary reference in the PEPP proceedings
- Do the lack of the limitation to the capital key of the ESCB participants, limitation of purchases of individual assets and the waiver for marketable debt securities issued by Greece violate Article 123 TFEU?

■ Consequences of potentially successful proceedings?

- Exit of the Bundesbank from the purchases under the PSPP/PEPP programme

Reasons for the critical stance of the BVerfG and the future

■ Reasons for the critical stance of the BVerfG

- Protecting national democracy and the national separation of powers arrangements as expressions of the remaining national sovereignty
- It must remain possible that policy choices made in the political space of Germany can be implemented by majority decision
 - Remaining budgetary autonomy of the German Parliament (even if the German Parliament decides to give up on a part of the autonomy)
 - Remaining policy space (in theory) and securing that effects of policy decisions (in practice) can take place

■ How to address these issues?

- Strengthening of European democracy (which is precarious with regard to EFSF, ESM, ECB and NGEU) as a substitute for national democracy
- Critical and active judicial dialogue
 - Conseil d'Etat and Corte Costituzionale

Thank you
for your attention!

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