

**Executive Master
in EU Studies**

***NextGenerationEU and the courts—
On the interrelationship between
the Bundesverfassungsgericht and
the Court of Justice of the EU***

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2022

Executive Master in EU Studies

**NextGenerationEU and the courts – On the
interrelationship between the Bundesverfassungsgericht
and the Court of Justice of the European Union
exemplified by the NextGenerationEU proceeding**

Supervised by Prof. Dr. Mattias Wendel

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Abstract

The legal systems of the EU and the individual Member States form a complex construct that clashes continuously. This also applies to the discussion on the primacy of EU law. The German Federal Constitutional Court, the Bundesverfassungsgericht, took a position on this issue, publishing an ultra vires ruling (which had previously only been threatened) in the 2020 PSPP ruling.¹ Only months later, discussions on the EU's NextGenerationEU recovery package began. Although the Bundesverfassungsgericht rejected an interim injunction in April 2021², the examination of whether the EU thereby violated the constitutional identity or acted outside the transferred competences is still open.³

Therefore, this thesis addresses the question of the extent to which this proceeding before the Bundesverfassungsgericht could have an influence on future cooperation between the courts. For this purpose, different scenarios and process flows are shown, on the basis of which the consequences are outlined. It was found that an ultra vires decision by the Bundesverfassungsgericht would represent the greatest caesura. Not only the legal basis but also the political dimension would be enormous. After the PSPP-infringement proceeding went smoothly, Germany and the Bundesverfassungsgericht might face a stricter procedure in this case and the relationship between the courts could suffer. The decision could not only have negative consequences, however. A better dialogue between the courts or a stabilisation of the systems might result from other decisions or processes. From that perspective, it is therefore imperative that the Bundesverfassungsgericht includes this evaluation in its considerations if they do not intend to move away from the EU.

Keywords: NextGenerationEU, ultra vires review, identity review

¹ cf. BVerfG, Judgement of the Second Senate of 5 May 2020, *PSPP*, 2 BvR 859/15

² cf. BVerfG, Judgement of the Second Senate of 26 March 2021, *NGEU I*, 2 BvR 547/21

³ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21

Acknowledgements

To start this thesis, I want to express my gratitude to my supervisor, Prof. Dr. Mattias Wendel, for his support and patience as well as to the whole CIFE team, especially Leonore and Camille, who helped along the whole way of my master's degree. I am also thankful to my fellow students for supporting and inspiring me on the way to finalise the thesis and grow personally. Big thanks to my friends and colleagues for their help, feedback sessions and moral support. Lastly, I would be remiss in not mentioning my family, especially my parents and brothers. Their belief in me has kept my spirits and motivation high during this process.

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List of abbreviations

AfD	Alternative für Deutschland
Art.	Article
BVerfG	Bundesverfassungsgericht
BVerfGG	Bundesverfassungsgerichtsgesetz
CDU	Christlich Demokratische Union
CJEU	Court of Justice of the European Union
CLC	Constitutional Law Committee of the Finnish Parliament
CSU	Christlich-Soziale Union in Bavaria
ECB	European Central Bank
EU	European Union
FDP	Freie Demokratische Partei
GDP	Gross domestic product
MFF	Multiannual Financial Framework
NGEU	NextGenerationEU
OMT	Outright Monetary Transactions

List of abbreviations

Para.	Paragraph
PSPP	Public Sector Purchase Program
SPD	Sozialdemokratische Partei Deutschlands
Sub-para.	Subordinate paragraph
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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1. Introduction

A. Significance of the NGEU proceeding

"It is the way to fiscal union and it is a good way for Europe's future."⁴ These were the words spoken by Germany's then Federal Minister of Finance and today's German Chancellor Olaf Scholz in front of the German Bundestag in February 2021. In this statement he addressed the Ratification Act for the 2020 Own Resources Decision in the course of the EU's recovery plan NextGenerationEU (NGEU) to tackle the consequences of the COVID-19 pandemic. This was a major agreement by the European Council, which already includes the 27 Member States to invest money in the financial markets, among other things, to strengthen the resilience of the economy and the national social systems.⁵

Over the past decades and until now, the EU developed into a common economic area and a common legal system. In this legal system, which is fundamentally based on the rule of law, the constitutional courts have a special position.⁶ In addition to the 27 national constitutional courts (or comparable institutions), one of the EU's main institutions is the Court of Justice of the European Union (CJEU).⁷ In Germany, the largest EU Member State, the constitutional court at federal level is the German Bundesverfassungsgericht (BVerfG) according to Art. 93 Basic Law.⁸ These two courts are linked by the EU's legal system. Depending on the perspective from which one looks at the division of competences is viewed, different alignments result.⁹

⁴ Deutscher Bundestag (2021): 26681.

⁵ cf. Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, OJ L 424, 15.12.2020, p. 1–10

⁶ Council Regulation (EU) 2020/2094 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ L 433I, 22.12.2020, p. 23–27

⁷ cf. Bergmann et al. (2022): 512–13.

⁸ cf. Grundgesetz für die Bundesrepublik Deutschland in der im Bundesgesetzblatt Teil III, Gliederungsnummer 100-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 1 u. 2 Satz 2 des Gesetzes vom 29. September 2020 (BGBl. I S. 2048) geändert worden ist

⁹ cf. CJEU, Judgement of 5 February 1963, *van Gend & Loos*, 26-62, ECLI:EU:C:1963:1 / CJEU, Judgement of 22 October 1987, *Foto Frost*, 314-85, ECLI:EU:C:1987:452 / CJEU, Judgement of 15 July 1964, *Costa v E.N.E.L.*, 4-64, ECLI:EU:C:1964:66 / CJEU, Judgement of 9 March 1978, *Simmenthal*, C-106/77,

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The relationship between the two courts has developed particularly through their jurisprudence. The CJEU has in principle activated the primacy of application of EU law¹⁰, whereas the BVerfG has in the well-known *Solange I*¹¹, *Solange II*¹², *Maastricht*¹³ and *Lisbon*¹⁴ decisions developed its own control functions to examine action at EU level and to claim the last instance jurisdiction.¹⁵ Then a jolt appeared in 2020, when the BVerfG ruled for the first time that the EU was acting outside its competences conferred by the Member States.¹⁶

These two legal perspectives collide occasionally in different court cases, for instance in a constitutional complaint from the ‘Bündnis Bürgerwille’ concerning the NGEU recovery plan.¹⁷ Thousands of plaintiffs filed a complaint that the German Ratification Act, which is supposed to ratify the 2020 Own Resources Decision of the EU and thus forms the country’s financial background of the recovery plan¹⁸, violates their legal rights provided by the German Basic Law (‘Grundgesetz’). In particular, it was argued that Member State’s competences would be transferred to the EU because the legal basis of Art. 311 para. 3 Treaty on the Functioning of the European Union (TFEU) was claimed to be exceeded. An additional complaint concerned the violation of the no-bail-out clause provided in Art. 125 TFEU. Furthermore, the constitutional identity, the core of the German Basic Law, would

ECLI:EU:C:1978:49 / BVerfG, Judgement of the Second Senate of 7 June 1970, *Solange I*, 2 BvL 1/97 / BVerfG, Judgement of the Second Senate of 22 October 1986, *Solange II*, 2 BvR 197/83 / BVerfG, Judgement of Second Senate of 12 October 1993, *Maastricht*, BvR 2159/92 / CJEU, Judgement of 5 October 1994, *Bananenmarktordnung*, C-280/93, ECLI:EU:C:1994:367 / BVerfG, Judgement of Second Senate of 30 July 2009, *Lisbon*, 2 BvE 2/08 / BVerfG, Judgement of Second Senate of 6 July 2010, *Mangold/Honeywell*, 2 BvR 2661/06 / BVerfG, Judgement of the Second Senate of 21 June 2016, *OMT*, 2 BvR 2728/13 / CJEU, Judgement of 11 December 2018, *Weiss and Others*, C-493/17, ECLI:EU:C:2018:1000 / BVerfG, Judgement of the Second Senate of 5 May 2020, *PSPP*, 2 BvR 859/15

¹⁰ cf. CJEU, Judgement of 5 February 1963, *van Gend & Loos*, ECLI:EU:C:1963:1 / CJEU, Judgement of 15 July 1964, *Costa v E.N.E.L.*, ECLI:EU:C:1964:66

¹¹ cf. BVerfG, Judgement of the Second Senate of 7 June 1970, *Solange I*, 2 BvL 1/97

¹² cf. BVerfG, Judgement of the Second Senate of 22 October 1986, *Solange II*, 2 BvR 197/83

¹³ cf. BVerfG, Judgement of Second Senate of 12 October 1993, *Maastricht*, BvR 2159/92

¹⁴ cf. BVerfG, Judgement of Second Senate of 30 July 2009, *Lisbon*, 2 BvE 2/08

¹⁵ cf. BVerfG, Judgement of Second Senate of 12 October 1993, *Maastricht*, BvR 2159/92 / BVerfG, Judgement of Second Senate of 30 July 2009, *Lisbon*, 2 BvE 2/08

¹⁶ cf. BVerfG, Judgement of the Second Senate of 5 May 2020, *PSPP*, 2 BvR 859/15

¹⁷ cf. Bündnis Bürgerwille (2021).

¹⁸ cf. Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, OJ L 424, 15.12.2020, p. 1–10

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be violated by transferring autonomy over the budget from the German Bundestag to the EU institutions. Supplementary to the constitutional complaint, an application for a temporary injunction was filed, which aimed to prohibit the Federal President from executing the law.¹⁹ Before that, the Bundestag²⁰ and the Bundesrat²¹ had already adopted the legal act. The BVerfG issued a suspension order ('Hängebeschluss') on 26 March 2021. It temporarily prevented the Federal President from signing and publishing the law until the court had ruled on it.²² On 15 April 2021, the injunction was rejected and the law was published.²³ The main proceeding is still pending.

This results in a wide range of variants as to how this procedure could be concluded. This thesis, however, will concentrate on the effects of the individual possible outcomes of the proceeding on the cooperation between the BVerfG and the CJEU. Possibly, the BVerfG could reach an ultra vires ruling or argue that its constitutional identity has been violated. Depending on this, the role in the multi-layered legal structure of the EU may also change. Since the BVerfG is a particularly significant national constitutional court, its rulings are often cited in other Member States constitutional jurisprudence on EU law affairs.²⁴ Therefore, it has a very concrete impact how other national courts perform judicial dialogue. Ultimately, not only the outcome of the proceedings is open, but also the further developments and hierarchies of the EU and national courts. The dispute could be intensified on the one hand, but the tense situation could also be maintained through a new way of dialogue on the other.

¹⁹ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 13-42

²⁰ cf. Deutscher Bundestag (2021): 27491–27499.

²¹ cf. Decision of the Bundesrat - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 'Fit for 55': moving towards climate neutrality – delivering the EU's 2030 climate target COM(2021) 550 final; Council doc. 10849/21

²² cf. BVerfG, Judgement of the Second Senate of 26 March 2021, *NGEU I*, 2 BvR 547/21

²³ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21

²⁴ cf. Nguyen and Chamon (2020): 8.

B. Purpose and research questions

The topics discussed have been researched in great detail²⁵, but since the NGEU proceeding are very current, there are no concrete analyses or studies on their effect on judicial cooperation. This research gap is to be filled in the scope of this thesis. In order to fill this research gap, the central question of this thesis is: “Which influence will the legal dispute on the NGEU recovery plan have on the constitutional interrelationship between the CJEU and the BVerfG?” Since this question covers a broad range of topics, it is accompanied by four subordinate guiding questions.

The aim of the first subordinate research question is to define the current relationship between the BVerfG and the CJEU and to determine what influence the present proceeding may have on it. The first subordinate research question is therefore: "How can the reciprocal relationship between the BVerfG and the CJEU be characterised and how is that reflected within the NGEU proceeding?" Secondly, the different control mechanisms used by the BVerfG to control the actions of the EU from the perspective of the Basic Law will be examined and evaluated, leading to the following subordinate question: "Which control standards does the BVerfG apply to ensure compliance with the Basic Law at the EU level from a German, constitutional law perspective?" The third sub-research question is: “How might different possible rulings by the BVerfG affect their judicial relationship?” In light of this question, four scenarios and different procedural paths will be explained and evaluated in order to determine how the effects could vary and what range of consequences can be expected. Finally, the fourth subordinate research question asks: “Is this dispute solely significant for the cooperation of the CJEU with the German Constitutional Court?” Since the EU’s legal system also includes 26 other national constitutional courts (or equilibriums) besides the BVerfG, this question will explore whether this is a phenomenon exclusively between the BVerfG and the CJEU or whether this conflict is also relevant beyond Germany’s national borders.

²⁵ See inter alia Józwicki (2020). / Riedl (2020). / Thiele (2020). / Kube (2013). / Baudenbacher (2020).

C. What this work does not depict

This thesis cannot comprehensively examine all areas of the NGEU instrument, the procedure and the legal basis. Many other questions concerning the NGEU program are not addressed in-depth, for instance the discussion on the competence basis, the further development of the EU into a fiscal union, or the actual investment of the funds by the European Commission, the recovery plan in detail as well as the effects on the Economic Monetary Union.²⁶ While some of these legal issues are referred to in this thesis, they cannot be fully evaluated, assessed and interpreted within this framework. Consequently, the work will concentrate on the most important cornerstones of the NGEU recovery plan and the procedural process to date, but it will not comprehensively evaluate and contextualise all the legal discussions and open decision-making issues.

Moreover, the impacts that might result cannot be definitively determined yet. The real effects will only be seen years from now when the BVerfG enacts a final ruling. Therefore, no binding statements can be made. These research findings are mere forecasts and considerations that are also intended to stimulate further research activities.

D. Roadmap of the work

In light of the formulated research questions, this thesis is divided into three chapters besides the introduction and the conclusion. Chapter two discusses with the legal background of the interaction of the two courts in a multi-layered legal system that combines German constitutional law and the European Treaties. The different legal perspectives are contrasted here. In addition, the historical development of the jurisprudence from both legal perspectives is shown and the specially developed control mechanisms of the BVerfG vis-à-vis the CJEU are explained. Afterwards, the third chapter deals with the present BVerfG proceeding concerning the NGEU. It shows the necessity for undertaking this unprecedented project and the procedural events that occurred in this regard. A legal contribution is then

²⁶ See for example Fabbrini (2020). / Schulze (2022): 181–204. / Echebarria Fernández (2019). / Kirst (2021).

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added by identifying and classifying the points of contention between the plaintiffs and the German Ratification Act. The fourth chapter combines these two thematic elements. The probability of several scenarios is quantified and, on this basis, possible options for litigation are presented. On the basis of these procedural steps (the scenarios and outcomes), their concrete effects on the cooperation between the BVerfG and the CJEU are demonstrated. Furthermore, this thesis discusses the rationale for a comparison with other Member States, and shows the limitations of this comparison, especially using the example of Poland. A reference to a comparable procedure in Finland follows thereafter. At the end of this thesis, the review is summarised, the answer to the research questions is presented and an outlook on the relationship between the courts is given.

2. Correlation of the BVerfG and the CJEU to date

The BVerfG is the national constitutional court of the biggest Member States. In this chapter, the importance of the relationship to the CJEU will be highlighted. As this is based on both, the legal provisions and jurisdiction of both courts, those will be described. Furthermore, the relationship will be classified.

A. The EU's judicial system

Multiple Treaty amendments have allowed the EU to evolve into its current form, where the courts have a special, independent position to guarantee comprehensive legal protection.²⁷ The Member States transferred limited sovereignty rights within which the EU in general and the CJEU in particular can act independently, based on the relevant Treaty provisions. The German basis for this transfer of sovereignty rights is Art. 23 in conjunction with Art. 79 Basic Law. Art. 23 Basic Law, which was inserted in 1992, renounces the EU's exercise of competences and recognises European legal acts. This provision illustrates the German commitment to the EU, limits the European integration and also regularises the participation of German constitutional bodies in the integration process. The CJEU concretised and also expand Union law through its case-law and gave impulses for further integration.²⁸

An often discussed judicial subject is the primacy of EU law. No questions appear for the CJEU, as the 1963 *Van Gend en Loos* case started determining the primacy of EU law to secure that EU law is applied equally throughout all Member States in the 1970s. The CJEU generally claims a priority of application of EU legal acts. From that perspective, constitutional national regulations are subject to EU legal acts.²⁹ The BVerfG acknowledges the primacy in general. It argues, however, that the national constitution has the supreme primacy as the EU's competences are solely based on the transfer of national sovereignty

²⁷ cf. Bergmann et al. (2022): 512-513.

²⁸ cf. Bergmann et al. (2022): 512–13. / CJEU, Judgement of 5 February 1963, *van Gend & Loos*, ECLI:EU:C:1963:1 / CJEU, Judgement of 15 July 1964, *Costa v E.N.E.L.*, ECLI:EU:C:1964:66 / CJEU, Judgement of 9 March 1978, *Simmenthal*, C-106/77, ECLI:EU:C:1978:49 / CJEU, Judgement of 22 October 1987, *Foto Frost*, ECLI:EU:C:1987:452

²⁹ cf. CJEU, Judgement of 5 February 1963, *van Gend & Loos*, ECLI:EU:C:1963:1

power. It views itself as competent to make the final decision with regard to the balance between EU acts and the German Basic Law.³⁰ This fundamental conflict between the two courts and the different perspectives in particular is raised in different cases on various issues.³¹ It is important to first evaluate the future cooperation of the Member States, the judicial relation of the courts and the future integration of the Union.

B. De jure division of competences from two perspectives

The CJEU was introduced in 1953 as the judicial organ of the Coal and Steel Community. Based on Art. 13 para. 1 Treaty on the European Union (EU), it is currently subdivided into the European Court of Justice, the General Court and several Specialized Courts. Those have the same legal standing vis-à-vis the other EU institutions. The CJEU's competences and scope of actions are outlined in Art. 19 para. 3 and Art.s 251-281 TFEU. Generally, the CJEU is responsible for interpreting the Treaties in the scope of the competences transferred from the Member States to the EU and for enforcing Union law at last instance. Acting, inter alia, as a kind of constitutional court of the Union, it considers obligations and rights of the EU bodies as well as the legal relationship between the EU and its Member States. However, it also includes administrative and other scopes of jurisdiction. All decisions are binding on the European citizens, the Member States and the national courts. Even though a jurisprudence only concerns one Member State specifically, it is effective in the whole Union territory. For the CJEU, the division of competences is clearly distributed based on these Treaty provisions. It has the competence of the ultimately binding interpretation of EU law and also the monopoly on annulling Union norms.³²

In Germany, the BVerfG is responsible for national constitutional jurisdiction. It has two senates based on para. 2 sub-para. 1 'Bundesverfassungsgerichtsgesetz' (BVerfGG), which

³⁰ cf. BVerfG, Judgement of Second Senate of 12 October 1993, *Maastricht*, BvR 2159/92 / BVerfG, Judgement of Second Senate of 30 July 2009, *Lisbon*, 2 BvE 2/08 / BVerfG, Judgement of Second Senate of 6 July 2010, *Mangold/Honeywell*, 2 BvR 2661/06 / BVerfG, Judgement of the Second Senate of 21 June 2016, *OMT*, 2 BvR 2728/13

³¹ cf. Bergmann et al. (2022): 1095.

³² cf. CJEU, Judgement of 22 October 1987, *Foto Frost*, 314-85, ECLI:EU:C:1987:452, 20

have delimitable competences.³³ It is not in particular competent to decide whether EU acts or Treaties are adopted compatibly with EU law, at least from a solely written perspective of the Treaty provisions. The jurisprudence depends to a certain degree on the presiding judges.³⁴ To secure the independence of their judgements during their twelve years in office, no re-election of the judges by the two parliamentary chambers, the Bundestag and the Bundesrat, is allowed.³⁵ They are obliged to apply EU law based on the clause about friendliness towards the Union in Art. 23 para. 1 Basic Law. The jurisdiction of the BVerfG is based on provisions in the Basic Law and in para. 13 BVerfGG. One of the provided procedures is the constitutional complaint based on Art. 93 para. 1 no. 4a Basic Law. Individuals, inter alia, can claim that the public authorities violate their basic rights provided in Art.s 20 para. 4, 33, 38, 101, 103 and 104 Basic Law. As the CJEU is the guardian of Union law, Art. 267 TFEU obliges the BVerfG to refer questions to it whenever an enforcement of EU law at last instance is needed. That offers them a special legal protection of their fundamental or equivalent rights provided by the Basic Law. The constitutional complaint is an extraordinary legal remedy when the individual violation of a specific constitutional provision is in question. When there is a risk of irreversible, extensive consequences of a violation that needs a fast decision, a preliminary injunction can be established.

One of the provided procedures of the BVerfG concerns in particular the application of the Basic Law.³⁶ Art. 19 para. 1 TFEU specifies that the effective legal protection in EU law is covered by both the CJEU and the national courts. However, the BVerfG has a significant weight vis-à-vis the other national constitutional courts. In fact, it exercises an influence on other national constitutional courts, which occasionally cite the BVerfG's jurisprudence.³⁷

In summary, the peculiarity in this multi-constitutional system is that both courts view the distribution of competences from two different legal perspectives. Arguably, both claims are

³³ According to § 14 BVerfGG

³⁴ cf. Thiele and Steinbeis (2021).

³⁵ According to Art. § 4 para. 2 BVerfGG

³⁶ cf. Hufeld and Epiney (2009): 33–71.

³⁷ cf. Nguyen and Chamon (2020): 8.

comprehensible and justified from their legal considerations. However, this tension creates a risk for the future cooperation between the courts and, more generally, for the entire legal system.

Legally, there is one procedural opportunity – in part also an obligation – for the national constitutional courts to start a dialogue with the CJEU: the preliminary ruling according to Art. 267 TFEU in conjunction with Art. 19 para. 3 TEU. It aims to safeguard the unity and coherence of EU law and the uniform application throughout the EU, while both courts act completely independently. During legal disputes and diverging perspectives of the national and EU judicial level, it opens the opportunity for dialogue. It has become, inter alia, a means of pre-empting such conflicts between the EU's and national legal sphere.³⁸ The preliminary rulings are a tool to make legally meaningful jurisdiction which equally applicable to both Member State in question and the whole EU territory. When questions concerning the validity or the interpretation of EU law appear in a national proceeding, the national can refer questions to the CJEU. If it concerns a question at last instance, national courts are actually obliged to do so.³⁹ The CJEU then issues a binding ruling, to which the national courts have to adhere to, according to Art. 267 TFEU.

C. Judicial interplay of the courts

I. Evolution of the relevant jurisdiction

The legal framework described in the previous section can be considered a baseline. Throughout the last decades of European cooperation, further integration, an increasing scope of competences of the Union and changes in the design of the legal system were repeatedly initiated by interrelated jurisdiction of the CJEU or the BVerfG. In the following, this paper will therefore focus on the jurisprudence that has driven this development.

³⁸ cf. Hufeld and Epiney (2009): 33–71.

³⁹ cf. CJEU, Judgement of 22 October 1987, *Foto Frost*, 314-85, ECLI:EU:C:1987:452, 11-20

2. Correlation of the BVerfG and the CJEU to date

In 1963, the CJEU's first relevant landmark ruling *Van Gend en Loos* established the EU as a individual legal system, supplementing the existing systems of international law.⁴⁰ A year later, *Costa v E.N.E.L.* introduced the principle of supremacy of the EU law to secure its uniform application throughout the whole EU territory. This decision is of central importance for the discussions on the primacy of EU law and, therefore, for the relationship between the CJEU and national courts. This decision laid the foundation for the European legal system as it is known today. All subsequent case law has clarified this.⁴¹ In the 1978 *Simmenthal* decision, for instance, the CJEU again assured that a uniform application of EU law is needed to stabilise the system: referrals of preliminary rulings and the CJEU's answers have to be applied in all Member States, not only the referring one. In doing so, the CJEU also stated that the primacy of EU law applies vis-à-vis national constitutions and thus represents an absolute primacy of application.⁴² The foundations for the current legal system were thus laid. In 1987, the CJEU even strengthened the perspective in the *Foto-Frost* decision, where it obliged all national courts to refer questions concerning the declaration of EU acts as void. Afterwards, this principle was also included in the Lisbon Treaty in Art. 267 TFEU. The determination of the invalidity of EU action was thus transferred solely to European jurisdiction, for example through preliminary rulings.⁴³ Already at this time, the European perspective on the legal system and the distribution of competences in the EU developed in order to ensure the stability of the system.

With the well-known 1970 *Solange I* decision, the BVerfG intervened in this further development of the CJEU's jurisdiction. It introduced a national review power to control an adequate protection of fundamental rights in the EU.⁴⁴ The BVerfG reviewed this in the 1963 *Solange II* case, where it characterised the Union a general fundamental rights protection. As long as this basic protection is maintained, the control function of the national constitutional court is not necessary, according to the BVerfG's case-law.⁴⁵ Besides the

⁴⁰ cf. CJEU, Judgement of 5 February 1963, *van Gend & Loos*, 26-62, ECLI:EU:C:1963:1, p. 12

⁴¹ cf. CJEU, Judgement of 15 July 1964, *Costa v E.N.E.L.*, 4-64, ECLI:EU:C:1964:66, p. 593-594

⁴² cf. CJEU, Judgement of 9 March 1978, *Simmenthal*, C-106/77, ECLI:EU:C:1978:49, 21+24

⁴³ cf. CJEU, Judgement of 22 October 1987, *Foto Frost*, 314-85, ECLI:EU:C:1987:452, 11-20

⁴⁴ cf. BVerfG, Judgement of the Second Senate of 7 June 1970, *Solange I*, 2 BvL 1/97, 56

⁴⁵ cf. BVerfG, Judgement of the Second Senate of 22 October 1986, *Solange II*, 2 BvR 197/83, 132

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jurisdiction on the protection of fundamental rights, the BVerfG further developed its jurisprudence during the review of the Maastricht Treaty in 1993. This ruling stipulates a cooperative relationship while highlighting that the principle of limited transfer of sovereignty is incompatible with a completely autonomous legislation of the EU institutions. However, the BVerfG emphasises that it rules upon the application of Union law in its territory of Germany after requesting the CJEU. In fact, it opened a review competence for the German courts to establish transgressive legal acts of the EU – the so-called *ultra vires* review.⁴⁶ In the judgement on the ‘*Bananenmarktordnung*’, some statements hereof were revised towards a more EU-friendly perspective. It increased the requirements for a constitutional complaint concerning Union secondary law to a sufficient argumentation of the EU’s lowered protection of fundamental rights from the complainant.⁴⁷ In 2009, this view was confirmed in the BVerfG’s *Lisbon* judgment. However, the terminology was revised and the responsibility for this review was transferred to the BVerfG alone. It thus established that the primacy of EU law is subject to a constitutional reservation of competence, which is monitored by the national constitutional court from a national constitutional perspective.⁴⁸

However, until the *PSPP* decision, no *ultra vires* claim has ever been executed by the BVerfG. In the 2010 *Mangold/Honeywell* case, the BVerfG explains in his decision of rejection that an *ultra vires* control is only appropriate when the EU obviously transgresses its competences. It thereby strengthened the cooperation its cooperation with the CJEU and dismissed a judicial confrontation.⁴⁹ This was then applied by the Second Senate of the BVerfG in the 2014 *OMT* jurisdiction, where it referred preliminary questions to the CJEU and adopted the European judgement about adherence of the given competences.⁵⁰

In 2020, the hitherto undone happened: the BVerfG declared the Public Sector Purchase Program (PSPP) of the ECB as *ultra vires*. It was described as a “historical caesura in the

⁴⁶ cf. BVerfG, Judgement of Second Senate of 12 October 1993, *Maastricht*, BvR 2159/92, 70

⁴⁷ cf. CJEU, Judgement of 5 October 1994, *Bananenmarktordnung*, C-280/93, ECLI:EU:C:1994:367, 62

⁴⁸ cf. BVerfG, Judgement of Second Senate of 30 July 2009, *Lisbon*, 2 BvE 2/08, 240 ff.

⁴⁹ cf. BVerfG, Judgement of Second Senate of 6 July 2010, *Mangold/Honeywell*, 2 BvR 2661/06, 60

⁵⁰ cf. BVerfG, Judgement of the Second Senate of 21 June 2016, *OMT*, 2 BvR 2728/13

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relation between BVerfG and CJEU and the development of constitutional European law”⁵¹. The BVerfG forwarded questions to the CJEU, after which the European court ruled that the PSPP program of the ECB does not infringe EU law.⁵² However, the BVerfG decided otherwise in its 2 *BvR 859/15* decision. It declared that the ECB’s action transgressed its mandate. It argued that the EU, including all its institutions, only have limited individual authorisation. When the action is not covered by mandate deriving from Art. 19 para. 1 sub-para. 2 TFEU, the democratic legitimacy is no longer given. Secondly, the BVerfG ruled upon the preliminary ruling of the CJEU in the *Heinrich Weiss and Others* case⁵³ and declared it to be ultra vires. However, no further questions were forwarded in that respect. The BVerfG did not agree with the CJEU’s weighing of proportionality and, therefore, called the issued ruling inapplicable.

This proceeding shows an on-going basic conflict between the courts. On the one hand, the CJEU claims the primacy of EU law and the precedence of EU jurisdiction in the scope of EU law independently from the Member States. The national constitutional court, on the other hand, claims that the national constitutions enable the EU to act, which is why the precedence of EU law only derives from the Member States.⁵⁴ Although the Member States even committed themselves to the primacy of EU law and the applicability of CJEU jurisdiction in declaration number 17 of the Lisbon Treaty.⁵⁵ Both courts approach the boundaries of their own precedence from their own perspective and capture themselves as competent to decide at last instance.

In its judgement, the BVerfG sparked an escalation that was unprecedented for the German court before.⁵⁶ In reaction to this, the European Commission introduced an infringement proceeding as a direct response to the BVerfG ruling and submitted a formal notice to the government on 9 June 2021: “The [European] Commission considers that the judgment of the German Constitutional Court constitutes a serious precedent, both for the future practice

⁵¹ Bergmann et al. (2022): 426.

⁵² cf. European Court of Justice (2018).

⁵³ cf. CJEU, Judgement of 11 December 2018, *Weiss and Others*, C-493/17, ECLI:EU:C:2018:1000

⁵⁴ cf. BVerfG, Judgement of the Second Senate of 5 May 2020, *PSPP*, 2 BvR 859/15

⁵⁵ cf. Fromberger and Schmidt (2018).

⁵⁶ cf. Bergmann et al. (2022): 426–29.

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of the German Constitutional court itself, and for the supreme and constitutional courts and tribunals of other Member States.”⁵⁷ Germany then had a time period of two months to reply to this formal notice of the European Commission.⁵⁸ In its answer to the formal notice, Germany had clarified three commitments which the European Commission accepted. Firstly, it recognised the authority of the CJEU and the binding character of its jurisprudence by stating that it “affirms and recognises the principles of autonomy, primacy, effectiveness and uniform application of Union law as well as the values laid down in Article 2 TEU, including in particular the rule of law.”⁵⁹ Secondly, it confessed that the competence to evaluate the validity of Union acts is conferred to the CJEU. Lastly, it committed itself to do everything in its power to counteract a renewed decision in this direction.⁶⁰ A few months later, on 2 December 2021, the European Commission released a press statement declaring that it closed the infringement procedure against Germany according to Art. 297 TFEU. In this case, a written declaration by Germany to the European Commission was sufficient. Consequently, no proceeding was brought before the European Court of Justice in this regard.

II. Approaches of the BVerfG to control the EU’s jurisdiction

Before the *PSPP* decision, the BVerfG only threatened but actually never used the control function to demand compliance with Art. 23 Basic Law in particular but also the German constitutional provisions in general. The parallelism of the legal systems on national and supranational level creates these potential conflicts between the courts based on their perspectives. Both agree, also in the *PSPP* judgement, that EU law in general is to be applied primarily to secure its uniform application throughout the EU. The CJEU interprets this as an absolute priority, whereas the BVerfG raises limitations.

⁵⁷ European Commission (2021).

⁵⁸ cf. European Commission (2021).

⁵⁹ European Commission (2021a).

⁶⁰ cf. European Commission (2021a).

However, the conflict can be divided into three different categories:

- the control of national fundamental rights as in the *Solange I* and *II*-decisions;
- the control of the compliance with the limited competences (ultra vires review) and
- the control of collision with primary national law (identity review).^{61/62}

The present proceeding is not about the protection of fundamental rights in the EU, but about the second and third category: the collision with national primary law and the possible transgression of transferred competences.⁶³

The BVerfG established the ultra vires review in its 1993 *Maastricht* decision.⁶⁴ It constitutes a general constitutional control competence for the BVerfG over the use of EU competences. This control is fully developed through jurisprudence and has no written legal basis.⁶⁵ Generally, the BVerfG acknowledges the primacy of EU law.⁶⁶ An ultra vires act, however, is an action of an institution or court which goes beyond the transferred competences. The BVerfG then declares the ratification act of Germany inapplicable in its territory, because it is not able to declare it void for the whole EU territory. In doing so, it encourages a Member States control that EU action can only be taken within the limited competences conferred and that these borders cannot be shifted by the EU itself. This, however, could result in unequal application of EU law throughout the Member States and a violation of EU law from the BVerfG as such, which might ultimately lead to an infringement procedure in front of the CJEU.⁶⁷ On the one hand, the tension between the courts is thereby manifested, on the one hand, manifested in the CJEU's legal competence. On the other hand, issues concerning EU law are decided by the BVerfG at last instance which applies not only German, but also EU constitutional law in its jurisprudence.⁶⁸

⁶¹ cf. Mayer (2010): para.s 88–91.

⁶² cf. Fromberger and Schmidt (2018): 29-33.

⁶³ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21

⁶⁴ cf. BVerfG, Judgement of Second Senate of 12 October 1993, *Maastricht*, BvR 2159/92, 70

⁶⁵ cf. Mayer (2010): para.s 3–87.

⁶⁶ cf. BVerfG, Judgement of Second Senate of 30 July 2009, *Lisbon*, 2 BvE 2/08, 339

⁶⁷ cf. Herdegen (2019): chapter 10.

⁶⁸ cf. Skouris (2021): 148.

With its 2009 *Lisbon* judgement, the BVerfG introduced the identity review control function. Art. 4 TEU is one written peculiarity. The identities of the national constitutions and their legal system may not be violated by EU actions.⁶⁹ This protects the German constitution, which has at its core, inter alia, Art. 23 para. 1 in conjunction with Art. 79 para. 3 Basic Law.⁷⁰ The German Basic Law contains therein the so-called eternity clause, which guarantees the upholding of some of the central written principles. This entails the authorisation to transfer sovereignty rights to the EU in Art. 23 Basic Law.⁷¹ The BVerfG uses this legal basis in the German Basic Law and the EU Treaties to claim a control competence on its part to ensure at last instance that actions at the European level do not violate the constitutional identity of the German Basic Law. In contrast to ultra vires control, such an infringement cannot be cured by amending the implementation law in Germany alone.

Commentators link the above mentioned ultra vires review to the protection of the national constitutional identity.⁷² Others insist on keeping these two control functions separate.⁷³ However, the BVerfG did develop in its jurisdiction two control mechanisms from a purely national perspective to make sure that the transferred sovereignty rights are used in the boundaries of the German Basic Law.

D. Discussion of the reciprocal cooperation

At first glance, the competences seem to be highly selective, especially from an EU law perspective. However, the different perspectives have introduced a lively discussion between the jurisdiction of the courts over the last decades. Both have their de jure competences, but the Treaties and previous jurisdiction did not find a solution worthy of approval for both, the European and the national perspective. Moreover, the German constitution contains. Art. 23 Basic Law, which detests friendliness towards the Union. One part of the resulting general

⁶⁹ According to Art. 4 para. 2 TFEU

⁷⁰ cf. Herdegen (2019): chapter 10.

⁷¹ cf. Mayer (2010): para.s 88–91.

⁷² cf. Riedl (2020).

⁷³ cf. Jóźwicki (2020).

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cooperation is the mutual observation of the judgements. Another, more interactive dialogue arises with the preliminary rulings according to Art. 267 TFEU. That shows that the exhaustive relationship between the two courts was not fully considered in the Treaties. However, this relationship and the mutual dialogue have developed over time. The discussions are solely in terms of content, as they discuss the content to preserve law.⁷⁴ Both courts have their de jure competences based on the legal system in which they operate. Their arguments are also de jure from their perspective. The CJEU's arguments are based on the Treaty provisions and its own jurisprudence.⁷⁵ The BVerfG, however, is responsible for ensuring compliance with the Basic Law according to the BVerfGG. This means that allegations of a violation of its area of responsibility are taken very seriously. This dispute between the primacy of EU law and national constitutional law originates from the fact that there is no relevant Treaty provision for that specific case. It would have been at least partly included in the Constitutional Treaty, which was rejected in a French and a Dutch referendum in 2005, however.⁷⁶

⁷⁴ cf. Bergmann et al. (2022): 676.

⁷⁵ cf. CJEU, Judgement of 5 February 1963, *van Gend & Loos*, ECLI:EU:C:1963:1 / CJEU, Judgement of 15 July 1964, *Costa v E.N.E.L.*, ECLI:EU:C:1964:66 / CJEU, Judgement of 22 October 1987, *Foto Frost*, ECLI:EU:C:1987:452

⁷⁶ cf. Skouris (2021): 147.

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In this chapter, especially the second sub-ordinate research question will be considered. Thereby, the need for the NGEU recovery plan will be evaluated. Moreover, this thesis will highlight the process of EU agreement and the ratification process in Germany. As a legal dispute originated from that before the BVerfG, the legal considerations are presented and general remarks on the effects of the recovery plan will be made.

A. The rationale behind it

On 31 December 2019, the World Health Organization was firstly informed about a then unknown lung disease in Wuhan.⁷⁷ Two months later, COVID-19 reached the European Union.⁷⁸ To limit the spread of the infection and to protect the health of the population, severe measures were implemented by the Member States. Lockdowns and temporary closure of national borders became the new normality for EU citizens.⁷⁹ The national governments decided to prioritise the safety and health of the population and accepted the financial as well as economic effects thereof. These consequences, both on an individual and on a macro-economic level, were substantial and the continent experienced a crisis. A recession of the EU economy was already expected in July 2020.⁸⁰ The Member States first implemented national measures to outweigh the negative consequences, but these measures were not reaching far enough. As the Member States are highly interrelated in economic terms, joint answers and cooperative actions were necessary. The EU then began to support the Member States and to coordinate the national measures.^{81/82}

After heavy discussions, the Member States agreed upon a joint recovery plan in July 2020. This plan, called NGEU, is the biggest conjunction project that has ever been financed by

⁷⁷ cf. World Health Organization (2020).

⁷⁸ cf. Ursula von der Leyen (2020).

⁷⁹ European Commission (2022).

⁸⁰ European Commission (2020a).

⁸¹ European Commission (2020).

⁸² cf. Resolution on EU coordinated action to combat the COVID 19 pandemic and its consequences of the European Parliament, 2020/2616(RSP)

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the EU budget.⁸³ The legal basis is Art. 311 TFEU and Art. 106a of the Euratom Treaty. Its purpose is to facilitate the EU's recovery from the pandemic, build resilience as well as to invest in future-related aspects of European integration like modernization, climate change, health care.⁸⁴ The NGEU plan is interrelated with the Multiannual Financial Framework (MFF) 2021-2027.⁸⁵ The MFF supplements NGEU by providing the financial foundation for all actions on EU level and planning the needed investments.

NGEU consists of three pillars. First, the Member States receive financial support to incent investments and reforms, to support the people and social systems and to boost the economy. They implemented the Recovery and Resilience Facility as well as the Just Transition Fund and increased the financial resources for existing programs to execute these investments. The second pillar aims to kick-start the EU economy by incentivizing private investments through the Solvency Support Instrument, InvestEU or the Strategic Investment Facility. Third, the lessons of the crisis are addressed through the programs EU4Health, rescEU and Horizon Europe. Deficiencies revealed by the crisis are to be eliminated for the future. Additionally, the EU incorporates its normative power in the world and aspires to support partners globally. Among these pillars, the general growth strategy in terms of the Green Deal is to be integrated in every action. To be more resilient and to keep advancing a global leadership role, the Green Deal should even be strengthened through this recovery plan.⁸⁶ Collectively, €390 billion will be provided in grants and €360 billion in loans. These financial resources will be transferred to the Member States based on their national Recovery and Resilience Plans, which can be submitted until the end of 2026 and, in the case of loans, repaid back until the end of 2058. The national plans will be reviewed by the European Commission and then approved by the Council of the EU.^{87/88}

⁸³ cf. European Council / Council of the European Union (2022).

⁸⁴ cf. European Commission (2022a).

⁸⁵ cf. European Parliamentary Research Service (2020).

⁸⁶ cf. European Commission (2020b).

⁸⁷ cf. General Secretariat of the Council of the European Union (2020).

⁸⁸ cf. Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, OJ L 424, 15.12.2020, p. 1–10

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The financing of NGEU is a major reason why the package represents an unprecedented landmark agreement. The EU agreed beyond the support package to ensure the availability of money and to reform its own resources system. The 2020 Own Resources Decision based on Art. 311 para. 3 TFEU in conjunction with Art. 122 TFEU includes three approaches to increase the inflow of financial resources to the EU budget: a pro-ratio increase of the annual payments by the Member States, the introduction of further EU taxes to strengthen the own resources inflow and investments on the capital market.

First, the Member States agreed upon a maximum amount of annual national payments of the Member States of 1.4% of their gross national income on a permanent basis. Additionally, until 2058, a further rise of up to 0.6% of the gross national income is possible.

Second, the EU retroactively introduced a plastic levy from the beginning of 2021 and opened the possibility for further EU taxes in Art. 2 of the 2020 Own Resources Decision. These own resources shall be developed during the application period of the MFF 2021-2027.

Thirdly, Art. 5 of the 2020 Own Resources Decision allowed the EU to acquire debt. The European Commission is instructed to invest €750 billion in 2018 prices on the capital market until 2058.⁸⁹ The Member States are already confronted with a high financial pressure through the national measures and initiatives. Therefore, they were able to agree upon a strengthening of the budget, so that the dependence on the Member State's budgets is not increased. If all Member States can settle their liabilities from the loans, every nation will only repay the amount it actually received. However, as soon as one Member States is unable to pay, the others may be asked to pay pro rata and temporarily. With that procedure the EU's budget may be stabilized, according to Art. 9 of the 2020 Own Resources Decision.⁹⁰

⁸⁹ cf. Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, OJ L 424, 15.12.2020, p. 1–10, Art. 5

⁹⁰ cf. Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, OJ L 424, 15.12.2020, p. 1–10, Art. 9

B. The procedure and the jurisdiction for the NGEU

I. A back-and-forth ratification process in Germany

The first draft of the MFF for 2021-2027 was presented by the European Commission in May 2019.⁹¹ Two years later, it presented an amended proposal, mainly due to the consequences of the covid-19 pandemic.⁹² Both former German Chancellor Angela Merkel and the French President Emmanuel Macron promoted the proposal of a joint project to tackle the pandemic subsequently throughout the Union.⁹³ In July 2020, the European Council agreed upon the comprehensive, unprecedented project to recover from the pandemic.⁹⁴ In December 2020, an Interinstitutional Agreement was reached to ensure NGEU's financing by enacting the 2020 Own Resources Decision in conjunction with the MFF 2021-2027 based on the German and France proposal after previous difficult negotiations among the Member States.⁹⁵

According to Art. 311 para. 3 TFEU, a ratification in all Member State, based on their national constitutional requirements was necessary to implement the 2020 Own Resources Decision.⁹⁶ Art. 311 TFEU, which serves as the basis of the NGEU project, in conjunction with para. 3 of the 'Integrationsverantwortungsgesetz'⁹⁷ demand to apply equal standards and a "ratification-like approval by the Member States"⁹⁸. The ratification procedure of former Own Resources Decisions in 2000, 2007 or 2014 usually took about two years. For

⁹¹ cf. European Commission (2018).

⁹² cf. European Commission (2020c).

⁹³ cf. Council of the European Union (2020).

⁹⁴ cf. General Secretariat of the Council of the European Union (2020).

⁹⁵ cf. Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources Interinstitutional Agreement of 16 December 2020 between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources, OJ L 433I , 22. December 2020, p. 28–46

⁹⁶ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 71 / Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, OJ L 424, 15.12.2020, p. 1–10, Art. 13

⁹⁷ cf. Integrationsverantwortungsgesetz vom 22. September 2009, das durch Artikel 1 des Gesetzes vom 1. Dezember 2009 (BGBl. I S. 3822) geändert worden ist, BGBl. I, 3022.

⁹⁸ BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 71

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the 2020 Own Resources Decision, however, the EU set the goal to ratify before the 2021 parliamentary summer break, which amounted to a timeframe of only six months.⁹⁹ The two German parliamentary chambers, the Bundestag and the Bundesrat, have to agree according to Art. 59 para. 2 Basic Law, after which the Federal President finalises the process with the execution and promulgation based on Art. 59 Basic Law.

In December 2020, shortly after the agreement on the 2020 Own Resources Decision, the federal government drafted the first Ratification Act. On 25 March 2021, the Bundestag adopted the Ratification Act¹⁰⁰ with 478 of the 645 votes cast voting in favour, 95 against and 72 abstaining. Motions of the Bündnis 90/Die Grünen parliamentary group and the AfD were rejected by the plenary, as were a draft bill and a motion for a resolution by the FDP parliamentary group. Only one motion by the governing parliamentary groups CDU/CSU and SPD were agreed to, with the AfD and FDP parliamentary groups voting against and abstaining, respectively. This added more far-reaching reporting obligations to the federal government.¹⁰¹ The Bundesrat agreed unanimously the next day.¹⁰²

Only hours after the Bundesrat agreed, 2,281 persons of the ‘Bündnis Bürgerwille’ filed a constitutional complaint with a request for a temporary injunction before the BVerfG.¹⁰³ Additionally, the AfD group in the Bundestag filed an organ complaint in front of the BVerfG¹⁰⁴ as well as seven CDU members of the Bundestag and one private person.¹⁰⁵ This thesis will focus on the complaint of ‘Bündnis Bürgerwille’, as this comprehensively represents the central focus of the subject of complaint. They claim that the German

⁹⁹ cf. D’Alfonso (2021).

¹⁰⁰ cf. Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, OJ L 424, 15.12.2020, p. 1–10.

¹⁰¹ cf. Deutscher Bundestag (2021): 27491–27499

¹⁰² cf. Decision of the Bundesrat - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – ‘Fit for 55’: moving towards climate neutrality – delivering the EU’s 2030 climate target COM(2021) 550 final; Council doc. 10849/21

¹⁰³ cf. Bündnis Bürgerwille (2021).

¹⁰⁴ cf. BVerfG, Judgement of Second Senate of 8 June 2021, *AfD v Bundesregierung and Bundestag*, 2 BvE 4/21

¹⁰⁵ cf. Welt (2020).

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Ratification Act of the 2020 Own Resources Decision for the NGEU project violates their constitutional rights under Art.s 38 para. 1, 20 paras. 1 and 2, 79 para. 3 Basic Law.

The BVerfG enacted a so-called ‘Hängebeschluss’ on 26 March 2021 and temporarily prohibited the Federal President to sign and execute until it decided upon a temporary injunction.¹⁰⁶ A Hängebeschluss is generally a provisional decision, which ensures that the present situation is maintained until the final judgement and thereby aims to prevent greater and potentially irreversible damage.¹⁰⁷ Such a prohibition vis-à-vis the Federal President is unusual. In the proceeding concerning the European Patent Court, for example, the Federal President declared himself willing to delay, so a ruling was not necessary in this regard.¹⁰⁸ At the time of the Hängebeschluss, the ratification process of the 2020 Own Resources Decision had not yet been executed in all of the other Member States.¹⁰⁹

The Second Senate of the BVerfG rejected the preliminary injunction and the Federal President was allowed to execute and promulgate the law in the judgement of 15 April 2021. The decision was based on para. 32 sub-para. 1 BVerfGG, which stipulates that the BVerfG can rule upon a preliminary injunction under strict standards only if highly negative consequences are expected otherwise. Additionally, it requires a summary examination when it concerns an international treaty or a violation against Art. 79 para. 3 Basic Law. Both of these requirements applied in this case. A summary examination was undertaken in particular for the claim of a violation of the German constitution’s identity. During the process, the Cabinet, the Bundestag and the Federal President had the opportunity to make a statement.¹¹⁰ The Cabinet¹¹¹ and the Bundestag¹¹² complied. The BVerfG performed a comprehensive assessment of consequences. It concluded that a preliminary injunction to stop the Federal President from promulgation and avoid possibly irreversible dangers to the

¹⁰⁶ cf. BVerfG, Judgement of the Second Senate of 26 March 2021, *NGEU I*, 2 BvR 547/21

¹⁰⁷ cf. Bundesverfassungsgericht (2021).

¹⁰⁸ cf. BVerfG, Judgement of Second Senate of 13 February 2020, *Einheitliches Patentgericht*, 2 BvR 739/17, 90

¹⁰⁹ cf. D’Alfonso (2021).

¹¹⁰ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 43

¹¹¹ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 55

¹¹² cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 44

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project in the whole EU outweighs the consequences resulting from a possible violation of the constitutional identity.¹¹³ The outcome passed the eight-judges Second Senate unanimously, but the full decision including the rationale was only taken with a seven-to-one vote.¹¹⁴ The European Commission is, therefore, inter alia authorised on the basis of Art. 122 TFEU to invest on the capital market. The main proceeding is expected to take considerable time, however. A decision can be expected in 2023 or 2024, involving possibly a referral of a preliminary ruling to the CJEU in accordance with Art. 267 TFEU.

This project was allowed to start after the ratification in all Member States.¹¹⁵ On 15 June 2021, the first transaction for a €20 billion amount a ten-year period.¹¹⁶ Not only the financing, but also the national-level implementation of the recovery plan started, however. Most of the Member States have already forwarded their national plans about the use of the money to the European Commission and twenty have so far been endorsed.¹¹⁷ Germany's National Recovery and Resilience Plan¹¹⁸ was officially approved by the European Commission on 22 June 2021 after an assessment of the targeted goals and expected outcomes.¹¹⁹ Two weeks later, the Council of the EU voiced its endorsement and thus gave the final approval that allowed the disbursement of the funds to start in Germany.¹²⁰ In the meantime, the European Commission already informed the European Parliament and the Council of the EU about the status quo of the recovery plan.¹²¹

¹¹³ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 104ff

¹¹⁴ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 112

¹¹⁵ cf. D'Alfonso (2021).

¹¹⁶ cf. Bergmann et al. (2022): 785.

¹¹⁷ cf. Policy Department for Budgetary Affairs and Directorate-General for Internal Policies (2021).

¹¹⁸ cf. Directorate General for Communication of the European Commission (2021).

¹¹⁹ cf. European Commission (2021b).

¹²⁰ cf. Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Germany, 2021/0167 (NLE)

¹²¹ cf. Report from the Commission to the European Parliament and the Council on the implementation of the Recovery and Resilience Facility, COM (2022) 75 final

II. Major risks for EU

As mentioned in the last paragraphs, the NGEU is an important tool to boost the economy and support the Member States in tackling the effects of the COVID-19 pandemic. However, if the project cannot be executed as planned, several negative effects might appear. In the next paragraphs, this thesis will briefly mention them in order to give a full overview over the research topic.

An NGEU halt could result in significant economical restraint. That is because not only the Member States themselves but also the economic players are supported by the project to tackle the effects of the pandemic.¹²² Companies could get more hesitant about economic growth, not only because the financial support from the EU may stop but also because the future economic harmonization and cooperation would be endangered.¹²³ The ECB expected the project to entail an increase in productive public investment and increase the GDP in the medium term. The financial support does not only facilitate the recovery but also sets priorities to make the EU, its Member States, and the economy resistant for the future. Additionally, it stimulates investments, especially in terms of climate change and digitalisation.¹²⁴ Viewed from that perspective, an NGEU stop would first lead to uncertainty. It would also raise the question of repayment of the funds already disbursed. Moreover, since all Member States have already been confronted with financial forfeits from coping with the pandemic, a stop would eventually cause uncertainty about these funds and outstanding liability claims. As Germany is the economically strongest Member State, the capital market would ascribe a reduced importance to the bonds. It is noteworthy that these corona bonds are reversed. Therefore, a simple withdrawal of Germany from NGEU is not possible in this regard. Admittedly, the BVerfG could still request a Treaty change or decide not to agree to future MFF decisions.¹²⁵ This would pose a great danger to the economic situation of the EU as a whole, however.

¹²² cf. European Commission (2022a).

¹²³ cf. Freier et al. (2022).

¹²⁴ cf. European Central Bank (2021): 3.

¹²⁵ cf. Nettesheim (2021).

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The EU's legal order is based on mutual respect and trust. Viewed from that perspective, an ultra vires verdict in Germany would lead to legal uncertainty about how the project might proceed in the other Member States and the EU as a whole. Moreover, such a decision would affect Germany's position in future discussions and disputes, as its own former Chancellor, Angela Merkel, was the one who promoted the idea with French President Emmanuel Macron.¹²⁶ Such a contradiction would reduce the ability to achieve further integration or react to future crises. Furthermore, the current institutional balance could be affected. In the past, the EU's economic development was mainly intergovernmentally negotiated and implemented. With NGEU, the European Commission gained more responsibility in this field, which could encourage possible future integration and a strengthening of the supranational institutions. Following an NGEU halt in Germany or even the whole EU, this development would be cancelled.¹²⁷ In particular, the courts would be affected by a standstill, depending on what procedural steps are initiated. Infringement proceedings could be filed, cooperation and mutual trust could be weakened or the legal order in the EU could be shifted. This will be evaluated at a later stage.

As mentioned above, an NGEU halt in Germany would raise the question of continuation in other Member States. The *PSPP* decision of the BVerfG was already used by other national constitutional courts to undermine the primacy or application of EU law.¹²⁸ The radiant power of the BVerfG's decisions is high and might lead to further constitutional claims across the EU. This would plunge the whole NGEU program and the future of the EU into uncertainty. Furthermore, repercussions could be felt worldwide beyond the European continent. That is because the EU's economic power is relevant for many global trading partners, which is emphasised by a possible normative power reduction that a disunited EU could cause.¹²⁹ The consequences of a jurisprudence that upholds the pleas are great - this is surely also clear to the Second Senate of the BVerfG itself.

¹²⁶ cf. General Secretariat of the Council of the European Union (2020).

¹²⁷ cf. Nettesheim (2021).

¹²⁸ cf. Nguyen and Chamon (2020): 10.

¹²⁹ cf. Nguyen and Chamon (2020): 8.

C. The scope of the legal discussion

I. Procedural legal questions are answered

Several legal questions appeared in the constitutional complaint of the ‘Bündnis Bürgerwille’ about which the BVerfG already has already decided in the judgement on the preliminary injunction or will rule on in the main proceeding.¹³⁰

In Bundestag and Bundesrat statements, both chambers claimed that the subject of negotiations was not authorised for a constitutional complaint based on para.s 23, 92 BVerfGG. They argued that the Ratification Act about the 2020 Own Resources Decision was not issued and was consequently not in force at the moment of request.¹³¹ The BVerfG rejected this argumentation, stating that an ex-ante control is de jure as it already passed both legislative chambers, the Bundestag and the Bundesrat. This control is only permitted if the ratification process is almost concluded, except for the promulgation of the Federal President.¹³²

Beyond the formal admissibility of the action, the complainants highlight three alleged violations in particular. The first is an alleged excessive conferral of sovereignty rights from the Member States to the EU. The complainants argue that a qualified majority in the national parliaments would be necessary for a transfer of additional competences, according to Art. 23 para. 1 sentence 3 in conjunction with Art. 79 para. 2 Basic Law. The draft legislation only titled a simple act, however. The complainants argue that formally the incorrect form to decide about this legislative was used and therefore the ratification decisions in the two chambers are not valid.¹³³ Second, they argue that this act transgressed the competences as no sovereignty rights for this project has been transferred to the EU. Allegedly, Art. 311 para. 3 TFEU should apparently exceed the competences. This legal basis is here interpreted as a prohibition of joint indebtedness. Additionally, they claim that their right of democracy

¹³⁰ cf. BVerfG, Judgement of the Second Senate of 26 March 2021, *NGEU I*, 2 BvR 547/21

¹³¹ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 47

¹³² cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 76

¹³³ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 79-80

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is violated as the prohibition of bailouts based on Art. 125 para. 1 TFEU is breached.¹³⁴ Finally, the third claim concerns a violation of the constitutional identity. As the Bundestag is alleged to surrender at least part of its budgetary authority, the very core of the Basic Law would be breached.¹³⁵

II. Established to date: no transfer of new competences

The applicants claim that the Ratification Act would transfer additional competences from the autonomous scope of action of the Member States, in particular of Germany. They resent a transfer of certain competences that enable the EU institutions to incur long-time debts and joint liabilities, because, as they argue, this would transform the EU into a fiscal union.¹³⁶ Their rationale is that the Ratification Act causes a material constitutional change in the Member States, which needs democratic legitimacy. This could only be reached through a two-thirds qualified parliamentary majority based on Art. 79 para. 3 Basic Law.¹³⁷ A transfer of sovereignty powers is only effective when based on Art. 38 para. 1 Basic Law, because because powers can only be transferred in the method prescribed by the Basic Law.¹³⁸ Thus, these transfers must always be compatible with Art. 23 para. 1, sentence 2 and 3 in conjunction with Art. 79 para. 2 Basic Law. Additionally, they claim that a Treaty amendment would require an ordinary amendment procedure based on Art. 48 TEU. Otherwise, Art. 5 para.s 1 and 2 TEU, which establishes the competences of the EU, could not be changed.¹³⁹

As a matter of fact, the Bundestag¹⁴⁰ and the Bundesrat actually exceeded the threshold demanded by the complainants. The Bundesrat even decided unanimously in favour of the Ratification Act for the 2020 Own Resources Decision.¹⁴¹ However, the applicants argue

¹³⁴ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 94

¹³⁵ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 81

¹³⁶ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 14

¹³⁷ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 23+26-28

¹³⁸ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 13

¹³⁹ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 17

¹⁴⁰ cf. Deutscher Bundestag (2021): 27498–27499.

¹⁴¹ cf. cf. Decision of the Bundesrat - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – ‘Fit for 55’:

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that this is not sufficient, as the bill was negotiated in a different form than was needed. The attainment of the threshold would not allow for a remedy of this violation, because only a law that is expressly designated in the sense of Art. 23 para. 1 sentence 3 Basic Law can bring about an amendment of the Basic Law.¹⁴² The BVerfG already took a binding decision about this in the judgement of 15 April 2021. This eliminated the first part of the allegations in this proceeding by stating that “the present case, however, is not about a transfer of sovereignty rights”¹⁴³. Nevertheless, the BVerfG did at least not completely rule out that this Ratification Act might exceed the limits of Art. 311 para. 3 TFEU, violate the no-bail-out clause of Art. 125 para. 1 TFEU or breach the national constitutional identity of the German Basic Law.¹⁴⁴

III. No comprehensive evaluation of whether the given legal framework is exceeded

The BVerfG expressively did not outline a summary review concerning the claims that the Ratification Law would transgress the limits of EU competences.¹⁴⁵ However, this claim still requires a decision from the outset in the main proceeding as the BVerfG did not yet rule upon that.¹⁴⁶

The particular explosiveness in this decision arises, among other matters, from the fact that the BVerfG is deciding on the admissibility of a European legal basis that is supposed to exist on the basis of the Basic Law. The claim of transgression is twofold. On the one hand, the ‘Bündnis Bürgerwille’ claims that the EU transgresses the competences based on the Treaties by incurring common debt. On the other hand, it highlights the violation of a core principle, which ensures that Member States cannot be held liable for debts of another Member State. These two claims will be discussed below.

moving towards climate neutrality – delivering the EU’s 2030 climate target COM (2021) 550 final; Council doc. 10849/21

¹⁴² cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 28

¹⁴³ BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 79-80

¹⁴⁴ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 94

¹⁴⁵ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 72

¹⁴⁶ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 92-93

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First, the applicants urge a decision on the compliance of the legal bases. They argue in principle that Art. 4 and 5 of the 2020 Own Resources Decision, which is annexed to the German Ratification Act, transgresses the following democratic limits of Art. 311 para. 3 TFEU:

“[...] The Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament adopt a decision laying down the provisions relating to the system of own resources of the Union. In this context it may establish new categories of own resources or abolish an existing category. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements. [...]”¹⁴⁷

The core of the argumentation is the ‘begrenzte Einzelermächtigung’ which derives from a national constitutional perspective. It stipulates that the EU is solely allowed to act within the sovereignty powers that have been forwarded to the EU by the Member States (and, therefore, by the Treaties), according to Art. 4 para. 1 TEU. However, the distribution of competences is regulated in Art. 5 TFEU. The NGEU recovery plan is based on Art. 122 TFEU about the usage of the provided financial resources, while Art. 311 TFEU justifies the raise of money – inter alia on the capital markets – and the conditions of compensation. Both of them are necessary because one part of the money will be provided as loans and the other part as grants. Moreover, the complainants presumptively determine a prohibition to develop joint debt in the EU in Art. 311 TFEU. In fact, it is a highly academically disputed legal basis.

Meanwhile, the Bundestag and Bundesrat argue that no prohibition of common debt is expressed and that it does not change the integration program of the EU as it is only a temporary tool. In the final analysis, the BVerfG's indications are limited to the following possible direction of the decision: “Given the concerns raised by the applicants, it can at least not be ruled out completely that Art. 4 and Art. 5 of the 2020 Own Resources Decision in

¹⁴⁷ Art. 311 para. 3 TFEU

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particular exceed the limits of the authorization contained in Art. 311(3) TFEU.”¹⁴⁸ Either it wants to hold for a preliminary decision by the CJEU or it could not agree on a deeper analysis within the Second Senate due to the urgency. Either way, this ultra vires accusation remains unresolved to date.

The second allegation under the guise of exceeding the transferred sovereignty powers involves the incompatibility of Art. 9 para. 5 sub-para. 2 sentence 1 of the 2020 Own Resources Decision with Art. 125 para. 1 TFEU. This EU provision stipulates the following:

*“A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.”*¹⁴⁹

This legal basis for a no-bail-out is allegedly violated when “the [European] Commission may call on the Member States to provisionally provide the difference between the overall assets and the cash resource requirements, in proportion (‘pro rata’) to the estimated budget revenue of each of them”¹⁵⁰. If one of the other Member States is unable to provide the payments, the 2020 Own Resources Decision opens the possibility to collect money from other Member States by the European Commission. Without such an backbone option, the EU budget might get endangered. By circumventing the contractual agreements, the competences might be exceeded.

The Bundestag, however, regards it as unlikely that the Member States will not be able to repay the funds that were made available. Since there would only be a small risk for this liability of other Member States, this could be endured during the project.¹⁵¹ The Federal Government also basically agrees with this chain of reasoning and adds that the debt is not

¹⁴⁸ BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 94

¹⁴⁹ Art. 125 para. 1 sentence 2 TFEU

¹⁵⁰ Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, OJ L 424, 15.12.2020, p. 1–10, Art. 9 para. 5.

¹⁵¹ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 103

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jointly borne by the Member States. Each Member State would incur debt proportionally, which it would then repay, at least in the parts envisaged. To ensure a balanced budget, other Member States would only step in if one Member State were unable to pay. Nevertheless, the debt would remain solely with the individual Member States vis-à-vis the EU and the EU itself on the capital market.¹⁵² In this legal question, the BVerfG remains even more open. The decision merely outlines the position of the conflicting parties, but it does not give its own consideration or concrete indications of an outcome of the proceeding.

IV. Identity violation procedurally open, but a direction recognisable

All EU institutions are obliged in Art. 4 para. 2 TEU to respect the national identities of the Member States. This is also the starting point for one of the accusations made by the ‘Bündnis Bürgerwille’ in their constitutional complaint. The constitutional identity in Germany is defined by Art. 79 para. 3 in conjunction with Art.s 1 and 20 Basic Law. The complainants argue that the act ratifying the 2020 Own Resources Decision violates Art. 38 para. 1 sentence 1 in conjunction with Art. 20 para. 1 and 2 and Art. 79 para. 3 Basic Law and, in turn, also the German constitution’s identity.¹⁵³ Art. 20 Basic Law stipulates in Art. 38 para. 1 Basic Law the right to act freely in all matters that concern the own territory. The exception is based on Art. 23 Basic Law which authorises the EU to act within the limits of the transferred competences. Art.s 20 para. 1 and 2 in conjunction with Art. 79 para. 3 Basic Law assures citizens that action on EU level is actually taken only within the framework of these competences.¹⁵⁴ The German Basic Law contains a so-called eternity clause (‘Ewigkeitsklausel’) which emerged from historical events and is justified by Art. 79 Basic Law. This is intended to ensure that the Basic Law cannot be repealed in the future. Art. 20 Basic Law is also protected by this clause, which argues in para. 2 that “[a]ll state authority is derived from the people. It shall be exercised by the people through elections and other

¹⁵² cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 59

¹⁵³ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 81

¹⁵⁴ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 82

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votes”¹⁵⁵ and in para. 3 that “[t]he legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice”¹⁵⁶.

The budgetary sovereignty of the German Bundestag is subsequently anchored directly in Art. 79 para. 3 of Basic Law. The citizens, who elect representatives at regular intervals in democratic elections, must be indirectly concerned with the revenues and expenditures from the perspective of the Basic Law.¹⁵⁷ The EU, including the Member States and, in turn, with that also the Bundestag and Bundesrat, are therefore not permitted to introduce long-term mechanisms that relinquish this Bundestag authority to any European institution. This would violate the principle of democracy – as claimed by the applicants in the present proceeding.¹⁵⁸ The specific charges on the Ratification Act of the 2020 Own Resources Decision are that the European Commission is in a position to decide on funds until the end of the financing on the 2058 financial market, for which period there is no MFF yet.¹⁵⁹ In addition, the contribution of the Member States could be increased and the financing of other Member States would have to be borne by Germany. In other words, the Bundestag would surrender its budgetary control to the European Commission.¹⁶⁰

Here, too, the BVerfG currently leaves the decision open, but in contrast to the ultra vires review, it already evaluates the proceeding on the basis of a summary examination. The BVerfG thus reaches its own conclusions in addition to presenting the arguments given by the parties.¹⁶¹ Specifically, the BVerfG concludes that there is no high probability of an identity violation and, on this basis, also dismisses the preliminary injunction.¹⁶² The BVerfG also respects the Bundestag’s room for manoeuvre in its evaluation.¹⁶³ It declares that there are no direct liabilities for Germany via the liability of other Member States resulting from Art. 5 of the 2020 Own Resources Decision. The proportional liability is

¹⁵⁵ Art. 20 para. 2 Basic Law

¹⁵⁶ Art. 20 para. 3 Basic Law

¹⁵⁷ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 84

¹⁵⁸ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 85

¹⁵⁹ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 88

¹⁶⁰ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 90

¹⁶¹ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 87

¹⁶² cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 90

¹⁶³ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 97

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enshrined in Art. 9 of the 2020 Own Resources Decision.¹⁶⁴ In addition, the purpose is considered, as the funds may only be used within the framework of the NGEU, namely for reconstruction after the COVID-19 pandemic. This is also supported by Regulation (EU) 2020/2094 and Regulation (EU) 2021/241.¹⁶⁵ The accusations regarding the time commitment beyond the MFF are also rejected. No additional investments on the capital market are authorised by this provision, except until a certain deadline.¹⁶⁶

However, it remains open to what extent democratic law is compatible with the possibilities of liability. This will be decided in the main proceeding.¹⁶⁷

¹⁶⁴ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 99

¹⁶⁵ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 100

¹⁶⁶ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 101

¹⁶⁷ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 96

4. Effects of an ultra vires verdict

This chapter will, first, detect four scenarios which are then weighted in terms of their probability regarding the statements the BVerfG already did in its decision on the preliminary injunction. Based on this, the assessed scenarios will be considered more closely. Although it might be the same scenario, those might result from different procedural paths. Those will be examined in connection with the effects that may occur for the relationship between the BVerfG and the CJEU.

A. Four scenarios

From the previous evaluation of the different legal discussion points in the NGEU procedure, different scenarios can be developed, which might further develop the relationship of the two courts in different directions in the coming years. As already noted, the BVerfG has ruled that no new competences are transferred by the Ratification Act of the 2020 Own Resources Decision. Only the violation of Germany's constitutional identity and a transgression of the transferred competences remain in question. The outcome has been kept open by preliminary injunction judgement of the BVerfG since 15 April 2021, even if there are already indications of their probability.¹⁶⁸ To strategically illustrate possible developments and interrelationships, four scenarios have been developed within the framework of this work:

- The first scenario, called '*final stroke*', is the strongest decision against the EU's recovery plan and in favour of a cancellation of further integration. Here, the BVerfG would at least partly establish a transgression of the competences and also ascertain a violation of the German constitution's identity.
- 'Trespassing' is the second scenario. In that case, the BVerfG would determine at least in part an ultra vires act, but it would not find a violation of the constitutional identity. Additionally, when questions are referred to the CJEU in the preliminary

¹⁶⁸ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21

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ruling according to Art. 267 TFEU, it could already establish a transgression of competences to which the BVerfG would agree in this scenario.

- The next scenario represents a possible judgement in which no ultra vires action is detected but at least partly a violation of the constitutional identity. It is called ‘infringed German identity’.
- The last scenario is called ‘way to go’. In this scenario the BVerfG would neither issue an ultra vires ruling nor establish a violation of the identity of the German Basic Law.

The summary examination in the ‘Hängebeschluss’ expressively concentrated on the identity review according to Art. 23 para. 1 Basic Law.¹⁶⁹ In this, the identity of the constitution would be violated if the Bundestag did not keep the budgetary autonomy according to Art. 110 Basic Law. In this discussion, the BVerfG discusses the likelihood of the authority transfer.¹⁷⁰ The court corrects the complainants by highlighting that the liability is only pro rata for all other Member States if one of them is not able to pay. Germany would not be liable for all other Member States, provided that not all Member States will become insolvent at the exact same time, regarding Art. 9 para. 5 of the 2020 Own Resources Decision. The probability for all Member States to be unable to pay is highly unrealistic, as the Bundestag and Bundesrat plausibly evaluated in their statements.¹⁷¹

On the one hand, the assessment by the BVerfG is very comprehensive¹⁷² and already takes a stand in that a breach of identity cannot be established with a high degree of probability.¹⁷³ On the other hand, the court did declare the complainants’ charges “neither inadmissible from the outset nor manifestly unfounded”¹⁷⁴. It did not decide about the claimed identity violation in a final way, so there is still a chance that the court detects an identity breach.¹⁷⁵ Nonetheless, even if the BVerfG has suspended the decision until the main proceeding, it

¹⁶⁹ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 70

¹⁷⁰ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 95-103

¹⁷¹ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 103+109

¹⁷² cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 91

¹⁷³ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 95

¹⁷⁴ BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 74

¹⁷⁵ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 87

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seems rather unlikely, based on the previous explanations, that a complete change of direction will be made here during the evaluation of the case.¹⁷⁶ Therefore, it can be assumed for the following discussion that the BVerfG is highly unlikely to establish a violation of the German constitutional identity. Consequently, the first scenario, the ‘final stroke’ and scenario three ‘infringed German identity’ can be treated subordinately in the further assessment.

As evaluated in the previous chapter, the ultra vires review includes the evaluation of a possible transgression of Art. 311 para. 3 TFEU by Art.s 4 and 5 of the 2020 Own Resources Decision, which authorised the European Commission to invest money on the capital market and thus sparked the first debt in the EU history.¹⁷⁷ Also, the BVerfG will need to revise the compatibility of Art. 9 para. 5 of the Own Resources Decision with the no-bail-out clause of Art. 125 para. 1 TFEU.¹⁷⁸ In comparison to the identity review, the BVerfG stays much more imprecise when evaluating the ultra vires claim in the preliminary injunction judgement.¹⁷⁹ It did not outline judicial evaluation of the claims, it titled the arguments of the complainant as “sufficient”¹⁸⁰ and demonstrated the different positions in its rationale.¹⁸¹ By failing to enact a preliminary injunction on the Ratification Act, the BVerfG at least tolerates that the project enters into force, although a transgression of the competences is alleged.¹⁸² As the BVerfG did not yet evaluate the possible ultra vires claims in depth, it can be expected that this assessment is only postponed to the main proceeding which is expected in a few years’ time.

¹⁷⁶ cf. Walter (2021).

¹⁷⁷ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 84

¹⁷⁸ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 103

¹⁷⁹ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 92-93

¹⁸⁰ BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 92

¹⁸¹ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 92

¹⁸² cf. Walter (2021).

B. Various procedural approaches are available to the BVerfG now

Although the BVerfG rejected the request for a preliminary injunction on 15 April 2021, the main proceeding can still have different procedural outcomes. Based on the evaluation of the probability of the scenarios in the previous chapter, the different procedural steps in the scenarios two and four will be focussed on. Those are shown in the following illustration and will be discussed thereafter.

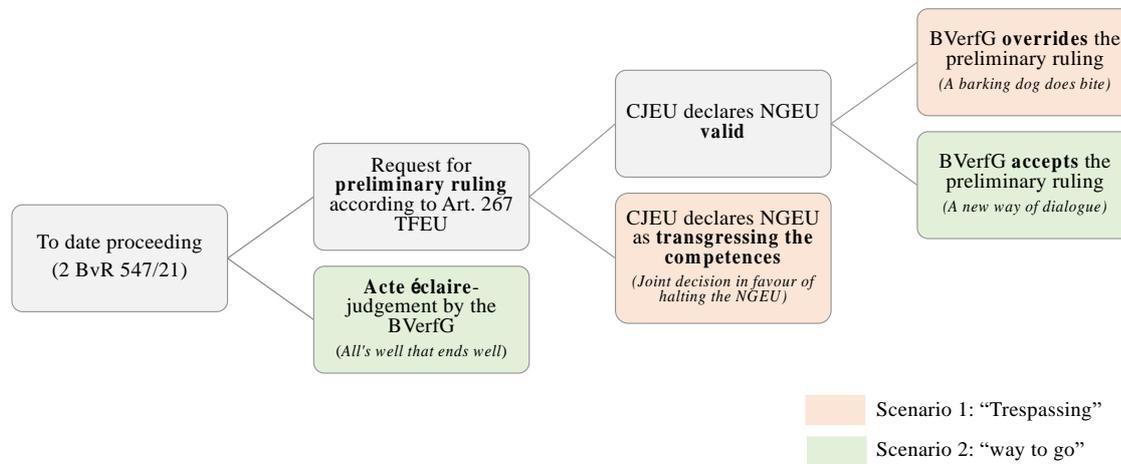


Illustration: Overview of possible procedural steps (self-created)

Firstly, the BVerfG could reach an acte éclairé verdict. Usually, the national courts are obliged to refer questions to the CJEU in decisions at last instance, especially as regards the validity of EU acts.¹⁸³ However, the CJEU established in its jurisdiction exceptions from Art. 267 TFEU in its jurisdiction. One is based on the 1982 *CILFIT* judgement, which argues that there is no necessity for a request of a preliminary ruling when either the CJEU already ruled upon the same matter or if the legal situation is so obviously clear that this becomes unnecessary.¹⁸⁴ This scope would only apply to a ruling that the NGEU recovery plan and, in this process, especially the German Ratification Act is valid and does not transgress the

¹⁸³ cf. Schoch et al. (2020): 26.

¹⁸⁴ cf. CJEU, Judgment of 6 October 1982, *Cilfit and Others*, 283/81, EU:C:1982:335, 13-14

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competences of the EU. In that case, the implementation of the NGEU can continue. As argued earlier, the BVerfG considered the complaint as not unfounded in the decision upon the preliminary injunction. Since the court did not publish a final decision, however, the probability of this outcome one is hard to determine.¹⁸⁵ This outcome would represent scenario four, in which neither the CJEU nor the BVerfG deems the project inapplicable.

Secondly, the BVerfG might refer questions in the scope of a preliminary ruling according to Art. 267 TFEU to the CJEU. It highlights in the judgement of the preliminary injunction that such a referral would be necessary if it reached an ultra vires verdict.¹⁸⁶ The CJEU will then answer the questions of the BVerfG and can either deem the 2020 Own Resources Decision valid or partly or fully beyond the transferred competences. If the latter is the case, the whole project maybe in danger as it is based on the financial resources provided in the 2020 Own Resources Decision. Many questions would appear regarding a possible repayment of already provided grants and loans and about the liabilities stemming from the capital markets. Additionally, all the positive legal, economic, and political effects of the program may be endangered. This is outcome would represent a variation of scenario two, where an ultra vires decision is executed.

Thirdly, the CJEU may deem the 2020 Own Resources Decision to be within the EU's competences. The preliminary ruling then returns to the BVerfG, where the judges have to take this ruling into account for the final decision. On the one hand, the BVerfG can accept the decision of the CJEU and discard the ultra vires claim as presented in the illustration. In that case, the recovery plan can continue without being threatened or harmed. This outcome can be expected based on the effects of the 2020 *PSPP* decision and the change of judges in the Second Senate of the BVerfG.¹⁸⁷ The BVerfG will probably try to avoid being highly criticised by its own judges.¹⁸⁸ This would pave the way for further integration, as scenario four implies.

¹⁸⁵ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 74

¹⁸⁶ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 105

¹⁸⁷ cf. Jahn (2020).

¹⁸⁸ cf. Meier-Beck (2022).

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On the other hand, the BVerfG could choose to dismiss the CJEU's preliminary ruling. It would then have to deem the preliminary ruling ultra vires as well in order to remove its binding character, effectively indicating that the CJEU's preliminary ruling is *res judicata*. The BVerfG would thus follow the jurisdiction of the *PSPP* and *Weiss* cases.¹⁸⁹ As it only criticised the line of argumentation in the former case, here it could go further in this case by deeming the Ratification Act of the 2020 Own Resources Decision, its reasoning and the overall EU law perspective inapplicable in Germany. The NGEU project would then need to stop at least temporarily as there is no legal basis in Germany for the financial resources. The effects may be enormous, not only for the program as such but also for the trusting relationship between the two courts.

In terms of the consequences, the European Commission could decide to implement an infringement procedure according to Art. 258 TFEU against Germany, as it was executed in the *PSPP* proceeding.¹⁹⁰ But even through that would not reverse the ultra vires verdict, however, as the BVerfG is an independent constitutional body.¹⁹¹ The Federal Government would need to consider the Ratification Act on the one side. That means that the BVerfG would request the Bundestag and Bundesrat to “counter such an act by suitable means”¹⁹² and to restore the constitutional compatibility. They would be asked to stop the implementation, obtain the amendments, veto possible adjustments or even prevent a new MFF in future negotiations.¹⁹³

Moreover, the European Commission could ask the German Federal Government in the infringement procedure to do their utmost to ignore the BVerfG's ruling and to comply with legal obligations arising from the successful ratification procedure. The *PSPP* infringement procedure against Germany has shown only little implications, because the Federal Government does not have the competences to instruct the independent court. Moreover, it remains to be seen whether the European Commission would actually implement an

¹⁸⁹ cf. CJEU, Judgement of 11 December 2018, *Weiss and Others*, C-493/17, ECLI:EU:C:2018:1000 / BVerfG, Judgement of the Second Senate of 5 May 2020, *PSPP*, 2 BvR 859/15

¹⁹⁰ cf. European Commission (2021).

¹⁹¹ According to §1 BVerfGG

¹⁹² BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 72

¹⁹³ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 111

infringement procedure as the prospects for substantial influence are relatively small. It would, however, help to protect the European legal order. Additionally, it may create the space for dialogue between the German government and the European Commission in which Germany might even stronger commit to the EU. The claim of the Eastern Member States that infringement procedures are implemented inequitably throughout the Union could be counteracted, which could send a warning to other national constitutional courts. To avoid any further escalation, Germany could again “commit[s] to use all the means at its disposal to avoid, in the future, a repetition of an ‘ultra vires’ finding and take an active role in that regard”¹⁹⁴. For this decision, the German government would again have to undertake the binding and primary character of CJEU decisions. However, it is questionable whether this argument is still credible after two ultra vires decisions in a relatively short period of time. Otherwise, the infringement procedure might finally result in penalty payments based on a decision from a proceeding in front of the CJEU according to Art. 260 TFEU. This outcome represents the biggest hazard for the EU’s legal system and future integration and would probably end the NGEU in its current state. Consequently, the judges of the BVerfG act independently and without political instructions, this infringement procedure might not influence them in their decision-making process.

These four possible procedural outcomes under the construct of the two probable scenarios show that the emerging situation for Germany and the EU as a whole can certainly take different forms. Moreover, they represent a wide spectrum of possible decisions and paths to be taken by the BVerfG.

C. Potential future collaborations

Chapter two already established that the courts have a special impact on a rule of law system. Therefore, the research question concerning the influence of the present procedure is significant. Every jurisprudence provides a certain development in evolving the Union further and has an influence on the relationship between the courts. However, it is the more general relation that shapes the legal system, not solely the individual jurisprudences.

¹⁹⁴ European Commission (2021a).

Therefore, the evaluation of the different procedural outcomes is also intended to provide an indication of possible outcomes concerning the CJEU and the BVerfG in the pending procedure. Notably, this proceeding is not a genuine dispute in the conventional sense of the term. Rather, it is an exchange of arguments and legal discussion through court rulings on how competences are distributed. In the process, both different perspectives clash with each other. Therefore, the four procedural outcomes are examined below regarding their influence on the courts, their cooperation and the further development of these.

I. All's well that ends well

The turbulence in Germany was not only great within the legal bubble¹⁹⁵ but also among the general public. The news that the Federal President is not allowed to sign the grandly announced project was spread on all communication channels.¹⁹⁶ The news engagement within the population – by whom the underlying general conflict may not be widely understood – were significant. The CJEU and its judges certainly also observed this proceeding attentively in anticipation of the preliminary injunction decision.

If the BVerfG were to dispose of the proceedings by an *acte éclair*, as shown in the first procedural outcome, the proceedings would be terminated and the legality of the Europe-wide project would be confirmed. There would be no concrete cooperation in the proceedings due to the preliminary decision not being requested, but this would also not be necessary due to the decision. The legal situation would be obvious in an *acte éclair* so that no preliminary ruling by the CJEU is necessary.¹⁹⁷ However, the likelihood of this outcome is questionable, because the BVerfG has at least not described the action as unfounded from the beginning. Presumably, the court likes to reserve the right to a detailed examination before reaching a final decision.

Nevertheless, the BVerfG would thus clearly position itself in favour of the NGEU, the legal basis of which the Basic Law would be substantiated. The doubts about the transgression of

¹⁹⁵ For instance Baudenbacher (2020). / Meier-Beck (2022). / Riedl (2020). / Schulze (2022).

¹⁹⁶ See for example ZDF (2021).

¹⁹⁷ cf. CJEU, Judgment of 6 October 1982, *Cilfit and Others*, 283/81, EU:C:1982:335, 13-14

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competence concerning the legal basis of Art. 311 para. 3 TFEU would thus be eliminated, at least in Germany. However, as the BVerfG has a significant position, it might result in a restraint for other proceedings in the other Member States. With the BVerfG's special position¹⁹⁸, this could also improve the situation with regard to the other courts by the BVerfG pronouncing legal certainty that reverberates far beyond the national borders. Moreover, a violation of the no-bail-out clause according to Art. 125 TFEU would not be established. Additionally, the claim of a violation of the core of the German legal system, the identity of the Basic Law, is violated would be rejected.

In contrast, this could also improve the situation with regard to the other courts by the BVerfG pronouncing legal certainty that resonates far beyond the national borders. Viewed from that perspective, it would have a positive impact on the further development of the relationship between the courts, as an escalation would be eliminated. The BVerfG's case law could then also be used to strengthen the legal basis for future EU projects, even in times of crisis, and make the Union itself more capable of acting. Put briefly, in light of the judicial relationship and the NGEU continuation, this outcome may entail positive consequences beyond Germany's national borders.

II. A new way of dialogue

The second outcome also represents scenario two, in which the transgression of the EU's competences will not be stated at the end of the proceeding. However, the BVerfG would request a preliminary ruling according to Art. 258 TFEU, the CJEU would declare it to be within the competences and the BVerfG would accept that perspective. This would lead to a peaceful settlement of the legal dispute, highlighting the compatibility of the perspectives of both courts. After the *PSPP* decision¹⁹⁹ and the subsequent infringement proceeding²⁰⁰ as

¹⁹⁸ cf. Nguyen and Chamon (2020): 8.

¹⁹⁹ cf. CJEU, Judgement of 11 December 2018, *Weiss and Others*, C-493/17, ECLI:EU:C:2018:1000 / BVerfG, Judgement of the Second Senate of 5 May 2020, *PSPP*, 2 BvR 859/15

²⁰⁰ cf. European Commission (2021).

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well as the academic contributions²⁰¹, this would also serve as a positive contribution for future judicial cooperation.

Such a result can also be found in past jurisdiction. In the 2016 *OMT* case, for instance, the BVerfG evaluated an ultra vires verdict, requested a preliminary ruling from the CJEU and accepted its perspective. This *OMT*-judgement is also particularly significant because the firstly BVerfG has made a referral of preliminary questions to the CJEU, according to Art. 19 para. 3b TEU in conjunction with Art. 267 para. 1 a and b TFEU.²⁰² This was a way for the German Constitutional Court to reach out for further cooperation, although the questions were already considered hypothetical in advance and a rejection by the CJEU was widely anticipated by academics. This first forwarding of questions also opened the first door of real legal discussion at this level.²⁰³

Another interesting case in this regard concerns the 2016 *OMT* proceeding, in which tens of thousands of individuals claimed a violation of their rights, including a request for a preliminary injunction. That was not adopted by the BVerfG. A ‘Hängebeschluss’ as in the *NGEU*-proceeding was not issued, either. However, the preliminary proceeding in September 2012 did not decide upon the parliamentary participation and transgression of the transferred competences. Since the Lisbon Treaty was already in force at that time, it was based on the same EU provisions as the *NGEU* discussion.²⁰⁴ Although there are differences between that proceeding and the current legal dispute, some parallels exist. For instance, in the *OMT* decision, the BVerfG did not stop further EU integration and dismissed almost all claims of violation of the Basic Law, except for some participation rights of the German Bundestag regarding possible financial liabilities. The BVerfG hereby accepted the CJEU’s preliminary ruling in which it rules that the *OMT* program is covered by the ECB’s

²⁰¹ See for example Nettesheim (2021a). / Meinel (2021). / Klünder (2020). / Józwicki (2020). / Abreu Duarte (2020). / Hatje (2020). / Eleftheriadis (2020).

²⁰² cf. BVerfG, Judgement of the Second Senate of 21 June 2016, *OMT*, 2 BvR 2728/13

²⁰³ cf. Pernice (2014).

²⁰⁴ cf. Wendel (2013).

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mandate.²⁰⁵ Additionally, in its final judgement, the BVerfG even ruled that an EU legal act was not an admissible subject of appeal and thus ruled in a pro-European manner.

Nonetheless, this is different in the *NGEU* proceeding. The complaint refers to a Ratification Act, which makes it a suitable object of complaint. On the one hand, it paved the way for further integration and a continuation of the program. On the other hand, it tested the cooperation through the preliminary ruling and laid the basis for future ultra vires reviews, which were only adopted once by a German court. However, it suggests that the BVerfG may be quite interested in a friendly settlement of the dispute, especially in light of improved relationship between the courts.²⁰⁶ This is because agreement between the two courts during an ongoing pandemic and additional current events (like the start of the war in Ukraine) would lay the foundation for future cooperation and give the citizens a sense of legal certainty.

Importantly, the execution of an ultra vires control might already represent a breach of the EU Treaties from an EU law perspective. However, the control as such does not affect the correlation of the courts. From the CJEU's perspective based on the Union law, the BVerfG invades its autonomous field of action by deciding on issues that are within the CJEU's competences. According to the Treaty provisions, the CJEU is the competent court of last instance in this regard. Even though no ultra vires decision might be made, this would further fuel the conflict between the courts. The CJEU will almost certainly be uncomfortable with the idea that national constitutional courts rule upon issues that they transferred to the CJEU, although it is conscious that this conferral is based on national sovereignty. The trusting relationship and mutual recognition of each other's jurisdiction might be undermined by that. Furthermore, the European Commission could choose to observe the full court proceedings before introducing an infringement procedure.²⁰⁷ The commencement of such a proceeding is determined by procedural law. Moreover, such a procedure would have to be legitimate and serve the purpose of persuading the Member State to act in compliance with the

²⁰⁵ cf. BVerfG, Judgement of the Second Senate of 21 June 2016, *OMT*, 2 BvR 2728/13

²⁰⁶ cf. Ruffert (2021).

²⁰⁷ cf. Thiele and Steinbeis (2021).

applicable law. If the BVerfG were to examine an ultra vires act and choose to refer it to the CJEU and agree to the latter's ruling, an infringement procedure would not be necessary.²⁰⁸

It has been argued that if the BVerfG accepted the preliminary ruling in the NGEU proceeding about a compliance with the limits of its own competences, the BVerfG could include remarks for future proceedings and even set the foundation for further integration and crisis management. It could articulate the conditions and circumstances in which an ultra vires ruling is reached. This would relax the situation between the courts and increase the stability of the legal system, which could create legal certainty to tackle future crises.²⁰⁹

III. Joint decision in favour of halting the NGEU

The exact opposite of the scenario above is the possibility that the NGEU program will be considered to transgress EU competences, which is illustrated in scenario one (‘final stroke’). In this outcome, the CJEU adopts the ultra vires claims during a preliminary ruling referred from the BVerfG. This would represent a constructive dialogue between the courts, in which a national constitutional court raises questions about the competence bases and the supranational courts agrees that EU competences were indeed transgressed. The BVerfG would presumably applaud this decision, as the CJEU is the highest EU court and has the competences to declare an EU act void. So far, there is no precedent for this. The ruling would not only affect the Ratification Act in Germany but also the whole NGEU program. This would at least temporarily be halted as the EU can only act within its transferred sovereignty rights, which would not include the 2020 Own Resources Decision in that case.

If Art. 311 para. 3 TFEU is deemed as not providing the needed competences for NGEU, the CJEU could advise the European Commission to review and amend the provisions that it ruled upon as outside the competences. The preliminary ruling may conclude that an amendment of the Treaties is necessary in this regard. The CJEU could also only partially grant the applications in the constitutional complaint in this way. That means that not all claims are enacted but that some aspects of it are proven. Moreover, the violation of the no-

²⁰⁸ cf. Möllers (2020).

²⁰⁹ cf. Nettesheim (2021).

bail-out clause under Art. 125 TFEU could also be established. At least partly it would then be considered invalid across the EU. That is because CJEU rulings have binding effect on both the referring court and the other 26 national constitutional courts.

Often, the CJEU rules in favour of the other EU institutions. Additionally, it only interprets and decides about Union law and does not consider the national constitutions, as this concerns the competence of the Member States and their constitutional institutions. The multi-layered relationship between the courts would then be strengthened by dialogue and mutual understanding. It remains to be seen what happens afterwards and how the economy and the public will react. Therefore, this outcome is highly improbable. On the one hand, it would exert a highly negative influence on the post-pandemic recovery of all EU Member States in that they would not be able to benefit from NGEU funds. On the other hand, it would open an agreement based on the legally written dialogue measures, which would feature them as effective.

IV. A barking dog does bite

The BVerfG threatened the EU and the CJEU over the last decades to rule upon EU law to transgress the transferred competences.²¹⁰ In 2020, the BVerfG first enforced it.²¹¹ It was described as follows: “as the dog that barks but does not bite now has indeed bitten”²¹² and as an overall censure for the relationship of the BVerfG and the CJEU. Not only the supremacy of EU law was challenged, but also the authority and standing of the CJEU was interrogated. Just a year after the PSPP decision, the NGEU proceeding started.²¹³ Before the PSPP decision the judicial restraint kept the BVerfG from publicly criticising the CJEU

²¹⁰ cf. BVerfG, Judgement of Second Senate of 12 October 1993, *Maastricht*, BvR 2159/92 / BVerfG, Judgement of Second Senate of 30 July 2009, *Lisbon*, 2 BvE 2/08 / BVerfG, Judgement of the Second Senate of 7 June 1970, *Solange I*, 2 BvL 1/97 / BVerfG, Judgement of the Second Senate of 22 October 1986, *Solange II*, 2 BvR 197/83 / BVerfG, Judgement of Second Senate of 6 July 2010, *Mangold/Honeywell*, 2 BvR 2661/06 / BVerfG, Judgement of the Second Senate of 21 June 2016, *OMT*, 2 BvR 2728/13

²¹¹ cf. BVerfG, Judgement of the Second Senate of 5 May 2020, *PSPP*, 2 BvR 859/15

²¹² Nguyen and Chamon (2020): 18.

²¹³ cf. BVerfG, Judgement of the Second Senate of 5 May 2020, *PSPP*, 2 BvR 859/15 / CJEU, Judgement of 11 December 2018, *Weiss and Others*, C-493/17, ECLI:EU:C:2018:1000

in its judgement. This restraint changed into a more offensive claim in the *PSPP* decision. Another ultra vires verdict repeatedly would solidify this dispute.²¹⁴

The declaration of the CJEU preliminary ruling as ultra vires in the *PSPP* proceeding has already been a barrier between both courts to observe each other's jurisdiction in a cooperative way. The *PSPP* decision established a grand arrêt to the judicial restraint of the BVerfG in the ultra vires control. Until the *PSPP* decision, the BVerfG did not executed the announced controlling function it had been developing in its jurisprudence since the 1970s.²¹⁵ A commentator compared the BVerfG's positioning in the *PSPP* decision with a teacher that grades the CJEU as a student's test as failed.²¹⁶ The BVerfG already criticised the CJEU's decision about its 2018 preliminary ruling²¹⁷ by stating that compliance would not be warranted as it was developed with an inappropriate evaluation of proportionality. The German constitutional court applied a strong national perspective, although the mature integration of the EU to date might need a more open, transnational jurisprudence. This was clearly a major disruption in the decades-long relationship, which is supposed to be based on mutual recognition and mutual respect. An EU law professor commented the *PSPP* decision and the influence of the courts by arguing that the "course of events could still lead from outright denial to recognition re-established"²¹⁸.

In the rejection of the present preliminary injunction concerning the NGEU recovery plan, the BVerfG did not find the complaint completely unfounded.²¹⁹ The final ruling here will take considerable time, which is why an ultra vires decision may still be the ultimate conclusion.²²⁰ Thus, there is the opportunity that an ultra vires decision prevails. Declaring

²¹⁴ cf. Nguyen and Chamon (2020): 18.

²¹⁵ cf. BVerfG, Judgement of Second Senate of 12 October 1993, *Maastricht*, BvR 2159/92 / BVerfG, Judgement of Second Senate of 30 July 2009, *Lisbon*, 2 BvE 2/08 / BVerfG, Judgement of the Second Senate of 7 June 1970, *Solange I*, 2 BvL 1/97 / BVerfG, Judgement of the Second Senate of 22 October 1986, *Solange II*, 2 BvR 197/83 / BVerfG, Judgement of Second Senate of 6 July 2010, *Mangold/Honeywell*, 2 BvR 2661/06 / BVerfG, Judgement of the Second Senate of 21 June 2016, *OMT*, 2 BvR 2728/13 / BVerfG, Judgement of the Second Senate of 5 May 2020, *PSPP*, 2 BvR 859/15 / CJEU, Judgement of 11 December 2018, *Weiss and Others*, C-493/17, ECLI:EU:C:2018:1000

²¹⁶ cf. Marzal (2020).

²¹⁷ cf. CJEU, Judgement of 11 December 2018, *Weiss and Others*, C-493/17, ECLI:EU:C:2018:1000

²¹⁸ Strumia (2020).

²¹⁹ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 94

²²⁰ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 105

the Ratification Act of the 2020 Own Resource Decision (and, if requested, also the CJEU's preliminary ruling) outside the limits of the competences may further escalate the collision between the two courts that started in the *NGEU* proceeding.²²¹ After many years of development of this dispute right from the *Solange I* decision until the *NGEU* proceeding now²²², no complete abandonment of the position is discernible in either court.

Therefore, a possible consequence of this escalated dispute is that both courts will monitor each other's jurisdiction even more closely, intensifying their control and remind each other of their respective limits. Two reasons underscore the significance of such interaction. Firstly, it does not represent a solid basis for future judicial cooperation, in which both courts act fully independently and resolve legal disputes respectfully through jurisdiction. As the case law of both courts has developed over the years, their future decisions will shape the EU's prospective legal system as well. Secondly, the image of the two courts is important for the legal system. The BVerfG may be publicly accused of ruling upon issues that do not fall into its competences from an EU law perspective. In a legal system which relies on the rule of law, citizens' and institutions' trust in courts is paramount. An open conflict restricts this trust.²²³ This might be a repeated censure for the CJEU when its competences to interpret the Treaty provisions are questioned.

As the previous chapters have shown, the relationship between the BVerfG and the CJEU has developed over the course of Treaty amendments and in particular through jurisdiction of all constitutional courts.²²⁴ In terms of the EU's legal system and the contained

²²¹ cf. Nettesheim (2021).

²²² cf. BVerfG, Judgement of Second Senate of 12 October 1993, *Maastricht*, BvR 2159/92 / BVerfG, Judgement of Second Senate of 30 July 2009, *Lisbon*, 2 BvE 2/08 / BVerfG, Judgement of the Second Senate of 7 June 1970, *Solange I*, 2 BvL 1/97 / BVerfG, Judgement of the Second Senate of 22 October 1986, *Solange II*, 2 BvR 197/83 / BVerfG, Judgement of Second Senate of 6 July 2010, *Mangold/Honeywell*, 2 BvR 2661/06 / BVerfG, Judgement of the Second Senate of 21 June 2016, *OMT*, 2 BvR 2728/13 / BVerfG, Judgement of the Second Senate of 5 May 2020, *PSPP*, 2 BvR 859/15 / CJEU, Judgement of 11 December 2018, *Weiss and Others*, C-493/17, ECLI:EU:C:2018:1000

²²³ cf. Bundesverfassungsgericht (2021a).

²²⁴ cf. BVerfG, Judgement of Second Senate of 12 October 1993, *Maastricht*, BvR 2159/92 / BVerfG, Judgement of Second Senate of 30 July 2009, *Lisbon*, 2 BvE 2/08 / BVerfG, Judgement of the Second Senate of 7 June 1970, *Solange I*, 2 BvL 1/97 / BVerfG, Judgement of the Second Senate of 22 October 1986, *Solange II*, 2 BvR 197/83 / BVerfG, Judgement of Second Senate of 6 July 2010, *Mangold/Honeywell*, 2 BvR 2661/06 / BVerfG, Judgement of the Second Senate of 21 June 2016, *OMT*, 2 BvR 2728/13 / BVerfG,

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cooperation of both courts, this judicial dialogue is important to uphold the EU's legal system and the integrity of the EU as such. An escalated conflict between the courts as a result of a preliminary ruling and its rejection of it endangers both the relationship between the courts and the EU's entire legal system. This is further emphasised by the COVID-19 pandemic and other unexpected crises.²²⁵ Viewed from that perspective, the future of the EU is thus currently at a crossroads. If the BVerfG were to link this to compliance with the Basic Law in order to raise its profile and sharpen its own claim, the at least perceived legal certainty in the system would also diminish. Furthermore, it would destabilise the post-pandemic recovery, existing harmonisations and cooperation between the Member States and further developments.

If the BVerfG ignored the CJEU's ruling, it would itself breach EU Treaty provisions. A judgement of the CJEU, even if it is a preliminary ruling, has binding effect on all Member States, not only the referring court. The Union primary law does not enable national courts to act contrary to the ruling. As the European Commission needs to secure compliance with the Treaties, an infringement procedure according to Art. 258 TFEU could be introduced. In the end, this infringement procedure may even appear before the CJEU itself.²²⁶ It is a bizarre notion that a conflict based on the different perspectives of an EU and a national court in a complex legal system will be decided by one of these two courts. It is also questionable to what extent the BVerfG would accept this. In the end, the legal construct of the EU would only be further endangered by a conflict between courts that are supposed to ensure stability and legal certainty.

Moreover, the relationship between the CJEU and the BVerfG cannot be assessed solely in terms of looking at the two courts alone. After all, there are 27 Member States in the EU, each with its own constitution and constitutional requirements, which is why every case law in the field of European law and every kind of dialogue between two courts also affects the other courts. The *PSPP* ruling has shown that other Member States adhere to the case law,

Judgement of the Second Senate of 5 May 2020, *PSPP*, 2 BvR 859/15 / CJEU, Judgement of 11 December 2018, *Weiss and Others*, C-493/17, ECLI:EU:C:2018:1000

²²⁵ cf. European Commission (2022c).

²²⁶ cf. Nguyen (2021).

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even if only partially and to enforce their own interests.²²⁷ The BVerfG is a particularly powerful constitutional court because it is the highest constitutional authority in the largest and one of the founding Member States.²²⁸ Therefore, recurring ultra vires decisions thus have an impact on both courts involved and on all other Member States. On the one hand, this can be seen by Member States that are criticised for their rule of law system could use this to justify their own actions. On the other hand, however, the authority of the CJEU's authority is questioned, which others could also take as an opportunity to condemn it. This would bring the fragile legal system in questions sphere of competence to a new level of escalation.

Both courts would not be sufficiently confident in such an outcome, the different perspectives would even get more extreme and a change in the way of jurisdiction might be expected. Either, both courts uphold to maintain up a trustful, cooperative relationship in the future, in which case the BVerfG will be more hesitant to decide against the CJEU, or the BVerfG could double down in its argumentation and use its perceived de jure competence to insist on compliance with the Basic Law. It may not accept that a supranational court wants to decide about what is compatible with the Basic Law. Consequently, the relationship would suffer under such a jurisdiction, which could also affect the whole EU legal system and proceedings in other Member States.

D. Significance outside Germany

I. The fundamental conflict does not only occur in Germany

The further proceeding is not only important for the relationship between the BVerfG and the CJEU. This relationship does not exclusively concern the jurisprudence of the two courts themselves, but their interaction and its effects also invariably affect legal judgements in other Member States. As Germany is the biggest and one of the six founding Member States

²²⁷ cf. BVerfG, Judgement of the Second Senate of 5 May 2020, *PSPP*, 2 BvR 859/15 / CJEU, Judgement of 11 December 2018, *Weiss and Others*, C-493/17, ECLI:EU:C:2018:1000

²²⁸ cf. Nguyen and Chamon (2020): 8.

and as the BVerfG enjoys a particularly prominent standing in the EU's judicial landscape, other national constitutional courts follow its jurisdiction occasionally.

Importantly, other national constitutional courts also issued ultra vires rulings vis-à-vis EU action in the past. Examples include the *Taricco I*²²⁹ and *Taricco II* proceedings in Italy²³⁰ or in the *Dansk Industri* proceeding in Denmark²³¹.²³² Moreover, when the Czech constitutional court, 'Ústavní soud České republiky', reached an ultra vires conclusion in the *Slovak Pension-case*,²³³ it cited prior well-known decisions of the BVerfG like the *Solange II* decision²³⁴ in 2006²³⁵ or the *Lisbon* decision²³⁶ in 2009²³⁷. In those rationales, it also reserved the control function to examine the EU's actions from a national, constitutional perspective for the Czech judicial system. An analysis showed, moreover, that the constitutional court of the newer Member States (which accessed in the 2000er years) mostly do not allow the supremacy of Union law over the Member States' constitutions to be reconciled with the respective constitutions.²³⁸

The individual judicial systems among all Member States differ fundamentally, however. Some Member States do not have a national constitutional court like the German one. In the Finnish legal system, for example, there is no constitutional court that addresses complaints about violations of the Finnish constitution. In this Member State, these procedures are heard by the Supreme Court, the 'Korkein oikeus'.²³⁹ The Finnish have other systems for the ex-

²²⁹ cf. CJEU, Judgement of 8 September 2015, *Taricco I*, C-105/14, ECLI:EU:C:2015:555 / Italian Constitutional Court, Judgement of 23 November 2016, *Taricco I*, 24/2017

²³⁰ cf. CJEU, Judgement of 5 December 2017, *Taricco II*, C-42/17, ECLI:EU:C:2017:936 / Italian Constitutional Court, Judgement of 23 November 2016, *Taricco I*, 24/2017

²³¹ cf. CJEU, Judgement of 19 April 2016, *Dansk Industri*, C-441/14, ECLI:EU:C:2016:278 / Danish Supreme Court, Judgement of 22 September 2014, *acting on behalf of Ajos A/S v. Estate of A*, 15/2014

²³² cf. Bergmann et al. (2022): 428-429.

²³³ cf. CJEU, Judgement of 22 June 2011, *Slovak Pension*, C-399/09, ECLI:EU:C:2011:415 / Czech Republic Constitutional Court, Judgement of 31 January 2012, *Slovak Pension*, Pl. ÚS 5/12

²³⁴ cf. BVerfG, Judgement of the Second Senate of 7 June 1970, *Solange I*, 2 BvL 1/97

²³⁵ cf. Czech Republic Constitutional Court, Judgement of 8 March 2006, *SUGAR QUOTAS III*, Pl. ÚS 50/04

²³⁶ cf. BVerfG, Judgement of Second Senate of 30 July 2009, *Lisbon*, 2 BvE 2/08 /

Mayer (2010): chapter 10.

²³⁷ cf. Czech Republic Constitutional Court, Judgement of 3 December 2009, *Lisbon I*, Pl. ÚS 29/09, 120

²³⁸ cf. Mayer (2010): chapter 10.

²³⁹ cf. Pihlajamäki (2016).

ante control inside of the parliament in addition.²⁴⁰ Due to the different legal systems and the resulting remedies and procedures, it is very difficult to compare the different Member States' control functions vis-à-vis the EU.

Nevertheless, a brief outlook will be given in the following section. On the one hand, it will be explained why the Polish constitutional procedure cannot be compared properly with the German one, despite the citation of the BVerfG's case law in Polish judgments. Notably, Poland has a particularly striking position here because of their rule of law situation, though it is by no means unique within the EU. On the other hand, the central points of discussion in the NGEU proceedings in Finland will be presented, while parallels with Germany will be highlighted. These two countries are relevant in this regard as Finland had a proceeding on the NGEU recovery plan as well and Poland occasionally cites the BVerfG.

II. The necessity to distinguish from the judicial opposition in Poland

Although no *NGEU* proceeding is currently pending in Poland, this is of particular importance due to the influence of the previous ultra vires decision by the BVerfG, the *PSPP* judgement, on the Polish jurisdiction. In fact, the Polish Tribunal, 'Trybunał Konstytucyjny', cited this German ruling in its case law – partly even in the German language.²⁴¹ The Polish Tribunal has already reached much media coverage for several months.²⁴² In a statement announcing the introduction of an Art. 7 TEU infringement proceeding against Poland, the European Commission argued that the Polish Tribunal "violate[d] the general principles of autonomy, primacy, effectiveness and uniform application of Union law, as well as the binding effect of judgments of the Court of Justice of the European Union"²⁴³. The European Commission's observation that judges are no longer subject to the independence requirement prescribed by Art. 19 para. 1 TFEU is particularly serious. The European Commission has

²⁴⁰ cf. Leino-Sandberg (2021).

²⁴¹ cf. Polish Tribunal, Judgement of 7 October 2021, K3/21, 7 X 2021

²⁴² See for example the German media coverage: Gwozdz-Palokat (2021). / Wefing (2021). / Veser (2022). / Palokat (2021).

²⁴³ European Commission (2021c).

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successfully requested daily penalty payments from the CJEU to address the violations of the rule of law as long as the situation is not remedied.²⁴⁴

In essence, the crisis between the Polish Constitutional Court and the EU also impacts all other Member States and their courts, especially because of concerns about the adherence with the rule of law principle which first emerged in 2016.²⁴⁵ In that year, judges were appointed to the Constitutional Court without regard for the core rule of law principle. In July 2021, these judges declared Art. 4 para. 3 TEU unconstitutional in conjunction with Art. 179 TFEU.²⁴⁶ Only three months later, the next ruling was issued, in which a review of the CJEU was performed without requesting a preliminary ruling.²⁴⁷

For this reason, it is repeatedly emphasised by academics that a comparison between the jurisprudence of the BVerfG and of the Polish ‘Trybunał Konstytucyjny’ cannot be equated with one another.²⁴⁸ The BVerfG recognised the principles of the EU in its *PSPP* ruling and drew attention to specific problem areas.²⁴⁹ In Poland, by contrast, these principles were disregarded overboard by a politically controlled constitutional court, which undermined the primacy of EU law in particular.²⁵⁰ Due to the piquant situation of the ‘Trybunał Konstytucyjny’, the opposition of the court towards the CJEU and the impact this has on cooperation between these two courts is much more fundamental. Although the BVerfG is often cited (as mentioned before), it differs fundamentally from the Polish Constitutional Court.²⁵¹

III. Comparable procedure in a different system in Finland

The Finnish Constitution offers its Parliament great democratic leeway, for instance in the ratification of EU laws. Committees like the Grand Committee and the Constitutional Law

²⁴⁴ cf. European Commission (2021a).

²⁴⁵ cf. Tadeusz Koncewicz (2019).

²⁴⁶ cf. Polish Tribunal, Judgement of 14 July 2021, 7/2019

²⁴⁷ cf. Polish Tribunal, Judgement of 7 October 2021, K3/21, 7 X 2021

²⁴⁸ cf. Thiele (2021).

²⁴⁹ cf. Thiele and Steinbeis (2021).

²⁵⁰ cf. Polish Tribunal, Judgement of 7 October 2021, K3/21, 7 X 2021

²⁵¹ cf. Thiele (2021).

Committee (CLC) give the government binding proposals on how to implement legislation. In this context, the CLC is the central institution when it comes to constitutional issues.²⁵² This ex-ante control is intended to ensure that the Finnish Constitution, in Finnish called ‘Suomen perustuslaki’ in Finnish, is respected throughout the whole integration process of the EU. The examination of the Ratification Act of the EU’s 2020 Own Resources Decision was also performed from this perspective. In the CLC opinion from 27 April 2021, which represents a purely national constitutional point of view, a very critical stance was expressed concerning the debt it includes. Until then, CLC opinions had been friendly to the EU, but this had changed in this proceeding. The CLC also evaluated the ECB’s PSPP program which was also criticised by the BVerfG.²⁵³ In the present statement, the legal basis in Art. 311 para. 3 TFEU and the prohibition of assumption of joint debts according to Art. 125 TFEU were evaluated. The claim of a transgression of the conferred, limited sovereignty rights was discussed in an ultra vires examination.²⁵⁴ As a rule, the Grand Committee adopts the analysis of the other committees and refers it to the government. In this case, it was operated differently.²⁵⁵ The Grand Committee replaced the analysis with its own, more pro-European analysis and added that the CLC had actually acted ultra vires itself because it was not empowered to examine competence under EU law. However, it issued a binding recommendation that the parliament be required to decide with a two-thirds majority, thus raising the requirements for enacting this specific legislation.²⁵⁶ On 18 May 2021, the Finnish Parliament approved the proposal with only six votes more than was needed for this qualified majority.²⁵⁷ Apart from the governmental institutions, the discussion about this Ratification Act also occurred in the Finnish public. There was even an initiative for a (unsuccessful) referendum which gathered the required signatures in a short time.²⁵⁸

Put briefly, the legal basis of the 2020 Own Resources Decision has also been discussed beyond the German borders. Nevertheless, the process in Finland can hardly be compared to

²⁵² cf. Leino-Sandberg (2020).

²⁵³ cf. BVerfG, Judgement of the Second Senate of 5 May 2020, *PSPP*, 2 BvR 859/15

²⁵⁴ cf. Finish committee opinion *PeVL 14/2021 vp HE 260/2020 vp*

²⁵⁵ cf. Leino-Sandberg (2021).

²⁵⁶ cf. Parliament of Finland (2020).

²⁵⁷ cf. Parliament of Finland (2021).

²⁵⁸ cf. *medborgarinitativ.fi* (2020).

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the *NGEU* proceeding in front of the BVerfG as they are embedded in different institutional structures and political spheres. Obviously, the core identity of the Finnish Constitution is different from the German one. Therefore, regarding the scope of this work, a comparison cannot be outlined in the necessary and appropriate details. What is particularly noteworthy about this, however, is that not only the German Constitutional Court but also other supreme institutions have been addressing this issue.²⁵⁹ Consequently, the public agitation surrounding the *NGEU* was therefore not a purely German endeavour but was also taken up in other countries and discussed in a comparable way, albeit in different structures.

²⁵⁹ cf. Polish Tribunal, Judgement of 7 October 2021, K3/21, 7 X 2021

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A. The relationship of the two courts

The reciprocal relationship between the BVerfG and the CJEU can be characterised in terms of EU developments over the years. In fact, the provisions deriving from the Treaties and the Basic Law, but especially the jurisdiction of both courts shaped the way they relate to each other. The relationship, including all the constitutional courts within the European legal system, is complex. It is not solely based on the Treaty provisions but additionally rooted – to a certain extent – on the national constitutions of the 27 Member States. Furthermore, a dialogue and mutual observation of each other’s jurisdiction in a sphere of 28 courts underscore this complexity.²⁶⁰

In terms of the first subordinate question, both the CJEU and the BVerfG have released notable judgements, which have been important for understanding the relationship between the courts since the 1970s. The CJEU laid the foundation with the *van Gend en Loos* case, for instance.²⁶¹ From a German constitutional perspective, particular reference must be made to the *Solange I*²⁶², *Solange II*²⁶³, *Maastricht*²⁶⁴, and *Lisbon*²⁶⁵ decisions. In this context, the BVerfG has repeatedly noted the previous approach in line with the further development of the EU.

B. Control standards of the BVerfG vis-à-vis the EU

In the course of these rulings, the BVerfG has also established different mechanisms to control the action at EU level with regard to the compatibility of the constitutional

²⁶⁰ cf. Bergmann et al. (2022): 512-513.

²⁶¹ cf. CJEU, Judgement of 5 February 1963, *van Gend & Loos*, 26-62, ECLI:EU:C:1963:1 / CJEU, Judgement of 15 July 1964, *Costa v E.N.E.L.*, 4-64, ECLI:EU:C:1964:66 / CJEU, Judgement of 9 March 1978, *Simmmenthal*, C-106/77, ECLI:EU:C:1978:49 / CJEU, Judgement of 22 October 1987, *Foto Frost*, 314-85, ECLI:EU:C:1987:452 / CJEU, Judgement of 5 October 1994, *Bananenmarktordnung*, C-280/93, ECLI:EU:C:1994:367

²⁶² cf. BVerfG, Judgement of the Second Senate of 7 June 1970, *Solange I*, 2 BvL 1/97

²⁶³ cf. BVerfG, Judgement of the Second Senate of 22 October 1986, *Solange II*, 2 BvR 197/83

²⁶⁴ cf. BVerfG, Judgement of Second Senate of 12 October 1993, *Maastricht*, BvR 2159/92

²⁶⁵ cf. BVerfG, Judgement of Second Senate of 30 July 2009, *Lisbon*, 2 BvE 2/08

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requirements. The relevant ones here are the ultra vires²⁶⁶ and the identity review²⁶⁷. From the perspective of the BVerfG, they are legitimised functions for national constitutional courts as the sovereignty powers of the EU originate from the national constitutions.²⁶⁸ The CJEU, by contrast, views the dispute from an EU law perspective and to make sure that the autonomy of the EU remains preserved.²⁶⁹ In terms of the second subordinate question, these two different perspectives are significant to comprehend the relationship between the BVerfG and the CJEU.

Firstly, in an ultra vires review, the BVerfG examines whether an EU institution has exceeded the limits of the transferred competences with legal acts.²⁷⁰ When such a judgement occurs, the Bundestag and the Federal Government might be instructed to restore a constitutionally compatible state of affairs.²⁷¹ However, from the perspective of European law, such a control mechanism already violates the autonomy that the EU obtained when the sovereignty rights were transferred from the national to the EU level. An infringement procedure could be introduced, which may eventually even appear in front of the CJEU itself according to Art. 258 TFEU.

Second, in an identity review, the control function and legal basis are individually tailored to the German Basic Law. It examines whether the core of the Basic Law is infringed, in particular the maintenance of the eternity clause.²⁷² On the basis of historical occurrences, these core elements cannot be changed. Therefore, the only solution would be a change of the EU Treaties to make it compatible with the German Basic Law.²⁷³

²⁶⁶ Developed in BVerfG, Judgement of Second Senate of 12 October 1993, *Maastricht*, BvR 2159/92

²⁶⁷ Developed in BVerfG, Judgement of Second Senate of 30 July 2009, *Lisbon*, 2 BvE 2/08

²⁶⁸ cf. Bergmann et al. (2022): 1095.

²⁶⁹ cf. CJEU, Judgement of 5 February 1963, *van Gend & Loos*, 26-62, ECLI:EU:C:1963:1 / CJEU, Judgement of 15 July 1964, *Costa v E.N.E.L.*, 4-64, ECLI:EU:C:1964:66 / CJEU, Judgement of 9 March 1978, *Simmmenthal*, C-106/77, ECLI:EU:C:1978:49 / CJEU, Judgement of 22 October 1987, *Foto Frost*, 314-85, ECLI:EU:C:1987:452 / CJEU, Judgement of 5 October 1994, *Bananenmarktordnung*, C-280/93, ECLI:EU:C:1994:367

²⁷⁰ cf. Skouris (2021): 148.

²⁷¹ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 72

²⁷² cf. Herdegen (2019): chapter 10.

²⁷³ According to Art. 79 Basic Law.

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Both of these control mechanisms are being evaluated in the *NGEU* proceeding.²⁷⁴ The biggest EU project to date is based on Art. 311 para. 1 TFEU and Art. 106a Treaty establishing the European Atomic Energy Community, which even initiates the authorisation for joint debts on the capital market.²⁷⁵ After the Bundestag²⁷⁶ and the Bundesrat²⁷⁷ had passed the Ratification Act for the 2020 Own Resources Decision of the EU in order to lay the foundation for the NGEU project, the ‘Bündnis Bürgerwille’, among others, filed a lawsuit against it.²⁷⁸ They thus achieved a so-called ‘Hängebeschluss’ on 26 March 2021²⁷⁹, but the BVerfG then rejected the application for a preliminary injunction on 15 April the same year.²⁸⁰ After the *PSPP* ruling in 2020, in which the BVerfG ruled ultra vires²⁸¹ and an infringement procedure was initiated by the European Commission afterwards²⁸², the judicial restraint of the German constitutional court clashed. The next ultra vires claim appeared in the *NGEU* proceeding. In this procedure, the accusations of ultra vires action and of violation of the constitutional identity violations could not be dispelled, so the main proceedings are awaited in the coming years.²⁸³

C. Effects on the judicial observations

It is all the more central to the discussions about the procedure to include the relationship between the courts. A violation of the constitutional identity could not be ruled out in the rejected request for a preliminary injunction, but its probability was still rather low.²⁸⁴ In the case of an ultra vires claim, the BVerfG remained much more open.²⁸⁵ On this basis, four

²⁷⁴ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21

²⁷⁵ cf. Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, OJ L 424, 15.12.2020, p. 1–10

²⁷⁶ cf. Deutscher Bundestag (2021): 24798-24799.

²⁷⁷ cf. Decision of the Bundesrat - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – ‘Fit for 55’: moving towards climate neutrality – delivering the EU’s 2030 climate target COM(2021) 550 final; Council doc. 10849/21

²⁷⁸ cf. Bündnis Bürgerwille (2021).

²⁷⁹ cf. BVerfG, Judgement of the Second Senate of 26 March 2021, *NGEU I*, 2 BvR 547/21

²⁸⁰ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21

²⁸¹ cf. BVerfG, Judgement of the Second Senate of 5 May 2020, *PSPP*, 2 BvR 859/15

²⁸² cf. European Commission (2020).

²⁸³ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 105

²⁸⁴ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 74

²⁸⁵ cf. BVerfG, Judgement of the Second Senate of 15 April 2021, *NGEU II*, 2 BvR 547/21, 86

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scenarios were developed in this thesis, two of which were evaluated as possible. In both, no violation of constitutional identity is established, in one an ultra vires ruling, in the other one of the claims turned out successful. Based on this, different procedural paths could be taken by the BVerfG.

In terms of the third sub-ordinate question, there could be an acte éclairé, whereby no preliminary ruling would have to be obtained from the CJEU as the legal situation would be examined as clear.²⁸⁶ In this case, the decision would be that the EU had not transgressed its competences. This entails positive consequences for the relationship between the courts, as legal certainty would be supported and a court dispute would be prevented by a judicial dialogue. The second possible outcome represents a referral of a preliminary ruling by the CJEU in which the CJEU does not an ultra vires ruling and in which the BVerfG agrees with this binding ruling. In all likelihood, an infringement proceeding would not be introduced here. Although the BVerfG's review could already constitute an infringement, the European Commission would presumably wait for the final decision of the BVerfG to introduce it. The BVerfG would act in favour of EU integration, so there is little incentive for the European Commission to introduce an infringement procedure – unless it is a preventive one. Either way, this dialogue between the courts could further challenge the effectiveness of the preliminary ruling procedure. At the same time, it could open new avenues for judicial settlement.²⁸⁷ This could be positive for the EU, the NGEU project and the courts. These two outcomes assume that no ultra vires decision will be issued in the end.

However, an ultra vires verdict is also possible, either by the preliminary ruling from the CJEU or by the BVerfG after the CJEU rules differently. In the latter case, the BVerfG would claim a transgression of the NGEU project and demand that the CJEU ruling be declared non-binding. Both outcomes would have enormous economic, political and legal consequences.²⁸⁸ Regarding the judicial relationship, however, the first variant (in which the CJEU would already reach an ultra vires ruling itself) would be preferably to uphold a

²⁸⁶ cf. CJEU, Judgment of 6 October 1982, *Cilfit and Others*, 283/81, EU:C:1982:335,13-14

²⁸⁷ cf. Möllers (2020).

²⁸⁸ cf. European Central Bank (2021).

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trustful relationship. In this case, the project and, to some extent, European integration would be jeopardised. At the same time, the BVerfG and the CJEU would agree, which would be positive in terms of their relationship. As a rule, however, the CJEU acts in a friendly manner towards the other EU institutions, which is why this outcome is unlikely.²⁸⁹

The greatest censure would be if the BVerfG found an ultra vires act against a preliminary ruling of the CJEU. After the academic comments on the BVerfG's PSPP ruling²⁹⁰ and the change of personnel in the Second Senate²⁹¹, from a pro-European perspective this decision would be preferable. This could have consequences for the judicial relationship between the CJEU and the BVerfG. That is because the fronts could be hardened by respective jurisdictions that interpret their own perspective even more consistently while considering the other court's perspective even less. At this level of dispute, the relationship would become more complicated. The CJEU would consider itself even more questioned in its competences and the German government – instead of the BVerfG – would be threatened with infringement proceedings, in which the sole commitment to EU values may no longer be sufficient.

D. Outlook and conclusion

An exploration beyond Germany's national borders has shown that these legal discussions are not only being held in Germany. The ratification of the 2020 Own Resources Decision was also vigorously debated in Finland, for example.²⁹² In such a superficial comparison, the different systems must be evaluated. A comparison with the Polish Tribunal is not applicable as there are strong rule of law allegations, however, because of its incompatibility with fundamental EU principles.²⁹³

²⁸⁹ cf. CJEU, Judgement of 11 December 2018, *Weiss and Others*, C-493/17, ECLI:EU:C:2018:1000

²⁹⁰ See for example Nettesheim (2021a). / Meinel (2021). / Klünder (2020). / Józwicki (2020). / Abreu Duarte (2020). / Hatje (2020). / Eleftheriadis (2020).

²⁹¹ cf. Crollly (2020).

²⁹² cf. Leino-Sandberg (2020).

²⁹³ cf. Thiele (2021).

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In conclusion to the overall research question, this decision could be a milestone in the relationship between the BVerfG and the CJEU. One end of the spectrum is embodied by further integration and more dialogue with each other. The other end is an intensified observation of each other, which could endanger the EU's very existence in the long term. In a few years, the consequences will be transmitted into reality. Until then, we must await a BVerfG ruling.

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Statement

Statement

I, Maiju Zoé Wilhelm, hereby declare (1) that I have written this Master thesis without any help from others and without the use of documents and aids other than those stated above, (2) that I have mentioned all used sources and that I have cited them correctly according to established academic rules, as agreed with the expert.

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