



Bundesverfassungsgericht

[> Homepage](#) [> Press](#) > Unsuccessful application for preliminary injunction against promulgation of the domestic act ratifying the EU Own Resources Decision ('EU Recovery Package')

Unsuccessful application for preliminary injunction against promulgation of the domestic act ratifying the EU Own Resources Decision ('EU Recovery Package')

Press Release No. 29/2021 of 21 April 2021

Order of 15 April 2021

2 BvR 547/21

In an order published today, the Second Senate of the Federal Constitutional Court rejected an application for preliminary injunction directed against the Act Ratifying the EU Own Resources Decision (*Eigenmittelbeschluss-Ratifizierungsgesetz* – ERatG).

In July 2020, the heads of state and government of the EU Member States agreed on the recovery instrument "Next Generation EU" to address the economic and social effects arising from the COVID-19 pandemic. The Council Decision of 14 December 2020 on the system of own resources, which requires approval by all Member States, authorises the European Commission to borrow up to EUR 750 billion in 2018 prices on capital markets on behalf of the European Union. The constitutional complaint lodged against the German act of approval in the principal proceedings is neither inadmissible from the outset nor clearly unfounded: the applicants have demonstrated that it is at least possible that domestic ratification could encroach upon the constitutional identity of the Basic Law (*Grundgesetz* – GG) enshrined in Art. 79 (3) GG or that the decision to be ratified might exceed the EU integration agenda (*Integrationsprogramm*) in a manifest and structurally significant manner. However, based on a summary examination, it does not appear highly likely that the Court will find a violation of Art. 79(3) GG in the principal proceedings. Therefore, the decision in the present preliminary injunction proceedings must be based on a balancing of consequences, the outcome of which is not in favour of the applicants: the consequences that would arise if the preliminary injunction sought were not issued but the act of approval were later found to be unconstitutional are less severe than the consequences that would arise if the preliminary injunction were in fact issued but the constitutional complaints lodged by the applicants ultimately turned out to be unfounded in the principal proceedings.

Facts of the case:

At the special meeting of the European Council that took place from 17-21 July 2020 in the midst of the COVID-19 pandemic, the heads of state and government of the EU Member States agreed on the multiannual financial framework for 2021-2027 and the temporary recovery package "Next Generation EU" (NGEU). This instrument aims to counteract and mitigate the severe economic and social damage caused by the pandemic in the Member States. The Council Decision of 14 December 2020 on the system of own resources (hereinafter: 2020 Own Resources Decision) lays down rules on the financing of these measures. In the 2020 Own Resources Decision, the European Commission is authorised – for the sole purpose of addressing the consequences of the COVID-19 pandemic – to borrow up to EUR 750 billion in 2018 prices on capital markets on behalf of the European Union. The Decision only enters into force upon approval by all Member States. On 25 March 2021, the German *Bundestag* adopted the draft act ratifying the EU Own Resources Decision, and the *Bundesrat* gave its consent on 26 March 2021.

The applicants essentially claim that the domestic act ratifying the 2020 Own Resources Decision violates their rights under Art. 38(1) first sentence GG in conjunction with Art. 20(1) and (2) and Art. 79(3) GG.

Key considerations of the Senate:

I. The constitutional complaint lodged in the principal proceedings is neither inadmissible from the outset nor clearly unfounded.

1. The right to democratic self-determination, as derived from Art. 38(1) first sentence GG in conjunction with Art. 20(1) and (2) and Art. 79(3) GG, protects citizens not only against a substantial erosion of the *Bundestag's* latitude to shape policy but also affords them a right that institutions, bodies, offices and agencies of the European Union only exercise the competences transferred to them in accordance with Art. 23 GG. The budgetary powers of the *Bundestag* and its overall budgetary responsibility are protected under Art. 38(1) first sentence, Art. 20(1) and (2), and Art. 79(3) GG as indispensable elements of the constitutional principle of democracy. It is for the *Bundestag*, as the constitutional organ directly accountable to the people, to take all essential decisions on revenue and expenditure; this prerogative forms part of the core enshrined in Art. 20(1) and (2) GG, which is beyond the reach of constitutional amendment. It would thus be impermissible under the Basic Law to create permanent instruments that would essentially entail an assumption of liability for decisions taken by other states, especially where this could have potentially unforeseeable consequences. Whenever the Federation undertakes significant solidary aid measures at international or EU level that affect public spending, approval by the *Bundestag* is required in each individual case. To the extent that measures agreed on at the supranational level can structurally affect parliamentary budgetary powers, it must in addition be ensured that the *Bundestag* retains sufficient influence on how the funds provided will be used. It would thus violate the principle of democracy if the type and level of public spending were, to a significant extent, determined at the supranational level, depriving the *Bundestag* of its decision-making prerogative.

2. The submissions made by the applicants demonstrate that it appears at least possible that the approved 2020 Own Resources Decision infringes the *Bundestag's* overall budgetary responsibility, encroaches upon the Basic Law's constitutional identity, and violates the applicants' right to democratic self-determination.

a) The applicants contend that under the rules on liability laid down in the 2020 Own Resources Decision, the European Commission has the right, subject to specified conditions, to make additional calls on the Member States to provide financing. This could increase the liability for EU debt assumed by the Federal Republic of Germany to an amount significantly exceeding Germany's liability under the ESM, which is capped at EUR 190 billion as liability of ESM Members is limited to their share in the subscribed capital. According to the applicants, the *Bundestag* would be subjected to an instrument affecting public finances that would "lead to unforeseeable budgetary burdens without prior constitutive approval by Parliament". The applicants further argue that the adopted framework would allow the launch of additional COVID-19 relief programmes without the need to amend the 2020 Own Resources Decision. The *Bundestag* can thus no longer be regarded as "master of its own decisions", the applicants claim. In this regard, however, the applicants consider neither the annual maximum limit for liabilities for the federal budget nor how likely it is that the asserted liability risks will actually be realised in full. Nevertheless, it cannot be ruled out from the outset that the 2020 Own Resources Decision could undermine the *Bundestag's* budgetary autonomy to a degree that exceeds the limits set by Art. 79(3) GG.

b) Moreover, the applicants sufficiently assert and substantiate that, and for what reasons, the 2020 Own Resources Decision is neither covered by Art. 311(3) TFEU nor compatible with Art. 125(1) TFEU, and thereby amounts to an *ultra vires* act that violates the principle of conferral in a manifest and structurally significant manner. According to the applicants, the Decision breaks with the balanced budget rule, which was an essential precondition for the German approval to the Treaties of Maastricht and Lisbon. The applicants furthermore claim that the 2020 Own Resources Decision violates the 'no bail out-clause' laid down in Art. 125(1) TFEU, according to which the European Union, and the Member States, shall not be liable for or assume the commitments of other Member States.

c) The constitutional complaint lodged in the principal proceedings is not clearly unfounded. In light of the concerns raised by the applicants, it can at least not be ruled out completely that by authorising the European Commission to borrow up to EUR 750 billion on capital markets, the 2020 Own Resources Decision exceeds the competences conferred in Art. 311(3) TFEU. Nor can it be ruled out, based on the applicants' submissions, that in certain constellations Germany would be liable for this debt and that this would affect the *Bundestag's* overall budgetary responsibility enshrined in Art. 110 GG in conjunction with Art. 20(1) and (2) GG in conjunction with Art. 79(3) GG.

II. Yet based on a summary examination, it does not appear highly likely that the *Bundestag's* overall budgetary responsibility (Art. 79(3) GG in conjunction with Art. 110 and Art. 20(1) and (2) GG) were indeed violated.

1. In its case-law, the Senate has not yet decided whether and to what extent the principle of democracy directly gives rise to justiciable limits regarding the assumption of payment obligations or liabilities. Regarding the principle of democracy, only evident breaches of absolute outer limits could be relevant in that respect. Payment obligations and assumptions of

liability can only violate an upper limit directly derived from the principle of democracy if such financial commitments not only had the effect of restricting budgetary autonomy but would essentially negate this autonomy, at least for a considerable period of time. As far as the assessment of those risks is concerned, the legislator disposes of a wide margin of appreciation, especially with regard to the likelihood of such commitments being called upon and the expected consequences for the legislator's budgetary autonomy.

2. Based on these considerations, the following reasons oppose a summary finding that the overall budgetary responsibility of the *Bundestag* is affected:

a) The Council Decision authorising the European Commission to borrow up to EUR 750 billion in 2018 prices on capital markets does not create direct liabilities for Germany or its federal budget. Such a liability could only arise if the authorised appropriations entered in the EU budget were not sufficient for the European Union to comply with its obligations resulting from the borrowing and if the European Commission could not generate the necessary liquidity by activating other measures, such as recourse to short-term financing on capital markets. To cover the resulting deficit, the Member States are in principle only liable in proportion ('pro rata') to the estimated budget revenue of each of them. Only in the event that a Member State fails, in full or in part, to honour a call to provide the necessary financing to this effect does the European Commission have the right to make additional calls on the other Member States, which again are only liable pro rata to the estimated budget revenue of each of them. Lastly, the 2020 Own Resources Decision provides that all funds borrowed must be repaid by 31 December 2058 at the latest. In addition, limits apply regarding the volume, duration and purpose of the borrowing to which the European Commission is authorised, as well as regarding possible liabilities incurred by Germany. Moreover, the funds in question are to be used exclusively to address the aftermath of the COVID-19 crisis. The Council Decision does not envisage any additional borrowing on behalf of the European Union.

b) Whether the design of the 2020 Own Resources Decision is fully compatible with the requirements arising from Art. 79(3) GG regarding the protection of the *Bundestag's* budgetary autonomy is a question that will have to be determined in the principal constitutional complaint proceedings. In this respect, the Federal Constitutional Court will have to review, in particular, whether the 2020 Own Resources Decision could lead to the creation of permanent instruments that essentially amount to an assumption of liability for decisions by other Member States, whether the potential liabilities incurred could structurally affect the *Bundestag's* budgetary powers, and whether it is ensured that the *Bundestag* retains sufficient parliamentary influence on decisions as to how the funds provided will be used. Taking into account the scope of liability risks, the envisaged duration and the *Bundestag's* limited involvement, an encroachment upon constitutional identity cannot be ruled out.

III. Given that the outcome of the principal proceedings can thus not be ascertained in a summary examination, the Federal Constitutional Court must in principle base its decision in the preliminary injunction proceedings on a balancing of consequences. In the present case, the balancing does not result in a decision in favour of the applicants.

1. If the preliminary injunction sought were issued, the 2020 Own Resources Decision could not enter into force until after the principal proceedings were concluded. It is expected that the principal proceedings will take considerable time to conclude. Delaying the 2020 Own Resources Decision's entry into force would adversely affect the economic policy objective pursued. The resulting disadvantages could prove irreversible and – given that as a recovery instrument, the NGEU specifically aims to address the consequences of the COVID-19 pandemic and envisages measures to be taken within a relatively short period of time – undermine the objective pursued due to the dynamics arising from the pandemic. According to the Federal Government, which is afforded a wide margin of appreciation and prognosis in assessing foreign policy matters and which the Federal Constitutional Court has to respect, delaying the Decision's entry into force would furthermore put a significant strain on foreign and European relations.

2. By contrast, the disadvantages that would arise if the preliminary injunction were not issued but the domestic act ratifying the 2020 Own Resources Decision were later found to be unconstitutional carry significantly less weight. In this case, the 2020 Own Resources Decision could enter into force once all Member State have ratified it, authorising the European Commission to borrow up to EUR 750 billion in 2018 prices on capital markets on behalf of the European Union until the year 2026. Additional liabilities for the federal budget could only arise if the overall assets of the European Union were insufficient to meet the cash resource requirements. In the event that all other EU Member States fail to honour calls by the Commission to provide additional financing, and on the basis of the Federal Government's submission, the mathematically possible burden on the federal budget could amount to EUR 21 billion annually until the year 2058. Both *Bundestag* and *Bundesrat* consider this scenario to be unrealistic. If it were concluded in the principal proceedings that the 2020 Own Resources Decision amounted to an *ultra vires* act, it appears possible that the Court of

Justice of the European Union – upon referral by the Federal Constitution Court – could declare the 2020 Own Resources Decision void. If the Federal Constitutional Court were to find that the 2020 Own Resources Decision constitutes an *ultra vires* act or hold, contrary to the summary examination in the preliminary injunction proceedings, that it encroaches upon the constitutional identity, it would be incumbent upon the Federal Government, the *Bundestag* and the *Bundesrat* to restore the constitutional order by all means available to them.
