ISSN 2723-9195

# CERIDAP

## Rivista Interdisciplinare sul Diritto delle Amministrazioni Pubbliche

Estratto

Fascicolo
2 / 2021

APRILE - GIUGNO

# The German Constitutional Court calls into question the Recovery and Resilience Plan

*José Luís da Cruz Vilaça*

DOI: 10.13130/2723-9195/2021-2-13

*La Corte costituzionale tedesca, a seguito di un ricorso proposto da duemila cittadini tedeschi, ha statuito che, in attesa della sua decisione finale, il presidente tedesco, Frank-Walter Steinmeier, non possa promulgare la legge relativa alla Decisione sulle risorse proprie che consente alla Commissione europea di emettere obbligazioni sui mercati per finanziare il dispositivo per la ripresa e la resilienza (Recovery and Resilience Facility-RRF). Decisione che era già stata approvata dal Bundestag e dal Bundesrat. I ricorrenti sostengono che il modo in cui il RFF è finanziato viola l'obbligo dell'UE di mantenere un bilancio in pareggio e considerano l'emissione prevista come una "violazione flagrante del trattato UE", vale a dire dell'articolo 311 del trattato sul funzionamento dell'UE (TFUE). Non è la prima volta, e probabilmente non sarà l'ultima, che il Bundesverfassungsgericht mette in questione e testa i limiti delle competenze europee e il rapporto tra sovranità costituzionale tedesca ed europea. È stato così con le sentenze Solange, nei decenni del 1970 e 80; nell'esaminare la costituzionalità della legge che ha ratificato il trattato di Maastricht nel 1992 e nella valutazione della legge che ha ratificato il trattato di Lisbona nel 2009; e, last but not the least, l'anno scorso, la Corte ha contestato il Public Sector Purchase Programme (PSPP) della Banca centrale europea, avvalendosi dei poteri conferiti dai trattati esclusivamente alla Corte di giustizia dell'UE e minacciando così le fondamenta stesse di un ordinamento giuridico di integrazione costruito in oltre 70 anni. Senza la Decisione sulle risorse proprie, che deve essere approvata da tutti gli Stati membri, la Commissione non sarà in grado di emettere le obbligazioni necessarie per finanziare la RRF. Per evitare di aggiungere una grave crisi economica a quella pandemica, aggravata in Europa dalle carenze nella gestione da parte della Commissione europea dell'acquisto dei vaccini, il Bundesverfassungsgericht dovrebbe fornire con urgenza una risposta. In un certo senso, la Corte costituzionale tedesca si è posta, nelle questioni europee, come il difensore di un rigido nazionalismo costituzionale, incompatibile con l'impegno della Germania per l'integrazione europea. Sicché, ancora una volta, a lungo termine il*

*futuro dell'Unione europea sarà deciso dalla risposta a breve termine della Corte costituzionale tedesca.*

*The German Constitutional Court, following a complaint by two thousand German citizens, determined that, pending the final decision, the German President, Frank-Walter Steinmeier, could not promulgate the Own Resources Decision that allows the European Commission to issue bonds on the markets to finance the Recovery and Resilience Facility (RRF). The decision had already been approved by the Bundestag and the Bundesrat. The complainants argue that the way in which the RFF is financed violates the EU's obligation to maintain a balanced budget and consider the planned issuance to be a "flagrant violation of the EU Treaty", namely of article 311 of the Treaty on the Functioning of the EU (TFEU). This is not the first time and probably will not be the last that the Bundesverfassungsgericht questions, and tests, the limits of European competences and the relationship between German and European constitutional sovereignties. It was so with the Solange judgments, in the decades of 1970 and 80; in examining the constitutionality of the law ratifying the Maastricht Treaty in 1992 and in the assessment of the law ratifying the Treaty of Lisbon in 2009; and last but not the least, last year, the Court questioned the European Central Bank's secondary markets purchase programme for public sector assets, ultimately, drawing upon itself powers conferred by the Treaties exclusively on the Court of Justice of the EU, thus threatening the foundations of an integration legal order established over 70 years. Without the Own Resources Decision, which must be approved by all Member-States, the Commission will not be able to issue the bonds needed to finance the RRF. To avoid adding a serious economic crisis to the pandemic one, aggravated in Europe by the shortcomings of the European Commission's management of the vaccines purchase, the Bundesverfassungsgericht should provide an urgent response. In a way, the German Constitutional Court has built itself up, in European matters, as a defender of a strict constitutional nationalism, incompatible with Germany's commitment to European integration. Once again, the long-term future of the European Union will be decided in the short-term response of the German Constitutional Court.*

## 1. The German Constitutional Court strikes again!

On 26 March 2012, two thousand German citizens, with spokesman Bernd

Luke, co-founder and one of the three spokesmen for the Eurosceptic party "Alternative for Germany" (AFD) and former MEP, lodged a complaint with the Constitutional Court of Karlsruhe (*Bundesverfassungsgericht*), which was directed against the approval by the constitutional bodies of the Federal Republic of the European Union's Own Resources Decision, adopted last December.

That Decision[1] allows the European Commission to issue bonds on the markets to finance the "NextGenerationEU" (or Recovery and Resilience Facility, RRF) programme of EUR 750 billion. Together with the Union's long-term budget - the multiannual financial framework -, it is the largest economic stimulus programme ever funded by the Union.

The Decision increases the ceiling of own resources available to the EU, allowing it to accommodate the additional funding obtained from the planned bond issue. It must be ratified by all Member States, and without it the Commission will not be able to issue such obligations. That is, without it there will be no Recovery and RFF - and the recovery will be even longer and more painful.

The complainants argue that the way in which the RFF is financed violates the EU's obligation to maintain a balanced budget and consider the planned issuance to be a «*flagrant violation of the EU Treaty*».

This concerns Article 311 of the Treaty on the Functioning of the EU (TFEU), which states in its first two paragraphs: «*The Union shall provide itself with the means necessary to attain its objectives and carry through its policies. Without prejudice to other revenue, the budget shall be financed wholly from own resources*».

The complainants consider that the issuance of debt to finance expenditure from the Union budget is unlawful and contrary to that provision.

On the other hand, the Own Resources Decision expressly states that «*To bear the liability related to the envisaged borrowing of funds, an extraordinary and temporary increase in the own resources ceilings is necessary. Therefore, for the sole purpose of covering all liabilities of the Union resulting from its borrowing to address the consequences of the COVID-19 crisis, the ceiling for appropriations for payments and the ceiling for appropriations for commitments should each be increased by 0,6 percentage points*» (recital 16).

The Commission claims that Article 311 allows for some discretion in the choice of means and that the increase of own resources through market financing does not represent a new own resource but a single additional reinforcement ("one-

off").
In this case, the third paragraph of Article 311 TFEU is relevant: «*The Council, acting by means of regulations in accordance with a special legislative procedure, shall lay down implementing measures for the Union's own resources system in so far as this is provided for in the decision adopted on the basis of the third paragraph. The Council shall act after obtaining the consent of the European Parliament*».
On the same day, 26 March, the German Court accepted the complaint and determined that, prior to its examination, Frank-Walter Steinmeier, President of the Federal Republic of Germany, could not promulgate the Decision.

## 2. Nothing new under the sun

This intervention of the *Bundesverfassungsgericht* is neither original nor surprising. Europeans have long been accustomed to the position of the German Constitutional Court, whose seat is in Karlsruhe, and which calls into question the competences of Union bodies.
Just recently, on 5 May 2020, the Court ordered the *Bundesbank* to stop participating in the European Central Bank's (ECB) secondary markets purchase programme for public sector assets if it did not demonstrate that the programme was compatible with the Treaty on European Union (TEU).
The decision caused a shock at the time, not only because it aimed at an important instrument to combat the recession caused by the Covid-19 pandemic, but also because the German Court assumed, as in other decisions in recent years, that whatever the decision of the Court of Justice of the European Union (ECJ) on the legality of the ECB's asset purchase programme (initiated in another form a few years earlier), it reserved itself the right to subject the ECB's action to its constitutional review - that is, to have the last word.
While, on the one hand, the economic health of a Union threatened by a pandemic, as before by a severe economic crisis (post-2008), on the other hand, the very foundations of European integration were threatened, because the competence of the CJEU to decide ultimately on Union law is exclusive, and can be neither delegated nor renounced as explained in a previous article[2]. Without this competence, the autonomy of European Union law and its effective and

uniform application throughout European territory is impossible - and European integration no longer makes sense.

It is not the first time, nor will it be the last one that the German Constitutional Court questions - and tests - the limits of European competences and the relationship between German and European sovereignty. Indeed, it played a relevant - and even constructive - role in the last century by contributing to the Court of Justice's important jurisprudential advances in the area of fundamental rights, as I have already explained[3].

In this sense, decisions and judgments such as *Solange* (judgment of 29.5.1974, BVerfG 37) or Solange II (judgment of 22.10.1986, BVerfG 73) are well known. In the first judgment the *Bundesverfassungsgericht* warned that as long as ("Solange") the Community legal order did not guarantee German citizens an equivalent level of protection of their rights to those guaranteed by the German *Grundgesetz* it would reserve the right to carry out its own checks on the constitutionality of European standards. In *Solange II*, in the light of developments in CJEU case law, the German Court agreed to waive its own constitutional review as long as the CJEU ensured the appropriate level of protection.

Later, in examining the constitutionality of the law ratifying the Maastricht Treaty in 1992, the *Bundesverfassungsgericht* introduced a reservation to the acceptance of the primacy of European law, making it dependent on the limits of the Treaty provisions adopted by the ratification law. On 30 June 2009, it assessed the law ratifying the Treaty of Lisbon in the light of the Federal Republic's Basic Law, requiring various modifications and announcing that it would continue to intervene to prevent the manifest disregard for the principle of conferral on the EU institutions and any violation of the essential core of the "constitutional identity" of the German *Grundgesetz*.

Last year's decision, on 5 May 2020, went even further and, in our opinion, represents a real ultra vires decision. The *Bundesverfassungsgericht* draws upon itself powers , which are conferred exclusively by the Treaties (and therefore by all the Member States which have signed them) on the judicial body set up to say the law in this legal and political area, the CJEU, thus threatening the foundations of an integration legal order established over 70 years (as referred to in the articles cited above).

## 3. And what now?

Now, it is to be expected that common sense will prevail and a quick decision is taken. In order not to generate a crisis over another crisis and to avoid adding a very serious economic crisis to the pandemic one, aggravated in Europe by the shortcomings that are still tainting the European Commission's management of the vaccines purchase, the *Bundesverfassungsgericht* should provide an urgent response that enables the German President to enact the EU Own Resources Decision, which has already been approved by the *Bundestag* and the *Bundesrat*.
In a way, the German Constitutional Court has built itself up, in European matters, as a defender of a strict constitutional nationalism, incompatible with Germany's commitment to European integration. It is, after all, a question of whether the last word on the legality of any European policy is entrusted to the EU Court of Justice or left to the national constitutional courts (or, even worse, to one of them). This is another way of saying that it is a question of whether or not there is a truly autonomous European legal order, which does not depend ultimately on a domestically focused (and inevitably biased) interpretation made by national bodies and whether or not there is an effective primacy of European rules over national laws.
The raison d'être of primacy is simple: without it, there would be no common European rules, no common internal market and ultimately no European Union, which would all be made impossible if any Member State could freely refuse to apply the EU rules or principles it disliked, just cherry picking those to their liking.
There is an urgent need to clarify the boundaries between the constitutional integrity of the EU and the sovereignty of the Member States. With the vaccine crisis, it has become clear that the Union has limited competence in health matters. Moreover, the economic crisis caused by the pandemic shows that the Union cannot be unduly limited by the unanimity rule or by a national courts blockade in its ability to act and its capacity to mobilise resources in the common interest, in particular in emergency situations that require swift action at the appropriate level (as demanded by the subsidiarity principle) to prevent an immediate danger to health and human lives of European citizens.
The legitimate place to resolve any doubts a national court may have as regards

the legality of using the markets to finance European emergency policies, and the increase in own resources, can only be the EU Court of Justice, otherwise the European Union will become unsustainable.
Once again, as so often in the past, the long-term future of the European Union will be decided in the short-term response of the German Constitutional Court to a challenge raised or accepted by itself against the autonomous nature of the European integration process grounded on the sovereignty of the Member States and the will of the peoples of Europe.
Once again, we must hope that wisdom, political will and judicial integrity will allow the right decisions to be made.

1. 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, ELI: http://data.europa.eu/eli/dec/2020/2053/oj
2. See at https://www.cruzvilaca.eu/xms/files/O_acordao_do_2o_Senado_resumo.pdf , point 3
3. J.L. da Cruz Vilaça, The judgment of the German federal constitutional court and the court of justice of the European union – judicial cooperation or dialogue of the deaf?, Ceridap 3/2020.