The Debt Brake as a Means of Intertemporally Safeguarding Freedom

On the Ruling of the German Federal Constitutional Court on the Second Supplementary Budget Act 2021 (Zweites Nachtragshaushaltsgesetz 2021)

Christian Waldhoff*

*Humboldt-Universität zu Berlin, Germany, email: christian.waldhoff@hu-berlin.de

Introduction

The decision of the German Federal Constitutional Court of 15 November 2023[1] is important for a number of reasons. It is the first authoritative interpretation by the Court of the German debt brake, introduced in 2009 in the Basic Law (*Grundgesetz*). It essentially holds that any debt issued under the exception clause of the debt brake must be used for the specific purposes foreseen in the clause. It also imposed a rather strict timeframe to spend the money borrowed under the exception clause. The decision of 15 November 2023 thus interpreted the debt brake from its teleological core and concretised it for emergency cases.

[1]R. Pracht, 'Bundesverfassungsgericht, Decision of 15 November 2023, 2 BvF 1/22,– Debt Brake', *Neue Zeitschrift für Verwaltungsrecht* (2023) p. 1892 with review; other reviews of the case include T.V. Meickmann, 'Das Ende der Großzügigkeit', *Verfassungsblog*, 15 November 2023; G. Kirchhof, 'Die Schuldenbremse – eine Haushaltskrise als Chance in der Zeitenwende', *Neue Juristische Wochenschrift* (2023) p. 3757 ff; S. Korioth, 'Urteilsanmerkung', *Juristenzeitung* (2024) p. 43 ff; H.-G. Henneke, 'BVerfG bettet Schuldenbremse in Haushaltsverfassungsrecht ein – eine neue Realität?', *Deutsches Verwaltungsblatt* (2024) p. 197 ff.

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It effectively foreclosed the political strategy employed by the current government to borrow money in advance in times of crisis. Its political impact has therefore been significant. As one commentator observed: 'The ruling destroys the cornerstone of the federal government's debt-driven financial architecture.'[2] The expansion of debt leeway via credit authorisations in advance is now closed – this 'adventure of financial policy' is at an end.[3]

The judgment also shifted public debate and brought home a simple truth. Politics depends on funding. In the aftermath of the euro crisis, during the last few years of zero interest rates and a good economic situation, this self-evident fact seemed to have been partially forgotten in Germany. However, following the rise in interest rates and the onset of a recession, as well as the major challenges posed by global politics, the availability of financial resources as a prerequisite for politics is becoming increasingly relevant. After years of increasing revenue, balancing the national budget is suddenly becoming more difficult again. The public is also becoming increasingly aware that this balance – whether between revenue and expenditure or between different expenditure blocks – is at the very heart of politics. The process of passing the parliamentary budget act proves to be the stage at which overall politics is coordinated via the legitimisation of expenditure. In other words, establishing the state budget is the only procedure in which politics and law meet that requires an overall coordination of politics based on the indicator of money.

The consequence of the judgment is that in this new era of fiscal scarcity political disagreements between coalition partners can no longer be concealed or covered up by spending more money, as used to be the case. Prioritisation decisions must be made. Against this backdrop, the judgment has changed the scope for politics in Germany like no other in recent years, indeed decades. Because the ability to dispose of funds is the essential basis and instrument of governing and law-making, reducing the constitutionally permissible deficit cushion affects core areas of current government policy and programmes.

Before discussing before the possible consequences of and reactions to the judgment, this case note will recall the genesis and function of the constitutional debt brake and present and analyse the decision on the basis of the facts of the case.

Genesis and function of debt brakes

The constitutional limitation of national debt by means of a so-called debt brake has been one of the central points of contention in Germany's financial

[2]Korioth, *supra* n. 1, p. 43.

[3]T. Büttner, 'Gestiegene finanzpolitische Unsicherheit – zur Finanzpolitik des Bundes nach dem Urteil zum zweiten Nachtragshaushalt 2021', *Wirtschaftsdienst* (2024) p. 10.

constitution for decades.[4] Until the second federalism reform in 2009, which introduced the debt brake, the scope for borrowing money at federal level was in principle linked to investments (so-called golden rule – *Goldene Regel*). However, a 'disturbance of the macroeconomic balance' was envisaged as an exceptional situation allowing for additional borrowing to balance the budget – this exception was introduced by the Great Financial Reform of 1969 as a means of anti-cyclical control of the economy by the state. The exception was used on a regular basis and the Federal Constitutional Court only marginally reviewed whether such an exceptional situation existed as claimed by the respective federal governments.[5] As a result, the level of public debt built up alarmingly, at least from a German perspective (67% of GDP in 2005). Not least the Federal Constitutional Court itself in earlier rulings suggested tightening the debt brake by amending the Constitution.[6]

Since 2009, Article 109(3) of the Basic Law has stipulated that the budgets of the federal and state governments must 'in principle be balanced without revenue from borrowing'. For the federal government, however, debt amounting to 0.35% of gross domestic product is always possible. Moreover, exceptions to these debt rules are possible in the event of abnormal economic developments, natural disasters or exceptional emergencies. A key element of this new debt brake is that this borrowing must be accompanied by a realistic plan to repay the loans. For the federal level, this is regulated by Article 115(2) of the Basic Law. The two exceptional circumstances of a natural disaster and an extraordinary emergency require a resolution of the German Bundestag, adopted by a majority of the constitutional number of its members (Article 115(2) and Article 121 Basic Law).

The provisions of the debt brake, i.e. Articlew 109(3) and 115(2), came into force for the federal government in 2016 and for the federal states in 2020. Nevertheless, at the federal level largely balanced budgets were passed from 2010 onwards, until the Covid-19 pandemic in 2020 and the Ukraine crisis in

[4]*See* S. Korioth, 'Das neue Staatsschuldenrecht', *Juristenzeitung* (2009) p. 729; C. Waldhoff and P. Dieterich, 'Die Föderalismusreform II', *Zeitschrift für Gesetzgebung* (2009) p. 97; M. Koemm, *Eine Bremse für die Staatsverschuldung* (Mohr Siebeck 2011); C. Hetschko et al. (eds.), *Staatsverschuldung in Deutschland nach der Föderalismusreform II – Eine Zwischenbilanz* (Bucerius Law School 2012).

[5]Bundesverfassungsgericht, Decision of 18 April 1989 – 2 BvF 1/82, Amtliche Entscheidungssammlung Band 79, 311 (343); Bundesverfassungsgericht, Decision of 9 July 2007 – 2 BvF 1/04, Amtliche Entscheidungssammlung Band 119, 96 (140 f.).

[6]Bundesverfassungsgericht, Decision of 9 July 2007 – 2 BvF 1/04, Amtliche Entscheidungssammlung Band 119, 96 (143).

2022. Germany's national debt decreased to the limits established under EU law again.[7]

Facts of the case and decision of the court

The facts

For the 2020 budget, which was originally planned to be debt-free, the German Bundestag in accordance with Article 115(2) sentences 6 and 7 of the Basic Law determined that an extraordinary emergency situation existed and enabled borrowing of around €218 billion through two supplementary budget Acts with regard to the Covid-19 crisis. For the 2021 budget, loans of €180 billion were initially planned because of a continuing extraordinary emergency situation. In 2021, parliament additionally approved a further €60 billion in credit authorisations through a supplementary budget Act. The origins of the budgetary approach that led to the Bundesverfassungsgerichts' ruling therefore date back to the time of the last grand coalition of the CDU/CSU and the SPD, respectively Germany's Christian democratic party and its social democratic party. Some observers suspect that the ultimate aim was to bypass the debt brake by borrowing during the crisis only to spend the money later in normal times. 'Apparently, the aim was to create a financial cushion for the time after the successful general election in September 2021'.[8]

However, during 2021 it became apparent that these additional loans were no longer needed to combat the Covid-19 crisis. A second supplementary budget Act therefore reallocated the €60 billion credit authorisation to the 'Energy and Climate Fund', a dependent special fund of the federal government. This law was only passed in February 2022. In the relevant Bill, the new German government, now based on a coalition of the SDP, the Green Party and the FDP, the liberal party, pointed out that 'to mitigate the social and economic consequences of the pandemic and in view of the massive economic slump in 2020, extensive supply- and demand-side measures are still necessary to put the German economy back on a long-term sustainable growth path'.[9] The government argued that financing of 'future and transformation tasks' in the areas of climate protection and digitalisation by a reformed Energy and Climate Fund were suitable means for this. This reallocation of credit authorisations would not increase the borrowing for 2021. At the same time, the accounting system for the fund was changed: loans would no longer be accounted for at the time funds were actually borrowed at the capital market, but at the time the Bundestag legally authorised the

[7]Actual documentation and analysis: U. Hufeld and C. Ohler (eds.), *Europäische Wirtschafts- und Währungsunion* (Nomos 2022).

[8]Korioth, *supra* n. 1, p. 43 (44).

[9]BT-Drs. 20/300, 4 sq.

issuance of debt, in this case retroactively, in 2021.[10] Members of the CDU/CSU parliamentary group in the Bundestag, now in the opposition, challenged the Second Supplementary Budget Act 2021 by way of an abstract review of the law before the Federal Constitutional Court. While an interim injunction had been rejected,[11] the application was ultimately successful and the law was declared unconstitutional and null and void. The decision was not entirely surprising, as there had been stark warnings beforehand, in the form of critical reports by important German financial institututions, i.e. the Federal Audit Office (*Bundesrechnungshof*) and the Independent Advisory Board of the Stability Council (*Unabhängiger Beirat des Stabilitätsrats*).[12]

Admissibility

The application for a review of law was admissible. The members of the parliamentary group CDU/CSU fulfilled the quorum for an abstract review of law of a statute under Article 93(2)(2) of the Basic Law, and the Second Supplementary Budget Act 2021 was a possible subject of review, despite the special features of budget Acts as acts without external effect, i.e. laws in the formal sense only. Moreover, although budget Acts in principle have no legal effects (*Rechtswirkungen*) after the end of the fiscal year, the Court reasoned that they have significance until the discharge of the Federal Government by the Bundestag and the Bundesrat on the basis of a report by the Bundsrechnungshof in the course of the following financial year (Article 114 of the Basic Law). In addition, the Court reasoned that once an application for abstract review has been filed admissibly, it remains admissible due to the objective nature of the procedure. In this case, the the application had been submitted on 18 March 2022, while the report of the Bundesrechnungshof was filed only on 22 December 2022.[13]

[10]There are two rulings from state constitutional courts on similar regulations under state constitutional law: *see* Hessischer Staatsgerichtshof, Decision of 27 October 2021 – P.St. 2783, P.St. 2827, *Neue Zeitschrift für Verwaltungsrecht* (2022) p. 147; Verfassungsgerichtshof Rheinland-Pfalz, Decision of 1 April 2022 – VGH N 7/21, *Neue Zeitschrift für Verwaltungsrecht* (2022) p. 1132.

[11]Bundesverfassungsgericht, Decision of 22 November 2022 – 2 BvF 1/22, *Neue Zeitschrift für Verwaltungsrecht* (2023) p. 326.

[12]Bundesrechnungshof, 'Schriftliche Stellungnahme zur Öffentlichen Anhörung zum Gesetzentwurf der Bundesregierung über die Feststellung eines Zweiten Nachtrags zum Bundeshaushaltsplan für das Haushaltsjahr 2021' (Bundestags-Drucksache 20/300 2022); Unabhängiger Beirat des Stabilitätsrats, *Stellungnahme zur Einhaltung der Obergrenze für das strukturelle gesamtstaatliche Finanzierungsdefizit* (2021).

[13]BVerfG, Debt brake, *supra* n. 1, para. 92.

The rationale of the Schuldenbremse

The court's fundamental remarks on the function of constitutional debt brakes are of central importance for understanding the judgment. The Second Senate of the Federal Constitutional Court cites its case law relating to the European financial and debt crisis, which had recalled the central functions of the state budget in a European context:

> In addition, the legislature amending the constitution has made it clear through the factual specification and factual tightening of the rules for borrowing … by the federal government and the federal states that a self-binding obligation of the parliaments and the associated tangible restriction of their ability to act in budgetary policy may be necessary precisely in the interest of preserving the ability to shape democracy in the long term … Even if such an obligation restricts the democratic room for manoeuvre in the present, it also serves to secure it for the future.[14]

This is also the basic idea behind the Federal Constitutional Court's 2020 climate protection ruling:[15] limiting freedom in the present in order to preserve freedom in the future ('intertemporal safeguarding of freedom'[16]) – freedom here not in the sense of freedom under fundamental rights, but in the sense of the state's ability to enact policies. In this reading, the debt brake is intended to control 'the seductiveness of government loans'.[17]

Not all conditions for an extraordinary emergency situation were met

Article 115(2) sentences 6–8 of the Basic Law contain the key exceptions to the debt brake. According to these provisions, the government may issue additional debt in cases of natural catastrophes or extraordinary emergency situations which are beyond governmental control and substantially harmful to the state's financial capacity, on the basis of a decision taken by a majority of the members of the Bundestag. When interpreting Article 115(2) sentences 6–8, the Court makes a precise distinction between the legal meaning of these terms and the legislature's scope for factual assessments, which can only be reviewed by the Court to a limited extent. Following on from Article 35 of the Basic Law, the Court specifies

[14]Ibid., para. 140.

[15]Bundesverfassungsgericht, Decision of 24 March 2021 – 1 BvR 2656/18, 78, 96, 288/20, Amtliche Entscheidungssammlung Band 157, 30.

[16]M. Eifert 'Climate Change and Constitutional Law: The German Federal Constitutional Court's Time Dimension', *Oxford Business Law Blog*, 21 July 2021, https://www.law.ox.ac.uk/business-law-blog, visited 17 September 2024.

[17]Kirchhof, *supra* n. 1, p. 3761.

the exceptional circumstance of a natural disaster as follows: 'The term "natural disaster" ... refers to imminently threatening dangerous situations or damage of considerable magnitude caused by natural events, such as earthquakes, floods, storms, drought or mass diseases.[18] In contrast, an 'extraordinary emergency situation' must be concretised on a budget-specific basis:

> With regard to the meaning and purpose of Art. 109 para. 3 sentence 2, Art. 115 para. 2 sentence 6 GG, to ensure the state's budgetary and fiscal capacity to act to overcome the crisis ..., an 'extraordinary emergency situation' shall also include extraordinary disruptions of the economic and financial situation. ... According to this, an 'extraordinary emergency situation' should also exist in the event of a sudden impairment of economic processes to an extreme extent due to an 'exogenous shock', if active support measures by the state are therefore required for reasons of the common good to maintain and stabilise economic processes.[19]

At the same time, such economic or fiscal emergency situations should be distinguished from the usual cyclical fluctuations. Decisive for accepting the existence of an extraordinary emergency situation is that its cause is beyond the control of the state. Precisely because of that, medium or longer-term developments, such as a creeping accumulation of government debt, cannot cause such an extraordinary emergency situation. More generally, this means that the consequences of crises that were foreseeable for a long time or were even caused by the public sector, should not be financed with emergency loans.[20] This distinction has been criticised.[21] However, it is convincing in my opinion, as it is in line with budgetary logic that foreseeable developments can and must be absorbed in the budget.

For the exceptions to apply, there must also be a significant impairment of the state's financial situation and, in addition, a causal link between the emergency situation and the new debt: 'It is necessary that the emergency situation leads to a reaction by the state that has a significant impact on the "financial situation" of the federal government and therefore provides justification for new debt.'[22]

The existence of these written conditions for the exceptions to the debt brake – natural disaster or extraordinary emergency situation – are fully judicially reviewable in accordance with the intended effect of the norm: budgetary constitutional law is, according to the Court, not 'soft law', not a law of lesser binding force. On the other hand, with regard to the significance of the

[18]BVerfG, Debt brake, *supra* n. 1, para. 103.
[19]Ibid., para. 106.
[20]Ibid., para. 109.
[21]Korioth, *supra* n. 1, p. 43 (45).
[22]BVerfG, Debt brake, *supra* n. 1, para. 111.

impairment of the state's financial situation, the budget legislature has a margin of appreciation that can only be reviewed by the Court to a limited extent.

The Federal Constitutional Court tightens the credit limit by introducing an additional unwritten criterion by requiring an objective causal connection with the emergency situation. This 'crisis connection' is intended to have a credit-limiting effect:

> While the criterion of significant impairment of the state's financial situation generally refers to the influence of the external crisis on state finances, the requirement of a material causal link demands a specific reference to the non-regular credit authorisations and asks whether these – also in terms of amount – can be traced back to the emergency situation as the cause. ... This does not include ... new loans for general policy measures that are taken at best on the supposedly favourable occasion of the suspension of the debt brake, but are not aimed at overcoming the crisis situation.[23]

While the Court thus limits the budget legislature's financial room for manoeuvre, it at the same time accepts that not only 'direct' but also 'indirect' consequences of an emergency situation can be taken into account. In my opinion, the Court is showing itself generous here, and quite rightly so. In relation to the Covid-19 pandemic, not only the direct medical measures such as the development, procurement and administration of vaccines, but also the economic consequences due to curfews and business closures are covered. The specific measures to be taken by the state are in turn subject to the legislature's scope for assessment and judgement. This corresponds to the legislature's burden of proof: it is subject to judicial review of whether the budget legislature's justifications are comprehensible and justifiable 'also against the background of the views in economics and finance'.[24]

Applying these criteria, the Second Senate regarded the Covid-19 pandemic as an emergency situation under public debt law, which also led to an impairment of the state's financial situation. Any other assessment would not have been justifiable. The Senate also noticed that Bundestag had established the existence of such an emergency situation with the required majority and had drawn up the repayment plan for the additional borrowing required by the Basic Law. In contrast, the burden of proof for the causal relationship between the emergency situation and the borrowing authorised in the Second Supplementary Budget Act 2021 as a means of overcoming it was not met – not least because the outbreak of the crisis had already happened around two years previously: the longer the crisis

[23]Ibid., paras. 127, 133.
[24]Ibid., para. 137.

diagnosed by the legislature persists and the more extensively the legislature has utilised emergency loans to combat it, the more detailed the reasons for the continuation of the crisis and the continued suitability of the measures planned by the legislature to overcome the crisis have to be. This also applied in the present case because the originally planned loans were no longer needed for the original purpose.[25]

It is noteworthy and correct that the Second Senate does not appy the principle of proportionality to this action: the borrowing must merely be 'suitable' to remedy or mitigate the emergency situation. This is in contrast to the Hessian State Court, which applied the principle of proportionality in full as regards emergency borrowing by the federal state Hessen.[26] This absence of a full proportionality test has the concrete consequence that the necessity criterion is not applicable: the legislature does not have to look for 'milder' means to combat the emergency situation. This is significant in terms of fiscal policy, as it is – rightly – left to politics to weigh up and decide autonomously on tax increases, spending cuts or the release of reserves.

The emergency situation also remains an emergency situation in terms of financial policy. The doctrinal distinction from fundamental rights reasoning is also convincing:

> For political action, the Basic Law grants the legislator a margin of manoeuvre, insofar as it does not concern – not given here – interventions in areas of law or freedom, for which it only sets a framework. Within this framework, the legislature is free to make political decisions.[27]

This is realistic and is reminiscent of the, in my view, convincing concept of the 'constitution as a framework order' for the political process, which goes back to Ernst-Wolfgang Böckenförde.[28] Unlike in many other decisions, the Senate also clearly distinguishes the application of the principle of proportionality in the context of fundamental rights, in which there is always a presumption in favour of freedom under fundamental rights, from the balancing of interests under constitutional law that are in principle of equal importance. In the latter case, it is therefore better not to speak of proportionality but, following Konrad Hesse, of practical concordance or harmony (*praktische Konkordanz*).[29]

[25]Ibid., paras. 151, 185-204.

[26]Hessischer Staatsgerichtshof, *Neue Zeitschrift für Verwaltungsrecht* (2022) p. 147.

[27]BVerfG, Debt brake, *supra* n. 1, para. 146 ff.

[28]E.-W. Böckenförde, 'Die Eigenart des Staatsrechts und der Staatsrechtswissenschaft', in E.-W. Böckenförde et al., *Demokratie* (Suhrkamp 1991) s 11 (p. 13 ff).

[29]K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (C.F. Muller 1999), margin number 72.

The principles of annuality of the budget, of the budget implementation and of cash-effec tiveness

In order to fulfil the purpose of the debt brake to limit government debt and avoid unnecessary burdens for the future, the principles of annuality of the budget preparation (*Jährlichkeit*; Article 110(2) sentence 1 of the Basic Law) and annuality of budget implemention (*Jährigkeit*) also apply to debt in emergency situations:

> The principle of annuality of budget preparation is closely functionally related to the principle of annuality of budget implementation expressly enshrined in Art. 110 para. 2 sentence 1 GG; while the former places requirements on the periodicity of the preparation of the budget, the latter addresses the question of the period of validity of the authorisations in the budgets. ... The substantive principle of annuality supplements the external principle of annuality in its protective effect in favour of parliamentary budget law by preventing the scope for decision-making of future budget legislators from being restricted by pre-determined provisions from previous budgets. ... It thus prevents the burden from being shifted into the future.[30]

The principle of annuality of budget implementation (*Jährigkeit*) is only provided for by ordinary statute and is subject to exceptions; it has constitutional status, according to the Court. These two annuality principles are supplemented by the budgetary principle of cash-effectiveness, according to which only those expenditures may be budgeted that are expected to be effectively spent in the financial year. These three principles also apply in emergency situations under the debt brake rules and to special funds, and they entail that the amount of borrowing must be assessed separately by year, must counted towards the total borrowing in that year and that the moment of the actual borrowing, not the authorisation to do so, is decisive.

This is all new constitutional territory. And this is also where the strongest criticism of the judgment comes in: 'The pace of annuality does not correspond to the typical characteristics of emergencies. They know nothing of the distinction between financial years.'[31] It will have to be clarified under ordinary law if and how the existing budgetary instrument of precommitted appropriations (*Verpflichtungsermächtigung*) can be used here. In principle, that instrument allows even future budgets to be committed to certain appropriations if it is necessary to carry out a certain policy.

[30]BVerfG, Debt brake, *supra* n. 1, para. 159.
[31]Korioth, *supra* n. 1, p. 46.

In effect, the judgment also rendered obsolete the new budgetary accounting method which would have severed the accounting of debt from its issuance. As an element of a new (now unconstitutional) debt architecture,[32] the method could only be characterised as trickery anyway.

No retroactive supplementary budget acts

There is a third independent reason for the unconstitutionality of the law. The clear strengthening of the periodicity of the budget process is also supported by the fact that the Senate demands that supplementary budgets cannot be passed retroactively, i.e. after the end of the financial year. This addresses the constitutional principle of the prior validity of budget Acts enshrined in Article 110(2) sentence 1 of the Basic Law, which is also declared applicable to supplementary budgets. The Second Supplementary Budget Act 2021 was also unconstitutional for this reason. This has been criticised with quite considerable argument. Stefan Korioth, for example, argues that it should be possible to adopt supplementary budget Acts until the closing of the books in accordance with section 36 of the Budgetary Principles Act, which regularly falls on 31 March of the following year.[33]

Nullity 'ex tunc'

The Court declares the Second Supplementary Budget Act 2021 null and void 'ex tunc', i.e. from the outset. This is, according to German tradition, normally the case if in an Act is found to be unconstitutional, but breaks with the Court's previous case law on budget Acts, which sought to keep the effects of the decisions manageable by avoiding reversal and financial consequences. Accordingly, the Court issued only a declaration of inconstitutionality. In this case however, as a consequence of the nullilty *ex tunc* of the Second Supplementary Budget Act 2021, the relevant €60 billion credit authorisation was definitively lost for the budget.

Consequences of the judgment

The consequences of the judgment can only be briefly outlined here. The immediate effects have not yet been fully clarified, but are likely to be manageable for Germany in financial terms. The political and legal significance of the decision, which can hardly be underestimated, lies in the fact that the debt

[32]Ibid., p. 44.
[33]Ibid., p. 47.

brake introduced in 2009 has 'gained teeth' while at the same time balancing the factual elements that can be fully reviewed by the Court with the plausible concession of political assessments that can only be reviewed to a limited extent. Here are five points in brief.

Differrent debt cultures

There are two potential lines of conflict in any public debt debate: domestically, those between lawyers trained in compliance with norms on the one hand, and economists inquiring about economic efficiency on the other. The second line of conflict is a cultural and theoretical one: different economic theories disagree in their assessment of public investment financed by debt and the virtues of a debt brake in particular. On a cultural level, the perception and evaluation of public debt are also fundamentally different in Germany than in many other countries due to historical traumas. The fact that 'financial debt' (*Schulden*) and 'moral or criminal debt' (*Schuld*) are linguistically very close to each other may have contributed to this, and financial debt is therefore viewed much more negatively in broad sections of the population than in other countries. The clash between these 'debt cultures' occurs primarily at European level, which ultimately prompted the constitutional amendment introducing the debt brake.

Consequences for the budget and special funds

The direct consequence is that the €60 billion in credit authorisations that were to be reallocated are 'lost' for the budget and other special funds. A supplementary budget also had to be drawn up for 2023. The effects on the numerous other special funds at federal level such as the Reconstruction Fund (set up after the flooding of the Ahr in 2021) are being examined. In any case, the 'core budget and dependent special funds must be considered as a whole' from a fiscal perspective.[34]

Increased legal certainty

Indirectly, the application of the debt brake is now more clearly comprehensible; in particular the exceptions are now very clear. It has not been possible to create complete legal certainty, but there is certainly a greater level of it; in particular, a stop has been put to the accumulation of credit authorisations 'in reserve'. Special funds, which are not unproblematic in any case, have been trimmed back to what they can and should be. This strengthens the core constitutional and political function of the budget. It will become more difficult to whitewash political

[34]BVerfG, Debt brake, *supra* n. 1, para. 182.

conflicts by satisfying all spending requests. Budgetary 'trickery' – which has already led to a loss of confidence beyond financial policy – should come to an end.

Redistribution 'from the bottom to the top'?

Surprisingly little reference is made to redistribution effects in the German public debt debate: As the funds borrowed by the state are ultimately provided by wealthy private circles, there is a latent danger that interest payments redistribute 'from the bottom to the top'.[35] This hardly aligns well with the political orientation of those who advocate for an expansion of debt.

The need for critical review and evaluation of the Schuldenbremse

The reform discussion that is now beginning in Germany is likely to be decisive. As a lawyer, one is pleased with the ruling insofar as constitutional law has been taken seriously and protected against 'trickery'. However, this only relates to the currently applicable constitutional standard. The 2009 debt brake should in any case be subjected to a critical review and evaluated. Stefan Korioth even considers the current debt brake installed in 2009 to be a 'total failure', as national debt has continued to build up under this regime:

> The objection that the costly consequences of the sovereign debt crisis, the migration crisis and the corona crisis have also occurred during this time does not hold water. A debt brake is supposed to put the brakes on precisely when times are difficult. If tax revenues are sufficient, it is not needed.[36]

The Federal Constitutional Court ruling therefore must not and cannot distract from options for reform and improvement. In other words, the ruling is not an argument against a possible reform of the debt brake by the legislature amending the constitution.

There are certainly reasons for a readjustment, especially in view of the current lack of investment in dilapidated infrastructure (for example in the transport sector) and the unusual accumulation of problems. As the Court itself acknowledged in 2007, the then (pre-2009) version of Article 115(2) of the Basic Law was unable to slow down the escalation of public debt.[37] In my

[35]T. Arbogast, 'Who Are These Bond Vigilantes Anyway? The Political Economy of Sovereign Debt Ownership in the Eurozone', *MPIfG Discussion Paper No. 20/2*.

[36]Korioth, *supra* n. 1, p. 48.

[37]Bundesverfassungsgericht, Decision of 9 July 2007 – 2 BvF 1/04, Amtliche Entscheidungssammlung Band 119, 96 (141 ff).

opinion, this was less due to the 'golden rule', i.e. the link between investments as a measure of debt, but rather to the then exceptional disturbance of the overall economic equilibrium, which can hardly be controlled by courts. At the time, the Second Senate of the Federal Constitutional Court shied away from interpreting the investment concept in a more intelligent and effective way. In view of the current huge increase in investment requirements compared to 2007, such an operation would probably make sense today, although it would have to be considered whether this can be achieved through substantive clarification or procedural precautions (or a combination of both). It would not be a question of replacing the 2009 model, but of supplementing it. The proposal of the Scientific Advisory Board at the Federal Ministry of Economics points in this direction.[38] A debt brake must not be hostile to investment – although the empirical evidence on this issue is highly controversial.

Another unsatisfactory aspect of the current legal situation is that the federal states, i.e. the member states of the German federal state, are granted far less leeway for debt than the federal government, i.e. the central government. Unlike the federal government, states are not allowed a small structural deficit under Article 109(3).

By their very nature, debt brakes are among the most drastic self-restraints of the political process. Their introduction requires a kind of small 'constitutional moment' (per Bruce Ackerman), a specific situation, for such a tour de force to succeed. They should, therefore, not be abandoned lightly. 'The eternal problem with every fiscal rule in a democratic state ... is the ambivalent way in which politicians deal with them'[39] – as soon as the 'constitutional moment' of self-restriction through constitutional law has ceased to exist.

Christian Waldhoff holds the Chair of Public Law and Law of Public Finance at the Humboldt-Universität zu Berlin.

[38]Wissenschaftlicher Beirat beim Bundesministerium für Wirtschaft und Klimaschutz, *Finanzierung von Staatsaufgaben: Herausforderungen und Empfehlungen für eine nachhaltige Finanzpolitik* (2023).

[39]Korioth, *supra* n. 1, p. 48.