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2020-06-18
Verfassungsblog.de Steinbeis
http://hdl.handle.net/10138/328091
Leino-Sandberg, P 2020, 'Who is ultra vires now? The EU’s legal U-turn in interpreting Article 310 TFEU', Verfassungsblog. https://doi.org/10.17176/20200618-124211-0

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Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU

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For decades, and until a few weeks ago, Article 310 TFEU has been seen as prohibiting the EU from borrowing to finance its expenditure. The Commission's Next Generation EU proposal reverses that interpretation and raises fundamental questions of EU law and its dynamic interpretation. With such a sudden change of heart, are the Member States under a duty to follow? What constitutional limits remain to their membership obligations?

Last Friday, the Finnish Constitutional Law Committee (CLC) adopted a highly critical statement on the proposal. Following the logic of the PSPP and the Ajos rulings, it argued that the financing model of the proposal exceeds the powers transferred to the EU.

The legal framework for the EU budget

Article 310(1) TFEU establishes that all Union items of revenue and expenditure 'shall be shown in the budget' and that the 'revenue and expenditure shown in the budget shall be in balance'. In a chapter titled "Principle of equilibrium", the Financial Regulation further specifies that the 'Union and the Union bodies …. shall not raise loans within the framework of the budget'.

Still, on June 15, the Council website informed that the principle of budgetary balance 'prevents the European Union from issuing debt to finance itself' (screen shot in file with author). Similarly, according to the Commission website: 'EU borrowing is only permitted to finance loans to countries. The EU cannot borrow to finance its budget'.

The Next Generation EU proposal stands in remarkable contrast to this traditional reading. The Union would issue debt to be spent during the next few years as grants, mostly under environmental, agricultural and cohesion policies. These debts would be repaid over three decades starting from 2028, with as yet unspecified means.

COVID-19 as a constitutional crisis in Finland

The COVID-19-related EU measures have triggered something close to a constitutional crisis in Finland.

Under Section 74 of the Constitution, the CLC 'shall issue statements on the constitutionality of legislative proposals and other matters brought for its consideration'. The other parliamentary committees and the Government are under

an obligation to follow its interpretation. The Grand Committee acts as the political body in charge of settling and coordinating the Parliament's position.

It is difficult to think of a case where the CLC's position would not have been followed. Last spring, the CLC found the Government's flagship social and health care reform package unconstitutional. After many years in preparation, the reform was abandoned and the Government resigned.

This setting changed with the Next Generation EU proposal. The Grand Committee approved its own statement, where it subtly replaced the CLC analysis with its own conclusions, indicating that the CLC was acting *ultra vires* when assessing EU competence.

What did the CLC decide?

According to the CLC, the proposal builds on a new and deeply troubling interpretation of Article 310 TFEU. The proposal is also seen to be in a problematic relationship with Article 125 TFEU, effectively assuming responsibility for economic policy outcomes in Member States.

As a legal community building on the rule of law, the EU needs to adopt its foundational solutions in a legally solid manner and following broad democratic discussion. Questions of competence fall under exclusive CJEU jurisdiction, which is only operational *ex post.* Union law provides no developed method for ensuring that envisaged EU measures comply with the Treaties. If a Commission proposal does not have an appropriate legal basis, this is a matter for constitutional assessment and relevant for sovereignty.

For the CLC, the Commission proposal represents both qualitatively and quantitatively a new element in EU action. All Union measures must be based on the EU Founding Treaties as they are ordinarily interpreted. While the COVID-19 situation calls for solidarity and enables recourse to Article 122 TFEU, any 'exceptional and temporary measures' should not amend the EU's foundational principles.

The CLC points out that the EU has engaged in borrowing before, including 2 billion for buildings and leases and 53 billion used for funding programmes under which the funds raised are lent back-to-back to the beneficiary country. However, the latter are not problematic for Article 310 TFEU. Public sector lending operations are considered financial transactions, not expenditure, and hence do not affect budgetary balance. In contrast, in the Commission proposal, the majority of the funds borrowed from the markets would be spent as grants, and would constitute budgetary expenditure for the Union.

The constitutionally most contentious parts of the proposal are included in the Own Resources Decision (OWD), which requires a separate national ratification. Under Section 94 and 95 of the Constitution, transfer of authority to the EU that is of significance with regard to Finland's sovereignty shall be approved by at least

two thirds of the votes cast. However, simple majority is enough in case of ‘minor adjustments’ to or ‘development’ of Union tasks.

The CLC argues that the new interpretation given to Article 310 TFEU is extraordinary and constitutes a development that was not and – keeping in mind the universally held interpretation of the provision at that time – could not have been anticipated when Finland ratified the Treaties. It would create considerable financial liabilities for the country, limit its budgetary sovereignty for a long period of time (until 2058), and change the relation of the Union and its members in a fundamental manner. For these reasons, the CLC anticipates that the approval of the OWD would require a two thirds majority – something the Government falls far short of.

The CLC repeats its old doctrine relating to sovereignty and budgetary powers. It concludes that, for reasons of budgetary sovereignty, Member States’ overall responsibilities must be clearly defined. The Government *may not accept or promote the proposed Union borrowing and the liability stemming for Member States from EU grants*. Finally, the Committee stresses that secondary legislation may not be used to amend institutional balance and points to the problematic consequences of the proposal for democratic decision making and the clarity of the division of competences.

The Grand Committee reaction

Given the role of the CLC in the Finnish Constitutional system and the forcefulness of its opinions, its statement could have been expected to effectively settle the Finnish position. However, the Grand Committee issued a mildly worded statement in which it had ‘no objections’ to the Government’s ‘open and constructive’ position. It noted, in agreement with the Government, that the compatibility of the recovery instrument with Article 310 and 311 TFEU would need to be confirmed. In the absence of an EU Council of State, there is no entity endowed with such powers. In practice, the Council Legal Service would deliver an opinion which, if positive, would be considered to have put at rest any legal concerns.

For the Grand Committee, constitutional questions were clearly a non-issue. It does acknowledge that the CLC examines questions that might be constitutionally sensitive and that should be clarified or removed. However, it then proceeds to express disagreement with the CLC analysis, referring to its own expert hearings. For the Grand Committee, the proposal seems to meet constitutional requirements and constitutes no threat to EU institutional balance. It doubts the relevance of the CLC’s concerns about implicit liabilities for Member States. The state of EU law is ambiguous and includes examples of borrowing. In short, the Committee effectively replaced the CLC analysis with analysis of its own. In a press conference, the Grand Committee Chair then explained that while the CLC may examine proposals form a constitutional point of view, it has no mandate to evaluate EU law.

This situation is unprecedented. The two Committees each have their constitutional role. As negotiations go on, they will engage with the matter again. Ultimately the

dispute will culminate in the ratification of the OWD – a process in which the Grand Committee has no role.

Limits to the teleological interpretation of EU law

During the EU legislative process, legal scrutiny lies in the hands of the institutions' legal services. The Commission's legal change of heart is evident in its freshly published Q&A: Next Generation EU – Legal Construction where it argues that borrowing is 'a justified means to attain the Union's objectives'. For the Commission, the 'borrowed funds are exceptional and one-off amounts coming in addition to the annual budget as external assigned revenue (for the spending part), they do not form part neither of revenue nor of expenditure under the annual budget'. The Commission admits that' [s]uch way to proceed for large amounts diverges from the standard practice for the establishment of the budget and financing of the Union'. However, Article 122 TFEU justifies 'derogating from standard Treaty rules, which would not allow the financing of such large amounts in addition to the Union's budget and outside of the annual budgetary procedure'.

In practice, a construction that lasts until 2058 will transform into a permanent structure that is convenient to deploy each time a crisis hits the Union. The Commission justification is not only unconvincing but also embarrassing. EU law recognizes no general 'state of emergency' beyond the provisions of Article 122 TFEU that could override the clearly worded provisions of Article 310 TFEU and the principle of sound financial management.

Indirectly, the Commission seems to recognize the problematic nature of its proposals. It suggests that these concerns are alleviated by the 'quasi-constitutional nature' of the Own Resource Decision, which in its view 'provides for the necessary democratic legitimacy of that innovative proposal necessary to fulfil the Union's objectives'.

The position of the Council Legal Service is not known, and is in any case likely to be highly confidential. However, something might be inferred from the fact that, on 16 June 2020, the Council internet page describing the Union's Own Resources system was revised. Notable in its absence is now the reference to the principle of budgetary balance precluding the EU from issuing debt to finance itself. It would be surprising if, at this point, the Council Legal Service came up with tangible objections. What remains unclear is the legal reasoning it will apply to reach this conclusion.

The main task of institutional legal services is to facilitate the institutional agenda. This may require, as the Commission puts it, 'innovative' legal solutions. The standard of legality applied in the legal services is whether a measure is likely to stand in the Court. For a highly political measure that, by the time of the Court decision, would already have distributed most of the money, this is not an effective deterrent. Annulment at that stage would make little sense and, in cases where the Court has found a funding measure illegal, it has, for reasons of legal certainty, routinely upheld its legal effects (see e.g Case C-166/07, Case C-155/07).

The Finnish Constitutional Law Committee is one of the few bodies that can engage in constitutional review prior to the adoption of EU measures. In expressing concern that the EU institutions could engage in *ultra vires* action that exceeds the limits of Member State consent, it mirrors the views of some other national constitutional bodies in Europe. In Brussels, such challenges tend to provoke irritation. Yet, the constitutional point is fundamental and deserves to be taken seriously. A Union that is frequently seen to trespass the boundaries of its powers risks eroding its legitimacy.

Teleological interpretations have enabled significant EU action at many decisive points in EU history. They have their legitimate uses, in particular when dealing with constitutional gaps or abstract and broad Treaty formulations. But is it really appropriate to use this method to override clearly worded Treaty prohibitions? What role would remain for Treaty revision procedures? Would it not mean that the principle of conferral is effectively dead and *Kompetenz-Kompetenz* is now with the Union?

In a society based on the rule of law, lawyers have a key role in safeguarding democratic procedures. It remains to be seen whether in the EU, constitutional limitations can be done away with a simple updating of a webpage.

The author was one of the experts consulted by the Constitutional Law and Grand Committees. Her monograph The Politics of Legal Expertise in EU Policymaking *is forthcoming with Cambridge University Press in 2021. The article builds on a talk given at the DFG Graduiertenkolleg DynamInt at Humboldt University Berlin.*

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