European Law Open (2024), **3**, 687–704
doi:10.1017/elo.2025.18

EDITORIAL

Editorial: rewriting the German fundamental law in a blitz

Agustín José Menéndez

Departamento de Filosofía y Sociedad, Universidad Complutense de Madrid, Madrid, Spain
Email: agustmen@ucm.es

(Received 1 April 2025; accepted 1 April 2025)

Abstract
Introduced in 2009, the debt brake instantly became a defining element of the German Fundamental Law. During the Eurozone fiscal crisis, it grew into the main constitutional export of the Merkel/Schäuble government, an executive remembered by its imposing austerity policies to 'save' the Eurozone. In what comes close to a U turn, Friedrich Merz, the German Chancellor *in pectore*, promoted in the early days of March 2025 an amendment to the Fundamental Law which, in less than a month, resulted in a radical recalibration of the debt brake. This editorial considers the very idiosyncratic procedure of reform followed in Germany, including the rather exceptional rulings produced by the German Federal Constitutional Court. I conclude by considering whether, politically and morally, it is wise for Germany to partially dismantle the break without some serious reconsideration of the effects that the previous "Germanisation" of the Eurozone had, and without some form of consultation with its European peers. Before that, I reconstruct how Germany shifted from debt brake enthusiasm to debt brake disenchantment.

Keywords: German Fundamental Law; Stability and Growth Pact; European Economic Constitution; German Constitutional Court; debt brake; fiscal compact

To Jeremy Leaman, in memoriam

> "Maybe that was not the right path. Now is the time to think about internal growth"
> Mario Draghi, informal audition before the Italian Senate, 18 March 2025[1]

> "Political equilibrium is not a condition of repose but rather one of countervailing tensions that is rarely prolonged in time"
> Charles S Maier[2]

By the time these lines will be perused by their readers, the German Fundamental Law will have undergone what we could label as a *blitz amendment* of momentous implications. The

[1]'Audizione del professore Mario Draghi in merito al Rapporto sul futuro della competitività europea', Senato della Repubblica [Italiana], 18 March 2025, available at <https://webtv.senato.it/webtv/commissioni/audizione-mario-draghi-sul-rapporto-futuro-competitivita-europea> accessed 18 April 2025. My translation from the Italian: "Forse quella lì non era la strada giusta. Oggi è venuto il momento di pensare alla crescita interna". These two sentences come between 2:10:30 and 2:10:39.

[2]CS Maier, *The Project State and Its Rivals* (Harvard University Press 2023) 18.

© The Author(s), 2025. Published by Cambridge University Press. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (https://creativecommons.org/licenses/by/4.0/), which permits unrestricted re-use, distribution and reproduction, provided the original article is properly cited.

https://doi.org/10.1017/elo.2025.18 Published online by Cambridge University Press

Schuldenbremse (the debt brake), for years regarded as the cornerstone of the German fiscal constitution,[3] will have been radically recalibrated. While the general aim of balancing the budgets remains on paper part of the supreme law of the German nation, two major exceptions have been carved out. One, temporary (12 years) and limited (500bn) corresponds to an earmarked fund which will be spent on infrastructure and on achieving climate neutrality by 2045. The other, permanent and basically unlimited, exempts from the borrowing limit of the debt brake all defence and security expenditures that exceed 1 per cent GDP.[4] To put it differently: while the limits on regular outlays, including social expenditure, remain fully in force, Parliament will be capable of spending basically at will on defence and security (on a permanent basis) and to make use of huge amounts of resources on infrastructure and climate neutrality (on a temporary basis).

This is the result of a change of heart on the side of the two parties which used to constitute the backbone of the German political system, the CDU/CSU 'union' (Christian Democratic Union of Germany and the Christian Social Union) and the SPD (Social Democrats).[5] If in 2009 there was a large consensus among the German political class on the wisdom of the *Schuldenbremse*, this agreement faded away as time passed by.[6] For years the SPD had favoured a redrafting and moved back to a position that was less identifiable with fiscal conservatism (without that translating into any evident renewed political consensus in their favour; instead the SPD has hemorraged votes in the last years). The case of the CDU/CSU was very different. Friedrich Merz, who emerged as the leader of the 'conservative' bloc in 2022 and was nominated in 2024 as candidate to the chancellorship, seemed to remain committed to leave the debt break basically untouched.[7] Nuances in his position emerged in the run up to the election[8] This is why it might be a trifle too emphatic to characterise his change of view immediately after the election as a U-turn. But it came extremely close to that. At least if we judge by his public statements.

Days after the February elections, and under Merz's leadership, as leader of the most voted party, what may be called a pre-agreement between the CDU/CSU and the SPD was found to form a *Große Koalition* on March 4.[9] The heart of that pre-agreement was precisely the rewriting of the

[3]A constitutional history of the German 'fiscal constitution' can be found in G Milbradt, 'History of the Constitutional Debt Limits in Germany and the New "Debt Brake": Experiences and Critique' in E Ahmad, M Bordignon and G Brossio (eds), *Multilevel Finance and the Euro Crisis* (Edward Elgar 2016) 66–80.

[4]In precise terms, the Fundamental Law now exempts 'defense expenditures, federal expenditures for civil and population protection, intelligence services, the protection of information technology systems, and assistance to states attacked in violation of international law'. These items are referred in the following as 'defence', admittedly a more imprecise term, but much shorter.

[5]As is well known, the SPD came third in the 23 February 2025 elections, being overcome, for the first time, by AfD (Alternative für Deutschland). It is too early to know whether this signals the end of the postwar dominance of the CDU/CSU and the SPD, but it clearly results in an unprecedented balance of forces in the 21st Bundestag.

[6]See the pre-electoral analysis of S Decker, 'A Fiscal Prescription for Economic Decline' <https://www.rosalux.de/en/debt-brake> accessed 18 April 2025.

[7]Ibid. If at all, Merz favoured creating some wider room of maneouvre for federal states, but insisted upon the need of lowering both taxes and public expenditure to increase the rate at which the German economy could structurally grow.

[8]S Kinkartz, 'German Parties Consider Taking on More Debt', Deutsche Welle, 14 February 2025 <https://www.dw.com/en/german-parties-consider-taking-on-more-debt/a-71588840> accessed 18 April 2025. However, anyone paying attention would have perceived clear signals, such as Merkel's plea for 'dropping' the debt brake on the occasion of the publication of her memories. See T Escritt, 'Drop the Debt Brake, Says Merkel, Once Europe's Fiscal Scourge', Reuters, 26 November 2024 <https://www.reuters.com/world/europe/drop-debt-brake-says-merkel-once-europes-fiscal-scourge-2024-11-26/> accessed 18 April 2025. Cf. A Merkel, *Freedom* (Pan MacMillan 2024) p 530: 'The idea of a debt brake in the interests of future generations is still right and proper. But to avoid conflicts over resource distribution in society and adapt to the changes in the age profile of the population, it needs to be reformed to allow higher levels of debt to be assumed for the sake of investment in the future'. A very useful detailed description of the political and legal events of the last months, leading to the elections, can be found in A Petris, 'Una Germania senza freno, ovvero: trasformare una crisi in catarsi' (2025) 69:1 DPCE Online, available at <https://doi.org/10.57660/dpceonline.2025.2437> accessed 18 April 2025.

[9]The actual negotiations on the *Große Koalition* started on 9 March 2025, see 'CDU/CSU and SPD to begin coalition negotiation', Deutschland.de, 9 March 2025 <https://www.deutschland.de/en/news/cducsu-and-spd-to-begin-coalition-negotiations> accessed 18 April 2025.

https://doi.org/10.1017/elo.2025.18 Published online by Cambridge University Press

constitutional clauses defining the debt brake. In particular, three sets of changes were decided.[10] First, a permanent exception to the *Schuldembremse* will be introduced. All the debt incurred on defence and security exceeding 1 per cent GDP will be exempted from the limit set by the debt break. Second, a one-off exception to the brake will be carved out, so as to render possible to spend 500bn euro on infrastructure during a period of (originally) 10 years. It did not take any insider knowledge to realise that this bit of the deal had the SPD imprint on it. And third, the debt break will be somehow relaxed in its application to federal states, which could run bigger (even if very moderate) structural deficits than before.[11] That was crucial to ensure the reform will be approved by the Senate (Bundesrat), where regions (länder) are represented.

Events unfolded very rapidly since then. Specific amendments to the Fundamental Law were tabled before the 'old' Bundestag (formally known as the '20th Bundestag') on 10 March 2025.[12] Legal and economic experts, with more or less tenuous links with the political groupings represented in the Bundestag, were heard on 13 March 2025.[13] The following day the bill was amended to bring on board the Greens. The said party had presented its own proposal of constitutional reform, in which they basically endorsed the permanent military exemption but advocated that the one-off exception should be made for expenditure aimed at achieving climate neutrality. Unsurprisingly, a complicated game of bargaining ensued. At the end of which the Greens basically caved in, and accepted to support the reform in exchange for the widening of the one-off exception, in particular by making use of 100bn euro of the total 500bn euro to achieve climate neutrality by 2045.[14] A mere four days afterwards, the amendments were approved by a supermajority of the Bundestag.[15] The Bundesrat followed suit on 21 March.[16] The reform became the supreme law of Germany on publication in the Federal Gazette.[17] It took less time (around 20 days) to conceive, draft and approve a change to the Fundamental law than to produce the most routinary and boring governmental decree. The only comparable precedent, and not really an edifying one, was the 'express' amendment of the Spanish constitution in 2011, undertaken in the middle of an acute fiscal crisis, precisely to *write the debt break in the Spanish Constitution,* under

[10]Kukies, successor of Lindner as Minister of Finance, published a tweet with the main outline of the pre-agreement. Cf. <https://x.com/joergkukies/status/1897015481552248913> accessed 18 April 2025.

[11]AF Presse, 'German Election winner Merz Moves Step Closer to Forming Government', The Guardian, 8 March 2025 <https://www.theguardian.com/world/2025/mar/08/german-election-winner-merz-moves-step-closer-to-forming-government> accessed 18 April 2025.

[12]'Gesetzentwurf der Fraktionen der SPD und CDU/CSU:Entwurf eines Gesetzes zur Änderung des Grundgesetzes (Artikel 109, 115 und 143h)', Deutscher Bundestag, 10 March 2025, Drucksache 20/15096 <https://dserver.bundestag.de/btd/20/150/2015096.pdf> accessed 18 April 2025.

[13]The account of the hearing, together with the written submissions, are available at <https://www.bundestag.de/dokumente/textarchiv/2025/kw12-de-sondersitzung-1056916> accessed 18 April 2025.

[14]A-S Chassany and L Pitel, 'Germany's Friedrich Merz Agrees Spending Deal with Greens', Financial Times, 14 March 2025 <https://www.ft.com/content/1f8242d1-9f7a-4c46-b2ac-a8fc5b341aa8> accessed 18 April 2025; C Lunday and H von der Burchard, 'Germany's Merz Secures Breakthrough on Gargantuan Spending Plan', Politico, 14 March 2025 <https://www.politico.eu/article/germanys-merz-secures-breakthrough-on-historic-spending-plan/> accessed 18 April 2025. The changes get reflected in the report of the budgetary committee of 16 March <https://dserver.bundestag.de/btd/20/151/2015117.pdf> accessed 18 April 2025.

[15]See A-S Chassany, Germany's Parliament Approves Friedrich Merz's €1tn Spending Plan', Financial Times, 18 March 2025 <https://www.ft.com/content/80742c32-1af3-4881-a935-f3045df12b12> accessed 18 April 2025; see also the piece of news published by the Bundestag itself, 'Mehrheit für Reform der Schuldenbremse: 512 Abgeordnete stimmen mit Ja' <https://www.bundestag.de/dokumente/textarchiv/2025/kw11-pa-haushaltsausschuss-1056668> accessed 18 April 2025.

[16]A-S Chassany, 'Friedrich Merz's €1tn Spending Plan Wins Final Approval from Germany's Upper House', Financial Times, 21 March 2025 <https://www.ft.com/content/bf9dde37-2dc8-44df-b5f5-ef5dece888f6> accessed 18 April 2025. See also the notice in the webpage of the Bundesrat, available at <https://www.bundesrat.de/DE/plenum/bundesrat-kompakt/25/1052/1052-node.html> accessed 18 April 2025.

[17]'Gesetz zur Änderung des Grundgesetzes (Artikel 109, 115 und 143h)' <https://www.recht.bund.de/eli/bund/bgbl-1/2025/94> accessed 18 April 2025.

https://doi.org/10.1017/elo.2025.18 Published online by Cambridge University Press

the formidable pressure exerted in a pincer movement by the ECB and the German government led by Merkel (I come back briefly to that episode below).

These transformations, not by chance, occurred at the very same time that the European Commission concretised its proposals to facilitate massive rearmament of the Member States of the European Union. Ursula von der Leyen, now President of the European Commission, but in a previous life German Defence Minister, made a number of proposals to that end,[18] later followed by a 'White Paper on Defence.'[19] The Commission advocated not only joint expenditure to the tenor of 150bn euros[20] but, above all, the coordinated activation of the national escape clauses of the Stability and Growth Pact (ex Article 26 of Regulation 1263/2024), so that Member States could increase their expenditure on defence and security by (for the time being) 1.5 per cent GDP *every year*.[21] That was necessary because existing European fiscal rules (largely drafted according to the preferences of previous German governments) would pre-empt states from basically any new military and defence expenditure. In other words, Germany could not make use, unless the said fiscal rules were suspended, of the 'fiscal space' that was about be created through the 'new' German debt brake. In that regard, it is relevant to notice that Von der Leyen's press conference took place when the CDU/CSU-SPD negotiations were well-advanced, and indeed just a few hours before the 'pre-agreement' on reforming the Fundamental Law was announced. It is possible, but difficult, not to reach the conclusion that there was intense coordination between the cabinets of Von der Leyen, Merz and Scholz.

In an editorial (perhaps even more than one) forthcoming in the next volume, we will discuss the implications of these German-led transformations for the European Union and for its Member States on what concerns the defence and security and foreign affairs policies of the Union. Instead, in this editorial I will focus on what may seem, in comparison, two minor questions, but which are in my view far from negligible. The first concerns the procedure which has been followed to amend the German Fundamental Law, in particular, the fact that the change has been approved by the 'old' Parliament, the 20th Bundestag, and not by the 'new' Parliament, the 21st Bundestag, elected on 23 February 2025. The second question revolves around the extent to which this reform undoes a constitutional arrangement which became the symbol of the 'Germanisation' of the European Union,[22] and specifically, of the Eurozone, during the years of the fiscal crisis. I will remind the reader in the third section that the debt break came to be regarded as the template of any 'sensible' European economic constitution via the Fiscal Compact. As such it was imposed on the periphery of the Eurozone as part of the

[18]See 'Press Statement by President von der Leyen on the Defence Package' (4 March 2025) <https://ec.europa.eu/commission/presscorner/detail/sv/statement_25_673> accessed 18 April 2025; Letter of the President of the European Commission to the European Council (4 March 2025) <https://ec.europa.eu/commission/presscorner/api/files/attachment/880628/Letter%20by%20President%20von%20der%20Leyen%20on%20defence.pdf> accessed 18 April 2025.

[19]'White paper for European Defence-Readiness 2030' (19 March 2025) <https://www.eeas.europa.eu/eeas/white-paper-for-european-defence-readiness-2030_en> accessed 18 April 2025. This results from the guidelines agreed by the European Council, see 'European Council conclusions on European Defence' (6 March 2025) <https://www.consilium.europa.eu/en/press/press-releases/2025/03/06/european-council-conclusions-on-european-defence/> accessed 18 April 2025.

[20]See European Council Conclusions in the previous note.

[21]After the newly elected (again) President Trump expressed his desire that European states spent on defence 5 per cent GDP (L Fisher, H Foy and F Schwartz, 'Trump Wants 5% Nato Defence Spending Target, Europe Told', Financial Times, 20 December 2024 <https://www.ft.com/content/35f490c5-3abb-4ac9-8fa3-65e804dd158f> accessed 18 April 2025), numerous announcements regarding increased expenditures on defence and security have been made. A coordinated 'plan' within NATO was leaked to *Financial Times*, see H Foy and B Hall, 'European Military Powers Work on 5–10 Year Plan to Replace US in Nato', Financial Times, 20 March 2025 <https://www.ft.com/content/939b695c-7df8-412d-a430-df988c98f2ca> accessed 18 April 2025.

[22]That is quite obviously a play with words with the concept of 'Europeanisation' as coined by JP Olsen, see his 'The Many Faces of Europeanisation' 40 (2002) Journal of Common Market Studies 921. In addition, it would be worth exploring how much could be learnt applying it systematically to the dynamics unleashed in the Eurozone periphery from 2009 to the present.

https://doi.org/10.1017/elo.2025.18 Published online by Cambridge University Press

structural reforms *de facto* required (and rather coercively implemented through a range of instruments, including the (in)famous Memoranda of Understanding) to enjoy the goodwill of European institutions, including the ECB. Its unilateral and sudden recalibration seems to contain an implicit repudiation of the policies of the last 15 years, perhaps following the cue of the first epigraph to this editorial. Keynes was certainly right when he famously claimed that it was wise to change one's mind when the facts changed. Still, that is far from incompatible from reflection on whether the changes are really as deep as they seem, and also on what such changes tell us about the past and future of the European economic constitution. Before that, however, the first section summarises how Germany moved from the commitment to the debt brake in 2009 to its asymmetric loosening in the *blitz* amendment of March 2025.

1. The gathering clouds around the 'debt brake' leading to its reform in a blitz

As is well known, the *Schuldenbremse* was made part of the German Fundamental Law by virtue of a CDU/SPD supermajority in August 2009.[23]

The gist of the institutional mechanism is contained in the first line of Article 115 (2) of the German Fundamental Law:

> Revenues and expenditures shall in principle be balanced without revenue from credits. This principle shall be satisfied when revenue obtained by the borrowing of funds does not exceed 0.35 per cent in relation to the nominal gross domestic product.

The mechanics of the brake, as well as two exceptions ('natural catastrophes' and 'unusual emergency situations beyond governmental control' which must also be 'substantially harmful to the state's financial capacity'), are enumerated in the second sentence of Article 115(2).[24]

It may not be exaggerated to say that the debt brake instantly became part of the material constitutional identity of the German state in the Merkel years, and it was actively 'exported' to other European states (more on that in the third section of this editorial).

Its economic effects were however complicated. Its supporters like to insist that the stock of German debt has, in proportion to GDP, declined since the debt brake was enshrined in the Fundamental Law (from its all-time high of 82 per cent in 2010 to 62.9 per cent in 2023, the last year for which we have complete data).[25] However, in order to ascertain its actual effects it is not enough to quote macroeconomic figures. Namely, it is necessary to determine *which policies would have been implemented had the debt brake not been introduced, and what levels of debt would have*

[23]The Bundestag approved the amendment on 29 May 2009, the Bundesrat on 12 June 2009. The law amending the Fundamental Law came into force on 1 August 2009. However, the provision did not enter fully into force until 2016 (on what regarded the Federal Government) and 2020 (regarding the federal states). As is known, it was 'suspended' in that same year due to the massive effects of the corona syndemics. It was reactivated in 2023.

[24]'In addition, when economic developments deviate from normal conditions, effects on the budget in periods of upswing and downswing must be taken into account symmetrically. Deviations of actual borrowing from the credit limits specified under the first to third sentences are to be recorded on a control account; debits exceeding the threshold of 1.5 per cent in relation to the nominal gross domestic product are to be reduced in accordance with the economic cycle. The regulation of details, especially the adjustment of revenue and expenditures with regard to financial transactions and the procedure for the calculation of the yearly limit on net borrowing, taking into account the economic cycle on the basis of a procedure for adjusting the cycle together with the control and balancing of deviations of actual borrowing from the credit limit, requires a federal law. In cases of natural catastrophes or unusual emergency situations beyond governmental control and substantially harmful to the state's financial capacity, these credit limits may be exceeded on the basis of a decision taken by a majority of the Members of the Bundestag. The decision must be combined with an amortisation plan. Repayment of the credits borrowed under the sixth sentence must be accomplished within an appropriate period of time'

[25]The figures are taken from Eurostat.

https://doi.org/10.1017/elo.2025.18 Published online by Cambridge University Press

ensued.[26] On such a basis, it would be necessary to consider whether the decline in the levels of public debt can be attributed to the disciplinary power of the brake, or simply to favourable macroeconomic circumstances. But independently of how we may answer those questions, there seems to be a consensus on the conclusion that the debt brake has resulted in *chronic public underinvestment in Germany.*[27] The expenditure that has actually been pre-empted represents a good deal of the funds it would have been wise to invest. In other terms, Germany has invested much less than what its capacities rendered possible and much less than what was required to reproduce the fabric of society.

These very negative side effects of the debt brake were not only predictable, but they were registered very early on. This goes some way to account for the fact that the rhetoric (the sacrosanct character of the debt brake) did not go hand in hand with actual practice, at least not all of the time. Or what is the same: the formal rigidity of the brake created incentives to find ways of circumventing it in actual practice (so as to minimise its growingly visible negative consequences). This was done by 'additional budgetary laws' which created 'off brake' instruments through which, de facto, the rigour of the provision was mitigated.

One way[28] of constructing the ruling of the GFCC of 15 November 2023, on the 'off brake' Climate Transformation Fund[29] was that such dual practice was not tolerable. The ruling did not necessarily entail, however, that the German Parliament had to become *more austere*, but could be interpreted as signalling that it was high time to reconsider the debt brake and its underlying vision of public finance, and of public debt in particular.[30] Instead, the German Minister of Finance, Christian Wolfgang Lindner, a very vocal representative of the tiny but decisive Liberal minority (FPD) in the 'traffic light' ruling coalition, won the political day with his proposal to double down on the brake, whatever the costs, therefore aggravating the public investment deficit.[31]

While the *European life* of the brake is the subject of the next section, it is necessary to anticipate here that the fact that the German political class wasted the occasion to reconsider the brake in 2023 ended up having major consequences not only at the German level (quite obviously,

[26]A point made clear by LP Feld and WH Reuter, 'The German "Debt Brake": Success Factors and Challenges' Freiburg Discussion Papers on Constitutional Economics 21/10, Walter Eucken Institute, 2021 <https://www.econstor.eu/bitstream/10419/235568/1/1761613642.pdf> accessed 18 April 2025.

[27]Ibid.; see also A Heise, 'Austerity and the Political Economy of the German Debt Brake', Discussion Paper, Zentrum für ökonomische und Soziologischen Studien, Universität Hamburg, June 2024 <https://www.econstor.eu/bitstream/10419/300690/1/1897333137.pdf> accessed 18 April 2025.

[28]It may be said that my interpretation is overgenerous towards the GFCC, and that the grounds on which the sentence was based were actually adding to the 'fiscal conservatism' at the basis of the debt brake as enshrined in the Fundamental Law at that time. I tend to agree with that, but it is also the case that by deciding that way, the GFCC was basically reminding the German electorate (and the European electorates) of the implications that the decisions taken in 2009 had. Given that by then it was abundantly clear that the debt brake had resulted in chronic public underinvestment, it should have been taken as the perfect occasion to open up a serious debate leading to a radical reform of the constitutional principles governing budgetary law. A full-blown critique of the judgement from the standpoint of planetary limits and international solidarity can be found at J-A Banyurwahe, 'How the Judgment by the German Federal Constitutional Court on the German Debt Brake Entrenches Climate Injustice' (*Verfassungsblog*, 14 October 2024) <https://verfassungsblog.de/how-the-judgment-by-the-german-federal-constitutional-court-on-the-german-debt-brake-entrenches-climate-injustice/> accessed 18 April 2025.

[29]BVerfG, Judgment of the Second Senate of 15 November 2023 – 2 BvF 1/22 -, ECLI:DE:BVerfG:2023:fs20231115.2bvf000122 <https://www.bverfg.de/e/fs20231115_2bvf000122en> accessed 18 April 2025.

[30]Even the institution embodying fiscal rectitude in Germany, the Bundesbank, had put forward some months before its views about how to recalibrate the brake in view of the many structural challenges that Germany was facing. Bundesbank, 'Central Government's Debt Brake: Options for Stability' <https://www.bundesbank.de/resource/blob/889930/1f3eff4b54f88b338aabeabfe879f118/mL/2022%E2%80%9304-schuldenbremse-data.pdf> accessed 18 April 2025.

[31]Lindner had no other option but to secure the basis for the 'off brake' expenditure put in question by the GFCC, while he doubled down on the need of standing fast to the debt break. G Chazan, 'Germany to Suspend Borrowing Limits for Fourth Year after Debt Brake Ruling', Financial Times, 23 November 2023 <https://www.ft.com/content/c0d9c754-a9c0-415c-bdaf-03af3bf191aa> accessed 18 April 2025.

https://doi.org/10.1017/elo.2025.18 Published online by Cambridge University Press

if changed then, it would not have been necessary to do it at the very last minute of the operative life of the 20th Bundestag)[32] but also at the European level. Indeed, the GFCC ruling came just at the time that negotiations on the reform of the Stability and Growth Pact were entering its most decisive phase.[33] As is well known, most Member States favoured a (moderate) change of paradigm from the extremely rigid text resulting from the 2011 reform at the height of the European fiscal crisis.[34] Many voices were also raised in academia arguing that the European fiscal rules should be rewritten so as to render possible to run higher deficits when those were necessary to undertake public investments (pre-empted by the hegemony of the economic views that underpinned the very idea of the debt brake). Or, what is the same, it was claimed that the so-called 'golden rule' of expenditure should be the cornerstone of a new Pact.[35] In his capacity as member of ECOFIN, Lindner frontally opposed any effective transformation of the European fiscal rules. Instead, he insisted on preserving the obligation of Member States to stick to debt reduction 'trajectories' when exceeding the Maastricht famous 60 per cent (debt) ceiling.[36] Lindner imposed his view both on his German coalition partners and on the other Member States of the Eurozone.[37] As a result, the 'new' Stability and Growth Pact resembled the 'old' one to a very large extent. With the benefit of hindsight, we can now say it was born dead from the presses in April 2024.[38]

2. A very lame duck Parliament amends the Fundamental Law in haste

I have already pointed in the introduction, and further clarified in the first section, that the blitz amendment of the Fundamental Law constitutes a major break with the Merkel/Schäuble years in German politics (by not so sudden as to be the regarded as a thunderbolt in a serene sky). By the same token, we should approach with some degree of healthy scepticism the claim that the ultimate triggering factor of the reform was exogenous to German politics and economics.

[32]The German Fundamental Law is not rigid in the same way as the Italian or the Spanish Constitutions are. This has resulted in more than 50 reforms since 1949. Given that that the political forces that finally supported the amendment had a solid supermajority during the life of the 20th Bundestag, they could have easily passed the reform well before the end of the Parliament term.

[33]It is telling, however, that in European circles it was not expected that Lindner's hand will be drastically weakened. See 'German Government's Court Setback Unlikely to Impact EU Fiscal Rule Reform', Euractiv, 17 November 2023 <https://www.euractiv.com/section/economy-jobs/news/german-court-setback-unlikely-to-impact-eu-fiscal-rule-reform-sources-say/> accessed 18 April 2025.

[34]See for example the coverage of the Financial Times of the attempts of the Spanish rotating presidency of the Council to mediate between the different national positions. Cf. H Foy, 'The Holy Quest to Agree on the EU's New Fiscal Rules' Financial Times, 18 September 2023 <https://www.ft.com/content/338682f5-9b38-469b-9fff-ccc966f8f021> accessed 18 April 2025.

[35]D Guarascio and F Zezza, 'Un'analisi critica della proposta di riforma delle regole fiscali europee', Menabó 184/2022 <https://eticaeconomia.it/unanalisi-critica-della-proposta-di-riforma-delle-regole-fiscali-europee/> accessed 18 April 2025; A Guazzarotti, 'La riforma delle regole fiscali in Europa: nessun "Hamiltonian moment"' 1 (2023) Rivista dell'Associazione Italiana dei Costituzionalisti <https://www.rivistaaic.it/it/rivista/ultimi-contributi-pubblicati/andrea-guazzarotti/la-riforma-delle-regole-fiscali-in-europa-nessun-hamiltonian-moment> accessed 18 April 2025.

[36]As now reflected in Article 7 of Regulation 2024/1263; see Regulation (EU) 2024/1263 of the European Parliament and of the Council of 29 April 2024 on the effective coordination of economic policies and on multilateral budgetary surveillance and repealing Council Regulation (EC) No 1466/97, OJ L, 2024/1263, of 30.4.2024, ELI: <http://data.europa.eu/eli/reg/2024/1263/oj> accessed 18 April 2025.

[37]Lindner made rather minimalistic negotiation concessions, in the form of accepting that states could enjoy longer adjustment periods if they introduced 'structural reforms' in line with the supranational recommendations. That negotiation strategy is considered in S Płóciennik, 'Germany Is Making Concessions over the Reform of the EU's Fiscal Rules' <https://www.osw.waw.pl/en/publikacje/analyses/2024-01-05/germany-making-concessions-over-reform-eus-fiscal-rules> accessed 18 April 2025.

[38]F Saraceno, 'Patto di stabilità e crescita: la riforma da riformare' (2024) December Aggiornamenti Sociali <https://www.aggiornamentisociali.it/articoli/patto-di-stabilita-e-crescita-la-riforma-da-riformare/> accessed 18 April 2025.

https://doi.org/10.1017/elo.2025.18 Published online by Cambridge University Press

According to journalistic folklore, the by now very famous discussion in the White House between President Trump, Vice-President Vance and President Zelensky[39] provoked in German politicians, and very especially on Merz, the same effect as the proverbial fall from the horse on the way to Damascus. An instantaneous consensus, led by Merz, would have emerged among mainstream German politicians on the significance of the episode. In particular, it came to be believed that the US military guarantee, enshrined in Article 5 of the NATO Treaty, had vanished into thin air. Therefore, Europe (and in particular, Germany) had to rearm itself.[40]

This interpretation seemed on its surface to have been confirmed by the haste with which, as already mentioned, the President of the Commission announced "Rearm Europe" on the fateful March 4th.[41] But we should keep in mind that Von der Leyen had already flagged in several occasions that it was necessary to suspend the Stability and Growth Pact to create the fiscal space necessary for Member States to spend more on defence and security.[42] What she did on March 4th was merely to indicate how that could be done, in legal and in economic terms.[43] Indeed, the assessment made by Trump of European dependency on the United States when it came to security was well known since the 2016 electoral campaign. And, at least theoretically, the Commission had said to be working on making the EU 'Trump-safe' since the summer of 2024. So, it is clear that European politicians were, so to say, seizing the moment and the momentum when interpreting the White House spectacle as a 'moment of truth.' This was especially convenient for Merz, not only on account of the inconsistency of his campaign statements with the new line of action he was taking, but also due to the fact that a part of his electorate was not exactly insensitive to Trump's charisma, independently of whether they were actually informed about his substantive political views.

Moreover, it suffices to read the memoranda produced by the CDU/CSU/SPD, on the one hand, and the Greens, on the other hand,[44] to justify their proposals of amendments to the German Fundamental Law, to realise that the structural crisis of the German economy has played a major role in persuading the German political elites that the state had to spend big time.[45] As several sources of the newspapers in the know put it, when you cannot any longer sell diesel cars,

[39]The full video of the meeting can be found in the C-Span YouTube channel: 'Full Meeting between President Trump, VP Vance and Ukrainian President Zelensky in Oval Office' <https://www.youtube.com/watch?v=7pxbGjvcdyY> accessed 18 April 2025.

[40]A-S Chassany, L Pitel and O Storbeck, 'Can Germany Spend Its Way Out of Industrial Decline?', Financial Times, 8 March 2025 <https://www.ft.com/content/006db78c-a6cc-424e-bc67-d2a43a681a74> accessed 18 April 2025.

[41]See above n 18.

[42]'Von der Leyen: 'Suspend Budget Rules for Defence Spending', EU News, 14 February 2025 <https://www.eunews.it/en/2025/02/14/von-der-leyen-suspend-budget-rules-for-defence-spending/> accessed 18 April 2025.

[43]This statement tells us two things. First, that the Commission had reached the conclusion that Art 25 of Regulation 1263/2024, where the so-called "collective escape clause" is defined and regulated, could not be activated because no matter how important the security threats, the European Union was not suffering an economic recession. Second, that the narrowness of Art 25 left no other option than to be active in a coordinated manner 27 (perhaps less, more in a second) national escape clauses, following the procedure established in Art 26. This is at the very least a very odd procedure to follow, because the national escape clause was clearly intended to be applied when one or several Member States suffered an asymmetric shock, a shock which was not experienced by the EU as a whole. Given that the conflict in Ukraine had been raging for 10 years when the Regulation 1262/2024 was agreed, this speaks volumes about the legal, economic and political quality of the text as agreed. And makes the choice of Von der Leyen to say the least problematic, if only because this interpretation of Art 26 is a way of circumventing the literal tenor of Art 25 of the Regulation. In comparison with other legal pirouettes of the legal services of the European Commission, this is however a rather modest one.

[44]'Gesetzentwurf der Fraktionen der SPD und CDU/CSU: Entwurf eines Gesetzes zur Änderung des Grundgesetzes (Artikel 109, 115 und 143h)', above, n 12; 'Gesetzentwurf der Fraktion BÜNDNIS 90/DIE GRÜNEN: Entwurf eines Gesetzes zur Änderung des Grundgesetzes (Artikel 109 und 115)', Deutscher Bundestag, Drucksache 20/15098, 10 March 2025 <https://dserver.bundestag.de/btd/20/150/2015098.pdf> accessed 18 April 2025.

[45]See reference below n 75.

https://doi.org/10.1017/elo.2025.18 Published online by Cambridge University Press

you may be tempted to start producing diesel tanks.[46] Under such circumstances, focusing public discussion on Trump's performance (and the Russian security and military menace) had a clear advantage. Quite obviously, the looming war narrative seemed to justify the extreme urgency of amending the Fundamental Law.

I have not yet explained, however, why it was so important not only to seize the moment, but to change the Fundamental Law in a blitz. After all, the plan is to engage into a long-term military build-up, something that will take years. Why then the haste to amend the Fundamental Law? It is hard to avoid the conclusion that the answer lies with the dwindling consensus elicited by the CDU/CSU and the SPD in the 2025 February elections. While these parties, together with the Greens, had the 'supermajority' needed to reform the Fundamental Law in the 20th Bundestag (the 'old' parliament), they will not have it in the 21st Bundestag. In other words, the CDU/CSU and the SPD had to act not just fast, but immediately. Otherwise, the key to any amendment would be in the hands of either AfD or with Die Linke, without whom it would be impossible to get to a 2/3 super-majority in the Bundestag. An agreement involving any of those two parties would result in a very different amendment, and even more decisively, in a very different policy implementation.

So, from March 4th, the project was to reconvene for the very last time the 'old' Bundestag, so that it could render its very last service. The term of that Parliament was certainly not fully over. But in political, not necessarily in legal terms, the operation was as close as it is possible to a resurrection. The 20th Bundestag was indeed a very lame duck Parliament, as a new relation of forces had been decided by German voters on the elections of 23 February. Indeed, the convening of the old Parliament when the new Parliament could already have been convened was not only truly exceptional, but was bound to result in litigation before the German Federal Constitutional Court, given the lengths at which the constitutional magistrates had gone to stress that the democratic principle and political rights should be given substantive, and not only, formal protection.[47] Former and future members of Parliament representing AfD and Die Linke (later joined by the FDP) brought several actions before the judges sitting in Karlsruhe. They raised two main sets of reasons why the magistrates should prevent the 'old' Bundestag from meeting and approving a change to the Fundamental Law. Quite predictably, the GFCC either found their arguments unfounded or considered that the substance of the issues should be decided at a later stage, and that for the time being the 'old' Parliament could proceed with its deliberations and vote.

The first complaint revolved around the competence of the 'old' Bundestag. There is wide agreement that Article 39 of the Fundamental Law[48] aims at pre-empting any kind of 'gap' between Bundestage. And indeed Article 39(1) affirms very explicitly that the term of every parliament ends only when the term of a new parliament begins. The controversy revolves around the interpretation to be given to Article 39(2), in which it is said that a newly elected Bundestag has to be convened 'no later than the thirtieth day after the elections'. What happens before the results are officially proclaimed is clear, what happens after the 30-day period has elapsed is also evident. The object of contention is what happens in the (necessarily few days) between the official proclamation of the results, a moment from which the 'new' Bundestag could convene, and in the period of 30 days after the election, when the 'old' Bundestag ceases to be operative to all purposes. To put it differently, does Article 39(2) set a 'maximum' limit, leaving the President of the 'old' Bundestag free to decide *which* Bundestag to convene in this interregnum, or is Article 39(2) to be

[46]Ibid., and A Kazmin, 'German Defence Splurge Could Revive Italy's Manufacturers, Says Minister', Financial Times, 23 March 2025 <https://www.ft.com/content/12dbf839-1889-4810-89ba-44a30b38a14d> accessed 18 April 2025.

[47]See for example BVerfG, Judgment of the Second Senate of 21 June 2016 – 2 BvR 2728/13 -, ECLI:DE:BVerfG:2016:rs20160621.2bvr272813 <https://www.bverfg.de/e/rs20160621_2bvr272813en> accessed 18 April 2025, para 81.

[48]It is perhaps not irrelevant that the present tenor of the Art results from a reform, agreed in 1976, and explicitly aimed at avoiding any 'gaps' in the functioning of Parliament.

https://doi.org/10.1017/elo.2025.18 Published online by Cambridge University Press

interpreted as requiring the speaker to convene the 'new' Bundestag once that is legally possible, and at latest, within the 30-day period?

This question was at the heart of three cases before the GFCC.[49] In the decisive one, several AfD parliamentarians argued that it was contrary to the Fundamental Law to convene the 'old' Bundestag when it was possible to convene the 'new' Bundestag. That infringed their rights as representatives of the people, and as a result, the rights of the German people to participate in the formation of the collective will.[50] The GFCC regarded this line of reasoning manifestly unfounded. The judges sitting in Karlsruhe claimed that the 'new' Bundestag could always convene out of its prerogative of self-assembly. That prerogative seems to fall under the general rule of parliament decision-making, enshrined in Article 42(2) of the Fundamental Law, the majority (50 per cent) rule. That by itself would put an end to the term of the 'old' Parliament.[51] However, that will was lacking in this case, as AdF, and Die Linke did not have that majority.[52] Under such circumstances, the president of the 'old' Bundestag could convene the 'old' Bundestag, and that would not infringe upon the rights of the members of the 'new' Bundestag.[53]

The second reason concerns the substantive dimension of the democratic principle and of the political rights of citizens. The question revolves no longer around the *formal* democratic legitimacy of the 'old' Bundestag, but around the actual capacity of the individual parliamentarians and of the Parliament as an institution to discharge their functions in a meaningful way. This is so for two reasons. One is that the 'old' Parliament is already in the process of being wound up. MPs which have not been re-elected lack the material and personal means to do their job: they have no, or very limited assistance and they are likely not to have an office any longer. The other is that a hastened process of constitutional reform renders it extremely difficult for all parliamentarians to think through the proposals, and it is likely that the research services of the Bundestag could not be of help either. That, it could be added, renders extremely problematic institutional debates reverberating in the wider general publics, and the latter feeding back on the positions of parties, as any robust understanding of the democratic principle would require.[54] This was indeed the line of reasoning underpinning the claim made by a member of the 20th Bundestag, who did not stand for re-election, in the case she brought before the GFCC.[55] On such a basis, she asked the constitutional judges to suspend the sessions of the 'old' Bundestag. The judges sitting in Karlsruhe did not prejudge the substantive question raised by the MP, but did not oblige her request for interim measures (which would have pre-empted the reform of the Fundamental Law). The constitutional magistrates considered that their decision was a matter of choosing which risk to run, either that of pre-empting the prerogative of the Bundestag to amend

[49]Federal Constitutional Court, Decision of the Second Senate of 13 March 2025 – 2 BvE 3/25 -, Alt Bundestag I, ECLI:DE:BVerfG:2025:es20250313.2bve000325 <https://www.bverfg.de/e/es20250313_2bve000325> accessed 18 April 2025; Federal Constitutional Court, Decision of the Second Senate of 13 March 2025 – 2 BvE 2/25 -, *Alt Bundestag II*, ECLI:DE:BVerfG:2025:es20250313.2bve000225 <https://www.bverfg.de/e/es20250313_2bve000225> accessed 18 April 2025.

[50]Paras 7–9 of *Alt Bundestag I*.

[51]Ibid.

[52]Para 15 of *Alt Bundestag I*. It could be argued, as the representatives of BSW seem to have done, that the constitution of the Bundestag is to governed by the same rule that applies to the calling of a meeting when the Bundestag is already constituted (the 1/3 required in Art 39(3) of the Fundamental Law. If that were the case, Die Linke and AdF could have motioned to convey the new Parliament, pre-empting the reform. However, that seems to go against an interpretation that takes seriously the literal tenor of Art 39. I am indebted to Matthias Goldmann for clarifying this point to me.

[53]Ibid.

[54]This 'discoursive' understanding of democracy is at the basis of the analysis, for example, of EO Eriksen and JE Fossum, 'Democracy through Strong Publics in the European Union?' 40 (2002) Journal of Common Market Studies 401.

[55]See Federal Constitutional Court, Decision of the Second Senate of 13 March 2025 – 2 BvE 4/25 -, *Alt Bundestag IV*, ECLI:DE:BVerfG:2025:es20250313.2bve000425 <https://www.bverfg.de/e/es20250313_2bve000425> accessed 18 April 2025.

https://doi.org/10.1017/elo.2025.18 Published online by Cambridge University Press

the supreme law of the land,[56] or that of infringing the rights of parliamentarians to a meaningful exercise of their political rights.[57] Under such conditions, it was preferrable to run the latter risk:

> 'Ultimately, the weighing of consequences concludes that the reasons for issuing an interim injunction do not outweigh the advantages. Both the issuing and non-issuing of an interim injunction would violate the rights of members of parliament. In both cases, it must be considered that these violations would be irreversible. An interference with the procedural autonomy of the Bundestag would be particularly serious in this case, because there is a real risk that the adoption of the proposed bill would become permanently impossible due to the principle of discontinuity'.[58]

In plain English, 'the reform can go on, but we will come back to the question you are posing to us.' It should be added, however, that even if it remains formally possible that the GFCC would at the end of the day accept the arguments of the plaintiff, this is extremely unlikely. Deciding in such a way would not only imply questioning the basis on which hundreds of billions of euros would have been borrowed and spent, but it could seriously damage the credit reputation of the German state. This would raise, implicitly, the questions which support the case for the so-called political question doctrine.[59] This is revealing of the nature of the rulings rendered on March 13th, in what could be said comes closer to an undeclared state of exception in German politics.[60] A very problematic development in itself, and even more so given that it is far from obvious that the objective grounds for regarding the present situation as exceptional are met.[61] Whether the prestige of the GFCC as a bold guardian of the inner normativity of the law as the form of democratic power will escape unscathed from these decisions is to be seen. Certainly, some of the perplexities that emerge from reading the rulings of the Court of Justice of the European Union during the Eurozone crisis will also emerge reading the *Alt Bundestag* rulings of the GFCC.

3. Do not do as I preach, but as I do: the European (constitutional) implications of the German 'second thoughts' on the debt brake (and therefore on austerity)?

In the previous section, I have raised doubts concerning the *soundness of the procedure* through which the German Fundamental Law has been amended, so as to redefine the debt brake. It seems to me it is important to consider also the economic and legal substance of the reform, and to do so, first and foremost, from a European perspective, and not only from a German one.

[56]Para 9: 'If an interim injunction were issued and the applications were to be unsuccessful in the main proceedings, this would constitute a significant encroachment upon the autonomy of Parliament and thus upon the primary jurisdiction of another supreme constitutional body'.

[57]Para 10: 'If an interim injunction were not granted and the applications were successful in the main proceedings, this would result in an irreversible, substantial violation of the applicant's asserted right to equal participation in parliamentary decision-making. The applicant would be irretrievably deprived of the opportunity to exercise her constitutionally guaranteed rights to participate in the deliberations and decision-making process. Furthermore, even taking into account the possibilities provided for in the Bundestag's Rules of Procedure to influence the design of the proceedings, the right of other members of parliament to informed consultation could be violated'.

[58]Para 11.

[59]See the dissenting opinion of Judge Lubbe Wolff in *Gauweiler*, BVerfG, Order of the Second Senate of 14 January 2014 – 2 BvR 2728/13 -, ECLI:DE:BVerfG:2014:rs20140114.2bvr272813 <https://www.bverfg.de/e/rs20140114_2bvr272813en> accessed 18 April 2025.

[60]In the same sense as suggested by AG Cruz Villalon in his conclusions in C-62/14, *Gauweiler*, 14 January 2015, ECLI:EU:C:2015:7, para 3.

[61]Perhaps it would be pertinent to speak of the German political elites coming close to a state of panic, given the extent to which the long-term consequences of the key policy commitments making up the identity of Germany since 1989, aggravated by the dismal government of the Eurozone fiscal crisis, had started to affect Germany itself, and not only the Eurozone periphery.

https://doi.org/10.1017/elo.2025.18 Published online by Cambridge University Press

In the previous section I anticipated that the debt brake became almost instantaneously part of the material constitutional identity of Germany during the Merkel years. Timing was of essence. The reform was ultimately (but not exclusively) triggered by the 2008 financial crisis; in particular, by the huge cost to the German taxpayer of bailing out the big German banks in the aftermath of the Lehmann Brothers' debacle.[62] When the Eurozone fiscal troubles became a full-blown crisis in the spring of 2010, the German chancellor came to regard the debt brake as its ultimate constitutional export.[63] In economic terms, 'austerity' policies were instrumental in protecting the interest of big German banks.[64] It was noticed at the time, but barely registered in public discussion, that most financial assistance to states experiencing major fiscal problems merely transited through their Treasuries, and ended up in the hands of financial institutions of the Eurozone core, not least Germany.[65] Such 'assistance' came hand in hand with the request of implementing 'structural reforms', which aimed at nothing less than the restructuring of periphery economies.[66] Having lost the adjustment variable of the exchange rate, external competitiveness was to be regained through internal devaluations, in which wages (that is labour, that is workers) were actually devalued.[67] In the mid run, it was expected, the structure of those economies would and should come to resemble that of Germany, with its neo-mercantilist reliance on constant surpluses as the engine of growth.

Such a vision was translated into legal norms. Most particularly in the so-called Six Pack and Two Pack sets of regulations and directives.[68] But the jewel of the crown was the Fiscal Compact.[69] Not by chance, Article 3 of said peculiar 'quasi-Treaty' required all Member States to write into their fundamental norms, preferably in their constitutions,[70] the European equivalent of the German debt brake. The famous letters addressed by Trichet and Draghi to Zapatero and Berlusconi[71] resulted in the Spanish and the Italian Constitutions being amended in line with the requirements of the Fiscal Compact (through the amendments to Articles 135 of the Spanish Constitution and 81 of the Italian Constitution). Slovenia followed somehow later (cf. Article 148 of the Slovenian constitution).

If we move back from the law to the political economy, so to say, it can be fairly said that 'Germanisation' resulted in macroeconomic developments very different from those experienced

[62]See Feld and Reuter, above, n 26.

[63]W Schäuble, 'Why Austerity Is Only Cure for the Eurozone' (Financial Times, 5 September 2011) <https://www.ft.com/content/97b826e2-d7ab-11e0-a06b-00144feabdc0> accessed 18 April 2025.

[64]A point Yanis Varoufakis made again and again. See for example T Hüetlin und A Neubacher, 'Austerity Has Done Nothing to Solve Greece's Problems', Der Spiegel, 16 February 2015 <https://www.spiegel.de/international/europe/interview-with-greek-finance-minister-giannis-varoufakis-a-1018443.html> accessed 18 April 2025.

[65]Cf. J Rocholl and A Stahmner, 'Where Did the Greek Bailout Money Go?', Working Paper 16-02 of the European School of Management and Technology, 2016 <https://www.astrid-online.it/static/upload/esmt/esmt_wp-16-02.pdf> accessed 18 April 2025.

[66]F Scharpf, 'Forced Structural Convergence in the Eurozone: Or a Differentiated European Monetary community', MPIfG Discussion Paper, No. 16/15, Max Planck Institute for the Study of Societies, 2016 <https://www.econstor.eu/bitstream/10419/150047/1/879422955.pdf> accessed 18 April 2025.

[67]A devastating critique in C Lavapitsas, *The Left Case Against the EU* (Polity 2019), especially pp 67–82, on the Eurozone crisis. See also K Armingeon and L Baccaro, 'Political Economy of the Sovereign Debt Crisis: The Limits of Internal Devaluation' 41 (2012) Industrial Law Journal 254.

[68]See A Menéndez, 'A European Union in Constitutional Mutation?' 20 (2014) European Law Journal 127.

[69]"Treaty on Stability, Coordination and Governance in the Economic and Monetary Union' <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A42012A0302%2801%29> accessed 18 April 2025.

[70]Art 3.2 of the Fiscal Compact reads: 'through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes'.

[71]The texts were pretty similar. The letter to Berlusconi can be read at <https://www.ecb.europa.eu/ecb/access_to_documents/document/pa_document/shared/data/ecb.dr.par2021_0001lettertoItalianPrimeMinister.en.pdf> accessed 18 April 2025. The letter to Zapatero was published by the latter in his memoir on the crisis years. See JL Rodríguez Zapatero, *El Dilema: 600 días de vértigo* (Planeta 2013) 169. Zapatero dwells in detail on the context of the letter, and of the reply given to it.

https://doi.org/10.1017/elo.2025.18 Published online by Cambridge University Press

in Germany in the same period.[72] In economies in free economic fall, the view that public debt was 'sinful' only aggravated the situation, with massive socio-economic implications. As the IMF acknowledged afterwards, the policies that the 'troika' enforced on Greece, Portugal and Ireland, and which through less coercive means were imposed on Italy and Spain, were premised on the wrong calculus of the economic effects of reducing public expenditure under such circumstances.[73] In technical terms, the IMF, the ECB and the Commission, altogether part of the popularly known as 'troika', got fiscal multipliers (terribly) wrong. The biggest impact, by all means, was suffered by Greece, which has yet to recover the GDP levels of 2010, and which has become the second poorest Member State of the Union, only doing better (in terms of that economic variable) than Bulgaria.[74] It is thus hard to conclude that the Merkel's and Schäuble's drive for austerity was an unqualified success.[75] Add to what has just been said that the attempt at remodelling the Eurozone into a bloc of economies relying on external competitiveness has indeed aggravated the extent to which the area is dependent on the goodwill of its trading partners, a good which seems increasingly scarce. Or to put it differently, the Eurozone of 2008, basically in balance with the rest of the world, was better equipped to confront the winds of protectionism blowing in the world economy than the Eurozone of 2025.

The export of the debt brake contributed significantly to the European mess, very especially in the periphery. Both in terms of the socio-economic vision underpinning it (public debt is sinful) and of the companion legal technology (paradigmatically reflected in the different laws implementing it). Constitutional and legal reforms on the hoof compromised the integrity of the constitutional orders, clearly leaving many scares on the rule of (constitutional) law. If that is so, are there no special obligations on the country which did most to inflict it onto others? In legal terms, the German Parliament is free to amend its Fundamental Law at will.[76] In moral and political terms, the least that the citizens of other states, especially of the Eurozone periphery, can expect is that they are provided with reasons why Germany is now doing things differently from what it preached they should be done. Or to put it differently, reasons concerning how they should interpret that Germany has changed its mind on the very constitutional norms that it insisted so much on exporting. Starting with why it insisted on a reform of the Stability and Growth Pact only last year to push now for its de facto suspension (albeit in asymmetric ways) *sine die*. Once a country uses its economic and financial muscle to transform the constitution of other states, and reorients the whole European economic system, can it simply change its mind

[72]Wolfgang Streeck and Fritz Scharpf offered lucid analyses of why monetary union should be regarded as an instance of overintegration. W Streeck, 'Why the Euro Divides Europe' 95 (2015) New Left Review 5; F Scharpf, 'Forced Structural Convergence in the Eurozone' in A Hassel and B Palier (eds), *Growth and Welfare in Advanced Capitalist Economies: How Have Growth Regimes Evolved?* (Oxford University Press 2020) 161. <https://doi.org/10.1093/oso/9780198866176.003.0005>. For a long-term analysis of the effects on the Italian economy, the pivotal country in that regard, see D Guarascio, P Heimberger and F Zezza, 'The Eurozone's Achilles Heel: Reassessing Italy's Long Decline in the Context of European Integration and Globalization' (2025) Italian Economic Journal <https://doi.org/10.1007/s40797-025-00323-8>.

[73]Cf. The IMF Report 'Greece: Ex Post Evaluation of Exceptional Access Under the 2010 Stand-By Arrangement', IMF Country Report No. 13/156, June 2013 <https://www.imf.org/external/pubs/ft/scr/2013/cr13156.pdf> accessed 18 April 2025. See also O Blanchard and D Leigh, 'Growth Forecast Errors and Fiscal Multipliers' 103 (3) (2013) American Economic Review 117.

[74]V Romey, 'Greece's Economic Rebound in (Painful) Context', FT Alphaville, 25 April 2024 <https://www.ft.com/content/ba7e18ea-eaf4-4104-bbe7-bb7f97d182e5> accessed 18 April 2025.

[75]One may speculate whether one the key factors leading to the change of heart of the German political elites regarding the debt brake is that the negative effects of the economic policies which have been applied since 2009 in the Eurozone have now also taken their toll on Germany. In that regard, it is important to highlight that while many Germans saw their income and wealth increase during the Merkel/Schäuble years, there were many losers also in Germany. Cf. for example P Polyak, 'The silent losers of Germany's export surpluses. How current account imbalances are exacerbated by the misrepresentation of their domestic costs' 22 (2024) Comparative European Politics 31–51.

[76]In all fairness, the European Commission, in its country specific recommendations, required once and again Germany to increase its levels of public investment, not least on infrastructure. The asymmetric character (in material, not formal terms) of such recommendations accounts for the fact that German governments largely ignored them.

https://doi.org/10.1017/elo.2025.18 Published online by Cambridge University Press

in a matter of days, this time again in a unilateral fashion? What if such rash decision is *wrong again*? And what about the implications this has for the EU as a whole? Very especially because, as I have insisted, the reform does not consist in a return to the pre-2009 German Fundamental Law, with its 'golden rule' on public expenditure, but rather a very asymmetric facilitation of, above all, military expenditure. One may doubt whether the economic constitution of Germany and the European Union are in the process not so much in a process of deep change, as of pursuing the same goals through different means.[77]

Three final questions may be raised.

The first regards the actual capacity of Germany to actually spend as freely as its new debt brake allows. We have seen that legally it is likely that the European constraints will be lifted. At the same time, macroeconomic calculations point to a considerable leeway to spend on the German side.[78] But what if the financial markets, in a context marked by turbulence and the weaponisation of monetary and financial instruments,[79] get cold feet on German bunds? After all, have not one entire generation of German politicians and scholars explained to the rest of Europe that their creditworthiness was the result of its capacity to be spendthrift, precisely what they have committed not to be in the coming decade or so-admittedly in a very selective way? The probability of such eventuality would be increased if the EU finally confiscates the frozen assets of the Russian central bank (in what, whatever the assessment one makes on the convenience of it, seems a lousy legal basis,[80] and therefore not exactly the kind of decision bound to attract foreign investors to euro assets, as argued once and again by the ECB, somehow on this matter less capable of persuading the minds of European leaders). But if that is so, even mighty Germany may need to be supported, one way or the other, by a non-conventional monetary programme of the ECB. This may indeed be a partial explanation of the rather puzzling 'supranational' pillar of what was originally labelled as Rearm Europe, and is now known as Readiness 2030. It could provide some semblance of a legal basis for a kind of 'military' QE.[81] But no matter what the legal gimmicks, that would amount in material terms to the irreversible transformation of the ECB in the unconditional lender of last resort of the Eurozone states, a move which would transmute the Eurozone, pushing it beyond any configuration compatible with the regulatory ideal of the 'stability union' underpinning German constitutional assent to the project since 1992.[82]

The second question concerns the effects that an asymmetric drive of public expenditure will have on the internal market. For all the gusto with which Von der Leyen has proposed Rearm Europe, what the Commission is basically arguing for is enabling Member States, acting

[77]In that regard, the derisking state is not so much a new phase in state evolution, but the radicalisation of a trend characteristic of the state in capitalism.

[78]O Storbeck, 'Germany Can Spend Almost €2tn Without Harming Growth, Economists Say', Financial Times, 10 March 2025 <https://www.ft.com/content/fd0cfe7e-3fc9-4218-9266-d19ad2954d4e> accessed 18 April 2025.

[79]The German government was very concerned with the potential impact on the perception of German 'credibility'. This was said quite explicitly by the German Minister of Finance. See 'German finance minister Jörg Kukies: "We're all affected"', Financial Times, 18 April 2025, available at <https://www.ft.com/content/6584e4ba-4a0d-47be-a956-5b7068786b36> accessed 18 April 2025. On the weaponisation of the world economy, see H Farrell and A Newman, *Underground Empire: How America Weaponised the World Economy* (Penguin 2023).

[80]N Moulder, 'The West Would Harm Itself with Rash Seizures of Frozen Russian Assets', Financial Times, 4 January 2024 <https://www.ft.com/content/2c917ef5-60bd-4825-89e4-8b88dc9080a8> accessed 18 April 2025.

[81]Relying on an extensive interpretation, perhaps, of the second line of Art 127 TFUE, where the 'secondary' mandate of the ESCB is defined: 'Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Art 3 of the Treaty on European Union'.

[82]Cf. The Maastricht ruling of the GFCC, especially para 148: 'This conception of the monetary union as a stability union is the basis and subject matter of the German act of approval. If the monetary union were unable to further develop the requisite stability for entry into stage three in line with the agreed remit for stability, it would depart from the conception laid down in the Treaties'. Cf. German Federal Constitutional Court, 2 BvR 2134/92, 2 BvR 2159/92 <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1993/10/rs19931012_2bvr213492en.html> accessed 18 April 2025.

https://doi.org/10.1017/elo.2025.18 Published online by Cambridge University Press

individually, to spend at will on defence and security. The 'supranational' component is not only small,[83] but it is unclear what its ultimate purpose is. But what kind of effect will this have on the so-called 'levelled playing field' without which the internal market is just an oxymoron?[84] Leaving aside the coherence of undertaking rearmament on a national basis if the threat is said to be common, can this be done without radically altering the terms of competition between industries located in different Member States? Especially when it is rather transparent that rearmament is intended as a *dual* policy, both about security and about reindustrialisation, as discussed above. But if that is so, then, does it make sense that the Commission encourages licensing Member States to spend at will? Should Germany be allowed to decide how much more competitive its industry is to be through expenditure earmarked as military? Does it make sense to keep on betting on competitiveness without reconsidering what its point and purpose are?[85]

Thirdly, forthcoming editorials will analyse the defence and security plans being concocted on the hoof at the time of writing. But I cannot resist taking leave to add that it is a question of time that a serious European debate takes place on both the pertinence of rearmament and on the ways in which it is being undertaken. It would be frivolous not to keep in mind European history.[86] The creation of a powerful German army is not a decision to be taken lightly and in a rush. The dangers involved in such a decision were not completely dissociated from the arguments put forward by Günther Grass against German reunification.[87] And not so long ago, Willy Brandt's last book piled argument after argument to justify his conclusion, namely that the arms race was organised lunacy.[88] The military-industrial-technological complex is indeed more dangerous than the old military-industrial one.[89]

A final and perhaps redundant caveat. None of what has been said should be constructed as a plea for maintaining the 'old' debt brake, or for that matter, to stick to the social, economic, political and cultural vision of Maastricht's Europe. It is high time we recognised that public debt is not a sinful device, but one tool which can and should be wielded, if only wisely. In a functioning democratic system, it cannot, however, be a replacement of a robust progressive tax system,

[83]Although small, however, there is one supranational component. In contrast with what is the case in some of the other initiatives put forward by the Von der Leyen II Commission. See for example the so-called Competitiveness Compass. The dedicated page is available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_25_339> accessed 18 April 2025. Many thanks to Francesco Costamagna for pointing this to me.

[84]Jeromin Zettelmeyer has recently argued similar risks result from opting for the development of European industrial policy on a national basis with national funds. See J Zettelmeyer, 'Draghi on a Shoestring: the European Commission's Competitiveness Compass', Bruegel, 3 February 2025 <https://www.bruegel.org/analysis/draghi-shoestring-european-commissions-competitiveness-compass> accessed 18 April 2025.

[85]On a very related point, see F Costamagna, 'The Long March of Competitiveness in the EU legal Order' 3 (2) (2024) European Law Open 221–5. <https://doi.org/10.1017/elo.2024.32>.

[86]Cf. M Mazower, *The Dark Continent: Europe's Twentieth Century* (Knopf 1999); A Tooze, *The Wages of Destruction: The Making and Breaking of the Nazi Economy* (Allen Lane 2006).

[87]G Grass, *Two States, One Nation?* (Secker and Warburg 1990). A similar point has been raised, admittedly in a different form, by Habermas. See J Habermas, 'Für Europa', Süddeutsche Zeitung (21 March 2025) <https://www.sueddeutsche.de/projekte/artikel/kultur/juergen-habermas-gastbeitrag-europa-e943825/?reduced=true> accessed 18 April 2025: 'What would become of a Europe in the centre of which the most populous and economically powerful state also became a military power far superior to all its neighbours, without being integrated by constitutional law into a common European foreign and defence policy subject to majority decisions?'

[88]W Brandt, *Arms and Hunger* (Pantheon Books 1986). The original German title was *Der Organisierte Wahnsinn*, published in 1985.

[89]On the old military-bureaucratic complex, see H Schiller (ed), *Readings in the Military-Industrial Complex* (University of Illinois Press 1970). On the emerging military-technological complex, see D Guarascio, 'Digital Technologies: Civilian vs. Military Trajectories' <https://ideas.repec.org/p/sap/wpaper/wp258.html> accessed 18 April 2025. It is hard not to reflect on the timing of the 'preparedness strategy' of the European Union, which on many accounts has a Cold War flavour to it. See <https://ec.europa.eu/commission/presscorner/detail/en/ip_25_856> accessed 18 April 2025. The bizarre video promoting the drive can be watched at <https://www.youtube.com/watch?v=A5rCEb16yTY> accessed 18 April 2025.

https://doi.org/10.1017/elo.2025.18 Published online by Cambridge University Press

legitimated by representative institutions. The permanent substitution of taxes by debt fosters financialisation, as well as weakens the democratic circuit of the legitimation of power.

Germany in particular, and the European Union as a whole, are facing massive challenges. The pending bills, cumulated during the *belle époque* in which hyper-globalisation and the holy trinity of economic freedoms, free competition and sound money were the only games in town, have become due. It is an understatement to conclude that the situation is extremely complex. But it is necessary to stress that the polar star should become again what it should always have been, the regulatory ideal of the Democratic, Social and Cooperative polity.

4. In this Issue

Gregoire reminds us that economic constitutionalism is the topos around which the different strands of neoliberalism overlap, with its growingly common emphasis on economic freedoms, free competition and sound money. His article offers us not only a painstakingly detailed reconstruction of the evolution of the economic constitution of the European Union, but also the key elements with which to understand how the growing fusion of neoliberalism and ordoliberalism into some form of 'neo-ordo-liberalism' (in which the often unduly neglected figure of Vanberg has played an important role) throw light on the consistency of contemporary capitalism in Europe and beyond. His fresco is painted with the whole range of greys, something which allows him to avoid the pitfalls of alluring but delusive conclusions. The European Union is not solely a neoliberal or ordoliberal project, but it has entered into a neo-ordo-liberal path, which is not irreversible, but which greatly constrains the range of possible policy choices. A conclusion which is not unrelated to the multiplication of emergencies and exceptions in the last years.

Dawson characterises what he calls Europe's coordination space. Policy coordination came back from the ashes of 'new modes of governance' that were fashionable in the late 1990s and 2000s not only in the NGEU and in the reform of the EU fiscal policy, but also in the unlikely area of the rule of law. Dawson zooms in on fiscal policy coordination to identify patterns in the 'messy' frameworks, past and present. He notes the continuities with new governance, but also the novel traits of the newer architectures of coordination and singles out the 'magnificent eight' features that characterise this way of governing in the EU. He explains also how it shifts away from core aspects of EU law. Thus, for example, the presumed equality of uniform application seems overcome by the bilateral relationships between the EU institutions and each Member State and the 'country-specific' character of the prescriptions that come out of coordination. Also, EU law is not a device of allocation of competences purportedly reigning in functional spillovers. It is merely a support of policy processes in the form of processes and economic indicators. Eventual breaches of hard law rules are then negotiated in bargaining processes where money, rather than rules, is the main leverage.

'What of antitrust after neoliberalism'? **Sauter** resurrects John Braithwaite's concept of responsive regulation in criminal law and uses it to elucidate the transformations of contemporary competition law in Europe. The current challenges of digital dominance, grotesquely unequal wealth distribution and climate change, he argues, are and should be met by a more interactive approach to enforcement which places a wider set of public interest obligations on undertakings.

Perhaps the most shocking aspect of **Gatti** and **Evolvi**'s discourse analysis of the European courts' caselaw on religious symbols is how unshocked the 'normal' reception of those judgements has been. The glaring differences in the framing of Islamic and Christian manifestations of faith are, moreover, not something to be remedied by a simple online module on 'unconscious bias': the authors claim the bias is very conscious indeed, and it serves to construct particular narratives legitimizing particular outcomes.

Are we all coders now? **Ovádek**, **Schroeder** and **Zglinski** make a plausible case against anxiety about an imminent takeover of legal scholarship by armies of quants. In a careful step-by-step

https://doi.org/10.1017/elo.2025.18 Published online by Cambridge University Press

research guide, they insist that legal expertise has a fundamental role to play in quantitative empirical work. So even if we become all coders now – we will still be better (legal) coders.

Orlando-Salling approaches the Digital Services Act from a core-periphery perspective. She shows that, beneath its global aspirations, and the image of a 'homogenous bloc' regulating online intermediaries, lie important social, cultural, political and legal disparities among Member States. She takes Malta as a case study to demonstrate that the particularities of countries in the periphery of integration, must be accounted for when assessing the success of the Digital Services Act and the possibility of the EU's citizens to enjoy digital rights. This is not just a matter of assessing the implementation of legislation. Asymmetries in representation of Member States in the processes leading up to the adoption of legislation exacerbate the problems then found on the ground. Universality of rights becomes largely fiction. She powerfully argues that critical approaches that account for 'disparities, liminalities and marginalisation' are particularly needed to face 'the hard questions of European integration.'

A fad is haunting Europe: the digital fad, which finds its paroxysm in the cultish approach to artificial intelligence. In the long run and with the benefit of hindsight it will be easy to determine what was mere hype, and what were relevant contributions of digital technology to human welfare, and what was the dark side of the emergence of the digital alongside the analogical. The symposium on data taxation, coordinated and brilliantly orchestrated by Angelo Golia, gives the ELO reader some elements to start separating the digital wheat from the digital chaff. **Golia** himself presents the symposium through a contribution that emphasises the need of focusing on how value is created, extracted and distributed in the digital economy. Following such an approach opens up new vistas, and in particular requires paying attention to (1) the impact of excessive datafication on contemporary societies; (2) the role of data in the contemporary economy; (3) the need and eventual design of data taxes; (4) the interaction of data tax with the other components of the legal system and regime, and with our theories and practices of social justice, not only at the national, but also at the regional and global levels. **Vipra** makes two cases in her paper. The first is that the data economy is characterised by accumulation through rent. The second is that we have to approach data rent by analogy with ground rent. That makes fascinatingly relevant the arguments of authors such as Thomas Paine, who did not only pen the instant bestsellers *Common Sense and The Rights of Man*, but the somehow neglected, but today fundamental, *Agrarian Justice*. **Parsons** reminds us that a meaningful discussion on data taxes has to start considering what is the purpose of the tax: is the point to reduce data collection and the harms of datafication going wrong? Or is it to increase the revenue at the disposal of the Exchequers? **Lamchek** engages with a fundamental aspect of Parsons's theme, namely, the role that data taxation can play in pre-empting rents resulting from the use of available data, especially rent on the scientific heritage (a major issue that we are already late confronting given the profits that are being extracted by AI platforms from the 'commons', not infrequently thanks to the fact that technology has weakened the actual bindingness of intellectual property rights). In its turn, **Pantazatou** makes a case for an EU digital levy, on the basis of the impracticability of a truly global tax, and of the increasingly explicit desire of European institutions to enlarge the sources of their 'own resources.' While the author was mainly thinking about EU Next Generation and potential similar endeavours, the question of how to pay European expenditures is bound to increase as the ambitions expressed by the Commission grow larger. Resort to debt is both economically and politically bound to reach its physiological limits sooner rather than later. The last but far from least piece authored by **Magalhães and Christians** considers the one-million-euro policy question when it comes to data taxation, namely, how to actually design and collect the tax when the United States (the home country of the biggest technological oligopolies, at the heart of datafication) disagrees. The contribution was already topical when it was being reviewed, but it has become a burning question as history has proved not only that it had not come to an end, but it has started to run desperately fast.

https://doi.org/10.1017/elo.2025.18 Published online by Cambridge University Press

Eklund engages with Kundnani's *Eurowhiteness*. The book has been promoted as an engagement with the many dark legacies of the crooked timber of European culture, which have for too long been ignored when it came to write the history of European integration. Eklund finds the book relevant. However, more than a granular engagement with the skeletons in the European cupboard, she finds it a critique of the regionalism promoted by the European Union, found to be a form of ethnic and/or cultural nationalism. This is done by means of singling out a specific set of actors (the pro-Europeans) and a yardstick of comparison (post-Brexit UK). Eklund finds the first element a construction too facile by half, which basically fails to consider pro-Europeans capable of being, at the same time, highly critical of the 'really existing' European Union. But it is the second element with which she engages especially, finding Kundnani fails to apply to the United Kingdom the test he makes the EU pass.

Acknowledgements. Special thanks to Francesco Costamagna, Marco Dani, Dario Guarascio, Matthias Goldmann, Andrea Guazzarotti, Joana Mendes and Harm Schepel for preventing many mistakes. I am sure other mistakes still remain, but they are to be attributed only to me.

Competing interests. The author has no conflicts of interest to declare.

Cite this article: AJ Menéndez, 'Editorial: rewriting the German fundamental law in a blitz' (2024) *European Law Open* **3**, 687–704. https://doi.org/10.1017/elo.2025.18

https://doi.org/10.1017/elo.2025.18 Published online by Cambridge University Press