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## Federal Challenges in the Implementation of the EU's Recovery and Resilience Facility in Germany<sup>1</sup>

### *Retos federales en la implementación del Mecanismo de Recuperación y Resiliencia de la UE en Alemania*

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#### ABSTRACT

The paper focuses on the internal implementation process of the EU Recovery and Resilience Facility (RRF) in Germany with special regard to the participation of the Länder in the development of the plan and its priorities. We argue that the course of the development and implementation process is illustrating how national executives can pursue their own goals by exploiting the blindness of the EU and its treaties to federal systems. This was favored by the fact that the European Commission (EC) labeled its Recovery and Resilience Facility (RRF) including NextGeneration EU (NGEU) as a "stimulus package". The coincidence of these two reasons allowed the German government to develop its own Recovery and Resilience Plan without major consultation. Moreover, the decades-long disputes between the federal government and the states, in which the latter had gained considerable information and voice, do not seem to have taken place. Since the RRF can be interpreted as a new cohesion policy approach of the EU, stronger involvement of the German Länder and municipalities in the negotiation process of the National Recovery and Resilience Plan (DARP) would have been essential. The analysis exemplifies aspects of multilevel governance that need to be strengthened if the EU is to expand its economic policy instruments in the future.

#### KEYWORDS

German federalism; NextGeneration EU; EU Recovery and Resilience Facility; multilevel governance; cohesion policy; federal blindness of the EU.

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**RESUMEN**

El documento se centra en el proceso de implementación interna del Fondo de Recuperación y Resiliencia de la UE (RRF) en Alemania, con especial atención a la participación de los Länder en el desarrollo del plan y sus prioridades. Argumentamos que el curso del proceso de desarrollo e implementación está ilustrando cómo los ejecutivos nacionales pueden perseguir sus propios objetivos explotando la ceguera de la UE y sus tratados a los sistemas federales. Esto se vio favorecido por el hecho de que la Comisión Europea (CE) calificó su Fondo de Recuperación y Resiliencia (RRF) que incluye NextGeneration EU (NGEU) como un “paquete de estímulo”. La coincidencia de estas dos razones permitió al gobierno alemán desarrollar su propio Plan de Recuperación y Resiliencia sin mayor consulta. Además, las disputas de décadas entre el gobierno federal y los estados, en las que estos últimos habían ganado considerable información y voz, no parecen haber tenido lugar. Dado que el RRF puede interpretarse como un nuevo enfoque de la política de cohesión de la UE, habría sido esencial una mayor participación de los Länder alemanes y los municipios en el proceso de negociación del Plan Nacional de Recuperación y Resiliencia (DARP). El análisis ejemplifica aspectos de la gobernanza multinivel que deben reforzarse si la UE quiere ampliar sus instrumentos de política económica en el futuro.

**PALABRAS CLAVE**

Federalismo alemán; NextGeneration EU; Mecanismo de Recuperación y Resiliencia de la UE; gobernanza multinivel; políticas de cohesión; ceguera federal de la UE.

**SUMMARY**

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**1. INTRODUCTION**

To mitigate the health, social and economic consequences of the COVID-19 pandemic, the member states of the European Union (EU) agreed in December 2020 on a proposal from the European Commission (EC) to establish a joint recovery plan. It consists of the temporary NextGeneration EU (NGEU) fund as well as the long-term EU budget from 2021 to 2027. While providing an economic stimulus for the EU and its member states, the recovery plan also steers “the transition towards a modern, sustainable and resilient Europe”. In total, the temporary NGEU comprises EUR 806.9 billion. The central component of NGEU is the Recovery and Resilience Facility (RRF), which has a volume of almost EUR 723.8 billion. The member states are to receive both financial assistance (EUR 338.0 billion) and loans (EUR 385.8 billion) to support national reform and investment projects. The remainder – around 83.1 billion euros – will be allocated to other EU funding programs (ibid.). For the first time in its history, the EU is authorized to take out loans for its refinancing at a significant level.

To ensure that the RRF is primarily used by the member states as an impulse for a green and digital transition, Regulation (EU) 2021/241 of the European Parliament and the Council of February 12, 2021, clearly defines the substantive objectives, the scope as well as the specific functioning and financing of the fund (Regulation 2021/241). It requires each member state to submit a national plan to the EC, which will then evaluate it according to predefined EU targets: at least 37 % of the expenditure must contribute to the climate change targets and 20 % to the digital targets (Regulation 2021/241, p. 37). By April 30, 2021, member states were supposed to submit their national plans to the EC (Regulation 2021/241, p. 23). However, since this was a non-binding closing date, national plans will be accepted until mid-2022 (European Commission, 2021b).

At the heart of the German debate on the RRF has been the question of the EU's borrowing capacity (Bundesrechnungshof, 2021; Feld, 2020; Guttenberg, 2020; Heinemann, 2020; Matthes, 2020). For the first time, under the NextGeneration EU Fund, the EC will be allowed to borrow up to EUR 806.9 billion on the

capital markets on behalf of the EU. Starting in 2028, this debt must be repaid from the EU budget within 30 years. As the member states will have to assume liability for possible defaults in the amount of their share of the EU budget, there was considerable criticism in Germany – particularly from conservative parties and neo-classical economists. Concerns about entering a “transfer union” (Feld, 2020; Heinemann, 2020) have been raised. For this reason, the Federal Constitutional Court was also called upon twice to challenge the decision of the German Bundestag to support the EU Councils’ resolution from December 14, 2020, on the system of own resources of the EU (Council Decision (EU, Euratom) 2020/2053).

Our paper focuses on the internal implementation of the RRF in the form of the German Recovery and Resilience Plan (DARP). We will pay special attention to the participation of the Länder in the development of the plan and its priorities. In doing so, we address the question of why the Länder did not intervene much more actively in the overall DARP development process, at least trying to assert their own interests more strongly vis-à-vis the federal government and the EU. This question is relevant for two reasons: First, not only the governments but also the parliaments of the German Länder have made considerable efforts over the past 30 years to expand their formal and informal rights to participate in EU affairs. Second, in other EU Member States, such as Spain and Italy, subnational authorities have been very active in the internal implementation process of the RRF (see the article on Italy and Spain in this volume). The analysis of this question will be guided through the following thesis: The course of the development and implementation process is exemplifying how national executives can pursue their own goals by exploiting the blindness of the EU (Hrbek, 2021) and its treaties to federal systems. This was facilitated by the fact that the European Commission (EC) labeled its Recovery and Resilience Facility (RRF) including NextGeneration EU (NGEU) as a “stimulus package” to combat the (short-term) consequences of COVID-19. This made it possible for the German government to develop its own Recovery and Resilience Plan without major consultation – always referring to time constraints. Since the program and structure of the Recovery and Resilience Facility can be interpreted as a new approach of EU cohesion policy, the lack of a broader public discussion is of concern (Höpner, 2021; Heinemann, 2021). Following this interpretation, a stronger involvement of the German Länder and regions in the negotiation process of the DARP would have been essential. For implementing the plan in the coming years until 2027, the federal government will have to rely on the support of the Länder and municipalities either way, as most of the priorities fall within their areas of competence. The following analysis of the implementation of the EU’s Recovery and Resilience Facility in the Federal Republic will highlight exemplary aspects of multilevel governance that would need to be strengthened in the future – particularly if the EU wants to expand its range of policy instruments in combatting economic crises.

To discuss the developed thesis the first section will present the priorities and issues of the German Recovery and Resilience Plan (DARP) while the second section will explore its federal dimension – including the basic challenge of the “federal blindness” of the EU and its treaties, which is repeatedly deplored in the German debate. The third section will discuss the federal implications of the DARP. The paper will end with a conclusion and outlook. Since the EU’s Recovery and Resilience Facility and, above all, its implementation within Germany is still in the making, the following analysis is faced with certain difficulties: There exist neither details on priorities of the individual funding lines planned by the federal government, nor concrete experiences from the implementation process of the Länder, municipalities, and companies. In this respect, reference can only be made here to later evaluations.

## 2. PRIORITIES AND VOLUME OF THE DARP

Germany intends to draw only on financial grants from the RRF (Hungerland et al., 2021, p. 37). Accordingly, from 2020 until 2027, Germany will receive around EUR 28 billion in grant allocations, amounting to approximately 8 % of the total volume of the RRF placing Germany as the fourth-largest grant recipient after Spain, Italy, and France (ibid.). In line with the objectives defined in Art. 3 of the EU Regulation establishing the Recovery and Resilience Facility, the German Recovery and Resilience Plan identifies six different priority issues and 40 individual measures. The six funding priorities have different volumes and include climate policy and energy transition (EUR 12.5 billion), digitization of the economy and infrastructure (EUR 6.0 billion), digitization of education (EUR 1.4 billion), strengthening social participation (EUR 1.4 billion), strengthening a pandemic-resistant healthcare system (EUR 4.6 billion), and modernization of administration and removal of investment barriers (EUR 3.5 billion) (BMF, 2021, pp. 14-17).

Various measures are being planned under these priorities: While the area of climate policy and energy transition comprises the three components “decarbonization”, “climate-friendly mobility” and “climate-friendly construction and renovation”, the components “data as the raw material of the future” and “digitization of the economy” were defined in the area “digitization of the economy and infrastructure”. At the heart of climate policy and the energy transition, the federal government together with France intends to expand hydrogen research. This approach is built on a multilateral agreement from 2020, in which 22 EU member states defined the expansion of hydrogen production in Europe as an “Important Project of Common European Interest” (IPCEI). For this purpose, the participating countries plan to coordinate their projects and establish a joint network. With a comprehensive funding program, the German government also plans to promote the conversion and new construction of private and public buildings with an energy efficiency level. Furthermore, measures for climate-friendly mobility will be implemented, e.g., by promoting the development and production of fuel cell systems and hydrogen technology for various vehicle types (BMF, 2021, p. 71).

In addition, it is planned to strengthen climate protection research as part of the national Climate Protection Program and the Adaptation Action Plan of the German Adaptation Strategy (BMF, 2021, p. 87). For this purpose, approximately 40 collaborative projects are planned in three areas: industry, SMEs, and climate resilience. This example illustrates that, in developing the DARF, the German government compiled measures that had already been set up before the plan was approved and adopted by the EU Commission. This phenomenon can be also observed under the funding priority “Modern Public Administration”. With this priority, the federal government intends to implement investments and reforms in the three areas “Creation of a European Identity Ecosystem” (1), “Administrative Digitization to Implement the Online Access Act (OZG)” (2), and “Administrative Digitization to Implement Register Modernization” (3) (BMF, 2021, pp. 894-895). 3 billion has been earmarked in the DARF for the second component alone. However, the German government had already allocated a corresponding amount “for nationwide, user-friendly administrative digitization” in its June 2020 stimulus package (BMF, 2021, p. 908). These are indications that the federal government intends to use the German Recovery and Resilience Plan –at least in part– to refinance its extensive economic stimulus measures.

Given the federal distribution of competencies and the responsibilities of the Länder, the third and fourth funding priorities (“digitization of education” and “strengthening social participation”) of the DARF are particularly relevant. While the federal government intends to implement investments and reforms in the areas of teacher devices, educational platforms, educational competence centers, and modernization of the educational facilities of the German armed forces in the first-mentioned area, the second-mentioned area includes measures to expand childcare, secure training places and measures for pandemic-related learning arrears among schoolchildren (BMF, 2021, p. 598). Administrative modernization projects focus firstly on intensifying federal coordination efforts among the jurisdictional levels to speed up planning and approval procedures, and secondly on a federal and state program for improved administration.

Despite the different priorities and measures, the funds are predominantly used for investment purposes. Therefore, further funding programs will be relaunched, and existing programs will be strengthened or refinanced with EU funds. Most of the funds will be spent in the form of investment allowances (EUR 12.7 billion) to companies, municipalities, or other public sector entities (Clemens et al., 2021, p. 5). The administrative processing is carried out by the federal government’s project management agencies within the framework of competitive tendering procedures.

### 3. THE FEDERAL DIMENSION OF THE EU RRF

In a federation such as Germany, the Länder play an important role in shaping and implementing EU policy measures. It is not without reason that the Länder successfully claimed participation rights from the federal government during the heyday of the European integration process in the years 1990 to 2007. Already in 1992, Article 23 of the Basic Law (BL) was amended: “The Bundestag and, through the Bundesrat, the Länder shall participate in matters concerning the European Union. (...)” (Article 23 (2) BL). Furthermore, the role of the Länder in EU affairs is emphasized specifically in Article 23 (4) BL: “The Bundesrat shall participate in the decision-making process of the Federation insofar as it would have been competent to do so in a comparable domestic matter or insofar as the subject falls within the domestic competence of the Länder”. And even in matters that fall within the exclusive competence of the federal government, the constitution grants the Länder rights of participation when they are responsible for the administration: However, the federal go-



vernment “shall take the position of the Bundesrat” only “into account” – a comparatively vague commitment in legal terms (Article 23 (5) BL).

“When legislative powers exclusive to the Länder concerning matters of school education, culture or broadcasting are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a member state of the European Union shall be delegated by the Federation to a representative of the Länder designated by the Bundesrat. These rights shall be exercised with the participation of, and in coordination with, the Federal Government; their exercise shall be consistent with the responsibility of the Federation for the nation as a whole” (Article 23 (6) BL).

However, the past has demonstrated that these far-reaching rights to information and participation have not always been considered. Complaints about the late and reactive involvement of the Länder in European legislative processes and programs have been a long-lasting critique of Germany's European policies (Große Hüttmann, 2007; Hrbek, 2005; Eppler, 2007). Several reasons are mentioned for these complaints: First, the variety and complexity of European policy and legislative processes; second, the foreign representation law of the federal government; and third, the sometimes ambiguous demarcation between international and European Union law.

The funding priorities of the German Recovery and Resilience Plan largely affect the concurrent and exclusive legislative competence of the Länder. Among others, climate protection and digitization, as well as healthcare and administrative modernization, belong within the Länder's jurisdiction. This is particularly strengthened by the strong administrative powers of the Länder and the municipalities. Thus, a strong involvement of the Länder would have been expected not only during the policy formulation of the RRF but also in the planning, implementation, and use of funds under the DARP. However, negotiations on the structure and priorities of the RRF and its national implementation plan were essentially conducted between the federal government and the EC. The whole process was hardly noticed –beyond the expert community– by the public. Issues of intra-German management of the COVID-19 pandemic and its economic consequences overshadowed this debate, especially since the envisaged volume of financial grants from the RRF for Germany is relatively small compared to the domestic COVID-19 response measures with a volume of around EUR 1.2 trillion (including all investment aid, allowances, guarantees, compensation for tax shortfalls and social assistance, etc.) (Scheller, 2021).

Nevertheless, the EU had a different vision of the involvement of subordinate local authorities in the post-Corona recovery process: The Regulation (EU) 2021/241 establishing the Recovery and Resilience Facility proactively considers the federal dimension of the EU's RRF. Thus, the EC and the member states shall “ensure complementarity, synergy, coherence, and consistency among different instruments at Union, national and, where appropriate, regional levels (...)” in both the drafting and implementation phases (Regulation 2021/241, p. 48). This is important to leverage synergies with the NGEU's other funding instruments, such as the Just Transition Fund or the Rural Development Program. Due to their cohesion policy elements, they fundamentally affect the level of the Länder and regions (Bundesministerium für Wirtschaft und Energie, 2021). This volume vividly illustrates the disputes that other member states –in contrast to Germany– have had with their regional authorities over the design of their national reconstruction plans.

### **3.1. The intra-German development process of the DARP**

The DARP negotiation process can be divided into two phases: The first phase started once the Government's Coalition Committee (“Koalitionsausschuss”) agreed on the key points of the DARP on August 25, 2020. The development of the plan entered its second phase after the submission of the preliminary draft to the European Commission on December 23, 2020. During this step, the plan was revised and specified before it was finally submitted to the European Commission on April 30, 2021. The overall process took a total of eight months and was driven forward under the leadership of the Federal Ministry of Finance (“Bundesministerium für Finanzen” – BMF) and the Federal Chancellery. The Ministry of Finance will continue to be the central point of contact for the EU institutions and the Länder in the coming years and, in this capacity, will formally coordinate the call for allowances and the budgetary allocation of RRF grants by the relevant ministries (BMF, 2021, p. 1062).

After the 2017 parliamentary elections, the Federal Ministry of Finance under then Finance Minister and Vice-Chancellor, Olaf Scholz (SPD), had considerably increased its personnel – especially in Department E,

which is responsible for European issues. Even the Federal Ministry of Economics and the Federal Ministry of the Interior, for Construction and Home Affairs, which were responsible for the topics of digitization and in terms of content, were largely left out of the process of drawing up Germany's Recovery and Resilience Plan. At least that is what emerges from a newspaper report by an investigative research network of European journalists. According to the report, employees of the Ministry of Economics had complained bitterly that "they had been deprived of the lead in decisions on the EU billions for Germany" (Tillack, 2022).

Already during the first phase of the process, in November 2020, the social partners –employers' associations and trade unions– and the German Council of Economic Experts (SVR) had been consulted (BMF, 2021, p. 1069). The Länder, however, were only informed about the key aspects of the preliminary DARP draft at the Standing Conference of the Ministers of Finance ("Finanzministerkonferenz" – FMK) at the beginning of December 2020 (BMF, 2021, p. 1066). This was followed by the submission of a preliminary draft of the DARP to the European Commission on December 23, 2020, by the government.

Nevertheless, the federal government did not officially submit the DARP draft to the Bundestag, its specialist committees, and the Federal Council ("Bundesrat") until the beginning of 2021. In the first quarter of 2021, the individual Länder, as well as welfare and environmental associations, had the opportunity to submit written comments on the DARP draft (BMF, 2021, p. 1067). Only at this point, the Länder were explicitly given the chance to contribute their perspectives and ideas. In parallel, the Federal Council published a statement on March 5, 2021, in which it welcomed the submitted DARP draft while simultaneously criticizing the federal government for the handling of the drafting process (Bundesrat, 2021a). Before the whole process was concluded with the handover of the finalized DARP to the EU Commission on April 30, 2021, the individual Länder submitted written comments on the DARP draft by mid-April (BMF, 2021, p. 1067). There was no public plenary debate on the topic in the Federal Council. Only the Bundestag had a controversial discussion on the required EU own resources act. In this respect, the participation of the Länder was limited to comments by their administrations.

### **3.2. Opportunities for the Länder to participate in the development of the DARP**

The Federal Council's critique of the government's preparation of the DARP related primarily to the insufficient and late involvement of the Länder. This circumstance must have angered the Länder to such an extent that they stated six months later in a resolution of the Standing Conference of the Länder's Prime Ministers ("Ministerpräsidentenkonferenz" – MPK) on the topic of "Involving the Länder in decisions on the distribution of EU funds":

"In addition, the Länder's heads of government are also dissatisfied with the federal government's approach to involving the Länder. The inadequate consideration of the needs of the Länder in the decision-making process to date and the insufficiently coordinated approach to decision-making on the BAR ['Brexid Adjustment Reserve'] is comparable to previous distribution processes of this kind. Specifically mentioned are decision-making procedures in the allocation of funds from the Just Transition Fund to fulfill the federal government's commitments under the Coal Regions Investment Act and in the use of funds from the European Union's Recovery and Resilience Facility" (MPK-Beschluss vom 20.-22. Oktober 2021 – own translation).

From this position, the Länder derived the following demand:

"The heads of government of the Länder consider it necessary for the federal government to involve the Länder more closely in the distribution of European funds in the future. In doing so, they call on the federal government to ensure that the necessary processes are initiated with sufficient lead time. In the first step, these processes must allow for a well-founded determination and registration of needs and, in the second step, for a further examination and evaluation of the distribution result by the Länder" (ibid.).

In their formal comments on the DARP draft, the Länder based their criticism primarily on three arguments (Bundesrat, 2021a, p. 2): First, the Länder highlighted that several planned projects under the DARP affected their concurrent and exclusive competencies. Second, they criticized the growing coordination requirements to avoid overlaps –and hence double financing– with other funds already being provided by the EU. Finally, the Länder emphasized that the EU's RRF aims for a comprehensive economic transformation for which an extensive involvement of the regional perspective is indispensable. Curiously, the Länder's criticism

did not refer to the DARP's basic distribution approach. For example, they did not articulate –as they usually do in intra-German financial negotiations– the demand for a general and earmarked increase in their financial strength, taking into account a regionally balanced distribution. The financially weaker states in eastern Germany also did not make any separate demands, although they regularly point out their special situation, which continues to exist. Apparently, the federal government had so prejudiced the entire discussion with its fundamental orientation of the DARP that corresponding objections were dispensed.

The German federal government, however, rejected the criticism, noting that the Länder were involved through the usual procedures if they were directly affected by them or if these fell within their area of responsibility (Bundesrat, 2021b, p. 1). Moreover, the federal government argued that the Länder perspective has been additionally considered since the Länder can participate in the development of the National Reform Program (NRP). The NRP is compiled by the member states every April as part of the European Semester and aims to serve as a complementary document to the DARP in the coming years. The Federal Ministry for Economic Affairs and Climate (BMWK) is coordinating the NRP (Bundesrat, 2021b, p. 2). Here, too, the participation of the Länder is limited to a more informal process of commenting by the specialized administrations – a procedure that is hardly transparent for the public.

Nevertheless, even if, following the argumentation of the federal government, the legal participation rights of the Länder were respected, the design of the drafting process for the DARP and its priorities cannot conceal the fact that the procedure and the policy formulation was predominantly shaped at the federal level. The participation of the Länder is to be viewed as advisory – at best corrective. Similarly, the social partners and business and environmental associations complained. For example, in the background research of the European journalists' network “#RecoveryFiles” on the inner-German negotiation process, the representative of a large German business association is quoted as follows: “The German government was obviously not interested in a dialog” (Tillack, 2022). Moreover, an environmental association criticized the “pro forma participation”.

### 3.3. Planning for federal implementation of DARP

Against this backdrop, the question arises of how the federal and Länder governments plan to work together to implement the DARP in the coming years. The role of the Länder, during the execution phase of the DARP, is outlined in the plan but focuses on their contribution to the implementation of the various projects while the federal government is in charge of its coordination (BMF, 2021, pp. 1062-1072). To this end, a “structured communication channel” is to be established between the federal government and the Länder. For this purpose, a coordination unit is to be set up at the Federal Ministry of Finance, which will hold regular meetings to evaluate the state of the DARP implementation with the Länder as well as with other relevant federal ministries. This structure has its origin in the fact that the different projects for the individual thematic priorities of the DARP are designed by the responsible federal ministries. In this context, they are to involve the Länder and local authorities in the further specification of individual measures, in particular on issues of digitization, the design of a digital education offensive, and measures to strengthen a pandemic-resilient healthcare system.

The DARP also provides for improved coordination between the federal levels, not least to implement the DARP funding measures themselves more quickly and effectively. As early as December 2020, the Länder's Prime Ministers Conference had agreed with the then Chancellor on a “Joint Program of the Federal and State Governments for a High-Performance, Citizen- and Business-Friendly Administration” (Bundesregierung, 2020a; Bundesregierung, 2020b). Given the massive increase in the number of federal funding programs in recent years –and here in particular during the COVID-19 pandemic– the aim was to promote an accelerated outflow of funds. To this end, Länder and local governments were to identify “concrete procedure-specific obstacles to a speedy outflow of funds together with the federal government” by May 2021 (Bundesregierung, 2020b, p. 1 – own translation).

Another aspect that intends to increase the effectiveness of the plan's implementation is that “barriers to investment should be specifically reduced by expanding the range of advisory services offered by the ‘PD – Berater der öffentlichen Hand (PD)’” (Bundesrat, 2021b, p. 1 – own translation). PD is a consulting agency that was founded in 2008 as a spin-off from the Federal Ministry of Finance and is 100 % publicly owned. The federal government holds just under 75 percent of the shares. However, the structure and operation of the PD are still not without controversy, especially since it has grown rapidly in recent years and has taken on countless consulting mandates at the federal, state, and local levels. Ultimately, the federal government, with



its strong position as a shareholder in the PD, has created an institution with which it can at least indirectly influence the administrative actions of the Lander and municipalities – even if the PD always emphasizes its independence.

Nevertheless, the role of the PD is to be strengthened during the implementation of the DARP. The federal government states:

“Many Lander and municipalities are familiar with PD because they are shareholders themselves or have already cooperated with it in the past. In this way, PD could increasingly act as a pilot between the funding provider and the funding recipient to make the retrieval of provided funding more effective. PD can also provide targeted and flexible support in the implementation of specific funding programs on a broad scale. In the spirit of partnership, suggestions and proposals from the federal states are welcome to support municipalities more effectively” (Bundesrat, 2021b, p. 2 – own translation).

#### 4. FEDERAL IMPLICATIONS OF THE DARP

Taking the perspective of federalism theory and practice, the development process of the EU's RRF, including federal participation, development, and implementation certainly must be evaluated ambivalently. Such EU programs illustrate a fundamental dilemma: while the federal governments have the largely exclusive rights of external representation vis-à-vis the EU, the implementation of the EU's RRF takes place at the Länder and local levels. In the case of the EU Recovery and Resilience Facility, the federal government –and here above all the Federal Ministry of Finance and the Federal Chancellery– saw its largely unilateral action, without much consideration of the Lander, as justified by the fact that the EU itself had labeled the ARF as an “economic stimulus program”. Indeed, economic stimulus and stabilization policies to combat economic crises are generally considered to be a matter for the (national) executives. As a result, tensions arise between time-critical decision-making processes at the EU level on the one hand and the granting of proactive participation and co-determination rights to subnational authorities on the other. The intention to quickly mitigate the consequences of the COVID-19 pandemic with the EU's Recovery and Resilience Facility as well as its German subpart appears to have led to a reduction in participation opportunities for the Länder and municipalities.

In the meantime, it has been pointed out that the EU Recovery and Resilience Facility is not so much an economic stimulus program as a reorientation of the EU's structural, cohesion and innovation policy (Höpner, 2021, p. 488; Heinemann, 2021, p. 8). Alternatively, it can be interpreted as a medium-term program for redistribution between the financially stronger and the financially weaker member states (Dorn & Fuest, 2021, p. 6). This assessment is supported by the fact that the NGEU has a duration of five years (from 2021 to 2026) –a period that goes beyond short-term shock absorption. Moreover, the distribution of the pledged funds does not follow the principle of the three “T” – “timely, targeted, and temporary” (Taylor & O'Sullivan, 2017; Heinemann, 2021, p. 9). However, the compensatory and integration policy goals of the NGEU may be one of the reasons why the German government strongly supported the adoption of this funding program (Becker, 2021; Thöne, 2021) and even accepted the newly created possibility of the EU taking on debt.

In approving the ARF, the federal government also pursued national interests (Schramm, 2021). It recognized the ARF early on as an opportunity to refinance at least parts of its extensive June 2020 economic stimulus program. It is not without reason that the Länder criticized in their Bundesrat statement that the principle of additionality or complementarity of EU funding was given too little consideration. The main reason for this is that a large share of DARP grants is used to refinance or increase existing programs. The generation of “additional innovative impulses” thus hardly succeeds (Bundesrat, 2021a, p. 3).

##### 4.1. Strengthening federal investment activities

At the same time, however, the federal government used the DARP to put issues on the agenda that have been addressed only hesitantly for years due to differing views among the federal levels. This includes the issues of administrative modernization and digitalization, where Germany's performance is mostly average among European countries. It remains to be seen to what extent sustainable progress can be achieved with the corresponding funding volumes of the DARP – especially since inadequate digitization and cumber-

some administrative procedures in Germany are considered as momentous obstacles to investment activities by the public sector. Local authorities, which make around 60 percent of all public investments in Germany, complain that –in addition to a lack of financial and human resources– it is primarily bureaucratic hurdles and thus the legal framework that inhibits their investment activities (Gornig & Michelsen, 2017; Feld et al., 2020; Brand & Steinbrecher, 2017; Scheller et al., 2021). In this context, complex planning procedures by specialized administrations (Fink & Wiemann, 2019; Otto & Ditzen, 2019) and German or European public procurement law have been criticized (Anger, 2020; Brand & Steinbrecher, 2017). In addition to a diversity of statutory construction and procurement standards that directly relate to planning and implementation issues of investment projects, German construction planning, and procurement law also provide various instruments of legal protection for individuals. These make it possible for affected parties, citizens' initiatives, associations as well as potential competitors to file objections and lawsuits in the context of public plan approval and tender procedures – in some cases through several instances. As early as November 2020, the Bundestag, therefore, responded to such lawsuits with the Act to Accelerate Investments.

Among other things, the acceleration of administrative court proceedings is to be possible in the future (Bundestag, 2020).

#### **4.2. Digitization offensive**

Beyond the complexity of the legal framework, due to partly autonomous, partly shared competencies of the federal government, the Länder, and the municipalities, the discussion on barriers to investment has long criticized the fact that the administrations of all three levels are only insufficiently digitized. For example, there have been comparatively few e-government processes to date (BMF, 2020; Kompetenzzentrum öffentliche Informationstechnologie, 2015; European Commission, 2019). In this context, a lack of interface management between the various specialized administrations involved is usually also complained about (Buchert & Ruther-Mehlis, 2017). From a federal point of view, this criticism is ambiguous: the German federal state belongs to the type of cooperative administrative federalism. The autonomy of the Länder is based to a large extent on their almost exclusive administrative sovereignty. The federal government may intervene in these powers only in very few exceptional cases. The full ambivalence of this problem becomes clear when it comes to the digitization of administration when the federal government states in the DARP that “the interoperability of the registers kept at the federal, state and local levels (is) to be improved in such a way that digital administrative services can be provided by the guidelines of the European Interoperability Framework on the once-only principle” (BMF, 2021, p. 896). To this end, “a nationwide implementation of 100 Länder services and 115 federal services” is to take place. The “different legal situations, political interests and development statuses of digitization of 16 Länder and around 11,000 municipalities with far-reaching decision-making powers in the digitization of administration” are to be “harmonized” for this purpose (BMF, 2021, p. 907). Even if the concern for cross-level digitization of the administration hardly seems to be controversial –especially in the interest of modernizing and simplifying existing structures and processes–, it remains to be stated from a federal perspective that a standardization or unitarization is being sought here. This dilemma is also discussed politically. In such cases, the federal government likes to point out that such solutions are primarily “technical” and indispensable for the necessary modernization of the administration. The Länder, on the other hand, point to their administrative sovereignty. At the same time, they are often dependent on financial grants from the federal government, since their revenue base is often inadequate in the Federal Republic's compounded tax system. At the same time, the Länder have once again come under heavy public pressure, especially in the wake of the Corona pandemic, since many administrative services in Germany still cannot be handled electronically – as would have made sense in the wake of the contact restrictions imposed by infection law. When they politicize funding programs from the federal government concerning federal responsibilities in such times, it is not uncommon for media criticism to grow as well. Surveys show that large parts of the public and also the media in Germany have little understanding of sixteen different Länder policies. Then the image of a “federal patchwork quilt” is often invoked.

#### **4.3. Strengthening the federal consulting agency**

About these very fundamental obstacles and backlogs in the German administration, the question arises whether the strengthening and staffing of a federal consulting agency –as envisaged in the DARP– can provide substantial relief here. A total of around EUR 50 million has been earmarked for the “PD – Berater der öffentlichen Hand GmbH” for the years 2021 to 2026. With this, the agency is to advise and support

Länder and municipalities in applying for grants in various funding programs. This “investment advice on life-cycle and impact-oriented procurement” for local authorities and Länder are to be used, among other things, in the areas of “expanding and strengthening the public healthcare system (esp. hospitals) and the public health service (health offices)”, “infrastructure expansion in the science, education and daycare sectors”, “in the field of an area-wide implementation of sustainable neighborhood development and construction concepts (e.g., infrastructure, processes)”, and in the “expansion and strengthening of the digitization of administration” (BMF, 2021, p. 1006). This thematic breadth of possible fields of consultation touches on many core areas of state sovereignty and local self-government autonomy. Even if only a fraction of the approximately 11,000 municipalities in Germany can be advised with the additional funding volume now made available, the logic behind this measure of the DARF is special. Instead of reducing the now unmanageable number of funding programs, pooling resources, and increasing the overall financial resources of the Länder and municipalities, the federal government is now investing in additional advisory services. In doing so, it notes in the DARF itself:

“At the same time, the complexity and multi-layered nature of the funding landscape increases with each new funding program, presenting private and public grantees with further challenges. According to survey results from PD – Berater der öffentlichen Hand GmbH (PD), about 60% of municipal grantees have not taken advantage of a funding program at least once, even though it would have basically fit and been available” (BMF, 2021, p. 974).

The fact that the additional advisory services are now provided by an agency in which the federal government holds the majority share is not entirely unproblematic. This is because it is not only the investment policy priorities of the Länder and municipalities that are predetermined by the corresponding programs of the federal government. Rather, their implementation is also to be accelerated through standardized tools and processes. This approach ultimately aims to justify new administrative standards, which are to be given the broadest possible reception among municipalities through corresponding communication activities by the PD. The accountability of the PD to the federal government also provides the latter with insights into the municipalities’ administrative practice – knowledge that can, of course, also be used for legislative purposes. Objections of this kind can only be refuted to a limited extent by references of the following kind:

“At present, in addition to the federal government, ten federal states, around 75 municipalities, three central municipal umbrella associations as well as other public-law - and other public-sector clients are shareholders of the PD. As a result, the PD has direct links to funding recipients and providers within Germany’s federal architecture. In particular, through the participation of the leading municipal umbrella associations (‘Deutscher Städtetag’, ‘Deutscher Landkreistag’, ‘Deutscher Städte- und Gemeindebund’) as well as through the implementation of inter-municipal consulting projects in cooperation with the municipal state associations, there is the possibility of reaching and informing municipal and regional authorities across the board, which is currently already being practiced in the education sector, among others” (BMF, 2021, p. 998).

The ambivalence associated with the strengthening of PD within the framework of the DARF is based not least on the fact that a large number of local authorities are happy to be able to make use of free advisory services here due to financial and personnel bottlenecks. Frequently, there are also internal administrative blockages on the ground for which there is hope that these can be resolved through the use of external consulting.

#### **4.4. Flipside of the coin I: Expansion of joint decision-making**

The DARF provides various new, earmarked, and time-limited federal investment programs. This means that no block grants are awarded to financially weaker local authorities, which might be allocated according to a general distribution key. Instead, Länder, municipalities, companies, and scientific institutions must apply for project-related funding on an allowances basis from specialized project agencies in a competitive process. The Federal Budget Code (§ 23 BHO) allows the federal government to provide in its budget for “expenditures and commitment appropriations for services rendered to agencies outside the federal administration for the fulfillment of specific purposes (allowance) if the federal government has a substantial interest in the fulfillment by such agencies that cannot be satisfied without the allowances or cannot be satisfied to the extent necessary”. This transfer channel for the allocation of development allowances is double-edged from a federal point of view. This is because, as a matter of principle, there may be no direct financial relations

between the federal government and the municipalities in Germany, as the latter are constitutionally part of the Länder. Allowances are an exception to this rule. This possibility of funding allows the federal government to set its priorities in terms of content and to support municipalities, companies, and scientific institutions directly – even if the administrative processing is carried out by commissioned agencies. In this context, criticism is repeatedly voiced that the federal government thus influences the setting of political priorities as well as the investment agenda of other actors. This is always particularly problematic when the relevant programs encroach on the Länder's and municipalities' spheres of competence.

In recent years, the federal government has significantly expanded its grant and allowances programs. However, this also applies to the “financial assistance for investments” programs under Article 104b BL. Thus, the following applies:

“To the extent that this Basic Law confers on it the power to legislate, the Federation may grant the Länder financial assistance for particularly important investments by the Länder and municipalities (associations of municipalities) which are necessary to: 1. avert a disturbance of the overall economic equilibrium, 2. equalise differing economic capacities within the federal territory, or 3. promote economic growth. By way of derogation from the first sentence, the Federation may grant financial assistance even outside its field of legislative powers in cases of natural disasters or exceptional emergency situations beyond governmental control and substantially harmful to the state's financial capacity” (Article 104b (1) BL).

Financial assistance of this kind –unlike allowances– must be formally handled by the Länder. Thus, Article 104b (2) BL stipulates:

“Details, especially with respect to the kinds of investments to be promoted, shall be regulated by a federal law requiring the consent of the Bundesrat or by an executive agreement based on the Federal Budget Act. The federal law or executive agreement may contain provisions on the shaping of the respective Land programmes for the use of the financial assistance. The criteria for the shaping of the Land programmes shall be specified in agreement with the affected Länder. To ensure that the funds are used for their intended purpose, the Federal Government may require the submission of reports and documents and conduct surveys of any authorities. The funds from the Federation shall be provided in addition to funds belonging to the Länder. The duration of the grants shall be limited, and the grants must be reviewed at regular intervals with respect to the manner in which they are used. The financial assistance must be designed with descending annual contributions”.

The common feature of allowances and financial assistance grants for investments is that they are aimed at financing projects for a limited period. This always raises the question of the sustainability of such measures. Financially stronger Länder, municipalities, and companies –as in the case of allowances– have usually an advantage here. For one thing, they often have the personnel to respond promptly to corresponding calls for proposals. On the other hand, they can raise the funds required for co-financing or for providing the necessary equity contribution. However, the financially weaker municipalities usually have significantly lower investment ratios. Their investment arrears are therefore also generally higher (Raffer & Scheller, 2021). Largely irrespective of their budget situation, Länder and municipalities have complained for years about the complex application and accounting procedures for these funding programs (Scheller et al., 2021). Even today, municipalities have hardly any personnel capacity left to apply for the relevant subsidies and spend them on time. As a result, the investment backlog of the cities and municipalities has risen in line with the trend over the past ten years and amounted to around EUR 149 billion across Germany in 2021 (Raffer & Scheller, 2021). Since this only captures the backlog that would be required to bring public service infrastructures in the municipalities up to the level required by law, this is a conservative estimate – especially since various outsourced infrastructure areas can only be captured rudimentary (Krone & Scheller, 2020). Positive and negative expansion or even transformation needs that will become necessary in the course of the foreseeable structural change of cities to meet the demands of climate change, digitization, demographic change, the transport turn-around, etc., have not even been taken into account. This is all the more problematic as the federal, Länder, and local governments have successively expanded their investment activities in recent years –particularly in the period from 2017 until the outbreak of the Corona pandemic– as a result of the positive overall economic development. Contrary to what is often assumed due to strong price increases, the investment growth has also been very strong in real terms, because nominal investment significantly excee-



ded price increases. For example, gross investment by local governments as defined by the national income accounts in the first quarter of 2020 was almost 30 percent higher than in the fourth quarter of 2017, after adjusting for prices and seasonal effects. Even in the Corona year 2020, aggregate investment spending by local governments increased slightly (Raffer & Scheller, 2021). However, there is a considerable gap between planned and actual investments made by municipalities (Krone & Scheller, 2020; Raffer & Scheller, 2021): obviously, public investment activity—at least in some municipalities—is reaching a limit.

#### 4.5. Flipside of the coin II: “Shadow of the Courts of Auditors”

Although the federal and Länder governments have massively expanded their funding programs in recent years and increased the volume of funding, the money cannot flow out in full because the municipalities cannot spend it as quickly. The federal government itself also states in the DARF:

“Despite the in some cases considerable expansion of funding—especially from the federal government—in recent years, noticeable obstacles to the implementation of investment projects remain. For example, a notable portion of funds at the federal and Länder levels (including subsidies from European Union funds) is often not drawn down or is slow to be converted into public investments” (BMF, 2021, p. 974).

It is not without reason that critical voices are questioning the expansion of funding programs, especially by the federal government (Bundesrechnungshof, 2021; Geißler, 2021). This is because the funds, which are often provided on a short-term and only temporary basis, do not lead to the administrative structures being permanently adapted to an increased flow of funds.

Also double-edged from a federal perspective is the fact that the role of the Federal Audit Office (“Bundesrechnungshof”) has changed with the increase of the many federal funding and investment programs. As part of the last Reform of the Fiscal Equalization Scheme of 2017, the Federal Audit Office was granted special audit rights, enabling it to audit down to the level of the municipalities. The ambivalence that results under aspects of federal theory is reflected in Article 114 (2) BL:

“The Federal Court of Audit, whose members shall enjoy judicial independence, shall audit the account and determine whether public finances have been properly and efficiently administered by the Federation. For the purpose of the audit pursuant to the first sentence of this paragraph, the Federal Court of Audit may also conduct surveys of authorities outside the federal administration; this shall also apply in cases in which the Federation allocates to the Länder ring-fenced financing for the performance of tasks incumbent on the Länder. It shall submit an annual report directly to the Bundestag and the Bundesrat as well as to the Federal Government. In other respects, the powers of the Federal Court of Audit shall be regulated by a federal law”.

In line with Scharpf’s formulation of the “shadow of hierarchy”, this has created a “shadow of auditing” (Scharpf, 2000). For the Länder and, above all, the municipalities and recipients of allowances, the use of funds is now always accompanied by uncertainties about possible misuse. This is even more true since audits of the use of funds are becoming increasingly tight and the number of auditing bodies has grown. Thus, in the case of ARF funds, the following institutions are in principle entitled to audit potential grantees: the audit offices of the municipalities, the municipal supervisory authorities of the Länder, the agencies that administratively process the allowances, the Federal Court of Audit and the Court of Auditors of the European Union. In the case of a co-financing obligation of the Länder, the audit offices of the Länder are also entitled to conduct audits of the recipients. This “shadow of auditing” is now making municipalities and companies weigh up whether to apply for funds. This is because the associated obligations to provide evidence and liability issues are considerable.

## 5. CONCLUSION AND OUTLOOK

The analysis shows that (European) stimulus programs such as the EU’s Recovery and Resilience Facility do not consistently follow the logic of the member states’ federal responsibilities – even if the policy formulation on the one hand and the program implementation and financing on the other are located at different levels. Public economic stabilization policies are time-critical interventions to absorb economic shocks



and crises as early and quickly as possible. Only in this case, these policies can successfully mitigate the knock-on effects not only for the real economy but also for public budgets. Given this specific rationality in policymaking, the fundamental question arises to what extent federal responsibilities in a multilevel system must be preserved in such crises. In constitutional practice, the necessary balancing of political goods is likely to be in favor of fighting the crisis as effectively as possible in most cases. The constitutional responsibilities of subnational jurisdictions must then take a back seat – especially in federations where the competencies of the constituent states have been eroded over the decades anyway.

To preserve the legitimacy of multilevel governance systems, even crisis-fighting measures motivated by economic stabilization policies must be implemented in a way that preserves the autonomy of subnational authorities as much as possible. Otherwise, the observed increase of crisis phenomena in recent years –as a result of globalization– will lead to even greater erosion of the federal states' competencies: By referring to the (supposed) "state of emergency", central states, and here mostly the executive branch – will intervene in the areas of the sovereignty of other levels. In the case of the EU's Recovery and Resilience Facility, this is particularly controversial, as the program is a longer-term stabilization and redistribution program among the member states. In terms of integration policy, this program seems to make perfect sense given the difficult situation in which the EU has found itself at least since the outbreak of the global financial and economic crisis in 2008/2009.

However, the development and implementation process of the DARP in Germany highlights the weaknesses associated with such programs for economically strong EU member states. Indeed, the federal government recognized early on that it could make good use of Germany's financial share from NextGeneration EU and the Recovery and Resilience Facility to refinance its own June 2020 stimulus package. Nevertheless, the German Recovery and Resilience Plan, with its 40 measures, remains more of a hodgepodge of arbitrarily compiled measures. It is not without reason that various stakeholders –in addition to the Länder and the municipalities– have voiced criticism of the plan's focus. The German Council of Economic Experts (SVR) has published an evaluation report on behalf of the German government (Sachverständigenrat, 2021). In this report, the Council criticizes above all the lack of a fundamental reform agenda to improve the general political framework, to foster sustainable economic growth and strengthen Germany's innovative capacities. The SVR claims that the DARP unilaterally focuses too strongly on individual technology-specific investment projects without a clear overall strategy (BMF, 2021, p. 1225). Furthermore, the Bundesrat stressed the lack of political measures to promote the competitiveness of companies whereby missing the opportunity to incentivize businesses to invest. Finally, the Bundesrat noted that too little consideration had been given to the principle of additionality or complementarity of EU funding since a large proportion of the financial grants applied for under the DARP are used to refinance or top-up previously existing programs. The generation of "additional innovative impulses" thus hardly succeeds (Bundesrat, 2021a, p. 3).

At the same time, the political and administrative price to be paid for the multitude of new funding programs is comparatively high for the multilevel tectonics between the federal government, the Länder, and the municipalities in Germany. Instead of strengthening the general financial and budgetary autonomy of the Länder and municipalities, the focus has once again been on funding programs for special purposes that are costly to administer and that will reinforce rather than reduce the much-criticized joint-decision-making structures in Germany (Scharpf, Reissert & Schnabel, 1976).

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