

On November 15, 2023, the German Constitutional Court (*Bundesverfassungsgericht*) declared the Act on the Second Additional Federal Budget for 2021 (*Zweites Nachtragshaushaltsgesetz 2021*), which was adopted by an act of Parliament in 2022, unconstitutional. The act transferred credit authorizations of €60 billion from 2021 into the new Climate and Transformation Fund.

Previously in 2021, this €60 billion credit authorization had been included in a special fund for fighting the economic consequences of the COVID-19 crisis but were not used in respect of that crisis.

The background to the decision of the Federal Constitutional Court, which is legally binding on the German Parliament, is that the German Constitution, provides for a so-called “*Schuldenbremse*”, i.e., a debt ceiling that prohibits the financing of the federal and state budgets through credit. This debt ceiling was introduced into the German Constitution in 2009 by a two thirds majority of the lower house of the federal parliament (*Bundestag*) and a two thirds majority in the Federal Council (*Bundesrat*), in which the governments of the 16 states of Germany are represented. At the federal level, only credit of 0.35% of the GDP may be used to finance the federal budget, unless there are extraordinary events, like natural catastrophes or other extraordinary emergency situations (*Naturkatastrophen oder außergewöhnliche Notsituationen*).

The German Federal Constitutional Court held that such funds reserved in 2021 for the COVID-19 crisis could not be transferred to the 2022 budget for climate and energy transformation purposes by a simple act of Parliament.

The challenge to the Act on the Second Additional Federal Budget for 2021 was brought to the Constitutional Court by members of the federal parliament from the CDU/CSU, i.e., the Christian Democrats, who are currently the largest opposition party.

Such funds were earmarked for several energy transition projects and subsidies contemplated in such context, for example the financing of the transition to use hydrogen instead of gas and coal in energy-intensive sectors of the German economy. It is currently unclear whether and how such funds will be replaced, whether there will be tax increases or a cutting of other budget positions, or whether there will be another change to the German Constitution and a cut-back of the current debt ceiling contained in the German Constitution. This would, however, require the consent of the opposition parties CDU/CSU to achieve the required two thirds majority.

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