FEDERAL CONSTITUTIONAL COURT

- 2 BVR 2728/13 -
- 2 BVR 2729/13 -
- 2 BVR 2730/13 -
- 2 BVR 2731/13 -
- 2 BVE 13/13 -

IN THE NAME OF THE PEOPLE

In the proceedings

I. on the constitutional complaint
of Dr. G…,

- authorised representatives: 1. Rechtsanwalt Prof. Dr. Wolf-Rüdiger Bub, Promenadeplatz 9, 80333 Munich,
2. Prof. Dr. Dietrich Murswiek, –

against 1. the Decision of the Governing Council of the European Central Bank of 6 September 2012 concerning Outright Monetary Transactions (OMT) and the continued purchases of government bonds on the basis of this Decision and of the predecessor programme for Securities Markets (SMP),

2. the Federal Government's omission to bring an action against the European Central Bank before the Court of Justice of the European Union on account of the Decision of the Governing Council of the European Central Bank of 6 September 2012 concerning Outright Monetary Transactions (OMT) and on account of the purchases of government bonds.

– 2 BVR 2728/13 –,

II. on the constitutional complaint

1. of Dr. B…,

2. of Prof. Dr. H…,

3. of Prof. Dr. N…,

4. of Prof. Dr. S…,

5. of Prof. Dr. Dr. h.c. S…,

- authorised representative for 1. to 3. and 5.:
Prof. Dr. Karl Albrecht Schachtschneider,
Treiberpfad 28, 13469 Berlin –

against the acts by the European System of Central Banks to save the euro, in

1. particular the purchase of government bonds of the Member States of the euro area for the purpose of indirect financing of states on the secondary market,

2. the Federal Government's omission to bring proceedings for annulment pursuant to Art. 263 sec. 1 and sec. 2 TFEU before the Court of Justice of the European Union against the purchase of government bonds of Member States of the euro area by the European System of Central Banks and the European Central Bank, and against the acceptance of government bonds as collateral for Central Bank loans if those acts serve the financing of states.

– 2 BVR 2729/13 –,

III. on the constitutional complaint
of Mr H…,

and of another 11,692 complainants,

- authorised representatives:
1. Prof. Dr. Christoph Degenhart,
Burgstraße 27, 04109 Leipzig,
2. Rechtsanwältin Prof. Dr. Herta Däubler-Gmelin,
of the law firm Schwegler Rechtsanwälte,
Unter den Linden 12, 10117 Berlin –
3. Prof. Dr. Bernhard Kempen
Rheinblick 1, 53424 Remagen/Oberwinter

against the Federal Government's omission to work towards a repeal of the Decision of the Governing Council of the European Central Bank of 6 September 2012 concerning the unlimited purchase of bonds of individual Member States of the euro area on the secondary market by the European Central Bank,

2. the Federal Government's omission to take effective precautions to ensure that the Federal Republic of Germany's liability arising from the purchase of bonds as a consequence of the Decision of the Governing Council of the European Central Bank of 6 September 2012 concerning the unlimited purchase of bonds of individual Member States of the euro area on the secondary market by the European Central Bank, and its liability arising from the Treaty establishing the European Stability Mechanism, will not exceed the sum of its payment obligations under Article 8 section 5 sentence 1 of the Treaty as stipulated in its Annex II,

3. the German Bundestag's refusal to exercise its overall budgetary responsibility by only consenting to the macroeconomic adjustment programmes established within the framework of the European Stability Mechanism as a requirement for the purchase of bonds by the European Central Bank if it had previously been comprehensively informed about the nature and scope of the European Central Bank's bond purchases.

– 2 BVR 2730/13 –,

IV. on the constitutional complaint
of Prof. Dr. von S…,

and of another 17 complainants,

- authorised representative for 1. to 6. and 8. to 18.:
Rechtsanwalt Prof. Dr. Markus C. Kerber,
Hackescher Markt 4, 10178 Berlin -

against the Decision of the Governing Council of the European Central Bank of 6 September 2012.

– 2 BVR 2731/13 –,

and

V.. on the application for a ruling in Organstreit proceedings that the respondent

1. is obliged, in order to protect its overall budgetary responsibility, to work towards a repeal of the Decision of the Governing Council of the European Central Bank of 6 September 2012 concerning the unlimited purchase of bonds of individual Member States of the Eurosystem on the secondary market by the European Central Bank, because it circumvents the prohibition of monetary financing pursuant to Article 123 of the Treaty on the Functioning of the European Union, and that the respondent must refrain from all acts or decisions which serve to implement this Decision;

2. may grant its approval to the adjustment programmes which were established as conditions for the purchase of government bonds by the European Central Bank on the secondary market within the framework of the European Financial Stability Facility or the European Stability Mechanism, an approval in the form of a constitutive parliamentary decision, which is required under Article 38 section 1 sentence 2, Article 20 section 1 and section 2, and Article 79 section 3 of the Basic Law to protect its overall budgetary responsibility, only if it receives sufficient information about the nature, scope and duration of the European Central Bank's bond purchases, as well as about their associated liability risks, and if it is guaranteed through effective precautions that the Federal Republic of Germany's liability arising from these bond purchases will not exceed the amount of its payment obligations under Article 8 section 5 sentence 1 of the Treaty establishing the European Stability Mechanism (TESM) as stipulated in its Annex II.

Applicant: Parliamentary group DIE LINKE in the German Bundestag,
represented by its Chairman Dr. Gregor Gysi, MdB,
Platz der Republik 1, 11011 Berlin,

- authorised representatives: 1. Prof. Dr. Dr. h.c. Hans-Peter Schneider,
Drosselweg 4, 30559 Hanover,
2. Prof. Dr. Andreas Fisahn,
Grüner Weg 83, 32130 Enger –

Respondent: German Bundestag,
represented by its President Prof. Dr. Norbert Lammert, MdB,
Platz der Republik 1, 11011 Berlin,

- authorised representatives: 1. Prof. Dr. Christian Calliess,
2. Prof. Dr. Christoph Möllers,
Adalbertstraße 84, 10997 Berlin,
3. Prof. Dr. Martin Nettesheim,
Horemer 13, 72076 Tübingen, –

– 2 BVE 13/13 –

joined the proceedings I to V:

German Bundestag,
represented by its President Prof. Dr. Norbert Lammert, MdB,
Platz der Republik 1, 11011 Berlin,

- authorised representatives: 1. Prof. Dr. Christian Calliess,
2. Prof. Dr. Christoph Möllers,
Adalbertstraße 84, 10997 Berlin,

3. Prof. Dr. Martin Nettesheim,
   Horemer 13, 72076 Tübingen, –

joined the proceedings I to IV, in proceedings V on the side of the German Bundestag:

Federal Government,
represented by the Federal Chancellor Dr. Angela Merkel,
Bundeskanzleramt, Willy-Brandt-Straße 1, 10557 Berlin,

- authorised representative: Prof. Dr. Ulrich Häde,
  Lennéstraße 15, 15234 Frankfurt (Oder) –

the Federal Constitutional Court – Second Senate – with the participation of Justices

President Voßkuhle,
Lübbe-Wolff,
Gerhardt,
Landau,
Huber,
Hermanns,
Müller,
Kessal-Wulf

held on 14 January 2014 as follows:

I. The proceedings are suspended.

II. Pursuant to Article 19 section 3 letter b of the Treaty on European Union and Article 267 section 1 letters a and b of the Treaty on the Functioning of the European Union, the following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

1. a) Is the Decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical Features of Outright Monetary Transactions incompatible with Article 119 and Article 127 sections 1 and 2 of the Treaty on the Functioning of the European Union, and with Articles 17 to 24 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, because it exceeds the European Central Bank's monetary policy mandate, which is regulated in the above-mentioned provisions, and infringes the powers of the Member States?

   Does a transgression of the European Central Bank's mandate follow in particular from the fact that the Decision of the Governing Council of the European Central Bank of 6 September 2012

   aa) is linked to economic assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (conditionality)?

   bb) envisages the purchase of government bonds only of selected Member States (selectivity)?

   cc) envisages the purchase of government bonds of Member States in addition to assistance programmes of the European Financial Stability Facility or the European Stability Mechanism (parallelism)?
   dd) might undermine the terms and conditions of the assistance programmes of the European Financial Stability Facility or the European Stability Mechanism (bypassing)?

   b) Is the Decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical Features of Outright Monetary Transactions incompatible with the prohibition of monetary financing enshrined in Article 123 of the Treaty on the Functioning of the European Union?

   Is the compatibility with Article 123 of the Treaty on the Functioning of the European Union precluded in particular by the fact that the Decision of the Governing Council of the European Central Bank of 6 September 2012

   aa) does not envisage quantitative limits for the purchase of government bonds (volume)?

   bb) does not envisage a certain time lag between the emission of government bonds on the primary market and their purchase by the European System of Central Banks on the secondary market (market pricing)

   cc) allows that all purchased government bonds may be held to maturity (inter-

ference with market logic)?

dd) contains no specific requirements for the credit rating of the government bonds that are to be purchased (default risk)?

ee) envisages equal treatment of the European System of Central Banks and private as well as other government bondholders (debt cut)?

2. In the alternative that the Court of Justice of the European Union does not consider the Decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical Features of Outright Monetary Transactions to be an act of an institution of the European Union and thus not a qualified object for a reference pursuant to Article 267 section 1 letter b of the Treaty on the Functioning of the European Union:

   a) Are Article 119 and Article 127 of the Treaty on the Functioning of the European Union and Articles 17 to 24 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank to be interpreted in such a way that they – alternatively or cumulatively – allow the Eurosystem

   aa) to make the purchase of government bonds contingent on the existence and adherence to economic assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (conditionality)?

   bb) to purchase government bonds of selected Member States only (selectivity)?

   cc) to purchase government bonds of Member States in addition to assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (parallelism)?
   dd) to undermine the terms and conditions of the assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (bypassing)?
   b) Regarding the prohibition of monetary financing: Is Article 123 of the Treaty on the Functioning of the European Union to be interpreted in such a way that the Eurosystem is allowed – alternatively or cumulatively –
   aa) to purchase government bonds without quantitative limits (volume)?

   bb) to purchase government bonds without a minimum time lag after their emission on the primary market (market pricing)?

   cc) to hold all purchased government bonds to maturity (interference with market logic)?

   dd) to purchase government bonds without minimum credit rating requirements (default risk)?

   ee) to accept equal treatment of the European System of Central Banks and private as well as other government bondholders (debt cut)?

ff) to influence pricing by communicating the intent to buy or in other ways, coinciding with the emission of government bonds by Member States of the euro currency area (encouragement to purchase newly issued securities)?

Reasons:

A. Facts of the Case

In a reasonable assessment of their applications, the complainants and the applicant challenge, complainants I to IV via constitutional complaints pursuant to Art. 93 sec. 1 no. 4a of the Basic Law (*Grundgesetz* – GG), § 13 no. 8a, §§ 90 et seq. of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), and applicant V via *Organstreit* proceedings [proceedings relating to disputes between constitutional organs] pursuant to Art. 93 sec. 1 no. 1 GG, § 13 no. 5, §§ 63 et seq. BVerfGG, first, *inter alia*, the participation of the German *Bundesbank* in the implementation of the Decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical Features of Outright Monetary Transactions, and secondly, that the German Federal Government and the German *Bundestag* failed to act regarding the Decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical Features of Outright Monetary Transactions (hereinafter: OMT Decision). 1

I. Subject Matter of the Proceedings

The OMT Decision envisages that government bonds of selected Member States can be purchased up to an unlimited amount if, and as long as, these Member States, at the same time, participate in a reform programme as agreed upon with the European Financial Stability Facility or the European Stability Mechanism. The stated aim of the Outright Monetary Transactions is to safeguard an appropriate monetary policy transmission and the consistency or “singleness” of the monetary policy. The Minutes of the 340th meeting of the Governing Council of the European Central Bank on 5 and 6 September 2012 in Frankfurt/Main read in this respect as follows: 2

[…]

With regard to *Outright Monetary Transactions (OMT)*, on a proposal from the *President*, the *Governing Council*:

(b) approved the main parameters of the Outright Monetary Transactions (OMT), which would be set out in a press release to be published after the meeting (Thursday, 6 September 2012);

The press release which was published on this subject on 6 September 2012 has the following wording: 3

6 September 2012 – Technical features of Outright Monetary Transactions

As announced on 2 August 2012, the Governing Council of the European Central Bank (ECB) has today taken decisions on a number of technical features regarding

the Eurosystem's outright transactions in secondary sovereign bond markets that aim at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy. These will be known as Outright Monetary Transactions (OMTs) and will be conducted within the following framework:

Conditionality

A necessary condition for Outright Monetary Transactions is strict and effective conditionality attached to an appropriate European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme. Such programmes can take the form of a full EFSF/ESM macroeconomic adjustment programme or a precautionary programme (Enhanced Conditions Credit Line), provided that they include the possibility of EFSF/ESM primary market purchases. The involvement of the IMF shall also be sought for the design of the country-specific conditionality and the monitoring of such a programme.

The Governing Council will consider Outright Monetary Transactions to the extent that they are warranted from a monetary policy perspective as long as programme conditionality is fully respected, and terminate them once their objectives are achieved or when there is non-compliance with the macroeconomic adjustment or precautionary programme.

Following a thorough assessment, the Governing Council will decide on the start, continuation and suspension of Outright Monetary Transactions in full discretion and acting in accordance with its monetary policy mandate.

Coverage

Outright Monetary Transactions will be considered for future cases of EFSF/ESM macroeconomic adjustment programmes or precautionary programmes as specified above. They may also be considered for Member States currently under a macroeconomic adjustment programme when they will be regaining bond market access.

Transactions will be focused on the shorter part of the yield curve, and in particular on sovereign bonds with a maturity of between one and three years.

No ex ante quantitative limits are set on the size of Outright Monetary Transactions.

Creditor treatment

The Eurosystem intends to clarify in the legal act concerning Outright Monetary Transactions that it accepts the same (pari passu) treatment as private or other creditors with respect to bonds issued by euro area countries and purchased by the Eurosystem through Outright Monetary Transactions, in accordance with the terms of such bonds.

Sterilisation

The liquidity created through Outright Monetary Transactions will be fully sterilised.

Transparency

Aggregate Outright Monetary Transaction holdings and their market values will be

published on a weekly basis. Publication of the average duration of Outright Monetary Transaction holdings and the breakdown by country will take place on a monthly basis.

Securities Markets Programme

Following today's decision on Outright Monetary Transactions, the Securities Markets Programme (SMP) is herewith terminated. The liquidity injected through the SMP will continue to be absorbed as in the past, and the existing securities in the SMP portfolio will be held to maturity.

The OMT Decision has not yet been put into effect. 4

II. History of the Proceedings

1. Submissions of the Complainants and the Applicant

The complainants and the applicant argue that the Federal Government and the German *Bundestag* are obliged to work towards a repeal of the OMT Decision, or at least to prevent its implementation, and that the German *Bundesbank* may not take part if the Decision is put into effect. They give the following reasons for this view: The OMT Decision is a so-called *ultra vires* act. It is not covered by the mandate of the European Central Bank pursuant to Art. 119, 127 et seq. of the Treaty on the Functioning of the European Union (TFEU); apart from this, it violates the prohibition of monetary financing (Art. 123 TFEU) and the independence of the European Central Bank. The purchase of government bonds is only permitted within the framework of monetary policy. For a number of reasons, however, the OMT Decision is not an act of monetary policy. It transgresses the boundaries of monetary policy and violates the prohibition of monetary financing of the budget by the European Central Bank by envisaging that only bonds of selected states will be purchased, that government bonds will be purchased for which no buyers exist on the market, and that the purchase of government bonds will be made contingent on political conditions, specifically on the participation of the Member State that benefits in a programme of the European Financial Stability Facility or of the European Stability Mechanism. Monetary policy must relate to the entire euro currency area and must be free from discrimination with regard to individual Member States of the Eurosystem. At the same time, linking OMT purchases to decisions of the European Financial Stability Facility or of the European Stability Mechanism and to the conditionalities agreed to therein collides with the independence of the European Central Bank. There are in fact no upheavals on the government bond markets, which are required for an intervention of the European Central Bank. The OMT Decision amounts to a suspension of the market mechanisms which violates the Treaties. The European Central Bank does not have a mandate to defend the euro by any means, including those that lead to large-scale redistributions between banks and taxpayers and between taxpayers of different Member States; in this respect, it does not enjoy sufficient democratic legitimation. The transfer of sovereign powers to the independent European Central Bank has only been po- 5

litically authorised and constitutionally approved under the condition that it would be limited to the area of monetary policy. Since the OMT Decision can create liability and payment risks affecting the federal budget to such an extent that the overall budgetary responsibility of the German *Bundestag*, and thus also its budgetary rights, can be impaired, the decision also violates the principle of democracy enshrined in Art. 20 sec. 1 and 2 GG, and impairs the constitutional identity of the Basic Law, which the eternity clause of Art. 79 sec. 3 GG protects not only against amendments of the Constitution but also against an erosion in the process of European integration.

2. Statements Submitted by the European Central Bank and the German *Bundesbank*

In the proceedings before the Federal Constitutional Court, the European Central Bank and the German *Bundesbank* have submitted statements. 6

a) According to the European Central Bank, the OMT Decision is covered by its mandate and does not violate the prohibition of monetary financing. Its monetary policy is no longer appropriately implemented in the Member States of the euro currency area because the so-called monetary policy transmission mechanism is disrupted. In particular, the link between the key interest rate and the bank interest rates is impaired. Unfounded fears of investors with regard to the reversibility of the euro have resulted in unjustified interest spreads. The Outright Monetary Transactions were intended to neutralise these spreads. The requirement for the purchase of government bonds on the basis of the OMT Decision is that the benefitting Member State has entered into agreements with the European Financial Stability Facility or with the European Stability Mechanism on macroeconomic, structural, budgetary and financial policy reforms, and complies with the agreements. The Outright Monetary Transactions are only intended to cut off unjustified interest rate hikes. If a Member State does not comply with its obligations, the purchases were to be stopped, even if this will result in major economic difficulties for the Member State concerned. Another condition is that the Member State has, or regains, access to the bond market so that the fiscally disciplining effect of the interest rate mechanism is upheld. 7

The European Central Bank further states that the Eurosystem will not claim preferred creditor status with regard to the government bonds purchased on the basis of the OMT Decision. While the European Central Bank objects to agreeing to a debt cut and to completely or partially waiving claims against the Member States concerned, it would accept equal treatment with other owners if, in a meeting of creditors, a majority voted in favour of a debt cut. 8

The European Central Bank argues that considering the Spanish, Italian, Irish and Portuguese bonds on the market, the potential volume of purchases on the basis of the OMT Decision would currently amount to approximately EUR 524 000 000 000 (status of 7 December 2012). The European System of Central Banks does not, however, intend to purchase the maximum possible amount of these bonds, but cannot publish the envisaged amount for tactical reasons. 9

The European Central Bank further states that immediately before and after the emission of government bonds, there shall be no purchases on the secondary market so that a market price can be formed; an appropriate time lag of some days will be observed for this. The exact locking period will be determined in a guideline, but not be published. 10

The European Central Bank further argues that the OMT Decision can be based on Art. 18.1. of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank (hereinafter: ESCB Statute). The purchase of government bonds on the secondary market does not serve to finance the budgets of the respective Member States independent from the financial markets, and it is not aimed at rendering market incentives ineffective; it is aimed at adapting interest rate levels to normal market activities. Moreover, the European System of Central Banks is called upon to support the general economic policies in the European Union to the extent that this does not conflict with maintaining price stability. However, the European Central Bank is independent in this respect (Art. 130 TFEU, Art. 7 ESCB Statute) and will always undertake an autonomous analysis of the overall situation. 11

According to the European Central Bank, there is no liability risk for the national budgets because the European System of Central Banks has ensured sufficient risk prevention, mostly through provisions and reserves. If losses occur nevertheless, they can be carried forward and balanced with revenues in the following years. 12

b) In the view of the German *Bundesbank*, the assumption of a disruption to the monetary policy transmission mechanism is questionable and does not justify the OMT Decision. According to the German *Bundesbank*, interest spreads on government bonds cannot be split into either justified or irrational components. A poorer economic development in a Member State justifies a higher interest spread. The fact that a disruption to the monetary policy transmission mechanism shall be tolerated if a Member State does not comply with its obligations under agreements with the European Financial Stability Facility or the European Stability Mechanism shows that the OMT Decision is in fact not about the effectiveness of monetary policy. 13

The German *Bundesbank* argues that the purchase of government bonds on the secondary market can also disconnect the benefitting state's financing terms from the financial market if the market participants can rely on being able to sell their government bonds to the Eurosystem at any time. The sooner such purchases are made after issuing, and the higher the purchase volume, the lower the risk. Moreover, a large-scale purchase of government bonds carries considerable risk and can lead to an ever-increasing amount of a Member State's debts being assumed by the Eurosystem. 14

The German *Bundesbank* further adds that every loss it incurs burdens the German federal budget, so that the risks ensuing from purchases of government bonds by the Eurosystem are no different, in economic terms, from those of the European Stability Mechanism. Unlike the European Stability Mechanism, the Eurosystem, however, 15

lacks parliamentary monitoring.

III. Relevant Legal Provisions and Jurisprudence

1. Legal Provisions

The relevant Articles of the Basic Law for the Federal Republic of Germany of 23 May 1949, most recently amended by the 59th Act Amending the Basic Law (*59. Gesetz zur Änderung des Grundgesetzes*) of 11 July 2012 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 1478) read as follows: (A translation of the Basic Law provided by the Federal Ministry of Justice and Consumer Protection can be found online: http://www.gesetze-im-internet.de/englisch_gg/index.html [http://www.gesetze-im-internet.de/englisch_gg/index.html].) 16

Art. 20

(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

(4) …

Art. 23

(1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. […] The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to sections (2) and (3) of Article 79.

(1a) to (7) …

Art. 38

(1) Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. […]

Art. 79

(1) ...

(2) Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat.

(3) Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid

down in Articles 1 and 20 shall be inadmissible.

Art. 88

The Federation shall establish a note-issuing and currency bank as the Federal Bank. Within the framework of the European Union, its responsibilities and powers may be transferred to the European Central Bank, which is independent and committed to the overriding goal of assuring price stability.

2. Jurisprudence of the Federal Constitutional Court

a) In its established case-law, the Federal Constitutional Court interprets these provisions so that they impose limits on the Federal Republic of Germany's participation in European integration; the Federal Constitutional Court can review whether these limits are respected, also upon complaints lodged by individual citizens. According to the jurisprudence which was established in 1993 with the *Maastricht* judgment, the individual's right to vote under Art. 38 sec. 1 sentence 1 GG has also a substantive content: 17

BVerfGE 89, 155 <171 and 172>: "Art. 38 GG does not merely guarantee that a citizen has the right to elect the German *Bundestag* and that the constitutional principles of electoral law will be complied with in the election. The guarantee also covers the fundamental democratic content of this right: Germans entitled to vote are guaranteed a subjective right to partake in the election of the *Bundestag* and to thereby contribute to the legitimation of state authority by the people at the federal level and to influence the exercise of this authority. (...) Art. 38 GG excludes the possibility that, in the area of application of Art. 23 GG, the legitimation of state authority and the influence on its exercise which an election provides is depleted by a transfer of the *Bundestag*'s responsibilities and powers to such a degree, that the democratic principle is violated to the extent that Art. 79 sec. 3 GG in conjunction with Art. 20 sec. 1 and 2 GG declares it inviolable."

The Federal Constitutional Court has affirmed and further substantiated this in later decisions (cf. only BVerfGE 123, 267 <330 et seq.; 340 et seq.>; 129, 124 <167 et seq.>). 18

This substantive content of what is guaranteed by the right to vote is violated only, but always so, if this right is in danger of being rendered ineffective in an area that is essential for the political self-determination of the people, i.e. if the democratic self-government of the people – through the German *Bundestag* – is permanently restricted in such a way that central political decisions can no longer be made independently (cf. BVerfGE 89, 155 <172>; 123, 267 <330>; 129, 124 <168>). However, Art. 38 sec. 1 sentence 1 GG does not extend this right any further and does not grant citizens a right to have the lawfulness of democratic majority decisions reviewed by the Federal Constitutional Court. The right to vote does not serve to monitor the content of democratic processes, but is intended to facilitate them (cf. BVerfGE 129, 124 <168 et seq.>; BVerfG, Order of the First Chamber of the Second Senate of 17 April 19

2013 – 2 BvQ 17/13 –, *Neue Zeitschrift für Verwaltungsrecht* – NVwZ 2013, p. 858 <859>).

b) The actions of the institutions and agencies of the European Union are democratically legitimated – as far as Germany is concerned – in the legislative Acts of Assent to the Treaty establishing the European Union and the Treaty on the Functioning of the European Union, which were enacted on the basis of Art. 23 sec. 1 GG, and in the programme of integration set out therein. An essential element of this programme of integration is the principle of conferral. 20

Against this background, actions of institutions and agencies of the European Union have a binding effect in the Federal Republic of Germany only within certain limits: 21

BVerfGE 89, 155 <187 and 188>: “Since the Germans entitled to vote exercise their right to participate in the democratic legitimation of the institutions and organs entrusted with sovereign authority mostly via the election of the German *Bundestag*, the *Bundestag* must also decide on the German membership in the European Union, its continued existence, and its development. (...) What is decisive is that the membership of the Federal Republic of Germany and the ensuing rights and obligations – especially the legally binding direct acts of the European Communities within the national legal sphere – have been defined in the Treaty so as to be predictable for the legislature, and have been enacted by it with sufficient certainty in the act of assent (cf. BVerfGE 58, 1 <37>; 68, 1 <98 and 99>). This implies that subsequent substantial changes to the programme of integration set out in the Union Treaty and to its powers to act are no longer covered by the Act of Assent to this Treaty (cf. BVerfGE 58, 1 <37>; 68, 1 <98 and 99> Mosler in: Handbuch des Staatsrechts, Vol. VII [1992], sec. 175, n. 60). Thus, if European agencies or institutions were to administer the Union Treaty, or develop it by judicial interpretation, in a way that is no longer covered by the Treaty as it underlies the Act of Assent, the ensuing legislative instruments would not be legally binding within the area of German sovereignty. For constitutional reasons, the organs of the German government would be prevented from applying these instruments in Germany. The Federal Constitutional Court thus examines whether the legislative instruments of European agencies and institutions remain within the limits of the sovereign powers conferred upon them or whether they transgress those limits (cf. BVerfGE 58, 1 <30 and 31>; 75, 223 <235, 242>).”

c) The Federal Constitutional Court’s powers of review cover the examination of whether acts of European institutions and agencies are based on manifest transgressions of powers (aa) or affect the area of constitutional identity, which cannot be transferred (Art. 79 sec. 3 in conjunction with Art. 1 and Art. 20 GG; cf. BVerfGE 75, 223 <235, 242>; 89, 155 <188 >; 113, 273 <296>; 123, 267 <353 and 354>; 126, 286 <302>; BVerfG, Judgment of the First Senate of 24 April 2013 – 1 BvR 1215/07 –, NJW 2013, pp. 1499 et seq. <1501> n. 91) (bb), which means that constitutional organs, authorities and courts are prohibited from taking part in putting them into effect (cc). 22

aa) Following the admissible challenge of an *ultra vires* act, the Federal Constitutional Court must review the applicability and binding effect of acts of institutions and other agencies of the European Union in Germany insofar as these acts provide the basis of actions taken by German authorities. 23

The requirements for an *ultra vires* review have been further outlined in the *Honeywell* decision: 24

BVerfGE 126, 286 <303 and 304>: "*Ultra vires* review may only be exercised in a manner which is friendly towards European law (see BVerfGE 123, 267 <354>). (…) The Union understands itself as a legal community; it is in particular bound by the principle of conferral and by fundamental rights, and it respects the constitutional identity of Member States (see in detail Art. 4 sec. 2 sentence 1, Art. 5 sec. 1 sentence 1 and Art. 5 sec. 2 sentence 1, as well as Art. 6 sec. 1 sentence 1 and Article 6 sec. 3 TEU). According to the legal system of the Federal Republic of Germany, the primacy of application of Union law is to be recognised and it is to be guaranteed that the powers of control which are constitutionally reserved for the Federal Constitutional Court are only exercised in a manner that is cautious and friendly towards European law. This means for the *ultra vires* review at hand that the Federal Constitutional Court must in principle comply with the rulings of the Court of Justice as a binding interpretation of Union law. Prior to the acceptance of an *ultra vires* act by European bodies and institutions, the Court of Justice is therefore to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the legal acts in question, in the context of preliminary ruling proceedings according to Art. 267 TFEU. (…) *Ultra vires* review by the Federal Constitutional Court can moreover only be considered if it is manifest that acts of European institutions and agencies have taken place outside the transferred powers (see BVerfGE 123, 267 <353, 400>). A breach of the principle of conferral is only manifest if the European bodies and institutions have transgressed the boundaries of their powers in a manner specifically violating the principle of conferral (Article 23.1 of the Basic Law), the breach of powers is, in other words, sufficiently qualified (see on the wording "sufficiently qualified" as an element in Union liability law, for instance, ECJ Case C-472/00 P *Fresh Marine*, judgment of 10 July 2003, <2003> ECR I-7541 n. 26-27). This means that the act of authority of the European Union must be manifestly in violation of powers and that the impugned act is highly significant for the allocation of powers between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law (see Kokott, *Deutschland im Rahmen der Europäischen Union - zum Vertrag von Maastricht*, *Archiv des öffentlichen Rechts* – AöR 1994, p. 207 <220>: "*erhebliche Kompetenzüberschreitungen*" (considerable transgressions of powers) and <233>: "*drastische*" (drastic) *ultra vires* acts; (...))."

This applies not only if independent expansions of powers affect areas which are part of the constitutional identity of the Member States or particularly depend on the process of democratic discourse in the Member States (see BVerfGE 123, 267 <357-358>), though transgressions of powers weigh particularly heavy here (BVer- 25

fGE 126, 286 <307>).

With regard to Art. 20 sec. 1 and 2 GG, this review cannot be waived. Otherwise, the power to dispose of the fundamental aspects of the Treaties would be shifted in such a way to the institutions and other agencies of the European Union that their understanding of the law could result in an amendment of a Treaty or in an expansion of powers (cf. BVerfGE 123, 267 <354 and 355>; 126, 286 <302 et seq.>). It is inevitable and due to the fact that in the European Union, Member States are invariably the masters of the Treaties, that constitutional and Union law perspectives do not completely match in the marginal cases of possible transgressions of powers by institutions and other agencies of the European Union – which are to be expected rarely according to the institutional and procedural precautions of Union law (cf. BVerfGE 75, 223 <242>; 89, 155 <190>; 123, 267 <348 and 349; 381 et seq.>; 126, 286 <302 and 303>). Unlike the primacy of application of federal law in a federal state, the precedence of Union law, which is based on national legislation giving effect to it, cannot be comprehensive (cf. BVerfGE 73, 339 <375>; 123, 267 <398>; 126, 286 <302>). 26

bb) If an act of an institution or other agency of the European Union has consequences which affect the constitutional identity protected by Art. 79 sec. 3 GG, it is, from the outset, inapplicable in Germany. Such an act cannot be based on primary law because even the legislature that decides on integration with the majority required by Art. 23 sec. 1 sentence 3 GG in conjunction with Art. 79 sec. 2 GG may not transfer sovereign powers to the European Union whose exercise would affect the constitutional identity protected by Art. 79 sec. 3 GG. If conferrals which originally have been in accordance with the Constitution were expanded in such a way, this would amount to *ultra vires* acts. Whether the principles which are declared inviolable by Art. 79 sec. 3 GG are affected by an act of the European Union is subject to review by the Federal Constitutional Court via a review of identity (cf. BVerfGE 123, 267 <353 and 354>). In such a case the Federal Constitutional Court will take the interpretation which the Court of Justice gives in a preliminary ruling pursuant to Art. 267 sec. 2 and 3 TFEU as a basis. In their cooperative relationship, it is for the Court of Justice to interpret the act. On the other hand, it is for the Federal Constitutional Court to determine the inviolable core content of the constitutional identity, and to review whether the act (in the interpretation determined by the Court of Justice) interferes with this core. 27

Identity review can, in particular, affect the safeguarding of the overall budgetary responsibility of the German *Bundestag*: 28

BVerfGE 132, 195 <239 n. 106>: “There is a violation of Article 38 sec. 1 of the Basic Law in particular if the German *Bundestag* relinquishes its parliamentary budget responsibility to the effect that it or a future *Bundestag* can no longer exercise the right to decide on the budget in its own responsibility (BVerfGE 129, 124 <177>). The decision on public revenue and public expenditure is a fundamental part of the ability

of a constitutional state to democratically shape itself (see BVerfGE 123, 267 <359>). The German *Bundestag* must therefore make decisions on revenue and expenditure with responsibility to the people. Insofar, the right to decide on the budget is a central element of the democratic development of informed opinion (cf. BVerfGE 70, 324 <355 and 356>; 79, 311 <329>; 129, 124 <177>)."

BVerfGE 132, 195 <240 n. 109 and 110>: "A necessary condition for the safeguarding of political latitude in the sense of the core of identity of the constitution (Article 20 sec. 1 and 2, Article 79 sec. 3 of the Basic Law) is that the budget legislature makes its decisions on revenue and expenditure free of heteronomy on the part of the bodies and of other Member States of the European Union and remains permanently 'the master of its decisions' (…). (…) It follows from the democratic basis of budget autonomy that the *Bundestag* may not consent to an automatism of bonds or benefits that are agreed upon intergovernmentally or supranationally and that is not subject to strict specifications and whose effects are not limited, and which – once it has been set in motion – is removed from the *Bundestag*'s control and influence (BVerfGE 129, 124 <180>).

Moreover, no permanent mechanisms may be created under international treaties which are tantamount to accepting liability for decisions made freely by other states, above all if they entail consequences which are hard to calculate. The *Bundestag* must individually approve every large-scale federal aid measure on the international or European Union level made in solidarity that results in expenditure." (cf. already BVerfGE 129, 124 <177 et seq.>).

Since Art. 79 sec. 3 GG also sets an "ultimate limit" (BVerfGE 123, 267 <348>) to the applicability of Union law within the German jurisdiction under the Basic Law, the principles which are stipulated therein may not be balanced against other legal interests (cf. BVerfGE 123, 267 <343>). Thus, the identity review performed by the Federal Constitutional Court is fundamentally different from the review under Art 4 sec. 2 sentence 1 TEU by the Court of Justice of the European Union. Art. 4 sec. 2 sentence 1 TEU obliges the institutions of the European Union to respect national identities. This is based on a concept of national identity which does not correspond to the concept of constitutional identity within the meaning of Art. 79 sec. 3 GG, but reaches far beyond (cf. ECJ, Judgment of 22 December 2010, Case C 208/09, *Sayn-Wittgenstein*, ECR 2010 p. I – 13693, n. 83 – "Law on the Abolition of the Nobility" as an element of national identity). On this basis, the Court of Justice of the European Union treats the protection of national identity, which is required according to Art. 4 sec. 2 sentence 1 TEU, as a "legitimate aim" which must be taken into account when legitimate interests are balanced against the rights conferred by Union law (cf. ECJ, Judgment of 2 July 1996, Case C-473/93, *Commission v Luxembourg*, ECR 1996, p. I-3207 n. 35; Judgment of 14 October 2004, Case C-36/02, *Omega*, ECR 2004, p. I-9609, n. 23 et seq.; Judgment of 22 December 2010, Case C-208/09, ECR 2010 p. I-13693, n. 83; Judgment of 12 May 2011, Case C-391/09, *Runevic-Vardyn and Wardyn*, ECR 2011, p. I-3787, n. 84 et seq.; Judgment of 24 May 2011, Case C-51/08, 29

Commission v Luxembourg, ECR 2011, p. I-4231, n. 124; Judgment of 16 April 2013, Case. C-202/11, Las, ECR 2013, p. I-0000, n. 26, 27). However, as an interest which may be balanced against others, the respect of national identity which is required according to Art. 4 sec. 2 sentence 1 TEU does not meet the requirements of the protection of the core content of the Basic Law according to Art. 79 sec. 3 GG, which may not be balanced against other legal interests. The protection of the latter is a task of the Federal Constitutional Court alone.

cc) The above-mentioned principles concerning the protection of the constitutional identity and of the limits of the transfer of sovereign powers to the European Union can also be found, with modifications depending on the existence or non-existence of unamendable elements in the respective national constitutions, in the constitutional law of many other Member States of the European Union (cf. for instance for the Kingdom of Denmark: Hojesteret, Judgment of 6 April 1998 – I 361/1997 –, para. 9.8.; for the Republic of Estonia: Riigikohus, Judgment of 12 July 2012 – 3-4-1-6-12 –, sec. no. 128, 223; for the French Republic: Conseil constitutionnel, Decision no. 2006-540 DC of 27 July 2006, 19th recital; Decision no. 2011-631 DC of 9 June 2011, 45th recital; for Ireland: Supreme Court of Ireland, *Crotty v. An Taoiseach* <1987>, I.R. 713 <783>; *S.P.U.C. (Ireland) Ltd. v. Grogan*, <1989>, I.R. 753 <765>; for the Italian Republic: Corte costituzionale, Decision no. 183/1973; Decision no. 168/1991; for the Republic of Latvia: Satversmes tiesa, Judgment of 7 April 2009 – 2008-35-01 –, sec. no. 17; for the Republic of Poland: Trybunal Konstytucyjny, Judgments of 11 May 2005 – K 18/04 –, n. 4.1., 10.2., of 24 November 2010 – K 32/09 –, n. 2.1. et seq.; of 16 November 2011 – SK 45/09 –, n. 2.4., 2.5., with further references; for the Kingdom of Sweden: Chapter 10 Art. 6 sentence 1, Form of government; for the Kingdom of Spain: Tribunal Constitucional, Declaration of 13 December 2004, DTC 1/2004; for the Czech Republic: Ústavni Soud, Judgment of 31 January 2012 – 2012/01/31 – Pl. ÚS 5/12 –, para. VII.). At national level, they have consequences not only for the Federal Constitutional Court but also for other public authorities. German authorities may not take part in the decision making process and the implementation of *ultra vires* acts (cf. BVerfGE 89, 155 <188>; 126, 286 <302 et seq.>) and are not entitled to participate in measures affecting the constitutional identity protected by Art. 79 sec. 3 GG. This applies to all constitutional organs, authorities and courts. It results from the constitutional principles of democracy (Art. 20 sec. 1 and sec. 2 GG) and the rule of law (Art. 20 sec. 3 GG), as well as from Art. 23 sec. 1 GG, and is safeguarded under European Union law by the principle of conferral (Art. 5 sec. 1 sentence 1 and sec. 2 TEU) and the obligation of the European Union to respect the national identities of the Member States (Art. 4 sec. 2 sentence 1 TEU, cf. BVerfGE 123, 267 <352>). 30

Besides the institutions of the European Union, German constitutional organs are also responsible to make sure that the programme of integration is observed. In this respect, the judgment on the Treaty of Lisbon reads as follows: 31

BVerfGE 123, 267 <352 and 353>: “If in the process of European integration primary law is amended, or expansively interpreted by institutions, a constitutionally impor-

tant tension will arise with the principle of conferral and with the individual Member State's constitutional responsibility with respect to integration. If legislative or administrative powers are only transferred in an unspecified manner or with a view to further dynamic development, or if the institutions are permitted to re-define expansively, fill lacunae or factually extend powers they risk transgressing the predetermined programme of integration and acting beyond the powers granted to them. They are moving on a road at the end of which there is the power of disposition of their foundations laid down in the treaties, i.e. the competence of freely disposing of their competences. There is a risk of transgression of the constitutive principle of conferral and of the conceptual responsibility with respect to integration incumbent upon Member States if institutions of the European Union can decide without restriction, without any outside control, however restrained and exceptional, how treaty law is to be interpreted. It is therefore constitutionally required not to agree dynamic treaty provisions with a blanket character or if they can still be interpreted in a manner that respects the national responsibility with respect to integration, to establish, at any rate, suitable national safeguards for the effective exercise of such responsibility. Accordingly, the Act approving an international agreement and the national accompanying laws must therefore be capable of permitting European integration continuing to take place according to the principle of conferral without the possibility for the European Union of taking possession of *Kompetenz-Kompetenz* or to violate the Member States' constitutional identity, which is not open to integration, in this case, that of the Basic Law. For borderline cases of what is still constitutionally admissible, the German legislature must, where necessary, take precautions in its legislation accompanying approval to ensure that the responsibility with respect to integration of the legislative bodies can sufficiently develop." (cf. also BVerfGE 129, 124 <180 and 181>; 132, 195 <238 and 239, n. 105>).

d) Finally, with regard to the constitutional foundations of Germany's membership in the monetary union and to the transfer of powers to the European Central Bank, the Federal Constitutional Court held as follows: 32

BVerfGE 89, 155 <207 et seq.>: "The *Bundestag's*, and thus the voters', possibilities to influence the exercise of sovereign powers by European institutions have, however, been taken away almost completely insofar as the European Central Bank has been provided with independence vis-à-vis the European Community and the Member States (Art. 107 EC). An essential policy that supports individual freedom through the maintenance of the monetary value and that determines through the money supply also public finances and the political spheres dependent thereon, is excluded from the regulatory power of sovereign authorities, and also – unless there is a treaty amendment – from the legislature's control of fields of functions and means of action. Placing most of the tasks of monetary policy on an autonomous basis with an independent central bank disconnects the exercise of governmental authority from direct governmental or supranational parliamentary responsibility, in order to free the monetary system from the access of interest groups and holders of political office who are

concerned about their re-election (as stated in the Government Draft of the Bundesbank Act, *Bundestag* document, *Bundestagsdrucksache* – BTDrucks. 2/2781 pp. 24 and 25).

This limitation of democratic legitimation, which is derived from the voters in the Member States, affects the principle of democracy, but is compatible with Art. 79 sec. 3 GG as a modification of this principle that is envisaged in Art. 88 sentence 2 GG. The addition to Art. 88 GG, which was made with a view to the European Union, allows a transfer of powers from the *Bundesbank* to a European Central Bank if it meets the "strict criteria of the Maastricht Treaty and the Statute of the European System of Central Banks and the priority of a stable currency" (Recommendation and Report of the Special Committee on 'European Union [Maastricht Treaty]' of 1 December 1992, BTDrucks. 12/3896 p. 21). The intention of the legislature amending the Constitution was thus clearly to create a constitutional basis for the monetary union envisaged in the Union Treaty, but to restrict the granting of the ensuing abovementioned independent powers and institutions to that case. This modification of the principle of democracy in order to protect the confidence placed in the value of a currency is justifiable because it takes account of the special feature of monetary policy – tried and tested in the German legal order, and also by the scientific community – that an independent central bank is more likely to safeguard the monetary value, and thus the general economic basis for governmental budgetary policies as well as for private plans and transactions in exercise of the economic freedoms, than state bodies whose options and means for action depend on money supply and monetary value and which need to rely on short-term approval by political forces. To that extent, placing the monetary policy on an autonomous basis under the sovereign jurisdiction of an independent European Central Bank, which cannot be transferred to other political areas, satisfies the constitutional requirements according to which the principle of democracy may be modified (cf. BVerfGE 30, 1 <24>; 84, 90 <121>)."

B. On the Validity of the OMT Decision

(First Question Referred for a Preliminary Ruling)

I. Relevance to the Decision

The first question referred for a preliminary ruling is relevant to the Federal Constitutional Court's decision. It is relevant even though the OMT Decision does not yet have legal effects on others (1.). The applications would be successful if the OMT Decision, transgressing the European Central Bank's mandate, encroached upon the powers of the Member States for economic policy and/or violated the prohibition of monetary financing of the budget. According to German constitutional law, the OMT Decision would then have to be qualified as a manifest and structurally significant *ultra vires* act (2.). In this case, the German constitutional organs would, because of their inactivity, not have met their responsibility with respect to integration (*Integrationsverantwortung*), and they would thus have violated the complainants' constitutional rights as well as the legal positions of the German *Bundestag* invoked by the 33

applicant in the *Organstreit* proceedings (3.).

1. Preventive Legal Protection

The admissibility of the constitutional complaints does not depend on whether the OMT Decision can already be understood as an act with an external dimension within the meaning of Art. 288 sec. 4 TFEU, or only as the announcement of such an act. It is also irrelevant for the present proceedings whether the OMT Decision affects the complainants and the applicant directly within the meaning of Art. 263 sec. 4 TFEU (cf. EGC, Order of 10 December 2013, Case T-492/12, *von Storch and Others v ECB*, ECR 2013, p. II-0000, n. 35 et seq.). Neither the scope nor the conditions of legal protection under national law against activities or omissions by national authorities regarding the OMT Decision are predetermined by this (cf. EGC, Order of 10 December 2013, loc. cit., n. 46 and 48). According to German law, the requirements for granting preventive legal protection are met. The case-law of the Federal Constitutional Court recognises that preventive legal protection can also be warranted in constitutional complaint proceedings in order to avoid consequences that cannot be corrected (cf. BVerfGE 1, 396 <413>; 74, 297 <318 ff.>; 97, 157 <164>; 108, 370 <385>; 112, 363 <367>; 123, 267 <329>; BVerfG, Order of the Third Chamber of the Second Senate of 11 March 1999 - 2 BvQ 4/99 -, NJW 1999, p. 2174 <2175>). 34

The complainants comprehensibly stated that the execution of the OMT Decision could lead to such consequences that could not be corrected. It is true that the purchase programme requires further implementing measures (cf. EGC, Order of 10 December 2013, loc. cit., n. 38). However, it has been sufficiently specified by the Decision of 6 September 2012 and, according to the European Central Bank, only requires some further specification regarding its details, which – as the European Central Bank's representative explained at the oral hearing – can be done at any time and within a very short timeframe. 35

2. Ultra Vires Act

If the OMT Decision violated the European Central Bank's monetary mandate or the prohibition of monetary financing of the budget, this would have to be considered an *ultra vires* act in the sense of the above-mentioned (n. 23) *Honeywell* decision. 36

a) A sufficiently qualified violation of the integration programme requires that the violation is manifest and that the challenged act entails a structurally significant shift in the allocation of powers to the detriment of the Member States (cf. BVerfGE 126, 286 <304 and 305 with further references>). Transgressions of the mandate are structurally significant especially (but not only) if they cover areas that are part of the constitutional identity of the Federal Republic of Germany, which is protected by Art. 79 sec. 3 GG, or if they particularly affect the democratic discourse in the Member States (cf. BVerfGE 126, 286 <307>). 37

b) It would have to be considered a manifest and structurally significant transgression of its mandate if the European Central Bank acted beyond its monetary policy 38

mandate (aa), or if the prohibition of monetary financing of the budget was violated by the OMT programme (bb).

aa) If the European Central Bank exceeded its monetary policy mandate with the OMT Decision, it would thus interfere with the responsibility of the Member States for economic policy. According to Title VIII of the Treaty on the Functioning of the European Union and notwithstanding the special powers expressly assigned to the Union (e.g. Art. 121, 122, 126 TFEU), the responsibility for economic policy lies clearly with the Member States. In this field of economic policy, the European Union is – apart from individual exceptions that are in particular regulated in Part Three of the Treaty on the Functioning of the European Union – essentially limited to a coordination of Member States' economic policies (Art. 119 sec. 1 TFEU). The European Central Bank may only support the general economic policies of the Member States (Art. 119 sec. 2, Art. 127 sec. 1 sentence 2 TFEU; Art. 2 sentence 2 ESCB Statute). It is not authorised to pursue its own economic policy. If one assumes – subject to the interpretation by the Court of Justice – that the OMT Decision is to be qualified as an independent act of economic policy, it manifestly violates this distribution of powers. 39

Such an act would also be structurally significant. This derives in particular from the fact that the OMT Decision – functionally equivalent in this regard – could be superimposed onto assistance measures which are part of the "Euro rescue policy" and which, due to their significant financial scope and general political implications, belong to the core aspects of the Member States' economic policy responsibilities (cf. Art. 136 sec. 3 TFEU). Decisions on the choice of instruments for the stabilisation of the monetary union or on the composition of the euro currency area substantially depend on the democratic process in the Member States. In addition, actions by the European Central Bank in this area could make diverging decisions by the Member States politically no longer feasible or sensible. 40

Acts of the kind that were announced in the OMT Decision are structurally significant especially because they lead to a considerable redistribution between the budgets and the taxpayers of the Member States, and can thus gain effects of a system of fiscal redistribution, which is not entailed in the integration programme of the European Treaties. On the contrary, independence of the national budgets, which opposes the direct or indirect common liability of the Member States for government debts, is constituent for the design of the monetary union (cf. Art. 125 TFEU; ECJ, Judgment of 27 November 2012, Case C-370/12, *Pringle*, ECR 2012, p. I-0000, n. 135; BVerfGE 129, 124 <181 and 182>). 41

bb) Should the OMT Decision violate the prohibition of monetary financing of the budget, this, too, would have to be considered a manifest and structurally significant transgression of powers. 42

The violation would be manifest because the Treaty on the Functioning of the European Union stipulates an explicit prohibition of monetary financing of the budget and the Treaty thus unequivocally excludes such powers of the European Central Bank 43

(cf. Art. 123 sec. 1 TFEU). The violation would also be structurally significant. The current integration programme designs the monetary union as a “community of stability”. As the Federal Constitutional Court has repeatedly emphasised (cf. BVerfGE 89, 155 <205>; 97, 350 <369>; 129, 124 <181 and 182>; 132, 195 <243>, n. 115), this is the basis for the participation of the Federal Republic of Germany in the monetary union. The prohibition of monetary financing of the budget is one of the fundamental rules that guarantee the design of the monetary union as a “community of stability”. Apart from this, it safeguards the overall budgetary responsibility of the German *Bundestag* (for more details cf. BVerfGE 129, 124 <181>; 132, 195 <243 and 244> n. 115 and 116).

3. Obligations to Act and not to Act of German Authorities

An *ultra vires* act as understood above creates an obligation of German authorities to refrain from implementing it and a duty to challenge it (a and b). These duties can be enforced before the Constitutional Court at least insofar as they refer to constitutional organs (c). 44

a) If an institution or other agency of the European Union acts *ultra vires* in the above-mentioned sense, German constitutional organs, authorities, and courts may neither participate in the decision making process nor in the implementation of the act. This also applies to the German *Bundesbank*. 45

b) Moreover, the German *Bundestag* and the Federal Government may not simply let a manifest or structurally significant usurpation of sovereign powers by European Union organs take place. 46

aa) The Member States and their constitutional organs – next to the institutions of the European Union – have to ensure that the integration programme is observed (responsibility with respect to integration, cf. BVerfGE 123, 267 <352 et seq., 389 et seq., 413 et seq.>; 126, 286 <307>; 129, 124 <181>; 132, 195 <238 and 239> n. 105). In the Federal Republic of Germany, it is the task of all constitutional organs to meet this responsibility with respect to integration. 47

Among other provisions, the special constitutional requirement of the enactment of a statute (Art. 23 sec. 1 sentence 2 GG), according to which sovereign powers may only be transferred by a law and with the approval of the *Bundesrat*, serves to protect this responsibility with respect to integration (cf. BVerfGE 123, 267, 355). Neither does the Basic Law authorise the constitutional organs to transfer sovereign powers in such a way that their exercise could independently establish other powers for the European Union. It prohibits the transfer of sovereign powers to decide on its own powers (*Kompetenz-Kompetenz*) (cf. BVerfGE 123, 267 <349>; 132, 195 <238 and 239>, n. 105). For this reason, Parliament may not cede the power to decide whether and to what degree sovereign powers are to be transferred, and it may not transfer this power to the institutions of the European Union. It is, in fact, obliged to decide on its own and in formal proceedings about the transfer of powers in the scope of Euro- 48

pean integration, in order to avoid that the constitutionally required principle of conferral is undermined.

bb) It is derived from the responsibility with respect to integration that the German *Bundestag* and the Federal Government are obliged to safeguard compliance with the integration programme and, in case of manifest and structurally significant transgressions of powers by European Union organs, to not only refrain from any participation and implementation, but to actively pursue the goal to reach compliance with the integration programme. To this end, they can retroactively legitimise the assumption of powers by initiating a corresponding change of primary law that adheres to the limits of Art. 79 sec. 3 GG, and by formally transferring the exercised sovereign powers in proceedings pursuant to Art. 23 sec. 1 sentences 2 and 3 GG. However, insofar as this is not feasible or wanted, they are generally obliged within their respective powers, to pursue the reversal of acts that are not covered by the integration programme with legal or political means, and – as long as the acts continue to have effect – to take adequate precautions to ensure that the domestic effects remain as limited as possible. 49

c) A violation of these duties, which follow from the responsibility with respect to integration of the German *Bundestag* and Federal Government, also violates individual rights of the voters that can be asserted with a constitutional complaint (aa). It can also be a subject of *Organstreit* proceedings (bb). 50

aa) According to the established jurisprudence of the Federal Constitutional Court, the individual's right under Art. 38 sec. 1 sentence 1 GG to elect the German *Bundestag* is not limited to a formal legitimation of (federal) state power, but also entails the fundamental democratic content of the right to vote (cf. BVerfGE 89, 155 <171>; 129, 124 <168>). This grants the individual the right to influence the political formation of opinions with his or her vote and to have an impact on them. Within the scope of Art. 23 GG, citizens who are entitled to vote are thus protected from being deprived of the right to a legitimate government and to influence the exercise of public authority, which an election provides, by transferring the responsibilities and powers of the German *Bundestag* to the European level to such an extent that it violates the principle of democracy (cf. BVerfGE 89, 155 <172>; 123, 267 <330>). 51

The substantive content of that right is violated if the right to vote is in danger of being rendered ineffective in an area that is essential for the political self-determination of the people, i.e. if the democratic self-government of the people – embodied in particular in the German *Bundestag* – is permanently restricted in such a way that vital political decisions can no longer be made independently (cf. BVerfGE 89, 155 <172>; 123, 267 <330>; 129, 124 <168>). On the other hand, Art. 38 sec. 1 sentence 1 GG does not entail a right that reaches beyond safeguarding the above-mentioned rights and that would let citizens have the legality of decisions taken by a democratic majority reviewed by the Federal Constitutional Court. The right to vote does not serve to monitor the content of democratic processes, but is intended to facilitate them (cf. 52

BVerfGE 129, 124 <168 et seq.>; BVerfG, Order of the First Chamber of 17 April 2013 - 2 BvQ 17/13 -, NVwZ 2013, p. 858 <859>).

Vis-à-vis manifest and structurally significant transgressions of the mandate by the European institutions, this safeguard against an erosion of the legislature's substantial scope of action consists not only of a substantive, but also of a procedural element. In order to safeguard their democratic influence in the process of European integration, citizens who are entitled to vote generally have a right, deriving from Art. 38 sec. 1 sentence 1 GG, to have a transfer of sovereign powers only take place in the ways envisaged in Art. 23 sec. 1 sentences 2 and 3, Art. 79 sec. 2 GG. The democratic decision-making process, which these regulations guarantee in addition to the necessary specificity of the transfer of sovereign powers (cf. BVerfGE 123, 267, 351 et seq.), is undermined when there is a unilateral usurpation of powers by institutions and other agencies of the European Union. A citizen can therefore demand that the *Bundestag* and the Federal Government actively deal with the question of how the distribution of powers entailed in the treaties can be restored, and that they decide which options they want to use to pursue this goal. 53

bb) The same applies to *Organstreit* proceedings. The responsibility with respect to integration enshrined in Art. 23 GG includes rights and obligations of the German *Bundestag*, the violation of which parliamentary groups can assert in their own name, on behalf of the *Bundestag* (§ 64 sec. 1 BVerfGG), also vis-à-vis Parliament (cf. BVerfGE 123, 267 <337>; 132, 195 <247>, n. 125). The German *Bundestag* may not waive those rights and obligations that it holds in the context of European integration, and it may not remain passive when facing an imminent erosion of its freedom to act because of an usurpation of powers by institutions and agencies of the European Union. If the *Bundestag* does not meet its responsibility with respect to integration, parliamentary groups can – on behalf of the *Bundestag* – take action against this. 54

II. Interpretation of Union Law by the Federal Constitutional Court

The OMT Decision is to be considered as a decision about purchases of government bonds of individual Member States of the euro currency area, which are not limited *ex ante*, and which are politically motivated; the primary objective (or at least the necessary intermediate objective) of the purchases is the reduction of the interest rates the Member States that benefit have to pay on the capital markets for new government bonds. Subject to the interpretation by the Court of Justice of the European Union, the Federal Constitutional Court considers the OMT Decision incompatible with Art. 119 and Art. 127 sec. 1 and 2 TFEU and Art. 17 et seq. of the ESCB Statute because it exceeds the mandate of the European Central Bank that is regulated in these provisions and encroaches upon the responsibility of the Member States for economic policy (1.). It also appears to be incompatible with the prohibition of monetary financing of the budget enshrined in Art. 123 TFEU (2.). The European Central Bank's reference to a "disruption to the monetary policy transmission mechanism" is not likely to change the assessment of these two points (3.). Accordingly, the applica- 55

tions would probably be successful. Another assessment could, however, be warranted if the OMT Decision could be interpreted in conformity with primary law (4.).

1. Transgression of the European Central Bank's Mandate

Art. 119 and 127 et seq. TFEU and Art. 17 et seq. ESCB Statute include in principle a mandate that is limited to monetary policy for the European System of Central Banks in general and the European Central Bank in particular (cf. BVerfGE 89, 155 <208 and 209>) (a). In addition, the European System of Central Banks is only allowed to support the general economic policies in the Union (b). Following these principles, the OMT Decision does not appear to be covered by the mandate of the European Central Bank (c). 56

a) The principle of conferral applies to the powers of the European System of Central Banks (aa). According to the Treaty on European Union and the Treaty on the Functioning of the European Union, the European Central Bank is responsible for monetary policy (bb). The responsibility for economic policy, however, rests, apart from individual cases, with the Member States (cc). 57

aa) The division of powers between the European Union and the Member States is governed by the principle of conferral (Art. 5 sec. 1 and 2 TEU). This also applies to functions and powers that are assigned by the Treaties to the European System of Central Banks, which consists of the European Central Bank and the national central banks (Art. 282 sec. 1 sentence 1 TFEU). In order to meet democratic requirements, this mandate must be shaped narrowly (1). The compliance with its limits is fully subject to judicial review; this review first and foremost falls within the responsibility of the Court of Justice of the European Union, whose task it is to ensure that the law is observed in the interpretation and application of the Treaties (Art. 19 n. 1 TEU) (2). 58

(1) The independence which the European Central Bank and the national central banks enjoy in the exercise of the powers conferred upon them (Art. 130, Art. 282 sec. 3 sentences 3 and 4 TFEU) diverges from the requirements the Basic Law states with regard to the democratic legitimation of political decisions. For Germany, the Federal Constitutional Court has expressly held that the democratic legitimation which emanates from the voters in the Member States is restricted by the transfer of monetary policy powers to an independent European Central Bank, and that this affects the principle of democracy. Nevertheless, this restriction is still compatible with democratic principles because it takes the tested and scientifically documented special character of monetary policy into account that an independent central bank is more likely to safeguard monetary stability, and thus the general economic basis for budgetary policies, than state bodies whose actions depend on money supply and value and which need to rely on short-term approval by political forces. The constitutional justification of the independence of the European Central Bank is, however, limited to a primarily stability-oriented monetary policy and cannot be transferred to other policy areas (cf. for the German Constitution Art. 88 sentence 2 GG; BVerfGE 89, 155 <208 and 209>; 97, 350 <368>). 59

(2) The independence of the European Central Bank does not preclude judicial review with regard to the delineation of its mandate (ECJ, Judgment of 10 July 2003, Case C-11/00, *Commission v. ECB*, ECR 2003 p. I-07147, n. 135 et seq.). The independence guaranteed by Art. 130, Art. 282 sec. 3 sentences 3 and 4 TFEU only refers to the actual powers (and their specific content) that the Treaties confer on the European Central Bank, but do not refer to the determination of the extent and scope of its mandate. It would be incompatible with the principle of conferral (Art. 5 sec. 2 TEU) if an institution of the European Union could autonomously determine the powers assigned to it. Moreover, the delimitation of powers of the European Central Bank cannot be exempt from judicial review because the European Central Bank would otherwise have the opportunity to expand its mandate at will. 60

bb) Pursuant to Art. 3 sec. 1 letter c TFEU, the European Union has the exclusive responsibility in the field of monetary policy for the Member States of the euro currency area. The Treaties do not define the term “monetary policy” (cf. ECJ, Judgment of 27 November 2012, Case C-370/12, *Pringle*, ECR 2012, p. I-0000, n. 53). The responsibility in question is, however, substantiated by the Treaty on the Functioning of the European Union and the ESCB Statute. 61

The primary objective of the European System of Central Banks is to maintain price stability (Art. 127 sec. 1 sentence 1, Art. 282 sec. 2 sentence 2 TFEU). The basic tasks of the System are, pursuant to Art. 127 sec. 2 TFEU, to define and implement the monetary policy of the Union (first indent), to conduct foreign-exchange operations (second indent), to hold and manage the official foreign reserves of the Member States (third indent), and to promote the smooth operation of payment systems (fourth indent). The Statute of the European System of Central Banks and the European Central Bank specifies, in Chapter IV, the monetary functions and operations of the European System of Central Banks and authorises it to open accounts (Art. 17 ESCB Statute), to conduct open market and credit operations (Art. 18 ESCB Statute), to define minimum reserves (Art. 19 ESCB Statute), and to use other instruments of monetary control (Art. 20 ESCB Statute). Pursuant to Art. 22 ESCB Statute, the European Central Bank and the national central banks may also provide facilities, and the ECB may issue regulations, to ensure efficient and sound clearing and payment systems within the Union and with other countries. Art. 23 ESCB Statute authorises them to enter into external operations with other countries and international organisations, and Art. 24 ESCB Statute authorises them to enter into other auxiliary fiscal operations. 62

cc) The monetary policy is to be distinguished – and thereby further defined – according to the wording, structure, and purpose of the Treaties from (in particular) the economic policy, which primarily falls into the responsibility of the Member States. Relevant to the delimitation are the immediate objective of an act, which is to be determined objectively, the instruments envisaged to achieve the objective, and its link to other provisions (cf. ECJ, Judgment of 27 November 2012, Case C-370/12, *Pringle*, ECR 2012, p. I-0000, n. 53 et seq. <summarising at n. 60>). 63

As far as the classification from the point of view of the distribution of powers is concerned, it is thus crucial, first, whether the act directly pursues economic policy objectives. In the *Pringle* case, the Court of Justice has affirmed this with regard to the European Stability Mechanism, because its aim is the stabilisation of the euro currency area as a whole. The Court of Justice has held that such an act could not be treated as equivalent to an act of monetary policy for the sole reason that it might have indirect effects on the stability of the euro (cf. ECJ, Judgment of 27 November 2012, loc. cit., n. 56 and 97). On the basis of this case-law, purchases of government bonds may not qualify as acts of monetary policy for the sole reason that they also indirectly pursue monetary policy objectives. 64

However, what is relevant is not only the objective, but also the instruments used for reaching the objective and their effects. According to the case-law of the Court of Justice, acts of monetary policy are, for instance, the decision on key interest rates for the euro currency area and the release of the euro currency (cf. ECJ, Judgment of 27 November 2012, loc. cit., n. 95 and 96). In contrast, the grant of financial assistance “clearly” does not fall within monetary policy (cf. ECJ, Judgment of 27 November 2012, loc. cit., n. 57). To the degree that the European System of Central Banks thus grants financial assistance, it pursues an economic policy that the European Union is prohibited from conducting. 65

Finally, it is relevant how the act in question relates to other provisions. In particular, references of an act to other provisions and the embedding of an act in an overall regulation that consists of several individual measures can indicate its adherence either to the economic or the monetary policy. Thus, the Court of Justice has decided, with regard to the European Stability Mechanism, that Decision 2011/199 of the European Council of 25 March 2011, which aims at the conclusion of the ESM Treaty, because of its reference to the economic provisions of the Treaty on the Functioning of the European Union as well as to the secondary legislation of the so-called six-pack, has to be regarded as an additional part of the new regulatory framework to strengthen the economic governance of the Union, and that this indicates that the European Stability Mechanism belongs to the area of economic policy (cf. ECJ, Judgment of 27 November 2012, loc. cit., n. 58-60). 66

The control of budgetary policy is, in any case, not part of monetary policy. The Treaties envisage the integration of the System of European Central Banks into the economic and budgetary policy only to a very limited degree, namely during a hearing in an excessive deficit procedure (Art. 126, sec. 14, sub-sec. 2 TFEU). The same applies in so far as during the financial and sovereign debt crisis provisions have been adopted in secondary law (cf. Art. 11 sec. 3 Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJEU No L 306 of 23 November 2011, p. 12 <23>; Art. 13 sec. 3 Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction 67

of macroeconomic imbalances, OJEU No L 306 of 23 November 2011, p. 25 <31>; Art. 10a sec. 3 Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJEU No L 306 of 23 November 2011, p. 33 <39>) and outside the framework of European Union law (cf. Art. 12 sec. 1 sentence 2 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) which enable a representative of the European Central Bank to participate in monitoring missions of the so-called Troika. This, however, has obviously no effect on the allocation of powers between the Union and the Member States under primary law.

b) Rather, the responsibility for economic policy under Title VIII of the Treaty on the Functioning of the European Union lies – if it reaches beyond the special powers expressly assigned to the Union (e.g. Art. 121, 122, 126 TFEU) – with the Member States. They are responsible, in particular, for defining the objectives and choosing the instruments of economic policy (Art. 5 sec. 1, Art. 120 et seq. TFEU). Pursuant to Art. 2 sec. 3 and Art. 5 sec. 1 TFEU, the role of the Union is restricted to the adoption of coordinating measures (cf. ECJ, Judgment of 27 November 2012, loc. cit., n. 64). The European System of Central Banks is only authorised to support the general economic policies in the Union to the degree that this is possible without compromising the objective of price stability (Art. 119 sec. 2, Art. 127 sec. 1 sentence 2, Art. 282 sec. 2 sentence 3 TFEU). The authority to support the general economic policies of the Member States at Union level (Art. 127 sec. 1 sentence 2 TFEU) does not justify any steering of economic policies by the System of European Central Banks. 68

c) According to these principles, it is likely that the OMT Decision – if one bases the assessment on its wording – is not covered by the mandate of the European Central Bank. Based on an overall assessment of the delimitation criteria that the Federal Constitutional Court considers relevant, it does not constitute an act of monetary policy, but a predominantly economic-policy act. This is supported by its immediate objective (aa), its selectivity (bb), the parallelism with assistance programmes of the European Financial Stability Facility or the European Stability Mechanism (cc), and the risk of undermining their objectives and requirements (dd). Therefore, it is likely that the OMT Decision can also not be justified as an act to support the Union's economic policy (ee). Against this background, there are considerable doubts concerning its validity. 69

aa) The OMT Decision aims to neutralise spreads on government bonds of selected Member States of the euro currency area which have emerged in the markets and which adversely affect the refinancing of these Member States (thus ECB, Monthly Bulletin September 2012, p. 7; ECB, Monthly Bulletin October 2012, pp. 7 and 8). 70

According to the European Central Bank, these spreads are partly based on fear – declared to be irrational – of investors of a reversibility of the euro. However, according to the convincing expertise of the *Bundesbank*, such interest rate spreads only re- 71

flect the scepticism of market participants that individual Member States will show sufficient budgetary discipline to stay permanently solvent. Pursuant to the design of the Treaty on the Functioning of the European Union, the existence of such spreads is entirely intended. As the Court of Justice of the European Union has pointed out in its *Pringle* decision, they are an expression of the independence of national budgets, which relies on market incentives and cannot be lowered by bond purchases by central banks without suspending this independence (cf. with regard to Art. 125 TFEU ECJ, judgment of 27 November 2012, loc. cit., n. 135; ECB, Statement [filed with the Federal Constitutional Court] of 16 January 2013, p. 13: “The prohibition of monetary financing <...> prohibits < ... > the suspension of the independence of the national budgets which relies on market incentives”). In any case, according to explanations given by the *Bundesbank*, one cannot in practice divide interest rate spreads into a rational and an irrational part (cf. also Jahresgutachten 2013/2014 des Sachverständigenrates – Annual Economic Report 2013/14 of the German Council of Economic Experts –, n. 200, on the significance of essential factors for yield differences on government bonds).

72 As for the European Central Bank claiming to safeguard the current composition of the euro currency area with the OMT Decision (cf. ECB Press Release of 26 July 2012), this is obviously not a task of monetary policy but one of economic policy, which remains a responsibility of the Member States. Pursuant to Art. 140 TFEU, the decisions on the composition of the euro currency area are the responsibility of the Council, the European Parliament, the Commission and the Member States; the European Central Bank only has a right to be heard in the decision making process concerning the abrogation of the derogations pursuant to Art. 139 TFEU, i.e. for the accession of new Member States to the euro currency area (Art. 140 sec. 3 TFEU). Following this division of powers, the Member States have taken a variety of measures in recent years to safeguard the economic and political conditions for the lasting cohesion of the euro currency area. They have granted each other bilateral assistance, set up the European Financial Stability Facility (cf. BVerfGE 129, 124 <133 and 134>), and finally created the European Stability Mechanism on the basis of the new Art. 136 sec. 3 TFEU. Its fundamental objective is to prevent the reversibility of the Euro via a combination of assistance measures and reform requirements for individual Member States (cf. ECJ, Judgment of 27 November 2012, loc. cit., n. 56, 60, 96; BVerfGE 132, 195 <249>, n. 130). The Euro Plus Pact (Conclusions of the European Council of 24/25 March 2011, EUCO 10/11, annex 1) and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (BGBl II 2012 p. 1006, pp. 1008 et seq.) serve this purpose, too.

73 bb) The conclusion that the OMT Decision has no monetary policy objective is further suggested by its selectivity. Under the guidelines adopted by the European Central Bank, the monetary policy framework of the European System of Central Banks does generally not have a targeted approach, which would necessarily differentiate between individual Member States (Annex I no. 1.1 of the Guideline of the European

Central Bank of 20 September 2011 on monetary policy instruments and procedures of the Eurosystem <ECB/2011/14>, OJEU No L 331 of 14 December 2011, p. 1, as amended by the Guideline of the European Central Bank of 26 November 2012 amending Guideline ECB/2011/14 on monetary policy instruments and procedures of the Eurosystem <ECB/2012/25>, OJEU No L 348 of 18 December 2012, p. 30). Monetary measures such as the fixing of key interest rates or the reserve ratio are applicable to all Member States and the resident commercial banks alike. Different effects that derive from these measures are a consequence of the open market economy, which Union law presupposes (Art. 127 sec. 1 sentence 3 TFEU), and an indirect effect that can be controlled by the European System of Central Banks only to a limited degree. Because the OMT Decision envisages a targeted purchase of government bonds of selected Member States, however, the spreads on government bonds issued by these states are levelled by changes in market conditions, and the government bonds of other Member States are eventually placed at a disadvantage.

cc) The fact that the OMT Decision links the purchase of bonds to the economic policy conditionality of assistance programmes of the European Financial Stability Facility or the European Stability Mechanism (parallelism) is another argument against counting the OMT Decision among the powers assigned to the European System of Central Banks by Art. 119 sec. 2, Art. 127 sec. 1 and 2 TFEU. 74

Pursuant to the OMT Decision, a purchase of government bonds shall only be undertaken under the condition that the Member State that benefits fully complies with the obligations of an assistance programme of the European Financial Stability Facility or the European Stability Mechanism, which envisages the purchase of government bonds of that Member State on the primary market. The respective obligations of the assistance programme relate not only to the general economic and social policy, but especially to the fiscal policy of the Member States. As follows from Art. 126 TFEU, it is, however, for the Commission (Art. 126 sec. 2 sentence 1 TFEU) or the Council (Art. 126 sec. 5 to sec. 14 TFEU) to monitor this. 75

It particularly speaks against a compatibility of the OMT Decision with the mandate of the European Central Bank that the European Central Bank plans to engage, with the intended purchases, in an activity which both the European Financial Stability Facility (Art. 2 sec. 1 letter b, Art. 3 sec. 1, Art. 10 sec. 5 letter a of the EFSF Framework Agreement) and the European Stability Mechanism (Art. 18 ESM Treaty) perform and which is – as the Court of Justice of the European Union has held in the *Pringle* case –, because of its objectives and mechanisms, an activity that belongs to the field of economic policy (cf. ECJ, Judgment of 27 November 2012, loc. cit., n. 60). 76

By tying the purchase of government bonds of selected Member States to full compliance with the requirements of the assistance programmes of the European Financial Stability Facility and the European Stability Mechanism and thus retaining its own conscientious examination, the European Central Bank makes the purchase of government bonds on the basis of the OMT Decision an instrument of economic policy. 77

This is also confirmed by the fact that it plans to refrain from buying government bonds if the Member State concerned does not meet the economic policy conditions (any more) (“as long as programme conditionality is fully respected, and terminate them once their objectives are achieved or when there is non-compliance with the macroeconomic adjustment or precautionary programme”).

The purchase of government bonds of selected Member States that is envisaged by the OMT Decision, and which is unilaterally tied to economic policy conditions of the European Financial Stability Facility or the European Stability Mechanism, appears, in this context, as the functional equivalent to an assistance measure of the above-mentioned institutions – albeit without their parliamentary legitimation and monitoring. 78

dd) The approach planned by the European Central Bank is likely to bypass the conditions and conditionalities envisaged by the two “rescue packages” for purchase programmes of government bonds on the secondary market (bypassing). The European Stability Mechanism can only adopt a secondary market support facility when both the general requirements for the granting of stability support under Art. 12 sec. 1 of the ESM Treaty are met (indispensability to safeguard the financial stability of the euro currency area as a whole and of its Member States), and in case of “exceptional financial market circumstances and risks to financial stability” (Art. 18 sec. 2 of the ESM Treaty, Art. 1 of the “Guideline on the Secondary Market Support Facility”). There is also a stricter conditionality towards the states concerned corresponding with this: While, for instance, an “Enhanced Conditions Credit Line” is already an option if the Member State takes certain “corrective measures” (cf. Art. 2 sec. 4 of the “Guideline on Precautionary Financial Assistance”), a Secondary Market Support Facility requires that the Member State either subjects itself to a macroeconomic adjustment programme or at least meets a number of strict criteria (cf. Art. 2 of the “Guideline on the Secondary Market Support Facility”). Thus, pursuant to Art. 18 of the ESM Treaty, the European Stability Mechanism may only purchase government bonds on the secondary market in an acute crisis and within narrow limits, while precautionary financial assistance under Art. 14 of the ESM Treaty is meant to prevent precisely such crises and is thus granted under considerably more generous terms. The OMT Decision does not envisage similar conditions for actions by the European Central Bank. 79

ee) In the view of the Federal Constitutional Court, the purchase of government bonds on the basis of the OMT Decision exceeds the support of the general economic policies in the European Union that the European System of Central Banks is allowed to pursue (Art. 119 sec. 2, Art. 127 sec. 1 sentence 2 TFEU). 80

First, the volume of assistance measures, which is a key aspect for the decisions of the European Stability Mechanism, could *de facto* be considerably broadened, and potentially even multiplied, through parallel purchases of government bonds by the Eurosystem. If the members of the European Stability Mechanism agree on a certain 81

volume of assistance and its conditions, this decision could be thwarted if the Eurosystem unilaterally increased the assistance volume significantly. This cannot be qualified as “support”.

On the other hand, due to the independence of the European Central Bank as laid down in Art. 130 TFEU, the Council of the European Central Bank wants to, and must, decide independently, and ultimately without being tied to the decisions of the European Financial Stability Facility or the European Stability Mechanism, whether, to what extent, and under which conditions it may purchase government bonds in selected cases (Decision of 6 September 2012: “in full discretion”) and/or to stop a purchasing programme that it had started. This inevitably requires independent economic assessments which must not merely retrace the decisions of the Commission, the so-called Troika or other institutions, and which, for this reason alone, extends beyond a mere “support” of the economic policy in the Union. 82

The Federal Constitutional Court holds the view that the purchases envisaged by the OMT Decision could only be considered as support of economic policy assistance measures under the responsibility of the Member States within the framework of the European Financial Stability Facility and the European Stability Mechanism (Art. 119 sec. 2, Art. 127 sec. 1 sentence 2 TFEU), if their volumes were so limited that parallel assistance programmes of the Member States and their underlying political decisions could not be thwarted. The “factual” limitation of the volume of bond purchases by the amount of the government bonds issued already in the currently scheduled maturity spectrum of one to three years – highlighted by the European Central Bank in the proceedings before the Federal Constitutional Court – is not likely to sufficiently ensure an adequate quantitative limitation. By changing their refinancing policies, the Member States that benefit can increase the volume of government bonds that are currently covered by the OMT Decision; it is unclear what would follow from the European Central Bank’s intention to observe the emission behaviour of individual Member States. In addition to this, the purchases would also have to be approved on the merits and legitimised by the Member States. 83

2. Violation of the Prohibition of Monetary Financing of the Budget

The prohibition of monetary financing of the budget enshrined in Art. 123 TFEU also includes a prohibition of bypassing (a). The OMT Decision is likely to violate this prohibition as well (b). 84

a) Art. 123 TFEU and Art. 21.1. ESCB Statute forbid the purchase of government bonds “directly” from the emitting Member States, i.e. the purchase on the primary market. This prohibition is, however, not limited to this interdiction, but is an expression of a broader prohibition of monetary financing of the budget (cf. Borger, German Law Journal 2013, p. 113 <119, 134>; de Gregorio Merino, CMLR 2012, p. 1613 <1625, footnote 36, 1627>; Lenaerts/van Nuffel, European Union Law, 3rd ed. 2011, n. 11-037). Union law recognises the legal concept of bypassing as do the national legal systems. It is ultimately based on the principle of effectiveness (“effet utile”) and 85

has repeatedly been alluded to in the Court of Justice's jurisprudence (cf. most recently ECJ, Judgment of 20 June 2013 Case C-259/12, *Rodopi-M* 91, ECR 2013, p. I-0000, n. 41).

b) Also in the present context, the Court of Justice has (in the *Pringle* case) largely focused on the objective pursued by the provision for the interpretation of Art. 125 TFEU (cf. ECJ, Judgment of 27 November 2012, Case C-370/12, *Pringle*, ECR 2012, p. I-0000, n. 133) and thus conducted a teleological interpretation. It seems obvious that this must also apply to the interpretation of Art. 123 TFEU, and that the prohibition of the purchase of government bonds directly from the issuing Member States may not be circumvented by functionally equivalent measures. Council Regulation (EC) No 3603/93 (7th recital of the Council Regulation (EC) No 3603/93 of 13 December 1993, OJEC No L 332 of 31 December 1993, p. 1), which is primarily addressed to the Member States, and to the European Central Bank itself (ECB, Monthly Bulletin October 2012, p. 8), does assume this, too. 86

c) In addition to the above-mentioned aspects, namely the neutralisation of interest rate spreads (n. 67 et seq.), selectivity (n. 70), and the parallelism with EFSF and ESM assistance programmes (n. 71 et seq.), the following aspects – at least when taken together – also indicate that the OMT Decision aims at a circumvention of Art. 123 TFEU and violates the prohibition of monetary financing of the budget: The willingness to participate in a debt cut with regard to the purchased bonds (aa), the increased risk of such a debt cut regarding the purchased government bonds (bb), the option to keep the purchased government bonds to maturity (cc), the interference with the price formation on the market (dd), and the encouragement of market participants to purchase the bonds in question on the primary market (ee). 87

aa) If the Eurosystem (partially) waived securitised claims against individual Member States of the euro currency area that are contained in government bonds, this would amount to an illegal monetary financing of the budget of these countries. It is not planned for the Eurosystem to maintain a preferred creditor status with regard to the government bonds that are to be purchased on the basis of the OMT Decision. This essentially means that the Eurosystem would have to participate in a debt cut adopted by the majority of creditors (Art. 12 sec. 3 of the ESM Treaty), and that it would have to renounce a (substantial) part of the securitised claims contained in the purchased government bonds in such a case. This is not likely to be compatible with Art. 123 TFEU. At least if a purchase contains, from the outset, the prospect of subsequently becoming part of a potential debt cut, one cannot, considering the regulatory purpose of Art. 123 sec. 1 TFEU, establish a relevant difference between waiving the repayment obligation from a loan and providing funds that are *a priori* irrevocable and not tied to any performance. 88

bb) A purchase of government bonds that carry an increased risk of failure or even of a debt cut is likely to violate the prohibition of monetary financing, too. As the predecessor programme SMP also indicates (Decision of the European Central Bank of 89

14 May 2010 establishing a securities markets programme <ECB/2010/5>, OJEU No L 124 of 20 May 2010, p. 8), it is planned that, based on the OMT Decision, the Eurosystem purchases government bonds which carry an increased risk of failure because of their lower credit rating; at the same time, the banks in the participating states shall be able to discharge these risky securities. In doing so, the Eurosystem would not only take over the function of a “bad bank” for the banks in the participating states; it would also indirectly contribute to the financing of their budgets. Though there are no provisions under Union law that completely prohibit the Eurosystem from entering into potentially loss-making monetary policy operations, the provisions concerning the compensation of losses of the European System of Central Banks such as Art. 33.2. ESCB Statute show that their activities can always entail losses and that the legislature has generally approved of this possibility. However, this, according to the considerations of the Federal Constitutional Court, does not include the authorisation to take large and unnecessary risks of losses.

cc) To hold government bonds to maturity may, under certain conditions, also collide with the prohibition of monetary financing of the budget (Art. 123 sec. 1 TFEU; interference with the market logic). It is true that Art. 18.1. first indent ESCB Statute allows the Eurosystem the “outright” purchase of marketable instruments. A purchase of government bonds that are mostly held to maturity by the Eurosystem can, however, have an impact on monetary financing of the budget. In particular, if a substantial amount of the government bonds issued by selected Member States is permanently removed from the market, certain effects that result from the sale of the bonds prior to maturity cannot occur. The Eurosystem would in such a case not only prevent an unbiased price determination; it would also contribute to the financing of the respective budgets. If government bonds are held to maturity, this results in any case in a shortage of the supply of bonds circulating on the secondary market, which may amount to a circumvention of Art. 123 TFEU. 90

The OMT Decision relates to government bonds with a maturity of one to three years. It contains no provisions regarding the question of how long the bonds acquired under the programme are to be held, and thus does not exclude the possibility that they are taken from the market until maturity. That this is an option under the Decision, especially in order to prevent or at least delay the disclosure of losses actually incurred on the balance sheet, follows from the accounting rules enacted by the Council of the European Central Bank, which require that the purchase costs and not the current market prices are used when including government bonds (cf. recital 1 and annex IV, balance sheet item assets 7.1, of the Guideline of the European Central Bank of 17 July 2009 amending Guideline ECB/2006/16 on the legal framework for accounting and financial reporting in the European System of Central Banks <ECB/2009/18>, OJEU No L 202 of 4 August 2009, p. 65). 91

dd) It can be another indication for a circumvention of the prohibition of monetary financing of the budget if government bonds are purchased on the secondary market to a considerable extent and shortly after their emission by the Eurosystem (market 92

pricing).

ee) Similar effects can also be caused by announcements of the Council of the European Central Bank on this issue (encouragement to purchase newly issued securities). The announcement of imminent purchases of government bonds of selected Member States prior to a new emission can – independently of market conditions – cause private and institutional first takers to do what Art. 123 sec. 1 TFEU does not allow the European System of Central Banks to do. By providing first takers with the prospect that the European System of Central Banks will assume the financial risk associated with this acquisition, a bypassing of Art. 123 sec. 1 TFEU seems obvious. 93

The OMT Decision and the accompanying communication of the Council of the European Central Bank (cf. ECB Press Release of 26 July 2012, President of the European Central Bank Mario Draghi, http://www.ecb.int/press/key/date/2012/html/sp120726.en.html [http://www.ecb.int/press/key/date/2012/html/sp120726.en.html]) encourage third parties to purchase the government bonds at issue on the primary market by providing the prospect of assuming the risk associated with the acquisition. It is true that no details are provided regarding the volume of potential purchases or the required time lag between the emission and the potential acquisitions by the Eurosystem. Yet it seemed also clear at the oral hearing before the Federal Constitutional Court on 11 and 12 June 2013, that the announcement nevertheless gave the market participants the impression that the Eurosystem would in any case be available as a “lender of last resort” for the government bonds in question. This is not likely to be compatible with Art. 123 sec. 1 TFEU. 94

3. Irrelevance of a Reference to a “Disruption to the Monetary Policy Transmission Mechanism”

In the view of the Federal Constitutional Court, the objective mentioned by the European Central Bank to justify the OMT Decision, namely to correct a disruption to the monetary policy transmission mechanism, can neither change the above-mentioned transgression of the European Central Bank’s mandate, nor the violation of the prohibition of monetary financing of the budget. 95

The fact that the purchase of government bonds can, under certain conditions, help to support the monetary policy objectives of the European System of Central Banks does not turn the OMT Decision itself into an act of monetary policy. In this respect, it also applies vice versa what the Court of Justice has said regarding the allocation of assistance measures of the European Stability Mechanism (cf. ECJ, Judgment of 27 November 2012, Case C-370/12, *Pringle*, ECR 2012, p. I-0000, n. 56). The (economic) accuracy or plausibility of the reasons for the OMT Decision are irrelevant in this respect. 96

Moreover, one can expect a significant deterioration of the monetary policy transmission mechanism in virtually every debt crisis of a state. A critical deterioration of the solvency of a state typically coincides with a corresponding deterioration of the 97

solvency of the national banking sector (so-called bank-state nexus). As a result, in this situation, the lending practices of the banks tend to hardly reflect the reductions in the key interest rate anymore; the monetary policy transmission mechanism is disrupted. If purchases of government bonds were admissible every time the monetary policy transmission mechanism is disrupted, it would amount to granting the European Central Bank the power to remedy any deterioration of the credit rating of a euro area Member State through the purchase of that state's government bonds. This would suspend the prohibition of monetary financing of the budget.

Finally, it seems irrelevant in this regard that the European Central Bank only intends to assume a disruption to the monetary policy transmission mechanism if the amount of the refinancing interest of a Member State of the euro currency area were "irrational". Spreads always only result from the market participants' expectations and are, regardless of their rationality, essential for market-based pricing. To single out and neutralise supposedly identifiable individual causes would be tantamount to an arbitrary interference with market activity (cf. above n. 88). Ultimately, the distinction between rational and irrational is meaningless in this context and can in any case not be operationalised. 98

4. Possibility of an Interpretation in Conformity With Union Law

The Federal Constitutional Court believes that these concerns regarding the validity of the OMT Decision, based on the interpretation used here, could be met by an interpretation in conformity with Union law. This would require that the content of the OMT Decision, when comprehensively assessed and evaluated, essentially complies with the above-mentioned conditions. 99

In the view of the Federal Constitutional Court, the OMT Decision might not be objectionable if it could, in the light of Art. 119 and Art. 127 et seq. TFEU, and Art. 17 et seq. of the ESCB Statute, be interpreted or limited in its validity in such a way that it would not undermine the conditionality of the assistance programmes of the European Financial Stability Facility and the European Stability Mechanism (cf. n. 72 et seq.; 77; 79 et seq.), and would only be of a supportive nature with regard to the economic policies in the Union (cf. n. 68 et seq.; 71; 79 et seq.). This requires, in light of Art. 123 TFEU, that the possibility of a debt cut must be excluded (cf. n. 86 and 87), that government bonds of selected Member States are not purchased up to unlimited amounts (cf. n. 81), and that interferences with price formation on the market are to be avoided where possible (cf. n. 88 et seq.). Statements by the representatives of the European Central Bank in the proceedings before the Constitutional Court concerning the framework for the implementation of the OMT Decision (limited volume of a possible purchase of government bonds; no participation in a debt cut; observance of certain time lags between the emission of a government bond and its purchase; no holding of the bonds to maturity) suggest that such an interpretation in conformity with Union law would also most likely be compatible with the meaning and purpose of the OMT Decision. 100

C. In the Alternative, Questions Referred for a Preliminary Ruling on the Interpretation of Various Provisions of Union Law

Considering the obligation of the Federal Constitutional Court to grant preventive legal protection, the interpretation of Union law is also relevant for the outcome of the legal dispute at hand should the Court of Justice not qualify the OMT Decision as a suitable subject for a referral under Art. 267 sec. 1 letter b TFEU. The responsibility with respect to European integration of the Federal Government and the German *Bundestag* would also apply with regard to *ultra vires* acts that have merely been announced, but the content of which is already sufficiently defined. The Federal Constitutional Court would then have to answer the preliminary question whether implementation of the OMT Decision would be compatible with Union law. To this end, the Federal Constitutional Court submits to the Court of Justice of the European Union the above-mentioned auxiliary questions on the interpretation of Art. 119, 123, and 127 TFEU, and of Art. 17 to 24 of the ESCB Statute. 101

D.

Whether the budgetary autonomy of the German *Bundestag*, which is guaranteed by Art. 20 sec. 1 and 2 in conjunction with Art. 79 sec. 3 GG, and its overall budgetary responsibility can be affected by the OMT Decision or its implementation with regard to possible losses of the *Bundesbank*, is not clearly foreseeable at present. The OMT Decision could violate the constitutional identity of the Basic Law if it created a mechanism which would amount to an assumption of liability for decisions of third parties which entail consequences that are difficult to calculate (cf. BVerfGE 129, 124 <179 et seq.>), so that, due to this mechanism, the German *Bundestag* would not remain the “master of its decisions” and could no longer exercise its budgetary autonomy under its own responsibility (cf. BVerfGE 129, 124 <177>; 132, 195 <239>). Whether this is the case depends on the compliance of the OMT Decision with the mandate assigned to the European Central Bank, and on its content and scope as interpreted in conformity with primary law in compliance with this mandate. The Senate will have to decide on this on the basis of the answers given to the questions it referred for a preliminary ruling. 102

At present, it is not foreseeable whether in addition to this, through individual implementation measures of the OMT Decision and with regard to possible losses of the *Bundesbank* and ensuing effects on the federal budget, consequences for the budgetary autonomy of the German *Bundestag* could arise in a way that affects Art. 79 sec. 3 GG. If necessary, the Senate would have to examine this on the basis of the Court of Justice’s interpretation of the OMT Decision without another question referred for a preliminary ruling, and it would have to determine the inapplicability of the respective act of implementation in Germany, because the identity review is not to be assessed according to Union law but exclusively according to German constitutional law. 103

E.

Pursuant to § 33 sec. BVerfGG, the procedures shall be suspended pending the decision of the Court of Justice of the European Union. After completion of the proceedings for a preliminary ruling, the Federal Constitutional Court will resume the proceedings *ex officio*. 104

F.

The decision was taken with 6:2 votes. 105

Voßkuhle	Lübbe-Wolff	Gerhardt
Landau	Huber	Hermanns
Müller		Kessal-Wulf

Dissenting Opinion
of Justice Lübbe-Wolff
on the Order of the Second Senate of 14 January 2013

- 2 BvR 2728/13 -
- 2 BvR 2729/13 -
- 2 BvR 2730/13 -
- 2 BvR 2731/13 -
- 2 BvE 13/13 -

In an effort to secure the rule of law, a court may happen to exceed judicial competence. In my view, this has occurred here. The motions should have been rejected as inadmissible. 1

I.

I skip my doubts as to the whether the summary interpretation of the present actions as being, all of them, at least *inter alia* directed against parliamentary and governmental inaction with respect to the ECB's OMT decision is correct, as to whether their admissibility can be judged sufficiently on the basis of this summary, generalising interpretation, and as to whether the Senate complies with its obligation to state reasons in treating the motions – insofar as they are directed against parliamentary and governmental inaction – as admissible without presenting, and dealing with, the relevant objections raised by *Bundestag* and Federal Government. 2

At any rate, what the plaintiffs, insofar as they turn against federal inaction with respect to the OMT decision, petition the Federal Constitutional Court to order goes, in my view, beyond the limits of judicial competence under the principles of democracy and separation of powers. 3

The demarcation of these limits is open to debate. There may also be good reasons for controversy over the question which of the various techniques to avoid overstraining judicial power (political question doctrines, other criteria of admissibility, recognition of margins of appreciation or application of other restrained standards of review) is applicable in a given case. Under German law, which has so far been interpreted as not containing a political question doctrine, such controversy will concern the choice between admissibility criteria and reduced intensity of review as instruments of judicial restraint. 4

A judge considering the limits of justiciability transgressed will therefore typically not be able to invoke clear standards in support of that claim. I must admit that this is so in the present case, but I do think that some guidelines can be derived from the principles of democracy, separation of powers and the rule of law. To mention only those which have a bearing on the case at hand: 5

1. The limits of reasonable governance by rules must be respected, because under the principles of democracy and separation of powers, decisions by judges at whom 6

the citizens cannot, either directly or indirectly, come back by exercising their right to vote are justifiable only as decisions according to legal rules.

2. The need for determinative legal standards, even if they be just judge-made standards from earlier case-law, grows with the importance of the decision to be made. The judicial branch of government will not work without a creative element. But the more far-reaching, the more weighty, the more irreversible – legally and factually – the possible consequences of a judicial decision, the more judicial restraint is appropriate where, due to vagueness, the legitimating force of existing legal rules appears feeble. 7

3. In determining the reach of judicial competence, the reach of judicial power to implement should be considered. This is not just a pragmatic maxim serving to avoid losses of authority that might endanger the proper functioning of a court, but also a legal imperative, since from the means of power vested or not vested in a court or in the courts in general by constitutional and other statutory rules, inferences can be drawn as to intended competences. 8

4. The more judicial restraint is required, the more preferable is it to exercise such restraint by way of refusal to go into the merits (political question doctrine, criteria of admissibility) rather than by way of applying restrained standards of review (recognition of margins of appreciation, substantive obviousness criteria and the like). That is because the former path is the path of greater restraint. Dealing with the substance of the case is altogether avoided here, while the mere application of restrained standards of review will typically result in some kind of benediction, although reduced in scope, of the object of judicial review. 9

5. It should be kept in mind that the limits of justiciability are not necessarily the same for national and transnational courts, but may diverge – in varying directions, depending on the nature of the case – because national and transnational courts differ in the sources of legitimacy of their operation, notably in the legal bases of their competence and implementing power. 10

II.

These guidelines suggest inadmissibility of the present motions. They do so regardless of the fact that so far, nothing but a referral of some questions and proposed answers to the Court of Justice has been effected. By treating the motions as admissible, at least in the generalising interpretation given to them, the Senate declares itself competent and obliged to make a decision on the merits later, be it after the referred questions have been answered by the Court of Justice, or be it after the Court of Justice has rejected the Senate's offer of dialogue by holding the referral inadmissible. The latter possibility is not to be ruled out since because of the last word claimed by the Federal Constitutional Court under certain conditions (cf. n. 21 et seq., 27 et seq.), the answers given by the Court of Justice would be only potentially relevant to the Federal Constitutional Court's final decision. 11

1. How *Bundestag* and Federal Government are to react to a violation, martial or non-martial, of German sovereign rights is a question that cannot reasonably by answered by rules making certain predetermined positive actions mandatory. Selecting from the variety of possible reactions (see 2. below) can only be a matter of political discretion (cf. dissenting opinion of my colleague Michael Gerhardt). 12

2. Accordingly, it comes as no surprise that no such rules are detectable either in the text of the constitution or in the case-law interpreting it. That would already seem awkward in more innocuous cases. Given the enormous stakes in the present case, a decision on the merits is unacceptable on such an airy basis. 13

The otherwise notorious tendency of the overburdened, relief-seeking Federal Constitutional Court to cultivate and extend admissibility hurdles in constitutional complaint cases is generally absent in matters of European integration. However, the Senate's readiness to hear complaints in this field has never been extended as far as in the present case. 14

According to an originally bold, now established doctrine of the Court's case-law, every single German citizen can, subject to certain conditions, seize the Federal Constitutional Court on the basis of Art. 38 sec. 1 GG (right to vote) with a challenge of legislation which positively transfers German sovereign rights to the European Union (cf. BVerfGE 89, 155 <171 et seq.>; 123, 267 <330 et seq.>). Without admitting to any innovation, it was recently held that the same applies to legislation on international treaties submitting the exercise of sovereign rights to other bonds and influences (cf. BVerfGE 129, 124 <168>). 15

It is not inconsistent that while, so far, only a diminution of competences of the *Bundestag* that would run counter to the principles protected by the eternity clause of Art. 79 sec. 3 GG (so-called "constitutional identity") had been considered as challengeable on the basis of Art. 38 sec. 1 GG (cf. BVerfGE 129, 124 <167 et seq.>; 132, 195 <234 et seq.>; cf. also, for corresponding claims of parliamentary groups in *Organstreit* proceedings, BVerfGE 123, 267 <338 et seq.>), the Senate now holds that Art. 38 sec. 1 GG also allows to address the Federal Constitutional Court with the assertion of a qualified *ultra vires* act (n. 44 et seq., 53) which does not necessarily include a violation of constitutional identity. The earlier cases mentioned did not raise the *ultra vires* question because only legislative transfers, or approvals of conventionary restrictions, of sovereign rights had been submitted to scrutiny. However, the admission of challenges of *ultra vires* acts based on Art. 38 sec. 1 GG is a novelty without a basis in earlier case-law. 1616

An even more blatant innovation for which the Court cannot rely on determinative standards from previous case-law lies in the assumption that under specified conditions not only acts of German federal organs which positively transfer or restrict sovereign rights, but also mere inaction in the face of qualified transgressions on the part of the European Union can be challenged on the basis of Art. 38 sec. 1 GG or, if the applicant is a parliamentary group, on the basis of the constitutional rights of the *Bun-* 17

destag.

With this assumption, the Senate departs from earlier case-law, just recently corroborated, according to which parliamentary or governmental inaction is contestable in constitutional complaint proceedings only if the complainant can rely on an explicit constitutional mandate substantially specifying the content and reach of the alleged duty to act (cf. BVerfGE 129, 124 <176>, with further references). With respect to *Organstreit* challenges of inaction, too, the Senate has just recently repeated that they are admissible only if directed against a *specific* omission (cf. BVerfG, decision of the Second Senate of 17 September 2013 –2 BvE 6/08, 2 BvR 2436/10 – juris, n. 158; BVerfGE 131, 152 <190>; 121, 135 <151>; 118, 244 <257>), i.e. against the omission of a specific action which can arguably be presented as constitutionally imperative. 18

Interpretable as the requirements of explicitness of the constitutional mandate and of specificity of the constitutionally imperative action may be, they are certainly not met in this case. Indeed, the present order for referral shies away from clearly specifying the action that would be due with respect to the OMT decision should this decision turn out to be *ultra vires* or to violate the German Constitution in its core content ("identity"). 19

Possible reactions range from more or less inconsequential communicative behaviour, for instance expressions of disapproval of the kind Chancellor Adenauer once used to comment on what he deemed an arrogation of competence by the Federal Constitutional Court ("That ain't wha' we imagined!"), via action before the Court of Justice (as postulated by complainant I.), negotiating efforts of all kinds or a partial blockade of OMT action by means of ESM and EFSF voting rights (as advocated by applicant V.) to an exit from the monetary union (for the latter possibility see BVerfGE 89, 155 <204>; 97, 350 <369>; 123, 267 <350, 396>; 129, 124 <181 and 182>; 132, 195 <236 and 237>, n. 215). Even if the choice from this array of options were reasonably determinable by legal rules, which it is not, such rules would at any rate be missing in German constitutional law. 20

Moreover, the notion that a mere omission of certain governmental behaviour on the Union level – like e.g. the omission to work towards a change of treaty that would adapt the law to ECB behaviour (cf. n. 49) – can be a proper object of constitutional complaint would seem to stand in strange contrast to recent case-law according to which even positive acts of governmental cooperation in EU decisions or in intergovernmental decisions related to the Union will not be examined (cf. BVerfGE 129, 124 <174 and 175>). 21

According to n. 53 of the order for referral, the Senate holds it actionable that *Bundestag* and Federal Government deal with the question of how the allocation of competences can be restored, and come to a positive decision in this matter. I doubt that any of the motions can be interpreted as being directed against the omission of an open-ended governmental or parliamentary debate. In relation to the specified ob- 22

jects of challenge, this is not a *minus* but an *aliud*. Apart from that, where the Federal Constitutional Court finds itself unable to identify specific decisions as mandatory under the Constitution, it is in my view not entitled to order, as an alternative or as a preliminary to further obligations not yet specified, that parliament or other supreme organs conduct a debate. Under German constitutional law, certain well-defined types of decisions can only be made by parliament (cf. BVerfGE 131, 88 <121>; 130, 318 <345 et seq.>; 126, 55 <69 f.>, each with further references), but there is no requirement of parliamentary or governmental blue-sky debate.

The Senate probably does not envisage such dealing with the matter as the *only* reaction that *Bundestag* and Federal Government can be sued to display in reaction to qualified *ultra vires* acts or violations of constitutional identity by the ECB. Notes 44 and 50 suggest that other reactions may be demandable. It remains unclear, however, what further steps can be claimed (exit from the monetary union, too?) and how they have to be taken (alternatively? cumulatively? successively? in which order?). This is only too understandable in view of the lack of legal sources from which answers to these questions might flow. But then one ought to refuse being sent on grand desert tours that will not lead to any spring. 23

3. Even if this case were not a particularly inappropriate occasion for twists in the case-law, the present difficulty – the problem that the steps to be taken by *Bundestag* and Federal Government in the event of a qualified violation of German sovereign rights are not reasonably determinable by legal rules – could not be outrunned into justiciable terrain by dropping the above-mentioned criterion of specificity of the act that should have been performed, i.e. by admitting constitutional complaints and *Organstreit* motions against inaction without that prerequisite. This appears to be the Senate's course when, positing an unspecified duty to work towards recovery of a sovereign right that has been violated (n. 49), it leaves the act whose omission is supposed to be objectionable largely indeterminate and, apparently, holds the corresponding unspecified motion (no. 1, first part) of applicant V. admissible. The problem of indeterminateness and indeterminability of what is positively due will not thereby be spirited away. It will remain virulent as a problem of indeterminateness and, accordingly, unenforceability of what the Court decides. 24

Even if the Court were to identify certain well-defined reactions of some avail as legally due, enforceability would not be much improved. The object of such duties would be too complex and the proper way of fulfilling them would again be too inept for guidance by rules to be reasonably governable by legal imperatives, let alone by judicial enforcement orders. 25

4. An awareness of this, but no readiness to draw the necessary conclusions, becomes apparent in that the Senate grows more cautious, or at least more conspicuously cautious, as it approaches the possible contents of its final decision. Already when the objective duties which in case of a qualified violation of sovereign rights following from the responsibilities concerning integration are presented (n. 49), no men- 26

tion is made of exiting the European Union or the monetary union as an *ultima ratio*. Rather, the Senate refers to the option of legitimising the transgression by adapting the treaty, and states that if this solution is not wanted or not possible, *Bundestag* and Federal Government are "in principle" obliged to use legal "or" political means in order to get at a cancellation of the relevant act of the Union, and meanwhile to contain its domestic consequences as best they can. Later, where the Senate declares "these" duties actionable *in abstracto* and undertakes some specification (n. 50 et seq.), the only actionable claim brought up *in concreto* is the claim that a debate leading to some positive decision be conducted.

Judicial competences do not (at least not *de jure*) depend on the greater or lesser courage of the judges. But where for reasons of law the judges' courage must dwindle when it comes to the substance, they ought not to go into the substance at all. It is therefore not an argument in favour of the present order that it leaves the Senate with many options to exercise talkative judicial restraint in its final decision. In constellations which foreseeably do not permit effective judicial intervention, judicial restraint ought to be displayed in silence. 27

5. As the Senate acknowledges, acts of EU institutions are not directly subject to the jurisdiction of the Federal Constitutional Court (cf. BVerfGE 22, 293 <295 et seq.>; 58, 1 <26 et seq.>; 118, 79 <95>; 129, 124 <175 and 176>) but come into play as an object of scrutiny only indirectly, i.e. insofar as trespasses may have consequences for the powers and duties of German institutions (n. 23 et seq.). Even the result of such indirect scrutiny may, however, have implications that stretch far beyond Germany. Apart from the above, the following ought therefore to be considered: A judicial decision from which the future of the euro may depend is *per se* an awkward matter, even if only consequences for the respective country are taken into account. In a perspective beyond the national box, the decision of a *national* court with such far-more-than-national implications appears particularly precarious. The democratic legitimacy which the decision of a national court may draw from the relevant standards of national law (if any) will not, or not without substantial detriment, extend beyond the national area. In a strictly national perspective, this may seem irrelevant on the assumption that as a consequence of the ECB's behaviour, the integrity of the national constitutional order is at stake, and if a blind eye is turned to the possible consequences of alternative scenarios. The question is, however, whether the national perspective which is properly held up against the Union perspective in certain cases of conflict (cf. BVerfGE 89, 155 <188>; 123, 267 <253 et seq.>; 126, 286 <302 et seq.>) is still the appropriate and the constitutional one where a decision may have legal and factual consequences of the magnitude and reach at issue here. That some few independent German judges – invoking the German interpretation of the principle of democracy, the limits of admissible competences of the ECB following from this interpretation, and our reading of Art. 123 et seq. TFEU – make a decision with incalculable consequences for the operating currency of the euro zone and the national economies depending on it appears as an anomaly of questionable democratic character. No such 28

anomaly would impend if the present decision were to be read as not envisaging any serious consequences. In that case: see 2. and 4.

Lübbe-Wolff

Dissenting Opinion
of Justice Gerhardt
on the Order of the Second Senate of 14 January 2014

- 2 BvR 2728/13 -
- 2 BvR 2729/13 -
- 2 BvR 2730/13 -
- 2 BvR 2731/13 -
- 2 BvE 13/13 -

To my regret, I am unable to support the decision. I hold that the constitutional complaints and the application in the *Organstreit* proceedings, in so far as they relate to the OMT Decision, are inadmissible. Thus, the outcome of the Senate's decision does not depend on the answers to the questions that according to the Senate require clarification; this is the requirement for a referral to the Court of Justice of the European Union for a preliminary ruling. 1

1. The Federal Constitutional Court is not responsible for general constitutional supervision. Instead, its powers are enumerated, and comprehensively regulated, in Art. 93 GG and in the federal laws issued in connection with this provision. These provisions delimit the powers of the Federal Constitutional Court in particular against those of the other constitutional organs and specify the system of the separation of powers in this respect. The necessary legal certainty is achieved by strongly formalising the requirements for turning to the Federal Constitutional Court; the influence of the admissibility requirements on the system may not be underestimated. It thus requires increased justification if the Federal Constitutional Court further develops legal rules in a way that results in an expansion of its powers to review and decide. 2

2. a) One of the most noble obligations of the Federal Constitutional Court is to defend the holders of fundamental rights against violations of fundamental rights by public authority which are challenged through constitutional complaints. In accordance with this mandate, where interferences with fundamental rights arise from an act of the European Union, the Federal Constitutional Court must examine whether the Federal Republic of Germany has provided the European Union with the necessary legal basis (Art. 23 sec. 1 GG). In this review, the so-called *ultra vires* review, the assessment under European Union law by the Court of Justice of the European Union is of overriding importance; accordingly, the Federal Constitutional Court exercises *ultra vires* review in a manner that is open to European law, and only subject to strict requirements. Since according to the concept of the European Treaties, *Kompetenz-Kompetenz* with regard to the scope of permissible European Union acts cannot rest with an institution of the European Union such as the Court of Justice, the last word, however, remains with the Federal Constitutional Court (cf. BVerfGE 126, 286 <300 et seq.>). 3

b) A distinction must be drawn between cases in which a substantive fundamental right is affected, and constitutional complaints in which the complainant challenges a 4

violation of the right to take part in the election of the Members of the German *Bundestag* under Art. 38 Abs. 1 GG, with the aim of preventing the erosion of the powers of Parliament, and thus the devaluation of the right to vote. In view of the dangers for the democratic process which such a right of challenge entails, the Senate found that citizens must have the opportunity of turning to the Constitutional Court to defend themselves against a Parliament that relinquishes its powers in a manner that is incompatible with Art. 23 sec. 1, Art. 79 sec. 3 GG (so-called identity review), and that the Basic Law does not provide a more extensive right of challenge (cf. BVerfGE 129, 124 <169 and 170, 177, 183>; 132, 195 <234 and 235, 238 et seq.>). While the Senate held that budgetary autonomy is one of the powers of Parliament which are inalienable pursuant to Art. 79 sec. 3 GG, it respected the primacy of assessment that is due to the legislature in this respect (cf. BVerfGE 129, 124 <182 ff.>; 132, 195 <239 and 240>).

3. Now the Senate extends the possibilities of the individual to initiate via Art. 38 sec. 1 GG a review of the acts of Union institutions by the Constitutional Court. First, the standards developed for *ultra vires* review with regard to acts of interference with substantive fundamental rights are transferred to this area. This means that the Senate, without there being a connection to a substantive fundamental right, claims the power to review whether an institution of the European Union has manifestly, and in a structurally significant manner, “usurped” powers not conferred upon it; it is not decisive here whether the constitutional identity pursuant to Art. 79 sec. 3 GG is affected. If such a transgression of powers exists, it is intended that the in individual can demand of the *Bundestag* and the Federal Government that they actively deal with the question of how the distribution of powers can be restored, and that they decide which options they want to use to pursue this goal. I cannot go along with this. 5

a) Identity review is about the respect of ultimate limits, which cannot be shifted even through an amendment of the Constitution. It is plausible, not least with a view to the citizen’s right to democracy, which is anchored in human dignity (cf. BVerfGE 123, 267 <341>), to grant every citizen an enforceable right to this effect, even if the ensuing promise of legal protection risks raising false expectations. By admitting, however, an *ultra vires* review that is based on the allegation of a violation of Art. 38 sec. 1 GG, the door is opened to a general right to have the laws enforced (*allgemeiner Gesetzesvollziehungsanspruch*), which the Basic Law does not contain (cf. BVerfGE 132, 195 <235> with further references). 6

The *actio popularis* character of this action is not changed by the fact that only specifically qualified transgressions of powers can be challenged. Moreover, the relevant criteria (manifest nature; considerable weight and structural significance of the assumption of powers) strongly depend on how they are assessed, and they invite controversy, so that they will hardly be able to channel access to the Court effectively and in the interest of a clear delimitation of powers. Via the possibility of demanding preventive legal protection, which is provided as a consequence, individuals entitled to vote can “bring into play” the Federal Constitutional Court at a time when the politi- 7

cal process is still ongoing. The ensuing danger of democratic responsibility becoming blurred can certainly be counteracted; I would, however, prefer such a danger not to arise in the first place. What must also be seen critically is the possible conflict with the values of the European system of legal protection, whose requirements regarding actions brought against acts of European institutions (Art. 263 TFEU) can be circumvented via an *ultra vires* popular action based on Art. 38 sec. 1 GG.

b) The central question, however, is why the individual should have a judicially enforceable right to German constitutional organs becoming active vis-à-vis acts of the European Union that transgress their powers, or, to put it differently, why it is not sufficient to work via the means that democracy provides – through the formation of political opinions within and outside Parliament and through elections – towards the system of powers being respected, or to demand that the consequences of a transgression of powers be accepted. 8

aa) The consideration that if the individual can challenge essential powers being relinquished by Parliament, a corresponding competence will exist all the more vis-à-vis the usurpation of powers by the European Union, is a consideration that could at most apply to the possibility of identity review, which, however, is not what this decision is about. Even though *ultra vires* review has been largely assimilated to identity review, the Senate is not likely to see this differently; the difference of category between the two cannot be levelled out in any way. 9

bb) Instead, the Senate's recognisable intention is to deal with the particular situation that the European Central bank has sufficient democratic legitimation only for its core obligations (Art. 88 sentence 2 GG), and that therefore, if it acts outside this area, this happens without connection to the democratic formation of opinions; the Senate holds that the curtailment of the citizen's right to democratic participation comes close to a violation of identity, and it must therefore be possible to be countered by the citizens with the help of the Federal Constitutional Court; according to the Senate, it cannot be conveyed to the citizens that given such a democratic deficit, and with a view to the possible significance of the OMT Decision, there is no legal protection. I do not find this convincing. 10

(1) The decision on how the Federal Republic of Germany reacts to violations of its sovereignty is generally within the political discretion of the competent constitutional organs, particularly of the Federal Government and the German *Bundestag*. It is exclusively for them to decide first whether there is a violation of international law, and which weight it has to be accorded if there is one. Nothing different applies to the further decision about which measure are expedient. In this respect, there exist no rights of individuals which can be derived from Art. 38 sec. 1 GG, and clearly, they are not claimed either. 11

(2) The European Union is a legal community by virtue of the transfer of sovereign powers of the Member States (cf. Art. 23 sec. 1 GG, Art. 4, 5 TEU). Accordingly, the German constitutional organs are obliged, *inter alia*, to work towards the revocation of 12

acts of the European Union if they are not covered by the integration programme, and to limit domestic consequences entailed by such acts.

(a) This responsibility with respect to integration exists vis-à-vis the general public, and yields nothing for the construction of a subjective right of any person entitled to vote to have constitutional organs take action. 13

(b) The Senate demands of the Federal Government and/or the *Bundestag* to (publicly) establish a massive transgression of competences by an institution of the European Union – here, by the European Central Bank –, from which ensues a general obligation to eliminate it. Here, in the view of the Senate, the decisive factor is not the assessment of the constitutional organs but whether such a violation of powers objectively exists. Under such a perspective, political acts and omissions are subjected to an inappropriate legal standard. 14

(aa) With regard to the question of whether there exists a qualified *ultra vires* act, the Federal Government and the *Bundestag* must have a margin of appreciation and discretion, which the citizen needs to accept. Such a margin is indispensable if only because legal clarification will often require considerable time, whereas political need for action can arise soon – the present case, in which the announcement of acts anticipates an essential effect of such acts, which makes it possible to influence the, so to speak, stretched enforcement, is probably atypical. In contrast to conventional obligations to act, whose violation can be judicially established *ex post*, what is at issue here can only be acts by the Federal Government and the *Bundestag* which are specific to certain situations and certain findings. For such acts, an (objectivised) *ex ante* perspective must apply, the legal structure of which is comparable to a risk assessment. If the *ultra vires* violation is not obvious, but if – as probably in most cases, and here as well – the action of the institution of the European Union is situated at the margin of the powers assigned to it, the Federal Government and the *Bundestag* must act in recognition of this and are not compelled to assume an assumption of powers that is manifest and shifts established structures. 15

(bb) The objection that only “manifest” transgressions of powers establish an obligation to act would only be correct if this meant violations of the distribution of powers which are obvious from the outset and which suggest themselves without further legal analysis. This, however, is not the view of the Senate. Instead, it is also considered possible that a transgression of powers can be manifest if it is preceded by a lengthy clarification process. 16

(cc) This case shows in abundant clarity how difficult it is to handle the criterion “manifest”. The Senate’s assessment that the OMT programme manifestly, and with a shift of structures, transgresses the powers assigned to the European Central Bank, can be objected to with good reasons. Monetary and economic policies relate to each other and cannot be strictly separated. The delimitation of the objectives and duties of the European System of Central Banks in Art. 127 TFEU corresponds to this. A review with regard to whether the principle of conferral has been adhered to 17

must take into account that, in consideration of the nature of independent central banks, the delimitation of their assigned powers has only been made with a view to their functions; this assignment of powers must, to a certain extent, include the authorisation to define one's own limits of action. As regards the design of purchases according to the OMT programme, and the effects that can be expected of them, it seems very likely that, due to its selectivity, it can lead to an impermissible monetary financing of the budget. However, not least due to a lack of sufficient understanding of how the programme is embedded in the overall acts of the European Central Bank – for instance with regard to the determination of the key interest rate – it seems to me that the claim, that the objective of the OMT Decision is first and foremost the re-establishment of the monetary transmission mechanism, cannot be contradicted, at least not with the necessary unequivocalness.

(c) I also consider the Senate's restriction of the political options to react to *ultra vires* acts of European institutions and agencies inappropriate and incompatible with the distribution of powers under the Basic Law. It is obvious that assumptions of powers must be opposed. How this effectively happens, however, depends on various circumstances. It can be considerably more effective, and wise, to first wait and to intervene only at a point that appears favourable, be it via negotiations at a promising level, be it via proceedings for annulment (Art. 263 TFEU). This also, and particularly, applies in the context of European integration, since the German constitutional organs must exercise responsibility with respect to integration according to the principle of sincere cooperation (Art. 4 sec. 3 TEU). I find that the argument that the room for manoeuvre of the German constitutional organs is reduced in the case of manifest and serious violations of powers is simply incorrect, because especially in such a situation, particular political skilfulness is required. 18

cc) The Senate does not ignore that the individual citizen cannot claim a right under Art. 38 sec. 1 GG to particular acts of the Federal Government and of the *Bundestag*. The Senate therefore derives from the claim to political participation a claim to have the Federal Government and the *Bundestag* deal in a qualified manner with certain subject-matters. However, when the decision says that a citizen can demand that the *Bundestag* and the Federal Government actively deal with the question of how the distribution of powers can be restored and that they actively decide which options they want to use to pursue this goal, this claim is, in fact, nothing else but a claim of the citizen on the merits. 19

The Senate recognisably intends to secure the public nature of the parliamentary process in cases of severe assumptions of powers by institutions of the European Union, and to thus prevent that essential losses of competence of the German *Bundestag* are tacitly tolerated, disregarding the formal requirements set out in Art. 23 sec. 1 GG, or even brought about by way of collusion. 20

(1) Indisputably, it is a central element of the democratic development of opinions that essential issues of the European distribution of powers are dealt with by the ple- 21

nary session of the *Bundestag*. However, a justiciable right of the individual that the involvement of Parliament take place in a specific manner appears neither required nor at all compatible with the special character of the democratic process. The citizens can influence the way and objectives of the political process through petitions, the political parties and Members of Parliament, and in particular through the media. That, with the help of the Federal Constitutional Court, an individual may steer the *Bundestag*'s right of initiative into a specific direction, does not fit into the constitutional framework of parliamentary work. In particular, Parliament does not owe the citizens an express reasoning to the effect that it makes its political decision (even) in view of competence-related concerns about European acts – in this case, the OMT Decision –; still less does Parliament owe the citizens a promise to proceed in a specific manner for the case that such an act constitutes a qualified *ultra vires* act.

(2) The constitutional requirement, which has been repeatedly emphasised in the Senate's case-law in recent years, that the German *Bundestag* may not relinquish its powers to a significant extent, does not contain any statements concerning the manner in which the *Bundestag* deals with a matter; this requirement is also not violated here. 22

If – to keep to the present case – the Federal Government approves the OMT programme and makes it one of the foundations of its own acts, and if the German Bundestag accepts all this with open eyes – against the backdrop of an intensive public debate, after having heard the President of the European Central Bank, and, according to the information provided by a member of the Budget Committee in the oral hearing, on the basis of the Bundestag's observation and assessment of the acts of the European Central Bank – this is the exercise of its democratic responsibility. The *Bundestag* could readily have criticised the OMT Decision by political means, threatened, if necessary, to bring proceedings for annulment before the Court of Justice of the European Union, waited for the reactions of the European Central Bank and the financial markets and then taken further steps. The fact that it did none of this does not indicate a democratic deficit, but is an expression of its majority decision for a certain policy when handling the sovereign debt crisis in the euro currency area. 23

4. The application in the *Organstreit* proceedings is inadmissible for corresponding reasons. It is the very own obligation of the political groups of the German *Bundestag* to involve the *Bundestag* with controversial issues, and to press for these issues to be dealt with in a manner that is appropriate to the respective problem. If this approach is pursued not at all, insufficiently or unsuccessfully, this cannot be compensated by constructing a right for Parliament to be involved that goes beyond adherence to the law regulating Parliament's internal organisation. 24

Gerhardt

Bundesverfassungsgericht, Beschluss des Zweiten Senats vom 14. Januar 2014 - 2 BvR 2728/13

Zitiervorschlag BVerfG, Beschluss des Zweiten Senats vom 14. Januar 2014 - 2 BvR 2728/13 - Rn. (1 - 24), http://www.bverfg.de/e/rs20140114_2bvr272813en.html

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