Headnotes

to the judgment of the Second Senate of 21 June 2016

2 BvR 2728/13

2 BvR 2729/13

2 BvR 2730/13

2 BvR 2731/13

2 BvE 13/13

1. In order to ensure their possibilities of influence in the European integration process, citizens are generally entitled to the right that a transfer of sovereign powers only takes place in accordance with the requirements the Basic Law has set out in Article 23 sec. 1 sentences 2 and 3, Article 79 sec. 2 of the Basic Law to that end.

2. *Ultra vires* acts of institutions, bodies, offices and agencies of the European Union violate the European integration agenda laid down in the Act of Approval pursuant to Article 23 sec. 1 sentence 2 of the Basic Law and thus also the principle of sovereignty of the people (Article 20 sec. 2 sentence 1 of the Basic Law). The *ultra vires* review aims to protect against such violations of the law.

3. Given their responsibility with respect to European integration, the constitutional organs must counter acts of institutions, bodies, offices and agencies of the European Union that violate the constitutional identity or constitute an *ultra vires* act.

4. The German *Bundesbank* may only participate in a future implementation of the OMT programme if and to the extent that the prerequisites defined by the Court of Justice of the European Union are met; i.e. if

- purchases are not announced,

- the volume of the purchases is limited from the outset,

- there is a minimum period between the issuing of the government bonds and their purchase by the ESCB that is defined from the outset and prevents the issuing conditions from being distorted,

- only government bonds of Member States are purchased that have bond market access enabling the funding of such bonds,

- purchased bonds are held until maturity only in exceptional cases, and

- purchases are restricted or ceased and purchased bonds are remarketed should continuing the intervention become unnecessary.

FEDERAL CONSTITUTIONAL COURT

– 2 BvR 2728/13 –

– 2 BvR 2729/13 –

– 2 BvR 2730/13 –

– 2 BvR 2731/13 –

– 2 BvE 13/13 –

Pronounced
on 21 June 2016
Fischböck
Amtsinspektorin
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings

I. on the constitutional complaint

of Dr. G(…),

– authorised representatives:

Rechtsanwalt Prof. Dr. Wolf-Rüdiger Bub […],

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 earlier Securities Markets Programme (SMP),

2. the Federal Government's omission to bring legal action against the European Central Bank before the Court of Justice of the European Union on account of the bank's decision 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. Sch(…),

5. of Prof. Dr. Dr. h.c. St(…),

– authorised representative for 1. to 3. and 5.:

Prof. Dr. Karl Albrecht Schachtschneider […] –

against

1. the measures by the European System of Central Banks and the European Central Bank aimed at rescuing the euro, in particular the purchase of government bonds of Member States of the euro area for the purpose of indirect monetary financing on the secondary market,

2. the Federal Government's omission to bring proceedings for annulment pursuant to Art. 263 secs. 1 and 2 of the Treaty on the Functioning of the European Union (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, insofar as those measures serve the purpose of monetary financing,

– 2 BvR 2729/13 –,

III. on the constitutional complaint

of Mr H(…),

and of another 11,692 complainants,

– authorised representatives:

Prof. Dr. Christoph Degenhart […],

Rechtsanwältin Prof. Dr. Herta Däubler-Gmelin […],

Prof. Dr. Bernhard Kempen […] –

against

1. the Federal Government's omission to take steps to ensure the rescission of the decision of the Governing Council of the European Central Bank of 6 September 2012 concerning the unlimited purchase of government bonds of Member States of the euro area by the European Central Bank on the secondary market ,

2. the Federal Government's omission to take effective measures to ensure that the Federal Republic of Germany's liability arising from purchases of government 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 government bonds of Member States of the euro area by the European Central Bank on the secondary market 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 Annex II of that Treaty,

3. the German *Bundestag*'s refusal to make its approval of the adjustment programmes within the framework of the European Stability Mechanism – needed for the purchase of government bonds by the European Central Bank – conditional on its having previously been informed in detail about the type and amount of the purchases of government bonds by the European Central Bank, in order to preserve its overall budgetary responsibility,

4. the decision of the European Central Bank of 6 September 2012 concerning the unlimited purchase of government bonds of individual Member States of the euro area on the secondary market,

– 2 BvR 2730/13 –,

IV. on the constitutional complaint

of Prof. Dr. von St…,

and of another 17 complainants,

– authorised representative for 1. to 6. and 8. to 18.:

Rechtsanwalt Prof. Dr. Markus C. Kerber […] –

against the decision of the Governing Council of the European Central Bank of 6 September 2012,

– 2 BvR 2731/13 –,

and

V. on the applications for a ruling in *Organstreit* proceedings to the effect that the respondent

1. is obliged, in order to preserve its overall budgetary responsibility, to take steps to ensure that the decision of the Governing Council of the European Central Bank of 6 September 2012 concerning the unlimited purchase of government bonds of Member States of the euro area by the European Central Bank on the secondary market be rescinded for circumventing the prohibition of monetary financing enshrined in Article 123 TFEU, and to refrain from all measures or decisions that serve to implement that decision,

2. ay only grant its approval to the adjustment programmes within the framework of the European Financial Stability Facility or of the European Stability Mechanism, which are a precondition for the purchase of government bonds by the European Central Bank on the secondary market, in the form of a constitutive parliamentary decision as required under Article 38 section 1 sentence 2, Article 20 sections 1 and 2 and Article 79 section 3 of the Basic Law in order to preserve the respondent's overall budgetary responsibility, if the respondent has been previously and sufficiently informed about the type, amount, and duration of the purchases of government bonds by the European Central Bank, as well as about the accompanying liability risks, and if effective measures have been taken to ensure that the liability of the Federal Republic of Germany arising from these bond purchases will not exceed the sum of its payment obligations under Article 8 section 5 sentence 1 of the Treaty Establishing the European Stability Mechanism as stipulated in Annex II of that Treaty,

applicant: Parliamentary group DIE LINKE in the German *Bundestag*,
represented by the chairpersons,
Platz der Republik 1, 11011 Berlin,

– authorised representatives:

Prof. Dr. Dr. h.c. Hans-Peter Schneider […],

Prof. Dr. Andreas Fisahn […] –

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

– authorised representatives:

Prof. Dr. Christoph Möllers,

Prof. Dr. Martin Nettesheim –

the proceedings I. to IV. were joined by:

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

– authorised representatives:

Prof. Dr. Christoph Möllers […],

Prof. Dr. Martin Nettesheim […] –

the proceedings I. to IV. as well as the proceedings V. on the side of the German *Bundestag* were joined by:

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

– authorised representative:

Prof. Dr. Ulrich Häde […]–

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Voßkuhle,

Landau,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

König,

Maidowski

held on the basis of the oral hearing of 16 February 2016:

J u d g m e n t

1. **The proceedings are joined for a joint decision.**

2. **The constitutional complaints are dismissed to the extent set out in C.II. For the rest, they are rejected for the reasons set down in D.II.3.**

3. The applications for *Organstreit* proceedings are dismissed to the extent set out in C.III.2. For the rest, they are rejected for the the reasons set down in D.II.3.

R e a s o n s:

A.

The constitutional complaints and the application for *Organstreit* proceedings (proceedings relating to disputes between constitutional organs) challenge two programmes for the purchase of marketable debt instruments, in particular government bonds of Member States of the euro area, by the Eurosystem. 1

I.

In response to the state debt crisis, the Eurosystem, comprising the European Central Bank and the national central banks of those Member States whose currency is the euro (Art. 282 sec. 1 sentence 2 TFEU), established several programmes aimed at purchasing assets. 2

1. With its decision of 14 May 2010 (ECB/2010/5, OJ L 124 of 20 May 2010, pp. 8 and 9), the Governing Council of the European Central Bank established a “Securities Markets Programme” (SMP). This programme envisaged purchases of public and private securities on the secondary market by the national central banks of the Eurosystem corresponding to their percentage in the capital key of the European Central Bank and by that bank itself. As justification, “exceptional circumstances in the financial markets, characterised by severe tensions in certain market segments which are hampering the monetary policy transmission mechanism and thereby the effective conduct of monetary policy oriented towards price stability in the medium term” were cited (second recital of the decision of 14 May 2010). The purpose of the programme was to “address the malfunctioning of securities markets and restore an appropriate monetary policy transmission mechanism” (third recital of the decision of 14 May 2010). 3

The SMP was implemented between May 2010 and March 2011 as well as between August 2011 and February 2012. The highest total settlement amount held in the SMP portfolio was EUR 219.5 billion (European Central Bank, Annual Report 2012, p. 82). The SMP was terminated by the decision of 6 September 2012 (see para. 8). 4

With a view to risks involved in the SMP programme, the German *Bundesbank* increased its provisions from EUR 7.7 billion at the end of 2011 to EUR 14.4 billion at the end of 2012 (German *Bundesbank*, Annual Report 2012, p. 154, Annual Report 2014, p. 88). At the end of 2015, the Eurosystem’s national central banks held SMP assets worth EUR 114 billion, of which the German *Bundesbank* held EUR 27.7 billion (German *Bundesbank*, Annual Report 2015, p. 83). On 5 February 2016, the balance sheet holdings of securities had decreased to a total of EUR 122 billion due to maturities and end-of-quarter valuation adjustments (German *Bundesbank*, Monthly 5

Report February 2016, p. 25).

2. At its 340th session on 6 September 2012 in Frankfurt am Main, the Governing Council of the European Central Bank adopted technical features of a programme aimed at conducting Outright Monetary Transactions (OMT). The minutes of the session of 5 and 6 September 2012 state: 6

> 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 framework conditions laid down in the OMT decision envisage the purchase of unlimited amounts of government bonds of select Member States if and as long as these Member States simultaneously adhere to the reform measures agreed upon with the European Financial Stability Facility (EFSF) or the European Stability Mechanism (ESM). Future reform measures must allow for the possibility that bonds issued by the Member State concerned be purchased on the primary market (Primary Market Support Facility, cf. Art. 17 of the Treaty establishing the European Stability Mechanism – ESM Treaty – of 2 February 2012, Federal Law Gazette, *Bundesgesetzblatt* – BGBl. II 2012, pp. 981 et seq.). The OMT Programme also extends to Member States that were already participating in a macroeconomic adjustment programme at the time of the decision on the technical framework conditions when they regain access to the bonds market. It is the declared aim of the OMT Programme to guarantee orderly monetary policy transmission as well as the uniformity of monetary policy. 7

The press release regarding the adoption of the technical framework conditions of 6 September 2012 reads as follows: 8

> Technical features of Outright Monetary Transactions – 6 September 2012
>
> 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.

To date, the OMT decision has not been implemented. 9

II.

1. The complainant in proceedings I. views the OMT decision as well as the purchase of government bonds within the framework of the SMP as having exceeded the competences of the European Central Bank. He asserts that these measures violate the principle of democracy (*Demokratieprinzip*) and thus his fundamental right under Art. 38 sec. 1 of the Basic Law (*Grundgesetz* – GG). Therefore, in the complainant's view, the German *Bundesbank* is not authorised to participate in the implemention of the OMT Programme. In the alternative, he claims that the Federal Government violates his fundamental right under Art. 38 sec. 1 GG by not bringing legal action against the European Central Bank before the Court of Justice of the European Union. 10

[…] 11-24

2. The complainants in proceedings II. claim that the purchases of government bonds by the European System of Central Banks (ESCB) exceed the European Union's competences, thereby violating the complainants' fundamental rights under Art. 1 sec. 1 GG, Art. 2 sec. 1 GG, Art. 38 sec. 1 sentence 2 GG and Art. 20 sec. 4 GG. In the alternative, they point to an obligation on the part of the Federal Government to bring proceedings for annulment before the Court of Justice of the European Union. 25

[…] 26-28

3. The complainants in proceedings III. primarily challenge the fact that the Federal Government has not taken steps towards having the decision of the Governing Council of the European Central Bank of 6 September 2012 rescinded and seek a declaration to the effect that the Federal Government is obliged to refrain from any action serving to implement that decision. "As a precaution", they further seek a declaration to the effect that the Federal Government is obliged to ensure that the Federal Re- 29

public of Germany's liability from purchases of government bonds will be limited to the sum of its payment obligations under the ESM Treaty as well as to the effect that the German *Bundestag* may only approve ESM measures of aid if it has received prior and detailed information on the type and amount of bond purchases by the European Central Bank.

Lastly, the complainants in proceedings III., too, challenge the OMT decision directly. […] 30

[…] 31

4. The complainants in proceedings IV. challenge the OMT decision directly. 32

[…] 33-39

5. The applicant in proceedings V. seeks a declaration to the effect that in order to preserve its overall budgetary responsibility (*haushaltspolitische Gesamtverantwortung*), the respondent is obliged to take steps to have the decision of the Governing Council of the European Central Bank of 6 September 2012 rescinded. In the alternative, this applicant seeks a declaration to the effect that the respondent may only approve the […] adjustment programmes within the framework of the EFSF or the ESM by way of […] parliamentary decision if it has received prior and sufficient information on the type, amount, and duration of the purchases of government bonds by the European Central Bank, as well as on the accompanying liability risks and if effective measures have been taken to ensure that the liability of the Federal Republic of Germany resulting from these purchases will not exceed the sum of its payment obligations under Art. 8 sec. 5 sentence 1 of the Treaty establishing the European Stability Mechanism as stipulated in Annex II of that Treaty. 40

[…] 41-42

III.

The Federal President, the German *Bundestag*, the *Bundesrat*, the Federal Government, as well as all *Land* (federal state) governments have had the opportunity to submit statements. 43

1. The Federal Government considers both the constitutional complaints and the application for *Organstreit* proceedings to be inadmissible or at least unfounded. 44

[…] 45-49

2. The German *Bundestag* , which provided detailed comments only in relation to the constitutional complaint of the complainant in proceedings I., also considers the constitutional complaints and the application for *Organstreit* proceedings to be inadmissible or at least unfounded. 50

[…] 51-64

IV.

1. By order of 17 December 2013 (Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 134, 357) the [Second] Senate [of the Federal Constitutional Court] separated the present proceedings from originally more extensive proceedings that also challenged German and European acts regarding the establishment of the ESM and the conclusion of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union as well as measures of the European Central Bank. They also challenged the inaction on the part of the federal legislature and the Federal Government in the aforementioned context. Earlier, on 11 and 12 June 2013, the Senate conducted an oral hearing. The Senate rendered a final decision on the proceedings that had not been separated with its judgment of 18 March 2014 (BVerfGE 135, 317). 65

2. By order of 14 January 2014, the Senate suspended the present proceedings and referred two questions to the Court of Justice of the European Union in accordance with Art. 267 sec. 1 TFEU (BVerfGE 134, 366 <369 et seq.>) 66

> 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 (interference 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 of 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 on-

ly (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 area (encouragement to purchase newly issued securities)?

3. Upon the request for a preliminary ruling by the Senate, the Court of Justice of the European Union decided by way of judgment of 16 June 2015 that Art. 119 TFEU, Art. 123 sec. 1 TFEU and Art. 127 secs. 1 and 2 TFEU and Articles 17 to 24 of Protocol (no. 4) on the Statute of the European System of Central Banks and of the European Central Bank (ESCB Statute) must be interpreted as permitting the European System of Central Banks to adopt a programme for the purchase of government bonds on secondary markets, such as the programme announced in the press release to which reference is made in the minutes of the 340th meeting of the Governing Council of the European Central Bank on 5 and 6 September 2012 (Judgment of 16 June 2015, Gauweiler, C-62/14, EU:C:2015:400, para. 128). 67

On the basis of the requirements and consequences of an *ultra vires* review presented by the Senate in its request for a preliminary ruling, the Court of Justice con- 68

sidered the request for a preliminary ruling to be admissible and dismissed the corresponding objections of several parties (ECJ, Gauweiler, loc. cit., paras. 11 to 31). In this context, it noted that according to its established case-law courts requesting a preliminary ruling are bound by the decisions of the Court of Justice (ECJ, Gauweiler, loc. cit., para. 16).

To the extent that the Court of Justice expressly commented on the questions referred to it by the Senate, it stated (ECJ, Gauweiler, loc. cit., paras. 33 et seq.): 69

> Articles 119 TFEU and 127(1) and (2) TFEU, and Articles 17 to 24 of the Protocol on the ESCB and the ECB
>
> 33 The referring court raises the question of whether a programme for the purchase of government bonds on secondary markets, such as the programme announced in the press release, can be covered by the powers of the ESCB, as defined by primary law.
>
> – Powers of the ESCB
>
> 34 It should be noted as a preliminary point that under Article 119(2) TFEU, the activities of the Member States and the Union are to include a single currency, the euro, as well as the definition and conduct of a single monetary policy and exchange-rate policy (judgment in Pringle, C-370/12, EU:C:2012:756, paragraph 48).
>
> 35 As regards more particularly monetary policy, Article 3(1)(c) TFEU states that the Union is to have exclusive competence in that area for the Member States whose currency is the euro (see, to that effect, judgment in Pringle, C-370/12, EU:C:2012:756, paragraph 50).
>
> 36 Under Article 282(1) TFEU, the ECB and the central banks of the Member States whose currency is the euro, which constitute the Eurosystem, are to conduct the monetary policy of the Union (judgment in Pringle, C-370/12, EU:C:2012:756, paragraph 49). Under Article 282(4) TFEU, the ECB is to adopt such measures as are necessary to carry out its tasks in accordance with Articles 127 TFEU to 133 TFEU, with Article 138 TFEU and with the conditions laid down in the Statute of the ESCB and of the ECB.
>
> 37 Within that framework, it is for the ESCB, pursuant to Article 127(2) TFEU, to define and implement that policy.
>
> 38 More specifically, it follows from Article 129(1) TFEU, read in conjunction with Article 12.l of the Protocol on the ESCB and the ECB, that the Governing Council is to formulate the monetary policy of the Union and that the Executive Board of the ECB is to implement that policy in accordance with the guidelines and decisions laid

down by the Governing Council.

39 It also follows, from the third subparagraph of Article 12.1 of the Protocol that, to the extent deemed possible and appropriate, the ECB is to have recourse to the national central banks to carry out operations which form part of the tasks of the ESCB, those banks being obliged, under Article 14.3 of the Protocol, to act in accordance with the guidelines and instructions of the ECB.

40 Furthermore, it is apparent from Article 130 TFEU that the ESCB is to be independent when carrying out its task of formulating and implementing the Union's monetary policy. It can be seen from the wording of that Article that it is intended to shield the ESCB and its decision-making bodies from external influences which would be likely to interfere with the performance of the tasks which the FEU Treaty and the Protocol on the ESCB and the ECB assign to the ESCB. Thus, Article 130 TFEU is, in essence, intended to shield the ESCB from all political pressure in order to enable it effectively to pursue the objectives attributed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by primary law (see, to that effect, judgment in Commission v ECB, C-11/00, EU:C:2003:395, paragraph 134).

41 In accordance with the principle of conferral of powers set out in Article 5(2) TEU, the ESCB must act within the limits of the powers conferred upon it by primary law and it cannot therefore validly adopt and implement a programme which is outside the area assigned to monetary policy by primary law. In order to ensure that the principle of conferral is complied with, the acts of the ESCB are, on the conditions laid down by the Treaties, subject to review by the Court (see, to that effect, judgment in Commission v ECB, C-11/00, EU:C:2003:395, paragraph 135).

42 It must be pointed out in this regard that the FEU Treaty contains no precise definition of monetary policy but defines both the objectives of monetary policy and the instruments which are available to the ESCB for the purpose of implementing that policy (see, to that effect, Pringle, C-370/12, EU:C:2012:756, paragraph 53).

43 Thus, under Articles 127(1) TFEU and 282(2) TFEU, the primary objective of the Union's monetary policy is to maintain price stability. The same provisions further stipulate that, without prejudice to that objective, the ESCB is to support the general economic policies in the Union, with a view to contributing to the achievement of its objectives, as laid down in Article 3 TEU (see, to that effect, judgment in Pringle, C-370/12, EU:C:2012:756, paragraph 54).

44 The Protocol on the ESCB and the ECB is thus characterised by a clear mandate, which is directed primarily at the objective of ensuring price stability. The tightly drawn nature of that mandate is further reinforced by the procedures for amending certain parts of the Statute of the ESCB and of the ECB.

45 As to the means assigned to the ESCB by primary law for the purpose of achieving those objectives, Chapter IV of the Protocol on the ESCB and the ECB, which describes the monetary functions and operations assured by the ESCB, sets out the instruments to which the ESCB may have recourse in the framework of monetary policy.

– The delimitation of monetary policy

46 The Court has held that in order to determine whether a measure falls within the area of monetary policy it is appropriate to refer principally to the objectives of that measure. The instruments which the measure employs in order to attain those objectives are also relevant (see, to that effect, judgment in Pringle, C-370/12, EU:C:2012:756, paragraphs 53 and 55).

47 In the first place, as regards the objectives of a programme such as that at issue in the main proceedings, it can be seen from the press release that the aim of the programme is to safeguard both ‘an appropriate monetary policy transmission and the singleness of the monetary policy’.

48 First, the objective of safeguarding the singleness of monetary policy contributes to achieving the objectives of that policy inasmuch as, under Article 119(2) TFEU, monetary policy must be ‘single’.

49 Secondly, the objective of safeguarding an appropriate transmission of monetary policy is likely both to preserve the singleness of monetary policy and to contribute to its primary objective, which is to maintain price stability.

50 The ability of the ESCB to influence price developments by means of its monetary policy decisions in fact depends, to a great extent, on the transmission of the ‘impulses’ which the ESCB sends out across the money market to the various sectors of the economy. Consequently, if the monetary policy transmission mechanism is disrupted, that is likely to render the ESCB’s decisions ineffective in a part of the euro area and, accordingly, to undermine the singleness of monetary policy. Moreover, since disruption of the transmission mechanism undermines the effectiveness of the measures adopted by the ESCB, that necessarily affects the ESCB’s ability to

guarantee price stability. Accordingly, measures that are intended to preserve that transmission mechanism may be regarded as pertaining to the primary objective laid down in Article 127(1) TFEU.

51 The fact that a programme such as that announced in the press release might also be capable of contributing to the stability of the euro area, which is a matter of economic policy (see, to that effect, judgment in Pringle, C-370/12, EU:C:2012:756, paragraph 56), does not call that assessment into question.

52 Indeed, a monetary policy measure cannot be treated as equivalent to an economic policy measure merely because it may have indirect effects on the stability of the euro area (see, by analogy, judgment in Pringle, C-370/12, EU:C:2012:756, paragraph 56).

53 In the second place, as regards the means to be used for achieving the objectives sought by a programme such as that announced in the press release, it is not disputed that the implementation of such a programme will entail outright monetary transactions on secondary sovereign debt markets.

54 It is clear from Article 18.1 of the Protocol on the ESCB and the ECB, which forms part of Chapter IV thereof, that in order to achieve the objectives of the ESCB and to carry out its tasks, as provided for in primary law, the ECB and the national central banks may, in principle, operate in the financial markets by buying and selling outright marketable instruments in euro. Accordingly, the transactions which the Governing Council has in mind in the press release use one of the monetary policy instruments provided for by primary law.

55 As regards the selective nature of the programme announced in the press release, it should be borne in mind that the programme is intended to rectify the disruption to the monetary policy transmission mechanism caused by the specific situation of government bonds issued by certain Member States. In those circumstances, the mere fact that the programme is specifically limited to those government bonds is thus not of a nature to imply, of itself, that the instruments used by the ESCB fall outside the realm of monetary policy. Moreover, no provision of the FEU Treaty requires the ESCB to operate in the financial markets by means of general measures that would necessarily be applicable to all the States of the euro area.

56 In the light of those considerations, it is apparent that a programme such as that announced in the press release, in view of its objectives and the instruments provided for achieving them, falls within the area of monetary policy.

57 The fact that the implementation of such a programme is made conditional upon full compliance with EFSF or ESM macroeconomic adjustment programmes does not alter that conclusion.

58 It is, of course, possible that a government bond-buying programme may, indirectly, increase the impetus to comply with those adjustment programmes and thus, to some extent, further the economic-policy objectives of those programmes.

59 However, such indirect effects do not mean that such a programme must be treated as equivalent to an economic policy measure, since it is apparent from Articles 119(2) TFEU, 127(1) TFEU and 282(2) TFEU that, without prejudice to the objective of price stability, the ESCB is to support the general economic policies in the Union.

60 The point should also be made that the ESCB, in a wholly independent manner, made implementation of the programme announced in the press release conditional upon full compliance with EFSF or ESM macroeconomic adjustment programmes, thereby ensuring that its monetary policy will not give the Member States whose sovereign bonds it purchases financing opportunities which would enable them to depart from the adjustment programmes to which they have subscribed. The ESCB thus ensures that the monetary policy measures it has adopted will not work against the effectiveness of the economic policies followed by the Member States.

61 Furthermore, since the ESCB is obliged, under Article 127(1) TFEU, read in conjunction with Article 119(3) TFEU, to comply with the guiding principle that public finances must be sound, the conditions included in a programme such as that announced in the press release, which prevent that programme from acting as an incentive to Member States to allow their financial situation to deteriorate, cannot be regarded as taking the programme beyond the confines of the monetary policy framework laid down by primary law.

62 It should be added that full compliance of the Member State concerned with the obligations arising under an adjustment programme to which it has subscribed is not, in any event, a sufficient condition to trigger intervention by the ESCB in the framework of a programme such as that announced in the press release, since such intervention is made strictly conditional upon there being disruptions of the monetary policy transmission mechanism or the singleness of monetary policy.

63 Accordingly, the fact that the purchase of government bonds on

the secondary market subject to a condition of compliance with a macroeconomic adjustment programme could be regarded as falling within economic policy when the purchase is undertaken by the ESM (see, to that effect, judgment in Pringle, C-370/12, EU:C:2012:756, paragraph 60) does not mean that this should equally be the case when that instrument is used by the ESCB in the framework of a programme such as that announced in the press release.

64 In that regard, the difference between the objectives of the ESM and those of the ESCB is decisive. Whilst it can be seen from paragraphs 48 to 52 of this judgment that a programme such as that at issue in the main proceedings may be implemented only in so far as is necessary for the maintenance of price stability, the ESM's intervention is intended to safeguard the stability of the euro area, that objective not falling within monetary policy (see, to that effect, judgment in Pringle, C-370/12, EU:C:2012:756, paragraph 56).

65 That analysis also leads the Court to exclude the possibility that a programme such as that announced in the press release may serve to circumvent the conditions circumscribing the ESM's activity on the secondary market, since the ESCB's intervention is not intended to take the place of that of the ESM in order to achieve the latter's objectives but must, on the contrary, be implemented independently on the basis of the objectives particular to monetary policy.

– Proportionality

66 It follows from Articles 119(2) TFEU and 127(1) TFEU, read in conjunction with Article 5(4) TEU, that a bond-buying programme forming part of monetary policy may be validly adopted and implemented only in so far as the measures that it entails are proportionate to the objectives of that policy.

67 In that regard, it should be borne in mind that, according to the settled case-law of the Court, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary in order to achieve those objectives (see, to that effect, judgment in Association Kokopelli, C-59/11, EU:C:2012:447, paragraph 38 and the case-law cited).

68 As regards judicial review of compliance with those conditions, since the ESCB is required, when it prepares and implements an open market operations programme of the kind announced in the

press release, to make choices of a technical nature and to undertake forecasts and complex assessments, it must be allowed, in that context, a broad discretion (see, by analogy, judgments in Afton Chemical, C-343/09, EU:C:2010:419, paragraph 28, and Billerud Karlsborg and Billerud Skärblacka, C-203/12, EU:C:2013:664, paragraph 35).

69 Nevertheless, where an EU institution enjoys broad discretion, a review of compliance with certain procedural guarantees is of fundamental importance. Those guarantees include the obligation for the ESCB to examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions.

70 In that regard, the Court has consistently held that, although the statement of reasons for an EU measure, which is required by Article 296(2) TFEU, must show clearly and unequivocally the reasoning of the author of the measure in question, so as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review, it is not required to go into every relevant point of fact and law. In addition, the question whether the obligation to provide a statement of reasons has been satisfied must be assessed with reference not only to the wording of the measure but also to its context and the whole body of legal rules governing the matter in question (see, to that effect, judgment in Commission v Council, C-63/12, EU:C:2013:752, paragraphs 98 and 99 and the case-law cited).

71 Although an examination of whether the obligation to provide a statement of reasons has been satisfied may be undertaken only on the basis of a decision that has been formally adopted, in this case it must none the less be found that the press release, together with draft legal acts considered during the meeting of the Governing Council at which the press release was approved, make known the essential elements of a programme such as that announced in the press release and are such as to enable the Court to exercise its power of review.

72 As regards, in the first place, the appropriateness of a programme such as that announced in the press release for achieving the ESCB's objectives, it is apparent from the press release and from the explanations provided by the ECB that the programme is based on an analysis of the economic situation of the euro area, according to which, at the date of the programme's announcement, interest rates on the government bonds of various States of the euro

area were characterised by high volatility and extreme spreads. According to the ECB, those spreads were not accounted for solely by macroeconomic differences between the States concerned but were caused, in part, by the demand for excessive risk premia for the bonds issued by certain Member States, such premia being intended to guard against the risk of a break-up of the euro area.

73 According to the ECB, that special situation severely undermined the ESCB's monetary policy transmission mechanism in that it gave rise to fragmentation as regards bank refinancing conditions and credit costs, which greatly limited the effects of the impulses transmitted by the ESCB to the economy in a significant part of the euro area.

74 Having regard to the information placed before the Court in the present proceedings, it does not appear that that analysis of the economic situation of the euro area as at the date of the announcement of the programme in question is vitiated by a manifest error of assessment.

75 In that regard, the fact, mentioned by the referring court, that that reasoned analysis has been subject to challenge does not, in itself, suffice to call that conclusion into question, since, given that questions of monetary policy are usually of a controversial nature and in view of the ESCB's broad discretion, nothing more can be required of the ESCB apart from that it use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy.

76 In the situation described in paragraphs 72 and 73 of this judgment, the purchase, on secondary markets, of government bonds of the Member States affected by interest rates considered by the ECB to be excessive is likely to contribute to reducing those rates by dispelling unjustified fears about the break-up of the euro area and thus to play a part in bringing about a fall in — or even the elimination of — excessive risk premia.

77 In those circumstances, the ESCB was entitled to take the view that such a development in interest rates is likely to facilitate the ESCB's monetary policy transmission and to safeguard the singleness of monetary policy.

78 Thus, it is undisputed that interest rates for the government bonds of a given State play a decisive role in the setting of the interest rates applicable to the various economic actors in that State, in the value of the portfolios of financial institutions holding such bonds

and in the ability of those institutions to obtain liquidity. Therefore, eliminating or reducing the excessive risk premia demanded in respect of the government bonds of a Member State is likely to avoid the volatility and level of those premia from hindering the transmission of the effects of the ESCB's monetary policy decisions to the economy of that State and from jeopardising the singleness of monetary policy.

79 Moreover, the ECB's assertion that the mere announcement of the programme at issue in the main proceedings was sufficient to achieve the effect sought — namely to restore the monetary policy transmission mechanism and the singleness of monetary policy — has not been challenged in these proceedings.

80 It follows from the foregoing that, in economic conditions such as those described by the ECB at the date of the press release, the ESCB could legitimately take the view that a programme such as that announced in the press release is appropriate for the purpose of contributing to the ESCB's objectives and, therefore, to maintaining price stability.

81 Accordingly, it should, in the second place, be established whether such a programme does not go manifestly beyond what is necessary to achieve those objectives.

82 It must be noted in that regard that the wording of the press release makes quite clear that, under the programme at issue in the main proceedings, the purchase of government bonds on secondary markets is permitted only in so far as it is necessary to achieve the objectives of that programme and that such purchases will cease as soon as those objectives have been achieved.

83 It should also be noted that the announcement made in the press release about the programme at issue in the main proceedings will be followed, if necessary, by a second phase, namely implementation of the programme, which will be dependent upon an in-depth assessment of the requirements of monetary policy.

84 Moreover, more than two years after the programme at issue in the main proceedings was announced, that programme has not been implemented, the Governing Council taking the view that its activation was not justified by the economic situation of the euro area.

85 In addition to the fact that implementation of a programme such as that announced in the press release is strictly subject to the objectives of that programme, the Court notes that the potential scale

of the programme is limited in a number of ways.

86 It is thus apparent that, in the context of such a programme, the ESCB may purchase only the government bonds of Member States which are undergoing a macroeconomic adjustment programme and which have access to the bond market again. Furthermore, a programme such as that at issue in the main proceedings is concentrated on government bonds with a maturity of up to three years, the ESCB reserving the right to sell at any time the bonds it has purchased.

87 It follows from those considerations, first, that a programme such as that announced in the press release ultimately concerns only a limited part of the government bonds issued by the States of the euro area, so that the commitments which the ECB is liable to enter into when such a programme is implemented are, in fact, circumscribed and limited. Secondly, such a programme can be put into effect only when the situation of certain of those States has already justified EMS intervention which is still under way.

88 In those circumstances, a programme whose volume is thus restricted could legitimately be adopted by the ESCB without a quantitative limit being set prior to its implementation, such a limit being likely, moreover, to reduce the programme's effectiveness.

89 Furthermore, in so far as the referring court raises the question of the selectivity of such a programme, it should be recalled that this programme is intended to rectify the disruption of the ESCB's monetary policy which arose as a result of the particular situation of government bonds issued by certain Member States. In those circumstances, the ESCB was fully entitled to take the view that a selective bond-buying programme may prove necessary in order to rectify that disruption, concentrating the ESCB's activity on the parts of the euro area which are particularly affected by that disruption and thereby preventing the scale of that programme from being needlessly increased, beyond what is necessary to achieve its objectives, or the programme's effectiveness from being diminished.

90 It must also be stated that a programme such as that announced in the press release identifies the Member States whose bonds may be purchased on the basis of criteria linked to the objectives pursued and not by means of an arbitrary selection.

91 In the third place, the ESCB weighed up the various interests in play so as to actually prevent disadvantages from arising, when the programme in question is implemented, which are manifestly dispro-

portionate to the programme's objectives.

92 It follows from the foregoing considerations that a programme such as that announced in the press release does not infringe the principle of proportionality.

Article 123(1) TFEU

93 The referring court raises the issue of the compatibility with Article 123(1) TFEU of a programme for the purchase of government bonds on secondary markets, such as the programme announced in the press release.

94 It is clear from its wording that Article 123(1) TFEU prohibits the ECB and the central banks of the Member States from granting overdraft facilities or any other type of credit facility to public authorities and bodies of the Union and of Member States and from purchasing directly from them their debt instruments (judgment in Pringle, C-370/12, EU:C:2012:756, paragraph 123).

95 It follows that that provision prohibits all financial assistance from the ESCB to a Member State (see, to that effect, judgment in Pringle, C-370/12, EU:C:2012:756, paragraph 132), but does not preclude, generally, the possibility of the ESCB purchasing from the creditors of such a State, bonds previously issued by that State.

96 Thus, Article 18.1 of the Protocol on the ESCB and the ECB permits the ESCB, in order to achieve its objectives and to carry out its tasks, to operate in the financial markets, inter alia, by buying and selling outright marketable instruments, which include government bonds, and does not make that authorisation subject to particular conditions as long as the nature of open market operations is not disregarded.

97 Nevertheless, the ESCB does not have authority to purchase government bonds on secondary markets under conditions which would, in practice, mean that its action has an effect equivalent to that of a direct purchase of government bonds from the public authorities and bodies of the Member States, thereby undermining the effectiveness of the prohibition in Article 123(1) TFEU.

98 In addition, in order to determine which forms of purchases of government bonds are compatible with Article 123(1) TFEU, it is necessary to take account of the objective pursued by that provision (see, by analogy, judgment in Pringle, C-370/12, EU:C:2012:756, paragraph 133).

99 To that end, it must be recalled that the origin of the prohibition

laid down in Article 123 TFEU is to be found in Article 104 of the EC Treaty (which became Article 101 EC), which was inserted in the EC Treaty by the Treaty of Maastricht.

100 It is apparent from the preparatory work relating to the Treaty of Maastricht that the aim of Article 123 TFEU is to encourage the Member States to follow a sound budgetary policy, not allowing monetary financing of public deficits or privileged access by public authorities to the financial markets to lead to excessively high levels of debt or excessive Member State deficits (see the Draft Treaty amending the Treaty establishing the European Economic Community with a view to achieving economic and monetary union, Bulletin of the European Communities, Supplement 2/91, pp. 24 and 54).

101 Thus, as is stated in the seventh recital in the preamble to Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles [123 TFEU] and [125(1) TFEU] (OJ 1993 L 332, p. 1), purchases made on the secondary market may not be used to circumvent the objective of Article 123 TFEU.

102 It follows that, as the Advocate General has observed in point 227 of his Opinion, when the ECB purchases government bonds on secondary markets, sufficient safeguards must be built into its intervention to ensure that the latter does not fall foul of the prohibition of monetary financing in Article 123(1) TFEU.

103 As regards a programme such as that announced in the press release, it must in the first place be stated that, in the framework of such a programme, the ESCB is entitled to purchase government bonds — not directly, from public authorities or bodies of the Member States — but only indirectly, on secondary markets. Intervention by the ESCB of the kind provided for by a programme such as that at issue in the main proceedings thus cannot be treated as equivalent to a measure granting financial assistance to a Member State.

104 That said, the point should be made, in the second place, that the ESCB's intervention could, in practice, have an effect equivalent to that of a direct purchase of government bonds from public authorities and bodies of the Member States if the potential purchasers of government bonds on the primary market knew for certain that the ESCB was going to purchase those bonds within a certain period and under conditions allowing those market operators to act, de facto, as intermediaries for the ESCB for the direct purchase of those bonds from the public authorities and bodies of the Member State concerned.

105 However, the explanations provided by the ECB in these proceedings have made clear that the implementation of a programme such as that announced in the press release must be subject to conditions intended to ensure that the ESCB's intervention on secondary markets does not have an effect equivalent to that of a direct purchase of government bonds on the primary market.

106 In this respect, the draft decision and draft guideline produced by the ECB in these proceedings indicate that the Governing Council is to be responsible for deciding on the scope, the start, the continuation and the suspension of the intervention on the secondary market envisaged by such a programme. The ECB has also made clear before the Court that the ESCB intends, first, to ensure that a minimum period is observed between the issue of a security on the primary market and its purchase on the secondary market and, secondly, to refrain from making any prior announcement concerning either its decision to carry out such purchases or the volume of purchases envisaged.

107 Inasmuch as those safeguards prevent the conditions of issue of government bonds from being distorted by the certainty that those bonds will be purchased by the ESCB after their issue, they ensure that implementation of a programme such as that announced in the press release will not, in practice, have an effect equivalent to that of a direct purchase of government bonds from public authorities and bodies of the Member States.

108 It is true that, despite those safeguards, the ESCB's intervention remains capable of having, as the referring court points out, some influence on the functioning of the primary and secondary sovereign debt markets. However, that fact is not decisive since such influence constitutes, as the Advocate General has observed in point 259 of his Opinion, an inherent effect in purchases on the secondary market which are authorised by the FEU Treaty. That effect is, moreover, essential if those purchases are to be used effectively in the framework of monetary policy.

109 In the third place, a programme such as that announced in the press release would circumvent the objective of Article 123(1) TFEU, recalled in paragraph 100 of this judgment, if that programme were such as to lessen the impetus of the Member States concerned to follow a sound budgetary policy. In fact, since it follows from Articles 119(2) TFUE, 127(1) TFEU and 282(2) TFEU that, without prejudice to the objective of price stability, the ESCB is to support the general economic policies in the Union, the action taken

by the ESCB on the basis of Article 123 TFEU cannot be such as to contravene the effectiveness of those polices by lessening the impetus of the Member States concerned to follow a sound budgetary policy.

110 Moreover, the conduct of monetary policy will always entail an impact on interest rates and bank refinancing conditions, which necessarily has consequences for the financing conditions of the public deficit of the Member States.

111 In any event, the Court finds that the features of a programme such as that announced in the press release exclude the possibility of that programme being considered of such a kind as to lessen the impetus of the Member States to follow a sound budgetary policy.

112 In that regard, it must be borne in mind, first, that the programme provides for the purchase of government bonds only in so far as is necessary for safeguarding the monetary policy transmission mechanism and the singleness of monetary policy and that those purchases will cease as soon as those objectives are achieved.

113 That limitation on the ESCB's intervention means (i) that the Member States cannot, in determining their budgetary policy, rely on the certainty that the ESCB will at a future point purchase their government bonds on secondary markets and (ii) that the programme in question cannot be implemented in a way which would bring about a harmonisation of the interest rates applied to the government bonds of the Member States of the euro area regardless of the differences arising from their macroeconomic or budgetary situation.

114 The adoption and implementation of such a programme thus do not permit the Member States to adopt a budgetary policy which fails to take account of the fact that they will be compelled, in the event of a deficit, to seek financing on the markets, or result in them being protected against the consequences which a change in their macroeconomic or budgetary situation may have in that regard.

115 Secondly, a programme such as that at issue in the main proceedings is accompanied by a series of guarantees that are intended to limit its impact on the impetus to follow a sound budgetary policy.

116 Thus, by limiting that programme to certain types of bonds issued only by those Member States which are undergoing a structural adjustment programme and which have access to the bond market again, the ECB has, de facto, restricted the volume of

government bonds eligible to be purchased in the framework of the programme and, accordingly, has limited the scale of the programme's impact on the financing conditions of the States of the euro area.

117 Moreover, the impact of a programme such as that announced in the press release on the impetus to follow a sound budgetary policy is also limited by the fact that the ESCB has the option of selling the purchased bonds at any time. It follows that the consequences of withdrawing those bonds from the markets may be temporary. That option also means that the ESCB is able to adapt its programme in the light of the attitude of the Member States concerned, in particular with a view to limiting or suspending purchases of government bonds if a Member State changes its issuance behaviour by issuing more short-maturity bonds in order to finance its budget by means of bonds that are eligible for ESCB intervention.

118 The fact that the ESCB also has the possibility of holding the bonds it has purchased until maturity does not play a decisive role in this regard, since that possibility depends on such action being necessary to achieve the objectives sought and, in any event, the market operators involved cannot be certain that the ESCB will make use of that option. It should also be observed that such a practice is in no way precluded by Article 18.1 of the Protocol on the ESCB and the ECB and that it does not imply that the ESCB waives its right to payment of the debt, by the issuing Member State, once the bond matures.

119 In addition, by providing only for the purchase of government bonds issued by Member States that have access to the bond market again, the ESCB in practice excludes from the programme it intends to implement the Member States whose financial situation has deteriorated so far that they are no longer in a position to secure financing on the market.

120 Finally, the fact that the purchase of government bonds is conditional upon full compliance with the structural adjustment programmes to which the Member States concerned are subject precludes the possibility of a programme, such as that announced in the press release, acting as an incentive to those States to dispense with fiscal consolidation, relying on the financing opportunities to which the implementation of such a programme could give rise.

121 It follows from the foregoing that a programme such as that announced in the press release does not lessen the impetus of the Member States concerned to follow a sound budgetary policy. Ac-

cordingly, Article 123(1) TFEU does not prevent the ESCB from adopting such a programme and implementing it under conditions which do not result in the ESCB's intervention having an effect equivalent to that of a direct purchase of government bonds from the public authorities and bodies of the Member States.

122 The features of such a programme to which the referring court has specifically drawn attention and which have not been mentioned in the analysis in the previous paragraphs do not call that conclusion into question.

123 Thus, even if it were established that that programme could expose the ECB to a significant risk of losses, that would in no way weaken the guarantees which are built into the programme in order to ensure that the Member States' impetus to follow a sound budgetary policy is not lessened.

124 In this regard, the Court observes that those guarantees are also likely to reduce the risk of losses to which the ECB is exposed.

125 It should also be borne in mind that a central bank, such as the ECB, is obliged to take decisions which, like open market operations, inevitably expose it to a risk of losses and that Article 33 of the Protocol on the ESCB and the ECB duly provides for the way in which the losses of the ECB must be allocated, without specifically delimiting the risks which the Bank may take in order to achieve the objectives of monetary policy.

126 Furthermore, although the lack of privileged creditor status may mean that the ECB is exposed to the risk of a debt cut decided upon by the other creditors of the Member State concerned, it must be stated that such a risk is inherent in a purchase of bonds on the secondary markets, an operation which was authorised by the authors of the Treaties, without being conditional upon the ECB having privileged creditor status.

127 In view of all the foregoing considerations, the answer to the questions referred is that Articles 119 TFEU, 123(1) TFEU and 127(1) and (2) TFEU and Articles 17 to 24 of the Protocol on the ESCB and the ECB must be interpreted as permitting the ESCB to adopt a programme for the purchase of government bonds on secondary markets, such as the programme announced in the press release.

4. On 16 February 2016, the Senate conducted an oral hearing in which the parties expounded on their previous submissions and made additional submissions. The Senate heard the President of the German *Bundesbank* , Dr. Jens Weidmann, and 70

the member of the Executive Board of the European Central Bank Yves Mersch on the subjects of the current relevance of the OMT Programme, the details of implementation of the OMT decision, as well as the possible volume of the programme and the risks it poses to the federal budget.

B.

[…] 71-75

C.

The constitutional complaints are admissible to the extent that they challenge the fact that the Federal Government did not take steps to challenge the policy decision of the Governing Council of the European Central Bank regarding the OMT Programme of 6 September 2012 (I.). For the rest, the constitutional complaints are inadmissible (II.). The application for *Organstreit* proceedings is admissible only to the extent that it seeks a declaration to the effect that the German *Bundestag* is obliged to take steps towards having the policy decision of 6 September 2012 regarding the OMT Programme rescinded. For the rest, it is inadmissible (III.). 76

I.

The constitutional complaints of the complainants in proceedings I., II., and III. are inadmissible to the extent that they assert that the fact that the Federal Government did not take steps against the policy decision regarding the OMT Programme violates their right under Art. 38 sec. 1 sentence 1 in conjunction with Art. 20 secs. 1 and 2, and Art. 79 sec. 3 GG. To the extent that they claim that the European Central Bank exceeded its competences in a sufficiently qualified manner by adopting the policy decision regarding the OMT Programme and its possible implementation, the possibility, at least, of such a violation of fundamental rights having occurred does emerge from their submissions (1.). The same goes for the additional assertion of the complainant in proceedings I. that the *Bundestag*'s overall budgetary responsibility has been impaired to the point of violating the constitutional identity (*Identitätsverletzung*) (2.). 77

1. The complainants in proceedings I., II., and III. submit in a sufficiently substantiated manner (§ 23 sec. 1 sentence 2, § 92 of the Federal Constitutional Court Act, *Bundesverfassungsgerichtsgesetz* – BVerfGG) that inaction on the part of the Federal Government, which is an appropriate subject of a constitutional complaint (§ 95 sec. 1 sentence 1 BVerfGG; cf. BVerfGE 10, 302 <306>; German Federal Constitutional Court, *Bundesverfassungsgericht* – BVerfG, Order of the Second Senate of 30 June 2015 – 2 BvR 1282/11 –, juris, para. 82; established case-law), may have led to one of their fundamental rights or rights equal to fundamental rights that according to Art. 93 sec. 1 no. 4a GG and § 90 sec. 1 BVerfGG may both be invoked before the Federal Constitutional Court (a) being individually, presently and directly violated (b). 78

a) From the submissions of the complainants in proceedings I., II., and III. it appears 79

possible that the European Central Bank exceeded its competences in a sufficiently qualified manner by adopting the policy decision of 6 September 2012 regarding the OMT Programme and its possible implementation, thus giving rise to duties to react on the part of the Federal Government, which can be invoked in court by the complainants.

aa) The core of the right to vote, which is protected by Art. 20 secs. 1 and 2 in conjunction with Art. 79 sec. 3 GG, gives citizens the right that institutions, bodies, offices, and agencies of the European Union exercise only such competences that have been transferred to them by the legislature deciding on European integration matters (*Integrationsgesetzgeber*) according to Art. 23 sec. 1 GG (1). This right can result in a legal claim vis-à-vis the constitutional organs, arising from their responsibility with respect to European integration (*Integrationsverantwortung*), to counteract institutions, bodies, offices, and agencies of the European Union exceeding their competences (2). 80

(1) The right to vote in the election of the German *Bundestag*, which is protected by Art. 38 sec. 1 sentence 1 GG and constitutes a right that is equivalent to fundamental rights, ensures the political self-determination of citizens and guarantees the possibility of their participating freely and equally in legitimating the state power exercised in Germany (cf. BVerfGE 37, 271 <279>; 73, 339 <375>; 123, 267 <340>; 132, 195 <238 para. 104>; 135, 317 <399 para. 159>). According to the established case-law of the Federal Constitutional Court, the right to vote is not merely a formal legitimation of the (federal) state power. Rather, it affords the individual the right to influence policy formation and to effect change by means of their electoral decision. Within the scope of Art. 23 GG, it protects citizens from having the legitimation of state power and the influence on the exercise of this power, both of which an election provides, devoided of meaning by transferring the functions and powers of the German *Bundestag* to the European level in a way that violates the principle of democracy (cf. BVerfGE 89, 155 <172>; 123, 267 <330>; 134, 366 <396 para. 51>). 81

In order to ensure that he or she has the possibility of exercising democratic influence within the process of European integration, Art. 38 sec. 1 sentence 1 GG fundamentally provides every voter with the right that the transfer of sovereign powers will only occur in the forms envisaged by Art. 23 sec. 1 sentences 2 and 3 and Art. 79 sec. 2 GG. This right can be violated when institutions, bodies, offices, and agencies of the European Union exercise sovereign powers of their own accord, as in such cases the process of democratic decision-making guaranteed by Art. 23 sec. 1 and Art. 79 sec. 2 GG is undermined. This may violate the principle of the sovereignty of the people, enshrined in Art. 20 sec. 2 sentence 1 GG and belonging to the constitutional identity of the Basic Law, which mandates that all public authority exercised in Germany must have a basis of legitimation by the voter (cf. BVerfGE 83, 37 <50 and 51>; 89, 155 <182>; 93, 37 <66>; 130, 76 <123>; 137, 185 <232 and 233 para. 131>; 139, 194 <224 para. 106>). 82

(2) Therefore, Art. 38 sec. 1 sentence 1 in conjunction with Art. 20 secs. 1 and 2 and Art. 79 sec. 3 GG also provides protection from institutions, bodies, offices, and agencies of the European Union exceeding their competences in a sufficiently qualified manner. The Federal Government's and the *Bundestag*'s duty to react, which stems from objective law and requires that they, as a consequence of their responsibility with respect to European integration (cf. BVerfGE 123, 267 <351 et seq., 389 et seq., 413 et seq.>; 126, 286 <307>; 129, 124 <181>; 132, 195 <238 and 239 para. 105>; 134, 366 <394 and 395 para. 47>), actively deliberate on the issue of how the order of competences can be restored in case of *ultra vires* acts by institutions, bodies, offices, and agencies of the European Union, is paralleled by a subjective right on the part of the citizens (cf. paras 166 and 167). However, in order for a constitutional complaint based on this right to be admissible, the complainant must show that the special requirements of an *ultra vires* complaint, stemming from the principle of the Constitution's openness to European integration, are met. 83

The right resulting from Art. 38 sec. 1 sentence 1 GG can only be invoked if the right to vote's having been devoided of meaning cannot be otherwise remedied by calling upon the regular courts or by obtaining a preliminary ruling by the Court of Justice of the European Union. 84

bb) Concerning the OMT Programme, the submissions of the complainants in proceedings I., II., and III. fulfil these requirements. 85

[…] 86-88

b) The complainants in proceedings I., II., and III. have also shown that the challenged inaction on the part of the Federal Government affects them individually, presently and directly. If the policy decision of the Governing Council of the European Central Bank of 6 September 2012 and its implementation are the result of the European Central Bank's having exceeded its competences in a sufficiently qualified manner, the Federal Government is obliged to act under its responsibility with respect to European integration. This applies even though to date the OMT Programme has not been implemented. 89

aa) The minutes of the session of the Governing Council of the European Central Bank and the press release show that the policy decision regarding the OMT Programme of 6 September 2012 constitutes a decision in the legal sense (cf. Art. 132 sec. 1 second indent TFEU), which determines the technical framework conditions of future purchases of bonds. This finding was confirmed in the present proceedings by representatives of the European Central Bank and of the German *Bundesbank*. It has become clear in the course of the proceedings and was also confirmed by the representative of the European Central Bank during the oral hearing of 16 February 2016 that the decision and the announcement of future bonds purchases further detailed therein – aided by the communications of the European Central Bank – have by themselves had considerable effects on the financial markets (cf. ECJ, Gauweiler, loc. cit., paras. 76, 79, 88). This constitutes an independent and intended effect of the 90

OMT Programme.

bb) Furthermore, the implementation of the policy decision regarding the OMT Programme is still possible, as the European Central Bank and the German *Bundesbank* also explained in the oral hearing of 16 February 2016. In particular, it has not been rendered obsolete by more recent purchase programmes. As the President of the German *Bundesbank* pointed out, the ongoing possibility that it may be implemented is the true reason for the effect the policy decision of 6 September 2012 regarding the OMT Programme still has on the financial markets. Its specific implementation can be effectuated any time and on very short notice. Therefore, – and also with a view to the irreversible consequences of implementation – the requirements for preliminary legal protection are met (cf. BVerfGE 134, 366 <391 and 392 paras. 34 and 35>). 91

cc) […] 92-93

2. The constitutional complaint of the complainant in proceedings I. is also admissible to the extent that it challenges unconstitutional inaction on the part of the Federal Government regarding a possible impairment of the overall budgetary responsibility of the *Bundestag* . It refers to the Senate's case-law on Art. 79 sec. 3 GG and Art. 20 secs. 1 and 2 GG and sufficiently substantiates the assertion that the OMT Programme could entail considerable risks for the federal budget, in that to a considerable extent decisions on budgetary funds could be taken without the constitutive approval by the *Bundestag* . Furthermore, the constitutional complaint asserts that the European Central Bank lacks the relevant democratic legitimation. According to the complaint, the fact that the European Central Bank would no longer limit itself to ensuring monetary stability but would make economic policy transcends the boundaries for permissible modifications of the principle of democracy on the basis of Art. 88 GG, which the Federal Constitutional Court defined in its Maastricht judgment. Thus, the complainant in proceedings I. has sufficiently substantiated his claim that the overall budgetary responsibility of the *Bundestag* would be impaired and that the Federal Government's inaction despite its having a responsibility with respect to European integration violates his rights under Art. 38 sec. 1 sentence 1 in conjunction with Art. 20 secs. 1 and 2 and Art. 79 sec. 3 GG (cf. BVerfGE 132, 195 <234 para. 91>; 135, 317 <384 and 385 para. 122>; on the issues of admissibility and the requirements regarding necessary substantiation of a claim of a violation of the constitutional identity cf. BVerfGE 129, 124 <167 et seq.>). 94

II.

For the rest, the constitutional complaints are inadmissible. 95

1. The constitutional complaints of the complainants in proceedings I. and III. are inadmissible to the extent that they challenge the policy decision of 6 September 2012 regarding the OMT Programme. The same goes for the constitutional complaint of the complainant in proceedings IV., which solely challenges that decision. The constitutional complaints of the complainants in proceedings I. and II. are also inadmissible 96

to the extent that they challenge past and future purchases of assets by the European Central Bank within the framework of the SMP and OMT Programmes. There is no proper object of complaint underlying these complaints.

Acts of institutions, bodies, offices, and agencies of the European Union are not acts of German public authority within the meaning of Art. 93 sec. 1 no. 4a GG, § 90 sec. 1 BVerfGG and therefore cannot be directly challenged by means of a constitutional complaint (cf. BVerfGE 129, 124 <175 and 176>; cf. […]). The same goes for acts of the European Central Bank. 97

Insofar as they affect subjects of fundamental rights in Germany, however, such acts may be the object of a review by the Federal Constitutional Court – as a preliminary matter – within the framework of a constitutional complaint. They touch upon the guarantees of the Basic Law and the tasks of the Federal Constitutional Court that concern the protection of fundamental rights in Germany and in this respect are not limited to acts of German state organs (BVerfGE 89, 155 <175>). 98

Therefore, such a power of review on the part of the Federal Constitutional Court with regard to acts of non-German state actors is limited to cases in which these acts either provide the basis for actions taken by German state organs (cf. BVerfGE 134, 366 <382 para. 23>) or result in duties to react on the part of German constitutional organs under their responsibility with respect to European integration (cf. BVerfGE 134, 366 <394 et seq. paras. 44 et seq.>; 135, 317 <393 and 394 para. 146>). Thus, the Federal Constitutional Court indirectly also reviews acts of institutions, bodies, offices, and agencies of the European Union as to whether they are covered by the European integration agenda (*Integrationsprogramm*), which on the basis of Art. 23 sec. 1 sentence 2 GG has been approved by the Act of Approval (*Zustimmungsgesetz*), or whether they exceed the limits otherwise imposed on European integration by the Basic Law (cf. BVerfGE 73, 339 <374 et seq.>; 102, 147 <161 et seq.>; 118, 79 <95 et seq.>; 123, 267 <354>; 126, 286 <298 et seq.>; BVerfG, Order of the Second Senate of 15 December 2015 – 2 BvR 2735/14 –, juris, paras. 36 et seq.). 99

According to these standards neither the SMP nor the OMT Programme as such are proper objects of a constitutional complaint. However, given how these programmes were established and how they are implemented, what can be challenged is the inaction on the part of German constitutional organs in violation of their responsibility with respect to European integration as well as the participation of German authorities in the implementation of these programmes to the extent that such inaction or participation directly affects rights that can be invoked by means of a constitutional complaint (cf. BVerfGE 134, 366 <394 paras. 44 et seq.>). 100

2. To the extent that the complainants in proceedings III. seek a declaration to the effect that the Federal Government is obliged to refrain from any action serving to implement the OMT decision, the constitutional complaint is also inadmissible. The complainants themselves acknowledge that the Federal Government does not take part in implementing the OMT decision. 101

3. The complainants in proceedings III. also have no standing to lodge a constitutional complaint to the extent that they challenge acts or omissions of German state organs with a view to a possible violation of the constitutional identity within the meaning of Art. 79 sec. 3 GG. In this respect, the constitutional complaint does not satisfy the substantiation requirements resulting from § 23 sec. 1 sentence 2, § 92 BVerfGG, as it does not sufficiently substantiate how the policy decision of 6 September 2012 regarding the OMT Programme can result in the asserted “assumption of liability by the Federal Republic of Germany for financially relevant decisions of the Monetary Union”. […] 102

This also goes for the constitutional complaint of the complainants in proceedings II. to the extent that they seek to assert an obligation on the part of the Federal Government to ensure that the liabilities of the Federal Republic of Germany are limited to the amount of the payment obligations resulting from the ESM Treaty. […] 103

4. Lastly, the constitutional complaint of the complainants in proceedings III. is not sufficiently substantiated within the meaning of § 23 sec. 1 sentence 2, § 92 BVerfGG to the extent that the complainants seek to have the German *Bundestag* ’s approval of adjustment programmes under Arts. 13 et seq. ESM Treaty made conditional on its having previously been informed about the type and amount of any bond purchases. […] 104

III.

1. The application for *Organstreit* proceedings is admissible to the extent that it seeks a declaration to the effect that the German *Bundestag* is obliged to take steps towards having the decision of 6 September 2012 rescinded. 105

[…] 106-112

2. However, the application for *Organstreit* proceedings is inadmissible to the extent that the applicant seeks a declaration to the effect that the German *Bundestag* is obliged to refrain from any action serving to implement the policy decision regarding the OMT Programme. The reasoning of the application shows that this is aimed at the German *Bundestag* ’s participation in approving the EFSF and the ESM support programmes, which the applicant seeks to have subjected to certain conditions. As explained, the Senate, in its judgment of 12 September 2012, held that the work of the ESM is to be strictly distinguished from the purchase of government bonds by the European Central Bank and – due to the distribution of competences within the Union – cannot be linked at will (cf. para 104). The obligation sought by the applicant would not free the German *Bundestag* of its duty to take steps to undo possible *ultra vires* acts. 113

D.

To the extent that the constitutional complaints and the application for *Organstreit* proceedings are admissible, they are unfounded. Taking into account the conditions 114

explained in detail in D.II.3., the inaction on the part of the Federal Government and of the *Bundestag* regarding the policy decision of the European Central Bank of 6 September 2012 does not violate the complainants' right under Art. 38 sec. 1 sentence 1, Art. 20 secs. 1 and 2 in conjunction with Art. 79 sec. 3 GG and does not impair the *Bundestag*'s rights and obligations with regard to European integration – including its overall budgetary responsibility.

I.

With a view to the precedence of application of Union law (*Anwendungsvorrang*), sovereign acts of the European Union and acts of German public authority that are determined by Union law shall in principle not be measured against the standards of the Basic Law. However, the precedence of application is limited by the European integration agenda as laid down in the Act of Approval of the Treaties (Art. 23 sec. 1 sentence 2 GG) and by the principles of Art. 1 and Art. 20 GG, which Art. 23 sec. 1 sentence 1 in conjunction with Art. 79 sec. 3 GG declares to be beyond the reach of European integration (*integrationsfest*) (1.). This applies particularly to the principle of democracy enshrined in Art. 20 secs. 1 and 2 GG. This principle not only prohibits the substantial erosion of the scope of action of the German *Bundestag* but also guarantees – in its specific form as the principle of sovereignty of the people (Art. 20 sec. 2 sentence 1 GG) – that Union law as applied in Germany possesses a sufficient amount of democratic legitimation; thus, it protects citizens from institutions, bodies, offices, and agencies of the European Union that exceed their competences in a manifest (*offensichtlich*) and structurally significant (*strukturell bedeutsam*) way (2.). German state organs may neither participate in the development nor in the implementation, execution or operationalising of such acts (3.). Due to their responsibility with respect to European integration (Art. 23 GG), the constitutional organs are obliged to use the means at their disposal to ensure that the European integration agenda is respected (4.). 115

1. According to Art. 23 sec. 1 sentence 1 GG, the Federal Republic of Germany shall participate in the establishment and the further development of the European Union. However, the opening of the German legal order as provided for to this end by the Basic Law (a) is limited by both the European integration agenda for which the German *Bundestag* is accountable as well as the constitutional identity, which Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG declares to be beyond the reach of amendment (b). 116

a) In addition to imposing a duty upon Germany to establish and further develop the European Union, Art. 23 sec. 1 GG also contains a promise as to the effectivity and implementation of Union law (cf. BVerfGE 126, 286 <302>; BVerfG, Order of the Second Senate of 15 December 2015, loc. cit., para. 37). The uniform application of Union law is crucial for the European Union to be successful and to achieve the aims set by the Treaties (cf. BVerfGE 73, 339 <368>; 123, 267 <399>; 126, 286 <301 and 302>; BVerfG, Order of the Second Senate of 15 December 2015, loc. cit., para. 37). 117

As a legal community of currently 28 Member States, it could not exist if there were no guarantee of the uniform application and effectivity of its law (cf. the foundational explanations of the ECJ, Judgment of 15 July 1964, Costa/ENEL, 6/64, ECR 1964, p. 1251 <1269 and 1270>).

Therefore, by empowering the Federation to transfer sovereign powers to the European Union (Art. 23 sec. 1 sentence 2 GG), the Basic Law also accepts the precedence of application accorded to European Union law by the Act of Approval of the Treaties. In principle, the precedence of application of Union law before national law also applies to conflicting national constitutional law (cf. BVerfGE 129, 78 <100>) and as a rule, in case of conflict, leads to the national law being inapplicable in the specific case (cf. BVerfGE 126, 286 <301>; BVerfG, Order of the Second Senate of 15 December 2015, loc. cit., para. 38; BVerfG, Order of the Third Chamber of the Second Senate of 4 November 2015 – 2 BvR 282/13, 2 BvQ 56/12 –, juris, paras. 15, 19). 118

On the basis of Art. 23 sec. 1 GG, the legislature deciding on European integration matters may not only exempt those institutions, bodies, offices, and agencies of the European Union exercising public authority in Germany from being comprehensively bound by the guarantees of the Basic Law but may also exempt German entities that implement European Union law ([…]). This applies to legislatures at the federal and the *Land* level when they implement secondary or tertiary law without having any leeway to design (*Gestaltungsspielraum*) (cf. BVerfGE 118, 79 <95>; 122, 1 <20>) and as a general rule to administrative bodies and courts as well. 119

b) However, the precedence of application of European Union law only extends as far as the Basic Law and the relevant Act of Approval permit or envisage the transfer of sovereign powers (cf. BVerfGE 73, 339 <375 and 376>; 89, 155 <190>; 123, 267 <348 et seq.>; 126, 286 <302>; 129, 78 <99>; 134, 366 <384 para. 26>; BVerfG, Order of the Second Senate of 15 December 2015, loc. cit., para. 40). The national order giving effect to European law (*Rechtsanwendungsbefehl*) at the national level, included in the Act of Approval, can only be given within the bounds of the applicable constitutional order (cf. BVerfGE 123, 267 <402>; BVerfG, Order of the Second Senate of 15 December 2015, loc. cit., para. 40). Limits to the opening of German statehood thus derive, pursuant to Art. 23 sec. 1 sentence 3 GG, from the constitutional identity of the Basic Law laid down in Art. 79 sec. 3 GG and from the European integration agenda laid down in the Act of Approval pursuant to Art. 23 sec. 1 sentence 2 GG without which European Union law lacks the necessary democratic legitimation for Germany. 120

2. The fundamental elements of the principle of democracy enshrined in Art. 20 secs. 1 and 2 GG are part of the constitutional identity of the Basic Law, which has been declared to be beyond the reach both of constitutional amendment (*verfassungsänderungsfest*) (Art. 79 sec. 3 GG) and of European integration (*integrationsfest*) (Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG). In conjunction with Art. 38 sec. 1 sentence 1 GG, the principle of democracy protects citizens not on- 121

ly from the substantial erosion of the scope of action of the German *Bundestag* but also from institutions, bodies, offices, and agencies of the European Union that exceed their competences in a manifest and structurally significant way (a). The question of whether acts of institutions, bodies, offices, and agencies of the European Union affect the principles of Art. 1 and Art. 20 GG, which are protected by Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG, is examined by the Federal Constitutional Court when it conducts an identity review (*Identitätskontrolle*) (b), while the issue of whether the boundaries of the democratically legitimmated European integration under Art. 23 sec. 1 sentence 2 GG are exceeded by such acts in a manifest and structurally significant manner and thereby violate the principle of the sovereignty of the people is determined by the Court in its *ultra vires* review (*Ultra-vires-Kontrolle*) (c). Both the identity review and the *ultra vires* review are derived from Art. 79 sec. 3 GG but constitute independent types of review using different standards (d). The competence retained by the Court for both of these reviews must be exercised cautiously and in a way that is open to European integration (*europarechtsfreundlich*) (e).

a) Acts that affect the foundational elements of the principle of democracy enshrined in Art. 20 secs. 1 and 2 GG may violate the citizens' right equivalent to a fundamental right under Art. 38 sec. 1 sentence 1 GG (aa). In principle, the right to participate in democratically legitimating the state power exercised in Germany also applies with regard to the European Union (bb). 122

aa) According to the established case-law of the Federal Constitutional Court, the citizens' right to vote in the election of the German *Bundestag* enshrined in Art. 38 sec. 1 sentence 1 GG is not limited to formally legitimating the (federal) state power but also entails the fundamental democratic content of the right to vote (cf. BVerfGE 89, 155 <171>; 129, 124 <168>; 134, 366 <396 para. 51>) (1). This content encompasses the principle of sovereignty of the people enshrined in Art. 20 sec. 2 sentence 1 GG as well as the corresponding right of the citizens to be subjected only to such public authority as can be legitimated and influenced by them (2). 123

(1) The self-determination of the people by way of majority decisions in elections and votes is constitutive for the state order of the Basic Law. The Basic Law is based on the concept of the value and dignity of the human being that is capable of being free; by giving all citizens the right to decide upon the persons and subject-matter comprising the public authority that they are subjected to, the Basic Law guarantees a human rights core to the principle of democracy. This core is rooted in human dignity (cf. BVerfGE 123, 267 <341>; 129, 124 <169>; 135, 317 <386 para. 125>; cf. […]). According to this concept, human beings are "personalities" capable of leading their lives in a self-responsible manner. They are regarded as capable and they are, thus, required to balance their interests and ideas with those of others. Out of respect for their dignity, they must be guaranteed the possibility to freely develop their personalities to the greatest extent possible. In a politico-social context, this means that it does not suffice for the "rulers" to care for the well-being of their "subjects", however well 124

they might do this; quite the contrary, citizens shall responsibly participate as much as possible in making decisions for the entire community (BVerfGE 5, 85 <204 and 205>).

Therefore, Art. 38 sec. 1 sentence 1 GG protects the voters from a loss in substance of their sovereign power – a power that is crucial for the constitutional order – brought about by considerable curtailment of the rights of the *Bundestag* and thus the elimination of the scope of action of the constitutional organ elected according to the principles of free and equal elections (cf. BVerfGE 123, 267 <341>; […]). 125

However, the citizens' right to democratic self-determination enshrined in Art. 38 sec. 1 sentence 1 GG (cf. BVerfGE 89, 155 <187>; 123, 267 <340>; 129, 124 <169, 177>; 132, 195 <238 para. 104>; 135, 317 <386 para. 125>) is strictly limited to the core of the principle of democracy that is rooted in human dignity (Art. 1 in conjunction with Art. 79 sec. 3 GG). Art. 38 sec. 1 sentence 1 GG provides no right to a review of the legality of democratic majority decisions that goes beyond securing this core. Its purpose is not to monitor the content of democratic processes but rather to facilitate them (cf. BVerfGE 129, 124 <168>; 134, 366 <396 and 397 para. 52>). As a fundamental right to participation in the democratic self-governance of the people, Art. 38 sec. 1 sentence 1 GG thus in principle does not provide standing to challenge parliamentary decisions, particularly parliamentary laws (BVerfGE 129, 124 <168>). Rather, its scope is limited to structural changes in how the state is organised that may occur, *inter alia*, when sovereign powers are transferred to the European Union or other supranational institutions (cf. BVerfGE 129, 124 <169>). 126

(2) The principle of the sovereignty of the people enshrined in Art. 20 sec. 2 sentence 1 GG as well as the corresponding right of the citizens to be subjected only to such public authority as they can legitimate and influence constitutes a specific manifestation of the principle of democracy stemming directly from the Constitution itself. This manifestation, too, is declared by Art. 79 sec. 3 GG to be beyond the reach of amendment (cf. BVerfGE 89, 155 <182>; 123, 267 <330>; 129, 124 <169>; […]). 127

Art. 20 sec. 2 sentence 1 GG establishes a link between the right to vote and the exercise of state power. All public authority exercised in Germany must be traceable to the citizens (cf. BVerfGE 83, 37 <50 and 51>; 93, 37 <66>; 130, 76 <123>; 137, 185 <232 para. 131>; 139, 194 <224 para. 106>). By way of the principle of the sovereignty of the people (cf. […]), the Basic Law guarantees a right of all citizens to freely and equally participate in legitimating and influencing the state power that affects them. This rules out citizens being subjected to a political power they cannot escape and in respect of which they cannot in principle freely and equally decide which persons and subject-matter shall be related thereto (cf. BVerfGE 123, 267 <341>). 128

bb) According to Art. 23 sec. 1 GG, the citizens' right to democratic self-determination enshrined in Art. 38 sec. 1 sentence 1 in conjunction with Art. 20 secs. 1 and 2 and Art. 79 sec. 3 GG also applies with regard to European integration (1). It protects citizens not only from the substantial erosion of the scope of action of the 129

German *Bundestag* but also from institutions, bodies, offices, and agencies of the European Union that exceed their competences in a manifest and structurally significant way (2.).

(1) Within the scope of application of Art. 23 sec. 1 GG, Art. 20 secs. 1 and 2 in conjunction with Art. 79 sec. 3 GG ensures that the legitimation of state power and the influence on its exercise effectuated by elections is not devoided of meaning by transfers of functions and powers of the German *Bundestag* to the European level (cf. BVerfGE 89, 155 <172>; 123, 267 <330>; 134, 366 <396 para. 51>). Thus, the Basic Law prohibits not only transferring the competence to decide upon its own competence (*Kompetenz-Kompetenz*) to the European Union or to institutions established in connection with it (cf. BVerfGE 89, 155 <187 and 188, 192, 199>; see also BVerfGE 58, 1 <37>; 104, 151 <210>; 123, 267 <349>; 132, 195 <238 para. 105>); blanket empowerments to exercise public authority may also not be given by the German constitutional organs (cf. BVerfGE 58, 1 <37>; 89, 155 <183 and 184, 187>; 123, 267 <351>; 132, 195 <238 para. 105>). If they can be interpreted in a way that stays within the boundaries set by Art. 20 secs. 1 and 2 in conjunction with Art. 79 sec. 3 GG, dynamic treaty provisions must at least be bound to suitable safeguards that enable the German constitutional organs to effectively exercise their responsibility with respect to European integration. For borderline cases of what is still constitutionally permissible, the legislature must, where necessary, take effective precautions in its legislation accompanying the Act of Approval in order to ensure there is enough room for its responsibility with respect to European integration (BVerfGE 123, 267 <353>; 132, 195 <239 para. 105>; 135, 317 <399 para. 160>). 130

With a view to majority decisions in the Council (Art. 238 TFEU), the possibility of the self-administration of the Union (Art. 298 TFEU), and the independence of the European Central Bank (Art. 130 TFEU), the execution of the European integration agenda comes with several drops in influence (*Einflussknicke*; on this term Wagener, in: id., Verselbständigung von Verwaltungsträgern, 1976, vol. 1, p. 31 <40>; […]) that may lower the level of the democratic legitimation of acts of the European public authority in light of Art. 20 secs. 1 and 2 GG (cf. BVerfGE 89, 155 <182 et seq.>). However, these acts are supported by other strands of legitimation at the supranational level (cf. BVerfGE 123, 267 <342, 344 and 345, 347 and 348, 351 and 352, 353 and 354, 365 et seq., 367 et seq., 369>) that take the particularities of this level into account. However, this does not change the general requirement that such acts too must be legitimated by a sufficiently specific authorisation of the legislature deciding on European integration matters. Whenever the people themselves are not called upon to decide, only those acts that can be traced to Parliament possess democratic legitimation (BVerfGE 123, 267 <351>; cf. BVerfGE 89, 155 <212>). Otherwise, the power to dispose of the fundamental aspects of the Treaties would be shifted in such a way to the institutions, bodies, offices, and agencies of the European Union that, given their legal understanding and practice, this would result in a treaty amendment or an expansion of competences (cf. BVerfGE 123, 267 <354 and 355>; 126, 286 131

<302 et seq.>; 134, 366 <384 para. 26>). They would *de facto* possess a *Kompetenz-Kompetenz* that was not allowed to be transferred to them (cf. BVerfGE 89, 155 <187 and 188>; 123, 267 <349>; 132, 195 <238 para. 105>; 134, 366 <395 para. 48>; 135, 317 <399 para. 160>).

Therefore, the exercise of public authority by institutions, bodies, offices, and agencies of the European Union violates the principle of sovereignty of the people (Art. 20 sec. 2 sentence 1 GG) if it does not possess sufficient democratic legitimation from the European integration agenda laid down in the Act of Approval. 132

(2) The core of the “right to democracy” deriving from Art. 38 sec. 1 sentence 1 in conjunction with Art. 20 secs. 1 and 2 and Art. 79 sec. 3 GG, is beyond the reach of amendment even with a view to acts of the European Union. 133

Furthermore, in order to secure the possibility of exercising democratic influence in the process of European integration, citizens generally have a right guaranteeing that a transfer of sovereign powers occur only in the ways envisaged by the Basic Law in Art. 23 sec. 1 sentences 2 and 3, Art. 79 sec. 2 GG (cf. BVerfGE 134, 366 <397 para. 53>). Art. 38 sec. 1 in conjunction with Art. 20 secs. 1 and 2 and Art. 79 sec. 3 GG is violated if a law based on Art. 23 sec. 1 sentence 2 GG encroaches upon the functions reserved for the *Bundestag* such as the areas of budgetary or defence policy (cf. BVerfGE 90, 286 <381 and 382>; 108, 34 <44>; 121, 135 <154>; 123, 267 <340 et seq., 360 et seq.>; 126, 55 <70>; 129, 124 <177>; 132, 195 <239 para. 106>; 135, 317 <399 and 400 para. 161>; BVerfG, Judgment of the Second Senate of 23 September 2015 – 2 BvE 6/11 –, juris, para. 67) or does not define the European integration agenda in a sufficiently determinable manner, as this would enable the European Union to exercise functions and powers that have not been transferred to it and would thereby be tantamount to a blanket authorisation (cf. BVerfGE 89, 155 <187>; 123, 267 <351>). 134

Art. 38 sec. 1 sentence 1 GG guards against institutions, bodies, offices, and agencies of the European Union exercising sovereign powers of their own accord as such acts undermine the process of democratic decision-making guaranteed by Art. 23 sec. 1 sentences 2 and 3 in conjunction with Art. 79 secs. 2 and 3 GG (cf. BVerfGE 134, 366 <397 para. 53>; […]). If institutions, bodies, offices, and agencies usurp functions and powers that have not been transferred to them by the European integration agenda laid down in the Act of Approval, they violate the core of the principle of the sovereignty of the people protected by Art. 1 sec. 1 GG, because they subject the citizens to a public authority that they have not legitimated and that – given the institutional structure of the organs of the European Union (cf. BVerfGE 123, 267 <372>; 129, 300 <336 et seq.>; 135, 259 <294 para. 71>; […]) – they cannot freely, equally and effectively influence. 135

b) The principles guaranteed by Art. 1 and Art. 20 in conjunction with Art. 79 sec. 3 GG must also be protected when applying Union law in Germany. This is the aim of the Federal Constitutional Court’s identity review (aa). This review is compatible with 136

the principle of sincere cooperation (Art. 4 sec. 3 TEU) (bb); the constitutional law of other Member States of the European Union contains similar boundaries (cc).

aa) When acts of institutions, bodies, offices, and agencies of the European Union affect the constitutional identity laid down in Art. 1 and Art. 20 GG, they transgress the Basic Law's boundaries of open statehood (*offene Staatlichkeit*). Such acts cannot be based on an authorisation in primary law as, even if it possesses the majority required by Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 2 GG, the legislature deciding in European integration matters cannot transfer sovereign powers to the European Union that would touch upon the constitutional identity protected by Art. 79 sec. 3 GG if exercised (cf. BVerfGE 113, 273 <296>; 123, 267 <348>; 134, 366 <384 para. 27>). 137

When conducting its identity review, the Federal Constitutional Court examines whether the principles declared by Art. 79 sec. 3 GG to be inviolable are affected by transfers by the German legislature of sovereign powers or by acts of institutions, bodies, offices, and agencies of the European Union (cf. BVerfGE 123, 267 <344, 353 and 354>; 126, 286 <302>; 129, 78 <100>; 134, 366 <384 and 385 para. 27>). This concerns the safeguarding of the core of human dignity in fundamental rights (Art. 1 GG; BVerfG, Order of the Second Senate of 15 December 2015, loc. cit., para. 48) as well as the fundamental principles upon which the principles of democracy, of the rule of law, of the social state, and of the federal state of Art. 20 GG are based. With a view to the principle of democracy, it must *inter alia* be ensured that the German *Bundestag* retains for itself functions and powers of substantial political importance when sovereign powers are transferred in accordance with Art. 23 sec. 1 GG (cf. BVerfGE 89, 155 <182>; 123, 267 <330, 356>), and that it remains capable of exercising its overall budgetary responsibility (cf. BVerfGE 123, 267 <359>; 129, 124 <177>; 132, 195 <239 para. 106>; 135, 317 <399 and 400 para. 161>). 138

The identity review not only ensures that the European Union is not attributed sovereign powers outside the areas open to transfers but it also prevents the implementation of acts of institutions, bodies, offices, and agencies of the European Union that have a comparable effect and at least *de facto* amount to a transfer of power in violation of the Basic Law (cf. […]; dissenting: […]). 139

bb) As the Senate explained in detail in its Order of 15 December 2015 (BVerfG, loc. cit., para. 44), the identity review does not violate the principle of sincere cooperation within the meaning of Art. 4 sec. 3 TEU. On the contrary, Art. 4 sec. 2 sentence 1 TEU essentially provides for identity review (on taking into consideration national identity see also ECJ, Judgment of 2 July 1996, Commission v Luxembourg, C-473/93, ECR 1996, I-3207, para. 35; Judgment of 14 October 2004, Omega, C-36/02, ECR 2004, I-9609, paras. 31 et seq.; Judgment of 12 June 2014, Digibet and Albers, C-156/13, EU:C:2014:1756, para. 34) and therefore it also conforms to the institutional situation of the European Union. The European Union is an association of sovereign states, of constitutions, administrations, and judiciaries (*Staaten-, Verfassungs-,* 140

Verwaltungs- und Rechtsprechungsverbund) founded upon international treaties concluded between the Member States. As masters of the Treaties (*Herren der Verträge*), the Member States, by ordering the applicability of European law at the national level, decide whether and to what extent Union law may claim applicability and precedence within the respective Member State (cf. BVerfGE 75, 223 <242>; 89, 155 <190>; 123, 267 <348 and 349, 381 et seq.>; 126, 286 <302 and 303>; 134, 366 <384 para. 26>). It is not decisive whether the order of applicability (*Geltungsanordnung*) – like in France (Art. 55 of the French Constitution), Austria (Federal Constitutional Act on the Accession of Austria to the European Union – *Bundesverfassungsgesetz über den Beitritt Österreichs zur Europäischen Union*, Federal Law Gazette of the Republic of Austria, *BGBl für die Republik Österreich* no. 744/1994), or Spain (Art. 96 sec. 1 of the Spanish Constitution) – is expressly provided for in national constitutional law or – like in the United Kingdom – in the Act of Approval (European Communities Act 1972; cf. Court of Appeal, Macarthys v. Smith, <1981> 1 All ER 111 <120>; Macarthys v. Smith, <1979> 3 All ER 325 <329>; House of Lords, Garland v. British Rail Engineering, <1982> 2 All ER 402 <415>), or whether it is deduced from the Act of Approval by way of a systematic, teleological, and historic interpretation – like in Germany –, or whether the precedence of European Union Law over national law is achieved by a case-by-case application of national law to individual cases – like in Italy (cf. Corte Costituzionale, decision no. 170/1984, Granital, Europäische Grundrechte-Zeitschrift – EuGRZ 1985, p. 98).

Therefore, it does not contradict the principle of the Constitution's openness to European integration (Preamble, Art. 23 sec. 1 sentence 1 GG) if the Federal Constitutional Court – by way of exception and under strict circumstances – declares an act of an institution, body, office, or agency of the European Union to be inapplicable in Germany by way of exception (cf. BVerfGE 37, 271 <280 et seq.>; 73, 339 <374 et seq.>; 75, 223 <235, 242>; 89, 155 <174 and 175>; 102, 147 <162 et seq.>; 123, 267 <354, 401>; BVerfG, Order of 15 December 2015, loc. cit., para. 45). 141

cc) The constitutional law of other Member States of the European Union also contains safeguards protecting their constitutional identity and the limits on transferring sovereign powers to the European Union (cf. in this respect BVerfGE 134, 366 <387 para. 30>). With respect to their own area of influence, a large majority of constitutional and supreme courts of the other Member States shares the view of the Federal Constitutional Court that the precedence (of application) of Union law does not apply without limits, but that it is restricted by national (constitutional) law (cf. for the Kingdom of Denmark: Højesteret, Judgment of 6 April 1998 – I 361/1997 –, sec. 9.8; for the Republic of Estonia: Riigikohus, Judgment of 12 July 2012 – 3-4-1-6-12 –, paras. 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; Conseil d'État, Judgment of 8 February 2007, no. 287110 <Ass.>, Société Arcelor Atlantique et Lorraine, Europarecht – EuR 2008, p. 57 <60 and 61>; for Ireland: Supreme Court of Ireland, Crotty v. An Taoiseach, <1987>, I.R. 713 <783>; 142

S.P.U.C. <Ireland> Ltd. v. Grogan, <1989>, I.R. 753 <765>; for the Italian Republic: Corte Costituzionale, Decision no. 98/1965, Acciaierie San Michele, EuR 1966, p. 146; Decision no. 183/1973, Frontini, EuR 1974, p. 255; Decision no. 170/1984, Granital, EuGRZ 1985, p. 98; Decision no. 232/1989, Fragd; Decision no. 168/1991; Decision no. 117/1994, Zerini; for the Republic of Latvia: Satversmes tiesa, Judgment of 7 April 2009 – 2008-35-01 –, para.-no. 17; for the Republic of Poland: Trybunal Konstytucyjny, Judgments of 11 May 2005 – K 18/04 –, paras. 4.1., 10.2.; of 24 November 2010 – K 32/09 –, paras. 2.1. et seq.; of 16 November 2011 – SK 45/09 –, paras. 2.4., 2.5.; for the Kingdom of Spain: Tribunal Constitucional, Declaration of 13 December 2004, DTC 1/2004, indent 2 of the reasoning of the decision, EuR 2005, p. 339 <343> and Decision of 13 February 2014, STC 26/2014, indent 3 of the reasoning of the decision, Human Rights Law Journal – HRLJ 2014, p. 475 <477 and 487>; for the Czech Republic: Ústavni Soud, Judgment of 8 March 2006, Pl. ÚS 50/04, sec. VI.B.; Judgment of 3 May 2006, Pl. ÚS 66/04, para. 53; Judgment of 26 November 2008, Pl. ÚS 19/08, paras. 97, 113, 196; Judgment of 3 November 2009, Pl. ÚS 29/09, paras. 110 et seq.; Judgment of 31 January 2012, Pl. ÚS 5/12, sec. VII.; for the United Kingdom: High Court, Judgment of 18 February 2002, Thoburn v. Sunderland City Council, <2002> EWHC 195 <Admin>, sec.-no. 69; UK Supreme Court, Judgment of 22 January 2014, R <on the application of HS2 Action Alliance Limited> v. The Secretary of State for Transport, <2014> UKSC 3, sec.-no. 79, 207; Judgment of 25 March 2015, Pham v. Secretary of State for the Home Department, <2015> UKSC 19, sec.-nos. 54, 58, 72 to 92).

c) Acts of institutions, bodies, offices, and agencies of the European Union that are *ultra vires* violate the European integration agenda laid down in the Act of Approval in accordance with Art. 23 sec. 1 sentence 2 GG. The instrument of *ultra vires* review serves to counter such violations (aa). With this instrument the Federal Constitutional Court examines whether acts of institutions, bodies, offices, and agencies of the European Union exceed the European integration agenda in a sufficiently qualified way and therefore lack democratic legitimation in Germany (bb). This also serves to ensure the rule of law (cc.). 143

aa) The European Union is a legal community (Art. 2 sentence 1 TEU; ECJ, Judgment of 23 April 1986, Les Verts v Parliament, case no. 294/83, ECR 1986, p. 1339, para. 23). It is bound in particular by the principle of conferral (Art. 5 sec. 1 sentence 1 and sec. 2 sentence 1 TEU; cf. BVerfGE 75, 223 <242>; 89, 155 <187 and 188, 192, 199>; 123, 267 <349>; see also BVerfGE 58, 1 <37>; 68, 1 <102>; 77, 170 <231>; 104, 151 <195>; 118, 244 <260>; 126, 286 <302>; 134, 366 <384 para. 26>) and the European human rights guarantees and respects the constitutional identity of the Member States upon which it is founded (see in detail Art. 4 sec. 2 sentence 1, Art. 5 sec. 1 sentence 1 and sec. 2 sentence 1, Art. 6 sec. 1 sentence 1 and sec. 3 TEU; cf. BVerfGE 126, 286 <303>). Union law remains dependent on conferral by treaty – even to the extent that it is understood as an autonomous (partial legal) system. Should institutions, bodies, offices, and agencies of the European Union wish to ex- 144

tend their powers, they still require treaty amendments, which the Member States effectuate and take responsibility for according to their respective constitutional rules (see in particular Art. 48 sec. 4(2), sec. 6(2) sentence 3, sec. 7(3) TEU).

When institutions, bodies, offices, and agencies of the European Union exceed their competences, they can violate the principle of sovereignty of the people as well as the right of all citizens under Art. 38 sec. 1 sentence 1 in conjunction with Art. 20 sec. 2 sentence 1 GG not to be subjected to any state power that they have not legitimated and that they cannot influence freely and equally. Insofar, it is the task of the Federal Constitutional Court to review whether the European integration agenda laid down in the Act of Approval has been adhered to and to ensure a sufficient level of democratic legitimation in its application (cf. […]). Thus, with a view to Art. 20 secs. 1 and 2 GG, the *ultra vires* review is indispensable (cf. BVerfGE 134, 366 <384 para. 26>). 145

The *ultra vires* review conducted by the Federal Constitutional Court with regard to acts of institutions, bodies, offices, and agencies of the European Union to which Union law standards of legality apply (cf. […]) may (only) examine whether these are covered by the European integration agenda (Art. 23 sec. 1 sentence 2 GG) and are thus subject to the precedence of application of European Union law. 146

bb) Due to the strict substantive limitation on the “right to democracy” enshrined in Art. 38 sec. 1 sentence 1 in conjunction with Art. 20 secs. 1 and 2 and Art. 79 sec. 3 GG, such a review may be conducted only in cases in which competences were exceeded in a sufficiently qualified manner. Only in such cases is it possible to say that acts of institutions, bodies, offices, and agencies of the European Union subject citizens to a political power that they cannot escape and in regard of which they cannot in principle freely and equally choose the related persons and subject-matter. Therefore, a qualified exceeding of competences within this meaning must be manifest (1) and of structural significance for the distribution of competences between the European Union and the Member States (2). 147

(1) Finding an act to be *ultra vires* requires – irrespective of the subject matter concerned – that the institutions, bodies, offices, and agencies of the European Union manifestly exceed their transferred competences (cf. BVerfGE 123, 267 <353, 400>; 126, 286 <304>; 134, 366 <392 para. 37>). 148

This is the case if – when applying common methodological standards (see paras. 158 et seq.) – the competence cannot be justified under any legal standpoint (cf. BVerfGE 126, 286 <308>; see also […]). This interpretation of “manifest” follows from the necessity of exercising restraint when performing the *ultra vires* review (see paras. 154 et seq.). With regard to the Court of Justice of the European Union, it also follows from the different nature of the tasks and standards that the Federal Constitutional Court on the one hand and the Court of Justice of the European Union on the other must fulfil and apply. One must also take into account that the Court of Justice has a right to tolerance of error (BVerfGE 126, 286 <307>). This leeway, which is necessarily linked to Art. 19 sec. 1 sentence 2 TEU assigning tasks to the Court of Jus- 149

tice, reaches its limit only when an interpretation of the Treaties is manifestly utterly incomprehensible and thus objectively arbitrary. Only if the Court of Justice were to cross that line, would its actions no longer be covered by Art. 19 sec. 1 sentence 2 TEU and would its decision lack the minimum of democratic legitimation necessary for Germany under Art. 23 sec. 1 sentence 2 in conjunction with Art. 20 secs. 1 and 2 and Art. 79 sec. 3 GG.

However, finding that competences have been exceeded in a manifest way does not require there to be no differing legal views on the respective issue. The fact that academia, politics or the media – often acting upon own interests – consider an act to be unobjectionable does not in principle hinder the Federal Constitutional Court from finding that competences have been manifestly exceeded. An exceeding of competences can be “manifest” even if it results from a careful and meticulously reasoned interpretation. In this respect, the general standards apply to the *ultra vires* review (see for example on § 24 sentence 1 BVerfGG BVerfGE 82, 316 <319 and 320>; 89, 243 <250>; 89, 291 <300>; 95, 1 <14 and 15>; 103, 332 <358 et seq.>). 150

(2) A shift of competences to the detriment of the Member States (cf. BVerfGE 126, 286 <309>) can only be found to be present if the exceeding of competences carries considerable weight for the principle of democracy and the sovereignty of the people. This is for instance the case if it is capable of altering the fundamental competences of the European Union (cf. […]) and thereby of undermining the principle of conferral. Such a case can be assumed if the exercise of the competence by the institution, body, office, or agency of the European Union were to require a treaty amendment in accordance with Art. 48 TEU or making use of an evolutionary clause (*Evolutivklausel*) (cf. ECJ, Opinion 2/94 of 28 March 1996, Accession to the ECHR, ECR 1996, I-1759, para. 30), i.e. in Germany, action on the part of the legislature – be it in accordance with Art. 23 sec. 1 sentence 2 GG, or in accordance with the Act Regarding Responsibility for European Integration (*Integrationsverantwortungsgesetz*; cf. already Art. 235 TEEC former version; BVerfGE 89, 155 <210>; […]). 151

cc) Further, the *ultra vires* review serves to protect the rule of law. In national law, the principle of the legality of the administration (*Grundsatz der Gesetzmäßigkeit der Verwaltung*) requires that the task in question have been validly assigned and – for infringements upon the legal sphere of individuals – that there be a limited and specific legal authorisation of the executive branch (cf. BVerfGE 107, 59 <102>; established case-law). This applies accordingly to the public authority exercised by the European Union (ECJ, Judgment of 22 March 1961, SNUPAT v High Authority, 42 and 49/59, ECR 1961, p. 101 <172>; Judgment of 21 September 1989, Hoechst v Commission, 46/87 and 227/88, ECR 1989, p. 2859, para. 19; Judgment of 17 October 1989, Dow Chemical Ibérica v Commission, 97-99/87, ECR 1989, p. 3165, para. 16; Judgment of 3 September 2008, Kadi, C-402/05 P and C-415/05 P, ECR 2008, I-6351, para. 281; Judgment of 31 March 2011, Aurubis Balgaria, C-546/09, ECR 2011, I-2531, para. 42; see also Art. 263 sec. 1 sentence 1 TFEU; […]). Those acts resulting from institutions, bodies, offices, and agencies of the European Union exceeding 152

their competences can neither be based on a valid attribution of competences by the Treaties in conjunction with the respective Act of Approval (Art. 5 sec. 1 sentence 1 TEU) nor can they justify infringements upon the legal sphere of the citizens. Just as in national law, they are therefore illegal and insofar also always violate the rule of law (Art. 20 sec. 3 GG; cf. BVerfGE 134, 366 <388 para. 30>).

d) The identity review and the *ultra vires* review constitute instruments of review that are independent of one another. Since the exceeding of competences in a sufficiently qualified manner also affects the constitutional identity (cf. paras. 121 et seq.), the *ultra vires* review constitutes a particular case – linking to the Act of Approval pursuant to Art. 23 sec. 1 sentence 2 GG – of the application of the general protection of the constitutional identity by the Federal Constitutional Court (cf. […]). Although both reservations to exercise review can be traced back to Art. 79 sec. 3 GG, they take different approaches with regard to what is examined. When conducting its *ultra vires* review, the Federal Constitutional Court examines whether acts of institutions, bodies, offices, or agencies of the European Union are covered by the provisions of the European integration agenda, as included in the Act of Approval in accordance with Art. 23 sec. 1 sentence 2 GG, or whether they transgress the boundaries of the framework set by the parliamentary legislature (cf. BVerfGE 75, 223 <235, 242>; 89, 155 <188>; 123, 267 <353>; 126, 286 <302 et seq.>; 134, 366 <382 et seq. paras. 23 et seq.>). Since according to Art. 23 sec. 1 sentence 3 GG competences may only be transferred to the European Union within the limits set by Art. 79 sec. 3 GG, the *ultra vires* review is joined by the identity review (cf. BVerfGE 123, 267 <353>; 126, 286 <302>; 133, 277 <316>; 134, 366 <382 para. 22>; BVerfG, Order of the Second Senate of 15 December 2015, loc. cit., paras. 40 et seq.). Unlike the *ultra vires* review, the identity review does not examine whether the transferred competences were exceeded or not. Rather, it examines the respective act of the European Union in a substantive sense as to whether the “ultimate limit” of the principles of Arts. 1 and 2 GG has been exceeded (cf. BVerfGE 123, 267 <343, 348>; 134, 366 <386 para. 29>). 153

e) Both the *ultra vires* and the identity review – each constituting independent instruments of review – must be exercised with restraint and in a manner open to European integration (cf. BVerfGE 126, 286 <303>; 134, 366 <383 para. 24>; BVerfG, Order of 15 December 2015, loc. cit., para. 46). They are reserved for the Federal Constitutional Court (aa). If necessary, the Court bases its review of the act on the interpretation provided by the Court of Justice of the European Union by way of preliminary ruling in accordance with Art. 267 sec. 3 TFEU (bb). In doing so, the Union-specific decision-making methods that have been developed by the Court of Justice of the European Union and that shall take into account the particularities of the Treaties and of their aims must in principle be respected (cc). It is not the task of the Federal Constitutional Court to replace the interpretation of the Court of Justice with its own in matters of interpretation, which – within the usual bounds of legal debate – can yield differing results (dd). 154

aa) Since the *ultra vires* and identity reviews may, in certain limited cases, result in Union law having to be declared inapplicable in Germany, the principle of the Constitution's openness to European integration – in order to protect the functioning of the Union's legal system and considering the legal concept expressed in Art. 100 sec. 1 GG – requires that the finding of a violation of the constitutional identity or the finding of an *ultra vires* act be reserved for the Federal Constitutional Court (cf. BVerfGE 123, 267 <354>; BVerfG, Order of 15 December 2015, loc. cit., para. 43). This is supported by Art. 100 sec. 2 GG, which requires that in case of doubt whether a general rule of international law creates rights and duties for the individual, the issue be brought before the Federal Constitutional Court (cf. BVerfGE 37, 271 <285>; BVerfG, Order of the Second Senate of 15 December 2015, loc. cit., para. 43). 155

bb) Applying the *ultra vires* and identity reviews with restraint and openness to European integration requires that – where necessary – the Court of Justice of the European Union is called upon for a preliminary ruling in accordance with Art. 267 sec. 3 TFEU and that in the course of its review, the Federal Constitutional Court interprets the act in question in the way determined by the Court of Justice in its preliminary ruling (cf. BVerfGE 126, 286 <304>). 156

Therefore, within the framework of the cooperative relationship between the Federal Constitutional Court and the Court of Justice in matters of *ultra vires* review, it is the latter that decides upon the validity and interpretation of an act; the Federal Constitutional Court on the other hand must ensure that acts of institutions, bodies, offices, and agencies of the European Union do not exceed the European integration agenda in a manifest and structurally significant way and thereby violate Art. 38 sec. 1 sentence 1 in conjunction with Art. 23 sec. 1 sentence 2, Art. 20 sec. 2 sentence 1, and Art. 79 sec. 3 GG (cf. on this issue ECJ, Gauweiler, loc. cit., paras. 14 and 15, 24 et seq.). 157

cc) The interpretation and application of Union law, including the determination of the applicable methods, is first and foremost incumbent upon the Court of Justice, which is obliged under Art. 19 sec. 1 sentence 2 TEU to ensure that the law is observed when interpreting and applying the Treaties. 158

The methods of judicial specification of the law (*richterliche Rechtskonkretisierung*) developed by the Court of Justice are based on the common (constitutional) legal traditions of the Member States (see also Art. 6 sec. 3 TEU, Art. 340 sec. 2 TFEU), which have not least left their imprint on the jurisprudence of the Member States' constitutional and supreme courts and the European Court of Human Rights (cf. Lenaerts/Gutiérrez-Fons, EUI Working Papers AEL 2013/9, pp. 35 et seq.; von Danwitz, Fordham International Law Review 37 <2014>, p. 1311 <1317 et seq.>). At any rate, in this respect, a provision's wording, which, of course, is authentic in several languages (Art. 55 TEU, Art. 358 TFEU; Art. 1 Regulation no. 1/58 on regulating the language issue for the European Economic Community <OJ P 17 of 6 October 1958, p. 385>; see […]), its aim (*effet utile*; cf. ECJ, Judgment of 8 March 2007, Gerlach, 159

C-44/06, ECR 2007, I-2071, para. 28; Judgment of 21 October 2015, Gogova, C-215/15, EU:C:2015:710, para. 45), and its systematic context carry particular weight (cf. ECJ, Judgment of 5 February 1963, Van Gend & Loos, 26/62, ECR 1963, p. 3 <24>; Judgment of 21 February 1973, Europemballage Corporation and Continental Can Company v Commission, 6/72, ECR 1973, p. 215 <244>). According to the jurisprudence of the Court of Justice, provisions containing exceptions must be interpreted in a restrictive manner (cf. ECJ, Judgment of 28 October 1975, Rutili, 36/75, ECR 1975, p. 1219, paras. 26/28; Judgment of 17 June 1981, Commission v Ireland, 113/80, ECR 1981, p. 1625, para. 7; Judgment of 17 March 2016, Aspiro, C-40/15, EU:C:2016:172, para. 20). As far as substantive law is concerned, the Court of Justice has for instance acknowledged the principle of the legality of the administration (ECJ, Judgment of 22 March 1961, SNUPAT v High Authority, 42 and 49/59, ECR 1961, p. 111 <172>; Judgment of 21 September 1989, Hoechst v Commission, 46/87 and 227/88, ECR 1989, p. 2859, para. 19; Judgment of 17 October 1989, Dow Chemical Ibérica v Commission, 97-99/87, ECR 1989, p. 3165, para. 16; see also Art. 263 sec. 1 sentence 1 TFEU), the principle of specificity (ECJ, Judgment of 9 July 1981, Gondrand and Garancini, 169/80, ECR 1981, p. 1931, para. 17), and the principle of proportionality (ECJ, Judgment of 17 May 1984, Denkavit Nederland, 15/83, ECR 1984, p. 2171, para. 25; Judgment of 18 June 2015, Estonia v Parliament and Council, C-508/13, EU:C:2015:403, para. 28; cf. Art. 5 sec. 1 sentence 2, sec. 4 TEU) (on the rule of law see von Danwitz, loc. cit., pp. 1311 et seq.). Furthermore, margins of assessment and discretion on the part of institutions, bodies, offices, and agencies of the European Union – which, of course, are subject to substantive and procedural limits – are also well-established (ECJ, Judgment of 18 June 2015, Estonia v Parliament and Council, C-508/13, EU:C:2015:403, para. 29).

The application of these methods and principles cannot and need not completely correspond to that of the national courts; yet it also cannot simply override it (cf. Pescatore, Revue Internationale de Droit Comparé – RIDC 32 <1980>, p. 332 <352 et seq.>; Lenaerts, International and Comparative Law Quarterly – ICLQ 52 <2003>, p. 873 <878 et seq.>; id./Gutiérrez-Fons, EUI Working Papers AEL 2013/9, pp. 35 et seq.). However, the particularities of Union law bring about differences with regard to the importance and weighting of the different means of interpretation that are not inconsiderable (Wegener, in: Calliess/Ruffert, EUV/AEUV, 4th ed. 2011, Art. 19 para. 12). The mandate of Art. 19 sec. 1 sentence 2 TEU does not allow manifestly ignoring the traditional European methods of interpretation or, more broadly, the general legal principles that are common to the legal systems of the Member States (Art. 6 sec. 3 TEU). 160

dd) Against this backdrop, it is not the task of the Federal Constitutional Court to replace the interpretation of the Court of Justice with its own when faced with issues of interpretation of Union law that can – even when handled in a methodologically correct manner within the usual bounds of legal debate – yield differing results (BVerfGE 126, 286 <307>). On the contrary, as long as the Court of Justice applies recognised 161

methodological principles and does not act in a way that is objectively arbitrary, the Federal Constitutional Court must respect judicial development of the law by the Court of Justice even when the Court of Justice adopts a view against which weighty arguments could be made. This applies both in the context of the identity review and the *ultra vires* review.

3. Acts of institutions, bodies, offices, and agencies of the European Union that exceed the boundaries defined by the European integration agenda in conjunction with Art. 23 sec. 1 sentence 2 and Art. 20 sec. 2 sentence 1 GG constitute *ultra vires* acts and are not covered by the precedence of application of Union law. Since they are inapplicable in Germany, they have no legal effect for German state organs. German constitutional organs, administrative bodies, and courts may neither participate in the development nor in the implementation, execution or operationalising of such acts (cf. BVerfGE 89, 155 <188>; 126, 286 <302 et seq.>; 134, 366 <387 and 388 para. 30>). They are required to examine for themselves whether the requirements of an *ultra vires* act are fulfilled and – if necessary – to seek a decision by the Federal Constitutional Court. 162

4. Due to their responsibility with respect to European integration, the constitutional organs are furthermore obliged to counter acts of institutions, bodies, offices, and agencies of the European Union that constitute a violation of identity as well as *ultra vires* acts – even if they do not touch upon the area declared to be beyond the reach of European integration by Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG (a). Art. 38 sec. 1 sentence 1 GG provides citizens entitled to vote with a right vis-à-vis the Federal Government and the *Bundestag* to the effect that these organs – with a view to possible identity violations or *ultra vires* acts of institutions, bodies, offices, and agencies of the European Union – form a reliable opinion regarding the extent of their responsibility with respect to European integration and the possibilities of fulfilling it (b). The constitutional organs have much leeway to design when it comes to further defining this obligation (c). 163

a) The responsibility with respect to European integration leads not only to an obligation on the part of the constitutional organs to ensure – when transferring sovereign powers and elaborating decision-making procedures – that the political systems of both Germany and the European Union adhere to democratic principles within the meaning of Art. 20 secs. 1 and 2 GG (cf. BVerfGE 123, 267 <356>; 134, 366 <395 para. 48>) and that the further requirements of Art. 23 GG are met. The precedence of the Constitution (Art. 20 sec. 3 GG) also obliges the constitutional organs to ensure that its limits are observed, even when participating in the implementation of the European integration agenda or further shaping or developing it (cf. BVerfGE 123, 267 <351 et seq., 435>; 129, 124 <180 and 181>; 135, 317 <399 et seq., paras. 159 et seq.>). 164

The responsibility with respect to European integration further encompasses permanent responsibility for ensuring that institutions, bodies, offices, and agencies of the 165

European Union observe the European integration agenda (cf. BVerfGE 123, 267 <352 et seq., 389 et seq., 413 et seq.>; 126, 286 <307>; 129, 124 <181>; 132, 195 <238 and 239, para. 105>; 134, 366 <394 and 395, para. 47>). The constitutional organs can only fulfil this responsibility if they continuously monitor the execution of the European integration agenda within the bounds of their competences. Such constitutional obligations to monitor further developments (*verfassungsrechtliche Beobachtungspflichten*) – which also exist in other legal contexts (cf. BVerfGE 25, 1 <12 and 13>; 35, 79 <117>; 49, 89 <130>; 88, 203 <310 and 311>; 95, 267 <314 and 315>; 110, 141 <158>; 111, 333 <355 and 356>; 127, 87 <116>; 130, 263 <300>; 133, 168 <235 and 236>) – are also aimed at securing the link of democratic legitimation when transferring sovereign powers to the European Union or other supranational or international institutions. This holds true even more when public authority is exercised by bodies that possess only little democratic legitimation (cf. BVerfGE 130, 76 <123 and 124>; 136, 194 <266 and 267>).

b) Not unlike the duties to protect (*Schutzpflichten*) mandated by the fundamental rights, the responsibility with respect to European integration requires the constitutional organs to protect and promote the citizens' rights protected by Art. 38 sec. 1 sentence 1 in conjunction with Art. 20 sec. 2 sentence 1 GG if the citizens are not themselves able to ensure the integrity of their rights (for general information on duties to protect cf. BVerfGE 125, 39 <78>; established case-law). The constitutional organs' obligation to fulfil their responsibility with respect to European integration is thus paralleled by a right of the voters enshrined in Art. 38 sec. 1 sentence 1 GG. This right requires the constitutional organs to ensure that the drops in influence (*Einflussknicke*) and the restrictions on the voters' "right to democracy" that come with the implementation of the European integration agenda in any case do not extend further than is justified by a permissible transfer of sovereign powers to the European Union and that the citizens are not subjected to a political power that they cannot escape and that they cannot in principle freely and equally choose in respect of persons and subject-matter (cf. BVerfGE 123, 267 <341>). 166

This right is primarily aimed at the Federal Government and the *Bundestag* – two constitutional organs vested with special competences in the area of foreign policy (cf. BVerfGE 90, 286 <381 et seq.>; 121, 135 <156 et seq.>; 131, 152 <195 et seq.>; BVerfG, Judgment of the Second Senate of 23 September 2015 –2 BvE 6/11 –, juris, paras. 67 et seq.). These organs are tasked with ensuring that the European integration agenda is respected and – in case of identity violation or of manifest and structurally significant exceeding of competences outside the area declared to be beyond the reach of European integration by Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG – with actively taking steps to ensure that the agenda as well as the boundaries it defines are respected (BVerfGE 134, 366 <395 para. 49>; […]). Therefore, with a view to such acts of institutions, bodies, offices, and agencies of the European Union, they must actively deliberate on how the identity can be protected or on how the order of competences can be restored and must come to an express deci- 167

sion on which steps shall be taken to that effect (BVerfGE 134, 366 <397 para. 53>).

c) Neither the constitutional organs' duty to react, following from their responsibility with respect to European intergration, nor the right of the voters similar to a duty to protect is negated by the fact that the Basic Law usually does not provide specific instructions. 168

aa) In the case of the fundamental rights, for instance, it is acknowledged that the competent (constitutional) organs generally decide for themselves how to fulfil their respective duties to protect (on Art. 2 sec. 1 in conjunction with Art. 1 sec. 1 GG BVerfGE 96, 56 <64>; on Art. 2 sec. 2 sentence 1 GG BVerfGE 66, 39 <61>; 77, 170 <214>; 79, 174 <202>; 85, 191 <212>; on Art. 4 secs. 1 and 2 GG BVerfGE 125, 39 <78>; on Art. 12 sec. 1 GG BVerfGE 92, 26 <47>). In doing so, they possess large margins of appreciation and assessment as well as much leeway to design (BVerfGE 125, 39 <78>). Such leeway to design exists not only in cases in which conflicting fundamental rights must be considered (BVerfGE 96, 56 <64>). In the field of foreign policy, too, it is incumbent upon the competent constitutional organs to reach duty-based political decisions and decide for themselves which measures to take. They must consider existing risks and take political responsibility for their decisions (cf. BVerfGE 66, 39 <61>; see also BVerfGE 4, 157 <168 and 169>; 40, 141 <178>; 53, 164 <182>; 55, 349 <365>; 66, 39 <60 and 61>; 68, 1 <97>; 84, 90 <128>; 94, 12 <35>; 95, 39 <46>; 121, 135 <158, 168 and 169>). This also goes for the question of how the state fulfils its duty to protect regarding fundamental rights in the area of foreign and defence policy when dealing with non-German public authority (cf. BVerfGE 53, 164 <182>; 55, 349 <364 and 365>; 66, 39 <61>; 92, 26 <47>; 77, 170 <214 and 215>; Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts*, 14, 192 <200 and 201>; see also BVerfGE 131, 152 <195>). Duties to protect are violated only if no protective measures are taken at all, if measures taken are manifestly unsuitable or completely inadequate, or if they fall considerably short of the protection's aim (cf. BVerfGE 77, 170 <214 and 215>; 85, 191 <212>; 88, 203 <254 and 255>; 92, 26 <46>; 125, 39 <78 and 79>). 169

For the responsibility with respect to European integration – which serves to protect democracy and the sovereignty of the people – this means that, if institutions, bodies, offices, and agencies of the European Union exceed their competences in a manifest and structurally significant manner or violate the constitutional identity in other ways, the constitutional organs must actively take steps to ensure that the European integration agenda is respected. They may, if needed, later legitimate an exceeding of competences by initiating an amendment of primary law – which must observe the boundaries of Art. 79 sec. 3 GG – (cf. BVerfGE 123, 267 <365>; 134, 366 <395 para. 49>) and by employing the procedure of Art. 23 sec. 1 sentences 2 and 3 GG to formally transfer the sovereign powers that had been exercised *ultra vires*. However, should that not be possible or wanted, they are – within the scope of their competences – required to use legal or political means to work towards the rescission of acts that are not covered by the European integration agenda, and – as long as the 170

acts continue to have effect – to take suitable measures to restrict the national effects of such acts as far as possible (cf. BVerfGE 134, 366 <395 and 396 para. 49>). To this end, they must take suitable measures to ensure respect of the European integration agenda (cf. BVerfGE 123, 267 <353, 364 and 365, 389 and 390, 391 and 392, 413 and 414, 419 and 420>; 134, 366 <395 and 396 para. 49, 397 para. 53>).

Concerning the Federal Government, this includes in particular bringing legal action before the Court of Justice of the European Union (Art. 263 sec. 1 TFEU), contesting the respective act vis-à-vis the acting and supervising authorities, adapting its voting policy in the decision-making bodies of the European Union including the exercise of veto rights and invoking the Luxemburg Compromise (cf. […]), proposing treaty amendments (cf. Art. 48 sec. 2, Art. 50 TEU), as well as instructing subordinate authorities to not apply the act in question. The German *Bundestag* can in particular exercise its rights to ask, to debate, and to decide, to which it is entitled in order to supervise the actions of the Federal Government in European Union matters (cf. Art. 23 sec. 2 GG, BVerfGE 131, 152 <196>). Furthermore, depending on the matter, it can also bring legal action on grounds of a violation of the principle of subsidiarity (Art. 23 sec. 1a GG in conjunction with Art. 12 letter b TEU and Art. 8 of the subsidiarity protocol), exercise its right of inquiry (Art. 44 GG), or hold a vote of no confidence (Art. 67 GG) (cf. […]). 171

bb) Like a duty to protect inherent in fundamental rights, the responsibility with respect to European integration may in certain legal and factual circumstances lead to a specific duty to act. Since the present context also touches upon the principle of the sovereignty of the people (Art. 20 sec. 2 sentence 1 GG), which belongs to the constitutional identity of Art. 79 sec. 3 GG, the *Bundestag* must without delay, at least if the Federal Constitutional Court makes such a finding, decide on how to counter the act in question. 172

This deliberation must in principle be held in the plenary; a deliberation in committees, which generally work behind closed doors, does not fulfil the responsibility with respect to European integration. The German *Bundestag* is the organ that directly represents the people. It consists of its members, who are elected as representatives of the whole people and, in their entirety, form the Parliament. The members' representative status, guaranteed by Art. 38 sec. 1 sentence 2 GG (cf. BVerfGE 4, 144 <149>; 80, 188 <217>), serves as the basis for the representative position of the *Bundestag*, which – being one of the "specific bodies" named in Art. 20 sec. 2 GG – exercises the state authority derived from the people (cf. BVerfGE 44, 308 <316>; 56, 396 <405>; 80, 188 <217>; 130, 318 <342>; BVerfG, Judgment of the Second Senate of 22 September 2015 – 2 BvE 1/11 –, juris, para. 91). The German *Bundestag* generally exercises its representative function in its entirety, with the participation of all of its members (cf. BVerfGE 44, 308 <316>; 56, 396 <405>; 80, 188 <218>; 130, 318 <342>; 131, 230 <235>; 131, 152 <204 and 205>; BVerfG, Judgment of the Second Senate of 22 September 2015, loc. cit., para. 91), not through individual members, groups of members, or the parliamentary majority. Public deliberation on arguments 173

and counterarguments, public debate, and public discussions are essential elements of democratic parliamentarianism. The measure of publicity of debate and decision-making ensured by parliamentary procedure not only makes the reconciliation of conflicting interests possible but also and primarily enables the citizens to exercise control over the *Bundestag* (cf. BVerfGE 40, 237 <249>; 70, 324 <355>; 131, 152 <205>; BVerfG, Judgment of the Second Senate of 22 September 2015, loc. cit., para. 92). Decisions of considerable significance, such as the decision concerning how to restore the order of competences (cf. BVerfGE 134, 366 <397 Rn. 53>) must therefore, in principle be preceded by a process that allows the public to form and express its views and that requires Parliament to hold a public debate on the necessity and scope of the measures to be taken (cf. BVerfGE 85, 386 <403 and 404>; 95, 267 <307 and 308>; 108, 282 <312>; 130, 318 <344>; 131, 152 <205>).

II.

174 According to these standards, the constitutional complaints and the application in the *Organstreit* proceedings – to the extent that they are admissible – are unfounded. If the conditions listed below are met, the inaction on the part of the Federal Government and of the *Bundestag* with regard to the policy decision of the European Central Bank of 6 September 2012 does not violate the complainants' rights under Art. 38 sec. 1 sentence 1, Art. 20 secs. 1 and 2 in conjunction with Art. 79 sec. 3 GG, nor are the *Bundestag*'s rights and obligations with regard to European integration – including its overall budgetary responsibility – impaired. As long as the conditions formulated by the Court of Justice of the European Union in its Judgment of 16 June 2015 are met, the policy decision of the Governing Council of the European Central Bank of 6 September 2012 and its possible implementation neither constitute a qualified exceeding of the competences attributed to the European Central Bank by Art. 119 and Arts. 127 et seq. TFEU, Arts. 17 et seq. ESCB Statute (1.), nor violate the prohibition of monetary financing enshrined in Art. 123 TFEU (2.). The German *Bundesbank* may participate in the implementation of the OMT decision only within the framework laid down by the Court of Justice of the European Union. If it does not do so, the Federal Government and the *Bundestag* would be required to intervene (3.). As long as the conditions formulated by the Court of Justice of the European Union are met, no threat to the *Bundestag*'s overall budgetary responsibility that would require the Federal Government and the *Bundestag* to take steps against the OMT Programme in order to protect the constitutional identity is apparent (4.). However, should the OMT Programme be implemented, these organs would be obliged to constantly monitor the fulfilment of these conditions in order to counter threats to compliance with the European integration agenda or to the overall budgetary responsibility of the German *Bundestag* early on (5.).

175 1. In accordance with the interpretation of the Court of Justice of the European Union, the policy decision regarding the technical framework conditions of the OMT Programme and the programme's possible implementation do not constitute *ultra vires* acts with a view to Arts. 119 and 127 et seq. TFEU as well as Arts. 17 et seq.

ESCB Statute. This interpretation, which in principle is binding for the Federal Constitutional Court (a), while raising considerable concerns with regard to the policy decision of the Governing Council of the European Central Bank of 6 September 2012 regarding the OMT Programme (b), does not provide for any prevailing constitutional objections (c).

a) The Federal Constitutional Court bases its review on the interpretation of the OMT decision formulated by the Court of Justice in its judgment of 16 June 2015 (cf. BVerfGE 123, 267 <353>; 126, 286 <304>; 134, 366 <385 para. 27>; BVerfG, Order of 15 December 2015, loc. cit., para. 46). The Court of Justice's finding that the policy decision on the OMT programme is within the bounds of the respective competences and does not violate the prohibition of monetary financing (see under 2.) still remains within the mandate of the Court of Justice in accordance with Art. 19 sec. 1 sentence 2 TEU (see also […]; dissenting […]). 176

The Court of Justice bases its view to a large extent on the objectives of the OMT Programme as specified by the European Central Bank, on the means employed to achieve those objectives, and on the programme's effects on economic policy, which – according to the Court of Justice – are only indirect in nature. Unlike the Senate, the Court of Justice examines not only on the policy decision of 6 September 2012 concerning technical details, but derives further framework conditions – in particular from the principle of proportionality –, which set binding limits to any implementation of the OMT Programme. This result is at least tenable and corresponds to the established case-law of the Court of Justice. 177

According to its established case-law, the Court of Justice, when delimiting competences between the European Union and the Member States, generally looks to the aims of the act in question (cf. ECJ, Judgment of 17 March 1993, Commission v Council, C-155/91, ECR 1993, I-939, para. 20; Judgment of 23 February 1999, Parliament v Council, C-42/97, ECR 1999, I-869, paras. 36, 38); when delimiting economic and monetary policy it also looks to the means employed (Judgment of 27 November 2012, Pringle, C-370/12, EU:C:2012:756, paras. 55, 60). This corresponds to the final attribution of competences, which characterises the primary law (cf. Arts. 3, 5 sec. 2 sentence 1, sec. 3 subsec. 1, sec. 4 TEU; Art. 127 sec. 1 sentence 1 TFEU; on the finality of the European integration agenda see […]). The Court of Justice considers that the merely indirect effects an act may have on other areas are irrelevant for the delimitation of competences (cf. ECJ, Judgment of 17 March 1993, Commission v Council, C-155/91, ECR 1993, I-939, paras. 18 et seq.; Judgment of 23 February 1999, Parliament v Council, C-42/97, ECR 1999, I-869, paras. 39 et seq.; Judgment of 27 November 2012, Pringle, C-370/12, EU:C:2012:756, para. 56). In the present case, the Court of Justice acted accordingly (ECJ Gauweiler, loc. cit., paras. 42 et seq.). 178

Since the Court of Justice always grants the organs of the European Union a wide margin of appreciation as well as broad discretion when fulfilling their tasks, and only 179

examines whether the outermost boundaries have been respected (“manifest error”, “abuse of discretion”, “limits of discretion”) (cf. ECJ, Judgment of 25 May 1978, Racke, 136/77, ECR 1978, p. 1245, para. 4; Judgment of 29 October 1980, Roquette Frères v Council, 138/79, ECR 1980, p. 3333, para. 25; Judgment of 25 October 1977, Metro v Commission, 26/76, ECR 1977, p. 1875, para. 50; Judgment of 17 December 1981, De Hoe v Commission, C-151/80, ECR 1981, p. 3161, para. 9; Judgment of 22 April 1999, Kernkraftwerke Lippe-Ems v Commission, C-161/97 P, ECR 1999, I-2057, para. 97; Judgment of 11 February 2010, Hoesch Metals and Alloys, C-373/08, ECR 2010, I-951, paras. 61 and 62), it has developed the principle of proportionality (Art. 5 sec. 1 sentence 2, sec. 4 TEU) so as to serve as a limiting corrective at the level of the exercise of competences (cf. ECJ, Judgment of 20 February 1979, Buitoni, 122/78, ECR 1979, p. 677, paras. 16/18; Judgment of 17 May 1984, Denkavit Nederland, 15/83, ECR 1984, p. 2171, paras. 25 et seq.; Judgment of 13 November 1990, FEDESA, C-331/88, ECR 1990, I-4023, para. 13; Judgment of 5. October 1994, Crispoltoni, C-133, 300 und 362/93, ECR 1994, I-4863, para. 41; Judgment of 8 June 2010, Vodafone, C-58/08, ECR 2010, I-4999, paras. 51 et seq.; Judgment of 12 May 2011, Luxembourg / v Parliament and Council, C-176/09, ECR 2011, I-3727, paras. 61 et seq.; Judgment of 18 June 2015, Estonia v Parliament and Council, C-508/13, EU:C:2015:403, paras. 28 et seq.; Trstenjak/Beysen, EuR 2012, p. 265 <266>). In addition to this corrective it has established the requirement that reasons be provided for all legal acts (Art. 296 sec. 2 TFEU; cf. ECJ, Judgment of 21 November 1991, TU München, C-269/90, ECR 1991, I-5469, para. 14; Judgment of 19 November 2013, Commission v Council, C-63/12, EU:C:2013:752, paras. 98 and 99) in order to enable judicial review (Art. 263 sec. 1 TFEU, Art. 35.1 sentence 1 ESCB Statute). These competence-limiting parameters are the focus of the Court of Justice’s review in the present case (ECJ, Gauweiler, loc. cit., paras. 66 et seq.).

Furthermore, the Court of Justice emphasises – more clearly than in the past (cf. ECJ, Judgment of 10 July 2003, Commission v ECB, C-11/00, ECR 2003, I-7147, para. 135) – that actions of the European Central Bank are also subject to judicial review, as a necessary consequence of the rule of law as expressed in Art. 263 sec. 1 TFEU and Art. 35.1 sentence 1 ESCB Statute and particularly with a view to observing the principles of conferral and proportionality (ECJ, Gauweiler, loc. cit., paras. 41 and 66; on the disputed scope of the judicial review of acts of the European Central Bank […]; for an basically autonomous definition of the competences of the European Central Bank […]). 180

b) Nevertheless, the manner in which the law was interpreted and applied in the Judgment of 16 June 2015 meets with serious objections on the part of the Senate in respect of the establishment of the facts of the case (aa), the principle of conferral (bb), and the judicial review of acts of the European Central Bank that relate to the definition of its mandate (cc). 181

aa) Firstly, the Court of Justice accepts the assertion that the OMT Programme pursues a monetary policy objective – an assertion that has been contested in a substantiated manner in the present proceedings – without questioning or at least discussing and individually reviewing the soundness of the underlying factual assumptions, and without testing these assumptions against indications that evidently argue against a character of monetary policy – particularly the selectivity of the purchases (BVerfGE 134, 366 <406 and 407 para. 73>; cf. […]) and the parallelism of those purchases to the EFSF and ESM aid programmes (BVerfGE 134, 366 <407 and 498 paras. 74 et seq.>; cf. […]). The Court of Justice does not address the consideration that limiting the OMT Programme to monetary policy goals aiming at restoring the transmission mechanism could be hindered by the fact that according to the policy decision purchases of government bonds are generally not permissible – irrespective of the effects on the transmission mechanism – if the state in question does not have access to the bonds market or if it does not abide by the rules of current macroeconomic adjustment programmes; it also does not address the fact that the quantifiability of the share of the interest rates that is not dependent on macroeconomics has been disputed – e.g. by the *Bundesbank* – although quantifiability would be a precondition for the determination of the volume that could by justified under monetary policy considerations if the programme were implemented. 182

bb) Furthermore, despite its own belief that economic and monetary policy overlap, the Court of Justice essentially relies on the objectives of the measure as indicated by the organ on review as well as on the recourse to the instrument of the purchase of government bonds enshrined in Art. 18 of the ESCB Statute when qualifying the OMT Programme as an instrument belonging to the field of monetary policy. On the other hand, it addresses the indications arguing against such a qualification only individually and does not address the issue of whether their sum – when comprehensively assessed and evaluated (cf. BVerfGE 134, 366 <416 and 417 para. 99>) – still complies with the requirements of Union law. 183

Generously accepting as fact asserted aims while at the same time granting wide margins of assessment to bodies of the European Union and considerably decreasing the intensity of judicial review is well-suited to enable institutions, bodies, offices, and agencies of the European Union to autonomously decide upon the scope of the competences that the Member States have attributed to them (cf. BVerfGE 123, 267 <349 et seq.>). Such an understanding of competences does not sufficiently take into account the constitutional dimension of the principle of conferral. 184

The principle of conferral is not only a principle of Union law but also incorporates constitutional principles from the Member States (cf. BVerfGE 123, 267 <350>). It is the predominant justification for the decrease in the level of democratic legitimation of the public authority exercised by the European Union, which in Germany not only touches upon fundamental constitutional principles (Art. 20 secs. 1 and 2 GG) but also upon the citizens' right to vote and their "right to democracy" (Art. 38 sec. 1 sentence 1 GG). Therefore, maintaining the bases of the competences of the European 185

Union is essential for protecting the Basic Law's principle of democracy. In particular, the finality of the European integration agenda may not lead to the *de facto* suspension of the principle of conferral, one of the fundamental principles of the Union (cf. Art. 3 sec. 6, Art. 4 sec. 1 TEU, Art. 7 TFEU; see also ECJ, Opinion 2/94 of 28 March 1996, Accession to the ECHR, ECR 1996, I-1759, para. 30; furthermore see Declaration no. 42 on Art. 352 TFEU annexed to the final act of the intergovernmental conference which adopted the Treaty of Lisbon). Insofar, the Union principle of conferral and the Union obligation to respect the Member States' constitutional identity are manifestations of the treaty-based foundation of the Union's power (cf. BVerfGE 123, 267 <350>).

The principle of conferral's interface function must have an effect on the methodical review of whether it is being respected. If fundamental interests of the Member States are affected, as is generally the case when dealing with competences in a union (*Verbandskompetenz*), judicial review may not simply accept the asserted positions of organs of the European Union without verification. 186

cc) Lastly, the Court of Justice provides no answer to the following issue presented by the Senate (cf. BVerfGE 134, 366 <399 and 400 para. 59>): that the independence granted to the European Central Bank (Art. 130 TFEU) leads to a noticeable reduction in the level of democratic legitimation of its actions and should thus lead to a restrictive interpretation, as well as to a particularly strict judicial review, of the mandate of the European Central Bank. 187

This holds all the more true if, as in the case at hand, by way of the principles of democracy and of the sovereignty of the people (Art. 20 secs. 1 and 2 GG), the constitutional identity of a Member State is affected, which the European Union is required to respect (Art. 4 sec. 2 sentence 1 TEU). The independence of the European Central Bank as well as of the national central banks releases the public authority exercised by them from direct national or supranational parliamentary responsibility. Therefore, their independence when exercising Union powers, which is guaranteed by Arts. 130 and 282 sec. 3 sentences 3 and 4 TFEU, is in noticeable conflict with the principles of democracy and the sovereignty of the people. An essential area of policy – one that by ensuring monetary stability protects individual freedom and by regulating the money supply influences public finance as well as the areas of policy dependent on it – is thus removed from the directly and democratically legitimated representatives' authority to issue orders and from legislative supervision of competences and means of action. 188

This limitation on the democratic legitimation emanating from the electorate is as such one of the modifications of the principle of democracy envisaged in Art. 88 sec. 2 GG that is justified on the grounds of the specific framework conditions of monetary policy (cf. BVerfGE 89, 155 <207 et seq.>). However, by way of compensation, the principles of democracy and the sovereignty of the people require that the monetary policy mandate of the European Central Bank be interpreted restrictively and that its 189

observance be subject to strict judicial review in order to at least limit the decrease in the level of democratic legitimation of the Bank's actions to what is absolutely necessary (cf. Hinarejos, European Constitutional Law Review 11 <2015>, p. 563 <571 et seq.>).

c) Despite these concerns, the policy decision on the OMT Programme as interpreted in the Court of Justice's judgment does not "manifestly" exceed the competences attributed to the European Central Bank within the meaning of the competence retained by the Federal Constitutional Court to review *ultra vires* acts. The Court of Justice bases its assessment on the aims that the OMT Programme is intended to serve according to the European Central Bank as well as on the means that are employed to achieve those goals (ECJ, Gauweiler, loc. cit., paras. 47 et seq.). As illustrated, this complies with the wording of the primary law foundations and the Court of Justice's case-law. Contrary to the Senate, the Court of Justice does not question the asserted aims and evaluates each of the indications held by the Senate to argue against the alleged aims in an isolated manner instead of performing an overall evaluation. This can however be accepted as with regard to the exercise of competences the Court of Justice has essentially performed the restrictive interpretation of the policy decision that the Senate had suggested was possible (cf. BVerfGE 134, 366 <416 and 417 paras. 99 and 100>). These parameters for the implementation of the policy decision identified by the Court of Justice are legally binding (aa) and sufficiently limit the reach of the decision (bb). 190

aa) The Court of Justice differentiates between the policy decision of 6 September 2012, which lays out the technical framework conditions of the OMT Programme, on the one hand and the implementation of the Programme on the other (cf. ECJ Gauweiler, loc. cit., paras. 83 and 88, furthermore paras. 53, 60, 68, 91, 105, 107, 114, and 120). It subjects the policy decision to establish the OMT Programme to less strict requirements and argues that the complete disclosure of all technical details could diminish the programme's effectivity (cf. ECJ, Gauweiler, loc. cit., para. 88). With a view to the proportionality of the OMT Programme and the fulfilment of the obligations to state reasons, however, it specifies additional restrictions that imperatively apply to any implementation of the OMT Programme and that exceed the framework conditions indicated in the policy decision. Based on these restrictions, which are also included in unpublished drafts of future specific implementing legal acts of the European Central Bank, the Court of Justice reaches the conclusion that judicial review is possible and that the European Central Bank has fulfilled its obligation to state reasons (cf. ECJ, Gauweiler, loc. cit., paras. 68 et seq.). According to the Court of Justice, the essential elements of the programme are discernable, thus enabling the Court to perform its review (cf. ECJ, Gauweiler, loc. cit., para. 71). It holds that under these conditions the programme does not violate the principle of proportionality (cf. ECJ, Gauweiler, loc. cit., para. 92). 191

Against this backdrop, one must assume that the Court of Justice considers the conditions it specified in order to limit the reach of the policy decision of 6 September 192

2012 regarding the OMT Programme to be legally binding and that a violation of these would constitute an exceeding of competences – viewed by the Court of Justice as a violation of Arts. 5 sec. 1 sentence 2, 4 TEU (cf. Hinarejos, European Constitutional Law Review 11 <2015>, p. 563 <574>). This also became evident during the oral hearing conducted by the Senate on 16 February 2016 and in the submission by the European Central Bank.

bb) If the conditions specified by the Court of Justice are applied, the policy decision regarding the OMT Programme and its possible implementation do not exceed, at least not manifestly, the competences attributed to the European Central Bank. As the Senate explained in its request for a preliminary ruling of 14 January 2014, in light of Art. 119 and Arts. 127 et seq. TFEU as well as Arts. 17 et seq. ESCB Statute, the policy decision regarding the OMT Programme can be interpreted or limited in its validity in such a way that it does not undermine the conditionality of the EFSF and ESM aid programmes and merely supports economic policy within the Union (BVerfGE 134, 366 <417 para. 100>). When comprehensively assessed and evaluated, the restrictively interpreted policy decision regarding the OMT Programme largely meets the requirements specified by the Senate (cf. BVerfGE 134, 366 <416 and 417 paras. 99 and 100>). 193

The judicial review of acts of the European Central Bank recognised by the Court of Justice (cf. ECJ, Gauweiler, loc. cit., para. 41) and the existing obligations to state reasons that apply to future legal acts regarding the implementation of the programme (cf. ECJ Gauweiler, loc. cit., para. 69) ensure that the potential of the policy decision, which the Senate has shown to be nearly unlimited and reaching far into economic policy (cf. BVerfGE 134, 366 <404 et seq. paras. 69 et seq.>), is limited. The leading aim of the implementation of the OMT Programme can only be to secure price stability, but not to stabilise the euro area (cf. ECJ, Gauweiler, loc. cit., para. 64). The European Central Bank may only use the OMT Programme to secure price stability. Insofar, it is required to state reasons for its acts. The necessary “in-depth assessment of the requirements of monetary policy” that it must provide and upon which implementation of the OMT Programme depends (cf. ECJ, Gauweiler, loc. cit., para. 83) is subject to judicial review. Whether the “implementation of a programme such as that announced in the press release is strictly subject to the objectives of that programme” (ECJ, Gauweiler, loc. cit., para. 85) – that is to say, the elimination of disruptions of the monetary policy transmission mechanism or the uniformity of monetary policy (ECJ, Gauweiler, loc. cit., para. 62) – can at least be reviewed *ex post*. The programme must be “strictly” limited to these goals and must be terminated as soon as they are achieved (cf. ECJ, Gauweiler, loc. cit., para. 112). 194

Limiting the volume of the purchases possible within the framework of the OMT Programme is of core importance for reducing the danger that the OMT Programme may undermine the conditionality of the EFSF and ESM aid programmes and for ensuring that the OMT Programme merely supports economic policy within the Union (cf. BVerfGE 134, 366 <417 para. 100; 410 and 411 para. 83>). Contrary to the parame- 195

ters included in the policy decision of 6 September 2012 and in the corresponding communications by the European Central Bank, the Court of Justice does not allow the purchase programme to be extended without limit. The volume of future purchases must be mandatorily fixed from the outset and may not exceed the amount necessary for restoring the transmission mechanism. Neither the decision to actually effectuate bond purchases, nor the predetermined volume of the intended purchases may be announced prior to the purchases (ECJ, Gauweiler, loc. cit., para. 106). This reduces the risk of Member States of the euro area issuing bonds with the sole purpose of having them purchased by the European System of Central Banks. Should affected states change their issuing policy after commencement of the programme, the European Central Bank would have to react if the monetary policy aims were otherwise no longer central to the programme (cf. ECJ, Gauweiler, loc. cit., para. 117). Due to the comprehensive monetary policy assessment required as basis for the decision to implement the programme (cf. ECJ, Gauweiler, loc. cit., para. 83), there must be the possibility of judicial review of whether the decisions regarding implementation of the programme and its volume were motivated by monetary policy concerns (cf. ECJ, Gauweiler, loc. cit., paras. 112 to 114). Therefore, the limitation of the programme restricting it to what is necessary to restore the transmission mechanism must be transparent. Holding bonds until maturity, which the Court of Justice considers to be generally possible (ECJ, Gauweiler, loc. cit., para. 118), may only be done if there are monetary policy reasons for doing so. In most cases, a use unlimited in time and in volume of this possibility will not be justifiable under monetary policy aspects. Therefore, if the ESCB regularly holds bonds until maturity, this can serve as an indication that it wishes to accept default risks. The Court of Justice is consistent in considering that the possible consequences of bonds being taken from the market by the purchase programme is that they “may be temporary” (ECJ, Gauweiler, loc. cit., para. 117).

In using mainly procedural means in its judicial review to delimit how the principle of proportionality must be observed, the Court of Justice takes up the issue of the nearly unlimited potential of the decision of 6 September 2012. The restrictive parameters developed by the Court of Justice do not insofar completely lift the OMT Programme’s character of touching upon economic policy. However, together with the conditions prescribed by the decision of 6 September 2012 – in particular the participation of Member States in adjustment programmes, Member States’ access to the bond market, and the focus on bonds with a short maturity – they make it appear acceptable to assume that the OMT Programme is at least predominantly of a monetary policy character. 196

2. If interpreted in accordance with the Court of Justice’s judgment, the policy decision on the technical framework conditions of the OMT Programme as well as its possible implementation also do not manifestly violate the prohibition of monetary financing enshrined in Art. 123 TFEU. Although the Court of Justice considers the policy decision to be permissible even without further specifications, its implementation 197

must fulfil further conditions in order for the purchase programme not to violate Union law (cf. ECJ, Gauweiler, loc. cit., particularly paras. 88 and 102 et seq.).

198 a) In its Judgment of 16 June 2015, the Court of Justice not only affirms that a prohibition of monetary financing underlies the Treaties; it also acknowledges that a circumvention prohibition can be derived from Art. 123 sec. 1 TFEU. According to the Court of Justice, government bonds may not be purchased even on the secondary market if this were to have the same effect as directly purchasing them from the issuing bodies (ECJ, Gauweiler, loc. cit., para. 97). In order to ensure that this prohibition is respected, "as the Advocate General has observed in point 227 of his Opinion, when the ECB purchases government bonds on secondary markets, sufficient safeguards must be built into its intervention to ensure that the latter do not fall foul of the prohibition of monetary financing in Art. 123(1) TFEU (ECJ, Gauweiler, loc. cit., para. 102). This requirement and the referenced submissions of the Advocate General (Opinion AG Cruz Villalón of 14 January 2015 on ECJ, Gauweiler, C-62/14, EU:C:2015:7, para. 227) show that the Court of Justice considers the restrictive parameters to be legally binding conditions.

199 The Court of Justice further defines these conditions by looking to the aim of Art. 123 TFEU (cf. ECJ, Gauweiler, loc. cit., paras. 98 et seq.). From this aim, it derives that bonds may not be purchased on the primary market; that purchases on the secondary market may not give the affected Member States certainty that their bonds will be purchased by the ESCB, and that the purchase may not relieve the affected Member States of incentive to conduct sound budgetary policy (cf. ECJ, Gauweiler, loc. cit., paras. 103, 104, and 107). Irrespective of the fact that according to the Court of Justice the programme may not be implemented in a way that would result in the harmonisation of interest rates irrespective of the differences that result from the macroeconomic situation or the budgetary situation of the states (ECJ, Gauweiler, loc. cit., para. 113), the judgment of the Court of Justice gives rise to the following requirements for the OMT Programme:

- Purchases may not be announced (para. 106).

- The volume of the purchases must be limited (para. 106).

- There must be a minimum period between the issue of the government bonds and their purchase by the ESCB that is defined from the outset and prevents the issuing conditions from being distorted (paras. 106 and 107).

- The ESCB may purchase only government bonds of Member States that have bond market access enabling the funding of such bonds (paras. 116 and 119).

- Purchased bonds may only in exceptional cases be held until maturity (paras. 117 and 118).

- Purchases must be restricted or ceased and purchased bonds must be remarketed should continuing the intervention or futher holding of the bonds become unnecessary for achieving the monetary policy aims (paras. 112 et seq., paras. 117 et seq.).

Since these standards are to ensure that the issuing Member States have no certainty that their bonds will be purchased by the ESCB (cf. ECJ, Gauweiler, loc. cit., paras. 104 and 106), they can be only understood to the effect that the framework conditions of individual interventions on the secondary market cannot be published until those interventions have been concluded. 200

b) Thus interpreted, and when comprehensively assessed and evaluated, the OMT Programme fulfils the requirements formulated by the Senate's Order of 14 January 2014 requesting a preliminary ruling by the Court of Justice (cf. BVerfGE 134, 366 <416 and 417 paras. 99 and 100>). One must bear in mind that the prohibition of monetary financing enshrined in Art. 123 sec. 1 TFEU constitutes a fundamental rule of the Monetary Union (cf. BVerfGE 134, 366 <394 para. 43>), and exceptions thereto must be restrictively interpreted according to the general principles acknowledged by the Court of Justice (see para. 159) (cf. Opinion AG Cruz Villalón of 14 January 2015, loc. cit., para. 219). 201

aa) The effects of interferences with market pricing are lessened by the fact that the decision to purchase certain bonds as well as the volume of the intended purchases may not be announced (cf. ECJ, Gauweiler, loc. cit., para. 106). Furthermore, there must be a minimum period between the issue of the government bonds and their purchase by the ESCB that is defined from the outset and prevents the issuing conditions from being distorted (cf. ECJ, Gauweiler, loc. cit., paras. 106 and 107). Lastly, market participants may not have certainty that the purchased bonds will be held until maturity (cf. ECJ, Gauweiler, loc. cit., paras. 117 and 118). Like the prohibition against deliberately accepting default risks by holding bonds until maturity, this presupposes that merely temporary purchases remain the rule. 202

bb) The fact that the volume of secondary market interventions must be decided upon from the outset but may not be announced (cf. ECJ, Gauweiler, loc. cit., para 106) further contributes to limiting the volume of bonds purchased from individual Member States beyond the framework conditions adopted on 6 September 2012. Should the Member State in question change its issuing policy, the ESCB may be required to react (cf. ECJ, Gauweiler, loc. cit., para 117). 203

cc) Unlike the Senate (cf. BVerfGE 134, 366 <412 and 413 paras. 88 and 89>), the Court of Justice does not consider that a possible debt cut conflicts with the prohibition of monetary financing (cf. ECJ, Gauweiler, loc. cit., para. 126; dissenting Steinbach, The Yale Journal of International Law Online 39 <2013>, p. 15 <30>; see also […]). However, according to the Court of Justice, only government bonds of such Member States that have bond market access may be purchased (cf. ECJ, Gauweiler, loc. cit., para. 86). In so holding, the Court of Justice goes beyond the framework 204

conditions formulated in the policy decision regarding the OMT Programme, which envisaged such a requirement only in certain cases. This would rule out bonds of Member States that are in a problematic financial situation (cf. ECJ, Gauweiler, loc. cit., para. 119; […]). This assessment is backed by the fact that the European Central Bank, as its representative explained during the oral hearing of 16 February 2016, would not approve a debt cut.

3. Since, against this backdrop, the OMT Programme constitutes an *ultra vires* act if the framework conditions defined by the Court of Justice are not met, the German *Bundesbank* may only participate in the programme's implementation if any acts of implementation stay within the framework specified by the Court of Justice (a). Should these conditions not be fulfilled when implementing the OMT Programme, the Federal Government and the *Bundestag* would be obliged to intervene (b). 205

a) The German *Bundesbank* may only participate in the programme's implementation if and to the extent that the prerequisites defined by the Court of Justice (para. 199) are met, i.e. 206

- purchases are not announced,
- the volume of the purchases is limited from the outset,
- there is a minimum period between the issue of the government bonds and their purchase by the ESCB that is defined from the outset and prevents the issuing conditions from being distorted,
- the ESCB purchases only government bonds of Member States that have bond market access enabling the funding of such bonds,
- purchased bonds are only in exceptional cases held until maturity and
- purchases are restricted or ceased and purchased bonds are remarketed should continuing the intervention become unnecessary.

Should any implementation of the policy decision of the Governing Council of the European Central Bank of 6 September 2012 fail to fulfil these conditions, it would constitute a sufficiently qualified exceeding of competences within the meaning of the *ultra vires* review (cf. BVerfGE 134, 366 <392 et seq. paras. 36 et seq., 398 et seq. paras. 55 et seq.>). 207

b) Given that the policy decision of 6 September 2012 regarding the OMT Programme in its concrete and applicable form as interpreted by the Court of Justice of the European Union, forming the basis of the present decision, does not constitute an *ultra vires* act, the Federal Government and the *Bundestag* were, within their responsibility with respect to European integration, not required to counter the decision. 208

However, should the conditions formulated by the Court of Justice for purchases of government bonds not be respected when the OMT Programme is implemented, the 209

Federal Government and the *Bundestag* would be obliged to take suitable steps (cf. para. 171) to ensure they are respected and – as long as the acts continue to have effect – to put in place suitable precautions to limit national repercussions as far as possible (cf. BVerfGE 134, 366 <395 and 396 para. 49>).

4. Their responsibility with respect to European integration does not require the Federal Government and the *Bundestag* to take action against the OMT Programme, even in order to preserve the overall budgetary responsibility of the *Bundestag* . This overall budgetary responsibility is indeed part of the constitutional identity of the Basic Law (a), and, in principle, it can be impaired by a programme for purchases of government bonds by the ESCB (b). However, currently there is no apparent threat to the right to decide on the budget (*Budgetrecht*) by the OMT Programme, which has yet to be implemented (c). 210

a) Decisions as to public revenue and spending constitute a fundamental part of the democratic capability of self-governance within the constitutional state (cf. BVerfGE 123, 267 <359>; 132, 195 <239 para. 106>; 135, 317 <399 and 400 para. 161>). Therefore, the *Bundestag* is accountable to the people for its decisions regarding revenue and spending. To this extent, the right to decide on the budget constitutes a core element of the democratic formation of opinions (cf. BVerfGE 70, 324 <355 and 356>; 79, 311 <329>; 129, 124 <177>; 132, 195 <239 para. 106>; 135, 317 <400 para. 161>), which must be respected even in a system of intergovernmental governance (cf. BVerfGE 135, 317 <400 para. 161>). 211

By opening itself to international cooperation and European integration, the Federal Republic of Germany binds itself not only legally but also with regard to financial policy. In order for the principle of democracy to be respected, the *Bundestag* must remain the place where autonomous decisions on revenue and expendiure are made – including those with regard to international and European liabilities (cf. BVerfGE 129, 124 <177>; 130, 318 <344>; 131, 152 <205 and 206>; 132, 195 <239 and 240 para. 107>; 135, 317 <400 para. 162>). If essential budgetary issues were decided without constitutive approval by the *Bundestag* or supranational legal obligations were entered into without a corresponding decision of free will by the *Bundestag*, parliament would find itself in the role of merely re-enacting and could no longer exercise its overall budgetary responsibility as part of its right to decide on the budget (BVerfGE 129, 124 <178 and 179>; 130, 318 <344 and 345>; 132, 195 <240 para. 107>; 135, 317 <400 and 401 para. 162>). 212

Therefore, the *Bundestag* may not, without first having given its constitutive approval, subject itself to financially relevant mechanisms that – whether by reason of their overall conception or an overall evaluation of the individual acts – can lead to incalculable liabilities affecting the budget, be they expenditures or losses of revenue. This prohibition of the relinquishment of budgetary responsibility does not impermissibly restrict the budgetary competence of the legislature but is specifically aimed at preserving it (cf. BVerfGE 129, 124 <179>; 132, 195 <240 para. 108>; 135, 317 <401 213

para. 163>).

A necessary condition for securing political latitude in the sense of the core identity of the Constitution (Art. 20 secs. 1 and 2, Art. 79 sec. 3 GG) is that the legislature deciding on budgetary matters (*Haushaltsgesetzgeber*) makes its decisions regarding revenue and expenditure matters freely and uninfluenced by the organs and other Member States of the European Union and always remains the “master of its decisions” (“*Herr seiner Entschlüsse*”) (cf. BVerfGE 129, 124 <179 and 180>; 132, 195 <240 para. 109>; 135, 317 <401 para. 164>). It follows from the democratic foundation of budgetary autonomy that the *Bundestag* may not approve a guarantee or payment automatism agreed upon intergovernmentally and supranationally that is not subject to strict requirements and whose effects are not limited, and that is beyond the *Bundestag's* control and influence once it has been set in motion (BVerfGE 129, 124 <180>; 132, 195 <241 para. 109>; 135, 317 <401 and 402 para. 164>). 214

b) In principle, purchases of government bonds by the Eurosystem may lead to expenditures or losses of revenue that are relevant for the budget. 215

Open market operations are always accompanied by a risk of loss (cf. ECJ, Gauweiler, loc. cit., para. 125). As the European Central Bank has explained in the current proceedings, the volume of bonds issued by the Member States that could currently be covered by the OMT Programme is such that the *Bundesbank*'s share in them would exceed its capital and its relevant provisions many times over. Even a partial default of the bonds would not only limit the net profit that must be transferred to the Federation (cf. § 27 of the Bundesbank Act, *Bundesbankgesetz* – BBankG) but could also lead to negative equity on the part of the *Bundesbank*. As the German *Bundesbank* and the European Central Bank have submitted in the current proceedings, this could – at least if it were lasting – undermine confidence in the capacity of the German *Bundesbank*, which constitutes an indispensable prerequisite for its functioning (see also European Central Bank, Convergence Report 2014, p. 36). The same holds true for the European Central Bank, the loss allocation of which is governed merely by the rule that losses can be compensated for with funds from the general reserve fund and from monetary income (cf. Art. 33.2 ESCB Statute). However, there is no provision on compensating losses that exceed those funds. 216

Constitutional law requires the Federal Republic of Germany to ensure the functioning of the German *Bundesbank*. Art. 88 sentence 1 GG protects the institution of the German *Bundesbank* (cf. […]) but is not limited to guaranteeing its mere existence. Rather, the provision also encompasses the obligation to provide the *Bundesbank* with such assets as are necessary to enable it to fulfil its constitutional tasks, which are also specifically set down in Art. 88 sentence 2 GG. Therefore, Art. 88 GG also includes a rule on institutional liability (*Anstaltslast*) requiring the guarantor, the Federal Republic of Germany, to guarantee the functioning of the German *Bundesbank*, which is a direct federal institution (*bundesunmittelbare Anstalt*) under public law (cf. § 2 BBankG). Against this backdrop, there is no need for a rule on institutional liability 217

in statutory law ([…]; advancing a different view at the time […]). Therefore, should the German *Bundesbank*'s ability to function be threatened by insufficient or even negative net equity, the Federal Republic of Germany may be required to inject additional capital. This may also be required under Union law (cf. European Central Bank, Convergence Report 2014, pp. 28 and 29).

c) However, if interpreted in accordance with the Court of Justice's judgment, the OMT Programme does not present a constitutionally relevant threat to the *Bundestag's* right to decide on the budget. Therefore, it can also not be established that the potential implementation of the OMT Programme would currently pose a threat to the overall budgetary responsibility. 218

It is currently unclear whether and to what extent the risks inherent in the OMT Programme will ever materialise. The restrictions defined by the Court of Justice aid in decreasing those risks. The prohibition of purchasing bonds with considerable default risks (cf. ECJ, Gauweiler, loc. cit., paras. 116 and 119) is of particular importance – even more so since bonds may generally not be held until maturity (cf. ECJ, Gauweiler, loc. cit., paras. 117 and 118). It must be noted that in the time since the policy decision of 6 September 2012 regarding the OMT Programme was adopted, the Hellenic Republic, to whose bonds an increased default risk is ascribed, has not had bond market access (cf. Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung, Konsequenzen aus der Griechenland-Krise für einen stabileren Euro-Raum, Special Report, July 2015, para. 54). Furthermore, the German *Bundesbank* – with a view to the holdings from the now terminated SMP and the ongoing purchase programmes – considers the general risk situation to be improving (cf. German *Bundesbank*, Annual Report 2015, pp. 89 and 90). 219

5. However, due to their responsibility with respect to European integration, the Federal Government and the German *Bundestag* are under a duty to closely monitor any implementation of the OMT Programme. This compulsory monitoring shall determine not only whether the abovementioned conditions are met, but also whether a specific threat to the federal budget derives in particular from the volume and the risk structure of the purchased bonds, which may change even after their purchase. If necessary, the Federal Government must procure information it does not possess. A suitable means to this end could for instance be the German *Bundesbank* 's duty to counsel and inform the Federal Government (§ 13 sec. 1 BBankG). 220

Voßkuhle Landau Huber

Hermanns Müller Kessal-Wulf

König Maidowski

Bundesverfassungsgericht, Urteil des Zweiten Senats vom 21. Juni 2016 - 2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13

Zitiervorschlag BVerfG, Urteil des Zweiten Senats vom 21. Juni 2016 - 2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13 - Rn. (1 - 220), http://www.bverfg.de/e/rs20160621_2bvr272813en.html

ECLI ECLI:DE:BVerfG:2016:rs20160621.2bvr272813