FEDERAL CONSTITUTIONAL COURT

– 2 BvR 859/15 –

– 2 BvR 1651/15 –

– 2 BvR 2006/15 –

– 2 BvR 980/16 –

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaints

I. 1. of Dr. W(…),

2. of Dr. H(…),

3. of Dr. A(…),

- authorised representative: Prof. Dr. Christoph Degenhart,
Burgstraße 27, 04109 Leipzig –

against 1. the omission on the part of the *Bundestag* and the Federal Government to take steps to ensure the rescission or non-implementation of

- the Decision of the Governing Council of the European Central Bank of 4 September 2014 on the implementation of the asset-backed securities purchase programme (ECB/2014/45) and the related Decision of the European Central Bank of 19 November 2014 (Decision [EU] 2015/5 of 19 November 2014), as amended by the Decision of the European Central Bank of 10 September 2015 (Decision [EU] 2015/1613),

- the Decision of the Governing Council of the European Central Bank on the implementation of the third covered bond purchase programme of 15 October 2014 (ECB/2014/40),

- the Decision of the Governing Council of the ECB of 22 January 2015 on an expanded asset purchase programme (ECB/2015/10) and the Decision of the European Central Bank of 4 March 2015 (Decision [EU] 2015/774) on a secondary markets public sector asset purchase programme, as amended by the Decision of the European Central Bank of 5 November 2015 (Decision [EU] 2015/2101), the Decision of the European Central Bank of 16 December 2015 (Decision [EU] 2015/2464) and the Decision of the European Central Bank of 18 April 2016 (Decision [EU] 2016/702),

- the Decision of the Governing Council of the European Central Bank of 10 March 2016 (Decision [EU] 2016/16) and the Decision of the European Central Bank of 1 June 2016 (Decision [EU] 2016/948) on the implementation of the corporate sector purchase programme (CSPP),

2. the omission on the part of the *Bundesbank* (Federal Central Bank) to bring legal action against the European Central Bank before the Court of Justice of the European Union directed against its inclusion in the asset purchase programme

– 2 BvR 859/15 –,

II. 1. of Prof. Dr. L(…),

2. of Prof. Dr. h.c. H(…),

3. of Prof. Dr. St(…),

4. of Mr K(…),

5. of Ms T(…),

and of another 1729 complainants

- authorised representatives: 1. Prof. Dr. Hans-Detlef Horn,
Universitätsstraße 6, 35037 Marburg,

2. Dr. Gunnar Beck,
OAS University of London, 10 Thornhaugh Street, Russell Square London WC1H OXG, 1 Essex Co

9AR, United Kingdom –

against 1. the domestic applicability of

a) the Decision of the Governing Council of the European Central Bank of 22 January 2015 and Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 (ECB/2015/10) on a secondary markets public sector asset purchase programme (PSPP), in conjunction with

   - Decision (EU) 2015/2101 of the European Central Bank of 3 September / 5 November 2015 amending Decision (EU) 2015/774 (ECB/2015/10) on a secondary markets public sector asset purchase programme (ECB/2015/10),

   - Decision (EU) 2015/2464 of the European Central Bank of 3 December / 16 December 2015 amending Decision (EU) 2015/774 (ECB/2015/10) on a secondary markets public sector asset purchase programme,

   - Decision (EU) 2016/702 of the European Central Bank of 10 March / 18 April 2016 amending Decision (EU) 2015/774 (ECB/2015/10) on a secondary markets public sector asset purchase programme,

b) the Decisions of the Governing Council of the European Central Bank of 4 September 2014 and 2 October 2014 and Decision (EU) 2015/5 of the European Central Bank of 19 November 2014 (ECB/2014/45) on the establishment and implementation of an asset-backed securities purchase programme (ABSPP), in conjunction with

   - Decision (EU) 2015/1613 of the European Central Bank of 10 September 2015 (ECB/2015/31) amending Decision (EU) 2015/5 (ECB/2014/45) on the implementation of an asset-backed securities purchase programme,

c) the Decisions of the Governing Council of the European Central Bank of 4 September 2014 and 2 October 2014 and Decision (EU) 2015/5 of the European Central Bank of 15 November 2014 (ECB/2014/45) on the establishment and implementation of the third covered bond purchase programme (CBPP3),

d) the Decisions of the Governing Council of the European Central Bank of 10 March / 21 April 2016 and Decision (EU) 2016/948 of the European Central Bank of 1 June 2016 (ECB/2016/416) on the implementation of the corporate sector purchase programme (CSPP),

2. the participation of the *Bundesbank* in the implementation of the decisions on asset purchase programmes listed in nos. 1 a) through d) above,

3. the omission on the part of the Federal Government and the German *Bundestag* to actively take steps to ensure the rescission of the decisions on asset purchase programmes listed in nos. 1 a) through d) above, and to take effective measures ensuring that the Federation's liability arising from the continued implementation of these decisions is as limited as possible

– 2 BvR 1651/15 –,

III. of Dr. G(…),

- authorised representative: Prof. Dr. Dietrich Murswiek,
Lindenaustraße 17, 79199 Kirchzarten –

against the inaction on the part of the Federal Government in relation to the Asset Purchase Programme (APP) of the European Central Bank and in relation to the practice of organs of the European Central Bank in respect of conflicts of interests

– 2 BvR 2006/15 –,

IV. 1. of Prof. Dr. v. St(…),

2. of Prof. Dr. H(…),

3. of Mr M(…),

4. of Mr v. E(…),

5. of Dr. G(...),

6. of Ms M(…),

7. of Dr. H(…),

8. of Dr. St(…),

9. of Prof. Dr. K(…),

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

against 1. the Public Sector Purchase Programme (PSPP), as announced by the European Central Bank on 22 January 2015, approved by Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 and entered into force on 15 May 2015, on a secondary markets public sector asset purchase programme, (ECB/2015/10) in conjunction with the expansions decided on 3 December 2015 and 10 March 2016 and specified on 21 April [2016],

2. the participation of the *Bundesbank* in the implementation of the Public Sector Purchase Programme (PSPP) of the European Central Bank, especially the expansions set out in the European Central Bank's Decisions of 3 December 2015, 10 March 2016 and 21 April 2016,

3. the inaction of the *Bundesbank* in relation to the Public Sector Purchase Programme (PSPP) of the European Central Bank, and in particular its expansions set out in the European Central Bank's Decisions of 3 December 2015, 10 March 2016 and 21 April 2016

a n d the application for a preliminary injunction of 24 May 2017

– 2 BvR 980/16 –

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Voßkuhle,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

König,

Maidowski,

Langenfeld

held on 18 July 2017:

I. The proceedings are suspended.

II. In accordance with Article 19(3)(b) of the Treaty on the European Union and Article 267(1)(a) of the Treaty on the Functioning of the European Union, the following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

1. **Does Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10), as amended by Decision (EU) 2015/2101 of the European Central Bank of 5 November 2015 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2015/33), Decision (EU) 2016/702 of the European Central Bank of 18 April 2016 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2016/8) and Decision 2016/1041 of the European Central Bank of 22 June 2016 on the eligibility of marketable debt instruments issued or fully guaranteed by the Hellenic Republic and repealing Decision (EU) 2015/300 (ECB/2016/18), or the manner and method of its implementation, violate Article 123(1) of the Treaty on the Functioning of the European Union?**

   In particular, is it a violation of Article 123(1) of the Treaty on the Functioning of the European Union if, under the secondary markets public sector asset purchase programme (PSPP),

a. **details of the purchases are communicated in a way that establishes *de facto* certainty on the markets that the Eurosystem will purchase part of the bonds to be issued by the Member States?**

b. **even after the event, no details are given about compliance with minimum periods between the issuing of a debt instrument on the primary market and its purchase on the secondary market, with the result that a judicial review is not possible in this regard?**

c. **none of the bonds purchased are resold but rather held until maturity and thus withdrawn from the market?**

d. **the Eurosystem purchases marketable debt instruments with a negative yield at maturity?**

2. **Does the Decision referred to in no. 1 above violate Article 123 TFEU, at the very least, when, in view of changes in conditions on the financial markets and in particular as a result of a shortage of bonds available for purchase, its continued implementation requires that the originally applicable purchase rules be steadily relaxed and that the restrictions laid down in the case-law of the Court of Justice with regard to a bond purchase programme such as the PSPP lose their effect?**

3. **Does the current version of Decision (EU) 2015/774 of the European Central Bank of 4 March 2015, referred to in no. 1 above, violate Article 119 and Article 127(1) and (2) of the Treaty on the Functioning of the European Union as well as 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 set out in these provisions and thus encroaches upon the competences of the Member States?**

   Does the European Central Bank exceed its mandate, in particular, by the fact that

   a) on account of the volume of the PPSP, which on 12 May 2017 amounted to EUR 1,534.8 billion, the Decision referred to in no. 1 above significantly influences the refinancing conditions of the Members States

   b) in light of the improvement in refinancing conditions of Member States referred to in lit. a above and its effect on commercial banks, the Decision referred to in no. 1 above not only has indirect economic consequences, but rather, its objectively ascertainable effects suggest that the programme in question pursues an economic policy objective with at least equal priority, in addition to its monetary policy aim?

   c) on account of its strong economic policy effects, the Decision referred to in no. 1 above violates the principle of proportionality?

   d) given the absence of a specific statement of reasons, it is not possible to review whether the Decision referred to in no. 1 has been necessary and proportionate on an ongoing basis during the over two-year period of its implementation?

4. **Does the current version of the Decision referred to in no. 1 above violate Article 119 and Article 127(1) and (2) TFEU and Articles 17 to 19 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank in any case because its volume and its over two-year long implementation and the resulting economic policy effects thereof give rise to a different assessment of the necessity and proportionality of the PSPP and thus, from a certain moment onwards, the Decision constituted an exceeding of the European Central Bank's monetary policy mandate?**

5. **Does the unlimited sharing of risks between national central banks of the Eurosystem in the event that the central governments and equivalent issuers default on bonds, which is possibly provided for in the Decision referred to in no. 1 above, violate Article 123 and Article 125 of the Treaty on the Functioning of the European Union as well as Article 4(2) of the Treaty on European Union, if this may require the recapitalisation of national central banks with funds drawn from the state budget?**

III. **In view of the application for a preliminary injunction lodged by complainant no. 5, it is requested that the referral for a preliminary ruling be subject to the expedited procedure pursuant to Article 105 of the Rules of Procedure of the Court of Justice..**

R e a s o n s :

[Excerpt from press release no. 70/2017 of 15 August 2017]

The PSPP is part of the Expanded Asset Purchase Programme (EAPP), a framework programme of the European Central Bank (ECB) for the purchase of financial assets. The PSPP accounts for – by far – the largest share of the EAPP's total volume. As of 12 May 2017, the EAPP had reached a total volume of EUR 1,862.1 billion, of which EUR 1,534.8 billion were allotted to the PSPP alone.

With their constitutional complaints, the complainants claim that, by way of launching the programme for the purchase of public sector securities, the European System of Central Banks (ESCB) violates the prohibition of monetary financing (Art. 123 of the Treaty on the Functioning of the European Union – TFEU) and the principle of conferral (Art. 5 of the Treaty on European Union – TEU, in conjunction with Arts. 119, 127 et seq. TFEU). Accordingly, the complainants submit that the German Bundesbank (Federal Central Bank) may not participate in the asset purchase programme and that the German *Bundestag* and the Federal Government are obliged to take suitable measures against the challenged programme.

[End of excerpt]

A. Facts of the Case

[…] 1-61

[Excerpt from press release no. 70/2017 of 15 August 2017]

The PSPP is part of the Expanded Asset Purchase Programme (EAPP), a framework programme of the European Central Bank (ECB) for the purchase of financial assets. The PSPP accounts for – by far – the largest share of the EAPP's total volume. As of 12 May 2017, the EAPP had reached a total volume of EUR 1,862.1 billion, of which EUR 1,534.8 billion were allotted to the PSPP alone.

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[End of excerpt]

[…]

B. On the validity of Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10) in its current version (hereinafter: PSPP Decision)

I. Relevance of referred questions

62 The referred questions nos. 1 to 4 are relevant for deciding the current proceedings. In the event that the PSPP Decision did constitute, in a sufficiently qualified manner, an exceeding of the mandate of the ECB and encroached upon the economic policy competences of the Member States and/or a violation the prohibition of monetary financing of Member State budgets, the applications in the current proceedings would be successful. In this case, the PSPP Decision would have to be qualified as an *ultra vires* act under German constitutional law (see 1 below). In this case, the inaction on the part of the Federal Government and the *Bundestag* would amount to a violation of the complainants' constitutional rights (see 2 below).

1. Ultra vires acts

63 a) For an act of the European Union (EU) to constitute a sufficiently qualified violation, it must manifestly exceed EU competences, resulting in a structurally significant shift in the distribution of competences to the detriment of Member States (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 126, 286 <304 et seq., 209>; 142, 123 <200 et seq. paras. 147 et seq.>). A shift of competences to the detriment of the Member States (cf. BVerfGE 126, 286 <309>) can only be found if the exceeding of competences carries considerable weight in relation to the principle of democracy and the sovereignty of the people. This is the case if it potentially changes the basis for the distribution of competences in the European Union, thus undermining the principle of conferral (cf. BVerfGE 142, 123 <201 and 202 para. 151> with further references). Such a case can be assumed if the exercise of the relevant 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 the application of an future developments clause (*Evolutivklausel*) (cf. Court of Justice of the European Union – CJEU, Opinion 2/94 of 28 March 1996, Accession to the ECHR, ECR 1996, I-1759, para. 30), so that action

on the part of the legislature would be required in Germany (cf. BVerfGE 142, 123 <201 and 202 para. 151>).

b) It would constitute a manifest and structurally significant exceeding of competences if the ECB acted outside its monetary mandate (aa) or if the PSPP violated the prohibition of monetary financing of Member State budgets (bb). 64

aa) If the ECB did exceed its monetary mandate, by way of the PSPP Decision, this would constitute an interference by the ECB with the economic policy competences of the Member States. Beyond the specific competences expressly assigned to the European Union (e.g., Art. 121, Art. 122, Art. 126 TFEU), economic policy under Title VIII falls within the area of competence of the Members States. Other than a few exceptions set out, in particular, in Part Three of the Treaty on the Functioning of the European Union, the competences of the European Union in the area of economic policy are essentially limited to coordinating policy measures adopted by the Member States (Art. 119(1) TFEU). The ECB is to merely support the general economic policies of the European Union (Art. 119(2), Art. 127(1) second sentence TFEU; Art. 2 second sentence ESCB Statute). The ECB does not have an independent mandate for economic policy. Assuming – without prejudice to the interpretation by the CJEU – that the PSPP Decision is to be qualified as an economic policy measure, it manifestly violates this distribution of competences. 65

Such an exceeding of competence would also probably be structurally significant. The considerable volume of the PSPP influences the refinancing conditions for Member States in a significant manner and thus affects the subject matters regulated in Art. 126 TFEU and in the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) as well as EU secondary law specifying these treaty provisions. [...] 66

bb) If the PSPP Decision and the specific manner of its implementation were to violate the prohibition of monetary financing of Member State budgets, this would also constitute a manifest and structurally significant exceeding of competences. 67

This violation would be manifest given that the Treaty on the Functioning of the European Union contains an explicit prohibition of monetary financing of Member State budgets, and it unequivocally excludes any competences of the ECB in this regard (cf. Art. 123(1) TFEU; CJEU, Judgment of 16 June 2015, Gauweiler, C-62/14, EU:C:2015:400, paras. 93 et seq.; Judgment of 27 November 2012, Pringle, C-370/12, EU:C:2012:756, paras. 123 et seq.). Such a violation would also be of a structurally significant nature. The current European integration agenda is based on an understanding of the monetary union as a community of stability; for the Federal Republic of Germany, this is an essential prerequisite for its membership in the monetary union. Most notably, this safeguards the German *Bundestag*'s overall responsibility for the budget (*haushaltspolitische Gesamtverantwortung*) (cf. further BVerfGE 129, 124 <181>; 132, 195 <243 and 244 paras. 115 and 116>; 134, 366 <394 para. 43>). 68

2. Duties on the part of German constitutional and state organs to take action or refrain from action

Ultra vires acts give rise to duties on the part of German state organs to take or refrain from action (see a and b below). These duties are justiciable before the Federal Constitutional Court to the extent that they derive from the *Bundestag*'s and the Federal Government's responsibility with respect to European integration (*Integrationsverantwortung*) (see c below). 69

a) German constitutional organs, administrative bodies, and courts may neither participate in the development nor in the implementation, execution or operationalising of *ultra vires* acts (cf. BVerfGE 89, 155 <188>; 126, 286 <302 et seq.>; 134, 366 <387 and 388 para. 30>; 142, 123 <207 para. 162>). This also applies to the *Bundesbank*. 70

b) Moreover, the German *Bundestag* and the Federal Government may not simply tolerate *ultra vires* acts of institutions, bodies, offices and agencies of the European Union. 71

They may, if possible, later legitimate an exceeding of competences by initiating – within the limits set by Art. 79(3) GG – an amendment of EU primary law (cf. BVerfGE 123, 267 <365>; 134, 366 <395 para. 49>) and, by way of the procedure set out in Art. 23(1) second and third sentences GG, 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 EU integration agenda, and – as long as the acts continue to have effect – to take suitable measures to restrict as far as possible the national effects of such acts (cf. BVerfGE 134, 366 <395 and 396 para. 49>). To this end, they must take suitable measures to ensure respect for 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>; 142, 123 <211 para. 170>). [...] 72

Concerning the Federal Government, such measures include, in particular, bringing legal action before the CJEU (Art. 263(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, proposing treaty amendments (cf. Art. 48(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(2) GG, BVerfGE 131, 152 <196>). Furthermore, depending on the case, it can also bring legal action on grounds of a violation of the principle of subsidiarity (Art. 23(1a) GG in conjunction with Art. 12 letter b TEU and Art. 8 of the Protocol on Subsidiarity), exercise its right of inquiry (Art. 44 GG), or hold a vote of no confidence (Art. 67 GG; cf. BVerfGE 142, 123 <211 and 212 para. 171>). 73

Given their responsibility with respect to European integration, the Federal Government and the *Bundestag* are also under a duty to monitor the implementation of the PSPP programme on an ongoing basis. The aim of this monitoring duty is to determine whether there is a specific threat to the federal budget – deriving in particular from the volume and the risk structure of the purchased bonds, which may change even after their purchase. [...] 74

c) The Federal Government's and the *Bundestag*'s duty to react is founded in objective law and requires that they, as a consequence of their responsibility with respect to European integration, 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; this objective duty corresponds to a subjective right on the part of the citizens rooted in Art. 38(1) first sentence GG (cf. BVerfGE 142, 123 <174 para. 83 and 209 and 210 paras. 166 and 167>) which can be asserted by way of constitutional complaint proceedings. 75

II. Interpretation of European Union law

There are doubts as to whether the PSPP Decision is compatible with the prohibition of monetary financing enshrined in Art. 123 TFEU (see 1. below). Moreover, the PSPP Decision might also violate Art. 119 and Art. 127(1) and (2) TFEU and Arts. 17 et seq. of the ESCB Statute on the grounds that, while formally pursuing monetary policy objectives, the PSPP has economic effects that lends it an economic policy dimension of at least equal weight (see 2. below). 76

1. Violation of the prohibition of monetary financing of Member State budgets

The prohibition of monetary financing of state budgets enshrined in Art. 123 TFEU also prohibits acts of circumvention (see a below). The PSPP Decision could give rise to violations in this regard (see b below). 77

a) Prohibition of monetary financing of Member State budgets

Art. 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 European Union and of Member States and from purchasing their debt instruments directly from them (CJEU, Judgment of 16 June 2015, Gauweiler, C-62/14, EU:C:2015:400, para. 94). Nevertheless, the Eurosystem is not, generally, precluded from purchasing bonds previously issued by a Member State from the creditors of that Member State (cf. CJEU, loc. cit., para. 95). Thus, Article 18.1 of the ESCB Statute 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 (cf. CJEU, loc. cit., para. 96). Nevertheless, the ESCB does not have authority to purchase government bonds on secondary markets under 78

conditions which would, in practice, mean that its action had an effect equivalent to that of a direct purchase of government bonds from the public bodies and institutions of the Member States, thereby undermining the effectiveness of the prohibition in Article 123(1) TFEU. (cf. CJEU, loc. cit., para. 97). The objective of Article 123 TFEU is to encourage the Member States to follow a sound budgetary policy, by 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 (cf. CJEU, loc. cit., para. 100). It is not permissible to resort to purchases on the secondary market in order to circumvent the objective pursued by Art. 123 TFEU (CJEU, loc. cit., para. 101). Therefore, any programme relating to the purchase of government bonds on the secondary market must provide sufficient guarantees to effectively ensure observance of the prohibition of monetary financing (cf. CJEU, loc. cit., paras. 102 et seq.). Market operators who would potentially purchase government bonds on the primary market must not know for certain that the ESCB is going to purchase those bonds within a certain period and under conditions allowing these market operators to act, de facto, as intermediaries for the ESCB for the direct purchase of those bonds (cf. CJEU, loc. cit., para. 104). Therefore, the Member States may not, in determining their budgetary policy, be afforded certainty that the ESCB will at a future point purchase their government bonds on secondary markets (cf. CJEU, loc. cit., para. 113). In addition, a minimum period must be observed between the issue of a security on the primary market and its purchase on the secondary market. Any prior announcement concerning either the ESCB's decision to carry out such purchases or the volume of the envisaged purchases must be ruled out (cf. CJEU, loc. cit., para. 106). Purchased bonds may only in exceptional cases be held until maturity (cf. CJEU, loc. cit., paras. 117 and 118). Lastly, purchases must be limited or suspended, and purchased bonds must be remarketed, should continuing the intervention or further holding the bonds no longer be necessary for achieving the monetary policy objectives (cf. CJEU, loc. cit., paras. 112 et seq., paras. 117 et seq.).

79 The Federal Constitutional Court presumes that the CJEU considers the conditions it developed [in its case-law], and which limit the scope of the ECB policy decision on the Outright Monetary Transactions (OMT) programme of 6 September 2012, to be legally binding criteria. Against that background, the Federal Constitutional Court further presumes that non-compliance with these criteria, also with regard to other programmes relating to the purchases of government bonds, would be considered by the CJEU to constitute an exceeding of competences, in violation of Art. 5(1) second sentence, (4) TEU (cf. BVerfGE 142, 123 <222 para. 192>).

b) Application of the law to the present case

80 The PSPP concerns government bonds issued by Member States, state-owned enterprises and other state institutions as well as debt securities issued by European institutions. While these bonds are exclusively purchased on the secondary market, the PSPP Decision may nevertheless be in violation of Art. 123 AEUV, namely because

details of the purchases are announced in a manner that could create *de facto* certainty on the markets that issued government bonds will, indeed, be purchased by the Eurosystem (see aa below); because it is not possible to verify compliance with certain minimum periods between the issuance of securities on the primary market and their purchase on the secondary market (see bb below); because to date all purchased bonds were – without exception – held until maturity (see cc below); and furthermore because the purchases include bonds that, from the outset, return a negative yield (see dd below).

aa) De facto certainty regarding the purchase of bonds by the Eurosystem

It is true that market operators do not have *legal* certainty that a specific bond, issued by euro area Member States and identifiable by International Securities Identification Number (ISIN), will be purchased by the Eurosystem. However, given the modalities of the PSPP that were expressly announced (see (1) below) and the modalities that can be deduced from the purchase practices (see (2) below), market operators could have sufficient *de facto* certainty that the Eurosystem is indeed going to purchase the issued bonds. 81

(1) Announced modalities

Pursuant to Art. 3(1) of the Decision of 4 March 2015, eligible debt securities are, in principle, any euro-denominated marketable debt securities issued for purchases by the Eurosystem central banks by central governments of a Member State whose currency is the euro, by recognised agencies located in the euro area, by international organisations located in the euro area or by multilateral development banks located in the euro area. Under the EAPP, it was initially announced that the monthly purchase volume would amount to EUR 60 billion, starting March 2015; this was later increased to EUR 80 billion as of April 2016 (cf. recital 7 of the Decision of 4 March 2015 and recital 3 of the Decision of 18 April 2016). The resulting purchases of debt securities amounted to EUR 780 billion by March 2016, and an additional EUR 960 billion by March 2017, and finally an additional EUR 120 billion from April to May 2017 after the monthly pace had been scaled back to EUR 60 billion from April 2017 on (cf. ECB, press release of 8 December 2016). At the end of May 2017, the total volume of the EAPP thus amounted to EUR 1,860 billion. The PSPP accounted for the largest share of purchases: on 12 May 2017, the Eurosystem held assets within the PSPP worth EUR 1,534.8 billion (cf. *Bundesbank*, Monthly Report May 2017, p. 28). 82

Art. 6(1) of the Decision of 4 March 2015 in conjunction with Art. 1 no. 3 of the Decision of 18 April 2016 determining the allocation of portfolios under the PSPP establishes that government bonds and bonds issued by national recognised agencies currently account for 90% of the PSPP: given that 10% of these bonds are purchased by the ECB pursuant to Art. 6(2) of the Decision of 4 March 2015 in conjunction with Art. 1 no. 4 of the Decision of 18 April 10, it follows that purchases by national central banks of government bonds and bonds issued by national recognised agencies ac- 83

count for 80% of the total volume of the PSPP. Pursuant to Art. 6(2) second sentence of the Decision of 4 March 2015 in conjunction with Art. 1 no. 4 of the Decision of 18 April 2016, the distribution of purchases across jurisdictions shall be according to the key for subscription to the ECB's capital as referred to in Article 29 of the ESCB Statute. In addition, Art. 5 of the Decision of 4 March 2015 in conjunction Art. 1 no. 2 of the Decision of 18 April 2016 set an issue share limit per ISIN applicable to marketable debt securities as well as an aggregate limit of an issuer's outstanding securities in respect of debt securities eligible for central bank purchase.

Based on this information alone, it is established that national issuers provide 90% of the bonds purchased under the PSPP. Moreover, it is established that within this 90% share, bonds are purchased from issuers across the various jurisdictions in accordance with the ECB capital key. These purchases are primarily carried out by the respective national central banks, while purchases by the ECB account for a 10% share of the total volume of the ECB. 84

Based on the expressly announced modalities, it can be deduced, for example, that the value of bonds purchased monthly from German issuers amounts to 23.7% of the total monthly purchase volume of the PSPP. The Bundesbank currently holds 1,948,208,997.34 Euro which constitutes a 17.9973% share of the paid-up capital of the ECB (cf. http://www.ecb.europa.eu/ecb/orga/capital/html/index.en.html). However, this share must be weighted, since, firstly, Member States with a non-euro currency have also (partially) paid up their allotted capital share yet the national central banks of these Member States do not participate in the EAPP. Accordingly, the 100% reference value for calculating the EAPP shares of national central banks participating in the Eurosystem must be based on the capital shares paid up – only – by the Eurosystem Member States. Secondly, bonds are purchased only from 18 of the 19 Member States whose currency is the euro given that, at least until 28 July 2016, Greek bonds were not eligible and have not been purchased under the programme. The respective capital shares of these 18 Member States – in total 68.3583% of the paid-up capital of the ECB – constitute the 100% reference volume for calculating the national central banks' respective shares in the implementation of the PSPP. On this basis, the share attributed to German issuers can be calculated to be 23.6951%. 85

(2) Modalities that can be deduced from the purchase practice

A few months after the commencement of the PSPP in March 2015, it was already possible for market operators to discern, based on the actual bond purchases conducted, the share of the PSPP in the EAPP as well as the ratio of government bonds vis-à-vis bonds issued by public entities within the Member States and, based thereon, to calculate the monthly purchase volume of the PSPP and the share attributable to national bonds in this regard. 86

The monthly purchase pace under the EAPP, which was initially set at EUR 60 billion, was subject to seasonal fluctuations. For instance, purchases decreased during the holiday seasons in August and December 2015, only to increase again after- 87

wards. These seasonal fluctuations were also announced by the ECB in advance. On average, the purchase volume remained within the envisaged range. In the period from March 2015 to March 2016, the average volume of bond purchases per month amounted to EUR 60.475 billion. From the outset, the PSPP continuously accounted for approximately 80% of the EAPP purchases. Based on this information, the euro value of bonds purchased by the national central banks can be calculated as follows: 80% of the EUR 60 billion monthly volume equals EUR 48 billion. For the German bonds with a calculated share of 23.6951%, the monthly volume amounts to EUR 11.37 billion based on the announced information. In the period from March 2015 to March 2016, the actual monthly purchases were, on average, commensurate with this figure.

Even after the monthly purchase pace under the EAPP had been increased to EUR 80 billion in April 2016, the share attributed to the PSPP remained, for the most part, stable. The monthly purchase pace ranged from EUR 85.1 billion to EUR 85.4 billion, with fluctuations in July 2016 (EUR 80.5 billion) and August 2016 (EUR 60.5 billion). The share of the EAPP attributed to the PSPP was initially 93.3%, then fell to 82-85%, and subsequently stabilised at approximately 80% of the EAPP. 88

It is even possible to draw detailed conclusions on which specific bonds that fulfil the PSPP eligibility criteria will be purchased within the available purchase volume and the maximum purchase limit of 33% per issuer. On the market, comprehensive information is available on the eligibility criteria of the bonds – most notably maturity and yield – given that analysts review the yield returned by the various government bonds with different maturities as well as the market volume of these bonds. Therefore, it can be assumed that the total volume of bonds available on the market as well as their characteristics are known. What is relevant here is that the supply of bonds eligible for the PSPP is scarce, as the bond maturity must range between 2 and 31 years and the minimum yield must be -0.4% (as of January 2017, the permissible maturity range was broadened to one to 31 years). According to analysts' and press reports, 62% of the federal bonds meeting the relevant maturity requirement were no available for purchase (cf. http://www.institutional-money.com/news/uebersicht/headline/ezb-in-der-zwickmuehle-buende-knapp-kapitalschluessel-bei-qe-wackelt-51507/newsseite/1/). In October 2016, more than half of all government bonds on the market carried a negative yield, with close to 30% returning a yield of less than -0.4%, rendering them ineligible for the PSPP (cf. Allianz, QE Monitor, 7 October 2016, p. 6). In Germany, the share of eligible bonds available for purchase was reportedly exhausted in February 2017 (cf. LBBW FITS No. 40 of 7 October 2016, p. 21; German Council of Economic Experts – *Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung*, Annual Report 2016/17, para. 382; cf. also Frankfurter Allgemeine Zeitung of 6 December 2016, p. 18: "German bonds meeting current eligibility criteria will reportedly be exhausted as of summer 2017" [original quote in German]). It is expected that in the course of 2017, the available stock of Finnish (cf. Allianz, QE Monitor, 7 October 2016, p. 14) as well as Dutch, Austrian, 89

Irish, Spanish and Portuguese bonds will be exhausted (cf. LBBW FITS No. 40 of 7 October 2016, p. 21). Even the Bundesbank reports that “the market signals an impending scarcity of government bonds” [original quote in German], concerning not only securities issued by the Federation but also those issued by the French Republic (cf. Bundesbank, Monthly Report November 2016, pp. 47 and 48).

Due to the scarcity of eligible bonds, the probability that bonds will be purchased comes close to *de facto* certainty; this applies all the more because the maximum purchase limit – 33 % per issuer – is not determined based on the share of the issue available on the secondary market, but rather based on the total issue volume, identified by ISIN (cf. Art. 5(1) first sentence of the Decision of 4 March 2015 as amended by the Decision of 5 November 2015). 90

(3) Virtual certainty among market operators

In light of these parameters, issuers and other market operators could expect with certainty that, subject to the maximum share limit, the bonds will indeed be purchased. This gives rise to the question whether this leads to a distortion of market conditions, weakening incentives for states to pursue sound budget policy. This potentially concerns not only cases where there is absolute certainty that specific bonds will be purchased by the Eurosystem, but also cases of sufficient certainty. In this regard, the question should not be whether the necessary degree of certainty applied to all bonds. Rather, it should suffice that one Member State is sufficiently sure that a specific share of its bonds will be purchased. Art. 123(1) TFEU goes beyond the prohibition of monetary financing of all state budgets, prohibiting the financing of even one single State. 91

It is doubtful whether this is refuted by the argument submitted by the ECB in its statement of 15 November 2016 that there is no *legal* obligation on the part of the Eurosystem central banks to purchase bonds with a specific ISIN. For the purposes of determining whether the prohibition of monetary financing of state budgets is violated, it is already clear from the wording of Art. 123(1) TFEU that what matters is the actual purchase, rather than the existence of a legal obligation. Thus, the question arises whether, despite the lack of a legal obligation to purchase bonds, the parameters described above lead to *de facto* certainty and that as a result, the activities of the Eurosystem under the PSPP essentially have the same effect as the direct purchase of government bonds from the public entities and institutions of the Member States. In this regard, the decisive factor is whether market operators purchasing government bonds on the primary market ultimately have the certainty that the Eurosystem will purchase those bonds within a foreseeable time and under conditions so as to allow those market operators to act, *de facto,* as intermediaries for the ESCB in facilitating the direct purchase of those bonds. 92

aa) Impossibility of verifying compliance with certain minimum periods

Included among the safeguards seeking to prevent purchases of government bonds 93

in violation of the prohibition of monetary financing of state budgets pursuant to Art. 123(1) TFEU is the requirement that certain minimum periods be observed between the issuance of a security on the primary market and its purchase on the secondary market (cf. CJEU, Judgment of 16 June 2015, Gauweiler, C-62/14, EU:C:2015:400, paras. 106 and 107). In principle, the PSPP stipulates the existence of such a minimum period. Pursuant to Art. 4(1) of the Decision of 4 March 2015, the purchase of new or tapped issuances and of marketable debt instruments with a remaining maturity that is close in time, before or after, to the maturity of the marketable instruments to be issued shall not be permissible until after a period determined by the ECB Governing Council ("blackout period") has lapsed, in order to permit the formation of a market price for eligible securities.

94 However, details on the specific nature of these periods remain unknown. In their statements submitted to the Federal Constitutional Court, the ECB and the *Bundesbank* explained that details are not disclosed so as not to influence the formation of market prices. In contrast, the CJEU has emphasised the fundamental importance of judicial review especially with regard to cases such as the one at hand where an EU institution enjoys broad discretion; accordingly, the CJEU held that the statement of reasons as required by Art. 296(2) TFEU must be provided in a manner that enables the person concerned to ascertain the reasons for the measure and to enable the CJEU to exercise its power of review (cf. CJEU, loc. cit., para. 70).

95 In view of this, it certainly stands to reason that the disclosure of details on the mandatory minimum periods should not undermine the objective of market price formation. This does not, however, rule out that the statement of reasons required under Art. 296(2) TFEU be provided *ex post* in order to allow for a judicial review of those safeguards the non-compliance of which would amount to a circumvention of the prohibition of monetary financing of state budgets. The PSPP has been running for more than two years, its end is not in sight, and the ECB has not yet provided any statement of reasons in this regard; thus, it is doubtful whether the requirements developed by the CJEU for preventing violations of the prohibition of monetary financing of state budgets are fulfilled by the current practice that, due to the non-disclosure of information, makes judicial review of compliance with the minimum periods impossible.

bb) Holding bonds until maturity

96 In its Judgment of 16 June 2015 (Gauweiler, C-62/14, EU:C:2015:400, para. 117), the CJEU assumed that the impact of a bond purchase programme on the impetus to follow a sound budget policy was limited by the fact that the purchased bonds could be sold at any time. Based thereon, the CJEU concluded that the consequences of withdrawing those bonds from the market were potentially of a temporary nature. Following this, the Federal Constitutional Court held in its OMT Judgment of 21 June 2016 that the circumvention prohibition under Art. 123(1) TFEU is not violated if, *inter alia*, purchased bonds are only exceptionally held until maturity (cf. BVerfGE 142, 123 <227 and 228 para. 202>).

To date – according to the statements submitted by the ECB and the *Bundesbank* – bonds purchased under the PSPP have not been remarketed. Art. 1 of the Decision of 4 March 2015 merely provides that the PSPP is a programme under which central banks of the Eurosystem purchase eligible marketable debt securities on the secondary markets under specified conditions. It does not expressly provide for the sale thereof. The ECB and the *Bundesbank*, in their statements submitted to the Federal Constitutional Court, presume that selling the bonds at any time is *legally* possible. However, the programme's monetary policy objective could be seen as an indication that – at least for the duration of the programme – bonds will not be sold given that each sale would reduce the money supply, which the EAPP in general and the PSPP in particular seek to increase. Accordingly, the *Bundesbank* and the ECB contend that in the foreseeable future, sales of assets purchased under the EAPP are not to be expected (*Bundesbank* statement before the Federal Constitutional Court of 15 November 2016, answer to question no. 2; ECB statement before the Federal Constitutional Court of 15 November 2016, answer to question no. 2). To date, the *Bundesbank* has not resold any of the assets purchased under the PSPP. According to its own statement, so far the ECB has only exceptionally sold individual assets for technical reasons, e.g., in order to comply with a maximum limit. It further submitted that the decision on whether assets would be sold after the end of the programme was contingent upon monetary policy considerations. From these submissions, the Federal Constitutional Court gathers that under the ESPP and its subsidiary programmes, the sale of assets is considered legally permissible but has not yet been put into practice. 97

Against this background, and assuming that the findings of the Judgment of 16 June 2015 (Gauweiler, C-62/14, EU:C:2015:400) apply accordingly, the question arises, on the one hand, whether the ECB is entitled, at its discretion, to prolong the duration of the programme, and to effectively suspend the obligation under Art. 18(1) ESCB Statute during this period. On the other hand, there is the question of what will happen once the programme ends. It seems reasonable to assume that, in this case, not all bonds would be sold at once given that such a sudden surge in supply would likely cause a market collapse. Yet, if the Eurosystem did not, even after the end of the programme, begin decreasing the quantities of bonds held by it, this would mean that the sovereign debts securitised in the relevant bonds would permanently remain off the market. These sovereign debts would then be bound in the Eurosystem and become almost entirely irrelevant for the markets – especially with regard to the credit rating of the issuing Member States and thus also the refinancing conditions available to them. The relevant sovereign debts would be neutralised with permanent effect. Even if it is to be assumed that quantitative easing is an instrument that must, in principle, be at the disposal of the Eurosystem and that the holding of bonds until maturity is not categorically prohibited under Art. 18(1) ESCB Statute, it still remains that the relationship between the rule and the exception regarding the sale as opposed to the holding of bonds until maturity would be reversed. In this case, it stands to reason that the states would no longer have an incentive to follow a sound budget policy. 98

cc) Purchases of bonds with a negative yield

Pursuant to Art. 3(5) of the PSPP Decision of 4 March 2015, purchases of nominal marketable debt instruments at a negative yield at maturity above the deposit facility rate (currently -0.4%) are, in principle, permissible; since 1 January 2017, it is even permissible, in principle, to purchase securities with a yield at maturity that is below this rate. Due to the eligibility of bonds with a negative yield at maturity and their link to the deposit facility rate, purchases under the PSPP currently include government bonds that yield at least -0.4%, which is clearly a negative return. As a result, Member States issuing bonds with a negative yield not only borrow repayable money on the capital markets, they also receive nominal returns generated by the negative yield. Since under the PSPP framework issuers and other market operators could potentially come to expect with certainty that government bonds will be purchased up to the maximum limit, it can be assumed that negative interest rates are passed on to the national central banks purchasing on the secondary market and that the national central banks finance the returns received by the Member States from issuing bonds at a negative yield. This would undermine the objective of Art. 123 TFEU as in this approach the negative interest rate provides relief for national budgets and thus creates considerable incentives to take out loans. In this respect, it also cannot be argued that the risk of loss is inherent in every purchase on the secondary market; the relevant considerations of the CJEU (cf. CJEU of 16 June 2015, Gauweiler, C-62/14, EU:C:2015:400, para. 126) refer to the [general] risk of loss related to market movements whereas, in the present case, due to the negative interest, losses and the related budget relief for the issuers are certain from the outset. 99

2. Exceeding of the ECB mandate

As regards the ESCB in general and the ECB in particular, Art. 119 and Arts. 127 et seq. TFEU as well as Art. 17 et seq. ESCB Statute confer upon these institutions a mandate that is, in principle, limited to monetary policy (cf. BVerfGE 89, 155 <208 and 209>) (see a below). Beyond this, the ESCB is only authorised to support the general economic policy of the European Union (see b below). Based on these principles, it is doubtful whether the PSPP Decision can still be considered as falling within the ECB mandate, given its volume and its implementation over more than two years and the effects resulting therefrom (see c below). 100

a) Limited mandate with regard to monetary policy

The principle of conferral is applicable to the ESCB's competences (see aa below). Pursuant to the Treaty on the European Union and the Treaty on the Functioning of the European Union, the ECB is competent with regard to monetary policy matters (see bb below). With few limited exceptions, the competence for economic policy matters rests with the Members States (see cc below). 101

aa) Independence of the ECB and the principle of democracy

The distribution of competences between the European Union and the Member States is informed by the principle of conferral (Art. 5(1) and (2) TEU). This also holds true for such functions and powers that the Treaties confer upon the ESCB, which is comprised of the ECB and the national central banks (Art. 282(1) first sentence TFEU). In order to satisfy democratic requirements, this mandate must be narrowly restricted (see 1 below). Compliance with these restrictions is subject to full judicial review; the review is primarily incumbent upon the CJEU, vested with the function of ensuring that in the interpretation and application of the Treaties the law is observed (Art. 19(1) TEU) (see 2 below). 102

(1) The independence enjoyed by the ECB and the national central banks in the exercise of the powers conferred to them (Art. 130, Art. 282(3) sentences 3 and 4 TFEU as well as Art. 88 second sentence GG) is in conflict with requirements pertaining to the democratic legitimation of political decisions. It had been repeatedly affirmed in the case-law of the Federal Constitutional Court that the transfer of monetary policy competences to an independent European Central Bank, and the resulting drops in influence (*Einflussknicke*), are still compatible with democratic principles on the grounds that it takes into account the proven and scientifically supported particularity of monetary policy, which is that an independent central bank is a better guarantor for monetary stability, and thus for the general economic foundation of the budgetary state policy, than organs whose activities are contingent upon monetary supply and monetary value, and which rely on the short-term approval of political actors. The endorsement under constitutional law of the ECB's independence hinges on the requirement that its mandate be interpreted restrictively. The ECB mandate is primarily limited to matters of monetary policy serving the aim of stability; it cannot be extended to other areas of policy (cf. for the German Constitution Art. 88(2) GG; BVerfGE 89, 155 <208 and 209>; 97, 350 <368 and 369>; 142, 123 <220 and 221 paras. 188 and 189>). 103

(2) The independence of the ECB does not bar a judicial review regarding the delineation of its competences (cf. CJEU, Judgment of 10 July 2003, C-11/00, EU:C:2003:395, paras. 135 et seq.). [...] 104

[…] 105

bb) Limitation to monetary policy

Pursuant to Art. 3(1) lit. c TFEU, the European Union has the exclusive competence for monetary policy for the euro area Member States. The Treaties contain neither a definition of monetary policy nor a definition of exchange-rate policy (cf. Art. 119(2) TFEU; CJEU, Judgment of 27 November 2012, Pringle, C-370/12, EU:C:2012:756, paras. 48, 53). This competence is, however, further specified in the Treaty on the Functioning of the European Union and the ESCB Statute. 106

The primary objective of the ESCB is to maintain price stability (Art. 127(1) first sen- 107

tence, Art. 282(2) second sentence TFEU). Pursuant to Art. 127(2) TFEU, the basic tasks to be carried out by the ESCB are to define and implement the monetary policy (first indent), to conduct foreign-exchange operations (second indent), to hold and manage the official foreign reserves of the Member States (third indent), to promote the smooth operation of payment systems (fourth indent). The ESCB Statute specifies the functions and operations of the ESCB in the area of monetary policy in Chapter IV [...].

cc) Distinguishing monetary policy and economic policy

The wording and systematic concept as well as the spirit and purpose of the Treaties distinguish matters of a monetary policy nature from economic policy matters, the latter being primarily the responsibility of the Member States. In doing so, decisive factors include the aim of a measure which is to be determined objectively, the means chosen with a view to achieving this aim as well as their connection to other provisions. In delineating competence, the decisive factor is whether it directly pursues economic policy objectives. In *Pringle*, the CJEU confirmed this in relation to the ESM, identifying that this mechanism seeks to safeguard the stability of the euro area as a whole. It held that 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 (cf. CJEU, Judgment of 27 November 2012, Pringle, C-370/12, EU:C:2012:756, paras. 56, 97). This legal view was affirmed by the CJEU in *Gauweiler*. However, the CJEU also observed that simply because a programme could to a certain degree further economic policy objectives does not mean that it must be treated as an economic policy measure, given that it follows from Art. 119(2), Art. 127(1) and Art. 282(2) TFEU that, without prejudice to the objective of price stability, the ESCB is competent to support the general economic policies in the Union (cf. CJEU, Judgment of 16 June 2015, Gauweiler, C-62/14, EU:C:2015:400, paras. 58 and 59). 108

In delineating competences, however, what must be taken into account is not only the objective pursued but also the means chosen and its effects. According to the case-law of the CJEU, monetary policy measures include setting the key interest rates for the euro area or issuing euro coins and notes (cf. CJEU, Judgment of 27 November 2012, Pringle, C-320/12, EU:C:2012:756, paras. 95 and 96). In contrast, granting financial assistance to a Member State “clearly” does not fall within monetary policy (cf. CJEU, loc. cit., para. 57). It follows that if and to the extent that the ESCB grants financial assistance, it engages in economic policy in a manner that the European Union is prohibited from doing. 109

Ultimately, it comes down to how the measure in question stands in relation to other provisions. In particular, where a measure refers to other provisions or forms part of a comprehensive framework consisting of several individual measures, this may provide an indication for qualifying the measure as being of economic policy nature or monetary policy nature, respectively. […] 110

In *Gauweiler*, the CJEU emphasised that according to Articles 119(2) TFEU and 127(1) TFEU in conjunction with Article 5(4) TEU, 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 (cf. CJEU, Judgment of 16 June 2015, Gauweiler, C-62/14, EU:C:2015:400, para. 66). The CJEU did afford the ESCB broad discretion in relation to the OMT programme, as it must make choices of a technical nature and undertake forecasts and complex assessments in this regard (cf. CJEU, loc. cit., para. 68). At the same time, however, the CJEU emphasised that in cases where an EU institution enjoys broad discretion, a review of compliance with certain procedural guarantees is of fundamental importance. According to the CJEU, these 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 (cf. CJEU, loc. cit., para. 69). 111

Control over budgetary policy is not, in any case, an element of monetary policy. The Treaties only assign the ESCB a very limited role in relation to economic and budgetary policy. [...] 112

b) Mere support of economic policy

Beyond the specific competences expressly allocated to the European Union (e.g. Art. 121, Art. 122, Art. 126 TFEU), the competence for economic policy under Title VIII rests with the Members States. Specifically, the Member States are competent for determining the objectives and choosing the means of economic policy (Art. 5(1), Arts. 120 et seq. TFEU). In this respect, Art. 2(3) and Art. 5(1) TFEU restrict the role of the Union in the area of economic policy to the adoption of coordinating measures (cf. CJEU, Judgment of 27 November 2012, Pringle, C-370/12, EU:C:2012:756, para. 64). The ESCB's mandate is limited to supporting, without prejudice to the objective of price stability, the general economic policy of the European Union (Art. 119(2), Art. 127(1) second sentence, Art. 282(2) third sentence TFEU; cf. CJEU, Judgment of 16 June 2015, Gauweiler, C-62/14, EU:C:2015:400, para. 59). The power to support the general economic policy of the Member States at the level of the European Union (Art. 127(1) second sentence TFEU) does not justify a steering influence of the Eurosystem over economic matters. 113

c) Application of the law in the present case

Based on these principles, there are strong indications that the PSPP Decision does not fall within the ECB mandate, given its volume and the duration of its implementation exceeding two years,. In the view of the Federal Constitutional Court, based on an overall assessment of the relevant delineation criteria, the PSPP Decision could no longer be qualified as a monetary policy measure but instead constitute a measure that is primarily of an economic policy nature. While it is true that the PSPP officially pursues a monetary policy objective and that monetary policy instruments are used to 114

achieve this objective (see aa below), the economic policy impacts stemming from the volume of the PSPP and the resulting foreseeability of purchases of government bonds, however, directly derive from the deliberate design of the programme itself (see bb below). The PSPP could thus prove to be disproportionate, as far as the underlying monetary policy objective is concerned (see cc below). In addition, the Decisions on which the programme is based lack comprehensible reasons that would allow for close monitoring, during the multi-year period envisaged for the implementation of these Decisions, of whether the programme continues to be necessary (see dd below).

aa) Objective and means

The PSPP Decision was conceived as part of a single monetary policy, which according to the ECB seeks to counteract deflation trends in the euro area and to increase inflation to a target below but close to 2%. Based on the assessment of the ECB, monetary policy measures implemented prior to the adoption of the PSPP Decision fell short of achieving the expected results. According to the ECB, at the time, most indicators of actual and expected euro area inflation (both headline measures and measures excluding the impact of volatile components such as energy and food) suggested a drift towards historical lows, and the increased potential of second-round effects on wage and price-setting stemming from a significant decline in oil prices (cf. recital 3 of the Decision of 4 March 2015). 115

In light of these risks, the proclaimed objective of the PSPP is to mitigate the risks to the outlook on price development by easing monetary and financial conditions, including those relevant to the borrowing conditions of euro area non-financial corporations and households. [...] Further, by virtue of its portfolio re-balancing effect, the sizeable purchase volume of the PSPP would contribute to achieving the underlying monetary policy objective of increasing provision of liquidity on the interbank market and of credit to the euro area economy (cf. […] recital 4 of the Decision of 4 March 2015). 116

It is the view of the Federal Court that objective of the PSPP to increase the inflation rate to close to but below 2% is, in principle, a permissible measure lending effect to the mandate of maintaining price stability. Safeguarding an appropriate monetary policy transmission also constitutes a matter of monetary policy (cf. CJEU, Judgment of 16 June 2015, Gauweiler, C-62/14, EU:C:2015:400, para. 47 et seq.). Due to the fact that the inflation rate hinges significantly on the spending of private households and the economy, the aim to increase liquidity for commercial banks and their clients may be regarded as a viable intermediate step en route to influencing the price increase. 117

This also holds true for the chosen means. Art. 18.1 ESCB Statute expressly allows for bond purchases by the ESCB. Therefore, monetary policy instruments covered by its mandate include, in principle, bond purchasing programmes (cf. CJEU, loc. cit., para. 54). 118

bb) Consideration of economic policy effects necessary

In the view of the Federal Constitutional Court it is doubtful, however, whether it is possible to distinguish between monetary and economic policy, and to determine the limits of the Eurosystem's mandate, solely by considering the objective of the measure and the means chosen. While solely indirect effects of monetary policy measures on economic policy may not per se suffice to qualify the measure in question as falling entirely within the area of economic policy (CJEU, loc. cit., paras. 52, 59), such effects can only be considered "indirect" when they are connected to the challenged measure only through additional intermediate measures and when they do not constitute consequences that are foreseeable with certainty. It might be untenable, however, to still consider economic policy effects to be "indirect" in nature if the economic policy effects of a measure are intended or deliberately accepted, and these effects are at least comparable in weight to the monetary policy objective pursued. Accepting the proclaimed objectives of the competent EU institutions and bodies, while granting wide margins of assessment to the entities and decreasing the intensity of judicial review, appears capable of enabling institutions, bodies, offices, and agencies of the European Union to decide autonomously upon the scope of the competences that the Member States have transferred to them (cf. BVerfGE 123, 267 <349 et seq.>). Such an understanding of competences does not sufficiently give consideration to the principle of conferral and the necessity of interpreting the ECB's mandate in a restrictive manner. Rather, it is necessary to conduct an overall assessment and evaluation, also taking into account factors contradicting the proclaimed objective (cf. BVerfGE 142, 123 <218 and 219 paras. 183 and 184>). 119

Beyond its proclaimed monetary policy objectives, and irrespective of the extent to which such objectives are achieved, the PSPP has considerable economic policy effects. Based on its sheer volume alone, the inevitable consequences of its monetary policy objectives are its considerable steering effects on the economy. The PSPP affects balance sheet structures in the commercial banking sector by transferring large quantities of Member State bonds, including high-risk ones, from the balance sheets of the Member States to the balance sheets of the ECB and national central banks. As a result, the economic situation of the banks is improved significantly and their credit rating increases. The mechanism allows banks to sell the Eurosystem high-risk securities that otherwise could have only been unloaded at a loss, if at all. The factual preponderance of economic policy that this brings about, could potentially result in the ECB exercising a steering influence in economic matters, thus undermining the distribution of competences of Chapter VIII of the Treaty on the Functioning of the European Union. 120

Moreover, the PSPP improves the refinancing conditions for the Member States. It enables the Member States to obtain loans on the capital market at much better conditions than would be available to them without the programme. Of course, the conduct of monetary policy will generally entail an impact on interest rates and bank refinancing conditions, which necessarily has consequences for the financing conditions 121

of the public deficit of the Member States (cf. CJEU, Judgment of 16 June 2015, Gauweiler, C-62/14, EU:C:2015:400, para. 110). Moreover, Art. 18 ESCB Statute expressly refers to the purchase of government bonds as a legitimate instrument of monetary policy (cf. CJEU, loc. cit., para. 54). Yet the question arises whether and to what extent the particularly large volume of the PSPP and the rather considerable economic policy effects resulting therefrom, as described above, could mean that the programme is to be qualified as predominantly of an economic policy nature. With an average monthly purchase pace of approximately EUR 48 billion starting in March 2015, and EUR 64 billion as of April 2016, it appears as though the impact on the refinancing conditions of the individual Member States were a deliberately accepted consequence of the PSPP. This impact is furthermore of such weight that it might be seen as superseding the monetary policy objectives. This applies all the more given that there is largely factual certainty – as explained above (cf. para. 80) – that the government bonds will indeed be purchased and that the euro area Member States are aware that these purchases improve the refinancing conditions available to them. In addition, it should be foreseeable for the ECB that the States will increase their borrowing in order to stimulate the economy by means of investment programmes; as discussed above, this is indeed largely what occurred (cf. para. 66). Thus, it could be concluded that the economic policy effects of the PSPP were not mere indirect effects of the monetary policy objectives pursued, but rather constituted an at least equally weighty aim pursued by the programme.

cc) Proportionality

There is no quantitative data available on the actual effects the purchasing of government bonds under the PSPP had on the development of inflation in the euro area. The PSPP did, however, at least achieve the effect, as explained above, that the euro area Member States can deliberately use low-yield government bonds as a means of budgetary policy and that the activities of commercial banks are factually subsidised. In light of these considerable economic policy effects, it is questionable whether the means chosen were still proportionate to achieving the proclaimed monetary policy objective (cf. para. 110). They are likely to be considered proportionate only if it can be ascertained that the ECB did weigh these monetary effects against the economic policy effects of the PSPP. Thus, there is a strong indication that tolerating the economic policy effects of the PSPP, which are problematic with regard to competence, could prove to be disproportionate in relation to the legitimate monetary policy objectives pursued. 122

dd) Requirement of a statement of reasons

Lastly, the decisions on which the programme and its implementation are based lack a specific statement of reasons. It is true that the ECB has continuously emphasised the importance of the PSPP for achieving its inflation target. The ECB did not, however, provide a specific statement of reasons regarding the necessity, scope and duration of the programme; in particular, no reasoning was provided showing a bal- 123

ancing of the intended monetary policy effects of the PSPP with the additional foreseeable economic policy effects. This also results in the fact that it is difficult, if not impossible, to determine when the programme can be expected to end.

C. Overall budgetary responsibility of the *Bundestag*

I. Relevance of referred questions

Referred question no. 5 is necessary for rendering a decision in the present case insofar as the complainant challenges the inaction on the part of the *Bundestag* and the Federal Government, claiming a potential violation of the constitutional identity as guaranteed in Art. 79(3) GG on the grounds that the PSPP entails considerable risks for the federal budget and affects the overall budgetary responsibility of the German *Bundestag.* 124

1. Domestic law

In principle, purchases of government bonds by the Eurosystem may lead to expenditures or losses of revenue that are relevant for the state budget. Open market operations are always accompanied by a risk of loss (cf. CJEU, Gauweiler, C-62/14, EU:C:2015:400, para. 125). 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*. This could – at least if it were lasting – undermine confidence in the performance of the *Bundesbank*, which constitutes an indispensable prerequisite for its functioning (see also ECB, Convergence Report 2014, p. 36). The same holds true for the ECB, whose loss allocation rule merely provides that losses may be offset against the general reserve fund and against the monetary income (cf. Art. 33.2 ESCB Statute). However, there is no provision on offsetting losses that exceed those funds (cf. BVerfGE 142, 123 <231 and 232 para. 216>). 125

The Federal Republic of Germany is constitutionally required to ensure the functioning of the *Bundesbank*. Art. 88 first sentence GG guarantees the institution of the *Bundesbank*, but is not limited to protecting its mere existence. Rather, the provision also encompasses the obligation to provide the *Bundesbank* with such assets as are necessary for it to fulfil its constitutional tasks, which are also specifically set down in Art. 88 second sentence 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 *Bundesbank*, which is a direct federal institution (*bundesunmittelbare Anstalt*) under public law (cf. § 2 BBankG). Therefore, should the *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 European Union law (cf. ECB, Convergence Report 2014, pp. 28 and 29; BVerfGE 142, 123 <232 and 233 para. 217>). 126

2. The PSPP provisions

In their statements submitted to the Federal Constitutional Court, the ECB and the *Bundesbank* contended that based on Art. 32.4 ESCB Statute, different forms of risk sharing between the ECB and national central banks were provided for in relation to the PSPP (cf. ECB, statement of 15 November 2016, pp. 6 et seq.; *Bundesbank*, statement of 15 November 2016, pp. 4 and 5): 127

?No risk sharing applies in respect of securities of national issuers that are purchased by the national central banks – i.e. 80% of the purchased bonds.

?A risk sharing limited to revenues that must be paid out to the national central banks (Art. 32.5 ESCB Statute) applies in respect of securities of national issuers that are purchased by the ECB – i.e. 10% of the purchased bonds. Therefore, losses incurred by the ECB under the PSPP affect the national central banks only insofar as the national central banks' share in monetary revenues is reduced or cut entirely (Art. 33.2 ESCB Statute). In this regard, it is not clear what would happen if the share in losses were to exceed the share in revenues.

?A full risk sharing applies in respect of bonds issued by international issuers and purchased under the PSPP. Losses incurred by one national central bank are distributed amount all other Eurosystem national central banks in accordance with the relevant capital key.

3. Significance for the constitutional identity

Currently it is not possible to determine with certainty whether, based on this risk sharing, the *Bundestag*'s right to decide on the budget (*Budgetrecht*), protected under Art. 20(1) and (2) GG in conjunction with Art. 79(3) GG, as well as its overall budgetary responsibility could be affected by the PSPP Decision and its implementation in terms of potential losses to be borne by the *Bundesbank*. 128

A violation of the Basic Law's constitutional identity would appear possible, however, in the event that the PSPP Decision created a mechanism that essentially entailed an assumption of liability contingent upon decisions freely made by third parties and the consequences of which could hardly be assessed in advance (cf. BVerfGE 129, 124 <179 et seq.>; 134, 366 <418 para. 102>); a mechanism of this nature would imply that the *Bundestag* is no longer the "master of its own decisions" and can no longer exercise its right to decide on the budget on its own authority (cf. BVerfGE 129, 124 <177>; 132, 195 <239>; 134, 366 <418 para. 102>). 129

In this respect, the complainants have plausibly argued that the legal foundations of the ESCB allow for changes in the risk sharing regime that would extend joint liability to also cover the other 80% of bonds purchased, which the national central banks buy from the national issuers of their own State and for which the current regime does not stipulate joint liability. In the event of default of bonds issued by a central government, it seems likely, if not inevitable, that the ECB Governing Council would react by adopting a decision pursuant to Art. 32.4 ESCB Statute that would bring about full risk 130

sharing. This would essentially lead to a re-distribution of risks on an unprecedented scale, which would exceed the ECB's mandate.

An unlimited risk sharing within the Eurosystem and the resulting risks for the profit and loss account of the national central banks would amount to a violation of the constitutional identity within the meaning of Art. 79(3) GG if it became necessary to provide recapitalisation for the national central banks through budgetary resources to such extent that approval by the German *Bundestag* would be required in accordance with the principles established by the Federal Constitutional Court in its case-law on the EFSF and the ESM (cf. BVerfGE 129, 124 <179 and 180>; 132, 195 <240 et seq. paras. 108 et seq.>; 134, 366 <418 para. 102>; 135, 317 <399 et seq. paras. 161 et seq.>; 142, 123 <230 and 231 paras. 211 et seq.>). Therefore, the success of the constitutional complaint at hand is contingent upon whether this form of a risk sharing can be precluded under primary law. 131

II. Interpretation of European Union law

Pursuant to Art. 32.4 ESCB Statute, the ECB Governing Council may decide that the national central banks be indemnified for specific losses arising from monetary policy operations undertaken for the ESCB. This could have adverse effects on the national central banks' profit and loss accounts and require them to increase their provisions accordingly (cf. [...] BVerfGE 142, 123 <231 and 232 para. 216>). In the financial year 2016, for instance, the *Bundesbank* increased its provisions for general risks, as part of its risk management, by EUR 1.75 billion to EUR 15.35 billion total. The reasons provided for this increase stated that the decisions of ECB Governing Council to expand the EAPP and the CSPP had created additional credit risks in the financial year 2016, and that these risks were only partially offset by the diminishing default risk stemming from securities covered by the now terminated SMP. In addition, the *Bundesbank* is expecting a further increase of its risk provisions in the 2017 annual accounts (cf. Bundesbank, Annual Report 2016, p. 76). 132

The decision-making of the ECB Governing Council concerning the manner and scope of risk sharing between the members of the ESCB is hardly specified in EU primary law. Consequently, the ECB Governing Council could modify the rules on risk sharing within the Eurosystem in a way that might result in risks for the profit and loss accounts of the national central banks and might also threaten the overall budgetary responsibility of national parliaments. Given that this type of risk sharing was already carried out under previous programmes (cf. regarding the SMP, Bundesbank, Annual Report 2010, p. 175), it is not inconceivable that the ECB Governing Council would decide to subject the PSPP to a full risk sharing as well. 133

Against that background, the question arises whether unlimited risk sharing between the national central banks of the Eurosystem in respect of default of bonds issued by central governments or by issuers of equivalent status would violate Art. 123 and Art. 125 TFEU as well as Art. 4(2) TEU (in conjunction with Art. 79(3) GG). 134

D. Suspension of proceedings

The proceedings are suspended pursuant to § 33(1) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG). 135

The Federal Constitutional Court requests the expedited procedure pursuant to Art. 105 of the Rules of Procedure of the Court of Justice as the nature of the case requires that it be dealt with within a short time. This is due to the large volume of the PSPP and the resulting effects, which could only be undone with great difficulty. Furthermore, the complainants listed under IV. have, by brief of 24 May 2017, applied for a preliminary injunction pursuant to § 32(1) BVerfGG, seeking an order prohibiting any further participation in the PSPP on the part of the *Bundesbank* given the volume already attained and ordering the Federal Government to take steps to terminate the *Bundesbank*'s participation in the EAPP. 136

Upon conclusion of the proceedings for a preliminary ruling before the CJEU, the Federal Constitutional Court will resume the proceedings at hand *ex officio*. 137

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