Headnotes

to the Order of the Second Senate of 29 April 2021

2 BvR 1651/15

2BvR 2006/15

1. **The power to issue an order of execution pursuant to § 35 of the Federal Constitutional Court Act is subject to limitations deriving from the principle of the separation of powers (Article 20(2) second sentence of the Basic Law) and from the fact that the law of procedure in constitutional court cases is necessarily tied to the subject matter in dispute in the proceedings. This gives rise to requirements that, as general principles, apply in all constitutional review proceedings in relation to all constitutional organs and all types of challenged acts.**

2. **Orders of execution pursuant to § 35 of the Federal Constitutional Court Act cannot address measures taken after the Federal Constitutional Court rendered its decision on the merits in the underlying matter. If orders of execution were to allow a review of such measures, they would require a legal analysis of the new situation under constitutional law and would thus modify and expand the original decision on the merits.**

FEDERAL CONSTITUTIONAL COURT

- 2 BvR 1651/15 -

- 2 BvR 2006/15 -

IN THE NAME OF THE PEOPLE

In the proceedings

on the applications of

II. 1. Prof. Dr. L…

2. Prof. Dr. h.c. H…,

3. Prof. Dr. S…,

4. Mr K…,

5. Ms T…,

and 1,729 other complainants,

– authorised representatives: 1. …

2. … –

seeking the following order of execution:

"the Federal Government and the *Bundestag* are obliged, in implementing the judgment of the Federal Constitutional Court of 5 May 2020, to demonstrate to the complainants how the violation of their rights, as set forth in that judgment, was remedied, and must therefore grant the complainants access to non-public documents furnished by the European Central Bank which, according to the Federal Government and the *Bundestag,* confirm inter alia that the European Central Bank demonstrated in a sufficiently comprehensible manner that it had conducted a proportionality assessment of the Public Sector Purchase Programme (PSPP) and thus satisfied the requirements set forth in the judgment"

- 2 BvR 1651/15 -,

II. Dr. G…,

– authorised representative: … –

seeking the following orders of execution:

1. “the *Bundestag* and the Federal Government remain obliged to take measures towards ensuring that the ECB Governing Council, without undue delay, takes a decision that entails a substantiated and comprehensible proportionality assessment that satisfies the requirements set forth in the judgment of 5 May 2020 - 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16 -, and publicly communicates said decision, or to take other steps to ensure that conformity with the Treaties is restored,

2. the Federal Government must take suitable measures towards ensuring that the *Bundesbank*, in line with the obligation imposed by the judgment of 5 May 2020, refrains from further participating in the execution of the PSPP,

3. the *Bundesbank* may no longer participate in the implementation and execution of Decision (EU) 2015/774, the amending Decisions (EU) 2015/2101, (EU) 2015/2464, (EU) 2016/702 and (EU) 2017/100, and the Decision of 12 September 2019, neither by carrying out any further purchases of bonds nor by contributing to another increase of the monthly purchase volume. The *Bundesbank* must furthermore ensure that the bonds already purchased under the PSPP and held in its portfolio are sold based on a – possibly long-term – strategy coordinated with the ESCB”

- 2 BvR 2006/15 -

the Federal Constitutional Court – Second Senate –

with the participation of Justices

Vice-President König,

Huber,

Hermanns,

Müller,

Maidowski,

Langenfeld,

Härtel

held on 29 April 2021:

The applications for an order of execution are dismissed as inadmissible.

R e a s o n s :

A.

The applicants seek an order of execution (§ 35 of the Federal Constitutional Court Act, *Bundesverfassungsgerichtsgesetz* – BVerfGG). 1

I.

By judgment of 5 May 2020 (Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 154, 17), the Second Senate of the Federal Constitutional Court held, in clause 3 of the operative part, that the Federal Government – and in relation to the applicants in proceedings I the *Bundestag* – had violated the right [to democratic self-determination] derived from Art. 38(1) first sentence of the Basic Law (*Grundgesetz* – GG) in conjunction with Art. 20(1) and (2) GG and Art. 79(3) GG of the applicants in proceedings I and II. The relevant sections from the operative part read (BVerfGE 154, 17 <22 f.>): 2

> 3. The Federal Government and – in relation to the complainants in proceedings I and II – the German *Bundestag* violated the rights under Article 38(1) first sentence in conjunction with Article 20(1) and (2) in conjunction with Article 79(3) of the Basic Law of the complainants in proceedings I, II and III by failing to take suitable steps challenging that
>
> a) in Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (Public Sector Asset Purchase Programme, ECB/2015/10, OJ EU L 121 of 14 May 2015, p. 20),
>
> b) 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, OJ EU L 303 of 20 November 2015, p. 106), Decision (EU) 2015/2464 of the European Central Bank of 16 December 2015 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2015/48, OJ EU L 344 of 30 December 2015, p. 1), 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, OJ EU L 121 of 11 May 2016, p. 24) and Decision (EU) 2017/100 of the European Central Bank of 11 January 2017 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2017/1, OJ EU L 16 of 20 January 2017, p. 51),
>
> the Governing Council of the European Central Bank neither as-

sessed nor substantiated that the measures provided for in these decisions satisfy the principle of proportionality.

This judgment imposed on the Federal Government and the Bundestag an obligation to take action against the PSPP to the extent that the European Central Bank (ECB) had failed to demonstrate the programme's proportionality and that the programme, on these grounds, had been qualified as an ultra vires act. The judgment obliges both constitutional organs to take suitable steps to ensure that the ECB conducts a proportionality assessment, and, to this end, clearly communicate their legal view to the ECB or take other steps to ensure that conformity with the Treaties is restored. The judgment of 5 May 2020 extends this obligation to the reinvestments under the PSPP that began on 1 January 2019 and the restart of the programme as of 1 November 2019; in this regard, the Second Senate also held that the constitutional organs have a duty to continue monitoring the decisions of the Eurosystem on the purchases of government bonds under the PSPP and to use the means at their disposal to ensure that the European System of Central Banks (ESCB) stays within the mandate conferred upon it (cf. BVerfGE 154, 17 <150 f. paras. 229, 232 f.>). 3

In relation to the *Bundesbank*, the Second Senate held that following a transitional period of no more than three months allowing for the necessary coordination with the ESCB, the *Bundesbank* may no longer participate in the implementation and execution of Decision (EU) 2015/774, the amending Decisions (EU) 2015/2101, (EU) 2015/2464, (EU) 2016/702 and (EU) 2017/100, and the Decision of 12 September 2019, neither by carrying out any further purchases of bonds nor by contributing to another increase of the monthly purchase volume, unless the ECB Governing Council adopts a new decision that demonstrates in a comprehensible manner that the monetary policy objectives pursued with the PSPP are not disproportionate to the economic and fiscal policy effects resulting from the programme. On the same condition, the *Bundesbank* must ensure that the bonds already purchased under the PSPP and held in its portfolio are sold based on a – possibly long-term – strategy coordinated with the ESCB (cf. BVerfGE 154, 17 <151 f. para. 235>). 4

II.

On 3-4 June 2020, the ECB Governing Council held a monetary policy meeting. Following a discussion on various monetary policy considerations (cf. Account of the monetary policy meeting of the Governing Council of the European Central Bank held on 3-4 June 2020, pp. 17-20 [*page numbers refer to the German translation provided by the Bundesbank*]), the Governing Council took six decisions, of which decisions nos. 4 and 5 are relevant in the present proceedings. These decisions read as follows (cf. Account of the monetary policy meeting of the Governing Council of the European Central Bank held on 3-4 June 2020, p. 22): 5

> (4) Net purchases under the asset purchase programme (APP) would continue at a monthly pace of €20 billion, together with the purchases under the additional €120 billion temporary envelope un-

til the end of the year. The Governing Council continued to expect monthly net asset purchases under the APP to run for as long as necessary to reinforce the accommodative impact of its policy rates, and to end shortly before it started raising the key ECB interest rates.

(5) Reinvestments of the principal payments from maturing securities purchased under the APP would continue, in full, for an extended period of time past the date when the Governing Council started raising the key ECB interest rates, and in any case for as long as necessary to maintain favourable liquidity conditions and an ample degree of monetary accommodation.

III.

1. On 26 June 2020, the Federal Ministry of Finance received several ECB documents from the *Bundesbank*. By letter of the same day, the Federal Ministry of Finance forwarded these documents to the President of the *Bundestag*. The subject line of that letter refers to eight enclosed “ECB-confidential” documents together with a full list of enclosures. Excerpts from this letter read as follows: 6

(…)

The ECB Governing Council has from the beginning regularly appraised the PSPP in its monetary policy meetings. In another decision taken on 24 June 2020, the Governing Council has agreed to the sharing of the enclosed documents on condition of confidentiality. The ECB Governing Council furthermore decided that the Federal Government may – if it considers this to be necessary –make the documents available to the *Bundestag* if and to the extent that the level of document security required by the ECB is ensured. Few elements of the text were sanitised by the ECB but the redactions should be acceptable, also to the Federal Constitutional Court.

(…)

We have come to the conclusion that the proportionality assessment undertaken by the ECB Governing Council, as evidenced by the documents provided, demonstrates the required balancing of interests in a comprehensible manner.

(…)

In our view, the *Bundesbank* is therefore allowed to continue participating in the implementation and execution of the challenged PSPP decisions.

(…)

2. In the evening of 26 June 2020, the members of the *Bundestag* were notified that the ECB documents would be available for inspection as classified material at the Secret Records Office of the *Bundestag* from 29 June 2020. Shortly thereafter, the date of the documents' availability was brought forward to the weekend of 27-28 June 2020. On 29 June 2020, several of the documents were declassified. 7

3. On 30 June 2020, the parliamentary groups CDU/CSU, SPD, FDP and *BÜNDNIS 90/DIE GRÜNEN* proposed a draft resolution titled "The judgment of the Federal Constitutional Court on the ECB's asset purchase programme PSPP" (*Bundestag* document, *Bundestagsdrucksache* – BTDrucks 19/20621), excerpts of which read as follows: 8

> I. The German *Bundestag* declares:
>
> 1. The Federal Republic of Germany is firmly rooted in the European Union. A mandate of European integration is enshrined in the Basic Law. European integration has contributed to preserving peace in Europe, achieving national unity und promoting prosperity and social development.
>
> The common currency is one of the cornerstones of the European Union. Germany has a paramount interest in protecting the future of the common currency. The European Central Bank (ECB) enjoys independence (Article 130 and Article 282(3) of the Treaty on the Functioning of the European Union – TFEU). The ECB's mandate is to pursue its primary objective of maintaining price stability. Without prejudice to the objective of price stability, the ECB supports the general economic policies in the European Union (Article 127(1) TFEU). The interpretation and application of EU law, including the determination of the applicable methodological standards, primarily falls to the Court of Justice (of the European Union), which in Article 19(1) second sentence of the Treaty on European Union (TEU) is called upon to ensure that the law is observed when interpreting and applying the Treaties (Federal Constitutional Court, Judgment of 5 May 2020 - 2 BvR 859/15 inter alia -, para. 112). The ECB is accountable to the European Parliament.
>
> 2. By judgment of 5 May 2020 - 2 BvR 859/15 inter alia - the Second Senate of the Federal Constitutional Court held that the Federal Government and the *Bundestag* must take steps to ensure that, with regard to its programme for the purchase of public sector assets on the secondary markets (Public Sector Purchase Programme – PSPP), the ECB demonstrates that it has conducted a balancing of interests in accordance with the principle of proportionality. The Federal Constitutional Court further held that the Federal Government and the *Bundestag* must clearly communicate their legal view

to the ECB or take other steps to ensure that conformity with the Treaties is restored.

According to that judgment, the *Bundesbank* would thus no longer be allowed to participate in the implementation and execution of the PSPP – following a transitional period of no more than three months – unless the ECB Governing Council adopts a new decision that demonstrates in a comprehensible and substantiated manner that the monetary policy objectives pursued by the PSPP are not disproportionate to the economic and fiscal policy effects resulting from the programme. On the same condition, the *Bundesbank* must ensure that the bonds already purchased under the PSPP and held in its portfolio are sold.

[...]

3. In exercising its 'responsibility with regard to European integration' (*Integrationsverantwortung*), the *Bundestag* addresses monetary policy matters, especially the proportionality of monetary policy measures taken by the ECB, with numerous parliamentary activities undertaken both by the plenary and the parliamentary committees. In all its activities, the *Bundestag* respects the institutional independence afforded the ECB.

[...]

II. The *Bundestag* takes note of the following:

1. The *Bundesbank* asked the ECB Governing Council to share its proportionality considerations with regard to the PSPP. In its meeting of 3-4 June 2020, as part of its monetary policy deliberations, the ECB Governing Council undertook a comprehensive appraisal of the programme's proportionality; on 25 June 2020, the ECB Governing Council made public its considerations to that effect as well as the monetary policy decision taken thereafter. In its meeting on 24 June 2020, the ECB Governing Council decided to grant the *Bundesbank* permission to share with the Federal Government, on condition of confidentiality, classified documents that further illustrate the ECB Governing Council's considerations regarding the PSPP since the programme was launched. The ECB Governing Council furthermore decided that the Federal Government may – if it considers this to be necessary – make the supporting documents available to the *Bundestag* if and to the extent that the level of document security required by the ECB is ensured. The documents have in the meantime been shared with the *Bundestag*.

The ECB Governing Council has documented – with information

published after the aforementioned judgment, accountability reports delivered to the European Parliament, monthly and annual reports as well as public statements by members of the ECB Executive Board and the ECB Governing Council – that it systematically takes into account proportionality considerations in its monetary policy decisions. From this information, it can be ascertained that the ECB Governing Council conducted a proportionality assessment of the PSPP, including a comprehensive balancing of affected matters and a weighing of affected interests in consideration of possible counter arguments.

The 'Account of the monetary policy meeting of the Governing Council of the European Central Bank' of 3-4 June 2020 sets out this proportionality assessment in a comprehensible manner. [...]

[...]

On 23 January 2020, the ECB Governing Council announced that it will launch a review of the ECB's monetary policy strategy. It emphasised that this will entail a review of the effectiveness and the potential side effects of the monetary policy toolkit developed over the past decade.

2. The Federal Ministry of Finance, in its letter accompanying the ECB documents forwarded to the *Bundestag*, stated its conviction that the decision of the ECB Governing Council demonstrates, in a comprehensible manner, the ECB's proportionality considerations with regard to the PSPP. According to the Ministry, the decision taken by the ECB Governing Council, together with the documents provided, fully satisfies the requirements arising from Federal Constitutional Court's judgment of 5 May 2020.

III. The *Bundestag* reaches the following conclusion:

Based on the decision taken by the ECB Governing Council and the documents provided by the ECB, the *Bundestag* concludes that the requirements set forth in the Federal Constitutional Court's judgment of 5 May 2020 - 2 BvR 859/15 inter alia - regarding a proportionality assessment to be conducted in relation to the PSPP have been satisfied. With regard to its decisions concerning the PSPP, the ECB assessed the suitability, necessity and appropriateness of the monetary policy measures laid down therein. In this respect, the ECB first identified and weighed the economic policy effects resulting from the PSPP and then – on the basis of proportionality considerations – balanced these effects against the expected positive contributions to achieving the monetary policy objective pursued.

> The *Bundestag* considers the statements provided by the ECB on the proportionality assessment it conducted to be comprehensible and the requirements set forth in the Federal Constitutional Court's judgment of 5 May 2020 - 2 BvR 859/15 inter alia - to be fulfilled. This notwithstanding, the *Bundestag* in any case continuously discharges its 'responsibility with regard to European integration', including with regard to monetary policy decisions taken by the ECB Governing Council.

4. The draft resolution of 30 June 2020 was adopted by the *Bundestag* in its 170th session on 2 July 2020 [with a broad majority] against the votes of the AfD parliamentary group and with abstentions from the *DIE LINKE* parliamentary group (cf. German *Bundestag*, Minutes of plenary proceedings 19/170, p. 21283). 9

a) In the plenary debate, members of the *Bundestag* Frank Schäffler and Christian Sauter (both FDP) as well as members of the *Bundestag* Alexander Müller (FDP) and Hans-Jürgen Thies (CDU/CSU) each gave statements explaining their votes, setting out their dissenting views, in accordance with Rule 31 of the *Bundestag* Rules of Procedure (cf. German *Bundestag*, Minutes of plenary proceedings 19/170, pp. 21356-21358 – annexes 7 and 8). In these statements, the aforementioned members of the *Bundestag* criticise, in particular, that the documents provided by the ECB were in English and that they were in part treated as classified material; they also claim that the documents were not sufficient to satisfy the requirements set by the Federal Constitutional Court with regard to a proportionality assessment of the PSPP. 10

b) In the same plenary session, the *Bundestag* rejected the draft resolution of 30 June 2020 submitted by the *DIE LINKE* parliamentary group titled "Finding political solutions to the conflict regarding the monetary policy of the European Central Bank – amending the EU Treaties and securing a monetary policy dialogue with the *Bundesbank*" (BTDrucks 19/20552), the draft resolution of 20 June 2020 submitted by the FDP parliamentary group titled "Proportionality assessment meets deadline – taking seriously the lasting mandate to ensure respect for the limits of monetary policy" (BTDrucks 19/20553), and the draft resolution of 26 June 2020 submitted by the AfD parliamentary group titled "Ensuring critical reflection and effectiveness in the *Bundestag*'s exercise of its so-called responsibility with regard to European integration vis-à-vis the ECB Governing Council and its decisions" (BTDrucks 19/20616) (cf. German *Bundestag*, Minutes of plenary proceedings 19/170, p. 21283). 11

IV.

1. By letter of 24 July 2020, addressed to the Federal Minister of Finance and the President of the *Bundestag*, the applicants in proceedings I requested that the documents provided by the ECB were made available to them, if necessary by allowing the applicants to inspect the documents at the *Bundestag* Secret Records Office. The President of the *Bundestag* responded by letter of 31 July 2020, making reference to the *Bundestag* resolution of 2 July 2020. On behalf of the Federal Ministry of Finance, 12

State Secretary Dr. K. responded by letter of 31 July 2020, forwarding another letter of 10 July 2020 from the Federal Minister of Finance to the Second Senate of the Federal Constitutional Court in which the Minister had informed the Senate of the review that had been conducted by the Ministry.

2. By submission of 5 August 2020, the applicants in proceedings I lodged an application for an order of execution pursuant to § 35 BVerfGG with the following contents: 13

The Federal Government and the *Bundestag* are obliged, in implementing the judgment of the Federal Constitutional Court of 5 May 2020, to demonstrate to the complainants how the violation of their rights, as set forth in that judgment, was remedied, and must therefore grant the complainants access to non-public documents furnished by the European Central Bank which, according to the Federal Government and the *Bundestag,* confirm inter alia that the European Central Bank demonstrated in a sufficiently comprehensible manner that it had conducted a proportionality assessment of the Public Sector Purchase Programme (PSPP) and thus satisfied the requirements set forth in the judgment.

By submission of 25 November 2020, the applicants in proceedings I reiterated that they want their applications to be understood as “applications for an order of execution pursuant to § 35 BVerfGG”, in keeping with the express wording used in their original application brief. 14

[…] 15-22

V.

1. Responding to a written inquiry of 27 July 2020 from the applicant in proceedings II, the *Bundesbank* – Directorate General Legal Services – informed the applicant, by letter of 3 August 2020, that the ECB had classified three (further specified) documents and that the *Bundesbank* therefore could share neither the documents themselves nor direct quotes from the documents with third parties. In that letter, the *Bundesbank* also stated that the ECB Governing Council, in its meeting on 3-4 July 2020, following a discussion on the PSPP’s proportionality, had concluded that the programme is proportionate, including in light of its economic policy effects. The *Bundesbank* further stated that, following the meeting, the ECB Governing Council had shared with the Federal Government and the *Bundestag* a series of documents relating to the balancing conducted by it. According to the letter of 3 August 2020, the Executive Board of the *Bundesbank* concurs with the *Bundestag*’s and the Federal Government’s assessment that the requirements set forth in the Federal Constitutional Court’s judgment of 5 May 2020 have been satisfied, which is why the *Bundesbank* would continue to participate in the purchases under the PSPP. 23

2. By submission of 7 August 2020, the applicant in proceedings II lodged an application for an order of execution with the following contents: 24

1. The *Bundestag* and the Federal Government remain obliged to

take measures towards ensuring that the ECB Governing Council, without undue delay, takes a decision that entails a substantiated and comprehensible proportionality assessment that satisfies the requirements set forth in the judgment of 5 May 2020 - 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16 -, and publicly communicates said decision, or to take other steps to ensure that conformity with the Treaties is restored

2. The Federal Government must take suitable measures towards ensuring that the *Bundesbank*, in line with the obligation imposed by the judgment of 5 May 2020, refrains from further participating in the execution of the PSPP.

3. The *Bundesbank* may no longer participate in the implementation and execution of Decision (EU) 2015/774, the amending Decisions (EU) 2015/2101, (EU) 2015/2464, (EU) 2016/702 and (EU) 2017/100, and the Decision of 12 September 2019, neither by carrying out any further purchases of bonds nor by contributing to another increase of the monthly purchase volume. The *Bundesbank* must furthermore ensure that the bonds already purchased under the PSPP and held in its portfolio are sold based on a – possibly long-term – strategy coordinated with the ESCB.

The applicant in proceedings II has expressly objected to an interpretation that would treat his application seeking orders pursuant to § 35 BVerfGG as a constitutional complaint. 25

[...] 26-38

VI.

By submission of 30 September 2020, the Federal Government provided a statement on the applications. The Federal Government asserts that the applications are inadmissible [...], and in any case unfounded [...], given that the obligations arising from the judgment of 5 May 2020 have been fully met. 39

[…] 40-56

VII.

By submission of 30 September 2020, the *Bundestag* contended that the applications for an order pursuant to § 35 BVerfGG are inadmissible [...], and in any case manifestly unfounded [...]. 57

[…] 58-70

B.

The applications are inadmissible. Orders of execution pursuant to § 35 BVerfGG 71

are strictly ancillary to the underlying decision on the merits, which means that such orders can neither modify nor expand that decision (see I. below). The applications lodged in the present proceedings do not satisfy this requirement (see II. below).

I.

1. An order of execution issued pursuant to § 35 BVerfGG serves to give effect to the Federal Constitutional Court's findings on the law and to bring about compliance with the underlying decision on the merits (the 'title of execution'). Orders of execution aim to ensure that decisions on the merits are adhered to and allow the Federal Constitutional Court to enforce its decisions in a manner that is both comprehensive and appropriate to the individual case. As § 35 BVerfGG serves to afford the Federal Constitutional Court the powers necessary in that regard, it must be interpreted broadly ([...]). 72

In deciding on an order of execution, the Federal Constitutional Court exercises due discretion ([…]). The law does not provide that affected parties must be heard prior to a decision on an order of execution. In this respect, the right to state their position in the proceedings on the merits is sufficient. 73

§ 35 BVerfGG essentially authorises the Federal Constitutional Court to issue orders that are necessary to enforce and give effect to its decision on the merits concluding a case. To that end, the Court may specify who is to execute its decision as well as the method of execution in the individual case ([...]). The Court's powers are not limited to issuing general and abstract orders governing the execution of its decision, it may also impose specific instructions as to how its decision is to be executed in the individual case (cf.BVerfGE 2, 139 <142>). Where the Court issues orders under § 35 BVerfGG only after rendering its decision on the merits, it must in principle limit them to what is absolutely necessary to enforce that decision ([...]). 74

2. An order of execution is meant to strictly serve the decision on the merits and its enforcement ([...]). As an ancillary order to the decision on the merits, an order of execution is only permissible within the limits set by the decision's operative part and by the reasons on which the decision rests (cf. BVerfGE 68, 132 <140>); what parts of the Court's reasoning are considered crucial in this sense is determined by the subject matter in dispute in the proceedings that lead to the decision on the merits (cf. BVerfGE 100, 263 <265>; [...]). 75

a) The contents of an order of execution thus depend on the contents of the underlying decision on the merits as well as on the specific circumstances in which that decision is to be executed. This includes the conduct of addressees of the decision on the merits (cf. BVerfGE 6, 300 <303>; 68, 132 <140>). It follows that an order of execution may – where necessary – be issued as a separate, subsequent order after the Court rendered its decision on the merits. 76

However, such a (subsequent) order of execution must not amend, modify, add to or expand the decision on the merits which it serves to enforce (cf. BVerfGE 6, 300 77

<304>; 68, 132 <140>; 100, 263 <265>; 142, 116 <120 para. 7>; […]); despite being issued at a later stage, a subsequent order of execution – like an order of execution issued together with the principal decision on the merits – remains exclusively aimed at, and limited to, enforcing the decision on the merits (cf. BVerfGE 6, 300 <304>; [...]).

In this regard, the subject matter of the decision on the merits is limited to the Court's assessment, at the time the judgment is pronounced, of the points of fact and law raised by the case. Orders of execution pursuant to § 35 BVerfGG cannot therefore address measures taken after the Court rendered the underlying decision on the merits (cf. BVerfGE 68, 132 <141>; […]). If an order of execution were to allow a review of such measures, it would require a legal analysis of the new situation under constitutional law and would thus modify and expand (the scope of) the original decision on the merits (cf. BVerfGE 68, 132 <141>; 142, 116 <121 para. 8>; […]). If this is indeed the relief sought by the applicant, in a matter in which a decision on the merits has already been rendered, the applicant is free to bring a new case before the Federal Constitutional Court if they so wish; it is not, however, necessary to afford applicants an additional – and likely simpler – legal remedy in the form of an order of execution pursuant to § 35 BVerfGG (cf. BVerfGE 68, 132 <141>; 142, 116 <121 para. 9>). 78

b) Against this backdrop, the Federal Constitutional Court has held in its case-law, with regard to legislation, that applications for an order pursuant to § 35 BVerfGG would be inadmissible if execution of the decision on the merits required that new legislation be enacted. If the legislator does enact (amended) legal provisions, such legislation may become the subject of separate proceedings before the Federal Constitutional Court initiated by a referral for specific judicial review of statutes or a (new) constitutional complaint; in such cases, initiating a constitutional review by applying for an order of execution pursuant to § 35 BVerfGG instead would not be permissible. Exceptions are only recognised if the legislator, despite an obligation to take legislative action imposed on it by the decision on the merits, either fails to take any action at all or only takes measures that so manifestly fall short of satisfying the decision on the merits that they are essentially equivalent to complete inaction (cf. BVerfGE 142, 116 <122 para. 11>; […]). 79

c) This holds true not only with regard to new legislation adopted in response to the decision on the merits but also applies with regard to all subsequent changes to the factual and legal circumstances resulting from acts of public authority or other measures taken by the state organs addressed in the pronounced judgment. The power to issue an order of execution is subject to limitations deriving from the principle of the separation of powers (Art. 20(2) second sentence GG) and from the fact that the law of procedure in constitutional court cases is necessarily tied to the subject matter in dispute in the proceedings. This gives rise to requirements that, as general principles, apply in all constitutional review proceedings in relation to all constitutional organs and all types of acts taken by them (cf. for a general overview BVerfGE 2, 139 80

<142 f.>; […]).

d) Making a distinction between the Federal Constitutional Court's powers of review when rendering a decision on the merits as opposed to issuing an order of execution pursuant to § 35 BVerfGG is imperative to preclude further decisions on the merits in the same case once the principal proceedings have been concluded ([...]); it is therefore necessary to determine precisely the contents and scope of the decision on the merits with regard to which execution is being sought (cf. BVerfGE 6, 300 <305>). 81

II.

The present applications for an order of execution go beyond the factual and legal circumstances of the matter decided by the Court in its judgment of 5 May 2020, and thus exceed the permissible scope of an order of execution pursuant to § 35 BVerfGG. The relief sought is therefore procedurally impermissible. 82

1. The applications (indirectly) seek a declaration that the measures taken by the Federal Government and the *Bundestag* in response to and in execution of the judgment of 5 May 2020 violate constitutional law. As this would require a constitutional review of the measures taken after the judgment was rendered, including an assessment of new legal circumstances, the relief sought is not limited to enforcing the judgment of 5 May 2020. The applicants challenge measures which were all taken after the judgment had been pronounced, which is why they could not possibly have been considered in the judgment. A constitutional review of these measures would modify and expand the original matter in dispute. 83

The applicants themselves assert that the measures taken by the Federal Government and the Bundestag in the implementation of the judgment of 5 May 2020 require a comprehensive and profound assessment under constitutional law. Such a complex review cannot be undertaken in the course of proceedings concerning an order of execution (cf. BVerfGE 142, 116 <121 f. para. 10>). 84

2. The same applies insofar as the applicants in proceedings I seek (first) to compel the Federal Government and the *Bundestag* to demonstrate that the violation of the applicants' rights identified in the judgment was remedied. Such an obligation was not at issue in the judgment of 5 May 2020. Regardless of the question whether, under substantive law, it is for the parties to negotiate the implementation of decisions rendered by a court, no obligation to furnish proof of remedial action was imposed on the Federal Government and the *Bundestag* by the judgment in the present case. A finding as to whether the violation of the right to democratic self-determination has been remedied, as sought by the applicants in proceedings I, would require a constitutional review by the Court of subsequent measures taken by the Federal Government and the *Bundestag* as well as (indirectly) an assessment under constitutional law of the measures taken by the ECB in relation to the PSPP after the judgment was pronounced. This would go beyond the matter in dispute in the present case. 85

The same holds true not only insofar as the applicants seek, by way of their (procedurally impermissible) application, to compel the Federal Government and the *Bundestag* to demonstrate that the violation of their rights identified in the judgment has been remedied. It also holds true with regard to the objective pursued by the application, by extension, to gain access to non-public ECB documents that were shared with the Federal Government and the *Bundestag*. The judgment of 5 May 2020 does not make any determinations to the effect that the obligation, imposed on the Federal Government and the *Bundestag* in para. 232 of the judgment, to take steps to ensure that the ECB conducts a proportionality assessment and, to this end, clearly communicate their legal view to the ECB, or to take other suitable steps to ensure that conformity with the Treaties is restored, also entailed an obligation to share all relevant documents with the applicants in proceedings I. In essence, the applicants assert a claim vis-à-vis the Federal Government and the *Bundestag* – and indirectly the ECB – seeking access to non-public ECB documents which, according to the Federal Government and the *Bundestag*, confirm that the ECB Governing Council has conducted a comprehensible proportionality assessment of the PSPP in accordance with the judgment of 5 May 2020. Deciding on the merits of such a claim would require the Court to address the – unresolved – question whether such a claim can be derived from constitutional or EU law and possibly to request a preliminary ruling from the Court of Justice of the European Union in accordance with Art. 267 TFEU. 86

3. With its application no. 1, the applicant in proceedings II seeks a declaration that the Federal Government and the *Bundestag* remain obliged to take measures towards ensuring that the ECB Governing Council, without undue delay, takes a decision that entails a substantiated and comprehensible proportionality assessment that satisfies the requirements set forth in the judgment of 5 May 2020, and publicly communicates said decision, or to take other steps to ensure that conformity with the Treaties is restored. Yet this would (indirectly) require a review of measures that were taken by the Federal Government and the *Bundestag*, as well as by the ECB Governing Council, after 5 May 2020 and that created new legal circumstances. The same holds true for the second order (application no. 2) sought by the applicant, which aims to compel the Federal Government to take steps vis-à-vis the *Bundesbank*. 87

According to the applicant's own submission, application no. 3 lodged in proceedings II merely reiterates the obligation set out in para. 235 of the judgment of 5 May 2020, i.e. the obligation on the part of the *Bundesbank* in the event that the three-month transitional period lapses without result; yet this would in any case not be capable of impairing the applicant's right to democratic self-determination under Art. 38(1) first sentence GG. The cited paragraph merely specifies the judgment's objective binding effect on the *Bundesbank*, given that a declaration by the Federal Constitutional Court that an EU measure amounts to an *ultra vires* act is binding on all German state organs, authorities and courts (cf. BVerfGE 142, 123 <207 para. 162>). As an institution that forms part of indirect state administration (*mittelbare Staasver-* 88

waltung), the *Bundesbank* itself is not an independent bearer of the 'responsibility with regard to European integration' (cf. BVerfGE 154, 17 <83 f. para. 95>). The order sought with application no. 3, which would be directed against the *Bundesbank*, cannot be based on constitutionally protected interests of the applicant in proceedings II. An objective legal obligation on the part of the *Bundesbank* to that effect would again presuppose a declaration by the Court that the measures taken by the Federal Government, the *Bundestag* and the ECB were not sufficient to restore conformity with the Constitution, meaning that the *ultra vires* act identified in the judgment of 5 May 2020 persisted. However, as set out above, this would go beyond the matter in dispute decided by the judgment of 5 May 2020.

C.

89 The lack of admissibility notwithstanding, the applications are also unfounded, even if they were interpreted as seeking a declaration that the Federal Government and the *Bundestag* failed to satisfy the requirements set forth in the judgment of 5 May 2020 because the implementing measures taken fell so manifestly short of the requirements arising from the decision on the merits that they were essentially equivalent to complete inaction (cf. para. 79 above). Following the judgment of 5 May 2020, the Federal Government and the *Bundestag*, in cooperation with the ECB, have taken measures to exercise their 'responsibility with regard to European integration' (see I. below). It has neither been demonstrated by the applicants nor is it otherwise ascertainable that these measures are manifestly inadequate or essentially equivalent to complete inaction (see II. below).

I.

90 1. When exercising their 'responsibility with regard to European integration', the constitutional organs in principle decide autonomously how to fulfil their mandate of protection; in this respect, they have a broad margin of appreciation, assessment and manoeuvre; they must consider existing risks and take political responsibility for their decisions (cf. BVerfGE 125, 39 <78>; 142, 123 <210 para. 169>; 151, 202 <299 para. 148>; 154, 17 <89 f. para. 109>; Federal Constitutional Court, Judgment of the Second Senate of 2 March 2021 - 2 BvE 4/16 -, para. 71 f.).

91 To ensure conformity with the integration agenda (*Integrationsprogramm*), they may provide retroactive legitimation to *ultra vires* acts of EU institutions, bodies, offices and agencies by initiating – within the limits set by Art. 79(3) GG – corresponding amendments of EU primary law and, by way of the procedure set out in Art. 23(1) second and third sentence GG, formally transfer the sovereign powers that were exercised *ultra vires* (cf. BVerfGE 146, 216 <250 para. 48>; 151, 202 <299 para. 148>; Federal Constitutional Court, Judgment of the Second Senate of 2 March 2021 - 2 BvE 4/16 -, para. 78). If that is neither possible nor wanted, they must in principle use legal or political means available to them, within the scope of their competences, to rescind acts that are not covered by the EU integration agenda and – as long as

these acts continue to have effect – take suitable measures to restrict as far as possible the domestic effects of such acts (cf. BVerfGE 134, 366 <395 f. para. 49>; 142, 123 <209 f. para. 167, 211 para. 170>; 146, 216 <251 para. 49>; 151, 202 <297 para. 141>; 154, 17 <150 para. 231>; Federal Constitutional Court, Judgment of the Second Senate of 2 March 2021 - 2 BvE 4/16 -, para. 78).

To this end, the Federal Government and the *Bundestag* can take a wide range of measures (cf. BVerfGE 142, 123 <211 f. para. 171>; Federal Constitutional Court, Judgment of the Second Senate of 2 March 2021 - 2 BvE 4/16 -, para. 79). Such measures include, in particular, bringing legal action before the Court of Justice of the European Union (cf. Art. 263(1) TFEU), contesting the respective act vis-à-vis the acting and supervising authorities or adapting their voting policy in the decision-making bodies of the European Union, including the exercise of veto rights, proposing treaty amendments (cf. Art. 48(2) and Art. 50 TEU) as well as instructing subordinate authorities not to apply the act in question. 92

In this context, the *Bundestag* can exercise the oversight powers it is afforded with regard to actions of the Federal Government in EU matters, such as the right to ask questions, to debate and to adopt decisions (cf. Art. 23(2) GG). It can inform the Federal Government of its view at any time by adopting a decision (cf. Art. 40(1) second sentence GG, Rule 75(1)(d) and 75(2)(c) of the *Bundestag* Rules of Procedure) or – as it did in the case of the Act on the SSM Regulation (cf. BVerfGE 151, 202 <371 f. para. 311 f.>) – by enacting a statute. Furthermore, depending on the scope and significance of the matter, it can also bring legal action asserting a violation of the principle of subsidiarity (cf. Art. 23(1a) GG in conjunction with Art. 12(b) TEU and Art. 8 of the Protocol on Subsidiarity), exercise its right of inquiry (cf. Art. 44 GG), or hold a vote of no confidence (cf. Art. 67 GG) (cf. Federal Constitutional Court, Judgment of the Second Senate of 2 March 2021 - 2 BvE 4/16 -, para. 79). In cases in which the Federal Constitutional Court has found that a measure constitutes an *ultra vires* act or affects Germany's constitutional identity, the *Bundestag* must in any case conduct a plenary debate given that the *Bundestag* generally exercises its representative function through all of its members collectively. Decisions of considerable significance, such as a decision on how to restore the order of competence [in accordance with the principle of conferral], must generally be preceded by a procedure that allows the public to form and express opinions and that requires Parliament to hold a public debate on the necessity and scope of the envisaged measures (cf. BVerfGE 142, 123 <212 f. para. 172 f.>; Federal Constitutional Court, Judgment of the Second Senate of 2 March 2021 - 2 BvE 4/16 -, para. 80). 93

2. Similar to a violation of (other) duties of protection, as derived for example from fundamental rights, a violation of the 'responsibility with regard to European integration', as derived inter alia from Art. 38 (1) first sentence GG, can only be found if no action is taken at all, if the legal and other measures taken are evidently unsuitable or completely inadequate, or if they fall significantly short of achieving the aim of the protection (cf. BVerfGE 77, 170 <214 f.>; 85, 191 <212>; 88, 203 <254 f.>; 92, 26 94

<46>; 125, 39 <78 f.>; 142, 123 <210 f. para. 169>; 151, 202 <299 para. 148>; Federal Constitutional Court, Judgment of the Second Senate of 2 March 2021 - 2 BvE 4/16 -, para. 73).

II.

It is not ascertainable in the present case that the measures taken after 5 May 2020 by the Federal Government and the *Bundestag*, in cooperation with the ECB Governing Council, in response to the Federal Constitutional Court's judgment were essentially equivalent to complete inaction. 95

1. The judgment of 5 May 2020 imposed on the Federal Government and the Bundestag an obligation to take action against the PSPP insofar as the ECB had failed to demonstrate the programme's proportionality, which was the reason why the programme had been qualified as an ultra vires act. The judgment obliges both the Federal Government and the Bundestag to take steps towards ensuring that the ECB conducts a proportionality assessment, and, to this end, clearly communicate their legal view (mandated by constitutional law) to the ECB, or take other suitable steps to ensure that conformity with the Treaties is restored. This obligation applies accordingly with regard to the reinvestments under the PSPP that began on 1 January 2019 and the restart of the programme as of 1 November 2019. The judgment also makes it incumbent upon the Federal Government and the Bundestag to continue monitoring the decisions of the Eurosystem on the purchases of government bonds under the PSPP and to use the means at their disposal to ensure that the ESCB stays within its mandate (cf. BVerfGE 154, 17 <150 f. paras. 229, 232 f.>). 96

2. To fulfil their obligations arising from the judgment of 5 May 2020, the Federal Government and the *Bundestag* – in cooperation with the ECB Governing Council and the *Bundesbank* – have taken a series of measures. 97

a) Following the pronouncement of the judgment, the *Bundestag* has engaged in numerous activities: As early as 6 and 13 May 2020 the *Bundestag* administration, Division PE 2 (Fundamental EU Issues, Economic and Monetary Union Issues) issued information briefs on the PSPP judgment (cf. German *Bundestag*, PE document 192/2020, p. 9). Also on 6 May 2020, the Budget Committee of the *Bundestag* met and received a communication from the Federal Government on the consequences of the Federal Constitutional Court's judgment for the ECB's asset purchase programme, and on 7 May 2020 the *Bundestag* plenary held a debate on matters of topical interest (*Aktuelle Stunde*) [pursuant to Rule 106 of the Rules of Procedure] on "the consequences of the Federal Constitutional Court's judgment for the ECB asset purchases" (cf. German *Bundestag*, PE document 102/2020, p. 3). On 13 May 2020, the Budget Committee received a communication from the Federal Government on the implementation of the judgment of 5 May 2020; moreover, in response to the judgment, the budgetary working group of the FDP parliamentary group proposed a parliamentary committee of inquiry on the ECB's asset purchase programme. On 15 May 2020, the *Bundestag*'s Research Services issued a paper on the PSPP's com- 98

patibility with EU law (cf. German *Bundestag*, Research Services, PE 6 - 3000 - 32/20). On 25 May 2020, the Committee on European Union Affairs held a public hearing on the judgment of 5 May 2020. On 28 May 2020, the draft resolution submitted by the AfD parliamentary group titled “Remedy breaches of the law – stop PEPP purchases now” (cf. BTDrucks 19/19516) was tabled before the *Bundestag* plenary (cf. German *Bundestag*, Minutes of plenary proceedings 19/163, p. 20263-20277). On 29 May 2020, the FDP parliamentary group submitted a minor interpellation (*Kleine Anfrage*) with questions [addressed to the Federal Government] on “The consequences of the Federal Constitutional Court’s judgment on the asset purchase programme of the European Central Bank” (cf. BTDrucks 19/19691; 19/19992).

On 8 June 2020, the *Bundestag* administration, Division PE 2, issued information briefs on the monetary policy decisions taken by the ECB Governing Council on 4 June 2020 (cf. German *Bundestag*, PE document 181/2020), and on 17 June 2020 the Finance Committee held non-public discussions on the PSPP judgment; on the same day, the Committee on European Union Affairs met to discuss the consequences of the judgment of 5 May 2020 with the President of the *Bundesbank* (cf. for an overview of the committee sessions German *Bundestag*, PE document 192, 2020, p. 6). Further activities that took place in June 2020 include exchanges held by the Committee on European Union Affairs, the Finance Committee and the Budget Committee on the topic of monetary policy as part of (regular) discussions with the President of the *Bundesbank* (cf. German *Bundestag*, PE document 192/2020, p. 1). 99

b) No detailed records are available on the activities undertaken by the Federal Government – including via the *Bundesbank* – vis-à-vis the ECB Governing Council. However, the ECB Governing Council did adopt, in its meeting on 3-4 June 2020, six monetary policy decisions in total, with decisions nos. 4 and 5 addressing the proportionality of the PSPP. In its account of the monetary policy considerations discussed at the meeting, the ECB Governing Council states inter alia that the overall evidence – which is elaborated on in more detail – underpinned the view that the PSPP has had a positive impact on macroeconomic outcomes. The ECB Governing Council also noted that the low interest rate environment in which central banks had to navigate was associated with a number of “challenges”, and assessed the benefits and costs of asset purchases. In that meeting, the ECB Governing Council discussed not only the potential interactions between monetary policy and fiscal policy but also the risk of fiscal dominance and the safeguards put in place to create incentives for sound fiscal policies. On this basis, the ECB Governing Council reached the conclusion that, in overall macroeconomic terms, asset purchases had made a very significant positive contribution to both economic growth and inflation in the euro area. Overall, there was broad agreement among members that while different weights might be attached to the benefits and side effects of asset purchases, the negative side effects had so far been clearly outweighed by the positive effects of asset purchases on the economy in the pursuit of price stability – at the same time, the importance of the obligation to continuously re-assess the measures was noted (cf. on all these aspects the Ac- 100

count of the monetary policy meeting of the Governing Council of the European Central Bank on 3-4 June 2020, pp. 17-20). It follows that the ECB Governing Council assessed the proportionality of the PSPP in its meeting on 3-4 June 2020 and ultimately affirmed the programme's proportionality with the decisions nos. 4 and 5 cited above.

c) Following a request from the *Bundesbank* that the ECB state its proportionality considerations with regard to the PSPP (cf. BTDrucks 19/20621, p. 2), the ECB Governing Council, by decision of 24 June 2020, authorised the *Bundesbank* to share with the Federal Government and the *Bundestag* the documents it had received from the ECB and from which the ECB Governing Council's considerations regarding the PSPP since the launch of the programme were ascertainable; this was done for the purposes of allowing the Federal Government and the *Bundestag* – on condition that the level of document security required by the ECB be ensured – to conduct their own review and evaluation of the ECB Governing Council's proportionality assessment (cf. BTDrucks 19/20621, p. 2 f.). 101

d) On this basis, the Federal Government and the *Bundestag* reached the conclusion that the ECB, by conducting a proportionality assessment, has remedied the shortcomings identified in the judgment of 5 May 2020 regarding the order of competences, thereby satisfying the requirements arising from that judgment. 102

aa) According to the letter of 26 June 2020 from the Federal Ministry of Finance to the *Bundestag*, the Ministry reviewed the ECB documents that had been forwarded to it by the *Bundesbank* (also by letter of 26 June 2020). In the Ministry of Finance´s opinion, the ECB has demonstrated, in a comprehensible manner, an assessment of proportionality with regard to the PSPP, as required by the aforementioned judgment. In the Ministry's view, the furnished documents show that the ECB, in its decisions, not only took into account the actual effects that the PSPP could potentially have on Member State finances, private households, savings and borrowing, the banking sector and business, but also balanced these effects against the PSPP's objective of increasing inflation rates to levels below, but close to, 2%. 103

bb) On 26 June 2020, the members of the German *Bundestag* were notified that the ECB documents would be available for inspection as classified material at the Secret Records Office of the *Bundestag* from 29 June 2020. Shortly thereafter, the start date of the documents' availability was brought forward to the weekend of 27-28 June 2020. On 29 June 2020, several of the documents were declassified. On 30 June 2020, the parliamentary groups CDU/CSU, SPD, FDP and *BÜNDNIS 90/DIE GRÜNEN* proposed a draft resolution titled "The judgment of the Federal Constitutional Court on the ECB's asset purchase programme PSPP", which was adopted by the *Bundestag* plenary in its session on 2 July 2020 against the votes of the AfD parliamentary group and with abstentions from the DIE LINKE parliamentary group, with votes from the other parliamentary groups securing the majority in favour (cf. German *Bundestag*, Minutes of plenary proceedings 19/170, p. 21283). 104

In this resolution, the *Bundestag* concludes that the proportionality assessment conducted by the ECB Governing Council satisfied the requirements arising from the judgment, and that the ECB Governing Council had documented – with information published after the pronouncement of the aforementioned judgment, accountability reports delivered to the European Parliament, monthly and annual reports as well as public statements by members of the ECB Executive Board and of the ECB Governing Council – that it systematically takes into account proportionality considerations in its monetary policy decisions; the account of the monetary policy meeting of the ECB Governing Council on 3-4 June 2020 demonstrated this proportionality assessment in a comprehensible manner. According to the *Bundestag´*s resolution, the ECB assessed the suitability, necessity and appropriateness of the monetary policy measures laid down in its decisions on the PSPP. In this respect, the *Bundestag* resolution states that the ECB first identified and weighed the economic policy effects resulting from the programme and then – on the basis of proportionality considerations – balanced these effects against the expected positive contributions to achieving the monetary policy objective pursued. 105

It must also be noted that members of the *Bundestag* Frank Schäffler and Christian Sauter (both FDP) as well as members of the *Bundestag* Alexander Müller (FDP) and Hans-Jürgen Thies (CDU/CSU) each gave personal statements (cf. German *Bundestag*, Minutes of plenary proceedings 19/170, pp. 21356-21358 – annexes 7 and 8), explaining why they voted against the resolution even though it was supported by their respective parliamentary groups. 106

Lastly, the counter proposals submitted by the parliamentary groups *DIE LINKE*, FDP and AfD were rejected (cf. German *Bundestag*, Minutes of the plenary proceedings 19/170, p. 21283). 107

3. With these comprehensive measures, the Federal Government and the *Bundestag* took action in response to the judgment of 5 May 2020 and in exercise of their ‘responsibility with regard to European integration’, and thus did not violate the prohibition of insufficient state action (*Untermaßverbot*). The measures taken do not fall so manifestly short of the requirements arising from the Court’s judgment that they could be considered essentially equivalent to complete inaction. With regard to fulfilling the requirements arising from the aforementioned judgment, the Federal Government and the *Bundestag* have a broad margin of (political) appreciation, assessment and manoeuvre (cf. BVerfGE 125, 39 <78>; 142, 123 <210 para. 169>; 151, 202 <299 para. 148>; 154, 17 <89 f. para. 109>; Federal Constitutional Court, Judgment of the Second Senate of 2 March 2021 - 2 BvE 4/16 -, para. 71 f.), which extends to deciding on the best course of action such as the appropriate technical and communicative procedures. 108

a) Ultimately, and even though not all individual steps might necessarily be documented in detail, the numerous activities undertaken by the Federal Government and the *Bundestag* in response to the judgment of 5 May 2020, which were in part carried 109

out via or with the assistance of the *Bundesbank*, have led to the ECB Governing Council demonstrating, in its decisions nos. 4 and 5 adopted 3-4 June 2020 and in the preceding discussions, that it conducted a proportionality assessment in accordance with Art. 5(1) second sentence and Art. 5(4) TEU in conjunction with Art. 119 ff. and Art. 127 ff. TFEU – the lack of which had been objected to by the Second Senate in its judgment. It is not for the Court to decide in the present case whether this proportionality assessment satisfies the substantive requirements deriving from Art. 5(1) second sentence and Art. 5(4) TFEU in every respect.

b) Against this backdrop, the steps that were undertaken to appraise the proportionality considerations put forward by the ECB Governing Council, as set out in the letter of 26 June 2020 from the Federal Ministry of Finance, do not manifestly amount to complete inaction. The short time span between the ECB Governing Council's decision of 24 June 2020 and the Ministry's letter of 26 June 2020 does not, by itself, provide any indication as to the substantive quality of the review or the effectiveness of the Federal Government's exercise of its 'responsibility with regard to European integration'. The Federal Government states, in its written submission of 30 September 2020, that the letter of 26 June 2020 had been preceded by an extensive review and evaluation process spanning several weeks. This appears plausible. 110

Lastly, the numerous parliamentary activities set out above (cf. para. 98 f., 104 ff.), which culminated in the resolution adopted on 2 July 2020, show that the *Bundestag* did in fact substantially and genuinely address and appraise the decisions of the ECB Governing Council and the proportionality of the PSPP in a manner that clearly surpasses the threshold of 'complete inaction'. The personal statements expressing dissent issued by four members of the *Bundestag* as well as the three counter proposals submitted by the (opposition) parliamentary groups *DIE LINKE*, FDP and AfD show that a real debate, including an exchange of differing views, took place in Parliament to address the requirements arising from the judgment of 5 May 2020. 111

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Müller	Maidowski	Langenfeld
	Härtel	

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