Headnotes

to the Judgment of the Second Senate of 6 December 2022

- 2 BvR 547/21 -

- 2 BvR 798/21 -

(Act Ratifying the EU Own Resources Decision – Next Generation EU)

1. **Constitutional complaints directed against the Act Ratifying the EU Own Resources Decision that claim a violation of the fundamental right to democratic self-determination derived from Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) and Art. 79(3) of the Basic Law must be granted admissibility. Admitting such challenges is necessary to safeguard the right to democratic self-determination, which would otherwise be rendered meaningless.**

2. **Measured against the limits set by the Basic Law, the Act Ratifying the EU Own Resources Decision – by which the Federal Republic of Germany gives its approval to the 2020 EU Own Resources Decision – is ultimately not objectionable under constitutional law. In any case, the 2020 EU Own Resources Decision does not manifestly exceed the limits of the currently valid European integration agenda (*Integrationsprogramm*). This is because the 2020 EU Own Resources Decision only authorises borrowing on the part of the European Union itself; ensures that the borrowed funds be used exclusively for tasks for which the European Union has competence in accordance with the principle of conferral; subjects the borrowing to limits as to both the duration and the amount of the commitments assumed; and requires that the amount of 'other revenue' not exceed the total amount of own resources.**

FEDERAL CONSTITUTIONAL COURT

- 2 BvR 547/21 -

- 2 BvR 798/21 -

Pronounced
on 6 December 2022
Fischböck
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings

I. on the constitutional complaints

1. [of the four complainants ...]

and 2,275 other complainants

– authorised representative: Prof. Dr. Hans-Detlef Horn,
Universitätsstraße 6, 35037 Marburg -

against the Act Ratifying the Council Decision of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom (Act Ratifying the EU Own Resources Decision, *Eigenmittelbeschluss-Ratifizierungsgesetz* – ERatG) (*Bundestag* document, *Bundestagsdrucksache* 19/26821)

- 2 BvR 547/21 -,

joining the proceedings as an interested party:

German *Bundestag*,
represented by its President Bärbel Bas, member of the *Bundestag,*
Platz der Republik 1, 11011 Berlin,

– authorised representative: Prof. Dr. Franz Mayer, LL.M. -

II. on the constitutional complaint

[of complainant ...]

– authorised representative: Prof. Dr. Christoph Degenhart,
Stormstraße 3, 90491 Nürnberg -

against the Act Ratifying the Council Decision of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom (Act Ratifying the EU Own Resources Decision; Federal Law Gazette, *Bundesgesetzblatt* – BGBl II 2021, p. 322)

- 2 BvR 798/21 -

joining the proceedings as an interested party:

German *Bundestag*,
represented by its President Bärbel Bas, member of the *Bundestag,*
Platz der Republik 1, 11011 Berlin,

– authorised representative: Prof. Dr. Ulrich Hufeld,
Stratenbarg 40a, 22393 Hamburg -

the Federal Constitutional Court – Second Senate –

with the participation of Justices

Vice-President König,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

Langenfeld,

Wallrabenstein

held on the basis of the oral hearing of 26 and 27 July 2022

Judgment:

1. **The proceedings are combined for joint decision.**
2. **The constitutional complaints are rejected as unfounded.**

R e a s o n s:

A.

The constitutional complaints lodged in proceedings nos. I and II are directed against the Act Ratifying the Council Decision of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Eu- 1

ratom (Act Ratifying the EU Own Resources Decision, *Eigenmittelbeschluss-Ratifizierungsgesetz* – ERatG). With that Act, the Federal Republic of Germany formally gives its approval to Council Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom (cf. OJ EU L 424 of 15 December 2020, p. 1 ff.; hereinafter '2020 EU Own Resources Decision'). The 2020 EU Own Resources Decision authorises the European Commission borrow up to EUR 750 billion on capital markets until the year 2026 in order to finance the temporary recovery instrument "Next Generation EU" (NGEU).

I.

1. At the special meeting of the European Council that took place from 17-21 July 2020 in the midst of the COVID-19 pandemic, the heads of state and government of the EU Member States agreed on the multiannual financial framework for the period 2021-2027 and the temporary recovery instrument NGEU (cf. Special Meeting of the European Council <17, 18, 19, 20 and 21 July 2020> – Conclusions, EUCO 10/20 of 21 July 2020). This instrument aims to counteract and mitigate the severe economic and social repercussions of the pandemic in the Member States. 2

By decision of 14 December 2020, the Council of the European Union formally adopted the 2020 EU Own Resources Decision. This authorises the European Commission to borrow – for the sole purpose of addressing the consequences of the COVID-19 pandemic – up to EUR 750 billion in 2018 prices on capital markets on behalf of the European Union. The following recitals and rules set forth in the 2020 EU Own Resources Decision are relevant to the present proceedings: 3

> (1) The system of own resources of the Union must ensure adequate resources for the orderly development of the policies of the Union, subject to the need for strict budgetary discipline. The development of the system of own resources can and should also contribute, to the greatest extent possible, to the development of the policies of the Union.
>
> (...)
>
> (6) In order to better align the Union's financing instruments with its policy priorities, to better reflect the role of the general budget of the Union ('the Union budget') in the functioning of the single market, to better support the objectives of Union policies and to reduce Member States' contributions based on gross national income (GNI) to the Union's annual budget, the European Council of 17 to 21 July 2020 concluded that over the coming years the Union would work towards reforming the system of own resources and introduce new own resources.
>
> (...)

(9) The European Council of 17 to 21 July 2020 concluded that the own resources arrangements should be guided by the overall objectives of simplicity, transparency and equity, including fair burden-sharing. It also concluded that Denmark, the Netherlands, Austria and Sweden, and, in the context of the support for the recovery and resilience, as well as Germany, are to benefit from lump sum corrections to their annual GNI-based contributions for the period 2021-2027.

(...)

(11) The integration of the European Development Fund into the Union budget should be accompanied by an increase in the own resources ceilings established in this Decision. A sufficient margin between the payments and the own resources ceiling is necessary to ensure that the Union is able – under any circumstances – to fulfil its financial obligations, even in times of economic downturn.

(12) A sufficient margin should be preserved under the own resources ceilings for the Union to cover all of its financial obligations and contingent liabilities falling due in any given year. The total amount of own resources allocated to the Union to cover annual appropriations for payments should not exceed 1,40 % of the sum of all the Member States' GNIs. The total annual amount of appropriations for commitments entered in the Union budget should not exceed 1,46 % of the sum of all the Member States' GNIs.

(...)

(14) The economic impact of the COVID-19 crisis underlines the importance of ensuring that the Union has sufficient financial capacity in the event of economic shocks. The Union needs to provide itself with the means to attain its objectives. Financial resources on an exceptional scale are required in order to address the consequences of the COVID-19 crisis without increasing the pressure on the finances of the Member States at a moment where their budgets are already under enormous pressure to finance national economic and social measures in relation to the crisis. An exceptional response should therefore take place at Union level. For that reason, it is appropriate to empower the Commission on an exceptional basis to borrow temporarily up to EUR 750 000 million in 2018 prices on capital markets on behalf of the Union. Up to EUR 360 000 million in 2018 prices of the funds borrowed would be used for providing loans and up to EUR 390 000 million in 2018 prices of the funds borrowed would be used for expenditure, both for the sole purpose of addressing the consequences of the COVID-19 crisis.

(15) This exceptional response should address the consequences of the COVID-19 crisis and avoid its re-emergence. Therefore, support should be limited in time and the majority of the funding should be provided in the immediate aftermath of the crisis, meaning that legal commitments of a programme financed by these additional resources should be made by 31 December 2023. The approval of payments under the Recovery and Resilience Facility will be subject to the satisfactory fulfilment of the relevant milestones and targets set out in the Recovery and Resilience Plan, which will be assessed in accordance with the relevant procedure set out in the Regulation establishing a Recovery and Resilience Facility, which reflects the conclusions of the European Council of 17 to 21 July 2020.

(16) To bear the liability related to the envisaged borrowing of funds, an extraordinary and temporary increase in the own resources ceilings is necessary. Therefore, for the sole purpose of covering all liabilities of the Union resulting from its borrowing to address the consequences of the COVID-19 crisis, the ceiling for appropriations for payments and the ceiling for appropriations for commitments should each be increased by 0,6 percentage points. The empowerment of the Commission to borrow funds on capital markets on behalf of the Union for the sole and exclusive purpose of financing measures to address the consequences of the COVID-19 crisis is closely related to the increase in the own resources ceilings foreseen in this Decision and, ultimately, to the functioning of the system of own resources of the Union. Accordingly, that empowerment should be included in this Decision. The unprecedented nature of this operation and the exceptional amount of the funds to be borrowed call for certainty about the overall volume of the Union's liability and the essential features of its repayment, as well as for the implementation of a diversified borrowing strategy.

(17) The increase in the own resources ceilings is necessary since the ceilings would otherwise not be sufficient to ensure the availability of adequate resources that the Union needs to meet the liabilities resulting from the exceptional and temporary empowerment to borrow funds. The need to have recourse to this additional allocation will also only be temporary since the relevant financial obligations and contingent liabilities will decrease over time as the borrowed funds are repaid and the loans mature. Therefore, the increase should expire when all funds borrowed have been repaid and all contingent liabilities relating to loans provided on the basis of those funds have ceased, which should be by 31 December 2058 at the latest.

(18) Activities of the Union to address the consequences of the COVID-19 crisis need to be significant and must take place over a relatively short period. The borrowing of funds needs to follow this timing. Therefore, new net borrowing activity should stop at the latest at the end of 2026. After 2026 borrowing operations should be strictly limited to refinancing operations to ensure an efficient debt management. The Commission, when implementing the operations through a diversified funding strategy, should make the best use of the capacity of the markets to absorb the borrowing of such significant amounts of funds with different maturities, including short-term financing for the purpose of cash management, and ensuring the most advantageous repayment conditions. In addition, the Commission should regularly and comprehensively inform the European Parliament and the Council about all aspects of its debt management. Once the payment schedules for the policies to be funded by the borrowing are known, the Commission will communicate an issuance calendar containing the expected issuance dates and expected volumes for the forthcoming year as well as a plan setting out the expected principal and interest payments to the European Parliament and the Council. The Commission should update that calendar regularly.

(19) The repayment of funds borrowed for the purpose of providing non-repayable support, providing repayable support through financial instruments or provisioning for budgetary guarantees, as well as payment of the interest due, should be funded by the Union budget. The borrowed funds which are used to provide loans to Member States should be repaid using the sums received from the beneficiary Member States. The necessary resources need to be allocated and made available to the Union for it to be able to cover all of its financial obligations and contingent liabilities resulting from the exceptional and temporary empowerment to borrow funds in any given year and under any circumstances, in compliance with Article 310(4) and Article 323 of the Treaty on the Functioning of the European Union (TFEU).

(20) Amounts not used for interest payments as foreseen will be used for early repayments before the end of the MFF 2021-2027, with a minimum amount, and can be increased above this level provided that new own resources have been introduced after 2021 in accordance with the procedure set out in the third paragraph of Article 311 TFEU. All liabilities incurred by the exceptional and temporary empowerment to borrow funds should be fully repaid by 31 December 2058. In order to ensure the efficient budgetary

management of the appropriations needed to cover repayments for the funds borrowed, it is appropriate to provide for the possibility of underlying budgetary commitments being broken down in annual instalments.

(21) The schedule of repayments should respect the principle of sound financial management and cover the entire volume of funds borrowed under the empowerment of the Commission with a view to achieving a steady and predictable reduction of liabilities during the overall period. For that purpose, the amounts due by the Union in a given year for the repayment of the principal should not exceed 7,5 % of the maximum amount of EUR 390 000 million for expenditure.

(22) Given the features of the exceptional, temporary and limited empowerment of the Commission to borrow funds for the purpose of addressing the consequences of the COVID-19 crisis, it should be clarified that, as a rule, the Union should not use funds borrowed on capital markets for the financing of operational expenditure.

(23) In order to ensure that the Union is always able to fulfil its legal obligations in respect of third parties in a timely manner, specific rules should be provided by this Decision authorising the Commission, during the period of the temporary increase in the own resources ceilings, to call on Member States to provisionally make available the relevant cash resources if the authorised appropriations entered in the Union budget are not sufficient to cover liabilities arising from the borrowing linked to that temporary increase. The Commission should, as its last resort, only be able to call cash resources if it cannot generate the necessary liquidity by activating other measures of active cash management, including, if necessary, through a recourse to short-term financing on capital markets, in order to ensure timely compliance with the Union's obligations towards lenders. It is appropriate to provide that such calls should be announced by the Commission to Member States duly in advance and should be strictly pro rata to the estimated budget revenue of each Member State, and in any case, limited to their share of the temporarily increased own resources ceiling, that is 0,6 % of Member States' GNI. However, if a Member State fails, in full or in part, to honour a call on time, or if it notifies the Commission that it will not be able to honour a call, the Commission should nevertheless be authorised on a provisional basis to make additional calls on other Member States on a pro rata basis. It is appropriate to provide a maximum amount that the Commission may annually call from a Member State. The Commission is expected to submit the necessary proposals for the purpose of entering the expenditure covered

by the amounts of cash resources provisionally provided by the Member States in the Union budget in order to ensure that those resources are taken into account as early as possible for the purpose of crediting own resources to accounts by the Member States, i.e. in accordance with the applicable legal framework and thus on the basis of the respective GNI keys and without prejudice to other own resources and other revenues.

(...)

(25) This Decision should enter into force only once it has been approved by all Member States in accordance with their respective constitutional requirements thus fully respecting national sovereignty. The European Council of 17 to 21 July 2020 noted the intention of Member States to proceed with the approval of this Decision as soon as possible.

(...)

(29) Due to the need to urgently enable borrowing with a view to financing measures to address the consequences of the COVID-19 crisis, this Decision should enter into force on the first day of the first month following receipt of the last of the notifications of the completion of the procedures for the adoption of this Decision.

(...)

Article 1

Subject matter

This Decision lays down rules on the allocation of own resources to the Union in order to ensure the financing of the Union's annual budget.

Article 2

Categories of own resources and specific methods for their calculation

1. Revenue from the following shall constitute own resources entered in the Union budget:

(a) traditional own resources consisting of levies, premiums, additional or compensatory amounts, additional amounts or factors, Common Customs Tariff duties and other duties established or to be established by the institutions of the Union in respect of trade with third countries, customs duties on products under the expired Treaty establishing the European Coal and Steel Community, as well as

contributions and other duties provided for within the framework of the common organisation of the markets in sugar;

(b) the application of a uniform call rate of 0,30 % for all Member States to the total amount of VAT receipts collected in respect of all taxable supplies divided by the weighted average VAT rate calculated for the relevant calendar year as stipulated in Council Regulation (EEC, Euratom) No 1553/89. For each Member State the VAT base to be taken into account for this purpose shall not exceed 50 % of GNI;

(c) the application of a uniform call rate to the weight of plastic packaging waste generated in each Member State that is not recycled. The uniform call rate shall be EUR 0,80 per kilogram. An annual lump sum reduction for certain Member States as defined in the third subparagraph of paragraph 2 shall apply;

(d) the application of a uniform call rate, to be determined pursuant to the budgetary procedure in the light of the total of all other revenue, to the sum of GNI of all the Member States.

2. For the purposes of point (c) of paragraph 1 of this Article, ‘plastic’ shall mean a polymer within the meaning of point (5) of Article 3 of Regulation (EC) No 1907/2006 of the European Parliament and of the Council, to which additives or other substances may have been added; ‘packaging waste’ and ‘recycling’ shall have the meaning assigned to those terms in points (2) and (2c) of Article 3 of European Parliament and Council Directive 94/62/EC respectively, and as used in Commission Decision 2005/270/EC.

The weight of plastic packaging waste that is not recycled shall be calculated as the difference between the weight of the plastic packaging waste generated in a Member State in a given year and the weight of the plastic packaging waste recycled in that year that is determined pursuant to Directive 94/62/EC.

The following Member States shall be entitled to annual lump sum reductions, expressed in current prices, to be applied to their respective contributions under point (c) of paragraph 1 in the amount of EUR 22 million for Bulgaria, EUR 32,1876 million for Czechia, EUR 4 million for Estonia, EUR 33 million for Greece, EUR 142 million for Spain, EUR 13 million for Croatia, EUR 184,0480 million for Italy, EUR 3 million for Cyprus, EUR 6 million for Latvia, EUR 9 million for Lithuania, EUR 30 million for Hungary, EUR 1,4159 million for Malta, EUR 117 million for Poland, EUR 31,3220 million for Portugal, EUR 60 million for Romania, EUR 6,2797 million for Slovenia

and EUR 17 million for Slovakia.

3. For the purposes of point (d) of paragraph 1, the uniform call rate shall apply to the GNI of each Member State.

GNI as referred to in point (d) of paragraph 1 means annual GNI at market prices, as provided by the Commission in application of Regulation (EU) No 549/2013.

4. For the period 2021-2027, the following Member States shall benefit from a gross reduction in their annual GNI-based contributions under point (d) of paragraph 1 in the amount of EUR 565 million for Austria, EUR 377 million for Denmark, EUR 3 671 million for Germany, EUR 1 921 million for the Netherlands and EUR 1 069 million for Sweden. Those amounts shall be measured in 2020 prices and adjusted to current prices by applying the most recent gross domestic product deflator for the Union expressed in euro, as provided by the Commission, which is available when the draft budget is drawn up. Those gross reductions shall be financed by all Member States.

5. If, at the beginning of the financial year, the Union budget has not been adopted, the previous uniform call rates based on GNI shall continue to apply until the entry into force of the new rates.

Article 3

Own resources ceilings

1. The total amount of own resources allocated to the Union to cover annual appropriations for payments shall not exceed 1,40 % of the sum of all the Member States' GNIs.

2. The total annual amount of appropriations for commitments entered in the Union budget shall not exceed 1,46 % of the sum of all the Member States' GNIs.

3. An orderly ratio between appropriations for commitments and appropriations for payments shall be maintained to guarantee their compatibility and to enable the ceiling set in paragraph 1 to be complied with in subsequent years.

4. Where amendments to Regulation (EU) No 549/2013 result in significant changes in the level of GNI, the Commission shall recalculate the ceilings set out in paragraphs 1 and 2 as temporarily increased in accordance with Article 6 on the basis of the following formula:

(...)

Article 4

Use of funds borrowed on capital markets

The Union shall not use funds borrowed on capital markets for the financing of operational expenditure.

Article 5

Extraordinary and temporary additional means to address the consequences of the COVID-19 crisis

1. For the sole purpose of addressing the consequences of the COVID-19 crisis through the Council Regulation establishing a European Union Recovery Instrument and the sectoral legislation referred to therein:

(a) the Commission shall be empowered to borrow funds on capital markets on behalf of the Union up to EUR 750 000 million in 2018 prices. The borrowing operations shall be carried out in euro;

(b) up to EUR 360 000 million in 2018 prices of the funds borrowed may be used for providing loans and, by way of derogation from Article 4, up to EUR 390 000 million in 2018 prices of the funds borrowed may be used for expenditure.

The amount referred to in point (a) of the first subparagraph shall be adjusted on the basis of a fixed deflator of 2 % per year. Each year the Commission shall communicate to the European Parliament and the Council the amount as adjusted.

The Commission shall manage the borrowing referred to in point (a) of the first subparagraph so that no new net borrowing takes place after 2026.

2. The repayment of the principal of the funds borrowed to be used for expenditure as referred to in point (b) of the first subparagraph of paragraph 1 of this Article and the related interest due shall be borne by the Union budget. The budgetary commitments may be broken down over several years into annual instalments in accordance with Article 112(2) of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council.

The repayment of the funds referred to in point (a) of the first subparagraph of paragraph 1 of this Article shall be scheduled, in accordance with the principle of sound financial management, so as to

ensure the steady and predictable reduction of liabilities. Repayments of the principal of the funds shall start before the end of the MFF 2021-2027 period, with a minimum amount, insofar as amounts not used for interest payments due under the borrowing referred to in paragraph 1 of this Article allow it, with due regard to the procedure set out in Article 314 TFEU. All liabilities incurred by the exceptional and temporary empowerment of the Commission to borrow funds referred to in paragraph 1 of this Article shall be fully repaid at the latest by 31 December 2058.

The amounts due by the Union in a given year for the repayment of the principal of the funds referred to in the first subparagraph of this paragraph shall not exceed 7,5 % of the maximum amount to be used for expenditure referred to in point (b) of the first subparagraph of paragraph 1.

3. The Commission shall establish the necessary arrangements for the administration of the borrowing operations. The Commission shall regularly and comprehensively inform the European Parliament and the Council about all aspects of its debt management strategy. The Commission shall establish an issuance calendar containing the expected issuance dates and volumes for the forthcoming year as well as a plan setting out the expected principal and interest payments, and communicate it to the European Parliament and the Council. The Commission shall update that calendar regularly.

Article 6

Extraordinary and temporary increase in the own resources ceilings for the allocation of the resources necessary for addressing the consequences of the COVID-19 crisis

The ceilings set out in Article 3(1) and (2) shall each be temporarily increased by 0,6 percentage points for the sole purpose of covering all liabilities of the Union resulting from the borrowing referred to in Article 5 until all such liabilities have ceased to exist, and at the latest by 31 December 2058.

The increase in the own resources ceilings shall not be used to cover any other liabilities of the Union.

Article 7

Universality principle

The revenue referred to in Article 2 shall be used without distinc-

tion to finance all expenditure entered in the Union's annual budget.

Article 8

Carry-over of surplus

Any surplus of the Union's revenue over total actual expenditure during a financial year shall be carried over to the following financial year.

Article 9

Collecting own resources and making them available to the Commission

1. The own resources referred to in point (a) of Article 2(1) shall be collected by the Member States in accordance with the national provisions imposed by law, regulation or administrative action. Member States shall, where appropriate, adapt those provisions to meet the requirements of Union rules.

The Commission shall examine the relevant national provisions communicated to it by Member States, transmit to Member States the adjustments it deems necessary in order to ensure that they comply with Union rules and report, if necessary, to the European Parliament and the Council.

2. Member States shall retain, by way of collection costs, 25 % of the amounts referred to in point (a) of Article 2(1).

3. Member States shall make the own resources provided for in Article 2(1) of this Decision available to the Commission, in accordance with regulations adopted under Article 322(2) TFEU.

4. Without prejudice to Article 14(2) of Council Regulation (EU, Euratom) No 609/2014, if the authorised appropriations entered in the Union budget are not sufficient for the Union to comply with its obligations resulting from the borrowing referred to in Article 5 of this Decision and the Commission cannot generate the necessary liquidity by activating other measures provided for by the financial arrangements applying to such borrowing in time to ensure compliance with the Union's obligations, including through active cash management and, if necessary, through a recourse to short-term financing on capital markets consistent with the conditions and limits set out in point (a) of the first subparagraph of Article 5(1) and Article 5(2) of this Decision, the Member States, as the Commission's last resort, shall make the resources necessary for that purpose available to the Commission. In such cases, paragraphs 5 to 9 of this Article shall

apply by way of derogation from Article 14(3) and from the first subparagraph of Article 14(4) of Regulation (EU, Euratom) No 609/2014.

5. Subject to the second subparagraph of Article 14(4) of Regulation (EU, Euratom) No 609/2014, the Commission may call on the Member States to provisionally provide the difference between the overall assets and the cash resource requirements, in proportion ('pro rata') to the estimated budget revenue of each of them. The Commission shall announce such calls to Member States duly in advance. The Commission will establish a structured dialogue with national debt management offices and treasuries in respect of its issuance and repayment schedules.

If a Member State fails, in full or in part, to honour a call on time, or if it notifies the Commission that it will not be able to honour a call, in order to cover for the part corresponding to the Member State concerned, the Commission shall provisionally have the right to make additional calls on the other Member States. Such calls shall be pro rata to the estimated budget revenue of each of the other Member States. The Member State which failed to honour a call shall remain liable to honour it.

6. The maximum total annual amount of cash resources that may be called from a Member State under paragraph 5 shall in all circumstances be limited to its GNI-based relative share in the extraordinary and temporary increase in the own resources ceiling as referred to in Article 6. For this purpose, the GNI-based relative share shall be calculated as the share in the total GNI of the Union, as resulting from the respective column in the revenue part of the last adopted annual Union budget.

7. Any provision of cash resources pursuant to paragraphs 5 and 6 shall be compensated without delay in line with the applicable legal framework for the Union budget.

8. The expenditure covered by the amounts of cash resources provisionally provided by Member States in accordance with paragraph 5 shall be entered in the Union budget without delay in order to ensure that the related revenue is taken into account as early as possible for the purpose of crediting own resources to accounts by the Member States in accordance with the relevant provisions of Regulation (EU, Euratom) No 609/2014.

9. On an annual basis, the application of paragraph 5 shall not lead to calling cash resources in excess of the own resources ceilings re-

ferred to in Article 3 as increased in accordance with Article 6.

(...)

Article 12

Entry into force

The Secretary-General of the Council shall notify the Member States of this Decision.

Member States shall notify the Secretary-General of the Council without delay of the completion of the procedures for the adoption of this Decision in accordance with their respective constitutional requirements.

This Decision shall enter into force on the first day of the first month following receipt of the last of the notifications referred to in the second paragraph.

It shall apply from 1 January 2021.

Article 13

Addressees

This Decision is addressed to the Member States.

The temporary recovery instrument NGEU is based on Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument ('EURI') to support the recovery in the aftermath of the COVID-19 crisis (cf. OJ EU L 433 I of 22 December 2020, p. 23 ff.; hereinafter ‘EURI Regulation’). The EURI Regulation, which was adopted on the basis of Art. 122 TFEU, provides for the following: 4

(...)

(1) In order to contain the spread of COVID-19, which on 11 March 2020 was declared a pandemic by the World Health Organization, Member States have adopted a set of unprecedented measures.

(2) The unprecedented measures taken in response to the exceptional situation caused by COVID-19, which is beyond the control of Member States, have caused significant disturbances to economic activity which are reflected in a steep decline in gross domestic product and a significant impact on employment, social conditions, poverty and inequalities. In particular, those measures have disrupted supply chains and production and caused absences from the workplace. In addition, the provision of many services has become

very difficult or impossible. At the same time, consumer demand has dropped. Many businesses are experiencing liquidity shortages, and their solvency is at risk, while the financial markets are very volatile. Key sectors like travel and tourism are particularly hard hit. More broadly, those measures have already led or will lead to severe deterioration of the financial situation of many businesses in the Union.

(3) The crisis caused by COVID-19 has spread quickly in the Union and in third countries. A sharp contraction of growth in the Union is foreseen for 2020. Recovery risks being very uneven in different Member States, increasing the divergence between national economies. The different fiscal abilities of Member States to provide financial support where it is needed most for recovery and the divergence between Member States' measures endanger the single market as well as social and territorial cohesion.

(4) A comprehensive set of measures is needed for economic recovery. That set of measures requires substantial amounts of public and private investment to set the Union firmly on the path towards a sustainable and resilient recovery, create high-quality jobs, support social inclusion and repair the immediate damage brought by the COVID-19 crisis, whilst supporting the Union's green and digital priorities.

(5) The exceptional situation caused by COVID-19, which is beyond the control of Member States, calls for a coherent and unified approach at Union level. In order to prevent further deterioration of the economy, employment and social cohesion and to boost a sustainable and resilient recovery of economic activity, an exceptional and coordinated programme of economic and social support should be put in place, in a spirit of solidarity between Member States, in particular for those Member States that have been particularly hard hit.

(6) As this Regulation is an exceptional response to temporary but extreme circumstances, the support provided under it should only be made available for the purposes of addressing the adverse economic consequences of the COVID-19 crisis or the immediate funding needs to avoid a re-emergence of the COVID-19 crisis.

(7) The support under the instrument established by this Regulation (the 'Instrument') should in particular focus on measures to restore labour markets and social protection as well as health care systems, to reinvigorate potential for sustainable growth and employment in order to strengthen cohesion among Member States and support their transition towards a green and digital economy, to

provide support to businesses affected by the impact of the COVID-19 crisis, in particular small and medium-sized enterprises, as well as support for investment in activities that are essential for strengthening sustainable growth in the Union including direct financial investment in enterprises, measures for research and innovation in response to the COVID-19 crisis, for capacity building at Union level to enhance future crisis preparedness, for maintaining efforts to ensure a just transition to a climate-neutral economy, and support for agriculture and development in rural areas in addressing the impact of the COVID-19 crisis.

(8) To ensure a sustainable and resilient recovery throughout the Union and facilitate the implementation of economic support, the established mechanisms of spending through Union programmes under the multiannual financial framework are to be used. Support under those programmes is to be provided in the form of non-repayable support, loans, and provisioning for budgetary guarantees. The allocation of financial resources should reflect the extent to which those programmes are capable of contributing to the objectives of the Instrument. Contributions to those programmes under the Instrument should be subject to strict compliance with the objectives of the Instrument, which are linked to supporting recovery in the aftermath of the COVID-19 crisis.

(9) In view of the nature of the measures to be financed, one part of the amounts available under the Instrument should be used for loans to Member States, whereas the other part of the amounts should constitute external assigned revenue for the purpose of Article 21(5) of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council (the 'Financial Regulation') and should be used for non-repayable support, support through financial instruments or provisioning for budgetary guarantees and related expenditure by the Union. To that effect, as part of the necessary measures under this Regulation, it is appropriate to enable Article 21(5) of the Financial Regulation to comprise the assigning under this Regulation, as a basic act, of a part of the revenue provided for under the exceptional and temporary empowerment provided for in the Council Decision on the system of own resources of the European Union and repealing Council Decision 2014/335/EU, Euratom (the 'Own Resources Decision').

(10) While point (c) of Article 12(4) and Article 14(3) of the Financial Regulation apply to commitment and payment appropriations made available in relation to the external assigned revenue under this Regulation, in view of the time limits set for the different types of

support, commitment appropriations resulting from that external assigned revenue should not be automatically carried over beyond the respective end dates, except for commitment appropriations necessary for technical and administrative assistance for implementation of the measures set out in the Instrument.

(11) Commitment appropriations for non-repayable support should be made available automatically up to the authorised amount. Liquidity should be managed effectively, so that funds are raised only when legal commitments need to be honoured through corresponding payment appropriations.

(12) Given the importance of using the amounts during the first years of the implementation of the Instrument, it is appropriate to review the progress achieved in the implementation of the Instrument and the use of the support allocated in accordance with this Regulation. To that effect, the Commission should prepare a report by 31 October 2022.

(...)

Article 1

Subject matter and scope

1. In order to support the recovery in the aftermath of the COVID-19 crisis, this Regulation establishes the European Union Recovery Instrument (the 'Instrument').

2. Support under the Instrument shall in particular finance the following measures to tackle the adverse economic consequences of the COVID-19 crisis or the immediate funding needs to avoid a re-emergence of that crisis:

(a) measures to restore employment and job creation;

(b) measures in the form of reforms and investments to reinvigorate the potential for sustainable growth and employment in order to strengthen cohesion among Member States and increase their resilience;

(c) measures for businesses affected by the economic impact of the COVID-19 crisis, in particular measures that benefit small and medium-sized enterprises as well as support for investment in activities that are essential for strengthening sustainable growth in the Union, including direct financial investment in enterprises;

(d) measures for research and innovation in response to the

COVID-19 crisis;

(e) measures for increasing the level of the Union's crisis preparedness and enabling a quick and effective Union response in the event of major emergencies, including measures such as stockpiling of essential supplies and medical equipment and acquiring the necessary infrastructures for rapid crisis response;

(f) measures to ensure that a just transition to a climate-neutral economy will not be undermined by the COVID-19 crisis;

(g) measures to address the impact of the COVID-19 crisis on agriculture and rural development.

3. The measures referred to in paragraph 2 shall be carried out under specific Union programmes and in accordance with the relevant Union acts laying down rules for those programmes whilst fully respecting the objectives of the Instrument. Those measures shall include technical and administrative assistance for their implementation.

Article 2

Financing of the Instrument and allocation of funds

1. The Instrument shall be financed up to an amount of EUR 750 000 million in 2018 prices on the basis of the empowerment provided for in Article 5 of the Own Resources Decision.

For the purposes of implementation under the specific Union programmes, the amount referred to in the first subparagraph shall be adjusted on the basis of a fixed deflator of 2 % per year. For commitment appropriations that deflator shall apply to the annual instalments.

2. The amount referred to in paragraph 1 shall be allocated as follows:

a) support of up to EUR 384 400 million in 2018 prices in the form of non-repayable support and repayable support through financial instruments shall be allocated as follows:

(i) up to EUR 47 500 million in 2018 prices for structural and cohesion programmes of the multiannual financial framework 2014-2020 as reinforced until 2022, including support through financial instruments;

(ii) up to EUR 312 500 million in 2018 prices for a programme financing recovery and economic and social resilience via support to

reforms and investments;

(iii) up to EUR 1 900 million in 2018 prices for programmes related to civil protection;

(iv) up to EUR 5 000 million in 2018 prices for programmes related to research and innovation, including support through financial instruments;

(v) up to EUR 10 000 million in 2018 prices for programmes supporting territories in their transition towards a climate-neutral economy;

(vi) up to EUR 7 500 million in 2018 prices for development in rural areas;

(b) up to EUR 360 000 million in 2018 prices in loans to Member States for a programme financing recovery and economic and social resilience via support to reforms and investments;

(c) up to EUR 5 600 million in 2018 prices for provisioning for budgetary guarantees and related expenditure for programmes aiming at supporting investment operations in the field of Union internal policies.

Article 3

Rules for budgetary implementation

1. For the purpose of Article 21(5) of the Financial Regulation, EUR 384 400 million in 2018 prices, of the amount referred to in Article 2(1) of this Regulation, shall constitute external assigned revenue to the Union programmes referred to in point (a) of Article 2(2) of this Regulation and EUR 5 600 million in 2018 prices of that amount shall constitute external assigned revenue to the Union programmes referred to in point (c) of Article 2(2) of this Regulation.

2. EUR 360 000 million in 2018 prices, of the amount referred to in Article 2(1), shall be used for loans to Member States under the Union programmes referred to in point (b) of Article 2(2).

3. Commitment appropriations covering support to the Union programmes referred to in points (a) and (c) of Article 2(2) shall be made available automatically up to the respective amounts referred to in those points as of the date of entry into force of the Own Resources Decision which provides for the empowerment referred to in Article 2(1) of this Regulation.

4. Legal commitments giving rise to expenditure for support as re-

ferred to in point (a) of Article 2(2), and, where appropriate, in point (c) of Article 2(2), shall be entered into by the Commission or by its executive agencies by 31 December 2023. Legal commitments of at least 60 % of the amount referred to in point (a) of Article 2(2) shall be entered into by 31 December 2022.

5. Decisions on the granting of the loans referred to in point (b) of Article 2(2) shall be adopted by 31 December 2023.

6. The Union's budgetary guarantees up to an amount which, in accordance with the relevant provisioning rate set out in the respective basic acts, corresponds to the provisioning for budgetary guarantees referred to in point (c) of Article 2(2), depending on the risk profiles of the supported financing and investment operations, shall be granted only for supporting operations which have been approved by the counterparts by 31 December 2023. The respective budgetary guarantee agreements shall contain provisions requiring that financial operations corresponding to at least 60 % of the amount of those budgetary guarantees are approved by the counterparts by 31 December 2022. Where provisioning for budgetary guarantees is used for non-repayable support related to the financing and investment operations referred to in point (c) of Article 2(2), the related legal commitments shall be entered into by the Commission by 31 December 2023.

7. Paragraphs 4 to 6 of this Article shall not apply to technical and administrative assistance referred to in Article 1(3).

8. Costs from technical and administrative assistance for the implementation of the Instrument, such as preparatory, monitoring, control, audit and evaluation activities including corporate information technology systems for the purposes of this Regulation, shall be financed from the Union budget.

9. Payments related to the legal commitments entered into, decisions adopted and the provisions regarding financial operations approved in accordance with paragraphs 4 to 6 of this Article shall be made by 31 December 2026, with the exception of technical and administrative assistance referred to in Article 1(3) and of cases where, exceptionally, although the legal commitment has been entered into, the decision has been adopted or the operation has been approved, on terms compliant with the deadline applicable under this paragraph, payments after 2026 are necessary for the Union to be able to honour its obligations towards third parties, including as a result of a definitive judgment against the Union.

Article 4

Reporting

By 31 October 2022, the Commission shall submit to the Council a report on the progress achieved in the implementation of the Instrument and the use of the funds allocated in accordance with Article 2(2).

(...)

Article 6

Entry into force

This Regulation shall enter into force on the day following that of its publication in the Official Journal of the European Union.

The Recovery and Resilience Facility is the key instrument at the heart of the NGEU. It was created by Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (OJ EU L 57 of 18 February 2021, p. 17 ff.; hereinafter 'RRF Regulation'). The RRF Regulation is based on Art. 175(3) TFEU. The following recitals and provisions of the Regulation are relevant to the present proceedings: 5

(...)

(6) The COVID-19 outbreak in early 2020 changed the economic, social and budgetary outlook in the Union and in the world, calling for an urgent and coordinated response both at Union and national level in order to cope with the enormous economic and social consequences as well as asymmetrical effects for Member States. The COVID-19 crisis as well as the previous economic and financial crisis have shown that developing sound, sustainable and resilient economies as well as financial and welfare systems built on strong economic and social structures helps Member States respond more effectively and in a fair and inclusive way to shocks and recover more swiftly from them. A lack of resilience can also lead to negative spill-over effects of shocks between Member States or within the Union as a whole, thereby posing challenges to convergence and cohesion in the Union. Reductions in spending on sectors, such as the education sector, cultural sector and creative sector, and on healthcare can prove counterproductive to achieving a swift recovery. The medium and long-term consequences of the COVID-19 crisis will critically depend on how quickly Member States' economies and societies will recover from that crisis, which in turn depends on the available fiscal space of Member States to take measures to mit-

igate the social and economic impact of the crisis, and on the resilience of their economies and social structures. Sustainable and growth-enhancing reforms and investments that address structural weaknesses of Member State economies, and that strengthen the resilience, increase productivity and lead to higher competitiveness of Member States, will therefore be essential to set those economies back on track and reduce inequalities and divergences in the Union.

(7) Past experiences have shown that investment is often drastically cut during crises. However, it is essential to support investment in this particular situation to speed up the recovery and strengthen long-term growth potential. A well-functioning internal market and investing in green and digital technologies, in innovation and research including in a knowledge-based economy, in the clean energy transition, and in boosting energy efficiency in housing and other key sectors of the economy are important to achieve fair, inclusive and sustainable growth, help create jobs, and reach EU climate neutrality by 2050.

(8) In the context of the COVID-19 crisis, it is necessary to strengthen the current framework for the provision of support to Member States and provide direct financial support to Member States through an innovative tool. To that end, a recovery and resilience facility (the ‘Facility’) should be established to provide effective and significant financial support to step up the implementation of sustainable reforms and related public investments in the Member States. The Facility should be a dedicated instrument designed to tackle the adverse effects and consequences of the COVID-19 crisis in the Union. It should be comprehensive and should benefit from the experience gained by the Commission and the Member States from the use of the other instruments and programmes. Private investment could also be incentivised through public investment schemes, including financial instruments, subsidies and other instruments, provided State aid rules are complied with.

(...)

(10) Recovery should be achieved, and the resilience of the Union and its Member States enhanced, through the support for measures that refer to the policy areas of European relevance structured in six pillars (the ‘six pillars’), namely: green transition; digital transformation; smart, sustainable and inclusive growth, including economic cohesion, jobs, productivity, competitiveness, research, development and innovation, and a well-functioning internal market with strong small and medium enterprises (SMEs); social and territorial

cohesion; health, and economic, social and institutional resilience with the aim of, inter alia, increasing crisis preparedness and crisis response capacity; and policies for the next generation, children and the youth, such as education and skills.

(11) The green transition should be supported by reforms and investments in green technologies and capacities, including in biodiversity, energy efficiency, building renovation and the circular economy, while contributing to the Union's climate targets, fostering sustainable growth, creating jobs and preserving energy security.

(12) Reforms and investments in digital technologies, infrastructure and processes will increase the Union's competitiveness at global level and will also help make the Union more resilient, more innovative and less dependent by diversifying key supply chains. Reforms and investments should in particular promote the digitalisation of services, the development of digital and data infrastructure, clusters and digital innovation hubs and open digital solutions. The digital transition should also incentivise the digitalisation of SMEs. Investments in digital technologies should respect the principles of interoperability, energy efficiency and personal data protection, allow for the participation of SMEs and start-ups, and promote the use of open-source solutions.

(...)

(19) In accordance with Council Regulation (EU) 2020/2094(7) and within the limits of resources allocated therein, recovery and resilience measures under the Facility should be carried out to address the unprecedented impact of the COVID-19 crisis. Those additional resources should be used in such a way as to ensure compliance with the time limits provided for in Regulation (EU) 2020/2094.

The Facility should support projects that respect the principle of additionality of Union funding. The Facility should not, unless in duly justified cases, be a substitute for recurring national expenditures.

(...)

(23) Reflecting the European Green Deal as Europe's sustainable growth strategy and the importance of tackling climate change in line with the Union's commitments to implement the Paris Agreement and the UN Sustainable Development Goals, the Facility is to contribute to the mainstreaming of climate action and environmental sustainability and to the achievement of an overall target of 30 % of Union budget expenditure supporting climate objectives. To that

end, the measures supported by the Facility and included in recovery and resilience plans of the individual Member States should contribute to the green transition, including biodiversity, or to addressing the challenges resulting therefrom, and should account for an amount that represents at least 37 % of the recovery and resilience plan's total allocation based on the methodology for climate tracking set out in an annex to this Regulation.

(...)

(26) The measures supported by the Facility and included in the recovery and resilience plans of the individual Member States should also account for an amount that represents at least 20 % of the recovery and resilience plan's allocation for digital expenditure.

(...)

(37) In order to ensure a meaningful financial contribution commensurate to the actual needs of Member States to undertake and complete the reforms and investments included in the recovery and resilience plan, it is appropriate to establish a maximum financial contribution available to them under the Facility as non-repayable financial support. 70 % of that maximum financial contribution should be calculated on the basis of the population, the inverse of the GDP per capita and the relative unemployment rate of each Member State. 30 % of that maximum financial contribution should be calculated on the basis of the population, the inverse of the GDP per capita, and, in equal proportion, the change in real GDP in 2020 and the aggregated change in real GDP during the period 2020-2021 based on the Commission Autumn 2020 forecasts for data not available at the time of calculation, to be updated by 30 June 2022 with actual outturns.

(...)

(46) To ensure that the financial support is frontloaded in the initial years after the COVID-19 crisis, and to ensure compatibility with the available funding for the Facility, the funds should be made available until 31 December 2023. To that end, it should be possible for 70 % of the amount available for non-repayable financial support to be legally committed by 31 December 2022 and 30 % between 1 January 2023 and 31 December 2023.

(...)

(47) Financial support for a Member State's recovery and resilience plan should be possible in the form of a loan, subject to the

conclusion of a loan agreement with the Commission, on the basis of a duly substantiated request by the Member State concerned. Loans supporting the implementation of national recovery and resilience plans should be provided until 31 December 2023 and should be provided at maturities that reflect the longer-term nature of such spending.

(...)

(52) The release of funds under the Facility is contingent on the satisfactory fulfilment of the relevant milestones and targets by the Member States set out in the recovery and resilience plans, the assessment of such plans having been approved by the Council. Before a decision authorising the disbursement of the financial contribution and, where applicable, of the loan, is adopted by the Commission, it should ask the Economic and Financial Committee for its opinion on the satisfactory fulfilment of the relevant milestones and targets by the Member States on the basis of a preliminary assessment by the Commission. In order for the Commission to take the opinion of the Economic and Financial Committee into account for its assessment, it should be delivered within four weeks of receiving the preliminary assessment by the Commission. In its deliberations, the Economic and Financial Committee shall strive to reach consensus. If, exceptionally, one or more Member States consider that there are serious deviations from the satisfactory fulfilment of the relevant milestones and targets, they may request the President of the European Council to refer the matter to the next European Council. The respective Member States should also inform the Council without undue delay, and the Council should, in turn, without delay inform the European Parliament. In such exceptional circumstances, no decision authorising the disbursement of the financial contribution and, where applicable, of the loan should be taken until the next European Council has exhaustively discussed the matter. That process should, as a rule, not take longer than three months after the Commission has asked the Economic and Financial Committee for its opinion.

(53) All payments of financial contributions to Member States should be made by 31 December 2026, with the exception of measures referred to in the second sentence of Article 1(3) of Regulation (EU) 2020/2094 and cases where, although the legal commitment has been entered, or the decision adopted, in compliance with the deadlines referred to in Article 3 of that Regulation, it is necessary for the Union to be able to honour its obligations towards the Member States, including as a result of a definitive judgment against the

Union.

(...)

CHAPTER I

GENERAL PROVISIONS AND FINANCING

Article 1

Subject matter

This Regulation establishes the Recovery and Resilience Facility (the ‘Facility’).

It lays down the objectives of the Facility, its financing, the forms of Union funding under it and the rules for providing such funding.

Article 2

Definitions

For the purposes of this Regulation, the following definitions apply:

(1) ‘Union funds’ means funds covered by a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Border Management and Visa Instrument (the ‘Common Provisions Regulation for 2021-2027’);

(2) ‘financial contribution’ means non-repayable financial support under the Facility that is available for allocation or that has been allocated to a Member State;

(3) ‘European Semester’ means the process set out in Article 2-a of Council Regulation);

(4) ‘milestones and targets’ means measures of progress towards the achievement of a reform or an investment, with milestones being qualitative achievements and targets being quantitative achievements;

(5) ‘resilience’ means the ability to face economic, social and environmental shocks or persistent structural changes in a fair, sustainable and inclusive way; and

(6) ‘do no significant harm’ means not supporting or carrying out economic activities that do significant harm to any environmental objective, where relevant, within the meaning of Article 17 of Regulation (EU) 2020/852.

Article 3

Scope

The scope of application of the Facility shall refer to policy areas of European relevance structured in six pillars:

(a) green transition;

(b) digital transformation;

(c) smart, sustainable and inclusive growth, including economic cohesion, jobs, productivity, competitiveness, research, development and innovation, and a well-functioning internal market with strong SMEs;

(d) social and territorial cohesion;

(e) health, and economic, social and institutional resilience, with the aim of, inter alia, increasing crisis preparedness and crisis response capacity; and

(f) policies for the next generation, children and the youth, such as education and skills.

Article 4

General and specific objectives

1. In line with the six pillars referred in Article 3 of this Regulation, the coherence and synergies they generate, and in the context of the COVID-19 crisis, the general objective of the Facility shall be to promote the Union’s economic, social and territorial cohesion by improving the resilience, crisis preparedness, adjustment capacity and growth potential of the Member States, by mitigating the social and economic impact of that crisis, in particular on women, by contributing to the implementation of the European Pillar of Social Rights, by supporting the green transition, by contributing to the achievement of the Union’s 2030 climate targets set out in point (11) of Article 2 of Regulation (EU) 2018/1999 and by complying with the objective of EU climate neutrality by 2050 and of the digital transition, thereby contributing to the upward economic and social convergence, restoring and promoting sustainable growth and the integration of

the economies of the Union, fostering high quality employment creation, and contributing to the strategic autonomy of the Union alongside an open economy and generating European added value.

2. To achieve that general objective, the specific objective of the Facility shall be to provide Member States with financial support with a view to achieving the milestones and targets of reforms and investments as set out in their recovery and resilience plans. That specific objective shall be pursued in close and transparent cooperation with the Member States concerned.

Article 5

Horizontal principles

1. Support from the Facility shall not, unless in duly justified cases, substitute recurring national budgetary expenditure and shall respect the principle of additionality of Union funding as referred to in Article 9.

2. The Facility shall only support measures respecting the principle of 'do no significant harm'.

Article 6

Resources from the European Union Recovery Instrument

1. Measures referred to in Article 1 of Regulation (EU) 2020/2094 shall be implemented under the Facility:

(a) through an amount of up to EUR 312 500 000 000 as referred to in point (ii) of Article 2(2)(a) of Regulation (EU) 2020/2094 in 2018 prices, available for non-repayable financial support, subject to Article 3(4) and (7) of Regulation (EU) 2020/2094.

As provided for in Article 3(1) of Regulation (EU) 2020/2094, those amounts shall constitute external assigned revenue for the purpose of Article 21(5) of the Financial Regulation;

(b) through an amount of up to EUR 360 000 000 000 as referred to in point (b) of Article 2(2) of Regulation (EU) 2020/2094 in 2018 prices, available for loan support to Member States pursuant to Articles 14 and 15 of this Regulation, subject to Article 3(5) of Regulation(EU) 2020/2094.

(...)

Article 8

Implementation

The Facility shall be implemented by the Commission in direct management in accordance with the relevant rules adopted pursuant to Article 322 TFEU, in particular the Financial Regulation and the Regulation).

Article 9

Additionality and complementary funding

Support under the Facility shall be additional to the support provided under other Union programmes and instruments. Reforms and investment projects may receive support from other Union programmes and instruments provided that such support does not cover the same cost.

Article 10

Measures linking the Facility to sound economic governance

1. The Commission shall make a proposal to the Council to suspend all or part of the commitments or payments where the Council decides in accordance with Article 126(8) or (11) TFEU that a Member State has not taken effective action to correct its excessive deficit, unless it has determined the existence of a severe economic downturn for the Union as a whole within the meaning of Articles 3(5) and 5(2) of Council Regulation (EC) No 1467/97(25).

(...)

CHAPTER II

FINANCIAL CONTRIBUTION, ALLOCATION PROCESS, LOANS AND REVIEW

Article 11

Maximum financial contribution

1. The maximum financial contribution shall be calculated for each Member State as follows:

(a) for 70 % of the amount referred to in point (a) of Article 6(1), converted into current prices, on the basis of the population, the inverse of the GDP per capita and the relative unemployment rate of each Member State as set out in the methodology in Annex II;

(b) for 30 % of the amount referred to in point (a) of Article 6(1), converted into current prices, on the basis of the population, the inverse of the GDP per capita and, in equal proportion, the change in real GDP in 2020 and the aggregated change in real GDP for the period 2020-2021 as set out in the methodology in Annex III. The change in real GDP for 2020 and the aggregated change in real GDP for the period 2020-2021 shall be based on the Commission Autumn 2020 forecasts.

2. The calculation of the maximum financial contribution under point (b) of paragraph 1 shall be updated by 30 June 2022 for each Member State by replacing the data from the Commission Autumn 2020 forecasts with the actual outturns in relation to the change in real GDP 2020 and the aggregated change in real GDP for the period 2020-2021.

Article 12

Allocation of financial contribution

1. Each Member State may submit a request up to its maximum financial contribution, referred to in Article 11, to implement its recovery and resilience plan.

2. Until 31 December 2022, the Commission shall make available for allocation 70 % of the amount referred to in point (a) of Article 6(1), converted into current prices.

3. From 1 January 2023 until 31 December 2023, the Commission shall make available for allocation 30 % of the amount referred to in point (a) of Article 6(1), converted into current prices.

(...)

Article 13

Pre-financing

1. Subject to the adoption by 31 December 2021 by the Council of the implementing decision referred to in Article 20(1), and when requested by a Member State together with the submission of its recovery and resilience plan, the Commission shall make a pre-financing payment of an amount of up to 13 % of the financial contribution and, where applicable, of up to 13 % of the loan as set out in Article 20(2) and (3). By derogation from Article 116(1) of the Financial Regulation, the Commission shall make the corresponding payment within, to the extent possible, two months after the adoption by the

Commission of the legal commitment referred to in Article 23.

(...)

Article 14

Loans

1. Until 31 December 2023, upon request from a Member State, the Commission may grant the Member State concerned a loan for the implementation of its recovery and resilience plan.

2. A Member State may request loan support at the time of the submission of a recovery and resilience plan referred to in Article 18, or at a different moment in time until 31 August 2023. In the latter case, the request shall be accompanied by a revised recovery and resilience plan, including additional milestones and targets.

3. The request for loan support by a Member State shall set out:

(a) the reasons for the loan support, justified by the higher financial needs linked to additional reforms and investments;

(b) the additional reforms and investments in line with Article 18;

(c) the higher cost of the recovery and resilience plan concerned compared to the amount of the financial contributions allocated to the recovery and resilience plan respectively pursuant to point (a) or (b) of Article 20(4).

4. The loan support to the recovery and resilience plan of the Member State concerned shall not be higher than the difference between the total costs of the recovery and resilience plan, as revised where relevant, and the maximum financial contribution referred to in Article 11.

5. The maximum volume of the loan support for each Member State shall not exceed 6,8 % of its 2019 GNI in current prices.

6. By derogation from paragraph 5, subject to the availability of resources, in exceptional circumstances the amount of the loan support may be increased.

(...)

CHAPTER III

RECOVERY AND RESILIENCE PLANS

Article 17

Eligibility

1. Within the scope set out in Article 3 and in pursuit of the objectives set out in Article 4, Member States shall prepare national recovery and resilience plans. Those plans shall set out the reform and investment agenda of the Member State concerned. Recovery and resilience plans that are eligible for financing under the Facility shall comprise measures for the implementation of reforms and public investment through a comprehensive and coherent package, which may also include public schemes that aim to incentivise private investment.

2. Measures started from 1 February 2020 onwards shall be eligible provided that they comply with the requirements set out in this Regulation.

3. The recovery and resilience plans shall be consistent with the relevant country-specific challenges and priorities identified in the context of the European Semester, as well as those identified in the most recent Council recommendation on the economic policy of the euro area for Member States whose currency is the euro. The recovery and resilience plans shall also be consistent with the information included by the Member States in the National Reform Programmes under the European Semester, in their National Energy and Climate Plans and updates thereof under Regulation (EU) 2018/1999, in the territorial just transition plans under a Regulation of the European Parliament and of the Council establishing the Just Transition Fund (the 'Just Transition Fund Regulation'), in the Youth Guarantee implementation plans and in the partnership agreements and operational programmes under the Union funds.

4. The recovery and resilience plans shall respect the horizontal principles set out in Article 5.

(...)

Article 18

Recovery and resilience plan

1. A Member State wishing to receive a financial contribution in ac-

cordance with Article 12 shall submit to the Commission a recovery and resilience plan as defined in Article 17(1).

(...)

4. The recovery and resilience plan shall be duly reasoned and substantiated. It shall in particular set out the following elements:

(a) an explanation of how the recovery and resilience plan, taking into account the measures included therein, represents a comprehensive and adequately balanced response to the economic and social situation of the Member State, thereby contributing appropriately to all pillars referred to in Article 3, taking into account the specific challenges of the Member State concerned;

(...)

(c) a detailed explanation of how the recovery and resilience plan strengthens the growth potential, job creation and economic, social and institutional resilience of the Member State concerned, including through the promotion of policies for children and the youth, and mitigates the economic and social impact of the COVID-19 crisis, contributing to the implementation of the European Pillar of Social Rights, and thereby enhancing the economic, social and territorial cohesion and convergence within the Union;

(d) an explanation of how the recovery and resilience plan ensures that no measure for the implementation of reforms and investments included in the recovery and resilience plan does significant harm to environmental objectives within the meaning of Article 17 of Regulation (EU) 2020/852 (the principle of 'do no significant harm');

(e) a qualitative explanation of how the measures in the recovery and resilience plan are expected to contribute to the green transition, including biodiversity, or to addressing the challenges resulting therefrom, and whether they account for an amount that represents at least 37 % of the recovery and resilience plan's total allocation, (...);

(f) an explanation of how the measures in the recovery and resilience plan are expected to contribute to the digital transition or to the challenges resulting therefrom, and whether they account for an amount which represents at least 20 % of the recovery and resilience plan's total allocation, (...);

(...)

(i) envisaged milestones, targets and an indicative timetable for the implementation of the reforms, and investments to be completed by

31 August 2026;

(...)

Article 19

Commission assessment

1. The Commission shall assess the recovery and resilience plan or, where applicable, the update to that plan submitted by the Member State in accordance with Article 18(1) or 18(2) within two months of the official submission, and make a proposal for a Council implementing decision in accordance with Article 20(1).

(...)

Article 20

Commission proposal and Council implementing decision

1. On a proposal from the Commission, the Council shall approve by means of an implementing decision the assessment of the recovery and resilience plan submitted by the Member State in accordance with Article 18(1) or, where applicable, of its update submitted in accordance with Article 18(2).

(...)

CHAPTER IV

FINANCIAL PROVISIONS

Article 22

Protection of the financial interests of the Union

1. In implementing the Facility, the Member States, as beneficiaries or borrowers of funds under the Facility, shall take all the appropriate measures to protect the financial interests of the Union and to ensure that the use of funds in relation to measures supported by the Facility complies with the applicable Union and national law, in particular regarding the prevention, detection and correction of fraud, corruption and conflicts of interests. To this effect, the Member States shall provide an effective and efficient internal control system and the recovery of amounts wrongly paid or incorrectly used. Member States may rely on their regular national budget management systems.

(...)

Article 23

Commitment of the financial contribution

1. Once the Council has adopted an implementing decision as referred to in Article 20(1), the Commission shall conclude an agreement with the Member State concerned constituting an individual legal commitment within the meaning of the Financial Regulation. For each Member State the legal commitment shall not exceed the financial contribution referred to in point (a) of Article 11(1) for 2021 and 2022, and the updated financial contribution referred to in Article 11(2) for 2023.

(...)

Article 24

Rules on payments, suspension and cancellation of financial contributions

1. Payments of financial contributions and, where applicable, of the loan to the Member State concerned under this Article shall be made by 31 December 2026 and in accordance with the budget appropriations and subject to the available funding.

(...)

CHAPTER VIII

COMMUNICATION AND FINAL PROVISIONS

(...)

Article 36

Entry into force

This Regulation shall enter into force on the day following that of its publication in the Official Journal of the European Union.

2. On 19 February 2021, the Federal Government submitted a legislative draft for the Act Ratifying the Council Decision of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom (Act Ratifying the EU Own Resources Decision, *Eigenmittelbeschluss-Ratifizierungsgesetz* – ERatG) (*Bundestag* document, *Bundestagsdrucksache* – BTDrucks 19/26821). [...] 6

[…]

On 25 March 2021, in accordance with the recommendations of the Parliamentary Budget Committee (BTDrucks 19/27901), the *Bundestag* adopted the bill. [...] 7

[…] 8-9

Following the *Bundestag*'s vote, the bill was tabled in the *Bundesrat.* On 26 March 2021, by unanimous vote, *Bundesrat* gave its consent to the bill in accordance with Art. 23(1) second sentence GG (cf. *Bundesrat* document, *Bundesratsdrucksache* – BRDrucks 235/21 <Beschluss>). 10

3. The Act Ratifying the EU Own Resources Decisions was certified by the Federal President on 23 April 2021 and promulgated in the Federal Law Gazette on 28 April 2021 (cf. Federal Law Gazette, *Bundesgesetzblatt* – BGBl II 2021 p. 322). 11

The 2020 EU Own Resources Decision entered into force on 1 June 2021, with retroactive application from 1 January 2021 (Art. 12 of the 2020 EU Own Resources Decision), after all Member States notified the EU that they had completed the procedures for the adoption of this Decision in accordance with their respective constitutional requirements. On June 2021, the European Commission disbursed the first payments under the NGEU (cf. European Commission, Press Release of 28 June 2021, IP/21/3262). 12

II.

(1) In their complaint brief dated 26 March 2021, the complainants in proceedings no. I assert that the Act Ratifying the EU Own Resources Decision violates their rights under Art. 38(1) first sentence GG in conjunction with Art. 20(1) and (2) and Art. 79(3) GG. They claim that the Act was not adopted with the necessary majority required under Art. 23(1) third sentence in conjunction with Art. 79(2) GG; that it exceeded, in a qualified manner, the limits set by the division of competences enshrined in EU law under Art. 311(3) TFEU and the no-bailout clause in Art. 125(1) TFEU; and that it violated the Basic Law's constitutional identity on the grounds that the 2020 EU Own Resources Decision infringes upon the overall budgetary responsibility of the *Bundestag*. 13

[…] 14-31

2. In his complaint brief dated 5 May 2021, the complainant in proceedings no. II asserts a violation of his right to democratic self-determination under Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) and Art. 79(3) GG [...]: 32

[…]

[…] 33-48

III.

The Federal President, the *Bundestag*, the *Bundesrat*, the Federal Government, as well as all *Land* (federal state) governments were given the opportunity to submit 49

statements.

[…] 50-92

IV.

By notifications of 16 April 2021 and 18 March 2021, the *Bundestag* joined proceedings 2 BvR 547/21 and 2 BvR 789/21 as an interested party. 93

V.

1. On 26 March 2021, the Second Senate of the Federal Constitutional Court issued an order enjoining the Federal President from certifying the Act Ratifying the EU Own Resources Decision until the Court rendered its decision on an application for a preliminary injunction brought by the complainants in proceedings no. I seeking suspension of the Act (cf. Federal Constitutional Court, Order of 26 March 2021 - 2 BvR 547/21 -). 94

2. By order of 15 April 2021, the Federal Constitutional Court ultimately rejected the application for preliminary injunction, based on the following reasoning: The constitutional complaint was neither inadmissible from the outset nor clearly unfounded. However, based on a summary examination, it did not appear highly likely that the domestic act of approval or the underlying 2020 EU Own Resources Decision itself amounted to a violation of the *Bundestag*'s overall budgetary responsibility to an extent that would constitute compelling grounds for issuing the preliminary injunction sought. The Court therefore based its decision in the preliminary injunction proceedings on a weighing of consequences, which revealed that the disadvantages that would arise if the preliminary injunction were issued clearly outweighed the disadvantages that would arise if the injunction were not issued, i.e. if the application were rejected (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 157, 332 <377 para. 74> – *Act Ratifying the EU Own Resources Decision – preliminary injunction*). 95

3. On 26 and 27 July 2022, the Second Senate conducted an oral hearing, in which the parties amended and further specified their submissions. The following expert third parties presented statements in accordance with § 27a of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG): Prof. Dr. Clemens Ladenburger, LL.M, Deputy Director-General of the Legal Service of the European Commission; Ahmed Demir, Federal Court of Audit (*Bundesrechnungshof*); Prof. Dr. Dr. h.c. Lars Feld, Director of the Walter Eucken Institute, Freiburg; Univ.-Prof. MMag. Gabriel Felbermayr, PhD, Director of the Austrian Institute of Economic Research, Vienna; and Prof. Dr. Dr. h.c. Clemens Fuest, President of the ifo Institute – Leibniz Institute for Economic Research at the University of Munich. 96

B.

The constitutional complaint in proceedings no. I is [...] admissible (see I. below), as 97

is the complaint in proceedings no. II (see II. below).

I.

The constitutional complaint, in the version of the complaint brief dated 10 October 2021, is admissible. 98

1. […] 99

2. […] 100

a) […] 101-103

b) The complaint is directed against the Act Ratifying the EU Own Resources Decision, which constitutes Germany's act of approval in relation to the 2020 EU Own Resources Decision. This is a permissible subject matter of constitutional complaint proceedings under Art. 93(1) no. 4a GG and § 90(1) BVerfGG. The domestic Act Ratifying the EU Own Resources Decision constitutes an act of German public authority, which can be challenged by means of a constitutional complaint (cf. § 93(3) and § 95(3) BVerfGG). 104

c) The complainants in proceedings no. I have standing to lodge a constitutional complaint. The have sufficiently asserted and substantiated (§ 23(1) second sentence, § 92 BVerfGG) a possible violation of their right to democratic self-determination and have demonstrated that they are individually, presently and directly affected by the challenged Act (see aa) below). The arguments opposing this conclusion are ultimately not persuasive (see bb) below). 105

aa) The complainants in proceedings no. I assert a violation of their right derived from Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) in conjunction with Art. 79(3) GG, which is equivalent to a fundamental right. With regard to the right of citizens to democratic self-determination enshrined in Art. 38(1) first sentence GG and Art. 79(3) GG (cf. BVerfGE 89, 155 <187>; 123, 267 <340>; 129, 124 <169, 177>; 132, 195 <238 para. 104>; 135, 317 <386 para. 125>; 142, 123 <190 para. 126>; 146, 216 <249 f. para. 46>; 151, 202 <286 para. 118> – *European Banking Union*; 153, 74 <153 para. 138> – *Unified Patent Court*; 154, 17 <86 para. 101> – *PSPP asset purchase programme of the ECB*), these challenges are sufficiently substantiated. 106

(1) Even when measured against the particularly strict requirements regarding the admissibility of an *ultra vires* challenge (cf. BVerfGE 142, 123 <172 ff. para. 77 ff.>; 151, 202 <274 ff. para. 90 ff.> – *European Banking Union*; 154, 17 <82 para. 90> – *PSPP asset purchase programme of the ECB*), the complainants sufficiently demonstrate – with reference to the constitutional standards developed in the Second Senate's case-law – that it appears at least possible that the 2020 EU Own Resources Decision, which the challenged Act ratifies, exceeds the scope of Art. 311(3) TFEU and is incompatible with Art. 125(1) TFEU, and could therefore violate the complainants' right to democratic self-determination derived from Art. 38(1) first sentence 107

in conjunction with Art. 20(1) and (2) and Art. 79(3) GG.

The complainants contend that Art. 311(3) TFEU does not provide a legal basis for the arrangements set out in Arts. 4 and 5 of the 2020 EU Own Resources Decision. This view finds significant support in German legal scholarship, as referenced by the complainants, as most of the early scholarly publications on this issue posited that any borrowing on the part of the EU was impermissible. In current debates, there are still voices who continue to advocate for this view. In this respect, it is argued that the 2020 EU Own Resources Decision is incompatible with the fundamental foundations of the EU's financial system. 108

The complainants further submit that the 2020 EU Own Resources Decision, especially the rules on collecting own resources in Art. 9(5) subpara. 2 first sentence, violate Art. 125(1) TFEU and for this reason, too, must be regarded as an *ultra vires* act. 109

(2) Based on the complainants' submission, it cannot be ruled out that the 2020 EU Own Resources Decision intrudes upon the overall budgetary responsibility of the *Bundestag*, possibly violating the complainants' right to democratic self-determination under Art. 38(1) first sentence, Art. 20(1) and (2) in conjunction with Art. 79(3) GG (cf. BVerfGE 157, 332 <382 ff. para. 87 ff.> – *Act Ratifying the EU Own Resources Decision – Preliminary injunction*). […] 110

bb) The arguments put forward by the *Bundestag* and the Federal Government asserting that the complainants in proceedings no. I lack standing are ultimately not persuasive. 111

(1) According to the *Bundestag* and the Federal Government, any infringement of the right to democratic self-determination under Art. 38(1) first sentence GG can be ruled out from the outset on the grounds that the Act Ratifying the EU Own Resources Decision does not entail a transfer of sovereign powers; they submit that the Act merely gives further shape to the European integration agenda (*Integrationsprogramm*) on the basis of Art. 311(3) TFEU and therefore cannot possibly be qualified as an *ultra vires* act. However, this assertion disregards the limits of the European integration agenda, as defined in the Treaties, which also sets binding limits for the decisions on own resources. The European integration agenda can only be amended in the procedure set forth in Art. 48 TFEU or by invoking one of the evolutionary clauses in the Treaties – which does not include Art. 311(3) third sentence TFEU – to further develop the agreed agenda. The fact that § 3 of the Act on the *Bundestag*'s and the *Bundesrat*'s Responsibility With Regard to European Integration (*Integrationsverantwortungsgesetz* – IntVG) requires an act of approval in the form of a law adopted by the *Bundestag* does not merit a different conclusion. 112

In its judgment on the European Banking Union, the Second Senate explicitly held that the German legislator may not authorise the Federal Government to approve an *ultra vires* measure of an EU institution, body, office or agency, as this would undermine the democratic decision-making process guaranteed by Art. 23(1) GG in con- 113

junction with Art. 20(1) and (2) as well as Art. 79(3) GG. It is incumbent upon Parliament to decide, in a formal procedure, on the transfer of competences in the context of European integration, thereby ensuring that the principle of conferral is observed (cf. BVerfGE 151, 202 <297 para. 48> – *European Banking Union*). This was subsequently affirmed in the judgment rendered on a dispute between constitutional organs concerning the EU-Canada free trade agreement (*CETA – Organstreit I*); that judgment also clarified that the Basic Law does not recognise the concept of 'special authorising laws' (*Mandatsgesetze*), i.e. laws through which Parliament could provide legitimation to an exercise of sovereign powers by the European Union or other international organisations beyond the scope of the agreed transfer of competences. If the European Union or another organisation were to unilaterally exercise sovereign powers contrary to the competences conferred upon it in the Treaties, exceeding the agreed upon integration agenda, or if its actions affected the German constitutional identity, such exercise of sovereign power or action would no longer be covered by the domestic act of approval and would thus run counter to the Constitution. Such exercise of sovereign power or action would still be incompatible with the Basic Law even if Parliament adopted a law authorising the German representative in the Council to give approval to the measure. A violation of the Constitution resulting from an *ultra vires* act cannot be remedied through the adoption of a domestic law unless the treaty basis is first amended, and a violation of the constitutional identity cannot be remedied at all. This means that Parliament may not authorise the Federal Government to approve *ultra vires* acts of institutions, bodies, offices and agencies of the European Union (cf. BVerfGE 157, 1 <21 f. para. 65> – *CETA – Organstreit I*). In this respect, it cannot tenably be argued that an exception applied with regard to Art. 311 TFEU merely because this treaty provision sets out a special legislative procedure for the adoption of the decisions on own resources in light of the significant role attributed to the Members States and national parliaments in the context of the European Union's financial system.

Nor can it be argued that the complainants in proceedings no. I lack standing on the grounds that the 2020 EU Own Resources Decision does not directly affect their legal interests. In the context of an *ultra vires* act, any manifest and structurally significant violation of the principle of conferral by EU institutions, bodies, offices and agencies intrudes upon the principle of the sovereignty of the people and, therefore, also infringes on the right of citizens under Art. 38(1) first sentence in conjunction with Art. 20(2) first sentence and Art. 79(3) GG. These constitutional guarantees confer upon citizens the right not to be subjected to a political authority that they cannot escape and as to which they cannot in principle influence, on free and equal terms, the persons in power or the decision-making on substantive issues (cf. BVerfGE 142, 123 <191 para. 128, 209 para. 166>; 151, 202 <285 f. para. 117> – *European Banking Union*; 154, 17 <85 para. 99> – *PSPP asset purchase programme of the ECB*). Democratic legitimation is only conferred within the limits of the European integration agenda to the extent that the approval given by the *Bundestag* and the *Bundestag* in accordance with Art. 23(1) GG. It can thus also not be argued that the German legis- 114

lator has issued a more specific order giving effect to European law at the domestic level on the basis of § 3(1) IntVG by adopting an act of approval as to a particular EU measure, which could then take precedence over the act of approval ratifying the underlying treaty. This argument is without merit, as it disregards the supremacy of the Constitution, which takes precedence over statutory law at the domestic level.

Based on these considerations, the complainants in proceedings no. I have standing. To establish standing, it does not matter whether the constitutional challenge concerns a law authorising the German representative to consent to an EU measure in the Council – as was the case with the SSM Authorising Act – or whether the legislator itself directly adopts an act of approval – as is the case here with the Act Ratifying the EU Own Resources Decision. In the latter situation, granting admissibility to a constitutional complaint that asserts a violation of the fundamental right to democratic self-determination derived from Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) and Art. 79(3) GG does not result in an excessive expansion of this right. On the contrary, admitting such challenges is necessary to safeguard the right to democratic self-determination, which would otherwise be rendered meaningless. 115

(2) Lastly, an *ultra vires* challenge can also be based on the assertion that an EU measure violates the no-bailout clause under Art. 125(1) TFEU. The fact that the Second Senate has dismissed as inadmissible a different constitutional complaint that had been directed against the Act on the European Stability Mechanism (ESM Act), claiming a violation of Art. 125 TFEU, does not warrant a different conclusion. In the ESM case, the Second Senate held that Art. 125 TFEU does not preclude the German legislator from amending the framework on the monetary union in accordance with the relevant treaty-amending procedures (cf. BVerfGE 132, 287 <292 para. 10). Yet the issue raised in the present proceedings is a different one, namely, that the no-bailout clause in Art. 125 TFEU prohibits certain measures, such as those imposing liability either on the European Union itself or on the Members States for commitments assumed by others. In this respect, Art. 125 TFEU goes beyond setting legal requirements for the design of the EU's financial system. Art. 125 TFEU can also be read as explicitly barring the European Union from taking certain measures in view of the objective of the no-bailout clause, which is to ensure that Member States remain subject to the logic of the market when they enter into debt in order to maintain the stability of the monetary union (cf. CJEU, Judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756; […]). By asserting a violation of this standard, the constitutional complaint raises a permissible *ultra vires* challenge. 116

II.

As regards the constitutional complaint lodged in proceedings no. II, the foregoing considerations on the issues of admissibility and standing apply accordingly. 117

In addition, the constitutional complaint is sufficiently substantiated insofar as the complainant asserts that Arts. 4 and 5 of the 2020 EU Own Resources Decision impair the overall budgetary responsibility vested in the *Bundestag*. Invoking the consti- 118

tutional standards developed in the Second Senate's case-law, the complainant contends that with its approval to the 2020 EU Own Resources Decision, the *Bundestag* essentially signs away vital decision-making, policy-shaping and oversight powers of significant scope; according to the complainant, this runs counter to the principle that Germany may not assume liability for decisions taken by others on which German public authority has no influence. [...]

[…] 119

C.

The constitutional complaints are, however, unfounded. Measured against the standards developed by the Second Senate for constitutional review on the basis of the *ultra vires* doctrine (*ultra vires* review) and the review on the basis of constitutional identity (identity review) (see I. below), the 2020 EU Own Resources Decision does not violate the complainants' rights under Art. 38(1) in conjunction with Art. 20(1) and (2) and Art. 79(3) GG. In the understanding affirmed by the European Commission and the Federal Government, the 2020 EU Resources Decision – supposing that it has structural significance for the division of competences between the EU and the Member States – does not amount to a manifest exceeding of the powers conferred by the Treaties in Art. 311(2) and (3) in conjunction with Art. 122(1) and (2) TFEU (see II.1 below), nor does it intrude upon the overall budgetary responsibility of the *Bundestag* (see II.2 below). There is no need for the Federal Constitutional Court to request a preliminary ruling from the Court of Justice of the European Union (CJEU) pursuant to Art. 267 TFEU (see III. below). 120

I.

1. The right to democratic self-determination, which follows from Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) and Art. 79(3) GG, not only protects citizens against a substantial erosion of the *Bundestag*'s latitude to shape policy, but also affords them the right to demand that EU institutions, bodies, offices and agencies exercise only those competences transferred to them in accordance with Art. 23 GG (cf. BVerfGE 142, 123 <173 para. 80 ff.>; 146, 216 <251 para. 50>; 151, 202 <275 para. 92> – *European Banking Union*; 157, 332 <380 para. 82> – *Act Ratifying the EU Own Resources Decision – preliminary injunction*). This right is violated when institutions, bodies, offices and agencies of the EU take measures that are outside the scope of the European integration agenda (cf. BVerfGE 75, 223 <235, 242>; 89, 155 <188>; 123, 267 <353>; 126, 286 <302 ff.>; 134, 366 <382 ff. para. 23 ff.>; 142, 123 <203 para. 153>; 146, 216 <252 f. para. 52 f.>; 151, 202 <275 para. 92> – *European Banking Union*; 157, 332 <380 para. 82> – *Act Ratifying the EU Own Resources Decision – preliminary injunction*) and when the execution of the integration agenda exceeds the limits set out in Art. 79(3) GG (cf. BVerfGE 123, 267 <353>; 126, 286 <302>; 133, 277 <316>; 134, 366 <382 para. 22, 384 ff. para. 27 ff.>; 140, 317 <336 ff. para. 40 ff.>; 142, 123 <203 para. 153>; 146, 216 <253 para. 54>; 151, 202 121

<275 para. 92> – *European Banking Union*; 157, 332 <380 para. 82> – *Act Ratifying the EU Own Resources Decision – preliminary injunction*).

When constitutional organs participate in the execution and in the further shaping and development of the integration agenda, the principle of the supremacy of the Constitution obliges them to ensure that the limits of this agenda are respected as well (cf. BVerfGE 123, 267 <351 ff.., 435>; 129, 124 <180 f.>; 135, 317 <399 ff. para. 159 ff.>; 142, 123 <208 para. 164>; 151, 202 <296 f. para. 141> – *European Banking Union*). In this regard, constitutional organs have a lasting responsibility to ensure that institutions, bodies, offices, and agencies of the European Union adhere to the European integration agenda (cf. BVerfGE 123, 267 <352 ff., 389 ff., 413 ff.>; 126, 286 <307>; 129, 124 <181>; 132, 195 <238 f. para. 105>; 134, 366 <394 f. para. 47>; 142, 123 <208 para. 165>; 151, 202 <296 f. para. 141> – *European Banking Union*). Similar to the state's duties to protect arising from fundamental rights, the responsibility with regard to European integration (*Integrationsverantwortung*) requires constitutional organs to protect and promote the legal interests of individual rights holders under Art. 38(1) first sentence in conjunction with Art. 20(2) first sentence GG when the latter are not themselves able to ensure that their rights are upheld (cf. BVerfGE 142, 123 <209 para. 166>; 151, 202 <297 para. 142> – *European Banking Union*). This responsibility corresponds to a right afforded citizens vis-à-vis the constitutional organs, enshrined in Art. 38(1) first sentence GG, which compels the latter to ensure that any restriction of the right of citizens to democratic self-determination resulting from the implementation of the European integration agenda does not go beyond what is justified by the permissible transfer of sovereign powers to the European Union (cf. BVerfGE 151, 202 <297 para. 142> – *European Banking Union*). 122

Art. 23(2) and (3) GG therefore entail not only a right (cf. BVerfGE 131, 152 <196 ff.>; 132, 195 <260 para. 156, 271 f. para. 181 f.>; 135, 317 <402 f. para. 166, 420 para. 213, 428 para. 232 f.>; 157, 1 <23 para. 70> – *CETA – Organstreit I*), but also a duty (cf. BVerfGE 134, 366 <395 para. 49>; 146, 216 <250 para. 49>; […]) on the part of the *Bundestag* to effectively exercise its responsibility with regard to European integration (cf. BVerfGE 134, 366 <395 f. para. 48 f.>; 146, 216 <250 ff. para. 47 ff.>; 151, 202 <296 ff. para. 141 ff., 332 f. para. 218> – *European Banking Union*; 157, 1 <22 f. para. 69 f.> – *CETA – Organstreit I*; 158, 89 <122 ff. para. 91 ff., 130 para. 110> – *PSPP – application for an order of execution*). 123

2. The principle of the sovereignty of the people in Art. 20(2) first sentence GG requires that any act of public authority exercised in Germany must be able to be traced back to the citizens, that is, the electorate (cf. BVerfGE 83, 37 <50 f.>; 93, 37 <66>; 130, 76 <123>; 137, 185 <232 para. 131>; 139, 194 <224 para. 106>; 142, 123 <191 para. 128>; 151, 202 <285 para. 117> – *European Banking Union*; 154, 17 <85 para. 99> – *PSPP asset purchase programme of the ECB*). With this principle, the Basic Law guarantees all citizens a right to free and equal participation in the process of conferring legitimation upon and influencing the public authority that governs them. This, in turn, prohibits measures that subject citizens to a political authority that they 124

cannot escape and in regard of as to which they cannot in principle influence, on free and equal terms, decision-making on the persons in power or the decision-making on substantive issues (cf. BVerfGE 123, 267 <341>; 142, 123 <191 para. 128>; 151, 202 <285 f. para. 117> – *European Banking Union*; 154, 17 <85 para. 99> – *PSPP asset purchase programme of the ECB*).

a) The protection afforded under Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) and Art. 79(3) GG is also activated when EU institutions, bodies, offices and agencies unilaterally seize sovereign powers (cf. BVerfGE 134, 366 <397 para. 53>; 142, 123 <194 para. 135>; 151, 202 <275 para. 92> – *European Banking Union*; 154, 17 <88 para. 106> – *PSPP asset purchase programme of the ECB*). In this regard, the exercise of competences and powers other than the ones transferred to the EU in the European integration agenda, as defined by the act of approval to the relevant treaty instrument, violates the core of the principle of the sovereignty of the people, which enjoys absolute protection under Art. 1(1) GG (cf. BVerfGE 123, 267 <372>; 129, 300 <336 ff.>; 135, 259 <294 para. 71>; 142, 123 <194 para. 135>). 125

b) These constitutional standards correspond to the provisions set forth in the Treaty on European Union (TEU). The European Union is a community based on the rule of law (Art. 2 first sentence TEU; CJEU, Judgment of 23 April 1986, Les Verts v Parliament, C-294/83, EU:C:1986:166, para. 23). Most notably, the European Union is bound by the principle of conferral (Art. 5(1) first sentence and Art. 5(2) first sentence TEU; cf. BVerfGE 75, 223 <242>; 89, 155 <187 f., 192, 199>; 123, 267 <349>; 126, 286 <302>; 134, 366 <384 para. 26>; 142, 123 <199 para. 144>) and by EU fundamental rights, and it must respect the constitutional identity of the different Member States, which forms part of the EU's foundations (cf. the specific guarantees in Art. 4(2) first sentence TEU, Art. 5(1) first sentence and Art. 5(2) first sentence TEU, Art. 6(1) first sentence and Art. 6(3) TEU; cf. BVerfGE 126, 286 <303>; 142, 123 <199 para. 144>). While the European Union is regarded (in part) as an autonomous legal order (cf. BVerfGE 123, 267 <348 f.>), the fact remains that its powers are contingent upon a specific conferral in the Treaties. If EU institutions, bodies, offices, and agencies wish to extend their powers, such extension requires a corresponding treaty amendment, which the Member States must effectuate and take responsibility for in line with their respective constitutional rules (cf. in particular Art. 48(4) subpara. 2, Art. 48(6) subpara. 2 third sentence, Art. 48(7) subpara. 3 TEU; cf. BVerfGE 142, 123 <199 para. 144>). 126

Similarly, the rule-of-law principle (Art. 2 TEU, Art. 20(3) GG) gives rise to a requirement that the exercise of public authority must have a valid legal basis. As measures of EU institutions, bodies, offices and agencies that result from an exceeding of competences are not based on a valid allocation of powers in the Treaties and the corresponding act of approval (Art. 5(1) first sentence TEU), they can also not justify interferences with citizens' rights and legal interests (cf. BVerfGE 134, 366 <388 para. 30>; 142, 123 <202 para. 152>). 127

c) When conducting an *ultra vires* review, the Federal Constitutional Court assesses whether the limits of the European integration agenda, as defined by the act of approval to the Treaties, have been observed (cf. BVerfGE 151, 202 <296 para. 140> – *European Banking Union*; 154, 17 <88 ff. para. 105 ff.> – *PSPP asset purchase programme of the ECB*). This review serves to ensure that implementation of the European integration agenda is carried out with a sufficient level of democratic legitimation, and thereby safeguards the foundations of EU law and its precedence of application (cf. BVerfGE 142, 123 <199 para. 145>; 158, 210 <239 ff. para. 73 f.> – *Unified Patent Court II – preliminary injunction*) as well as the guarantee of the rule of law. 128

In light of the narrow substantive scope and limits of the right to democratic self-determination derived from Art. 38(1) in conjunction with Art. 20(1) and (2) and Art. 79(3) GG, the *ultra vires* review is limited to determining whether competences were exceeded in a sufficiently qualified manner, because only then can it be said that measures taken by EU institutions, bodies, offices and agencies subject citizens to a political authority that they cannot escape and as to which they cannot in principle influence, on free and equal terms, the persons in power or the decision-making on substantive issues (cf. BVerfGE 142, 123 <200 para. 147>; 154, 17 <85 para. 99, 90 para. 110> – *PSPP asset purchase programme of the ECB*). This standard of review ensures respect for the judicial mandate of the Court of Justice of the European Union enshrined in Art. 19(1) second sentence TEU (cf. BVerfGE 126, 286 <307>; 142, 123 <200 f. para. 149>; 154, 17 <92 para. 112> – *PSPP asset purchase programme of the ECB*). A qualified exceeding of competences must therefore be manifestly evident and of structural significance for the division of competences between the European Union and the Member States (cf. BVerfGE 154, 17 <90 para. 110> – *PSPP asset purchase programme of the ECB*). 129

aa) A measure of an EU institution, body, office, and agency manifestly exceeds the competences conferred on it (cf. BVerfGE 123, 267 <353, 400>; 126, 286 <304>; 134, 366 <392 para. 37>; 142, 123 <200 para. 148>; 151, 202 <300 para. 151> – *European Banking Union*; 154, 17 <90 para. 110> – *PSPP asset purchase programme of the ECB*) when, in applying common methodological standards, a competence cannot be based on any serious legal point of view (cf. BVerfGE 126, 286 <308>; 142, 123 <200 para. 149>; 151, 202 <300 f. para. 151> – *European Banking Union*). 130

At the same time, establishing that a measure manifestly exceeds EU competences does not require that absolutely no dissenting legal views have been put forward on the issue. The fact that some voices in legal scholarship, politics or the media have argued for the permissibility of certain measures does not generally rule out that such measures can constitute a manifest exceeding of competences. An exceeding of competences can therefore be “manifest” even if it results from a careful and meticulously reasoned interpretation of the law. In this respect, the general standards apply accordingly in the context of an *ultra vires* review (cf. BVerfGE 142, 123 <201 131

para. 150>; 151, 202 <301 para. 152> – *European Banking Union*; 154, 17 <92 f. para. 113> – *PSPP asset purchase programme of the ECB*).

bb) A structurally significant shift of competences to the detriment of the Member States results where the exceeding of competences has a considerable impact on the principle of conferral and on the extent to which respect for the legal order, as part of the rule of law, is upheld. This is generally the case if the exercise of the competence invoked by an EU institution, body, office, or agency is contingent upon a treaty amendment in accordance with Art. 48 TEU or the use of an evolutionary clause (cf. BVerfGE 126, 286 <309>; 151, 202 <301 para. 153> – *European Banking Union*; 154, 17 <90 para. 110> – *PSPP asset purchase programme of the ECB;* in addition, cf. CJEU, Opinion 2/94 of 28 March 1996, ECHR Accession, ECR 1996, I-1783 <1788 para. 30>), thus requiring action on the part of the German legislator pursuant to either Art. 23(1) second sentence GG or the Act on the *Bundestag*'s and the *Bundesrat*'s Responsibility With Regard To European Integration (cf. BVerfGE 89, 155 <210>; 142, 123 <201 f. para. 151>; 151, 202 <301 para. 153> – *European Banking Union*; 154, 17 <90 para. 110> – *PSPP asset purchase programme of the ECB*). 132

3. Moreover, the right to democratic self-determination derived from Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) and Art. 79(3) GG is violated when acts of EU institutions, bodies, offices and agencies encroach upon the limits of the principles enshrined in Art. 20 GG, which are declared inviolable by Art. 79(3) GG (in conjunction with Art. 23(1) third sentence GG); specifically, when such acts substantially restrict the ability of the *Bundestag* to shape policy (cf. BVerfGE 151, 202 <302 para. 155> – *European Banking Union*; 154, 17 <93 f. para. 114 f.> – *PSPP asset purchase programme of the ECB*; 157, 332 <381 para. 84> – *Act Ratifying the EU Own Resources Decision – Preliminary injunction*). 133

a) The budgetary powers of the *Bundestag* (cf. BVerfGE 123, 267 <359>; 129, 124 <177, 181>) and its overall budgetary responsibility are indispensable elements of the constitutional principle of democracy that are protected by Art. 38(1) first sentence, Art. 20(1) and (2) and Art. 79(3) GG (cf. BVerfGE 123, 267 <359>; 129, 124 <177>; 132, 195 <239 para. 106>; 135, 317 <399 f. para. 161>; 142, 123 <195 para. 138>; 146, 216 <253 f. para. 54>; 151, 202 <288 f. para. 123> – *European Banking Union*; 154, 17 <87 para. 104> – *PSPP asset purchase programme of the ECB*; 157, 332 <381 para. 84> – *Act Ratifying the EU Own Resources Decision – preliminary injunction*). It is for the *Bundestag,* as the elected legislator directly accountable to the people, to take all essential decisions on revenue and expenditure (cf. BVerfGE 70, 324 <355 f.>; 79, 311 <329>; 129, 124 <177>; 142, 123 <195 para. 138>; 151, 202 <288 para. 123> – *European Banking Union*; 154, 17 <87 para. 104> – *PSPP asset purchase programme of the ECB*; 157, 332 <381 para. 84> – *Act Ratifying the EU Own Resources Decision – preliminary injunction*), including the overall financial burden imposed on its citizens and on the essential tasks of the state (cf. BVerfGE 123, 267 <361>; 151, 202 <288 f. para. 123> – *European Banking* 134

Union; 157, 332 <381 para. 84> – *Act Ratifying the EU Own Resources Decision – preliminary injunction*); this prerogative forms part of the core guarantees enshrined in Art. 20(1) and (2) GG, which are beyond the reach of constitutional amendment. It would thus violate the principle of democracy if the type and level of public spending were, to a significant extent, determined at the supranational level, depriving the *Bundestag* of its decision-making prerogative (cf. BVerfGE 129, 124 <179>; 151, 202 <288 f. para. 123> – *European Banking Union*; 154, 17 <87 para. 104> – *PSPP asset purchase programme of the ECB*; 157, 332 <382 para. 85> – *Ratifying the EU Own Resources Decision – preliminary injunction*).

No permanent mechanisms may be created that would essentially entail an assumption of liability for decisions taken by other states, intergovernmental institutions or international organisations, especially if the commitments question could have potentially unforeseeable consequences. When the Federation undertakes significant aid measures based on solidarity at the international or EU level that affect public spending, approval by the *Bundestag* is required in each individual case. Every single measure agreed upon at the supranational level which, by reason of its scale, may structurally affect Parliament's budgetary powers not only requires approval by the *Bundestag*, it must also be ensured that the *Bundestag* retains sufficient influence on how the means provided will be used (cf. BVerfGE 132, 195 <241 para. 110>; 135, 317 <402 para. 165>; 157, 332 <381 f. para. 85> – *Act Ratifying the EU Own Resources Decision – preliminary injunction*; also BVerfGE 129, 124 <180 f.>); this requirement applies, for instance, if guarantees were given that, in the event of default, could endanger budgetary autonomy, or if Germany participated in a financial guarantee system of such nature. 135

In its case-law, the Second Senate has not yet decided whether and to what extent justiciable limits regarding the assumption of payment obligations or liabilities can be derived from the principle of democracy. In any case, only evident breaches of absolute outer limits would be relevant for the purposes of constitutional review (cf. BVerfGE 129, 124 <182>; 132, 195 <242 para. 112>; 157, 332 <387 para. 96> – *Act Ratifying the EU Own Resources Decision – preliminary injunction*). Similarly, payment obligations or assumptions of liability can only be considered to be in breach of any such outer limit following directly from the principle of democracy if, when they are called, such financial commitments not only had the effect of restricting budgetary autonomy, but would essentially negate this autonomy, at least for an appreciable period of time (cf. BVerfGE 129, 124 <183>; 132, 195 <242 para. 112>; 135, 317 <405 para. 174>; 157, 332 <387 para. 96> – *Act Ratifying the EU Own Resources Decision – preliminary injunction*). 136

It is primarily for Parliament to determine whether the scale of payment obligations and assumptions of liability will result in the *Bundestag* relinquishing its budgetary autonomy. Parliament has a wide margin of appreciation, particularly with regard to the risk of the commitments being called and with regard to the expected consequences for the legislator's latitude; the Federal Constitutional Court must, in princi- 137

ple, respect this margin. The same applies when it comes to appraising the future soundness of the federal budget in terms of the ability to honour debt commitments and the economic performance of the Federal Republic of Germany (cf. BVerfGE 129, 124 <182 f.>; 157, 332 <387 para. 97> – *Act Ratifying the EU Own Resources Decision – preliminary injunction*), including considerations pertaining to the consequences of alternative courses of action (cf. BVerfGE 132, 195 <242 f. para. 113>; 157, 332 <387 para. 97> – A*ct Ratifying the EU Own Resources Decision – preliminary injunction*).

b) When conducting an identity review in relation to measures by EU institutions, bodies, offices and agencies, the Court also examines whether such acts conflict with the principles protected by Art. 79(3) GG (cf. BVerfGE 140, 317 <337 para. 43, 341 para. 49>; 151, 202 <287 para. 120, 324 ff. para. 203 ff.> – *European Banking Union*). 138

3. *Ultra vires* review and identity review are exercised with restraint and in a cooperative manner that is open to European integration. This requires – when necessary – that the Federal Constitutional Court request a preliminary ruling from the Court of Justice of the European Union in accordance with Art. 267(3) TFEU and, in the course of its own review, interpret the measure in question in accordance with the understanding determined by the Court of Justice (cf. BVerfGE 126, 286 <304>; 134, 366 <382 ff. para. 22 ff.; 142, 123 <204 para. 156>). 139

4. The specific obligations arising from the responsibility of constitutional organs with regard to European integration depend upon the circumstances of the particular case (cf. BVerfGE 157, 1 <22 ff. para. 69 ff.> – *CETA – Organstreit I*). 140

a) German constitutional organs may not participate in measures taken by EU institutions, bodies, offices and agencies if such measure constitutes an *ultra vires* act or affect German constitutional identity (cf. BVerfGE 151, 202 <297 f. para. 144, 321 para. 194> – *European Banking Union*; 157, 1 <27 para. 81> – *CETA - Organstreit I*). Instead, the constitutional organs must counter such acts (cf. BVerfGE 142, 123 <207 f. para. 163 ff.>; 151, 202 <276 para. 94> – *European Banking Union*; 157, 1 <27 para. 81> – *CETA – Organstreit I*); they must actively address the question of how the integrity of the constitutional order can be restored, and make a positive determination as to which course of action to pursue to this end (cf. most recently BVerfGE 154, 17 <88 f. para. 107, 150 para. 231> – *PSPP asset purchase programme of the ECB*; 157, 1 <23 para. 71 f.> – *CETA – Organstreit I*; 158, 89 <122 para. 90> – *PSPP – application for an order of execution*). 141

b) When exercising their responsibility with regard to European integration, the constitutional organs have a wide margin of appreciation, assessment and latitude; this also includes the responsibility to appraise existing risks and take political responsibility in that regard (cf. BVerfGE 125, 39 <78>; 142, 123 <210 para. 169>; 151, 202 <299 para. 148> – *European Banking Union*; 154, 17 <89 f. para. 109> – *PSPP asset purchase programme of the ECB*; 157, 1 <23 para. 71 f.> – *CETA – Organstreit I*; 142

158, 89 <122 para. 90> – *PSPP – application for an order of execution*).

aa) To ensure conformity with the European integration agenda, constitutional organs 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 to the Treaties 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* to the European Union (cf. BVerfGE 146, 216 <250 para. 48>; 151, 202 <299 para. 148> – *European Banking Union*; 157, 1 <25 para. 78> – *CETA – Organstreit I*; 158, 89 <122 para. 91> – *PSPP – application for an order of execution*). If that is either not possible or not desired, constitutional organs must in principle use any 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 the domestic effects of such acts to the greatest extent possible (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> – *European Banking Union*; 154, 17 <150 para. 231> – *PSPP asset purchase programme*; 157, 1 <25 para. 78> – *CETA – Organstreit I*; 158, 89 <122 f. para. 91> – *PSPP application for an order of execution*). 143

To this end, the Federal Government and the *Bundestag* have a wide range of measures at their disposal that they can take themselves or for which they can advocate. Such measures include: legal action before the Court of Justice of the European Union (Art. 263(1) TFEU); contesting the act in question with the relevant authorities and their supervising authorities; adapting its voting policy in the decision-making bodies of the European Union, including exercising veto rights; proposing treaty amendments (cf. Art. 48(2) and Art. 50 TEU); and instructing subordinate authorities to not apply the act in question (cf. BVerfGE 142, 123 <211 f. para. 171>; 157, 1 <26 para. 79> – *CETA – Organstreit I*; 158, 89 <123 para. 92> – *PSPP – application for an order of execution*). 144

The *Bundestag* can exercise the oversight powers it is afforded vis-à-vis the Federal Government in EU matters, such as the right to ask questions and to debate and adopt resolutions (cf. Art. 23(2) GG). It can inform the Federal Government of its view at any time by adopting a parliamentary decision (cf. Art. 40(1) second sentence GG, Rule 75(1)(d) and 75(2)(c) of the *Bundestag* Rules of Procedure) or by enacting a law. 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 resort to a motion of no confidence (cf. Art. 67 GG) (cf. BVerfGE 157, 1 <26 para. 79> – *CETA – Organstreit I*). In cases in which the Federal Constitutional Court finds that a measure constitutes an *ultra vires* act or affects Germany's constitutional identity, the *Bundestag* must conduct a plenary debate, given that the *Bundestag* generally exercises its representative function through all of its members collectively. Parliamentary decisions of considerable sig- 145

nificance, such as a decision on how to restore the order of competences, 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 proposed measures (cf. BVerfGE 142, 123 <212 f. para. 172 f.>; 157, 1 <26 f. para. 80> – *CETA – Organstreit I*; 158, 89 <123 f. para. 93> – *PSPP – application for an order of execution*).

bb) A violation of Parliament's responsibility with regard to European integration derived inter alia from Art. 38(1) first sentence GG is similar to a violation of (other) duties of protection arising from fundamental rights in that a violation can only be found if Parliament fails to take any action at all, if the laws enacted and measures taken are evidently unsuitable or completely inadequate, or if they fall significantly short of achieving the aim of the protection (cf. BVerfGE 142, 123 <210 f. para. 169>; 151, 202 <299 para. 148> – *European Banking Union*; 157, 1 <23 f. para. 73> – *CETA – Organstreit I*; 158, 89 <124 para. 94> – *PSPP – application for an order of execution*). 146

II.

Based on these standards, the 2020 EU Own Resources Decision, which is the subject of the challenged act of approval, does not manifestly exceed the current European integration agenda in a structurally significant way (see 1. below). Nor does it affect the Basic Law's constitutional identity within the meaning of Art. 79(3) GG (see 2. below). Thus, it cannot be held that the complainants' right to democratic self-determination derived from Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) as well as Art. 79(3) GG (see 3. below) have been violated. 147

1. The 2020 EU Own Resources Decision is based on Art. 311(2) and (3) in conjunction with Art. 122(1) and (2) TFEU. Art. 5(1) subpara. 1(a) of the Decision authorises the European Commission to borrow up to EUR 750 billion in 2018 prices on capital markets on behalf of the European Union until the year 2026 (cf. Recital 14 of the 2020 EU Own Resources Decision; Art. 2(1) subpara. 1 of the EURI Regulation). Up to EUR 360 billion in 2018 prices of the funds borrowed may be used for providing loans and up to EUR 390 billion in 2018 prices of the funds borrowed may be used for expenditure (Art. 5(1) subpara. 1(b) of the 2020 EU Own Resources Decision; cf. Recital 14 of the Decision; Art. 2(2), Art. 3(1) and (2) of the EURI Regulation; Art. 6(1) of the RRF Regulation). According to Art. 4 of the 2020 EU Own Resources Decision, the European Union cannot use funds borrowed on capital markets for the financing of operational expenditures. 148

Ultimately, it is not ascertainable that the 2020 EU Own Resources Decision amounts to a manifest violation of the European integration agenda. It is true that the Treaties do not appear to contain a specific competence conferred in accordance Art. 5(1) first sentence and Art. 5(2) TEU that would allow the European Union to borrow on the capital markets (see a) below). However, under exceptional circumstances, it does not appear (completely) implausible that the measure could be based on Art. 311(2) TFEU, with the borrowed funds constituting a category of 'other revenue' 149

within the meaning of that provision, provided that the decision on own resources satisfies at least the following requirements: it sets out an authorisation to borrow on behalf of the European Union; it ensures that the financial means obtained be used exclusively for tasks for which the EU has competence in accordance with the principle of conferral; it subjects the borrowing to limits as to the duration and the amount of the commitments assumed; and it requires that the amount of other revenue not exceed the total amount of own resources. It is not entirely clear whether Art. 5 of the 2020 EU Own Resources Decision satisfies these requirements; in light of the prerequisites set out in Art. 122(1) and (2) TFEU, it appears somewhat doubtful whether the Decision can be based on that provision, and the volume of the borrowing authorised in relation to the volume of own resources raises concerns as well. And yet, in accordance with the applicable standard of review, it cannot ultimately be concluded that the measure manifestly lacks a sufficient legal basis in the Treaties (see b) below). Similarly, even though it cannot be ruled out completely that the measure circumvents the no-bailout clause in Art. 125(1) TFEU, it cannot be said that it constitutes a manifest violation of that prohibition either (see c) below).

a) The Treaties do not contain a specific competence conferred in accordance with Art. 5(1) first sentence and Art. 5(2) of the TEU that enables the European Union to borrow on the capital markets. 150

aa) Given that a specific conferral of such competence would be required under the system for the division of competences laid down in Art. 4(1) and Art. 5(1) first sentence and Art. 5(2) TEU in order for EU institutions, bodies, offices and agencies to be authorised to carry out the measure in question, the prevailing opinion in legal circles is that the European Union is subject to a general prohibition of borrowing. Although it is an instrument of secondary law rather than a part of the Treaties, Art. 17(2) of the EU Financial Regulation (cf. Regulation <EU, Euratom> 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, OJ EU L 193, p. 1 <36>) provides that the European Union is not permitted to raise loans within the framework of its budget. 151

The EU institutions themselves also assume that the Treaties give rise to a general prohibition on borrowing ([...]), as was confirmed by a representative of the European Commission in the oral hearing (cf. European Commission, Q&A : Next Generation EU - Legal Construction, 9 June 2020, QANDA/20/1024; also Council of the European Union, Opinion of the Legal Service, 24 June, 9062/20, para. 57 fn 39). It was confirmed that, without an amendment of the Treaties, it would not be possible to recognise borrowing as a permanent source of financing for the European Union, and that the European Commission holds the view that borrowing should not become a regular mechanism in the EU financial system. 152

A prohibition on borrowing is also supported in legal scholarship, particularly among German-language commentators, although there is no agreement on the exact scope of such prohibition. According to one view ([...]), there is a blanket prohibition of bor- 153

rowing; Art. 310(1) subpara. 3 TFEU is sometimes cited as evidence in support of this view ([...]). Other German scholars argue that borrowing is prohibited in cases where the borrowed funds serve to finance the general budget and are not attributed to a specific purpose, as it would exceed the scope of Art. 311(3) TFEU in that case ([...]).

In other jurisdictions, as well as in non-German scholarship, borrowing on the part of the European Union has mostly been addressed in the context of the NGEU ([...]). For the most part, the discussion has been focused on economic aspects ([...]). Insofar as legal considerations are addressed, various views have emerged: while some contend that the NGEU is generally incompatible with EU law ([...]), others claim that the NGEU is actually too limited in scope ([...]); there are nuanced assessments drawing mixed conclusions ([...]), as well as voices levelling strong criticism ([...]). 154

bb) This notwithstanding, the Treaties themselves do not appear to expressly set out an absolute prohibition on borrowing. In particular, such a prohibition cannot be derived from Art. 310(1) subpara. 3 TFEU, which requires that the revenue and expenditure shown in the budget be in balance. Almost all fiscal regimes in European legal systems contain a similar rule, with Art. 110(2) second sentence GG being one example. That rule alone does not determine whether revenue is to be sourced through own resources or through borrowing. In fact, Art. 318(1) TFEU – which obliges the European Commission to submit to the European Parliament and the Council an annual financial statement of the assets and liabilities of the European Union – is an indication that the possibility of debt on the part of the European Union is naturally assumed. 155

There are in fact ample past instances of borrowing being a part of the European Union's financial operations ([...]). However, in all of those cases, the amount was limited, and the borrowed funds were exclusively used for the purposes of (back-to-back) lending. 156

Against this backdrop, various arguments in the legal scholarship have been made that borrowing may be permissible if it is sufficiently limited and the funds are assigned to specific designated purposes; by contrast, borrowing is believed to be impermissible if it serves to finance the general EU budget. Some even support the view that borrowing should generally be regarded as permissible ([...]). 157

cc) Ultimately, it can be concluded that, at a minimum, it would be impermissible for the European Union to borrow on capital markets when the borrowed funds serve to provide general financing for the EU's budget. In accordance with the principle of conferral under Art. 5(1) first sentence and Art. 5(2) TFEU, this type of borrowing would require a competence in the Treaties; such a conferral of competence does not exist. 158

The lack of a treaty-based authorisation for the European Union to enter into debt through general borrowing cannot be offset by the fact that Art. 311(3) TFEU requires ratification by all Member States for EU decisions on own resources. Regardless of 159

whether the decision on own resources is qualified as a an act of EU secondary law, or whether it is regarded as an act *sui generis* ([...]) the legality of which is determined by the rules of national constitutional law, the fact remains that decisions on own resources constitute legal acts adopted by EU institutions, by means of a special procedure, in the execution of the European integration agenda. The requirement of ratification set out in Art. 311(3) third sentence TFEU does not alter the fact that any use of the authorisation set forth in Art. 311 TFEU – which does constitute a specific conferral of competence in accordance with Art. 5(1) first sentence and Art. 5(2) TEU – must satisfy the legal prerequisites of EU primary law.

Moreover, deviations from the prerequisites set out in Art. 311(2) and (3) TFEU cannot be justified by arguing that it is necessary for the EU to assume debt liabilities in order to achieve the objectives of the NGEU. A policy objective does not by itself confer a legal competence to carry out the measures needed to achieve it (cf. BVerfGE 89, 155 <194 f.>; 123, 267 <393>; 142, 123 <218 f. para. 184>; 146, 216 <285 f. para. 119>). The Council does not have the power to fundamentally change the basis of the European Union's financial architecture, not even by unanimous decision. Rather, changes of this nature can only be effected by means of a treaty amendment in accordance with the procedure set out Art. 48 TEU. 160

dd) Ultimately, this question need not be settled in the present proceedings, as Arts. 4 and 5 of the 2020 EU Own Resources Decision neither constitute a deviation from Art. 311 TFEU, nor do they authorise borrowing for the purposes of providing general financing to the EU budget. 161

b) It cannot be clearly ruled out that Art. 5 of the 2020 EU Own Resources Decision satisfies the requirements for the authorisation of the European Union to borrow on capital markets as 'other revenue' within the meaning of Art. 311(2) TFEU and that it does not encroach upon the rules of primary law governing the EU's financial system. In this respect, it must be established, in particular, that the financing through own resources is not undermined by revenue obtained from other sources. This requirement is satisfied with regard to the measure at issue. The 2020 EU Own Resources Decision itself contains an authorisation to borrow on the capital markets as a form of 'other revenue' (see aa) below). Arts. 4 and 5 of the 2020 EU Own Resources Decision explicitly ensure that the borrowed funds can only be used for specific purposes, namely, to achieve a task that, in an interpretation that is not manifestly untenable, could be based on Art. 122 TFEU. The authorised borrowing is limited in terms of both volume and duration (see cc) below). The borrowed funds may not considerably exceed the amount of own resources (see dd) below). 162

aa) An authorisation of the European Union to borrow on capital markets, and thereby obtain 'other revenue' in the sense of Art. 311(2) TFEU, is laid down in the 2020 EU Own Resources Decision. Art. 311(3) first sentence TFEU, which refers to "provisions relating to the system of own resources", does not preclude the establishment of other categories of revenue (as revenue assigned to a specific purpose) (cf. Coun- 163

cil, Opinion of the Legal Service, 24 June, 9062/20, para. 48 ff). In keeping with the rationale underpinning the procedure set out in Art. 311(3) TFEU, and to ensure respect for the budgetary powers of the Member States and their national legislatures when providing financing to the European Union, it is necessary to specify such 'other revenue' in the own resources decision.

(1) Pursuant to Art. 311(2) TFEU, the budget of the European Union must be wholly funded through its own resources, without prejudice to other revenue. Art. 311(3) first sentence provides that the Council shall unanimously, acting in accordance with a special legislative procedure, and after consulting the European Parliament, adopt a decision laying down the provisions relating to the system of own resources of the Union. Pursuant to the second sentence of this provision, the Council may establish new categories of own resources or abolish an existing category. Art. 311(3) third sentence provides that a decision on own resources shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements. 164

At the same time, as is established practice, it is permissible to insert new (specifically assigned) categories of revenue into the decision on own resources. The wording of the treaty provision expressly mentions the category 'other revenue'. Other revenue within the meaning of Art. 311(2) TFEU includes (direct) taxes imposed on EU staff, other levies collected within the context of the common agricultural policy framework (such as the co-responsibility levy and the monetary compensatory amounts collected until 1992) as well as revenue collected from EU administrative operations through fees, penalties, interest on late payments, fines (e.g. in the area of competition and antitrust law), forfeited deposits, endowments and donations et cetera; it also includes budget surpluses from previous budget years and revenue from sales and rental transactions ([...]). Proceeds from borrowing may also be 'other revenue' (cf. Council, Opinion of the Legal Service, 24 June, 9062/20, para. 28). 165

Making the designation of other revenue directly in a decision on own resources is a prerequisite under EU primary law. Without such a designation, a reliable decision by the Council and the national parliaments on the provision of own resources cannot be taken. Over time, the European Union has transitioned from the classic model of financing international organisations, which rely on state party contributions, to a financial architecture based on own resources – although it is submitted that, in terms of financial economics, the EU's own resources are basically still 'camouflaged member contributions' ([...]). It is incumbent upon the Member States to provide financing to the European Union, and the former have the final say over the allocation of financial resources to the latter. The Member States have refrained from conferring upon the European Union direct taxation or levying powers. In particular, Art. 114(1) TFEU does not authorise the European Union to impose taxes or levies that are similar to taxes, such as special levies or fees (cf. BVerfGE 151, 202 <366 para. 299> – *European Banking Union*). This is supported by the wording of that provision, which only mentions the "approximation of […] laws, regulations or administrative provisions". 166

Moreover, it is clear that the financing of the European Union and its operations is to be governed exclusively by the system of own resources laid down in Art. 311 TFEU and the decisions on own resources adopted on that basis. In this respect, the allocation of own resources to the European Union not only requires a unanimous Council decision, but must also be approved by the Member States in accordance with their respective constitutional requirements (cf. BVerfGE 151, 202 <366 f. para. 300> – *European Banking Union*). Thus, the Member States have the final say over the resources allocated to the European Union. This reservation is imperative from a constitutional perspective – under the Basic Law it is prescribed by Art. 20(1) and (2) GG in in conjunction with Art. 79(3) GG – in order to safeguard the budgetary autonomy of national parliaments.

(2) Arts. 4 and 5 of the 2020 EU Own Resources Decision set out a legal framework for the European Union to borrow on its own behalf. Based on the foregoing standards, these provisions are not objectionable. 167

The total amount of borrowing authorised by the 2020 EU Own Resources Decision is limited to EUR 750 billion (Art. 5(1) subpara. 1(a)). According to Art. 5(1) subpara. 1(b) of the 2020 EU Own Resources Decision, up to EUR 360 billion of the funds borrowed may be used for providing loans and up to EUR 390 billion may be used for expenditure; in both cases, the means are assigned to the sole purpose of addressing the consequences of the COVID-19 crisis. Art. 5 of the 2020 EU Own Resources Decision makes explicit reference to the EURI Regulation, which further specifies the distribution of the funds (Art. 2(2) of the Regulation). 168

The borrowed funds fall under the category of ‘other revenue’ in Art. 311(2) TFEU. According to the Federal Government and the European Commission, the funds do not constitute ‘own resources’ in the sense of Art. 311(3) first sentence TFEU because the European Union is not permitted to use them as outside financing for the general budget. This view is confirmed by the rules set out in the 2020 EU Own Resources Decision: Art. 4 makes clear that the European Union cannot use funds borrowed on the capital markets for the financing of operational expenditures. Rather, according to Art. 5(1) subpara. 1 of the 2020 EU Own Resources Decision, the funds are assigned “for the sole purpose of addressing the consequences of the COVID-19 crisis through the Council Regulation establishing a European Union Recovery Instrument and the sectoral legislation referred to therein”, that is, exclusively for the financing of specific pandemic-related programmes of the European Union and the Member States. The fact that the EURI Regulation reiterates this reservation (in a declaratory manner) only with regard to the expenditure segment in the amount of EUR 390 billion (cf. Art. 3(1) and (2) EURI Regulation) and not with regard to the loans segment in the amount of EUR 360 billion does not warrant a different conclusion; this discrepancy can be explained with the consideration that the loans are classified as a neutral operation for purposes of the budget (cf. Council, Opinion of the Legal Service, 24 June 2020, 9062/20, para. 21 ff.; [...]) 169

Whether other revenue may be used to balance a budget deficit is contested ([...]), however, this issue is not relevant to the present proceedings. As explained above, the loans authorised in Art. 5 of the 2020 EU Own Resources Decision may not in any case be used to finance the general budget of the European Union. 170

bb) Authorising the European Union to borrow on capital markets as ‘other revenue’ does not amount to a manifest violation of Art. 311(2) and (3) TFEU when the funds are used for the exercise of competences conferred upon the European Union and, to that end, are from the outset strictly assigned to such specific purposes. The requirement that other revenue within the meaning of Art. 311(2) TFEU be assigned to specific purposes ensures that the funds are used within the limits of the European integration agenda as defined in the Treaties and prevents the European Union from borrowing funds for tasks for which it lacks competence under the principle of conferral in Art. 5(1) first sentence, Art. 5(2) TEU (see (1) below). While there is still doubt as to whether this is truly the case for the 2020 EU Own Resources Decision, ultimately it can not be said that Arts. 4 and 5 of the Decision manifestly exceed the competence conferred in Art. 122(1) and (2) TFEU. 171

(1) The distribution of the funds borrowed pursuant to Arts. 4 and 5 of the 2020 EU Own Resources Decision is intended to address severe difficulties within the scope of Art. 122 TFEU. Art. 5(1) subpara. 1(a) of the 2020 EU Own Resources Decision states that the authorisation for the European Union to borrow funds is limited to the exceptional need “to address the consequences of the Covid-19 crisis” and therefore strictly assigned to specific purposes. This limitation is also evident in Arts. 4 und 6 of the 2020 EU Own Resources Decision (“Extraordinary and temporary increase in the own resources ceilings for the allocation of the resources necessary for addressing the consequences of the COVID-19 crisis”) as well as the recitals (cf. in particular Recitals 14 to 18, 22 and 29); it is also reflected in Art. 1(1) and (2) of the EURI Regulation and the recitals (cf. in particular Recitals 1 to 8) as well as in Art. 4(1) of the RRF-Regulation and the recitals (cf. in particular Recitals 6, 8, 13, 15 f., 19, 28 and 46). Finally, the limitation that the borrowed funds only be used for the designated purposes is integral to the Act Ratifying the EU Own Resources Decision, as the domestic act of approval adopted by the German legislator (cf. BTDrucks 19/26821, p. 9, 12 f.). 172

(2) Whether Arts. 4 and 5 of the 2020 EU Own Resources Decision can actually be based on the competence set out in Art. 122(1) and (2) TFEU appears doubtful (see (a) below). Ultimately, however it cannot clearly be ruled out (see (b) below). 173

(a) Article 122(1) TFEU provides that, without prejudice to any other procedures provided for in the Treaties, the Council may, on a proposal from the Commission and in a spirit of solidarity between Member States, decide upon measures appropriate to the economic situation, in particular, if severe difficulties arise in the supply of certain products, notably in the area of energy. Pursuant to Art. 122(2) TFEU, the Council may, on a proposal from the Commission, grant financial assistance from the 174

European Union under certain conditions to a Member State that is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control. Pursuant to the second sentence of that provision, the President of the Council shall inform the European Parliament of the decision taken. Art. 122 TFEU sets out clauses to address exceptional situations of severe difficulties and, as such, must generally be interpreted narrowly; for the most part, the interpretation of its exact scope and contents has not yet been settled.

(aa) The arguments against recourse to Art. 122 TFEU to establish a legal basis for the measure at issue include the wording of paragraph 2, which states that assistance is permitted only for difficulties "caused by natural disasters or exceptional occurrences" that are beyond the control of a Member State. This indicates that assistance measures benefiting all Member States is not within the intended scope of the provision, although the wording admittedly does not necessarily exclude the possibility of providing parallel assistance to each individual Member State ([...]). 175

(bb) Moreover, the connection between the EURI Regulation and the endeavour to counter the effects of the pandemic appears tenuous, which also argues against recognising Art. 122 TFEU as a sufficient legal basis for the Regulation. The wording of Art. 122(2) TFEU does not explicitly require a connection between the damage caused by the 'difficulties' in question and the objective pursued by the assistance measures. Nevertheless, establishing such a connection is necessary to avoid turning Art. 122(2) TFEU into a general blanket clause with hardly any restrictions that could be invoked to authorise virtually any type of measure without having to involve the European Parliament. In order to safeguard the principle of democracy at EU level (Art. 10(1) TEU) and the principle of institutional balance, it is therefore imperative that Art. 122(2) TEFU be read in the aforementioned narrow interpretation ([...]). 176

Whether a sufficient connection between the NGEU recovery instruments and the consequences of the pandemic can be established or – as the complainants contend – the NGEU merely constitutes a general stimulus package, is not entirely clear. A direct connection between the recovery instrument and the COVID-19 pandemic can at least be assumed for those 30% of the funds that are to be distributed according to the decline in GDP in the Member States for the period 2020-2021. For the remaining 70%, for which distribution is based on the GDP for the year 2019 in each Member State, as well as the national unemployment rates, such a connection has been called into doubt ([...]); similar doubts have been raised regarding the recovery instrument's objectives of climate neutrality and digital transformation ([...]). [...] 177

In scholarship, some commentators point out that there is no sufficient connection between the effects of the pandemic-related shock and the envisaged financial assistance ([...]). It is argued that the recovery instrument is designed to provide incentives for a transformation of the Member States' economies that goes far beyond combatting the immediate effects of the pandemic ([...]). This view is supported by the fact that 37% of the funds are assigned to the climate target and 20% to the digital target 178

(Recitals 23 and 26; Art. 16(2)(b), Art. 18(4)(e) and (f), Art. 19(3)(e) and (f) RRF Regulation). With regard to funds earmarked for measures supporting digital transformation, some connection with the pandemic is discernible in view of the consequences of lockdowns and the restriction of direct personal contact; such connection is much harder to discern with regard to climate action ([...]). The fact that Art. 1(2)(f) EURI Regulation mentions “measures to ensure that a just transition to a climate-neutral economy will not be undermined by the COVID-19 crisis” does not allay these doubts.

(cc) The assertion that Art. 122 TFEU provides a sufficient legal basis for the recovery instrument is also subject to objection on the grounds that the funds are to be distributed over the period 2021-2026. The intended economic stimulus to overcome the effects of the pandemic would appear to warrant intervention on a shorter term. However, according to the expert third parties who testified at the oral hearing, there is no consensus among economists on this point. 179

(dd) In addition, the fact that a good 10% of the funds – EUR 77.5 billion – are to be used to subsidise ongoing programmes of the European Union that have no relation to the COVID-19 pandemic also raises concerns as to whether the recovery instrument can in fact be based on 122 TFEU. 180

(ee) Similar concerns arise from the distribution key, which is determined by figures from previous years. In the oral hearing, the economic experts confirmed that the key for the distribution of the funds is only be partially connected to the economic effects of the pandemic ([...]). 181

(b) Despite these concerns, Arts. 4 and 5 of the 2020 EU Own Resources Decision do not manifestly exceed the competence set out in Art. 122(1) and (2) TFEU. Insofar as reference is made to the EURI Regulation (Art. 5(1) subpara. 1 of the 2020 EU Own Resources Decision) and its legislative framework in order to assign the authorisation for borrowing to specific purposes, this can ultimately be regarded as an at least tenable interpretation of Art. 122(1) and (2) TFEU. 182

When determining the prerequisites of Art. 122 TEFU, the Council and the European Commission are afforded a wide margin of appreciation and assessment ([...]). 183

In the oral hearing, the European Commission submitted that the EU legislator based the EURI Regulation on Art. 122(1) TFEU because it understood the clause “difficulties arise in the supply of certain products, notably in the area of energy” – which argues against the recovery instrument being covered by this competence – to merely illustrate one typical example of measures falling within the scope of this treaty competence. As this interpretation finds some support in the wording of Art. 122(1) (“in particular”), it is not untenable to qualify the allocation of funds under the NGEU as a “measures appropriate to the economic situation”. 184

This view is further supported by the fact that the EU legislator relied on the rationale underpinning Art. 122(2) TGEU, thereby preventing an excessively broad reading of Art. 122(1) TGFEU and giving effect to the standards developed in the Court of 185

Justice's case-law. In *Pringle*, the Court of Justice held that Art. 122(1) TFEU does not constitute an appropriate legal basis for any financial assistance from the European Union to Member States who are experiencing, or are threatened by, severe financing problems (cf. CJEU, Judgment of 27 November 2012, C-370/12, EU:C:2012:756, para. 116). This would not include cases where a Member State experiences difficulties caused by natural disasters or exceptional occurrences beyond its control.

Ultimately, it can be concluded that the recovery instrument does not manifestly exceed the competence conferred in Art. 122(1) and (2) TFEU, provided that the EURI Regulation remains strictly limited to the historically exceptional case of "support[ing] the recovery in the aftermath of the COVID-19 crisis" (Art. 1(1) of the EURI Regulation) and "tackl[ing] the adverse economic consequences of the COVID-19 crisis" (Art. 1(2) EURI Regulation). 186

The 2020 EU Own Resources Decision presumes that the EURI Regulation and the NGEU are exceptional measures enacted to tackle the adverse economic consequences of the COVID-19 crisis. In the oral hearing, the Federal Government and the *Bundestag* emphasised that the NGEU was meant to be a one-time instrument in reaction to an unprecedented crisis, in that the COVID-19 pandemic had resulted in massive disruptions to the European economy, and that Germany's approval to the recovery instrument in the form of the Act Ratifying the EU Own Resources Decision was given on those grounds. They further asserted that the NGEU did not constitute a step towards a 'transfer union' [marked by institutionalised financial equalisation]. 187

This view finds considerable support in scholarship. [...] 188

cc) The authorisation of the European Union to borrow on capital markets set out in Art. 5 of the 2020 EU Own Resources Decision and the resulting 'other revenue' are limited in terms of the total amount (see (1) below) and is also subject to a time limit (see (2) below). These limitations are integral to the Act Ratifying the EU Own Resources Decision (see (3) below). 189

(1) The authorisation of borrowing on behalf of the European Union in 2018 prices on capital markets is an extraordinary large volume, albeit one that is subject to the strict upper limit of EUR 750 billion (Art. 5(1) subpara. 1(a) and Recital 14 of the 2020 EU Own Resources Decision; Art. 2(1) subpara. 1 of the EURI Regulation). 190

(2) Similarly, the duration of the borrowing activities is subject to a clear time limit: First, Art. 5(1) subpara. 3 of the 2020 EU Own Resources Decision provides that no new net borrowing may take place after 2026 (cf. also Recital 18 of the Decision; Art. 3(9) of the EURI Regulation; Art. 24(1) of the RRF Regulation and its Recital 53). Second, Art. 5(2) subpara. 2 third sentence of the 2020 EU Own Resources Decision states that all liabilities incurred by the exceptional and temporary empowerment of the European Commission to borrow funds must be fully repaid at the latest by 31 December 2058 (cf. also Art. 6 first sentence of the 2020 EU Own Resources Deci- 191

sion and its Recitals 17 and 20).

(3) These limitations are integral to the Act Ratifying the EU Own Resources Decision, as the domestic act of approval adopted by the German legislator (cf. BTDrucks 19/26821, p. 1 f., 9, 12 f.). The 2020 EU Own Resources Decision makes no provision for additional borrowing by the European Union beyond these limits. Such additional borrowing could only be achieved by means of an amendment to the 2020 EU Own Resources Decision, which would require a new unanimous Council decision and its ratification by the *Bundestag* and the *Bundesrat* in accordance with Art. 311(3) third sentence TFEU in conjunction with Art. 23(1) GG and § 3(1) IntVG (cf. BVerfGE 157, 332 <389 para. 101> – *Act Ratifying the EU Own Resources Decision – preliminary injunction*). 192

dd) It does appear possible that the funds obtained as ‘other revenue’ in the sense of Art. 311(2) TFEU through borrowing on the basis of Art. 5 of the 2020 EU Own Resources Decision could exceed the ‘own resources’ contemplated in Art. 311(3) TFEU (see (1) below). At the same time, such possible exceeding of competences is not manifestly apparent (see (2) below). 193

(1) The 2020 EU Own Resources Act authorises the European Commission to borrow on capital markets up to EUR 750 billion (Art. 5(1) subpara. 1(a) of the 2020 EU Own Resources Decision) and to direct the borrowing operations such that no new net borrowing takes place after 2026 (Art. 5(1) subpara. 3 of the 2020 EU Own Resources Decision). It appears doubtful whether borrowing in such an amount and timeframe can still be considered an exceptional measure in relation to the EU budget. 194

Given the wording of Art. 311(2) TFEU (specifically, “without prejudice to”), ‘other revenue’ is to remain the exception in relation to own resources of the EU. In accordance with Art. 311(2) TFEU, the (main) subject matter of the decision on own resources is the definition of ‘categories of own resources’ rather than the definition of ‘other revenue’. This can most notably be explained by the fact that only own resources are assigned to the general budget of the European Union and are subject to the budget procedure set out in Art. 314 TFEU, in which the European Parliament has the final say over the budget ([...]). The system of own resources aims to strengthen the European Union’s political leeway. This argues for an interpretation of the Treaty according to which funds that do not actually constitute net gains for the EU may only be inserted into decisions on own resources in exceptional cases ([...]). Debt financing of EU operations undermines the financing through own resources intended by the Treaty and could even create a dependency of the European Union on funding provided by the Member States contrary to the aim and intention of the system of own resources. Thus, it would run counter to the spirit and purpose of Art. 311(3) first sentence and Art. 314 TFEU and to the principle of institutional balance between EU bodies (cf, CJEU, Judgment of 29 October 1980, *Roquette Frères v Council*, C-138/79, ECR 1980, p. 3333 <3360>; Judgment of 22 May 1990, *Parlia-* 195

ment v Council, C-70/88, ECR 1990, I-2067 <2072 f. para. 21 ff.>; Judgment of 6 May 2008, *Parliament v Council*, C-133/06, EU:C:2008:257, para. 57) if it were permissible for decisions on own resources to inflate the category of other revenue while reducing the amount of own resources, thereby changing the financial system of the EU "through the backdoor" and, in particular, taking power away from the European Parliament. In the past, other revenue accounted for only 1% of the EU budget ([...]).

The legal assessment of this matter must look at the authorisation to borrow granted to the European Commission, not at the execution of the borrowing operations or the actual volume of funds borrowed. When the scope of the authorisation to borrow exceeds the annual total budget of the European Union, that would certainly suggest that the authorisation violates Art. 311(2) and (2) TFEU ([...]); cf. Council, Opinion of the Legal Service, 24 June 2020 9062/20, para. 57), thereby exceeding the competence conferred in the Treaty. 196

The EU budget must obey the principle of annuality (vgl. Art. 310(1) subpara. 2, Art. 312(1) subpara. 3, Art. 312(3) subpara. 2, Art. 313, Art. 314(1) TFEU; Arts. 9 to 16 of the Financial Regulation). When one compares the volume of other revenue provided for in the 2020 EU Own Resources Decision with the general EU budget on this basis, it appears that in the budget years 2021 and 2022 the borrowed funds have and will significantly exceed the volume of own resources (cf. European Commission, The EU's 2021-2027 long-term Budget and NextGenerationEU, Facts and Figures, 2021, p. 56 <commitments, amounts in 2018 prices>): 197

	Long-term budget of the EU (multiannual financial framework – MFR 2021-2027):	**NGEU:**
	EUR 1,074.3 billion	EUR 750 billion
2021	EUR 154.049 billion	EUR 335.151 billion
2022	EUR 153.254 billion	EUR 312.582 billion
2023	EUR 152.848 billion	EUR 102.267 billion
2024	EUR 152.750 billion	-
2025	EUR 152.896 billion	-

2026	EUR 153.390 billion	-
2027	EUR 155.113 billion	-

When viewing the allocation for the years 2021 and 2022 in isolation, the fact that the volume of funds borrowed under the NGEU by far exceeds the respective annual budget indicates a violation of Art. 311(2) and (3) TFEU. 198

(2) However, a different legal assessment emerges when the multiannual financial framework of the European Union (cf. Art. 312 TFEU) is used as the relevant point of reference. 199

The authorisation to borrow under the 2020 EU Own Resources Decision runs until 2026. In the years 2023 to 2026, the contemplated borrowing will be considerably lower than the volume of the general budget, such that for the majority of the years until 2026, the proper relationship between what should constitute the general rule and what should remain the exception under Art. 311(2) and (3) TFEU is maintained. This applies all the more if the analysis is based entirely on the multiannual financial framework, setting aside the principle of annuality. 200

This was the approach, in particular, of the expert third parties heard at the oral hearing. One of these experts, Professor Feld, submitted that, based on information provided by the Federal Ministry of Finance, the volume of the multiannual financial framework amounts to EUR 1,094.4 billion in 2018 prices (including the Brexit Adjustment Reserve etc.). He stated that if the funds allocated under the NGEU were executed to the full amount, the total volume would be the equivalent of 68.5% of the current multiannual financial framework. Citing the likelihood of fluctuations over time, Professor Feld submitted that it could not be determined whether the annual borrowing would in fact exceed the annual budget of the EU. In 2021, due to Member States making use of the option of receiving a pre-financing payment in an amount of up to 13%, borrowing (in the amount of EUR 91 billion) was relatively high (approximately 54%) in relation to the volume of the general budget, which stood at 168 billion. According to the expert, the share of borrowing will likely decrease to 31% in 2022, with a volume of EUR 53 billion in borrowed funds as compared to a general budget of EU 170.8 billion. Professor Felbermayr, another expert, asserted that the multiannual financial framework has a volume of EUR 1,074 billion in 2018 prices, and that the NGEU financed through borrowing operations accounts for about 70%. He concluded that, for the relevant period 2021-2026, the average volume of borrowed funds does not exceed the general budget of the European Union. Considering the total volume of the multiannual financial framework and the NGEU, the expert found that roughly 41% of the European Union’s expenditure from 2021 to 2026 would be financed through debt. He claimed that, compared to the levels of new debt assumed by na- 201

tional governments in a normal economic climate, this constitutes a high rate of debt financing. He also pointed out that during the crisis years 2020 and 2021, the US had financed about 50% of federal expenditure through new debt, while the new net borrowing undertaken by Germany in those two years accounted for 30% and 39% of the annual expenditure, respectively. Based thereon, the expert concluded that the debt financing operations of the European Union are definitely at the upper end of the scale. According to his submission, the gross borrowing to be carried out by the European Union to implement the NGEU amounts to 5% of the GNI. Professor Fuest, another expert, asserted that borrowing (including the funds earmarked for loans provided to the Member States) accounted for 40% of the total budget including the NGEU and 67% of the EU budget excluding the NGEU. Regarding the principal authorisation of the European Commission to borrow EUR 356 billion (for the year 2021) and EUR 338 billion (for the year 2020) to finance the NGEU, he stated that the actual borrowing operations would depend on the progress made regarding the assessment of the recovery and resilience plans prepared by the Members States. It could therefore be assumed that the borrowing will take place over an extended period of time.

Against this backdrop, and considering the design of the NGEU as well as the protective purpose underpinning Art. 311(2) and (3) TFEU, it does not appear manifestly untenable to base the legal analysis on the multiannual financial framework rather than the budget of a specific year. Based on this standard, the exception to the rule relationship mandated in the Treaty is only dispensed with for two out of the seven budget years in question; for the overall intended period of the NGEU, there is no deviation from the general rule. The long-term budget of the EU (2021-2027) amounts to EUR 1,074.3 billion (cf. Council Regulation <EU, Euratom> 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027, OJ EU L 433 I, p. 11 <21>). On this basis, while the NGEU funds of up to EUR 750 billion constitute a significant amount in comparison, it cannot be said that this manifestly gives rise to a violation of Art. 311(2) and (3) TFEU. 202

c) Nor can it be established that the 2020 EU Own Resources Decision violates Art. 125(1) TEGU (see aa) below). While a circumvention of this provision cannot be ruled out (see bb) below), it is also not manifestly evident (see cc) below). 203

aa) According to Art. 125(1) first sentence TFEU, the European Union is not liable for and does not assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. The second sentence of that provision states the Member States also shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. 204

As a result of the authorisation to obtain funds through borrowing under Art. 5 of the 205

2020 EU Own Resources Decision, the European Union assumes new debt on the capital markets, but it does not assume liability for commitments of the Member States. The increase in the own resources ceilings under Art. 6 of the 2020 EU Own Resources Decision, which applies until 2028 at the latest, means that the Member States themselves may incur new liabilities; however, even though their own financial obligations in terms of financing provided to the EU increase considerably, they do not assume liability for the debt of other Member States ([...]). Thus, a direct violation of Art. 125(1) TFEU can be ruled out from the outset, given that the NGEU neither establishes liability of the European Union for Member State commitments, nor does it create a mechanism that would impose direct liability on the Member States.

bb) Nevertheless, the 2020 EU Own Resources Decision might lead to a circumvention of the no-bailout clause in Art. 125(1) TFEU (on the prohibition to circumvent the prohibition of monetary financing in Art. 123 TFEU, cf. BVerfGE 134, 366 <411 para. 86>; CJEU, Judgment of 16 June 2015, *Gauweiler*, C-62/14, EU:C:2015:400, para. 101). 206

The purpose of the no-bailout clause is to ensure that the financial policy of the Member States remains autonomous and that there is no mutual responsibility for the respective liabilities of the Member States. EU law does not allow a financial equalisation among Member States. Rather, the Treaties ensure that the Member States remain subject to the logic of the market when they enter into debt (cf. CJEU, Judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, para. 116). Thus, recourse to Art. 122 TFEU would be impermissible if it serves to circumvent the no-bailout clause in Art. 125 TFEU regarding the liability for commitments of another Member States ([...]). 207

Such a circumvention of Art. 125 TFEU cannot be ruled out completely in the present case. A number of Member States have excessive debt (cf. Eurostat, Key figures on Europe, 83/2022, 21 July 2022). In light of this, the NGEU could serve to alleviate the pressure of market logic on these Member States and provide them with favourable lending conditions, as was explained by Professor Felbemayr in his expert submission ([...]). With debt financed non-repayable grants and the borrowing by the European Union in the context of the NGEU, the need for Member States to engage in new borrowing at the national level is considerably reduced or might even be eliminated. 208

If the authorised appropriations entered in the Union budget are not sufficient to cover liabilities arising from the borrowing linked to the NGEU, the European Commission is empowered, as its last resort, to call on the Member States to make the necessary resources available in proportion (‘pro rata’) to their respective contribution to the EU budget. The same rule applies if a Member State fails, in full or in part, to honour a call on time; in that event, the European Commission provisionally has the right to make additional calls on the other Member States to cover for the part of the Member State concerned (Art. 9(5) subpara. 2 first sentence of the 2020 EU Own 209

Resources Decision). Yet the Member State which failed to honour a call remains liable to cover its part of the call for additional financing to meet the obligations resulting from the borrowing. The other Member States do not assume true liability for that Member State's part; the European Commission may only call on them to provide interim financing (Art. 9(5) subpara. 2 first sentence 2020 EU Own Resources Decision), which therefore only constitutes a provisional commitment, not a permanent one.

cc) It is true that the borrowing on the part of the European Union and the rules on repayment appear somewhat at odds with the no-bailout clause enshrined in Art. 125(1) TFEU. However, Art. 125(1) TFEU ultimately does not rule out the allocation of NGEU funds on the basis of the competence conferred in Art. 122 TFEU under EU primary law. The value judgments underpinning Art. 122 TFEU do not fall short of the ones enshrined in Art. 125(1) TFEU, which is why it cannot be concluded that the 2020 EU Own Resources Decision manifestly enables a circumvention of the latter provision. 210

2. The 2020 EU Own Resources Decision, especially the arrangements in its Articles 6 and 9, does not affect the constitutional identity of the Basic Law enshrined Art. 79(3) GG. Given that that the borrowed funds are strictly assigned to specific purposes and subject to limitations as to both amount and duration, and given that the authorisation to borrow was contingent upon the *Bundestag'*s approval in the procedure set out in Art. 311(3) third sentence TFEU, the 2020 EU Own Resources Decision does not – by itself – impair the *Bundestag*'s overall budgetary responsibility (see a) below). Taking into account the overall financial burden from all commitments, liabilities and guarantees approved by the *Bundestag* in the context of EU matters, considerable risks for the federal budget cannot be denied; nevertheless, the *Bundestag* has not exceeded its wide margin of appreciation in budgetary matters (see b) below). This notwithstanding, the *Bundestag* has an ongoing duty, in the context of its responsibility with regard to European integration, to monitor the use of funds from NGEU and the development of liability risks arising from the programme and, when necessary, to take suitable measures to protect the federal budget (see c) below). 211

a) In its Order of 15 April 2021, concerning an application for a preliminary injunction against the Act Ratifying the EU Own Resources Decision, the Second Senate found, based on a summary examination, that it was highly unlikely that the overall budgetary responsibility of the *Bundestag* was affected by the challenged Act or the underlying 2020 EU Own Resources Decision (cf. BVerfGE 157, 332 <388 f. para. 99 ff.> – *Act Ratifying the EU Own Resources Decision –preliminary injunction*). In the present decision, the Second Senate upholds this assessment. Based on the findings of the oral hearing, it does not appear that either the regular repayment plan for NGEU funds or the arrangements set out in Art. 9 of the 2020 EU Own Resources Decision result in obligations for the federal budget that substantially impair the budgetary powers of the *Bundestag*. 212

aa) Art. 5(1)(a) of the 2020 EU Own Resources Decision, which authorises the European Commission to borrow up to EUR 750 billion in 2018 prices on capital markets, does not create direct liabilities for Germany or its federal budget. Such liabilities could only arise if EU funds were not sufficient for the European Union to comply with its obligations resulting from the borrowing pursuant to Art. 5 of the 2020 EU Own Resources Decision and if the European Commission could not generate the necessary liquidity by activating other measures, such as recourse to short-term financing on capital markets (cf. Art. 9(4) first sentence of the 2020 EU Own Resources Decision). In this case, the Member States are, in principle, liable to provide provisional financing covering the difference in proportion ('pro rata') to their respective contributions to the EU budget (Art. 9(5) subpara. 1 of the 2020 EU Own Resources Decision). Only in the event that a Member State fails, in full or in part, to honour a call to provide the necessary financing to this effect does the European Commission have the right to make additional calls on the other Member States, which again are only liable in proportion to their respective contributions to the budget (Art. 9(5) subpara. 2, first and second sentence of the 2020 EU Own Resources Decision). The foregoing is without prejudice to the liability of the Member State that failed to honour the call (Art. 9(5) subpara. 2, third sentence of the 2020 EU Own Resources Decision). The maximum total annual amount of cash resources that may be called from a Member State under Art. 9(4) first sentence of the 2020 EU Own Resources Decision, moreover, is limited to its GNI-based relative share in the extraordinary and temporary increase in the own resources ceiling by 0.6 percentage points of the GNI (Art. 9(6) in conjunction with Art. 6 of the 2020 EU Own Resources Decision). 213

Limitations apply to the volume and purpose of the funds of up to EUR 750 billion in 2018 prices that the European Commission is authorised to borrow, as well as to the potential liability of the Federal Republic of Germany. The funds in question are to be used exclusively to address the aftermath of the COVID-19 crisis (cf. Recitals 14 to 18, 22 and 29, Arts. 5 and 6 of the 2020 EU Own Resources Decision, BTDrucks 19/26821, pp. 9 and 12 f.), which is to be further ensured by means of Regulation (EU) 2020/2094 and Regulation (EU) 2021/241. 214

Furthermore, the obligations arising from the 2020 EU Own Resources Decision are subject to a time limit. The Decision makes no provision for additional borrowing by the European Union beyond that limit. Such additional borrowing could only be achieved by means of an amendment to the 2020 EU Own Resources Decision, which would require a new unanimous Council decision and its ratification by the *Bundestag* in accordance with Art. 311(3) third sentence TFEU in conjunction with Art. 23(1) GG and § 3(1) IntVG. Lastly, the 2020 EU Own Resources Decision provides that principal payments for the borrowed funds under Art. 5(2) subpara. 2 of the Decision are to start, subject to specified conditions, before the end of the multiannual financial framework 2021-2027 period and that full repayment must be completed by 31 December 2058. 215

bb) These arrangements do not jeopardise the *Bundestag*'s overall budgetary responsibility guaranteed in Art. 79(3) GG in conjunction with Art. 110 and Art. 20(1) and (2) GG. 216

(1) The 2020 EU Own Resources Decision does not create any permanent mechanisms that entail an assumption of liability for decisions taken by other Member States or that structurally affect the *Bundestag*'s budgetary powers. Given that the borrowing authorised in the 2020 EU Own Resources Decision is assigned to specific purposes, and that the *Bundestag* has the ability to influence the decisions of the Federal Government with regard to the execution of the NGEU (cf. Art. 23(2) and (3) GG), the *Bundestag* retains sufficient influence in the decision-making process as to how the funds provided will be used (cf. BVerfGE 129, 124 <180 f.>; 132, 195 <241 para. 110>) . 217

The same applies to the obligation to provide additional financing under Art. 9(4) of the 2020 EU Own Resources Decision. As mentioned above (cf. para. 209), this does not result in an assumption of liabilities for the decisions made by other Members States or the European Commission; rather, it provides for a temporary pro rata advance that is subject to detailed requirements in the 2020 EU Own Resources Decision and for which the *Bundestag* has taken full responsibility with its adoption of the Act Ratifying the EU Own Resources Decision. 218

(2) In its case-law, the Second Senate has recognised the possibility that the budgetary powers of the *Bundestag* under Art. 110 in conjunction with Art. 20(1) and (2) GG could potentially be undermined in the event of an "evident breach of absolute outer limits" in budget matters (cf. BVerfGE 129, 124 <182>; 132, 195 <242 para. 112>; 157, 332 <387 para. 96> – *Act Ratifying the EU Own Resources Decision – preliminary injunction*). However, there is no need to determine in the present proceedings whether such a justiciable strict outer limit exists, especially considering the heterogeneity of potential scenarios and affected interests, or to define the exact nature of such limit. The financial obligations and assumptions of liability in the present case would only be in breach of any such outer limit if, when they are called, the financial burden not only had the effect of restricting budgetary autonomy, but also essentially negated this autonomy, at least for an appreciable period of time (cf. BVerfGE 129, 124 <183>; 157, 332 <387 para. 96>; 135, 317 – *Act Ratifying the EU Own Resources Decision – preliminary injunction*; for an early discussion of this standard, cf. BVerfGE 123, 267 <361 f.>). Based on this standard, a violation is not ascertainable in the present case. 219

(a) By adopting the Act Ratifying the EU Own Resources Decision, the *Bundestag* has approved the Decision and also exercised its responsibility with regard to European integration. The *Bundestag* thereby approved not only the increase of the ceiling for German contributions by 0.6 percentage points of the GNI until the year 2058 (Art. 6 in conjunction with Art. 3(1) and (2) of the 2020 EU Own Resources Decision), but also the risks associated with potentially having to provide additional financing 220

pursuant to Art. 9(4) of the 2020 EU Own Resources Decision. There are no indications that this appraisal by the *Bundestag* was flawed, and the oral hearing in particular did not reveal any such indications.

Based on the regular plan for principal payments on the borrowed funds of up to EUR 390 billion in 2018 prices used to subsidise expenditure – the funds of up to EUR 360 billion borrowed for the purposes of providing loans to the Member States being excluded here, as these must repaid by the Member State receiving the relevant loan – the maximum amount of annual repayments on the principal is capped at EUR 29.25 billion in 2018 prices in Art. 5(2) subpara. 3 of the 2020 EU Own Resources Decision (7.5% of EUR 390 billion). Germany's average contribution to the EU budget amounts to 24%; the borrowing on the part of the EU would increase the German contribution by roughly EUR 7 billion per year, according to the Federal Government. At the same, the Federal Government expects repayment of the borrowed funds to be carried out at a slower pace, in which case, the prospective yearly German contribution would be much lower in the amount of roughly EUR 3.84 billion (excluding interests). This prognosis was essentially confirmed by the expert third parties in the oral hearing. [...] 221

The *Bundestag*'s assessment that the federal budget will be able to cover the resulting financial burdens is not objectionable. The amounts in question are, of course, far from insignificant. In the past, financial commitments of this scale were considered to have political significance in terms of their impact on the federal budget. However, in sum, the financial commitments in question do not affect the federal budget or the *Bundestag*'s overall budgetary responsibility in a structurally significant manner from a constitutional perspective. 222

(b) The same applies to the risk of having to provide additional financing under Art. 9(4) of the 2020 EU Own Resources Decision. The legislator has assessed this risk to be rather low and, taking into account the likely maximum amount of the yearly contributions provided by Germany, has also concluded that there is no significant risk of the *Bundestag*'s budgetary powers being vitiated for a considerable period of time. In light of the margin of appreciation and leeway afforded the legislator, this assessment is not objectionable. 223

(aa) In view of the budgetary principle of annuality (cf. inter alia Art. 110(2) GG, § 11(1) Federal Budget Code, *Bundeshaushaltsordnung* – BHO; Art. 310(1) subpara. 2, Art. 312(1) subpara. 3, Art. 312(3) subpara. 2, Art. 313, Art. 314(1) TFEU; Arts. 9 to 16 of the Financial Regulation; […]), constitutional review of this issue must look at the potential maximum burden per year rather than the total sum of (potential) liabilities that could be incurred until the year 2058. While it is true that by approving the Act Ratifying the EU Own Resources Decision in 2021, the *Bundestag*, in its 19th legislative term, has taken a decision that will bind future Parliaments and restrict parliamentary latitude in budgetary matters considerably and over many years, making this type of commitment are an inherent part of parliamentary law-making. The 224

fact that the principle of democracy generally presupposes the reversibility of parliamentary decisions (cf. BVerfGE 141, 1 <21 f. para. 53>) does not rule out commitments that are legally and factually binding and that cannot easily be reversed.

225 According to the Federal Government's prognosis, which aligns with the legislator's assessment, the maximum amount that the European Commission could request in additional financing, besides contributions for principal payments on the funds borrowed in the context of the NGEU, would be approximately EUR 21.8 billion annually. In the highly unrealistic scenario that all other Member States except Germany fail to honour calls to provide additional financing, this is the maximum burden that would have to borne by the federal budget annually until 2058 (cf. BVerfGE 157, 332 <392 f. para. 109> – *Act Ratifying the EU Own Resources Decision – preliminary injunction*). The complainants in proceedings no. I assume that the maximum annual burden additionally imposed on the federal budget would range from EUR 24.84 billion to 32.25 billion, based on an assumed maximum risk of liabilities in the amount of about EUR 770 billion until 2058, whereas the complainant in proceedings no. II has calculated the maximum annual amount at EUR 20.81 billion. According to the *Bundestag*'s prognosis, the maximum amount that might additionally have to be borne by the federal budget would be EUR 21.75 billion annually. The oral hearing has furnished evidence essentially supporting this prognosis. Professor Feld has submitted – based on information provided by the Federal Ministry of Finance – that in the event of all Member States except Germany failing to honour calls for additional financing, the extra burden on the federal budget would be EUR 21.8 billion annually, amounting to roughly EUR 675.8 billion in total until 2058 (both calculations assume constant prices). Professor Felbermayr assessed the maximum amount resulting from the obligation to provide additional financing at EUR 25.4 billion annually and Professor Fuest calculated the amount at EUR 28 billion. All of the expert third parties have emphasised that the scenario of all Member States except Germany defaulting is highly unrealistic and mostly theoretical in nature.

226 But even in that scenario, the maximum annual burden additionally borne by the federal budget would be between EUR 21 and 28 billion. On that basis, it cannot be concluded that the budgetary power of the *Bundestag* would be restricted or effectively vitiated for a considerable period of time. In the (pre-pandemic) fiscal year 2019, the revenue and expenditure in the federal budget was roughly EUR 357.1 billion (cf. Federal Ministry of Finance, Haushaltsrechnung des Bundes für das Haushaltsjahr 2019, vol. 1, p. 3). In the fiscal year 2020, the federal budget stood at around EUR 443.4 billion (cf. Federal Ministry of Finance, Haushaltsrechnung des Bundes für das Haushaltsjahr 2020, vol. 1, p. 3), compared to EUR 557.1 billion in the fiscal year 2021 (cf. Federal Ministry of Finance, Haushaltsrechnung des Bundes für das Haushaltsjahr 2021, vol. 1, p. 3). For the year 2022, a federal budget of roughly EUR 495.8 billion has been approved (cf. 2022 Budget Law, BGBl I p. 890). The fiscal projections for the 2023 federal budget are assessed at EUR 445.2, and for the 2024, 2025 and 2026 federal budgets are assessed at EUR 423.7 billion, EUR 428.6

billion, and EUR 436.3 billion, respectively (cf. Federal Ministry of Finance, Press Release No. 17 of 1 July 2022). These figures do not yet include ancillary budgets and special funds.

The overall public debt (Federation, *Länder*, municipalities and municipal associations, public social insurance providers, including all ancillary budgets) together with debt in the non-public sector (financial institutions as well as the domestic and international activities of private businesses) amounted to EUR 2,318.9 billion in the first quarter of 2022, of which federal debt accounted for EUR 1,546.9 billion (cf. Federal Statistical Office, Press Release No. 271 of 29 June 2022). 227

These comparative figures demonstrate that the mathematically possible maximum burden on the federal budget would be considerable, and significant with regard to political leeway, but that it would not have the effect of vitiating the budgetary powers of Parliament. Without prejudice to the requirements following from Art. 109(3) and Art. 115(2) GG, this also applies with regard to the remaining degree of flexibility in budgetary policies. 228

(bb) Moreover, based on a valid prognosis, the legislator assumes this scenario to be highly unlikely. The less likely the scenario in question is, the more tenable for Parliament to take a calculated risk. At the same time, even a low likelihood of the relevant risk materialising would result in consequently more weight as the potential liability assumed by Germany, and thus also the potential risk to the *Bundestag*'s budgetary powers, increases. In present case, the volume of the maximum liabilities assumed is considerable, however, the risk the Germany will indeed be the only Member State held liable for the total volume of the NGEU almost non-existent. It was within the *Bundestag*'s margin of appreciation to adopt the challenged Act and to thereby give its approval to the 2020 EU Own Resources Decision and to assume the underlying risks of liability. 229

In an overall consideration of other payment obligations and assumptions of liability on the part of Germany in the context of the Economic and Monetary Union, there does not appear to be a violation of the budgetary powers of the *Bundestag*. It is first and foremost for Parliament to decide, in balancing affected current interests with the risks of mid-term and long-term guarantees, to what extent payment obligations and guarantees can tenably be assumed (cf. BVerfGE 135, 317 <401 para. 164>). Even where an individual payment obligation or guarantee is not objectionable under constitutional law, a (gradual) accumulation of such commitments may reach a point where the budgetary powers are in fact restricted to such degree that the *Bundestag* is no longer "master of its own decisions" (cf. BVerfGE 129, 124 <179 f.>; 132, 195 <240>; 135, 317 <401 para. 163 f.>; 153, 74 <154 para. 140> – *Unified Patent Court*). 230

However, it was not evident from the oral hearing that, in an overall assessment of other existing payment obligations and assumptions of liability, the *Bundestag* had relinquished its budgetary powers by adopting the Act Ratifying the Own Resources 231

Decision such that it was no longer “master of its own decisions”. Given the existing payment obligations and assumptions of liability, the future financial leeway of the *Bundestag* has of course significantly shrunk. In the statement made by the representative of the Federal Court of Audit, it is submitted that the federal budget is effectively “paralysed” due to the considerable amount of existing commitments, with only 10% of disposable funds, of which about 1% would have to be dedicated for principal and interest payments in the context of NGEU. Ultimately, it was found that the liability risks stemming from contingent liabilities such as EFSF, ESM, Temporary Support to mitigate Unemployment Risks in an Emergency (SURE) and NGEU could not be verified with certainty, given that it would not be possible to conduct a reliable appraisal of the overall risk resulting from EU-related commitments.

[…] 232

c) In light of these commitments, the *Bundestag* has an ongoing duty, in the context of its responsibility with regard to European integration, to monitor the use of funds from NGEU and the development of risks of liability arising from the programme and, when necessary, to take suitable action to protect the federal budget. In light of the NGEU having, at best, a weak democratic foundation in terms of parliamentary legitimation, the *Bundestag* – in cooperation with the Federal Government and in the exercise of its parliamentary rights set out in Art. 23(2) and (3) GG as well as in the Act on Cooperation Between the Federal Government and the German *Bundestag* in Matters Concerning the European Union – has a duty to assess how NGEU funds will be used and how the associated liability risks for the federal budget develop. If new information emerges that calls into question the credibility of the initial risk prognosis, the *Bundestag* must immediately take suitable measures to ensure protection of the federal budget. 233

The requirements developed in the Second Senate’s case-law on the financial aid measures for Greece, the European Financial Stability Facility and the European Stability Mechanism (cf. BVerfGE 132, 195 <241 para. 110>; 135, 317 <402 para. 165>; cf. also BVerfGE 129, 124 <180 f.>; 157, 332 <381 f. para. 85> – *Act Ratifying the EU Own Resources Decision – preliminary injunction*) are not directly applicable to the present proceedings, which concern the system of own resources of the European Union established in accordance with Art. 311(3) TFEU. In this context, the overall budgetary responsibility of the *Bundestag* is limited to approving the provision of own resources with the domestic ratifying act pursuant to the third sentence of that treaty provision and to exercising oversight vis-à-vis the Federal Government regarding the governmental negotiations and voting behaviour in the Council on matters concerning the EU budget. However, the situation is different when the appropriation of funds concerns other revenue in the context of Art. 311(2) TFEU, i.e. funds that do not provide financing to the general EU budget, but are assigned to specific purposes. In this regard, the appropriation of funds lacks the legitimation that would normally be conferred by the involvement of the European Parliament in the budget procedure pursuant to Art. 314 TFEU. This lack of legitimation at EU level corresponds to a 234

greater scope of the *Bundestag*'s responsibility with regard to European integration at the domestic level.

3. Ultimately, the 2020 EU Own Resources Decision does not violate the right to democratic self-determination of the complainants in proceedings no. I and II following from Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) as well as Art. 79(3) GG. 235

III.

A request for a preliminary ruling from the Court of Justice of the European Union pursuant to Art. 267 TFEU is not necessary. The present proceedings do not require an interpretation of Art. 122 and Art. 311 TFEU from the Court of Justice of the European Union. This is because, based on a strict understanding of the 2020 EU Own Resources Decision, the Second Senate is of the view that the measure does not involve a sufficiently qualified exceeding of the European integration agenda or an impairment of the Basic Law's constitutional identity of the Basic law. There is no reason to assume that the Court of Justice of the European Union would interpret the competences in Art. 122 and Art. 311(2) TFEU more narrowly than the Federal Constitutional Court. Against this background, the constitutional complaints would remain unsuccessful even with a referral of these questions to Luxembourg (cf. BVerfG 151, 202 <372 f. para. 317 – *European Banking Union*). 236

As far as Art. 125(1) TFEU is concerned, the interpretation of this provision is an acte éclairé. In this respect, the Federal Constitutional Court has based its review on the ruling of the Court of Justice in *Pringle* (CJEU, Judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756) and, drawing on the standards developed in that case regarding the budgetary policies of Members States, concluded that the 2020 EU Own Resources Decision does not amount to a qualified exceeding of the competences conferred in the Treaties on these grounds. 237

IV.

This decision was taken with 6:1 votes. 238

König	Huber	Hermanns
Müller	Kessal-Wulf	Langenfeld
	Wallrabenstein	

Dissenting opinion of Justice Müller

to the Judgment of the Second Senate

of 6 December 2022

- 2 BvR 547/21 -

- 2 BvR 798/21 -

"To see the curtain down and nothing settled" – this popular quote by Bertolt Brecht makes for good theatre. However, it seems to me a rather ill-suited approach to the effective protection of the fundamental right to democracy under Art. 38(1) first sentence GG. And yet the Senate majority leaves all of the relevant questions of EU law unanswered, refuses to engage in the dialogue between European constitutional courts, accepts a violation of the responsibility with regard to European integration and signals a retreat from the substance of *ultra vires* review. Therefore, I regrettably cannot join in the decision. 1

The Senate majority itself lists a number of doubts as to the existence of a competence in the Treaties for the borrowing authorised by Art. 5(1) subpara. 1(a) of the 2020 EU Own Resources Decision. And yet, it neglects to conduct an independent assessment of whether EU competences were exceeded (see 1. below). Given the Senate majority's own significant doubts as to the conformity of the 2020 EU Own Resources Decision with EU primary law, it seems that, at a minimum, a referral to the Court of Justice of the European Union was warranted (see 2. below). The (ultimately futile) attempt to lay down limitations regarding future borrowing activities by the European Union cannot conceal the fact that the Senate majority essentially accepts the first step towards a permanent and fundamental change in the financial architecture of the European Union without the necessary amendment of the Treaties (see 3. below). Accordingly, the Senate majority's approach does not meet the requirements of an effective *ultra vires* review in the context of Art. 38(1) first sentence GG (see 4. below) Beyond the present case, the approach of the Senate majority risks rendering the *ultra vires* review meaningless with regard to the division of competences between the European Union and the Member States (see 5. below). 2

4. The Senate majority refuses to settle the question of whether the borrowing by the European Union authorised by Art. 5(1) subpara. 1(a) of the 2020 EU Own Resources Decision is in conformity with the requirements of EU primary law. It merely states – accepting the arguments presented by the European Commission in the oral hearing – that it cannot be "clearly ruled out" that the European Union has the competence, on the basis of Art. 311(2) and (3) in conjunction with Art. 122(1) and (2) TFEU, to authorise the borrowing in question. At the same time, the Senate majority voices significant doubts as to the existence of a competence permitting borrowing by the European Union, raising both general (see a) below) and specific concerns 3

(see b) below).

a) First, the Senate majority correctly establishes that the European Union is subject to a general prohibition on borrowing, citing Art. 17(2) of the Financial Regulation, and that the permanent introduction of debt financing in the EU's financial architecture would require an amendment of the Treaties (cf. Judgment, para. 150 ff.). I concur with this assessment. 4

Next, the Senate majority asserts that, while the prohibition on borrowing derived from the Treaties might not be absolute, borrowing for the purposes of financing the European Union's general budget remains impermissible, as no competence to that end has been conferred in the Treaties in accordance with Art. 5(1) first sentence and Art. 5(2) TEU (cf. para. 158). According to the Senate majority's findings, the Council does not have the power to fundamentally change the European Union's financial architecture, not even by unanimous decision, as fundamental changes of this kind require an amendment of the Treaties through the procedure set out in Art. 48 TEU. The Senate majority furthermore states that deviations from the prerequisites set out in Art. 311(2) and (3) TFEU cannot be justified by arguing that it was necessary for the European Union to assume debt commitments in order to achieve the objectives of the NGEU; a policy objective cannot by itself confer the required legal competence to carry out the measures needed to achieve it (cf. Judgment, para. 160). Again, I unequivocally agree with these findings. 5

b) However, in spite of these and other concerns listed in the Judgment, the Senate majority then limits its review to the determination that it cannot be clearly ruled out that the Art. 5(1) subpara. 1(a) of the 2020 EU Own Resources Decision is in conformity with the requirements of EU primary law (cf. Judgment, para. 162). In doing so, the Senate majority fails to honour the very standard it is fond of reiterating, namely, that the manifest exceeding of one's competences be determined on the basis of a "careful and meticulously reasoned interpretation of the law" in accordance with general principles (cf. BVerfGE 142, 123 <201 para. 150>; 151, 202 <301 para. 152> – *European Banking Union*; 154, 17 <92 f. para. 113> – *PSPP asset purchase programme of the ECB*; established case-law), as the Senate majority itself does not meet this standard in its examination of both Art. 311(2) TFEU (see aa) below) and Art. 122 TFEU (see bb) below). 6

aa) The Senate majority finds that the borrowing under Art. 5(1) subpara. 1(a) of the 2020 EU Own Resources Order does not constitute 'own resources', but must instead be classified as 'other revenue' in the sense of Art. 311(2) TFEU (cf. Judgment, para. 169). However, the Senate majority fails to sufficiently appreciate the supplementary function of such other revenue, as indicated by the wording and systematic approach of Art. 311(2) TFEU, and the legal consequences arising therefrom. 7

(1) Art. 311(2) TFEU states that, without prejudice to other revenue, the budget of the European Union must be *wholly* funded through its own resources. The European Union's past financial operations reflect this requirement of primary financing through 8

own resources; prior to the NGEU, other revenue within the meaning of Art. 311(2) TFEU has included (direct) taxes imposed on EU staff, levies collected within the context of the common agricultural policy framework, monetary compensatory amounts, public charges collected in the context of the EU administrative operations as well as revenue from sales and rental transactions ([...]). Against this backdrop, other revenue in the past has accounted for only about 1% of the EU budget – a fact also cited by the Senate majority in its reasoning (cf. Judgment, para. 195 [...]).

(2) In light of this, the Senate majority correctly states that recourse to the category of other revenue must remain the exception (cf. Judgment, para. 195) and cannot be used to circumvent the requirement that the European Union be financed through a system of own resources (cf. Judgment, para. 162). However, this requirement is not thoroughly examined in the subsequent review conducted by the Senate majority and it is objectively incomprehensible how the Senate majority's conclusions in the present case can be reconciled with this standard. 9

(a) The fact that the borrowing authorised under Art. 5 of the 2020 EU Own Resources Decision for the budget years 2021 and 2022 is, respectively, more than double the contemplated regular budget of the European Union for each of these years under the multiannual financial framework for 2021-2027 argues against the assertion that the authorisation to borrow can be reconciled with the mandated system of financing through own resources (EUR 335.151 billion under NGEU compared with EUR 154.049 billion allocated to the year 2021 under the MFF; EUR 312.582 billion under NGEU compared with 153.254 billion allocated for the year 2022 under the MFF; cf. Judgment, para. 197). For the total period of the multiannual financial framework, the contemplated total borrowing is EUR 750 billion as compared to a total general budget of EUR 1,074 billion. The 'other revenue' thus amounts to 40% of the total budget of the European Union, inclusive of NGEU, or 67% of the total volume excluding NGEU. [...] 10

(b) It therefore appears far-fetched to assume that the borrowing authorised under the 2020 EU Own Resources Decision has no bearing on the requirement, derived from Art. 311(2) TFEU, that the primary financing of the European Union through own resources remains the rule and that other revenue remains the exception. It is obvious that the borrowing under the 2020 EU Own Resources Decision is not limited to an exceptional arrangement that merely serves to supplement the system of own resources. This strongly points to the conclusion that, when assessed over the total time period of the multiannual financial framework, debt financing forms a 'second pillar' of nearly equal importance to financing through the own resources of the European Union. This suggests that Art. 5 of the 2020 EU Own Resources does exceed the competences conferred in the Treaties and, ultimately, brings about a fundamental change in the financial architecture of the European Union. 11

(c) In this respect, the Senate majority remarks that a violation of Art. 311(2) and (3) TFEU is seriously indicated when – as is the case for the years 2021 and 2022 – the 12

volume of the authorised borrowing exceeds the total annual budget allocated for that year (cf. Judgment, para. 196). The Senate majority nevertheless limits itself to the finding that it is not manifestly incorrect to rely on the multiannual financial framework as the overall basis of the legal assessment rather than on the individual budget years (cf. Judgment, para. 202).

This is not convincing. Why the principle of annuality that normally applies to the EU budget (cf. Judgment, para. 197) does not apply in this case remains unclear. In any case, even based on the total time period of the multiannual financial framework, this assessment would need to resolve the issue of whether Art. 5(1) subpara. 1(a) of the 2020 EU Own Resources Decision is compatible with the general prohibition on borrowing – which the Senate majority explicitly highlights – and with the requirement under Art. 311(2) TFEU that the European Union budget be in principle financed from own resources when, with a volume of EUR 750 billion, the contemplated borrowing is only about a third less than the total EU budget. In this regard, the Senate majority is satisfied with the finding that it is not "manifestly untenable" to consider it sufficient that the total volume of the budget over the total period of the multiannual financial framework is slightly higher that the total volume of borrowed funds. Yet this assessment by no means constitutes a meticulous interpretation of the law of Art. 311(2) TFEU in line with common methodological standards. 13

bb) A different conclusion does not result from the Senate majority's reference to the exceptional character of the recovery instrument and the assertion that the borrowed funds are strictly assigned to addressing the consequences of the COVID-19 crisis. In this respect, the Senate majority submits that the authorisation of the European Union to carry out borrowing is in any case not a manifest violation of Art. 311(2) and (3) TFEU if the funds are used for the exercise of competences conferred upon the European Union and are thus used for purposes that are covered by European integration agenda laid down in the Treaties. It is then submitted that it cannot ultimately be clearly ruled out that Art. 122 TFEU provides a legal basis for the recovery instrument (cf. Judgment, para. 171). 14

At the same time, arguing against the very considerations on which the Judgment is based, the Senate majority itself views it questionable whether the factual circumstances in the present case meet the prerequisites of Art. 122(1) and (2) TFEU, (see (1) below). Further concerns are raised in relation to the specific design of NGEU (see (2) below). What the Senate majority fails to do is deliver a comprehensible reasoning as to why the conferral of a substantive competence upon the European Union also entails the power to engage in borrowing for the purposes of carrying out that competence (see (3) below). 15

(1) According to the Senate majority, Art. 122 TFEU confers a competence for exceptional measures and must therefore be read narrowly; it is also submitted that, for the most part, the interpretation of its exact scope and contents has not yet been settled (cf. Judgment para. 174). Based on the interpretative principle that exception 16

clauses are to be read narrowly, neither Art. 122(1) TFEU (“in particular if severe difficulties arise in the supply of certain products, notably in the area of energy”) nor Art. 122(2) TFEU (“severe difficulties caused by natural disasters or exceptional occurrences”; assistance for individual affected Member States, not collective assistance for all Member States) appear to provide a legal basis for the recovery instrument – these concerns are shared by the Senate majority (cf. Judgment, para. 175). In spite of these reservations, the Senate majority avoids actually deciding which particular subsection of the treaty provision could in fact provide a legal basis for Art. 5 of the 2020 EU Own Resources Decision, and simply states that an exceeding of the “competence conferred in Art. 122(1) and (2) TFEU” is not manifestly evident. This approach blurs the two subsections into a unified treaty competence and thereby fails to meet the required level of careful examination in the interpretation of Art. 122(1) and (2) TFEU.

(2) There are additional concerns, as pointed out by the Senate majority, regarding recourse to Art. 122 TFEU as a legal basis for Art. 5 of the 2020 EU Own Resources Decision, namely, those arising from the design of the NGEU. On this point, the Senate majority correctly presumes that the recovery instrument can only be based on Art. 122 TFEU, in terms of competence, if the relevant measures are in fact aimed at addressing the consequences of the COVID-19 pandemic rather than at providing a general stimulus package (cf. Judgment, para. 177). The Senate majority then lists numerous concerns that argue against a sufficient link between the consequences of the pandemic and the measures provided for under NGEU; including: 17

- the distribution key for the disbursement of the funds, which is determined by economic figures from previous years that are not sufficiently connected to the effects of the pandemic (cf. Judgment, paras. 177, 181), 18

- the purposes to which the funds are assigned, including the objectives of climate neutrality and digital transformation, which also lack a sufficient connection to the pandemic (cf. Judgment, para. 178), 19

- the statement made by the Federal Minister of Finance in the first parliamentary deliberation of the legislative draft for the Act Ratifying the EU Own Resources Decision, according to which the NGEU is actually a transformation rather than a recovery package (cf. Judgment, para. 177), as well as 20

- the timeframe for the disbursement of the funds (cf. Judgment, para. 179) and the fact that the funds are partially used to subsidies ongoing programmes of the European Union (cf. Judgment, para. 180). 21

These concerns were confirmed by the economic experts who testified in the oral hearing. [...] Even though the experts also recognised that NGEU could have a positive impact on economic development, this does not alter the fact that the recovery package appears to be “an instrument of cohesion policy rather than a stability mechanism” (cf. written statement to oral hearing, submitted by Prof. Felbemayr, p. 9). Giv- 22

en the lack of a sufficient connection to the effects of the COVID-19 pandemic, the recovery instrument cannot, in large part, be based on the competence conferred in Art. 122 TFEU.

Nevertheless, the Senate majority once again limits its review to the determination that, in light of the broad margin of assessment on the part of the Council and the Commission, any exceeding of Art. 122 TFEU is not manifestly evident (cf. Judgment, para. 183 ff.). [...] 23

(3) In addition, Senate majority does not provide a tenable explanation for its conclusion that the competence conferred in Art. 122 TFEU also confers upon the European Union the authority to borrow up to the amount of the regular budget (which is to be funded through own resources). 24

Following the logic of the Senate majority, any competence conferred in the Treaty could be invoked to justify borrowing by the European Union for the purposes of carrying out that competence, so long as the volume of borrowed funds does not exceed – when measured over a multiannual term – the total volume of own resources in the regular budget. This would lead to the creation of two co-existing pillars of financing: the regular budget, subject to a strict prohibition of borrowing; and supplementary budget lines, that can reach an almost equal volume but are not subject to such prohibition. The notion that the European integration agenda set out in primary law imposes a strict prohibition on borrowing for the regular budget and then, at the same time, opens the door to circumvent such prohibition by allowing the European Union – under the pretext of carrying out any of the competences conferred – to borrow supplementary revenue at whim appears absurd to me. 25

5. In light of the foregoing concerns as to the conformity of Art. 5(1) subpara. 1(a) of the 2020 EU Own Resources Decision with EU primary law – an issue left unresolved by the Senate majority – it seems that, at a minimum, a referral to the Court of Justice of the European Union pursuant to Art. 267(3) TFEU was necessary. This would have afforded the Court of Justice the opportunity to exercise its mandate to interpret and apply the Treaties and to ensure uniformity and coherence of EU law (cf. BVerfGE 154, 17 <91 para. 111> – *PSPP asset purchase programme of the ECB*). Given that the Senate majority itself addresses, but ultimately leaves unresolved, doubts as to the existence of a competence permitting the European Union to borrow in an almost equal volume compared with the total of own resources, and taking into account the controversial discussion in scholarship as cited in the Senate's reasoning, the Federal Constitutional Court's commitment to the multi-level cooperation of European courts should have required a referral of these issues to the Court of Justice in order to give effect to the latter's role as the definitive interpreter of EU law. A preliminary ruling from the Court of Justice would provide a foundation for the Federal Constitutional Court to properly conduct its own review as to whether Art. 5(1) subpara. 1(a) of the 2020 EU Own Resources Decision constitutes a manifest exceeding of competences and, consequently, whether there has been a violation of the rights of the 26

complainants under Art. 38(1) first sentence.

[...] The Senate majority claims that requesting a preliminary ruling was unnecessary because it seemed unlikely that the Court of Justice of the European Union would interpret [the competences conferred in Art. 122 or Art. 311(2) TFEU] “more narrowly” than would the Federal Constitutional Court. This assertion is not [...] supported by sound indications from the case-law of either court. 27

6. Having declined to request a preliminary ruling from the Court of Justice, the Senate majority is at pains to establish limits to borrowing by the European Union, and to that end establishes a set of criteria that it derives from the prohibition on circumventing the requirement to finance the EU budget with own resources. According to this standard, borrowing on the part of the European Union requires an explicit authorisation in the decision on own resources, the borrowed funds must be strictly assigned to be used exclusively for tasks for which the EU has competence in accordance with the principle of conferral, and the borrowing must be subject to limits as to both the duration and the amount of the commitments assumed (cf. Judgment, para. 162). I am not convinced that these criteria can effectively ensure that the requirement that the European Union be financed through own resources is respected (see a) below). In any case, these criteria do not alter the fact that the Senate majority’s Judgment opens the door to a fundamental change in the financial architecture of the European Union without the necessary amendment of the Treaties (see b) below). 28

a) As one of the limiting criteria, the Senate majority defines the condition that borrowing must be based on an explicit authorisation in a decision on own resources. While this condition may serve to safeguard the final say of the Member States over the financial resources of the European Union (cf. Judgment, para. 166), it does little to ensure that the volume of borrowing remains within the limits set by Art. 311(2) TFEU. 29

The Senate majority’s view that an authorisation to borrow does not manifestly violate Art. 311 TFEU if the funds are used within the scope of a substantive competence conferred in the Treaties and thus for purposes covered by the European integration agenda (cf. Judgment, para. 171) is similarly unconvincing. This view does not properly distinguish between the conferral of a task and the entitlement to assume debt for the purposes of carrying out that task. The requisite conferral of a specific competence for the contemplated borrowing under Art. 5(1) first sentence TEU cannot be substituted with a substantive competence for a specific task conferred in the Treaties. [...] 30

Nor does imposing a limit on the duration of the borrowing constitute an effective means for ensuring that the exception to the rule relationship mandated by Art. 311(2) TFEU is respected. Imposing a time limit on individual debt commitments does not rule out the possibility of assuming new debt commitments at recurring intervals, each time based on the substantive competence in question; limiting the duration of borrowing activities therefore cannot ensure that such financing remains the excep- 31

tion in line with Art. 311(2) TFEU. From past experiences with the implementation of similar legal interventions, it is well-known that temporary instruments created in times of crisis often, in practice, evolve into permanent mechanisms of the European Union's financial architecture and that, in the end, the Member States accept these developments ([...]). The Senate majority, however, neglects to address this.

Finally, the condition that the amount of borrowing be subject to a limit also does not give effect to the requirement of primary budget financing through own resources, at least not on the basis of the interpretation of Art. 311(2) TFEU endorsed by the Senate majority. [...] 32

b) By accepting the legality of the arrangements in Art. 5(1) subpara. 1(a) of the 2020 EU Own Resources Decision, the Senate majority opens the door to a fundamental change in the financial architecture of the European Union, as it allows the European Union to permanently move to a system that relies on both own resources and borrowing on a nearly equal footing. The budgetary structure of the European Union is visibly tilted in the direction of a fiscal and transfer union. 33

While there may appear to be sound political arguments for doing so, that does not alter the fact that there are no indications that the current European integration agenda defined in Art. 310 ff. TFEU supports such a budgetary system. It is my firm conviction that the path to transforming the European Union into a fiscal and debt union can only be achieved through an amendment of the Treaties in the procedure set out in Art. 48 TEU. The Council does not have the power to fundamentally change the make-up of the European Union's financial architecture, not even by unanimous decision (cf. Judgment, para. 160). 34

The arguments that the European Union has borrowed in the past (see aa) below), or that the NGEU constitutes a one-time exception to address an unprecedented crisis (see bb) below), do not change this conclusion. 35

aa) The past borrowing activities by the European Union are in no way comparable with the contemplated borrowing under Art. 5(1) subpara. 1(a) of the 2020 EU Own Resources Decision. Besides the fact that prior practice is not determinative as to the Decision's conformity with EU primary law, the Senate majority itself points out that past borrowing has always been strictly limited to much smaller volumes and was mostly used to give out back-to-back loans (cf. Judgment, para. 156). These type of borrowing operations do not contradict the supplementary function of other revenue under Art. 311(2) TFEU. 36

By contrast, the contemplated borrowing authorised in the 2020 EU Own Resources Decision fundamentally changes the financial architecture of the European Union, not only due to its total volume of EUR 750 billion. Most notably, Art. 5(1) subpara. 1(b) of the 2020 EU Own Resources Decision permits the largest portion of the borrowed funds (EUR 390 billion) to be distributed as non-repayable grants. As repayment of these funds will come from the EU budget, this gives rise to redistributive effects that 37

were not present with respect to past borrowing.

bb) The claim of the Senate majority that the NGEU is a “one-time instrument in reaction to an unprecedented crisis” and not “a step towards a transfer and fiscal union” is unconvincing in many respects. 38

(1) It is contradicted not only by the inadequate limitations on the use of NGEU funds to purposes that actually address the consequences of the COVID-19 pandemic, but also the general pattern of continuing the use of temporarily introduced instruments beyond the end of the respective crisis. Above all, the legal reasoning for establishing a competence in the Treaties as a basis for the NGEU – as accepted by the Senate majority – opens up boundless possibilities for further debt-financed measures and programmes by the European Union. Solely based on the set of criteria developed by the Senate majority – an authorisation in the decision on own resources, a connection to a substantive competence conferred in the Treaties, and limitations of the amount and duration of borrowing – recourse to ‘other revenue’ in the form of debt financing would allow the European Union to create, at discretion, new instruments that are structured similar to the NGEU and entail comparable redistribution effects. [...] 39

(2) The finding that Art. 5 of the 2020 EU Own Resources Decision essential constitutes the first step in the direction of transforming the European Union into a transfer is confirmed by public statements made by the responsible political office holders. [...] 40

7. Overall, it can therefore be concluded that – despite the numerous significant concerns as to the conformity of Art. 5(1) subpara. 1(a) of the 2020 EU Own Resources Decision with the rules of primary law governing the EU’s financial system – the Senate majority refrains both from referring these issues to the Court of Justice for a preliminary ruling and from conducting its own thorough assessment of these questions. Thus, the Senate majority accepts the possibility that the 2020 Own Resources brings about fundamental changes in the financial architecture of the European Union by transforming it into a fiscal and transfer union without the necessary amendment of the Treaties. At the same time, the Senate majority rejects the possibility of amending the Treaties “through the backdoor” by means of the unanimous adoption of 2020 EU Own Resources Decision (cf. Judgment, para. 160), acknowledging that in such case the Act Ratifying the Own Resources Decision would in fact constitute a violation of the complainants’ right to democracy derived from Art. 38(1) GG. To ensure effective protection of this right, the Senate majority should have attempted to settle the relevant issues of EU law by requesting a preliminary ruling from the Court of Justice pursuant to Art. 267(3) TFEU, instead of merely submitting that any exceeding of competences is not “manifestly evident” and, based thereon, refraining from conducting its own independent legal examination of these questions. 41

8. Beyond this specific case, I see the risk that the approach of the Senate majority will undermine the substance of the *ultra vires* review. It restricts the review of whether the EU exceeded its competences to such a lenient standard that it can no 42

longer serve to give effect to Art. 38(1) first sentence GG.

To understand the substance of the *ultra vires* review, we must refer to [...] the established case-law of the Second Senate. Finding a violation on the basis of the *ultra vires* doctrine requires a determination of a sufficiently qualified exceeding of competences, that is, one that is manifestly evident and structurally significant (cf. BVerfGE 142, 123 <200 para. 148>; 154, 17 <90 para. 110> – *PSPP asset purchase programme of the ECB*). This is the case if – when applying common methodological standards – a competence for the contested measure cannot be demonstrated under any legal point of view (cf. BVerfGE 126, 286 <308>; 142, 123 <200 para. 149>; 151, 202 <300 f. para. 151> – *European Banking Union*). 43

However, this standard of review does not exempt the Federal Constitutional Court from the necessity of engaging the Court of Justice in dialog to clarify issues of EU law. In its case-law, the Second Senate has correctly held that a finding that a decision amounts to a manifest exceeding of competences does not require that absolutely no dissenting legal views have been put forward on the issue in question. The fact that commentators in legal scholarship, politics or the media have argued for the permissibility of certain measures does not generally rule out that such measures can be found to constitute a manifest exceeding of competences. An exceeding of competences may be regarded as ‘manifest’ even where this finding derives from a careful and meticulously reasoned interpretation (cf. BVerfGE 82, 316 <319 f.>; 89, 243 <250>; 89, 291 <300>; 95, 1 <14 f.>; 103, 332 <358 ff.>; 142, 123 <201 para. 150>; 154, 17 <92 f. para. 113> – *PSPP asset purchase programme of the ECB*). 44

Where disputes of this nature arise, it is incumbent upon the Federal Constitutional Court to conduct a careful examination and interpretation of the relevant provisions of EU law and, if necessary, request a preliminary ruling pursuant to Art. 267 TFEU in order to engage in a dialogue with the Court of Justice of the European Union. Only after such efforts have been made is it possible to make a reliable determination as to whether the interpretation of the relevant provisions of EU law is sufficiently clear or whether the Federal Constitutional Court must – exceptionally – dispense with the finding that the exceeding of competences constitutes a ‘manifest violation’ because there are ultimately sufficiently weighty legal arguments that tenably support the existence of a competence in the Treaties. When the Federal Constitutional Court, based on a careful examination of EU law, arrives at the conclusion that the conformity of an EU measure with the division of competences is seriously in doubt, it is imperative for ensuring effective legal protection that it make a referral to the Court of Justice, in my opinion. Such a referral may only be refrained from when the interpretation of the relevant provision of EU law constitutes an acte clair or an acte éclairé. 45

When the Senate majority, from the outset, limits its review to a mere assessment of whether an EU measure ‘manifestly’ exceeds competences, without taking the effort to engage in a careful and detailed analysis of EU law, it risks undermining the 46

ultra vires review with far-reaching effect. This is the case here: All of the decisive questions on the conformity of Art. 5(1) subpara. 1(a) of the 2020 EU Own Resources Decision with the requirements of EU primary law under Art. 311(2) and (3) and Art. 122(1) and (2) TFEU remain unanswered in the Senate majority's reasoning. [...] In my opinion, this falls short of a "careful and meticulously reasoned interpretation" of EU law.

Rather, by concentrating its review from the outset on the element of a manifest violation, the Senate majority's approach could essentially render the *ultra vires* review meaningless. It seems unlikely that it will not be possible, in cases of dispute, to find at least some commentators in scholarship that present plausible arguments as to why an EU measure has a sufficient legal basis in the Treaties. EU institutions, bodies, offices and agencies have sufficient legal in-house expertise to demonstrate that, in a given case, the conferral of a competence on which the measure in question can be based "cannot be ruled out" or is at least "not manifestly untenable". If this by itself permitted the Federal Constitution Court to refrain from conducting its own careful examination of EU law and from engaging in a dialogue with the Court of Justice, the *ultra vires* review would essentially be abandoned. This approach not only fails to give effect to the right to democracy derived from Art. 38(1) first sentence GG, it could also aid attempts to circumvent Art. 48 TEU by expanding or amending the Treaties "through the backdoor". In view of this, I hope the Senate majority will not continue onto this path. 47

Müller

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