Headnotes

to the Judgment of the Second Senate of 5 May 2020

- 2 BvR 859/15 -

- 2 BvR 1651/15 -

- 2 BvR 2006/15 -

- 2 BvR 980/16 -

1. **Where an *ultra vires* review or an identity review raises questions regarding the validity or the interpretation of a measure taken by institutions, bodies, offices and agencies of the European Union, the Federal Constitutional Court, in principle, bases its review on the understanding and the assessment of such a measure as put forward by the Court of Justice of the European Union.**

2. **The Court of Justice of the European Union exceeds its judicial mandate, as determined by the functions conferred upon it in Article 19(1) second sentence of the Treaty on European Union, where an interpretation of the Treaties is not comprehensible and must thus be considered arbitrary from an objective perspective. If the Court of Justice of the European Union crosses that limit, its decisions are no longer covered by Article 19(1) second sentence of the Treaty on European Union in conjunction with the domestic Act of Approval; at least in relation to Germany, these decisions lack the minimum of democratic legitimation necessary under Article 23(1) second sentence in conjunction with Article 20(1) and (2) and Article 79(3) of the Basic Law.**

3. **Where fundamental interests of the Member States are affected, as is generally the case when interpreting the competences conferred upon the European Union as such and its democratically legitimated European integration agenda (*Integrationsprogramm*), judicial review may not simply accept positions asserted by the European Central Bank without closer scrutiny.**

4. **The combination of the broad discretion afforded the institution in question together with the limited standard of review applied by the Court of Justice of the European Union clearly fails to give sufficient effect to the principle of conferral and paves the way for a continual erosion of Member State competences.**

5. **For safeguarding the principle of democracy, it is imperative that the bases for the division of competences in the European Union be respected. The finality of the European integration agenda (*Integrationsprogramm*) must not undermine the principle of conferral, one of the fundamental principles of the European Union.**

6. **a) In the context of delimiting the competences between the European Union and the Member States, the principle of proportionality and the overall assessment and appraisal it entails are of great importance with regard to the principles of democracy and the sovereignty of the people. Disregarding these requirements potentially shifts the bases for the division of competences in the European Union, undermining the principle of conferral.**

   6. b) A programme for the purchase of government bonds only satisfies the principle of proportionality if it constitutes a suitable and necessary means for achieving the aim pursued; the principle of proportionality requires that the programme's monetary policy objective and the economic policy effects be identified, weighed and balanced against one another. Where a programme's monetary policy objective is pursued unconditionally and its economic policy effects are ignored, it manifestly disregards the principle of proportionality enshrined in Article 5(1) second sentence and Article 5(4) of the Treaty on European Union.

   6. c) The fact that the European System of Central Banks has no mandate for economic or social policy decisions does not rule out that effects of a programme for the purchase of government bonds on, for example, public debt, personal savings, pension and retirement schemes, real estate prices and the keeping afloat of economically unviable companies are taken into account in the proportionality assessment pursuant to Article 5(1) second sentence and Article 5(4) of the Treaty on European Union and – in an overall assessment and appraisal – weighed against the monetary policy objective that the programme aims to achieve and is capable of achieving.

7. **The determination whether a programme like the Public Sector Purchase Programme manifestly circumvents the prohibition in Article 123(1) of the Treaty on the Functioning of the European Union does not hinge on a single criterion; rather, it requires an overall assessment and appraisal of the relevant circumstances. In particular, the purchase limit of 33% and the distribution of purchases according to the European Central Bank's capital key prevent selective measures being taken under the Public Sector Purchase Programme for the benefit of individual Member States and the Eurosystem becoming the majority creditor of one Member State.**

8. **If the risk-sharing regime for bond purchases under the Public Sector Purchase Programme were subject to (retroactive) changes, this would affect the limits set by the overall budgetary responsibility of the German *Bundestag* and be incompatible with Article 79(3) of the Basic Law. It would essentially amount to an assumption of liability for decisions taken by third parties with potentially unforeseeable consequences, which is impermissible under the Basic Law.**

9. **Based on their responsibility with regard to European integration (*Integrationsverantwortung*), the Federal Government and the *Bundestag* are required to take steps seeking to ensure that the European Central Bank conducts a proportionality assessment. They must clearly communicate their legal view to the European Central Bank or take other steps to ensure that conformity with the Treaties is restored.**

10. **German constitutional organs, administrative bodies and courts may participate neither in the development nor in the implementation, execution or operationalisation of *ultra vires* acts. This generally also applies to the *Bundesbank.***

FEDERAL CONSTITUTIONAL COURT

- 2 BvR 859/15 -
- 2 BvR 1651/15 -
- 2 BvR 2006/15 -
- 2 BvR 980/16 -

Pronounced
on 5 May 2020
Fischböck
Amtsinspektorin
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaints of

I. 1. Dr. W…,

2. Dr. H…,

3. Dr. A…,

- authorised representative: –

against 1. the omission on the part of the Federal Government and the *Bundestag* to take steps to ensure the rescission or non-implementation of Decision of the Governing Council of the European Central Bank of 22 January 2015 on an expanded asset purchase programme (ECB/2015/10) and Decision of the European Central Bank of 4 March 2015 (Decision [EU] 2015/774) on a secondary markets public sector asset purchase programme, as amended by Decision of the European Central Bank of 5 November 2015 (Decision [EU] 2015/2101), Decision of the European Central Bank of 16 December 2015 (Decision [EU] 2015/2464), Decision of the European Central Bank of 18 April 2016 (Decision [EU] 2016/702), Decision of the European Central Bank of 11 January 2017 (Decision [EU] 2017/100) and Decision of the Governing Council of the European Central Bank of 13 December 2018,

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

3. the applicability of the Judgment of the Court of Justice of the European Union of 11 December 2018 – Case 493/17, *Weiss and Others* – within the ambit of the Basic Law

- 2 BvR 859/15 -,

II. 1. Prof. Dr. L…,

2. Prof. Dr. h. c. H…,

3. Prof. Dr. S…,

4. Mr K…,

5. Mr T…,

and 1,729 other complainants,

- authorised representatives: 1. ,

2. –

against 1. the domestic applicability and implementation of Decision of the Governing Council of the European Central Bank of 22 January 2015 and Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 (ECB/2015/10) on a secondary markets public sector asset purchase programme (Public Sector Asset Purchase Programme), in conjunction with

- Decision (EU) 2015/2101 of the European Central Bank of 3 September/5 November 2015 (ECB/2015/33) amending Decision (EU) 2015/774 (ECB/2015/10) on a secondary markets public sector asset purchase programme (ECB/2015/10),

- Decision (EU) 2015/2464 of the European Central Bank of 3 December/16 December 2015 (ECB 2015/48) amending Decision (EU) 2015/774 (ECB/2015/10) on a secondary markets public sector asset purchase programme,

- Decision (EU) 2016/702 of the European Central Bank of 10 March/18 April 2016 (ECB/2016/8) amending Decision (EU) 2015/774 (ECB/2015/10) on a secondary markets public sector asset purchase programme, and

- Decision (EU) 2017/100 of the European Central Bank of 8 December 2016/11 January 2017 (ECB/2017/1) amending Decision (EU) 2015/774 (ECB/2015/10) on a secondary markets public sector asset purchase programme,

2. the omission on the part of the Federal Government and the German *Bundestag*, in the exercise of their responsibility with regard to European integration (*Integrationsverantwortung*), to take steps to ensure the rescission of the decisions on a secondary markets public sector asset purchase programme listed in no. 1 above, and to take suitable measures limiting, to the greatest extent possible, the domestic impact arising from the continued implementation of these decisions,

by way of subsidiary application:

the omission on the part of the Federal Government and the German *Bundestag,* in the exercise of their responsibility with regard to European integration (*Integrationsverantwortung*), to actively address the question how the order of competences in the European Union can be restored and Germany’s constitutional identity can be protected with regard to the decisions on a secondary markets public sector asset purchase programme listed in no. 1 above, and to make a positive determination in this regard

- 2 BvR 1651/15 -,

III. Dr. G…,

- authorised representative: –

against the omission on the part of the Federal Government to take suitable steps against

the actions of the European Central Bank in the form of its Secondary Markets Public Sector Asset Purchase Programme (PSPP),

specifically Decision of the Governing Council of the European Central Bank of 22 January 2015 on an expanded asset purchase programme (Expanded Asset Purchase Programme – EAPP; currently known as Asset Purchase Programme – APP), and – regarding the PSPP – Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10), as amended by Decision (EU) 2015/2101 of the European Central Bank of 5 November 2015 amending Decision (EU) 2015/774 (ECB/2015/33), Decision (EU) 2015/2464 of the European Central Bank of 16 December 2015 amending Decision (EU) 2015/774 (ECB/2015/48), Decision (EU) 2016/702 of the European Central Bank of 18 April 2016 amending Decision (EU) 2015/774 (ECB/2016/8), Decision (EU) 2016/1041 of the European Central Bank of 22 June 2016 on the eligibility of marketable debt instruments issued or fully guaranteed by the Hellenic Republic and repealing Decision (EU) 2015/300 (ECB/2016/18), and Decision (EU) 2017/100 of the European Central Bank of 11 January 2017 amending Decision (EU) 2015/774 (ECB/2017/1),

and in the form of purchases under the PSPP, by which the European Central Bank

a) exceeded its monetary policy mandate, encroaching upon the economic policy competences of the Member States,

b) violated the prohibition of monetary financing of Member State budgets by central banks,

c) violated the constitutional identity of the Federal Republic of Germany

- 2 BvR 2006/15 -,

IV. 1. Prof. Dr. S…,

2. Prof. Dr. H…,

3. Mr M…,

4. Mr E…,

5. Dr. G…,

6. Ms M…,

7. Dr H…,

8. Dr S…,

9. Prof. Dr. K…,

- authorised representative: –

for nos. 1 to 8

against 1. the Public Sector Purchase Programme (PSPP), as announced by the European Central Bank on 22 January 2015, approved by Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10) and effective 15 May 2015, in conjunction with the expansions decided on 3 December 2015 and 10 March 2016 and further specified on 21 April 2016, and currently the restarting of the programme decided on 12 September 2019 with net purchases in the amount of EUR 20 billion as of 1 November 2019 that are expected to run until the ECB starts to raise its key interest rates,

2. the participation of the *Bundesbank* in the implementation of the Public Sector Purchase Programme of the European Central Bank, especially the expansions set out in the European Central Bank's Decisions of 3 December 2015, 10 March 2016, 21 April 2016 and 11 January 2017, and in the form of the restarted net purchases at a monthly pace of EUR 20 billion as of 1 November 2019,

3. the inaction of the *Bundesbank*, the Federal Government and the *Bundestag* in relation to the Public Sector Purchase Programme (PSPP) of the European Central Bank, especially the expansions set out in the European Central Bank's Decisions of 3 December 2015, 10 March 2016 and 21 April 2016, and in relation to the restarting of the Public Sector Purchase Programme (PSPP) as of 1 November 2019 together with the other policy decisions on interest rates taken by the European Central Bank on 12 September 2019; this concerns, in particular, the omission on the part of the *Bundesbank* representative in the Governing Council of the European Central Bank to call for a vote on 12 September 2019 on the proposal in the Governing Council on 12 September 2019 and the apparent omission on the part of the *Bundesbank* to issue a declaration that it will not participate in the restarted asset purchase programme.

- 2 BvR 980/16 -

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Voßkuhle,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

König,

Maidowski,

Langenfeld

held on the basis of the oral hearing of 31 July 2019:

Judgment

1. **The proceedings 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15 and 2 BvR 980/16 are combined for joint decision.**
2. **The constitutional complaints of the complainants in proceedings I regarding challenges nos. 2 and 3, the constitutional complaints of the complainants in proceedings II regarding challenge no. 1 as well as the constitutional complaints of the complainants in proceedings IV are dismissed as inadmissible.**
3. **The Federal Government and – in relation to the complainants in proceedings I and II – the German *Bundestag* violated the rights under Article 38(1) first sentence in conjunction with Article 20(1) and (2) in conjunction with Article 79(3) of the Basic Law of the complainants in proceedings I, II and III by failing to take suitable steps challenging that**

a. **in Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (Public Sector Asset Purchase Programme, ECB/2015/10, OJ EU L 121 of 14 May 2015, p. 20),**

b. **amended by Decision (EU) 2015/2101 of the European Central Bank of 5 November 2015 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2015/33, OJ EU L 303 of 20 November 2015, p. 106), Decision (EU) 2015/2464 of the European Central Bank of 16 December 2015 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2015/48, OJ EU L 344 of 30 December 2015, p. 1), Decision (EU) 2016/702 of the European Central Bank of 18 April 2016 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2016/8, OJ EU L 121 of 11 May 2016, p. 24) and Decision (EU) 2017/100 of the European Central Bank of 11 January 2017 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2017/1, OJ EU L 16 of 20 January 2017, p. 51),**

the Governing Council of the European Central Bank neither assessed nor substantiated that the measures provided for in these decisions satisfy the principle of proportionality.

4. **For the rest, the constitutional complaints are rejected as unfounded.**

5. **[...]**

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R e a s o n s:

A.

With their constitutional complaints, the complainants essentially challenge the Public Sector Asset Purchase Programme (PSPP). The complainants in proceedings IV furthermore challenge the Corporate Sector Purchase Programme (CSPP). Both programmes are components of the Expanded Asset Purchase Programme (EAPP) of the European System of Central Banks (ESCB). The complainants contend that the 1

decisions of the European Central Bank (ECB) on which the programmes are based constitute *ultra vires* acts. They argue that the programmes violate the prohibition of monetary financing (Art. 123(1) TFEU) and the principle of conferral (Art. 5(1) TEU in conjunction with Art. 119, Art. 127 *et seq*. TFEU). They also assert a violation of the constitutional identity enshrined in the Basic Law to the extent that the programmes infringe the budgetary powers of the German *Bundestag*.

I.

2 The EAPP is a framework programme comprising four sub-programmes: the Third Covered Bond Purchase Programme (CBPP3), the Asset-Backed Securities Purchase Programme (ABSPP), the PSPP and the CSPP. In the – unpublished – decision of 22 January 2015, the ECB Governing Council consolidated the first two programmes, which had been launched in October and November 2014 respectively, under a common framework; moreover, it announced the PSPP and defined certain technical features of the programme design. In March 2016, the ECB Governing Council decided to launch the CSPP. As of 10 March 2016, the overall programme is referred to as EAPP. Since then, the EAPP has undergone various modifications.

3 1. As set out in the reasoning communicated by the ECB, the EAPP serves to increase money supply and thereby ease monetary conditions (cf. ECB, Press Release of 22 January 2015), seeking to increase inflation rates (cf. *Bundesbank*, Monthly Report June 2016, p. 30 *et seq*. [...]). It aims to ease borrowing conditions of households and firms. This is believed to support investment and consumption, and ultimately contribute to returning to inflation rates "to levels closer to 2%" (cf. Recital 2 of Decision <EU> 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme <ECB/2015/10>, OJ EU L 121 of 14 May 2015, p. 20; cf. also *Bundesbank*, Monthly Report June 2016, p. 39).

4 The volume of monthly asset purchases under the EAPP was initially limited to EUR 60 billion. It was announced that the purchases were intended to be carried out until the end of September 2016 and would, in any case, be conducted until the Governing Council sees a sustained adjustment in the path of inflation which is consistent with its aim of achieving inflation rates below, but close to, 2% over the medium term (cf. Recital 7 of Decision <EU> 2015/774). The ECB Governing Council reserved the right "to increase the programme in terms of size and/or duration" (cf. ECB, Press Release of 8 December 2016).

5 From March 2015 to March 2016, the monthly purchases of securities under the programme averaged EUR 60 billion. In April 2016, it was decided to increase the purchase volume to a monthly pace of EUR 80 billion on average and to continue the purchases, in any case until March 2017 (cf. Recital 3 of Decision <EU> 2016/702 amending Decision <EU> 2015/774 on a secondary markets public sector asset purchase programme <ECB/2016/8>, OJ EU L 121 of 11 May 2016, p. 24). On 8 December 2016, the ECB Governing Council decided to continue the EAPP, in any case until the end of 2017. The purchases continued at a monthly pace of EUR 60 billion

from April 2017 to December 2017 (cf. *Bundesbank*, Monthly Report August 2017, p. 23; *Bundesbank*, Monthly Report November 2017, p. 22), and at a monthly pace of EUR 30 billion on average from January 2018 to September 2018 (cf. *Bundesbank*, Monthly Report May 2018, p. 20). The ECB Governing Council justified its decision to reduce the purchase volume by stating that confidence in the gradual convergence of inflation rates towards its inflation aim of rates below, but close to, 2% has grown (cf. ECB, Press Release of 26 October 2017; *Bundesbank*, Monthly Report November 2017, p. 22). On 13 September 2018, the ECB Governing Council decided to again reduce the monthly purchase pace to now EUR 15 billion for the period from October 2018 to December 2018 (cf. ECB, Press Release of 13 September 2018; *Bundesbank*, Monthly Report November 2018, p. 23). On 13 December 2018, the ECB Governing Council decided to end the net purchases under the asset purchase programme by 31 December 2018 (cf. ECB, Press Release of 13 October 2018; *Bundesbank*, Monthly Report February 2019, pp. 22, 26).

6 At the same time, it decided to continue reinvesting, in full, the principal payments from maturing securities purchased under the asset purchase programme without a specified end date in order to maintain favourable liquidity conditions and an ample degree of monetary accommodation (cf. ECB, Press Release of 13 December 2018). This was reaffirmed in the meetings of the ECB Governing Council held on 24 January 2019, 7 March 2019, 10 April 2019, 6 June 2019 and 25 July 2019 (cf. ECB, Press Releases of 24 January 2019, 7 March 2019, 10 April 2019, 6 June 2019 and 25 July 2019).

7 On 12 September 2019, the ECB Governing Council decided to restart net purchases at a monthly pace of EUR 20 billion as from 1 November 2019 (cf. ECB, Press Release of 12 September 2019, p.1; introductory statement to the press conference held on 12 September 2019, p. 1).

8 2. The ECB launched the PSPP with Decision (EU) 2015/774 of 4 March 2015, which was subsequently amended by Decisions (EU) 2015/2101, 2015/2464, 2016/702, 2017/100 and Decision (EU) 2019/1558 of 12 September 2019. The PSPP is by far the biggest sub-programme of the EAPP. As of 8 November 2019, the total value of the securities purchased under the EAPP by the Eurosystem, i.e. the ECB and the national central banks of the euro area (Art. 282(1) second sentence TFEU), amounted to EUR 2,557,800 million, with purchases under the PSPP accounting for EUR 2,088,100 million (81.63%) (cf. *Bundesbank*, Monthly Report November 2019, p. 24).

9 The PSPP intends to further ease monetary and financial conditions – including those relevant to the borrowing conditions of businesses and households –, thereby supporting aggregate consumption and investment spending in the euro area and ultimately contributing to a return of inflation rates to levels below, but close to, 2% (cf. Recital 4 of Decision <EU> 2015/774).

10 Under the PSPP, the Eurosystem central banks purchase government bonds or other euro-denominated marketable debt securities issued by central governments of a

Member State whose currency is the euro, and by “recognised agencies”, international organisations or multilateral development banks located in the euro area (Art. 3(1) of Decision <EU> 2015/774). Under certain circumstances, Eurosystem central banks may propose public non-financial corporations as issuers of marketable debt instruments to be purchased (Art. 3(4) of Decision <EU> 2015/774); moreover, since April 2016, securities issued by regional or local governments may be purchased (Art. 1 no. 3 of Decision <EU> 2016/702).

11 In addition to the general eligibility criteria for monetary operations (Guideline ECB/2011/14), issuers must have a credit quality assessment of at least Credit Quality Step 3 (BBB- or Baa3) (Art. 3(2) of Decision <EU> 2015/774). Bonds issued by euro area Member States that are subject to a financial assistance programme may be eligible even if the credit assessment does not comply with at least Credit Quality Step 3 on condition that “the application of the Eurosystem’s credit quality threshold is suspended by the Governing Council pursuant to Article 8 of Guideline ECB/2014/31 [(2)]” (Art. 3(2) lit. c of Decision <EU> 2015/774). The ECB made use of this option in Art. 1(2) of its Decision of 22 June 2016 (cf. Decision <EU> 2016/1041 of the European Central Bank of 22 June 2016 on the eligibility of marketable debt instruments issued or fully guaranteed by the Hellenic Republic and repealing Decision <EU> 2015/300 <ECB/2016/18>, OJ EU L 169 of 28 June 2016, p. 14). The ECB Governing Council reserved decision on whether to purchase Greek debt securities under the PSPP (cf. Art. 3 of Decision <EU> 2016/1041).

12 Initially, the issue share limit per international securities identification number (ISIN) was set at 25% (Art. 5 of Decision <EU> 2015/774). As from 10 November 2015, the limit was raised to 33% subject to verification that this would not lead the Eurosystem central banks to reach blocking minority holdings in orderly debt restructurings (cf. Art. 1 of Decision <EU> 2015/2101 of the European Central Bank amending Decision <EU> 2015/774 on a secondary markets public sector asset purchase programme <ECB/2015/33>, OJ EU L 303 of 20 November 2015, p. 106). As from 19 April 2016, the limit was raised to 50% for securities issued by international organisations or multilateral development banks (cf. Art. 1 no. 2(1) lit. a of Decision <EU> 2016/702).

13 Eligible debt securities must have a remaining maturity of two to 30 years (Art. 3(3) of Decision <2015/774>). As from 13 January 2017, the minimum remaining maturity was decreased to one year in order to broaden the range of eligible securities (cf. Recital 6 of Decision <EU> 2017/100 of the European Central Bank of 11 January 2017 amending Decision <EU> 2015/774 on a secondary markets public sector asset purchase programme <ECB/2017/1>).

14 Initially, the minimum yield was set at -0.4% (cf. Art. 3(5) of Decision <EU> 2015/774). As from 13 January 2017, “purchases of securities under the [E]APP with a yield to maturity below the interest rate on the ECB's deposit facility should [also] be permitted to the extent necessary” (cf. Recital 6 and Art. 1(2) of Decision <EU> 2017/100).

No purchases are permitted in a newly issued or tapped security and the marketable debt instruments with a remaining maturity that are close in time, before and after, to the maturity of the marketable debt instruments to be issued, over a period to be determined by the Governing Council ('blackout period'); this serves to allow the formation of a market price for eligible securities (Art. 4(1) of Decision <EU> 2015/774). The blackout period is not disclosed so as to not jeopardise its purpose. 15

The Eurosystem accepts the same (*pari passu*) treatment as private investors as regards the eligible securities (cf. Recital 8 of Decision <EU> 2015/774). 16

[Of the total value of marketable debt instruments purchased] under the PSPP, 10% (before April 2016: 12%; cf. Art. 6(1) of Decision <EU> 2015/774) shall be purchased in securities issued by international organisations and multilateral development banks, and 90% (previously: 88%) shall be purchased in securities issued by central governments and "recognised agencies" (cf. Art. 1 no. 3 of Decision <EU> 2016/702). On this basis, the ECB and national central banks have purchased government bonds and other eligible debt securities on the secondary markets since 9 March 2015 (Art. 1 of Decision <EU> 2015/774). The ECB purchased 10% (before April 2016: 8%) and the national central banks 90% (previously: 92%) (Art. 6(2) first sentence of Decision <EU> 2015/774; amended by Art. 1 Decision <EU> 2015/2101). The national central banks' share is distributed according to the key for subscription of the ECB's capital as referred to in Art. 29 of the ESCB Statute (Art. 6(2) second sentence of Decision <EU> 2015/774). Under the current ECB capital key, which is adjusted periodically, with the most recent adjustment effected on 1 January 2019, the *Bundesbank*'s share is 26.4% (cf. *Bundesbank*, Annual Report 2018, p. 53). These purchases are subject to the following rules: each national central bank only purchases eligible securities of its own central governments or issuers of its own jurisdiction (cf. *Bundesbank*, Annual Report 2015, p. 84); exceptions are only recognised for international organisation and multilateral development banks as their securities may be purchased by all national central banks (Art. 6(2) and (3) of Decision <EU> 2015/774). 17

According to the ECB, the distribution of purchases under the PSPP between the ECB on the one hand and the national central banks on the other hand implies a risk-sharing regime (cf. ECB, Press Release of 10 March 2016) with regard to "hypothetical losses" resulting from certain securities (cf. ECB, Press Release of 22 January 2015). In unpublished ECB decisions, it is asserted that 20% of purchases are subject to such a risk-sharing regime, namely the 10% of securities purchased by the ECB itself and the 10% of securities issued by European institutions and purchased by the national central banks (cf. *Bundesbank*, Monthly Report June 2016, p. 32, fn. 4; *Bundesbank*, Monthly Report July 2018, p. 18). The remaining purchases by the national central banks are not subject to any loss sharing (cf. *Bundesbank*, Monthly Report June 2016, p. 32 fn. 4). However, none of the ECB decisions expressly address the question of liability for losses. 18

II.

1. The complainants in proceedings I challenge the omission on the part of the *Bundestag* and the Federal Government to take steps against the PSPP; they also challenge that the *Bundesbank* failed to bring an action before the Court of Justice to the European Union (CJEU) directed against its involvement in the PSPP. 19

a) [...] With regard to the Decision of the ECB Governing Council of 10 March 2016 on the CSPP (cf. ECB, Press Release of 10 March 2016) and the Decision of 1 June 2016 (Decision <EU> 2016/948 of the European Central Bank of 1 June 2016 on the implementation of the corporate sector purchase programme, OJ EU L 157 of 15 June 2016, p. 28), the Second Senate of the Federal Constitutional Court decided by Order of 14 January 2020 to sever the proceedings for a separate decision. 20

[...] 21

b) [...] 22-32

2. The complainants in proceedings II challenge the domestic applicability and implementation of the ECB Governing Council's Decisions of 22 January 2015 and 4 March 2015 together with the subsequent amending decisions. In addition, they challenge the omission on the part of the Federal Government and the *Bundestag* to take steps towards having these decisions rescinded and to take suitable measures limiting, to the greatest extent possible, the domestic impact arising from the continued implementation of these decisions. By way of subsidiary application, they seek a declaration that the Federal Government and the *Bundestag* violated their responsibility with regard to European integration (*Integrationsverantwortung*) by failing to actively address, and by failing to seek a positive determination as to the question how the order of competences in the European Union can be restored and Germany's constitutional identity can be protected. [...] 33

[...] 34-41

3. The complainant in proceedings III challenges the omission on the part of the Federal Government, with regard to the ECB decisions on the PSPP and the implementation of that programme, to take suitable steps against the ECB exceeding its monetary policy mandate and encroaching upon the Member State's economic policy competences, and against the ECB violating the prohibition on central banks providing monetary financing and infringing the constitutional identity of the Federal Republic of Germany. [...] Moreover, he challenges the participation of members of the ECB Governing Council in the adoption of the relevant decisions on grounds of bias. 42

[...] 43-52

4. The complainants in proceedings IV challenge the ECB Governing Council's decisions on the PSPP and the CSPP, the execution of these programmes by the ECB and the *Bundesbank* as well as the omission of the Federal Government and the *Bundestag* to take action in this regard. By Order of 14 January 2020, the Second 53

Senate severed the proceedings to the extent that the constitutional complaint is directed against the CSPP. For the rest, the complainants seek a declaration that the announcement on the PSPP issued by the ECB on 22 January 2015 and the corresponding Decision of 4 March 2015 together with the continuing monthly purchases of securities under the programme exceed the competences conferred upon the ECB under EU primary law in a sufficiently qualified manner, thereby violating both the European integration agenda (*Integrationsprogramm*) enshrined in the Act of Approval under Art. 23(1) second sentence of the Basic Law (*Grundgesetz* – GG) and the principle of the sovereignty of the people under Art. 20(2) first sentence GG as well as the rights of the complainants in proceedings IV under Art. 38(1) first sentence GG. They further seek an order enjoining the *Bundesbank* from participating in the adoption, implementation, execution and operationalisation of the PSPP. Lastly, they seek a declaration that the Federal Government violates their fundamental right deriving from Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) and Art. 79(3) GG by failing to take action against the relevant ECB decisions and – as long as the measures continue to have effect – to take suitable measures limiting the domestic impact to the greatest extent possible.

[...] 54-61

III.

62 1. The *Bundestag*, the *Bundesrat*, the Federal Chancellery, the Federal Ministry of the Interior, the Federal Ministry of Justice and Consumer Protection, the Federal Ministry of Finance as well as all *Land* governments were notified of the constitutional complaints and of the opportunity to submit statements in the proceedings. The Court only received a statement from the Federal Government (see 2 below). Both the President of the *Bundesbank* (see 3 below) and the President of the ECB (see 4 below) submitted a statement based on the list of questions provided by the Second Senate in preparation of the oral hearing.

63 2. The Federal Government contends that the constitutional complaints are in part inadmissible [...], and unfounded for the rest [...].

[...] 64-68

3. […] 69-74

4. […] 75-79

IV.

80 1. By Order of 18 July 2017, the Second Senate suspended the proceedings and referred the following question to the CJEU for a preliminary ruling pursuant to Art. 267(1) TFEU (Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 146, 216 <219 *et seq*.>):

1. Does Decision (EU) 2015/774 of the European Central Bank of

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

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

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

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

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

d) the Eurosystem purchases marketable debt instruments with a negative yield to maturity?

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

3. Does the current version of Decision (EU) 2015/774 of the European Central Bank of 4 March 2015, referred to in no. 1 above, violate Article 119 and Article 127(1) and (2) of the Treaty on the Functioning of the European Union as well as Articles 17 to 24 of the Protocol on the Statute of the European System of Central

Banks and of the European Central Bank, because it exceeds the European Central Bank's monetary policy mandate set out in these provisions and thus encroaches upon the competences of the Member States?

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

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

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

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

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

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

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

2. By Judgment of 11 December 2018 (*Weiss and Others*, C-493/17, EU:C:2018:1000), the CJEU decided on the request for a preliminary ruling. With regard to the first to fourth questions, it held that consideration of those questions had disclosed no factor of such a kind as to affect the validity of Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme, as amended by Decision (EU) 2017/100. The fifth question was found to be inadmissible. In particular, the CJEU held the following:

81

Compliance with the obligation to state reasons laid down in the second paragraph of Article 296 TFEU

> 30 In that regard, in so far as concerns the alleged absence of a specific statement of reasons for the ECB decisions relating to the PSPP, it should be recalled that, in situations such as that at issue in the present case, in which an EU institution enjoys broad discretion, a review of compliance with certain procedural safeguards — including the obligation for the ESCB to examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions — is of fundamental importance (...).
>
> 31 According to settled case-law of the Court, although the statement of reasons for an EU measure, which is required by the second paragraph of Article 296 TFEU, must show clearly and unequivocally the reasoning of the author of the measure in question, so as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review, it is not required to go into every relevant point of fact and law (...).
>
> 32 In particular, in the case of a measure intended to have general application, which makes clear the essential objective pursued by the institutions, a specific statement of reasons for each of the technical choices made by the institutions cannot be required (...).
>
> 33 The question whether the duty to state reasons has been satisfied must, moreover, be assessed by reference not only to the wording of the measure but also to its context and to the whole body of legal rules governing the matter in question (...).
>
> 34 In the present case, recitals 3 and 4 of Decision 2015/774 outline the objective of the PSPP, the economic context justifying the establishment of that programme as well as the mechanisms for bringing about the intended effects of the programme.
>
> 35 While the statements of reasons for Decisions 2015/2464, 2016/702 and 2017/100 do not reproduce those reasons relating to the PSPP, they do include explanations concerning the considera-

tions underpinning the amendments which those decisions made to the rules governing the PSPP.

36 Furthermore, various documents published by the ECB at the time when each of those decisions was adopted supplement the reasoning given in the decisions by setting out, in detail, the economic analyses underpinning the decisions, the various options considered by the Governing Council and the reasons justifying the choices made, in the light, in particular, of the observed and anticipated effects of the PSPP.

37 Thus, as the Advocate General has observed at points 133 to 138 and 144 to 148 of his Opinion, the successive decisions of the ECB relating to the PSPP have consistently been clarified by the publication of press releases, introductory statements of the President of the ECB at press conferences, accompanied by answers to the questions raised by the press, and by the accounts of the ECB Governing Council's monetary policy meetings, which outline the discussions within that body.

38 In that regard, attention should be drawn in particular to the fact that those accounts include, inter alia, explanations of the upward then downward trends in the monthly volume of purchases of bonds and of the reinvestment of the sums received on maturity of the bonds. They show, in that context, that the potential side effects of the PSPP, including its possible impact on the budgetary decisions of the Member States concerned, were taken into account.

39 The President of the ECB explained at successive press conferences that it was the exceptionally low level of inflation rates, by comparison with the objective of maintaining price stability by returning annual inflation rates to levels closer to 2%, that justified establishing the PSPP and making regular adjustments to that programme. Indeed, prior to the adoption of Decisions 2015/774, 2015/2464, 2016/702 and 2017/100, the annual rate of inflation was, respectively -0.2%, 0.1%, 0.3% and 0.6%. It was only at his press conference on 7 September 2017 that the President of the ECB announced that the annual rate of inflation had reached 1.5%, thus approaching the target.

40 In addition to the various documents mentioned in paragraph 37 of this judgment, which were made available both at the time when the PSPP was set up and whenever that programme was reviewed and amended, mention can also be made of the publication, in the ECB's *Economic Bulletin*, of general analyses of the monetary situation in the euro area and of a number of specific studies dealing

with the effects of the APP and the PSPP.

41 It follows from all those factors that the ESCB explained how persistently low levels of inflation and the exhaustion of the instruments normally used for the conduct of its monetary policy led it to consider that the adoption and implementation, with effect from 2015, of an asset purchase programme with the features of the PSPP was necessary, both in principle and in its various practical aspects.

42 Having regard to the principles referred to in paragraphs 31 to 33 of this judgment, those factors establish that the ECB duly stated the reasons for Decision 2015/774.

43 As regards the absence of any subsequent publication of details relating to the black-out period, the Court observes that, since the purpose of such publication would be to show the precise content of the measures adopted by the ESCB rather than the reasons justifying those measures, it cannot be required by virtue of the obligation to state reasons.

Article 119 and Article 127(1) and (2) TFEU and Articles 17 to 24 of the Protocol on the ESCB and the ECB

The powers of the ESCB

46 It should be noted that under Article 119(2) TFEU, the activities of the Member States and the Union are to include a single currency, the euro, as well as the definition and conduct of a single monetary policy and exchange-rate policy (...).

47 As regards more particularly monetary policy, Article 3(1)(c) TFEU states that the Union is to have exclusive competence in that area for the Member States whose currency is the euro (...).

48 Under Article 282(1) TFEU, the ECB and the central banks of the Member States whose currency is the euro, which constitute the Eurosystem, are to conduct the monetary policy of the Union. According to Article 282(4) TFEU, the ECB is to adopt such measures as are necessary to carry out its tasks in accordance with Articles 127 to 133 and Article 138 TFEU, as well as with the conditions laid down in the Statute of the ESCB and of the ECB (...).

49 Within that framework, it is for the ESCB, pursuant to Article 127(2), Article 130 and Article 282(3) TFEU, to define and implement that policy, acting independently and in compliance with the principle of conferral of powers, while it is for the Court, in the exercise of its power of review, to safeguard, under the conditions laid

down by the Treaties, the principle of conferral (...).

50 It must be pointed out in this regard that the FEU Treaty contains no precise definition of monetary policy but defines both the objectives of monetary policy and the instruments which are available to the ESCB for the purpose of implementing that policy (...).

51 Thus, under Articles 127(1) and 282(2) TFEU, the primary objective of the Union's monetary policy is to maintain price stability. The same provisions further stipulate that, without prejudice to that objective, the ESCB is to support the general economic policies in the Union, with a view to contributing to the achievement of its objectives, as laid down in Article 3 TEU (...).

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

Delimitation of the Union's monetary policy

53 The Court has held that in order to determine whether a measure falls within the area of monetary policy it is appropriate to refer principally to the objectives of that measure. The instruments which the measure employs in order to attain those objectives are also relevant (...).

54 In the first place, so far as the objectives of Decision 2015/774 are concerned, it is apparent from recital 4 of that decision that the purpose of the latter is to contribute to a return of inflation rates to levels below, but close to, 2% over the medium term.

55 In that regard, it is important to point out that the authors of the Treaties chose to define the primary objective of the Union's monetary policy — namely the maintenance of price stability — in a general and abstract manner, but did not spell out precisely how that objective was to be given concrete expression in quantitative terms.

56 It does not appear that the specification of the objective of maintaining price stability as the maintenance of inflation rates at levels below, but close to, 2% over the medium term, which the ESCB chose to adopt in 2003, is vitiated by a manifest error of assessment and goes beyond the framework established by the FEU Treaty. As the ECB has explained, such a choice can properly be based, inter alia, on the fact that instruments for measuring inflation are not pre-

cise, on the appreciable differences in inflation within the euro area and on the need to preserve a safety margin to guard against the possible emergence of a risk of deflation.

57 It follows that, as the ECB submits and as the referring court has indeed noted, the specific objective set out in recital 4 of Decision 2015/774 can be attached to the primary objective of the Union's monetary policy, as set out in Article 127(1) and Article 282(2) TFEU.

58 That conclusion is not called into question by the fact, to which the referring court draws attention, that the PSPP allegedly has considerable effects on the balance sheets of commercial banks as well as on the refinancing terms of the Member States of the euro area.

59 In the present case, it is undisputed that, by virtue of its underlying principle and its procedures, the PSPP is capable of having an impact both on the balance sheets of commercial banks and on the financing of the Member States covered by that programme and that such effects might possibly be sought through economic policy measures.

60 It must be emphasised in that regard that Article 127(1) TFEU provides, inter alia, that (i) without prejudice to its primary objective of maintaining price stability, the ESCB is to support the general economic policies in the Union and that (ii) the ESCB must act in accordance with the principles laid down in Article 119 TFEU. Accordingly, within the institutional balance established by the provisions of Title VIII of the FEU Treaty, which includes the independence of the ESCB guaranteed by Article 130 and Article 282(3) TFEU, the authors of the Treaties did not intend to make an absolute separation between economic and monetary policies.

61 In that connection, it should be recalled that a monetary policy measure cannot be treated as equivalent to an economic policy measure for the sole reason that it may have indirect effects that can also be sought in the context of economic policy (...).

62 The Court cannot concur with the referring court's view that any effects of an open market operations programme that were knowingly accepted and definitely foreseeable by the ESCB when the programme was set up should not be regarded as 'indirect effects' of the programme.

63 First, both in the judgment of 27 November 2012, *Pringle* (...) and in the judgment of 16 June 2015, *Gauweiler and Others* (...), the Court regarded as indirect effects, having no consequences for the

purposes of classification of the measures at issue in the cases that gave rise to those judgments, effects which, even at the time of adoption of the measures, were foreseeable consequences of those measures, which must therefore have been knowingly accepted at that time.

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

65 More specifically, as the ECB explained before the Court, the transmission of the ESCB's monetary policy measures to price trends takes place via, inter alia, facilitation of the supply of credit to the economy and modification of the behaviour of businesses and individuals with regard to investment, consumption and saving.

66 Consequently, in order to exert an influence on inflation rates, the ESCB necessarily has to adopt measures that have certain effects on the real economy, which might also be sought — to different ends — in the context of economic policy. In particular, when the maintenance of price stability requires the ESCB to seek to raise inflation, the measures that it must adopt to ease monetary and financial conditions in the euro area for that purpose may entail an impact on the interest rates of government bonds because, inter alia, those interest rates play a decisive role in the setting of the interest rates applicable to the various economic actors (...).

67 That being so, if the ESCB were precluded altogether from adopting such measures when their effects are foreseeable and knowingly accepted, that would, in practice, prevent it from using the means made available to it by the Treaties for the purpose of achieving monetary policy objectives and might — in particular in the context of an economic crisis entailing a risk of deflation — represent an insurmountable obstacle to its accomplishing the task assigned to it by primary law.

68 In the second place, as regards the means used in Decision 2015/774 to achieve the objective of maintaining price stability, it is common ground that the PSPP is based on the purchase of government bonds on secondary markets.

69 It is clear from Article 18.1 of the Protocol on the ESCB and the ECB, which forms part of Chapter IV of that protocol, that in order to achieve the objectives of the ESCB and to carry out its tasks, as provided for in primary law, the ECB and the central banks of the

Member States may, in principle, operate in the financial markets by buying and selling outright marketable instruments denominated in euros. It follows that the operations provided for by Decision 2015/774 use one of the monetary policy instruments for which primary law provides (...).

70 In view of the foregoing, it follows that, taking account of its objective and of the means provided for achieving that objective, a decision such as Decision 2015/774 falls within the sphere of monetary policy.

Proportionality in relation to the objectives of monetary policy

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

72 According to settled case-law of the Court, the principle of proportionality requires that acts of the EU institutions should be suitable for attaining the legitimate objectives pursued by the legislation at issue and should not go beyond what is necessary to achieve those objectives (...).

73 As regards judicial review of compliance with those conditions, since the ESCB is required, when it prepares and implements an open market operations programme of the kind provided for in Decision 2015/774, to make choices of a technical nature and to undertake complex forecasts and assessments, it must be allowed, in that context, a broad discretion (...).

74 As regards, first, the suitability of the PSPP for attaining the ESCB's objectives, it follows from recital 3 of Decision 2015/774, from the documents published by the ECB at the time of adoption of that decision and from the observations submitted to the Court that Decision 2015/774 was adopted in the light of a number of factors that materially increased the risk of a decline in prices over the medium term, in the context of an economic crisis entailing a risk of deflation.

75 It can be seen from the documents before the Court that, in spite of the monetary policy measures adopted, annual rates of inflation in the euro area were at that time far below the 2% target fixed by the ESCB, as they were no higher than -0.2% in December 2014, and that the forecasts available at that time as to how inflation rates would move anticipated that such rates would remain very low or negative over the following months. Although monetary and finan-

cial conditions in the euro area subsequently improved gradually, it is the case that, at the date of adoption of Decision 2015/774 [*in the German version and other language versions*: 2017/100], actual annual inflation rates continued to be appreciably below 2%, the rate being 0.6% in November 2016.

76 Against that background, recital 4 of Decision 2015/774 states that, for the purpose of achieving the objective of inflation rates at levels below, but close to, 2%, the PSPP is intended to ease monetary and financial conditions, including those of non-financial corporations and households, thereby supporting aggregate consumption and investment spending in the euro area and ultimately contributing to a return of inflation rates to the levels sought over the medium term.

77 The ECB has referred in this regard to the practices of other central banks and to various studies, which show that large-scale purchases of government bonds can contribute to achieving that objective by means of facilitating access to financing that is conducive to boosting economic activity by giving a clear signal of the ESCB's commitment to achieving the inflation target set, by promoting a reduction in real interest rates and, at the same time, by encouraging commercial banks to provide more credit in order to rebalance their portfolios.

78 Accordingly, in view of the information before the Court, it does not appear that the ESCB's economic analysis — according to which the PSPP was appropriate, in the monetary and financial conditions of the euro area, for contributing to achieving the objective of maintaining price stability — is vitiated by a manifest error of assessment.

79 It must therefore be determined, in the second place, whether the PSPP does not go manifestly beyond what is necessary to achieve that objective.

80 In that regard, the PSPP programme was adopted in a context which the ECB described as characterised, on the one hand, by persistently low inflation that risked triggering a cycle of deflation and, on the other, by an inability to counter that risk by means of the other instruments available to the ESCB for increasing inflation rates. Concerning the latter point, it is to be noted, inter alia, that key interest rates were at levels close to the bottom of their conceivable range and that the ESCB had, for several months, already been implementing a programme of large-scale purchases of private sector assets.

81 In those circumstances, in view of the foreseeable effects of the PSPP and given that it does not appear that the ESCB's objective could have been achieved by any other type of monetary policy measure entailing more limited action on the part of the ESCB, it must be held that, in its underlying principle, the PSPP does not manifestly go beyond what is necessary to achieve that objective.

82 As regards the procedures for implementing the PSPP, the way that programme is set up also helps to guarantee that its effects are limited to what is necessary to achieve the objective concerned, in particular because, since the PSPP is not selective, the ESCB's action will have an impact on financial conditions across the whole of the euro area and will not meet the specific financing needs of certain Member States of that area.

83 Likewise, the decision, reflected in Article 3 of Decision 2015/774, to make the purchase of bonds under the PSPP subject to stringent eligibility criteria has the effect of limiting that programme's impact on the balance sheets of commercial banks, by ensuring that the programme is not implemented in such a way as to allow those banks to resell securities with a high level of risk to the ESCB.

84 In addition, the PSPP has, from the start, been intended to apply only during the period necessary for attaining the objective sought and is therefore temporary in nature.

85 It thus follows from recital 7 of Decision 2015/774 that it was initially anticipated that the PSPP's period of application would run until the end of September 2016. That period was subsequently extended until the end of March 2017 and then until the end of December 2017, as is stated in recital 3 of Decision 2015/2464 and recital 4 of Decision 2017/100 respectively. To that end, the decisions taken in that regard were incorporated into Article 2(2) of the Guideline on a secondary markets public sector asset purchase programme (ECB/2015/NP3) ('the Guideline'), which is binding on the central banks of the Member States in accordance with Article 12(1) of the Protocol on the ESCB and the ECB.

86 It does not appear that that initial period or the successive extensions thereof manifestly go beyond what was necessary to achieve the objective sought, since they always covered relatively short periods and were decided upon in view of the fact that the observed changes in inflation rates were not sufficient to achieve the objective sought by Decision 2015/774.

87 As to the volume of bonds that can be purchased under the

PSPP, it must first be emphasised that a set of rules has been adopted to limit that volume in advance.

88 Thus, that volume was, from the outset, circumscribed by setting a monthly asset purchase amount under the APP. That amount, which was regularly revised in order to restrict it to what was necessary in order to achieve the stated objective, is found in recital 7 of Decision 2015/774, recital 3 of Decision 2016/702 and recital 5 of Decision 2017/100 and was incorporated in Article 2(2) of the Guideline. It also follows from the last-mentioned provision that priority is given to bonds issued by private operators for the purpose of reaching the monthly asset purchase volume under the APP as a whole.

89 In addition, the extent of the ESCB's possible intervention on secondary markets, within the framework of the PSPP, is also restricted by the rules in Article 5 of Decision 2015/774, which lay down strict purchase limits per issue and per issuer.

90 Next, although it is true that, despite those various limits, the total volume of securities that may be acquired under the PSPP remains substantial, the ECB has made the valid point that the efficacy of such a programme through the mechanisms described in paragraph 77 of this judgment depends on a large volume of government bonds being purchased and held. That means not only that the volume of purchases must be sufficient, but also that it may prove necessary — in order to achieve the objective pursued by Decision 2015/774 — to hold the bonds purchased on a lasting basis and to reinvest the sums realised when those bonds are repaid on maturity.

91 In that regard, the fact that that reasoned analysis is disputed does not, in itself, suffice to establish a manifest error of assessment on the part of the ESCB, since, given that questions of monetary policy are usually of a controversial nature and in view of the ESCB's broad discretion, nothing more can be required of the ESCB apart from that it use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy (...).

92 Finally, having regard to the information in the documents before the Court and to the broad discretion enjoyed by the ESCB, it is not apparent that a government-bonds purchase programme of either more limited volume or shorter duration would have been able to bring about — as effectively and rapidly as the PSPP — changes in inflation comparable to those sought by the ESCB, for the pur-

pose of achieving the primary objective of monetary policy laid down by the authors of the Treaties.

93 In the third place, as the Advocate General has stated in point 148 of his Opinion, the ESCB weighed up the various interests involved so as effectively to prevent disadvantages which are manifestly disproportionate to the PSPP's objective from arising on implementation of the programme.

94 In particular, as the Court has already had occasion to note, in paragraph 125 of the judgment of 16 June 2015, *Gauweiler and Others* (...), the open market operations authorised by the authors of the Treaties inevitably entail a risk of losses. However, the ESCB has adopted various measures designed to circumscribe that risk and to take it into account.

95 Thus, the rules mentioned in paragraphs 83 and 89 of this judgment also reduce that risk, by limiting the ESCB's exposure in the event of a default of the issuer of some of the bonds purchased and by ensuring that bonds with a significant default risk cannot be purchased under the PSPP. It follows, moreover, from Article 4(3) of the Guideline that the ECB monitors the central banks of the Member States on an ongoing basis to ensure that they are complying with those rules.

96 In addition, in order to prevent the position of a central bank of one Member State from being weakened in the event of an issuer in another Member State failing to make a repayment, Article 6(3) of Decision 2015/774 provides that each national central bank is to purchase eligible securities of issuers of its own jurisdiction.

97 If, despite those preventive measures, the purchase of securities under the PSPP were to result in, possibly significant, losses, the information provided to the Court indicates that the rules on loss allocation, which were established right at the start of the programme and have subsequently been maintained, provide that, in the case of any losses of a national central bank that are related to the programme, the only losses to be shared are those generated by securities issued by eligible international organisations; under Article 6(1) of Decision 2015/774, such securities represent 10% of the total value of the PSPP. By contrast, the ESCB has not adopted any rule allowing for the sharing of losses of a central bank of a Member State that derive from securities issued by issuers of that Member State. Nor has the adoption of such a rule been announced by the ESCB.

98 It follows from the foregoing that the ESCB duly took into consideration the risks to which the substantial volume of asset purchases under the PSPP might possibly expose the central banks of the Member States and that, having considered the interests involved, it took the view that it was not appropriate to establish a general rule on loss sharing.

99 As regards possible PSPP-related losses of the ECB, especially in the event of its purchasing, within the limit of the 10% share allocated to it by Article 6(2) of Decision 2015/774, exclusively or predominantly securities issued by national authorities, it must be observed that the ESCB has not adopted – beyond the safeguards against such a risk that are afforded both by the high eligibility criteria set out in Article 3 of that decision and by the purchase limits per issue and per issuer under Article 5 of the decision – any rule derogating from the general scheme for the allocation of losses of the ECB under Article 32(5) of the Protocol on the ESCB and the ECB in conjunction with Article 33 thereof. It follows, in essence, that such losses may be offset against the ECB’s general reserve fund and, if necessary, following a decision by the Governing Council, against the monetary income of the relevant financial year in proportion and up to the amounts allocated to the national central banks in accordance with the rule that allocation is in proportion to their respective paid-up shares in the capital of the ECB.

Article 123(1) TFEU

102 According to the wording of Article 123(1) TFEU, that provision prohibits the ECB and the central banks of the Member States from granting overdraft facilities or any other type of credit facility to public authorities and bodies of the Union and of Member States and from purchasing directly from them their debt instruments.

103 It follows that that provision prohibits all financial assistance from the ESCB to a Member State, but does not preclude, generally, the possibility of the ESCB purchasing from the creditors of such a State, bonds previously issued by that State (...).

104 As regards Decision 2015/774, it should be observed that under the PSPP the ESCB is not entitled to purchase bonds directly from public authorities and bodies of the Member States, but only to do so indirectly, on the secondary markets. The intervention by the ESCB provided for by that programme thus cannot be equated with a measure granting financial assistance to a Member State.

105 However, the Court has held that Article 123(1) TFEU impos-

es two further limits on the ESCB when it adopts a programme for purchasing bonds issued by the public authorities and bodies of the Union and the Member States.

106 First, the ESCB cannot validly purchase bonds on the secondary markets under conditions which would, in practice, mean that its intervention has an effect equivalent to that of a direct purchase of bonds from the public authorities and bodies of the Member States (...).

107 Secondly, the ESCB must build sufficient safeguards into its intervention to ensure that the latter does not fall foul of the prohibition of monetary financing in Article 123 TFEU, by satisfying itself that the programme is not such as to reduce the impetus which that provision is intended to give the Member States to follow a sound budgetary policy (...).

108 The safeguards which the ESCB must provide so that those two restrictions are observed will depend both on the particular features of the programme under consideration and on the economic context in which that programme is adopted and implemented. Whether those safeguards are sufficient must then be determined by the Court in the event of the programme being challenged.

The alleged equivalence of intervention under the PSPP and the purchase of bonds on the primary markets

109 The referring court considers that the PSPP procedures may create, for private operators, de facto certainty that the bonds that they may acquire from the Member States will subsequently be purchased by the ESCB on the secondary markets.

110 In that regard, it should be observed that the ESCB's intervention would be incompatible with Article 123(1) TFEU if the potential purchasers of government bonds on the primary markets knew for certain that the ESCB was going to purchase those bonds within a certain period and under conditions allowing those market operators to act, de facto, as intermediaries for the ESCB for the direct purchase of those bonds from public authorities and bodies of the Member State concerned (...).

111 In the present case, it is true that the foreseeability of the ESCB's intervention under the PSPP is — deliberately — increased by publishing in advance a set of features of that programme, which, as the Commission and the ECB have emphasised, is intended to contribute to the effectiveness and proportionality of the programme, by limiting the volume of bonds that actually have to be purchased

to achieve the objective sought.

112 In particular, the announcement, both in decisions of the ESCB and in communications intended for the public, of the monthly volume of asset purchases envisaged under the APP, the expected duration of that programme, the rules for allocating those volumes between the various central banks of the Member States, or the eligibility criteria governing the purchase of a security, is such as to enable private operators to foresee, to some extent, significant aspects of the ESCB's future actions on the secondary markets.

113 However, the ESCB has put in place various safeguards with a view to ensuring that a private operator is not able to act as if it were an intermediary of the ESCB.

114 Thus, observance of the blackout period provided for in Article 4(1) of Decision 2015/774, which is monitored by the ECB pursuant to Article 9 of the Guideline, ensures that bonds issued by a Member State cannot be purchased by the ESCB immediately after they are issued.

115 Although Article 4(1) of Decision 2015/774 does not specify the precise duration of the blackout period, which is fixed in Article 15 of the Guideline, the ECB has stated, in its written observations, that the length of the period is measured in days rather than weeks. Such a duration does not, however, give operators who are potential purchasers of government bonds on the primary markets the certainty that the ESCB is going to purchase those bonds very shortly thereafter.

116 Indeed, the absence of any publication, either in advance or after the event, of information concerning the duration of the blackout period, and the fact that the period in question is only a minimum period, on expiry of which the purchase of a security is permitted, avoid a situation in which a private operator is able to act, *de facto*, as an intermediary of the ESCB, since those factors limit the foreseeability, in terms of timing, of the ESCB's interventions on the secondary markets. The fact that a purchase may thus take place several months or several years after a bond has been issued increases the uncertainty of private operators all the more, given that the ESCB has the option of reducing the monthly volume of bond purchases under the APP and has, moreover, already made use of that option on a number of occasions.

117 In addition, the ESCB has introduced a number of safeguards specifically to prevent private operators from predicting with certain-

ty whether particular bonds will in fact be purchased on the secondary markets under the PSPP.

118 First, although the ESCB discloses the total volume of projected purchases under the APP, it does not disclose the volume of bonds issued by public authorities and bodies of a Member State which will in the normal course of events be purchased in a given month under the PSPP. In addition, the ESCB has laid down rules intended to ensure that that volume cannot be precisely determined in advance.

119 In that regard, first, the rules laid down in Article 2(2) of the Guideline provide that the volume set out therein applies for the whole of the APP and that PSPP purchases may be made only up to the residual amount. It follows that the volume of those purchases having to be made can vary from month to month depending on how many bonds issued by private operators are available on the secondary markets. That provision also enables the Governing Council to depart, by way of exception, from the monthly forecast volume, when specific market conditions so demand.

120 Secondly, although Article 6(2) of Decision 2015/774 provides that purchases are to be distributed among the central banks of the Member States in accordance with the key for subscription of the ECB's capital, it cannot be deduced with certainty therefrom that the amount thus allocated to a central bank of a Member State will be used, to the extent provided for in Article 6(1) of that decision, for the purchase of bonds originating from public authorities and bodies of that Member State. Indeed, the allocation of securities purchased under the PSPP, as provided for in Article 6(1) of Decision 2015/774, is, under the second sentence of that provision, to be subject to revision by the Governing Council. Decision 2015/774 also includes various mechanisms that inject a degree of flexibility into purchases under the PSPP, in particular by permitting, in Article 3(3) and(4), substitute purchases to be carried out and, in Article 6(3), the Governing Council to allow ad hoc deviations from the specialisation scheme for the allocation of securities purchased under the PSPP. Article 2(3) of the Guideline enables the Eurosystem central banks to depart from the monthly purchase guidance in order to react appropriately to market conditions.

121 Next, it is apparent from Article 3(1), (3) and (5) of Decision 2015/774 that the ESCB has authorised the purchase of diversified securities under the PSPP, thereby reducing the possibilities for determining in advance the nature of the purchases that will be made

for the purpose of achieving the programme's monthly purchase targets.

122 Thus, it is possible in that context for not only bonds issued by central governments but also those issued by regional or local governments to be purchased. Similarly, those bonds can have a maturity of between 1 year and 30 years and 364 days and their yield may, where necessary, be negative, or even below the deposit facility rate.

123 It must also be noted that Decisions 2015/2464 and 2017/100 rightly amended, on these points, the scheme initially set up in order to extend the scope of asset purchases. Those decisions thus further limited, in the light of the changes in market conditions, the foreseeability of the ESCB's purchases of Member State bonds.

124 Lastly, under Article 5(1) and(2) of Decision 2015/774, the Eurosystem central banks cannot purchase more than 33% of a particular issue of bonds of a central government of a Member State or more than 33% of the outstanding securities of one of those governments.

125 It follows from those purchase limits, compliance with which is monitored on a daily basis by the ECB in accordance with Article 4(3) of the Guideline, that the ESCB is not permitted to buy either all the bonds issued by such an issuer or the entirety of a given issue of those bonds. As has been pointed out by the governments that have taken part in the present proceedings and by the ECB, it follows that, when bonds are purchased from a central government of a Member State, a private operator necessarily runs the risk of not being able to resell them to the ESCB on the secondary markets, as a purchase of all the bonds issued is in all cases precluded.

126 The uncertainty that those purchase limits create in that regard is heightened by the restrictions which Article 8 of Decision 2015/774 places on the publication of information concerning the bonds held by the ESCB. As a result of those restrictions, only aggregate information is published, to the exclusion of any indication as to the proportion of bonds actually held by the ESCB following a given issue.

127 It follows from all the foregoing that, assuming that, as mentioned by the referring court, the ESCB is faced with a severe shortage of bonds issued by certain Member States — which has been strongly disputed by the ECB —, the safeguards built into the PSPP ensure that a private operator cannot be certain, when it purchases

bonds issued by a Member State, that those bonds will actually be bought by the ESCB in the foreseeable future.

128 Accordingly, it must be found, as the Advocate General has stated in point 79 of his Opinion, that the fact that the PSPP procedures make it possible to foresee, at the macroeconomic level, that there will be a purchase of a significant volume of bonds issued by public authorities and bodies of the Member States does not afford a given private operator such certainty that he can act, de facto, as an intermediary of the ESCB for the direct purchase of bonds from a Member State.

Allegedly reduced impetus to conduct a sound budgetary policy

129 The referring court asks whether Decision 2015/774 is compatible with Article 123(1) TFEU inasmuch as the certainty that that decision might create with regard to the ESCB's intervention may distort market conditions by reducing the impetus for Member States to pursue a sound budgetary policy.

130 It should be borne in mind that the fact that implementation of an open market operations programme to some extent facilitates financing for the Member States concerned is not decisive, since the conduct of monetary policy will always entail an impact on interest rates and bank refinancing conditions, which necessarily has consequences for the financing conditions of the public deficit of the Member States (...).

131 Accordingly, although such a programme may make it foreseeable that, in the months ahead, a not inconsiderable proportion of the bonds issued by a Member State is likely to be purchased by the ESCB, which can facilitate that Member State's financing, that does not in itself mean that the programme is incompatible with Article 123(1) TFEU.

132 However, in order to avoid a situation in which the Member States' impetus to pursue a sound budgetary policy is reduced, the adoption and implementation of such a programme may not create certainty regarding a future purchase of Member State bonds, in consequence of which Member States might adopt a budgetary policy that fails to take account of the fact that they will be compelled, in the event of a deficit, to seek financing on the markets, or in consequence of which they would be protected against the consequences which a change in their macroeconomic or budgetary situation may have in that regard (...).

133 In that context, it must be stated, in the first place, that, ac-

cording to recital 7 of Decision 2015/774, the PSPP is intended to be implemented only until the Governing Council sees a sustained adjustment in the path of inflation which is consistent with its aim of achieving inflation rates below, but close to, 2% over the medium term. Although the actual period of anticipated application of the PSPP has nonetheless been extended on a number of occasions, that principle has never been called into question when it was decided to adopt those extensions, as is confirmed by recital 3 of Decision 2015/2464 and recital 5 of Decision 2017/100.

134 It follows that the ESCB has, in its successive decisions, provided for the purchase of government bonds only in so far as necessary for the maintenance of price stability, that it has regularly revised the PSPP volume and that it has consistently preserved the temporary nature of that programme.

135 The programme's temporary nature is also reinforced by the fact that, under Article 12(2) of the Guideline, the ESCB has retained the option of selling purchased bonds at any time, which enables it to adapt its programme according to the attitudes of the Member States concerned and means that the operators involved cannot be certain that the ESCB will not make use of that option (...).

136 Accordingly, Decision 2015/774 does not enable the Member States to determine their budgetary policy without taking account of the fact that, in the medium term, continuity in the implementation of the PSPP is in no way guaranteed and that they will thus be compelled, in the event of a deficit, to seek financing on the markets without being able to take advantage of the easing of financing conditions that implementation of the PSPP may entail (...).

137 In the second place, it is important to note that Decision 2015/774 and the Guideline contain a series of safeguards designed to limit the effects of the PSPP on the impetus to pursue a sound budgetary policy.

138 First, the scale of the PSPP's impact on the financing conditions of the Member States of the euro area is limited by the measures restricting the volume of Member State bonds eligible to be purchased under the PSPP (...).

139 In that regard, it can be seen from the considerations in paragraph 88 of this judgment that the total volume of those bonds is limited, de jure, both by the setting of a monthly purchase amount under the APP and by the subsidiary nature of the PSPP within the APP, as described in Article 2(2) of the Guideline.

140 In addition, as the ECB has argued, the distribution, in accordance with Article 6(2) of Decision 2015/774, of those purchases between national central banks in accordance with the key for subscription of the ECB's capital, as referred to in Article 29 of the Protocol on the ESCB and the ECB, rather than in accordance with other criteria such as, for example, the level of the respective debts of each Member State, in conjunction with the rule set out in Article 6(3) of that decision that each national central bank is to purchase securities of public issuers of its own Member State, means that the considerable increase in a Member State's deficit resulting from the possible abandonment of a sound budgetary policy would reduce the proportion of that Member State's bonds purchased by the ESCB. Implementation of the PSPP does not therefore enable a Member State to avoid the consequences, so far as financing is concerned, of any deterioration in its budgetary position.

141 Moreover, as a result of the purchase limits per issue and per issuer set out in Article 5(1) and (2) of that decision, in every case only a minority of the bonds issued by a Member State can be purchased by the ESCB under the PSPP, which means that that Member State has to rely chiefly on the markets to finance its budget deficit.

142 Next, Article 3(2) of Decision 2015/774 lays down stringent eligibility criteria based on a credit quality assessment, from which it is possible to depart only if the Member State concerned is subject to a financial assistance programme. Article 13(1) of the Guideline provides in addition that, in the event of a downgrade of the rating of a Member State's bonds or of a negative review of a financial assistance programme, the Governing Council will have to decide whether to sell the bonds of the Member State concerned that have already been purchased.

143 It follows, as the Advocate General has stated in point 87 of his Opinion, that a Member State cannot rely on the financing possibilities to which the implementation of the PSPP may give rise in order to abandon a sound budgetary policy, without ultimately running the risk (i) of the bonds that it issues being excluded from the PSPP because they have been downgraded or (ii) of the ESCB selling the bonds of that Member State which it had previously purchased.

Holding bonds until maturity and purchasing bonds at a negative yield to maturity

146 As regards, in the first place, the possibility of the ESCB hold-

ing bonds purchased under the PSPP until maturity, it must be recalled that such a practice is in no way precluded by Article 18.1 of the Protocol on the ESCB and the ECB and that it does not imply that the ESCB waives its right to payment of the debt, by the issuing Member State, once the bond matures (...).

147 The ESCB is thus entitled to evaluate, on the basis of the objectives and characteristics of an open market operations programme, whether it is appropriate to envisage holding the bonds purchased under that programme; selling the bonds is not to be regarded as the rule and holding them as the exception to that rule.

148 In the present case, although Decision 2015/774 does not provide any further details concerning the possible sale of bonds purchased under the PSPP, it is clear from Article 12(2) of the Guideline that the ESCB retains the option of selling such bonds at any time and without any specific conditions.

149 Furthermore, the absence of any obligation to sell the bonds purchased is not sufficient to establish an infringement of Article 123(1) TFEU.

150 First, the mere fact that the ESCB has the option of selling, should it so wish, all or part of the purchased bonds helps to maintain the impetus to conduct a sound budgetary policy, since — as has been stated in paragraph 135 of this judgment — that option allows the ESCB to adapt its programme according to the attitudes of the Member States concerned.

151 Secondly, should the ESCB continue to hold those bonds, that does not, in itself, mean that that impetus of the Member States concerned is diminished, particularly because, as the ECB has pointed out, such retention of the bonds is not accompanied by any obligation for the ESCB to purchase the new bonds which a Member State that ceased to follow a sound budgetary policy would inevitably have to issue.

152 Although such holding of bonds is nonetheless liable to have some influence on the functioning of the primary and secondary sovereign debt markets, that effect is inherent in purchases on the secondary markets which are authorised by primary law. That effect is, moreover, essential if those purchases are to be used effectively in the framework of monetary policy (...) and are thereby to contribute to the objective of maintaining price stability, mentioned in paragraph 51 of this judgment.

153 As regards, in the second place, the purchase of government

bonds at a negative yield to maturity, the first point to make is that Article 18.1 of the Protocol on the ESCB and the ECB authorises open market operations and does not provide that such operations must concern bonds with a minimum yield.

154 Secondly, Article 123(1) TFEU is not to be interpreted as preventing the ESCB from purchasing such bonds within the framework of the PSPP.

155 Although the issue of bonds at a negative yield to maturity is advantageous in financial terms for the Member States concerned, those bonds can be purchased, under the PSPP, only on the secondary markets and they do not therefore give rise to the grant of overdraft facilities or any other type of credit facility in favour of public authorities and bodies of the Member States, or to the direct purchase from them of their debt instruments.

156 As to the question whether the purchase by the ESCB of government bonds at a negative yield to maturity has an effect equivalent to that of a direct purchase of bonds from the public authorities and bodies of the Member States, it should be pointed out that, in the economic context in which Decision 2015/774 was adopted, authorising the purchase of bonds at a negative yield to maturity does not make it easier for private operators to identify the bonds that the ESCB will buy. It is more likely to reduce the certainty of operators on that point by broadening the range of bonds eligible for purchase under the PSPP. The easing of the yield criteria which Decision 2017/100 effects is, moreover, likely further to reinforce the safeguards adopted by the ESCB in that regard.

157 In addition, as the ECB has stated, since bonds with a negative yield can be issued only by Member States whose financial situation is assessed positively by operators in the sovereign debt markets, the purchase of such bonds cannot be considered to reduce the impetus of the Member States to follow a sound budgetary policy.

The fifth question

162 In that regard, it should be noted that primary law includes no rules providing for the losses sustained by one of the central banks of the Member States in the course of open market operations to be shared between those central banks.

163 Moreover, it is undisputed that the ECB decided not to adopt a decision entailing sharing of the entirety of losses made by the central banks of the Member States during implementation of the

PSPP. As the referring court points out, the ECB has, up until now, provided, so far as such losses are concerned, only for the sharing of losses generated by securities issued by international issuers.

164 It follows, first, that the potential volume of those losses is circumscribed by the rule, set out in Article 6(1) of Decision 2015/774, limiting the proportion of those securities to 10% of the book value of purchases under the PSPP and, secondly, that the losses that may be shared, should the case arise, between the central banks of the Member States cannot be the direct consequence of the default of a Member State, to which the referring court alludes.

165 In that regard, the Court has consistently held that, although questions concerning EU law enjoy a presumption of relevance, it must refuse to give a ruling on a question referred by a national court where it is quite obvious that the interpretation, or the determination of validity, of a rule of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (...).

166 Accordingly, the Court cannot, if it is not to exceed its powers, reply to the fifth question by delivering an advisory opinion on a problem which is, at this stage, hypothetical (...).

3. On 30 and 31 July 2019, the Second Senate of the Federal Constitutional Court conducted an oral hearing, in which the parties amended and further specified their submissions. Pursuant to § 27a of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), the following expert third parties were heard: Jens Ulbrich, Director General Economics of the *Bundesbank*; and Dr. Andreas Guericke, Director General Legal Services of the *Bundesbank;* furthermore Prof. Dr. Volker Wieland, Johann Wolfgang Goethe University (Frankfurt am Main); Prof. Dr. Dr. h. c. Lars Feld, Director of the Walter Eucken Institute (Freiburg); Dr. Klaus Wiener, Executive Board Member of the German Insurance Association (*Gesamtverband der Deutschen Versicherungswirtschaft e.V.*); Volker Hofmann, Director of Economics of the Association of German Banks (*Bundesverband Deutscher Banken*); Dr. Tammo Diemer, CEO of the German Finance Agency GmbH (*Bundesrepublik Deutschland – Finanzagentur GmbH*); Dr. Ulrich Kater, Chief Economist at *Deka-Bank – Deutsche Girozentrale;* Dr. Johannes Mayr, Head of Investment Research at *Bayerische Landesbank;* and Bernd Volk, Head of Covered Bond Research at *Deutsche Bank* – Zurich Branch. 82

The ECB chose not to participate in the oral hearing. 83

4. The Second Senate rejected the applications for a preliminary injunction filed on 84

27 September 2017 (by the complainants in proceedings I), on 6 October 2017 (by the complainants in proceedings II), on 26 September 2017 (by the complainant in proceedings III), as well as the application for a preliminary injunction filed on 24 May 2017 together with the application filed on 22 October 2019 against the decision of the ECB Governing Council of 12 September 2019 to restart the PSPP as from 1 November 2019 (both by the complainants in proceedings IV). In its reasoning, the Senate referred to the prohibition to prejudice the decision in the principal proceedings, and further held that following the order of referral requesting a preliminary ruling, the complainants no longer had a recognised legal interest in seeking an injunction obliging the Federal Government to bring an action before the CJEU (cf. BVerfGE 147, 39 <46 *et seq.*>; Federal Constitutional Court <BVerfG>, Order of 30 October 2019 - 2 BvR 980/16 -, para. 8 *et seq.*).

B.

85 The constitutional complaints of the complainants in proceedings I to III are admissible to the extent that they challenge – with different nuances – that the Federal Government and the *Bundestag* failed to take action against the PSPP (see I below). For the rest, the constitutional complaints are inadmissible (see II below).

I.

86 It has no bearing on the admissibility of the constitutional complaints that the complainants in proceedings I to III have only raised the challenge directed against the omission on the part of the Federal Government and the *Bundestag* to take action against the PSPP later in the proceedings, after partly modifying and withdrawing the original applications set out in their constitutional complaints (see 1 below). The challenge directed against the omission on the part of the Federal Government and the *Bundestag* is admissible in constitutional complain proceedings (see 2 below). The complainants in proceedings I to III have standing to the extent that they assert, in a sufficiently substantiated manner, that with the PSPP the Eurosystem manifestly exceeded its competences in a structurally significant manner and violated Art. 123(1) TFEU; they also have standing as regards the assertion that possible changes to the risk-sharing regime could infringe the overall budgetary responsibility (*haushaltspolitische Gesamtverantwortung*) of the German *Bundestag* (see 3 below). Moreover, the complainants in proceedings I and III continue to have a recognised legal interests in bringing proceedings (*Rechtsschutzinteresse*) (see 4 below).

87 1. The modifications made by the complainants in proceedings I to III in respect of their original applications, in the course of the constitutional complaint proceedings, were permissible. [...]

88 The motion to modify the applications was based on the Judgment of the Second Senate of 21 June 2016, which was rendered only after the original applications had been lodged; in this Judgment, the Second Senate clarified that acts of institutions, bodies, offices and agencies of the European Union cannot be directly challenged

before it (cf. BVerfGE 142, 123 <180 para. 98 *et seq.*>). By limiting their applications to measures under the PSPP, the complainants in proceedings I to III responded to the order of referral of the Second Senate of 18 July 2017 pursuant to Art. 267 TFEU (cf. BVerfGE 146, 216), which solely concerned that specific sub-programme.

89

2. By directing their constitutional complainants against the omission on the part of the Federal Government and the *Bundestag* in relation to the PSPP, the complainants in proceedings I to III bring admissible challenges with their complaints. In its review, the Federal Constitutional Court may consider – as a preliminary question – acts of institutions, bodies, offices and agencies of the European Union where these affect fundamental rights holders in Germany (cf. BVerfGE 142, 123 <180 para. 98>). This is the case if these acts either provide the basis for measures taken by German state organs (cf. BVerfGE 126, 286 <301 *et seq.*>; 134, 366 <382 para. 23>; 142, 123 <180 para. 99>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 101) or trigger obligations, deriving from the responsibility with regard to European integration (*Integrationsverantwortung*) and incumbent upon German constitutional organs, to take or refrain from certain actions (cf. BVerfGE 134, 366 <394 *et seq*. para. 44 *et seq.*>; 135, 317 <393 and 394 para. 146>; 142, 123 <180 para. 99>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 101). Thus, it is only admissible to challenge acts of secondary or tertiary EU law by means of a constitutional complaint for the purposes of asserting that German constitutional organs violated their responsibility with regard to European integration (*Integrationsverantwortung*) either by implementing such acts or, subsequently, by failing to actively take steps to ensure that conformity with the European integration agenda (*Integrationsprogramm*) is (re-)established (BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, paras. 102 and 103). In relation to such acts, the Federal Constitutional Court reviews whether they remain within the ambit of the European integration agenda (*Integrationsprogramm*) and observe the limits otherwise imposed by the Basic Law in respect of Germany's membership in the European Union (cf. BVerfGE 123, 267 <354>; 126, 286 <298 *et seq.*>; 134, 366 <394 para. 44 *et seq.*>; 140, 317 <334 *et seq*. para. 36 *et seq.*>; 142, 123 <180 paras. 99 and 100>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 101).

90

3. The complainants in proceedings I to III have standing. [...]

91

4. The complainants in proceedings I to III continue to have a recognised legal interest in bringing proceedings, even though the challenged omission on the part of the Federal Government and the *Bundestag* concerns ECB decisions that have in part already been implemented. Firstly, the execution of the programme until the end of 2018 continues to have noticeable consequences given that the ECB decided to continue reinvesting the principal payments from maturing securities for an unspecified period of time. Secondly, the ECB restarted the asset purchase programme in November 2019.

II.

The constitutional complaints are inadmissible for the rest. The complaints are partly inadmissible as regards the challenged acts (see 1 below), and partly not sufficiently substantiated (see 2 below). 92

1. The constitutional complaints of the complainants in proceedings I are inadmissible to the extent that the complainants seek a declaration that the Judgment of the CJEU of 11 December 2018 is not applicable within the ambit of the Basic Law. In this respect, they directly challenge a legal act of an EU institution, which is not an admissible challenge in constitutional complaint proceedings. In its case-law, the Second Senate has clarified that acts of institutions, bodies, offices and agencies of the European Union do not constitute 'acts of public authority' within the meaning of Art. 93(1) no. 4a GG and § 90(1) BVerfGG and thus cannot be directly challenged by means of a constitutional complaint (cf. BVerfGE 142, 123 <179 and 180 para. 97>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 112). 93

This also applies with regard to the constitutional complaints of the complainants in proceedings II and IV to the extent that they directly challenge the ECB Governing Council's decisions on the PSPP and the domestic applicability and implementation of these decisions. 94

The constitutional complaints of the complainants in proceedings II and IV are also inadmissible to the extent that they challenge an omission on the part of the *Bundesbank*. It is true that the *Bundesbank* may not participate in acts of institutions, bodies, offices and agencies of the European Union that amount to *ultra vires* acts or violate the constitutional identity guaranteed in Art. 79(3) GG and that the *Bundesbank* – like any other German state body – must independently assess whether this is the case if there are indications to this effect. However, as an institution established under public law (*bundesunmittelbare Anstalt des öffentlichen Rechts*) pursuant to § 2 of the Bundesbank Act (*Bundesbankgesetz* – BBankG), the *Bundesbank* constitutes an administrative body that forms part of indirect state administration; according to established case-law of the Second Senate, the sole addressees of the specific responsibility with regard to European integration *(Integrationsverantwortung)* are constitutional organs – and the *Bundesbank* is no such organ (cf. BVerfGE 123, 267 <352 *et seq*., 389 *et seq*., 413 *et seq.*>; 126, 286 <306 and 307>; 129, 124 <181>; 132, 195 <238 and 239 para. 105; 241 para. 110; 270 para. 178>; 134, 366 <394 and 395 para. 47>; 135, 317 <392 and 393 para. 141; 399 para. 160; 402 para. 165; 424 and 425 para. 224>; 142, 123 <174 and 175 para. 83; 184 paras. 111, 191 and 192 para. 130; 207 *et seq*. para. 163 *et seq.*>; 146, 216 <250 para. 47>). 95

2. Lastly, the constitutional complaints of the complainants in proceedings IV do not satisfy the substantiation requirements under § 23(1) second sentence, § 92 BVerfGG insofar as they are directed against an omission on the part of the Federal Government and the *Bundestag* and thus indirectly challenge the PSPP. […] 96

C.

97 The constitutional complaints of the complainants in proceedings I to III are well-founded to the extent that they challenge the omission on the part of the Federal Government and the *Bundestag* to take suitable steps to ensure that the ECB, by means of purchasing securities under the PSPP, does not exceed its monetary policy competence and encroach upon the economic policy competence of the Member States. For the rest, the constitutional complaints are – to the extent that they are not already inadmissible – unfounded.

I.

98 Art. 38(1) first sentence GG guarantees the individual the right to vote in elections to the German *Bundestag.* This right is not limited to the formal legitimation of (federal) state power (see 1 below). The citizens' right to democratic self-determination also applies with regard to European integration *(Integrationsverantwortung)* (see 2 below). Within the scope of application of Art. 23(1) GG, it protects against a manifest and structurally significant exceeding of competences by institutions, bodies, offices and agencies of the European Union (see 3 below). It furthermore affords protection where acts of institutions, bodies, offices and agencies of the European Union exceed the limits set by the principles enshrined in Art. 1 and Art. 20 GG, which Art. 79(3) GG declares inviolable (see 4 below).

99 1. The right to vote in elections to the German *Bundestag*, guaranteed as an individual right in Art. 38(1) GG, is not limited to the formal legitimation of (federal) state power but also protects the basic democratic contents of the right to vote (cf. BVerfGE 89, 155 <171>; 97, 350 <368>; 123, 267 <330>; 129, 124 <168>; 134, 366 <396 para. 51>; 142, 123 <189 para. 123>; 146, 216 <249 para. 45>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 115; cf. also BVerfGE 135, 317 <386 para. 125>). These contents include the principle of the sovereignty of the people enshrined in Art. 20(2) first sentence GG as well as the corresponding right of citizens to be subjected only to such public authority as they can legitimate and influence (cf. BVerfGE 142, 123 <189 para. 123>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 115). It requires that any act of public authority exercised in Germany can be traced back to its citizens (cf. BVerfGE 83, 37 <50 and 51>; 93, 37 <66>; 130, 76 <123>; 137, 185 <232 para. 131>; 139, 194 <224 para. 106>; 142, 123 <191 para. 128>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 117). This prohibits subjecting citizens to a political authority they cannot escape and in regard of which they cannot in principle influence, on free and equal terms, decisions on the persons in power and on substantive issues (cf. BVerfGE 123, 267 <341>; 142, 123 <191 para. 128>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 117).

100 Art. 38(1) first sentence GG does not, however, confer a right upon citizens to subject democratic majority decisions to a review of lawfulness that goes beyond what is

necessary to safeguard the right to democratic self-determination enshrined in Art. 20(1) and (2) in conjunction with Art. 79(3) in conjunction with Art. 1(1) GG. The purpose of this fundamental right is not to subject the contents of democratic decision-making to substantive review but to facilitate democratic decision-making processes as such (cf. BVerfGE 129, 124 <168>; 134, 366 <396 and 397 para. 52>; 142, 123 <190 para. 126>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 118).

2. Art. 23(1) first and third sentence GG affirms that the right to democratic self-determination enshrined in Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) and Art. 79(3) GG applies, in principle, also with regard to European integration (*Integrationsverantwortung*). The democratic legitimation by the people of public authority exercised in Germany belongs to the essential contents of the principle of the sovereignty of the people and thus forms part of the Basic Law's constitutional identity protected in Art. 79(3) GG; it is therefore beyond the reach of European integration in accordance with Art. 23(1) third sentence in conjunction with Art. 79(3) GG (cf. BVerfGE 89, 155 <182>; 123, 267 <330>; 129, 124 <169>; 142, 123 <191 para. 127>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 119). It follows that the Basic Law does not authorise German state organs to transfer sovereign powers to the European Union in such a way that the European Union were authorised, in the independent exercise of its powers, to create new competences for itself (see a below). The manner and scope of the transfer of sovereign powers must satisfy democratic principles. The substantive leeway to design afforded the *Bundestag* – especially in the form of its budgetary powers – must be preserved (see b below). 101

a) The Basic Law does not authorise German state organs to transfer sovereign powers to the European Union in such a way that the European Union were authorised, in the independent exercise of its powers, to create new competences for itself. It prohibits conferring upon the European Union the competence to decide on its own competences (*Kompetenz-Kompetenz*) (cf. BVerfGE 89, 155 <187 and 188, 192, 199>; 123, 267 <349>; cf. also BVerfGE 58, 1 <37>; 104, 151 <210>; 132, 195 <238 para. 105>; 142, 123 <191 and 192 para. 130>; 146, 216 <250 para. 48>). In any case, dynamic treaty provisions must be subject to suitable safeguards that enable the German constitutional organs to effectively exercise their responsibility with regard to European integration (*Integrationsverantwortung*) (cf. BVerfG, Judgment of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 121). 102

b)The manner and scope of the transfer of sovereign powers must satisfy democratic principles. Art. 38(1) first sentence GG protects the holders of the right to vote from a loss in substance of their sovereign power – a power that is crucial for the constitutional order – resulting from the rights of the *Bundestag* being considerably curtailed, as such a loss would diminish the leeway to design vested in the one constitutional organ that is established based on the principles of free and equal elections (cf. BVerfGE 123, 267 <341>; 142, 123 <190 para. 125>). When sovereign powers are trans- 103

ferred to the European Union in accordance with Art. 23(1) GG, it must be ensured that the German *Bundestag* retain for itself functions and powers of substantial political significance (cf. BVerfGE 89, 155 <182>; 123, 267 <330, 356>; 142, 123 <195 para. 138>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 122).

104

Art. 38(1) first sentence, Art. 20(1) and (2) and Art. 79(3) GG protect, in particular, the budgetary powers of the German *Bundestag* (cf. BVerfGE 123, 267 <359>; 129, 124 <177, 181>) and its overall budgetary responsibility as indispensable elements of the constitutional principle of democracy (cf. BVerfGE 123, 267 <359>; 129, 124 <177>; 132, 195 <239 para. 106>; 135, 317 <399 and 400 para. 161>; 142, 123 <195 para. 138>; 146, 216 <253 and 254 para. 54>). It is for the German *Bundestag*, as the organ directly accountable to the people, to take all essential decisions on revenue and expenditure; this prerogative forms part of the core of Art. 20(1) and (2) GG, which is beyond the reach of constitutional amendment (cf. BVerfGE 70, 324 <355 and 356>; 79, 311 <329>; 129, 124 <177>; 142, 123 <195 para. 138>). It falls to the *Bundestag* to determine the overall financial burden imposed on citizens and to decide on essential expenditure of the state (cf. BVerfGE 123, 267 <361>). Thus, a transfer of sovereign powers violates the principle of democracy at least in cases where the type and level of public spending are, to a significant extent, determined at the supranational level, depriving the *Bundestag* of its decision-making prerogative (cf. BVerfGE 129, 124 <179>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 123).

105

3. Against this backdrop, Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) first sentence GG affords voters a right vis-à-vis the Federal Government, the *Bundestag* and, as the case may be, the *Bundesrat*, compelling these constitutional organs to monitor whether institutions, bodies, offices and agencies of the European Union adhere to the European integration agenda (*Integrationsprogramm*), to refrain from participating in the adoption and implementation of measures that exceed the limits of the integration agenda (*Integrationsprogramm*), and, where such measures constitute a manifest and structurally significant exceeding of EU competences, to actively take steps to ensure conformity with the integration agenda (*Integrationsprogramm*) and respect for its limits (see a below). The Federal Constitutional Court conducts an *ultra vires* review to assess whether these standards are met (see b below).

106

a)The supremacy of the Constitution (Art. 20(3) GG) obliges constitutional organs participating in the execution and in the further shaping and development of the integration agenda (*Integrationsprogramm*) to ensure that its limits are respected (cf. BVerfGE 123, 267 <351 *et seq.*, 435>; 129, 124 <180 and 181>; 135, 317 <399 *et seq.* para. 159 *et seq.*>; 142, 123 <208 para. 164>). In this regard, constitutional organs have a lasting responsibility for ensuring that institutions, bodies, offices, and agencies of the European Union adhere to the European integration agenda (*Integrationsprogramm*) (cf. BVerfGE 123, 267 <352 *et seq.*, 389 *et seq.*, 413 *et seq.*>; 126, 286 <307>; 129, 124 <181>; 132, 195 <238 and 239 para. 105>; 134, 366 <394 and

395 para. 47>; 142, 123 <208 para. 165>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 141). This responsibility corresponds to a right afforded citizens as the electorate vis-à-vis the constitutional organs, enshrined in Art. 38(1) first sentence GG, which compels the constitutional organs to ensure that the restriction of their right to democratic self-determination resulting from the execution of the European integration agenda (*Integrationsprogramm*) does not go beyond what is justified by the permissible transfer of sovereign powers to the European Union (cf. BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 142).

107 This right is primarily directed against the Federal Government and the *Bundestag* as the two constitutional organs vested with special competences in the area of foreign affairs (cf. BVerfGE 90, 286 <381 *et seq*.>; 121, 135 <156 *et seq*.>; 131, 152 <195 *et seq*.>; 140, 160 <187 *et seq*. para. 67 *et seq*.>; 142, 123 <209 para. 167>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 143). In the event of a manifest and structurally significant exceeding of competences by institutions, bodies, offices and agencies of the European Union, these constitutional organs must, in the exercise of their powers, actively take steps to ensure conformity with the integration agenda (*Integrationsprogramm*) and respect for its limits (cf. BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 142). This duty may also extend to the *Bundesrat* (cf. Art. 23(4) to (6) as well as the Act on the Cooperation of the Federation and the *Länder* in European Union Matters) or the Federal President.

108 In the exercise of their powers, the constitutional organs can only discharge their lasting responsibility with regard to European integration (*Integrationsverantwortung*) if they continuously monitor the execution of the European integration agenda (*Integrationsprogramm*). This applies all the more where public authority is exercised by bodies that have only weak links to democratic legitimation (cf. BVerfGE 130, 76 <123 and 124>; 136, 194 <266 and 267 paras. 176 and 177>; 142, 123 <208 and 209 para. 165>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 146).

109 Where measures taken by institutions, bodies, offices and agencies of the European Union exceed the limits of the European integration agenda (*Integrationsprogramm*) in a manifest and structurally significant manner, it is incumbent upon the Federal Government and the *Bundestag* to actively address the question how the order of competences can be restored and to make a positive determination as to which course of action to pursue (cf. BVerfGE 134, 366 <397 para. 53>; 142, 123 <209 and 210 para. 167>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 147). Constitutional organs are afforded wide political latitude in this context. They may retroactively legitimate an exceeding of competences by initiating – within the limits set by Art. 79(3) GG – an amendment of EU primary law (cf. BVerfGE 123, 267 <365>; 134, 366 <395 para. 49>; 142, 123 <211 para. 170>) and, by way of the procedure set out in Art. 23(1) second and third sen-

tence GG, formally transfer the sovereign powers that were exercised *ultra vires*. However, where this is either not possible or not wanted, the constitutional organs are required to use legal or political means to work towards the rescission of acts not covered by the European integration agenda (*Integrationsprogramm*), and – as long as such acts continue to have effect – to take suitable action seeking to limit the domestic impact of such acts to the greatest extent possible (cf. BVerfGE 134, 366 <395 and 396 para. 49>; 142, 123 <211 *et seq*. para. 170 *et seq*.>; BVerfG, Judgment of the 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 149).

b) The conditions under which the Federal Constitutional Court conducts an *ultra vires* review are well-established (BVerfGE 126, 286 <302 *et seq*.>; 134, 366 <382 *et seq*. para. 22 *et seq*.>; 142, 123 <198 *et seq*. para. 143 *et seq*.>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 140 *et seq*.). The Court may only hold that an act violates the principle of conferral where institutions, bodies, offices and agencies of the European Union have exceeded the limits of their competences in a manner that specifically runs counter to the principle of conferral (Art. 23(1) GG); in other words, it must be established that the violation of competences is sufficiently qualified. This requires that the act manifestly exceeds EU competences, resulting in a structurally significant shift in the division of competences to the detriment of the Member States. 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 (cf. BVerfGE 126, 286 <304>). This is generally the case if the exercise of the competence in question by an institution, body, office, or agency of the European Union were to require a treaty amendment in accordance with Art. 48 TEU or an evolutionary clause (*Evolutivklausel*) (cf. CJEU, Opinion 2/94 of 28 March 1996, *ECHR Accession*, ECR 1996, I-1783 <1788 para. 30>), requiring action on the part of the German legislature 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 (*Integrationsverantwortungsgesetz*) (cf. BVerfGE 89, 155 <210>; 142, 123 <201 and 202 para. 151>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 153).

111 While the Federal Constitutional Court must review substantiated *ultra vires* challenges regarding acts of institutions, bodies, offices and agencies of the European Union, the Treaties confer upon the CJEU the mandate to interpret and apply the Treaties and to ensure uniformity and coherence of EU law (cf. Art. 19(1) subpara. 2 TEU, Art. 267 TFEU); it is imperative that the respective judicial mandates be exercised in a coordinated manner. If any Member State could readily invoke the authority to decide, through its own courts, on the validity of EU acts, this could undermine the precedence of application accorded to EU law and jeopardise its uniform application. Yet if the Member States were to completely refrain from conducting any kind of *ultra vires* review, they would grant EU organs exclusive authority over the Treaties even

in cases where the EU adopts a legal interpretation that would essentially amount to a treaty amendment or an expansion of its competences. Though cases in which institutions, bodies, offices and agencies of the European Union exceed their competences are exceptionally possible, it is to be expected that these instances remain rare due to the institutional and procedural safeguards enshrined in EU law. Nevertheless, where they do occur, the constitutional perspective might not perfectly match the perspective of EU law given that, even under the Lisbon Treaty, the Member States remain the 'Masters of the Treaties' and the EU has not evolved into a federal state (cf. BVerfGE 123, 267 <370 and 371>). In principle, certain tensions are thus inherent in the design of the European Union; they must be resolved in a cooperative manner, in keeping with the spirit of European integration, and mitigated through mutual respect and understanding. This reflects the nature of the European Union as a union based on the multi-level cooperation of sovereign states, constitutions, administrations and courts (*Staaten-, Verfassungs-, Verwaltungs- und Rechtsprechungsverbund*) (BVerfGE 140, 317 <338 para. 44).

112

The *ultra vires* review must be exercised with restraint, giving effect to the Constitution's openness to European integration. The interpretation and application of EU law, including the determination of the applicable methodological standards, primarily falls to the CJEU, which in Art. 19(1) second sentence TEU is called upon to ensure that the law is observed when interpreting and applying the Treaties. The methodological standards recognised by the CJEU for the judicial development of the law are based on the (constitutional) legal traditions common to the Member States (cf. also Art. 6(3) TEU, Art. 340(2) TFEU), which are notably reflected in the case-law of the Member States' constitutional and apex courts and of the European Court of Human Rights. The application of these methods and principles by the CJEU cannot and need not completely correspond to the practice of domestic courts; yet the CJEU also cannot simply disregard such practice. The particularities of EU law give rise to considerable differences with regard to the importance and weight accorded to the various means of interpretation. Yet the mandate conferred in Art. 19(1) second sentence TEU is exceeded where the traditional European methods of interpretation or, more broadly, the general legal principles that are common to the laws of Member States are manifestly disregarded. Against this backdrop, it is not for the Federal Constitutional Court to substitute the CJEU´s interpretation with its own when faced with questions of interpreting EU law, even if the application of accepted methodology, within the established bounds of legal debate, would allow for different views (BVerfGE 126, 286 <307>). Rather, as long as the CJEU applies recognised methodological principles and the decision it renders is not arbitrary from an objective perspective, the Federal Constitutional Court must respect the decision of the CJEU even when it adopts a view against which weighty arguments could be made. The mandate, conferred upon the CJEU in Art. 19(1) second sentence TEU, to ensure that the law is observed in the interpretation and application of the Treaties necessarily entails that the CJEU be granted a certain margin of error (cf. BVerfGE 126, 286 <307>; 142, 123 <200 and 201 para. 149>).

At the same time, establishing 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 only from a careful and meticulously reasoned interpretation (cf. BVerfGE 82, 316 <319 and 320>; 89, 243 <250>; 89, 291 <300>; 95, 1 <14 and 15>; 103, 332 <358 *et seq.*>; 142, 123 <201 para. 150>). In this respect, general principles apply accordingly in the context of an *ultra vires* review (cf. BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 152). If the CJEU crosses the limit set out above, its actions are no longer covered by the mandate conferred in Art. 19(1) second sentence TEU in conjunction with the domestic Act of Approval; at least in relation to Germany, its decision then lacks the minimum of democratic legitimation necessary under Art. 23(1) second sentence in conjunction with Article 20(1) and (2) and Art. 79(3) GG (cf. BVerfGE 142, 123 <201 para. 149>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 151). 113

4. Art. 38(1) first sentence GG in conjunction with the constitutional organs' responsibility with regard to European integration (*Integrationsverantwortung*) protects citizens entitled to vote not only against the transfer of sovereign powers beyond the areas open to integration, in violation of Art. 23(1) third sentence in conjunction with Art. 79(3) GG, but also prevents the implementation of acts of institutions, bodies, offices, and agencies of the European Union that have an equivalent effect and at least *de facto* amount to a transfer of competences in violation of the Basic Law (cf. BVerfGE 142, 123 <195 and 196 para. 139>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 154). The responsibility with regard to European integration (*Integrationsverantwortung*) requires constitutional organs to protect and promote the rights of the individual enshrined in Art. 38(1) first sentence in conjunction with Art. 20(2) first sentence GG (BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 154). 114

Where acts of institutions, bodies, offices and agencies of the European Union give rise to effects that bear on Germany's constitutional identity enshrined in Art. 1 and Art. 20 GG, they exceed the limits of open statehood set by the Basic Law (cf. BVerfGE 113, 273 <296>; 123, 267 <348>; 134, 366 <384 para. 27>; 142, 123 <195 para. 137>). This concerns the protection of the human dignity core enshrined in fundamental rights under Art. 1 GG (cf. BVerfGE 140, 317 <341 para. 48>) as well as the basic tenets that inform the principles of democracy, the rule of law, the social state and the federal state within the meaning of Art. 20 GG. With a view to the principle of democracy enshrined in Art. 20(1) and (2) GG, it must *inter alia* be ensured that the German *Bundestag* retain for itself functions and powers of substantial political significance (cf. BVerfGE 89, 155 <182>; 123, 267 <330, 356>; 142, 123 <195 para. 115

138>) and that it remain capable of exercising its overall budgetary responsibility (cf. BVerfGE 123, 267 <359>; 129, 124 <177>; 131, 152 <205 and 206>; 132, 195 <239 para. 106>; 135, 317 <399 and 400 para. 161>; 142, 123 <195 para. 138>; cf. also BVerfGE 146, 216 <261 para. 68>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 123).

II.

116 Based on these standards, the Federal Government and the German *Bundestag* violated the rights of the complainants in proceedings I to III under Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) in conjunction with Art. 79(3) GG by failing to take suitable steps challenging that the ECB, in Decision (EU) 2015/774 as amended by Decisions (EU) 2015/2101, (EU) 2015/2464, (EU) 2016/702 and (EU) 2017/100, neither assessed nor substantiated that the measures provided for in these decisions satisfy the principle of proportionality. In light of this, Decision (EU) 2015/774 and amending Decisions (EU) 2015/2101, (EU) 2015/2464, (EU) 2016/702, (EU) 2017/100 constitute a qualified, i.e. manifest and structurally significant, exceeding of the competences assigned to the ECB in Art. 119, Art. 127 *et seq*. TFEU and Art. 17 *et seq*. ESCB Statute. The differing view of the CJEU set out in its Judgment of 11 December 2018 does not merit a different conclusion, given that on this point, the judgment is simply not comprehensible so that, to this extent, the judgment was rendered *ultra vires* (see 1 below). Nevertheless, it cannot yet be definitively determined whether the ECB decisions at issue satisfy the principle of proportionality (see 2 below). Even though certain details of the CJEU's arguments raise considerable concerns, the interpretation of Art. 123 TFEU undertaken by the CJEU can still be considered tenable from a methodological perspective. On this basis, the ECB decisions at issue cannot be found to violate the prohibition of monetary financing (see 3 below). It essentially follows from the replies of the CJEU, especially in consideration of the fifth question referred for a preliminary ruling, that the PSPP does not pose a risk to the overall budgetary responsibility of the *Bundestag*. It can thus be ruled out that the decisions at issue affect Germany's constitutional identity (see 4 below). In the exercise of their responsibility with regard to European integration (*Integrationsverantwortung*), the Federal Government and the *Bundestag* are obliged, in their capacity as constitutional organs, to take suitable steps to ensure adherence to the European integration agenda (*Integrationsprogramm*). Moreover, they have an obligation to monitor the further execution of the PSPP to ensure timely action countering any risks regarding adherence to the European integration agenda (*Integrationsprogramm*) and/or the overall budgetary responsibility of the German *Bundestag* (see 5 below). The *Bundesbank* may in principle not participate in the implementation and execution of Decision (EU) 2015/774 and the subsequent Decisions (EU) 2015/2101, (EU) 2015/2464, (EU) 2016/702 and (EU) 2017/100 (see 6 below).

117 1.In light of Art. 119 and Art. 127 *et seq*. TFEU as well as Art. 17 *et seq*. ESCB Statute, the ECB Governing Council's Decision of 4 March 2015 (EU) 2015/774 and the subsequent Decisions (EU) 2015/2101, (EU) 2015/2464, (EU) 2016/702 and (EU)

2017/100 must be qualified as *ultra vires* acts. It is true that, in its replies to the third and fourth question referred by the Second Senate, the CJEU expressed a different view and that the interpretation put forward by the CJEU is, in principle, binding upon the Federal Constitutional Court. However, in this case the delimitation of competences undertaken by the CJEU is simply untenable (see a below). Ultimately, the objections arising from the order of competences in relation to the PSPP Decision of the ECB Governing Council of 4 March 2015 (EU) 2015/774 and the subsequent Decisions (EU) 2015/2101, (EU) 2015/2464, (EU) 2016/702 and (EU) 2017/100 have not been refuted (see b below).

118 a) Where an *ultra vires* review or an identity review raises questions regarding the validity or interpretation of a measure taken by institutions, bodies, offices and agencies of the European Union, the Federal Constitutional Court, in principle, bases its review on the understanding and the assessment of such a measure as put forward by the CJEU. However, this no longer applies where the interpretation of the Treaties is simply not comprehensible and thus objectively arbitrary (see paras. 112 and 113).

119 In its Judgment of 11 December 2018, the CJEU held that the Decision of the ECB Governing Council on the PSPP and its subsequent amendments were still within the ambit of the ECB's competences (see aa below). This view manifestly fails to give consideration to the importance and scope of the principle of proportionality (Art. 5(1) second sentence and Art. 5(4) TEU), which also applies to the division of competences, and is no longer tenable from a methodological perspective given that it completely disregards the actual effects of the PSPP (see bb below). Therefore, the Judgment of the CJEU of 11 December 2018 manifestly exceeds the mandate conferred upon it in Art. 19(1) second sentence TEU, resulting in a structurally significant shift in the order of competences to the detriment of the Member States. To this extent, the CJEU Judgment itself constitutes an *ultra vires* act and thus has no binding effect [in Germany] (see cc below).

120 aa) According to the Judgment of the CJEU of 11 December 2018, the determination whether Decision (EU) 2015/774 and its amending decisions fall within the sphere of monetary policy, which is the exclusive competence of the ECB, or economic policy, which in principle remains a competence of the Member States, primarily hinges on the objectives of the measure and the instruments the measure employs to attain those objectives (cf. CJEU, Judgment of 11 December 2018, *Weiss and Others*, C-493/17, EU:C:2018:1000 <hereinafter: CJEU, *loc. cit.*>, para. 50 *et seq.*). Firstly, the CJEU refers to Recital 4 of Decision (EU) 2015/774, according to which the purpose of the PSPP is to contribute to a return of inflation rates to levels below, but close to, 2% over the medium term, and thus finds that the specific objective of the programme can be attached to the primary objective of the EU's monetary policy (cf. CJEU, *loc. cit.*, paras. 54, 57). Secondly, the CJEU submits that Decision (EU) 2015/774 relies on the purchase of government bonds on secondary markets as a means to achieve its objectives, and thus uses one of the monetary policy instruments for which primary law provides (cf. CJEU, *loc. cit.*, paras. 68 and 69). In view

of the foregoing, the CJEU concludes that, taking account of its objective and the means provided for achieving that objective, Decision (EU) 2015/774 falls within sphere of monetary policy within the meaning of Art. 127(1) TFEU, Art. 282(2) TFEU (cf. CJEU, *loc. cit.*, paras. 57, 70).

121 According to the CJEU, the conclusion that Decision (EU) 2015/774 and its amending decisions fall within the sphere of monetary policy within the meaning of Art. 127(1), Art. 282(2) TFEU is not called into question by the fact that the PSPP allegedly has considerable effects on the balance sheets of commercial banks as well as on the refinancing terms of the Member States in the euro area (cf. CJEU, *loc. cit.*, para. 58). The CJEU recognises that it is undisputed that, by virtue of its underlying principle and its procedures, the PSPP is capable of having an impact both on the balance sheets of commercial banks and on the financing of the Member States covered by that programme and that such effects might possibly be sought through economic policy measures (cf. CJEU, *loc. cit.*, para. 59). However, the CJEU emphasises that the ESCB must act in accordance with the principles laid down in Art. 119 TFEU and that the ESCB is to support the general economic policies in the EU as set out in Art. 127(1) TFEU; according to the CJEU, this illustrates that within the institutional balance established by the provisions of Title VIII of the TFEU, which includes the independence of the ESCB guaranteed by Art. 130 and Art. 282(3) TFEU, the authors of the Treaties did not intend to make an absolute separation between economic and monetary policies (cf. CJEU, *loc. cit.*, para. 60). In that regard, the CJEU states that a monetary policy measure cannot be treated as equivalent to an economic policy measure for the sole reason that it may have indirect effects that can also be sought in the context of economic policy (cf. CJEU, *loc. cit*, para. 61, with references to Judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, para. 56, and Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, para. 52).

122 The CJEU does not concur with the view of the Second Senate that any effects of an open market operations programme that were knowingly accepted and definitely foreseeable by the ESCB when the programme was set up should not be regarded as (merely) ‘indirect effects’ of the programme (cf. CJEU, *loc. cit.*, para. 62). Firstly, the CJEU recalls that both in *Pringle* (Judgment of 27 November 2012, C-370/12, EU:C:2012:756) and in *Gauweiler* (Judgment of 16 June 2015, C-62/14, EU:C:2015:400), it regarded as indirect effects, having no consequences for the purposes of classification of the measures at issue as measures of monetary policy or economic policy in the cases that gave rise to those judgments, effects which, even at the time of adoption of the measures, were foreseeable consequences of those measures, which must therefore have been knowingly accepted at that time (cf. CJEU, *loc. cit.*, para. 63). Secondly, the CJEU contends that the conduct of monetary policy will always entail an impact on interest rates and bank refinancing conditions, which necessarily has consequences for the financing conditions of the public deficit of the Member States; more specifically, the transmission of the ESCB’s monetary policy measures to price trends takes place via, *inter alia*, facilitation of the supply of

credit to the economy and modification of the behaviour of businesses and individuals with regard to investment, consumption and saving (cf. CJEU, *loc. cit.*, paras. 64 and 65). Based thereon, the CJEU concludes that in order to exert an influence on inflation rates, the ESCB necessarily has to adopt measures that have certain effects on the real economy, which might also be sought – to different ends – in the context of economic policy (cf. CJEU, *loc. cit.*, para. 66). Accordingly, the CJEU holds that if the ESCB were precluded altogether from adopting such measures when their effects are foreseeable and knowingly accepted, that would, in practice, prevent it from using the means made available to it by the Treaties for the purpose of achieving monetary policy objectives and might – in particular in the context of an economic crisis entailing a risk of deflation – represent an insurmountable obstacle to its accomplishing the task assigned to it by primary law (cf. CJEU, *loc. cit.*, para. 67).

123 bb) The CJEU's approach to disregard the actual effects of the PSPP for the purposes of assessing the measure's proportionality (see (1) below) and to refrain from conducting an overall assessment and appraisal in this regard (see (2) below) does not satisfy the requirements of a comprehensible review as to whether the ESCB and the ECB observe the limits of their monetary policy mandate. Applied in this manner, the principle of proportionality cannot fulfil its corrective function for the purposes of safeguarding the competences of the Member States, as provided for in Art. 5(1) second sentence and Art. 5(4) TEU. The interpretation undertaken by the CJEU essentially renders meaningless the principle of conferral set out in Art. 5(1) first sentence and Art. 5(2) TEU (see (3) below).

124 (1) The principle of proportionality is a general principle of EU law that is codified in Art. 5(2) second sentence and Art. 5(4) TEU. It was developed in common law [...] and, in particular, German law (for a general overview cf. BVerfGE 3, 383 <399> […]). Facilitated by the case-law of the European Court of Human Rights [...] and the CJEU, it is now recognised in all (partial) legal orders in Europe [...].

125 In applying the principle of proportionality, German law distinguishes between the elements of suitability (*Geeignetheit*), necessity (*Erforderlichkeit*) and appropriateness (*Angemessenheit*) (cf. BVerfGE 16, 147 <181>; 16, 194 <201 and 202>; 30, 292 <316 and 317>; 45, 187 <245>; 63, 88 <115>; 67, 157 <173>; 68, 193 <218>; 81, 156 <188 and 189>; 83, 1 <19>; 90, 145 <172 and 173>; 91, 207 <221 *et seq.*>; 95, 173 <183>; 96, 10 <21>; 101, 331 <347>; 120, 274 <321 and 322>; 141, 220 <265 para. 93>). The French C*onseil constitutionnel*, too, assesses the proportionality of acts of public authority in these three steps [...], as do the Spanish *Tribunal Constitucional* [...] and the Swedish *Högsta domstolen* [...]. The Italian *Corte Costituzionale* takes a similar approach with the additional element of reasonableness, which entails a balancing of constitutional values [...] Similar approaches are reflected in the jurisdictions of Austria […], Poland [...], Hungary [...] or the United Kingdom [...].

126 In its established case-law, the CJEU, too, has recognised the principle of propor-

tionality as an unwritten principle of EU law [...]. It requires "that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives" (cf. the leading decision CJEU, Judgment of 29 November 1956, *Fédération Charbonnière*, C-8/55, ECR 1956, I-302 <311>; cf. also CJEU, Judgment of 10 December 2002, *British American Tobacco*, C-491/01, ECR 2002, I-11550 <11590 para. 122>; Judgment of 8 July 2010, *Afton Chemical*, C-343/09, ECR 2010, I-7062 <7078 para. 45>; Judgment of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, para. 50; Judgment of 17 October 2013, *Schaible*, C-101/12, EU:C:2013:661, para. 29; Judgment of 8 April 2014, *Digital Rights and Others*, C-293/12 *inter alia*, EU:C:2014:238, para. 46). The application of this principle in the CJEU's case-law is often characterised by the terms 'suitable', 'appropriate' and 'necessary', although the CJEU does not necessarily attach the same meaning to these terms as German terminology and doctrine [...]. According to the case-law of the CJEU, a measure is appropriate [or suitable] (*geeignet*) if it genuinely reflects a concern to attain the objective in a consistent and systematic manner (cf. CJEU, Judgment of 9 September 2010, *Engelmann*, C-64/08, ECR 2010, I-8244 <8256 para. 35>; Judgment of 16 December 2010, *Josemans*, C-137/09, ECR 2010, I-13054 <13077 para. 70>; Judgment of 21 December 2011, *Commission v Austria*, C-28/09, ECR 2011, I-13567 <13605 para. 126>); in this context, the CJEU frequently limits its review to whether the relevant measure is manifestly inappropriate having regard to the objective pursued (cf. CJEU, Judgment of 7 February 1972, *Schroeder v Germany*, C-40/72, ECR 1973, I-126 <142 and 143 para. 14>; Judgment of 21 February 1979, *Stölting*, C-138/78, ECR 1979, I-713 <722 para. 7>; Judgment of 11 July 1987, *Schräder*, C-265/87, ECR 1989, I-2263 <2270 para. 22>; Judgment of 5 October 1994, *Germany v Council*, C-280/93, ECR 1994, I-5039 <5068 and 5069 para. 90>; Judgment of 13 May 1997, *Germany v Parliament and Council*, C-233/94, ECR 1997, I-2441 <2461 paras. 55 and 56>; Judgment of 8 February 2000, *Emesa Sugar*, C-17/98, ECR 2000, I-712 <733 para. 53>; Judgment of 10 December 2002, *British American Tobacco*, C-491/01, ECR 2002, I- 11550 <11590 para. 123>; Judgment of 14 December 2004, *Swedish Match,* C-210/03, ECR 2004, I-11900 <11919 para. 48>; Judgment 21 July 2011, *Etimine*, C-15/10, ECR 2011, I-6725 <6762 para. 125> […]). Regarding the element of necessity, the CJEU reviews whether recourse can be had to less onerous means for attaining the objectives pursued (cf. CJEU, Judgment of 10 November 1982*, Rau v De Smedt*, C-261/81, ECR 1982, I-3962 <3973 para. 17>; Judgment of 12 July 2001, *Jippes*, C-189/01, ECR 2001, I-5693 <5720 para. 81>; Judgment of 8 July 2010, *Afton Chemical*, C-343/09, ECR 2010, I-7062 <7078 para. 45>; Judgment of 21 July 2011, *Beneo-Orafti*, C-150/10, ECR 2011, I-6881 <6911 para. 75>; Judgment of 4 May 2016, *Poland v Parliament and Council*, C-358/14, EU:C:2016:323, para. 78 […]), whereas little to no consideration is given to whether the measure is actually proportionate in the strict sense [also referred to as *Angemessenheit* in German] (cf. CJEU, Judgment of 29 April 1982, *Merkur*, C-147/81, ECR 1982, I-1389 <1397 para. 12>; Judgment of

13 November 1990, *FEDESA*, C-331/88, ECR 1990, I-4057 <4063 para. 13>; Judgment of 5 May 1998, *National Farmers Union*, C-157/96, ECR 1998, I-2236 <2258 para. 60>; Judgment of 12 Mai 2002, *Omega Air and Others*, C-27/00 *inter alia*, ECR 2002, I-2599 <2621 para. 60>; Judgment of 28 July 2011, *Agrana Zucker*, C-309/10, ECR 2011, I-7337 <7354 para. 42>; Judgment of 23 October 2012, *Nelson and Others*, C-581/10 *inter alia*, EU:C:2012:657, para. 71; […]). As a general rule, the CJEU refrains from reviewing proportionality in the strict sense (cf. CJEU, Judgment of 23 February 1983, *FORMA*, C-66/82, ECR 1983, I-396 <404 para. 8>; Judgment of 17 July 1997, *Affish*, C-183/95, ECR 1997, I-4362 <4372 para. 30> […]). Moreover, recent decisions show a tendency to merge the elements of appropriateness and necessity (cf. CJEU, Judgment of 8 June 2010, *Vodafone and Others*, C-58/08, ECR 2010, I-5026 <5045 paras. 53 and 54>; Judgment of 12 May 2011, *Luxembourg v Parliament and Council*, C-176/09, ECR 2011, I-3755 <3779 and 3780 para. 63>; Judgment of 17 October 2019, *Cirigliana*, C-569/18, EU:C:2019:873, para. 43 […]).

127 (2) The specific manner in which the CJEU applies the principle of proportionality in the case at hand renders that principle meaningless for the purposes of distinguishing, in relation to the PSPP, between monetary policy and economic policy, i.e. between the exclusive monetary policy competence conferred upon the EU (Art. 3(1) lit. c TFEU) and the limited conferral upon the EU of the competence to coordinate general economic policies, with the Member States retaining the competence for economic policy at large (Art. 4(1) TEU; Art. 5(1) TFEU).

128 The CJEU emphasises that the authors of the Treaties did not intend to make an absolute separation between economic and monetary policies (cf. CJEU, *loc. cit.*, para. 60) and that it therefore follows from Art. 119(2) and Art. 127(1) TFEU in conjunction with Art. 5(4) TEU that a bond-buying programme forming part of monetary policy may be validly adopted and implemented only in so far as the measures that it entails are proportionate to the objectives of that policy (cf. CJEU, Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, para. 66; *loc. cit.*, para. 71). This is informed by the notion that a generous interpretation of the specific competence conferred may, to a certain extent, be compensated by a sound proportionality assessment. The CJEU thus agrees that acts of EU institutions must be suitable for attaining the legitimate objectives pursued by the legislation at issue and may not go beyond what is necessary to achieve those objectives (cf. CJEU, Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, para. 67; *loc. cit.*, para. 72).

129 Following the finding that the ESCB must be afforded broad discretion (CJEU, *loc. cit.*, paras. 73, 91) – curtailing the competences of the Member States –, the CJEU essentially assesses the proportionality of the PSPP in three steps:

130 In a first step, the CJEU states that at the time the relevant measures were adopted, annual inflation rates in the euro area were far below the close-to-2% target fixed by the ECB, and that in determining this target the ESCB had referred to the practices

of other central banks and to various studies, which showed that large-scale purchases of government bonds can contribute to achieving that objective. The CJEU concludes that there is no “manifest error of assessment” on the part of the ESCB with regard to the PSPP’s suitability (cf. CJEU, *loc. cit.*, para. 74 *et seq*.).

131 In a second step, the CJEU assesses the necessity of the PSPP. In this context, the CJEU states that it would not have been possible to counter the risk of deflation, as described by the ECB, by other means, such as by lowering key interests rates or by purchasing private sector assets (cf. CJEU, *loc. cit*., paras. 80 and 81), and that the way the PSPP is set up helps to guarantee that its effects are limited to what is necessary to achieve the objective concerned. With regard to the latter, the CJEU notes, in particular, that the PSPP is not selective, that purchases are subject to stringent eligibility criteria, that the PSPP is temporary in nature, that the volume of bonds that can be purchased is limited, that priority is given to bonds issued by private operators, and that the PSPP framework sets out purchase limits per issuer and per issue (cf. CJEU, *loc. cit.*, para. 82 *et seq*.). The CJEU also states that the programme’s overall volume does not stand in the way of its suitability since, based on valid information provided by the ECB, it is not apparent that an asset purchase programme of either more limited volume or shorter duration would have been as effective. Given the complexity of monetary policy questions, the CJEU holds that nothing more can be required of the ESCB apart from that it use its economic expertise and the necessary technical means at its disposal (cf. CJEU, *loc. cit.*, para. 90 *et seq*.).

132 Lastly, in a third step, the CJEU states that the ECB weighed up the various interests involved so as effectively to prevent, upon implementation of the programme, disadvantages which are manifestly disproportionate to the objectives pursued (cf. CJEU, *loc. cit.*, para. 93). In terms of substance, however, the CJEU only touches upon the rules designed to reduce the risk of losses (cf. CJEU, *loc. cit.*, para. 94 *et seq*.); it finds the PSPP to be proportionate based on the argument that the ECB has taken sufficient measures to circumscribe the risk of losses related to the PSPP, for instance by limiting the sharing of losses to only a small share of the securities purchased under the programme and by setting out strict credit quality requirements (cf. CJEU, *loc. cit.*, paras. 93 *et seq*.). In that regard, the CJEU does not make it clear which opposing interests these two safeguards serve; objectively, it can be assumed that they serve the budgetary autonomy of Member States and thus promote fiscal policy interests, which do not fall within the ambit of monetary policy, as follows from Art. 126 TFEU. However, it appears that other opposing interests are not taken into consideration.

133 (3) When applied in this manner, as undertaken by the CJEU, the principle of proportionality enshrined in Art. 5(1) second sentence and Art. 5(4) TEU cannot fulfil its corrective function for the purposes of safeguarding the competences of the Member States. The complete disregard of the PSPP’s economic policy effects means that already the determination of the ESCB’s objectives is not comprehensible from a methodological perspective (see a below). As a result, the review of proportionality is

rendered meaningless, given that suitability and necessity of the PSPP are not balanced against the economic policy effects – other than the risk of losses – arising from the programme to the detriment of Member States' competences, and that these adverse effects are not weighed against the beneficial effects the programme aims to achieve (see b below). This contradicts the methodological approach taken by the CJEU in virtually all other areas of EU law (see c below). Ultimately, the Judgment of the CJEU of 11 December 2018 allows the ESCB to conduct economic policy as long as the ECB asserts that it uses the means set out or provided for in the ESCB Statute (cf. Art. 20(1) ESCB Statute) and that it aims to achieve the inflation target fixed by the ECB itself.

134 (a) In its *OMT* Judgment of 21 June 2016, the Second Senate voiced considerable concerns in relation to how the CJEU specified, by way of judicial interpretation, the contents of Art. 119 and Art. 127 *et seq*. TFEU in *Gauweiler* with regard to the principle of conferral, and to the judicial review exercised by the CJEU vis-à-vis the ECB when determining the ECB's mandate; in this regard, the Senate expressed doubts regarding the CJEU's approach to simply accept the monetary policy objective asserted by the ECB without questioning the underlying factual assumptions or at least reviewing whether the respective reasoning was comprehensible, and without testing these assumptions against other indications that evidently argue against the qualification as a monetary policy measure. The *OMT* Judgment further reads:

> Generously accepting as fact proclaimed objectives of EU institutions while at the same time granting them wide margins of assessment and considerably decreasing the intensity of judicial review is capable of enabling institutions, bodies, offices and agencies of the EU to decide autonomously upon the scope of the competences that the Member States have transferred to them (...). Such an understanding of competences does not sufficiently take into account the constitutional dimension of the principle of conferral (cf. BVerfGE 142, 123 <217 and 218 para. 182 *et seq*.>).

135 In its Order of Referral of 18 July 2017, the Second Senate reiterated this criticism, emphasising that determining whether an act constitutes a measure of monetary policy or economic policy should not be limited to assessing the objective pursued and the means employed but should also give consideration to relevant effects resulting from the measure in question (cf. referred question 3 lit. a to c and referred question 4). In view of this, the Court recalled that such effects can only be considered 'indirect' if they are connected to the challenged measure only through additional intermediate measures and if they do not constitute consequences that are foreseeable with certainty. By contrast, effects can no longer be qualified as being indirect in nature if the economic policy effects of a measure are intended or knowingly accepted, and these effects are at least comparable in weight to the monetary policy objective pursued (cf. BVerfGE 146, 216 <285 and 286 para. 119>). It further states that if the purchasing of government bonds by the ESCB essentially amounted to granting fi-

nancial assistance to Member States, it would qualify as an economic policy measure for which the EU has no competence (cf. BVerfGE 146, 216 <280 and 281 paras. 108 and 109>).

136 As regards the distinction between economic policy and monetary policy, the CJEU accepts the proclaimed objectives of the ECB as fact without further scrutiny and without regard to foreseeable and/or intended – perhaps even primarily so – consequences of the programme in the areas of economic and fiscal policy, the possibility of which the ECB at the very least knowingly accepted; in doing so, the CJEU allows the ESCB to decide autonomously on the scope of the competences conferred upon it by the Member States (cf. BVerfGE 142, 123 <218 and 219 para. 184>; 146, 216 <285 and 286 para. 119>). Such an understanding of competences does not sufficiently give consideration to the principle of conferral and the necessity of interpreting the ECB's mandate in a restrictive manner (BVerfGE 142, 123 <218 and 219 para. 184>), given that it *de facto* affords the ECB a (limited) competence to decide on its own competences.

137 The CJEU expressly acknowledges the economic policy dimension of the asset purchase programme yet declares this aspect to be irrelevant in view of the monetary policy objective purportedly pursued. As a result, the CJEU allows asset purchases even in cases where the purported monetary policy objective is possibly only invoked to disguise what essentially constitutes an economic and fiscal policy agenda. In this respect, the CJEU simply accepts, as it did in *Gauweiler*, the ECB's assertion – despite the substantiated objections challenging this assertion – that the PSPP pursued a monetary policy objective, without questioning the underlying factual assumptions or at least reviewing whether the respective reasoning is comprehensible, and without testing these assumptions against other indications that evidently argue against the classification as a monetary policy measure. Therefore, it is not discussed at all whether there is or was a possibility that Member States of the euro area could deliberately issue low-yield government bonds as a means to improve their refinancing conditions, that certain Member States benefitted more than others from the programme, that recent economic studies did not find evidence of the purported monetary policy effects [...] and that the programme significantly boosted the economic situation and credit rating of commercial banks (cf. BVerfGE 146, 216 <286 and 287 para. 120> […]). In its reasoning, the CJEU argues that the ESCB must not be precluded altogether from adopting such measures even if their effects are foreseeable and knowingly accepted, as this would, in practice, prevent it from using the means made available to it by the Treaties for the purpose of achieving monetary policy objectives and might – in particular in the context of an economic crisis entailing a risk of deflation – represent an insurmountable obstacle to its accomplishing the task incumbent upon it (cf. CJEU, *loc. cit.*, para. 67). However, what this reasoning entails is that it would not be possible to prevent such purchases even if they constituted an abuse of law.

138 (b) As the economic policy effects of the PSPP are disregarded completely, the application of the principle of proportionality by the CJEU cannot fulfil its purpose, given that its key element – the balancing of conflicting interests – is missing. As a result, the review of proportionality is rendered meaningless.

139 Relying on the principle of proportionality to distinguish between monetary policy and economic policy (Art. 5(1) second sentence and Art. 5(4) TEU) implies that a programme's effects can render it disproportionate. Thus, assessing the consequences of such a programme is a necessary step in the delimitation of competences. Nevertheless, the CJEU's approach does not require weighing the PSPP's actual contribution to achieving the objectives pursued, even though such a contribution is far from apparent given that interest rates remain at permanently low levels, that the requirements deriving from Art. 126 TFEU and from the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (SCG Treaty) must be borne in mind, and that the risk of "reversal effects" discussed in public finance research increases over time [...]. Nor does the review of proportionality conducted by the CJEU give consideration to the economic and social policy effects of the PSPP. The fact that the ESCB has no mandate for economic or social policy decisions, even when using monetary policy instruments, does not rule out taking into account, in the proportionality assessment pursuant to Art. 5(1) second sentence and Art. 5(4) TEU, the effects that a programme for the purchase of government bonds has on, for example, public debt, personal savings, pension and retirement schemes, real estate prices and the keeping afloat of economically unviable companies, and – in an overall assessment and appraisal – weighing these effects against the monetary policy objective that the programme aims to achieve and is capable of achieving.

140 In the manner applied by the CJEU, the principle of proportionality is neither a suitable means for compensating the insufficient limits of the ESCB's competences in terms of its elements ('broad discretion') nor for weighing the encroachment upon the competences of the Member States [...]. Rather, the CJEU's approach ultimately entails that the ECB is free to choose any means it considers suitable even if the benefits are rather slim – compared to possible alternative means –, while collateral damage is high.

141 Despite the overlap between economic policy and monetary policy, the CJEU regards as irrelevant the indications that argue against the classification of the programme as a monetary policy measure and, from the outset, refrains from conducting an overall assessment and appraisal for the purposes of distinguishing between those two policy areas (cf. BVerfGE 134, 366 <416 and 417 paras. 99 and 100>; 142, 123 <218 and 219 para. 183>); as a result, the CJEU does not conduct an effective review as to whether the ECB exceeds its competences. It is true that the ECB is afforded a margin of appreciation as regards the assessment and appraisal of the consequences of its actions and the weighing of such consequences in relation to the objectives pursued by the asset purchase programme. However, from a methodological perspective, it is not tenable that the CJEU attaches no legal relevance whatso-

ever to the effects of the asset purchase programme, neither in determining the objectives pursued by the ESCB nor in reviewing the proportionality of the programme.

142 This standard of review applied by the CJEU fails to give effect to the function of the principle of conferral as a key determinant [in the division of competences] and to the consequences this entails, in terms of methodology, for the review as to whether that principle is observed. Where fundamental interests of the Member States are affected, as is generally the case when interpreting the competences conferred upon the European Union as such and its democratically legitimated European integration agenda (*Integrationsprogramm*), judicial review may not simply accept positions asserted by the ECB without closer scrutiny (cf. BVerfGE 142, 123 <219 and 220 para. 186>). This applies all the more as Art. 119 and Art. 127 *et seq*. TFEU as well as Art. 17 *et seq*. ESCB Statute confer upon the ESCB a mandate that is limited to matters of monetary policy, beyond which the ESCB is merely authorised to support the general economic policies within the European Union (cf. BVerfGE 146, 216 <277 para. 100>). The CJEU's findings are incompatible with these standards – specifically where the CJEU finds that because the ESCB is subject to the principles laid out in Art. 119 TFEU while also being called upon to support the general economic policies within the EU as provided for in Art. 127(1) TFEU, it follows that within the institutional balance established by the provisions of Title VIII of the TFEU, which include the independence of the ESCB guaranteed by Art. 130 and Art. 282(3) TFEU, the authors of the Treaties did not intend to make an absolute separation between economic and monetary policies (cf. CJEU, *loc. cit.*, para. 60); this reasoning is flawed not least given that the European Union only has an exclusive competence for monetary policy [but not for matters of economic policy] (Art. 3(1) lit. c TFEU).

143 It is furthermore imperative that the mandate of the ESCB be subject to strict limitations given that the ECB and the national central banks are independent institutions (Art. 130, Art. 282(3) third and fourth sentence TFEU, Art. 88(2) GG), which means that they operate on the basis of a diminished level of democratic legitimation. The independence afforded the ECB relates only to the powers conferred upon it in the Treaties and the substantive exercise of such powers but is not applicable with regard to defining the extent and scope of the ECB's mandate. To ensure that the ECB cannot validly adopt a programme that, contrary to the principle of conferral, exceeds the monetary policy mandate vested in the ECB under primary law, it is imperative that adherence to limits of the ECB's competence be subject to full judicial review (cf. BVerfGE 89, 155 <207 *et seq*., 211 and 212>; 134, 366 <399 and 400 para. 59>; 142, 123 <219 *et seq*. para. 187 *et seq*.>; 146, 216 <278 paras. 102 and 103>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, paras. 134, 139, 211). It is incompatible with this restrictive interpretation, which is mandated under German constitutional law, to interpret the specific conferral of monetary policy competences in a manner that, in the context of asset purchases, regards the mere assertion of monetary policy objectives as sufficient while disregarding as irrelevant the economic and fiscal policy effects of the PSPP for both the

delimitation of competences and the proportionality assessment, even where such effects are foreseeable, knowingly accepted or might actually be (tacitly) intended.

144 Such an interpretation would also run counter to the requirements deriving from Art. 6 ECHR, Art. 47 of the EU Charter of Fundamental Rights [hereinafter: the Charter] and Art. 23(1) first sentence in conjunction with Art. 19(4) first sentence GG (on Art. 19(4) first sentence GG, cf. BVerfGE 15, 275 <282>; 61, 82 <110 and 111>; 78, 214 <226>; 84, 59 <77>; 129, 1 <20>; 149, 346 <363 and 364 paras. 34 and 35>; on Art. 47 of the Charter, cf. CJEU, Judgment of 18 July 2013, *Kadi*, C-584/10 P *inter alia*, EU:C:2013:518, para. 119; Judgment of 18 July 2015, *Schindler*, C-501/11, EU:C:2013:522, paras. 36, 38; Judgment of 18 June 2015, *Ipatau*, C-535/14, EU:C:2015:407, para. 42; Judgment of 17 December 2015, *Imtech*, C-300/14, EU:C:2015:825, para. 38; Judgment of 18 February 2016, *Bank Mellat*, C-176/13, EU:C:2016:96, para. 109; Judgment of 21 April 2016, *Bank Saderat*, C-200/13, EU:C:2016:284, para. 98 […]; for a more restrictive interpretation, cf. CJEU, Judgment of 15 October 2009, *Enviro Tech*, C-425/08, ECR 2009, I-10035, para. 62; Judgment of 10 July 2014, *Telefónica de España*, C-295/12, EU:C:2014:2062, para. 55).

145 In other contexts, the CJEU itself has held that the review of compliance with legal criteria would be deprived of effect if, in the event of doubt as to that compliance, the review would be left to the organisation intending to carry out the contested measure (cf. CJEU, Judgment of 17 April 2018, *Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, C-414/16, EU:C:2018:257, para. 46). It is not ascertainable why a different standard should apply in relation to EU institutions such as the ECB, especially given that the CJEU has repeatedly emphasised the legitimising function of judicial review (cf. CJEU, Judgment of 9 March 2010, *Commission v Germany*, C-518/07, ECR 2010, I-1897 para. 42; Judgment of 22 January 2014, *United Kingdom v Parliament and Council,* C-270/12, EU:C:2014:18, paras. 45, 53).

146 (c) Lastly, completely disregarding the economic policy effects of the PSPP contradicts the methodological approach taken by the CJEU in virtually all other areas of EU law.

147 This holds true with regard to the fundamental rights protected under EU law. European law has long recognised factual restrictions on fundament rights (cf. CJEU, Judgment of 6 December 1984, *Biovilac*, C-59/83, ECR 1984, I-4058 <4079 para. 22>; Order of 23 September 2004, *Springer v Zeitungsverlag Niederrhein and Others*, C-435/02 *inter alia,* ECR 2004, I-8667 <8683 para. 49> […]).

148 The same is true for indirect discrimination arising from factual circumstances (cf. CJEU, Judgment of 12 February 1974, *Sotgiu*, C-152/73, ECR 1974, I-154 <164 and 165 para. 11>; Judgment of 16 February 1978, *Commission v Ireland*, C-61/77, ECR 1978, I-418 <451 paras. 78/80>; Judgment of 15 July 1978, *Defrenne*, C-149/77, ECR 1978, I-1366 <1377 and 1378 paras. 16/18, 19/23>; Judgment of 12 July 1979, *CRAM v Toia*, C-237/78, ECR 1979, I-2646 <2653 para. 12>; Judgment of 10 April

1984, *Colson and Kamann*, C-14/83, ECR 1984, I-1892 <1907 para. 18>; Judgment of 15 December 1994, *Stadt Lengerich and Others v Helmig and Others*, C-399/92, ECR 1994, I-5738 <5753 para. 20>; Judgment of 6 December 2007, *Voß v Land Berlin*, C-300/06, ECR 2007, I-10592 <10605 para. 38>; Opinion of Advocate General Warner of 28 January 1981, *Jenkins v Kingsgate*, C-96/80, ECR 1981, I-929 <937> […]).

149 As regards the freedoms of the single market, the notion of measures of equivalent effect is well-established (cf. CJEU, Judgment of 11 July 1974, *Dassonville*, C-8/74, ECR 1974, I-838 <852 para. 5>; Judgement of 31 March 1993, *Kraus v Land Baden-Württemberg*, C-19/92, ECR 1993, I-1689 <1697 para. 32>; Judgment of 30 November 1995, *Gebhard*, C-55/94, ECR 1995, I-4186 <4197 and 4198 para. 37>; Judgment of 27 January 2000, *Graf v Filzmoser*, C-190/98, ECR 2000, I-513 <523 para. 23>; Judgment of 10 February 2009, *Commission v Italy*, C-110/05, ECR 2009, I-519, para. 37 […]). In the judicial review of whether quantitative restrictions on imports or exports, or measures of equivalent effect, are justified under Art. 36 TFEU, the CJEU requires an objective examination, through statistical or *ad hoc* data or by other means, whether it may reasonably be concluded from the evidence submitted by the Member State concerned that the means chosen are appropriate for the attainment of the objectives pursued and whether it is possible to attain those objectives by measures that are less restrictive of the free movement of goods (cf. CJEU, Judgment of 19 October 2016, *Deutsche Parkinson Vereinigung*, C-148/15, EU:C:2016:776, para. 36).

150 This is applied accordingly in relation to general principles such as the principle of effectiveness (cf. CJEU, Judgment of 5 February 1963, *van Gend & Loos*, C-26/62, ECR 1963, I-7 <26>; Judgment of 4 December 1974, *van Duyn*, C-41/74, ECR. 1974, I-1338 <1348 para. 12>; Judgment of 1 February 1977, *Nederlandse Ondernemingen*, C-51/76, ECR 1977, I-114 <126 and 127 paras. 20/29>; Judgment of 21 September 1983, *Deutsche Milchkontor*, C-205/82 *inter alia*, ECR 1983, I-2635 <2665 and 2666 para. 19>; Judgment of 20 September 1988, *Beentjes*, C-31/87, ECR 1988, I-4652 <4655 para. 11>; Judgment of 20 September 1988, *Borken v Moormann*, C-190/87, ECR 1988, I-4714 <4723 para. 27>; Judgment of 15 September 1998, *Edis*, C-231/96, ECR 1998, I-4979 <4990 paras. 34 and 35>; Judgment of 9 February 1999, *Dilexport*, C-343/96, ECR 1999, I-600 <611 and 612 paras. 25 and 26>; Judgment of 14 June 2011, *Pfleiderer*, C-360/09, ECR 2011, I-5186 <5200 paras. 28 and 29>; Judgment of 26 June 2019, *Kuhar v Addiko Bank*, C-407/18, EU:C:2019:537, paras. 46, 48; Judgment of 7 November 2019, *Flausch*, C-280/18, EU:C:2019:928, paras. 27, 29, 43 and 44 […]).

151 The CJEU has taken a similar approach with regard to the principle of equivalence (cf. CJEU, Judgment of 21 September 1983, *Deutsche Milchkontor*, C-205/82 *inter alia*, ECR 1983, I-2635 <2665 and 2666 para. 19>; Judgment of 8 February 1996, *FMC*, C-212/94, ECR 1996, I-404 <422 para. 52>; Judgment of 10 July 1997, *Palmisani*, C-261/95, ECR 1997, I-4037 <4046 para. 27; 4047 and 4048

paras. 32 and 33>; Judgment of 15 September 1998, *Edis*, C-231/96, ECR 1998, I-4979 <4986 para. 19; 4990 para. 34; 4991 para. 36>; Judgment of 9 February 1999, *Dilexport*, C-343/96, ECR 1999, I-600 <610 para. 25; 611 para. 27>; Judgment of 19 September 2002, *Austria v Huber*, C-336/00, ECR 2002, I-7736 <7755 para. 55>; Judgment of 26 June 2019, *Kuhar v Addiko Bank*, C-407/18, EU:C:2019:537, paras. 46 and 47; Judgment of 7 November 2019, *Flausch*, C-280/18, EU:C:2019:928, paras. 27 and 28 […]).

152 Lastly, even in relation to provisions allocating competences the CJEU takes the actual effects of a contested measure into account in its legal review, for instance, when interpreting the competence for harmonisation measures concerning the internal market pursuant to Art. 114 TFEU (cf. CJEU, Judgment of 2 May 2006, C-217/04, *United Kingdom v Parliament and Council*, ECR 2006, I-3789 <3805 para. 42>; Judgment of 22 January 2014, C-270/12, *United Kingdom v Parliament and Council*, EU:C:2014:18, para. 113; Judgment of 4 May 2016, C-358/14, *Poland v Parliament*, EU:C:2016:323, para. 32) or reviewing compliance with the regime on aid granted by Member States pursuant to Arts. 107 and 108 TFEU (cf. CJEU, Judgment of 10 December 1969, *Commission v France*, C-6/69 *inter alia*, ECR 1969, I-525 <540 paras. 18/19 and 20>; Judgment of 17 September 1980, *Philip Morris v Commission*, C-730/79, ECR 1980, I-2672 <2688 and 2689 paras. 11 and 12>; Judgment of 16 April 2014, *Trapeza*, C-690/13, EU:C:2015:235, para. 23 […]).

153 It is not discernible, neither from the CJEU's Judgment of 11 December 2018 nor from its earlier decisions in *Pringle* (CJEU, Judgment of 27 November 2012, C-370/12, EU:C:2012:756) and *Gauweiler* (CJEU, Judgment of 16 June 2015, C-62/14, EU:C:2015:400), why a different standard should apply with regard to delimiting the competences for monetary policy and economic policy at issue here. Without providing further reasons to justify this different approach, the interpretation undertaken by the CJEU is not comprehensible from a methodological perspective.

154 cc) The interpretation of the principle of proportionality undertaken by the CJEU in its Judgment of 11 December 2018 and the determination of the ESCB's mandate based thereon, manifestly exceed the judicial mandate conferred upon the CJEU in Art. 19(1) second sentence TEU (see (1) below) and result in a structurally significant shift in the order of competences to the detriment of the Member States (see (2) below). In this regard, the aforementioned judgment thus constitutes an *ultra vires* act that is not binding upon the Federal Constitutional Court (see (3) below).

155 (1) It follows from the reasons set out above (see para. 134 *et seq.*), that the Judgment of the CJEU of 11 December 2018 manifestly exceeds the mandate conferred upon the CJEU in Art. 19(1) second sentence TEU to the extent that it finds the PSPP to be proportionate.

156 With self-imposed restraint, the CJEU limits its review to whether there is a "manifest error of assessment" on the part of the ECB (cf. CJEU, *loc. cit.*, paras. 56, 78, 91), whether the PSPP "manifestly" goes beyond what is necessary to achieve its

objective (cf. CJEU, *loc. cit.*, paras. 79, 81, 92), and whether its disadvantages are "manifestly" disproportionate to the objectives pursued (cf. CJEU, *loc. cit.*, para. 93 *et seq.*); this standard of review is by no means conducive to restricting the scope of the competences conferred upon the ECB, which are limited to monetary policy. Rather, it allows the ECB to expand – gradually and in a manner that is not necessarily noticeable from the outset – its competences on its own authority; at the very least, it largely or completely exempts such action on the part of the ECB from judicial review. This combination of the broad discretion afforded the institution in question together with the limited standard of review as to whether that institution manifestly exceeded its competences may well be in line with traditional case-law in other areas of EU law. Yet it clearly fails to give sufficient effect to the principle of conferral [...] and paves the way for a continual erosion of Member State competences.

157 (2) To this extent, the *Weiss* Judgment also results in a structurally significant shift in the order of competences to the detriment of the Member States (cf. BVerfGE 126, 286 <309>; 146, 216 <260 and 261 para. 66>). This gives rise to the risk of a continual erosion – beyond the control of the Member States as 'Masters of the Treaties' – of their competences in economic policy and fiscal policy matters and of further weakening the democratic legitimation of the public authority exercised by the Eurosystem, which would not be compatible with the Basic Law (cf. BVerfGE 134, 366 <395 para. 48>; 142, 123 <192 and 193 para. 131; 193 and 194 para. 134>; 146, 216 <250 and 251 para. 48> […]).

158 The principle of conferral is not solely a principle of EU law but also incorporates constitutional principles from the Member States (cf. BVerfGE 123, 267 <350>; 142, 123 <219 para. 185>). It is integral to justifying the decrease in the level of democratic legitimation of the public authority exercised by the European Union; in Germany, this decrease in democratic legitimation not only affects objective tenets of the Constitution (Art. 20(1) and (2) GG) but also bears upon the citizens' right to vote and their right to democracy (Art. 38(1) first sentence GG). For safeguarding the principle of democracy, it is thus imperative that the bases for the division of competences in the European Union be respected. The finality of the European integration agenda (*Integrationsprogramm*) must not lead to the *de facto* suspension or undermining of the principle of conferral, one of the fundamental principles of the European Union (cf. Declaration no. 42 on Article 352 of the Treaty on the Functioning of the European Union annexed to the Final Act of the Intergovernmental Conference; CJEU, Opinion 2/94 of 28 March 1996, *ECHR Accession*, ECR 1996, I-1783 <1788 para. 30>),).

159 The distinction between economic policy and monetary policy is a fundamental political decision with implications beyond the individual case and with significant consequences for the distribution of power and influence within the European Union. The classification of a measure as a monetary policy matter as opposed to an economic or fiscal policy matter bears not only on the division of competences between the European Union and the Member States; it also determines the level of democratic le-

gitimation and oversight of the respective policy area, given that the competence for monetary policy has been conferred upon the ESCB as an independent authority pursuant to Arts. 130, 282 TFEU (cf. CJEU, Judgment of 9 March 2010, *Commission v Germany*, C-518/07, ECR 2010, I-1897, para. 42; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 132 *et seq*.).

160 Rendering the principle of proportionality more or less meaningless, resulting in a failure to conduct an overall assessment and appraisal of relevant circumstances, carries significant weight for the principle of democracy and the principle of the sovereignty of the people. As explained above (see para. 158 *et seq*.), these dynamics potentially shift the bases for the division of competences in the European Union, undermining the principle of conferral (cf. BVerfGE 142, 123 <201 and 202 para. 151>; 146, 216 <259 and 260 para. 63>). The adoption of economic policy measures by the ESCB would necessitate a treaty amendment pursuant to Art. 48 TEU (cf. CJEU, Opinion 2/94 of 28 March 1996, *ECHR Accession*, ECR 1996, I-1783 <1788 para. 30>), which in turn would require involvement of the German legislature (cf. BVerfGE 142, 123 <201 and 202 para. 151>; 146, 216 <259 and 260 para. 63>).

161 Based on the Judgment of the CJEU of 11 December 2018, a distinction between economic policy and monetary policy would be largely impossible. At the same time, this approach jeopardises the independence of the ECB guaranteed in Art. 130 TFEU, as it possibly exposes the ECB to political pressure that it make use of the leeway afforded it by the CJEU. The broader the scope of the ECB's mandate, and the further it reaches into areas reserved to economic and fiscal policy, the greater the risk that interested parties try to influence the ECB's decision-making [...].

162 (3) In its Judgment of 11 December 2018, the CJEU largely abandoned the distinction between economic policy and monetary policy given that, for the purposes of reviewing the PSPP's proportionality, it simply accepted the proclaimed objectives of the ECB and its assertion that less intrusive means were not available. Thereby, the CJEU allows the ESCB to pursue an economic policy agenda by means of bonds purchases. This has no basis in primary law.

163 The interpretation of the ECB's monetary policy mandate, as undertaken by the CJEU, encroaches upon the competences of the Member States for economic and fiscal policy matters. With few exceptions (cf. Arts. 121 and 122, Art. 126 TFEU), the competence of the European Union in economic policy matters is essentially limited to coordinating the policies of the Member States (Art. 119(1) TFEU). The ESCB is to merely *support* the general economic policies *in* the European Union (Art. 119(2), Art. 127(1) second sentence TFEU; Art. 2 second sentence ESCB Statute); it is not, however, authorised to pursue its own economic policy agenda. To the extent that the *Weiss* Judgment of the CJEU essentially affords the ECB the competence to pursue its own economic policy agenda by means of an asset purchase programme, and refrains from subjecting the ECB's actions to an effective review as to conformity with the order of competences on the basis of the principle of proportionality, including a

balancing of the economic and fiscal policy effects of the PSPP against its monetary policy objective, the Judgment of the CJEU exceeds the judicial mandate deriving from Art. 19(1) second sentence TEU (cf. also BVerfGE 126, 286 <306>). The CJEU thus acted *ultra vires,* which is why, in that respect, its Judgment has no binding force in Germany.

b) The determination under constitutional law whether the Federal Government and the *Bundestag* discharged their responsibility with regard to European integration (*Integrationsverantwortung*) hinges on the preliminary question whether the ESCB's actions in terms of adopting and implementing the PSPP remain within the competences conferred upon it. Given that, for the reasons set out above, the Federal Constitutional Court cannot rely on the *Weiss* Judgment of the CJEU in this regard, it must conduct its own review to decide this preliminary question. Based on its own review, the Second Senate concludes that, due to the lack of sufficient proportionality considerations, Decision (EU) 2015/774 together with Decisions (EU) 2015/2101, (EU) 2015/2464, (EU) 2016/702 and (EU) 2017/100 are neither covered by the monetary policy competence of the ECB (Art. 127(1) first sentence TFEU) nor by its merely supporting competence regarding the Member States' economic policies (Art. 127(1) second sentence TFEU. 164

A programme adopted by the ESCB for the purchase of government bonds, such as the PSPP, that has significant economic policy effects must satisfy the principle of proportionality (cf. CJEU, Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, para. 66 *et seq.*; *loc. cit.*, para. 71). This requires that the programme constitute a suitable and necessary means for achieving the aim pursued; it further requires that the programme's monetary policy objective and its economic policy effects be identified, weighed and balanced against one another. The PSPP's monetary policy objective is in principle not (yet) objectionable (see aa below). However, by pursuing that objective unconditionally while ignoring the economic policy effects resulting from the programme, the ECB manifestly disregards the principle of proportionality enshrined in Art. 5(1) second sentence and Art. 5(4) TEU (see bb below). This violation of the principle of proportionality is structurally significant so that the actions of the ECB constitute an *ultra vires* act (see cc below). 165

aa) It is true that there are doubts as to the PSPP's suitability, for instance in light of persistent low interest rates (cf. German Council of Economic Experts, Annual Report 2016/2017, p. 194 <December 2016>; Annual Report 2017/2018, p. 174 <December 2017>; Association of German Public Banks, 3 Jahre EZB-Wertpapierankäufe, p. 11 <30 November 2017>) and the resulting dampening effect on inflation, which the ECB decisions at issue fail to address, just like they do not mention the possible risk of "reversal effects" that could result from the programme – at least if it were continued for a longer duration. This notwithstanding, the conclusion that the PSPP is suitable for achieving the ECB's inflation target of levels below, but close to, 2% is – in accordance with the CJEU's findings – in principle not objectionable. The objective of the PSPP to increase inflation rates to levels below, but close to, 2% is in principle per- 166

missible as a specific manifestation of the ECB's task to maintain price stability; moreover, Art. 18.1 ESCB Statute expressly authorises the purchasing of marketable instruments as a means available to the ECB in carrying out its tasks (cf. CJEU, Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, para. 54; *loc. cit.*, paras. 69, 146, 153; BVerfGE 146, 216 <284 *et seq*. para. 115 *et seq.*>).

167 bb) However, it is not ascertainable from Decision (EU) 2015/774 of the ECB Governing Council of 4 March 2015 on the PSPP nor from subsequent Decisions (EU) 2015/2101, (EU) 2015/2464, (EU) 2016/702, (EU) 2017/100 and the Decision of 12 September 2019 that these decisions contained, or were based on, the required balancing of the monetary policy objective against the economic policy effects resulting from the means used to achieve it (see (1) below). As a result, the foregoing decisions violate the principle of proportionality enshrined in Art. 5(1) second sentence and Art. 5(4) TEU (see (2) below).

168 (1) The decisions at issue merely assert that the ECB's declared inflation target of levels below, but close to, 2% has not yet been achieved and that less intrusive means were not available. Firstly, this does not make it clear what kind of burdens were taken into consideration in the assessment of the programme's necessity. Secondly, the relevant decisions contain neither a prognosis as to the PSPP's economic policy effects nor an assessment of whether any such effects were proportionate to the intended advantages in the area of monetary policy.

169 Therefore, it is not ascertainable that the ECB Governing Council did in fact consider and balance the effects that are inherent in and direct consequences of the PSPP, as these effects invariably result from the programme's volume of more than EUR 2 trillion and its duration of now over three years. As the PSPP's negative effects increase the more it grows in volume and the longer it is continued, a longer programme duration gives rise to stricter requirements as to the necessary balancing of interests.

170 (a) The PSPP improves the refinancing conditions of the Member States as it allows them to obtain financing on the capital markets at considerably better conditions than would otherwise be the case. To the extent that the PSPP, with a volume of more than EUR 2 trillion, has a substantial impact on the Member States' refinancing conditions, it has far-reaching consequences for the matters governed by Art. 123 TFEU – which fall within the area of fiscal policy. This was also expressly recognised by the CJEU (cf. CJEU, *loc. cit*., paras. 130 and 131, 136) and confirmed by expert third parties in the oral hearing. It is therefore undisputed that the budgetary situations of Member States benefit from the reduction of general interests rates facilitated by the PSPP [...]. This gives rise to the risk – despite the "safeguards" referred to by the CJEU – that necessary consolidation and reform measures will either not be implemented or discontinued [...].

171 Thus, the PSPP has a significant impact on the fiscal policy terms under which the Member States operate and furthermore affects the policy matters governed by Art.

126 TFEU, the SCG Treaty and further specifying provisions of secondary law (cf. Regulation <EU> No. 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area <OJ EU L 306 of 23 November 2011, p. 1>; Regulation <EU> No. 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area <OJ EU L 306 of 23 November 2011, p. 8>; Regulation <EU> No. 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation <EC> No. 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies <OJ EU L 306 of 23 November 2011, p. 12>; Regulation <EU> No. 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances <OJ EU L 306 of 23 November 2011, p. 25>, Council Regulation <EU> No. 1177/2011 of 8 November 2011 amending Regulation <EC> No. 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure <OJ EU L 306 of 23 November 2011, p. 33>; Regulation <EU> No. 472/ 2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability <OJ EU L 140 of 27 May 2013, p. 1>; Regulation <EU> No. 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area <OJ EU L 140 of 27 May 2013, p. 11>; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States <OJ EU L 306 of 23 November 2011, p. 41>). In particular, the PSPP could – as the CJEU, too, concedes (cf. CJEU, *loc. cit.*, paras. 130, 136, 143) – have the same effect as financial assistance instruments pursuant to Art. 12 *et seq*. ESM Treaty. Despite the safeguards cited by the CJEU, the volume and duration of the PSPP may render the effects of the programme disproportionate – even where these effects are initially in conformity with primary law – if they prevent Member States from adopting own measures to pursue a sound budgetary policy and, more generally, result in “monetary dominance”, with the ECB determining fiscal policies of the Member States. At the time Decision (EU) 2015/774 was adopted, it was already foreseeable that several Member States of the euro area would increase new borrowing in order to boost the economy with investment programmes (cf. European Commission, General Government Data, General Government Revenue, Expenditure, Balances and Gross Debt, Part II: Tables by series, Autumn 2016, p. 158).

172 (b) Moreover, the effects of the PSPP on the banking sector must be taken into account. The programme affects balance sheets in the commercial banking sector by transferring large quantities of government bonds, including high-risk ones, to the balance sheets of the Eurosystem, which significantly improves the economic situation of the relevant banks and increases their credit rating. At the same time, it creates an incentive for banks to increase lending despite the low level of interest rates [...].

(c) Relevant economic policy effects of the PSPP furthermore include the risk of creating real estate and stock market bubbles as well as the economic and social impact on virtually all citizens, who are at least indirectly affected *inter alia* as shareholders, tenants, real estate owners, savers or insurance policy holders. For instance, there is a considerable risk of losses for private savings. This has direct consequences for (private) pension schemes and the returns they generate [...]. Both factors lead to, in part excessive, portfolio shifts [...], while risk premiums are in decline. Real estate prices are on the rise with trends of sometimes particularly sharp increases – especially regarding residential property in major cities – [...], which possibly already come close to creating a "market bubble", as the oral hearing confirmed. It is not for the Federal Constitutional Court to decide in the current proceedings how such concerns are to be weighed exactly in the context of a monetary policy decision; rather, the point is that such effects, which are created or at least amplified by the PSPP, must not be completely ignored. 173

(d) As the PSPP lowers general interest rates, it allows economically unviable companies to stay on the market since they gain access to cheap credit [...]. 174

(e) In addition, the longer the programme continues and the more its total volume increases, the greater the risk that the ESCB becomes dependent on Member State politics as it can no longer simply terminate and undo the programme without jeopardising the stability of the monetary union. 175

(2) In view of the considerable economic policy effects resulting from the PSPP – not all of which are discussed here –, it would have been incumbent upon the ECB to weigh these effects and balance them, based on proportionality considerations, against the expected positive contributions to achieving the monetary policy objective the ECB itself has set. It is not ascertainable that any such balancing was conducted, neither when the programme was first launched nor at a any point during its implementation; it is therefore not possible to review whether it was still proportionate to tolerate the economic and social policy effects of the PSPP, problematic as they may be in respect of the order of competences, or, possibly, at what point they have become disproportionate. Neither the ECB's press releases nor other public statements by ECB officials hint at any such balancing having taken place. 176

For this lack of balancing and lack of stating the reasons informing such balancing, the ECB decisions at issue violate Art. 5(1) second sentence and Art. 5(4) TEU and, in consequence, exceed the monetary policy mandate of the ECB deriving from Art. 127(1) first sentence TFEU. 177

cc) The violation of the principle of proportionality is structurally significant. In this regard, the considerations set out above in relation to the Judgment of the CJEU in *Weiss* apply accordingly (cf. para. 124 *et seq.*). Therefore, the ECB's actions amount to an *ultra vires* act. 178

2. At present, it cannot yet be determined whether the Federal Government and the 179

Bundestag did actually violate their responsibility with regard to European integration *(Integrationsverantwortung)* by failing to actively advocate for the termination of the PSPP. This determination is contingent upon a proportionality assessment by the Governing Council of the ECB, which must be substantiated with comprehensible reasons. In the absence of such an assessment, it is not possible to reach a conclusive decision as to whether the PSPP in its specific form is compatible with Art. 127(1) TFEU.

3. The CJEU's conclusion in its Judgment of 11 December 2018 that the PSPP does not violate Art. 123(1) TFEU (see a below) does meet with considerable concerns (see b below). However, on condition that the "safeguards", which, according to the CJEU, prevent circumvention of the prohibition of monetary financing, are strictly observed (see c below), it follows from an overall balancing that a manifest violation of Art. 123(1) TFEU is not ascertainable (see d below). The fact that the purchases by the Eurosystem also include government bonds with a negative yield to maturity and collective action clauses (CAC) does not merit a different conclusion (see e below). 180

a) Art. 123 TFEU prohibits the ESCB from granting monetary financing to Member States (cf. CJEU, Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paras. 94 and 95; *loc. cit.*, paras. 102 and 103; BVerfGE 134, 366 <411 para. 85>; 142, 123 <225 and 226 paras. 198 and 199>; 146, 216 <264 and 265 para. 78> […]). This provision aims to encourage Member States to follow a sound budgetary policy (cf. BVerfGE 146, 216 <265 para. 78>) and to prevent excessively high levels of debt or excessive Member State deficits (cf. CJEU, Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, para. 100; *loc. cit.*, para. 107). 181

Art. 123(1) TFEU also precludes measures circumventing this prohibition, which applies to purchases of government bonds on the secondary markets by the Eurosystem (cf. CJEU, Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paras. 97, 101; BVerfGE 134, 366 <411 para. 85>; 142, 123 <225 and 226 para. 198>; 146, 216 <264 and 265 para. 78>). Bond purchases on the secondary markets must not have an effect equivalent to direct purchases of government bonds from the issuer (cf. CJEU, Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, para. 97; *loc. cit.*, para. 106; BVerfGE 142, 123 <225 and 226 para. 198>; 146, 216 <264 and 265 para. 78>). It must thus be ensured in determining their budgetary policy, the Member States do not know for certain that the Eurosystem will at a future point purchase their government bonds on secondary markets (cf. CJEU, Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, para. 113). 182

It is by now established case-law of the Federal Constitutional Court that the review of a programme for the purchase of government bonds may, in principle, refer to the "safeguards" set out by the CJEU in its *Gauweiler* Judgment. The criteria developed in this context allow for the determination whether a measure circumvents the prohi- 183

bition of Art. 123 TFEU. While the weight and indicative value of these criteria may differ depending on the design of the respective programme, they nevertheless provide a comprehensive framework for a meaningful assessment (cf. CJEU, Opinion of Advocate General Wathelet of 4 October 2018, *Weiss and Others*, C-493/17, EU:C:2018:815, para. 48). Whether these "safeguards" suffice to achieve their intended purpose depends on the particular circumstances of the individual case (cf. CJEU, *loc. cit.*, para. 108). Whether an asset purchase programme is permissible (under primary law) thus depends on the effectiveness of the safeguards built into it.

184 b) In the view of the Second Senate, the manner in which the CJEU applied some of these criteria in its *Weiss* Judgment gives rise to considerable concerns. In relation to Art. 123 TFEU, the Judgment in *Weiss* is essentially based on a consideration of the safeguards built into the PSPP to ensure that the prohibition of Art. 123 TFEU is not circumvented. Yet the CJEU neither subjects these safeguards to closer scrutiny nor does it test them against counter indications (cf. the criticism set out in BVerfGE 142, 123 <217 and 218 para. 182>; 146, 216 <267 *et seq*. para. 81 *et seq*.> […]). In accordance with the above considerations (cf. para. 140 *et seq*.), this does not satisfy the requirements relating to effective judicial review of measures potentially circumventing the prohibition of monetary financing, and contradicts the approach applied by the CJEU in other areas of law (cf. CJEU, Judgment of 8 December 2011, *Chalkor v Commission*, C-386/10 P, ECR 2011, I-13085; Judgment of 6 November 2012, *Otis*, C-199/11, EU:C:2012:684, para. 59 *et seq*.).

185 aa) According to the Judgment of the CJEU in *Gauweiler*, it is generally impermissible for the ECB to make a prior announcement concerning either the decision to carry out purchases of government bonds or the volume of purchases envisaged. The CJEU states that this *inter alia* prevents the conditions of issue of government bonds from being distorted by the certainty that those bonds will be purchased by the ESCB after their issue, ensuring that implementation of a programme such as the PSPP will not, in practice, have an effect equivalent to that of a direct purchase of government bonds from public authorities and bodies of the Member States (cf. CJEU, Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paras. 106 and 107). The Second Senate concurred with this finding (cf. BVerfGE 142, 123 <229 para. 206>). However, in its Judgment of 11 December 2018, the CJEU now argues that announcing in advance the monthly volume of asset purchases, the rules for allocating those volumes between the various central banks of the Member States in accordance with the capital key, the eligibility criteria governing the purchase of a security and the expected duration of that programme contributed to the effectiveness and proportionality of the PSPP (cf. CJEU, *loc. cit.*, paras. 111 and 112). This is not only contradictory but also undermines the criterion of relative uncertainty on the part of Member States and market operators regarding bond purchases by the Eurosystem.

186 The prior announcement of asset purchases with detailed information on the features of the programme may, in principle, be regarded as an indication that such a

programme potentially circumvents Art. 123(1) TFEU. In this respect, the Judgment of 11 December 2018 particularly emphasises that uncertainties regarding the envisaged purchases under the PSPP remain, which the CJEU views as essential "safeguards" designed to ensure that the prohibition of Art. 123(1) TFEU is not circumvented. According to the CJEU, the adoption and implementation of the PSPP may not create certainty regarding future purchases of government bonds, ensuring that Member States would still be compelled, in the event of a deficit, to seek financing on the markets (cf. CJEU, *loc. cit.*, paras. 132, 135, 138 *et seq*., with references to the Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, para. 112 *et seq*.). What the CJEU regards as decisive is whether potential purchasers of government bonds can know for certain that the Eurosystem is going to purchase those bonds within a certain period and under conditions allowing those market operators to act, *de facto*, as intermediaries for the Eurosystem (cf. CJEU, *loc. cit.*, para. 110). Yet, such certainty can not only arise from a legal obligation to purchase the bonds in question, but also from specific factual circumstances (cf. BVerfGE 146, 216 <267 para. 81; 271 and 272 para. 91>). Therefore, the underlying factual circumstances must not be disregarded completely.

187 bb) It is furthermore clarified in both the case-law of the CJEU and of the Second Senate that a blackout period must be observed between the issue of a security on the primary markets and its purchase by the Eurosystem on the secondary markets, in order to prevent the conditions of issue of government bonds from being distorted, ensuring that the prohibition of monetary financing is not circumvented (cf. CJEU, Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paras. 106 and 107; *loc. cit.*, para. 114 *et seq*.; BVerfGE 134, 366 <414 para. 92>; 142, 123 <226 para. 199; 227 para. 202>; 146, 216 <265 para. 78; 272 and 273 para. 93>). Thus, the determination and observance of this blackout period is of considerable importance (cf. already CJEU, Opinion of Advocate General Villalón, *Gauweiler and Others*, C-62/14, EU:C:2015:7, para. 262).

188 To ensure that purchases do not result in a circumvention of Art. 123(1) TFEU, Art. 4(1) of Decision (EU) 2015/774 provides that no purchases are permitted in a newly issued or tapped security and the marketable debt instruments with a remaining maturity that are close in time, before and after, to the maturity of the marketable debt instruments to be issued, over a period to be determined by the Governing Council ('blackout period'). However, no further information on the duration of the blackout period is provided, nor are any reasons specified in this regard. The CJEU accepts this, stating that it contributes to the aim of limiting the foreseeability, in terms of timing, of the Eurosystem's interventions on the secondary markets. According to the CJEU, this lack of information increases the uncertainty of private market operators given that a purchase may thus take place several months or several years after a bond has been issued and given that the Eurosystem has the option of reducing the monthly volume of bond purchases under the PSPP (cf. on the EAPP as a whole, CJEU, *loc. cit.*, paras. 115 and 116). At the same time, the CJEU limits its finding in

this context to the assertion that the length of the blackout period is measured "in days rather than weeks". The CJEU concludes from the mere existence of the blackout period – without any further information – that it constitutes a sufficiently effective "safeguard"; in this regard, it must be noted that the CJEU chose not to request further information that the ECB had actually offered to provide (cf. ECB, Statement of 30 November 2017). The CJEU does not even consider it necessary that further information on the blackout period be disclosed *ex post*.

189 On this basis, it is not possible to conduct a judicial review. The mere existence of a blackout period does not justify the conclusion that purchases of government bonds were not foreseeable or would only occur at a time when an independent market price has formed for eligible securities. In this context, the CJEU states that the uncertainty of private operators is increased by the fact that the blackout period is only a minimum period and a purchase may thus take place several months or several years after a bond has been issued and by the fact that the ESCB has the option of reducing the monthly volume of bond purchases (cf. CJEU, *loc. cit.*, para. 116); ultimately, however, this does not support the aforementioned conclusion. Moreover, by simply accepting the assertions of the ECB without scrutiny, the CJEU contradicts its own case-law; in other cases, the CJEU held that where an EU institution enjoys broad discretion, judicial review is of fundamental importance. In the case at hand, the CJEU fails to sufficiently distinguish between a publication in advance and *ex post* disclosure of information on the relevant blackout period. The CJEU's reasoning is persuasive insofar as it finds publication of the relevant information not to be appropriate where such publication potentially jeopardises the effectiveness of the PSPP in the future (cf. CJEU, *loc. cit.*, paras. 112, 115). For the same reasons, the Second Senate argued [in its Order of Referral] that publication of detailed information on the relevant blackout period should not be required if such disclosure undermined the very purpose of the blackout period (cf. BVerfGE 146, 216 <273 para. 95>). With regard to the publication of detailed information in advance, the risk of undermining the blackout period's purpose is obvious; the same cannot be said, however, for *ex post* disclosure of such information. Rather, *ex post* disclosure of the relevant information is a prerequisite for conducting an effective judicial review of whether the purchases circumvent the prohibition of monetary financing (cf. BVerfGE 142, 123 <223 para. 194>; 146, 216 <272 and 273 para. 93 *et seq*.>). As was confirmed in the oral hearing, no objective reason is ascertainable as to why details on the blackout period cannot be disclosed *ex post*, especially since the ECB can simply modify its purchase strategy for the future so that information on past operations does not necessarily provide insights into future operations. The oral hearing furthermore confirmed that no negative effects on the government bond market would have to be expected in the event that information on the blackout period provided for in Art. 4(1) of Decision 2015/774 was disclosed *ex post*. According to the statements made in the oral hearing, market operators assume in practice that the blackout period lasts between five and 14 days and have adjusted their behaviour accordingly. For the formation of prices on the primary markets, the precise duration of the blackout period is in any

case irrelevant.

190 In this context, the CJEU observes that a requirement to publish *ex post* details relating to the blackout period cannot be derived from the obligation to state reasons laid down in Art. 296(2) TFEU, given that the purpose of such publication would be to show the precise content of the measures adopted by the ESCB rather than the reasons justifying those measures (cf. CJEU, *loc. cit.*, para. 43 […]). Again, this view is not convincing. The statement of reasons for an EU measure required under Art. 296(2) TFEU must enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review (cf. CJEU, Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, para. 70). In this regard, however, the CJEU invokes, without explanation, the requirements regarding statement of reasons applicable to legislative acts and applies them accordingly to simple administrative action on the part of the Eurosystem (cf. CJEU, *loc. cit.*, para. 32), rendering effective judicial review of the PSPP on the basis of Art. 123(1) TFEU *de facto* impossible (cf. BVerfGE 146, 216 <273 and 274 para. 95>). As a result, it is neither possible to review whether the envisaged blackout period is even suitable for protecting the formation of market prices on the secondary markets [...], nor whether the blackout period is actually observed in practice. With this approach, the CJEU undermines its own assertion that the blackout period serves as one of the safeguards ensuring that private market operators cannot act as intermediaries of the ESCB (cf. CJEU, *loc. cit.*, paras. 113 and 114).

191 The criterion of a blackout period, as interpreted and applied by the CJEU, is manifestly unsuitable for preventing a circumvention of Art. 123(1) TFEU. It effectively deprives its steering function of any effect; in fact, it is not possible to review whether the blackout period has any steering effect at all. The assertion that the ESCB's risk management committee might be better placed than a court to assess whether the blackout period is adequate (cf. CJEU, Opinion of Advocate General Wathelet of 4 October 2018, *Weiss and Others*, C-493/17, EU:C:2018:815, para. 60) does not merit a different conclusion. This committee is part of the very institution whose actions are under review here; therefore, it is neither called upon to provide effective legal protection nor to ensure democratic legitimation of the ECB's actions (cf. BVerfG, Judgment of Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, paras. 137, 212, 274 *et seq*.).

192 cc) The holding of government bonds until maturity has a significant impact on the secondary markets for government securities (cf. CJEU, Opinion of General Advocate Villalón of 14 January 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:7, para. 243) and constitutes an important indication for monetary financing of state budgets. According to the Judgment of the CJEU in *Gauweiler*, this practice affects the impetus for Member States to follow a sound budgetary policy. The resulting effects were, however, limited by the option of selling the purchased bonds at any time, which – as per the reasoning provided in *Gauweiler* – means that the consequences of purchasing those bonds "may be temporary" (cf. CJEU, Judgment of 16 June

2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, para. 117). The CJEU submits that the holding of bonds until maturity is in any case only permissible if it is necessary to achieve the objectives sought. It further states that, in any event, it must be ensured that the market operators involved cannot be certain that the ESCB will make use of that option (cf. CJEU, Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, para. 118). Based on these considerations, the Second Senate has found that the prohibition of measures circumventing Art. 123(1) TFEU is not violated if – *inter alia* – the purchased securities are only exceptionally held until maturity and that the merely temporary purchase and holding of such assets remains the rule (cf. BVerfGE 142, 123 <227 *et seq*. paras. 202, 206>; 146, 216 <266 para. 78; 274 para. 96>). It follows that the holding of purchased bonds until maturity without limitations in terms of duration or volume is at least an indication that such purchases amount to monetary financing that is impermissible under Art. 123(1) TFEU.

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By contrast, the CJEU finds, in its Judgment in *Weiss*, that there is no obligation to only hold securities purchased by the Eurosystem until maturity in exceptional cases (cf. CJEU, *loc. cit.*, para. 147). Yet at the same time, the CJEU emphasises that the purchases under the PSPP are potentially only temporary in nature (cf. CJEU, *loc. cit.*, paras. 135, 150). The CJEU contends that the possibility of holding government bonds purchased by the Eurosystem until maturity does not imply a waiver of the right to payment of the debt, by the issuing Member State, once the bond matures (cf. CJEU, *loc. cit.*, para. 146; cf. already CJEU, Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, para. 118), and that Decision (EU) 2015/774 does not provide any further details concerning the possible sale of bonds purchased under the PSPP so that the Eurosystem retains the option of selling such bonds at any time and without any specific conditions in accordance with Art. 12(2) of the Guideline. According to the CJEU, the mere fact that the Eurosystem has the option of selling the purchased bonds at any time helps maintain the impetus to conduct a sound budgetary policy, since that option allows the Eurosystem to adapt its programme according to the attitudes of the Member States concerned. The CJEU lastly states that the ESCB is under no obligation to purchase bonds from Member States that ceased to follow a sound budgetary policy (cf. CJEU, *loc. cit.*, para. 148 *et seq*.; similar observations were already made in CJEU, Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paras. 117, 120).

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What appears problematic is that the CJEU, in its Judgment of 11 December 2018, emphasises the merely temporary nature of the PSPP (cf. CJEU, *loc. cit.*, paras. 134 and 135) but without making any determination as to what consequences this actually entails. The CJEU rejects any obligation on the part of the Eurosystem to sell bonds with an indefinite or very long duration purchased under the programme on the grounds that the PSPP is subject to the principle of necessity and that market operators lack specific certainty regarding the holding and selling of bonds. The CJEU also fails to make any determination on the necessity of an exit strategy.

However, if the Eurosystem were to refrain from reselling purchased government bonds indefinitely, it would assume the role of a permanent source of finance for the Member States. This is especially true if – as is currently the case under the PSPP – payments received upon maturity are reinvested for purchasing new government bonds. These sovereign debts would then be permanently tied up in the Eurosystem and would become almost entirely irrelevant for the markets – especially with regard to the credit rating of the issuing Member States and thus also the refinancing conditions available to them (cf. BVerfGE 146, 216 <274 *et seq*. paras. 97 and 98>). This would amount to a violation of the objective prohibition laid down in Art. 123(1) TFEU, regardless of whether or not market operators had certainty that specific bonds would be purchased by the Eurosystem. 195

Moreover, whether the purchases in question are necessary for achieving the monetary policy objectives – a criterion invoked by the CJEU in this context (cf. CJEU, *loc. cit.*, para. 152) – should not actually be relevant for determining whether the purchases amount to a circumvention of Art. 123(1) TFEU. This provision sets out an absolute prohibition of monetary financing. It does not leave room for interferences on the grounds that the relevant measures are necessary and justifiable. Rather, where a measure amounts to a circumvention of the prohibition of monetary financing, Art. 123(1) TFEU sets a definitive limit that restricts the means available to the Eurosystem in pursuing its monetary policy objectives. 196

c) Nevertheless, the decisions on the adoption and implementation of the PSPP ultimately do not amount to a qualified violation of Art. 123(1) TFEU given that, based on a proper application of the criteria recognised by the CJEU, it is not ascertainable that the purchases under the PSPP manifestly circumvent the prohibition of monetary financing. It is true that the approach taken by the CJEU in *Weiss* renders some of these criteria practically meaningless; in an overall assessment, however, the remaining valid criteria still suffice to rule out a manifest circumvention of Art. 123(1) TFEU. In this regard, the CJEU thus remains within the judicial mandate conferred upon it in Art. 19(1) second sentence TEU (cf. BVerfGE 142, 123 <215 para. 176>). Therefore, the interpretation undertaken by the CJEU provides the basis for the review of the PSPP Decisions in question by the Second Senate (cf. BVerfGE 123, 267 <353>; 126, 286 <304>; 134, 366 <385 para. 27>; 140, 317 <339 para. 46>; 142, 123 <215 para. 176>). 197

aa) The CJEU does not question, as such, the criterion that purchases of government bonds not be announced in advance. The CJEU's finding that neither issuing Member States nor market operators can essentially be certain that specific government bonds will indeed by purchased under the PSPP is ultimately not objectionable. 198

Nonetheless, it is true that Member States and market operators knew in advance the purchase volume, the distribution of purchases between the national central banks in accordance with the ECB's capital key, the eligibility criteria for securities and the (initial) duration of the PSPP so that from their perspective there was a high 199

probability that a significant proportion of eligible issues would be purchased by the Eurosystem. German bonds, for example, accounted for 23.6951% of the purchases made until end 2018, which – based on the monthly volume of net purchases in the amount of EUR 60 billion – translates to a monthly purchase pace of EUR 11.37 billion (cf. BVerfGE 146, 216 <269 and 270 para. 87>). Similarly, it was possible to deduce, with respect to the announced purchase volumes and limits, which specific bonds would meet the eligibility criteria for the PSPP. In addition, the temporary shortage of eligible securities (cf. CJEU, *loc. cit.*, paras. 127 and 128) issued by Germany, Finland, Ireland, the Netherlands and Portugal increased the likelihood of purchases for certain ISIN, especially since the purchase limit per issue refers not to the proportion of securities available on the secondary markets but to the total volume of the relevant issue (cf. BVerfGE 146, 216 <267 *et seq*. para. 82 *et seq*., 269 *et seq*. para. 86 *et seq*.>; German Council of Economic Experts, Annual Report 2017/2018, p. 167 <December 2017>).

200 Despite these strong indications, however, it was not ascertainable in the oral hearing that issuing Member States and market operators could essentially be certain that newly issued government bonds would indeed be purchased by the Eurosystem on the secondary markets.

201 bb) For ensuring that Art. 123(1) TFEU is observed, in particular for ensuring that Member States and market operators cannot essentially be certain of purchases under the PSPP, it is particularly significant that the purchase volume is determined in advance and, more importantly, subject to limits. According to the Judgment of the CJEU of 11 December 2018, this requirement is satisfied by the purchase limit set out in Art. 5(1) and (2) of Decision 2015/774, which provides that the Eurosystem central banks cannot purchase more than 33% of a particular issue of bonds of a central government of a Member State or more than 33% of the outstanding securities of one of those governments (cf. CJEU, *loc. cit.*, para. 124 *et seq*.). The CJEU found that due to the purchase limit only a small proportion of the bonds issued by one Member States may be purchased by the Eurosystem, so that the respective Member State still has to rely chiefly on the markets to finance its public deficit. In the view of the CJEU, those purchase limits, compliance with which is monitored on a daily basis by the ECB in accordance with Art. 4(3) of the Guideline, ensure that a private operator necessarily runs the risk of not being able to resell bonds to the ESCB on the secondary markets, as a purchase of all the bonds issued is in all cases precluded (cf. CJEU, *loc. cit.*, para. 125).

202 It follows that, even though the purchase limit of 33% is determined not by the proportion of securities available on the secondary market, as identified by the ISIN, but by the total volume of the issue, it remains uncertain for both issuing Member States and market operators, at least if the purchase limit is observed, which eligible instrument from the total volume of eligible securities will actually be purchased – provided that a large enough volume is available on the markets. It was established in the oral hearing that the purchase limit of 33% still allows for a sufficient “safety margin” en-

suring that there is no actual certainty regarding purchases of bonds by the Eurosystem; it was also established that only on this condition can it be assumed that the market is not dominated by the Eurosystem, which is imperative for preventing Member States and market operators from being largely certain that newly issued government bonds will be purchased by the ESCB.

203 cc) The distribution of the purchase volume according to the key for subscription of the ECB's capital (Art. 6(2) and (3) Decision <EU> 2015/774) also contributes to preventing a circumvention of Art. 123(1) TFEU. It constitutes an objective criterion that is independent of the economic and budgetary situation of the respective Member States of the euro area. Therefore, it can be ruled out that this criterion could be used to purposely direct bond purchases to support struggling Member States. Moreover, the CJEU rightly points out that the PSPP is not selective – setting it apart from the programme reviewed in *Gauweiler* (cf. CJEU, Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, para. 89) – and will have an impact on financial conditions across the whole of the euro area as opposed to merely meeting the specific financing needs of certain Member States (cf. CJEU, *loc. cit.*, para. 82). This in in line with the view adopted by the Second Senate in earlier decisions (cf. BVerfGE 134, 366 <406 para. 73; 412 para. 87>; 142, 123 <217 and 218 para. 182>).

204 In the CJEU'S view, the distribution of the purchase volume according to the capital key furthermore means that the considerable increase in a Member State's deficit resulting from the possible abandonment of a sound budgetary policy would reduce the proportion of that Member State's bonds purchased by the ESCB and the PSPP does not therefore enable a Member State to avoid the consequences, so far as financing is concerned, of any deterioration in its budgetary position (cf. CJEU, *loc. cit.*, para. 140).

205 dd) The CJEU considers that several other factors contribute to ensuring that Art. 123(1) TFEU is not circumvented, although the relevance of these factors depends on discretionary decisions of the ECB. One of these factors is that pursuant to Art. 8 of Decision 2015/774 the ECB only publishes aggregate information on the volume of bonds originating from public authorities and bodies of one Member State that are purchased under the PSPP (cf. CJEU, *loc. cit.*, para. 126). The CJEU further states that the Eurosystem laid down rules intended to ensure that the purchase volume cannot be precisely determined in advance: For instance, the CJEU points out that purchases under the PSPP are subsidiary to purchases under other sub-programmes of the EAPP (Art. 2(2) of the Guideline) so that the volume of PSPP purchases can vary from month to month; furthermore, the Governing Council is authorised to depart from the monthly forecast volume, when specific market conditions so demand. Moreover, the CJEU finds that neither Member States nor market operators can deduce with certainty that the amount allocated to a national central bank for the purchase of bonds originating from public authorities and bodies of that Member State will indeed be used (Art. 6(1) Decision <EU> 2015/774). The CJEU also submits that the allocation of securities to the national central banks according to the capital key is subject

to revision by the Governing Council. The CJEU also refers to Art. 3(1), (3) and (5) of Decision (EU) 2015/774, holding that the ESCB has authorised the purchase of diversified securities under the PSPP, thereby reducing the foreseeability of purchases, as it is possible in that context for not only bonds issued by central governments but also those issued by regional or local governments to be purchased. Furthermore, as the CJEU points out, those bonds can have a maturity of between one year and 30 years and 364 days and their yield may, where necessary, be negative, or even below the deposit facility rate. Lastly, the CJEU submits that Decisions (EU) 2015/2464 and (EU) 2017/100 further limited the foreseeability of the Eurosystem's purchases of Member State bonds (cf. CJEU, *loc. cit.*, para. 118 *et seq*.)

206 ee) In *Weiss*, the CJEU in principle also agrees with the requirement of observing a 'blackout period' between the issue of a debt security and its purchase by the Eurosystem (cf. CJEU, *loc. cit.*, paras. 115 and 116). However, the CJEU did not review whether the duration of the blackout period envisaged in Art. 4(1) of Decision (EU) 2015/774 was sufficient and whether it was actually observed until the end of 2018; as the relevant information was not provided by the ECB, it was also not possible for the Second Senate to make any determination in this regard. Yet, on the basis of Art. 4(1) of Decision (EU) 2015/774, together with the ECB's assertion that the blackout period was measured in "days rather than weeks" and the statements made by the expert third parties in the oral hearing, it can reasonably be assumed that the blackout period was in fact observed.

207 ff) Purchases under the PSPP are furthermore limited to government bonds of Member States that achieve a certain credit rating (cf. CJEU, *loc. cit.*, paras. 142 and 143). In addition to the general eligibility criteria for monetary operations, under Guideline ECB/2011/14, issuers must have a credit quality assessment of at least Credit Quality Step 3 (Art. 3(2) of Decision <EU> 2015/774). Bonds of euro area Member States that are subject to a financial assistance programme may be eligible if the application of the Eurosystem's credit quality threshold is suspended by the Governing Council pursuant to Art. 8 of Guideline ECB/2014/31 (Art. 3(2) lit. c of Decision <EU> 2015/774). The ECB exercised this option in Art. 1(2) of Decision (EU) 2016/1041 in relation to the Hellenic Republic, following the decision of the ESM to grant further financial assistance (cf. BVerfGE 146, 216 <236 para. 15>). According to the CJEU, Art. 3(2) of Decision (EU) 2015/774 lays down stringent eligibility criteria based on a credit quality assessment, from which it is possible to depart only if the Member State concerned is subject to a financial assistance programme. The CJEU further points out that Art. 13(1) of the Guideline provides in addition that, in the event of a downgrade of the rating of a Member State's bonds or of a negative review of a financial assistance programme, the Governing Council will have to decide whether to sell the bonds of the Member State concerned that have already been purchased. From this, the CJEU concludes that if a Member State abandoned a sound budgetary policy, it would thus run the risk of the bonds that it issues being excluded from the PSPP because they have been downgraded or of the Eurosystem selling the bonds already

purchased (cf. CJEU, *loc. cit.*, para. 138 *et seq.*).

208 It must be noted, of course, that the ECB's Governing Council has gradually relaxed the criteria regarding the credit rating of eligible securities over the course of the programme. Any further lowering of the criteria below a rating complying with at least Credit Quality Step 3 would – as was confirmed in the oral hearing – no longer meet the aforementioned standards in terms of credit quality assessment.

209 gg) Another relevant factor in determining whether the PSPP circumvents Art. 123(1) TFEU is whether the purchased bonds are held until maturity. In *Weiss*, the CJEU in principle agrees with this criterion; however, it also points out that Art. 18 ESCB Statute does not give rise to any obligation to sell the purchased bonds before they reach maturity (cf. CJEU, *loc. cit.*, para. 146 *et seq.*). Nonetheless, the CJEU emphasises – even though the duration of the PSPP was extended by Decision (EU) 2015/2464 and again by Decision (EU) 2017/100 – that the programme is of a merely temporary nature, which is reinforced by the fact that, under Art. 12(2) of the Guideline, purchased bonds can be sold at any time. The CJEU concludes that, on this basis, the programme can be adapted to the attitudes of the Member States concerned and that the operators involved cannot be certain that the Eurosystem will not make use of its option to sell (cf. CJEU, *loc. cit.*, para. 132 *et seq.*; cf. already CJEU, Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, para. 114).

210 Even though neither Art. 1 of Decision (EU) 2015/774 nor any of its subsequent amendments expressly provide for the option to sell the bonds purchased by the Eurosystem, they also do not preclude this option. Nevertheless, government bonds purchased under the PSPP have so far – with few exceptions in particular cases – not been sold before maturity. So far the ECB only sold individual assets in exceptional cases for technical reasons, e.g., in order to comply with the purchase limits. This does not, however, call into question the relevance of this criterion as such, especially since it is not manifestly untenable to assume that the monetary purpose pursued by the PSPP has so far precluded sales before maturity due to the (still) limited duration of the programme. Any sale of bonds purchased under the PSPP would reduce the money supply when it is the programme's objective to actually increase liquidity. Thus, the holding of bonds by the Eurosystem for a certain period of time is an essential feature of the programme, given that there must be a sufficient increase in market liquidity in order to lead to the rebalancing of the portfolio that the programme aims to achieve (cf. CJEU, Opinion Wathelet of 4 October 2018, *Weiss and Others*, C-493/17, EU:C:2018:815, para. 71). This was confirmed in the oral hearing.

211 However, even though it must be assumed – in accordance with the CJEU's view – that the holding of government bonds until maturity is not precluded by Art. 18(1) ESCB Statute, it is still imperative to ensure that the relationship between rule and exception not be reversed regarding the sale and holding until maturity of bonds. The greater the volume of purchased bonds in the balance sheets of the Eurosystem, the greater the risk that the prohibition of monetary financing is circumvented. This is es-

pecially true with regard to the PSPP given the massive volume of the programme and its now quite considerable overall duration.

hh) If a binding exit strategy, which sets sufficiently specific criteria for ending the programme, was already decided on at the time a programme such as the PSPP was adopted, this would significantly minimise the risk of a circumvention of Art. 123(1) TFEU. In the oral hearing, the expert third parties have repeatedly emphasised that determining an exit strategy is imperative and that the criteria set out therein must ensure that the selling of bonds purchased under the programme does not become a mere theoretical possibility. Yet the decisions at issue do not contain any such exit strategy. 212

d) Ultimately, based on a proper application of the criteria set out by the CJEU in its Judgment of 11 December 2018, it is not ascertainable that the purchases under the PSPP manifestly circumvent the prohibition of monetary financing. In an overall assessment, the "safeguards" built into the PSPP still suffice to rule out a manifest circumvention of Art. 123(1) TFEU. 213

At the same time, it must be noted that the CJEU did render some of these "safeguards" largely ineffective; this is true, for instance, with regard to the prohibition of prior announcements, the blackout period, the holding of bonds until maturity and the requirement to decide on an exit strategy. Moreover, given that the CJEU refrained from conducting a more thorough review, some of these "safeguards" cannot be comprehensibly assessed as to whether they even constitute suitable means for ensuring the necessary level of uncertainty on the part of Member States and market operators in relation to the bond purchases, especially as their effectiveness depends on the willingness of the ECB Governing Council to actually make use of these means during the implementation of the programme, which can neither be legally enforced nor reviewed. The CJEU does not examine, for any of the aforementioned "safeguards", whether these have already been put to use; nor does the CJEU look into the question if and to what extent the failure to use certain options reinforces market expectations that might actually lead to certainty on the part of market operators. 214

Nonetheless, the determination whether a programme like the PSPP manifestly circumvents the prohibition in Art. 123(1) TFEU does not hinge on a single criterion; rather, it requires an overall assessment and appraisal of the relevant circumstances (cf. BVerfGE 134, 366 <412 para. 87; 416 and 417 para. 99>; 142, 123 <222 and 223 para. 193; 227 para. 201> […]). This was also confirmed by the statements made by the expert third parties in the oral hearing. 215

Based on the required overall assessment, and despite the concerns set out above in relation to the Judgment of the CJEU of 11 December 2018, a manifest circumvention of Art. 123(1) TFEU is ultimately not ascertainable, which is mainly due to the following reasons: 216

- even though certain information is published by the ECB [in advance] (see paras. 186 and 187, 200) no specific information is provided in relation to individual ISIN;
- the volume of the purchases is limited from the outset;
- only aggregate information on the purchases carried out by the Eurosystem is published;
- the purchase limit of 33% is observed;
- purchases are carried out according to the capital key of the ECB;
- bonds of public authorities may only be purchased under the PSPP if the issuer has a minimum credit quality assessment that provides access to the bond markets; and
- purchases must be restricted or discontinued, and purchased securities sold on the markets, if continuing the intervention on the markets is no longer necessary to achieve the inflation target.

217 The purchase limit of 33% and the distribution of purchases according to the ECB's capital key, in particular, have so far prevented selective measures being taken under the PSPP for the benefit of individual Member States (cf. CJEU, *loc. cit.*, paras. 140 and 141; cf. already CJEU, Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, para. 95) and the Eurosystem becoming the majority creditor of one Member State. To this extent, these are the crucial "safeguards" based on which it can be concluded that possible circumventions of the prohibition in Art. 123(1) TFEU are not sufficiently manifest for finding a violation.

218 e) The CJEU has declared irrelevant the fact that Art. 3(5) of Decision (EU) 2015/774 allows purchases of securities at a negative yield to maturity under the PSPP – initially, this concerned government bonds with a yield at the deposit facility rate of y -0.4% at that time; since 1 January 2017, purchases at an even lower yield to maturity are possible; similarly, the CJEU regards collective action clauses (CAC) as irrelevant in this context. Both conclusions are comprehensible (on securities with a negative yield, see aa below; on collective action clauses, see bb below).

219 aa) In its reasoning, the CJEU submits that the open market operations [that may permissibly be carried out by the Eurosystem] are not limited to bonds with a minimum yield, although the issue of such bonds is advantageous in financial terms for the Member States concerned, as they can thus realise net profits – which in this scenario are financed by the Eurosystem. The CJEU points out that those bonds can be purchased only on the secondary markets and the programme does not therefore give rise to the grant of overdraft facilities or any other type of credit facility in favour of public authorities and bodies of the Member States, or to the direct purchase from them of their debt instruments. In addition, the CJEU contends that easing the yield criteria is more likely to reduce the certainty of operators on that point by broadening the range of bonds eligible for purchase under the PSPP. The CJEU states, lastly,

that the purchase of bonds at a negative yield cannot be considered to reduce the impetus of the Member States to follow a sound budgetary policy given that such bonds can be issued only by Member States whose financial situation is assessed positively by operators in the sovereign debt markets (cf. CJEU, *loc. cit.*, para. 153 *et seq*.).

220 Assuming that the formation of market prices remains possible under the PSPP, the profits realised by Member States through bonds issued at a negative yield result, in economic terms, from the behaviour of the initial purchasers on the primary markets. It has not been proven whether this is actually the case. But neither did the oral hearing prove the opposite.

221 bb) The fact that the Eurosystem does not demand privileged creditor status in the context of purchases under the PSPP (cf. Recital 8 of Order <EU> 2015/774) does not give rise to a manifest violation of Art. 123(1) TFEU either. In its *OMT* Judgment, the Second Senate already concurred with the view of the CJEU that the risk of a debt cut does not necessarily render such purchases incompatible with the prohibition of monetary financing provided that the purchases are limited to bonds of Member States that have access to the bond markets (cf. BVerfGE 142, 123 <228 para. 204>; CJEU, Judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, para. 126). These considerations apply accordingly to the PSPP.

222 4. The scheme for the allocation of risk between the national central banks provided for in Art. 6(3) of Decision 2015/774 and its subsequent amendments does not enable a redistribution of sovereign debt between the Member States of the euro area (see a below) and thus does not affect the overall budgetary responsibility of the German *Bundestag* (see b below).

223 a) The CJEU found the fifth question inadmissible on the grounds that it is clearly hypothetical in nature (cf. CJEU, *loc. cit.*, para. 166). In this regard, the CJEU points out that the ECB decisions at issue do not entail the sharing of the entirety of losses incurred by the national central banks during implementation of the PSPP; rather, the PSPP provides only for the sharing of losses generated by securities issued by international issuers. The CJEU submits that the potential volume of those losses is circumscribed by Art. 6(1) of Decision (EU) 2015/774, which limits the proportion of those securities to 10% of the book value of purchases under the PSPP, and that the losses that may be shared, should the case arise, between the national central banks cannot be the direct consequence of the default of a Member State (cf. CJEU, *loc. cit.*, para. 162 *et seq*.). The CJEU also found that in order to prevent the position of a central bank of one Member State from being weakened in the event of an issuer in another Member State failing to make a repayment, Art. 6(3) of Decision 2015/774 provides that each national central bank is to purchase only eligible securities of issuers of its own jurisdiction (cf. CJEU, *loc. cit.*, para. 96). According to the CJEU, this ensures that the PSPP does not enable a Member State to avoid the consequences, so far as financing of its public deficit is concerned, of any deterioration in its budgetary position (cf. CJEU, *loc. cit.*, para. 140).

Moreover, the CJEU notes that primary law includes no rules providing for the losses sustained by one of the national central banks in the course of open market operations to be shared between those central banks. The CJEU emphasises that the Treaties do not confer the competences necessary in this regard under Art. 5(1) second sentence and Art. 5(2) TEU (cf. CJEU, *loc. cit.*, para. 162) so that, under EU law, adopting any such rule would require a treaty amendment in accordance with Art. 48 TEU, whereas such a rule could not be adopted through acts of secondary or tertiary law, including decisions by the ECB. Against this backdrop, the finding of the CJEU declaring the fifth question inadmissible has specific consequences in terms of substantive law: it rules out any future acts of secondary or tertiary law creating such a loss-sharing regime given that, on the basis of the current European integration agenda (*Integrationsprogramm*), the CJEU regards the creation of such a rule of EU law as hypothetical on the grounds that it is not only uncertain in factual terms but also legally impossible. If the ECB were authorised to adopt such a loss-sharing regime on the basis of the current Treaties, the fifth question would not have been hypothetical at the time the CJEU rendered its decision. In the balance sheets of national central banks, the value of bonds purchased under the PSPP accounted for more than EUR 2 trillion, which would by far have exceeded the amount of existing reserves at least in the event of a large Member State defaulting. At the time the question was referred for a preliminary ruling, there was reason to believe, in terms of a real possibility, that the ECB were indeed free in deciding on the modalities of risk sharing given that a different risk-sharing regime had been applied in the past, for instance in the case of the Securities Markets Programme (SMP) (cf. BVerfGE 146, 216 <293 para. 133> with references to *Bundesbank*, Annual Report 2010, p. 175). 224

Moreover, it follows from the CJEU's replies to the first four questions referred that retroactive changes to the risk-sharing regime are prohibited. A regime providing for full risk-sharing would enable individual Member States to avoid the consequences of any deterioration in its budgetary position (cf. CJEU, *loc. cit.*, para. 140) and retroactively compromise the "safeguards" built into the PSPP for the purposes of preventing a circumvention of Art. 123(1) TFEU. It follows from the observations of the CJEU, in the sense of an *acte éclairé*, that the risk-sharing regime is a determinant factor in assessing the proportionality of the PSPP, which precludes any 'retroactive' changes in this regard. 225

Moreover – with the exception of the indemnifications provided for in Art. 32.4 ESCB Statute – any redistribution of losses resulting from open market operations carried out by the national central banks under the PSPP would violate the EU principle of national budget autonomy enshrined in Arts. 123 and 125 TFEU, as one of the constitutive principle of the monetary union (cf. BVerfGE 129, 124 <181 and 182>; 132, 195 <248 para. 128>; 134, 366 <393 para. 41>; 135, 317 <407 para. 180>). The Treaties do not allow a redistribution among national budgets (cf. BVerfG 134, 366 <393 para. 41> […]), despite the fact that the 'no bail-out clause' in Art. 125 TFEU does not prohibit all forms of financial assistance (cf. CJEU, Judgment of 27 Novem- 226

ber 2012, *Pringle*, C-370/12, EU:C:2012:756, para. 136). 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. 135). Full sharing of possible losses would be manifestly incompatible with Art. 32.4 ESCB Statute and amount to direct monetary financing of state budgets. According to Art. 1(1) lit. b of Regulation (EC) 3603/93, the term ‘other type of credit facility’ within the meaning of Art. 123 TFEU means, in particular, “any financing of the public sector's obligations vis-à-vis third parties”. If national central banks of other Member States assumed actual (or impending) losses incurred by one national central bank through the purchasing of bonds under the PSPP, they would essentially finance the securitised obligations vis-à-vis the national central bank holding the relevant debt security. According to the case-law of the CJEU, such retroactive granting of financial assistance to a Member State clearly does not fall within monetary policy (cf. CJEU, Judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, para. 57).

227 b) In light of the volume of bond purchases under the PSPP, which amounts to more than EUR 2 trillion, such a risk-sharing regime, at least if it were subject to (retroactive) changes, would affect the limits set by the overall budgetary responsibility of the German *Bundestag*, as recognised by the Second Senate in its case-law (cf. BVerfGE 129, 124 <179>; 132, 195 <240 para. 108>; 135, 317 <401 para. 163>; 142, 123 <231 para. 213>), and be incompatible with Art. 79(3) GG. As this could possibly entail a recapitalisation of the *Bundesbank* (cf. BVerfGE 142, 123 <232 and 233 para. 217>; 146, 216 <291 para. 128>), it would essentially amount to an assumption of liability for decisions taken by third parties with potentially unforeseeable consequences, which is impermissible under the Basic Law (cf. BVerfGE 129, 124 <179 *et seq.*>; 134, 366 <418 para. 102>; 146, 216 <291 para. 129>).

228 However, in its current design, the PSPP does not provide for such a risk-sharing regime in relation to bonds of the Member States purchased by the national central banks. According to the information provided by the ECB in the present proceedings, the adoption of such a risk-sharing regime is not intended, and would in any case be prohibited under primary law, as set out above. Against this backdrop, it can be ruled out that the PSPP affects the constitutional identity of the Basic Law (Art. 23(1) in conjunction with Art. 79(3) in conjunction with Art. 20(1) and (2) GG) in general and the overall budgetary responsibility of the German *Bundestag* in particular.

229 5. Based on their responsibility with regard to European integration (*Integrationsverantwortung*) (see a below), constitutional organs have a duty to take active steps against the PSPP given that it constitutes an *ultra vires* act (see b below).

230 a) The responsibility with regard to European integration (*Integrationsverantwortung*) requires the constitutional organs to protect and promote the right to democracy enshrined in Art. 38(1) first sentence in conjunction with Art. 20(2) first sentence GG (see para. 115).

231 In the event of a manifest and structurally significant exceeding of competences by institutions, bodies, offices and agencies of the European Union, the constitutional organs must use the means at their disposal to actively take steps seeking to ensure adherence to the European integration agenda (*Integrationsprogramm*) and respect for its limits. If it is either not possible or not wanted to transfer sovereign powers [for the purposes of rectifying the lack of EU competences], the constitutional organs are – within the scope of their competences – required to use legal or political means to work towards the rescission of acts that are not covered by the EU integration agenda *(Integrationsprogramm)*, and – as long as these acts continue to have effect – to take suitable action to limit the domestic impact of such acts to the greatest extent possible (cf. BVerfGE 134, 366 <395 and 396 para. 49>). To this end, they must take suitable action to ensure adherence to the European integration agenda (*Integrationsprogramm*) (cf. BVerfGE 123, 267 <353, 364 and 365, 389 and 390, 391 and 392, 413 and 414, 419 and 420>; 134, 366 <395 and 396 para. 49; 397 para. 53>). In certain legal and factual circumstances, the responsibility with regard to European integration (*Integrationsverantwortung*) may indeed give rise to a specific obligation to act.

232 b) As the PSPP constitutes an *ultra vires* act, given the ECB's failure to substantiate that the programme is proportionate, their responsibility with regard to European integration (*Integrationsverantwortung*) requires the Federal Government and the *Bundestag* to take steps seeking to ensure that the ECB conducts a proportionality assessment in relation to the PSPP. This duty does not conflict with the independence afforded both the ECB and the *Bundesbank* (Art. 130, Art. 282 TFEU, Art. 88(2) GG), as was already decided by the Second Senate. The Federal Government and the *Bundestag* must clearly communicate their legal view to the ECB or take other steps to ensure that conformity with the Treaties is restored.

233 This applies accordingly with regard to the reinvestments under the PSPP that began on 1 January 2019 and the restart of the programme as of 1 November 2019 (cf. Decision of the ECB Governing Council of 12 September 2019). In this respect, the competent constitutional organs also have a duty to continue monitoring the decisions of the Eurosystem on the purchases of government bonds under the PSPP and use the means at their disposal to ensure that the ESCB stays within its mandate.

234 6. To the extent that the Federal Constitutional Court finds an act of institutions, bodies, offices and agencies of the European Union to exceed the limits set by the European integration agenda (*Integrationsprogramm*) in conjunction with Art. 23(1) second sentence and Art. 20(2) first sentence GG, this *ultra vires* act does not partake in the precedence of application of EU law (*Anwendungsvorrang*). As a result, the *ultra vires* act is not to be applied in Germany, and has no binding effect in relation to German constitutional organs, administrative authorities and courts. These organs, courts and authorities may participate neither in the development nor in the implementation, execution or operationalisation of *ultra vires* acts (cf. § 31(1) BVerfGG; BVerfGE 89, 155 <188>; 126, 286 <302 *et seq.*>; 134, 366 <387 and 387 para. 30>;

142, 123 <207 para. 162>). This generally also applies to the *Bundesbank*, all the more as it is called upon to advise the Federal Government in monetary policy matters pursuant to § 13(1) BBankG.

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

D.

236 [...]

E.

237 This decision was taken with 7:1 votes.

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Bundesverfassungsgericht, Urteil des Zweiten Senats vom 5. Mai 2020 - 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15

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