

Provisional text

OPINION OF ADVOCATE GENERAL  
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**Case C-493/17**

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(Request for a preliminary ruling from the Bundesverfassungsgericht (Federal Constitutional Court, Germany))

(Reference for a preliminary ruling — Economic and monetary policy — Decision (EU) 2015/774 of the European Central Bank (ECB) — Secondary markets public sector asset purchase programme — Validity — Articles 119 and 127 TFEU — Powers conferred on the ECB and the European System of Central Banks — Maintenance of price stability — Proportionality — Article 123 TFEU — Prohibition of monetary financing of the euro area Member States)

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## I. Introduction

1. This request for a preliminary ruling concerns 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, (2) as amended by Decision (EU) 2015/2101 of the European Central Bank of 5 November 2015 (3) and by Decision (EU) 2016/702 of the European Central Bank of 18 April 2016 (4) ('Decision 2015/774'), and the interpretation of Article 4(2) TEU, Articles 119, 123, 125 and 127 TFEU, and Articles 17 to 24 of Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank (5) ('the Protocol on the ESCB and the ECB').

2. The request has been made by the Bundesverfassungsgericht (Federal Constitutional Court, Germany) in the context of a series of constitutional actions concerning the applicability, in the Federal Republic of Germany, of various decisions of the European Central Bank (ECB), the participation of the Deutsche Bundesbank (German Central Bank, Germany) in the implementation of those decisions or its alleged failure to act with regard to those decisions, and the alleged failure of the Bundesregierung (Federal Government, Germany) and the Deutscher Bundestag (Lower House of the German Federal Parliament, Germany), to act in respect of that participation and those decisions.

3. The judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400) is inevitably reflected in this new case. On the one hand, the request for a preliminary ruling has once again been made to the Court by the Bundesverfassungsgericht (Federal Constitutional Court) in proceedings seeking to establish that an act of the ECB is manifestly ultra vires and is not compatible with German constitutional identity. On the other hand, the acts at issue in the present case and in the case which gave rise to the judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400) both relate to ‘unconventional’ ECB programmes which are said to fall outside the realm of monetary policy and undermine the prohibition of monetary financing laid down in Article 123 TFEU.

4. However, the judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400) concerned an ECB press release which gave details of a decision authorising a programme for the purchase of government bonds issued by States of the euro area — transactions which were to be known as Outright Monetary Transactions (OMTs), which had not — and, to date, have never — been implemented. By contrast, the secondary markets public sector asset purchase programme (‘the PSPP’) at issue in the present case has not only been formally adopted, but has also been implemented for over three years. Moreover, there are objective differences between OMTs and the PSPP with regard to both the stated objective and technical details and the amounts at issue.

## II. Legal framework

### A. *The FEU Treaty*

5. The relevant provisions are laid down, in essence, in Title VIII of Part Three of the FEU Treaty, entitled ‘Economic and monetary policy’. Thus, under Article 119 TFEU:

‘1. For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States’ economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

2. Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition.

3. These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.’

6. Article 123(1) TFEU provides for the prohibition of monetary financing of the Member States as follows:

‘1. Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as “national central banks”) in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.’

7. The objectives and the basic tasks of the ECB are set out in Article 127 TFEU in the following terms:

‘1. The primary objective of the European System of Central Banks (hereinafter referred to as “the ESCB”) shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.

2. The basic tasks to be carried out through the ESCB shall be:

- to define and implement the monetary policy of the Union,
- to conduct foreign-exchange operations consistent with the provisions of Article 219,
- to hold and manage the official foreign reserves of the Member States,
- to promote the smooth operation of payment systems.

...’

### ***B. The Protocol on the ESCB and the ECB***

8. The Protocol on the ESCB and the ECB sets out the instruments of monetary policy available to the ECB. Those instruments include open market and credit operations. They are set out as follows in Article 18.1 of the Protocol on the ESCB and the ECB:

‘18.1. In order to achieve the objectives of the ESCB and to carry out its tasks, the ECB and the national central banks may:

- operate in the financial markets by buying and selling outright (spot and forward) or under repurchase agreement and by lending or borrowing claims and marketable instruments, whether in euro or other currencies, as well as precious metals;
- conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral.’

### ***C. Decision 2015/774***

#### ***1. The consolidated text of Decision 2015/774***

9. The ECB decision at the heart of the questions referred for a preliminary ruling by the Bundesverfassungsgericht (Federal Constitutional Court) is Decision 2015/774. Since its adoption on 4 March 2015, that decision has been amended by Decisions 2015/2101, 2015/2464, 2016/702, and by Decision 2017/100.

10. Article 1 of Decision 2015/774, entitled ‘Establishment and scope of PSPP’, provides:

‘The Eurosystem hereby establishes the PSPP under which the Eurosystem central banks shall purchase eligible marketable debt securities, as defined in Article 3, on the secondary markets, from eligible counterparties, as defined in Article 7, under specific conditions.’

11. Article 3 of Decision 2015/774, entitled ‘Eligibility criteria for marketable debt securities’, provides:

‘1. Subject to the requirements laid down in Article 3, euro-denominated marketable debt securities issued by central, regional or local governments of a Member State whose currency is the euro, recognised agencies located in the euro area, international organisations located in the euro area and multilateral

development banks located in the euro area shall be eligible for purchases by the Eurosystem central banks under the PSPP. In exceptional circumstances, where the envisaged purchase amount cannot be attained, the Governing Council may decide to purchase marketable debt securities issued by other entities located in the euro area ...

2. In order to be eligible for purchases under the PSPP, marketable debt securities shall comply with the eligibility criteria for marketable assets for Eurosystem credit operations pursuant to Part Four of Guideline (EU) 2015/510 of the European Central Bank (ECB/2014/60), subject to the following requirements:

(a) the issuer or guarantor of the marketable debt securities shall have a credit quality assessment of at least Credit Quality Step 3 in the Eurosystem's harmonised rating scale ...

...

(d) if the credit assessment provided by an accepted ECAI for the issuer, guarantor or issue does not comply with at least Credit Quality Step 3 in the Eurosystem's harmonised rating scale, marketable debt securities shall be eligible only if they are issued or fully guaranteed by the central governments of euro area Member States under a financial assistance programme and in respect of which the application of the Eurosystem's credit quality threshold is suspended by the Governing Council pursuant to Article 8 of Guideline ECB/2014/31;

(e) in the event of a review of an ongoing financial assistance programme, eligibility for PSPP purchases shall be suspended and shall resume only in the event of a positive outcome of the review.

3. In order to be eligible for purchase under the PSPP, debt securities, within the meaning of paragraphs 1 to 2, shall have a minimum remaining maturity of 1 year and a maximum remaining maturity of 30 years at the time of their purchase by the relevant Eurosystem central bank. ...

...

5. Purchases of nominal marketable debt instruments at a negative yield to maturity (or yield to worst) equal to or above the deposit facility rate are permitted. Purchases of nominal marketable debt instruments at a negative yield to maturity (or yield to worst) below the deposit facility rate are permitted to the extent necessary.'

12. Article 4(1) of Decision 2015/774, entitled 'Limitations on the execution of purchases', provides:

'To permit the formation of a market price for eligible securities, no purchases shall be 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"). For syndications, the blackout period in question is to be respected on a best effort basis before the issuance.'

13. Article 5(1) and (2) of Decision 2015/774, entitled 'Purchase limits', is worded as follows:

'1. Subject to Article 3, an issue share limit per international securities identification number (ISIN) shall apply under the PSPP to marketable debt securities fulfilling the criteria laid down in Article 3, after consolidating holdings in all of the portfolios of the Eurosystem central banks. The issue share limit shall be as follows:

(a) 50% per ISIN for eligible marketable debt securities issued by eligible international organisations and multilateral development banks;

(b) 33% per ISIN for other eligible marketable debt securities; ...

2. All marketable debt securities eligible for purchase under the PSPP and which have the remaining maturities specified in Article 3 shall be subject to an aggregate limit, after consolidating holdings in all of the portfolios of the Eurosystem central banks, of:

- (a) 50% of the outstanding securities of an issuer which is an eligible international organisation or a multilateral development bank; or
- (b) 33% of the outstanding securities of an issuer other than an eligible international organisation or a multilateral development bank.’

14. Article 6 of Decision 2015/774, entitled ‘Allocation of portfolios’, states:

‘1. Of the book value of purchases of marketable debt securities eligible under the PSPP, 10% shall be purchased in securities issued by eligible international organisations and multilateral development banks, and 90% of that book value shall be purchased in securities issued by eligible central, regional or local governments and recognised agencies ... This allocation is subject to revision by the Governing Council. Purchases of debt securities issued by eligible international organisations, multilateral development banks and regional and local governments shall be made by [national central banks of a Member State whose currency is the euro (NCBs)] only.

2. The NCBs’ share of the book value of purchases of marketable debt securities eligible under the PSPP shall be 90%, and the remaining 10% shall be purchased by the ECB. The distribution of purchases across jurisdictions shall be in accordance with the key for subscription of the ECB’s capital as referred to in Article 29 of the Statute of the ESCB.

3. Eurosystem central banks shall apply a specialisation scheme for the allocation of marketable debt securities to be purchased under the PSPP. The Governing Council shall allow for ad hoc deviations from the specialisation scheme should objective considerations obstruct the achievement of the said scheme or otherwise render deviations advisable in the interests of attaining the overall monetary policy objectives of the PSPP. In particular, each NCB shall purchase eligible securities of issuers of its own jurisdiction. Securities issued by eligible international organisations and multilateral development banks may be purchased by all NCBs. The ECB shall purchase securities issued by central governments and recognised agencies of all jurisdictions.’

15. Under Article 8 of Decision 2015/774, entitled ‘Transparency’:

‘1. The Eurosystem shall publish on a weekly basis the aggregate book value of the securities held under the PSPP in the commentary of its consolidated weekly financial statement.

2. The Eurosystem shall publish on a monthly basis the weighted average residual maturity by issuer residence, separating international organisations and multilateral development banks from other issuers, of its PSPP holdings.

3. The book value of securities held under the PSPP shall be published on the ECB’s website under the open market operations section on a weekly basis.’

**2. *The recitals of Decision 2015/774 and the decisions which amended them***

**(a) *The recitals of Decision 2015/774***

16. Recitals 2, 3 and 4 of Decision 2015/774 are worded as follows:

‘(2) On 4 September 2014, the Governing Council decided to initiate a third covered bond purchase programme (hereinafter the “CBPP3”) and an asset-backed securities purchase programme (ABSPP). Alongside the targeted longer-term refinancing operations introduced in September 2014, these asset purchase programmes are aimed at further enhancing the transmission of monetary policy,

facilitating credit provision to the euro area economy, easing borrowing conditions of households and firms and contributing to returning inflation rates to levels closer to 2%, consistent with the primary objective of the ECB to maintain price stability.

- (3) On 22 January 2015, the Governing Council decided that asset purchases should be expanded to include a secondary markets public sector asset purchase programme (hereinafter the “PSPP”). Under the PSPP the NCBS, in proportions reflecting their respective shares in the ECB’s capital key, and the ECB may purchase outright eligible marketable debt securities from eligible counterparties on the secondary markets. This decision was taken as part of the single monetary policy in view of a number of factors that have materially increased the downside risk to the medium-term outlook on price developments, thus jeopardising the achievement of the ECB’s primary objective of maintaining price stability. These factors include lower than expected monetary stimulus from adopted monetary policy measures, a downward drift in most indicators of actual and expected euro area inflation — both headline measures and measures excluding the impact of volatile components, such as energy and food — towards historical lows, and the increased potential of second-round effects on wage and price-setting stemming from a significant decline in oil prices.
- (4) The PSPP is a proportionate measure for mitigating the risks to the outlook on price developments, as it will further ease monetary and financial conditions, including those relevant to the borrowing conditions of euro area 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 levels below but close to 2% over the medium term. In an environment where key ECB interest rates are at their lower bound, and purchase programmes focusing on private sector assets are judged to have provided measurable, but insufficient, scope to address the prevailing downside risks to price stability, it is necessary to add to the Eurosystem’s monetary policy measures the PSPP as an instrument that features a high transmission potential to the real economy. Thanks to its portfolio re-balancing effect, the sizable purchase volume of the PSPP will contribute to achieving the underlying monetary policy objective of inducing financial intermediaries to increase their provision of liquidity to the interbank market and credit to the euro area economy.’

**(b) *The recitals of Decision 2015/2101***

17. Recitals 2 and 3 of Decision 2015/2101 are worded as follows:

- ‘(2) On 3 September 2015, the Governing Council decided in principle to increase the PSPP issue share limit from 25% to 33% per ISIN, subject to verification on a case-by-case basis that a holding of 33% per ISIN would not lead the Eurosystem central banks to reach blocking minority holdings in orderly debt restructurings.
- (3) The envisaged increase of the PSPP issue share limit aims to promote the full and smooth implementation of the PSPP, while at the same time allowing the smooth operation of markets in eligible marketable debt securities and avoiding the obstruction of orderly debt restructurings.’

**(c) *The recitals of Decision 2015/2464***

18. Recitals 2 to 5 of Decision 2015/2464 state:

- ‘(2) On 3 December 2015, the Governing Council decided, in line with its mandate to ensure price stability, to revise certain of the PSPP’s design features, to secure a sustained adjustment in the path of inflation towards levels that are below, but close to 2%, over the medium term. The revisions are in line with the Governing Council’s monetary policy mandate and duly reflect risk management considerations.
- (3) Accordingly, in order to achieve the PSPP’s objectives, the Governing Council decided to extend the intended horizon of purchases under the PSPP until the end of March 2017, or beyond, if necessary,

and in any event until the Governing Council sees a sustained adjustment in the path of inflation that is consistent with its aim of achieving inflation rates below, but close to, 2% over the medium term. The Governing Council decided to extend the intended horizon of the purchases under the CBPP3 and the ABSPP accordingly.

- (4) The Governing Council also decided that, in order to enhance the flexibility of the PSPP and thereby support the continued smooth implementation of purchases at least until its intentional end date, euro-denominated marketable debt instruments issued by regional and local governments located in the euro area will be eligible for regular purchases under the PSPP by the national central banks of the jurisdiction in which the issuing entity is located.
- (5) The Governing Council also decided to reinvest the principal payments of the securities purchased under the APP as the underlying securities mature, for as long as necessary, thus contributing to favourable liquidity conditions and to an appropriate monetary policy stance.'

**(d) *The recitals of Decision 2016/702***

19. Recitals 2 to 5 of Decision 2016/702 state:

- '(2) In line with the Governing Council's mandate to ensure price stability, certain features of the PSPP should be modified in order to ensure a sustained adjustment in the path of inflation towards levels that are below, but close to 2%, over the medium term. The changes are in line with the Governing Council's monetary policy mandate and duly reflect risk management considerations.
- (3) More specifically, in order to achieve the PSPP's objectives, the liquidity provided to the market through the combined monthly purchases under the APP should be increased to EUR 80 billion.
- (4) In addition, the issuer and issue share limits for marketable securities issued by eligible international organisations and multilateral development banks should be increased. The new threshold was determined in order to ensure that the envisaged purchases will continue to be proportionate to the aims of the PSPP, also considering that the risk of obstructing orderly debt restructurings is limited.
- (5) Starting in April 2016, the allocation between purchases of eligible marketable debt securities issued by international organisations and multilateral development banks and purchases of other eligible marketable debt securities under the PSPP should be modified in order to achieve the PSPP's objectives and ensure its smooth implementation for the duration of the PSPP and at its increased purchase volume.'

**(e) *The recitals of Decision 2017/100***

20. Recitals 3 to 6 of Decision 2017/100 are worded as follows:

- '(3) On 8 December 2016, the Governing Council decided, in line with its mandate to ensure price stability, that certain parameters of the APP should be adjusted in order to achieve the APP's objectives. The adjustments are in line with the Governing Council's monetary policy mandate, fully comply with the obligations of the Eurosystem central banks under the Treaties and duly reflect risk management considerations.
- (4) More specifically, the intended horizon of purchases under the APP should be extended until the end of December 2017, or beyond, if necessary, and in any event until the Governing Council sees a sustained adjustment in the path of inflation that is consistent with its aim of achieving inflation rates below, but close to, 2% over the medium term.
- (5) The liquidity provided to the market through the combined monthly purchases under the APP should continue to amount to EUR 80 billion until the end of March 2017. From April 2017, the combined

monthly purchases under the APP should proceed at a pace of EUR 60 billion until the end of December 2017, or beyond, if necessary, and in any case until the Governing Council sees a sustained adjustment in the path of inflation consistent with its inflation aim. If, in the meantime, the outlook becomes less favourable, or if financial conditions become inconsistent with further progress towards a sustained adjustment in the path of inflation, the Governing Council intends to increase the programme in terms of size and/or duration.

- (6) To ensure the continued smooth implementation of purchases under the APP over the intended horizon, the maturity range of the PSPP should be broadened by decreasing the minimum remaining maturity for eligible securities from 2 years to 1 year. Moreover, purchases of securities under the APP with a yield to maturity below the interest rate on the ECB's deposit facility should be permitted to the extent necessary.'

### III. The facts of the cases in the main proceedings

#### A. *The principal features of the PSPP*

21. Decision 2015/774, to which the questions referred for a preliminary ruling by the national court relate, is the legal formalisation of the PSPP. The PSPP is one of the four sub-programmes of the Expanded Asset Purchase Programme ('APP') announced by the ECB on 22 January 2015.

22. The APP, alongside existing sub-programmes for the purchase of private sector bonds, (6) therefore provides for the purchase of public sector bonds on secondary markets. This type of programme is generally classified as 'quantitative easing' on account of the increase in the central bank's volume of money which triggers the purchase of large quantities of bonds. This decision was made by the ECB in January 2015 in response to the strong downward pressure on inflation in the euro area.

23. The principal features of the PSPP, as provided for in the version of Decision 2015/774 currently in force, may be summarised as follows:

- The bonds that are eligible for purchase under the PSPP are euro-denominated marketable debt securities issued by central, regional or local governments of a Member State whose currency is the euro, recognised agencies located in the euro area, international organisations and multilateral development banks located in the euro area. (7) The eligible bonds must have remaining maturity of a minimum of 1 year and a maximum of 30 years at the time of their purchase on secondary markets. (8)
- Each bond has a purchase limit which is set, in principle, at 33% per share, provided that the Eurosystem cannot thereby obtain blocking minority holdings in debt restructuring procedures involving 'collective action clauses'. Moreover, in no case can the Eurosystem hold more than 33% of the outstanding securities of an issuer. (9)
- The issuers (or guarantors) of the marketable debt securities must have at least one rating corresponding to Credit Quality Step 3 on the Eurosystem's harmonised rating scale in order to be eligible under the PSPP. (10)
- Purchases under the PSPP are made on the basis of particular allocation keys which are defined in the PSPP Decision. First, 10% of purchases are bonds issued by international organisations or multilateral development banks and 90% are bonds issued by central, regional or local governments of Member States and recognised agencies. The national central banks' share of the book value of purchases of bonds that are eligible under the PSPP amounts to 90% (distributed across the euro area Member States in accordance with the key for subscription of the ECB's capital) and the remaining 10% is purchased by the ECB. In addition to the international bonds, each national central bank must purchase bonds only from issuers of its own jurisdiction. (11)

- Risks and losses are shared between the national central banks and amount to 20% of total purchases (10% are purchased by the ECB itself and 10% are bonds issued by international organisations that are purchased by national central banks) whereas the remaining 80% of purchases are on a no-risk-sharing basis and each national central bank is to bear its own risks. (12)
- Finally, a number of guarantees, such as a blackout period, are specified in the (non-public) Guideline of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/NP3) ('the PSPP Guideline').

### ***B. The main proceedings and the order for reference***

24. Several groups of individuals have brought various constitutional actions before the referring court concerning various decisions of the ECB relating to the APP, the participation of the Deutsche Bundesbank in the implementation of those decisions or the alleged failure to act with regard to those decisions and the alleged failure of the Federal Government and the Lower House of the German Federal Parliament to act in respect of that participation and those decisions.

25. According to the applicants in the main proceedings, the PSPP infringes the prohibition of monetary financing of the Member States laid down in Article 123 TFEU and the principle of conferral of powers laid down in Article 5(1) TEU, read in conjunction with Articles 119 and 127 TFEU. Moreover, they claim that the decisions on the PSPP infringe the principle of democracy enshrined in the Grundgesetz (German Basic Law) and, accordingly, undermine German constitutional identity.

26. The referring court states that, if Decision 2015/774 infringes Article 123 TFEU or exceeds the mandate of the ECB, it must find that the powers of the ECB have been manifestly and structurally significantly exceeded and, consequently, uphold the actions in the main proceedings. The same applies if the rules on the sharing of losses stemming from Decision 2015/774 affected the budgetary responsibility of the Lower House of the German Federal Parliament.

27. In those circumstances, the Bundesverfassungsgericht (Federal Constitutional Court) decided to stay the proceedings and to request a preliminary ruling from the Court.

## **IV. The request for a preliminary ruling and the procedure before the Court**

28. By decision of 18 July 2017, received at the Court on 15 August 2017, the Bundesverfassungsgericht (Federal Constitutional Court) therefore decided to refer the following questions to the Court for a preliminary ruling:

'(1) Does Decision ... 2015/774 ... as amended by ... Decision ... 2016/1041 ... or the method of its implementation, infringe Article 123(1) of the Treaty on the Functioning of the European Union?

Does it infringe Article 123(1) of the Treaty on the Functioning of the European Union in particular if in the course of the [PSPP],

- (a) details of the purchases are communicated in a way that creates 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 issue of a debt instrument on the primary market and its purchase on ... secondary market[s], with the result that a review by the courts is not possible in that regard?
- (c) all bonds purchased are not resold but held until maturity and thus withdrawn from the market?

- (d) the Eurosystem purchases marketable debt instruments with a negative yield at maturity?
- (2) Does the Decision referred to in [the first question] then infringe Article 123 TFEU in any event if, in view of changes in conditions on the finance markets, in particular as a result of a shortage of bonds available for purchase, its continued implementation requires a continual loosening of the originally agreed purchase rules and the restrictions laid down in the case-law of the Court of Justice for a bond purchase programme, such as the PSPP represents, lose their effect?
- (3) Does the current version of Decision ... 2015/774 ..., referred to in [the first question], infringe Article 119 and Article 127(1) and (2) of the Treaty on the Functioning of the European Union and Articles 17 to 24 of the Protocol on the [ESCB and the ECB] because it exceeds the monetary policy mandate of the [ECB] laid down in those provisions and for that reason encroaches upon the competence of the Member States?

Is the mandate of the [ECB] exceeded in particular as a result of the fact that:

- (a) on the basis of the volume of the PSPP, which amounted to EUR 1 534.8 billion on 12 May 2017, the Decision referred to in [the first question] materially influences the refinancing terms of the Member States?
- (b) in view of the improvement in the refinancing terms of the Member States referred to in (a) above and their effect on the commercial banks, the Decision referred to in [the first question] has not only indirect economic policy consequences but its objectively ascertainable effects suggest that an economic policy aim of the programme is at least of equal priority as the monetary policy aim?
- (c) on account of its powerful economic policy effects, the Decision referred to in [the first question] infringes the principle of proportionality?
- (d) in the absence of a specific statement of reasons during the period of more than two years of implementation, it is not possible to examine whether the Decision referred to in [the first question] is still necessary and proportionate?
- (4) Does the Decision referred to in [the first question] infringe Article 119 and Article 127(1) and (2) TFEU and Articles 17 to 24 of the Protocol on the [ESCB and the ECB] in any event because its volume and implementation period of more than two years and the resulting economic policy effects give grounds for a different view of the need for and proportionality of the PSPP and consequently, from a certain point in time, it exceeds the economic policy mandate of the [ECB]?
- (5) Does the unlimited sharing of risks between the national central banks of the Eurosystem that may be provided for under the Decision referred to in [the first question], in the event of the non-repayment of bonds of the central governments and of equivalent issuers, infringe Article 123 and Article 125 of the Treaty on the Functioning of the European Union and Article 4(2) of the Treaty on European Union, if as a result it may be necessary for national central banks to be recapitalised using budget funds?

29. Written observations were submitted by Mr Weiss and others; Mr Lucke and others; Mr von Stein and others; the ECB; the Deutsche Bundesbank; the German, Greek, French, Italian, Portuguese and Finnish Governments and the European Commission. With the exception of the Finnish Government, they all presented oral argument at the hearing held on 10 July 2018. Mr Gauweiler also put forward his arguments at that hearing.

## V. Analysis

**A. Preliminary remark on the relevant version of Decision 2015/774**

30. By its questions, the Bundesverfassungsgericht (Federal Constitutional Court) asks the Court to rule on the validity of Decision 2015/774. In its first question, the referring court states that this is Decision 2015/774 as amended by Decision 2015/2101 and by Decision 2016/702, as well as by Decision (EU) 2016/1041 of the ECB 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). (13)

31. Although Decision 2016/1041 is based on Decision 2015/774, it did not amend it. By contrast, Decision 2015/774 has been amended by Decision 2015/2464 and by Decision 2017/100. Although the referring court does not make express reference to the two latter decisions, I consider that regard should be had to them in order to answer the questions submitted.

32. In its first question, the Bundesverfassungsgericht (Federal Constitutional Court) contemplates Decision 2015/774 'or the method of its implementation'. However, on the date on which the request for a preliminary ruling was made, Decisions 2015/2464 and 2017/100 had already been adopted. Decision 2015/774 was therefore implemented, necessarily, on the basis of the four decisions which amended the original wording. Moreover, in its third question, the referring court asks the Court about 'the current version' of Decision 2015/774 'referred to in [the first question]', that is to say as at 18 July 2017. Finally, the interpretation of EU law proposed by the referring court in the request for a preliminary ruling seems to me to be based, in certain respects, on the latest version of Decision 2015/774.

33. I therefore take the same view as the Commission that it makes better sense to assess the validity of Decision 2015/774 in the version in force on the date on which the request for a preliminary ruling was made, with all of the features it contained at that point.

**B. Admissibility of the request for a preliminary ruling**

34. As a preliminary point, the Italian Government submits that all of the questions referred for a preliminary ruling by the national court are inadmissible. With the exception of the fifth question, I consider, however, that the request for a preliminary ruling is admissible.

35. I note that the present request for a preliminary ruling undoubtedly concerns the interpretation and the application of EU law. As the court pointed out in its judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400), this means that the Court's answer will have definitive consequences as regards the resolution of the main proceedings and that the subsequent judgment, like all judgments in preliminary ruling proceedings, will be binding on the referring court, as regards the interpretation or the validity of the acts of the ECB in question, for the purposes of the decision to be given in the main proceedings. (14)

36. Moreover, it is also apparent from the order for reference that the national court is seized of a genuine dispute in which the question of the validity of an EU act is raised on indirect grounds. The request for a preliminary ruling is therefore admissible in principle. (15)

37. It is true that, although the first, second and fourth questions concern the validity of Decision 2015/774 in the light of, inter alia, Articles 119, 123 and 127 TFEU, in those questions the court expresses doubts which originate more from its implementation than from the decision itself. The legality of a measure must be assessed on the basis of the factual and legal situation which existed at the time when it was adopted and cannot, in particular, depend on retrospective assessment of the efficacy of that measure. (16) As the Court has already had occasion to specify, that means that, 'by analogy, the assessment of the validity of a measure which the Court is called upon to undertake on a reference for a preliminary ruling must normally be based on the situation which existed at the time that measure was adopted'. (17)

38. However, it follows from the judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400), that, when the ECB purchases government bonds on secondary markets, sufficient safeguards must be built into its intervention to ensure that the latter does not fall foul of the prohibition of monetary financing in Article 123(1) TFEU. (18) Moreover, the programme which permits a purchase of that kind may be validly adopted and implemented only in so far as the measures that it entails are proportionate to the objectives of monetary policy, in accordance with Article 119(2) and Article 127(1) TFEU. (19)

39. The elements mentioned by the referring court in its first question are concerned with guarantees capable of influencing the validity of Decision 2015/774. In those circumstances, I consider that they may be taken into account. Moreover, that also seems to me to be the case with regard to the second question referred for a preliminary ruling, which considers the ‘restrictions laid down in the case-law of the Court of Justice for a bond purchase programme, such as the PSPP’.

40. Admittedly, that second question presents elements of uncertainty where it considers the possible loosening of the applicable rules in the event of a change in conditions on the financial markets. However, it meets an objective need for resolving the cases brought before the referring court (20) since it concerns, in essence, the guarantees which must form the framework of the PSPP so as not to infringe Article 123 TFEU. I therefore consider that it is admissible and may be addressed together with the first question referred for a preliminary ruling.

41. As regards the fourth question, this essentially concerns the connection between the PSPP and monetary policy and the examination of proportionality which must be carried out in respect of Decision 2015/774. I therefore consider that it may be regarded as admissible and that a useful answer may be provided to that question by examining it together with the third question which concerns the same issue.

42. However, I am more wary as to whether the fifth question referred for a preliminary ruling is admissible. Although questions concerning EU law enjoy a presumption of relevance, that presumption must be disregarded ‘where it is quite obvious that the interpretation 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’. (21)

43. Like the ECB, the Greek, French, Italian, Portuguese and Finnish Governments and the Commission, I note that the fifth question referred for a preliminary ruling concerns a development which is uncertain in two respects. First, the assumption underlying that fifth question is the unlimited sharing of risks between the euro area Member States in the event of the non-repayment of bonds of the central governments and of equivalent issuers that ‘*may be provided for under [Decision 2015/774]*’. (22) However, such unlimited sharing does not exist, as the applicable provisions currently stand, under the PSPP. On the contrary, there has been a sustained intention to strictly limit loss sharing between central banks since the programme was announced on 22 March 2015. (23)

44. Secondly, even if such unlimited sharing was adopted, the possibility that there may be a conflict with Articles 123 and 125 TFEU, and Article 4(2) TEU, arises, as is specified by the referring court itself in the wording of its question, only ‘*if as a result [that unlimited sharing of risks] may be necessary for national central banks to be recapitalised using budget funds*’. (24) Therefore, it is indisputably a mere hypothesis and the possibility of putting it into practice has, to date, never been demonstrated. It is true that the request for a preliminary ruling makes reference to a substantial increase in risk provisions by the Deutsche Bundesbank during the financial year 2016. However, the referring court states that the reason given for that decision was that the decisions of the Governing Council of the ECB to expand the APP to the PSPP, taken during the financial year 2016, entailed additional risks. It must be noted that none of the decisions on the PSPP provides for an unlimited sharing of risks. Therefore, the lack of additional details regarding the reasons which prompted the Deutsche Bundesbank to increase risk provisions does not enable practical effect to be given to the purely theoretical hypothesis of national central banks being recapitalised in the event of major default due to the PSPP.

45. To me, the issue raised by the fifth question is indisputably hypothetical since both the legal context and the factual context which would require a response to that question do not correspond to the current situation and the likelihood of their occurrence has not been demonstrated with sufficient certainty. In any event, if it were to be considered that an unlimited sharing of risks is a situation the likelihood of which has been demonstrated sufficiently, *quod non*, it cannot be disputed that that sharing of risks has not yet been given concrete expression in a rule of EU law, or even announced. In those circumstances, how can the Court give a ruling on the validity of a rule which does not yet exist?

46. In the light of the foregoing considerations, I therefore consider that, in this context and to date, that fifth question is inadmissible.

### **C. *The first and second questions referred for a preliminary ruling***

#### **1. *The analytical framework established in the judgment of 16 June 2015, Gauweiler and Others (C-62/14, EU:C:2015:400)***

47. The first two questions referred for a preliminary ruling concern, in essence, the observance of the prohibition of the monetary financing of sovereign debt laid down in Article 123(1) TFEU.

48. The judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400) provided the relevant analytical framework in that regard. In spite of the differences between the PSPP and the OMT, both are programmes for the purchase of government bonds on secondary markets. In the abovementioned judgment, the Court specified the limits with which the ECB must comply when it implements a programme for the purchase of government bonds. The large majority of parties which submitted observations in the present proceedings also fall within that analytical framework.

49. From the outset, the Court confirmed that Article 123(1) TFEU prohibited all financial assistance from the ESCB to a Member State but did not preclude the possibility of the ESCB purchasing government bonds on secondary markets. (25)

50. However, the Court circumscribed that possibility within two limits:

- In the first place, ‘the ESCB does not have authority to purchase government bonds on secondary markets under conditions which would, in practice, mean that its action has an effect equivalent to that of a direct purchase of government bonds from the public authorities and bodies of the Member States’. (26) That would be the case if the potential purchasers of government bonds on the primary market knew for certain that the ESCB was going to purchase those bonds within a certain period and under conditions allowing those market operators to act, *de facto*, as intermediaries for the ESCB for the direct purchase of those bonds from the public authorities and bodies of the Member State concerned.
- In the second place, the ECB programme which permits the purchase of government bonds on secondary markets must not be such as to lessen the impetus of the Member States to follow a sound budgetary policy. ‘In fact, since it follows from Articles 119(2) TFEU, 127(1) TFEU and 282(2) TFEU that, without prejudice to the objective of price stability, the ESCB is to support the general economic policies in the Union, the action taken by the ESCB on the basis of Article 123 TFEU cannot be such as to contravene the effectiveness of those policies by lessening the impetus of the Member States concerned to follow a sound budgetary policy’. (27)

51. It follows from those two limits that, when the ECB purchases government bonds on secondary markets, safeguards must be built into its intervention which are, on the one hand, sufficient to ensure that it does not fall foul of the prohibition of monetary financing in Article 123(1) TFEU and, on the other, intended to limit the impact of the ECB programme on the impetus to follow a sound budgetary policy. (28)

## 2. *The application of the principles to the PSPP*

52. The legality in principle of a purchase transaction of government bonds on secondary markets by the ESCB is not open to question. (29) It finds support from Article 18.1 of the Protocol on the ESCB and the ECB which ‘permits the ESCB, in order to achieve its objectives and to carry out its tasks, to operate in the financial markets, inter alia, by buying and selling outright marketable instruments, which include government bonds, and does not make that authorisation subject to particular conditions as long as the nature of open market operations is not disregarded’, (30) and from Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b(1) of the Treaty (now Articles 123 and 125 TFEU). (31) In accordance with the seventh recital of that regulation, the possibility of purchasing government bonds is expressly provided for since that recital states that ‘purchases made on the secondary market must not be used to circumvent the objective of [Article 123 TFEU]’.

53. The validity of a programme such as the PSPP is therefore dependent on the guarantees surrounding it. Specifically, it is necessary to determine their ability, on the one hand, to prevent operators which are active on the government bond markets from being able to act, de facto, as intermediaries for the ESCB for the direct purchase of bonds from the public authorities and bodies of the Member State concerned and, on the other, not to deflect from the impetus of the Member States to follow a sound budgetary policy.

### (a) *The lack of certainty among operators*

54. With the exception of the applicants in the cases in the main proceedings, the Member States and the EU institutions which expressed their views all agree that the PSPP offers sufficient guarantees to prevent the purchase of government bonds on secondary markets having an effect equivalent to that of a direct purchase of such bonds on the primary markets. I share that view.

#### (1) *The adequacy of the guarantees provided for in Decision 2015/774 (Question 1, including (a) and (b))*

55. First, the fact that the Governing Council is responsible for deciding on the scope, the start, the continuation and the suspension of the intervention on the secondary markets envisaged by the PSPP is not insignificant. It is an element which was specifically taken into account by the Court in its assessment of the validity of the OMT programme. (32) It is clear, inter alia, from the minutes of the ECB Governing Council’s monetary policy meetings that the PSPP is continuously evaluated and adjusted, independently, within the limits of what is necessary in order to achieve the stated objective. (33)

56. Secondly, the PSPP is only one of the four sub-programmes of the APP. The purchase of government bonds on secondary markets authorised under the PSPP is subsidiary in relation to the other three programmes which concern the purchase of private bonds. (34) The fact that the authorised volume of government bond purchases is determined, each month, on the basis of the predictability of purchases in the other three sub-programmes contributes to preventing the certainty that government bonds purchased on the primary market will be repurchased.

57. Thirdly, the absence of selectivity under the PSPP also contributes to ensuring that the detailed rules for the practical implementation of that programme cannot be predicted. Unlike the OMT, the PSPP does not provide for the selective purchase of bonds, rather it provides for purchases in a manner which is representative of all the Member States of the euro area. In accordance with Article 6(2) of Decision 2015/774, purchases are distributed across the Member States on the basis of the key for subscription of the ECB’s capital laid down in Article 29 of the Protocol on the ESCB and the ECB. (35)

58. Fourthly, there can be no question of certainty regarding repurchase on the part of operators which are active on the primary markets even though Article 5 of Decision 2015/774 sets two limits for the purchase of government bonds on secondary markets — after consolidating holdings in all of the portfolios of the ESCB central banks — which concern, first, the issuing of bonds and, secondly, the issuer. In

principle, the first authorises the holding of 33% of bonds from a single issue; (36) the second prohibits the ESCB from holding more than 33% of the outstanding bonds of a single issuer for the entire duration of the PSPP. (37) In addition to the fact that these are maximum limits and not an obligation to purchase government bonds in those proportions, the limits provided for in Article 5 of Decision 2015/774 mean that the holder of a government bond cannot be sure that the ESCB will be able to purchase the bond or if, on the contrary, that purchase is impossible on account of one of the two abovementioned limits being reached. The daily monitoring of those limits by the ESCB's risk management committee ensures that that guarantee is effective. (38)

59. Fifthly, the existence of a minimum period between the issue of a security on the primary market and its purchase on the secondary market also contributes to conditions of issue of government bonds not being distorted by the certainty that those bonds will be purchased by the ESCB after their issue. (39) That period is necessary to enable the formation of a market price. Such a blackout period is expressly provided for in Article 4(1) of Decision 2015/774 and specified in Article 15 of the PSPP Guideline.

60. The lack of precise information regarding that period is an essential condition for it to be effective. If the duration of the blackout period was disclosed, this may influence the predictability of purchases and price formation. In so far as the ESCB's risk management committee monitors that transactions are executed at market prices, (40) the information that the minimum period between the issue of a government bond on the primary market and its purchase on the secondary markets is measured in days rather than in weeks is, in my view, sufficient to ensure the judicial review of whether Decision 2015/774 complies with Article 123 TFEU. (41) First, the ESCB's risk management committee has more of the necessary skills and expertise than a court to determine whether a price is formed in accordance with market conditions and, consequently, whether the blackout period is adequate to ensure that formation. Secondly, it is not inconceivable that disclosing the exact blackout period, even after the event, would lead to expectations on the part of operators active on the markets which may prevent the formation of a market price.

61. Sixthly, the balance between the type of information communicated and the level of detail in the facts that are disclosed ensures the effectiveness of the PSPP while preventing certainty among operators which are active on the primary markets that government bonds will be repurchased on the secondary markets.

62. The main details of the PSPP, such as the monthly purchase volume, the estimated duration of the APP or even the criterion for distributing purchases of government bonds across the euro area Member States or the sharing of possible risks, have been made public by the President of the ECB since 22 January 2015. (42) That disclosure contributes to the effectiveness of the APP; it is intended to strengthen the desired effects of the purchase of private and public sector bonds established by that programme. In its communication, the ECB affirms its commitment to combating deflationary trends by explaining in a credible manner the action taken in that regard. It is a means by which the ECB transmits to the real economy the easing of monetary and financial conditions established by the PSPP. In economics, it is called the 'signalling channel'. It enables the effective strengthening of the desired effects of a quantitative easing programme. (43)

63. However, as the ECB points out in its written observations, that communication plays a role at a macroeconomic level only. The information provided does not provide the potential purchasers of government bonds on the primary market with certainty that the ESCB will purchase those bonds within a specific period and under conditions which allow those market operators to act, de facto, as intermediaries for the ESCB for the direct purchase of those bonds from the public authorities and bodies of the Member State concerned. At the hearing on 10 July 2018, the Head of the Legal Service of the Deutsche Bundesbank confirmed that, although there was some predictability on account of the ECB's announcements — in particular with regard to the fact that one third of government bonds could be purchased under the PSPP — that did not play a role at a microeconomic level.

64. The PSPP procedures communicated by the ECB are of a general nature. The amount of the monthly purchases under the APP programme is an indication which is not specified further, be it in terms of purchase or maturity date. Moreover, the extent to which purchase limits, per issue and issuer, are used is not communicated either. Finally, although the PSPP bonds portfolio is published on a weekly basis, it is only on an aggregated basis, (44) whereas the residual maturity is published monthly, by issuer residence, on a weighted average basis. (45) As the ECB explained at the hearing on 10 July 2018, the information communicated on the ECB website must be sufficient for operators active on the markets to be able to know which securities the ESCB holds, but not the actual purchasing practice.

65. Those different guarantees seem to me to be appropriate in order to prevent the conditions of issue of government bonds being distorted by the certainty that those bonds will be purchased by the ESCB after their issue. They therefore ensure that the 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 the public authorities and bodies of the Member States.

(2) *The holding of bonds until maturity and the purchase of bonds at a negative yield have no impact (Question 1(c) and (d))*

66. Where the first question referred for a preliminary ruling is expanded, the referring court asks about the possible impact on the legality of the PSPP in the light of Article 123(1) TFEU of, first, the holding of all bonds purchased until maturity and, secondly, the purchase of nominal marketable debt instruments at a negative yield to maturity. I do not consider that those elements are capable of invalidating Decision 2015/774.

(i) *The holding of bonds until maturity*

67. As regards the holding of bonds until maturity, the Court held in the case which gave rise to the judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400), that the possibility of holding the bonds purchased until maturity did not play a decisive role in assessing the validity of the OMT ‘since that possibility depend[ed] on such action being necessary to achieve the objectives sought and, in any event, the market operators involved [could not] be certain that the ESCB will make use of that option’. (46) Moreover, the Court observed that Article 18.1 of the Protocol on the ESCB and the ECB in no way precluded that practice, which does not imply that the ESCB waives its right to payment of the debt, by the issuing Member State, once the bond matures. (47)

68. I note that Article 18.1 of the Protocol on the ESCB and the ECB provides expressly for the possibility of the *forward* purchasing and selling of marketable instruments in the financial markets without qualifying that possibility. In those circumstances, contrary to the referring court’s suggestions, the fact that holding a bond until its maturity has no impact on the lawfulness of a programme such as the PSPP is not, in my view, dependent on whether the transaction is exceptional in nature. By contrast, it must meet the objective of the programme in question.

69. To me, that appears to be the situation in the present case. As a preliminary point, I note that the PSPP Guideline confirms that the ESCB may sell securities purchased under that programme at any time for monetary policy reasons. (48) Moreover, Article 3(3) of Decision 2015/774 authorises the purchase of securities with a remaining maturity of 1 year to 30 years and 364 days. As a result of such a wide distribution of securities, economic operators cannot be sure that the ESCB will hold *all* bonds until maturity.

70. Above all, the holding of securities purchased until maturity is, in my view, capable of meeting the objective of the PSPP. The PSPP seeks to maintain price stability. More specifically, recital 4 of Decision 2015/774 adds that, ‘thanks to its portfolio re-balancing effect, the sizable purchase volume of the PSPP will contribute to achieving the underlying monetary policy objective of inducing financial intermediaries to increase their provision of liquidity to the interbank market and credit to the euro area economy’.

71. In the light of that specific objective, I take the same view as the German Government, that it seems plausible that the assets purchased are to be resold only where the effect of the purchase on monetary policy will no longer be compromised. (49) However, for the purchase to have effect, there must be a sufficient increase in market liquidity in order to lead to a rebalancing of the portfolio and, consequently, securities purchased must not be resold prematurely. The holding of government bonds, or even the majority of them, until maturity, seems to me, therefore, to be consistent with the objective pursued by the PSPP.

*(ii) The purchase of bonds at a negative yield*

72. Article 3(5) of Decision 2015/774 permits purchases of nominal marketable debt instruments at a negative yield to maturity equal to or above the deposit facility rate. I do not think that that possibility leads to a circumvention of the prohibition of monetary financing under Article 123(1) TFEU.

73. First of all, it should be noted that the open market operations that the ECB is led to conduct inevitably expose it to a risk of losses, irrespective of the advertised yield. (50) Moreover, with regard to the PSPP, the ECB has expressly stated that priority should be given to the purchase of assets with a positive rate of return. (51)

74. Furthermore, since the bonds of certain Member States of the euro area are issued at a negative rate on account of market conditions, prohibiting the purchase of their securities would be contrary to the open market principle which must govern the ESCB's activity in the financial markets under Article 18.1 of the Protocol on the ESCB and the ECB. (52) As the ECB and the Commission point out, to exclude the purchase of bonds with a negative yield from the PSPP would be contrary to the principle of market neutrality, which forms part of the principle of an open market economy with free competition, a condition of the ESCB's activity pursuant to Article 127(1) TFEU. (53)

75. Finally, as the German Government rightly observes, foregoing the purchase of government bonds issued at a negative rate runs counter to a key element of the PSPP which provides for the purchase of government bonds issued by *all* of the euro area Member States, which ensures that the monetary policy objective is pursued.

76. In those circumstances, I do not consider that the purchase of government bonds at a negative yield is contrary to Article 123(1) TFEU.

*(3) The alleged ability to determine the securities that will be purchased has no impact on the validity of Decision 2015/774 (Question 1(a) and Question 2)*

77. According to the referring court, the combination of the announced aggregate volume of the APP, its breakdown in accordance with the key for subscription of the ECB's capital and the consistent proportion of the APP made up of purchases of government bonds enable the monthly purchase volume of bonds issued by the public sector of a given Member State to be determined in advance. In that context, the shortage of government bonds available for purchase, in the light of the tightness of the eligibility conditions relating to remaining maturity and to yield, and the rule which limits purchases by the ESCB to 33% of the issue volume, enable operators to establish with *de facto* certainty which specific securities will be purchased under the PSPP.

78. That potential certainty, which is *de facto* and not *de jure*, based on the procedures announced by the ECB in conjunction with the practice of purchasing securities which has been observed since the entry into force of the PSPP, is not, in my opinion, such as to invalidate Decision 2015/774.

79. First of all, although certainty does exist with regard to the purchase of government bonds, this is of a macroeconomic — and not a microeconomic — nature. (54) Moreover, the analyses on which the referring court relies do not appear to take account, or at least sufficient account, of the fact that a portion

of the purchases made under the PSPP concern bonds which are not issued by the central governments of the Member States. (55)

80. Furthermore, that alleged certainty would be possible only because of the shortage of available securities. Even if that shortage is proven (56) and it is demonstrated that the shortage enables the purchase of specific government bonds to be inferred with certainty, those findings would result in the effectiveness of the guarantees provided for in Decision 2015/774 being assessed on the basis of evidence subsequent to its adoption. As I pointed out when assessing the admissibility of the request for a preliminary ruling, the legality of a measure must be assessed on the basis of the factual and legal situation *which existed at the time when it was adopted* and cannot, in particular, depend on retrospective assessment of the efficacy of that measure. (57)

81. Where the effects of a measure cannot be accurately foreseen at the time of adoption, the assessment by the competent authority is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question. (58) In the present case, Decision 2015/774 does not seem to me to be the result of a ‘manifestly incorrect’ assessment. On the contrary, it is not disputed that, as set out in the preamble to Decision 2015/774, the decision was adopted ‘in an environment where key ECB interest rates [were] at their lower bound, and purchase programmes focusing on private sector assets [were] judged to have provided measurable, but insufficient, scope to address the prevailing downside risks to price stability’. (59) In those circumstances, it could have legitimately appeared ‘necessary to add to the Eurosystem’s monetary policy measures the PSPP as an instrument that features a high transmission potential to the real economy’. (60) The guarantees which form the framework of the PSPP also reinforce my belief that the ECB carried out a thoughtful and measured assessment when it adopted Decision 2015/774.

82. I am sympathetic to the argument recently supported by Advocate General Bobek in his Opinion in *Confédération paysanne and Others* (C-528/16, EU:C:2018:20), in accordance with which any evolution is not irrelevant in order to assess the validity of an EU law act. (61) There is therefore a need to keep the legislation up to date which could, ‘in extreme cases of technical or social lack of responsiveness’, lead to a declaration of invalidity. (62)

83. However, that is not the case here since Decision 2015/774 has undergone various successive amendments which have, perhaps, relaxed the purchase rules originally laid down but have, also, contributed to maintaining the effectiveness of the guarantees necessary for it to be valid. I am thinking in particular of the increase in the issue share limit (63) or the inclusion of bonds issued by regional and local governments in the list of eligible assets. (64) Those measures are, theoretically, capable of preventing, or, at the very least, alleviating, the shortage of available securities. That was also the reason expressly given in support of the second amendment cited. According to the minutes of the ECB Governing Council’s monetary policy meeting on 2 and 3 December 2015, ‘it was felt that [the inclusion of bonds issued by regional and local governments in the list of eligible assets] would contribute to avoiding any possible strains on the availability of securities’. (65)

**(b) *The impetus to follow a sound budgetary policy***

84. At this stage of my analysis, I am of the opinion that the purchase of government bonds on secondary markets authorised by the PSPP does not have an effect equivalent to that of a direct purchase of that type of bond from the public authorities and bodies of the Member States. However, for the PSPP not to conflict with the prohibition of monetary financing laid down in Article 123(1) TFEU, the guarantees surrounding it must also limit its impact on the impetus to follow a sound budgetary policy.

85. In addition to the fact that the effects of a programme such as the PSPP on the impetus to follow a sound budgetary policy are, already, limited by the fact that the ESCB has the option of selling the purchased bonds at any time (66) or of deciding to end the programme, I consider three features of that programme to be essential.

86. First, Article 3(2)(a) of Decision 2015/774 requires that the issuer or guarantor of marketable debt securities under the PSPP has a credit quality assessment of at least Credit Quality Step 3 in the Eurosystem harmonised rating scale. Otherwise, Article 3(2)(d) of Decision 2015/774 states that marketable debt securities are eligible only if they are issued or fully guaranteed by the central governments of euro area Member States under a financial assistance programme and in respect of which the application of the Eurosystem's credit quality threshold is suspended by the ECB Governing Council pursuant to Article 9 of Guideline ECB/2014/31 of the ECB of 9 July 2014 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral and amending Guideline ECB/2007/9. (67)

87. That requirement constitutes an important guarantee in terms of the impetus to follow a sound budgetary policy. If an issuer of government bonds no longer follows a sound budgetary policy, the bonds issued risk losing that credit quality rating. That loss would automatically result in the purchase of those bonds being terminated. (68)

88. Secondly, the purchases between the public issuers of all of the euro area Member States are distributed in accordance with a criterion which is objective and separate from the economic situation or their budgetary policy, namely the ECB's capital key. Therefore, the PSPP cannot be interpreted as mechanism that might assist Member States which are in financial difficulty. The aggregate limit per issuer laid down in Article 5(2) of Decision 2015/774 extends that guarantee further by making euro area Member States dependent on demand from private investors for most of the bonds that they issue.

89. Thirdly, limiting risk sharing to purchases made by the ECB itself and to purchases of bonds issued by international organisations, thus 20% of the PSPP, also contributes to maintaining the impetus to follow a sound budgetary policy. As the Deutsche Bundesbank submitted in its written observations, for 80% of purchases made under the PSPP, local taxpayers or other creditors of government borrowing will have to bear any losses and recapitalise the central bank in question. It is a 'key parameter' of the PSPP. (69)

90. Admittedly, that risk sharing does not expressly feature in Decision 2015/774. However, it is expressly mentioned in the introductory statement of the President of the ECB of 22 January 2015 and in the ECB press releases of 22 January 2015 and 10 March 2016. Moreover, according to the ECB, the sharing between the Eurosystem central banks of losses which may result from the purchase of bonds issued by international organisations and multilateral development banks whose registered offices are in the euro area, is reflected in the unpublished decision of the ECB of 19 November 2015 on the allocation of losses arising from monetary policy operations (revised version) (ECB/2015/NP29), which is based on the second subparagraph of Article 32.4 of the Statute of the ESCB and of the ECB. The allocation of losses of the ECB which may result from the purchase of bonds issued by euro area Member States are dealt with in accordance with Article 33.2 of the Statute of the ESCB and of the ECB. Thus, possible losses would reduce the annual surplus that the ECB may pay to Eurosystem central banks or lead to losses being carried forward.

91. I consider that those different features are sufficient to prevent a programme such as the PSPP from lessening the impetus of the Member States to follow a sound budgetary policy. It may also be noted that, since, on 22 June 2018, the Council decided to close the excessive deficit procedure for France, (70) now only one Member State is under an excessive deficit procedure, whereas that number was 24 in 2011. (71) That objective situation suggests that the euro area Member States are pursuing a sound budgetary policy.

### **3. Conclusion on the first and second questions**

92. It follows from the foregoing that, first, the PSPP does not give the ESCB's intervention an effect equivalent to that of a direct purchase of government bonds from the public authorities and bodies of the Member States and, secondly, it is not such as to lessen the impetus of the Member States to follow a sound budgetary policy. In those circumstances, I do not consider that Decision 2015/774 is contrary to Article 123(1) TFEU.

#### **D. *The third and fourth questions***

93. The third and fourth questions concern, in essence, the connection between the PSPP and monetary policy — which defines the mandate of the ECB — and the examination of proportionality which must be carried out in respect of Decision 2015/774 to verify that it complies with Article 119 and Article 127(1) and (2) TFEU (and Articles 17 to 24 of the Protocol on the ESCB and the ECB). The referring court asks whether the PSPP may still be regarded as covered by the ECB's mandate in the light of its volume, its period of application and the ensuing consequences.

94. In accordance with the principle of conferral of powers set out in Article 5(2) TEU, the ESCB must act within the limits of the powers conferred upon it by primary law. It cannot therefore validly adopt and implement a programme which is outside the area assigned to monetary policy by primary law. In addition, in order to ensure that the principle of conferral is complied with, the acts of the ESCB are, on the conditions laid down by the Treaties, subject to review by the Court. (72)

95. The parameters required to answer those questions have been established in the judgments of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756), and of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400).

#### **1. *The analytical framework established in the judgments of 27 November 2012, Pringle (C-370/12, EU:C:2012:756), and of 16 June 2015, Gauweiler and Others (C-62/14, EU:C:2015:400)***

##### **(a) *The definition of monetary policy***

96. Although the FEU Treaty does not precisely define monetary policy, the Court has nonetheless held that that treaty defined the objectives of that policy and that it was possible to identify the instruments which are available to the ESCB for the purpose of implementing that policy. (73)

97. In that regard, although the judgments of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756), and of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400), show a certain evolution in how they are expressed, this does not appear to me to be of any consequence. In the first judgment, the Court held that the FEU Treaty refers, in its provisions relating to monetary policy, 'to the objectives, *rather than to the instruments, of monetary policy*'. (74) That hierarchy has disappeared in the second judgment in which the Court held that the FEU Treaty 'defines *both the objectives of monetary policy and the instruments which are available to the ESCB for the purpose of implementing that policy*'. (75) However, despite that difference in wording, when determining whether a measure falls within the area of monetary policy, there is no doubt that it is appropriate to refer to the objective pursued *and* to the instruments employed. (76)

98. It is also important to recall that a monetary policy measure cannot be treated as equivalent to an economic policy measure merely because it may have indirect effects on the stability of the euro area. (77) Any possible indirect effects do not mean that an ECB programme must necessarily be treated as equivalent to an economic policy measure, since it is apparent from the Treaty itself, in particular Article 119(2), Article 127(1) and Article 282(2) TFEU that, without prejudice to the objective of price stability, the ESCB is to support the general economic policies in the Union. (78)

##### **(b) *The principle of proportionality and the scope of the related judicial review***

99. If it appears that an ECB programme falls within the area of monetary policy, it follows from Article 119(2) and Article 127(1) TFEU, read in conjunction with Article 5(4) TEU, that a bond-buying programme such as the PSPP may be validly adopted and implemented only in so far as the measures that it entails are proportionate to the objectives of that policy. (79) In practice, this means that the PSPP, like any act of an EU institution, must be appropriate for attaining the legitimate objectives it pursues, and must not exceed the limits of what is necessary to attain those objectives.

100. However, as regards judicial review of compliance with those conditions, the same proviso that the Court made in respect of OMTs in paragraph 68 of the judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400), exists in respect of the PSPP. When it prepares and implements an open market operations programme such as the PSPP, the ESCB is also required to make choices of a technical nature and to undertake forecasts and complex assessments. In that context, it must therefore be allowed a broad discretion.

101. Nevertheless, the Court specified that, in those cases where an EU institution enjoys broad discretion, a review of compliance with certain procedural guarantees is of fundamental importance and that those guarantees include the ‘obligation for the ESCB to examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions’. (80)

## **2. The application of the principles of the PSPP**

### **(a) Compliance with the mandate of the ECB**

#### **(1) The objective of and the instruments used by the PSPP**

102. In accordance with Article 119(2) and Article 127(1) TFEU, the primary objective of the ESCB is to maintain price stability. The objective of the PSPP — and more generally the APP as the PSPP is one of its four sub-programmes — is to contribute to that price stability by countering the downward drift in inflation that has been seen since 2013 and deteriorated sharply in 2014.

103. That objective is expressly mentioned in recital 4 of Decision 2015/774. In that recital, the ECB notes that ‘[the PSPP] will further ease monetary and financial conditions, including those relevant to the borrowing conditions of euro area 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 levels below but close to 2% over the medium term’ ‘in an environment where key ECB interest rates are at their lower bound’. The ECB has also guided each of the amendments to the PSPP. (81)

104. Moreover, in his introductory statement of 22 January 2015, the President of the ECB confirmed that purchases under the APP would be conducted until the Governing Council of the ECB sees ‘a sustained adjustment in the path of inflation which is consistent with [the] aim of achieving inflation rates below, but close to, 2% over the medium term’. As that objective was in reach, the ECB stated, during the meeting of the Governing Council of 14 June 2018, that the monthly pace of the net asset purchases under the APP would, in principle, be reduced to EUR 15 billion from October 2018 until the end of December 2018 and that net purchases will then end. (82)

105. The relationship between the PSPP and price stability and, consequently, the monetary policy mandate of the ECB, is therefore unquestionable, as is the need for reaction in response to the risks of deflation which were objectively identified when the PSPP was adopted. (83) Moreover, as the Italian and Finnish Governments, inter alia, note in their written observations, the monetary policy objective of the programme is reinforced by the absence of selectivity under the PSPP. (84)

106. The means used are also monetary policy instruments since, in accordance with Article 3 of Decision 2015/774, authorising the purchase of public sector debt securities on secondary markets is concerned. However, as the Court held in paragraph 54 of its judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400), ‘it is clear from Article 18.1 of the Protocol on the ESCB and the ECB, which forms part of Chapter IV thereof, that in order to achieve the objectives of the ESCB and to carry out its tasks, as provided for in primary law, the ECB and the national central banks may, in principle, operate in the financial markets by buying and selling outright marketable instruments in euro’.

107. The referring court itself takes the view that the aim of the PSPP and the means used are in principle permissible concretisation of ECB’s task of ensuring price stability. As the inflation rate

substantially depends on spending by private households and on the real economy, an increase in the liquidity of commercial banks and their customers — which is the aim of the PSPP — may be considered a useful interim aim on the way to influencing an increase in prices. (85)

(2) *The indirect effects of the PSPP*

108. The high volume of purchases authorised by Decision 2015/774 and the duration of the PSPP nevertheless raise doubts on the part of the Bundesverfassungsgericht (Federal Constitutional Court) which asks, therefore, about the impact that the *effects* of the PSPP may have in terms of economic policy on the validity of Decision 2015/774.

109. In the first place, according to the Bundesverfassungsgericht (Federal Constitutional Court), the volume of the PSPP inevitably leads to a shift in economic policy. The fact that, because of the PSPP, the banks are able to sell a very large number of risky securities that they would not have been able to unload without the PSPP (or only at a loss) reflects an economic policy objective since the PSPP significantly improves the economic situation of the banks and increases their creditworthiness. In the second place, the Bundesverfassungsgericht (Federal Constitutional Court) states that the PSPP improves the refinancing terms of the Member States which are able to obtain clearly more favourable terms for loans on the capital market than would be the case without the PSPP. Given the particularly large volume of the PSPP, this could lead to that programme being regarded, qualitatively, as falling primarily within economic policy.

(i) *Theoretical considerations with regard to the relationship between monetary policy and economic policy and the scope of judicial review*

110. It is unavoidable that the implementation of the PSPP has consequences for the economic policy pursued by the Member States, particularly since, under Article 119(2), Article 127(1) and Article 282(2) TFEU, the secondary objective of the ECB is to support the EU's economic policies. (86) That is why, as the Court held in its judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 59), indirect effects do not mean that an ECB programme which has a monetary policy objective and, for that purpose, uses instruments particular to that policy, is treated as equivalent to an economic policy measure.

111. The difficulty therefore lies in determining the 'indirect effects' of a monetary policy measure. According to the Bundesverfassungsgericht (Federal Constitutional Court), that concept cannot refer to a certain and foreseeable consequence of the contested measure, but solely to consequences that are associated with further interim steps. I do not share that interpretation.

112. First of all, I note that, although the Court did not define the concept of 'indirect effects' in the case which gave rise to the judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400), the effect examined in the context of that case did not relate to an 'interim' step of OMTs but, on the contrary, to an essential condition for their application — namely the implementation of the programme being conditional upon full compliance with EFSF or ESM macroeconomic adjustment programmes. The Court recognised that, with that condition, it was possible that the OMT programme may, 'indirectly', increase the impetus to comply with those adjustment programmes and thus, to some extent, further the economic-policy objectives of those programmes. However, such effects, which are more than probable and have an immediate link with the programme in question, were deemed to be indirect. (87)

113. Furthermore, without distorting the meaning of the adjective used by the Court, an 'indirect effect' cannot be equated with an effect which is only 'limited', 'ancillary' or even 'marginal'. Such an interpretation would also conflict with the wording of the FEU Treaty. The FEU Treaty adds support for general economic policies in the Union to the objective of price stability without limiting the scope of such support. On the contrary, Article 127(1) TFEU requires the ESCB to act in that manner since, written in the present tense, it stipulates that 'the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the

Treaty on European Union'. The only limitation on that support is not to undermine the monetary policy objective.

114. Finally, I take the view that the Court must be wary of carrying out a review of expediency since the ESCB enjoys broad discretion 'when it prepares *and implements* an open market operations programme' (88) in the light of choices of a technical nature which it makes and the forecasts and complex assessments to be undertaken.

115. In those circumstances, I consider that, where it has been found that the objectives of the programme at issue and the instruments chosen for its implementation fall within the area of monetary policy, it is necessary but sufficient for the judicial body to find that guarantees which are theoretically sufficient exist to prevent that programme from pursuing, in reality, an overriding economic policy objective or from undermining the objective of price stability.

116. This seems to me to be consistent with the role of the court which, when it is recognised that the legislature has a broad discretion on account of highly complex economic, scientific and technical facts, must confine itself to examining whether the exercise of such powers has been vitiated by a manifest error of appraisal or a misuse of powers, or whether the legislature has manifestly exceeded the limits of its discretion. (89) 'In such a context, the EU judicature cannot substitute its assessment of [economic,] scientific and technical facts for that of the [institution] on which the Treaty has placed that task'. (90)

117. Such a review may seem limited, or even formal. The Court — or any other court — cannot therefore be criticised for acting in that manner since a more in-depth analysis would no longer be legal, but, in the present case, would be economic, and this falls outside the technical competence of the court. (91) The question of expertise must necessarily be taken into account when considering the separation of powers and the resolution of constitutional disputes. (92) The courts called upon to review the validity of decisions of the ECB are not elected, nor are the bodies of the ECB. They both derive their legitimacy not only from their independence —which does not mean impunity — but also from their expertise, which makes it possible to determine the scope of their mandate.

*(ii) The PSPP guarantees that limit its impacts in terms of economic policy*

118. The first effect of the PSPP that is criticised by the referring court for having an economic policy aim is the improvement in the economic situation of the banks and the increase in their creditworthiness on account of the sale to the ESCB of a significant volume of risky securities that they would not have been able to unload without the PSPP (without incurring losses).

119. In that regard, the credit quality requirement laid down in Article 3(2)(a) of Decision 2015/774 is not only a guarantee which contributes to compliance with the impetus to follow a sound budgetary policy, but also demonstrates that the objective of the PSPP is not to allow commercial banks to unload the risky securities that they own.

120. The second indirect effect put forward by the referring court is the improvement in the refinancing terms of the Member States which are able to obtain clearly more favourable terms for loans on the capital market than would be the case without the PSPP. Given the particularly large volume of the PSPP, this could lead to that programme being regarded, qualitatively, as falling primarily within economic policy.

121. As the Court has already held in a manner which is relevant, 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. (93) The ECB's activities cannot, however, amount to the grant of financial assistance to a Member State as such a measure clearly does not fall within monetary policy. (94)

122. In that regard, some of the guarantees which legitimise the PSPP in the light of Article 123 TFEU also ensure that the programme does not, principally, pursue an economic policy objective. In addition to

making the purchase of government bonds conditional upon credit quality, (95) I consider three guarantees to be essential. First, purchases of government bonds under the PSPP are subsidiary in relation to the activities authorised by the other three APP programmes which all concern the purchase of private bonds. (96) Secondly, the purchases authorised by the PSPP are distributed across all of the euro area Member States in accordance with a fixed and objective distribution key, which is independent of the individual economic situation of those States. Thirdly, risk sharing is limited to 20% of purchases made under the PSPP. Those features, which determine and frame the implementation of the PSPP, prevent that programme from being treated as equivalent to the grant of financial assistance to a Member State.

123. In the light of the foregoing, I do not therefore consider that the ECB committed a manifest error of assessment in determining the objective of the programme, or in its choice of instruments to be implemented. Moreover, it did not misuse its powers (97) or manifestly exceed the limits of its discretion. That said, if the PSPP pursues a monetary policy objective using instruments which fall under that same policy, the measures that it entails must still be proportionate to the stated objective.

**(b) *The proportionality of the PSPP***

124. 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. (98)

125. As I have already mentioned several times in this Opinion, the ESCB, however, enjoyed broad discretion since, when it prepared and implemented an open market operations programme such as the PSPP, it was required to make choices of a technical nature and to undertake forecasts and complex assessments. (99) In that context, ‘a review of compliance with certain procedural guarantees is of fundamental importance. Those guarantees include the obligation for the ESCB to examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions’. (100)

**(1) *The ability of the PSPP to achieve the objectives of the ESCB and the need for it***

126. In accordance with recital 4 of Decision 2015/774, the PSPP is a proportionate measure for mitigating the risks to the outlook on price developments as ‘it will further ease monetary and financial conditions, including those relevant to the borrowing conditions of euro area 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 levels below but close to 2% over the medium term’. According to the same recital, the measure is justified as, ‘in an environment where key ECB interest rates are at their lower bound, and purchase programmes focusing on private sector assets are judged to have provided measurable, but insufficient, scope to address the prevailing downside risks to price stability, it is necessary to add to the Eurosystem’s monetary policy measures the PSPP as an instrument that features a high transmission potential to the real economy. Thanks to its portfolio re-balancing effect, the sizable purchase volume of the PSPP will contribute to achieving the underlying monetary policy objective of inducing financial intermediaries to increase their provision of liquidity to the interbank market and credit to the euro area economy’.

127. The risk of deflation, at the time when Decision 2015/774 was adopted, is not disputed. (101) The deflationary context in which the PSPP arose is also described in recital 3 of Decision 2015/774. In that recital, the ECB notes that the decision was taken ‘in view of a number of factors that have materially increased the downside risk to the medium-term outlook on price developments, thus jeopardising the achievement of the ECB’s primary objective of maintaining price stability. These factors include lower than expected monetary stimulus from adopted monetary policy measures, a downward drift in most indicators of actual and expected euro area inflation — both headline measures and measures excluding the impact of volatile components, such as energy and food — towards historical lows, and the increased

potential of second-round effects on wage and price-setting stemming from a significant decline in oil prices’.

128. As the referring court acknowledges, the inflation rate substantially depends on spending by private households and on the real economy. In that regard, an increase in the liquidity of commercial banks and their customers may be considered a useful interim aim on the way to influencing an increase in prices. (102)

129. The economic doctrine relied on by the ECB tends to confirm that a quantitative easing programme is capable of attaining the objective of price stability as it has a significant and lasting impact on the economy. A large purchase of securities, including public sector bonds, eases monetary and financial conditions and therefore enables undertakings and households to obtain financing at more favourable prices. In principle, this stimulates investment and consumption, which contribute to returning inflation rates to a level below, but close to, 2%.

130. As the ECB convincingly explains in its written observations, Decision 2015/774 is capable of attaining its objective by mobilising three different channels of influence: the signalling channel, the duration channel and the portfolio reallocation channel. First of all, the PSPP indicates the ECB’s tendency to combat deflationary trends and, accordingly, strengthens the credibility of the communication on the future development of key interest rates. Subsequently, the PSPP has the effect of reducing the risk premia associated with maturity which are required by market participants and are related to taking interest rate risks. Finally, the fall in public sector bond yields caused by the reduction in supply encourages private investors to redistribute their portfolios in other market sectors, inter alia by purchasing corporate bonds or, in the case of banks, by increasing lending to households and private undertakings.

131. In addition, the PSPP was necessary because the ECB had already exhausted the other monetary policy measures that are equally effective. The only category of securities capable of providing the purchase volume needed to bridge the inflation gap, owing to its market volume at that time, was that of public sector bonds.

132. Those features of a quantitative easing measure and the context in which Decision 2015/774 arose were clarified by the President of the ECB in his introductory statement of 22 January 2015 and, above all, in the minutes of the ECB Governing Council’s monetary policy meeting on 21 and 22 January 2015 in which the PSPP was agreed. Although the obligation to provide a statement of reasons which is incumbent on the ECB is important, compliance with that obligation must be assessed with reference not only to the wording of the measure concerned, but also to its context and the whole body of legal rules governing the matter in question. (103) The introductory statements of the President of the ECB and the minutes of the ECB Governing Council’s monetary policy meetings unquestionably form part of the documents which may depict that ‘context’.

133. The introductory statement of the President of the ECB is the first useful statement of reasons. It explains clearly and coherently that ‘today’s monetary policy decision on additional asset purchases was taken to counter two unfavourable developments. First, inflation dynamics have continued to be weaker than expected. While the sharp fall in oil prices over recent months remains the dominant factor driving current headline inflation, the potential for second-round effects on wage and price-setting has increased and could adversely affect medium-term price developments. This assessment is underpinned by a further fall in market-based measures of inflation expectations over all horizons and the fact that most indicators of actual or expected inflation stand at, or close to, their historical lows. At the same time, economic slack in the euro area remains sizeable and money and credit developments continue to be subdued. Second, while the monetary policy measures adopted between June and September [2014] resulted in a material improvement in terms of financial market prices, this was not the case for the quantitative results. As a consequence, the prevailing degree of monetary accommodation was insufficient to adequately address heightened risks of too prolonged a period of low inflation. Thus, today the adoption of further balance sheet measures has become warranted to achieve our price stability objective, given that the key ECB interest rates have reached their lower bound’.

134. The minutes of the ECB Governing Council's monetary policy meeting on 21 and 22 January 2015 are even more comprehensive. In particular, in those minutes, the inflation outlook in the euro area is classified at 'subdued', the annual increase in the Harmonised Indices of Consumer Prices (HICP) was  $-0.2\%$  in December 2014, 'mainly reflecting a drop in the annual rate of change of the energy component but also a decline in the food component'. (104) Under the heading 'Monetary policy considerations and policy options' in point 1 'Review of financial, economic and monetary developments and policy options', the question as to whether 'the monetary stimulus already in the pipeline remains adequate to achieve inflation rates below, but close to,  $2\%$  over the medium term, or whether an expanded asset purchase programme has become necessary to fulfil the ECB's price stability mandate' was expressly raised, and at a time when 'the macroeconomic risks from too prolonged a period of low inflation have intensified further and risks of second-round effects have increased'. (105) It was also noted that the 'quantitative' element of the measures taken previously by the Governing Council had fallen short of initial expectations.

135. It was in that context that Mr Praet, a member of the Executive Board of the ECB, suggested that two monetary policy options could be considered: either the immediate intensification of the accommodative stance of monetary policy — two variants were set out —, or a wait and see approach, stating that 'due account would also need to be taken of the risks stemming from not acting at the present meeting, which might be higher than the risks stemming from acting'. (106) The issue of risk sharing was also covered in that meeting, as were the various possible options. (107) The operational details of a possible purchase programme for public sector securities were, subsequently, set out by Mr Cœuré, another member of the Executive Board of the ECB.

136. The minutes of the ECB Governing Council's monetary policy meeting on 21 and 22 January 2015 make reference to a real debate on price developments — which did not illustrate a deflationary situation, but nevertheless posed a risk of second-round effects which needed to be considered very seriously. The decisions on monetary policy were taken on those bases for discussion. The minutes expressly report that 'a number of considerations in favour of maintaining a wait-and-see stance at the current meeting were also advanced by some members, as the cost-benefit assessment of the proposed measures was not positive in their view'. (108) Those elements are detailed in the remainder of the minutes, as are the alternative solutions that were proposed.

137. However, 'it was widely judged that, given the current level of corporate bond yields and the size of the corporate bond market, the credit easing potential of corporate bond purchases appeared rather small, and therefore offered only limited scope for providing the degree of accommodation needed at this stage'. (109) Therefore, following an open and reasoned discussion, 'purchases of sovereign debt appeared to be the only remaining instrument of sufficient scope to provide the necessary monetary stimulus to deliver on the ECB's price stability objective'. (110) Risk sharing, the volume of the programme and the technical features of the PSPP were then discussed and decided upon.

138. It follows from the foregoing that the reasoning and the decisions of the ESCB are disclosed in a clear and unequivocal fashion, either directly in the recitals of Decision 2015/774, clarified by the introductory statement of the President of the ECB of 22 January 2015, or in the minutes of the ECB Governing Council's monetary policy meeting on 21 and 22 January 2015. Decision 2015/774 therefore satisfies the requirement to state reasons laid down in the second paragraph of Article 296 TFEU since the persons concerned are able to ascertain the reasons for the measure and the Court is able to exercise its power of review.

139. Moreover, it follows from that reasoning that the ESCB has examined carefully and impartially all the relevant elements of the situation in question and that its analysis of the economic situation did not appear, on the date of the announcement of the programme and of Decision 2015/774, vitiated by a manifest error of assessment.

(2) *The proportionality stricto sensu of the PSPP*

140. While the PSPP is capable of attaining its pursued objective of price stability, it must also not go manifestly beyond what is necessary.

141. In that regard, recitals 5 and 7 of Decision 2015/774 state, first, that ‘the PSPP contains a number of safeguards to ensure that the envisaged purchases will be proportionate to its aims, and that the related financial risks have been duly taken into account in its design and will be contained through risk management’ and, secondly, that, ‘in terms of the size of the PSPP, the ABSPP and the CBPP3, the liquidity provided to the market by the combined monthly purchases will amount to EUR 60 billion. Purchases are intended to be carried out until the end of September 2016 and will, 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’.

142. First of all, the amount of EUR 60 billion does not appear to go beyond what was therefore necessary. It follows from the minutes of the ECB Governing Council’s monetary policy meeting on 21 and 22 January 2015 that a programme with a volume ‘in the order of EUR 50 billion lasting from March 2015 to end-2016’ was seen as ‘needed to compensate for the weakened inflation outlook coupled with the weaker than expected monetary stimulus’. However, ‘in order to accelerate the impact [of the PSPP], there was broad support in favour of some frontloading by increasing the monthly purchase volume to EUR 60 billion, starting in March 2015 and intended to last until the end of September 2016, while not materially altering the overall volume of intended purchases’. [\(111\)](#)

143. In addition, the unfavourable developments observed during 2015 and 2016 justified the amendments to Decision 2015/774, in particular with regard to the duration and the volume of the PSPP.

144. In particular, the extension of the PSPP, which was decided on 3 December 2015, was adopted following a debate based on several pieces of data which confirmed that the adjustment of inflation to rates closer to 2% would take longer than envisaged in March 2015. [\(112\)](#) There is no doubt that the interests involved had been weighed up. The minutes of the ECB Governing Council’s monetary policy meeting on 2 and 3 December 2015 record, inter alia, that ‘it was ... argued ... that the risk of policy inaction clearly outweighed the risk of action’, but also that some members of the Governing Council ‘did not see sufficient evidence in support of a recalibration of monetary policy at the current meeting’, or even ‘cautioned that the judgement on the need to act could not be separated from the nature of the remaining available instruments’ and that ‘the effectiveness of further monetary policy action had to be weighed against its potential costs and side effects’. Accordingly, while there was significant support for the proposed extension of the APP from September 2016 to March 2017, there was broad consensus that the circumstances did not warrant the other options, such as extending the programme further or expanding the monthly volume of purchases. [\(113\)](#)

145. The decision to increase the monthly purchase volume under the APP to EUR 80 billion on 8 December 2016 was taken following a similar debate, and after a further deterioration in the prospects for a sustained adjustment in the path of inflation had been noted, primarily owing to worsening external conditions. [\(114\)](#) As recorded — and explained in detail — in the minutes of the ECB Governing Council’s monetary policy meeting on 9 and 10 March 2016, ‘different views were expressed with regard to the individual components of the proposed package’. [\(115\)](#) In particular, the costs and risks of engaging further in public sector asset purchases were raised by some members [\(116\)](#) and the introduction of an exemption scheme for the deposit facility rate applicable to banks’ holdings of excess reserves was not seen as warranted. [\(117\)](#)

146. The decision to extend the APP until December 2017 also responds to a serious analysis of the outlook on price developments. Accordingly, without overlooking the rise in inflation, in his presentation on the global environment and economic and monetary developments in the euro area, Mr Praet drew the attention of the Governing Council of the ECB to the fact that underlying inflation had not yet shown a convincing upward trend. In the light of all of the parameters available to the ECB, while Mr Praet considered that an extension of the asset purchase programme beyond March 2017 seemed warranted, there was still insufficient progress towards a sustained adjustment in the path of inflation. [\(118\)](#) Two

options were therefore proposed to the Governing Council: to continue purchases at the monthly pace of EUR 80 billion for six months or to extend the programme by nine months at a monthly pace of EUR 60 billion. Both Mr Praet and Mr Cœuré — after having outlined the issues raised by the implementation of both options — expressed their preference towards the second option. (119)

147. Those options were the subject of real debate within the Governing Council of the ECB. According to the minutes of the ECB Governing Council's monetary policy meeting on 7 and 8 December 2016, arguments in favour of a shorter or a longer purchase horizon were put forward, and other members did not support either of the options proposed. (120) Extending purchases over a horizon of nine months at a monthly pace of EUR 60 billion was, finally, regarded as the option which '[struck] the right balance between providing a signal of confidence and the need to preserve stability in an uncertain environment, while having clear merits in terms of flexibility to respond to adverse circumstances and safeguarding operational feasibility'. (121)

148. The various amendments to the PSPP, in particular in terms of duration and volume, are therefore the outcome of balancing the interests involved. In that regard, the ECB's practice of publishing the minutes of the ECB Governing Council's monetary policy meetings in which decisions concerning the PSPP are taken ensures that a specific and sufficient statement of reasons which satisfies the requirements of the second subparagraph of Article 296 TFEU is given. As it was announced in the ECB's press releases and reflected in the recitals of the decisions of the ECB amending Decision 2015/774, the binding force of the monthly purchase volumes and the period of application of the APP vis-à-vis the ESCB cannot be disputed, if for no other reason than the principle *patere legem quam ipse fecisti*. According to the ECB, those amendments, in addition, led to the amendment of Article 2(2) and Article 3 of the PSPP Guideline, in order to implement the changes to the monthly purchase volume of the APP and the extensions to the period of application of that programme.

149. Moreover, in addition to making the PSPP subordinate to the objective of achieving inflation rates below, but close to, 2% over the medium term — which determines its duration but also its volume — the potential scale of the PSPP is limited in a number of ways by Decision 2015/774.

150. Those limitations respond to some of the guarantees which prevent operators which are active on the government bond markets from being able to act, de facto, as intermediaries for the ESCB for the direct purchase of bonds from the public authorities and bodies of the Member State concerned. I shall therefore limit myself to recalling them:

- first, the PSPP is only one of the four sub-programmes of the APP and the purchase of government bonds on secondary markets authorised under the PSPP is subsidiary in relation to the other three programmes which concern the purchase of private bonds; (122)
- secondly, it follows from Article 6(2) of Decision 2015/774 that the purchases permitted are distributed across all of the euro area Member States on the basis of the key for subscription of the ECB's capital laid down in Article 29 of the Protocol on the ESCB and the ECB, and
- thirdly, Article 5 of Decision 2015/774 sets two limits for the purchase of government bonds on secondary markets: the first relates to the issuing of bonds and the second to the issuer.

151. It is therefore apparent from the features of the PSPP as established by Decision 2015/774 that the ESCB weighed up the various interests involved in such a way as to prevent disadvantages which are manifestly disproportionate to the objectives pursued from arising when the programme in question is implemented.

152. My conclusion is not a denial of the controversies over the effectiveness of the PSPP. However, as the Court has already had occasion to emphasise in a manner which is relevant, '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'. (123) The minutes of the ECB Governing Council's monetary policy meetings concerning Decision 2015/774 provide sufficient evidence of that diligence.

### 3. *Conclusion on the third and fourth questions*

153. It follows from the foregoing that, in adopting Decision 2015/774, the ECB did not exceed its mandate, as defined in Article 119 and in Article 127(1) and (2) TFEU and that the PSPP was established and implemented in accordance with the principles of conferral and of proportionality set out in Article 5(2) and (4) TEU.

## VI. Conclusion

154. In the light of the foregoing considerations, I propose that the Court should reply as follows to the questions referred for a preliminary ruling by the Bundesverfassungsgericht (Federal Constitutional Court, Germany):

Examination 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) 2015/2101 of the European Central Bank of 5 November 2015, by Decision (EU) 2016/702 of the European Central Bank of 18 April 2016, by Decision (EU) 2015/2464 of the European Central Bank of 16 December 2015, and by Decision (EU) 2017/100 of the European Central Bank of 11 January 2017, has not revealed any factor capable of affecting its validity.

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[1](#) Original language: French.

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[2](#) OJ 2015 L 121, p. 20.

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[3](#) OJ 2015 L 303, p. 106.

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[4](#) OJ 2016 L 121, p. 24. Although the referring court makes no reference to it in its questions, Decision 2015/774 has also been amended by Decision (EU) 2015/2464 of the European Central Bank of 16 December 2015 (OJ 2015 L 344, p. 1) and by Decision (EU) 2017/100 of the European Central Bank of 11 January 2017 (OJ 2017 L 16, p. 51).

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[5](#) OJ 2012 C 326, p. 230.

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[6](#) That is to say the asset-backed securities purchase programme ('ABSPP') and the third covered bond purchase programme ('CBPP3'). The fourth sub-programme, the corporate sector purchase programme ('CSPP'), was agreed on 10 March 2016 (see Decision (EU) 2016/948 of the ECB of 1 June 2016 on the implementation of the corporate sector purchase programme (ECB/2016/16) (OJ 2016 L 157, p. 28)).

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[7](#) Article 3(1) of Decision 2015/774.

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[8](#) Article 3(3) of Decision 2015/774.

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[9](#) Article 5 of Decision 2015/774. The purchase limits are increased to 50% for bonds issued by international organisations and multilateral development banks.

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[10](#) Article 3(2) of Decision 2015/774. Special rules apply to the bonds of Member States that are subject to a financial assistance programme.

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[11](#) Article 6 of Decision 2015/774.

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[12](#) See the introductory statement of the President of the ECB of 22 January 2015 and the ECB press release of the same date and the ECB press release of 10 March 2016 regarding the addition of the CSPP to the APP and changes to the APP.

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[13](#) OJ 2016 L 169, p. 14.

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[14](#) See, to that effect, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraphs 14 and 16).

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[15](#) See, to that effect, judgments of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741, paragraph 40), and of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 29).

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[16](#) See, to that effect, judgment of 22 October 2002, *National Farmers' Union* (C-241/01, EU:C:2002:604, paragraph 37 and the case-law cited).

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[17](#) Judgment of 17 July 1997, *SAM Schiffahrt and Stapf* (C-248/95 and C-249/95, EU:C:1997:377, paragraph 46). See, also, judgment of 1 October 2009, *Gaz de France — Berliner Investissement* (C-247/08, EU:C:2009:600, paragraph 49).

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[18](#) Judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 102).

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[19](#) Judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 66).

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[20](#) See, to that effect, judgments of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463, paragraph 65), and of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 28).

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[21](#) Judgment of 6 October 2015, *Târșia* (C-69/14, EU:C:2015:662, paragraph 14). See, also, judgments of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 29), and of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 25).

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[22](#) Emphasis added.

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[23](#) The position of the ECB in favour of sharing losses between national central banks which is limited to 12% of purchases was announced in the introductory statement of the President of the ECB of 22 January 2015 and published in a press release of the same date. That share has subsequently been *reduced* to 10% on account of a change in the allocation of purchases (see ECB press release of 10 March 2016 and the amendment to Article 6 of Decision 2015/774 by Article 1 of Decision 2016/702).

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[24](#) Emphasis added.

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[25](#) See, to that effect, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 95).

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[26](#) Judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 97).

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[27](#) Judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 109).

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[28](#) Judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraphs 102 and 115).

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[29](#) See, to that effect, Wilsher, D., 'Ready to Do Whatever it Takes? The Legal Mandate of the European Central Bank and the Economic Crisis', *Cambridge Yearbook European of Legal Studies*, Vol. 15, 2012-2013, pp. 510 to 536, in particular, p. 514.

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[30](#) Judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 96).

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[31](#) OJ 1993 L 332, p. 1.

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[32](#) See, to that effect, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 106).

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[33](#) Therefore, it follows from the minutes of the ECB Governing Council's monetary policy meeting on 21 and 22 January 2015 that the APP 'would start in March 2015 and involve monthly purchases of EUR 60 billion which were intended to last until the end of September 2016, and, in any case, until the Governing Council sees a sustained adjustment in the path of inflation consistent with the aim of achieving inflation rates below, but close to, 2%' (p. 21 of the French-language version; see, also, ECB press release of 22 January 2015). Subsequent minutes confirm that 'the Governing Council remain[s] willing and able to act, if necessary, by using all available tools within its mandate, *including the flexibility of its asset purchase programmes in terms of adjusting their size, composition and duration*' (minutes of the ECB Governing Council's monetary policy meeting on 2 and 3 September 2015, p. 19 of the French-language version available on the Banque de France website; emphasis added). See, also, the minutes of the ECB Governing Council's monetary policy meeting on 2 and 3 December 2015, in particular, pp. 18 to 20 of the French-language version available on the Banque de France website, or even the minutes of the ECB Governing Council's monetary policy meeting on 7 and 8 December 2016 which state that 'it [must] be reiterated that, given prevailing uncertainties, the Governing Council [will] continue to monitor closely the evolution of the outlook for price stability and, if warranted to achieve its objective, would act by using all the instruments available within its mandate' (p. 15 of the French-language version available on the Banque de France website).

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[34](#) Article 2(2) of the PSPP Guideline.

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[35](#) Subject to the exclusion of Greece on account of credit quality requirements. On the basis of those guarantees, the central banks of the Eurosystem did not purchase Greek public sector bonds under the PSPP (see Decision 2016/1041). With regard to those conditions, see points 86 and 87 of this Opinion.

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[36](#) In exceptional circumstances, that limit is restricted to 25% (Article 5(1)(b) of Decision 2015/774). It is, however, 50% for bonds issued by international organisations and multilateral development banks (Article 5(1)(a) of Decision 2015/774).

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[37](#) The limit per issuer rises to 50% for issuers which are international organisations or multilateral development banks (Article 5(2)(a) of Decision 2015/774).

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[38](#) Article 4(3) of the PSPP Guideline, read in conjunction with paragraph 5 of its Annex.

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[39](#) See, to that effect, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraphs 106 and 107).

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[40](#) Article 9 of the PSPP Guideline, read in conjunction with paragraph 6 of its Annex.

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[41](#) The information was given by the ECB in the context of the reference for a preliminary ruling (paragraph 89 of the ECB's observations). In addition, I note that the ECB also stated that the period which actually elapsed between a bond being issued on the primary market and its purchase on the secondary markets was usually longer than that required by the blackout period. That 'de facto' extension of the blackout period increases the uncertainty among operators regarding the resale of public sector bonds acquired on the primary market and the formation of a market price.

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[42](#) See the introductory statement of the President of the ECB of 22 January 2015 and the ECB press release of the same date. Amendments to the PSPP have also been communicated regularly (see, inter alia, ECB press releases of 10 March 2016 on monetary policy decisions and on changes to the APP, and of 8 December 2016 on monetary policy decisions).

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[43](#) See, inter alia, to that effect, Krishnamurthy, A., and Vissing-Jorgensen, A., 'The Effects of Quantitative Easing on Interest Rates: Channels and Implications for Policy', *Brookings Papers on Economic Activity*, 2011, pp. 215 to 287; Bauer, M.D., and Rudebusch, G.D., 'The Signaling Channel for Federal Reserve Bond Purchases', *International Journal of Central Banking*, 2014, pp. 233 to 289.

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[44](#) Article 8(1) of Decision 2015/774.

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[45](#) Article 8(2) of Decision 2015/774.

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[46](#) Paragraph 118 of that judgment.

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[47](#) See, to that effect, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 118).

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[48](#) Article 12(2) of the PSPP Guideline.

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[49](#) Paragraph 16 of the German Government's written observations.

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[50](#) See, to that effect, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 125).

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[51](#) See ECB press release of 19 January 2017 providing details on APP purchases of assets with yields below the deposit facility rate.

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[52](#) See, to that effect, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 96).

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[53](#) See, also, Article 119(2) TFEU. Recital 6 of Decision 2015/774 expressly refers to the principle of an open market economy with free competition.

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[54](#) See point 63 of this Opinion.

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[55](#) According to the ECB, this represents one eighth of the volume of bonds in circulation under the PSPP.

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[56](#) That claim was formally challenged by several Member States in response to questions put to them by the Court. Moreover, the Deutsche Bundesbank confirmed, in its written replies to the Court's questions, that, while there may have been signals of scarcity in the German government bond market in 2016, German government bonds had nevertheless always been available in sufficient quantities.

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[57](#) See, to that effect, judgment of 22 October 2002, *National Farmers' Union* (C-241/01, EU:C:2002:604, paragraph 37 and the case-law cited).

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[58](#) See, to that effect, judgments of 5 October 1994, *Crispoltoni and Others* (C-133/93, C-300/93 and C-362/93, EU:C:1994:364, paragraph 43), and of 12 July 2001, *Jippes and Others* (C-189/01, EU:C:2001:420, paragraph 84).

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[59](#) Recital 4 of Decision 2015/774.

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[60](#) Recital 4 of Decision 2015/774.

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[61](#) See points 131 to 142 of that Opinion and see, also, my Opinion in *Coman and Others* (C-673/16, EU:C:2018:2, footnote 25).

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[62](#) Opinion of Advocate General Bobek in *Confédération paysanne and Others* (C-528/16, EU:C:2018:20, point 140).

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[63](#) See Decision 2015/2101.

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[64](#) See Decision 2015/2464.

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[65](#) Minutes of the ECB Governing Council's monetary policy meeting on 2 and 3 December 2015, p. 18 of the French-language version available on the Banque de France website.

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[66](#) See, to that effect, in relation to OMTs, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 117).

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[67](#) OJ 2014 L 240, p. 28.

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[68](#) The exclusion of Greek bonds from the PSPP confirms the effectiveness of that guarantee (see Decision 2016/1041).

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[69](#) See, to that effect, statement by Mr Cœuré (Minutes of the ECB Governing Council's monetary policy meeting on 9 and 10 March 2016, p. 8 of the French-language version available on the Banque de France website).

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[70](#) In accordance with the Commission Recommendation of 23 May 2018 to abrogate Decision 2009/414/EC on the existence of an excessive deficit in France (See Commission Decision COM(2018) 433 final).

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[71](#) Spain.

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[72](#) See, to that effect, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 41).

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[73](#) See, to that effect, judgments of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756, paragraph 53), and of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 42).

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[74](#) Emphasis added.

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[75](#) Emphasis added.

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[76](#) See, to that effect, judgments of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756, paragraph 55), and of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 46).

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[77](#) See, to that effect, judgments of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756, paragraph 56), and of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 52).

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[78](#) See, to that effect, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 59).

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[79](#) See, to that effect, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 66).

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[80](#) Judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 69).

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[81](#) Accordingly, in recital 2 of Decision 2015/2464, the ECB specified that ‘on 3 December 2015, the Governing Council decided, in line with its mandate to ensure price stability, to revise certain of the PSPP’s design features, to secure a sustained adjustment in the path of inflation towards levels that are below, but close to 2%, over the medium term’. See, also, recital 2 of Decision 2016/702 and recitals 3 and 4 of Decision 2017/100. In accordance with a decision of the Governing Council of the ECB taken in 1998, price stability was defined as a year-on-year increase in the Harmonised Index of Consumer Prices of below 2%. While confirming that definition, the Governing Council decided, on 8 May 2003, that, in the pursuit of price stability, it would aim to maintain inflation rates close to 2% over the medium term. In so doing, the ECB’s intention was to provide a safety margin to guard against the risks of deflation (see ECB press release of 8 May 2003 on the ECB’s monetary policy strategy).

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[82](#) See ECB press release of 14 June 2018 regarding monetary policy decisions.

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[83](#) See, to that effect, Antonin, C., Blot, C., Le Bayon, S., Péléraux, H., Riffart, C., et al., ‘Banques centrales, dernier rempart contre la déflation: Perspectives économiques 2014-2015 pour l’économie mondiale’, *Revue de l’OFCE – Analyse et prévisions*, 2014, pp. 11 to 51.

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[84](#) With regard to the link between monetary policy and the uniform application of the PSPP in all of the euro area Member States, see Adamski, D., ‘Economic Constitution of the Euro Area After the *Gauweiler* Preliminary Ruling’, *Common Market Law Review*, Vol. 52, 2015, pp. 1451 to 1490, in particular, pp. 1488, footnote 122. In the case which gave rise to the judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400), the Court held that the mere fact that the OMT programme is specifically limited to government bonds of certain Member States was not of a nature to imply, of itself, that the instruments used by the ESCB fell outside the realm of monetary policy (paragraph 55). This is particularly true where such selectivity is lacking.

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[85](#) See paragraph 117 of the request for a preliminary ruling.

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[86](#) See, to that effect, Martucci, F., ‘La Cour de justice face à la politique monétaire en temps de crise de dettes souveraines: l’arrêt *Gauweiler* entre droit et marché’, *Cahiers de droit européen*, 2015, pp. 493 to 534, in particular, pp. 513 and 514. The author speaks of ‘porosity’ between the areas of competence in the field of monetary policy, on the one hand, and matters of economic policy, on the other.

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[87](#) See, to that effect, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraphs 56 to 59).

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[88](#) See, to that effect, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 68, emphasis added).

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[89](#) See, to that effect, in relation to reviewing the activity of the EU legislature in economic matters, judgment of 11 January 2017, *Spain v Council* (C-128/15, EU:C:2017:3, paragraph 46) or in scientific matters, judgment of 21 June 2018, *Poland v Parliament and Council* (C-5/16, EU:C:2018:483, paragraph 150).

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[90](#) Judgment of 21 June 2018, *Poland v Parliament and Council* (C-5/16, EU:C:2018:483, paragraph 150). See, also, to that effect, judgments of 22 November 2001, *Netherlands v Council* (C-301/97, EU:C:2001:621, paragraph 135), and of 8 July 2010, *Afton Chemical* (C-343/09, EU:C:2010:419, paragraph 28).

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[91](#) See, to that effect, Martucci, F., ‘La Cour de justice face à la politique monétaire en temps de crise de dettes souveraines: l’arrêt *Gauweiler* entre droit et marché’, *Cahiers de droit européen*, 2015, pp. 493 to 534, in particular, p. 509; Classen, C.D., ‘Funktionsadäquate checks and balances statt richterliche Vollkontrolle unter demokratischem Vorwand’, *Europarecht*, 2015, Vol. 4, pp. 477 to 486; Herrmann, C., and Dornacher, C., ‘Grünes Licht vom EuGH für EZB-Staatsanleihenkäufe — ein Lob der Sachlichkeit!’, *Europäische Zeitschrift für Wirtschaftsrecht*, 2015, pp. 579 to 583, and Hinarejos, A., ‘*Gauweiler* and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union’, *European Constitutional Law Review*, Vol. 11, 2015, pp. 563 to 576, in particular, p. 575. Some of those authors also rely on the necessary independence of the ECB in order to justify the limited nature of the review which must be undertaken by the Court.

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[92](#) See, in that regard, Halberstam, D., ‘Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States’, in Dunoff, J., and Trachtman, J., (Ed.), *Ruling the World? Constitutionalism, International Law and Global Government*, Cambridge University Press, 2009, pp. 326 to 355. See, also, for an application of Halberstam, D.’s theory to decisions taken by the Union to combat the financial crisis, Fabbrini, F., ‘The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective’, *Berkeley Journal of International Law*, Vol. 32:1, 2014, pp. 64 to 123, in particular, p. 116 et seq.

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[93](#) Judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 110).

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[94](#) See, to that effect, judgment of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756, paragraph 57).

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[95](#) With regard to that condition, see points 86 and 87 of this Opinion.

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[96](#) Article 2(2) of the PSPP Guideline.

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[97](#) To recall, a measure is vitiated by misuse of powers ‘if it appears, on the basis of objective, relevant and consistent evidence to have been taken with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case’ (judgment of 22 November 2001, *Netherlands v Council*, C-301/97, EU:C:2001:621, paragraph 153).

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[98](#) Judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 66).

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[99](#) See, to that effect, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 68).

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[100](#) Judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 69).

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[101](#) See, inter alia, Antonin, C., Blot, C., Le Bayon, S., Péléraux, H., Riffart, C., et al., ‘Banques centrales, dernier rempart contre la déflation: Perspectives économiques 2014-2015 pour l’économie mondiale’, *Revue de l’OFCE – Analyse et prévision*, 2014, pp. 11 to 51.

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[102](#) Paragraph 117 of the request for a preliminary ruling.

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[103](#) See, to that effect, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 70).

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[104](#) Minutes of the ECB Governing Council’s monetary policy meeting on 21 and 22 January 2015, p. 4 of the French-language version available on the Banque de France website.

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[105](#) Minutes of the ECB Governing Council’s monetary policy meeting on 21 and 22 January 2015, p. 7 of the French-language version available on the Banque de France website.

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[106](#) Minutes of the ECB Governing Council’s monetary policy meeting on 21 and 22 January 2015, p. 8 of the French-language version available on the Banque de France website.

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[107](#) See minutes of the ECB Governing Council’s monetary policy meeting on 21 and 22 January 2015, p. 9 of the French-language version available on the Banque de France website.

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[108](#) Minutes of the ECB Governing Council’s monetary policy meeting on 21 and 22 January 2015, p. 16 of the French-language version available on the Banque de France website.

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[109](#) Minutes of the ECB Governing Council’s monetary policy meeting on 21 and 22 January 2015, p. 17 of the French-language version available on the Banque de France website.

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[110](#) Minutes of the ECB Governing Council’s monetary policy meeting on 21 and 22 January 2015, p. 17 and 18 of the French-language version available on the Banque de France website.

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[111](#) Minutes of the ECB Governing Council’s monetary policy meeting on 21 and 22 January 2015, p. 19 of the French-language version available on the Banque de France website. In its written observations, the ECB states that it used several econometric models to estimate the approximate purchase volumes that were necessary to achieve the inflation rate target (see paragraph 22 of those observations).

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[112](#) See, in that regard, the statement by Mr Praet and the discussion within the Governing Council in that connection in the minutes of the ECB Governing Council’s monetary policy meeting on 2 and 3 December 2015,

in particular, pp. 6, 11 and 12 of the French-language version available on the Banque de France website.

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[113](#) See minutes of the ECB Governing Council's monetary policy meeting on 2 and 3 December 2015, in particular, pp. 15 to 17 of the French-language version available on the Banque de France website.

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[114](#) In particular the fall in energy prices and exchange rate developments. See minutes of the ECB Governing Council's monetary policy meeting on 9 and 10 March 2016, in particular, pp. 12 and 22 of the French-language version available on the Banque de France website.

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[115](#) In particular, p. 15 of the French-language version of those minutes available on the Banque de France website.

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[116](#) See minutes of the ECB Governing Council's monetary policy meeting on 9 and 10 March 2016, in particular, p. 17 of the French-language version available on the Banque de France website.

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[117](#) See minutes of the ECB Governing Council's monetary policy meeting on 9 and 10 March 2016, in particular, p. 19 of the French-language version available on the Banque de France website.

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[118](#) As regards taking into consideration the progress made and the insufficiency of that progress, see also the discussion within the Governing Council of the ECB (minutes of the ECB Governing Council's monetary policy meeting on 7 and 8 December 2016, in particular, p. 9 of the French-language version available on the Banque de France website).

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[119](#) Minutes of the ECB Governing Council's monetary policy meeting on 7 and 8 December 2016, in particular, p. 6 of the French-language version available on the Banque de France website.

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[120](#) In particular, pp. 13 and 14 of the French-language version of those minutes available on the Banque de France website.

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[121](#) See minutes of the ECB Governing Council's monetary policy meeting on 7 and 8 December 2016, p. 12 of the French-language version available on the Banque de France website.

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[122](#) Article 2(2) of the PSPP Guideline.

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[123](#) Judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 75).