Headnotes

to the Judgment of the Second Senate of 30 July 2019

- 2 BvR 1685/14 -

- 2 BvR 2631/14 -

1. **The Europeanisation of national administrative structures and the establishment of independent bodies, offices and agencies of the European Union require a minimum of democratic legitimation and oversight (Art. 23(1) third sentence in conjunction with Art. 79(3) and Art. 20(1) and (2) of the Basic Law).**

2. **Art. 20(1) and (2) of the Basic Law allow for limited modifications of the means of democratic legitimation, which serve to compensate for drops in influence. In particular, this applies to effective judicial review or to parliamentary oversight rights, which give Parliament specific possibilities of influencing public authorities and enable it to amend or repeal the respective legal bases and thus have the final say.**

3. **However, diminishing the level of democratic legitimation is not permissible without limits and requires justification. While, based on this, there are no fundamental objections to the establishment of independent agencies of the European Union, such practice remains precarious in light of the principle of democracy.**

4. **The Federal Government and the *Bundestag* must not participate in the adoption or implementation of secondary law of the European Union that exceeds the limits of the European integration agenda. The legislator may not authorise the Federal Government to approve *ultra vires* acts of institutions, bodies, offices and agencies of the European Union.**

5. **Ultimately, the participation of the Federal Government and the *Bundestag* in the adoption and implementation of the SSM Regulation (OJ EU No L 287 of 29 October 2013, pp. 5, 63) and of the SRM Regulation (OJ EU No L 331 of 15 December 2010, p. 12) does not raise serious concerns under the Basic law.**

FEDERAL CONSTITUTIONAL COURT

- 2 BvR 1685/14 -

- 2 BvR 2631/14 -

Pronounced
on 30 July 2019
Fischböck
Amtsinspektorin
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings

I. on the constitutional complaint

1. of Prof. Dr. S...,
2. of Mr N...,
3. of Prof. Dr. S...,
4. of Dr. S...,
5. of Prof. Dr. K…,

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

against

1. the Act on the Proposal for a Council Regulation Conferring Specific Tasks on the European Central Bank Concerning Policies Relating to the Prudential Supervision of Credit Institutions (*Gesetz zum Vorschlag für eine Verordnung des Rates zur Übertragung besonderer Aufgaben im Zusammenhang mit der Aufsicht über Kreditinstitute auf die Europäische Zentralbank,* SSM Authorising Act) of 25 July 2013 (Federal Law Gazette – *Bundesgesetzblatt* II p. 1050),

2. Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ EU No L 287 of 29 October 2013, p. 63) in conjunction with the Regulation (EU) No 1022/2013 of the European Parliament and the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013 (OJ EU No L 287 of 29 October 2013, p. 5),

3. Regulation (EU) No. 806/2014 of the European Parliament and the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ EU No L 331 of 15 December 2010, p. 12)

- 2 BvR 1685/14 -

and

II. on the constitutional complaint

of Prof. Dr. Dr. H…,

– authorised representative: Rechtsanwalt Prof. Dr. Markus C. Kerber, Hackescher Markt 4, 10178 Berlin –

against

1. the Act on the Proposal for a Council Regulation Conferring Specific Tasks on the European Central Bank Concerning Policies Relating to the Prudential Supervision of Credit Institutions of 25 July 2013 (Federal Law Gazette – *Bundesgesetzblatt* II p. 1050),

2. Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ EU No L 287 of 29 October 2013, p. 63) in conjunction with the Regulation (EU) No 1022/2013 of the European Parliament and the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013 (OJ EU No L 287 of 29 October 2013, p. 5),

3. Regulation (EU) No 806/2014 of the European Parliament and the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ EU No L 331 of 15 December 2010, p. 12)

- 2 BvR 2631/14 -

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Voßkuhle,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

König,

Maidowski,

Langenfeld

held on the basis of the oral hearing of 27 November 2018:

Judgment:

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

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R e a s o n s:

A.

The constitutional complaints concern the participation of the Federal Government and the German *Bundestag* in establishing the European Banking Union. In particular, the constitutional complaints challenge the Act on the Proposal for a Council Regulation Conferring Specific Tasks on the European Central Bank Concerning Policies Relating to the Prudential Supervision of Credit Institutions (*Gesetz zum Vorschlag für eine Verordnung des Rates zur Übertragung besonderer Aufgaben im Zusammenhang mit der Aufsicht über Kreditinstitute auf die Europäische Zentralbank*, *SSM-Verordnungsgesetz* – SSM Authorising Act) of 25 July 2013, the participation of the Federal Government and the *Bundestag* in the introduction of the Single Supervisory Mechanism (SSM) pursuant to Regulation (EU) No 1024/2013 (SSM Regulation) and the introduction of the Single Resolution Mechanism (SRM) pursuant to Regulation (EU) No 806/2014 (SRM Regulation). In addition, the constitutional complaints challenge Regulation (EU) No 1022/2013 of 22 October 2013 (Regulation amending the European Banking Supervision Regulation). 1

I.

[…] 2-40

II.

With their constitutional complaints, the complainants assert a violation of their fundamental rights and rights equivalent to fundamental rights (*grundrechtsgleiche Rechte*) under Art. 14(1) in conjunction with Art. 88 second sentence of the Basic Law (*Grundgesetz* – GG) and under Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) GG. They claim that the legal acts underlying the European Banking Union are unconstitutional and constitute *ultra vires* acts; the Federal Government and the *Bundestag* were not allowed to participate in such acts and instead should have opposed them. 41

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III.

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B.

Unlike the constitutional complaint of the complainant in proceedings II, the constitutional complaints of the complainants in proceedings I are admissible to the extent that they challenge the SSM Authorising Act of 25 July 2013 (see I. below). Furthermore, the constitutional complaints of the complainants in proceedings I and II are admissible to the extent that they are directed against the participation of the Federal Government and the *Bundestag* in the adoption and implementation of the SSM Regulation and the SRM Regulation and to the extent that they seek to challenge these measures in a suitable manner (see II. below). To the extent that the constitutional complaints challenge the Regulation amending the European Banking Supervision Regulation, they are inadmissible (see III. below). 86

[…] 87-112

C.

To the extent that the constitutional complaints are admissible, they are unfounded. Neither the SSM Authorising Act nor the participation of the Federal Government and the *Bundestag* in the adoption and implementation of the SSM Regulation and the SRM Regulation violate the rights of the complainants under Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) and Art. 79(3) GG. 113

I.

Art. 38(1) first sentence GG guarantees the individual the right to vote in elections to the German *Bundestag*. This right is not limited to the formal legitimation of (federal) state power, but also protects the basic democratic contents of the right to vote 114

(see 1. below). The citizens' right to democratic self-determination enshrined in Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) and Art. 79(3) GG also applies with regard to European integration (see 2. below). Within the scope of application of Art. 23 GG, this right allows the Federal Constitutional Court to review the transfer of sovereign powers which, in violation of Art. 79(3) GG, jeopardises (Art. 23(1) third sentence GG) the essential contents of the principle of the sovereignty of the people (Art. 20(1) and (2) first sentence GG) (see 3. below). Art. 38(1) first sentence GG in conjunction with the constitutional organs' responsibility with regard to European integration (*Integrationsverantwortung*) protects citizens entitled to vote from a manifest and structurally significant exceeding of competences by institutions, bodies, offices and agencies of the European Union (see 4. below). It furthermore affords protection where acts of institutions, bodies, offices and agencies of the European Union exceed the limits set by the principles enshrined in Art. 1 and Art. 20 GG, which Art. 79(3) GG (in conjunction with Art. 23(1) third sentence GG) declares inviolable (see 5. below).

1. Art. 38(1) first sentence GG guarantees the individual the right to vote in elections to the German *Bundestag*. This right is not limited a formal legitimation of (federal) state power, but also protects the basic democratic contents of the right to vote (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 89, 155 <171>; 129, 124 <168>; 134, 366 <396 para. 51>). These contents include the principle of the sovereignty of the people enshrined in Art. 20(2) first sentence GG as well as the corresponding right of citizens to be subjected only to such public authority as they can legitimate and influence (cf. BVerfGE 142, 123 <189 para. 123>). 115

a) The self-determination of the people through elections and votes on the basis of the principle of majority rule is constitutive for the state order under the Basic Law. The Basic Law is based on the intrinsic value and dignity of the human being (Art. 1(1) GG) and guarantees a human rights core of the principle of democracy through the right of citizens to freely and equally choose, by means of elections and votes, the persons in power and the substantive issues dealt with by the public authority they are subjected to. This core is rooted in the guarantee of human dignity (cf. BVerfGE 123, 267 <341>; 129, 124 <169>; 135, 317 <386 para. 125>; 142, 123 <189 para. 124>). 116

The principle of the sovereignty of the people (Art. 20(2) first sentence GG) as well as the corresponding right of citizens to be subjected only to such public authority they can legitimate and influence links the right to vote to the exercise of public authority. It requires that any act of public authority exercised in Germany can be traced back to its citizens (cf. BVerfGE 83, 37 <50 and 51>; 93, 37 <66>; 130, 76 <123>; 137, 185 <232 para. 131>; 139, 194 <224 para. 106>; 142, 123 <191 para. 128>). With the principle of the sovereignty of the people, the Basic Law guarantees all citizens a right to participate, on free and equal terms, in legitimating and influencing the public authority they are subjected to. This prohibits subjecting citizens to an authori- 117

ty they cannot escape and in regard of which they cannot in principle influence, on free and equal terms, decisions on the persons in power and on substantive issues (cf. BVerfGE 123, 267 <341>; 142, 123 <191 para. 128>).

b) The citizens' right to democratic self-determination enshrined in Art. 38(1) first sentence GG (cf. BVerfGE 89, 155 <187>; 123, 267 <340>; 129, 124 <169, 177>; 132, 195 <238 para. 104>; 135, 317 <386 para. 125>) is strictly limited to the core of the principle of democracy that is rooted in the guarantee of human dignity; under Art. 79(3) GG this core is beyond the reach of the Constitution-amending legislator. However, Art. 38(1) first sentence GG does not confer a right upon citizens to subject democratic majority decisions to a review of lawfulness that goes beyond what is necessary to safeguard this right. The purpose of this fundamental right is not to subject the contents of democratic decision-making to substantive review, but to facilitate democratic decision-making processes as such (cf. BVerfGE 129, 124 <168>; 134, 366 <396 and 397 para. 52>; 142, 123 <190 para. 126>). Thus, as a fundamental right to participation in the democratic self-government of the people, Art. 38(1) first sentence GG, in principle, does not give standing to challenge parliamentary decisions, particularly legislative decisions (cf. BVerfGE 129, 124 <168>). Rather, its scope is limited to protection from structural changes in how the state is organised that may occur, *inter alia*, when sovereign powers are transferred to the European Union or other supranational institutions (cf. BVerfGE 129, 124 <169>; 142, 123 <190 para. 126>). 118

2. Art. 23(1) first and third sentence GG affirms that the citizens' right to democratic self-determination enshrined in Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) and Art. 79(3) GG applies, in principle, also with regard to European integration. The democratic legitimation by the people of public authority exercised in Germany belongs to the essential contents of the principle of the sovereignty of the people and thus forms part of the Basic Law's constitutional identity protected in Art. 79(3) GG; it is therefore beyond the reach of European integration in accordance with Art. 23(1) third sentence in conjunction with Art. 79(3) GG (cf. BVerfGE 89, 155 <182>; 123, 267 <330>; 129, 124 <169>; 142, 123 <191 para. 127>). 119

3. Art. 38(1) first sentence GG protects citizens entitled to vote from the transfer of sovereign powers pursuant to Art. 23(1) second sentence GG which, in violation of Art. 79(3) in conjunction with Art. 23(1) third sentence GG, jeopardises the essential substance of the principle of the sovereignty of the people (Art. 20(1) and (2) first sentence GG). The Federal Constitutional Court conducts an identity review to assess whether these standards are met. The Basic Law does not authorise German state organs to transfer sovereign powers in such a way that the European Union were authorised, in the independent exercise of its powers, to create new competences for itself (see a) below). The manner and scope of the transfer of sovereign powers must satisfy democratic principles. The substantive latitude afforded the *Bundestag* must be preserved (see b) below). The European Union must adhere to democratic principles, including where the organisational and procedural design of the 120

autonomous exercise of its powers is concerned (see c) below).

a) The Basic Law does not authorise German state organs to transfer sovereign powers to the European Union in such a way that the European Union were authorised, in the independent exercise of its powers, to create new competences for itself. It prohibits conferring upon the European Union the competence to decide on its own competences (*Kompetenz-Kompetenz*) (cf. BVerfGE 89, 155 <187 and 188, 192, 199>; 123, 267 <349>; see also BVerfGE 58, 1 <37>; 104, 151 <210>; 132, 195 <238 para. 105>; 142, 123 <191 and 192 para. 130>; 146, 216 <250 para. 48>). Nor may the German constitutional organs provide blanket authorisations to the European Union for the exercise of public authority (cf. BVerfGE 58, 1 <37>; 89, 155 <183 and 184, 187>; 123, 267 <351>; 132, 195 <238 para. 105>; 142, 123 <191 and 192 para. 130>). In any case, dynamic treaty provisions must be subject to suitable safeguards that enable the German constitutional organs to effectively exercise their responsibility with regard to European integration. When it comes to cases that are on the boundary of what is still constitutionally permissible, the legislator must, where necessary, enshrine effective precautions in its authorising acts in order to ensure that it can sufficiently discharge its responsibility with regard to European integration (cf. BVerfGE 123, 267 <353>; 132, 195 <239 para. 105>; 135, 317 <399 para. 160>; 142, 123 <191 and 192 para. 130>). 121

b) The manner and scope of the transfer of sovereign powers must satisfy democratic principles. Art. 38(1) first sentence GG protects citizens from a loss in substance of their sovereign power – a power that is crucial for the constitutional order – resulting from the rights of the *Bundestag* being considerably curtailed, as such a loss would diminish the latitude vested in the only constitutional organ that is established based on the principles of free and equal elections (cf. BVerfGE 123, 267 <341>; 142, 123 <190 para. 125>). When sovereign powers are transferred to the European Union in accordance with Art. 23(1) GG, it must be ensured that the *Bundestag* retains for itself functions and powers of substantial political significance (cf. BVerfGE 89, 155 <182>; 123, 267 <330, 356>; 142, 123 <195 para. 138>). 122

Art. 38(1) first sentence, Art. 20(1) and (2) and Art. 79(3) GG protect, in particular, the budgetary powers of the *Bundestag* (cf. BVerfGE 123, 267 <359>; 129, 124 <177, 181>) and its overall budgetary responsibility (*haushaltspolitische Gesamtverantwortung*) as indispensable elements of the constitutional principle of democracy (cf. BVerfGE 123, 267 <359>; 129, 124 <177>; 132, 195 <239 para. 106>; 135, 317 <399 and 400 para. 161>; 142, 123 <195 para. 138>; 146, 216 <253 and 254 para. 54>). […]. 123

c) The European Union must adhere to democratic principles, including where the organisational and procedural design of the autonomous exercise of its powers is concerned (cf. BVerfGE 123, 267 <356>). The structural standards clause (*Strukturs icherungsklausel*) laid down in Art. 23(1) first sentence GG sets out limits to the fundamental national objective of participation in the European Union: Its basic struc- 124

tures must correspond to the core principles that are protected from amendments by the Constitution-amending legislator in accordance with Art. 79(3) GG (BVerfGE 123, 267 <363 and 364>). Under the Basic Law, these structures do not have to be congruent with the constitutional requirements for the democratic legitimation and oversight of acts of German public authorities (see aa) below). However, this does not change the fundamental prerequisite that acts of the EU must be legitimated by a sufficiently specific authorisation given by the legislator deciding on European integration matters (see bb) below). The Europeanisation of national administrative structures and the establishment of independent bodies, offices and agencies of the European Union also require a minimum of democratic legitimation and oversight under Art. 20(1) and (2) GG (see cc) below). EU law sets requirements for the democratic legitimation and oversight of independent authorities, both at national and EU level (see dd) below).

aa) Constitutional requirements regarding democratic legitimation and oversight of acts of public authority do not have to be congruent with such requirements under EU law. In view of the different constitutional traditions and manifestations of the principle of democracy in the Member States, the requirements for the legitimation of acts of German public authority cannot simply be applied to acts of institutions, bodies, offices and agencies of the European Union (cf. BVerfGE 123, 267 <344>). Rather, on the basis of Art. 23(1) first sentence GG, the Basic Law allows for deviations from the domestic requirements for the democratic organisation of the administrative system where these deviations follow from prerequisites of European integration based on the principle of sovereign equality of states as set out in international law (cf. BVerfGE 123, 267 <347>). As long and insofar as a union of sovereign states with clear elements of executive and governmental cooperation adheres to the principle of conferral, it is sufficient that legitimation at Member State level is derived from the national parliaments and governments, which is complemented and underpinned by the European Parliament (cf. BVerfGE 123, 267 <364>). 125

bb) The execution of the European integration agenda (*Integrationsprogramm*) comes with several drops in influence (*Einflussknicke*) given the possibility to adopt majority decisions in the Council (Art. 238 TFEU), the possibility of self-administration of the European Union (Art. 298 TFEU) and the independence of the European Central Bank (ECB; Art. 130 TFEU) ([…]); these drops in influence may diminish the level of democratic legitimation of EU acts of public authority in light of Art. 20(1) and (2) GG (cf. BVerfGE 89, 155 <182 *et seq.*>). Yet these acts are subject to other elements of legitimation at the supranational level (cf. BVerfGE 123, 267 <342, 344 and 345, 347 and 348, 351 and 352, 353 and 354, 365 *et seq.*, 367 *et seq.*, 369>) that take account of the particular features of this level. However, this does not change the fundamental requirement that such measures must be legitimated by a sufficiently specific authorisation granted by the legislator deciding on European integration matters. Where citizens themselves are not called upon to decide, only acts for which Parliament is accountable to citizens have democratic legitimation (BVerfGE 142, 126

123 <192 and 193 para. 131>; cf. also BVerfGE 123, 267 <351>).

cc) The Europeanisation of national administrative structures and the establishment of independent bodies, offices and agencies of the European Union also require a minimum of democratic legitimation and oversight under Art. 20(1) and (2) GG (Art. 23(1) third sentence in conjunction with Art. 79(3) and Art. 20(1) and (2) GG). 127

(1) Art. 20(1) and (2) GG entails requirements for the tasks and powers of independent authorities. 128

(a) Under constitutional law, the required relationship of accountability between the people and public authority is established, in particular, by way of parliamentary elections, laws adopted by Parliament setting legal standards for the executive branch, by way of parliamentary influence on government policies and by the fact that the administration is generally bound by government instructions (cf. BVerfGE 83, 60 <72>; 136, 194 <261 and 262 para. 168>; established case-law). Public officials have full personal democratic legitimation if they have been elected by the people or by Parliament, or if they have been appointed by or with the approval of another public official who in turn has personal legitimation. Legitimation in functional and substantive terms is achieved by the binding effect of law and by oversight and instructions provided by higher-ranking public authorities (cf. BVerfGE 93, 37 <67>; 107, 59 <89>). The form of democratic legitimation of state action is not decisive, but its effectiveness; however, a certain level of democratic legitimation is necessary in any event (cf. BVerfGE 83, 60 <72>; 93, 37 <66 and 67>; 107, 59 <87>; 130, 76 <124>; 136, 194 <262 para. 168>). When determining whether a sufficient level of democratic legitimation has been achieved, the various forms of legitimation are not significant by themselves, but only in interaction (cf. BVerfGE 107, 59 <87>; 130, 76 <124, 128>; 136, 194 <262 para. 168>). 129

(b) Art. 20(1) and (2) GG allows for limited modifications of the means of democratic legitimation (cf. BVerfGE 107, 59 <87 *et seq*.>), which serve to compensate for drops in influence. In particular, this applies to effective judicial review (cf. BVerfGE 142, 123 <220 *et seq*. para. 187 *et seq*.>; CJEU, Judgment of 9 March 2010, *Commission v Germany*, C-518/07, ECR 2010, I-1897 <1914 para. 42>) or to parliamentary oversight rights, which give Parliament – within the limits of what is permissible under constitutional law – specific possibilities of influencing public authorities and enable it to amend or repeal the respective legal bases and thus have the final say ([…]). 130

However, diminishing the level of democratic legitimation is not permissible without limits and requires justification (cf. BVerfGE 89, 155 <208>; 134, 366 <389 and 390 para. 32>; 142, 123 <220 para. 189>). This applies even where an act of public authority does not have a direct external effect, but only creates the preconditions for performing official tasks (cf. BVerfGE 93, 37 <68>). While drops in influence are permissible for reasons that are recognised as legitimate under constitutional law ([…]), they may not undermine the principle of the sovereignty of the people ([…]). 131

(c) Conferring tasks and powers on independent institutions leads to a diminished level of democratic legitimation of the measures taken by these institutions ([…]). 132

According to the Federal Constitutional Court's case-law, the establishment of authorities that are not bound by instructions issued by the Federal Government or the competent Minister is only compatible with the principle of democracy exceptionally and under limited circumstances. The Federal Constitutional Court did not generally rule out a "sphere that is not subject to the influence of a Ministry"; however, it did emphasise that there are tasks that must, due to their political significance, remain within governmental responsibility and must not be conferred upon agencies that are independent of government and Parliament. Otherwise, it would be impossible for the government to assume its responsibility given that agencies that are not subject to oversight nor accountable to anybody could thus gain too much influence on state administration. It can only be determined in the specific case to which tasks this applies (cf. BVerfGE 9, 268 <282>). 133

(2) In order to guarantee a minimum of democratic legitimation and oversight, the same must apply with regard to the Europeanisation of national administrative structures and the establishment of bodies, offices and agencies of the European Union. In both cases, specific justification is required and both must potentially be compensated by judicial review of acts of public authority, by granting special oversight rights to the European Parliament and to the *Bundestag*, or by accountability requirements which enable Member States and EU institutions to amend the legal bases for independent bodies, offices and agencies. Thus, the Federal Constitutional Court held that the ECB's independence is justified under constitutional law as it reflects that an independent central bank can be a better guarantor for monetary stability, and thus for the general economic foundation of budgetary policy, than institutions that depend on money supply and monetary value and which require the short-term approval by political forces as has been proven within the German legal order and is also supported by scientific research (cf. BVerfGE 89, 155 <208 and 209>; 134, 366 <389 para. 32, 399 and 400 paras. 58 and 59>; 142, 123 <220 and 221 paras. 188 and 189>; 146, 216 <256 *et seq*. para. 59 *et seq*., 278 para. 103>; established case-law). 134

dd) In Art. 2 and Arts. 10 to 12 TEU, EU law, too, sets requirements for the democratic legitimation and oversight of independent authorities, both at national and at EU level. Pursuant to Art. 10(1) TEU, the functioning of the European Union is based on representative democracy, which also includes parliamentary legitimation and oversight of public authority ([...]). 135

With regard to the administrative systems in the Member States, the CJEU holds that independent authorities may be required in order to ensure that they act objectively and impartially when carrying out the duties conferred on them by secondary law (cf. CJEU, Judgment of 9 March 2010, *Commission v Germany*, C-518/07, ECR 2010, I-1897 <1910 para. 25 *et seq*.>). The CJEU submits that it is generally compatible with the EU's principle of democracy to establish public authorities out- 136

side the classic hierarchical administration which are more or less independent of the government and thus mostly free from political influence, insofar as these are bound by law and subject to judicial review. At the same time, the CJEU emphasises that the absence of any parliamentary influence is not permissible (cf. CJEU, *loc. cit*., <1914 paras. 42 and 43>).

Moreover, as regards EU bodies, offices and agencies, it follows from the CJEU's so-called *Meroni* doctrine that solely clearly defined executive powers may be delegated to "third parties" (not subject to parliamentary oversight) that must then adhere to objective criteria. The delegation of powers must be based on the Treaties and may not provide for free choices or a wide margin of discretion given that this would lead to an impermissible "actual transfer of responsibility" (cf. CJEU, Judgment of 22 January 2014, *United Kingdom v Council and Parliament*, C-270/12, EU:C:2014:18, para. 42). The powers must be limited further by procedural safeguards, such as consultation, notification and review requirements. Judicial review by the CJEU is of particular significance in this respect (cf. CJEU, Judgment of 22 January 2014, *United Kingdom v Council and Parliament*, C-270/12, EU:C:2014:18, paras. 50, 53). 137

Thus, there are no fundamental objections to the establishment of independent agencies; however, such practice remains precarious in light of the principle of democracy ([...]). 138

At least where institutions, bodies, offices and agencies of the European Union drift towards a complete disconnect from democratic oversight, they come up against the limits of the EU's principle of democracy. This also applies to the ECB ([...]). 139

4. Art. 38(1) first sentence GG in conjunction with Art. 20(1) and (2) first sentence GG gives voters a right vis-à-vis the *Bundestag* and the Federal Government, compelling these constitutional organs, in discharging their responsibility with regard to European integration (see a) below) to monitor whether institutions, bodies, offices and agencies of the European Union adhere to the European integration agenda, to refrain from participating in the adoption and implementation of measures that exceed the limits of the European integration agenda and, where such measures constitute a manifest and structurally significant exceeding of EU competences (see c) below), to actively take steps to ensure conformity with the integration agenda and respect for its limits, without participating in such measures themselves (see b) below). The Federal Constitutional Court conducts an *ultra vires* review to assess whether these standards are met. 140

a) The responsibility with regard to European integration not only entails an obligation on the part of constitutional organs transferring sovereign powers and shaping decision-making procedures to ensure that the political systems of both Germany and the European Union are in accordance with democratic principles within the meaning of Art. 20(1) and (2) GG (cf. BVerfGE 123, 267 <356>; 134, 366 <395 para. 48>) and that the further requirements of Art. 23 GG are met. The supremacy of the Constitution (Art. 20(3) GG) also obliges constitutional organs participating in the execution 141

and in the further shaping and development of the European integration agenda to ensure that its limits are respected (cf. BVerfGE 123, 267 <351 *et seq*., 435>; 129, 124 <180 and 181>; 135, 317 <399 *et seq*. para. 159 *et seq*.>; 142, 123 <208 para. 164). Constitutional organs have a lasting responsibility for ensuring that institutions, bodies, offices and agencies of the European Union adhere to the European integration agenda (cf. BVerfGE 123, 267 <352 *et seq*., 389 *et seq*., 413 *et seq*.>; 126, 286 <307>; 129, 124 <181>; 132, 195 <238 and 239 para. 105>; 134, 366 <394 and 395 para. 47>; 142, 123 <208 para. 165>).

Similar to the duties of protection arising from fundamental rights, the responsibility with regard to European integration requires constitutional organs to protect and promote the rights of the individual enshrined in Art. 38(1) first sentence in conjunction with Art. 20(2) first sentence GG where individuals are not themselves able to ensure the integrity of these rights (BVerfGE 142, 123 <209 para. 166>). Therefore, this responsibility of constitutional organs corresponds to an individual right given to citizens enshrined in Art. 38(1) first sentence GG, which compels the constitutional organs to ensure that the restriction of their right to democratic self-determination resulting from the execution of the European integration agenda does not go beyond what is justified by the permissible transfer of sovereign powers to the European Union. 142

b) This right is primarily directed against the Federal Government and the *Bundestag* as the two constitutional organs vested with special competences in the area of foreign affairs (cf. BVerfGE 90, 286 <381 *et seq.*>; 121, 135 <156 *et seq.*>; 131, 152 <195 *et seq.*>; 140, 160 <187 *et seq.* para. 67 *et seq.*>; 142, 123 <209 para. 167>). 143

aa) The Federal Government and the *Bundestag* must not participate in the adoption or implementation of secondary European Union law that exceeds the limits of the European integration agenda and that would thus amount to an *ultra vires* act. The legislator may not authorise the Federal Government to approve an *ultra vires* act of institutions, bodies, offices and agencies of the European Union. Otherwise, the democratic decision-making process guaranteed by Art. 23(1) and Art. 79(3) GG would be undermined. Parliament is obliged to decide on the conferral of competences in the context of European integration in a formal procedure in order to uphold the principle of conferral (cf. BVerfGE 134, 366 <395 para. 48>). Where EU institutions exceed their competences in a manifest and structurally significant manner, Art. 38(1) first sentence GG not only has a substantive, but also a procedural element. In order to ensure that voters retain the possibility of exercising democratic influence in the European integration process, it is their right that any transfer of sovereign powers must be limited to the forms provided for by Art. 23(1) second and third sentence and Art. 79(2) GG only (cf. BVerfGE 134, 366 <397 para. 53>). 144

bb) In the event of a manifest and structurally significant exceeding of competences by institutions, bodies, offices and agencies of the European Union, the Federal Government and the *Bundestag* must actively take steps to ensure respect for the limits 145

set by the integration agenda.

(1) Constitutional organs can only discharge their lasting responsibility with regard to European integration if they continuously monitor the execution of the European integration agenda in the exercise of their powers. When sovereign powers are transferred to the European Union or other supranational or international institutions, such constitutional duties to monitor further developments, which also exist in other legal contexts, serve to ensure democratic legitimation. This applies all the more where public authority is exercised by bodies that only have weak democratic legitimation (cf. BVerfGE 130, 76 <123 and 124>; 136, 194 <266 and 267 paras. 176 and 177>; 142, 123 <208 and 209 para. 165>). 146

(2) Where measures taken by institutions, bodies, offices and agencies of the European Union exceed the limits of the European integration agenda in a manifest and structurally significant manner, it is incumbent upon the Federal Government and the *Bundestag* to actively address the question how the order of competences can be restored and to make a positive determination as to which course of action to pursue (cf. BVerfGE 134, 366 <397 para. 53>; 142, 123 <209 and 210 para. 167>). 147

Constitutional organs are afforded wide political latitude when discharging their responsibility with regard to European integration. With respect to fundamental rights, it is generally recognised that it falls in principle to the competent (constitutional) organs to decide how they fulfil the duties of protection incumbent on them and that they are afforded a wide margin of appreciation and assessment as well as latitude in this regard. The same also holds true with respect to foreign affairs. The competent organs must consider existing risks and take political responsibility for them. They only breach their duties of protection if they do not take any protective measures at all, if their arrangements and measures are manifestly unsuitable or completely inadequate, or if they fall considerably short of the aim of protection (cf. BVerfGE 77, 170 <214 and 215>; 85, 191 <212>; 88, 203 <254 and 255>; 92, 26 <46>; 125, 39 <78 and 79>; 142, 123 <210 and 211 para. 169>). 148

In respect of the responsibility with regard to European integration, this means that the constitutional organs may legitimate an exceeding of competences *ex post* by initiating – within the limits set by Art. 79(3) GG – an amendment of EU treaties (cf. BVerfGE 123, 267 <365>; 134, 366 <395 para. 49>; 142, 123 <211 para. 170>) and, by thus formally transferring the sovereign powers that were exercised *ultra vires* through the procedure set out in Art. 23(1) second and third sentence GG. However, should that not be possible or wanted, they are required to use legal or political means to work towards the rescission of acts that are not covered by the European integration agenda, and – as long as the acts continue to have effect – to take suitable measures to reduce as far as possible the domestic effects of such acts (cf. BVerfGE 134, 366 <395 and 396 para. 49>; 142, 123 <211 *et seq.* para. 170 *et seq.*>). 149

c) A violation of the right deriving from Art. 38(1) first sentence in conjunction with 150

Art. 20(1) and (2) first sentence GG, which requires the Federal Government, the *Bundestag* and the *Bundesrat* to discharge their responsibility with regard to European integration and to fulfil their corresponding duty of protection, can only be found where the exceeding of competences is sufficiently qualified. Only in such cases is it possible to hold that acts of institutions, bodies, offices and agencies of the European Union subject citizens to a political authority that they cannot escape and in regard of which they cannot in principle influence, on free and equal terms, decisions on the persons in power and on substantive issues. This requires that the qualified exceeding of competences, which means that it is manifest (see aa) below) and of structural significance for the division of competences between the European Union and the Member States (see bb) below).

aa) Finding an act to be *ultra vires* requires – irrespective of the subject matter concerned – that a measure taken by the institutions, bodies, offices and agencies of the European Union manifestly exceeds the competences conferred upon them (cf. BVerfGE 123, 267 <353, 400>; 126, 286 <304>; 134, 366 <392 para. 37>; 142, 123 <200 para. 148>). This is the case if – when applying established methodological standards – a competence for the contested measure cannot be demonstrated under any legal point of view (cf. BVerfGE 126, 286 <308>; 142, 123 <200 para. 149>). This understanding of the term “manifest” is informed by the requirement that *ultra vires* review be conducted with restraint (cf. BVerfGE 142, 123 <203 *et seq.* Rn. 154 *et seq.*>). In relation to the CJEU, it is also informed by the differences in the mandate to be fulfilled and the standards to be applied by the Federal Constitutional Court on the one hand and the CJEU on the other. In this respect, it must also be taken into account that the CJEU must be granted a certain margin of error (cf. BVerfGE 126, 286 <307>; 142, 123 <200 and 201 para. 149>). This margin is covered by the mandate conferred in Art. 19(1) second sentence TEU and is only exceeded when an interpretation of the Treaties is not comprehensible and must thus be considered objectively arbitrary. If the CJEU crosses that limit, its decisions may no longer be covered by Art. 19(1) second sentence TEU and in relation to Germany, would then lack the minimum of democratic legitimation necessary under Art. 23(1) second sentence in conjunction with Art. 20(1) and (2) and Art. 79(3) GG (cf. BVerfGE 142, 123 <201 para. 149>). 151

[…] 152

bb) A structurally significant shift of competences to the detriment of the Member States (cf. BVerfGE 126, 286 <309>) can be found where the exceeding of competences carries significant weight in relation to the principles of democracy and the sovereignty of the people. This is the case if it potentially undermines the principle of conferral. This can be assumed if the exercise of the competence in question by an institution, body, office or agency of the European Union were to require a treaty amendment in accordance with Art. 48 TEU, the exercise of an evolutionary clause (*Evolutivklausel*; cf. CJEU, Opinion 2/94 of 28 March 1996, *ECHR Accession*, ECR 1996, I-1783 <1788 para. 30>), or on the part of the German legislator an action 153

pursuant to either Art. 23(1) second sentence GG or the Act on the *Bundestag*'s and the *Bundesrat*'s Responsibility With Regard To European Integration (*Integrationsverantwortungsgesetz*) (cf. BVerfGE 89, 155 <210>; 142, 123 <201 and 202 para. 151>).

5. Art. 38(1) first sentence GG in conjunction with the constitutional organs' responsibility with regard to European integration protects citizens not only from the transfer of sovereign powers to the European Union beyond the areas open to integration, in violation of Art. 79(3) (in conjunction with Art. 23(1) third sentence GG) (see 3. above), but also prevents the implementation of acts of institutions, bodies, offices and agencies of the European Union that have an equivalent effect and at least *de facto* amount to a conferral of competences in violation of the Basic Law (cf. BVerfGE 142, 123 <195 and 196 para. 139>). The responsibility with regard to European integration requires constitutional organs to protect and promote the rights of the individual enshrined in Art. 38(1) first sentence in conjunction with Art. 20(2) first sentence GG. 154

[…] 155

6. Identity review and *ultra vires* review on the basis of Art. 38(1) first sentence GG do not alter the possibility of a review of violations of the constitutional identity *in the individual case*, in particular, a review of violations of the guarantee of human dignity, which is beyond the reach of European integration pursuant to Art. 23(1) third sentence in conjunction with Art. 79(3) GG (cf. BVerfGE 140, 317 <341 para. 48>). Furthermore, it does not change the possibility of an *ultra vires* review in cases where freedoms protected by fundamental rights are specifically affected (cf. BVerfGE 126, 286). 156

II.

According to these standards, the constitutional complaints, to the extent that they are admissible, are unfounded. Based on the interpretation adopted by the Federal Constitutional Court in these proceedings, the SSM Regulation neither amounts to an *ultra vires* act nor does it encroach on the constitutional identity protected by Art. 79(3) GG (see 1. below). The same applies to the SRM Regulation (see 2. below). Thus, a violation of the responsibility with regard to European integration on the part of the Federal Government and the *Bundestag* can be ruled out, just as a violation of the complainants' rights under Art. 38(1) first sentence GG resulting therefrom. Accordingly, the SSM Authorising Act is also not objectionable (see 3. below). 157

1. The adoption of the SSM Regulation does not exceed the competences conferred on the European Union in a sufficiently qualified manner. Based on the interpretation set forth in these proceedings, the use of the authorisation in Art. 127(6) TFEU amounts neither to a manifest exceeding of the European integration agenda (see a) below), nor to a sufficiently qualified violation of Art. 129 TFEU (see b) below). The SSM Regulation does not result in a violation of the constitutional identity either (see 158

c) below).

a) Pursuant to Art. 127(6) TFEU, the Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings (see aa) below). Based on the interpretation set forth in this decision, the Council, in adopting the SSM Regulation, did not use this authorisation in a manner that manifestly exceeds the limits of the authorisation (see bb) below). 159

aa) Under Art. 127(6) TFEU, it is possible to confer "specific tasks" relating to banking supervision on the ECB. Thus, its competences are limited to precise and clearly defined tasks. Art. 127(6) TFEU rules out a full conferral of the complete supervision of banks. This follows from the wording of Art. 127(6) TFEU (see (1) below), its systematic position in the Treaties (see (2) below) and its objectives (see (3) below). While an interpretation with regard to the legislative history is not conclusive, it does not contradict the conclusions drawn in the context of interpretation (see (4) below). 160

(1) Insofar as Art. 127(6) TFEU, in its German wording, authorises the conferral on the ECB of "specific tasks concerning policies relating to the prudential supervision of credit institutions" ("*besondere Aufgaben im Zusammenhang mit der Aufsicht über Kreditinstitute*"), this argues against a full conferral of banking supervision. Otherwise, it would have made sense to refer to a "conferral of tasks relating to banking supervision" or to a "conferral of banking supervision" ("*Übertragung von Aufgaben der Bankenaufsicht*") or to drop the limiting adjective "specific" ("*besondere*") in the context of the Lisbon Treaty amendment of Art. 127(6) TFEU in 2009 when the initial requirement of approval by the European Parliament was reduced to a right to be consulted. The explicit exemption of insurance undertakings, which was already part of the original version of the Maastricht Treaty (Art. 105 EC Treaty f.v.), also shows that the Member States were not able to agree on a blanket conferral of supervisory powers relating to the financial markets. 161

[…] 162-165

(2) The systematic position of Art. 127(6) TFEU also suggests a narrow interpretation of the authorisation. Art. 127(6) TFEU is part of the Second Chapter of the VIIIth Title of the TFEU, and thus forms part of the framework on monetary policy, for which exclusive competence is conferred on the European Union, unlike for economic policy, which is governed by the First Chapter of the Treaty (cf. Art. 3(1) lit. c, Art. 5(1) first sentence and Art. 5(2) TFEU). However, even from the perspective of primary law, banking supervision does not form part of monetary policy ([...]), but essentially amounts to the supervision of businesses, which is a task that does not necessarily have to be performed by the ECB and was in fact not performed by the ECB during a 15-year period before the SSM Regulation was adopted. [...] 166

Art. 127(5) TFEU and, with the same wording, Art. 3.3 of the ESCB Statute provide that the ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system; this also argues in favour of a narrow interpretation of Art. 127(6) TFEU. Pursuant to those provisions, the ESCB is specifically not the competent authority with respect to the supervision of the credit system, but its role is merely to support the activities of the national supervisory authorities, to coordinate them and, where applicable, to selectively harmonise them [...]. 167

Furthermore, the principle of conferral (Art. 5(1) first sentence, Art. 5(2) TEU), the principle of subsidiarity (Art. 5(1) second sentence, Art. 5(3) TEU) and the principle of proportionality (Art. 5(1) second sentence, Art. 5(4) TEU) also suggest a narrow interpretation of Art. 127(6) TFEU. Finally, another argument for a narrow interpretation is that, in view of the ECB's independence (Art. 130 TFEU), any further transfer of tasks and powers to the ECB is in conflict with the principle of representative democracy under Art. 10(1) TEU ([...]) and with the principle of democracy under the constitutions of the Member States, enshrined in Art. 20(1) and (2) GG for Germany, which must be respected by EU law pursuant to Art. 4(2) TEU (cf. BVerfGE 89, 155 <208 and 209>; 134, 366 <389 para. 32, 399 and 400 paras. 58 and 59>; 142, 123 <220 and 221 paras. 188 and 189>; 146, 216 <256 *et seq*. para. 59 *et seq*., 278 para. 103>; established case-law). Thus, Art. 127(6) TFEU must be interpreted in a way ensuring that measures of banking supervision are, as far as possible, democratically legitimated and subject to oversight. 168

(3) Teleological considerations also support a restrictive interpretation of Art. 127(6) TFEU. It is the primary task of the ESCB and its main decision-making bodies, the Governing Council and the Executive Board (Art. 129(1) TFEU), to determine the EU's monetary policy (Art. 127(1) and (2) TFEU). The transfer of banking supervision to the ECB is merely supplementary and is thus only intended to the extent that it is necessary for, or at least conducive to, consolidating the monetary policy mandate ([...]). [...] 169

(4) While an interpretation with regard to the legislative history is not conclusive, it does not contradict the conclusions drawn in the context of interpretation. [...] 170

bb) It is not ascertainable that the SSM Regulation manifestly exceeds the limits of the authorisation granted under Art. 127(6) TFEU as set out above. It does not fully confer banking supervision in the euro area on the ECB (see (1) below). Ultimately, the national supervisory authorities retain significant elements of the tasks and powers relating to banking supervision (see (2) below). 171

(1) The SSM Regulation does not fully confer supervision of credit institutions in the euro area on the ECB. In substance, it provides for a division of banking supervision, with the competence for banking supervision mostly remaining at national level (recital 5 first sentence SSM Regulation) and all supervisory tasks not conferred on the ECB remaining with the national authorities (recital 28 first sentence SSM Regu- 172

lation). By contrast, specific supervisory tasks which are crucial to ensuring a coherent and effective implementation of the European Union's policy relating to the prudential supervision of credit institutions are conferred on the ECB (recital 15 first sentence SSM Regulation). To this end, certain tasks are conferred on the ECB that it must perform for all credit institutions in the euro area (see (a) below). With regard to other tasks conferred, the ECB is, in principle, competent only for supervising significant credit institutions, while the national supervisory authorities generally remain competent for supervising less significant credit institutions in accordance with the regulations, guidelines and general instructions adopted by the ECB (see (b) below). Finally, in areas of banking supervision that are not subject to the SSM Regulation, national supervisory authorities retain their competences (see (c) below).

(a) In relation to all credit institutions in the euro area, the ECB is competent for the tasks listed in Art. 4(1) lit. a and c SSM Regulation, which are to authorise credit institutions and to withdraw authorisations of credit institutions as well as to assess notifications of the acquisition and disposal of qualifying holdings in credit institutions (cf. CJEU, Judgment of 8 Mai 2019, *Landeskreditbank Baden-Württemberg v European Central Bank*, C-450/17 P, EU:C:2019:372, para. 36 *et seq*. […]). 173

(b) As regards the other tasks listed in Art. 4(1) SSM Regulation, it depends on the significance of the credit institution whether the ECB or a national supervisory authority is competent. 174

(aa) Significant credit institutions are subject to direct supervision by the ECB (cf. Art. 89 SSM Framework Regulation). In this respect, the ECB has exclusive competence for the tasks listed in Art. 4(1) and (2), Art. 5(2) SSM Regulation (cf. Art. 9(1) first sentence SSM Regulation) and has specific powers for this purpose. These include the investigatory powers laid down in Arts. 10 to 13 SSM Regulation, the power to grant or withdraw authorisation (Art. 14 SSM Regulation), the power to prohibit acquisitions of qualifying holdings (Art. 15 SSM Regulation), specific supervisory powers pursuant to Art. 16 SSM Regulation and the power to impose administrative penalties (Art. 9(1) subsection 3 SSM Regulation). Unless otherwise provided for, the ECB also has all the powers and obligations which competent and designated authorities have under the relevant secondary and tertiary law (Art. 9(1) subsection 2 SSM Regulation). 175

Whether a credit institution is significant depends on the criteria listed in Art. 6(4) subsection 1 and 2 SSM Regulation: total value of assets, ratio of total assets over the GDP of the respective Member State, significant relevance with regard to the domestic economy. This notwithstanding, the three most significant credit institutions in each of the participating Member States are subject to direct supervision by the ECB (Art. 6(4) subsection 5 SSM Regulation). Pursuant to Art. 6(4) subsection 2 and 5 SSM Regulation, the ECB must classify what would otherwise be a significant credit institution as less significant where particular circumstances exist that justify this classification, namely where the classification of a credit institution as significant is inap- 176

propriate, taking into account the objectives and principles of the SSM Regulation and the need to ensure the consistent application of high supervisory standards (Art. 70(1) SSM Framework Regulation). Whether such particular circumstances exist is determined on a case-by-case basis and specifically for the supervised entity or supervised group concerned, but not for categories of supervised entities (Art. 71(1) SSM Framework Regulation). The ECB may also subject to its supervision a credit institution carrying out cross-border activities (Art. 6(4) subsection 3 SSM Regulation). Finally, credit institutions for which public financial assistance has been requested or received directly from the EFSF or the ESM are subject to direct supervision by the ECB (Art. 6(4) subsection 4 SSM Regulation).

177 The national supervisory authorities assist the ECB in the performance of its tasks (recital 37, Art. 6(3) first sentence SSM Regulation). The ECB can give instructions to the national supervisory authorities where the measures they are instructed to perform fall within the tasks conferred on the ECB pursuant to Art. 4(1) SSM Regulation and where this is necessary for performing the tasks (Art. 6(3) second sentence SSM Regulation, Art. 90(2) SSM Framework Regulation). For performing direct supervision, joint supervisory teams (JST) composed of staff members from the ECB and from the national supervisory authorities have been established (cf. Art. 3 *et seq*. SSM Framework Regulation). A JST is directed by a staff member from the ECB that is not from the country in which the supervised bank has its head office ([...]).

178 Without prejudice to the competence of national supervisory authorities, the ECB, pursuant to Art. 6(5) lit. d SSM Regulation, is limited to the investigatory powers referred to in Arts. 10 to 13 SSM Regulation with respect to less significant credit institutions (Art. 138 SSM Framework Regulation). The ECB may, on its own initiative, exercise itself all the relevant powers also with respect to less significant credit institutions in specific cases and as an *ultima ratio* (so-called right to act on its own initiative – *Selbsteintrittsrecht*) where this is necessary to ensure consistent application of high supervisory standards (cf. Art. 6(5) lit. b SSM Regulation, Art. 69(3) SSM Framework Regulation; CJEU, Judgment of 8 May 2019, *Landeskreditbank Baden-Württemberg v European Central Bank*, C-450/17 P, EU:C:2019:372, para. 56 […]). […]

179 (bb) The national supervisory authorities are, in principle, responsible for directly supervising less significant credit institutions, without prejudice to the ECB's power to decide in specific cases to directly supervise such entities (recital 5 fourth sentence SSM Framework Regulation). The powers laid down in Art. 6(5) lit. a SSM Regulation – issuing regulations, guidelines or general instructions – serve to enable the ECB to generally control the Single Supervisory Mechanism in order to achieve consistent supervision in all participating Member States, but do not enable it to perform specific supervisory tasks vis-à-vis a credit institution. Yet the national supervisory authorities are obliged to provide the ECB, in accordance with the ECB's instructions, with comprehensive information about the supervision of less significant institutions (Art. 6(5) lit. c, Art. 7 lit. c SSM Regulation); the ECB may also request further information at any time (Art. 6(5) lit. e SSM Regulation).

(c) In areas of banking supervision that are not subject to the SSM Regulation, national supervisory authorities retain their competences (Art. 1(2) SSM Framework Regulation). These include the power to receive notifications from credit institutions in relation to the right of establishment and the free provision of services, to supervise bodies which are not covered by the definition of credit institutions under EU law, but which are supervised as credit institutions under national law, to supervise credit institutions from third countries establishing a branch or providing cross-border services in the European Union, to supervise payments services, to carry out day-to-day verifications of credit institutions, to carry out oversight in relation to markets in financial instruments and consumer protection (cf. recital 28 second sentence SSM Regulation). 180

Furthermore, the tasks of the national supervisory authorities include the prevention of money laundering and terrorist financing (for the Federal Republic of Germany cf., e.g., § 25h(5), § 25i(4) of the Banking Act, *Kreditwesengesetz* – KWG). […] 181

Finally, the competences of national supervisory authorities include the macroprudential tasks and tools expressly set out in Art. 5 SSM Regulation, such as the imposition of capital buffer requirements. Pursuant to Art. 5(1) second sentence SSM Regulation, the authority concerned will notify its intention to apply capital buffers to the ECB ten working days prior to taking such a decision (cf. also Art. 104 SSM Framework Regulation). If deemed necessary, the ECB may apply higher requirements (Art. 5(2) SSM Regulation, Art. 105 SSM Framework Regulation). 182

(2) Even with regard to the SSM Regulation, the national supervisory authorities ultimately retain important tasks and powers relating to banking supervision (see (a) below). They carry out these tasks based on Member State competences and not as a result of a re-delegation of competences that had been conferred on the ECB (see (b) below). This is confirmed by current practice (see (c) below). 183

(a) According to the allocation of tasks between the ECB and the national supervisory authorities as laid down in the SSM Regulation, the latter remain competent for significant elements of the supervision of individual credit institutions (recital 5 first sentence SSM Regulation). All tasks and powers not conferred on the ECB remain with the national authorities (recital 28 first sentence SSM Regulation, Art. 1(2) SSM Framework Regulation). 184

(b) The Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – BaFin) performs its tasks and exercises its powers relating to banking supervision on the basis of the mandate assigned to it under federal law, rather than as a result of a re-delegation of competences by the ECB (see (aa) below). A re-delegation of EU administrative tasks would require that all supervisory tasks had been fully conferred on the ECB, which is evidently not what the SSM Regulation provides; otherwise, it would amount to an *ultra vires* act (see (bb) below). 185

(aa) Under Art. 127(6) TFEU, it is only possible to confer “specific tasks” relating to 186

banking supervision on the ECB. Thus, the ECB's competences are limited to precise and clearly defined areas of banking supervision. Art. 127(6) TFEU does not allow a full conferral of banking supervision (cf. para. 160 *et seq*.); consequently, the Member States retain the competence for all tasks and powers that are not conferred on the ECB under the SSM Regulation. [...]

(bb) A re-delegation of EU administrative tasks would require that all supervisory tasks had fully been conferred on the ECB, which is specifically not what the SSM Regulation provides. A legal view claiming the opposite would neither be compatible with the primary law basis nor with the systematic concept of the SSM Regulation (see (α) below). Based on this interpretation, the SSM Regulation would amount to an *ultra vires* act (see (β) below). The decision of the CJEU of 8 May 2019 *(Landeskreditbank Baden-Württemberg v European Central Bank*, C-450/17 P, EU:C:2019:372) does not merit a different conclusion (see (?) below). 187

[…] 188-195

(c) […] 196

cc) A manifest violation of the principle of subsidiarity cannot be found, given that the SSM Regulation only confers tasks and powers on the ECB which are indispensable for effective banking supervision, and given that national supervisory authorities still retain extensive powers, which have not been affected by the SSM Regulation and acts of tertiary law enacted for its implementation (Art. 5(1) second sentence, Art. 5(3) TEU). 197

b) The establishment of the Supervisory Board pursuant to Art. 26(1) SSM Regulation does also not amount to a manifest violation of Art. 129(1) and Art. 141(1) TFEU in conjunction with Art. 44 ESCB Statute. […] 198

[…] 199-202

c) Based on the interpretation adopted by the Federal Constitutional Court in these proceedings, the SSM Regulation does not encroach upon the constitutional identity protected by Art. 23(1) third sentence in conjunction with Art. 79(3) GG. The constitutional identity must be taken into account as a standard in *ultra vires* review, to the extent that the "right to democracy" enshrined in Art. 38(1) in conjunction with Art. 20(1) and (2) and Art. 79(3) GG is concerned. 203

Identity review and *ultra vires* review constitute distinct instruments of review. Although both instruments are based on Art. 79(3) GG, the respective standard of review differs. The *ultra vires* review examines whether acts of institutions, bodies, offices and agencies of the European Union are covered by the European integration agenda, as included in the respective authorising act in accordance with Art. 23(1) second sentence GG, or whether they exceed the limits of the framework set by the parliamentary legislator (cf. BVerfGE 75, 223 <235, 242>; 89, 155 <188>; 123, 267 <353>; 126, 286 <302 *et seq*.>; 134, 366 <382 *et seq*. para. 23 *et seq*.>; 142, 123 204

<203 and 204 para. 154>). By contrast, the identity review does not examine the adherence to the permissible scope of a conferral of competences, but to the “absolute limit” set by Art. 79(3) GG (cf. BVerfGE 123, 267 <343, 348>; 134, 366 <386 para. 29>; 142, 123 <203 para. 153>). Constitutional complaints seeking an *ultra vires* or an identity review are therefore subject to different requirements: For an *ultra vires* review, a sufficiently qualified exceeding of competences and, for an identity review, a violation of the interests protected by Art. 79(3) GG. Therefore, a constitutional complaint is only admissible if it contains a sufficiently substantiated submission, pursuant to § 23(1) second sentence and § 92 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG) as to the requirements for either an *ultra vires* or an identity challenge (cf. BVerfGE 140, 317 <341 and 342 para. 50>). If the admissibility requirements are met, the Federal Constitutional Court is bound by the specific challenge raised by the complainant. Therefore, in the context of these two review instruments, it cannot extend its review to rights the violation of which has not been challenged with the constitutional complaint.

205 However, to the extent that the complainants assert a violation of the “right to democracy” with their constitutional complaint, a uniform standard of review is applicable. In this instance, *ultra vires* review and identity review do not only have the same basis in constitutional law, they are also congruent in terms of the asserted rights violation and the aim pursued by the constitutional complaint. The *ultra vires* review is a particular case of identity review that is applied to questions relating to the principle of democracy (cf. BVerfGE 142, 123 <203 para. 153>); it serves to prevent institutions, bodies, offices and agencies of the European Union from exceeding their competences in a sufficiently qualified manner, which, according to the established case-law of the Federal Constitutional Court, would necessarily constitute a violation of the principle of the sovereignty of the people and of the right of citizens enshrined in Art. 38(1) first sentence in conjunction with Art. 20(2) first sentence GG not to be subjected to any public authority that they cannot legitimate and influence on free and equal terms. Conversely, a European Union measure that encroaches on the “right to democracy” cannot be based on an authorisation under primary law, given that the legislator deciding on European integration matters cannot transfer sovereign powers to the European Union that, if exercised, would encroach on the constitutional identity protected by Art. 79(3) GG, not even if it commands the majorities required by Art. 23(1) third sentence in conjunction with Art. 79(2) GG (cf. BVerfGE 113, 273 <296>; 123, 267 <348>; 134, 366 <384 para. 27>; 142, 123 <195 para. 137>). With respect to the “right to democracy”, *ultra vires* review and identity review are thus two sides of the same coin.

206 If an admissible constitutional complaint challenges an *ultra vires* act or a violation of the constitutional identity on the grounds that an EU measure violates the “right to democracy”, the measure in question must therefore be extensively reviewed (indirectly) as to its compatibility with Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) and Art. 79(3) GG. However, if the review by the Federal Constitutional Court

were to be restricted to the aspects of the “right to democracy” challenged with the constitutional complaint, the complaint would also have to be rejected where the – admissibly challenged – EU measure or its implementation violated Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) and Art. 79(3) GG for reasons other than those asserted. Such an approach would divide the subject matter in a manner for which no reasons under substantive law exist and that has no basis in the procedural law of the Federal Constitutional Court.

The diminished level of democratic legitimation in the domain of banking supervision that results from the independence of the ECB (see (aa) below) and of the national supervisory authorities (see (bb) below) does not call into question parliamentary responsibility for the measures at issue here in a manner that would encroach upon Art. 20(2) first sentence in conjunction with Art. 79(3) GG. 207

aa) When exercising the powers and carrying out the tasks and duties conferred upon it by the Treaties and the Statute of the ESCB and of the ECB, the ECB may not seek or take instructions from EU institutions, bodies, offices or agencies, from any government of a Member State or from any other body (Art. 130, Art. 282(3) third and fourth sentence TFEU). This also applies to the specific tasks relating to the prudential supervision of banks conferred upon the ECB pursuant to Art. 127(6) TFEU ([...]) and is expressly emphasised in Art. 19(1) SSM Regulation. The ECB’s independence in the context of the Single Supervisory Mechanism not only encompasses the domains for which it has exclusive competence or in which it exercises direct supervision of significant credit institutions, but also domains in which it exercises powers in relation to indirect supervision. 208

In principle, the ECB’s independence as regards the performance of tasks and the exercise of powers relating to banking supervision does not call into question that Parliament remains responsible. The diminished level of democratic legitimation in the domain of banking supervision that results from the independence of the ECB is a cause for concern (see (1) below) because it comes on top of the ECB’s monetary policy mandate, which in itself is far-reaching and difficult to delineate (cf. BVerfGE 89, 155 <207 *et seq*.>; 134, 366 <399 and 400 para. 59>; 142, 123 <220 and 221 para. 189>; 146, 216 <256 and 257 para. 59, 258 and 259 para. 61, 278 para. 103>). Ultimately, however, it is still acceptable because it is compensated by specific safeguards that serve to ensure democratic accountability in relation to the acts at issue in these proceedings (see (2) below). 209

(1) Even when performing the tasks and exercising the powers conferred on it under the SSM Regulation, the ECB’s independence is in clear conflict with the principle of the sovereignty of the people (Art. 20(2) first sentence GG) given that an essential policy area is beyond the reach of the directly and democratically legitimated representatives of the people and its authority to issue orders, and given that the *Bundestag’s* possibilities of influencing the performance of tasks and the exercise of powers in these areas are significantly curtailed. This cannot be justified by the 210

institutional framework under Art. 88 second sentence GG given that – as repeatedly held by the Federal Constitutional Court– this provision requires a restrictive interpretation of the ECB's monetary policy mandate and may not simply be applied to other areas (cf. BVerfGE 134, 366 <399 and 400 paras. 58 and 59>; 142, 123 <220 and 221 paras. 188 and 189>; 146, 216 <257 and 258 para. 60>).

211 If further tasks beyond monetary policy are conferred on the ECB, additional safeguards are required to limit the diminishing of democratic legitimation to what is absolutely necessary. Such safeguards may include strict judicial review of the ECB's mandate (cf. BVerfGE 142, 123 <220 and 221 para. 187 *et seq*.>; 146, 216 <258 and 259 para. 61>; cf. also CJEU, Judgment of 9 March 2010, *European Commission v Germany*, C-518/07, ECR 2010, I-1897 <1914 para. 42>) or specific parliamentary oversight rights which give the *Bundestag* further possibilities of influencing the ECB's actions. At EU level, such safeguards also include accountability requirements vis-à-vis those EU institutions that have transferred tasks and powers to the ECB in order to enable those institutions to evaluate such transfers, to rescind them where necessary, or to limit or withdraw the ECB's independence. The decisive factor is that the legislator must be able to exercise democratic responsibility for the actions of an independent body and can decide on amendments to the legal bases of such a body where necessary ([...]).

212 (2) The decisions implementing the SSM Regulation meet the requirements for democratic accountability as regards organisation and staff matters primarily due to the way in which the ECB's decision-making bodies are appointed. In functional and substantive terms, democratic legitimation is achieved by the fact that, when carrying out its supervisory tasks, the ECB is bound by relevant primary law – by the principles of conferral (Art. 5(1) first sentence, Art. 5(2) TEU), of proportionality (Art. 5(1) second sentence, Art. 5(3) TEU) and by the Charter of Fundamental Rights – as well as by secondary law, primarily by the SSM Regulation. Furthermore, the ECB applies domestic legislation enacted by national parliaments where such domestic legislation transposes directives or exercises options granted by regulations (cf. Art. 4(3) SSM Regulation). Where the ECB may exercise discretion – for example, when applying Art. 6(4) subsection 2 SSM Regulation in conjunction with Arts. 70, 71 SSM Framework Regulation or when imposing additional requirements for own funds pursuant to Art. 16(1) lit. c SSM Regulation, it uses broad – albeit not unlimited – discretion (cf. CJEU, Judgment of 8 Mai 2019, *Landeskreditbank Baden-Württemberg v European Central Bank*, C-450/17 P, EU:C:2019:372, para. 44 *et seq*. […]). Ultimately, this is still acceptable because the resulting drops in influence are compensated by specific safeguards that serve to ensure democratic accountability in relation to the acts at issue in these proceedings, such as possibilities of legal recourse (see (a) below), accountability requirements and reporting obligations on the part of the ECB vis-à-vis EU institutions (see (b) below) and vis-à-vis national parliaments (see (c) below).

213 (a) Pursuant to Art. 24(1) first sentence SSM Regulation, the ECB establishes an Administrative Board of Review to strengthen legal recourse and for reasons of pro-

cedural economy (recital 64 SSM Regulation). The Board reviews measures taken in the course of the implementation of the SSM Regulation and any natural or legal person may request a review of a decision of the ECB which is addressed to them, or which is of direct and individual concern to them. The Administrative Board of Review expresses an opinion no later than two months from the receipt of the request and remits the case for preparation of a new draft decision to the Supervisory Board (cf. Art. 24(7) SSM Regulation). The Supervisory Board takes into account the opinion of the Administrative Board of Review and promptly submits a new draft decision to the Governing Council. This is without prejudice to the right to bring proceedings before the CJEU in accordance with the Treaties (Art. 24(11) SSM Regulation).

Pursuant to recital 60 of the SSM Regulation, the CJEU is to review, pursuant to Art. 263 TFEU, the legality of acts intended to produce legal effects vis-à-vis third parties. As practice has shown, this allows for extensive legal protection against measures of the ECB (cf. only GCEU, Judgment of 16 May 2017, *Landeskreditbank Baden-Württemberg v European Central Bank*, T-122/15, EU:T:2017:337; Judgment of 13 December 2017, *Crédit mutuel Arkéa v European Central Bank*, T-712/15, EU:T:2017:900; Judgment of 24 April 2018, *Caisse régionale de crédit agricole mutuel Alpes Provence v European Central Bank*, T-133/16, EU:T:2018:219; pending proceedings *Trasta Komercbanka et al. v European Central Bank*, T-698/16, OJ EU No C 441 of 28 November 2016, p. 29). The CJEU has jurisdiction over the ECB's decisions concerning the acquisition or disposal of qualifying holdings in credit institutions pursuant to Art. 4(1) lit. c SSM Regulation, insofar as these do not concern preparatory acts adopted by the national authorities (cf. CJEU, Judgment of 19 December 2018, *Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA <Fininvest> v Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni <IVASS>*, C-219/17, EU:C:2018:1023, para. 51 *et seq*.). Member States and EU institutions are preferential plaintiffs in that they may bring an action for annulment before the CJEU (Art. 263(2) TFEU). In addition, they may bring an action for failure to act (Art. 265 TFEU) if the ECB does not adopt a decision vis-à-vis a credit institution even though it was obliged to do so (cf. GCEU, Order of 28 February 2018, *Claudio Ferri v European Central Bank*, T-641/17, EU:T:2018:113). The CJEU can also provide preliminary legal protection (Art. 278 second sentence or Art. 279 TFEU). 214

As regards on-site inspections and the entering of business premises and property, the judicial authorities of the Member States provide legal protection according to domestic law (Art. 13(1), (2) SSM Regulation). This also applies with regard to assistance by the national competent authority where coercive administrative measures are used (Art. 12(5) SSM Regulation). 215

(b) Furthermore, the SSM Regulation provides for accountability requirements and reporting obligations of the ECB vis-à-vis EU institutions. For example, the ECB is accountable to the European Parliament and the Council pursuant to Art. 20 SSM Regulation. According to the explicit statement of the EU legislator, any shift of supervisory powers from the Member State to the EU level should be "balanced" by 216

such accountability requirements (cf. recital 55 second sentence SSM Regulation), so as to strengthen the level of democratic legitimation ([...]). [...]

217 These accountability requirements and reporting obligations cannot compensate for the drops in influence resulting from the transfer of tasks relating to banking supervision to the independent ECB. However, they allow for better political governance and also create a basis for democratic legitimation (cf. BVerfGE 89, 155 <184>) given that they enable the competent authorities to assess the ECB's actions, to have their lawfulness reviewed (Art. 263(2) TFEU) and to enforce the binding effect of EU law on the ECB in functional and substantive terms. Moreover, they allow for continual review of the Single Supervisory Mechanism and its appropriateness (*Zweckmäßigkeit*) so that it may be amended, if necessary, or even be abolished. Thus, the EU legislator retains the final say on banking supervision ([...]).

218 (c) Finally, the SSM Regulation provides for accountability requirements and reporting obligations of the ECB vis-à-vis national parliaments. Pursuant to Art. 21(1) first sentence SSM Regulation, the ECB is obliged to forward its annual report regarding the SSM (Art. 20(2) SSM Regulation) directly to national parliaments. National parliaments may respond to this report by submitting reasoned observations (Art. 21(1) second sentence SSM Regulation). Furthermore, they may request the ECB to reply in writing to any observations or questions submitted by them to the ECB in respect of the tasks of the ECB; they may also invite the Chair or a member of the Supervisory Board to participate in an exchange of views in relation to the supervision of credit institutions in the respective Member State together with a representative of the national competent authority (Art. 21(2), (3) SSM Regulation). These rights provide a minimum of accountability to Parliament. In conjunction with the *Bundestag*'s rights to receive information vis-à-vis the Federal Government, which is represented in the Council (Art. 23(2) and (3) GG, §§ 3 *et seq*. of the Act on Cooperation between the Federal Government and the German *Bundestag* in Matters concerning the European Union, *Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union* – EUZBBG), these rights contribute to allowing the *Bundestag* to effectively assume its responsibility with regard to European integration in relation to acts of the ECB in the domain of banking supervision (cf. BVerfGE 134, 366 <395 and 396 para. 49>; 142, 123 <229 and 230 para. 209>).

219 bb) The independent exercise of tasks and powers by the national supervisory authorities laid down in the SSM Regulation poses problems with regard to the level of legitimation of measures adopted by German authorities in the context of banking supervision (see (1) below). However, it is justified by factual reasons (see (2) below) and ultimately does not amount to a violation of Art. 20(1) and (2) in conjunction with Art. 79(3) GG (see (3) below).

220 (1) Before the SSM Regulation entered into force, the entire domain of banking supervision in Germany was subject to comprehensive democratic accountability. As

an institution under public law (*Anstalt des öffentlichen Rechts*) with legal capacity (§ 1(1) of the Act on the Federal Financial Supervisory Authority, *Finanzdienstleistungsaufsichtsgesetz* – FinDAG 2002), BaFin performed the tasks and powers related to banking supervision (§ 6(1) KWG 2013); in that respect, it was subject to the legal and technical supervision (*Rechts- und Fachaufsicht*) of the Federal Ministry of Finance (cf. § 2 FinDAG 2002). [...]

Pursuant to Art. 19(1) SSM Regulation, when acting within the Single Supervisory Mechanism, the national supervisory authorities, now act independently and are not bound by instructions when carrying out the tasks the SSM Regulation assigns to them. In particular, this concerns the supervision of less significant credit institutions as well as measures supporting the ECB with regard to the supervision of significant credit institutions (Art. 4, Art. 5 SSM Regulation). With regard to all powers, tasks and obligations conferred on the ECB, the *Bundesbank,* as an integral part of the ESCB (§ 3 first sentence of the *Bundesbank* Act, *Bundesbankgesetz* – BBankG), is covered by the guarantee of independence in Art. 130 first sentence TFEU in conjunction with Art. 127(6) TFEU. In this respect, ministerial orders and instructions are impermissible. However, the general rules apply outside the Single Supervisory Mechanism. 221

This requirement of a sphere that is not subject to the influence of a ministry clearly creates tensions with the principle of the sovereignty of the people protected by Art. 20(2) first sentence in conjunction with Art. 79(3) GG (cf. BVerfGE 142, 123 <220 para. 188> […]). 222

(2) The diminished level of democratic legitimation resulting from Art. 19(1) SSM Regulation serves to enable the ECB to effectively carry out its supervisory tasks and to protect it from undue political influence and from industry interference (cf. recital 75 SSM Regulation). 223

(3) The secondary law requirement that tasks be carried out independently within the Single Supervisory Mechanism does not render parliamentary oversight of German supervisory authorities impossible. BaFin and the *Bundesbank* remain democratically legitimated in organisation and staff matters as well as in functional and substantive terms (see (a) below). This democratic legitimation is safeguarded by possibilities of legal recourse (see (b) below) and special rights to receive information, ensuring that the *Bundestag* remains accountable to citizens regarding the activities of German supervisory authorities. 224

[…] 225-228

(a) The activities of BaFin and the *Bundesbank* are subject to judicial review under Art. 19(4) GG ([...]). This review is generally comprehensive and addresses factual and legal aspects (cf. BVerfGE 60, 253 <296 and 297>; 149, 346 <363 and 364>). In principle, the administrative courts are competent for actions directed against measures taken in the context of the Single Supervisory Mechanism. 229

(b) Ultimately, special rights to receive information contribute to ensuring that the 230

Bundestag remains effectively accountable to citizens regarding the activities of the German supervisory authorities [see Art. 21 SSM Regulation]. [...]

2. As regards the SRM Regulation, the establishment of the Single Resolution Board and the competences assigned to it do not exceed the competences conferred upon the European Union under Art. 114(1) TFEU in a qualified manner (see a) below). The independence of both the Single Resolution Board and BaFin required by the SRM Regulation does not violate Art. 20(1) and (2) in conjunction with Art. 79(3) GG (see b) below). The imposition of the bank levy and the transfer of its revenue to the Single Resolution Fund are based on domestic law and, therefore, do not pose any problems with respect to the European integration agenda and the principle of the sovereignty of the people. Thus, an encroachment on the overall budgetary responsibility of the *Bundestag* cannot be found (see c) below). 231

a) The establishment of the Single Resolution Board and the competences assigned to it do not, in a sufficiently qualified manner, exceed the competences conferred upon the European Union under Art. 114(1) TFEU. While they do raise concerns (see aa) below), these concerns are not sufficient, if the conferred tasks and powers are strictly observed, for finding a manifest and structurally significant violation of Art. 114(1) TFEU (see bb) below). 232

aa) The establishment of bodies, offices and agencies of the European Union on the basis of Art. 114(1) TFEU (see (1) below) does raise concerns with regard to the principle of conferral (see (2) below); however, it does not amount to a manifest exceeding of competences insofar as it is limited to narrowly defined exceptions (see (3) below). 233

(1) Primary law does not provide for the establishment of EU offices and agencies, nor does it provide for a delegation of competences to them. However, in various instances, the establishment of offices and agencies is implied, as reflected in Art. 263(1) second sentence, Art. 263(5), Art. 265(1) second sentence, Art. 265(3), Art. 267(1) lit. b, Art. 277 TFEU (see (a) below). According to the CJEU's case-law, the establishment of offices and agencies can, in principle, also be based on Art. 114(1) TFEU (see (b) below). 234

(a) Until the end of the 1990s, the establishment of offices and agencies was based on the EU's subsidiary powers (currently laid down in Art. 352(1) TFEU) and required a unanimous Council decision ([...]). Recently, the EU legislator has increasingly based the establishment of agencies on the EU's competence to adopt harmonisation measures (currently) laid down in Art. 114(1) TFEU ([...]). Pursuant to this provision, in order to achieve the objectives set out in Art. 26 TFEU, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which aim at the establishment and functioning of the internal market (cf. Art. 3(3) TEU, Art. 4(2) lit. a, Art. 26 TFEU and Protocol No 27). 235

(b) According to the CJEU, the establishment of bodies of the European Union can also be based on Art. 114(1) TFEU where the corresponding secondary legislation comprises measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States and aims at the establishment and functioning of the internal market. In this respect, such secondary legislation must reduce obstacles to the exercise of fundamental freedoms or reduce appreciable distortions of competition (cf. CJEU, Judgment of 5 October 2000, *Federal Republic of Germany v European Parliament and Council*, C-376/98, ECR 2000, I-8498 <8527 para. 95, 8529 and 8530 paras. 106 and 107>). In the *ESMA* case (CJEU, Judgment of 22 January 2014, *United Kingdom v European Parliament and Council*, C-270/12, EU:C:2014:18), the CJEU not only significantly reduced the requirements for the delegation of tasks and powers to bodies, offices and agencies of the European Union that had been applicable since its *Meroni* decision (CJEU, Judgment of 13 June 1958, *Meroni v High Authority*, C-9/56, ECR 1958, I-16 *et seq*.) ([...]), but also considerably extended the EU's competence to adopt harmonisation measures laid down in Art. 114(1) TFEU. Since its *ESMA* decision, the CJEU has considered Art. 114(1) TFEU to be a suitable basis for the delegation of implementation powers to bodies, offices and agencies of the European Union that are vested with decision-making powers vis-à-vis EU citizens and companies; the CJEU has justified this based on special circumstances and the restriction of powers to interfere to exceptional situations that require swift and temporary action, especially in fields with complex technical features. 236

According to the CJEU, the EU legislator has discretion as regards the assessment which "measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States" are necessary for the functioning of the internal market (cf. CJEU, Judgment of 8 June 2010, *The Queen v Secretary of State*, C-58/08, ECR 2010, I-5026 <5040 para. 35>; Judgment of 22 January 2014, *United Kingdom v European Parliament and Council*, C-270/12, EU:C:2014:18, para. 102); the EU legislator may thus choose between different regulatory instruments when it determines specific approximation measures. The CJEU held that this is the case in particular where the measures to be adopted are dependent on specific professional and technical expertise and the ability to respond swiftly and appropriately – such as where regulating the banking sector is concerned (cf. CJEU, Judgment of 22 January 2014, *United Kingdom v European Parliament and Council*, C-270/12, EU:C:2014:18, paras. 85, 105; Judgment of 4 May 2016, *The Queen v Secretary of State*, C-547/14, EU:C:2016:325, para. 63). It further stated that the approximation of general laws alone may not be sufficient to ensure the unity of the market in such domains; consequently, the EU legislator must also have the power to take individual measures vis-à-vis the persons concerned. In view of serious threats to the orderly functioning and integrity of the financial markets or the stability of the financial system in the EU, such measures could take the form of providing an appropriate mechanism for averting such threats (cf. CJEU, Judgment of 22 January 2014, *United Kingdom v European Parliament and Council*, C-270/12, EU:C:2014:18, para. 105 *et seq*.). 237

Furthermore, the CJEU held that the object of the legal act in question must objectively and genuinely be to improve the conditions for the establishment and functioning of the internal market and to contribute to the removal of obstacles to the free movement of goods and services or of distortions of competition (cf. with regard to the previous provision Art. 95 EC – CJEU, Judgment of 10 December 2002, *The Queen v Secretary of State and British American Tobacco and Others*, C-491/01, ECR 2002, I-11550 <11574 para. 60>; Judgment of 2 May 2006, *United Kingdom v Parliament and Council*, C-217/04, ECR 2006, I-3789 <3805 and 3806 para. 42>; Judgment of 8 June 2010, *The Queen v Secretary of State*, C-58/08, ECR 2010, I-5026 <5039 para. 32>). Thus, the differences between the laws, regulations or administrative provisions of the Member States must be such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market (cf. CJEU, Judgment of 4 May 2016, *The Queen v Secretary of State*, C-547/14, EU:C:2016:325, para. 58); an abstract risk is not sufficient (cf. already CJEU, Judgment of 8 June 2010, *The Queen v Secretary of State*, C-58/08, ECR 2010, I-5026 <5039 para. 32>). According to the CJEU, the tasks that may be conferred on an agency must be closely linked to the subject matter of the acts approximating the laws, regulations and administrative provisions of the Member States (cf. CJEU, Judgment of 2 May 2006, *United Kingdom v Parliament and Council*, C-217/04, ECR 2006, I-3789 <3805 and 3806 para. 45>). To the extent that improving the internal market is not only an incidental or subsidiary objective, pursuing other objectives and thus attributing tasks to other competences does not preclude a sufficient link to the internal market (cf. CJEU, Judgment of 9 October 2001, *Kingdom of the Netherlands v European Parliament and Council*, C-377/98, ECR 2001, I-7149 <7158 paras. 27 and 28>; see also CJEU, Judgment of 8 June 2010, *The Queen v Secretary of State*, C-58/08, ECR 2010, I-5026 <5039 para. 32>; Judgment of 4 May 2016, *The Queen v Secretary of State*, C-547/14, EU:C:2016:325, para. 60). 238

Furthermore, the CJEU held that the delegation of powers must be precisely delineated by detailed legal requirements and exercise of these powers must be amenable to judicial review in the light of the established objectives (cf. CJEU, Judgment of 22 January 2014, *United Kingdom v European Parliament and Council*, C-270/12, EU:C:2014:18, paras. 45, 53). However, the use of legal concepts that are not precisely defined and the discretion related thereto are unobjectionable ([...]). Moreover, the delegation of comprehensive powers must be integrated into a substantive and procedural framework ensuring that margins of discretion are circumscribed. This framework encompasses consultation requirements and requirements to provide information and to state reasons as well as a time limit for the measures, where applicable (cf. CJEU, Judgment of 22 January 2014, *United Kingdom v European Parliament and Council*, C-270/12, EU:C:2014:18, paras. 45, 50). Thus, according to the CJEU, it can be concluded that a delegation of powers that vests agencies with a large measure of discretion is impermissible given that it entails a transfer of responsibility for fundamental decisions and for setting the agenda that must remain with the political institutions to which the Treaties assign the respective competences 239

and democratic legitimation (cf. CJEU, Judgment of 22 January 2014, *United Kingdom v European Parliament and Council*, C-270/12, EU:C:2014:18, paras. 50, 53 and 54).

(2) The establishment of bodies, offices and agencies of the European Union on the basis of Art. 114(1) TFEU raises considerable concerns with regard to the principle of conferral (Art. 5(1) second sentence, Art. 5(2) TEU). It can neither be based on the wording of Art. 114(1) TFEU (see (a) below) nor on its systematic position (see (b) below), nor on teleological reasons (see (c) below). 240

(a) Art. 114(1) TFEU authorises the approximation of the laws, regulations and administrative provisions of the Member States. There is nothing in its wording to indicate that the establishment of or authorisation to self-administration of the EU is permissible. 241

(b) Systematic aspects underline this finding. The principle of conferral suggests a narrow interpretation and application of Art. 114(1) TFEU. It is not only a principle of EU law that the EU may, under Art. 5(1) first sentence and (2) TEU, only act within the limits of the European integration agenda; rather, this is also a consequence of EU-related minimum standards set by national constitutional law (cf. BVerfGE 89, 155 <187 and 188, 192 and 193>; 123, 267 <350>; 142, 123 <219 para. 185>). Strict adherence to the principle of conferral is the key justification for accepting drops in influence that are necessarily related to the exercise of public authority by the EU. Therefore, the focus of the European integration agenda on its very purpose may not lead to the de facto suspension of the principle of conferral (cf. Art. 3(6), Art. 4(1) TEU, Art. 7 TFEU; see also CJEU, Opinion 2/94 of 28 March 1996, *ECHR Accession*, ECR 1996, I-1783, <1788 para. 30>; cf. also Declaration No 42 on Art. 352 TFEU annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon). This affects any interpretation of the powers conferred as part of the European integration agenda and the method of review (cf. BVerfGE 142, 123 <219 and 220 para. 186>). 242

Furthermore, it must be taken into consideration that the European Union is based on a multi-level cooperation of administrative systems (*Verwaltungsverbund*), in which tasks are primarily performed by national administrations. Its structure and organisation are rooted in the political and social traditions of the Member States ([...]) and often shape their national identities within the meaning of Art. 4(2) TEU. National administrations form the basis of multi-level administrative cooperation since they not only implement domestic law, but in principle, also EU law – as guaranteed by Art. 4(3) subsection 2 TEU, Art. 197 and Art. 291(1) TFEU ([...]). Against this background, the direct implementation of law by institutions, bodies, offices and agencies of the European Union is an exception ([…]). 243

Thus, Art. 114(1) TFEU does not justify the removal of any obstacle resulting from the coexistence of national administrations in the framework of multi-level administrative cooperation. Different approaches within the federal order that are generally 244

recognised as inherent in the unitary Federation under the Basic Law (cf. BVerfGE 10, 354 <371>; 12, 139 <143>; 16, 6 <24>; 17, 319 <331>; 27, 175 <179>; 30, 90 <102 and 103>; 32, 346 <360>; 33, 224 <231>; 42, 20 <27>; 51, 43 <58 and 59>; 76, 1 <73>; 93, 319 <351>; 106, 225 <241>; 134, 1 <21 para. 61>; 138, 261 <288 para. 61>; 147, 253 <337 para. 183> […]) in the context of the implementation of federal law ([...]) are all the more inherent in the European Union (cf. Art. 4(2), Art. 5(1) second sentence, Art. 5(3), (4) TEU; CJEU, Judgment of 12 June 2014, *Digibet and Others v Westdeutsche Lotterie*, C-156/13, EU:C:2014:1756, paras. 24, 32 and 33). Therefore, the establishment of European agencies and the delegation of implementation functions to them cannot be justified solely by the removal of mere difficulties that decentralised implementation always entails ([...]).

(c) Teleological considerations support a narrow interpretation of Art. 114(1) TFEU. Insofar as the CJEU invokes the so-called doctrine of implied powers in this respect (cf. CJEU, Judgment of 29 November 1956, *Fédération Charbonnière de Belgique v High Authority*, C-8/55, ECR 1955, I-302 <311 and 312>; Judgment of 15 July 1960, *Government of the Italian Republic v High Authority*, C-20/59, ECR 1960, I-687 <708 *et seq*.>; Judgment of 31 March 1971, *Commission v Council*, C-22/70, ECR 1971, I-264 <274 *et seq*. para. 15/19 to 23/29>; Judgment of 26 March 1987, *Commission v Council*, C-45/86, ECR 1987, I-1517 <1522 para. 20>; Judgment of 13 September 2005, *Commission v Council*, C-176/03, ECR 2005, I-7907 <7925 para. 48>; Judgment of 23 October 2007, *Commission v Council*, C-440/05, ECR 2007, I-9128 <9155 *et seq*. paras. 58, 60, 63>; Judgment of 6 March 2018, *Slovak Republic v Achmea BV*, C-284/16, EU:C:2018:158, para. 34; Opinion 2/94 of 28 March 1996, *ECHR Accession*, ECR 1996, I-1783 <1787 paras. 25 and 26>; Opinion 2/13 of 18 December 2014, *ECHR Accession*, EU:C:2014:2454, para. 173), enforcement functions can only be justified within narrow limits – namely where the provisions on the establishment of an agency appear to be an annex to the complete legal act, and where its establishment is necessary for the application of the provision that is to be adopted. 245

(3) However, the establishment of an agency vested with enforcement powers on the basis of Art. 114(1) TFEU does not amount to a manifest exceeding of competences insofar as it is limited to narrowly defined exceptions. According to the CJEU's case-law, an agency may be established only in order to avoid or remove differences in administrative practice that would otherwise be inevitable and that cannot be accepted because of the special nature of the matter in question. The type of the task to be carried out must also require the establishment of an EU body. For example, this applies to ensuring specific knowledge or expertise, in particular with regard to specifically technical areas if the availability of such knowledge is (predominantly) not guaranteed within the administrative systems of the Member States. The transfer of powers that are not clearly defined or cannot be sufficiently reviewed, of essential decisions on the strategic direction of a policy area and of other fundamental decisions as well as the delegation of legislative powers is ruled out (cf. CJEU, Judgment 246

of 13 June 1958, *Meroni v High Authority*, C-9/56, ECR 1958, I-16 <43 and 44>; Judgment of 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, EU:C:2014:18, paras. 41 and 42).

bb) The establishment of the Single Resolution Board and the competences assigned to it satisfy the criteria developed in the CJEU's case-law (see (1) below). If the transferred tasks and powers in the domain of bank resolution are interpreted strictly, they do not amount to a manifest and structurally significant violation of Art. 114(1) TFEU (see (2) below). 247

(1) The SRM Regulation serves to harmonise rules within the internal market (see (a) below) and also satisfies the other requirements for establishing an agency on the basis of Art. 114(1) TFEU (see (b) below). This is not altered by the fact that the SRM Regulation is also intended to maintain the stability of the financial system (see (c) below) nor by the limited number of participating Member States (see (d) below). 248

(a) The SRM Regulation is aimed at the centralisation of necessary decision-making processes with regard to the resolution of credit institutions (cf. recital 10 SRM Regulation) and integrates the national authorities into a Single Resolution Mechanism (cf. Art. 7 SRM Regulation). It pursues the objective of harmonising specific domains of the internal market through special insolvency law applicable to the credit institutions that are subject to the Single Resolution Mechanism, since the EU legislator identified the different frameworks for resolution and the lack of a uniform decision-making process with regard to the resolution of credit institutions as a decisive reason for the instability of the (internal) market (cf. recital 2 and 10 SRM Regulation; OJ EU No C 44 of 15 February 2013, pp. 68, 70, 75; OJ EU No C 67 of 6 March 2014, pp. 59 and 60; COM<2012> 510 final, pp. 5 and 6; *Bundestag* document, *Bundestagsdrucksache* – BTDrucks 18/1340, pp. 6 and 7; BTDrucks 18/2150, pp. 644, 736; BTDrucks 19/6418, p. 8; *Bundesrat* document, *Bundesratsdrucksache* – BR-Drucks 592/13, pp. 2 and 3, 5 *et seq*., 99 *et seq*. […]). 249

In addition, for the credit institutions concerned, the establishment of the Single Resolution Mechanism serves to allow for more predictability and more adequate consideration of their cross-border activities (cf. BTDrucks 18/1340, p. 6). The Single Resolution Mechanism is intended to complement the Single Supervisory Mechanism and is closely interwoven with it (cf. recital 11 fourth and fifth sentence SRM Regulation). The aim is to ensure that all credit institutions subject to the Single Resolution Mechanism have a similar resolution risk. 250

According to the EU legislator, ensuring effective and uniform resolution rules and equal conditions of resolution financing across Member States will also lead to an improved functioning of the internal market given that it will prevent the spill-over of crises into non-participating Member States (cf. recital 12 sixth sentence SRM Resolution). Thus, every action, proposal or policy of the Board, the Council, the Commission, or of a national resolution authority in the framework of the SRM must be undertaken with full regard for the unity and integrity of the internal market (Art. 6(2) SRM 251

Resolution).

This assessment is not objectionable. Within the limits of its competences, the EU legislator has a prerogative of assessment and significant leeway as to making prognoses and to designing legislation. This leeway would only be exceeded where it made its assessments on the basis of manifestly incorrect information or took measures that are manifestly unsuitable for achieving the intended purpose even from an *ex ante* perspective. This is not the case here. 252

(b) The establishment of the Single Resolution Board as an independent regulatory agency (Art. 42(1), Art. 47(1) SRM Regulation) and the competences assigned to it satisfy the other requirements for the establishment of an EU agency on the basis of Art. 114(1) TFEU. The competences are set out in a sufficiently specific manner in the SRM Regulation (see (aa) below), they do not extend to fundamental matters (see (bb) below) and limit the communitisation of administrative competences to what is necessary from the perspective of the EU legislator (see (cc) below). 253

(aa) The Single Resolution Board is the institutional centre of the Single Resolution Mechanism (cf. BTDrucks 18/1340, p. 8). Insofar as it performs tasks or exercises powers, it is considered the competent national resolution authority (Art. 5(1) SRM Regulation). This serves an efficient and equal implementation of the Bank Recovery and Resolution Directive (BRR Directive) and of the SRM Regulation without being distorted by national interests (cf. BTDrucks 18/1340, p. 10). 254

The tasks and powers assigned to the Single Resolution Mechanism in general and the Single Resolution Board in particular are sufficiently specific. Art. 50(1) SRM Regulation lists the tasks of the plenary sessions, while Art. 54 SRM Regulation lists the tasks of the executive sessions and its powers. [...] 255

[…] 256

This is supplemented by procedural requirements [see, in particular, Art. 18(7) SRM Regulation]. [...] 257

Insofar as the Board is ultimately authorised to impose fines, this authorisation is restricted by narrowly defined circumstances (Art. 38(1), (2) SRM Regulation) and detailed rules as to the amount of the fines (Art. 38(3) to (7), (9) SRM Regulation). Similar rules apply to the imposition of periodic penalty payments (Art. 39 SRM Regulation). Arts. 40 and 41 SRM Regulation provide for more detailed requirements for proceedings and, in particular, ensure that effect is given to the right to be heard (Art. 40(1) SRM Regulation) and rights of defence (Art. 40(2) SRM Regulation). 258

Overall, the Board has no *de facto* exclusive decision-making competence. Comprehensive rights of rejection or amendment by EU institutions would undermine the concentration of particular expertise that is the very purpose of the establishment of the Board (cf. Art. 56(4) first sentence SRM Regulation); the short periods for review also do not justify the assumption that the EU institutions cannot adequately fulfil the 259

tasks assigned to them ([...]). By its nature, the resolution of credit institutions is time-critical ([...]) given that, according to the EU legislator's intent, it is to be carried out between the close of trading in the US on Friday evening and the opening of trading in Asia on Monday morning ([...]). Finally, the Commission has a key role where resolution involves the granting of state aid (Art. 107(1) TFEU) or the use of financial resources from the Single Resolution Fund (Art. 19(3) of the SRM Regulation). In these cases, the adoption of the resolution scheme may not take place until such time as the Commission has adopted a positive decision concerning compatibility with the internal market (Art. 19(1) SRM Regulation).

(bb) Tasks and powers of the Board do not extend to fundamental matters. As stated above, the SRM Regulation itself sets out how these are to be handled (cf. recital 24 first to sixth sentence). 260

(cc) Moreover, the communitisation of administrative competences is limited to what is necessary from the perspective of the EU legislator. Thus, the national resolution authorities retain the competence for all credit institutions that are not subject to the Single Supervisory Mechanism – which is by far the largest group of institutions (cf. para. 196). Yet also within the scope of application of the SRM Regulation, it falls to the national resolution authorities to draft and adopt resolution plans (Art. 7(3) subsection 1, Art. 9(1) SRM Regulation) in relation to entities and groups other than those referred to in Art. 7(2), (4) lit. b, Art. 7(5) SRM Regulation; where it is necessary to ensure the consistent application of high resolution standards, the Board may, however, decide on its own initiative, after consulting the national resolution authority concerned, or upon request from the national resolution authority concerned, to exercise directly all of the relevant powers attributed to the national resolution authority under the Regulation (Art. 7(4) lit. b SRM Regulation). Finally, in the context of decentralised implementation, the national resolution authorities are competent to implement the decisions of the Board and to specify further the measures to be taken (Art. 6(7), Art. 18(9), Art. 29(1) SRM Regulation), while the Board has the right to directly give instructions to the credit institution under resolution (Art. 29(2) SRM Regulation). 261

(c) The applicability of Art. 114(1) TFEU to the SRM Regulation is not ruled out by the fact that the Single Resolution Mechanism also bolsters the stability of the financial system in the participating Member States. This does not call into question that harmonising the resolution regimes in the Member States is the essential objective of the SRM Regulation and that stabilising the financial markets is merely a supplementary effect ([...]). 262

(d) The limited number of Member States participating in the Single Resolution Mechanism does also not call into question the applicability of Art. 114(1) TFEU to the SRM Regulation ([...]). 263

Furthermore, enhanced cooperation with respect to bank resolution is justified by objective reasons ([...]) given that the Single Resolution Mechanism is, in a way, the 264

second step after the establishment of the Single Supervisory Mechanism as a first step (cf. recital 15 to 17 of the SRM Regulation). This second step is intended to protect entities, deposit holders, investors or other creditors from discrimination on grounds of their nationality or place of business (Art. 6(1) SRM Regulation; cf. also recital 46 sixth sentence SRM Regulation). While the Single Resolution Mechanism does not abolish the existing fragmentation of the internal market, it reduces such fragmentation.

(2) Overall, the establishment of the Single Resolution Board under the SRM Regulation and its competences are in line with a restrictive application of Art. 114(1) TFEU regarding the establishment and competences of bodies, offices and agencies of the European Union and thus do not amount to a manifest exceeding of the European integration agenda, even though they are structurally significant. Therefore, as long as the tasks and powers of the Single Resolution Board are not extended through interpretation, the SRM Regulation does not amount to an *ultra vires* act. 265

b) Given the existing compensation measures, the conferral of tasks and powers relating to bank resolution to an independent Board does not encroach on the constitutional identity protected by Art. 20(1) and (2) in conjunction with Art. 79(3) GG (see aa) below). This also applies where the SRM Regulation exempts national resolution authorities from accountability to Parliament when performing resolution tasks within the framework of the SRM Regulation (see bb) below). 266

aa) The establishment of independent bodies, offices and agencies of the European Union conflicts with the principle of democracy. A minimum of political accountability must also be ensured with regard to decisions taken by institutions, bodies, offices and agencies of the European Union. The establishment of independent administrative bodies and other agencies requires specific justification and it must be ascertained that the Member States and institutions of the European Union are able to ensure the democratic accountability of their actions and, where necessary, to adjust, amend or repeal the relevant legal bases. 267

When performing the tasks conferred on it, the Single Resolution Board acts independently (Art. 47(1) SRM Regulation). Its members must neither seek nor take instructions from the European Union's institutions or bodies, from any government of a Member State or from any other public or private body (Art. 47(2) second sentence SRM Regulation). The procedure to appoint the members of the Board (see (1) below), its accountability requirements (see (2) below) and the fact that it is subject to extensive administrative oversight and judicial review (see (3) below) ensure sufficient democratic control. 268

(1) The Single Resolution Board is composed of the Chair, four further full-time members and a member appointed by each participating Member State (Art. 43(1) SRM Regulation). The Chair, the Vice-Chair and the four further full-time members are appointed by the European Parliament based on a proposal submitted by the Commission; the Council then adopts an implementing decision by qualified majority 269

[to appoint the proposed members] (Art. 56(6) subsection 1, subsection 3 SRM Regulation). […]

(2) The Single Resolution Board is fully accountable to the European Parliament, the Council and the Commission (Art. 45(1) SRM Regulation [see also Art. 63 SRM Regulation]). […] 270

[…] 271

In light of this, the Federal Government can at least indirectly influence the actions of the Single Resolution Board by seeking to ensure that the Council takes suitable measures, such as amending the SRM Regulation. [...] 272

The *Bundestag* indirectly participates in these oversight instruments through the Federal Government, which is represented in the Council (Art. 23(2) second sentence GG), and also has the opportunity to state its position in this respect under Art. 23(3) GG. The information provided to the *Bundestag* must enable it to influence the Federal Government's decision-making early and effectively. The *Bundestag* is only capable of accompanying and influencing the integration process, of debating the advantages and disadvantages of a project and of preparing opinions if it receives sufficient information. This information must be provided in such a way that the *Bundestag's* options are not reduced to mere reaction (cf. BVerfGE 131, 152 <202 and 203>). This also ensures that the *Bundestag* can fulfil the tasks conferred on it under Art. 12 TEU, Art. 1 and 2 of the Protocol on the role of national Parliaments in the European Union and Art. 4 of the Protocol on the application of the principles of subsidiarity and proportionality, and it is an essential requirement for the ability of citizens to effectively influence the exercise of public authority required by Art. 20(2) second sentence GG (cf. BVerfGE 131, 152 <204>). 273

(3) Furthermore, the level of democratic legitimation of the work of the Single Resolution Board is ensured by administrative oversight and judicial review. 274

In the cases set out in Art. 85(3) SRM Regulation [...], any natural or legal person, including national resolution authorities, may appeal against a decision of the Board which is addressed to that person, or which is of direct and individual concern to that person. An Appeal Panel established by the Single Resolution Board decides on such appeals (Art. 85(1) SRM Regulation). […] 275

It falls to the General Court of the European Union (GCEU) to provide judicial protection where the Board takes legal measures directly vis-à-vis the entity concerned. [...] Where Member States or institutions of the European Union challenge such decisions, the CJEU has jurisdiction (Art. 86(2) SRM Regulation, Art. 256(1), Art. 263 subsection 1 second sentence, subsection 2 to 6 TFEU, Art. 51 CJEU Statute). [...] 276

[…] 277

bb) To the extent that the SRM Regulation also declares the national resolution authorities to be independent, this again amounts to a diminishing of the level of demo- 278

cratic legitimation (see (1) below). Again, it does not encroach upon the constitutional identity. (see (2) below)

(1) While domestic law initially provided for comprehensive democratic legitimation and oversight of measures relating to bank resolution (see (a) below), the SRM Regulation results in a diminished level of democratic legitimation (see (b) below). 279

(a) Under domestic law, until 31 December 2017 the Federal Agency for Financial Market Stabilisation (*Bundesanstalt für Finanzmarktstabilisierung* – FMSA) decided on resolution measures involving the use of the Restructuring Fund, a special fund of the Federation (§ 1 of the Restructuring Fund Act, *Restrukturierungsfondsgesetz* – RStruktFG) financed by contributions (§ 12(1) RStruktFG); since 1 January 2018, BaFin makes such decisions (§ 3(1) of the Act on Restructuring and Resolving Institutions and Financial Groups, *Gesetz zur Sanierung und Abwicklung von Instituten und Finanzgruppen* – SAG in the version of 23 December 2016). 280

Pursuant to § 16(1) RStruktFG 2018, parliamentary oversight of the Restructuring Fund and its management is carried out by a panel established under § 3 of the Federal Debt Management Act (*Gesetz zur Regelung des Schuldenwesens des Bundes* – BSchuWG) that is elected by the *Bundestag* for the duration of a parliamentary term and is composed of members of the *Bundestag*'s Budget Committee (§ 3(1) first sentence BSchuWG). The Federal Ministry of Finance continually provides the panel with information on all matters concerning the Fund (§ 16(1) second sentence RStruktFG in conjunction with § 10a(2) of the Financial Market Stabilisation Fund Act (*Finanzmarktstabilisierungsfondsgesetz* – FMStFG). 281

To the extent that BaFin retains its competences (Art. 9(1), Art. 7(3) SRM Regulation) and applies domestic law, it continues to be subject to national oversight mechanisms ([…]). Pursuant to Art. 46(4) SRM Regulation, this is without prejudice to the accountability requirements of national resolution authorities to national parliaments in accordance with domestic law for the performance of tasks not conferred on the Single Resolution Board, the Council or the Commission by the SRM Regulation and for the performance of activities carried out by them in accordance with Art. 7(3) SRM Regulation. Pursuant to Art. 7(3) SRM Regulation, the national resolution authorities apply the SRM Regulation and exercise the powers conferred on them under domestic legislation that transposes the BRR Directive in accordance with the conditions laid down in domestic law (Art. 7(3) subsection 4 first and third sentence SRM Regulation). 282

(b) The SRM Regulation has considerably diminished the original level of democratic legitimation by declaring the national resolution authorities to be independent (Art. 47(1) SRM Regulation); however, this does not apply to the personal legal position of their staff members – as can be inversely inferred from Art. 47(2) second sentence SRM Regulation, which only applies to members of the Single Resolution Board. This leads to a division of the resolution regime within BaFin: Where BaFin acts outside the Single Resolution Mechanism, it is a subordinate authority of the 283

Federal Ministry of Finance, and, as such, accountable to and bound by the instructions of the Ministry; where BaFin performs tasks within the Single Resolution Mechanism, the Ministry may not give instructions to BaFin.

The work of the Single Resolution Mechanism is of major political significance (cf. recital 12 SRM Regulation); therefore, providing for the independence of national resolution authorities results in a considerable diminishing of the level of democratic legitimation. In particular, this holds true given that this comes in addition to other drops in influence – namely the independence of the Single Resolution Board and its staff members as well as the use of legal concepts that are not precisely defined –, which at least renders it more difficult to make the law strictly binding ([…]). 284

(2) There is, however, no encroachment on the principle of the sovereignty of the people (Art. 20(2) first sentence in conjunction with Art. 79(3) GG) if further elements of legitimation are added. In this respect, in addition to legitimation in organisation and staff matters (see (a) below) and in functional and substantive terms (see (b) below), further arrangements safeguarding democratic accountability are required (see (c) below). Such safeguards do exist (see (d) below). 285

(a) […] 286

(b) […] 287

(c) The transparency provided by the involvement of EU institutions and by reporting and accountability requirements to national parliaments serves to ensure democratic legitimation and oversight (cf. recital 42 third and fourth sentence; Art. 45(2) first sentence, Art. 46(2) first sentence SRM Regulation). [...] 288

Furthermore, judicial review of the measures adopted by BaFin can contribute to democratic legitimation insofar as BaFin implements decisions of the Single Resolution Board pursuant to Art. 29(1) first sentence SRM Regulation. In this respect, the credit institutions concerned are usually subject to legal measures adopted by the national resolution authority, so that legal protection is generally governed by domestic law, too (recital 120 fourth sentence SRM Regulation). 289

The calculation and determination of annual contributions by the Single Resolution Board (Art. 70(1) SRM Regulation) can be challenged only by bringing an action for annulment before the GCEU or the CJEU (Art. 86(1) SRM Regulation), even though such decisions are addressed to the institutions concerned as decisions of the national resolution authority. Thus, the GCEU and the CJEU provide legal protection against measures of FMSA or, respectively, BaFin ([…]); this legal protection must at least satisfy the requirements of Art. 19(4) GG. 290

The safeguards set out here can in part, though not completely, compensate for the drops in influence related to the independence of national resolution authorities (cf. CJEU, Judgment of 9 March 2010, *Commission v Federal Republic*, C-518/07, ECR 2010, I-1897 <1915 para. 45> […]). 291

(d) In an overall assessment, the drops in influence resulting from the independence of BaFin within the framework of the Single Resolution Mechanism can be compensated by the abovementioned safeguards, which serve to ensure democratic legitimation, in such a way that an encroachment on the principles protected under Art. 20(1) and (2) in conjunction with Art. 79(3) GG can be avoided. However, this requires that the individual safeguards be interpreted and applied in light of the principle of democracy, and that the *Bundestag* make full use of its possibilities of ensuring democratic accountability. 292

c) As far as the bank levy is concerned, it does not impair the *Bundestag*'s overall budgetary responsibility to a relevant extent. The substantive provisions of the SRM Regulation regarding the bank levy do not manifestly exceed the competence to harmonise rules within the internal market under Art. 114(1) TFEU (see aa) below). The imposition of the bank levy is based on domestic law and therefore does not pose any problems with respect to the European integration agenda and in the context of an *ultra vires* review (see bb) below). Likewise, the revenue generated by the bank levy is not transferred to the Single Resolution Fund based on the SRM Regulation, but based on the relevant Intergovernmental Agreement (IGA) (see (cc) below). 293

aa) The Single Resolution Fund provided for in Art. 67 SRM Regulation is designed to ensure that no taxpayers' money is used for the resolution of financial institutions in the future; it also serves to establish joint liability of financial institutions in the participating Member States so that funding for resolution can also be ensured in cases where recourse to the owners and creditors is not sufficient (cf. recital 73 first and third sentence SRM Regulation; BTDrucks 18/1340, p. 4 <regarding the BRR Directive>; BTDrucks 18/2150, pp. 564 *et seq*., 568; BTDrucks 18/3265, pp. 185, 209 and 210; BTDrucks 19/6418, p. 6). This does not establish liability of the participating Member States (cf. recital 21 second sentence IGA, Art. 67(2) second sentence SRM Regulation). […] 294

The substantive provisions regarding the bank levy do not manifestly exceed the competence to harmonise rules within the internal market. Pursuant to Art. 114(2) TFEU, Art. 114(1) TFEU is not applicable, *inter alia*, to fiscal provisions. Accordingly, the CJEU repeatedly held with regard to Art. 95(2) EC Treaty, the provision applicable prior to Art. 114(2) TFEU, that the words 'fiscal provisions' cover direct and indirect taxes and encompass both material and procedural rules (cf. CJEU, Judgment of 29 April 2004, *Commission v Council*, C-338/01, ECR 2004, I-4852 <4877 para. 63>; Judgment of 26 January 2006, *Commission v Council*, C-533/03, ECR 2006, I-1051 <1071 para. 47>). […] 295

[…] 296-298

bb) Art. 114(1) TFEU does, in principle, not authorise the European Union to impose levies on individuals or companies (see (1) below). No such obligation to pay a levy can be derived from the SRM Regulation (see (2) below). 299

(1) Art. 114(1) TFEU does not authorise the European Union to impose taxes or levies that are similar to taxes, such as special levies or fees. [...] 300

[…] 301-302

(2) The bank levy is not part of the Own Resources Decision under Art. 311 TFEU, and might therefore raise concerns with regard to primary law [...]. However, it is decisive with regard to Art. 23(1) in conjunction with Art. 20(1) and (2) and Art. 79(3) GG that its imposition is not based on the SRM Regulation, but on domestic law. 303

The SRM Regulation does not include any provisions establishing an obligation to pay the levy on the part of credit institutions. [...] 304

Rather, such an obligation derives from the Restructuring Fund Act. [...] 305

cc) Likewise, it is not the SRM Regulation, but the relevant Intergovernmental Agreement that provides for the transfer of the revenue generated by the bank levy. Thus, there are no grounds for finding that the SRM Regulation violates the European integration agenda (see (1) below) nor for finding that it encroaches on the overall budgetary responsibility of the *Bundestag* (see (2) below). 306

(1) Germany's obligation to transfer the revenue generated by the bank levy to the Single Resolution Fund is not based on the SRM Regulation, but on the Intergovernmental Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund of 21 May 2014 (cf. recital 7 sentence 4 IGA). The participating Member States chose this arrangement because they did not consider Art. 114(1) TFEU to be a sufficient legal basis in this respect (cf. BTDrucks 18/298, p. 16; BT-Drucks 18/1340, p. 2 […]). The Agreement was ratified by the Act of Approval of 17 December 2014 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl II, p. 1298). Thus, an *ultra vires* act is ruled out from the outset. 307

(2) There are also no grounds for finding that the SRM Regulation encroaches on the overall budgetary responsibility of the *Bundestag*. An independent right of the European Union to impose levies would indeed encroach on the overall budgetary responsibility, which is protected by Art. 20(1) and (2) in conjunction with Art. 79(3) GG, given that decisions on public revenue and public expenditure constitute a fundamental part of the democratic capability of self-governance within the constitutional state (cf. BVerfGE 129, 124 <177>; 132, 195 <239 para. 106>; 135, 317 <399 and 400 para. 161>; 142, 123 <230 para. 211>) and the *Bundestag* is accountable to citizens for such decisions; as a consequence, it falls to the *Bundestag* to determine the overall financial burden imposed on citizens. The same applies to essential expenditure of the state, which citizens want to influence through free and equal elections (cf. BVerfGE 123, 267 <361>). 308

However, given that the imposition of the bank levy and the transfer of its revenue to the Single Resolution Fund is not based on the SRM Regulation, but on *Bundestag* decisions, an encroachment on the overall budgetary responsibility of the *Bundestag* 309

cannot be found.

3. Based on the interpretation underlying this decision, neither the SSM Regulation nor the SRM Regulation amount to *ultra vires* acts, nor do they exceed the limits of the requirements set by the principle of democracy that are beyond the reach of European integration under Art. 79(3) GG in conjunction with Art. 23(1) third sentence GG; thus, a violation of the responsibility with regard to European integration on the part of the Federal Government and the *Bundestag*, and, consequently, a violation of the complainants' right under Art. 38(1) first sentence GG can be ruled out. This also applies with regard to the SSM Authorising Act. By adopting this Act, the *Bundestag* simply assumed its responsibility with regard to European integration 310

The SSM Authorising Act does not confer any sovereign powers on the European Union. Rather, Art. 127(6) TFEU provides for the relevant authorisation for the SSM Regulation (cf. para. 158 *et seq*.) The legislative procedure does not indicate in any way that the legislator wanted to amend primary law or the European integration agenda. […] 311

[…] 312-313

D.

It was not necessary to request a preliminary ruling from the CJEU pursuant to Art. 267 TFEU. 314

I.

According to the CJEU case-law (ECJ, Judgment of 6 October 1982, *C.I.L.F.I.T.*, C-283/81, ECR 1982, I-3417 <pp. 3430 and 3431 para. 21>), a national court against whose decisions no judicial remedy is available must comply with its duty of referral where a question of European Union law is raised in proceedings before it, unless the court has established that the question raised is irrelevant, that the provision of European Union law in question has already been subject to an interpretation by the CJEU or that the correct application of European Union law is obvious (cf. BVerfGE 82, 159 <193>; 128, 157 <187>; 129, 78 <105 and 106>; 135, 155 <231 para. 178>; 140, 317 <376 para. 125>). The correct application may be obvious because the applicable legal standards are either clear from the outset ("acte clair") or clarified beyond reasonable doubts in the case-law of the ECJ ("acte éclairé", cf. BVerfGE 129, 78 <107>; 135, 155 <233 para. 184>; 147, 364 <381 and 382 para. 43>). 315

II.

Measured against these standards, a request for a preliminary ruling is neither required with regard to the interpretation of Art. 127(6) TFEU and the SSM Regulation (see 1. below) nor with regard to the interpretation of Art. 114(1) and (2) TFEU and the SRM Regulation (see 2. below). 316

1. In the case at hand, the interpretation of Art. 127(6) TFEU is obvious with regard 317

to the SSM Regulation given that, in the opinion of the Federal Constitutional Court, it does not constitute a sufficiently qualified exceeding of the European integration agenda. Even after the judgment in the case *Landeskreditbank Baden-Württemberg* (cf. CJEU, Judgment of 8 May 2019, *Landeskreditbank Baden-Württemberg v European Central Bank*, C-450/17 P, EU:C:2019:372), it cannot be assumed that the CJEU might interpret Art. 127(6) TFEU, which governs the allocation of competences in this case, more narrowly than the Federal Constitutional Court. Thus, the constitutional complaints would also remain unsuccessful in case of a reference to the CJEU. In principle, this also applies with regard to the SSM-Regulation. Insofar as the Federal Constitutional Court makes reference to considerations of the CJEU concerning the ECB's exclusive competence to perform all tasks listed in Art. 4(1) SSM Regulation and the classification of a financial institution as "less significant", the Senate assumes that this constitutes an "acte éclairé".

2. The interpretation of Art. 114(1) TFEU is also an "acte éclairé". With regard to the scope of Art. 114(1) TFEU as a legal basis for the establishment of the Single Resolution Board as an independent agency of the European Union and the allocation of competences to it, the Federal Constitutional Court based its considerations on the related case-law of the CJEU (in particular, the Judgment of 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, EU:C:2014:18); on the basis of this case-law and, in particular, the limits set out there as regards avoiding substantial shifts of competences between the European Union and the Member States, it came to the conclusion that the establishment of the Board does not amount to a qualified exceeding of the competences conferred under primary law, in this case Art. 114(1) TFEU. 318

The SRM Regulation does not contain any fundamental provisions in relation to the imposition of the bank levy and the transfer of its revenue to the Single Resolution Fund. Rather, these are included in domestic provisions and the Intergovernmental Agreement; thus, the interpretation of Art. 114(2) TFEU is irrelevant for the decision in the case at hand. There was no need to decide here whether the bank levy is subject to the derogation clause of Art. 114(2) TFEU; the Federal Constitutional Court left this question unresolved. 319

E.

[…] 320

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