Headnotes

to the Judgment of the First Senate of 18 July 2018

– 1 BvR 1675/16 –

– 1 BvR 745/17 –

– 1 BvR 836/17 –

– 1 BvR 981/17 –

1. **The Basic Law does not prohibit levies that compensate a benefit which take on the form of fees contributing to the costs of a public institution and which are imposed on those persons who – potentially – draw an advantage from using this institution.**

   The benefit that is compensated by the levying of the public broadcasting fee is the possibility of using public broadcasting services.

2. **A fee may be imposed on an indefinite number of persons, or even on every person, as long as a benefit can be attributed to each person specifically and individually and the use of the benefit appears to be realistically possible.**

3. **In respect of private use, the *Länder* legislatures were entitled, to make the liability to pay public broadcasting fees subject to the occupation of a dwelling, based on the assumption that public broadcasting services are typically used in dwellings. It is not relevant whether the person liable for the fee possesses a receiving device or intends to use the broadcasting services.**

   In addition to the public broadcasting fee in respect of private use, the possibility that the services be used for commercial purposes justifies a separate imposition on the proprietors of permanent establishments and of vehicles not used exclusively for private purposes.

4. **A person liable for a fee cannot be charged more than once for the same benefit.**

   Persons occupying multiple dwellings may not be charged more than one full public broadcasting fee for the possibility of using public broadcasting services.

FEDERAL CONSTITUTIONAL COURT

– 1 BvR 1675/16 –

– 1 BvR 745/17 –

– 1 BvR 836/17 –

– 1 BvR 981/17 –

Pronounced
on
18 July 2018
Sommer
Amtsinspektorin
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaints

I. of Mr S…,

– authorised representative: Rechtsanwalt Thorsten Bölck,
Bahnhofstraße 11, 25451 Quickborn –

1. directly against

a) the Order of the Federal Administrative Court (*Bundesverwaltungsgericht*) of 9 June 2016 – BVerwG 6 C 37.16 –,

b) the Judgment of the Federal Administrative Court of 18 March 2016 – BVerwG 6 C 7.15 –,

c) the Judgment of the Higher Administrative Court (*Oberverwaltungsgericht*) for the *Land* North Rhine-Westphalia of 12 March 2015 – 2 A 2423/14 –,

d) the Judgment of the Arnsberg Administrative Court (*Verwaltungsgericht*) of 20 October 2014 – 8 K 3353/13 –,

2. indirectly against

§ 2(1) of the State Treaty of the *Länder* on Public Broadcasting Fees (*Rundfunkbeitragsstaatsvertrag*) of 15 December 2010 in conjunction with the Act of Approval of the *Land* North Rhine-Westphalia

– 1 BvR 1675/16 –

II. of Mr A…,

– authorised representative: Rechtsanwalt Prof. Dr. Thomas Koblenzer, Königsallee 14, 40212 Düsseldorf –

1. directly against

a) the Judgment of the Federal Administrative Court of 25 January 2017 – BVerwG 6 C 11.16 –,

b) the Judgment of the Baden-Württemberg Higher Administrative Court (*Verwaltungsgerichtshof*) of 3 March 2016 – 2 S 386/15 –,

c) the Judgment of the Stuttgart Administrative Court of 27 January 2015 – 3 K 1773/14 –,

2. indirectly against

§ 2(1) of the State Treaty of the *Länder* on Public Broadcasting Fees of 15 December 2010 in conjunction with the Act of Approval of the *Land* Baden-Württemberg

– 1 BvR 745/17 –,

III. of S… GmbH & Co. A. KG,
represented by its sole and personally liable partner, S… GmbH, which, in turn, is represented by its managing directors S…, P…, Dr P…, S… and S…,

– authorised representatives: 1. Prof. Dr. Christoph Degenhart,
Stormstraße 3, 90491 Nürnberg,
2. Rechtsanwalt Dr. Holger Jacobj
in Sozietät Prof. Versteyl Rechtsanwälte,
Kokenhorststraße 19, 30938 Burgwedel –

1. directly against

a) the Order of the Federal Administrative Court of 21 March 2017 – BVerwG 6 C 5.17 –,

b) the Judgment of the Federal Administrative Court of 7 December 2016 – BVerwG 6 C 49.15 –,

2. indirectly against

§2(1) of the State Treaty of the *Länder* on Public Broadcasting Fees of 15 December 2010 in conjunction with the approval by the *Landtag* of 17 May 2011, publicly announced on 7 June 2011 (Bavarian Law and Ordinance Gazette, *Bayerisches Gesetzes- und Verordnungsblatt* – BayGVBl p. 258)

– 1 BvR 836/17 –,

IV. of Mr W…,

– authorised representative: Rechtsanwalt Prof. Dr. Thomas Koblenzer, Königsallee 14, 40212 Düsseldorf –

1. directly against

a) the Judgment of the Federal Administrative Court of 25 January 2017 – BVerwG 6 C 15.16 –,

b) the Judgment of the Baden-Württemberg Higher Administrative Court of 3 March 2016 – 2 S 1629/15 –,

c) the Judgment of the Stuttgart Administrative Court of 1 July 2015 – 3 K 4017/14 –,

2. indirectly against

§ 2(1) of the State Treaty of the *Länder* on Public Broadcasting Fees of 15 December 2010 in conjunction with the Act of Approval of the *Land* Baden-Württemberg

– 1 BvR 981/17 –

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Kirchhof,

Eichberger,

Masing,

Paulus,

Baer,

Britz,

Ott,

Christ

held on the basis of the oral hearing of 16 May 2018:

Judgment:

1. **Insofar as they incorporate into *Land* law § 2(1) of the State Treaty of the *Länder* on Public Broadcasting Fees (published in the Annex to Article 1 of the Act on the Fifteenth State Treaty to Amend State Broadcasting Treaties and Media Law Provisions, *Gesetz zum Fünfzehnten Rundfunkänderungsstaatsvertrag und zur Änderung medienrechtlicher Vorschriften* of 18 October 2011 <Baden-Württemberg Law and Ordinance Gazette, *Gesetzblatt für Baden-Württemberg* pages 477, 478>), the acts and resolutions of the *Länder* approving Article 1 of the Fifteenth State Treaty to Amend State Broadcasting Treaties (*Fünfzehnter Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge*) of 15 December 2010 are incompatible with Article 3(1) of the Basic Law (*Grundgesetz*) to the extent that persons occupying multiple dwellings are charged more than the broadcasting fee payable for one dwelling.**

2. **The existing provisions continue to apply until new provisions have been enacted on condition that, until new provisions enter into force, persons who can provide proof of payment of the public broadcasting fee for one dwelling pursuant to § 2(1) and (3) of the State Treaty of the *Länder* on Public Broadcasting Fees are exempted, upon application, from the liability for the public broadcasting fee in respect of further dwellings. Where legal proceedings have not yet been finally decided, such an application can be filed retroactively for the period laid down in the notice of assessment challenged in those cases.**

3. **The legislatures must enact new provisions by 30 June 2020 at the latest.**

4. **The Judgments of the Federal Administrative Court of 25 January 2017 – BVerwG 6 C 15.16 –, of the Baden-Württemberg Higher Administrative Court of 3 March 2016 – 2 S 1629/15 – and of the Stuttgart Administrative Court of 1 July 2015 – 3 K 4017/14 – violate the fundamental rights of the complainant in proceedings 1 BvR 981/17 under Article 3(1) of the Basic Law. The Judgment of the Federal Administrative Court is reversed and the matter is remanded to the Federal Administrative Court.**

5. **For the rest, the constitutional complaints are rejected.**

6. […]

R e a s o n s :

A.

The proceedings concern the question whether levying a public broadcasting fee (*Rundfunkbeitrag*) is constitutional […]. 1

I.

Public broadcasting is primarily financed with public broadcasting fees, in addition to revenues from broadcast advertising and other revenues […]. The relevant provisions entered into force on 1 January 2013. 2

[…] 3

II.

The public broadcasting fee is levied on private dwellings and in the commercial and non-private sector. The key provisions regarding its levying are laid down in the State Treaty of the *Länder* on Public Broadcasting Fees (*Rundfunkbeitragsstaatsvertrag* – RBStV). 4

[*Excerpt from Press Release No. 59/2018*]

Three of the constitutional complaints on which the decision is based challenge the levying of public broadcasting fees for private dwellings, with one of the complainants challenging in particular the levying of fees for secondary dwellings. The fourth constitutional complaint, lodged by a car rental company, challenges the levying of public broadcasting fees in the commercial and non-private sector, in particular the payment of additional fees for motor vehicles.

[*End of excerpt*]

[…] 5-10

III.

[…] 11-17

IV.

[…] 18-30

V.

[…] 31-43

VI.

[…] 44

B.

The constitutional complaints nos. I and III are inadmissible to the extent that they challenge a violation of the guarantee of recourse to the courts under Art. 19(4) of the Basic Law (*Grundgesetz* – GG) and the right to be heard under Art. 103(1) GG. 45

[…] 46-47

C.

The constitutional complaints in proceedings 1 BvR 1675/16, 1 BvR 745/17 and 1 BvR 836/17 are unfounded; the constitutional complaint in proceedings 1 BvR 981/17 is well-founded. 48

The *Länder* have legislative competence for the provisions governing the levying of the public broadcasting fee (I). Substantively, the liability to pay the public broadcasting fee is also for the most part compatible with the Constitution. It is in principle not objectionable that it is linked, in respect of private persons, to dwellings. However, the levying of the public broadcasting fee in respect of secondary dwellings is not compatible with the general guarantee of the right to equality (Art. 3(1) GG). The liability to pay the public broadcasting fee for permanent commercial or non-private establishments (*Betriebsstätten*) and motor vehicles in the non-private sector, by contrast, is compatible with the general guarantee of the right to equality (II). For the rest, there are no constitutional concerns with regard to the liability to pay the public broadcasting fee (III) nor with regard to the challenged decisions (IV). 49

I.

Formally, the liability for the public broadcasting fee of occupants of dwellings, proprietors of permanent commercial or non-private establishments, as well as proprietors of motor vehicles not exclusively used for private purposes (§ 2, § 5(1), (2) first sentence no. 2, second sentence RBStV), is compatible with the Constitution. Pursuant to Art. 70(1) GG, the *Länder* have legislative competence for the levying of the public broadcasting fee. 50

[…] 51

The public broadcasting fee in the form under review here is a non-tax levy within the meaning of the constitutional law governing public finances (*Finanzverfassung*), rather than a tax, which would be subject to other requirements regarding its formal constitutionality that arise primarily from Art. 105 GG. 52

1. There is no legal definition of tax in the Basic Law. Yet the Federal Constitutional Court has always presumed that the term “tax” in the Basic Law is based on the definition set out in § 3(1) of the Fiscal Code (*Abgabenordnung* – AO) (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 67, 256 <282>; 93, 319 <346>). According to that definition, taxes are “payments of money, other than payments made in consideration of the performance of a 53

particular activity, which are collected by a public body for the purpose of raising revenue and imposed by the body on all persons to whom the characteristics on which the law bases liability for payment apply". It is thus a defining feature of a tax that it is levied without individual consideration [for particular services] and independent of a specified purpose ("without precondition") to raise funds for the general financial needs of public bodies (cf. BVerfGE 108, 186 <215 and 216>; 110, 370 <384>; 124, 235 <243>; 124, 348 <364>; 137, 1 <17 para. 41>). The amount of the tax is not limited by the state functions it finances (cf. BVerfGE 43, 108 <118 et seq.>; 61, 319 <344 et seq.>; 66, 214 <222 et seq.>; 82, 60 <86>). However, it is permissible to generally earmark the revenue raised from a tax; such taxes are so-called special-purpose taxes (*Zwecksteuern*) (cf. BVerfGE 7, 244 <254>; 49, 343 <353 and 354>; 110, 274 <294>). The performance of public functions financed with special-purpose taxes does not, though, constitute consideration provided by those collecting the levy to those liable for paying it; the earmarking of such taxes is merely a simultaneous decision by the legislature in its budgetary function on how to use the tax revenue […].

In contrast, fees (*Beiträge*) and charges (*Gebühren*) are levies that compensate a benefit (*Vorzugslasten*) (cf. BVerfGE 110, 370 <388>; 137, 1 <17 and 18 para. 42>) and, together with other levies, are categorised as non-tax levies. In constitutional law, there is no general and independent concept of levies compensating a benefit. The Basic Law does not rule out such levies and does not contain an exhaustive list of the permissible types of levies (cf. BVerfGE 113, 128 <146 and 147>; 122, 316 <333>; 123, 132 <141>; 137, 1 <17 and 18 para. 42>). 54

Charges are defined as payments under public law imposed on persons on the basis of the use of services attributable to these persons by way of a provision under public law or another act of state authority. Fees are distinguished from charges by the fact that they are levied on the mere potential use of a public institution or service. Fees are designed to make those persons contribute to the costs of a public institution who – at least potentially – draw an advantage from using it (cf. BVerfGE 38, 281 <311>; 137, 1 <18 para. 43>). The notion of consideration, i.e. offsetting benefits and burdens, is what defines fees under fiscal law (cf. BVerfGE 9, 291 <298>; 137, 1 <18 para. 43>). This is the element that necessarily distinguishes fees from taxes. 55

The design of the relevant law is the decisive factor when categorising a levy either as a tax or as a non-tax levy (cf. BVerfGE 7, 244 <256>; 49, 343 <352 f.>; 123, 1 <17>; 137, 1 <17 para. 40>). […] 56

[…] 57

2. In accordance with these considerations, the public broadcasting fee is not a tax but rather a non-tax levy, and, specifically, a fee. 58

a) Public broadcasting fees are levied in respect of the possibility of receiving public broadcasting programmes, and serve to adequately fund the functioning of public 59

broadcasting pursuant to § 1 RBStV. The revenue [from this fee] […] does not accrue to the general budget (cf. BVerfGE 113, 128 <146>). Instead, the levy serves to adequately fund the functioning of public broadcasting and is thus imposed in respect of a particular financial need (see also BVerfGE 110, 370 <384>; 137, 1 <19 para. 44>).

[…] Even though public broadcasting services can be received by almost everyone and the levy must therefore be paid by a large number of persons, it does not lose its status as a special levy and a fee, and thus does not become a tax. For the fee is imposed in respect of every individual's possibility of receiving public broadcasting services; by making use of this possibility and specifically receiving public broadcasting services, the use of this possibility can be attributed individually. 60

b) The link between the financial burden imposed on the one hand and the purpose of the levy and a public service on the other sufficiently satisfies the statutory requirements in respect of a fee. According to § 1 RBStV, the purpose of public broadcasting fees is the adequate funding of the functioning of public broadcasting. Pursuant to § 2(1) first sentence of the State Treaty of the *Länder* on Public Broadcasting (*Rundfunkstaatsvertrag* – RStV), broadcasting is defined as the production and distribution of services in moving image and sound. […] 61

3. […] 62

II.

The structure of the public broadcasting fee levied in respect of private dwellings satisfies the requirements of the general guarantee of the right to equality under Art. 3(1) GG (1.), with the exception of the public broadcasting fees levied on secondary dwellings (2.). The liability of permanent establishments and proprietors of motor vehicles used for non-private purposes to pay the fee does not violate the general guarantee of the right to equality (3.). 63

1. a) Art. 3(1) GG requires that all persons be treated equally before the law. The resulting principle to treat equally what is essentially alike and to treat unequally what is essentially different applies to unequal burdens and unequal privileges. At the same time, Art. 3(1) GG does not entirely prevent the legislature from differentiating. A differentiation, however, must always be justified by factual reasons commensurate with the aim and the extent of the unequal treatment. The standard of constitutional review applicable here, based on the principle of proportionality, is a fluid one whose limits cannot be determined in the abstract; instead they are defined by the particular subject matters and regulatory areas affected (cf. BVerfGE 138, 136 <180 para. 121> with further references; BVerfG, Judgment of the First Senate of 10 April 2018 – 1 BvL 11/14 et al. –, www.bverfg.de, para. 94; established case-law). Depending on the matter regulated and on the differentiation criteria, the general guarantee of the right to equality gives rise to varying limits for the legislature, ranging from the mere prohibition of arbitrariness to strict proportionality requirements. Stricter requirements for the legislature may arise depending on the freedoms affected in a given case. 64

Moreover, the constitutional requirements become stricter when the statutory differentiation is based on grounds that are less under the control of the individual; the same applies the more closely the grounds resemble those listed in Art. 3(3) GG (cf. BVerfGE 138, 136 <180 para. 122>, 139, 1 <13 para. 39>; 141, 1 <38 and 39 paras. 93 and 94>; 145, 20 <87 para. 171>; BVerfG, Judgment of the First Senate of 10 April 2018 – 1 BvL 11/14 et al. –, www.bverfg.de, para. 95; established case-law).

b) In the context of fiscal law, the general guarantee of the right to equality gives rise to the principle of equal burdening (for non-tax levies cf. BVerfGE 124, 235 <244>; 132, 334 <349>; 137, 1 <20 para. 48>; for taxes BVerfGE 138, 136 <181 para. 123>; 139, 1 <13 para. 40>; BVerfG, Judgment of the First Senate of 10 April 2018 – 1 BvL 11/14 et al. –, www.bverfg.de, para. 96). It is true that the legislature has a wide scope of discretion with regard to selecting the object of the levy and fixing its amount (cf. BVerfGE 137, 1 <20 para. 49>; 138, 136 <181 para. 123>; 139, 1 <13 para. 40>; BVerfG, Judgment of the First Senate of 10 April 2018 – 1 BvL 11/14 et al. –, www.bverfg.de, para. 96). However, those persons liable to pay a non-tax levy are generally also taxpayers, who, as such, are already called upon to finance the burdens of the community. Non-tax levies thus impose additional payments on individuals on top of taxes. In order to safeguard the principle of equal burdening of contributors, non-tax levies require a particular factual reason justifying them that goes beyond the purpose of generating revenue (cf. BVerfGE 108, 1 <16>; 124, 235 <243>; 132, 334 <349 para. 47>; 137, 1 <20 and 21 para. 49>; 144, 369 <397 para. 62>; established case-law). Firstly, this reason must allow a clear differentiation between the levy and a tax; secondly, it must accommodate the principle of equal burdening, also with regard to the additional burden it imposes on taxpayers (cf. BVerfGE 93, 319 <342 and 343>; 108, 1 <16>; 123, 132 <141>; 124, 235 <243>; 124, 348 <364>; established case-law). 65

Thus, where fees are levied, Art. 3(1) GG requires that the persons liable to pay the fee are differentiated from the persons not liable to pay the fee on the basis of the potential benefit, which is what is compensated by the fee (cf. BVerfGE 137, 1 <21 para. 51>). The levying of fees requires sufficient factual reasons justifying the specific and individual attribution on the basis of the benefits compensated by the fee to each person liable to pay the fee (cf. BVerfGE 137, 1 <22 para. 52>). This is because the service provided is essential to the concept of fees: where the community provides a particular institution to perform a public function, those who enjoy, or can potentially enjoy, the particular economic advantages offered by this institution should contribute to the costs of that institution's establishment and maintenance (cf. BVerfGE 14, 312 <317>; 137, 1 <22 para. 52>). Whether a benefit can be specifically and individually attributed to a person can be deduced in particular from a person's legal or actual ownership of the object [of the levy] (*Sachherrschaft*), or from their legal or actual proximity to it (*Sachnähe*), and from the related possibility of specifically using or benefitting from it (cf. BVerfGE 137, 1 <22 para. 52>). 66

aa) A fee may also be imposed on an indefinite number of persons, or even on every person, as long as a benefit can be attributed to each person specifically and individually (cf. BVerfGE 137, 1 <22 para. 52>). The decisive factor for establishing a particular benefit is not the position of the persons liable to pay the fee in relation to the general public; rather, it is essential that the measure to be financed [with the fee] can be distinguished from the common burdens of general state measures [financed with taxes] (cf. Constitutional Court of the *Land* Rhineland Palatinate, Judgment of 13 May 2014 – VGH B 35/12 –, Neue Zeitschrift für Verwaltungsrecht – NVwZ 2015, p. 64 <71>). The benefit justifies imposing a levy compensating it in addition to taxes. Just as a tax is not precluded by the fact that it may only affect a narrow group of taxpayers (cf. BVerfGE 145, 171 <207 para. 103>), a levy compensating a benefit is also not precluded by the fact that an indefinite group of persons is liable to pay it. However, in such a case it is required that all persons liable to pay the fee have a realistic possibility of being able to use the public service or institution. 67

bb) When deciding whether a matter is to be included in the scope of application of a law on levies, the legislature has broad discretion, because there is no reason for it to be subject to stricter requirements in respect of the right to equality (see para. 65 above). However, the legislature exceeds its discretionary leeway when no specific link is ascertainable between the statutorily defined benefit and the persons liable for the levy (cf. BVerfGE 137, 1 <23 para. 54>). The legislature acts in a manner compatible with the right to equality when it can give a factual reason for selecting the objects of the levy, if it can be ruled out that unreasonable and arbitrary considerations were taken into account and if the specific decision to impose the levy does not conflict with other constitutional provisions (cf. BVerfGE 137, 350 <367 para. 42>). It is essential that there be a factual reason for the decision that cannot be considered arbitrary in light of the idea of justice (cf. BVerfGE 137, 350 <370 para. 51>; 141, 1 <39 para. 94>). 68

cc) The notion of consideration must also inform the legislative design and particularly the standard of assessment of the fee (cf. BVerfGE 9, 291 <298>). However, a levy compensating a benefit only becomes objectionable for lack of factual justification, contrary to the right to equality, if it is grossly disproportionate to the legitimate purposes pursued by it (cf. BVerfGE 20, 257 <270>; 83, 363 <392>; 108, 1 <19>; 132, 334 <350 para. 51>; 144, 369 <398 and 399 para. 66>). 69

In this regard, a person liable for a fee cannot be charged more than once to cover the same costs for a service or to use the same benefit (cf. BVerfGE 108, 1 <21>; 132, 334 <357 para. 66>; 144, 369 <406 para. 93>). Persons liable to pay more than one full fee should be able to benefit significantly more from the possibility of using the service than persons liable to pay only one fee. With regard to assessing the benefit under fiscal law, the legislature must apply a factual standard, or at least a substitute standard or a standard of probability. While the legislature is not obliged to choose the most appropriate, reasonable, equitable and probable standard, it is limited to choosing a standard which allows for reasonably certain, or at least probable, 70

conclusions to be drawn with regard to the benefit (cf. BVerfGE 123, 1 <20 and 21>).

c) In addition to the purpose of compensating benefits and the purpose of covering costs, the purpose of influencing behaviour as well as social purposes can also justify imposing a levy (cf. BVerfGE 50, 217 <230 and 231>; 97, 332 <345 et seq.>; 107, 133 <144>; 108, 1 <18>; 132, 334 para. 49>; 144, 369 <397 para. 64>; established case-law). […] 71

d) If a levy generally fails to satisfy equality requirements due to the legislative design of its collection procedure, this can also result in the unconstitutionality of its statutory basis and constitute a violation of the fundamental right to the equality of levies for persons liable to pay the levy (cf. BVerfGE 84, 239 <268>; 110, 94 <112>). […] 72

2. The levying of public broadcasting fees in respect of private dwellings satisfies these requirements for the most part. Public broadcasting fees compensate an individual benefit (a) which is objectively linked to the factual occupancy of a dwelling (b). The inequalities arising from it do not reach a level or an extent that would result in constitutional objections (c); however, public broadcasting fees are objectionable to the extent that they are also levied on secondary dwellings (d). 73

a) Public broadcasting fees compensate an individual benefit; they are thus fees within the meaning of constitutional law governing public finances. 74

aa) However, the fact that “public broadcasting offers an advantage for society as a whole”, fosters to a particularly high degree the foundations of the information society and “significantly contributes to integration and participation in democratic, cultural and economic processes” is not in itself sufficient for establishing an individual benefit […]. If that were the case, the public broadcasting fee would be a “levy on democracy”, which cannot be financed in the form of a levy compensating a benefit. Such a benefit to society as a whole does not give rise to an individual benefit which, having regard to the additional burden on top of taxes, would equally burden the persons liable for the levy. Rather, imposing a levy compensating benefits is factually justified only if the persons liable to pay it do, or can, draw a particular advantage from the public service (cf. BVerfGE 14, 312 <317>; 137, 1 <22 para. 52>). An information culture brought about by or based on the media provides a general advantage to the entire population […]. However, it does not give rise to an individual benefit within the meaning of fiscal law; rather, it is equivalent to those benefits that come with public services financed by taxes. 75

bb) However, a benefit to society as a whole does not rule out an additional individual benefit for the persons liable for the levy, thereby rendering the financing through a non-tax levy permissible […]. Therefore, a fee may be imposed on an indefinite number of persons, or even on every person, as long as a benefit can be attributed to each person specifically and individually (cf. BVerfGE 137, 1 <22 para. 52>). In this respect, it does not matter whether the persons receiving the service actually use 76

it and how they use it (cf. BVerfGE 90, 60 <91>), or whether almost all persons liable for the levy benefit from it (cf. however Decisions of the Federal Administrative Court, *Entscheidungen des Bundesverwaltungsgerichts* – BVerwGE 154, 275 <285 and 286 paras. 27 and 28>). It is merely necessary that all persons liable for the levy have the realistic possibility of using the public service or institution. In the case at hand, such a benefit justifying the levying of the public broadcasting fee is the individual possibility of using public broadcasting services.

(1) Within the dual broadcasting system, public broadcasting fulfils the classical function of broadcasting coverage. As a counterweight to the private broadcasters, its task is to provide a range of services selected using a different rationale than economic incentives, thus opening up different programming possibilities. It is to contribute to the diversity of content in a manner that cannot be provided by the free market alone (cf. BVerfGE 73, 118 <158 and 159>; 74, 297 <324 and 325>; 83, 238 <297 and 298>; 90, 60 <90>; 114, 371 <388 and 389>; 119, 181 <215 and 216> 136, 9 <29 para. 31>). Journalistic and economic competition does not automatically lead to broadcasting programming that depicts the full diversity of information, experience, values and behavioural patterns present in society. Furthermore, due to the considerable force of concentration in private broadcasting and the related risk of one-sided influence on the formation of public opinion, it is necessary [for the legislature] to take precautions to protect journalistic diversity (cf. BVerfGE 119, 181 <217>; 136, 9 <29 para. 31>). 77

Given that public broadcasters are, at least for the most part, publicly financed, they are able to act and make decisions under different financial conditions. On this basis, they can, and should, contribute to the diversity of what is offered by means of their own ideas and perspectives, and offer programming that meets the constitutional requirements of content and opinion-related diversity, independent from audience ratings and advertising contracts (cf. BVerfGE 90, 60 <90>; 119, 181 <219>; 136, 9 <29 and 30 para. 32>). In doing so, they also must address issues that go beyond the standard formats of programmes for a mass audience, or give these their own touch. At the same time, the juxtaposition of the different rationales for decisions in private and public broadcasting can influence each other (cf. BVerfGE 114, 371 <387 and 388>; 119, 181 <217>; 136, 9 <30 para. 32>). Their potential impact is all the more significant given that new technologies have increased the amount and variety of the offer and enabled additional forms and ways of transmission and innovative programme-related services (cf. BVerfGE 119, 181 <214 and 215>; 136, 9 <28 para. 29>). 78

This range of services is not called into doubt by the development of communication technology and in particular the dissemination of information via the Internet (cf. BVerfGE 57, 295 <322 and 323>; 73, 118 <160>; 95, 163 <173>; 119, 181 <217>; 136, 9 <28 para. 29>). A broader range of services provided by private broadcasters and a large number of providers does not – in and of itself –already result in quality and diversity of broadcasting. On the contrary, the digitalisation of the media and in 79

particular the focus on Internet networks and platforms, including social media, fosters tendencies of concentration and monopolisation in respect of content providers, disseminators and intermediaries. Where services are for the most part financed through advertising, they do not necessarily foster journalistic quality; even on the Internet, the large audiences sought by the advertising industry can only be reached by way of programmes that appeal to the masses. In addition, there is the danger that content can be deliberately tailored to users' interests and preferences, also by means of algorithms, which leads to the reinforcement of the same range of opinions. Such services do not aim to reflect diverse opinions; rather, they are tailored to one-sided interests or the rationale of a business model that aims to maximise the time users spend on a website, thus increasing the advertising value of the platform for its clients. In that respect, results shown by search engines are also pre-filtered, they are in part financed through advertising, and in part depend on the number of clicks. Furthermore, there is an increase in non-journalistic providers that do not prepare and refine information in a journalistic manner.

This all leads to increased difficulty in the separation of fact from opinion, content from advertisement, as well as to new uncertainties regarding the credibility of sources and assessments. Individual users themselves must now process and assess the information provided by the mass media, which would traditionally have passed through the filter of professional selection in the spirit of responsible journalism. In light of these developments, the duty incumbent upon public broadcasters financed through fees becomes more significant. This duty includes providing genuine, thoroughly researched information that distinguishes between facts and opinions, does not distort reality and does not focus on the sensational, but rather provides a counterweight safeguarding diversity and providing guidance […]. 80

(2) The possibility of using public broadcasting in this function constitutes the individual benefit justifying the levying of the public broadcasting fee (regarding the public broadcasting charge cf. BVerfGE 90, 60 <106>; Chamber Decisions of the Federal Constitutional Court – *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 20, 37 <41>). […] The public broadcasting fee is thus a fee levied on the potential use of a public service (cf. BVerfGE 9, 291 <297 and 298>; 92, 91 <115>; 110, 370 <388>; 113, 128 <148>; 137, 1 <18 para. 43>). 81

It is realistic to assume that all persons liable for the fee have the possibility of using public broadcasting services, since the nationwide services provided by public broadcasters can be accessed at any time by means of a suitable receiving device. Whether this possibility is in fact used by a large number of persons is not relevant (*contra* BVerwGE 154, 275 <285 para. 27>). […] 82

(3) The purposes to be financed laid down in § 40(1) RStV also serve the carrying out of public broadcasting. The *Land* Media Authorities (*Landesmedienanstalten*; § 40(1) first sentence no. 1 RStV) are responsible for licensing private broadcasters and overseeing compliance with the requirements set out in the laws and more 83

specifically in the licences […]. Their oversight of private broadcasters also benefits public broadcasters. Given that public broadcasters provide the basic broadcasting services, the requirements for the licensing of private broadcasters are lower in respect of the objective legal guarantees of Art. 5(1) second sentence GG. Yet private broadcasters, too, are obliged to provide balanced and diverse reporting – albeit differently and to a lower degree than public broadcasters. Therefore, the legislature must take specific and suitable measures for achieving and ensuring the highest possible degree of balanced diversity in private broadcasting. This is necessary because the broadcasting system in its entirety must correspond – within the limits of what is possible – to the constitutional requirements (cf. BVerfGE 73, 118 <157 et seq.>). The rules governing licensing and oversight aim to prevent the predominance of the opinion of individual providers and to safeguard the required minimum breadth of topics and diversity of opinions in private broadcasting, thereby benefitting all users (cf. BVerwGE 108, 108 <121>).

The carrying out of broadcasting also includes the support of public-access channels (§ 40(1) first sentence no. 2 RStV) and the non-commercial carrying out of local and regional broadcasting (§ 40(1) fourth sentence, first half-sentence RStV) (see also Fiebig, Gerätebezogene Rundfunkgebührenpflicht und Medienkonvergenz, 2008, p. 263). The improvement of the broadcasting system brought about by the funding of technical infrastructure and new transmission technologies (§ 40(1) second and third sentences RStV) also benefits all users (see also BVerfGE 90, 60 <106 and 107>). Projects promoting media literacy (§ 40(1) fourth sentence, second half-sentence RStV) support the carrying out of public broadcasting […]. 84

(4) By contrast, the technical delivery of broadcasting services into dwellings is not included in the benefits covered by public broadcasting fees. It follows from the legislative materials and the statements made at the oral hearing that the legislatures did not consider the local reception of public broadcasting services in dwellings as part of the public service that must be provided, but only as a possible additional service, and that liability to pay the fee should persist even if this additional service is not provided. Further arrangements may be necessary to allow users to receive the services via satellite, cable, Internet or mobile data. Extreme hardship pursuant to § 4(6) first sentence RBStV is only presumed in cases where it is objectively impossible for persons to receive broadcasting services; upon application, these persons must be exempted from the liability to pay […]. The same applies where persons cannot, from the outset, draw any possible advantage from broadcasting services due to their personal circumstances, such as deaf-blind persons. The State Treaty expressly provides for an exemption from the liability to pay the fee for these persons upon application (§ 4(1) no. 10 RBStV); moreover, the fee is reduced to one third upon application for persons who can only partially use the services, in particular deaf or blind persons (§ 4(2) RBStV). 85

b) By tying the public broadcasting fee to the occupancy of a dwelling (§ 2(1) RBStV), the *Länder* legislatures have defined the group of beneficiaries in a way that is 86

not objectionable under constitutional law. It has no bearing on this that the definition is very broad. The benefit derived from the possibility of using public broadcasting can be individually attributed to all occupants of dwellings.

aa) The legislature has broad discretion with regard to determining who is liable to pay the fee and, in particular, also how the benefit can be attributed to individual persons. By tying the public broadcasting fee to the occupancy of a dwelling, the *Länder* legislatures stay within this discretion. They based their discretionary decision on the consideration, which is supported by statistical surveys and not objectionable that the recipients of programming content typically can receive and use the broadcasting services in their dwellings […]. Therefore, the occupancy of such a spatial unit allows the drawing of sufficient inferences regarding the possibility of using the services as the benefit to be compensated […]. 87

This legislative decision […] is, in principle, permissible under constitutional law. The legislature is not required to choose a factual standard, but may also choose a substitute standard or standard of probability and thus focus on the actual fact that broadcasting services are principally used in dwellings (cf. BVerfGE 123, 1 <20 and 21> and para. 70 above). However, a different approach would also have been permissible under constitutional law, in particular a per-capita approach, whereby everyone living in Germany would have been charged one full fee, except for persons exempted for social reasons. Such an approach would be at least as effective in protecting the privacy of the persons concerned, since it would dispense with linking persons to dwellings. 88

bb) However, it is not relevant whether receiving devices are in fact installed in each dwelling for which public broadcasting fees are due ((1)) or whether the persons liable for the fee actually wish to use the broadcasting services ((2)). 89

(1) The *Länder* legislatures may provide for the levying of the fee regardless of the existence of a receiving device. It is true that the specific possibility of using broadcasting services only exists when persons liable for the fee possess a receiving device (cf. BVerfGE 90, 60 <91>; BVerfGK 20, 37 <41>). However, there is already a link between the benefit derived from the possibility of using broadcasting services and the persons liable for the broadcasting fee, even if they do not possess receiving devices, because the possibility of receiving broadcasting services, in principle, exists anywhere in Germany. It is not relevant for the link between the benefit and the imposition of the fee that a receiving device be required […]. In cases where it is factually impossible to receive public broadcasting services by any means of transmission, an exemption will be granted upon application pursuant to § 4(6) first sentence RBStV (cf. *Landtag* of Baden-Württemberg, document 15/197, p. 41). 90

Furthermore, tying the liability for the fee to the possession of a receiving device was apparently no longer practicable. Given that it was linked to receiving devices, the former public broadcasting charge (*Rundfunkgebühr*) was only levied from persons who possessed such devices. Despite considerable efforts, the public broad- 91

casters had only limited possibilities of verification [whether users in fact possessed receiving devices], in particular in respect of mobile devices. […] In view of the increasingly diverse possibilities today for receiving broadcasting, effective verification would hardly be possible anymore.

[…] 92-93

c) The assessment of public broadcasting fees for private dwellings is, in general, compatible with the principle of equal burdening. 94

aa) When fixing the public broadcasting fee at EUR 17.89 as of 1 January 2013, and EUR 17.50 as of 1 April 2015, the legislatures did not exceed their broad discretion. The *Länder* sought to base the amount of the public broadcasting fee on the calculations of the Commission for the Determination of the Financial Needs of the Public Broadcasting Corporations (*Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten*) […]. 95

Furthermore, at the end of the period for which the fee is charged, any surplus is deducted from the next period's budget, pursuant to § 3(2) third sentence of the State Treaty of the *Länder* on Financing Public Broadcasting (*Rundfunkfinanzierungsstaatsvertrag* – RFinStV). Ultimately, what is significant under constitutional law is that the fee is not levied in a manner that would be contrary to § 1 RBStV for purposes other than the funding of the functioning of public broadcasting, including the tasks under § 40(1) RStV. 96

bb) Levying the public broadcasting fee per dwelling does not violate the principle of equal burdening. The public broadcasting fee compensates an equivalent public service ((1)). While the fact that several occupants of a dwelling may split the fee among themselves so that their burden is less than that of one individual person does constitute unequal treatment ((2)), this is based on factual reasons that still meet the constitutional requirements ((3)). 97

(1) The amount of the fee is not disproportionate to the services provided. Public broadcasters provide programming that is, in this form, not available on the free market (see paras. 77 et seq. above). The service currently encompasses ten TV channels, available throughout Germany, provided by the public broadcasters *ARD* and *ZDF* in the form of general channels, special interest channels and additional online channels, as well as nine regional channels ("*Dritte Fernsehprogramme*") and an educational channel (cf. § 11b RStV). Currently 67 radio channels in total are in operation (cf. § 11c RStV; […]). In addition, there is a variety of online programming available (cf. § 11d RStV). Public broadcasters limit advertising to a minimum (cf. § 16(1) RStV: 20 minutes on average on workdays). By contrast, private broadcasters are permitted to finance themselves through advertising to a significantly higher degree (cf. § 45(1) RStV: 20% per hour). General pay TV channels are substantially more expensive, other pay TV channels only cover special interests and only offer some of the services provided by public broadcasters. In view of this situation, an equivalent 98

service compensates for the burden of owing a full amount of the public broadcasting fee.

(2) The public broadcasting fee places a lower burden on multi-person households. It must be paid by all occupants of a dwelling (§ 2(1) RBStV), i.e. by all persons aged 18 or over occupying a dwelling (§ 2(2) first sentence RBStV). Occupants of the same dwelling are jointly liable to pay the public broadcasting fee (§ 2(3) RBStV, with reference to § 44 AO), the amount of which does not depend on the number of persons occupying a dwelling […]. That means that occupants of one-person households pay the full public broadcasting fee alone, while several occupants can split it among themselves […]. This distribution of the fee does not follow from a corresponding difference in the possibility of use of broadcasting services and thus places a lower burden on multi-person households. 99

For assessing the benefit, an increase in the practical value of the dwelling cannot be taken into consideration. […] 100

Likewise, actual use in the dwelling or the presumed scope of use in the sense that different types and habits of use within the dwelling offset one another cannot be taken into account […]. Rather, it is more likely that the more persons live in a household, the greater the use of broadcasting services there, given the variety of existing receiving devices, in particular novel devices (see para. 82 above). 101

Thus, the personal benefit can only be determined in abstract terms. All occupants of dwellings can derive the same value from the possibility of receiving broadcasting services, since all have the same possibility of receiving them and can benefit from them to the same degree […]. When all occupants of dwellings are equally addressed by public broadcasting services, they all have the same possibility of using them, irrespective of whether and to what extent they actually do so. The liability to pay the fee does not depend on the recipients' habits of use (cf. BVerfGE 90, 60 <91> regarding the public broadcasting charge and para. 76 above). 102

(3) The lower burden placed on multi-person households is based on sufficient factual reasons; it is thus acceptable under constitutional law. In this respect, the legislatures have a wide margin of appreciation. 103

In view of this margin, they base the levying of the public broadcasting fee per dwelling on the fact that private households, due to the diversity of modern ways of life, often reflect social units where people live together and typically use the broadcasting offerings in the shared dwelling […]. The legislature may proceed on the basis of this social reality. Moreover, the social units are in many cases subject to the protection of Art. 6(1) GG. 104

The unequal treatment can also be tolerated because the unequal burden does not exceed the extent accepted by the Federal Constitutional Court in similar cases. The service provided by public broadcasting programming is equivalent to the amount of the fee even if the occupant of a one-person household is liable to pay the full 105

amount.

d) In contrast to this, the assessment of the fees for secondary dwellings violates the principle of equal burdening derived from Art. 3(1) GG. If the occupant of a dwelling has already been charged the public broadcasting fee for one dwelling in accordance with the current provisions, the benefit has already been paid for; occupants of secondary dwellings would be made to pay more than once for the same benefit (aa). This arrangement cannot be justified on the basis of administrative simplification (bb). The possibilities of misuse and circumvention are not ascertainable either (cc). However, the legislatures may take precautions to keep the administrative burden of accounting for secondary dwellings within reasonable limits. The same person may, however, not be charged more than a maximum of one full fee for the possibility of privately using public broadcasting services (dd). 106

aa) Under currently applicable law, occupants of a secondary dwelling are required to pay twice for the same benefit. The benefit is personal in the sense that what matters is the individual and direct benefit from broadcasting drawn by the persons liable for the fee (see para. 100 above). Even in multiple dwellings, one person cannot use public broadcasting services more than once at the same time. Occupying multiple dwellings does not result in a greater benefit with regard to the possibility of privately using public broadcasting, regardless of how many persons live together in the respective dwellings. Occupancy of a dwelling is only the statutory reference point to account in a standardised way for the possibility of receiving public broadcasting services in private households, which is in principle available to individuals anywhere in Germany. Since the benefit compensated by the fee is not an increase in the value of the dwelling (see para. 100 above), the benefit of being able to receive public broadcasting services does not become greater when a further dwelling is used. Under the current legislation, the benefit is compensated when it is paid in respect of the primary dwelling, and thus it does not have to be paid again for a secondary dwelling. 107

bb) The legislation can also not be justified on the basis of administrative simplification. Liability to pay the fee in respect of secondary dwellings could only have been considered on this basis had there been substantial difficulties, compromising the collection of the fee, in determining whether a dwelling constitutes a secondary dwelling. 108

[…] 109

cc) Charging the fee in respect of secondary dwellings is also not justified on the basis of a danger of misuse or circumvention under the current arrangement. Where persons liable to pay the fee occupy a dwelling as their primary dwelling, they remain liable to pay the public broadcasting fee pursuant to § 2 RBStV, irrespective of whether the dwelling is a secondary dwelling for other occupants. Occupants of primary dwellings, too, can illegally evade the payment of fees by violating the law on registration; in such a case, however, an intentionally wrongful statement can be prosecuted as an administrative offence (§ 54(2) no. 1 of the Federal Act on Regis- 110

tration, *Bundesmeldegesetz*) or even as a criminal offence (§ 263(1) of the Criminal Code, *Strafgesetzbuch*). Moreover, the public broadcasting fee is not so high as to constitute an incentive for the misuse of a secondary dwelling [to circumvent the fee].

dd) When enacting new provisions, the legislatures may, for instance, make the exemption from the public broadcasting fee for secondary dwellings subject to an application and providing proof of registration for the primary and secondary dwellings, in order to avoid administrative difficulties. In this context, the legislatures may also deny exemptions to those occupants of secondary dwellings who fail to provide proof of payment on their part of the full public broadcasting fee for the primary dwelling. However, the legislatures may not demand that the same person pay more than one full fee for the possibility of using public broadcasting services. 111

3. In the commercial and non-private sector, neither the liability for the public broadcasting fee for permanent commercial or non-private establishments nor the liability for the public broadcasting fee for motor vehicles not exclusively used for private purposes violates the principle of equal burdening. The possibility of receiving public broadcasting services constitutes a benefit (a) that can be attributed to the proprietors of permanent establishments and commercially used motor vehicles (b) and that is statutorily assessed in a manner that is compatible with the principle of equal burdening (c). 112

a) aa) Proprietors (*Inhaber*) of permanent establishments and commercially used motor vehicles also benefit from public broadcasting services, which justifies their liability for public broadcasting fees. The possibility of media use has a commercial aspect to it and benefits business activities for financial gains […]. The persons liable for the fee can obtain information for their establishment from public broadcasting and use it to inform or entertain their employees and customers […]. This different situation with regard to benefits [derived from public broadcasting] justifies the separate liability of proprietors of permanent establishments and commercially used motor vehicles to pay a public broadcasting fee in addition to their liability to pay such a fee for private use. 113

Proprietors of permanent establishments obtain an additional economic benefit through the possibility of receiving broadcasting services in commercially or non-privately used motor vehicles. This benefit is different from the benefit of receiving these services in their permanent establishments. This benefit derives not only from parts of broadcasting programming that are specifically useful while using a motor vehicle (e.g. traffic reports). In addition, users of motor vehicles use the possibility of receiving broadcasting services comparatively more often than permanent establishments […]. For example, this different manifestation of the benefit of using broadcasting services exists in relation to companies with field workers. It is especially apparent in relation to companies whose economic activity consists mainly in the use of motor vehicles, such as passenger transport or logistics companies. For these companies, the benefit of use [of broadcasting services in motor vehicles] is not just an additional 114

benefit on top of the possibility of receiving broadcasting services in the permanent establishment, but rather, it is the main benefit. In the case of rental cars, the benefit consists in the fact that the possibility of receiving public broadcasts is relevant to the rental price. The legislatures have covered the entirety of these additional benefits in a constitutional manner by providing for a liability for the public broadcasting fee for commercially used motor vehicles.

In the case of rental cars, proprietors do not obtain an immediate benefit from the communicational aspect of broadcasting programming. However, in this case, the possibility of receiving broadcasting services is an economic benefit that can be compensated, because the customers' possibility of receiving public broadcasting is a relevant factor for the rental price of motor vehicles [...], allowing rental companies to charge higher prices for vehicle rental. 115

bb) It also does not violate the principle of equal treatment that only commercially used motor vehicles are subject to the public broadcasting fee, while privately used motor vehicles are not. In the commercial sector, proprietors extend the scope of their business activities beyond the permanent establishment [by using motor vehicles] and also obtain an additional economic benefit in doing so (cf. BVerwGE 156, 358 <387 para. 77>). Such a benefit does not exist with regard to private use, which justifies the differentiation. 116

b) The benefit can be attributed to the proprietors of permanent establishments and commercially or non-privately used motor vehicles. Based on the legislatures' broad discretion (cf. BVerfGE 137, 1 <23 para. 54>), it is not objectionable under constitutional law that the liability to pay the fee is tied to ownership of a permanent establishment in one case (§ 5(1) first sentence RBStV), and to ownership of a motor vehicle in the other (within the meaning of § 5(2) first sentence no. 2, second sentence RBStV). In line with the constitutionally unobjectionable reasoning regarding private dwellings, both of the reasons for charging the fee in the commercial and non-private sector are based on the consideration that broadcasting services are normally used in these spatial units […], the possibility of using them thus typically arises in them. 117

[…] 118

Just as with private dwellings, the actual possession of receiving devices is not relevant in the non-private sector, either. The only decisive factor is that the persons liable for the fee have a realistic possibility of using the broadcasting services, which is certain given that receiving devices are inexpensive. To what extent broadcasting services are specifically used in the respective permanent establishment is also irrelevant. It is true that, unlike in private dwellings where receiving devices can generally be used comprehensively, actual use in the non-private sector may be restricted if proprietors of permanent establishments do not allow their employees to receive broadcasting services, if they create technical barriers, or if business processes do not permit their use. However, such circumstances do not undo the link [between the benefit and the proprietors], since they only result from the will of the beneficiaries. 119

Just as with private dwellings, a lack of interest in using the service does not result in an exemption from liability for the fee.

c) The specific way the fee is assessed with regard to permanent establishments (aa) and motor vehicles (bb) complies with the principle of equal burdening. A structural deficit in respect of the levying of fees cannot be established (cc). 120

aa) The State Treaty of the *Länder* on Public Broadcasting Fees bases the amount of the fee on the number of persons employed, except the proprietor, in the respective permanent establishment, applying a degressive scale as the burden increases (§ 5(1) first and second sentences RBStV). This basis is fair with regard to the benefit gained ((1)). Depending on the distribution of employees among permanent establishments, companies may face different burdens. But this effect results from the choice by the legislatures of permanent establishments as the basis for levying the fee ((2)). 121

(1) The legislatures' assumption that the benefit obtained by the possibility of using public broadcasting services increases with the size of the establishment is not objectionable under the right to equality. By linking the public broadcasting fees to the number of employees, the legislatures base the arrangement on the fact that the benefit of using public broadcasting services becomes greater when the number of employees is higher. Degressive scaling accommodates the fact that there is no linear increase in the benefit in line with the increase in the number of employees. How the different benefits derived from the possibility of using public broadcasting services interact in relation to one another cannot be quantified in general and largely depends on the type of establishment […]. Therefore, the legislatures were entitled to account for and assess the various benefits of use in a general manner. They do not exceed their discretion by choosing a degressive fee structure in this context (cf. BVerwGE 156, 358 <383 and 384 paras. 67 and 68>); quantity discounts are common in fiscal law and generally factually justified. 122

(2) It does not constitute a violation of the principle of equality that businesses with the same number of total employees may be liable for different fees depending on the number of permanent establishments among which the employees are distributed. The legislatures were entitled to tie the liability for payment of fees to permanent establishments as the place where public broadcasting services are typically used. They were also entitled to measure the benefit related to the size of a permanent establishment by way of degressive scaling based on the number of persons employed there. In this context, it is immaterial that compared to the total number of persons employed in a business, the fees charged may vary (cf. BVerwGE 156, 358 <385 para. 71>), because the legislatures did not take the number of employees in a business as the basis for determining the amount of the broadcasting fee, but rather the number of employees in a permanent establishment (cf. *Landtag* of Baden-Württemberg, document 15/197, p. 42). 123

bb) For each registered commercially used motor vehicle, the proprietor is liable to 124

pay one-third of the full amount of the public broadcasting fee (§ 5(2) first sentence no. 2 RBStV). Pursuant to § 5(2) second sentence RBStV, one vehicle is exempt for each of the proprietor's permanent establishments for which fees are due. This additional liability to pay the fee is also fair with regard to the benefit gained. In particular, it does not constitute an additional charging for the same benefit that was already compensated with the fee for the permanent establishment, as was the case in regard to the liability to pay the fee for secondary dwellings.

Irrespective of their different types of use, the uniform levying of one third of the full amount of the fee on each vehicle for which the fee is owed is compatible with the principle of equal burdening. The legislatures were also entitled to levy a (partial) fee on motor vehicles, as places where public broadcasting services are typically used extensively, so as to include operators without permanent establishments (cf. *Landtag* of Baden-Württemberg, document 15/197, p. 15). 125

In particular, the legislatures were not required to differentiate between those vehicles that the proprietor of the permanent establishment uses directly for operational purposes and those that are rented to customers, like the vehicles of complainant no. III. It is true that in the former case, vehicles are only used for communicational purposes within the operation of the business, i.e. to inform and entertain employees, whereas in the latter only customers draw an advantage from the communicational use, and the proprietor profits by receiving leasing and service charges; however, the legislatures did not have to translate this difference into different fee structures. […] 126

In any case, it is justified that complainant no. III is charged for its motor vehicles, even though it does not make communicational use of the broadcasting services itself. As a car rental company, it profits from the communicational use of its customers insofar as it can rent out vehicles offering broadcasting services at a higher price or even rent them out at all. This advantage is not covered by the fees paid in respect of a permanent establishment, so that the legislatures can classify it as a service for which, as consideration, (one third of) a fee is due. 127

cc) The levying system for the public broadcasting fee in the commercial and non-private sector also complies with the principle of equal burdening. The public broadcasting corporations have sufficient means to determine the factors relevant to the assessment of the fee, and they make use of them. A structural deficit with regard to the levying of fees is not apparent. 128

[…] 129-133

III.

For the rest, too, the liability to pay public broadcasting fees is compatible with the Constitution. 134

1. The fundamental right to freedom of information following from Art. 5(1) first sentence, second half sentence GG protects both access to generally available sources 135

of information (cf. BVerfGE 103, 44 <60>; 145, 365 <372 para. 20>) and also the individual decision to use such sources of information (cf. BVerfGE 15, 288 <295>). The aspect of choice is the basic constituent element of any information (cf. BVerfGE 27, 71 <83>). It is not for the Court to decide in this case whether the fundamental right to freedom of information additionally has a negative dimension that equally provides protection from information that is forced upon a person against their will (in this vein BVerfGE 44, 197 <203 and 204>), or whether the scope of protection of Art. 2(1) GG is applicable in this regard […]. In any case, there is no interference with this right because the liability for the public broadcasting fee does not constitute a forced confrontation with the information disseminated via public broadcasting. No one is directly or indirectly forced to watch or listen to the programming of public broadcasting corporations (regarding the public broadcasting charge see also BVerwGE 108, 108 <117>).

2. There is also no violation of the requirement of specificity following from Art. 20(3) GG in the fact that the amount of the public broadcasting fee is not regulated in the State Treaty of the *Länder* on Public Broadcasting Fees but rather in the State Treaty of the *Länder* on the Financing of Public Broadcasting. Under the requirement of specificity deriving from the rule of law, the persons concerned must be able to discern the legal situation and adapt their behaviour accordingly (cf. BVerfGE 103, 332 <384>; 113, 348 <375>; 128, 282 <317>). The purpose of a law can become apparent from the wording of the law in conjunction with the legislative materials, and it can also follow from the link between the law and the area of life it seeks to regulate (cf. BVerfGE 65, 1 <54>). […] 136

IV.

In addition, the challenged decisions do not raise constitutional objections. They do not deny the complainants their right to their lawful judge. In particular, there is no violation of Art. 101(1) second sentence GG in the failure of the Federal Administrative Court to initiate a procedure for a preliminary ruling pursuant to Art. 267(3) of the Treaty on the Functioning of the European Union (TFEU) concerning the question of whether the switch from a system of the broadcasting charge to that of the broadcasting fee constituted a redesign of an aid scheme within the meaning of Art. 107(1) TFEU requiring notification of the European Commission pursuant to Art. 108(3) first sentence TFEU. 137

1. The Court of Justice of the European Union is a lawful judge within the meaning of Art. 101(1) second sentence GG (cf. BVerfGE 73, 339 <366 and 367>; 75, 223 <223 and 224>; 82, 159 <192>; 126, 286 <315>; 128, 157 <186 and 187>; 129, 78 <105>; 135, 155 <230 para. 177>). If the conditions set out in Art. 267(3) TFEU are met, national courts are required to refer their questions to the Court of Justice of the European Union *ex officio* (cf. BVerfGE 82, 159 <192 and 193>; 128, 157 <187>; 129, 78 <105>; established case-law). Where a German court fails to comply with its duty to refer a matter for a preliminary ruling, the right to one's lawful judge guaran- 138

teed to the person seeking legal protection in the initial proceedings may be violated (cf. BVerfGE 73, 339 <366 et seq.>; 126, 286 <315>; 135, 155 <231 para. 177>).

According to the case-law of the Court of Justice of the European Union, 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 question raised is irrelevant; the provision of European Union law in question has already been interpreted by the Court of Justice of the European Union; or, the correct application of European Union law is so obvious as to leave no scope for any reasonable doubt (cf. CJEU, Judgment of 6 October 1982, C.I.L.F.I.T., C-283/81, EU:C:1982:335, para. 21; see also BVerfGE 82, 159 <193>; 128, 157 <187>; 129, 78 <105 and 106>; 135, 155 <231 para. 178>). 139

Yet the Federal Constitutional Court only intervenes if, under a reasonable appraisal of the tenets of the Basic Law, the provisions governing the allocation of jurisdiction between courts are interpreted and applied in a manner that no longer appears comprehensible and is manifestly untenable (cf. BVerfGE 29, 198 <207>; 82, 159 <194>; 129, 78 106; 135, 155 <231 para. 179>). The guarantee of Art. 101(1) second sentence GG, which is equivalent to a fundamental right, does not turn the Federal Constitutional Court into a review organ for correcting all procedural errors affecting the allocation of jurisdiction between courts. Rather, the Federal Constitutional Court is obliged to also observe the framework of judicial competences, which confers upon the regular courts the competence for review regarding compliance with the system of allocation of jurisdiction (cf. BVerfGE 82, 159 <194>; 135, 155 <231 para. 179>). 140

These principles also apply to the European Union law provision on the allocation of jurisdiction in Art. 267(3) TFEU. Therefore, failure to comply with the duty of referral under European Union law does not always amount to a violation of Art. 101(1) second sentence GG (cf. BVerfGE 126, 286 <207>; 135, 155 <231 and 232 para. 180>). The Federal Constitutional Court limits its review to whether the allocation of jurisdiction set out in Art. 267(3) TFEU is interpreted and applied in a manner that, under a reasonable appraisal of the Basic Law, no longer seems comprehensible and is manifestly untenable (cf. BVerfGE 126, 286 <315 and 316>; 128, 157 <187>; 129, 78 <106>). In reviewing whether a violation of Art. 101(1) second sentence GG has taken place, it does not matter foremost whether the regular courts' interpretation of the substantive European Union law applicable to the matter in dispute is tenable, but rather whether their handling of their duty of referral pursuant to Art. 267(3) TFEU was (cf. BVerfGE 128, 157 <188>; 129, 78 <107>). This limited review by the Federal Constitutional Court grants the regular courts a margin of appreciation and assessment when interpreting and applying European Union law. This margin corresponds to the margin afforded courts when applying provisions of ordinary law within the German legal order. The Federal Constitutional Court only ensures that the limits of this margin are observed. It does not serve as a "supreme court for review of referrals" (cf. BVerfGE 82, 159 194; 126, 286 <315 and 316>; 135, 155 <232 para. 180>). 141

[…] 142-143

In case the issue has not yet been fully resolved, Art. 267(3) TFEU is certainly applied in an untenable manner if the regular court concludes that the legal situation is clear from the outset or clarified beyond any reasonable doubt, without plausible reasons supporting its conclusion (cf. BVerfGE 82, 159 <196>; 126, 286 <317>; 135, 155 <233 para. 185>). Furthermore, an application can be untenable if views on the European Union law question raised are clearly preferable to the one put forward by the court (cf. BVerfGE 82, 159 <195 and 196>; 126, 286 <317>). 144

2. According to these considerations, there is no violation of Art. 101(1) second sentence GG. The Federal Administrative Court neither failed to recognise a potential duty of referral, nor did it deliberately deviate from the case-law of the Court of Justice of the European Union. It could reasonably proceed on the assumption that the legal situation regarding the duty of notification has been settled in a way that leaves no reasonable doubt. 145

a) In interpreting whether [in the switch from the public broadcasting charge to the public broadcasting fee] there was a redesign of an aid scheme subject to approval within the meaning of Art. 108(3) first sentence TFEU, the Federal Administrative Court drew on the Communication from the Commission on the application of State aid rules to public service broadcasting of 27 October 2009 (OJ no. C 257 of 27 October 2009, p. 1; hereinafter: Broadcasting Communication). In this communication, the Commission set out its practice with regard to the assessment of state aid to public broadcasting that is subject to notification. According to this communication, the Commission assesses whether the original financing regime for public service broadcasters is existing aid, whether subsequent modifications affect the actual substance of the original measure or whether these modifications are rather of a purely formal or administrative nature; and, in case subsequent modifications are substantial, whether they are severable from the original measure, or whether the original measure is as a whole transformed into a new aid (Broadcasting Communication, para. 31). The substance of the measure includes the nature of the advantage or the source of financing, the purpose of the aid, the beneficiaries and the scope of activities of the beneficiaries. This approach does not raise any objections because the Broadcasting Communication only describes the assessment and decision-making practice followed by the Commission. As this practice corresponds to the case-law of the European courts, it is tenable that the Federal Administrative Court based its assessment of the legal situation regarding state aid on the Broadcasting Communication. 146

aa) In Art. 108(3) first sentence TFEU, primary law itself only uses the terms “to grant and alter aid”, without further defining these. The term “new aid” is defined by distinguishing it from existing aid in Art. 1 letter c of Council Regulation (EU) no. 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ no. L 248 of 24 September 147

2015, p. 9). This term includes all aid measures which are not existing aid, including alterations to existing aid. An alteration to existing aid means any change, other than modifications of a purely formal or administrative nature, which can affect the evaluation of the aid measure's compatibility with the common market (Art. 4(1) of Commission Regulation (EC) No. 1125/2009 of 23 November 2009 amending Regulation (EC) No. 794/2004 implementing Council Regulation (EC) No. 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ No. L 308 of 24 November 2009, p. 5 – Implementing Regulation).

bb) According to the Court of Justice of the European Union, factors determining whether something is to be classified as new aid or an alteration to existing aid are whether the provisions granting the aid have been amended, in particular either in regard to the nature of those advantages or in regard to the activities of the public establishment to which they are applied (cf. CJEU, Judgment of 9 August 1994, Namur-Les Assurances du Crédit, C-44/93, EU:C:1994:311, paras. 28 and 29). The General Court of the European Union (GCEU) concluded from this that an alteration to the original aid scheme is only regarded as new aid if its legal basis is substantially different from the aid scheme approved by the approval decision, in particular where the alteration affects the actual substance of the original scheme (cf. GCEU, Judgment of 30 April 2002, Gibraltar, T-195/01 et al., EU:T:2002:111, para. 111; Judgment of 28 November 2008, Hotel Cipriani, T-254/00 et al., EU:T:2008:537, paras. 358, 362; Judgment of 20 September 2011, Regione autonoma della Sardegna, T-394/08 et al., EU:T:2011:493, paras. 175 and 176; confirmed by CJEU, Judgment of 13 June 2013, Regione autonoma della Sardegna, C-630/11 P et al., EU:C:2013:387, paras. 90 et seq.; see also CJEU, Judgment of 18 July 2013, P Oy, C-6/12, EU:C:2013:525, para. 47). 148

b) On this basis, the Federal Administrative Court did not affirm the existence of a settled legal situation arbitrarily or without plausible reasons. It is not objectionable under constitutional law that the Federal Administrative Court held that there was no change to the substance of the scheme, because the public broadcasting fee, like the previous public broadcasting charge, is levied as consideration for public broadcasting programming in order to ensure funding of public broadcasting services in a manner that is needs-oriented and detached from state authority […]. The fact that additional persons are now also liable for payment although they do not possess a receiving device was not considered significant by the Federal Administrative Court, given that they only make up a small part of the overall number of persons liable. This is also reasonable. 149

D.

The provisions of the *Land* laws and of the State Treaties are incompatible with Art. 3(1) GG to the extent that they impose an additional public broadcasting fee on occupants of secondary dwellings pursuant to § 2(1) RBStV. Accordingly, the acts and resolutions of the *Länder* incorporating § 2(1) RBStV into *Land* law are incompatible 150

with the Constitution to the extent established above. Until new provisions are enacted, the legislatures must exempt occupants of multiple dwellings from the liability to pay the fee, if they provide proof of payment of the public broadcasting fee for the primary dwelling pursuant to § 2(1) and (3) RBStV.

I.

1. Pursuant to § 82(1) in conjunction with § 78 first sentence of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), the Federal Constitutional Court declares a law void if it comes to the conclusion that it is incompatible with the Basic Law. A mere declaration of incompatibility with the Basic Law is usually sufficient in cases where the legislature has different options to remedy the violation of the Constitution. This generally holds true for violations of the principle of equality (cf. BVerfGE 133, 59 <99>; 138, 136 <249 para 286>; 142, 313 <352 para. 102>; established case-law). Not declaring a law void is also necessary if declaring it void would result in a situation which was even farther from the constitutional order than the unconstitutional provision. This is the case if the disadvantages that result from the law immediately ceasing to have effect outweigh the disadvantages associated with its preliminary continued application (cf. BVerfGE 33, 303 <347>; 61, 319 <356>; 83, 130 <154>; 85, 386 <401>; 87, 153 <177 and 178>; 128, 282 <321 and 322>; established case-law). 151

2. Based on these considerations, the Senate merely declares the unconstitutional provision incompatible with the Basic Law (a). The declaration of incompatibility extends to all *Land* acts and resolutions implementing the provision (b). 152

a) Insofar as the liability for the public broadcasting fee based on dwellings pursuant to § 2(1) RBStV results in the unequal levying of fees imposed on occupants of multiple dwellings, thus violating Art. 3(1) GG, the legislatures can remedy this situation by providing for exemptions from the liability for the fee upon application or by choosing another method to ensure that persons liable for the fee are not charged more than one full fee altogether, for instance by limiting the liability for the fee to primary dwellings. If, however, the provisions were to be declared void retroactively (cf. BVerfGE 1, 14 <37>; 7, 377 <387>; 8, 51 <71>; 132, 334 <359 para. 71>; 144, 369 <411 para. 111>), the financing of public broadcasting, guaranteed under constitutional law by Art. 5(1) second sentence GG, would be jeopardised, given that the provision considered unconstitutional could no longer be applied and persons liable for the fee would have the possibility of reclaiming fees they had already paid (cf. on this BVerfGE 108, 1 <33>; 132, 334 <359 and 360 para. 72>; 144, 369 <411 and 412 para. 112>). 153

b) The declaration of incompatibility is directly applicable to the act of approval of the *Land* Baden-Württemberg which was at issue in the initial proceedings of constitutional complaint 1 BvR 981/17. In addition, in the interest of legal clarity and pursuant to § 78 second sentence BVerfGG, the declaration of incompatibility must be extended to the acts of approval of the other *Länder*, to the extent that they incorpo- 154

rate § 2(1) RBStV into the respective *Land* law, since these acts are incompatible with the Basic Law for the same reasons as the provisions at issue in the proceedings. Pursuant to § 78 second sentence BVerfGG, which applies in constitutional complaint proceedings (cf. BVerfGE 94, 241 <265>; 99, 202 <216>; 128, 326 <404>; 129, 49 <75 and 76>), the Federal Constitutional Court may declare further provisions of the same law void for the same reasons. This also applies with respect to the declaration of incompatibility (cf. BVerfGE 128, 326 <404>; 132, 179 <192 para. 41>) and identical provisions of other laws by the same legislative authority (cf. BVerfGE 94, 241 <265 and 266>; on subsequent laws see also BVerfGE 99, 202 <216>; 104, 126 <150>). The same must apply to provisions enacted by different legislative authorities, at least where, as in this case, these are provisions that are incorporated into the respective *Land* law based on a state treaty with identical content, thus reflecting a uniform intent of the legislative authorities. In these cases, the declaration of incompatibility may be extended to identical provisions of different legislative authorities for reasons of legal clarity and uniform application of the law.

II.

The legislatures must enact new provisions by 30 June 2020 at the latest. From the day this judgment is pronounced and until new provisions are in place, persons who pay the public broadcasting fee for their primary dwelling must, upon application, be exempted from the payment of fees for additional dwellings. Those persons who have already initiated legal proceedings that have not been finally decided can file such an application retroactively for the period laid down in the notice of assessment that has not yet become final. Notices of assessment that became final prior to the pronouncement of this judgment remain unaffected (cf. § 79(2) first sentence BVerfGG). Potential losses in the financing of public broadcasting, which is constitutionally protected, must be tolerated under constitutional law, since they do not occur retroactively for the most part. The legislatures can thus account and compensate for them. Moreover, they only represent a small proportion of the overall revenue raised from the public broadcasting fee. 155

III.

Pursuant to § 95(2) BVerfGG, the Judgment of the Federal Administrative Court in the initial proceedings of constitutional complaint 1 BvR 981/17 is reversed; the matter is remanded to the Federal Administrative Court. 156

[…] 157

Kirchhof Eichberger Masing

Paulus Baer Britz

Ott Christ

Bundesverfassungsgericht, Urteil des Ersten Senats vom 18. Juli 2018 - 1 BvR 1675/16, 1 BvR 981/17, 1 BvR 836/17, 1 BvR 745/17

Zitiervorschlag BVerfG, Urteil des Ersten Senats vom 18. Juli 2018 - 1 BvR 1675/16, 1 BvR 981/17, 1 BvR 836/17, 1 BvR 745/17 - Rn. (1 - 157), http://www.bverfg.de/e/rs20180718_1bvr167516en.html

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