Headnotes

to the Judgment of the First Senate of 22 November 2000

– 1 BvR 2307/94 –

– 1 BvR 1120/95 –

– 1 BvR 1408/95 –

– 1 BvR 2460/95 –

– 1 BvR 2471/95 –

1. A duty on the part of the Federal Republic of Germany to compensate property damage inflicted by a state authority which is not bound to follow the Basic Law cannot be derived from individual fundamental rights. It can, however, arise from the obligation imposed by the Basic Law to establish and maintain a social state. The principle of a state governed by the rule of law and the general principle of equality before the law contained in Article 3.1 of the Basic Law, which prohibits arbitrariness, must be complied with in regulating the details of the compensation.

2. Discussion of the application of these principles to the compensation of property damage pursuant to the Compensation Act (*Entschädigungsgesetz*), the Equalisation Payments Act (*Ausgleichsleistungsgesetz*) and the Nazi Victim Compensation Act (*NS- Verfolgtenentschädigungsgesetz*).

3. […].

FEDERAL CONSTITUTIONAL COURT

– 1 BvR 2307/94 –

– 1 BvR 1120/95 –

– 1 BvR 1408/95 –

– 1 BvR 2460/95 –

– 1 BvR 2471/95 –

Pronounced
on 22 November 2000
Achilles
Amtsinspektorin
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

**In the proceedings
on
the constitutional complaints**

I. 1. of Mr T…,

and four other complainants,

– authorised representatives: 1. Rechtsanwälte Dr. Fritz Rosenberger und Koll, Rhodiusstraße 18, Köln,

2. Rechtsanwalt Dr. Klaus Märker, Hansastraße 4, Freiburg -

against Art. 1 § 1.1, §§ 3, 4, § 7.1, § 8, also in conjunction with Art. 2 § 2 of the Act on Compensation pursuant to the Act for the Settlement of Unresolved Property Issues and on State Equalisation Payments for Expropriations Carried Out under Occupation Law or on the Basis of Sovereign Acts by Occupying Powers (Compensation and Equalisation Payments Act, *Entschädigungs- und Ausgleichsleistungsgesetz* – EALG) of 27 September 1994 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 2624)

- 1 BvR 2307/94 -,

II. of Professor H...,

- authorised representative: Rechtsanwalt Dr. Hans Peter Wüst, Schlüterstraße 41, Berlin -

against Art. 3 § 2 of the Act on Compensation pursuant to the Act for the Settlement of Unresolved Property Issues and on State Equalisation Payments for Expropriations Carried Out under Occupation Law or on the Basis of Sovereign Acts by Occupying Powers (Compensation and Equalisation Payments Act, *Entschädigungs- und Ausgleichsleistungsgesetz* – EALG) of 27 September 1994 (BGBl I p. 2624)

- 1 BvR 1120/95 -,

III. a) of Mr Graf von und zu H...

1. and four other complainants as legal successors of the deceased Ms Gräfin von und zu H...,

2. of Ms zu L...

and 28 other complainants,

- authorised representatives:

1. Rechtsanwälte Professor Dr. Rüdiger Zuck und Koll.,
Möhringer Landstraße 5, Stuttgart,

2. Rechtsanwälte Dr. Joachim Brauer, und Koll.,
Hannoversche Straße 57, Celle -

against Art. 2 §§ 3 and 5 and against Art. 3 § 3 in conjunction with Art. 1 § 8 of the Act on Compensation pursuant to the Act for the Settlement of Unresolved Property Issues and on State Equalisation Payments for Expropriations Carried Out under Occupation Law or on the Basis of Sovereign Acts by Occupying Powers (Compensation and Equalisation Payments Act, *Entschädigungs- und Ausgleichsleistungsgesetz* – EALG) of 27 September 1994 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 2624)

- 1 BvR 1408/95 -,

IV. 1. of the T... AG

and two other complainants,

- authorised representatives: Rechtsanwälte Professor Dr. Rüdiger Zuck und Koll.,
Möhringer Landstraße 5, Stuttgart,

against Art. 2 § 1.1 sentence 1 of the Act on Compensation pursuant to the Act for the Settlement of Unresolved Property Issues and on State Equalisation Payments for Expropriations Carried Out under Occupation Law or on the Basis of Sovereign Acts by Occupying Powers (Compensation and Equalisation Payments Act, *Entschädigungs- und Ausgleichsleistungsgesetz* – EALG) of 27 September 1994 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 2624)

- 1 BvR 2460/95 -,

V. of the T... Foundation F.V.S.,

- authorised representatives: Rechtsanwälte Professor Dr. Rüdiger Zuck und Koll., Möhringer Landstraße 5, Stuttgart,

against Art. 2 § 1.1 sentence 1 of the Act on Compensation pursuant to the Act for the Settlement of Unresolved Property Issues and on State Equalisation Payments for Expropriations Carried Out under Occupation Law or on the Basis of Sovereign Acts by Occupying Powers (Compensation and Equalisation Payments Act, *Entschädigungs- und Ausgleichsleistungsgesetz* – EALG) of 27 September 1994 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 2624)

- 1 BvR 2471/95 -

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Papier,

Kühling,

Jaeger,

Haas,

Hömig,

Steiner,

Hohmann-Dennhard

Hoffmann-Riem

held on the basis of the oral hearing of 11 April 2000:

Judgment:

1. The constitutional complaint brought by the fifth complainant is dismissed as inadmissible.

2. The other constitutional complaints are rejected as unfounded.

R e a s o n s:

A.

The constitutional complaints concern regulations in the Compensation Act and the Equalisation Payments Act on compensation for injustice caused by expropriation. 1

I.

1. During the course of unification, the two German states set themselves the task of providing compensation after the accession of the German Democratic Republic to the Federal Republic of Germany for the wrong perpetrated by the state in the acceding territory. Of particular significance was the question of whether and to what extent property holdings which had been taken from former owners in a fashion incompatible with the principles in a state governed by the rule of law should and could be returned. 2

The Joint Declaration by the Governments of the Federal Republic of Germany and the German Democratic Republic on the Settlement of Unresolved Property Issues of 15 June 1990 (*Gemeinsame Erklärung der Regierungen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik zur Regelung offener Vermögensfragen* (Federal Law Gazette (*Bundesgesetzblatt – BGBl*) II p. 1237; hereinafter referred to as: the “Joint Declaration”) already contained essential benchmarks for this purpose. Number 3 [of the Joint Declaration] stipulated that real property which the German Democratic Republic was responsible for expropriating should in principle be returned. In the event retransfer was not possible due to the thing's own nature or in the event third parties had acquired the real estate in good faith, the former owners were to be compensated. Expropriations carried out under occupation law or on the basis of sovereign acts by occupying powers from 1945 to 1949 were not to be reversed, however. As is evident from no. 1 of the Joint Declaration, the governments of the Soviet Union and the German Democratic Republic did not see any possibility of redressing the measures taken at that time. The government of the Federal Republic of Germany took note of this “in view of the historical development” and at the same time expressed the opinion that the future unified German parliament would have to reserve the right to make a final decision on any state equalisation payments. The Joint Declaration became an integral component of the Treaty of 31 August 1990 between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity (*Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands, Einigungsvertrag,* Federal Law Gazette II p. 889, hereinafter referred to as: Unification Treaty) as Annex III (see Article 41.1 of the Unifica- 3

tion Treaty).

These benchmarks were first implemented in the Act on the Settlement of Unresolved Property Issues (*Gesetz zur Regelung offener Vermögensfragen, Vermögensgesetz – VermG*, Property Act, Federal Law Gazette II p. 1159) of 23 September 1990, which took effect as law of the German Democratic Republic and has existed since 3 October 1990 as federal German law (Annex II chapter III subject B part I no. 5 of the Unification Treaty). The principle embodied in the Act is the reversal of expropriations carried out in a fashion incompatible with the principles of a state governed by the rule of law within the territory of the German Democratic Republic after its foundation (see §§ 1.1 to 1.3 of the Property Act). This principle also applies to compensation for property damage incurred due to National Socialist persecution, which is regulated in the Property Act (see § 1.6), even though such compensation was not mentioned in the Joint Declaration. Retransfer is ruled out in exceptional cases when it is no longer possible due to the thing's own nature, for example, because land or a building has been used in housing complex construction (see § 4.1 and § 5 of the Property Act) or when natural persons, religious groups or non-profit foundations acquired title or rights of use *in rem* to property holdings in good faith after 8 May 1945 (see § 4.2 and § 4.3 of the Property Act). Pursuant to §1.8 letter a of the Property Act expropriations carried out under occupation law or on the basis of sovereign acts by occupying powers are not covered by the Act. Instead of retransfer, compensation could and can be elected in accordance with § 8 of the Property Act. The original version of § 9 of the Property Act provided first principles for this compensation – for example, the special arrangement for companies in § 6.7 of the Property Act – and otherwise referred with respect to the details of the compensation to a law to be enacted in the future. 4

2. Such law was passed as part of the … Compensation and Equalisation Payments Act (*Entschädigungs- und Ausgleichsleistungsgesetz – EALG*) of 27 September 1994 (Federal Law Gazette I p. 2624; rectified in Federal Law Gazette I 1995, p. 110), which combined several Acts, including as Article 1 the […] Compensation Act (*Entschädigungsgesetz – EntschG*), as Article 2 the … Equalisation Payments Act (*Ausgleichsleistungsgesetz – AusglLeistG*) and as Article 3 the Act for Compensation of Victims of National Socialist Persecution (*NS-Verfolgtenentschädigungsgesetz – NS-VEntschG*, hereinafter referred to as: Nazi Victims Compensation Act), all of which took effect on 1 December 1994 (see Article 13 sentence 2 of the Compensation and Equalisation Payments Act). 5

a) The Compensation Act regulates compensation for property losses which occurred in the territory of the German Democratic Republic and for which the latter was responsible in cases in which restitution in kind is ruled out or the person entitled elects compensation (see § 1.1 sentence 1). Pursuant to § 2.1 of the Compensation Act, the amount of compensation is determined in accordance with the basis for calculation, the details of which are fixed for real property, agricultural and forestry property as well as for companies in §§ 3 and 4 of the Compensation Act, less, where ap- 6

plicable, any liabilities in accordance with § 3.4 of the Compensation Act, consideration or compensation received in accordance with § 6 of the Compensation Act, and progressive reductions in accordance with § 7 of the Compensation Act.

If an assessed value exists, the basis for calculation is the expropriated property holding's last assessed value prior to its loss and it is computed such that the relevant assessed value is multiplied by factors contingent on the property type (see § 3.1 sentence 1, § 4.1 sentence 1 of the Compensation Act); this approach is intended to orient the basis for calculation towards the generalised market value of the respective assets on the accession date (3 October 1990) (see […] *Bundestag* document (*Bundestagsdrucksache – BTDrucks*) 12/7588, pp. 32, 35, 37). The basis for calculation in accordance with § 7 of the Compensation Act is reduced in several stages. For amounts of more than DM 10,000 up to and including DM 20,000, there is a reduction of 30 per cent, for amounts of more than DM 100,000 up to and including DM 500,000 a reduction of 80 per cent, and for amounts over DM 3 million a reduction of 95 per cent. Any primary compensation which claimants or their universal predecessors in title have received for a property loss to be compensated in accordance with the Equalisation of War Burdens Act (*Lastenausgleichsgesetz – LAG*) must be deducted in accordance with § 8 of the Compensation Act from the basis for calculation reduced as explained above. The residual compensation claim will be satisfied pursuant to § 1.1 sentences 2 to 4 of the Compensation Act through the allocation of transferable bonds, which are redeemable by drawings as of 2004 in five equal annual instalments at 6 per cent annual interest. 7

In accordance with § 9 of the Compensation Act, the compensation is to be paid from the so-called "Compensation Fund", a special federal fund with no legal capacity. The revenue of the Fund is determined in § 10 of the Compensation Act and as of 1 January 2004 is to consist *inter alia* of subsidies from the federal budget in accordance with § 10.1 sentence 1 no. 13. 8

The challenged versions of the aforementioned provisions read as follows, to the extent that they are of interest here: 9

§ 1

Principles of compensation 11

(1) A claim to compensation shall exist if restitution is ruled out in accordance with the Act on the Settlement of Unresolved Property Issues ("Property Act") (§§ 4.1 and 4.2, § 6.1 sentence 1 of the Property Act) … or if the person entitled has elected compensation (§ 6.7 and § 8.1 of the Property Act) … The compensation claim shall be satisfied through the allocation of transferable bonds from the Compensation Fund (§ 9) in a nominal amount of 1,000 German marks or whole multiples thereof which shall accrue interest as of 1 January 2004 at an annual rate of 6 per cent. The interest shall be due 12

subsequently each year, initially on 1 January 2005. The bonds shall be redeemable by drawings as of 2004 in five equal annual instalments, initially as of 1 January 2004. […] § 3 of the Equalisation Payments Act shall apply accordingly.

(1.a) to (5) […].

§ 2

Calculation of the amount of compensation

(1)The amount of compensation shall be determined in accordance with the basis for calculation (§§ 3 to 5), less (where appropriate):

1. liabilities in accordance with § 3.4;

2. consideration or compensation received in accordance with § 6;

3. […] or

4. reductions in accordance with § 7.

Payments pursuant to the Equalisation of War Burdens Act in accordance with § 8 shall be deducted from the basis for calculation reduced in accordance with nos. 1 to 4.

(2) Compensation above 1,000 German marks shall be rounded down to one thousand or to the next multiple of one thousand.

§ 3

Basis for calculating compensation for real property, agricultural and forestry property

(1) The basis for calculating the compensation for real property, including owned buildings, as well as for agricultural and forestry property shall be:

1. for agricultural and forestry land, 3 times;

2. for leased residential properties with more than two apartments, 4.8 times;

3. for properties used for mixed purposes, more than 50 per cent of which are used for residential purposes, 6.4 times;

4. for commercial properties, leased residential properties with two apartments, properties used for mixed purposes not falling under no. 3, single family homes and other developed properties, 7 times;

5. for undeveloped properties, 20 times

the last value assessed prior to the loss […]. 31

(2) If no value has been assessed or if the assessed value is no longer known, but an alternate value has been computed using the method fixed in the Act on the Preservation and Determination of Evidence (*Beweissicherungs- und Feststellungsgesetz*), such alternate value shall be decisive […]. 32

(3) […]. 33

(4) Long-term liabilities which at the time of the loss had an economic connection with a property within the meaning of subsection 1 sentence 1 or were secured *in rem* using such property are to be deducted at the value stated on such date. The “value stated” shall be the nominal value of the previous title, unless the person entitled provides evidence of redemption payments or other grounds for cancellation. This shall apply to liabilities based on reconstruction loans only if one of the construction measures connected with the loan has led to an increase in the basis for calculation. The amount of the deduction shall be computed in accordance with § 18.2 of the Property Act … 34

(5) and (6) […]. 35

§ 4 36

Basis for calculating compensation for companies 37

(1) The basis for calculating the compensation for companies or shares in companies, except for agricultural or forestry enterprises expropriated up to and including on 31 December 1952, shall be 1.5 times the last value assessed in the main assessment period prior to the loss […]. 38

(2) […]. 39

(2.a) For companies with a maximum of 10 employees, including family members who work in the family company, the basis for calculation shall be computed at the request of the person entitled, at variance with subsection 1 or 2, at 7 times the assessed value of the business premises included in the company assets, plus the other company assets to be assessed in accordance with subsection 2 sentence 2 nos. 2 to 5 and sentence 3. 40

(3) and (4) […]. 41

§ 6 42

Crediting of consideration or compensation received 43

(1) If the person entitled in accordance with § 2.1 of the Property Act or his or her universal predecessor in title has received consideration or compensation for the property holding to be compensated, such consideration or compensation and any interest received is to be deducted from the basis for calculation taking into account the conversion rate of two marks of the German Democratic Republic to one German mark … 44

(2) […]. 45

§ 7 46

Reductions 47

(1) If the sum allocable to a person entitled from the basis for calculation and deductions in accordance with § 3.4, § 4.4 and § 6 exceeds the amount of 10,000 German marks, the compensation is to be reduced by the following amounts: 48

- for an amount in excess of 10,000 German marks up to 20,000 German marks by 30 per cent 49

- for an amount in excess of 20,000 German marks up to 30,000 German marks by 40 per cent; 50

- for an amount in excess of 30,000 German marks up to 40,000 German marks by 50 per cent; 51

- for an amount in excess of 40,000 German marks up to 50,000 German marks by 60 per cent; 52

- for an amount in excess of 50,000 German marks up to 100,000 German marks by 70 per cent; 53

- for an amount in excess of 100,000 German marks up to 500,000 German marks by 80 per cent; 54

- for an amount in excess of 500,000 German marks up to 1 million German marks by 85 per cent; 55

- for an amount in excess of 1 million German marks up to 3 million German marks by 90 per cent; 56

- for an amount in excess of 3 million German marks by 95 per cent. 57

(2) If a person entitled has claims to compensation or equalisation payments in accordance with the Equalisation Payments Act for several property holdings, subsection 1 shall apply to the aggregate thereof … 58

(3) […].

§ 8

Deduction of payments pursuant to the Equalisation of War Burdens Act

If the person entitled in accordance with § 2.1 of the Property Act or his or her universal predecessor in title has received primary compensation in accordance with the Equalisation of War Burdens Act for compensatable property holdings for which a damage amount has been computed in accordance with § 245 of the Equalisation of War Burdens Act or for which a savings premium has been recognised in accordance with § 249a of the Equalisation of War Burdens Act, the repayment amount determined by an unappealable decision of the compensation administration in accordance with the provisions of the Equalisation of War Burdens Act is to be deducted from the basis for calculation reduced in accordance with § 7. The basis for calculation reduced in accordance with § 7 and communicated to the compensation administration by the competent authorities shall be considered as a cash damage equalisation payment within the meaning of § 349.3 of the Equalisation of War Burdens Act.

(2) […].

§ 9

Compensation Fund

(1) Compensation in accordance with this Act, equalisation payments in accordance with §§ 1 and 2 of the Equalisation Payments Act, compensation in accordance with the Nazi Victims Compensation Act and … shall be paid from a special federal fund with no legal capacity (Compensation Fund) […].

(2) to (8) […].

§ 10

Revenue of the Compensation Fund

(1) The following is to be paid to the Compensation Fund:

1. three billion German marks by the Trust Agency (*Treuhandanstalt*) from its sale proceeds […];

2. to 12. […];

13. subsidies from the federal budget as of 1 January 2004.

[…]

(2) […]. 75

b) The Equalisation Payments Act regulates the compensation of property losses attributable to uncompensated expropriations carried out under occupation law or on the basis of sovereign acts by occupying powers in the Soviet occupation zone from 1945 to 1949 (see § 1.1 sentence 1) and implements the reservation of the Federal Government in no. 1 sentence 4 of the Joint Declaration. The Act does not contain its own basis for calculating the compensation granted only to natural persons, but instead refers in § 2 to the relevant provisions of the Compensation Act. In addition, §§ 3 and 4 provide for the so-called “land acquisition programme”, which creates for particular groups of persons the possibility of acquiring agricultural and forestry land in the acceding territory (on this, see already Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 94, 334, (340-341)), and the provision in § 5 is also relevant. § 5 relates to the return of movable property and stipulates a public usufruct for such property which is to be initially free of charge and later in return for payment to the extent that cultural objects intended for public exhibition, for use by the public or for research are concerned. 76

The provisions applicable to these proceedings are worded as follows: 77

§ 1 78

Claim to equalisation payments 79

(1) Natural persons who have lost property holdings within the meaning of § 2.2 of the Act on the Settlement of Unresolved Property Issues (Property Act) through uncompensated expropriations under occupation law or on the basis of sovereign acts by occupying powers in the territory specified in Article 3 of the Unification Treaty (acceding territory) or the heirs or later heirs (heirs of heirs) thereof shall receive equalisation payments in accordance with this Act. § 1.7 of the Property Act shall not be prejudiced hereby. 80

(1.a) […]. 81

(2) “Intervention under occupation law or on the basis of sovereign acts by occupying powers” shall exist with respect to the expropriation of the assets of a company or a cooperative if such expropriation led to a reduction of the values of the shares in the company or the membership shares of the cooperative members. This shall also apply to beneficiaries (§ 18b.1 sentence 1 of the Property Act) of former rights *in rem* to real property which was expropriated under occupation law or on the basis of sovereign acts by occupying powers. § 1.2 sentences 3 and 4 of the Compensation Act shall apply accordingly. If the property of a family foundation or family association with its registered office in the acceding territory was expropriated, the persons holding shares therein are to be granted equalisation 82

payments as if they had been jointly entitled to the property of the family foundation or family association; …

(3) and (4) […].

§ 2

Type and amount of equalisation payment

(1) Subject to §§ 3 and 5, equalisation payments are to be paid from the Compensation Fund in accordance with §§ 1 and 9 of the Compensation Act. Unless stipulated otherwise in this Act, equalisation payments shall be calculated and fulfilled in accordance with §§ 1 to 8 of the Compensation Act […].

(2) to (7) […].

§ 3

Land acquisition

(1) Any person who on 1 October 1996 has leased on a long-term basis formerly state-owned agricultural land to be privatised by the Trust Agency may acquire such land in accordance with subsections 2 to 4 and 7 below.

(2) Entitled shall be natural persons who have re-established their original enterprise and are resident on land specified in subsection 1 (re-organisers) or who have established a new enterprise and were resident [in the acceding territory] on 3 October 1990 (new organisers) and who manage such enterprise themselves alone or as a partner with unlimited liability in a partnership. This shall also apply to legal persons under private law who operate agricultural enterprises which have duly carried out after an assessment by the competent state authorities an apportionment of assets and liabilities pursuant to §§ 44 et seq. of the Agricultural Adjustment Act (*Landwirtschaftsanpassungsgesetz*) as promulgated on 3 July 1991 (Federal Law Gazette I p. 1418) and most recently amended by the Act of 31 March 1994 (Federal Law Gazette I p. 736), and 75 per cent of whose shares are held by natural persons who were already resident [in the acceding territory] on 3 October 1990. Re-organisers within the meaning of sentence 1 shall also be those natural persons for whom the restitution of their original agricultural or forestry enterprise is ruled out on legal or factual grounds as well as natural persons whose agricultural and forestry property holdings were expropriated under occupation law or on the basis of sovereign acts by occupying powers. Entitled shall also be partners or shareholders of the legal persons entitled in accordance with sentence 2 who were

resident [in the acceding territory] on 3 October 1990, work in such company full time and have agreed to extend the lease entered into by their company with the agency competent for the privatisation up to a total term of 18 years and to answer with such land for liabilities of the company.

(3) Persons entitled in accordance with subsection 2 sentences 1 to 3 may acquire up to 600,000 yield points, subject to sentences 2 to 4. To the extent that the land has been leased long term by a partnership, the partners entitled in accordance with subsection 2 may acquire in total land up to the maximum limit in accordance with sentence 1. If a legal person entitled in accordance with subsection 2 fails to exhaust the maximum limit in accordance with sentence 1, the partners or shareholders thereof entitled in accordance with subsection 2 sentence 4 may acquire the residual yield points in accordance with the company's detailed determinations. The acquisition option in accordance with subsection 1 shall exist provided an ownership share of 50 per cent of the agriculturally used land is not exceeded; the land belonging to a company and the partners or shareholders thereof is to be added to the ownership share; land which is available or previously acquired in accordance with subsection 5 shall likewise be credited towards the percentage and the yield points. 92

(4) Persons entitled in accordance with subsection 2 sentences 1 to 3 may acquire up to 100 hectares of formerly state-owned forest to be privatised by the Trust Agency in addition to agricultural land, provided this represents an appropriate supplement to the agricultural portion of the enterprise taking into account the operational concept presented and provided there is evidence that the agricultural enterprise is essentially managed on its own land or land leased for a minimum of 12 years. 93

(5) Natural persons whose agricultural or forestry property was taken away and with regard to whom the restitution of their original enterprise is ruled out on legal or factual grounds or whose property holdings were expropriated under occupation law or on the basis of sovereign acts by occupying powers and who are not entitled in accordance with subsections 1 and 2 may acquire formerly state-owned agricultural land and forest to be privatised by the Trust Agency which has not been claimed for acquisition in accordance with subsections 1 to 4. Agricultural land may only be acquired in the amount of up to half the equalisation payment in accordance with § 2.1 sentence 1 of the Compensation Act but, at maximum, up to 300,000 yield points; forestry land may only be acquired up to the 94

amount of the residual equalisation payment. This shall not apply if the equalisation payment can be used for an acquisition pursuant to subsections 1 to 4. To the extent that it is not possible to acquire the former property, land from a nearby area shall be offered. No claim shall exist to particular land. A person entitled in accordance with sentence 1 who has lost forestry property holdings may not, or only to a limited degree, acquire agricultural land. If a person entitled in accordance with sentence 1 intends to exercise his or her acquisition option, the person entitled must notify such intention to the agency competent for the privatisation within a preclusive period of 6 months after the equalisation payment or compensation notice becomes unappealable. If a person entitled in accordance with subsections 1 to 4 is notified by the agency competent for the privatisation that land managed by him or her has been claimed by a person entitled in accordance with this subsection, he or she must notify the agency competent for the privatisation within 6 months as to which land he or she prefers to acquire. The acquisition option in accordance with this subsection may be transferred by the person entitled to spouses, relatives in a direct line of descent or relatives in the second degree in the collateral line of descent. To the extent that a community of heirs is entitled, the acquisition option may be transferred to a single member or divided among several members.

(6) The acquirer in accordance with subsection 5 must declare to any lessee his or her willingness to extend existing leases up to a total term of 18 years. If the agency competent for the privatisation is obliged to the lessee to sell the lessee the leased land, such land shall only be available within the limits of subsections 1 to 4 for acquisition in accordance with subsection 5 with the approval of the lessee. 95

(7) Subject to sentence 2, the value of agricultural land shall be three times the value of the respective land assessed or still to be computed in accordance with the value relationships on 1 January 1935 (value assessed in 1935). If buildings on such land have also been acquired, premiums or discounts may be determined based on a recommendation of the advisory board in accordance with § 4.1 taking into account the circumstances of the specific case, particularly the condition of the building; the market value of the building shall also be taken into account in this regard. For forestry land with a fellable inventory of less than 10 per cent, the value is to be computed based on three times the value assessed in 1935 with due regard to the current conditions of the forest … If the portion of fellable inventory is 10 per cent or more, the market value is to be used … 96

(8) Natural persons who 97

a) re-establish their original forestry enterprise located in the acceding territory and are resident therein or become resident therein in connection with the re-establishment; or 98

b) establish a new forestry enterprise and were resident [in the acceding territory] on 3 October 1990; or 99

c) are entitled to acquisition in accordance with subsection 5 sentence 1 and establish a new forestry enterprise and manage such enterprise alone or as a partner with unlimited liability in a partnership may acquire up to 1,000 hectares of formerly state-owned forestry land to be privatised by the Trust Agency, provided they do not acquire any agricultural land in accordance with subsections 1 to 7. A forestry enterprise within the meaning of sentence 1 shall also include the forestry portion of any agricultural and forestry enterprise. Subsection 2 sentence 3 shall apply accordingly. The persons entitled must present a forest operating concept for the land sought to be acquired which provides a guarantee of orderly forest management. The manager of the enterprise must possess the qualifications requisite for the management of a forest enterprise. Subsection 7 shall apply accordingly. 100

(9) If formerly state-owned agricultural land to be privatised by the Trust Agency has not been sold in accordance with subsections 1 to 5 prior to 31 December 2003, such land may be acquired by the persons entitled in accordance with these provisions. The purchase request must be received prior to 30 June 2004 at the latest by the agency competent for the privatisation. Subsection 7 shall apply accordingly. An acquisition in accordance with subsection 3 and sentence 1 shall only be possible up to an upper limit of 800,000 yield points; an acquisition in accordance with subsection 5 and sentence 1 shall only be possible only up to a total maximum limit of 400,000 yield points. 101

(10) The agricultural and forestry land acquired in accordance with this provision may not be sold prior to the expiration of 20 years without a permit from the agency competent for the privatisation. A permit may only be issued provided the sale proceeds exceeding the acquisition price are passed on to the Trust Agency or the legal successor thereof. The prohibition on sale in accordance with sentence 1 must be entered in the land register; a decree in accordance with § 4.3 shall stipulate the further details. 102

(11) […]. 103

§ 4

Advisory board and regulatory authorisation

(1) Advisory boards shall be established in the agencies competent for privatisation in accordance with the Trust Act (*Treuhandgesetz*) of 17 June 1990 (Law Gazette of the German Democratic Republic (*Gesetzblatt – GBl*) I no. 33, p. 300) […] as amended; such advisory boards may be appealed to in the event of conflicting interests in connection with the exercise of the acquisition options in accordance with § 3 …

(2) […].

(3) The Federal Government is hereby authorised to regulate by way of decree with the approval of the Bundesrat the details of the acquisition option in accordance with § 3, the procedure and the advisory boards […].

§ 5

Return of movable property

(1) Movable property not included in an assessed value must be retransferred. Retransfer shall be ruled out if impossible due to the thing's own nature or if natural persons, religious groups or non-profit foundations have acquired the property holding in good faith.

(2) Cultural objects intended for public exhibition shall remain available for a period of 20 years for public use and research free of charge (free public usufruct). The usufructuary may request continuation of the usufruct in return for adequate compensation. This shall also apply to essential furnishings of buildings which are accessible to the public and protected as historical landmarks. If the cultural objects have not been made available to the public for more than two years, the usufruct shall end at the request of the person entitled, unless the highest state authorities determine good cause for the non-availability and the continuation of the purpose mentioned in sentence 1.

(3) […] The usufructuary shall bear the expenses for the cultural objects provided.

The […] Land Acquisition Ordinance (*Flächenerwerbsverordnung – FlERwV*) of 20 December 1995 (Federal Law Gazette I p. 2072) was enacted on the basis of § 4.3 of the Equalisation Payments Act.

c) The Nazi Victims Compensation Act regulates the compensation of property losses in what is now the acceding territory which are based on National Socialist perse-

cution in cases in which compensation through restitution is ruled out or the persons entitled elect compensation (see § 1.1). The amount of compensation to be paid in cash is determined pursuant to § 2 sentence 1 of the Nazi Victims Compensation Act in principle in accordance with the provisions of the […] Federal Restitution Act (*Bundesrückerstattungsgesetz – BRüG*) of 19 July 1957 (Federal Law Gazette I p. 734). With regard to assets for which a value has been assessed, the amount of compensation is to be computed, at variance with the above, at four times the last value assessed prior to the loss (§ 2 sentence 2 of the Nazi Victims Compensation Act). Long-term liabilities are only to be deducted to a limited extent from the basis for calculation in accordance with § 2 sentence 3 of the Nazi Victims Compensation Act. On the other hand, any previously received payments for the equalisation of war burdens is to be credited here as well (see § 3 sentence 1 of the Nazi Victims Compensation Act in conjunction with § 8 of the Compensation Act). The Nazi Victims Compensation Act does not provide for any declining-balance method of reducing compensation. Nor is the due date for the compensation deferred over time.

The provisions of the Act applicable here read as follows in their original version: 116

§ 1 117

Principles of compensation 118

(1) If restitution is ruled out in the cases stipulated in § 1.6 of the Act on the Settlement of Unresolved Property Issues (Property Act) (§§ 4.1 and 4.2, § 6.1, sentence 1 … of the Property Act) or if the person entitled has elected compensation (§§ 6.7 and 8.1) of the Property Act), a claim to cash compensation shall exist against the Compensation Fund. 119

(2) […]. 120

§ 2 121

Amount of compensation 122

§§ 16 to 26, except for § 16.2 sentence 2, of the Federal Restitution Act shall apply to the compensation. With regard to properties whose assessed value was determined, the amount of compensation is set at four times the most recent assessed value prior to the loss. § 3.1 sentences 2 and 3, §§ 3.2 to 3.6 and §§ 4.2 to 4.4 of the Compensation Act shall apply accordingly. § 3.4 of the Compensation Act shall apply subject to the condition that the liabilities which arose in the period between 15 September 1935 and 8 May 1945 shall not be taken into consideration and the other liabilities shall be deducted at half of their nominal value as of the date of the loss, subject to documentation that a greater percentage of the liabilities was a result of persecution … 123

§ 3 124

Crediting of consideration or compensation received 125

§6 and §8 of the Compensation Act […] shall apply accordingly […]. 126

II.

The complainants are natural and legal persons who have, either themselves or through their legal predecessors in the current acceding territory, suffered economic losses due to National Socialist persecution or for which the Soviet occupation authorities or the German Democratic Republic was responsible. 127

1. Complainant I 1 is the legal successor of the owner of a villa property whose assessed value was set at 31,900 marks of the German Democratic Republic in 1978. In order to receive a permit to leave the German Democratic Republic and settle in the Federal Republic of Germany, the owner sold the property for 25,000 marks of the German Democratic Republic. The buyers resold the property in 1992 for DM 745,000. Retransfer was requested after reunification, but was refused due to acquisition in good faith pursuant to § 4.2 of the Property Act. However, a notice showing the basis of compensation was issued in favour of the complainant. 128

Complainant I 2 is the legal successor of the owner of a company which was expropriated under the Saxon Act on the Nationalisation of Enterprises Owned by War and Nazi Criminals of 30 June 1946 (*Gesetz über die Übergabe von Betrieben von Kriegs- und Naziverbrechern*, Saxon Law and Ordinance Gazette (*Sächsisches Gesetz- und Verordnungsblatt – GVBl Sachsen*) p. 305). The complainant bought the company back in 1991. 129

Complainants I 3 and 4 are the legal successors of the owner of a manor, additional real estate and a brewery with several restaurant and hotel properties. The most recent total assessed value of these properties is almost RM (*Reichsmarks*) 1.5 million. Some of the property was expropriated in the course of the land reform, and some was seized under Order no. 124 of the Soviet Military Administration in Germany (hereinafter referred to as: “SMAD”) of 30 October 1945 and nationalised. The complainants have received primary compensation for their property losses pursuant to the Equalisation of War Burdens Act, including an interest premium of around DM 250,000. 130

Complainant I 5 is the legal successor of the owner of an agricultural enterprise which was expropriated in the course of the land reform. Since the owner and his family never left the German Democratic Republic, his family never received compensation under the Equalisation of War Burdens Act. In accordance with a municipal certification, the real property, whose most recent assessed value prior to expropriation was at least RM 290,000, now consists of a commercial property with a value of DM 1,750,000, agricultural land valued at DM 2,440,000 and a residential building 131

valued at DM 300,000.

2. Complainant II is the sole heir of his mother, whose property was confiscated by the Gestapo in 1943 for the benefit of the German Reich. This confiscation included properties situated in the territory later occupied by the German Democratic Republic. Some of the property was used in so-called housing complex construction so that its return is excluded pursuant to § 4.1 in conjunction with § 5.1 letter c of the Property Act. The complainant therefore has […] a claim for compensation pursuant to §§ 1.1 and 1.2 sentence 2 of the Nazi Victims Compensation Act. 132

3. Complainants III 1 to 6 are the legal successors of the owner of 17 estates expropriated during the land reform […]. [These properties] have a total assessed value of more than RM 9,576,000. RM 2,106,000 in previous encumbrances existed in connection with the estates. Payments for the equalisation of war burdens, i.e. primary compensation and an interest premium were made in the amount of DM 1,766,000. The complainants wish to take advantage of all possible options offered by the land acquisition programme in order to acquire both agricultural and forestry land. 133

Complainant III 7 owned estates used for agricultural and forestry purposes which were expropriated during the land reform. The total assessed value of these properties was set … at more than RM 2,561,000. The value of the encumbrances on the property was around RM 1,101,000. The complainant received primary compensation under the Equalisation of War Burdens Act in the amount of DM 593,000, including an interest premium, though this compensation covered not only the loss of agricultural and forest property, but also other damage. Works of art and other movable assets were also expropriated during the land reform. A small remnant of these assets is located in two museums and is subject […] to the usufruct provision in § 5.2 of the Equalisation Payments Act. Complainant III 7 also desires to participate in the land acquisition programme. 134

Complainant III 8 is the legal successor of the owner of a manor which was expropriated during the land reform. The manor's most recent assessed value prior to expropriation […] was RM 1,470,600. [The complainant] received payments, i.e. primary compensation and an interest premium totalling around DM 385,400 under the Equalisation of War Burdens Act. An application for the conclusion of a lease agreement was refused so that the only purchase option open to the complainant, who desires to participate in the land acquisition programme, is the option pursuant to § 3.5 of the Equalisation Payments Act. 135

Complainants III 9 to 15 are heirs of the owner of an agricultural enterprise expropriated during the land reform. Complainant III 10 has leased more than 5 hectares of the original property in a short-term lease and around 62 hectares in a long-term lease and manages the land herself. She wishes to exercise her option to purchase the land pursuant to § 3 subsections 1 to 3 of the Equalisation Payments Act, but is prevented from purchasing more than about 35 hectares by § 3.3 sentence 4 of the Equalisation Payments Act. 136

The father of complainant III 16 was co-owner of agricultural estates which were expropriated during the land reform, whose most recent assessed value totalled almost RM 747,000. Previous encumbrances existed in the amount of around RM 227,000. As the sole heir, the complainant received payments for the equalisation of war burdens of more than DM 229,000 for the loss of the estates; since the estate included real property in the Federal Republic of Germany, the complainant was requested to pay the property levy pursuant to the Equalisation of War Burdens Act. His son has leased about 500 hectares of the original property and desires to exercise his option for privileged land acquisition pursuant to § 3 subsections 1 to 4 of the Equalisation Payments Act. In addition, the complainant himself would like to purchase forestry land pursuant to § 3.8 of the Equalisation Payments Act, but believes he is prevented from doing so by sentence 1 of that provision. 137

Complainants III 17 to 19 are the legal successors of the owner of a one-family house containing a medical practice, as well as a garden property. Their application for restitution was refused pursuant to § 1.8 letter a of the Property Act. They consider themselves wronged in that they were not permitted to buy back their original property at favourable conditions or, at least, to request transfer of an alternate property pursuant to § 9 of the Property Act. 138

Complainants III 20 and 21, together with their father, from whom they had inherited, were owners of a forest estate which was expropriated during the land reform. They would like to purchase up to 1,000 hectares of forestry land pursuant to § 3.8 sentence 1 letter c of the Equalisation Payments Act. 139

Complainants III 22 to 30 are heirs of a resistance fighter executed by the National Socialists whose assets were forfeited to the German Reich at the time the death sentence against him was pronounced. Restitution has been made in relation to some of the original property. The complainants, who have received payments for the equalisation of war burdens for the property loss, also have a claim for compensation pursuant to the Nazi Victims Compensation Act. 140

4. Complainants IV are public companies and complainant V is a private-law foundation. 141

a) The real property of complainant IV 1 was expropriated without compensation based on the Ordinance for the Nationalisation of Corporations and Other Industrial Enterprises (*Verordnung zur Überführung von Konzernen und sonstigen wirtschaftlichen Unternehmen in Volkseigentum*) of 10 May 1949 (Gazette of Ordinances for Greater Berlin – *VOBl für Groß-Berlin*) I p. 112). Retransfer of the properties was refused due to § 1.8 letter a of the Property Act. 142

Complainant IV 2 originally maintained its registered office in the territory of the Soviet occupation zone. After expropriation of its plants and real estate under SMAD Orders nos.124 and 64, it continued the company in West Germany as a so-called split company. 143

Complainant IV 3 also shifted its registered office to the Federal Republic of Germany after expropriation of its enterprises on the basis of SMAD Orders nos. 124 and 64. Administration of the estate … was ordered at the end of 1990. The request for retransfer of the company made by the estate administrator was refused in unappealable fashion, making reference to § 1.8 letter a of the Property Act. 144

b) Complainant V requested retransfer of an estate expropriated during the land reform, but its request was refused. The Administrative Court (*Verwaltungsgericht*) dismissed the foundation's complaint in unappealable fashion, making reference to § 1.8 letter a of the Property Act. 145

III.

1. In the constitutional complaints 1 BvR 2307/94 and 1 BvR 1408/95, complainants I and III […] directly challenge § 1.1, §§ 3.1 and 3.4 sentence 1, § 4.1 and §§ 7 and 8 of the Compensation Act, in conjunction with §§ 1, 2.1 sentence 2 of the Equalisation Payments Act, §§ 3 and 5 of the Equalisation Payments Act and § 3 sentence 1 of the Nazi Victims Compensation Act, in conjunction with § 8 of the Compensation Act. They assert a violation of Article 3.1 and Article 14.1 of the Basic Law and the principles of a state based on the rule of law and of a social state in conjunction with Article 2.1 of the Basic Law. 146

a) Complainant I 1, as a recipient pursuant to the Compensation Act, alleges unconstitutional, unequal treatment compared to persons entitled to restitution under the Property Act. He alleges that while the latter received the full market value of the restored property, the settlement he received makes up only a portion of this value. This arrangement is essentially based on the interaction of the provisions on the basis for calculating compensation in §§ 3 and 4 of the Compensation Act and on the degressive reduction in § 7 of the Compensation Act with the provision in § 1.1 of the Compensation Act stating that compensation payments are not to be paid immediately, but only beginning in 2004. The same is true for equalisation recipients pursuant to § 2.1 sentences 1 and 2 of the Equalisation Payments Act. 147

[…]. 148-153

bb) The complainants contend that in adopting these provisions for compensation recipients the legislature strayed from the legal standards it itself established at reunification. Number 3 letter a of the Joint Declaration states the following regarding victims of expropriation after 1949 for whom restitution is excluded: "In such cases, compensation shall be made […]." This means that the compensation must be based on the value of the objects to be restored. Section 8.1 of the Property Act grants restitution recipients a choice between restitution and compensation. Such a choice would make no sense if the compensation did not have approximately the same value as the expropriated property to be returned. The complainants argue that § 6.7 of the Property Act expressly states that expropriated companies must be compensated at market value if return is impossible. Moreover, § 9.2 of the Property Act stipulates that 154

if return is excluded due to purchase in good faith compensation must be made through transfer of properties in the value most closely approximating that of the expropriated property. If this is impossible, monetary compensation is made. The complainants assert that it is clear from this context that the amount of the monetary compensation may be no less than the value of compensation through transfer of an alternate property. The complainants allege that by amending these provisions through the Compensation and Equalisation Payments Act and making compensation pursuant to the Compensation Act the legislature almost completely deprived recipients of existing compensation claims in violation of Article 14.1 of the Basic Law.

[…]. 155

cc) The complainants assert that payments under the Compensation Act and under the Equalisation Payments Act have to be equivalent in the future as well. There are insufficient grounds to justify unequal treatment of the two groups of victims. The unlawfulness of the expropriations is no different if they were carried out prior to 1949 under occupation law or on the basis of sovereign acts by occupying powers or if they were made thereafter by a satellite regime of the Soviet Union. 156

In addition, the complainants contend that payments under the Equalisation Payments Act must be supplemented by the return of property expropriated prior to 1949 which is still in existence. As is now clear based on new revelations, the Soviet Union had never demanded the continuance of measures taken between 1945 and 1949 as a precondition for German reunification. Nor had the German Democratic Republic made such a demand. […]. 157

b) The complainants who are victims of expropriations carried out under occupation law or on the basis of sovereign acts by occupying powers allege unequal treatment not only in comparison to recipients under the Property Act, but also in comparison to other groups. 158

… The complainants contend that public authorities, especially local authorities, unjustifiably received preferential treatment as far as compensation was concerned, since their original property was generally retransferred under property allocation law. 159

Political parties also suffered expropriations carried out under occupation law or on the basis of sovereign acts by occupying powers. The complainants assert that although § 20.b of the Act on Parties and Other Political Associations (*Gesetz über Parteien und andere politische Vereinigungen – Parteiengesetz-DDR*) of 21 February 1990 (Law Gazette of the German Democratic Republic (*Gesetzblatt – GBl*) I p. 66) as amended on 31 May 1990 (Law Gazette of the German Democratic Republic I p. 275) stipulated prior to reunification that restitution to the former owners be made from the party assets, which were temporarily managed by the Trust Agency, the Trust Agency has since largely released these assets to the parties. 160

The complainants also allege that citizens of the United States whose property was expropriated under occupation law or on the basis of sovereign acts by occupying 161

powers also received preferential treatment. On their behalf, the German Federal Government and the government of the United States of America concluded the agreement concerning the settlement of certain property claims of 13 May 1992 (Federal Law Gazette II p. 1223) under which the Federal Government paid the US government a lump sum compensation of USD 190 million for the victims […]. [This amount] […] is sufficient to distribute to each victim the market value of his or her original property.

In addition, the complainants allege unjustified unequal treatment in comparison to victims of expropriations under occupation law or on the basis of sovereign acts by occupying powers who have since been rehabilitated by the Russian authorities and are entitled to assert claims pursuant to § 1.7 of the Property Act […]. 162

The complainants also assert unjustified discrimination in comparison to recipients under the Property Law Adjustment Act (*Sachenrechtsbereinigungsgesetz – SachenRBerG*) of 21 September 1994 (Federal Law Gazette I p. 2457). Under that Act, compensation is made for developed properties by dividing the land value between the property owner and the user. Each receives 50% of that value. In the case of expropriated property, on the other hand, which must be privatised anyway, the state treasury takes the property entirely; the victims of the expropriation have to be content with a disproportionately low monetary compensation. 163

c) The complainants further allege that the crediting of the payments for the equalisation of war burdens towards the compensation pursuant to § 8 of the Compensation Act, also in conjunction with § 2.1 sentence 2 of the Equalisation Payments Act and § 3 sentence 1 of the Nazi Victims Compensation Act, violates the principles of a state based on the rule of law and of a social state as well as Article 3.1 of the Basic Law. They contend that it is constitutionally unjustifiable to require the return in full of primary compensation pursuant to the Equalisation of War Burdens Act even though the compensation paid under the contested provisions does not even approach the value of the loss. […]. 164

The complainants allege that the interest premium paid in addition to the primary compensation was compensation for the fact that payments for the equalisation of war burdens was often paid late. According to the complainants, the crediting of this premium also violates Article 3.1 of the Basic Law. […] Article 14.1 of the Basic Law is also violated. The interest premium was not compensation for a loss of intrinsic value, but for loss of use. Taking away this compensation would constitute an uncompensated intervention tantamount to expropriation. It would most certainly be unjustifiable to credit the payments for the equalisation of war burdens also in the case of recipients who had to pay the property levy pursuant to the Equalisation of War Burdens Act […]. 165

[…] 166

Finally, the complainants allege discrimination against those who remained in the 167

German Democratic Republic and live in the new federal *Länder* today. Unlike victims of expropriation who had fled to the West, these persons did not receive payments for the equalisation of war burdens. Admittedly, the deduction of the primary compensation and the interest premium have no effect in their case. However, the result is not equal treatment since the recipients of the payments for the equalisation of war burdens were able to build up an existence with these funds, which they can now use, at least in part, to take advantage of repurchase options under the land acquisition programme.

d) It is alleged that this programme as well is unconstitutional [in multiple respects], as [argued in detail] by complainants III 1 to 21 […]. 168

[…]. 169-170

e) It is contended that Section 5 of the Equalisation Payments Act also results in unjustified unequal treatment. That provision cancels the exclusion of the retransfer of movable property for expropriations carried out under occupation law or on the basis of sovereign acts by an occupying power, with the effect of *de facto* applicability of the Property Act to that property. This would no longer make the future exclusion of the retransfer of real estate even when a return is not opposed by the public interest, third-party rights warranting protection, or overriding investments appear consistent with the principle of equality. In addition, § 5.1 of the Equalisation Payments Act is limited by arbitrary exceptions in § 5.2 of the Equalisation Payments Act, constituting another violation of the equality principle […]. 171

[…] 172

2. In proceedings 1 BvR 1120/95, complainant II asserts that § 2 sentence 2 of the Nazi Victims Compensation Act violates Articles 3.1 and 3.3 and Articles 14.1 and 14.3 of the Basic Law […]. 173

As a recipient under the Nazi Victims Compensation Act, the complainant alleges discrimination in comparison to persons entitled to the return of expropriated property under the Property Act who have the benefit of the current market value of such property. […]. It is also alleged that discrimination also exists in comparison to recipients under the Compensation Act, whose compensation for the loss of undeveloped land is calculated based on 20 times the assessed value pursuant to § 3.1 sentence 1 no. 5 of the Compensation Act. Finally, it is contended that it is inconsistent with Article 3 of the Basic Law for recipients under the Nazi Victims Compensation Act not to receive half the market value of the expropriated properties like owners who are recipients under the Property Law Adjustment Act. 174

Since the Nazi Victims Compensation Act affects primarily persons of Jewish faith, the unequal treatment also constitutes a violation of Article 3.3 of the Basic Law. 175

Finally, refusing market value compensation while excluding return would constitute a partial expropriation in violation of Articles 14.1 and 14.3 of the Basic Law in that it 176

would take away from the victims the difference between the compensation based on the value assessed in 1935 and the compensation based on current market value.

3. In constitutional complaints 1 BvR 2460/95 and 1 BvR 2471/95, of which the latter was received by the Federal Constitutional Court on 1 December 1995, complainants IV and V contest § 1.1 sentence 1 of the Equalisation Payments Act to the extent that it states that equalisation payments may only be claimed by natural persons. They assert that such a limitation constitutes a violation of Article 3.1 and Article 2.1 of the Basic Law in conjunction with the principles of a state based on the rule of law and of a social state. 177

[…]. 178-179

IV.

The Federal Ministry of Finance commented on the constitutional complaints on behalf of the Federal Government, and the governments of the federal *Länder* Berlin, Brandenburg, Mecklenburg-West Pomerania, Saxony, Saxony-Anhalt and Thuringia commented on constitutional complaints 1 BvR 2307/94 and 1 BvR 1408/95 in a joint opinion. 180

1. The Federal Ministry stated the following: 181

a) Constitutional complaints 1 BvR 2307/94 and 1 BvR 1408/95 are […] in any case […] unfounded. […]. 182

[…] 183-184

aaa) Article 14 of the Basic Law is irrelevant for assessing the constitutionality of compensation and equalisation payments made under the challenged provisions. The Federal Republic of Germany is not responsible for interventions against property occurring prior to reunification outside of the area of application of the Basic Law. The Ministry also rejected the opinion that the Joint Declaration, the Unification Treaty and the Property Act established compensation claims protected under Article 14 of the Basic Law which were unlawfully reduced by the Compensation and Equalisation Payments Act.

bbb) The Ministry also contended that the general principle of equality before the law as set down in Article 3.1 of the Basic Law was not violated in this case. 186

(1) According to the Ministry, just compensation for all damage inflicted on Germans in former East Germany in the past 50 years is absolutely impossible. […]. 187

(a) If compensation and equalisation payments equivalent to the restitution value were provided for property losses, new injustices would result in comparison to those whose freedom, health, professional advancement and life opportunities had been impaired. Above all, the legislature had to consider the interests of society as a whole in making such a provision, which would necessarily involve extensive costs; these interests would not allow the commitment of considerable portions of the federal bud- 188

get for the compensation of damage not caused by the Federal Republic of Germany in view of the vital responsibilities facing the government in the future.

The Ministry did not dispute that compensation under the Compensation Act is generally less than the current market value of comparable properties. However, it had to be noted with respect to the present cases that most of the complainants were victims of the land reform who had suffered considerable property losses so that due to the degressive reduction required by law the discrepancy between the monetary compensation and the current market value appeared larger than it did in the bulk of compensation cases for expropriation, which more typically involved the loss of one-family houses and apartment buildings. In the case of one-family houses and apartment buildings, the difference in value was much lower partly because the affected properties in respect of which restitution was sought were often in poor condition or encumbered with third-party use rights and partly because the compensation for the loss of such properties was particularly high. 189

[…]. 190-195

(2) To the extent that the complainants who had been the victims of expropriation carried out under occupation law or on the basis of sovereign acts by occupying powers either themselves or through their legal predecessors alleged unequal treatment compared with other groups, they were unable to demonstrate such unequal treatment. 196

[…]. 197

(3) The Ministry also contended that the crediting of the payments for the equalisation of war burdens was unobjectionable. It asserted that in view of the fact that the object of the payment had been to settle damages, those payments had from the beginning been subject to return upon restitution of the properties or the payment of compensation … 201

[…] 202-203

[The] deduction of the interest premium was [also] unobjectionable. This premium was part of the primary compensation. If it were not deducted from the compensation, it would constitute unjustified preferential treatment of the recipients of the interest premium in comparison to those who had not received payments for the equalisation of war burdens. Moreover, the crediting of the interest premium violated neither Article 14 of the Basic Law nor the principle of protection of public confidence, since, like the primary compensation, it had from the beginning been subject to return. 204

[…]. 205

(4) The Ministry argued that the legislature had not been required to enact the land acquisition programme. This programme combined repurchase options for former owners and the privatisation required under the Trust Act. This juxtaposition created apparently comparable groups (e.g. lessees and compensation recipients). In fact, 206

however, the provision concerned different matters. The priority of acquisition requests by lessees in comparison to former owners who were not currently managing the property was the result of extraordinarily controversial deliberations. If lessees had not been guaranteed priority, the land acquisition programme would never have come about. The purpose of giving priority to lessees was to stabilise agricultural enterprises in the new federal *Länder* by inducing them to acquire ownership in the land they managed.

[…]. 207

(5) The Ministry asserted that § 5.2 of the Equalisation Payments Act was also constitutionally unobjectionable. In encumbering certain cultural objects with a 20-year public usufruct, the provision had balanced the interests of the former owners with those of the persons currently authorised to have those objects. The Ministry contended that the general public had a need for individual objects to remain freely accessible or to be made accessible to the general public in the future. 208

bb) The Ministry asserted that constitutional complaint 1 BvR 1120/95 also had no chance of success on the merits. 209

The provisions on compensation under the Nazi Victims Compensation Act did not violate Article 3.1 of the Basic Law. In this case as well, the legislature was not required to provide market value compensation based on its decision to return property expropriated by foreign governments, when possible. Since the damage to be compensated cannot be ascribed to the scope of responsibility of the Federal Republic of Germany, which is bound by the Basic Law, the complainant may not successfully invoke Article 14 of the Basic Law. 210

[…]. 211-213

cc) Finally, the Ministry contended that constitutional complaints 1 BvR 2460/95 and 1 BvR 2471/95 are unfounded. 214

An extension of compensation payments to legal persons was not constitutionally required. Article 14.1 of the Basic Law was irrelevant for this question since the actions to be compensated cannot be ascribed to the scope of responsibility of the Federal Republic of Germany. The limitation of payments to natural persons pursuant to the provisions of the Equalisation of War Burdens Act, the Occupation Damages Act and the Act on Reparations Losses, did not violate Article 3.1 of the Basic Law in conjunction with the principles of a state based on the rule of law and of a social state according to the case-law of the Federal Constitutional Court on these Acts, which may be applied to the contested provision. 215

[…]. 216-217

2. In addition, the governments of the federal *Länder* commented on proceedings 1 BvR 2307/94 and 1 BvR 1408/95 … 218

[…]. 219-225

V.

During the oral hearing held on 11 April 2000, statements were made by the complainants, the Federal Government and the governments of Berlin and the new federal *Länder*. 226

B. – I.

Constitutional complaint 1 BvR 2471/95 is inadmissible since it was not brought, pursuant to § 93.3 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*), within one year of the entry into force of the challenged § 1.1 sentence 1 of the Equalisation Payments Act. 227

[…] 228

[…] Pursuant to Article 13 sentence 2 of the Compensation and Equalisation Payments Act, [that provision] … entered into force on the first day of the third calendar month following promulgation on 30 September 1994, i.e. … at 00:00 on 1 December 1994. Since … the beginning of that day is the relevant date for the beginning of the one-year period pursuant to § 93.3 of the Federal Constitutional Court Act, the period expired in the present case pursuant to § 187.2 in conjunction with § 188.2 2nd alternative of the [West] German Civil Code at the end of 30 November 1995, and was therefore no longer in force when the constitutional complaint was received at the Federal Constitutional Court on 1 December 1995. 229

II.

On the other hand, constitutional complaints 1 BvR 2307/94, 1 BvR 1120/95, 1 BvR 1408/95 and 1 BvR 2460/95 are admissible. […]. 230

[…] 231

Inadmissible, however, is the challenge made by complainants I 3 and 4 that § 2.1 sentence 2 of the Equalisation Payments Act in conjunction with § 4.1 of the Compensation Act violate Article 3.1 of the Basic Law to the extent that a factor of 1.5 is specified for the calculation of compensation for companies whose value has essentially been determined by the value of their properties, and not a factor of 7, as set out in § 3.1 sentence 1 no. 4 of the Compensation Act for independent commercial properties. The complainants have failed to explain in the specificity necessary for a constitutional assessment that, to what extent and why the value of the particularly large and, according to their statements, successful brewery company of their legal predecessor was based on the value of the commercial properties it owned to such an extent that the value of the enterprise was determined by the value of those properties […]. Consequently, constitutional complaint 1 BvR 2307/94 does not satisfy to this extent the substantiation requirements of § 92 in conjunction with § 23.1 sentence 2 clause 1 of the Federal Constitutional Court Act. 232

Also inadmissible is the challenge made in proceedings 1 BvR 1408/95 that in view of the restitution provision for movable property in § 5 of the Equalisation Payments Act, § 1.8 letter a of the Property Act is no longer consistent with the general principle of equality before the law to the extent that that provision excludes retransfer of real estate expropriated under occupation law or on the basis of sovereign acts by occupying powers. Complainants III are to this extent not adversely affected by the challenged provision in § 5 of the Equalisation Payments Act. 233

C.

Constitutional complaints 1 BvR 2307/94, 1 BvR 1120/95, 1 BvR 1408/95 and 1 BvR 2460/95 are unfounded. 234

I.

The primary standard for constitutional review is the general principle of equality before the law set out in Article 3.1 of the Basic Law. Some of the challenged provisions must also be evaluated based on the principles of a social state and of a state based on the rule of law (Articles 20.1 and 20.3 of the Basic Law). On the other hand, the property guarantee set out in Article 14 of the Basic Law is largely unsuitable as a standard for review. 235

1. No duty of the Federal Republic of Germany to provide compensation for injustice committed by a government not bound to follow the Basic Law can be derived from the individual fundamental rights. This is true for the compensation of property damage regardless of whether the damage can be ascribed to a foreign government or to an earlier German government. Consequently, no guidelines can be derived from the fundamental property guarantee in Article 14 of the Basic Law to answer the question as to whether and to what extent the Federal Republic of Germany is required to provide compensation for such injustices (see BVerfGE 41, 126 (150); 84, 90 (125 ff.)). The same is also true for the type of compensation and its individual form. Thus, Article 14 of the Basic Law does not oblige the federal legislature to make compensation for property damage by either returning property expropriated in violation of the rule of law (see BVerfGE 84, 90 (126-127); 94, 334 (348-349)) or by allowing the property's repurchase or by paying compensation for it. 236

2. However, it does not follow that the federal legislature, which is bound by the Basic Law, is free to decide whether to make compensation to those who suffered property losses under another governmental system, whose occurrence, implications and scope are inconsistent with the values of its own constitutional order. 237

The principle of a social state set out in Article 20.1 of the Basic Law requires the state as a rule to share in burdens resulting from misfortunes for which society as a whole is responsible and which affect individual citizens or specific groups more or less randomly. However, it does not follow that such burdens are automatically shifted to the state so that the state would effectively be required to compensate the victims directly in full; instead, the principle of a social state can only give rise to a duty to 238

share the burdens in accordance with a statutory provision. Only such a provision can establish concrete compensation claims for the individual victims (see BVerfGE 27, 253 (270, 283); 41, 126 (153-154); 84, 90 (125)).

How such compensation is to be structured depends on the respective circumstances, particularly the nature and scope of the special burden, and to what degree the shared responsibility of society as a whole is required in the interests of social justice and appears reasonable in the general interest. The legislature has a particularly broad regulatory and interpretive discretion in making this determination (see BVerfGE 13, 39 (43); 27, 253 (270, 283)). This is true both for the type of compensation and for its scope. Thus, the legislature may determine the damage equalisation in accordance with what is possible in view of other financial burdens and the financial requirements for future tasks (see – with particular reference to BVerfGE 27, 253 (270, 283 ff.); 41, 126 (150 ff.) – BVerfGE 84, 90 (125) for compensation payments pursuant to no. 1 sentence 4 of the Joint Declaration). 239

In addition to the social state principle, the rule of law principle affects the individual structure of compensation (see BVerfGE 84, 90 (126)). The fundamental elements of a state governed by the rule of law and the rule of law as a whole must be preserved (see BVerfGE 7, 89 (92-93); 52, 131 (144)). These elements include the concept of substantive justice (see BVerfGE 21, 378 (388); 33, 367 (383); 52, 131 (144-145)). 240

3. Furthermore, the legislature is also bound by the general principle of equality before the law as provided in Article 3.1 of the Basic Law with regard to compensation for injustices for which another government was responsible (see BVerfGE 27, 253 (285); 84, 90 (131)). According to the case-law of the Federal Constitutional Court, Article 135.a.2 of the Basic Law does not release the legislature from this obligation with respect to liabilities of the type specified above (see BVerfGE 84, 90 (128-129)). However, the legislature is allowed a particularly broad evaluative discretion for assessing compensation also with respect to Article 3.1 of the Basic Law (see BVerfGE 13, 31 (36); 13, 39 (43); 84, 90 (130-131)). Consequently, in connection with this regulatory matter, as is generally the case with matters concerning the consequences of the war and the collapse of the National Socialist regime, the legislature must merely comply with the principle of equality before the law in its function of prohibiting arbitrariness (see BVerfGE 15, 126 (150 ff.); 15, 167 (201); 23, 153 (168)). 241

According to the prohibition of arbitrariness, the legislature is prohibited from treating unequally cases which are equivalent in all material aspects. Which elements of variation are sufficiently significant as to justify unequal treatment of a case is generally subject to the decision of the legislature. The legislature's freedom of discretion ends where unequal treatment is no longer consistent with analytical standards based on the concept of fairness, in other words where there are no grounds for statutory distinction due to the thing's own nature or any other objective, plausible grounds (see BVerfGE 9, 334 (337); 38, 128 (134); 83, 1 (23)). 242

II.

Based on these standards, the provisions in § 1.1 and § 3.1 of the Compensation Act challenged by complainant I 1 are not constitutionally objectionable. The constitutional objections raised by complainant I 1 against § 7.1 of the Compensation Act are also not accepted in the final analysis. 243

1. The provisions named do not violate the property guarantee in the Constitution. 244

Since Article 14 of the Basic Law is inapplicable as a standard for assessing compensation for encroachment on property by the German Democratic Republic carried out in violation of the rule of law (see C I 1 above), neither the value attached to private property in Article 14.1 of the Basic Law nor the compensation provision in Article 14.3 of the Basic Law can be used as guidelines for the calculation of compensation under the Compensation Act. 245

However, the allegation that the compensation provisions of the Compensation Act worsened the legal positions of persons whose property was expropriated, as defined in § 1 of the Property Act, under the responsibility of the German Democratic Republic cannot be advanced to substantiate a violation of the property guarantee in the Basic Law. The persons affected by such measures were not entitled to compensation prior to the enactment of the Compensation Act at all so that the entitlement derived from the Compensation Act could not be lower. 246

To the extent that no. 3 letters b and c of the Joint Declaration state that in the event real property is purchased in good faith by third parties, socially acceptable compensation must be made to the former owners by substituting properties of comparable value or through monetary compensation and the former owners and their heirs must be able to opt for compensation instead of exercising their existing rights to retransfer, they are provisions which do not conclusively determine the amount of compensation. This is generally evident from the fact that the provisions of the Joint Declaration were merely benchmarks (see Memorandum to the Unification Treaty, *Bundestag* document 11/7760, p. 355 (377)), which required further specification, in particular, by the legislature. In addition, no. 3 letter c subsection 2 of the Joint Declaration makes explicit reference with regard to the question of the equalisation of increases in value to the necessity for specific provisions; and no. 7 of the Joint Declaration also leaves the retransfer of companies and the planned alternative claim for compensation to more specific statutory provision. 247

The above is also true for determining the principles of compensation in the original version of § 9 of the Property Act. Pursuant to § 9.3, a subsequent law was to specify the details under § 9.2 regarding monetary compensation where compensation through transfer of an alternate property in the value most closely approximating that of the expropriated property is impossible. The fact that § 9.2 of the Property Act was made subject to subsequent legislation also contradicts the assumption that any concrete compensation rights existed prior to the Compensation Act’s coming into force and that these could have been encroached upon by its provisions. Rather, the type 248

and scope of the compensation were as yet undetermined. The legislature rightly assumed this when enacting the Compensation and Equalisation Payments Act (see … *Bundestag* document 12/4887, p. 29 under A II 1.1.1).

2. § 1.1, § 3.1 and § 7.1 of the Compensation Act are also compatible with the principles of a social state and of a state based on the rule of law as set forth in the Basic Law. 249

Admittedly, the Compensation Act does not grant full compensation for property damage for which the German Democratic Republic was responsible (see *Bundestag* document 12/4887, p. 30 under 1.2, and *Bundestag* document 12/7588, p. 35 under 3.). Nevertheless, the compensation payments allowed under the Act are not so low as to be inconsistent with the principles of a state based on the rule of law and of a social state. 250

In assessing compensation for unlawful expropriations, the federal legislature was permitted to take into account that persons in the German Democratic Republic, as in the Soviet occupation zone before it (see in this regard BVerfGE 84, 90 (130-131)), suffered not only property damage in violation of the rule of law, but also suffered numerous types of impairment to other interests, such as life, health, freedom, educational opportunities and professional advancement. Considering the fact that compensation covered unlawful acts also in these areas and considering the cost of German unification otherwise and also considering the fact that those suffering property damage after reunification, unlike victims immediately after the end of the Second World War, generally did not require immediate resettlement aid, the principles of a state based on the rule of law and of a social state can in relation to property damage only justify claims for compensation for particularly grievous wrongs; the compensation must be within the limits of what can reasonably be expected of the polity and at the same time express the solidarity of the legal community bound by the Basic Law with the victims of injustice. The Compensation Act adequately satisfies these requirements through the provision of compensation payments. These payments alone, according to information provided by the Federal Government whose accuracy has not been disputed by the complainants, result in total expenditures of about DM 12.3 billion for the Compensation Fund prior to deductions for the payments for the equalisation of war burdens … 251

3. Nor do the challenged provisions violate Article 3.1 of the Basic Law which prohibits arbitrariness. 252

a) As part of its evaluative discretion and its freedom of drafting, and especially when dealing with compensation, the legislature is largely free to select from a large number of circumstances a few circumstances to be decisive for determining whether treatment is equal or unequal (see BVerfGE 71, 39 (53) with further references). A violation of the principle of equality before the law through a violation of the prohibition of arbitrariness only exists if there are no reasonable grounds for the statutory distinction due to the thing's own nature or any other objective, plausible grounds …The 253

Senate unanimously confirms that there are grounds justifying the unequal financial treatment of persons entitled to restitution as compared to persons who have lost their property entirely.

aa) The legislature itself saw the relevant justification for unequal treatment in the goal pursued through the return of restorable property holdings: the immediate return to reasonable, decentralised, privatised property structures in the new federal *Länder* (see *Bundestag* document 12/7588, p. 35). This goal is a cogent reason which, especially in view of the value attached to private property in Article 14 of the Basic Law, can justify not only the regulatory decision to prefer retransfer to compensation, but also in principle the disadvantages necessarily suffered by those only entitled to compensation. It is not necessary to answer the question of whether this reason alone would be sufficient to legitimise differences in value between restitution in kind and monetary compensation in view of the fact that other possibilities existed for a return to a privatised ownership system in the acceding territory (see e.g. the method of repurchasing the expropriated property at favourable conditions selected in the Wall Real Property Act (*Mauergrundstücksgesetz*) of 15 July 1996 (Federal Law Gazette I p. 980). After all, such differences in value can be justified on other objective, plausible grounds. 254

bb) As stated by the Federal Constitutional Court with respect to the granting of compensation for expropriations carried out under occupation law or on the basis of sovereign acts by occupying powers, when the legislature assesses the amount of compensation payments it may use its discretion to also take into account its financial capacity to make compensation by considering other governmental tasks. Consequently, the legislature may take into account the overall volume of compensation and not just compensation needed for property damage. It must be kept in mind with regard to the relative importance of property damage that other interests were also impaired during the period in question (see C II 2 above). In addition, the legislature may consider the funds necessary for meeting its existing and future responsibilities with respect to reconstruction in the new federal *Länder* (see BVerfGE 84, 90 (130-131)). 255

The above considerations apply in their entirety also to the assessment of compensation payments under the Compensation Act. Thus, in the case of compensation payments, the legislature was permitted to assume that constitutional law does not bind it to compensate property losses by granting compensation whose value is equivalent to that of restitution; this is due to the large number of obligations arising in connection with German reunification and in view of the enormous costs accruing in this regard, which – according to statements made by the Federal Government during the oral hearing – are reflected in government transfer payments from West to East Germany which currently amount to DM 1 trillion; the situation is the same even in the light of Article 3.1 of the Basic Law (see BVerfGE 84, 90 (131)). 256

cc) Another factor against equating compensation and restitution is the special situ- 257

ation in which the legislature found itself during the events which ultimately led to the unification of the German Democratic Republic and the Federal Republic of Germany.

The speed at which political conditions in the German Democratic Republic changed between the fall of the Berlin Wall in November 1989 and accession in October 1990 exceeded expectations. Consequently, during the initial discussions between the two German states (during which many vital decisions were made with regard to their future course), there was neither enough time nor familiarity with conditions in the German Democratic Republic for sufficiently differentiated solutions for each of the tasks needing regulation to be found. At that time, at most only a rough estimate could be made of the effects of the principle of preferring restitution to compensation … as set out in the Joint Declaration of 15 June 1990. The statement made in the Federal Government's opinion that no one at that time could have foreseen the future development is understandable. The Federal Government stated that when the decision had been made in favour of restitution, it had still been assumed that the German Democratic Republic would remain in existence for some time to come. If that had been the case, the real estate market would have developed differently. Therefore, it had been permissible to have assumed that the values of retransfer and compensation would both remain at a low level. In addition, the extent of the bankruptcy of the German Democratic Republic and the costs of reunification had been entirely unforeseeable. 258

As a result, a few years later the legislature found itself through no fault of its own in a situation where it could no longer reverse its decision in favour of restitution (nor did it desire to do so), but where market values, especially those of real estate in the new federal *Länder*, had meanwhile increased to such an extent that market value compensation appeared impossible – both in view of the federal budgetary situation and in view of the goal of providing balanced overall compensation payments – because not enough funds were available. It would be to overlook the unique and difficult political situation in which the fundamental decision was made in favour of restitution and which characterised and continues to characterise the further development of the German unification process, if this decision had compelled the legislature, in spite of its later realisations, to grant full market value compensation; the grant of full market value compensation would lead to unforeseeable consequences in relation to any further claims outside of the scope of the Property Act thereby imposing an excessive burden on the federal budget with negative consequences for other important tasks. In the light of this special political situation, persons entitled to compensation can be expected to endure certain disadvantages in comparison to persons entitled to restitution. 259

dd) This is all the more true as such persons have their property holdings restored “as they stand”, i.e. without taking into account any changes which may have occurred in the period between expropriation and return. In many cases, the returned properties are encumbered with third-party rights or, due to the failure to perform nec- 260

essary repairs to leased buildings, contamination, or for other reasons, are in such a condition that the restitution recipient has to expend a considerable amount of money, time, and effort in order to restore the property to a condition where it satisfies contemporary standards of use. The law does not grant compensation for this (see *Bundestag* document 12/7588, p. 37 regarding § 3.1 sentence 1). Instead, the former owner must bear the loss in value associated with the specified expenditures alone. This is in contrast to the "convenience mark-down" which the recipients of compensation have (see Motsch, *Neue Juristische Wochenschrift – NJW* 1995, p. 2249 (2253)). The term expresses the advantage received by recipients of monetary compensation since they can use the compensation payment economically without any of the expenditures of the types specified above.

ee) Finally, in comparing the values of restitution and monetary compensation, it cannot be ignored that in accordance with the will of the legislature persons entitled to restitution sometimes suffer losses in value – even irrespective of legal encumbrances and the actual condition of the returned property – so that the actual value of the compensation received is considerably lower than the market value of the respective property. Pursuant to § 121 of the Property Law Adjustment Act, the user of a property, a building or a structure may after its retransfer request from the owner the creation of a hereditary building right or the acceptance of a purchase offer under the conditions specified in subsections 1 and 2 of that provision (see the reference in § 121.1 sentence 1 of the Property Law Adjustment Act to Chapter 2 of the Act, and, thus, to § 15.1 in conjunction with §§ 32 *et seq.* and §§ 61 *et seq.* of the Property Law Adjustment Act). The economic effect of this provision, considering that the regular interest on the hereditary building right is half of the interest otherwise due for equivalent use and that the purchase price is generally half of the land value (see §§ 43.1 and 68.1 of the Property Law Adjustment Act), is that the user and the property owner each receive one half of the land value after property law adjustment is made (see … *Bundestag* document 12/5992, pp. 63-64). The land value is to be determined based on the respective market value (see *ibid.*). Thus, if the user exercises its existing options, the property owner will retain only half of the property's market value after restitution. 261

b) For these reasons, both the satisfaction of compensation claims through the issue of bonds in accordance with § 1.1 of the Compensation Act and the regulation in § 3.1 of the Compensation Act concerning the basis for calculating compensation for real property as well as agricultural and forestry property are not arbitrary. 262

aa) In accordance with § 1.1 of the Compensation Act, compensation claims are satisfied through the issue of transferable bonds from the Compensation Fund, which are redeemable in five equal annual instalments from 2004 on and with interest accruing from that time. As a result, recipients under the Compensation Act admittedly do not receive the full compensation owing to them until well after the Act comes into force, and even further after the occurrence of the loss for which compensation is to be made. However, this arrangement is constitutionally unobjectionable. 263

That compensation under the Compensation Act is not due immediately but only at a time in the near future is appropriate as a compromise between the interest of the person entitled to receive compensation in receiving it as quickly as possible and the financial capabilities of the state; it also constitutes a reasonable delay as far as the person entitled to receive compensation is concerned. Admittedly, the challenged provision which selects a form of compensation (the issue of bonds) that is not constitutionally objectionable can mean that older recipients will not be able to fully enjoy the compensation to which they are entitled during their lifetimes. However, it is not constitutionally objectionable since the bonds are transferable pursuant to § 1.1 sentence 2 of the Compensation Act, i.e. not only can a claim to the nominal amount be transferred by will, but the bonds can also be sold to third parties before maturity discounted to the applicable current value. Therefore, a constitutionally unjustified, discriminatory, unequal treatment of the younger generation *vis-à-vis* the older generation cannot be found in § 1.1 of the Compensation Act. 264

bb) Nor are there identifiable constitutional objections with respect to the regulation of the basis for calculating compensation in § 3.1 sentence 1 of the Compensation Act. 265

Under that provision, the basis for calculating the compensation for real property, including owned buildings, as well as for agricultural and forestry property, is the last value assessed prior to the loss multiplied by a multiplier which is differentiated into five groups based on the type of property, e.g. 3 for forestry land and 20 for undeveloped properties. The purpose of this provision is to base the amount of the compensation on the fictitious market value of the respective property at reunification on 3 October 1990 (see *Bundestag* document 12/7588, pp. 32, 35, 37). Both the differentiation of the basis for calculation based on property types and the use of 3 October 1990 as a deadline are sufficiently justified by objective considerations of the legislature. 266

In using the last value assessed prior to the loss, which is in most cases the value assessed in 1935, § 3.1 sentence 1 of the Compensation Act bases the compensation amount on the quality of the property at the time of the event which triggered the duty to pay compensation … This is appropriate as a starting point for calculating compensation since the differences in assessed values reflect the variety in the kinds of properties; it is also within the bounds of the legislature's evaluative discretion. The same is true for the multiples defined by the legislature. They express in a simplified fashion the increase in value experienced by individual properties as a result of German unification on 3 October 1990, whilst taking into account their typical condition; according to the submissions of the Federal Government, they are based on estimates made by tax specialists in connection with the introduction of a property levy which was originally planned as part of the Compensation and Equalisation Payments Act (see *Bundestag* document 12/4887, pp. 13 ff.). The present constitutional complaint proceedings have provided no indications for a conclusion that the multiples determined in that Act might be incorrect or inappropriate. 267

Furthermore, it is also not constitutionally objectionable for the legislature to base the compensation amount on conditions at reunification. This is the case regardless of whether the amount of compensation due under the Compensation Act is comparable to the value of the property obtained by a person receiving restitution in kind under the Property Act. Even if the two amounts are comparable in principle, the legislature was not obliged to base the assessment of compensation on the property values at a certain date after reunification. After all, in addition to the considerations and aspects which justify differentiating between the value of compensation and restitution on the merits (see C II 3a above), there are also good reasons why the compensation amount should be based specifically on the value of the expropriated property as of 3 October 1990. 268

As of that date, unimpeded retransfer of restorable property holdings became possible. Furthermore, a real estate market subject to the laws of supply and demand began to re-emerge after the end of the price freeze on land prices. Moreover, basing compensation on the values assumed at reunification ensured that the compensation which has to be paid for expropriations carried out in violation of the rule of law during the period between 1949 and 1990 is not too far removed from the low compensation amounts paid for lawful expropriations in the German Democratic Republic, which were not increased after German unity was restored (see on this aspect *Bundestag* document 12/4887, p. 30 under 1.2). These grounds are objectively justifiable and are, therefore, sufficient to defend the choice of 3 October 1990 as the cut-off date against the charge of arbitrariness. 269

c) § 7.1 of the Compensation Act is also entirely compatible with Article 3.1 of the Basic Law. An opposite finding cannot be reached pursuant to § 15.4 sentence 3 of the Federal Constitutional Court Act because the votes in the Senate are equal. 270

The challenged provision subjects compensation claims to a degression which begins at a 30 per cent reduction for amounts above DM 10,000 up to DM 20,000, reaches an 80 per cent reduction for amounts of over DM 100,000 DM up to DM 500,000 and leads to a mark-down of 95 per cent for amounts above DM 3 million. Thus, the higher the value of the expropriated property, the higher the discrepancy between the compensation and the actual value. 271

aa) In the opinion of Judges Kühling, Jaeger, Hohmann-Dennhardt and Hoffmann-Riem, which is the decisive opinion in this respect pursuant to § 15.4 sentence 3 of the Federal Constitutional Court Act, the difference in value does not violate the prohibition of arbitrariness. 272

The legislature did not have to base the compensation amount primarily on the market value of the lost property; it could also consider other aspects of compensation law central to the alleviation of the consequences of the war and the partition of Germany. Examples of such are the relationship between the compensation in this case and other compensation payments as well as the performance of additional reconstruction work which it considered necessary in connection with German unification. 273

In particular, the legislature did not have to treat restitution recipients as the only comparative group relevant for compensation recipients. Compensation is also claimed by other groups of persons who have suffered injustices that cannot be reversed by restoring the original situation. Therefore, the legislature was entitled to include other victims of injustice whose freedom, health or property had been impaired in its compensation concept. Accordingly, it was entitled to consider the relationship between the monetary compensation in this case and other compensation payments in calculating the compensation amount. In addition, it was entitled to take precautions to ensure that the additional responsibilities created by German unification which were necessary in its eyes could be met despite limited funds. The grounds cited to justify the treatment of compensation recipients (see C II 3a above) are of such significance that the enacted provision does not conflict with general notions of justice even when compared to the treatment of restitution recipients.

aaa) The legislature was guided by significant goals aimed at promoting the public good as well as notions of justice in accordance with the principle of the social state when with regard to the funding of tasks associated with German unification it gave priority to projects orientated towards the public good such as the establishment of a public infrastructure in the transportation, information and education sectors and the combating of unemployment in connection with the privatisation of state-owned enterprises. In doing so, it wanted to improve the future opportunities of all the citizens who suffered under the unjust regime of the German Democratic Republic and promote an equal standard of living to that in the old *Länder*. Especially for the sake of these goals, the legislature was permitted to reduce the total budgetary funds allocated to compensation recipients to an affordable total. 274

bbb) The legislature is not bound by the fact that it originally intended there to be a smaller difference in value. 275

This intention was based on the notion that the cost of equalisation would be offset by a property levy which would be borne by restitution recipients (see *Bundestag* document 12/4887, p. 13 ff.; see *Bundestag* document 12/7588, p. 35 under 2.). This levy was also meant to create a certain balance between the advantages and disadvantages of restitution recipients in relation to previous owners entitled to compensation (see *Bundestag* document 12/4887, p. 29 under A I). However, during the legislative process such serious objections to this property levy were raised by the *Bundesrat* and at the hearings of the *Bundestag*'s Finance Committee and Law Committee (minutes no. 57 and no. 86 of 15 and 16 September 1993), that the legislature felt compelled to abandon this idea (see *Bundestag* document 12/7588, p. 32). 276

After the failure of this project, the legislature was not constitutionally obliged to adhere to the previously desired value relationship between restitution and compensation and to allocate tax revenue to close the financing gap resulting from the loss of the revenue from the property levy. In view of the financial costs of unification, which were anyway high and whose vastness became apparent at this date at the latest, it 277

is highly probable that such adherence would have resulted in the cancellation of funding for other tasks associated with the reconstruction process. In resolving a distribution problem of the present magnitude, a first step made even before accession consisting of a fundamental decision in favour of restitution cannot set standards for all ensuing steps, if it later becomes clear that the consequences of that decision cannot as originally intended be placed in a financially tolerable relationship to the other tasks which must be performed in the course of reunification. A self-imposed commitment by the legislature of the scope asserted by complainant I 1, who invokes the discrepancy between the market value and the compensation amount, would unreasonably restrict the flexibility the government needs for its financial policy in this historically unique situation. Finally, reducing the discrepancy between the situation of restitution recipients and that of compensation recipients would delay the overall approximation of the standards of living in the old and new federal *Länder*. This would contradict the goal in Article 3.1 in conjunction with Article 20.1 of the Basic Law, expressed in Article 72.2 of the Basic Law, of offering all citizens equal living conditions.

ccc) The idea of assessing the compensation amount not just on the basis of the value of the lost property but on the basis of other injustices suffered as well is also the product of seminal notions of justice on the part of legislature. 278

This can be seen by comparing the group of compensation recipients with the group of persons whose properties in the German Democratic Republic were legally expropriated under GDR law. The latter have received compensation which is even further below the market value of the restored properties after the opening of the real estate market than the compensation granted under the Compensation Act. 279

When compensation for expropriations is assessed, consideration should in this particular context also be given to citizens of the German Democratic Republic who did not lose property but suffered injuries to their freedom and health due to state injustice or were subjected to criminal prosecution or were denied opportunities for education and professional development in line with their abilities as a result of politically motivated discrimination and persecution. The loss of these legal interests, which are constitutionally protected to the same degree as property, is no less serious than the loss of property. However, as an examination of the legal situation reveals, compensation for such losses is only possible to a minor extent. Finally, compared to the inhabitants of the old *Länder* nearly all of the inhabitants of the German Democratic Republic suffered considerable financial disadvantages as a consequence of living in a managed economic system and due to the fact that because of the actual conditions [in the German Democratic Republic] they were unable to accumulate a significant amount of private assets in the entire course of their working lives. 280

By its very nature, discrimination of such kind cannot be compensated. Instead, it can only be counteracted through government-funded development projects with the object of creating an equal standard of living and equal opportunities throughout Germany. In view of the compensation and distribution problems arising in the aftermath 281

of German unification, a reduction of the compensation payable for a loss of property to the amount specified in the challenged provisions cannot be regarded as arbitrary.

ddd) Finally, in providing for a degression of compensation payments in § 7 of the Compensation Act, the legislature ensured for reasons of social policy that the lower the value of the lost property was, the higher the compensation would be. As with the legislation relating to the equalisation of burdens, the framers of this provision were guided by the idea that even if less affluent persons necessarily suffer a lower property loss than affluent persons, they are more heavily affected by that loss and therefore require greater solidarity from the state. The goal of this provision, namely to achieve social justice in the assessment of compensation, has a constitutional basis in the principle of the social state in Article 20.1 of the Basic Law (see BVerfGE 27, 253 (292)) and is, therefore, sufficient to justify the discrepancies caused by § 7.1 of the Compensation Act between the value of the lost property and the compensation amount. The principles established in the aforementioned decision on the payment of compensation during the post-war period for occupation and war damage in the Federal Republic of Germany are also constitutionally unobjectionable in the current second phase of the compensation. 282

The manner in which the legislature has defined the individual degression levels also cannot be regarded as arbitrary based on notions of justice. The legislature provided for greater differentiation in the case of lower property values, with smaller increases and degression rates, thus making particularly sure that socially acceptable compensation would be achieved for that category [of loss]. In addition, through the method of also dividing up high-value properties and assigning them to individual degression levels, the legislature ensured that each person receives half-value compensation for a certain basic sum of his or her lost property up to about DM 90,000. This method is also based on notions of justice which do not breach the prohibition of arbitrariness in Article 3.1 of the Basic Law. Moreover, even restored property may be encumbered to such an extent that the recipients retain only a small fraction of its original value … 283

bb) In the opinion of the other four judges, Vice-President Papier and Judges Haas, Hömig and Steiner, the provision in § 7.1 of the Compensation Act does not meet the requirements of the prohibition of arbitrariness in every respect. 284

aaa) Although, as stated above …, it is not constitutionally objectionable if the values of restitution and compensation under the Compensation Act are not fully equivalent. The aspects which justify unequal treatment on the merits are of such significance that the value of compensation may be set far below the amount given in kind to restitution recipients based on a standardised analysis. However, it is constitutionally indispensable for the monetary value of the compensation in the most important area of practice to have a real connection with the actual value of the expropriated and non-restorable property. 285

(1) The principle of restitution, as provided for by the Property Act following the deci- 286

sion made in the Joint Declaration, and the payment of compensation through the issue of bonds, as provided for in the Compensation Act, both serve to provide compensation for property losses suffered under the rule of the German Democratic Republic that show no differences of any kind with respect to the type and severity of the cases. Thus, the circumstances which must be classified in each case belong to one and the same "life category". Therefore, the two cases must be treated equally, in principle, notwithstanding the legislature's freedom to make an independent determination as to the essential "life circumstances" which are decisive for equal or unequal treatment … (see BVerfGE 9, 338 (349)).

This fact does not just require that compensation be based on the market value of 287
the non-restorable property; the legislature has fulfilled this requirement in a constitutionally unobjectionable fashion by setting the cut-off date as 3 October 1990 in § 3.1 sentence 1 of the Compensation Act (see C II 3b bb above). In addition, however, there must be an actual recognisable connection between the value of the compensation and the market value in most of the typical compensation cases. Only if and to the extent that this is the case, is compensation in the form of [monetary] compensation consistent with a method of analysis based on notions of justice and is the unequal treatment not so serious as to no longer be constitutionally acceptable (see BVerfGE 9, 334 (337); 91, 93 (115)).

(2) Such a connection between the value of the compensation and the value of resti- 288
tution does not exist if the compensation amount in the specified cases is less than 50 per cent of the market value selected by the legislature. On the other hand, compensation equalling at least half of the market value for typical property losses, including cases of slight to intermediate loss, must be regarded as objectively justifiable and, as a result, constitutionally unobjectionable. It takes into account, although just to a sufficient extent, all of the aspects which generally justify the value of monetary compensation pursuant to the Compensation Act remaining below the value of compensation through restitution in kind (see in this regard C II 3a above). In particular, compensation in this amount takes into account that many properties which are returned to their previous owners are in poor condition or encumbered with third-party rights so that their real value is in some cases considerably reduced. In addition, such a provision fits, all in all, into the overall framework of socially acceptable compensation for those requiring compensation in the course of reunification, since its fundamental approach is consistent with that of the provision in § 121 of the Property Law Adjustment Act, which requires restitution recipients to provide the returned property to users at half its value at the request of the users as part of the property law adjustment […].

The fact that the value of compensation is only required to be recognisably connect- 289
ed with the value of restitution in cases of slight to intermediate loss is justified by social considerations. On the model of the legislation on the equalisation of war burdens, § 7.1 of the Compensation Act is based on the principle of "social degression", which assumes that the less affluent, who in the majority of cases have suffered smaller losses, are generally more heavily affected by those losses than more afflu-

ent persons, although the absolute value of the affluent persons' losses may be higher (see Bundestag *document 12/4887, p. 36 and BVerfGE 27, 253 (292)). Unlike the latter, the former are particularly dependent on the solidarity and support of the state. The legislature was justified in making this the guiding principle for its decisions within the framework of the Compensation Act. No grounds are apparent which could have prevented the legislature from implementing the principles of social justice (see BVerfGE 27, 253 (292)) in this case as well as part of its broad regulatory discretion.*

bbb) In the light of these principles, the degression in § 7.1 of the Compensation Act only partially meets the requirements of Article 3.1 of the Basic Law. 290

The reductions provided for in that regulation for compensation amounts of up to and including DM 50,000 are unobjectionable. These reductions do not reduce the compensation below half of the market value as of 3 October 1990 for non-restorable properties. In fact, the amount of compensation is actually well above market value in some cases even for amounts above DM 10,000; thereafter the degression begins to reduce the compensation amount. Even for the degression levels between DM 50,000 and DM 100,000, compensation is still higher in most cases than half of the market value as of October 1990. Only for amounts of about DM 90,000 and over does the degression result in the compensation amount falling below this limit. Such a reduction can be adequately justified, although just to a sufficient extent, in the case of compensation totalling more than DM 500,000 on the basis of the aforementioned social objectives of the degression rule. 291

However, in the range between DM 90,000 and DM 500,000, there are no clear objective grounds which could justify the sharp cuts in the compensation paid to the persons concerned which are associated with the degression. This range includes primarily properties which constitute the typical compensation cases, such as one-family houses, two-family houses or small apartment buildings, for which it is necessary both on grounds of social solidarity and constitutionally to compensate loss with a tangible compensation payment. Consequently, compensation may not fall below half of the market values assumed for 3 October 1990 in these cases. However, if the compensation amount does fall below that limit, the provision fails to meet its goal of providing socially balanced compensation and is, therefore, inconsistent with the principle of justice. Consequently, the provision is arbitrary in terms of Article 3.1 of the Basic Law. 292

This assessment is not changed by the fact that the cases affected by the degression rules for amounts from DM 90,000 up to and including DM 500,000 are particularly numerous, so that the financial significance of such compensation would be not insignificant if the legislature were to amend the provision to conform with constitutional requirements. Admittedly, also financial considerations may be proper and adequate for countering the allegation of arbitrariness (see BVerfGE 3, 4 (11); consistent case-law). However, this principle does not apply without exceptions, not even as a general rule (see BVerfGE 87, 1 (46); 93, 386 (402)), and it certainly is not applicable 293

to cases of unequal treatments of the present scope.

Regardless of this circumstance, the legislature is not required to fill deficits in the provision by increasing the amount of compensation which has been assessed as too low. Instead, to the extent the property required for this purpose is actually available, it may give the persons concerned the general option of acquiring such property at preferential conditions, thus generally following the path it already took for agricultural and forestry land in accordance with the land acquisition programme in § 3 of the Equalisation Payments Act. These properties may include not only properties whose return is not desired by the previous owners, but also replacement land of another kind. 294

III.

The provisions of the Equalisation Payments Act challenged in proceedings 1 BvR 2307/94, 1 BvR 1408/95, 1 BvR 2460/95 and 1 BvR 2471/95 are also consistent with the Basic Law. 295

1. § 1.1 sentence 1 of the Equalisation Payments Act does not violate either Article 3.1 of the Basic Law or the principles of a social state and of a state based on the rule of law by providing only for equalisation payments to natural persons, their heirs or the heirs of their heirs while legal persons are excluded from the scope of that Act without exception. 296

a) The fact that natural persons are thus advantaged over legal persons is sufficiently objectively justified by the legislature's goal with respect to the principle of a social state … that the state should share in the special burdens of those who suffered uncompensated expropriations carried out under occupation law or on the basis of sovereign acts by occupying powers in the period between 1945 and 1949 in the Soviet occupation zone (see *Bundestag* document 12/4887, p. 37). It is consistent with this social goal for government equalisation payments to focus on natural persons (see – with respect to the Equalisation of War Burdens Act – already in BVerfGE 41, 126 (183)). Social equality can only be required in the relationship with the original subjects of fundamental rights, not in the relationship between natural persons and legal entities formed by those subjects of fundamental rights in order to better preserve their common interests (see BVerfGE 35, 348 (357); 41, 126 (183)). 297

Objections in this respect are even less justifiable considering the fact that § 1.2 of the Equalisation Payments Act expressly provides for equalisation payments in cases where the property of legal persons is expropriated. In accordance with sentence 1 of that provision, an “intervention under occupation law or on the basis of sovereign acts by occupying powers” exists with respect to the expropriation of a company or a cooperative if the expropriation leads to a reduction in the value of the shares in the company or the business assets of the members of the cooperative. In addition, sentence 4 of the provision stipulates that if the property of a family foundation or association with its registered office in the acceding territory is expropriated, the persons 298

holding shares in those foundations or associations are to be granted equalisation payments as if they had been jointly entitled to the property of the family foundation or association. Thus, the natural persons who are behind the legal person or who are involved in the legal person through a close personal connection are entitled to equalisation payments. In making this provision, the legislature has taken into account the personal connection to the property. The legislature is not required to extend the provisions of § 1.2 sentences 1 and 4 of the Equalisation Payments Act to other legal persons in respect of which no such connection is found, regardless of the scope of responsibilities of the respective legal persons.

b) That § 1.1 sentence 1 of the Equalisation Payments Act treats legal persons less favourably than § 1.1 of the Compensation Act is also not constitutionally objectionable. 299

By defining recipients in terms of the Property Act, § 1.1 of the Compensation Act grants a claim to compensation to legal as well as natural persons. This conclusion is based on the fact that legal persons are entitled to restitution in accordance with § 2.1 sentence 1 of the Property Act in addition to natural persons and partnerships. Thus, legal persons have in principle a claim to the retransfer of expropriated property just like natural persons. If restitution is not possible on the grounds specified in § 1.1 sentence 1 of the Compensation Act, or not desired, both groups are entitled to request compensation in accordance with the Compensation Act, i.e. both groups are treated equally with respect to their secondary claims as well. From the outset, the Equalisation Payments Act had no such scope because the reversal of expropriations carried out under occupation law or on the basis of sovereign acts by occupying powers in the period between 1945 and 1949 is excluded in principle (see also *Bundestag* document 12/4887, pp. 37-38). Thus, § 1.1 sentence 1 of the Equalisation Payments Act deals with a different state of affairs than § 1.1 of the Compensation Act and is, therefore, also in this respect consistent with Article 3.1 of the Basic Law and the principles of a social state and of a state based on the rule of law. 300

2. The objections lodged by the complainants against § 2.1 sentences 1 and 2 of the Equalisation Payments Act in conjunction with § 1.1, § 3.1 and § 3.4, § 7.1 and § 8.1 of the Compensation Act are also not accepted. 301

a) § 2.1 sentences 1 and 2 of the Equalisation Payments Act in conjunction with § 1.1, § 3.1, § 7.1 and § 8.1 of the Compensation Act is consistent with both the property guarantee in Article 14.1 of the Basic Law and the principles of a social state and of a state based on the rule of law. 302

aa) With regard to the constitutionality of § 2.1 sentences 1 and 2 in conjunction with § 1.1, § 3.1 and § 7.1 of the Compensation Act, it is largely sufficient to refer to the statements relating to the Compensation Act (see C II 1 and 2 above). Since the Joint Declaration does not contain any standards for equalisation payments (see BVerfGE 84, 90 (129-130)), no claims were created prior to the entry into force of the Compensation and Equalisation Payments Act which could have been reduced in violation of 303

Article 14.1 of the Basic Law. Nor are any violations of the principles of a social state and of a state based on the rule law apparent. The Federal Government has estimated the equalisation expenses of the Compensation Fund as DM 2.4 billion … In view of this high amount, whose accuracy has not been questioned by the complainants, and in the light of the fact that responsibility for the property losses lies with the Soviet occupying power, it cannot be denied that the Federal Republic of Germany has adequately performed its obligation as a state based on principles of a social state and of the rule of law to provide reasonable compensation for the hardships suffered.

bb) The deduction of the primary compensation received by equalisation recipients in accordance with the Equalisation of War Burdens Act from the basis for calculation reduced in accordance with § 7 of the Compensation Act pursuant to § 2.1 sentence 2 of the Equalisation Payments Act in conjunction with § 8.1 of the Compensation Act is also not subject to constitutional objections. 304

The only result of this deduction is that the final basic amount of the primary compensation and any interest premiums are credited to the equalisation amount computed in accordance with §§ 2 to 7 of the Compensation Act. The deduction does not require recipients to return the primary compensation they received. Thus, recipients of primary compensation are not deprived of any legal position which may be protected under Article 14 of the Basic Law. Moreover, the primary compensation was, from the very beginning, made subject to the reservation (see § 342.2 of the Equalisation of War Burdens Act in the original version of 14 August 1952, Federal Law Gazette I p. 446) that the property for whose loss this compensation was granted would not be returned to the original owner. Under these circumstances, recipients could not have relied on the fact that they would be allowed to retain the primary compensation in accordance with the Equalisation of War Burdens Act if damage equalisation was provided at a later date. 305

b) § 2.1 sentences 1 and 2 of the Equalisation Payments Act in conjunction with § 1.1, § 3.1 and § 3.4, § 7.1 and § 8.1 of the Compensation Act is also in accordance with Article 3.1 of the Basic Law. 306

aa) The provisions on the type and amount of equalisation payments in § 2.1 sentences 1 and 2 of the Equalisation Payments Act in conjunction with § 1.1, § 3.1 and § 7.1 of the Compensation Act are not arbitrary. 307

aaa) To the extent that objections are made that there is no objective justification for the value of compensation received by equalisation recipients in accordance with these provisions being far below that of compensation in accordance with the Property Act, reference is made to the statements with respect to the Compensation Act (see under C II 3 above). 308

The equal treatment of compensation and equalisation recipients is also not subject to constitutional objections. As demonstrated by the reference in § 2.1 sentences 1 and 2 of the Equalisation Payments Act to the relevant provisions of the Compensa- 309

tion Act, the legislature decided to base the type and amount of compensation and equalisation payments on the same principles (see also *Bundestag* document 12/4887, p. 30 under 1.2). It was free to do so within its broad decision-making discretion. No objective grounds are apparent which would have justified setting monetary compensation in accordance with the Equalisation Payments Act differently than in accordance with the Compensation Act. Notwithstanding the major injustice which often marked the carrying out of expropriations under occupation law or on the basis of sovereign acts by occupying powers, the constitutional assessment of compensation provisions on the type and amount of compensation can be no different in the area of application of the Equalisation Payments Act than in the area of application of the Compensation Act.

bbb) Furthermore, the provisions named on the type and amount of equalisation payments are not inconsistent with the prohibition of arbitrariness in Article 3.1 of the Basic Law due to improper discrimination against equalisation recipients in comparison with the other groups cited by the complainants. 310

To the extent that it is alleged in this regard that persons whose property was expropriated under occupation law or on the basis of sovereign acts by occupying powers have since been rehabilitated by the Russian authorities and have received favourable treatment in comparison with recipients under the Equalisation Payments Act, this objection concerns matters which are so different, both factually and legally (see § 1.7 of the Property Act), that equal treatment of the two groups is not required under the Basic Law. Moreover, the statements made above apply with respect to the differences in value between restitution and monetary compensation (C III 2 b aa aaa in conjunction with C II 3). 311

The objection that equalisation recipients were subjected to unjustifiable discrimination in comparison with persons entitled to claims based on the lump sum compensation agreement concluded with the United States of America in 1992 … is also unfounded. Whether and to what extent the persons in that comparison group are actually entitled to higher compensation than recipients under the Equalisation Payments Act can be left undecided. Even if this were the case, discrimination would be justified because the Federal Government according to its unrefuted submission was unable to avoid concluding a lump sum compensation agreement in the course of the Two-Plus-Four Talks, and it is not apparent that the government's assessment of the negotiating situation in this regard was incorrect (see BVerfGE 94, 12 (35)). 312

An unjustified discrimination against recipients under the Equalisation Payments Act in comparison with political parties is also not apparent. To the extent that the complainants refer in this regard to § 20.b of the [GDR] Act on Parties and Other Political Associations, it is not a regulation which is of relevance for the test of arbitrariness. That regulation merely concerns the fiduciary administration of property which previously belonged to political parties and mass organisations in the German Democratic Republic and does not contain provisions with respect to compensation law. For this 313

reason, the relevant provision remains § 1.8 letter a of the Property Act for this property as well, to the extent that it was expropriated under occupation law or on the basis of sovereign acts by occupying powers.

Objectively unjustified unequal treatment also does not exist in relation to corporations under public law to which property holdings are retransferred under property allocation law (see in particular Article 21.3 and Article 22.1 sentence 7 of the Unification Treaty). Such retransfer is admittedly made in some cases to reverse uncompensated property transfers from one administrative body to another made in the Soviet occupation zone and the German Democratic Republic which was sometimes made in violation of the principle of the rule of law (e.g. regarding Article 21.3 of the Unification Treaty, the Memorandum to the Unification Treaty, *loc. cit.*, p. 365). The primary goal is, however, to give public administrative bodies a share in public property after reunification so as to enable them to perform their duties […]. This goal, which applies to property allocation in general, justifies different treatment of these responsible bodies in comparison with compensation recipients under the Equalisation Payments Act. 314

Finally, a constitutionally inadmissible discrimination against this group cannot be seen in the fact that its members are not given the option of being awarded 50 per cent of the current value of the property in question as are persons entitled in accordance with the Property Law Adjustment Act … The purpose of the property law adjustment is not to provide compensation for state injustice, but to balance the opposing private interests of property owners and users in the course of incorporating legal relationships which were created under the German Democratic Republic into the property law system of the [West] German Civil Code (see BVerfGE 98, 17 (23-24)). This goal is so far removed from that of the Equalisation Payments Act that recipients under that Act may be treated differently to recipients under the Property Law Adjustment Act. 315

bb) § 2.1 sentence 2 of the Equalisation Payments Act in conjunction with § 3 of the Compensation Act also withstands a test of arbitrariness based on the standard of Article 3.1 of the Basic Law to the extent that § 3.4 sentence 1 of the Compensation Act states that long-term liabilities which had an economic connection to the property within the meaning of § 3.1 sentence 1 of the Compensation Act at the time of the loss or were secured *in rem* using such property are to be deducted from the basis for calculation at their value stated on that date. 316

aaa) In making this provision, the legislature was guided by the notion that only the net value of a property can determine the amount of compensation (see *Bundestag* document 12/4887, p. 33 regarding § 3.4). The provision is not constitutionally objectionable even considering the fact that pursuant to its sentence 2, the nominal amount of the previous title counts as the value stated for the deduction in accordance with § 3.4 of the Compensation Act, i.e. the liabilities are deducted in full. The legislature was justified in basing the overall compensation on conditions at the time of reunifica- 317

tion. It was within its constitutive discretion to provide for the crediting of the old long-term liabilities in full when setting the fictitious market values as of 3 October 1990.

bbb) However, the deduction of the “liabilities” within the meaning of § 3.4 of the Compensation Act from the basis for calculating compensation in full results in the unequal treatment of the persons concerned in comparison with restitution recipients under the Property Act. For the latter, the redemption amount due for loss of rights *in rem* resulting from the nationalisation of the returned property pursuant to § 18.1 sentence 2 of the Property Act in conjunction with § 2.1 sentence 1 of the Mortgage Redemption Ordinance (*Hypothekenablöseverordnung*) of 10 June 1994 (Federal Law Gazette I p. 1253) is to be converted into German marks at a ratio of 2:1 […]. However, this unequal treatment is adequately justified by the fact that the provisions in §§ 18 to 18.b of the Property Act and § 3.4 of the Compensation Act relate to different matters. 318

The determination of the redemption amount in accordance with the Property Act involves the determination of a real monetary amount which the person entitled to retransfer is obliged to pay in accordance with § 18 of the Property Act. Conversion of the redemption amounts which are listed in marks of the German Democratic Republic into German marks at a rate of 2:1 is in accordance with the conversion rule which was established for comparable liabilities in Article 10.5 of the Treaty of 18 May 1990 Creating a Monetary, Economic and Social Union Between the Federal Republic of Germany and the German Democratic Republic (*Vertrag über die Schaffung einer Währungs-, Wirtschafts- und Sozialunion zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik,* Federal Law Gazette II p. 537). The liabilities within the meaning of § 3.4 of the Compensation Act, on the other hand, are merely a computational amount for the determination of the value of the loss at the time of reunification for which compensation must be made (see *Bundestag* document 12/7588, p. 37 regarding § 3.1 sentence 1 and § 3.4). It is comprehensible and within the limits of the broad evaluative discretion which the legislature has in this context for it in view of this difference not to adhere to its original intention of limiting the deduction of long-term liabilities from the basis for calculation to 50 per cent of the property value at the time of the loss (see *Bundestag* document 12/4887, p. 8). 319

The court upheld the constitutionality of § 2.1 sentence 2 of the Equalisation Payments Act in conjunction with § 3.4 sentence 1 of the Compensation Act, even in relation to restitution recipients in accordance with the Property Act, by a vote of 7 to 1 (C III 2b bb bbb above). 320

ccc) Contrary to the complainants' submissions, § 3.4 of the Compensation Act cannot result in the deduction of amounts which no longer encumber the affected property, e.g. because they were paid to creditors after the loss. Liabilities under § 3.4 of the Compensation Act which were not cancelled when the relevant property was nationalised may only be credited to the compensation amount if they also actually reduce the value of the property at the time of the crediting. For this reason, in order to avoid 321

imposing a double burden on compensation recipients, which would be contrary to the principle of equality, redemption payments or other grounds for cancellation must be taken into account even if the payments were made or the grounds arose only after the time of the loss.

The wording of § 3.4 of the Compensation Act does not exclude such an interpretation, which is in conformity with constitutional requirements. It is true that sentence 1 of that provision bases the original existence and amount of the relevant liabilities, as well as the securities *in rem* for those liabilities, on the time of the loss. Also Sentence 2 refers to the “nominal value of the previous title”. At the same time, however, the provision allows redemption payments and other grounds for cancellation to be shown without specifying a definite time or temporal limit. As was declared by the Federal Government at the oral hearing, it would contradict the legislature’s intention if such grounds within the context of § 3.4 of the Compensation Act were only considered if they existed at the time of the loss. 322

cc) The provision in § 2.1 sentence 2 of the Equalisation Payments Act in conjunction with § 8 of the Compensation Act on the deduction of primary compensation granted in accordance with the Equalisation of War Burdens Act from the basis for calculation reduced in accordance with § 7 of the Compensation Act also does not violate the prohibition of arbitrariness in Article 3.1 of the Basic Law. 323

aaa) Due to the deduction, whose purpose it is to avoid double compensation payments for one and the same injustice (see *Bundestag* document 12/2170, p. 11 regarding no. 3), there is no discrimination without material grounds against equalisation and compensation recipients in comparison with restitution recipients pursuant to the Property Act. 324

In accordance with § 8.1 sentence 1 of the Compensation Act, the subject of the deduction is the repayment amount determined by an unappealable decision of the compensation administration in accordance with the provisions of the Equalisation of War Burdens Act. That amount is determined in accordance with § 349 of the Equalisation of War Burdens Act as published on 2 June 1993 (Federal Law Gazette I p. 845), last amended on 16 December 1999 (Federal Law Gazette I p. 2422), which regulates the repayment of compensation under the Equalisation of War Burdens Act in the event of subsequent damage equalisation. Repayment of the primary compensation in the case of restitution in accordance with the Property Act and the deduction of that payment from the basis for calculation reduced in accordance with § 7 of the Compensation Act in the case of monetary compensation are based on the same provisions. The fact that pursuant to § 8.1 sentence 2 of the Compensation Act the basis for calculation reduced in accordance with § 7 of the Compensation Act and communicated to the compensation administration by the competent authorities is considered a “cash damage equalisation payment” within the meaning of § 349.3 of the Equalisation of War Burdens Act, so that the assessed damage has been compensated in full in accordance with sentence 4 of that provision, can be explained by the 325

function compensation and equalisation payments have of making conclusive compensation for such damage as required by the principle of the social state (see the reasons for the *Bundesrat*'s bill for a 32nd amendment to the Equalisation of War Burdens Act, 12 January 1995, *Bundestag* document 13/188, p. 5 for article 1 no. 8).

bbb) A violation of Article 3.1 of the Basic Law also cannot be established on the grounds that the payments for the equalisation of war burdens previously received can only be deducted from the reduced basis for calculation in accordance with § 7 of the Compensation Act in the amount determined as damage equalisation and not in the amount which served the social integration of the victims. 326

In accordance with § 2.1 sentence 2 of the Equalisation Payments Act and § 8.1 sentence 1 of the Compensation Act, only primary compensation granted in accordance with the Equalisation of War Burdens Act is credited to the compensation in accordance with the Equalisation and Compensation Acts. The sole purpose of that compensation in accordance with § 243 of the Equalisation of War Burdens Act was to compensate property damage specified in that provision. Accordingly, primary compensation is not a means of subsistence protection (see Decisions of the Federal Administrative Court (*Entscheidungen des Bundesverwaltungsgerichts* – BVerwGE), Order of 20 July 1981 – BVerwG 3 B 6.79 – (Buchholz 427.3 § 248 of the Equalisation of War Burdens Act no. 3)). Since the exclusive function of the primary compensation was therefore to provide monetary compensation for assessed damage, there can on the other hand be no constitutional objections to deducting this compensation in full from the equalisation and compensation payments, whose purpose is also to compensate damage, in accordance with § 8.1 of the Compensation Act. Moreover, those affected by the deduction in accordance with § 8 of the Compensation Act will retain the economic value they created with that compensation in addition to the credited compensation amounts … This is another reason not to grant them full compensation in accordance with the Equalisation and Compensation Acts in addition to the primary compensation. 327

ccc) Furthermore, it does not constitute a violation of Article 3.1 of the Basic Law that primary compensation pursuant to § 8.1 sentence 1 of the Compensation Act is deducted from compensation in accordance with the Equalisation and Compensation Acts even if the recipient paid a property levy in accordance with §§ 16 *et seq*. of the Equalisation of War Burdens Act for property that the recipient retained after the end of the war. All those meeting the legal requirements were obliged to pay this levy. It is not apparent to what extent Article 3.1 of the Basic Law could require that this payment duty be considered within the scope of § 8.1 of the Compensation Act to the benefit of those who received primary compensation in accordance with the Equalisation of War Burdens Act, thus allowing them to receive double compensation. 328

ddd) Finally, § 8.1 sentence 1 of the Compensation Act is constitutionally unobjectionable to the extent that, also in conjunction with § 2.1 sentence 2 of the Equalisation Payments Act, it provides for the crediting of the “interest premium” along with the 329

deduction of the primary compensation.

Victims were granted a right to primary compensation in accordance with § 250.1 sentence 1 of the Equalisation of War Burdens Act with the resulting basic amount. Pursuant to § 250.3 of the Equalisation of War Burdens Act, this amount was supplemented by an interest premium of one per cent for each quarter begun. According to the case-law of the Federal Administrative Court, the main purpose of this interest premium was not to compensate recognised property damage in any individual case. Instead, it was interpreted as fair compensation for the fact that victims entitled to the premium did not receive payments due under the Equalisation of War Burdens Act as soon as that Act came into force, but generally only substantially later, and, in addition, very often received compensation for equivalent losses at very different times. Thus, the interest premium represented compensation for the delay experienced by those whose primary compensation was not granted earlier due to administrative or financial reasons (see BVerwGE 105, 110 (112-113) with further references). At the same time, it restored economic equal treatment to this group in comparison with those who had received the equalisation payments they were entitled to at an earlier date. This effect is admittedly reversed if the return of the interest premium along with the final basic amount of the primary compensation is requested pursuant to § 349.4 sentences 1 and 3 of the Equalisation of War Burdens Act or if the premium is deducted from the basis for calculation reduced in accordance with § 7 of the Compensation Act as provided in § 2.1 sentence 2 of the Equalisation Payments Act and § 8.1 sentence 1 of the Compensation Act in conjunction with the Equalisation of War Burdens Act. Nonetheless, doing so is not constitutionally objectionable as far as the prohibition of arbitrariness in Article 3.1 of the Basic Law is concerned. 330

As stated comprehensibly by the Federal Administrative Court with respect to the wording, legal categorisation as well as meaning and purpose of § 250.3 of the Equalisation of War Burdens Act, the interest premium represents an annex to the claim for the final basic amount of the primary compensation. Therefore, the premium shares the legal fate of the final basic amount in the event the loss is subsequently compensated through retransfer of the property or another form of compensation (see BVerwGE 105, 110 (113)). However, the deduction of this interest premium is also materially justified because otherwise the difference between those who were entitled to claims under the Equalisation of War Burdens Act in the past and those who, like the legal predecessor to complainant I 5, were as residents of the German Democratic Republic not able to assert claims for the payments for the equalisation of war burdens, would be even greater. The former retain the full economic value which they created with the final basic amount of the primary compensation and the interest premium despite the deduction. The latter, however, are unable to assert claims for equalisation of war burdens, even subsequently, although this is not constitutionally objectionable in view of the legislature's broad legislative discretion (see in this regard […] *Bundestag* document 11/7817, p. 4 on subject area D). Under these circumstances, it is immediately apparent why the legislature did not want to make the differ- 331

ence between these two groups even greater by not crediting the interest premium.

This decision was passed by a vote of 6 to 2. 332

3. Also unfounded are the objections made to § 2.1 sentence 3 of the Equalisation Payments Act and § 7.2 sentence 1 of the Compensation Act with reference to the general principle of equality before the law. In accordance with those provisions, several claims for equalisation payments in accordance with the Equalisation Payments Act, several claims for compensation in accordance with the Compensation Act and claims within the scope of both Acts are to be combined for the degression in accordance with § 7.1 of the Compensation Act in conjunction with § 2.1 sentence 2 of the Equalisation Payments Act. These provisions ensure that persons entitled who have lost *one* valuable property holding are treated equally in comparison with persons entitled who have lost several properties whose aggregate value equals that of the one property. The specified provisions have no added significance beyond this […]. With respect to the assessment of the provision on the social degression itself, reference is made to the statements under C II 3 c. 333

4. The objections to the land acquisition programme pursuant to § 3 of the Equalisation Payments Act are also unsuccessful. This programme violates neither the principle of the rule of law nor the prohibition of arbitrariness pursuant to § 3.1 of the Basic Law. 334

a) The fact that the legislature included in the land acquisition programme “new organisers” (see § 3.2 sentence 1, § 3.8 sentence 1 letter b of the Equalisation Payments Act) and certain legal persons (see § 3.2 sentence 2 of the Equalisation Payments Act) in addition to the compensation recipients in accordance with the Compensation Act (see § 1.1 sentence 6 of the Compensation Act) and the Equalisation Payments Act does not violate Article 3.1 of the Basic Law. 335

In enacting the land acquisition programme, the legislature is pursuing two different goals. On the one hand, it is a compensation programme for those whose agricultural or forestry property was expropriated in violation of the rule of law under occupation law or on the basis of sovereign acts by occupying powers between 1945 and 1949 and under the responsibility of the German Democratic Republic after its founding. Those affected are permitted to re-establish their agricultural or forestry enterprises at privileged conditions in accordance with § 3.1 to § 3.4, § 3.7, § 3.8 and § 3.10 of the Equalisation Payments Act. In addition, they may acquire agricultural and forestry land at privileged conditions even without establishing a self-managed enterprise in accordance with § 3.5 of the Equalisation Payments Act. On the other hand, the land acquisition programme is an independent programme to promote agriculture and forestry in the new federal *Länder* whose object it is to facilitate the acquisition of property by agricultural and forestry enterprises (see already in this regard BVerfGE 94, 334 (349-350)). 336

The Basic Law also does not prevent the legislature from pursuing this goal since 337

previous owners receiving preferential treatment under the land acquisition programme have no claim to receive compensation in the form of subsidised reacquisition of agricultural and forestry land to the exclusion of others (see BVerfGE 84, 90 (126-127, 131); 94, 334 (348-349)). Moreover, creating new ownership structures for agriculture and forestry in eastern Germany in order to establish a functional foundation for the preservation and development of those sectors in the new federal *Länder* constitutes a legitimate goal.

b) It is also consistent with Article 3.1 of the Basic Law that the compensation programme contained in § 3 of the Equalisation Payments Act is limited to agricultural and forestry land. This limitation is also adequately justified by the goal – combined with compensation – of promoting these economic sectors, which are of particular importance for the acceding territory. Furthermore, according to the statements of the Federal Government, this is the only area where there is adequate potential for reacquisition of the expropriated property (see Bundestag document 12/7588, p. 35 under 3. and p. 41 with regard to § 3.1). 338

c) That the ownership share after a privileged land acquisition in accordance with § 3.1 of the Equalisation Payments Act may not exceed 50 per cent of the total agriculturally used land pursuant to § 3.3 sentence 4 of the Equalisation Payments Act also is not objectionable with respect to Article 3.1 of the Basic Law. Admittedly, one effect of this restriction is that larger enterprises may, under certain circumstances, be able to acquire more land under privileged conditions than smaller ones. However, this is justified by the object of the contested provision to approximate the relative amount of land owned and leased by privileged enterprises to the operating structure of full-time holdings in the old federal *Länder* […]. In this manner, distortions of competition in the agricultural sector can be prevented which would otherwise arise between the old and new federal *Länder*. 339

d) A violation of Article 3.1 of the Basic Law is also not indicated by the objections to § 3.5 of the Equalisation Payments Act. 340

That in accordance with sentence 2 of that provision agricultural land may only be acquired in the amount of up to half the equalisation in accordance with § 2.1 sentence 1 of the Compensation Act or, at maximum, up to 300,000 yield points, and forestry land may only be acquired up to the amount of the residual equalisation is not objectionable, if only because § 3.5 of the Equalisation Payments Act, as stated above …, does not serve the establishment and promotion of agricultural and forestry businesses in the acceding territory, but instead aims to enable low-price replacement of property by the previous owners. This limitation is not arbitrary in view of the limited availability of the land which is eligible for this purpose. Sentence 5 of § 3.5 of the Equalisation Payments Act, which states that no claim exists to particular land, is also not objectionable, since such a claim cannot be established constitutionally (see BVerfGE 84, 90 (126-127); 94, 334 (348-349)). That previous owners whose forestry property was expropriated may not acquire agricultural land in accordance with sen- 341

tence 6 of the provision in conjunction with § 3 sentence 2 of the Land Acquisition Ordinance is based, according to the Federal Government's declaration at the hearing, on the objectively comprehensible consideration that agricultural land should not be used to compensate the loss of less valuable forestry property. Finally, § 3.5 sentence 10 of the Equalisation Payments Act, under which the purchase option of a community of heirs may be transferred to a single member or divided among several members, obviously aims to expand the flexibility of such communities and their members. This cannot be regarded as an irrelevant and thus arbitrary provision.

e) In the final analysis, § 3.6 sentence 1 of the Equalisation Payments Act also gives no cause for constitutional objections. 342

The contested provision, under which the buyer involved in land acquisition in accordance with § 3.5 of the Equalisation Payments Act must declare to the lessee his or her willingness to extend existing leases up to a total term of 18 years, serves the legitimate goal of providing planning certainty for the lessees concerned in the new federal *Länder*. In principle, this justifies the restrictions on the buyer which are associated with the provision despite the lengthy lease term both with respect to the principle of the rule of law in Article 20.3 of the Basic Law and with regard to Article 3.1 of the Basic Law. However, the possibility cannot be automatically excluded that the lessee will make use of the provision even when he or she no longer requires its protection, e.g. since the lessee no longer uses the leased space to manage his or her business. In cases of this type, it is the task, if necessary, of the generally competent courts to prevent abuse and to help the owner's interests triumph over the interests of the lessee which are no longer worthy of protection. The wording of the law and the framers' intent do not contradict the constitutional application of the provision in this sense. 343

f) The contested provisions on privileged acquisition of forestry land in § 3.8 of the Equalisation Payments Act also pass the arbitrariness test. 344

Article 3.1 of the Basic Law does not oblige the legislature to enable privileged acquisition of both agricultural and forestry land to persons entitled under the land acquisition programme. Therefore, it is not constitutionally objectionable that § 3.8 sentence 1 of the Equalisation Payments Act restricts the option to acquire forestry land to natural persons who do not acquire agricultural land in accordance with § 3.1 to § 3.7 of the Equalisation Payments Act. It is also unobjectionable that in accordance with § 3.8 sentence 4 of the Equalisation Payments Act, those entitled to acquire forestry land are required to present a forest operating concept for the desired land which guarantees orderly forest management. In view of the land acquisition programme's goal of promoting agriculture and forestry in the new federal *Länder* […], it is justifiable for it to automatically exclude from assistance those for whom the orderly management essential for the goal of the provision is not guaranteed beyond a doubt because of their failure to present such a concept, thus discriminating against them in comparison with those who are willing and able to present a forest operating concept. 345

g) In addition, the provision in § 3.10 of the Equalisation Payments Act is neither in violation of the principle of the rule of law nor inconsistent with the prohibition of arbitrariness. 346

In accordance with sentence 1 of that provision, agricultural and forestry land acquired in accordance with § 3 of the Equalisation Payments Act may not be sold prior to the expiration of 20 years without a permit from the agency competent for the privatisation. Pursuant to sentence 2, a permit may only be issued if the sale proceeds exceeding the acquisition price are passed on to the legal successor of the Trust Agency. The purpose of these provisions is to prevent speculative purchases … This also qualifies as a reasonable, objective, axiomatic regulatory goal, which can in principle justify the sale restrictions affecting the owner in spite of the long period of time for which that restriction applies. However, it would be objectionable as the result of being outside the scope of the regulation if the owner would be required to pay over the proceeds in excess of the original purchase price to the legal successor of the Trust Agency even in cases of hardship, e.g. in the event he or she sold the acquired land and abandoned agricultural operations due to illness because the owner would then not be able to receive compensation e.g. for investments made to increase the value of the property or lost interest profits. However, the provisions on the land acquisition programme do not necessitate such an application of the law and the associated economic losses for the buyer. Instead, hardships for the owner in this regard not covered by the purpose of the law can be avoided via constitutional interpretation and application of the relevant provisions, i.e. through an expanded interpretation of the hardship clause in § 12.8 of the Land Acquisition Ordinance by the competent agencies, including the courts. It is not apparent that this would conflict with the regulatory intent of the framers of the legislation. 347

5. Finally, the objections that § 5.2 sentences 1 and 2 of the Equalisation Payments Act violates the principle of the rule of law in Article 20.3 of the Basic Law and the general principle of equality before the law pursuant to Article 3.1 of the Basic Law to the extent that under that provision movable cultural objects intended for public exhibition but not included in an assessed value remain available for public use and research free of charge for a period of 20 years after their retransfer pursuant to § 5.1 of the Equalisation Payments Act and the usufructuary may request continuation of that public usufruct in return for adequate compensation are without merit. 348

a) This provision is sufficiently clear and definite and is, therefore, not objectionable because it violates the requirement based on the principle of the rule of law that a legal provision must be clear and definite. 349

The requirement based on the principle of the rule of law that a legal provision must be clear and definite does not oblige the legislature to provide precise, ascertainable standards for each matter regulated. However, the legislature is required to enact provisions as clearly and definitely as possible based on the unique nature of the matter being regulated and with due consideration of the purpose of the provisions (see 350

BVerfGE 49, 168 (181); 78, 205 (212)). The intensity of the provision's impact on those affected by the provision must also be considered in determining whether it is sufficiently clear and definite in an individual case (see BVerfGE 49, 89 (133)). Those subject to the provision must reasonably be able to recognise whether the factual requirements exist for the legal consequence expressed in the legal provision (see BVerfGE 37, 132 (142); 59, 104 (114)). It is sufficient in this regard if this can be determined by interpreting the applicable provision with the aid of recognised rules of interpretation (see BVerfGE 21, 209 (215); 79, 106 (120)).

Based on these principles, § 5.2 of the Equalisation Payments Act does not encounter any serious objections with respect to the requirement based on the principle of the rule of law that a legal provision be clear and definite. The concept of “cultural objects” is no longer restricted to the meaning of that term in the Act on the Protection of German National Treasures from Migration (*Gesetz zum Schutz deutschen Kulturgutes gegen Abwanderung*) of 6 August 1955 (Federal Law Gazette I p. 501), as provided in the government draft for a Compensation and Equalisation Payments Act (see Article 2 § 3.2; *Bundestag* document 12/4887, p. 13) and the resolution recommended by the Finance Committee of the Bundestag (see Article 2 § 6.2; *Bundestag* document 12/7588, p. 14), but is instead to be interpreted more broadly. As shown by the commentary on § 5.2 of the Equalisation Payments Act in the relevant literature (see [e.g.] Hellmann, in: Fieberg/Reichenbach/Messerschmidt/Neuhaus […] [*Gesetz zur Regelung offener Vermögensfragen*], § 5 *AusglLeistG*, marginal nos. 80 ff. (version: March 1996); […]; Weskamm, in: Kimme, Offene Vermögensfragen, § 5 *AusglLeistG,* marginal nos. 50 ff. (version: October 1997); …), the regulatory content of that provision can be determined using standard methods of interpretation. The same is true with respect to the preconditions which must exist for a cultural object to be intended for public exhibition in terms of § 5.2 sentence 1 of the Equalisation Payments Act and when the 20-year use period pursuant to that provision begins. 351

b) In substantive terms as well, § 5.2 sentences 1 and 2 of the Equalisation Payments Act does not violate the principle of the rule of law. It does not violate Article 3.1 of the Basic Law either. 352

aa) The encumbrance of cultural objects within the scope of § 5.2 sentence 1 of the Equalisation Payments Act with a free public usufruct serves to balance the interests of the previous owners of these objects and those of the new federal *Länder* in whose territory the cultural objects had been designated for public exhibition in the past. Although the previous owners are to regain possession of their property pursuant to § 5.1 of the Equalisation Payments Act, the property is only to be returned in a manner which ensures that the objects concerned remain accessible to the public and that the museums and public collections where most of those objects were previously located are not “emptied” all at once (see Hellmann, *loc. cit.*, § 5 *AusglLeistG*, marginal no. 77). The fact that no compensation for use is due for a period of 20 years makes evident the legislature's goal of reducing the financial burden on the usufructuaries. In view of the cultural importance which the objects falling within the scope of § 5.2 sen- 353

tence 1 of the Equalisation Payments Act have for the new federal *Länder* and the residents of those *Länder* and in view of the financial bottlenecks in public budgets in the acceding territory which exist to this day, these goals are adequate to constitutionally justify imposing a financial burden on the owners of cultural objects intended for public exhibition and discriminating against such owners in comparison with owners of other restorable movable property. This is true despite the term of 20 years set by § 5.2 sentence 1 of the Equalisation Payments Act on the free public usufruct.

Admittedly, this period of time is long and the ownership restrictions associated with the usufruct are considerable. In receiving restitution, the owner essentially reacquires only a formal legal title to the property. The private benefit of the property and the fundamental freedom of disposition, the distinguishing marks of ownership (see BVerfGE 98, 17 (35); 101, 54 (74-75)), are denied to him or her for a long period of time since cultural objects which are encumbered with the free public usufruct cannot be used by the owner himself or herself, yield no profit and may not be sold for all intents and purposes. 354

On the other hand, it must be kept in mind that owners of the affected cultural objects had neither title to such objects nor any associated rights of use and exploitation in the period prior to reunification. They could hardly have expected that these rights would ever be restored. Moreover, the legislature was not obliged to enact legislation for the return of cultural objects. Therefore, having decided on the principle of retransfer of movable property in § 5.1 of the Equalisation Payments Act, it was entitled to make those objects accessible to the previous owners subject to the provision that the owners would only be granted a claim for restitution of the property encumbered with a free public usufruct for a term of 20 years. Possible increases in value resulting from the cultural objects remaining dedicated to public or research purposes are the exclusive property of the owner. In addition, the owner has the option in accordance with § 5.2 sentence 4 of the Equalisation Payments Act of requesting an end to the usufruct if the cultural object has not been made available to the public for more than two years. Thus, the period of 20 years in accordance with § 5.2 sentence 1 of the Equalisation Payments Act can be considerably shortened in this manner in an individual case. In view of this aspect as well, the provision appears constitutionally justified, although just to a sufficient extent. 355

The decision was passed by a vote of 6 to 2. 356

bb) It is also not objectionable that pursuant to § 5.2 sentence 2 of the Equalisation Payments Act the usufructuary may request continuation of the usufruct after 20 years in return for adequate compensation provided the intended use specified in § 5.2 sentence 1 of the Equalisation Payments Act still applies. However, it would be inconsistent with the principle of the rule of law and the prohibition of arbitrariness if the provision could only be understood in such a manner that the usufructuary could continue the usufruct by unilateral declaration, i.e. against the will of the owner (see Weskamm, *loc. cit.*, § 5 *AusglLeistG* marginal no. 109). In that case the encumbrance 357

associated with the public usufruct would no longer be reasonable for the owner despite the compensation for continued use in view of the fact that § 5.2 sentence 2 of the Equalisation Payments Act does not specify any temporal limitation at all for the usufruct.

However, the provision may be interpreted in a manner in conformity with constitutional requirements without conflicting with the wording or clearly recognisable intent of the provision so that the usufructuary may only request continuation of the usufruct in return for adequate compensation from the owner if the latter consents in a contract. Under this interpretation, § 5.2 sentence 2 of the Equalisation Payments Act merely gives the usufructuary a right to commence negotiations with the object of continuing the usufruct at reasonable conditions. According to this interpretation it is primarily dependent on the will of the owner whether he or she is prepared to waive direct ownership of the cultural object after 20 years in the interests of the general public, and, if so, in return for how much compensation. This interpretation would again fully take into account the private benefit of the property and the owner's fundamental right to freely dispose of his or her property. If the usufructuary is interested in continuing the usufruct, he or she must notify the owner of this intent in timely fashion before the expiration of the 20-year usufruct period so that an agreement on continuation of the usufruct can take effect at the end of the period as seamlessly as possible. If the deadline is exceeded in any individual case in the course of negotiations between the parties and an agreement is not reached on extending the usufruct, § 5.2 sentence 2 of the Equalisation Payments Act applies with respect to the amount of the compensation for the period after the deadline. 358

IV. 359

§ 2 sentence 2 and § 3 sentence 1 of the Nazi Victim Compensation Act in conjunction with § 8 of the Compensation Act, which are challenged in proceedings 1 BvR 1120/95 and 1 BvR 1408/95, are also constitutional. 360

1. The constitutional objections to § 2 sentence 2 of the Nazi Victim Compensation Act are unfounded. 361

a) The provision does not violate the property guarantee in Article 14.1 of the Basic Law. 362

In accordance with § 2 sentence 2 of the Nazi Victim Compensation Act, the amount of compensation for recipients of compensation under the Nazi Victim Compensation Act is set, for properties whose assessed value was determined, at four times the most recent assessed value prior to the loss. This provision does not encroach upon property rights which recipients would have been entitled to before the Act came into force. Compensation to victims of Nazi persecution is not a subject of the Joint Declaration of the two German governments, which does not establish any claims in any case (see C II 1 above). Moreover, there is no basis for legal claims by this group of people which the Nazi Victim Compensation Act could have fallen short of. 363

The Federal Chancellor assured the President of the Conference on Jewish Material Claims against Germany in a letter of 6 September 1990 in the following terms: 363

In principle, property expropriated between 1933 and 1945 is to be returned if still possible. The Act on the Settlement of Unresolved Property Issues provided for in the Unification Treaty contains a provision corresponding with the restitution in kind that is provided for by the laws of the Allied Powers which are applicable in the Federal Republic of Germany […]. In the event restitution […] is impossible for legal or factual reasons, the damage compensation law to be enacted will ensure that victims are compensated as they would be in accordance with the restitution laws applicable in the Federal Republic of Germany (cited from Motsch, in: Motsch/Rodenbach/Löffler/Schäfer/Zilch, … [*Entschädigungs- und Ausgleichsleistungsgesetz*], marginal no. 5 before *NS-VEntschG*). 364-365

Accordingly, the Federal Government declared to the governments of the Three Powers in an exchange of notes on 27/28 September 1990 (Federal Law Gazette II p. 1386) under no. 4 letter c subsection 4 that the Federal Restitution Act (*Bundesrückerstattungsgesetz*) and the Federal Compensation Act (*Bundesentschädigungsgesetz*) would be extended to the territory of the German Democratic Republic. To this end, additional provisions would be necessary to take into account conditions in that territory. Consequently, this obligation under international law to enforce Allied restitution law in the acceding territory was not associated with any specific individual claims in a particular amount. Such claims could only be established with the additional provisions yet to be made. 366

b) § 2 sentence 2 of the Nazi Victim Compensation Act is also in keeping with the prohibition of arbitrariness pursuant to Article 3.1 of the Basic Law. 367

aa) The aforementioned obligation under public international law and the circumstance that compensation for victims of Nazi persecution was also to be approximated to payments in accordance with the lump sum compensation agreement between the governments of the Federal Republic of Germany and the United States of America of 13 May 1992 … (see Motsch, in: Motsch/Rodenbach/Löffler/Schäfer/Zilch, *loc cit.*, marginal no. 26 before *NS-VEntschG* (edition: 1995)) explain the fact that compensation under the Nazi Victim Compensation Act is assessed based on principles fundamentally different from those of the Compensation and Equalisation Payments Acts. 368

aaa) The starting point for compensation was the obligation assumed by the German government *vis-à-vis* the Three Powers to base the assessment of compensation on the principles of Allied restitution law and the Federal Restitution Act (see in this regard and below Motsch, in: Motsch/Rodenbach/Löffler/Schäfer/Zilch, *loc. cit.*, § 2 *NS-VEntschG* marginal no. 10 (edition: 1995)). Recipients in the Soviet occupation zone and, later, in the German Democratic Republic, were supposed to be placed in the same position as if they had received the compensation in West Germany, i.e. as if they had received the replacement value of the expropriated property as of 1 April 369

1956. This goal, together with the separate intention of basing compensation on the average compensation due to recipients in accordance with the lump sum compensation agreement with the United States of America, led the legislature to double the applicable assessed value of properties in accordance with § 2 sentence 2 of the Nazi Victim Compensation Act. Finally, by doubling the compensation amount once again, to four times the respective assessed value, the legislature sought to take into account interest, i.e. the fact that compensation to victims of Nazi persecution was not paid in the acceding territory from the beginning in 1956, as it was in West Germany, but only in the years after reunification.

bbb) This calculation provision is not objectionable from the point of view of equality before the law. Its use of the standardised multiple of four admittedly has the effect, for example, that unimproved properties are valued considerably less than is the case within the scope of the Compensation and Equalisation Payments Acts with a factor of 20 to be used in accordance with § 3.1 sentence 1 no. 5 of the Compensation Act and in conjunction with § 2.1 sentence 2 of the Equalisation Payments Act. Moreover, it cannot be excluded that the value of compensation determined in accordance with § 2 sentence 2 of the Nazi Victim Compensation Act will remain below the current market value of restorable property. However, both these circumstances are adequately justified on material grounds. 370

When assessing circumstances which occurred 50 years or more before the enactment of its legislation, as in the present case, the legislature has a particularly broad evaluative and regulatory discretion in determining compensation for injustices committed by a government not bound by the Basic Law. Therefore, as part of its authority to consolidate, categorise and generalise (see in this regard generally BVerfGE 17, 1 (23); 98, 365 (385)), it may enact far-reaching uniform laws. It is reasonable to expect any associated hardships and apparent injustices to be borne by those affected. This is certainly the case if the compensation which the legislature otherwise provides is more favourable for the recipients than compensation for other injustices. 371

This is the case in relation to compensation in accordance with the Nazi Victim Compensation Act. Unlike compensation under the Compensation and Equalisation Payments Acts, such compensation is granted in cash pursuant to § 1.1 of the Nazi Victim Compensation Act and is due when the respective approval notice becomes unappealable. In accordance with § 2 sentence 3 clause 2 of the Nazi Victim Compensation Act, long-term liabilities in terms of § 3.4 of the Compensation Act are not deducted from the amount calculated in accordance with § 2 sentence 2 of the Nazi Victim Compensation Act at their value at the time of the loss; instead, liabilities arising in the period between 15 September 1935 and 8 May 1945 are not deducted at all and other liabilities are deducted at half their nominal value at the time of the loss, subject to documentation that a greater percentage of the liabilities was a result of persecution. Finally, unlike compensation in accordance with the Compensation and Equalisation Payments Acts, compensation paid to victims of Nazi persecution is not subject to degressive reduction; no reference is made to § 7 of the Compensation Act 372

in §§ 1 to 3 of the Nazi Victim Compensation Act. Due especially to the latter reason, compensation in accordance with the Nazi Victim Compensation Act is in most cases substantially higher than compensation in accordance with the Compensation Act and equalisation payments in accordance with the Equalisation Payments Act; this is evidenced in the still undisputed statement of the Federal Government.

However, even if the compensation nevertheless does not equal the current market value of the non-restorable property in an individual case, the provision is not constitutionally objectionable. For the four judges who consider § 7.1 of the Compensation Act entirely consistent with Article 3.1 of the Basic Law (see C II 3c aa above), this is evident from the fact that in their view, even within the scope of § 2 sentence 2 of the Nazi Victim Compensation Act, the value of the compensation is not comparable to the market value of the restorable property. The other four judges come to the same conclusion based on the court's unanimous view that the value of the property at issue may also be assessed in a constitutionally unobjectionable fashion based on the market value at the time of reunification … In the opinion of those judges, one half of that value represents the minimum amount which still bears an adequate, recognisable relationship to the real value of the expropriated property and meets the requirements of Article 3.1 of the Basic Law … This amount is generally reached under the Nazi Victim Compensation Act, in particular because of the non-inclusion of a degressive reduction in the compensation granted under that Act. 373

bb) Moreover, § 2 sentence 2 of the Nazi Victim Compensation Act is not inconsistent with Article 3.1 of the Basic Law because it discriminates against claimants under the Nazi Victim Compensation Act in comparison with owners of improved properties used by third parties which are the subject of claims under the Property Law Adjustment Act. As stated above …, the property law adjustment does not constitute compensation for previous state injustice, but a reconciliation of interests between property owners and users as part of the transition of legal relations created under the German Democratic Republic to the real property law of the German Civil Code. On the other hand, compensation in accordance with the Nazi Victim Compensation Act constitutes compensation for injustice done to the victims or their legal predecessors under the rule of the Nazi regime. This difference in legal goals adequately justifies the different legal consequences of the two Acts. 374

c) § 2 sentence 2 of the Nazi Victim Compensation Act also does not violate Article 3.2 sentence 1 of the Basic Law. That provision's special prohibitions of discrimination are not affected by § 2 sentence 2 of the Nazi Victim Compensation Act. Contrary to the argumentation of complainant II, compensation granted to victims of Nazi persecution is not determined based on the Jewish faith of the recipients within the meaning of Article 3.3 sentence 1 of the Basic Law. Instead, § 2 sentence 2 of the Nazi Victim Compensation Act applies to all individuals, regardless of their faith, who qualify as victims of Nazi persecution by meeting the requirements specified in § 1.1 of the Nazi Victims Compensation Act in conjunction with § 1.6 of the Property Act. 375

2. Finally, § 3 sentence 1 of the Nazi Victim Compensation Act is not constitutionally objectionable to the extent that in conjunction with § 8 of the Compensation Act, it also calls for the deduction of the primary compensation received in accordance with the Equalisation of War Burdens Act from the compensation due to recipients under the Nazi Victim Compensation Act. No special rules apply to this group of persons in this regard. Therefore, the provision can be justified by referring to the statements made above relating to the deduction of the primary compensation from compensation in accordance with the Equalisation and Compensation Acts (see C III 2 a bb and b cc). 376

Papier Kühling Jaeger

Haas Hömig Steiner

Hoffmann-Riem

Bundesverfassungsgericht, Urteil des Ersten Senats vom 22. November 2000 - 1 BvR 2307/94, 1 BvR 2471/95, 1 BvR 2460/95, 1 BvR 1408/95, 1 BvR 1120/95

Zitiervorschlag BVerfG, Urteil des Ersten Senats vom 22. November 2000 - 1 BvR 2307/94, 1 BvR 2471/95, 1 BvR 2460/95, 1 BvR 1408/95, 1 BvR 1120/95 - Rn. (1 - 376), http://www.bverfg.de/e/rs20001122_1bvr230794en.html

ECLI ECLI:DE:BVerfG:2000:rs20001122.1bvr230794