H e a d n o t e

to the order of the First Senate of 21 July 2010

- 1 BvR 611/07 -

- 1 BvR 2464/07 -

The unequal treatment of marriages and registered civil partnerships in the Gift and Inheritance Tax Act (*Erbschaftsteuer- und Schenkungsteuergesetz* - ErbStG) in the version effective until 31 December 2008 is incompatible with Article 3.1 of the Basic Law (*Grundgesetz* - GG).

FEDERAL CONSTITUTIONAL COURT

- 1 BvR 611/07 -

- 1 BvR 2464/07 -

IN THE NAME OF THE PEOPLE

**In the proceedings on
the constitutional complaints**

1. of Mr P...

- authorised Attorney Markus Danuser,
Kaiser-Wilhelm-Ring 27-29, 50672 Cologne -

I. directly against

a) a) the order of the Federal Finance Court (*Bundesfinanzhof*)

of 1 February 2007 - II R 43/05 -,

b) the summary decision of the Federal Finance Court

of 8 November 2006 - II R 43/05 -,

c) the judgment of the Cologne Finance Court

of 29 June 2005 - 9 K 1041/03 -,

II. indirectly against

§ 15.1, § 16.1 no. 1, § 17, and § 19 of the Gift and Inheritance Tax Act

(*Erbschaftsteuergesetz* – ErbStG)

- 1 BvR 611/07 -,

2. and of Mrs W

- authorised

Attorney Ursula Rohr,
of the Law Firm of Ute Bünnemann, Ursula Rohr
Gartenstrasse 6, 26122 Oldenburg -

I.directly against

the order of the Federal Finance Court of 20 June 2007 - II R 56/05 -,

II.indirectly against

§ 15.1, § 16.1 no. 1, § 17, and § 19 ErbStG

- 1 BvR 2464/07 -

the Federal Constitutional Court – First Senate -

with the participation of

Justices Kirchhof (Vice-President),

Hohmann-Dennhardt,

Bryde,

Gaier,

Eichberger,

Schluckebier,

Masing, and

Paulus

held on 21 July 2010:

1. **§16.1 of the Gift and Inheritance Tax Act in the version published on 27 February 1997 (Federal Law Gazette (*Bundesgesetzblatt*) I p. 378), is, to the extent it affects registered civil partnerships, incompatible with Article 3.1 of the Basic Law (*Grundgesetz* - GG) from the effective date of the Act on the Termination of Discrimination of Same-Sex Couples: Civil Partnerships (*Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften*) of 16 February 2001 (Federal Law Gazette I p. 266) until the effective date of the Act to Reform Inheritance Tax and Property Valuation (*Gesetz zur Reform des Erbschaftsteuer- und Bewertungsrechts*) of 24 December 2008 (Federal Law Gazette I p. 3018).**

§ 17 of the Gift and Inheritance Tax Act in the version published on 27 February 1997 (Federal Law Gazette I p. 378), is, to the extent it does not grant an exemption for retirement benefits to registered civil partnerships, incompatible with Article 3.1 of the Basic Law from the effective date of the Act on the Termination of Discrimination of Same-Sex Couples: Civil Partnerships of 16 February 2001 (Federal Law Gazette I p. 266) until the effective date of the Act to Reform Inheritance Tax and Property Valuation of 24 December 2008 (Federal Law Gazette I p. 3018).

§ 15.1 and § 19 of the Gift and Inheritance Tax Act in the version published on 27 February 1997 (Federal Law Gazette I p. 378) are, to the extent they affect registered civil partnerships, incompatible with Article 3.1 of the Basic Law from the effective date of the Act on the Termination of Discrimination of Same-Sex Couples: Civil Partnerships of 16 February 2001 (Federal Law Gazette I p. 266) until the effective date of the Act to Reform Inheritance Tax and Property Valuation of 24 December 2008 (Federal Law Gazette I p. 3018).

2. **a) The order of the Federal Finance Court of 1 February 2007 – II R 43/05 - and the judgment of the Cologne Finance Court of 29 June 2005 – 9 K 1041/03 – violate the fundamental right of complainant no. 1 under Article 3.1 of the Basic Law. The order of the Federal Finance Court is annulled and the matter referred back to the Federal Finance Court.**

a. **The order of the Federal Finance Court of 20 June 2007 – II R 56/05 – violates a fundamental right of complainant no. 2 arising under Article 3.1 of the Basic Law. The order is annulled and the matter referred back to the Federal Finance Court.**

3. **The Federal Republic of Germany shall reimburse the complainants for their necessary expenses.**

G r o u n d s:

A.

The constitutional complaints relate to the unequal treatment of registered civil partners and spouses under the Gift and Inheritance Tax Act in the version according to the 1997 Annual Tax Reform Act of 20 December 1996 (Federal Law Gazette (*Bundesgesetzblatt* – BGBl) I p. 2049). 1

I.

1. a) Since the beginning of the 19th century the level of taxation under inheritance tax law has continuously – with the exception of a short period of uniform taxation at the end of the war – been geared toward marriage or family connection ascertained 2

by the relationship of the heirs to the deceased. While initially, spouses and children were completely exempted from the taxes levied as inheritance tax, the legislature later provided for staggered exemptions and tax classes for heirs based upon the proximity of the relationship to the deceased. Between 1925 and 1973, the grant of tax-free inheritance and later of an exemption for spouses required that at the time of the death of the deceased there were joint children or descendants of the deceased and the inheriting spouse. Since the Act to Reform the Gift and Inheritance Act of 17 April 1974 (Federal Law Gazette I p. 933) spouses – in addition to a newly granted exemption for retirement benefits – have been granted an exemption independent of the presence of children.

b) aa) The allocation of taxpayers into different tax classes pursuant to § 15 ErbStG determines the tax rate level (§ 19 ErbStG) and the personal exemptions (§ 16 ErbStG). While pursuant to § 15 ErbStG in the version of the 1997 Annual Tax Reform Act published on 27 February 1997 (*Erbschaftsteuer- und Schenkungsteuergesetz a.F.* – ErbStG old) (Federal Law Gazette I p. 378), which was applicable to the original proceedings, spouses were subject to the most beneficial Tax Class I, civil partners were classified as “other recipients” and placed in Tax Class III. § 15 ErbStG old states in part: 3

§ 15 ErbStG 4

Tax Classes 5

(1)The following three tax classes shall differentiate among recipients pursuant to their personal relationship to the deceased or the person making a gift: 6

Tax Class I 7

1.Spouse, 8

2.Children and step-children, 9

3.Descendants of the children and step-children in no. 2, 10

4.Parents and ancestors in cases of transfer by reason of death; 11

Tax Class II 12

1.Parents and ancestors, to the extent they do not belong in Tax Class I, 13

2.Siblings, 14

3.First generation descendants of siblings, 15

4.Step-parents, 16

5.Sons-in-law and daughters-in-law, 17

6.Parents-in-law, 18

7.Divorced spouse; 19

Tax Class III 20

All other recipients and bequests. 21

(...)

bb) The grant of the personal exemptions pursuant to § 16 ErbStG depends upon the degree of kinship or relationship by marriage. Based upon their placement in Tax Class III pursuant to § 16 ErbStG old, civil partners were only granted an exemption in the amount of DM 10,000/Euro 5,200 while spouses received an exemption in the amount of DM 600,000/Euro 307,000. Excerpts of § 16 ErbStG old are set forth below, with the Euro amounts effective from 1 January 2002 onward pursuant to the Act on the Conversion and Alignment of Euro Amounts Relating to Taxes (*Gesetz zur Umrechnung und Glättung steuerlicher Euro-Beträge*) of 19 December 2000 (Federal Law Gazette I p. 1790) being provided after a slash for each amount: 22

§ 16 ErbStG 23

Exemptions 24

(1) In cases under § 2.1 no.1 no taxes are levied on receipt 25

1.by the spouse: the amount of DM 600,000 / Euro 307,000; 26

2.by children within the meaning of Tax Class I no. 2 and children of deceased children within the meaning of Tax Class I no. 2: the amount of DM 400,000 /Euro 205,000; 27

3.by other persons in Tax Class I: the amount of DM 100,000 /Euro 51,200; 28

4.by persons in Tax Class II the amount of DM 20,000 /Euro 10,300; 29

5.by persons in Tax Class III: the amount of DM 10,000 /Euro 5,200. 30

Pursuant to the original legislative considerations the personal exemption dependent upon children for spouses was intended to address the avoidance of double inheritance taxes in the case of a transfer of the estate from the deceased to the surviving spouse and then to a joint child or several joint children, in the interest of preserving the substance of the assets (see *Bundestag* printed paper (*Bundestagsdrucksache* – BTDrucks) 1/1575, pp. 11, 15). After the existence of children was no longer a prerequisite for the grant of an exemption for spouses, the legislature based the grant of an exemption upon conserving small and medium-sized estates (see *Bundestag* printed paper 140/72, pp. 50, 70). In the statement of reasons of the 1997 Annual Tax Reform Act which was determinative in the original proceedings, the legislature referred to the constitutional requirement to conserve ordinary family-use assets and the close relationship between the constitutional law protection of marriage and the family with the law on inheritance and the guarantee of ownership to justify the high amount of the exemptions for spouses and children (see *Bundestag* printed paper 13/4839, pp. 38, 63-64, 70). 32

cc) In addition to the general exemption, spouses and children of the deceased are entitled to an exemption for retirement benefits pursuant to § 17 ErbStG, which is to be reduced by the capital value of the retirement benefits which are not taxable pursuant to the Gift and Inheritance Tax Act and which is to compensate for inadequate support from retirement benefits subject to inheritance taxes (see Meincke, *ErbStG*, 15th Ed. 2009, § 17 ErbStG, marginal no. 1). Pursuant to § 17 ErbStG old, civil partners were not granted an exemption for retirement benefits. § 17 ErbStG old states in excerpts, with the Euro amounts modified as of 1 January 2002 again being provided after the slash: 33

§ 17 ErbStG 34

Special Exemption for Retirement Benefits 35

(1) In addition to the exemption pursuant to § 16.1 no. 1, the surviving spouse is granted a special exemption for retirement benefits in the amount of DM 500,000 / Euro 256,000. The exemption available to spouses who upon the death of the deceased are entitled to retirement benefits not subject to inheritance tax is reduced by the capital value of these retirement benefits as determined pursuant to § 14 of the Act on Valuation (*Bewertungsgesetz*). 36

(2) In addition to the exemption pursuant to §16.1 no. 2, children within the meaning of Tax Class I no. 2 (§ 15.1) are granted a special exemption for retirement benefits received upon death in the following amounts: 37

1.up to the age of 5 years, the amount of DM 100,000 / Euro 52,000; 38

2.older than 5 years up to 10 years, the amount of DM 80,000 / Euro 41,000; 39

3.older than 10 years up to 15 years, the amount of DM 60,000 / Euro 30,700; 40

4.older than 15 years up to 20 years, the amount of DM 40,000 / Euro 20,500; 41

5.older than 20 years until the end of the 27th year, the amount of DM 20,000 /Euro 10,300. 42

If the child is entitled to retirement benefits not subject to inheritance tax based upon the death of the deceased, the exemption will be reduced by the capital value of these retirement benefits determined pursuant to § 13.1 of the Act on Valuation. 43

dd) The tax rates to be applied to the value of the taxable assets received are determined by § 19 ErbStG, which makes reference to the tax classes in § 15 ErbStG and, thus, to the relationship based upon marriage or kinship of the taxpayer to the deceased. Pursuant to §§ 15 and 19 ErbStG old, civil partners, classified under Tax Class III, were taxed as distant relatives and unrelated persons. § 19 ErbStG old states in excerpts, with the Euro amounts modified as of 1 January 2002 again being provided after a slash: 45

§ 19 ErbStG 46

Tax Rates 47

(1) Inheritance tax shall be levied according to the following percentages: 48

As the grounds for the tax classes, the legislature referred to taxation pursuant to degree of kinship and the moderation of the inheritance tax take for spouses and children mandated by constitutional law; according to the legislature, the rate must be viewed in connection with the personal exemptions (see *Bundestag* printed paper 13/4839, pp. 65, 69, 71). 50

c) With the Inheritance Tax Reform Act (*Erbschaftsteuerreformgesetz*) of 24 December 2008 (Federal Law Gazette I p. 3018) the above-named provisions of the Gift and Inheritance Tax Act were amended to the benefit of registered civil partners. While pursuant to § 15 ErbStG in the version of the Inheritance Tax Reform Act (hereinafter: ErbStG new), registered civil partners are still classified in Tax Class III, § 16.1 no. 6 ErbStG new provides for a personal exemption in the amount of Euro 500,000 for inheriting civil partners, which corresponds to the increased personal exemption for spouses in the Inheritance Tax Reform Act. Pursuant to § 17.1 ErbStG new, the amendments to the law also provide for a special exemption for retirement benefits for an inheriting civil partner, which corresponds to the exemption for retirement benefits for spouses. Nevertheless, based upon their placement in Tax Class III as “other recipients”, pursuant to §§ 15 and 19 ErbStG new, registered civil partners continue to be taxed at the highest tax rates as distant relatives and unrelated persons. Moreover, the Inheritance Tax Reform Act increased the tax rates for Tax Class III. The tax rates for Tax Class II were also increased, although this increase was reversed in part by the Act to Accelerate Economic Growth (*Gesetz zur Beschleunigung des Wirtschaftswachstums - Wachstumsbeschleunigungsgesetz* – Growth Acceleration Act) of 22 December 2009 (Federal Law Gazette I p. 3950). Pursuant to § 37.1 ErbStG new, the new rules of the Inheritance Tax Reform Act shall only be applicable to estates as to which the tax arose after 31 December 2008. 51

In the Bill for the Inheritance Tax Reform Act presented early in 2008 the exemption for family-use assets required by constitutional law was referred to in regard to the further increase of the personal exemptions for spouses and children and emphasis was placed on the fact that smaller assets are not taxed, while the largest assets outside of the family scope should provide a higher contribution to tax revenue (see *Bundestag* printed paper 16/7918, pp. 23, 37). To the extent registered civil partners were treated equally with spouses, the reason stated for this was the comparable situation of civil partners and spouses, which was specifically stated in regard to the special exemption for retirement benefits pursuant to § 17.1 ErbStG new with the same existing support obligations for civil partners and spouses (see *Bundestag* printed paper 16/7918, p. 37). 52

d) Pursuant to the Federal Government’s Bill for the 2010 Annual Tax Reform Act of 22 June 2010, complete equality is intended for civil partners and spouses in the gift and inheritance tax law, also in regard to tax rates (see *Bundestag* printed paper 17/ 53

2249, pp. 2, 44-45).

2. The registered civil partnership is a family law institution for a same-sex relationship of a permanent nature between two persons (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 124, 199 <206>). 54

a) Upon taking effect on 1 August 2001 the Act on Registered Civil Partnerships (*Gesetz über die eingetragene Lebenspartnerschaft* – LPartG – *Lebenspartnerschaftsgesetz* – Civil Partnerships Act) of 16 February 2001 (Federal Law Gazette I p. 266) provided rules for the creation and dissolution of registered civil partnerships and for the personal and financial legal relationships between the civil partners. 55

Pursuant to § 2 LPartG registered civil partners have a duty to provide each other with care and support, to organise their lives together, and to bear responsibility for one another (see § 1353.1 sentence 2 of the Civil Code - *Bürgerliches Gesetzbuch* – BGB). Pursuant to § 5 sentence 1 LPartG in the version of 16 February 2001 (hereinafter LPartG old) civil partners had a duty of “reasonable maintenance” toward each other; pursuant to § 5 sentence 2 LPartG old the provisions for spouses regarding maintenance applied *mutatis mutandis*. Pursuant to § 12 LPartG old, maintenance upon separation emulated that for spouses: after dissolution of the civil partnership, which is similar in its prerequisites to divorce, a civil partner was liable for the payment of maintenance to the other when one civil partner was unable to support himself or herself, § 16.1 LPartG old. 56

Pursuant to § 10.1 sentence 1 LPartG a civil partner has a legal right of inheritance in the same way as spouses pursuant to § 1931.1 sentence 1 of the Civil Code. In addition, a civil partner has a claim for a compulsory portion of the estate arising from § 10.6 sentence 1 LPartG and in regard thereto the provisions addressing compulsory estate shares in the Civil Code (§§ 2303 et seq. BGB) are referred to with the proviso that a civil partner “is to be treated as a spouse.” The influence of the system of equalisation of accrued gains (*Ausgleichsgemeinschaft*) on the civil partner’s estate share corresponded to that of the statutory marital property regime (Federal Law Gazette I p. 3396) pursuant to § 1371 of the Civil Code, to which § 6.2 sentence 3 LPartG old referred. The rules under the law of inheritance applicable to civil partners otherwise only differ in minor details from the statutory provisions applicable to spouses. 57

b) Through the Act for the Revision of the Law of Civil Partnerships of 15 December 2004 (*Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts*), which took effect on 1 January 2005, the law regarding registered civil partnerships was further aligned with matrimonial law; in doing so, reference was made to a large extent to the standards in the Civil Code on marriage. The law governs the adoption of the statutory marital property regime, the further alignment of the law on maintenance, the conformance of the prerequisites for dissolution with divorce law, the introduction of stepchild adoption, the adjustment of pension rights in case of dissolution, and the inclu- 58

sion of a civil partner in survivor's pensions under the statutory pension scheme (see in detail BVerfGE 124, 199 (206 et seq.)). Under civil inheritance law civil partners are now completely equal to spouses, § 10 LPartG.

II.

1. Complainant no. 1 is the sole heir of his male civil partner who passed away on 25 August 2001. The Tax Office (*Finanzamt*) – assuming taxable receipt of DM 279,050 within the meaning of the Inheritance Tax Act – set the complainant's inheritance tax at DM 61,295. It placed the complainant in Tax Class III, granted, among other things, a personal exemption pursuant to § 16.1 no. 5 ErbStG old in the amount of DM 10,000 and applied a tax rate pursuant to § 19.1 ErbStG old in the amount of 23%. The complainant's objection and lawsuit were unsuccessful. 59

The Federal Finance Court rejected the allowed appeal on points of law. It stated that the complainant did not have a claim under either Article 3.1 of the Basic Law or Article 14.1 of the Basic Law to be placed on equal footing with a spouse by way of analogue application of §§ 15, 16, 17, and 19 ErbStG. The legislature could grant registered civil partners, regardless of the duty of protection only of marriage and the family in Article 6.1 of the Basic Law, the same benefits as spouses, but it was not required to do so. The existing inheritance tax law beyond the guarantee of the right of inheritance viewed the principle of the family as a further limit on the amount of tax burden due to the protection of marriage and the family. Only as to spouses and children was the tax take on inheritance to be reduced in such a way that each of these taxpayers should benefit from a large portion of the inheritance or, in the case of smaller estates, the entire inheritance being tax-free. 60

2. Complainant no. 2 is the heir of her female registered civil partner who passed away on 28 February 2002. The Tax Office – assuming taxable receipt of Euro 58,500 within the meaning of the Inheritance Tax Act – set the complainant's inheritance tax at Euro 12,090. It placed the complainant in Tax Class III, granted a personal exemption pursuant to § 16.1 no.5 ErbStG old in the amount of Euro 5,200, and applied a tax rate pursuant to § 19.1 ErbStG old in the amount of 23%. Upon objection by the complainant the inheritance tax was reduced to Euro 12,040 by a summary decision on the objection (*Einspruchsbescheid*) based upon evidence of further debts; in all other respects the objection was rejected as unfounded. In particular, categorisation for the personal exemption and the tax class was maintained. The lawsuit filed against this by the complainant was unsuccessful and the Federal Finance Court rejected the allowed appeal on points of law. The reasoning of the decision on the appeal was the same as that for the decision regarding complainant no. 1. 61

III.

1. In his constitutional complaint complainant no. 1 argues that his rights under Article 3.1 of the Basic Law and Article 14.1 of the Basic Law were violated. [He states as follows:] 62

a) It is a violation of Article 3.1 of the Basic Law that the complainant, in contrast to married taxpayers, only received minimal tax exemptions although he lived with his partner for many years before his partner's death and upheld the complete mutual responsibility they had assumed. The unequal treatment is not justified because both marriages and registered civil partnerships are relationships entered into for the long term. Homosexuals, because of their sexual identity, do not have the option to choose between marriage and civil partnership. The unequal treatment regarding inheritance tax, thus, leads to discrimination of this segment of the population and has a detrimental effect on their freedom protected pursuant to Article 2.1 in conjunction with Article 1.1 of the Basic Law to enter into a binding partnership with a partner of their choosing. 63

b) Civil partnerships are largely conformed to marriage through the Civil Partnerships Act. Like spouses, civil partners create an economic basis for shaping their life together in the expectation that they will also enjoy the life they created in later years, including to the benefit of the surviving partner when one has passed away. It thus violates the constitutional law guarantee of inheritance that the legislature absolutely did not take account of this, but rather, treated surviving civil partners as third parties regarding categorisation into a tax class, the amount of the tax rate, and personal exemptions. 64

2. In her constitutional complaint complainant no. 2 argues that her rights under Articles 3.1 and 3.3 and Article 14.1 of the Basic Law were violated. [She states as follows:] 65

a) The application of Tax Class III to her pursuant to § 15.1 ErbStG and the corresponding denial of the personal exemption for spouses in accordance with § 16.1 no. 1 ErbStG old violates Articles 3.1 and 3.3 of the Basic Law. There are no longer any relevant differences between civil partnerships and marriage regarding their asset situation, long-term bond, and mutual care for one another. The unequal treatment particularly affects the area of freedoms protected by fundamental rights and, thus, is subject to specific limitations. The legislature must strictly adhere to the principle of equality because civil partners, based on their sexual orientation, cannot choose between marriage and civil partnership. Article 6.1 of the Basic Law does not require that civil partnerships be disadvantaged in regard to marriage. 66

b) It is a violation of Article 14.1 of the Basic Law when the legislature does not take into account the extensive equalisation of civil partnerships and marriage, but rather, treats civil partners as third parties in regard to inheritance tax. Even a divorced spouse is placed in a better position under inheritance tax law. 67

IV.

Opinions on the constitutional complaints were submitted by Tax Office A., the Federal Chamber of Tax Consultants (*Bundessteuerberaterkammer*), the Federal Chamber of Attorneys-at-Law (*Bundesrechtsanwaltskammer*), the Gay and Lesbian Asso- 68

ciation in Germany (*Lesben- und Schwulenverband in Deutschland*) and the Federal Working Group for Gay and Lesbian Couples (*Bundesarbeitsgemeinschaft Schwule und Lesbische Paare e.V.*).

1. In the opinion of Tax Office A., the rules that are indirectly challenged are constitutional. Article 3.1 of the Basic Law has not been violated because marriage and civil partnership do not involve substantially similar situations and unequal treatment is otherwise justified by recognition of the protection of marriage and the family required by Article 6.1 of the Basic Law. The existing inheritance tax law views the principle of the family as a limit on the amount of the tax burden and through this effectuates the promotion of the family required by Article 6.1 of the Basic Law. Article 14.1 sentence 1 of the Basic Law is not violated because the complainant was not unreasonably burdened by a tax rate of 23%. 69

2. In the opinion of the *Bundessteuerberaterkammer* the unequal treatment of registered civil partners and spouses, but not the equal treatment of registered civil partners and unrelated third parties, is compatible with Article 3.1 of the Basic Law. Because marriage and civil partnership, based on the gender of the persons involved and their formal relationship, do not involve substantially similar situations, the legislature is allowed to enact different rules for each. There lacks, however, a factually reasonable basis for equal treatment of registered civil partners with third parties because the relationship of a civil partner to the deceased is neither legally nor economically comparable to the relationship to a third party. Otherwise, the principle of the family serves as a limit on the tax burden. Placing family members in a more beneficial position regarding taxes is justified based upon the value decision in the Basic Law set forth in Article 6.1 of the Basic Law, which emphasises the special need for protection of marriage and the family. The protection of marriage and the family pursuant to Article 6.1 of the Basic Law requires consideration of the continuity of marriage and family assets. Because registered civil partners also created the financial basis for their chosen manner of living for their family with the expectation that the surviving partner would benefit therefrom, reduction of the inheritance tax take is required in light of Article 14.1 of the Basic Law. 70

3. The *Bundesrechtsanwaltskammer* presents the opinion that the unequal treatment of registered civil partners and spouses is justified in consideration of the protection of marriage and the family required by Article 6.1 of the Basic Law. However, it is incompatible with Article 3.1 of the Basic Law that civil partners are placed in Tax Class III and that they are only granted a personal exemption pursuant to § 16.1 no. 5 ErbStG old. Taking into account the right of inheritance for the surviving partner based on the Civil Partnership Act, this taxation is contrary to the system. There is no objective rationale that could justify subjecting civil partners to the same taxation as very distant relatives, despite the equal treatment with spouses under inheritance law. 71

4. In the opinion of the *Lesben- und Schwulenverband in Deutschland* and the *Bun-* 72

desarbeitsgemeinschaft Schwule und Lesbische Paare e.V. the provisions indirectly challenged are unconstitutional because they violate Article 3.1 of the Basic Law and Article 14.1 sentence 1 of the Basic Law. Registered civil partners and spouses are in comparable situations as regards inheritance law. As with spouses, registered civil partners worked for their assets together in the expectation of being able to maintain their standard of living in the later years of life and even in the event of the demise of one of the partners. Thus, there are no apparent rational grounds that could justify the unequal treatment of registered civil partners and spouses, particularly since this has an indirect effect of discrimination based on sexual identity. Likewise, treatment as third parties is not justified. No requirement to disadvantage other ways of life in comparison to marriage can be derived from Article 6.1 of the Basic Law. Moreover, in consideration of the guarantee of inheritance in Article 14.1 sentence 1 of the Basic Law, the tax take must be limited in such a way that the inheritance for a civil partner is the product of the civil partnership endeavour in the same way as is demanded for spouses. The applicable inheritance tax law is unduly burdensome to surviving civil partners.

B.

The constitutional complaints are admissible and well-founded. The less favourable treatment of registered civil partners under inheritance tax law in comparison to spouses as to the personal exemption (§ 16 ErbStG old), as to the tax rate (§§ 15, 19 ErbStG old), as well as to their non-consideration regarding the special exemption for retirement benefits (§ 17 ErbStG old) is incompatible with the general principle of equality (Article 3.1 of the Basic Law) (I.). Whether the challenged decisions and the inheritance tax law provisions upon which they were based are in accord with Article 14.1 of the Basic Law, can thus remain open (II.). 73

I.

Under the provisions applicable in the original proceedings in the Gift and Inheritance Tax Act in the version published on 27 February 1997 (Federal Law Gazette I p. 378) pursuant to the 1997 Annual Tax Reform Act, registered civil partners were substantially more burdened than spouses (1.). As to this unequal treatment, which is to be reviewed against particularly strict standards (2.), there is a lack of sufficiently sustainable grounds for justification (3.). Whether the treatment of registered civil partners as distant relatives and third parties in regard to tax rate and personal exemptions, which has been likewise challenged, also presents equal treatment of substantially unequal situations, which is contrary to the principle of equality, thus, does not require a decision (4.). 74

1. The Gift and Inheritance Tax Act in the new version based upon the 1997 Annual Tax Reform Act ensured, among other things, far-reaching tax relief through the granting of extensive exemptions and through low tax rates for spouses and close relatives upon inheriting small and medium-sized estates. Thus, § 16.1 no. 1 ErbStG 75

granted spouses a personal exemption in the amount of DM 600,000 / Euro 307,000 and § 17.1 ErbStG granted a special exemption for retirement benefits in the amount of DM 500,000 / Euro 256,000. Because pursuant to § 15.1 ErbStG, spouses were and still are placed in Tax Class I, they had to pay a tax rate between 7% and 30% in accordance with § 19.1 ErbStG depending upon the amount of the inheritance.

Registered civil partners, on the other hand, were not given particular consideration in the Gift and Inheritance Tax Act after the creation of the legal institution of civil partnerships in 2001; as “other recipients” pursuant to § 15.1 ErbStG old, they were considered and treated as third parties with placement in Tax Class III. Thus, they only received a personal exemption in the amount of DM 10,000 / Euro 5,200 pursuant to § 16.1 no. 5 and § 15.1 ErbStG old. They were completely excluded from the advantages of the exemption for retirement benefits. Pursuant to § 19.1 ErbStG, in Tax Class III they had to pay tax rates between 17% and 50% on their inheritance. 76

2. Article 3.1 of the Basic Law requires review of this unequal treatment between spouses and civil partners against a strict equality standard. 77

a) The general principle of equality requires that all persons are treated equally before the law. The requirement that follows from this, that what is substantially equivalent must be treated equally and what is substantially dissimilar must be treated differently, applies to dissimilar burdens and dissimilar privileges (see BVerfGE 79, 1 (17); 110, 412 (431); 121, 108 (119); 121, 317 (370)). Thus, exclusion from a privilege which is done in violation of equal treatment is also prohibited in cases where a group of persons is granted a privilege that is refused another group of persons (see BVerfGE 110, 412 (431); 112, 164 (174); 116, 164 (180); 121, 108 (119); 121, 317 (370)). 78

Depending upon the subject governed and the differentiating elements, the general principle of equality results in varying limits, which range from a mere prohibition on arbitrariness to a strict adherence to proportionality requirements (see BVerfGE 97, 169 (180-181); 110, 274 (291); 117, 1 (30); 120, 1 (29); 121, 108 (119); 121, 317 (369)). More specific standards and criteria regarding the prerequisites under which the legislature violated the prohibition on arbitrariness or the requirement of proportional equal treatment in individual cases cannot be determined in an abstract and generalised manner, but rather, only in relation to each different factual and legal area involved (see BVerfGE 75, 108 (157); 101, 275 (291); 103, 310 (318); 105, 73 (111); 110, 412 (432); 121, 108 (119)). 79

Pursuant to established constitutional court case-law, in the area of tax law the legislature has broad decision-making discretion both in the choice of taxable goods and services and in the determination of tax rates (see BVerfGE 93, 121 (136); 105, 73 (126); 107, 27 (47); 117, 1 (30); 120, 1 (29); 13, 1 (19)). The legislative freedom in tax law – and in inheritance tax law – however, is limited in this regard by two guidelines: the requirement of the alignment of the tax burden with the principle of financial ability to pay and by the requirement of consistency (see BVerfGE 116, 164 (180-181); 117, 1 (30); 121, 108 (119-120)). As a general rule, taxpayers must be uniformly burdened 80

both legally and actually by a tax law (see BVerfGE 110, 274 (292); 117, 1 (30); 121, 108 (120)). Once the decision on the choice of taxable goods and services has been made, the legislature must consistently apply it in accordance with the requirement of the most uniform burden possible on all taxpayers when shaping the facts from which tax law proceeds (see BVerfGE 110, 274 (292); 117, 1 (30); 121, 108 (120)). Exceptions to consistent application require a specific objective reason (see BVerfGE 99, 88 (95); 107, 27 (47); 117, 1 (31); 120, 1 (29)).

b) aa) The inheritance law provisions indirectly challenged by the complainants, which lead to gravely different tax burdens for spouses and civil partners, must first be measured against these specific tax law attributes of the principle of equality, that is, against the principle of uniform taxation according to financial ability to pay in consideration of the principle of consistency. 81

bb) Another reason why a uniformity test oriented toward the principle of proportionality is required is that the different taxation on inheritance varies here based upon personal characteristics. 82

Because the principle that all persons are equal before the law is primarily intended to prohibit unjustified advantages or disadvantages to persons, in cases of unequal treatment that is based upon personal characteristics, the legislature is subject to strict constraints (see BVerfGE 88, 87 (96); 98, 365 (389); 121, 317 (369)). In this regard the requirement placed on grounds for justification in cases of statutory differentiation in large part depends upon the extent of the negative effect of the unequal treatment of persons or circumstances on the exercise of freedoms protected by fundamental rights (see BVerfGE 105, 73 (110-111); 106, 166 (176); 112, 164 (174)). The legislature’s discretion is particularly broad when it distinguishes among ways of life and those affected can adapt themselves by their behaviour to the varying provision (see BVerfGE 55, 72 (89)). In contrast to this, the legislature is subject to increasingly stricter limitations as the effect of the unequal treatment on constitutionally guaranteed freedoms increases (see BVerfGE 82, 26 (146)) and as the ability to avoid individual negative consequences by one’s own conduct decreases. The limits derived from Article 3.1 of the Basic Law are transgressed in particular if a group of persons to whom a certain statute applies are treated differently than another group of persons to whom the statute applies although there are no differences between the two groups of such a nature and such weight that could justify the unequal treatment (see BVerfGE 55, 72 (88); 82, 126 (146); 87, 1 (36); 88, 5 (12); 100, 195 (205); 117, 272 (300-301)). 83

In assigning tax classes and the concomitant staggering of personal exemptions, tax rates, and the exemption for retirement benefits, inheritance tax law distinguishes among groups of persons depending upon the closeness of family and relationship ties. The tax take on the inherited assets affects heirs in their right of inheritance, protected as a fundamental right under Article 14.1 sentence 1 of the Basic Law (see BVerfGE 93, 165 (172 et seq.)), in varying amounts without them having the ability to 84

influence the differentiation in taxation by their own conduct. This, of course, is the nature of the inheritance process, which for an heir is limited to his decision on acceptance, and in the nature of his relationship and family position in regard to the deceased at that time. The consequence of this, however, is that measured against the standard of Article 3.1 of the Basic Law, the differentiations among varying groups of heirs made by the legislature regarding inheritance tax require sufficiently weighty reasons for differentiation that could justify the different taxation.

cc) Finally, the Federal Constitutional Court requires strict review of equality in cases where the legislature differentiates based upon the sexual orientation of persons (see in detail BVerfGE 124, 199 (220-221) with further references). The decision by an individual to marry or to enter into a registered civil partnership is virtually inseparable from his or her sexual orientation (see BVerfGE 124, 199 (221)). Typically, homosexuals are encompassed by the provisions regarding the rights and duties of registered civil partners and heterosexuals are encompassed by those that govern the rights and duties of married spouses (see BVerfGE 124, 199 (222)). 85

For the unequal treatment of spouses and registered civil partners in inheritance tax law to be connected to sexual orientation there must be sufficiently weighty differences between these two forms of legally binding partnership that are entered into for the long term to justify the actual unequal treatment (see BVerfGE 124, 199 (222)). 86

3. In regard to the less favourable treatment of registered civil partners in comparison to spouses there are no differences of such weight that could justify the significant disadvantage to civil partners in the Gift and Inheritance Tax Act in the version of the 1997 Annual Tax Reform Act. This applies to the personal exemption pursuant to § 16 ErbStG old (a), to the exemption for retirement benefits pursuant to § 17 ErbStG old (b), and to the tax rate pursuant to § 19 ErbStG old (c). 87

a) The personal exemption (§ 16 ErbStG) ensures that an inheritance up to a certain amount remains tax-free. The extent of the exempted amount follows from the categorisation of the tax classes, which is oriented toward the principle of the closeness of family and kinship ties. Granting a privilege to spouses in comparison to civil partners cannot be solely based upon reference to Article 6.1 of the Basic Law (aa); as to the unequal treatment provided for in the exemption provision in § 16 ErbStG old, there is no sustainable ground for differentiation either in the principle of taxation according to financial ability (bb) or in the principle of the family dominating inheritance tax law (cc). 88

aa) Article 6.1 of the Basic Law places marriage and family under the special protection of the state. Thus, the constitution not only guarantees the institution of marriage, but as a binding value decision also requires particular protection by the state for the whole area of private and public law relating to marriage and the family (see BVerfGE 6, 55 (72); 55, 114 (126); 105, 313 (346)). In order to fulfil the requirements of the mandate of protection, it is in particular the duty of the state to refrain from anything that damages or otherwise adversely affects marriage and to promote marriage by 89

suitable measures (see BVerfGE 6, 55 (76); 28, 104 (113); 53, 224 (248); 76, 1 (41); 99, 216 (231-232)).

By reason of the constitutional protection of marriage, the legislature in principle is not prevented from treating it more favourably than other ways of life (see BVerfGE 6, 55 (76-77); 105, 313 (348)). Thus, the Federal Constitutional Court has held that it is justified to give preferential treatment to marriage in the social-law provisions on the financing of artificial insemination, in particular out of consideration for the legally protected status of marriage as a responsible relationship and guarantee of stability (see BVerfGE 117, 316 (328-329)). The provisions that treat marriage more favourably with regard to maintenance, pensions, and tax law may also find their justification in the spouses' joint shaping of their lives (see BVerfGE 124, 199 (225)). However, if the promotion of marriage includes disadvantages to other ways of life although they are comparable to marriage in terms of the life circumstances regulated and the goals pursued by the statutory provisions on marriage, mere reference to the duty to protect marriage does not justify such differentiation (see BVerfGE 124, 199 (226)). 90

The authority of the state, in fulfilment of its constitutional duty of protection as set forth in Article 6.1 of the Basic Law for marriage and the family, remains completely unaffected by the question of the extent to which others can assert claims for equal treatment. Only the principle of equality (Article 3.1 of the Basic Law), in accordance with the principles of application developed by the Federal Constitutional Court on this, determines whether and to what extent others, in this case registered civil partners, have a claim for treatment equal to the statutory or actual promotion of married spouses and family members. The Federal Finance Court failed to recognise this in the challenged decisions when it held, essentially by mere reference to Article 6.1 of the Basic Law, that the promotion of spouses and, consequently, the less favourable treatment of registered civil partners in inheritance tax law is justified because only spouses and not civil partners can rely upon the constitutional law protection of marriage. 91

bb) Inheritance tax is due as a tax on assets transferred upon death from each recipient at the time the enrichment is received from the estate (see BVerfGE 93, 165 (167); 117, 1 (33)). In its current form, through the inheritance tax, the legislature pursues the goal of registering the value of each increase in assets resulting from inheritance and taxing the concomitant increase in the recipient's financial ability to pay (§ 10.1 ErbStG). The increase in assets from an inheritance is no different for a spouse or a civil partner. 92

In the literature on tax law the grant, in particular, of the high exemption for spouses and children primarily in comparison to third parties is justified by the lower financial ability of these persons at the time of inheritance. A variety of grounds are presented for this: the financial ability of close relatives of the deceased is not increased by the inheritance to the same extent as the financial ability of third persons (see Breitenbach, *Erbschaftsteuer*, 1969, p. 31; Meincke, op. cit., *§ 16 ErbStG*, marginal no. 1; 93

Oberhauser, in: Neumark, *Handbuch der Finanzwissenschaft*, Volume II, 3rd Edition 1980, p. 493; Oechsle, in: *Wirtschafts- und Steuerordnung auf dem Prüfstand, Festschrift für Bayer*, 1998, p. 242). During the lifetime of the deceased spouses and children benefitted from the deceased's assets, shared in the deceased's standard of living, and expected to be able to maintain the standard of living (see Breitenbach, op. cit., p. 32; similarly Meincke, op. cit., *§ 15 ErbStG*, marginal no. 2). Typically, the deceased developed his assets not only for himself but also for his family members, particularly his core family, that is, spouse and children (see Breitenbach, op cit., p. 31; Mönter, *Zur Steuerreform: Die Erbschaftsteuer*, 1972, pp. 89, 95). Consequently, these persons are legally granted something that they already economically possessed (see Breitenbach, op cit., p. 31; Mönter, op. cit., p. 89). Spouses and close relatives not infrequently substantially participate in developing the assets (see *Gutachten der Steuerreformkommission 1971*, Series from the Federal Ministry of Finance, 1971, Volume III, Section VII, p. 89). In addition, in many cases the inheritance by a spouse and the descendants of the deceased is bound with the moral duty to transfer the assets with as little reduction as possible to further descendants (see Breitenbach, op. cit., p. 32). The enrichment upon the death also corresponds to a loss of income and, thus, functions as a replacement of income (see Breitenbach, op. cit., pp. 31-32) Upon the death of the deceased the close family – unlike distant relatives and third parties who had no financial relationship to the deceased – usually loses a source of income and support payments (see Oechsle, op. cit., p. 242).

Even if it were correct that the economic ability of an inheriting spouse, taking into consideration the balancing effect described, had a considerably smaller increase in scope than would be expected from the nominal value of the inheritance so that the value of the inheritance reduced by the personal exemption would be the lump-sum expression of the actual, reduced increase in financial ability, these considerations would require similar application to civil partners. The differences in regard to the personal exemption to the detriment of civil partners pursuant to § 16 ErbStG old cannot be justified by this. 94

Like spouses, registered civil partners live in a long-term, legally recognised partnership (see BVerfGE 124, 199 (225)). While both are alive they share the assets of their registered civil partner and expect to be able to maintain their joint standard of living in the event of the death of one of the civil partners. Not unlike a spouse, a civil partner also acquires assets not only for himself, but also for his civil partner and, when applicable, for the children living with the partners. To the extent that through the exemption for spouses pursuant to § 16 ErbStG old, receipt of the inheritance functions to replace income and has a pension effect, it must be considered that these effects also apply to inheritance for civil partners. Under the legal situation applicable at the start of the proceedings they were already entitled to claims for maintenance, which substantially corresponded to that for spouses. Pursuant to § 5 sentence 1 LPartG old, civil partners were obliged to one another to provide "reasonable maintenance." The provisions governing maintenance between spouses in §§ 1360a and 1360b of 95

the Civil Code were and are applicable *mutatis mutandis* (§ 5 sentence 2 LPartG). The mere circumstance that, in contrast to the rule applicable to spouses in § 1360 sentence 2 of the Civil Code, housekeeping at first was not expressly treated equally to financial benefits does not justify applying the maintenance replacement effect only to inheritances for spouses. Finally, the possibility that, pursuant to § 12.1 sentence 2 LPartG old, a previously non-working civil partner entitled to maintenance could be directed to find paid work in the event of a separation does not alter the existence of a claim for maintenance payments upon separation and, thus, the compensatory function of an inheritance.

cc) The principle of the family enshrined in constitutional law provides scope and direction to inheritance tax law and also influences the formulation of the personal exemption (1). The less favourable treatment of civil partners in regard to spouses in the Inheritance Tax Act in the version of the 1997 Annual Tax Reform Act, as with the personal exemption here, likewise cannot be justified by the principle of the family (2). 96

(1) The right of inheritance for relatives with reasonable participation of the spouse corresponds with German legal tradition (see BVerfGE 91, 346 (359)). Both inheritance law pursuant to the Civil Code and inheritance tax law grant spouses and close relatives of the deceased a special position. In civil law this is primarily expressed by the statutory right of inheritance of a spouse (§ 1931 BGB), by the statutory right of inheritance of relatives of the deceased, which is based on the closeness of the recipient to the deceased (§§ 1924 et seq. BGB), as well as by claims to compulsory portions for the spouse and close relatives (parents and descendants) of the deceased (§ 2303 BGB). Under inheritance tax law the tax take always was and remains reduced for spouses and close relatives by exemptions and low tax rates (see above A.I.1.a). 97

In the decisions of the Federal Constitutional Court it has been clarified that testamentary freedom and the right of inheritance for relatives are part of the fundamental content of the guarantee of inheritance in Article 14.1 sentence 1 of the Basic Law (see BVerfGE 93, 165 (173) and BVerfGE 67, 329 (341); 91, 346 (359); 112, 332 (349)). In addition to this there is the protection of marriage and the family (Article 6.1 of the Basic Law). Therefore, the existing inheritance tax law also treats the principle of the family as a limit on the amount of the tax burden (see BVerfGE 93, 165 (174)). From this the Federal Constitutional Court concluded that the family bond of the closest relatives to the deceased should be taken into account in regard to inheritance tax (see BVerfGE 97, 1 (7)) and the tax take for family members, particularly for spouses and children, should be moderated so that they receive at a minimum a clear majority of the inheritance or, in the case of smaller assets, all of the inheritance completely tax-free (see BVerfGE 93, 165 (174-175)). The majority of the literature supports this understanding of the right of inheritance for relatives and the guarantee of inheritance, which are manifested in Article 14.1 sentence 1 of the Basic Law and in Article 6.1 of the Basic Law and, thus, guide inheritance law and inheritance tax law (see 98

Leisner, *Verfassungsrechtliche Grenzen der Erbschaftsbesteuerung*, 1970, p. 111; Löhle, *Verfassungsrechtliche Gestaltungsspielräume und -grenzen bei der Besteuerung von Erbschaften und Schenkungen*, 2001, pp. 25, 102-103; Papier, in: Maunz/Dürig, *GG*, *Art. 14 GG*, marginal nos. 301 et seq. (March 2010); Reinisch, *Erbschaftsteuer und Verfassungsrecht*, 1999, pp. 69 et seq.).

It is true that the legislature did not expressly address the principle of the family either in § 16 ErbStG old or in the legislative materials as a supporting basis for the substantial exemption reserved for spouses. Nevertheless, the formulation of the personal exemption in § 16 ErbStG old, the distribution of the tax classes in § 15 ErbStG old, and the staggered tax rates pursuant to § 19 ErbStG old leave no doubt that for the legislature, the principle of the family was and remains a significant determinative factor for the system of inheritance tax law (previously explicitly stated in BVerfGE 93, 165 (175) regarding § 16 ErbStG in the 1974 version). In accordance therewith, family ties as determined by birth and marriage are the decisive criteria for the staggering of the exemptions and tax rates. The version of the Inheritance Tax Act applicable to the original proceedings was created in reaction to the order of the Federal Constitutional Court of 22 June 1995 and was intended to address the instructions of the Federal Constitutional Court that spouses and children should receive at least the clear majority of the inheritance tax-free (see *Bundestag* printed paper 13/4839, pp. 38, 63-64, 70). 99

(2) The less favourable treatment of civil partners in comparison to spouses in the law on personal exemptions, however, cannot be justified by the principle of the family. 100

(a) In inheritance tax law spouses always have been undisputedly included in the group of persons encompassed, and privileged, by the principle of the family. To the extent internal justification for their participation in the guarantee of inheritance, which is strengthened by the principle of the family and, consequently, their corresponding participation in the protection concerning the taxation of inheritance, derives from the partnership with the deceased spouse arising from the marriage promise as well as from the long-term and legally binding responsibility for the partner undertaken therewith, it cannot justify more favourable treatment in comparison to a surviving civil partner. This is because there is no difference between marriages and registered civil partnerships in this regard. Both are long-term, are legally binding, and are the basis for an obligation of mutual responsibility (see BVerfGE 124, 199 (225)). 101

To the extent that for justification of the preferential treatment of spouses in inheritance tax law supported by Article 6.1 of the Basic Law, reference is made to the fact that the personal marital community between spouses is characterised by joint participation in the financial structures and mutual duties of maintenance and support (see, e.g. Löhle, *Verfassungsrechtliche Gestaltungsspielräume und -grenzen bei der Besteuerung von Erbschaften und Schenkungen*, 2001, pp. 23), this similarly applied to civil partners already under the legal situation applicable at the time of the original 102

proceedings (see a. bb. above)

(b) Unequal treatment also is not justified by the fact that in principle joint children can only result from a marriage and that the legislature, relying on the principle of the family, sought to maintain small and medium-sized assets as undiminished as possible from generation to generation. 103

The structure of both the law on inheritance and the law on inheritance taxes shows that the legislature takes account of and promotes the succession of assets acquired by the family from generation to generation. Likewise, the requirement derived by the Federal Constitutional Court from Article 6.1 in conjunction with Article 14.1 of the Basic Law that for the closest family members, each inheritance – depending on its size – should be at least to a large majority or, in the case of smaller estates, completely tax-free (see BVerfGE 93, 165 (174-175), obtains its actual significance and particular justification in light of the succession in future generations. In particular, multiple instances of inheritance taxation on an estate within possibly short time periods of devolution of the inheritance from generation to generation would jeopardise the protective function of the principle of the family, that is, maintaining small and medium-sized assets as the basis for private lifestyles with as little reduction as possible. In addition to the exemptions this is also taken into account in the Inheritance Tax Act by a tax reduction in the case of short-term, multiple devolutions of inheritance within Tax Class I (§ 27 ErbStG). Not only the transfer of family assets the first time, but across numerous generations, is frequently a testator's dominant purpose and is a defining characteristic of the nature of the right of inheritance. This does not exclude that the inheritance cannot also be given to the parent generation or to third parties depending upon the family circumstances and the testator's exercise of testamentary freedom. The legislature, however, in balancing the inheritance tax system, can assume as a rule the transfer of the assets to following generations. 104

In its qualification as a starting point for a succession of generations, marriage differs in principle from civil partnerships. Because civil partnerships are limited to same-sex couples joint children in principle cannot come from the relationship. In contrast, marriage, as a bond between heterosexual partners, can be the starting point of their own generational succession. It also is a privileged legal area for building a family based upon multiple statutory provisions, regardless of the freedom of the spouses to choose parenthood. 105

It need not be dealt with whether the better abstract qualification of marriage as the starting point for generational succession can justify higher exemptions benefitting spouses with a view toward possible further devolution of the family assets to joint children. If the legislature took account of this point in the applicable tax law at all, it did so in any event with a rule that does not sufficiently implement this approach and, thus, also cannot be used as a basis for differing treatment of spouses and civil partners. This is because the applicable law – in contrast to earlier provisions – does not make the privileged treatment for marriage dependent upon the existence of joint chil- 106

dren, but rather, it does not differentiate the amount of the exemption between childless marriages and those with children. Instead, in the Inheritance Tax Reform Act of 17 April 1974 the legislature turned away from the legal situation prevailing up until then in granting the personal exemption to spouses in § 16.1 no. 1 ErbStG without further dependence on the existence of children (see *Bundestag* printed paper 140/72, p. 70).

b) There is also a lack of sufficient grounds for differentiation as to the non-consideration of civil partners regarding the exemption for retirement benefits pursuant to § 17 ErbStG, which benefits spouses in the amount of Euro 256,000. 107

The exemption for retirement benefits was and is granted to spouses and, to a lesser extent also to children, without prerequisites. It primarily serves to balance the differing inheritance tax law treatment of taxable (§ 3.1 no. 4 ErbStG) and non-taxable retirement benefits (see Meincke, op. cit., *§ 17 ErbStG*, marginal nos. 1-2). By deducting the capital value of retirement benefits that are not subject to inheritance tax from the exemption for retirement benefits pursuant to § 17.1 sentence 2 ErbStG old, the law strives for indirect inheritance tax law equality with retirement benefits that are subject to inheritance tax. To the extent no such offset takes place in accordance therewith, the result of the remaining exemption for retirement benefits is the same as an increase in the personal exemption for spouses and children. To this extent the exemption for retirement benefits is intended to compensate the surviving spouse for insufficient financial support with tax-free retirement amounts (see *Bundesrat* printed paper (BRDrucks 140/72, pp. 70-71). 108

To the extent to which the exemption for retirement benefits balances the different inheritance tax law treatment of statutory and contractual retirement benefit amounts, this purpose of the provision does not allow any room for differentiation between marriage and civil partnership. The legislative goal of eliminating otherwise existing injustices in the inheritance tax law treatment of retirement benefits is similarly applicable to both spouses and civil partners. To the extent the exemption for retirement benefits is not depleted through offsetting pursuant to § 17.1 sentence 2 ErbStG old and, thus, ultimately has the effect of an additional personal exemption, the considerations set forth above in section (3.a) correspondingly apply here. 109

c) Finally, there also is no sufficient reason for differentiation justifying that registered civil partners are placed in Tax Class III with the highest tax rates and spouses in Tax Class I with the lowest tax rates (§ 15.1, § 19,1 ErbStG old), particularly when viewed together with the serious unequal treatment in regard to the personal exemptions. 110

aa) The legislature has broad discretion in decisions on the number of tax classes and the tax rates that apply within the tax classes depending on the amount of the inheritance to be taxed. Likewise, the legislature has considerable discretion in classifying heirs into the individual tax classes. In so doing, of course, it must consistently implement the principle of taxation according to closeness of relationship that it set for 111

itself, which otherwise is also taken into account by the principle of the family enshrined in Article 14.1 and Article 6.1 of the Basic Law (see above 3.a.cc); in any event it cannot contradict this. However, if the legislature places spouses and registered civil partners in two different tax classes although both partner relationships are to a large extent harmonised with one another in the legal system regarding the closeness of their legally fixed relationship to the deceased, it must be able to withstand strict scrutiny as to equality. This is because it involves the effect of differentiation among groups of persons within the area of the guarantee of inheritance which in addition is related to their sexual orientation (see above 2.b.cc).

bb) The staggering of the tax classes and tax rates serves the purpose of apportioning the inheritance tax pursuant to marriage and proximity of relationship on the one hand and the amount of the inheritance on the other hand. This rule takes into account the principle of the family in inheritance law and the tax law principle of financial ability to pay. As to the different treatment of spouses and civil partners in regard to the tax rates, thus, the same considerations apply in regard to supportable grounds for differentiation that were previously set forth in regard to the personal exemption (see above 3.a). In favour of this, in particular, is also the fact that personal exemptions and tax rates closely interact with one another in the gradation of the actual tax burden on heirs. Pursuant thereto, the principle of taxation according to financial ability to pay, mere reliance upon Article 6.1 of the Basic Law, and the principle of the family do not justify differences between spouses and civil partners in the tax rates. As with the personal exemptions, it is also applicable here that the differences between marriages and civil partnerships under the current statutory approach do not allow for less favourable treatment for civil partners. 112

4. Because the provisions of the Gift and Inheritance Tax Act in the version of the 1997 Tax Reform Act, which are at the basis of the challenged decisions and which are indirectly challenged by the complainants, are unconstitutional already due to the disadvantage to registered civil partners in comparison to spouses in violation of Article 3.1 of the Basic Law, there is no need for a decision on whether, in addition, an infringement on equality can be based upon the fact that civil partners in these provisions are treated as distant relatives and third parties as to the personal exemption and tax rates and, thus, substantially different groups of persons are treated the same. 113

II.

For the same reasons (see above I.4) it can remain open whether the challenged provisions in the Gift and Inheritance Tax Act in the version of the 1997 Tax Reform Act are compatible with the guarantee of inheritance derived from Article 14.1 sentence 1 of the Basic Law and with the principles developed by the Federal Constitutional Court on this (see BVerfGE 91, 346 (358 et seq.); 93, 165 (172 et seq.); 97, 1 (6-7); 112, 332 (348 et seq.)). 114

C.

§§ 16.1, 17, and 15.1 in conjunction with § 19 ErbStG old are incompatible with Article 3.1 of the Basic Law (regarding a declaration of incompatibility as a regular consequence upon violations of the principle of equality, see BVerfGE 99, 280 (298); 105, 73 (133); 117, 1 (69); 122, 210 (245); established case-law). Courts and administrative authorities may no longer apply the provisions to the extent of the established incompatibility and ongoing proceedings must be discontinued (see BVerfGE 73, 40 (101); 105, 73 (134); established case-law). 115

The legislature has until 31 December 2010 to enact a new provision for those old cases affected by the Gift and Inheritance Tax Act in the version published on 27 February 1997 (Federal Law Gazette I p. 378) that removes the infringement on equality from the time period between the effective date of the Act on the Termination of the Discrimination of Same-Sex Couples: Civil Partnerships of 16 February 2001 (Federal Law Gazette I p. 266) until the effective date of the Act to Reform Inheritance Tax and Property Valuation of 24 December 2008 (Federal Law Gazette I p. 3018). 116

There also is no cause to grant the legislature a transition period for improving the Gift and Inheritance Tax Act after the introduction of registered civil partnerships and to order the continued applicability of the unconstitutional legal provisions during this time period. Pursuant to the decisions of the Federal Constitutional Court, an order for temporary continued applicability based upon considerations of orderly financial and budget planning will be considered only when the constitutional law situation up until then was insufficiently clarified and for this reason the legislature should be granted a reasonable period to create a new provision (see BVerfGE 120, 125 (167-168) with further references; BVerfG, order of the First Senate of 9 February 2010 – 1 BvL 1/09 et al., *Neue Juristische Wochenschrift – NJW* 2010, p. 505 (518, marginal no. 217)). There is no expected threat to the orderly financial and budget planning from the retroactive improved treatment for registered civil partners under the Gift and Inheritance Tax Act as of August 2001 based upon the expected small number of cases affected hereby. Unlike in the case under the social security law which was at the basis of the order of the Third Chamber of the First Senate of the Federal Constitutional Court of 11 June 2010 (1 BvR 170/06, juris) and in which only the question of subsequent payment of survivors' pensions for civil partners during a short, closed period of time, had to be decided, in light of the obvious difference in taxation between spouses and civil partners with significant financial repercussions for those affected it cannot be established here in the area of gift and inheritance tax law that there was an unclarified constitutional law situation for which the legislature as an exception should be given a transition period for improvement. It is true that the constitutional complaints to be decided here also involve statutes no longer in effect. The unequal taxation related thereto, however, has significant consequences that extend into the future for the assets involved. Inheritances are one-time occurrences often of significant financial volume through which typically the income from an entire life of marriage, partnership, or family is transferred. The taxation on an inheritance, 117

thus, has effects extending years beyond the tax take.

If the legislature seeks to exhaust its discretion in regard to the new provision that is required, for example, with a view to the principle of the family characterising inheritance tax law through special acknowledgment of spouses with joint children, the basis for differentiation that it relies upon must be clearly expressed and must be sufficiently supportable measured against the scope of the different treatment and against the backdrop of existing differences between spouses and civil partners. 118

The court decisions challenged violate the rights of the complainants under Article 3.1 of the Basic Law. They are based on a disadvantage to registered civil partners in comparison to spouses under the Gift and Inheritance Tax Act in the version of the 1997 Tax Reform Act without the possibility of limiting the relevance for the decision in one of the original proceedings to one of the provisions established as unconstitutional. The orders of the Federal Finance Court are annulled in both original proceedings and the matters referred back to the Federal Finance Court. 119

The decision on the reimbursement of expenses is based on § 34a.2 of the Federal Constitutional Court Act. 120

Kirchhof	Hohmann-Dennhardt	Bryde
Gaier	Eichberger	Schluckebier
Masing		Paulus

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 21. Juli 2010 - 1 BvR 611/07, 1 BvR 2464/07

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