Headnotes

to the Order of the First Senate of 4 October 2011

– 1 BvL 3/08 –

1. **The submission of a statute transposing European Union law to the Federal Constitutional Court according to Article 100.1 sentence 1 of the Basic Law is inadmissible if the submitting court has not clarified whether the legal provision which it judges to be unconstitutional has been adopted in transposition of latitude left to the national legislature by Union law.**
2. **The submitting court must where appropriate initiate preliminary ruling proceedings for this to the European Court of Justice according to Article 267.1 TFEU regardless of whether or not it is a court of last instance.**

FEDERAL CONSTITUTIONAL COURT

– 1 BVL 3/08 –

IN THE NAME OF THE PEOPLE

**In the proceedings
on the constitutional review**

of whether § 2 sentence 2 no. 4 of the Investment Allowance Act (*Investitionszulagengesetz* – InvZulG) 1996 in the version of the 1999 Tax Relief Act (*Steuerentlastungsgesetz*) of 19 December 1998 is compatible with Article 20.3 of the Basic Law (*Grundgesetz*) insofar as the provision also encompasses investments with regard to which the investor has taken a binding investment decision prior to 28 September 1998,

– suspension and submission order of the Finance Court of the *Land* (state of) Saxony-Anhalt of 20 December 2007 (1 K 290/01) –

the Federal Constitutional Court – First Senate – with the participation of Justices

Kirchhof (Vice President),
Gaier,
Eichberger,
Schluckebier,
Masing,
Paulus,
Baer,
Britz

ruled on 4 October 2011:

The submission is inadmissible.

Gounds:

A.

The Finance Court requests a ruling on the part of the Federal Constitutional Court as to whether the retroactive exclusion of the granting of an investment allowance for investment decisions taken prior to 28 September 1998 provided for in § 2 sentence 2 no. 4 of the Investment Allowance Act 1996 (Federal Law Gazette (*Bundesgesetzblatt* – BGBl) I 1996, p. 60) in the version of the 1999 Tax Relief Act (Federal Law Gazette I 1998, p. 3779) is unconstitutional because of a non-permissible retroactive 1

effect.

I.

1. The Investment Allowance Act regulates the payment of state aid (investment allowances) for specific business investments in the eligible area encompassing the *Land* Berlin and the new Federal *Länder* (states). The Investment Allowance Act is to facilitate quicker, more comprehensive investment activity on the part of private enterprises in the eligible area (see *Bundestag* printed paper (*Bundestagsdrucksache* – BTDrucks) 12/3432, p. 69). The Investment Allowance Act 1996 did not initially contain any restrictions on investments in the agricultural sector. 2

2. The European Commission handed down a decision (94/173/EC, OJ EC 1994 L 79, p. 29) on 22 March 1994 establishing selection criteria for investments eligible for Community assistance for improving the processing and marketing conditions for agricultural and forestry products. According to point 2.1 of the Annex to the decision, investments in the cereals and rice sectors (not including seeds) for milling, amongst other areas, are excluded from aid. 3

By letter of 20 October 1995 (no. SG[95] D/13086, reproduced in OJ EC 1996 C 29, p. 4), the Commission notified the Member States of Community guidelines and appropriate measures for state aid in connection with investments in the processing and marketing of agricultural products. It went on to state that it would authorise no further aid measure which did not comply with the Community guidelines and the appropriate measures. Amongst other things, state aid for investments which were excluded by point 2 of the Annex to the decision of the Commission of 22 March 1994 was to be considered incompatible with the common market. The Federal Government categorised the communication as a recommendation with no binding force according to Article 189.5 EC (now Article 288.5 TFEU). 4

The Commission decided on 12 June 1996 to initiate the procedure provided for in Article 93.2 EC (now Article 108.2 TFEU) in respect of investment aids for the processing and marketing of agricultural products which Germany might grant on the basis of existing regional aid schemes. The Commission informed the Federal Republic of Germany of this by letter of 1 July 1996 (no. SG[96] D/6026, published in OJ EC 1997 C 36, p. 13) and gave it, as well as the other Member States and other interested parties, notice to submit their comments. 5

The Commission, finally, decided on 20 May 1998 (no. K [1998] 1712, OJ EC 1999 L 60, p. 61) that national aid schemes were incompatible with the common market in so far as they did not comply with the Community guidelines and appropriate measures for state aid in connection with investments in the processing and marketing of agricultural products which had been communicated to Germany by letter of 20 October 1995. Germany was instructed to amend, or abolish, existing aids and existing aid schemes within two months; in particular, Germany was to ensure that no state aid for investment was granted which was unconditionally excluded by point 2 of the 6

Annex to Decision 94/173/EC. The letter of the Commission was served on the Federal Government on 2 July 1998.

3. By letter of 18 September 1998, the Federal Ministry of Finance thereupon informed the highest finance authorities of the *Länder* that from 3 September 1998 onwards, amongst other things no investment allowances according to the Investment Allowance Act 1996 may be granted for the investments designated in point 2 of the Annex to Decision 94/173/EC in the processing and marketing of agricultural products. At the same time, it was pointed out that a corresponding amendment to the Investment Allowance Act was planned to be carried out. The letter of the Federal Ministry of Finance was published in the Federal Tax Gazette (*Bundessteuerblatt* – BStBl) on 28 September 1998 (Federal Tax Gazette I 1998, p. 1132). 7

4. An exclusion was inserted in § 2 sentence 2 of the Investment Allowance Act as a new no. 4 by means of Article 4 no. 1 of the 1999 Tax Relief Act of 19 December 1998. This meant that certain commodities concerned with the processing and marketing of agricultural products which had been acquired or produced after 2 September 1998 were no longer eligible. The provision read as follows subsequent to the amendment: 8

§ 2 Nature of the investments 9

[1]Eligible investments shall be the acquisition and the production of new, depreciable, moveable commodities of the fixed assets which, at least three years subsequent to their acquisition or production, 10

form part of the fixed assets of a business or of a permanent establishment in the eligible area, 11

remain in a permanent establishment in the eligible area, and 12

are not used more than 10 per cent privately in each year. 13

[2]The following shall not be eligible 14

commodities of minor value within the meaning of § 6.2 of the Income Tax Act (*Einkommensteuergesetz*), 15

aircraft the ordering or production of which was commenced by the eligible party prior to 5 July 1990 or subsequent to 31 October 1990, 16

passenger motor vehicles, and 17

commodities which the eligible party has acquired or produced subsequent to 2 September 1998 and which are designated in point 1.2 second or third indent or in point 2 of the Annex to European Commission Decision 94/173/EC of 22 March 1994 on the selection criteria to be adopted for investments for improving the processing and marketing conditions for agricultural and forestry products and repealing Decision 90/342/EEC – OJ EC L 79 p. 29 – (agricultural and forestry products decision). 18

The new provision came into force according to Article 6.2 of the 1999 Tax Relief Act on the date subsequent to its promulgation, 24 December 1998. 19

The recommendation for a resolution and the report of the Finance Committee of the German *Bundestag* state with regard to the new provision that the Commission had obliged Germany to amend, or abolish, existing aids and existing aid schemes within two months of the announcement of the Commission's decision; Germany was to particularly ensure that no state aid was granted for investments designated in the Commission's decision of 22 March 1994 (see *Bundestag* printed paper 14/125, p. 44). 20

5. The representatives of the highest finance authorities of the Federation and of the *Länder* discussed in the ensuing period the question of how the term "granting" used by the Commission was to be interpreted. This could not be understood to constitute the "disbursement" of the tax relief, but rather the restrictions of the Community guidelines only covered investments that had been concluded subsequent to 2 September 1998. 21

II.

1. The plaintiff of the original proceedings, a limited company, runs a mill in the new federal *Länder*. It applied in September 1999 for an investment allowance to be granted for investments from 1998 amounting to roughly DM 5.9 million. The tax office only assessed an investment allowance for investments amounting to roughly DM 1.9 million. The tax office refused to grant the investment allowance applicable to the basis of assessment going beyond this, amounting to DM 3.9 million, on the basis of § 2 sentence 2 no. 4 of the Investment Allowance Act 1996 in the version of the 1999 Tax Relief Act on grounds that the investments had not been carried out until after 2 September 1998. The objection filed by the plaintiff was unsuccessful. 22

2. The plaintiff is claiming with the action the granting of the refused investment allowance. It essentially claims that the insertion of § 2 sentence 2 no. 4 of the Investment Allowance Act 1996 violates the constitutional ban on retroactivity. The right to investment allowance had not arisen until after 1998, but the standards of genuine retroactive effect were said to nonetheless to be material. The investment decisions had already been taken prior to 3 September 1998, and hence indeed prior to the proclamation of the amendment to § 2 of the Investment Allowance Act 1996. The provisions on aid affected by the amendment were said to have achieved their steering function and to have become a basis of trust that was eligible for protection. The genuine retroactive effect which this entailed was said to also not be exceptionally justified because Germany would otherwise have been threatened with infringement proceedings under Community law. 23

III.

The Finance Court suspended the proceedings and submitted to the Federal Constitutional Court the question of whether § 2 sentence 2 no. 4 of the Investment Al- 24

lowance Act 1996 in the version of the 1999 Tax Relief Act is compatible with Article 20.3 of the Basic Law in that the provision also covers investments with regard to which the investor had taken a binding investment decision prior to 28 September 1998.

§ 2 sentence 2 no. 4 of the Investment Allowance Act 1996 was said to exclude an investment allowance for the commodities which had been acquired after 2 September 1998, whilst the plaintiff had taken its binding investment decisions prior to 3 September 1998. 25

The provision is said to violate the rule-of-law ban on retroactivity of Article 20.3 of the Basic Law in that it also excludes from eligibility for an investment allowance those investments with regard to the implementation of which the investor had taken its investment decision prior to 28 September 1998. 26

From the time of an investor's binding investment decision which could no longer be easily reversed, an investor was said to enjoy the protection of legitimate expectations against statutes retroactively restricting or rescinding the fiscal promotion of the investment. The investor's trust in the continuation of a provision that was advantageous to the investor was said to be protected according to the standards of the genuine retroactive effect, even if there was in terms of definition no genuine retroactive effect in such cases. The Finance Court further argued that the basis for the trust in the continuation of the provisions contained in the Investment Allowance Act 1996 prior to the insertion of the contentious provision had also not been shaken by legal acts or announcements prior to September 1998. Neither the decision of the Commission of 22 March 1994, nor the letter of the Commission of 20 October 1995, or the initiation of the main examination procedure on 12 June 1996, or the call by the Commission on the other Member States and interested parties to submit their comments, could have had such an effect. It was not until the publication of the Commission's decision of 20 May 1998 in the Federal Tax Gazette on 28 September 1998 that trust eligible for protection in the continued application of the funding rules had been removed. 27

The retroactive effect linked with § 2 sentence 2 no. 4 of the Investment Allowance Act 1996 was said to be constitutionally not justified. The justifications recognised in the case-law were said not to apply. Provisions had been amended that had not been ineffective under constitutional law or because of Community law. Also, no imperative reasons of the common good were said to be recognisable which could justify a retroactive effect. 28

The decision of the Commission of 20 May 1998 was said not to have required the exclusion of investments from the granting of investment allowance if they had already been initiated in the shape of binding investment decisions. Firstly, the Commission had accepted the previous national provisions for the past. Secondly, infringement proceedings had not been threatened because a transitional regulation would have been compatible with the Commission's decision with the content that in- 29

vestments remained eligible that had already been commenced. The Commission was said to have only issued an obligation that was applicable to the future. The order of 20 May 1998 to amend or abolish incompatible provisions on aid constituted neither by its wording nor by its spirit an obligation to abolish all aids for the past too. It was stated that, had the Commission intended to order a retroactive effect, it would have explicitly done so, especially since such an order could not be taken for granted and considerations of the protection of legitimate expectations were not alien to Community law as a matter of principle. It could not be derived from the Commission's decision that investments were to be covered which had already commenced although an investment as a rule took some time between planning and completion.

The finance authorities' understanding of the Commission's decision, said not to consider the eligibility of investments that had already been commenced, was said to neglect the nature of decisions on aid. The alternative to equating "granting" with "disbursement" was said not to be solely the establishment of allowances for investments that have been completed. It was said to be necessary to link to the realisation of the fact of aid under substantive law, which was said not to rule out the granting of an investment allowance in those cases in which only some of the facts had been materialised prior to the cut-off date. If the Commission's decision did not explicitly prescribe the refusal of aids for investments that had only commenced, there was no reason to interpret it in this manner with no explicit cause if this led to a constitutionally objectionable retroactive effect. 30

This presumption was also said to be confirmed by the subsequent Community guidelines for state aid in the agriculture sector of 1 February 2000 (OJ EC 2000 C 28, p. 2). Accordingly, agricultural aids – permissible once more according to a recent legal amendment – should not be granted in respect of work begun or activities undertaken before an application for aid has been properly submitted. Community law is hence said to also presume that the steering impact of an aid is already exercised at the beginning of an investment. If the granting of an aid were to be ruled out if the investment had already been commenced, a ban on aid aimed at the future could also only cover investments which had not yet begun. 31

The Finance Court argued that, even if Germany had been threatened with infringement proceedings, this would not have justified the reform of § 2 sentence 2 no. 4 of the Investment Allowance Act 1996. Not every threat of infringement proceedings is said to justify a genuine retroactive effect against the citizen. If the risk of infringement proceedings rested solely on Germany having got into trouble with Community law because of imprudent dealings, it was no longer in the interest of the common good to seek an exit strategy by sacrificing the protection of legitimate expectations; the necessary weighing up between the protection of legitimate expectations and the avoidance of infringement proceedings was hence said to be concluded in the favour of the protection of legitimate expectations. 32

A submission to the European Court of Justice could not be considered. The Senate 33

had no doubts as to the interpretation of the material rules of Community law, including the Commission's decisions. It also did not call into question the compatibility of the Commission's decisions with higher-ranking Community law. The breach of the law was said to be founded on national law.

IV.

34 The Federal Ministry of Finance on behalf of the Federal Government, the Federal Finance Court (*Bundesfinanzhof*), the German Association of Chambers of Industry and Commerce (*Deutscher Industrie- und Handelskammertag*), the Association of German Mills (*Verband Deutscher Mühlen*) and the German Association for Small and Medium-sized Businesses (*Bundesverband mittelständische Wirtschaft*) have made observations on the submission.

35 1. The Federal Government has doubts as to the admissibility of the submission, but at any rate considers § 2 sentence 2 no. 4 of the Investment Allowance Act 1996 to be constitutional.

36 a) The Federal Constitutional Court is said to have ruled that, as secondary Community law, European legal acts which the Federal Republic of Germany is obliged to transpose are not subject to review by German courts. The German legislature is said with § 2 sentence 2 no. 4 of the Investment Allowance Act 1996 to have merely followed the binding instructions of the European Commission ensuing from the decision of 20 May 1998. The Commission is said not to have left any latitude by having set a concrete deadline for the transposition of the amendments which were demanded; Germany had only been able to grant state aid in connection with investments until 2 September 1998.

37 b) Since, according to § 4 sentence 1 of the Investment Allowance Act 1993, the right to an investment allowance is said to arise not when the application is filed, but at the end of the economic year in which the investment had been planned, the amendment of § 2 of the Investment Allowance Act 1996 had not related to any completed circumstances. It was a factual link back (*tatbestandliche Rückanknüpfung*), and hence a false retroactive effect which was justified.

38 The trust of an investor in whose favour not yet all claim prerequisites had been met is said not to be as eligible for protection as that of an investor who had already met all claim prerequisites. This is said to apply regardless of the fact that the steering and shaping function of the statute was already reached with the commercial investment decision. The legal amendment had transposed the binding requirements contained in the Commission's decision of 20 May 1998 in national law without the legislature having had any latitude – even in light of infringement proceedings which were otherwise threatened. If, in the interest of the protection of legitimate expectations, one were to take as a cut-off date not the time of the final arising of the claim, but an earlier point in time, a uniform point in time would certainly have been taken for all prerequisites under substantive law, namely the time of the conclusion of the investment,

that is acquisition or production. With its decision of 22 March 1994, published in the Official Journal, and the letter of 20 October 1995, which was also communicated in the Official Journal, the Commission is said to have made it clear that it wished to rule out future investments in milling from eligibility for aid. The enterprises in question could hence have taken note of the immanent changes. At the latest on the initiation of the formal state aid investigation procedure, trust in the continuation of the legal situation, which was subsequently amended, had been destroyed. The trust of the plaintiff eligible for protection must at any rate be subordinate to the urgent interests of the common good pursued with the legal amendment. Imperative requirements of European law had only been transposed with the legal amendment. If the legislature had not complied with the requirements from the Commission's decision of 20 May 1998 in good time, it would have risked the immediate initiation of infringement proceedings.

Even if § 2 sentence 2 no. 4 of the Investment Allowance Act 1996 had entailed a genuine retroactive effect or the provision had had to be measured by the standards for the justification of such an effect, the provision would not be unconstitutional. Protection of legitimate expectations is said not to be required if one would have had to anticipate an amendment of the provision at the time to which the establishment of the legal consequence of a statute was related. This very circumstance is said to exist for the reasons already stated; one could not expect the legislature to deliberately commit a breach of the Treaty in order to protect the trust of the individual in the eligibility of investment decisions although the latter should have been aware of the immanent legal amendments and could have taken steps to keep open its contractual obligation and to obtain binding information from the tax office prior to making the investment decision. 39

2. The Federal Finance Court has transmitted observations made by its Third Senate which essentially reproduce its case-law on the retroactive amendment of provisions on investment allowances. 40

3. The German Association of Chambers of Industry and Commerce and the Association of German Mills hold the view that altering the de facto requirements for granting an investment allowance constitutes a constitutionally unjustified genuine retroactive effect. They argue that the plaintiff should have been granted protection of its legitimate expectations until the amendment to the law had become recognisable after the publication of the Commission's decision of 20 May 1998. The plaintiff should not have had to anticipate an amendment of the provision granting aid at the time of its binding investment decisions which had already exerted its steering function. There are said to be no imperative reasons of the common good justifying the retroactive effect. It is said that the legislature could not evoke the threat of infringement proceedings because the state could not expect its citizens to have a better knowledge of the law than it did. Infringement proceedings would furthermore not have been the imperative consequence of the recognition of the plaintiff's trust. Given the lack of an imperative order, it should not be presumed that the Commission had 41

intended to order a retroactive effect.

4. The German Association for Small and Medium-sized Businesses is of the opinion that there is a non-permissible genuine retroactive effect. This is however said to be countered by European Community law on the protection of legitimate expectations and its application to state aid. The Federal Constitutional Court should review whether to accept the partial waiver of the rule of law for reasons of the enforcement of European Community law or to prohibit its application in this regard. 42

B.

The submission is inadmissible because the submitting court has not adequately clarified whether the legal provision of the Investment Allowance Act 1996 submitted to the Federal Constitutional Court for review is based on a requirement of European Community law that is binding on the German legislature, and in this regard not has adequately set forth the materiality of the question submitted to the decision. 43

I.

If a court submits to the Federal Constitutional Court a provision which was adopted in transposition of legal acts of the European Union, this submission is material to the decision because of the withdrawal practised by the Federal Constitutional Court from the exercise of its jurisdiction in such cases if the statute was adopted in the exercise of national latitude in transposition. The ordinary (non-constitutional) court must clarify whether Union law permits such latitude in transposition in the respective dispute (1), and in doing so must deal with the questions arising thereby in a substantiated manner (2). 44

1. An Act which transposes Union law can only be submitted to the Federal Constitutional Court according to Article 100.1 sentence 1 of the Basic Law for a ruling on its constitutionality if it is subject to review by the Federal Constitutional Court. As long as and to the degree that the Federal Constitutional Court withdraws its review of Union law and of national law transposing imperative Union law by the standard of the Basic Law, the question of the compatibility of the Act with the Basic Law is not material to the decision since it is to be answered neither by the Federal Constitutional Court nor by the submitting court. The submission of a statute to the Federal Constitutional Court is inadmissible in such a case. The ordinary court must therefore clarify prior to making a submission according to Article 100.1 sentence 1 of the Basic Law whether Union law leaves latitude to the national legislature facilitating a review by the constitutional court. 45

a) Over and above the ultra vires proviso and the reserve of constitutional identity (see on this Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 123, 267 <353-354>; 126, 286 <302-303>), which are not at issue here, the Federal Constitutional Court no longer exercises its jurisdiction to decide on the applicability of Union law in the Federal Republic of Germany that is cited as the legal basis for any acts of German courts and authorities, 46

and hence does not review this law by the standard of the fundamental rights contained in the Basic Law as long as the European Union generally ensures effective protection of fundamental rights vis-à-vis the powers of the Union which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law in each case, and in so far as they generally safeguard the essential content of fundamental rights (see BVerfGE 73, 339 <387>; 102, 147 <162 et seq.>; 118, 79 <95>). On the basis of Article 23.1 of the Basic Law, this applies not only to regulations, but also to directives according to Article 288.3 TFEU and to decisions of the Commission addressing the Federal Republic of Germany according to Article 288.4 TFEU (earlier: decisions of the Commission according to Article 249.4 EC). Also a provision of domestic law which transposes a directive or a decision into German law is in this respect not measured by the fundamental rights of the Basic Law in the sense that Union law does not leave any latitude in transposition, but makes imperative requirements (see BVerfGE 118, 79 <95-96>; 125, 260 <306-307>).

b) If an ordinary court poses the question as to the compatibility of a statute which is material to the decision in its proceedings derived from Union law with the fundamental rights, it is hence first and foremost its task to clarify – where appropriate by making a submission to the Court of Justice of the European Union (below: European Court of Justice) according to Article 267.1 TFEU – whether Union law leaves latitude in transposition to the German legislature. Only when this is established can the Act filling out the latitude in transposition be subject to a review of its constitutionality by the Federal Constitutional Court, and hence a submission to the Federal Constitutional Court considered. 47

aa) The obligation incumbent on the submitting court to clarify the binding nature of the requirements under Union law for the German legislature ensues from the requirement of materiality to the decision. A submission according to Article 100.1 sentence 1 of the Basic Law is only admissible if it is material to the decision of the original proceedings. In this respect, firstly, the submitted statute must be material to the decision for the proceedings to be ruled on by the submitting court. Since the Federal Constitutional Court is only to be seized of aspects which are material to the decision in the original proceedings, the submission of a statute which a court has judged to be unconstitutional is, secondly, conditional on the Federal Constitutional Court being able to rule on the constitutional question which has arisen. The latter is not the case if the Federal Constitutional Court refrains, out of respect for the powers assigned to the European Union, from reviewing the German transposition law by the standard of the Basic Law. The submission to the Federal Constitutional Court is then unable to contribute anything towards the resolution of the original case; the outcome of such a submission is not material to the decision. 48

bb) In the relationship with the Federal Constitutional Court, it is primarily the task of the ordinary courts to clarify the question of the latitude in transposition that is available to the national legislature under Union law, where appropriate by making a sub- 49

mission to the European Court of Justice according to Article 267.1 TFEU.

(1) If there is ambiguity regarding the meaning of Union law, a submission to the European Court of Justice according to Article 267.1 TFEU can be considered, in the context of which the European Court of Justice can find in the preliminary ruling proceedings on the validity and the interpretation of Union law, but also on the act of a Union body, such as on the question of whether a Member State is bound by a decision of the Commission according to Article 288.4 TFEU. 50

According to Union law, an obligation to bring a matter before the European Court of Justice exists exclusively for courts of last instance, against whose decisions there is no judicial remedy under national law (Article 267.3 TFEU). Even the courts of last instance of a Member State are not obliged to implement preliminary ruling proceedings if the question of Union law at issue has already been the subject-matter of interpretation by the European Court of Justice or the correct application of Union law is so obvious as to leave no scope for any reasonable doubt. A national court of last instance may only conclude that there is no such reasonable doubt as to the manner in which the question raised is to be resolved if it is convinced that the matter is equally obvious to the courts of the other Member States and the European Court of Justice. Only if these preconditions are satisfied may the national court of last instance refrain from submitting this question to the European Court of Justice and take upon itself the responsibility for resolving it (acte clair doctrine, see ECJ, judgment of 6 October 1982, Case C-283/81, C.I.L.F.I.T., European Court Reports 1982, p. 3415; BVerfGE 82, 159 <193>). 51

(2) Even instance courts are however obliged to clarify questions of Union law via a preliminary ruling from the European Court of Justice if it is unclear whether and to what degree Union law leaves the Member States latitude in transposition, where there are grounds to submit the national transposition law because of incompatibility with the Basic Law according to Article 100.1 sentence 1 of the Basic Law. 52

The fact that Article 267.2 TFEU grants greater latitude for decisions to the national courts which are not courts of last instance from a Union law point of view in this respect does not contradict this because the obligation to submit the underlying fundamental question is founded on the reserve of materiality to the decision according to Article 100.1 sentence 1 of the Basic Law (see aa above), and hence on the national law on constitutional procedure. 53

This obligation incumbent on the instance courts to initiate preliminary ruling proceedings according to Article 267 TFEU corresponds with the competence and task in the relationship with the Federal Constitutional Court primarily incumbent on the ordinary courts to interpret ordinary (non-constitutional) national law (see BVerfGE 79, 1 <24>; 86, 382 <386-387>; 113, 88 <103>), and where appropriate to judge the impact of Union law on a provision of ordinary national law. It lies within the competence of the national ordinary courts to interpret Union law in this respect insofar as their decision depends on it. In the same way as the interpretation and application of ordinary 54

law is primarily a matter for the ordinary courts, the latter are also called on to interpret and apply Union law (see Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG), Order of the First Senate of 19 July 2011 – 1 BvR 1916/09 –, juris, marginal no. 89; further BVerfGE 126, 286 <316>). In this framework, they must also clarify the binding nature of requirements of Union law for the national legislature and where necessary invoke the jurisdiction of the European Court of Justice. The judgment of the impact of the questions of Union law resolved by the European Court of Justice on national law is then in turn primarily a matter for the ordinary courts and not for the Federal Constitutional Court. By contrast, it would not correspond to the distribution of jurisdiction established in the Basic Law between the Federal Constitutional Court and the ordinary courts if the latter were allowed to submit national transposition law that had not been clarified in the relationship with Union law according to Article 100.1 sentence 1 of the Basic Law to the Federal Constitutional Court, and hence could cause the Federal Constitutional Court for its part to initiate preliminary ruling proceedings according to Article 267.3 TFEU where it was only able to determine the scope of its review by the constitutional court by these means.

cc) The obligation incumbent on the ordinary courts prior to making a submission to the Federal Constitutional Court to clarify the content and binding nature of Union law, where appropriate by initiating preliminary ruling proceedings according to Article 267.1 TFEU, does not contradict the possibility of the ordinary courts, confirmed by the Federal Constitutional Court, to select between a review of statutes according to Article 100.1 sentence 1 of the Basic Law and submission to the European Court of Justice, given that this relates to different case constellations. 55

If there is a dispute as to whether a legal provision which is material to the decision in the original proceedings is compatible with Union law and constitutional law, there is – according to the case-law of the Federal Constitutional Court from the point of view of German constitutional law – in principle no established sequence among any interim proceedings which might have to be initiated by the ordinary court according to Article 267.2 or 267.3 TFEU and submission according to Article 100.1 sentence 1 of the Basic Law. A court which has doubts under both Union and constitutional law may hence rule according to its own expediency considerations as to which set of interim proceedings it initially initiates (see BVerfGE 116, 202 <214>). In contradistinction to this, the binding of the national legislature by primary Union law which is at issue here is a matter of determining the power of the Federal Constitutional Court to review, and is hence a preliminary question which imperatively must be clarified for the admissibility of a review of statutes. 56

c) For the assessment of the materiality of the submission question to the decision in the context of a concrete review of statutes, in principle the legal view of the submitting court is decisive unless it is evidently untenable (see BVerfGE 2, 181 <190-191 and 193>; 88, 187 <194>; 105, 61 <67>). This follows from the task, primarily reserved for the ordinary courts, to interpret and apply both ordinary law and Union law. 57

Such far-reaching withdrawal of the review of the legal opinion of the submitting court is however not justified for the question as to the materiality of a submission to the decision which has as its subject-matter national law transposing Union law. With the decision on the scope of the binding nature of Union law on the national legislature, at the same time a finding is handed down on the limits imposed on the review by the constitutional court by the standard of the Basic Law. The determination of the prerequisites for the exercise of own jurisdiction, and hence the answer to the question of whether it measures national law by the standard of the fundamental rights of the Basic Law or refrains from doing so, must remain within the remit of the Federal Constitutional Court in the relationship with the submitting court. The decision of an ordinary court regarding whether and to what degree Union law leaves latitude in transposition to the legislature within the meaning of an *acte clair* is hence not only subjected to a review by the Federal Constitutional Court of whether a matter is obvious. The latter is, rather, entitled in this respect to a further-reaching right of review (see Federal Constitutional Court, Order of the First Senate of 19 July 2011 – 1 BvR 1916/09 –, juris, marginal no. 90). Otherwise, the ordinary court would also be able to have a content review carried out by the Federal Constitutional Court were there to be an unconvincing presumption of latitude in transposition being available to the national legislature if only it proves not to be obviously untenable. 58

This is not opposed by the fact that the Federal Constitutional Court reviews the omission of a submission to the European Court of Justice by a court of last instance in the context of a constitutional complaint based on a breach of Article 101.1 sentence 2 of the Basic Law only examining whether the obligation to submit according to Article 267.3 TFEU has been handled in an untenable manner (see most recently BVerfGE 126, 286 <315 et seq.>; Federal Constitutional Court, Orders of the First Senate of 25 January 2011 – 1 BvR 1741/09 –, *Neue Juristische Wochenschrift* – NJW 2011, p. 1427 <1431> [items 104-105] and of 19 July 2011 – 1 BvR 1916/09 –, juris, marginal no. 98). Those cases relate not to the decision regarding the exercise of the review by the constitutional court in a review of statutes, but to the handling of procedural law by the courts in terms of the guarantee of one’s lawful judge otherwise only reviewed within broad limits as well. 59

2. With the obligation incumbent on the court to clarify the binding nature of the requirements of Union law prior to the submission of a statute transposing Union law to the Federal Constitutional Court, there is a corresponding obligation of setting forth within the context of the submission. 60

According to Article 100.1 sentence 1 of the Basic Law in conjunction with § 80.2 sentence 1 of the Federal Constitutional Court Act (*Bundesverfassungs¬gerichts¬gesetz* – BVerfGG), the submitting court must set forth to what degree its decision depends on the submission and that the court carried out the necessary review of materiality to the decision. According to established case-law, it must be possible to derive from the order with sufficient clarity that and for what reasons the court would reach a different outcome were the provision to be valid than were it to be invalid (see BVer- 61

fGE 86, 71 <77>; 88, 187 <194>; 105, 48 <56>; 105, 61 <67>). As regards the materiality of the submission question to the decision, the submitting court must comprehensively and extensively name the constitutional review standard and the considerations that are decisive for its conviction of the unconstitutionality of the statute (see BVerfGE 86, 71 <77-78>; 88, 70 <74>; 88, 187 <194>; Chamber Decisions of the Federal Constitutional Court (*Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK) 14, 429 <432>). In doing so, the court must investigate imperative factual and legal aspects. In particular, it may be necessary to discuss the reasons which have been named in the legislative procedure as being decisive for the legislative decision (see BVerfGE 86, 71 <77-78>; BVerfGK 14, 429 <432>).

These standards apply accordingly to the duty incumbent on the court to set forth its presumption – possibly gained without initiating a request for a preliminary ruling – that material Union law leaves to the national legislature latitude in transposition with regard to the contentious question. Also in this regard, it must show with sufficient clarity the reasons why the submission of the statute is material to the decision. 62

II.

The Finance Court has already not adequately explained the materiality of the submission to the decision (1). What is more, it should have had it clarified by making a request for a preliminary ruling to the European Court of Justice whether the legislature had latitude for further transitional regulations in the transposition of the requirements of Union law (2). 63

1. The observations of the Finance Court regarding the materiality of the submission question to the decision do not satisfy the demands of Article 100.1 sentence 1 of the Basic Law in conjunction with § 80.2 sentence 1 of the Federal Constitutional Court Act. 64

a) The submitting court has already not dealt with the issue that the constitutional review of § 2 sentence 2 no. 4 of the Investment Allowance Act 1996 by the Federal Constitutional Court can be restricted because the German legislature transposed a decision of the European Commission into German law with this provision. The Finance Court did address the question of whether the German legislature was entitled, having regard to the Commission's decision, to grant an investment allowance once the deadline set by the Commission had expired if a binding investment decision had already been taken by an investor prior to the expiry of the deadline. It did not however establish a link to the scope of the constitutional-court review of § 2 sentence 2 no. 4 of the Investment Allowance Act 1996. Quite the contrary: The Finance Court explicitly regarded the breach of the law as being founded exclusively in national law. 65

b) Moreover, there are no adequate observations regarding the scope of the binding effect of the Commission's decision for the German legislature. 66

The Finance Court has presumed that the Commission accepted with its decision of 20 May 1998 the *de facto* circumstances pertaining in the past and only made a regu- 67

lation for the future. This finding however does not have any authority for the question of whether the Commission's decision hence also sought to prevent investment aids for investment decisions already taken prior to the expiry of the two-month deadline. The same applies to the reference made by the Finance Court to the subsequent Community guidelines.

The Finance Court essentially justified its understanding of the Commission's decision – according to which the German legislature was said not to have been prevented from subsequently considering eligible investment decisions that had been bindingly taken prior to 3 September 1998 – on the fact that the Commission had not implicitly ordered the banning of aids for investments that had already been commenced. The fact that the Commission did not explicitly deal in its decision with investment decisions that had already been taken prior to expiry of the deadline which it set, and with protection of legitimate expectations to be granted in this regard where appropriate, however does not force one to reach the conclusion that the granting of an investment allowance was to remain permissible after the expiry of the deadline if a binding investment decision had already been taken prior to the expiry of the deadline. According to its wording, the Commission's decision, rather, stipulated that no more investment allowances were to be granted after expiry of the deadline, regardless of whether or not an investor had already taken a binding investment decision. 68

By contrast, both the legislature and the finance authorities (see the order of Frankfurt Regional Finance Office of 20 July 1999, InvZ 1000 A-1-St II 24, juris) related the term "granting" an investment aid used by the Commission to the acquisition or production of the commodity, and hence to the (complete) realisation of the fact under substantive law although, in the understanding of the Federal Fiscal Court, the "granting" of an investment allowance relates as a rule to the time of its establishment and disbursement by the tax office – an understanding to which it made explicit reference in its statement. The Finance Court did not concern itself with these different possibilities for interpretation for the relevant point of reference of the Commission's decision. Rather, the Finance Court above all relied upon the finding that the Commission's decision need not mandatorily be understood as ruling out investments that had already been commenced. 69

2. The submission is also inadmissible because the Finance Court presumes latitude of the German legislature in transposition to exist for the further permissibility of investment allowances in relation to investment decisions that had been taken previously, although this understanding of the Commission's decision is not tenable as being beyond doubt within the meaning of the acte clair doctrine. 70

The interpretation of the Commission's decision that is favoured by the Finance Court, in accordance with which the German legislature had even been left with sufficient latitude for granting investment allowances subsequent to 2 September 1998, has neither been the subject-matter of an interpretation by the European Court of Justice, nor is such an interpretation of the Commission's decision so obvious as to 71

leave no scope for any reasonable doubt. On the contrary, particularly the wording of the decision, including against the background of the (national) understanding of the term used, “granting” (*Gewähren*), favours the exclusion of all aids after expiry of the deadline set by the Commission to adjust the national aid schemes regardless of the point in time when the investment decision was taken. The genesis of the 1999 Tax Relief Act, as well as the statement of the Federal Ministry of Finance in the instant proceedings, further permits one to recognise that, at any rate, the German legislature itself presumed the existence of such an obligation with no remaining latitude.

Given these facts, the Finance Court should have submitted the interpretation question that is relevant here for the existence of national latitude for transposition to the European Court of Justice in proceedings for a preliminary ruling. 72

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