

**In the proceedings
on
the constitutional complaint**

1. of the T...GmbH,
represented by its director Mr K...,
2. of Mr E...,

– authorised representative: Rechtsanwalt Höcker,
Friesenplatz 1, 50672 Cologne-

- against
- a) non-admission during the allocation of seats by the Munich Higher Regional Court of 25 March 2013, based on the security order of 4 March 2013,
 - b) the security order of the Munich Higher Regional Court of 22 March 2013 – 6 St 3/12 –,
 - c) the security order of the Munich Higher Regional Court of 4 March 2013 – 6 St 3/12 (NSU-trial) –

and application for a preliminary injunction

here: application for a preliminary injunction

the Third Chamber of the First Senate of the Federal Constitutional Court, with

Vice-President Kirchhof,

Justice Masing

and Justice Baer

decided unanimously on 12 April 2013:

1. In the criminal proceedings against Beate Z. et al. under § 129 et al. of the Penal Code (*Strafgesetzbuch – StGB*), file no.: 6 St 3/12, the presiding judge of the 6th Senate in Penal Matters of the Munich Higher Regional Court (*Oberlandesgericht München*) is assigned to grant an adequate number of seats to representatives of foreign media with a special relationship to the victims of the crimes brought to trial, according to a procedure that is to be decided within the limits of his power to direct the formal course of the proceedings.

2. The further application for a preliminary injunction is rejected.

1. The Land of Bavaria has to reimburse the complainants for their necessary expenses in the proceedings for a preliminary injunction.

R e a s o n s :

I.

The constitutional complaint, which is the principal proceeding that informs the application for a preliminary injunction, concerns the procedure for accreditation and distribution of assigned seats for media representatives in what is known as the NSU-trial at the Munich Higher Regional Court. In the principal proceedings, the complainants request that the Higher Regional Court's orders which constitute the basis for this procedure be nullified and that their execution be stayed by way of a preliminary injunction until a decision has been taken in the principal proceedings. 1

1. [...] The acts charged in the criminal trial include, in particular, crimes against Turkish citizens and citizens of Turkish descent. The media interest in this trial – both national and international – has been intense for quite a while. <...> 2

2. The first complainant publishes the newspaper "Sabah", which is written in Turkish and, according to the complainant, read by about one fifth of Germany's population with Turkish ancestry; the second complainant is its deputy chief editor. [...] 3

3. On 4 March 2013 and according to § 176 of the Judiciary Act (*Gerichtsverfassungsgesetz – GVG*), the Munich Higher Regional Court issued the order on security and public order in the court hearings which the constitutional complaint challenges. [...] 4

No. VI.1. of the order describes [...] the accreditation procedure for all media representatives, including, in particular, representatives of print media. [...] 5

[...] 6-7

The order of 4 March was sent out on 5 March at 8.56 am based on the court's email distribution list. [...] Because of error messages, some of the addressees among who was the second complainant had to be temporarily taken off the list in order to send the email with the order. The second complainant subsequently received the email at 9.15 am [...] 8

The court received the first applications as early as 8.58 am. Altogether, 39 applications for accreditation had been submitted by 9.15 am, and 50 by 9.36 am, insofar all of them exclusively from German media. The complainants' applications were received as numbers 171 and 172 on the following day, 6 March 2013, at 11.59 am. 9

1. On 22 March 2013, according to § 176 GVG, the court issued a second order on security and public order in the court hearings to complement the order of 4 March. 10

In this order, it was declared for the first time that accredited media representatives were to be awarded a total of 50 seats in the courtroom [...]. 11

5. On 25 March 2013, the presiding judge of the 6th Senate in Penal Matters of the Higher Regional Court sent, by email to all accredited media including the complainant, two lists of the 123 media and media representatives that were accredited (list 1 nos. 1-50 / list 2 nos. 51-123) with the remark that they contained all timely and admissible applications for accreditation in the order they had been received by the court's press office; the first 50 media representatives, determined according to the criteria mentioned above, received, in addition to their accreditation, an ID card in their names which gave them the right to a seat. 12

Of the first 40 applications that had been received by 9.15 am, 12 were accepted as admissible. The fiftieth application that was accepted as admissible – no. 117 of all applications – was received on 5 March at 11.42 am. Among all of the accredited media with a reserved seat, none is Turkish. Nine Turkish media had applied. While victims of the crimes brought to trial also came from Greece and Iran, the media of these countries did not apply for accreditation. 13

6. The complainants, with the constitutional complaint that is the principal proceeding that informs the application for a preliminary injunction, claim in particular a violation of their fundamental rights under Art. 5 sec. 1 and Art. 3 sec. 1 and 3 of the Basic Law (*Grundgesetz* – GG). 14

7. The Bavarian Ministry for Justice and Consumer Protection was given the opportunity to comment on the application for a preliminary injunction. Following this, the Higher Regional Court explained that, according to the established principles, there was no violation of fundamental rights. 15

II.

The application for the issue of a preliminary injunction is successful to the extent set out in the operative provisions. 16

1. Under § 32 sec. 1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), the Federal Constitutional Court, in a case of dispute, may provisionally provide for a situation by preliminary injunction if this is advisable for the common good in order to avert serious detriment, to prevent imminent violence or for another compelling reason. In such a case, the arguments advanced to substantiate the unconstitutionality of the state action challenged must generally be 17

left out of consideration unless the constitutional complaint is, from the outset, inadmissible in its entirety or clearly unfounded (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 112, 284 <291>).

2. In the case at hand, the constitutional complaint is neither inadmissible from the outset nor clearly unfounded. In particular, it does not appear to be impossible that the complainants' right to equal treatment in the competition among journalists, located in Art. 3 sec. 1 GG in conjunction with Art. 5 sec. 1 sentence 2 GG (cf. BVerfGE 80, 124 <133-134>; BVerfG, First Chamber of the First Senate of 18. March 2008 – 1 BvR 282/01 –, *Neue Juristische Wochenschrift-Rechtsprechungs-Report* – NJW-RR 2008, p. 1069 <1071>), i.e. the right to equal participation in the opportunities of reporting from court proceedings, might be violated.

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However, the decision on the opportunity of access to court proceedings, on the reservation of a certain number of seats for media correspondents and the distribution of a scarce number of seats among them is, in general, a question which, in light of the protection of the independence of the courts afforded by the Constitution, is first taken according to ordinary law and rests within the power of the presiding judge to direct the formal course of the proceedings in question (cf. BVerfGE 103, 44 <61 et seq.>; Order of the First Chamber of the First Senate of 30 October 2002 – 1 BvR 1932/02 –, NJW 2003, p. 500. In this decision, the presiding judge has a broad margin of appreciation. The Federal Constitutional Court reviews the presiding judge's orders only insofar as they may violate constitutional law and reviews in particular whether such orders are based on a fundamentally erroneous view of the meaning of a fundamental right (cf. BVerfGE 18, 85 <97-98>; consistent jurisprudence). However, considering that the press generally has a right of access so that it can freely cover the news, such orders have to be to the point and take the media representatives' subjective right to equal participation in the opportunities of reporting into account (cf. BVerfGE 80, 124 <133-134>; BVerfG, First Chamber of the First Senate of 18 March 2008 – 1 BvR 282/01 –, NJW-RR 2008, p. 1069 <1071>). This means that recourse to the principle of priority is generally an option (cf. order of the First Chamber of the First Senate of 30 October 2002 – 1 BvR 1932/02 –, NJW 2003, p. 500). However, even this principle requires that it be set up in a way that realistically guarantees equal opportunities. In implementing such procedures according to the law, the situation of the parties which can be expected to be interested in this has to be taken into consideration. So far, it has neither been decided, nor has it been excluded, whether a differentiation between media representatives is permitted or required by the constitution in certain situations (cf. order of the First Chamber of the First Senate of 30 October 2002 – 1 BvR 1932/02 –, NJW 2003, p. 500 <501>).

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Whether, according to these standards, the challenged decisions violate the complainants' fundamental rights must be reviewed in detail, taking into account the specific circumstances and requirements of the accreditation procedure in question, which is impossible to achieve in proceedings for a preliminary injunction and thus

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has to be left to the principal proceedings. In this context, it has to be considered that the criminal trial in question draws an unusual amount of public attention and is thus of interest even to those members of the media that might not be too familiar with questions of court reporting and accreditation procedures in Germany. Hence, the question arises whether the procedural arrangements in question here took this situation sufficiently into account. In this context, it might be relevant that, at some earlier point in time, the court's press office had told individual media representatives that it was likely that accreditations would be taken into account in the order in which they were received. If that were the case, it would however also have to be considered to which degree a delay of information of the complainants had influenced their opportunity of being assigned their own seat. Considering the media hype that could be expected (and, according to the presiding judge's statement, had indeed been expected), and because of the obviously strong interest of foreign media particularly from the victims' countries of origin, one might contemplate whether the use of the priority principle during accreditation and the start of this procedure should have been announced in a timely manner and clear enough to be understood by less experienced participants. It has also to be taken into consideration whether it would have been in the interest of procedural fairness to point to the limited number of available seats for media representatives that was at least foreseeable at the time, so that, in particular, foreign media that do not regularly attend German trials would have been better able to prepare themselves for the limited number of seats and the urgency of the application. Against this backdrop, additional circumstances of the accreditation procedure might be taken into consideration as well to assess its constitutionality, for example the fact that in the order of March 4 of 2013, the existence of a principle of priority was only mentioned in relation to the accreditation as such but not explicitly in relation to the allocation of seats, and the fact that it was only on March 22, 2013, that the court explicitly decided on a differentiation between the accreditation and a later allocation of seats. Finally, this begs the question whether, because of the victims' heritage, there may, as an exception, exist a mandatory reason arising from the facts of the case to differentiate between different media, or possibly parts of them, for example in the sense of setting a quota.

All of this raises difficult questions of law. Thus, a violation of constitutional requirements cannot be clearly excluded.

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3. If a constitutional complaint does not prove to be, from the outset, inadmissible in its entirety or clearly unfounded, the consequences which would occur if the preliminary injunction were not granted, but the constitutional complaint were later successful, have to be weighed against the disadvantages that would occur if the preliminary injunction were granted but the constitutional complaint were unsuccessful (cf. BVerfGE 71, 158 <161>; 96, 120 <128-129>; 117, 126 <135>; consistent jurisprudence). According to these principles the application for a preliminary injunction regarding the distribution of seats by the Munich Higher Regional Court of 25 March 2013 has to be granted to the degree of the operative provisions of this judgment.

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If, in this case, no preliminary injunction were granted but the constitutional complaint were successful, there would be a danger that the complainants, without having been given the same opportunities as other media representatives, as well as other foreign media with a special relationship to the victims of the crimes brought to trial, would remain excluded from the opportunity of their own news coverage based on the very essence of the court hearings as a whole in what is known as the NSU-trial. It may also be imagined that media that cater to a Turkish audience are not very familiar with questions of accreditation at German courts and may thus be particularly affected by a potential infringement of equal opportunities in matters of accreditation. In the present case, this weighs particularly heavy since especially Turkish media representatives can claim a particular interest to be able to cover this trial in complete independence because numerous victims of the crimes brought to trial are of Turkish descent and because, both among the German population of Turkish heritage and in Turkey itself, there exists a correspondingly great need for information.

These disadvantages outweigh the disadvantages that would occur if the application for a preliminary injunction were successful within the limits of the operating clause while the principal constitutional complaint would be unsuccessful. Because in this case, foreign media with a special relationship to the victims of the crimes brought to trial would have been granted reserved seats in the hearings of the court, which they would not have had a right to according to the present allocation of seats. If that would amount to unequal treatment of other media because the seats already granted to them would be taken away, or because they would not receive a seat from an additional allotment of seats, this would weigh less heavy against the backdrop of the specific interest these media have. In any case, the rights of media only exist within the limits of selection that does justice to equality. Also, the disadvantage that would occur for the general population if an additional allocation of a few seats for the public at large were given to certain media representatives is, in relation, smaller, because these seats have not been specifically allocated to individuals and because, according to the applicable principles, there is still an appropriate number of seats allocated to the general public (cf. BVerfG, order of the First Chamber of the First Senate of 18 March 2008 – 1 BvR 282/01 –, NJW-RR 2008, p. 1069 <1071>; Federal Court of Justice, *Bundesgerichtshof* – BGH, order of 10 January 2006 – 1 StR 527/05 –, NJW 2006, p. 1220 <1221>; von Coelln, *Der Zutritt von Journalisten zu öffentlichen Gerichtsverhandlungen* (the access of journalists to public court hearings), *Die Öffentliche Verwaltung* – DÖV 2006, p. 804 < p. 806-807 with footnotes 32 et seq.>). Such a distribution of seats thus does not violate the principle of the public nature of the court proceedings.

In proceedings for preliminary injunctions, the Federal Constitutional Court may give an order so as to avoid serious detriment in situations in which the urgency of the matter renders a thorough assessment of its constitutionality impossible. Such measures are thus not to be understood as the enforcement of a result required by the constitution, but as a preliminary order to avoid or minimize impending disadvan-

tages. This applies even more in a situation like the present one, in which there is, from the outset, no constitutional right to access to a trial, but only a question of whether there is a violation of an opportunity to equal participation, and in which disadvantages derive from a potential violation of equal opportunities. The court order may focus on alleviating these consequences. In the present case, this in part anticipates the potential result of the principal proceedings; however, this is permitted in exceptional cases if the decision in the principal proceedings would be taken too late and no other sufficient recourse to the courts could be granted (cf. BVerfGE 34, 160 <162-163>; consistent jurisprudence). For these reasons, the presiding judge of the 6th Senate in Penal Matters of the Higher Regional Court is assigned to grant an adequate number of seats to representatives of other foreign media with a special relationship to the victims of the crimes brought to trial, according to a procedure that is to be decided within the limits of his power to direct the formal course of the proceedings. One possibility would be to open up an additional allotment of no fewer than three seats, of which seats would be distributed according to the principle of priority or by the drawing of lots. But it also remains within the discretion of the presiding judge to arrange the distribution of seats or the accreditation as a whole according to different principles.

The order only applies to foreign media with a special relationship to the victims of the crimes brought to trial, because the complainants' application which determines the subject of this proceeding relied but on this specific interest in press coverage from a Turkish perspective because of the Turkish victims of the crimes tried in court. 26

4. The further application by the complainants to completely suspend the execution of the allocation of seats of 25 March 2013 and the orders of the Higher Regional Court to maintain security of 22 March 2013 and 4 March 2013 had to be denied because they did not sufficiently state a reason for application for such an extensive order of the Constitutional Court, because the complainants did not sufficiently state a reason for this claim. 27

5. The decision regarding the costs is based on § 34a sec. 3 BVerfGG. 28

Kirchhof

Masing

Baer

**Bundesverfassungsgericht, Beschluss der 3. Kammer des Ersten Senats vom
12. April 2013 - 1 BvR 990/13**

Zitiervorschlag BVerfG, Beschluss der 3. Kammer des Ersten Senats vom
12. April 2013 - 1 BvR 990/13 - Rn. (1 - 28), [http://www.bverfg.de/e/
rk20130412_1bvr099013en.html](http://www.bverfg.de/e/rk20130412_1bvr099013en.html)

ECLI ECLI:DE:BVerfG:2013:rk20130412.1bvr099013