Headnotes

to the Order of the First Senate of 21 March 2018

– 1 BvF 1/13 –

1. **The publication of official information by the state must be measured against Article 12(1) of the Basic Law (*Grundgesetz* – GG) if the objective pursued and the resulting indirect and factual impacts amount to an interference with the freedom of occupation in terms of functional equivalency (*funktionales Äquivalent*). The publication of official information is equivalent to an interference with Article 12(1) of the Basic Law, at least where it directly targets the market conditions of specific individualised companies by influencing consumer behaviour and thus alters the market and competitive situation to the economic disadvantage of the affected companies.**

2. **The interests of companies that violate food and feed law provisions may be outweighed by the interest of the public in receiving information. This may also be the case if the relevant legal non-compliance does not entail health risks. When individualised official information on legal non-compliance that is relevant to consumer protection is published on the Internet, however, the duration for which such information may be disseminated must generally be limited by statute.**

3. **The Federal Constitutional Court reviews whether a national law is compatible with the Basic Law, including in cases where compatibility with the secondary law of the European Union is also in doubt.**

FEDERAL CONSTITUTIONAL COURT

– 1 BvF 1/13 –

IN THE NAME OF THE PEOPLE

**In the proceedings
for constitutional review of**

whether § 40(1a) of the Code of Food and Feed Law (*Lebensmittel- und Futtermittelgesetzbuch* – LFGB), enacted by Article 2 no. 2 of the Act Amending the Law on Consumer Information (*Gesetz zur Änderung des Rechts der Verbraucherinformation*) of 15 March 2012 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl. I p. 476), is void

Applicant: The *Land* Government of Lower Saxony,
represented by the State Chancellery of Lower Saxony,
Planckstraße 2, 30169 Hannover,

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Kirchhof,

Eichberger,

Masing,

Paulus,

Baer,

Britz,

Ott,

Christ

held on 21 March 2018:

1. **§ 40(1a) LFGB, enacted by Article 2 no. 2 of the Act Amending the Law on Consumer Information of 15 March 2012 (BGBl I p. 476), is incompatible with Article 12(1) of the Basic Law (*Grundgesetz* – GG) to the extent that the publication of information provided for under this provision is not limited in time.**

2. **It is incumbent upon the legislature to enact new legislation governing the duration of publication by 30 April 2019; otherwise, the challenged provision shall be void.**

3. **The challenged provision shall continue to apply, in accordance with the reasons attached to this Order, until new legislation has been enacted or, at the latest, until 30 April 2019.**

R e a s o n s:

A.

The application for judicial review (*Normenkontrollantrag*) is directed against § 40(1a) of the Code of Food and Feed Law (*Lebensmittel- und Futtermittelgesetzbuch* – LFGB) governing the publication of official information concerning non-compliances in relation to the Code of Food and Feed Law. 1

I.

1. The Code of Food and Feed Law has been in force since 2005; it was amended in 2012 to include new section 1a in § 40 LFGB. This provision authorises and obliges the competent authorities to inform the public *ex officio* about violations by food and feed companies regarding statutory limit values and all other provisions within the Code's scope of application that serve to protect consumers against health risks or misleading practices, or to ensure compliance with hygiene standards. In this regard, the existence of a current health risk is not required. 2

[…] 3

A specific statutory basis in food and feed law governing the provision of information to the public had already been set out in § 40(1) LFGB, which entered into force in September 2005. In September 2012, § 40 LFGB was amended by Article 2 of the Act Amending the Law on Consumer Information (*Gesetz zur Änderung des Rechts der Verbraucherinformation*) (Federal Law Gazette, *Bundesgesetzblatt* – BGBl 2012 I p. 479 and 480), introducing subsection 1a, the provision challenged in the current proceedings. Unlike § 40(1) LFGB, the more recent § 40(1a) LFGB does not afford authorities any discretion regarding the decision to publish the relevant information. In the absence of administrative discretion, the authorities are thus bound by law to publish the relevant information in accordance with § 40(1a) LFGB. In this respect, the legislature reacts to the fact that – in particular regarding recent food scandals – administrative practice was perceived as too lenient in the past; it intended to create a 4

more rigorous statutory basis for ensuring that the public is effectively informed. […]

2. Transparency provisions are also set out in the food and feed law of the European Union. However, European Union law neither contains provisions comparable, in terms of their specific content, to the challenged § 40(1a) LFGB, nor does it enjoin the German legislature to enact such provisions. […] 5

3. […] 6

II.

The applicant [the *Land* Government of Lower Saxony] contends that § 40(1a) LFGB is unconstitutional: providing information to the public pursuant to § 40(1a) LFGB interfered with the right to informational self-determination; this interference was not justified because the publication of the relevant information is not subject to a time limit. […] Moreover, the applicant claims that § 40(1a) LFGB interfered with the scope of protection of the freedom of occupation guaranteed food and feed companies under Art. 12(1) of the Basic Law (*Grundgesetz* – GG). 7

III.

The *Bundestag*, the *Bundesrat*, the *Federal Government* and all *Land* governments were given the opportunity to submit statements, as well as the Federal Commissioner for Data Protection and Freedom of Information, the commissioners for data protection of all the *Laender*, the Federal Administrative Court (*Bundesverwaltungsgericht*), the German Federation for Food Law and Food Science (*Bund für Lebensmittelrecht und Lebensmittelkunde e.V.*), the Federation of German Consumer Organisations (*Verbraucherzentrale Bundesverband e.V.*), foodwatch e.V., the German Association for Animal Feeds (*Deutscher Verband Tiernahrung e.V.*) as well as the Federation of German Food and Drink Industries (*Bundesvereinigung der Deutschen Ernährungsindustrie e.V.*). 8

[…] 9-16

IV.

[…] 17

B.

The application for judicial review is admissible and well-founded. 18

I.

1. According to § 1(3) LFGB, the Code of Food and Feed Law serves, *inter alia*, to implement and enforce legal acts of the European Union and of the European Community; this does not, however, bar constitutional review proceedings before the Federal Constitutional Court concerning the compatibility of § 40(1a) LFGB with the requirements of the Basic Law. 19

§ 40(1a) LFGB is not based on binding standards set by European Union law, but goes beyond European Union law and can thus be measured against the fundamental rights laid down in the Basic Law (cf. in this regard Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 118, 79 <95 et seq.>; 121, 1 <15>; 125, 260 <306 and 307>; 129, 78 <90 and 91>; 133, 127 <313>; 142, 74 <112 para. 115>; concerning regulations [of the European Community], cf. BVerfGE 73, 339; 102, 147). It is true that Art. 10 of Regulation (EC) No. 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (Official Journal EC 2002 No. L 31, p. 1 – General Food Law Regulation) requires public authorities to take appropriate steps to inform the general public where there are reasonable grounds to suspect that a food or feed may present a risk to human or animal health; a corresponding obligation is set out in § 40(1) first sentence LFGB. Yet § 40(1a) LFGB significantly extends the obligation of public authorities to provide information to the general public in the area of food and feed law. This extended obligation to publish information under § 40(1a) LFGB concerns violations of specified food and feed law provisions irrespective of whether the non-compliance in question entails health risks. 20

§ 40(1a) LFGB also goes beyond the scope of Art. 7 of Regulation (EC) No. 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (Official Journal EU 2004 No. L 165, p. 1 – Official Food and Feed Controls Regulation). Art. 7 of the Official Food and Feed Controls Regulation imposes a general obligation on the competent authorities to carry out their activities with a high level of transparency, and provides that the general public shall have access to information on their control activities. However, the Official Food and Feed Controls Regulation neither requires nor authorises authorities to provide individualised and company-specific information on non-compliances with food and feed law to the public in a manner comparable to the content of § 40(1a) LFGB, the provision challenged in the current proceedings. 21

2. It is argued by some that the publication of official information in the field of food and feed law were exhaustively regulated at the level of European Union law, thus blocking additional regulations at Member State level (*Sperrwirkung*) and that, in consequence, § 40(1a) LFGB were incompatible with secondary law of the European Union (yet see also the recent case-law of the Court of Justice of the European Union, Judgment of 11 April 2013, C-636/11, Berger, juris – concerning § 40(1) second sentence no. 4 LFGB); nonetheless, this would not bar constitutional review proceedings before the Federal Constitutional Court. Even if, in addition to the constitutional concerns at issue, the compatibility of § 40(1a) LFGB with secondary law of the European Union was in question, the Federal Constitutional Court could nonetheless examine the compatibility of § 40(1a) LFGB with the Basic Law in constitutional re- 22

view proceedings independent of those concerns (accordingly, for cases concerning the specific judicial review of statutes pursuant to Art. 100(1) first sentence GG, cf. BVerfGE 116, 202 <214>; 129, 186 <203>).

II.

There are no objections to the formal constitutionality of the challenged provision. In particular, the Federation has legislative competence. Pursuant to Art. 74(1) no. 20 GG in conjunction with Art. 72(2) GG, the Federation is competent to legislate on the authorities' information activities in the area of food and feed law. It is necessary to regulate this matter at the federal level in order to maintain economic unity in accordance with Art. 72(2) GG (cf. in this regard BVerfGE 138, 136 <176 and 177 para. 109>), as federal legislation ensures that consistent and comprehensible information is provided in relation to nationwide market activities. Ensuring market transparency in this manner is a prerequisite for consumer confidence in the relevant information (cf. *Bundestag* document, *Bundestagsdrucksache* – BTDrucks 17/7374, p. 13; 17/12299, p. 7). 23

III.

§ 40(1a) LFGB is in breach of substantive constitutional law. § 40(1a) LFGB violates the freedom of occupation (Art. 12(1) GG) to the extent that a legal provision limiting the time period for disseminating the relevant information is lacking. For the rest, disproportionate interferences with the freedom of occupation can, and must, be ruled out by way of applying the provision in a manner that ensures conformity with the Constitution. 24

1. The challenged provision authorises and obliges the competent authorities to interfere with the scope of protection of Art. 12(1) GG. The publication of information pursuant to § 40(1a) LFGB must be measured against Art. 12(1) GG as it constitutes an administrative measure that directly targets the market conditions of individualised companies, influences consumer behaviour and thus, considering the indirect and factual impacts, alters the market and competitive situation to the economic disadvantage of the affected companies. 25

a) Art. 12 GG guarantees the right to freely choose and practice one's occupation. In accordance with Art. 19(3) GG, this fundamental right is also applicable to legal persons if they carry out an activity for profit-making purposes that by its nature and type can be carried out by both legal and natural persons alike (BVerfGE 50, 290 <363>; 105, 252 <265>; established case-law). 26

The freedom of occupation, however, does generally not protect against the mere change of market information and conditions pertaining to entrepreneurial activities. In the current economic order, the freedom of Art. 12(1) GG protects the occupation-related sphere of activity of companies in the market, based on the principles of competition. Yet fundamental rights do not confer upon market participants an entitlement to unchanging competition conditions. In particular, fundamental rights do not guaran- 27

tee success in the marketplace, nor future business opportunities. Rather, competitive positions of market participants and opportunities to generate profits are subject to the risk of constant change, depending on the circumstances and operating conditions of the market (cf. BVerfGE 110, 274, 288 with further references; cf. also BVerfGE 98, 218 <258 and 259>; 105, 252 <262>; 106, 275 <298 and 299>). In principle, provisions that merely influence companies in a factual and indirect manner do not touch upon the scope of protection of Art. 12(1) GG (cf. BVerfGE 134, 204 <238> with further references). It follows that official information published by the authorities that alters the competitive position of companies to their disadvantage does not generally amount to an interference with fundamental rights, at least not necessarily (cf. BVerfGE 113, 63 <76>).

Even if the relevant statutory provisions do not directly affect professional activities, they are nevertheless subjected to the requirements deriving from the fundamental right of Art. 12(1) GG if the objective pursued and the resulting indirect and factual impacts amount, in terms of functional equivalency (*funktionales Äquivalent*), to an interference with the freedom of occupation (cf. BVerfGE 105, 252 <273>; 105, 279 <303>; 110, 177 <191>; 113, 63 <76>; 116, 135 <153>; 116, 202 <222>; 118, 1 <20>; cf. also BVerfG, Order of the Second Chamber of the First Senate of 25 July 2007 – 1 BvR 1031/07 –, juris, para. 32); in other words, it must be established that the indirect impacts in question are more than mere unintended side effects of statutory decisions that pursue unrelated objectives (cf. BVerfGE 106, 275 <299>; BVerfGE 116, 202 <222> with further references). This also applies in respect of whether the state is bound by fundamental rights when publishing official information. The publication of official information may be functionally equivalent to an interference with Article 12(1) of the Basic Law, at least where it directly targets the market conditions of specific individualised companies by intentionally influencing the basis of consumer decision-making, thus altering the market and competitive situation to the economic disadvantage of the affected companies. 28

b) The requirement that official information be provided to the public pursuant to § 40(1a) LFGB does not affect the freedom of occupation directly; it still amounts to an interference with the freedom of occupation, however, due to the objectives pursued and the resulting indirect and factual impacts of the law. It must therefore be measured against Art. 12(1) GG. § 40(1a) LFGB requires public authorities to provide comprehensive information on companies' non-compliances with food and feed law to the public in an individualised and company-specific manner. Providing comprehensive consumer information serves the objective of enabling consumers to make decisions on an informed basis regarding the featured compliance deficits and, as the case may be, refrain from doing business with the companies concerned. Therefore, the publication of the relevant information directly aims to alter market conditions for the specifically targeted companies. From the perspective of the companies concerned, these changes are more than mere unintended side effects of statutory provisions serving unrelated purposes. Rather, the challenged provision is specifically de- 29

signed to alter the informational basis of consumer choices (cf. BTDrucks 17/7374, p. 2).

2. Ultimately, the interference with the freedom of occupation is not justified in its entirety under constitutional law, since § 40(1a) LFGB fails to meet the requirements of the principle of proportionality in all respects. § 40(1a) LFGB serves legitimate objectives (a) that must be weighed against the fundamental rights of the companies concerned, as pursuing those objectives may potentially give rise to significant interferences in this regard (b). When the provision is applied in conformity with the Constitution, the dissemination of information provided for under § 40(1a) LFGB is suitable (c) and necessary (d) to achieve the objectives pursued. In principle, the challenged provision is proportionate in the narrow sense, however, it is imperative that certain elements be applied in conformity with the Constitution; the challenged provision is disproportionate to the extent that it does not provide for a time limit for disseminating the information in question (e). 30

a) Providing information to the public on deficits regarding food and feed law compliance serves legitimate objectives. 31

The explanatory memorandum to the draft act states that the objective pursued is to create a viable basis for informed consumer choices (cf. BTDrucks 17/7374, p. 2). It is furthermore emphasised that § 40(1a) LFGB serves to promote food and feed law compliance. The potential disadvantages resulting from the dissemination of the relevant information are meant to incentivise the individual companies to keep their business operations in compliance with the applicable provisions of food and feed law. Ultimately, this contributes to achieving the overall objective of the Code of Food and Feed Law, namely to prevent health risks and to protect consumers against misleading practices (cf. § 1(1) LFGB). 32

The objectives pursued by the legislature are all legitimate, albeit of varying importance. Promoting compliance with provisions that serve to protect [consumers] against health risks carries greater weight (Art. 2(2) first sentence GG) than the mere information of consumers regarding (rectified) hygiene deficits. Nonetheless, the protection of consumers against misleading practices, and the goal to increase consumers' knowledge so that they can make informed choices, is recognised as significant under constitutional law as well. In any case, it strengthens consumers' freedom of contract (Art. 2(1), Art. 12(1) GG). Besides, legislative interferences with the freedom of occupation may be permissible for the purposes of achieving aims that the legislature is not constitutionally required to pursue. 33

b) The impairments of the companies concerned arising from the publication of the relevant information potentially carry significant weight. Depending on the technical mode of publication, the information may end up being widely disseminated, especially when published on the Internet (cf. already BVerfGE 104, 65 <72>). While § 40(1a) LFGB does not expressly require the authorities to publish the information on the Internet, it also does not bar them from doing so. In fact, until the *Laender* halted 34

the enforcement of § 40(1a) LFGB, the publication of the relevant information had indeed been carried out via the Internet. In this context, the published information is easily accessible and seen by many users; it concerns, in part, legal non-compliances that have not yet been established in a definitive manner as well as non-compliances that have already been rectified. The companies concerned may potentially suffer a significant loss of reputation and sales and, in the individual case, may even be forced to close down their business entirely. […]

In this respect, the extent to which companies face a potential loss of reputation depends, *inter alia*, on the specific manner in which the information is presented by the authorities. […] Regardless, the publication of the relevant information will hardly come without any negative consequence. In keeping with the legislative objective pursued, the publication is intended to bring about negative consequences, as a prerequisite for the effect of general prevention brought about by the threat of publication. 35

However, the weight of the potentially significant interference with fundamental rights is diminished by the fact that the publication of negative information was brought on by the affected companies themselves through unlawful conduct – meaning that, conversely, they could avoid any such interference through lawful conduct – and by the fact that their misconduct entails consequences for consumers and thus qualifies as a matter pertaining to public interest. […] This distinguishes the case at hand from the publication of information on the Internet, including individual names, concerning the awarding of agricultural subsidies (cf. Court of Justice of the European Union, Judgment of 9 November 2010, Joined Cases C-92/09 and C-93/09, Volker and Markus Schecke et al./Land Hessen, juris, para. 67). 36

c) The challenged provision is suitable for achieving the objectives pursued. Under constitutional law, a statutory provision is already considered suitable if it contributes to facilitating the intended attainment of legislative objectives; in this regard, it is sufficient to show that there is a possibility of achieving the objective in question (cf. BVerfGE 126, 112 <144>; established case-law). 37

aa) The publishing of information concerning not only ongoing non-compliances, but also non-compliances that have already been rectified, is suitable for achieving the legislative objective in question. This holds true, in particular, with regard to the goal of general prevention pursued by the provision. Providing information on rectified non-compliances to the public increases the deterrent effect of the information activity envisaged under the challenged provision and thus promotes compliance with the relevant food and feed regulations. In addition, publishing information on non-compliances that have already been resolved also serves to inform consumers, since even information on past unlawful conduct may be significant in relation to consumer decision-making. 38

bb) Ultimately, the legislature has also sufficiently taken into account that only the publication of correct information is suitable for achieving the relevant informational 39

purposes (cf. BVerfGE 105, 252 <272>). Pursuant to § 40(4) LFGB, the authorities are obliged to rectify incorrect information where applicable. To meet the standard of suitability, the authorities are, however, required under constitutional law to take additional precautions when applying the challenged provision, in order to ensure that the information is correct and not misleading to consumers.

(1) When publishing the information, the competent authorities must also report whether and when the relevant non-compliance has been resolved. This is imperative under constitutional law. Otherwise, publishing information on the non-compliance in question would not be suitable for achieving the information goal pursued given that it could give rise to the misconception that the relevant non-compliance still persisted. The information whether and how swiftly the non-compliance was resolved will generally be a significant factor influencing consumer choices. 40

While the law does not prescribe that information on whether non-compliances were resolved be provided, it also does not rule out sharing such information. In this respect, it is incumbent upon the competent authorities to apply the provision in conformity with the Constitution. […] 41

(2) In addition, § 40(1a) LFGB provides for the possibility of informing the public even in cases of suspected non-compliances, if the suspicion is sufficiently justified. Yet in order to prevent the authorities from disseminating information that is incorrect, and thus not suitable for achieving the legislative purpose, this may only be applied under strict conditions. 42

In principle, extending the publication of official information to cases of suspected non-compliances, as provided for under the challenged provision, is not objectionable under constitutional law given that this is indispensable for achieving the legislative objectives. If publishing the information were not permissible until after the relevant non-compliance has been established in a non-appealable and final manner, the public would presumably only receive the information with delay in many cases, as it would have to be expected that the companies affected would seek legal recourse; the information activities provided for under the challenged provision would thus lose their effectiveness. […] Consumers are reliant on up-to-date information in order to be able to make informed decisions. If information on legal non-compliances were only made available after possibly years of delay, it would most likely no longer be suitable for the purposes of consumer information. 43

Nonetheless, the factual circumstances on which the suspicion of non-compliance is based must meet strict requirements under constitutional law. This is necessary to ensure that, to the greatest extent possible, only information that in retrospect proves to be valid will be published prior to a non-appealable finding of non-compliance. When applied in this manner, § 40(1a) LFGB satisfies the constitutional standards. § 40(1a) LFGB requires that the suspicion of non-compliance be based on sufficient factual evidence. This requirement is not met if the authorities have yet to establish the relevant factual circumstances (cf. BTDrucks 17/7374, p. 20). Rather, the wording 44

of the provision makes it clear that the suspicion requires a sufficient factual basis. In relation to sample testing, the law specifies that a suspicion of non-compliance requires at least two independent test findings. In this regard, the legislature essentially imposes an obligation on the authorities to investigate the facts of the case in a conclusive manner. This must also be the benchmark for investigating the facts of the case where the suspicion is not investigated by way of sample testing but in a different manner, e.g., by inspecting the business premises. In these cases, too, the factual circumstances, which the authority believes to give rise to a suspicion of non-compliance, must be fully investigated and the results of the investigation must be documented accordingly.

§ 40(1a) LFGB does not determine the conditions under which the authorities may inform the public in cases where there is a health risk, even if the factual circumstances have not yet been fully investigated; rather, § 40(1) first sentence LFGB is applicable in this regard. 45

(3) […] 46

d) The challenged provision meets the standard of necessity. A state measure may not exceed what is necessary for achieving the objective pursued, and it may not go beyond the intended protective purposes (cf. BVerfGE 79, 179 <198>; 100, 226 <241>; 110, 1 <28>). A measure falls short of this standard if the legislative authority disposes of an alternative means that would be equally effective yet less restrictive in relation to the holders of fundamental rights, and would not entail a greater burden for third parties or the general public (cf. BVerfGE 113, 167 <259>; 135, 90 <118>; established case-law). In the current proceedings, the fact that companies are not afforded the opportunity to inform the public themselves *in lieu* of the authorities publishing the relevant information does not call into question the necessity of the challenged provision; pursuant to § 40(2) first sentence LFGB, such a “right of substitution” (*Selbsteintrittsrecht*) is provided for only in relation to section 1, but not in relation to section 1a (i.e. the section in dispute in the current proceedings). While a right to publish company information as a substitute for official information would constitute a less restrictive means, it would not achieve the same level of effectiveness. In particular, there is a risk that consumers would only receive incomplete information (cf. BTDrucks 17/7374, p. 20). 47

e) Ultimately, § 40(1a) LFGB violates Art. 12(1) GG on the grounds that the provision does not subject the publication of the relevant information to a time limit and thus fails to meet the requirement of proportionality in the narrow sense. It must be noted that the assessment and balancing of conflicting interests as carried out by the legislature is, in principle, tenable under constitutional law (aa). By way of interpreting the provision in conformity with the Constitution, it is possible to ensure that only information on non-compliances that carry sufficient weight will be published (bb). There is, however, no statutory provision imposing a time limit on the publication of information; such a time limit is requisite for satisfying the requirement of proportionality in the 48

narrow sense (cc).

aa) In § 40(1a) LFGB, the legislature has rendered an assessment and balancing of conflicting interests that is, in principle, tenable under constitutional law. The principle of proportionality in the narrow sense requires that, in an overall assessment, the severity of legislative restrictions on fundamental rights not be disproportionate to the weight attached to the reasons that are submitted by way of justification. It is imperative to strike an appropriate balance between the weight of the interference stemming from the provision in question and the legislative objective pursued as well as the extent to which the objective is expected to be achieved (cf. only BVerfGE 133, 277 <322> with further references; established case-law). The challenged provision pursues important objectives (see a. above). It is appropriate, in principle, to give precedence to the consumers' interests in being granted protection and receiving information over the interests of affected companies, in cases where non-compliance is indicated. The fact that the targeted non-compliances need not necessarily entail a health risk does not merit a different assessment. Rather, the protection against misleading practices and against non-compliance with hygiene standards, as well as the facilitation of informed consumer choices, also constitute legitimate aims pertaining to consumer protection. 49

bb) Ultimately, the fact that the challenged provision does not limit the mandatory publication of information to a set catalogue of relevant non-compliances does not render the resulting impairment of fundamental rights disproportionate to the objectives pursued. Nor does a finding of disproportionality derive from the argument that authorities are not afforded discretion and thus cannot choose to only publish information in cases of sufficient weight. The constituent elements of the challenged provision that trigger the obligation to publish can, and must, be applied in a manner that limits publications to non-compliances that carry sufficient weight. 50

(1) Pursuant to § 40(1a) no. 1 LFGB, the competent authority shall inform the public where there are grounds to suspect that statutory limit values, maximum levels or maximum quantities defined within the scope of application of the Code of Food and Feed Law have been exceeded. Accordingly, not each and every deviation will be made public; rather, the public will only be informed about deviations that exceed the levels of materiality already contained in these thresholds. Once these thresholds are exceeded, even a minor digression triggers the mandatory publication; this is not, however, objectionable under constitutional law as these consequences are inherent in the nature of limit and maximum values. 51

(2) Pursuant to the first alternative set out in § 40(1a) no. 2 LFGB, the authorities are required to inform the public where there are grounds to suspect a non-compliance with other provisions within the scope of application of the Code of Food and Feed Law provided that the non-compliance is not insignificant in scope; it must be established that an administrative fine of at least EUR 350 is expected to be imposed. In this respect, the challenged provision does also not violate the principle of proportion- 52

ality in the narrow sense given that the obligation to inform the public is contingent upon sufficiently weighty conditions.

[…] 53

In addition to the requirement of an expected administrative fine, it is required that the relevant non-compliance be not insignificant in scope. This is a pivotal aspect for applying the challenged provision in conformity with the Constitution. It is incumbent upon the competent authority and, if legal action is brought, the administrative courts to specify the undefined legal concept of “not insignificant in scope” on the basis of quantitative and qualitative criteria. In this respect, non-compliances may only be considered “significant” if they carry sufficient weight to justify the potentially severe consequences suffered by the companies concerned. […] It is not objectionable under constitutional law that the legislature refrained from defining specifics for assessing non-compliances, leaving this issue to be resolved by the authorities and courts. 54

(3) Pursuant to the second alternative set out in § 40(1a) no. 2 LFGB, the authorities are required to inform the public where there are grounds to suspect a repeated non-compliance with other provisions within the scope of application of the Code of Food and Feed Law; it must be established that an administrative fine of at least EUR 350 is expected to be imposed. Insofar, the challenged provision is also compatible with the principle of proportionality in the narrow sense. While it is not a prerequisite for informing the public that the non-compliance with food and feed law provisions be of considerable weight, it must be established that the non-compliance has occurred repeatedly. For achieving the objectives of § 40(1a) LFGB, it is appropriate to inform the public about repeated non-compliances, even though the individual instances of non-compliance may be of a lesser nature compared to the non-compliances covered by the first alternative of § 40(1a) LFGB. If a company repeatedly violates provisions within the scope of application of the Code of Food and Feed Law, this indicates that the company is either not willing or not able to fulfil the relevant legal requirements. This information may be significant for consumer decisions. More importantly, however, informing the public about repeated, albeit less significant non-compliances serves to deter companies from generally ignoring less important provisions, and thus prevents them from gaining an advantage vis-a-vis companies that consistently make an effort to ensure full legal compliance. At the same time, the additional requirement that information only be published regarding cases where an administrative fine of at least EUR 350 will likely be imposed serves to ensure that repeating even the most minor non-compliance does not automatically trigger the obligation to inform the public. This holds true all the more given that for an administrative fine to be considered a likely consequence, the element of culpability must be met, serving as yet another mechanism limiting the impact of the challenged provision. 55

c) However, the challenged provision is disproportionate in the narrow sense to the extent that the law does not provide for a time limit for disseminating the relevant information (cf. only Baden-Württemberg Higher Administrative Court, Order of 28 Jan- 56

uary 2013 – 9 S 2423/12 –, juris, para. 24; Bavarian Higher Administrative Court, Order of March 2013 – 9 CE 13.80 –, juris, para. 18; Lower Saxony Higher Administrative Court, Order of 14 June 2013 – 13 ME 18/13 –, juris, para. 6; Hesse Higher Administrative Court, Order of 23 April 2013 – 8 B 28/13 –, juris, para. 7; North Rhine-Westphalia Higher Administrative Court, Order of 24 April 2013 – 13 B 192/13 –, juris, paras. 21 et seq.).

(1) Over time, the interferences with fundamental rights arising from the challenged provision will become increasingly disproportionate to the purposes pursued by means of publication if the information continues to remain available to the public. The longer the period of dissemination lasts, the wider the disparities between the overall burden to the company that increases over time on the one hand, and the diminishing value of the information for consumers on the other; in consequence, it becomes harder to argue that the burden imposed on the affected companies can still be considered reasonable. 57

The objective value of disseminating information on non-compliance decreases the more time has passed; this is due to the fact that, over time, past non-compliance no longer allows objective conclusions to be drawn regarding the present situation of the affected company. The longer negative information about a company is disseminated in public, the bigger the burden on the company, because a larger number of consumers may be influenced by this information, to the detriment of the company. It is true that, also from the perspective of consumers, the significance attached to the information will typically decrease the more time has passed since the information was disseminated and the longer ago the legal non-compliance triggering the publication occurred. It cannot, however, be expected that older information will invariably be perceived as less relevant. Most notably, despite the influence on consumer choices diminishing over time, this does not change the fact that even when considerable time has passed since the actual non-compliance occurred, consumers – albeit fewer in number – may still be influenced by the published information to the disadvantage of the company concerned. Therefore, it is constitutionally required that the publication of the relevant information be subjected to a time limit. 58

(2) It has no bearing on this requirement that it may not be possible to fully implement such a time limit in practice in the event that the information is disseminated on the Internet. In contrast to print publications, information published on the Internet platform of the responsible administrative authority can be modified retrospectively by way of disclaimers, deletion or other modifications. Beyond this, it is almost impossible to limit the availability of this information in time, as it might remain accessible via so-called caches of search engines or other forms of Internet “archives”. However, in these cases it will be apparent from the manner of presentation that the accessed information no longer constitutes up-to-date, official information published by the authorities. For the rest, the possibility that third parties might publish a compilation of such past information could also not be ruled out if the information were published in print; also, such compilations would be subject to a different legality regime [not at is- 59

sue here]. Yet, most importantly, the fact that once information is disseminated via the Internet, it may be impossible to completely undo the publication does not call into question that imposing a time limit on the direct dissemination mitigates the resulting impairment; it is therefore a prerequisite for satisfying the principle of proportionality.

(3) […] Such a time limit must […] be laid down in statutory law; this issue cannot be resolved solely by administrative practice or jurisprudence (accordingly, in relation to the right to informational self-determination, BVerfGE 65, 1 <46>; 128, 1 <55 and 56>; 141, 220 <285 and 286 para. 144>; established case-law). Regarding the specific elements of the time limit, different concerns and parameters that are all significant need to be weighed and balanced. This requires a legal provision. A sufficiently specific legal time limit is neither included in § 39(2) LFGB, nor can it be derived from deletion requirements set out in data protection law, which would in any case only be applicable by way of analogy. 60

(4) It would have been incumbent upon the federal legislature to enact a time limit. The Federation is competent to legislate on time limits governing the dissemination of official information; this is also covered by Art. 74(1) no. 20 GG in conjunction with Art. 72(2) GG. Regardless of whether the *Laender* would have been competent as well to enact the necessary statutory time limit, they were in any case not obliged to do so. The federal legislature has, in principle, laid down a comprehensive framework in § 40(1a) LFGB and intended it to be directly applicable; yet the framework suffers from a constitutional deficit due to the lack of a statutory time limit. Such a time limit falls within the federal legislative competence, and it is incumbent upon the federal legislature to exercise its power – as would have been its responsibility in the first place – to rectify the constitutional deficit in this regard. 61

IV.

Art. 12(1) GG supersedes the right to informational self-determination given that the fundamental right guarantee of Art. 12(1) GG completely covers the protection of companies in relation to market competition, as *lex specialis* in substantive terms (cf. BVerfGE 105, 252 <278> with further references). 62

C.

For these reasons, § 40(1a) LFGB is incompatible with Art. 12(1) GG to the extent that it does not subject the publication of the relevant information to a statutory time limit. In the case at hand, this does not result in the voidness of the challenged provision pursuant to § 78 first sentence of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*) (cf. BVerfGE 114, 1 <70>; 115, 277 <317>; 127, 87 <131 and 132>; 128, 157 <192 and 193>). This is due to the fact that § 40(1a) LFGB serves to discharge mandates of protection under constitutional law (see B III 2. a. above) that outweigh the necessity, also established under constitutional law, to subject information provided to the public to a statutory time limit (cf. BVerfGE 127, 293 <333 and 334> with further references). This applies all the more in light of the fact 63

that time limits have already been used in the application of the provision in practice.

The federal legislature must enact provisions specifying the duration for which the relevant information may be published by 30 April 2019. § 40(1a) LFGB shall continue to apply until new provisions have been enacted or, at the latest, until 30 April 2019. Otherwise the challenged provision shall be void. […] 64

With the exception of the requirement of a statutory time limit, the challenged provision can be applied in conformity with the Constitution; the legislature is thus not required to take further action. To ensure conformity with the Constitution, it is incumbent upon the competent authorities to apply strict standards regarding the factual basis that gives rise to a suspicion of non-compliance within the meaning of § 40(1a) LFGB. In relation to the constituent element that the non-compliance not be “insignificant in scope” (§ 40(1a) no. 2 LFGB), the authorities need to make sure that only non-compliances of sufficient weight are qualified as meeting the relevant threshold. 65

Kirchhof Eichberger Masing

Paulus Baer Britz

Ott Christ

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 21. März 2018 - 1 BvF 1/13

Zitiervorschlag BVerfG, Beschluss des Ersten Senats vom 21. März 2018 - 1 BvF 1/13 - Rn. (1 - 65), http://www.bverfg.de/e/fs20180321_1bvf000113en.html

ECLI ECLI:DE:BVerfG:2018:fs20180321.1bvf000113