H e a d n o t e s

to the Order of the First Senate of 20 March 2001

– 1 BvR 491/96 –

It is compatible with the fundamental right of occupational freedom (Article 12.1 of the Basic Law) and with the general principle of equality before the law (Article 3.1 of the Basic Law) that licensed physicians aged 55 or over are, in principle, not newly admitted to the lists of physicians eligible to provide services under the statutory health insurance scheme.

FEDERAL CONSTITUTIONAL COURT

– 1 BvR 491/96 –

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaint

of Professor Dr B…,

- authorised representatives: Rechtsanwälte Becker, Büttner und Koll., Gisonenweg 9, 35037 Marburg/Lahn –

1. directly against

a) the Order of the Federal Social Court (*Bundessozialgericht*) of 9 January 1996 – 6 BKa 24/94 –,

b) the Judgment of the North Rhine-Westphalia Higher Social Court (*Landessozialgericht*) of 25 May 1994 – L 11 Ka 17/94 –

c) the Judgment of the Cologne Social Court (*Sozialgericht*) of 20 October 1993 – S 19 Ka 26/93 –,

d) the Order of the North Rhine Board of Appeal for Admission as Physicians Eligible to Provide Services under the Statutory Health Insurance Scheme (*Berufungsausschuss für Kassenarztzulassungen*) of 9 June 1993 – W.-Nr. 57/93 –,

e) the Order of the Cologne Admission Board for Contracted Physicians (*Zulassungsausschuss für Vertragsärzte*) at the North Rhine Association of Statutory Health Insurance Physicians (*Kassenärztliche Vereinigung*)

2. indirectly against

a) § 98(2) no. 12 of the Fifth Book of the Code of Social Law (*Fünftes Buch Sozialgesetzbuch* – SGB V) as amended by the Healthcare Reform Act (*Gesetz zur Strukturreform im Gesundheitswesen* – GRG) of 20 December 1988 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 2477)

b) § 25 of the Admission Ordinance for Statutory Health Insurance Physicians (*Zulassungsverordnung für Kassenärzte* – Ärzte-ZV) as amended by the Healthcare Reform Act of 20 December 1988 (BGBl I p. 2477)

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Papier,

Jaeger,

Haas,

Hömig,

Steiner,

Hohmann-Dennhardt,

Hoffmann-Riem

held on 20 March 2001:

The constitutional complaint is rejected as unfounded.

Reasons:

A.

The constitutional complaint concerns the question whether licensed physicians aged 55 or over may, as a general rule, be denied admission to the lists of physicians eligible to provide services under the statutory health insurance scheme, especially as a contribution to cost-cutting in the health sector. 1

I.

[…] 2-11

II.

1. The complainant, who was born in 1934, is a specialist in internal medicine. He had been working at a university hospital, as an assistant medical director and as a supernumerary professor, mainly in the field of hemapheresis (separation of blood cells and plasma), since 1969. The employment relationship was not free from tensions, which came to a close only in 1994, when a settlement was reached in Labour Court proceedings; it was part of the settlement that the employment relationship continued. 12

2. Early in 1993, while the proceedings before the Labour Court were still pending, and shortly before his 60th birthday, the complainant unsuccessfully applied for admission to the lists of physicians eligible to provide services under the statutory health 13

insurance scheme; to substantiate his application, he put forward that he perceived the continuation of the employment relationship as too great a strain and, on the whole, as no longer reasonable; he asserted that if he was admitted to the lists, he would give up his employment as a staff physician. The application for admission as well as the legal remedies against the rejection of the application were unsuccessful. The Higher Social Court *(Landessozialgericht*) justified the rejection of the complainant's application on the basis of § 98.2 number 12 of the Fifth Book of the Code of Social Law (*Fünftes Buch Sozialgesetzbuch* –SGB V) in conjunction with § 25 of the Admission Ordinance for Statutory Health Insurance Physicians (*Zulassungsverordnung für Kassenärzte – Ärzte-ZV*); and deemed it constitutional, in accordance with the considerations of the Sixth Senate of the Federal Social Court (*Bundessozialgericht*). The Higher Social Court held that these statutes precluded first-time admissions of licensed physicians aged 55 or over; it further held that the complainant's circumstances did not qualify as a hardship case justifying an exceptional admission because the complainant worked in an unterminated employment relationship; in the court's opinion, conflicts that resulted from the employment relationship would have to be resolved by way of negotiations or by recourse to the labour courts.

[…] 14-15

III.

By way of his constitutional complaint, the complainant directly challenged the decisions of the admission board, of the board of appeal and of the social courts, and he indirectly challenged § 98.2, number 12 *SGB V* and § 25 *Ärzte-ZV*. 16

The complainant alleged that the denial of his application constitutes a violation of his fundamental right under Article 12.1 of the Basic Law (*Grundgesetz* – GG). The complainant claimed that the age limit for the admission to the lists of physicians eligible to provide services under the statutory health insurance scheme constitutes a [...] subjective restriction on the admission, which can only be justified if the admission of older applicants would seriously jeopardise the financial capacity of the health insurance funds. The complainant claimed that this was not the case. He put forward that the legislature had not been able to prove this. In the complainant's opinion, the provision that affected him, and all other admission for contracted physicians, were neither suitable nor necessary to curb the supply induced demand for services of physicians under the statutory health-insurance system. To achieve this, there were, in the opinion of the complainant, other, less burdensome means, like, for instance, a change of the physicians' remuneration structure, and cost-cutting measures as regards medical drugs, pharmaceuticals, and the in-patient sector of hospitals. 17

[…] 18

IV.

[…] 19-23

B.

[…] 24-26

C.

The constitutional complaint is unfounded. The challenged administrative and court decisions and the provisions of § 98.2, number 12 of the *SGB V* and of § 25 of the *Ärzte-ZV*, on which the decisions are based, are compatible with the Basic Law. 27

I.

The challenged provisions have thoroughly reorganised the legislation governing the professions in the areas that are relevant for physicians under the statutory health-insurance scheme; due to the reorganisation, access to this field of professional activity is, in principle, only open to physicians who are not yet aged 55 when they file their application. Such reorganisation affects the fundamental right of occupational freedom of prospective physicians wishing to provide services under the statutory health-insurance scheme. 28

1. Article 12.1 of the Basic Law grants everyone the right to make any economic activity for which they believe to be qualified their occupation or profession, i.e. the basis of their livelihood. The provision gives concrete shape to the fundamental right to the free development of one's personality in the area of individual performance and of the securing of one's livelihood; it is geared at ensuring that the practice of occupations or professions is subject to as few restraints as possible (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 82, 209 <223> with further references). The fundamental right also protects changes of profession or occupation and transitions between different forms of practising a specific profession or occupation, in particular the transition from employment to self-employment (cf. BVerfGE 7, 377 <398 and 399>). 29

Article 12.1 of the Basic Law formulates a uniform fundamental right; the different forms in which this right can be guaranteed, are, however, significant to the extent that the requirements that must be met to justify a restriction of the choice of an occupation or profession are higher than those placed on restrictions of the practice of an occupation or profession. An intervention that affects the choice of an occupation or profession impairs the individual's claim to freedom in a particularly severe manner. Therefore, very strict requirements are to be placed on the substantiation of the necessity of such a restriction of personal liberty. As a general rule, such restrictions are only justified to avert proven or highly probable threats to a public interest of overriding importance (BVerfGE 97, 12 <32>). In professional reality, there are fluid transitions between the choice and the practice of an occupation or profession because the personal decision to dedicate oneself to the practice of a specific professional activity 30

of one type or another may contain elements that at least come close to a choice of an occupation or profession (cf. BVerfGE 33, 125 <161>).

Purpose and intensity of the interference must always be in a reasonable proportion to one another (cf. BVerfGE 101, 331 <347>). In areas in which a very general goal is pursued by a great variety of measures that affect different legal positions of various holders of fundamental rights, the assessment of the proportion is determined by the extent to which the restriction affects the respective individual. If the legislature pursues a complex goal like the financial stability of the statutory health insurance scheme by various means, the fact that the persons affected by a specific measure see greater potential for cost-cutting elsewhere does not make the challenged measure unsuitable. A specific measure can also not be regarded as unnecessary because other measures exist within the system that would burden other persons less. Neither is a single measure disproportionate merely because it does not place an equal burden on all persons affected by its terms. 31

2. […] 32-34

3. Apart from the provision of health care services to the population, to which the Federal Constitutional Court has referred, in its case law, as a public interest of special importance (cf. BVerfGE 78, 179 <192>), the aspect of cost carries considerable weight for legislative decisions especially in the health care sector. Admittedly, the stability of the statutory health insurance scheme is of high importance for the common good (cf. BVerfGE 70, 1 <30>; 82, 209 <230>). If the provision of health care services to the population is supposed to be achieved with the help of a social security system, the financing of such a system also constitutes a public interest of overriding importance, and the legislature can take this interest as a guideline for shaping the system and for steering the service providers' behaviour. 35

a) In the case at hand, the legislature did not exceed the discretion that it has been granted for establishing and shaping social policy objectives (cf. BVerfGE 77, 308 <332>). To the extent that the legislature seeks to ensure the provision of health care services to the population through a statutory health insurance scheme, the legislature must, in this context, reconcile different, sometimes opposing, legal positions and public interests of many groups of persons. 36

aa) The statutory health insurance scheme is the compulsory insurance scheme for employees in the lower and medium income range and for pensioners. The premiums are provided by the insured persons themselves, by their employers, the pensioners and the entities that establish pension plans within the social security system. The premiums are calculated according to the individual's economic performance, which is reflected in the gross income that he or she achieves, and not according to the individual risk. This type of insurance provides full health insurance coverage, at moderate premiums, also to low-income sectors of the population. In private health insurance schemes, the premiums for families, for the chronically ill and the elderly covered by the scheme, in particular for those who are married to a partner who is not 37

economically active would be many times higher than the contributions to social security

bb) The statutory health insurance scheme is organised in such a way that, in large parts, it is not regulated by market forces. The prices of goods and services are not freely negotiated in a framework goverened by free competition. The providers of services within the system are therefore to an increased extent subject to the effects of legislation that is based on the concept of the social state (cf. BVerfGE 68, 193 <220 and 221>). In this respect, the regulations that the state issues in the context of legislation governing professions make it possible to participate in the comprehensive system of social services provided by the statutory health insurance scheme. This scheme is financed by the premiums paid by those covered by the scheme, the providers of services within the system also benefit from it; and the state is responsible for its functioning (cf. BVerfGE 70, 1 <31>). 38

cc) With consideration given to these factors and to the general economic framework conditions, the legislature has to decide which amount of contributions can be reasonably expected to be paid by the insured persons themselves, their employers, and the entities that establish pension plans within the social security system, and which health services can be paid from these funds. At the same time, the state has to determine the conditions for the service providers in such a way that the health insurance schemes can fulfil their mandate to ensure the provision of such services. The precondition for this is that the service providers in the health sector are willing to provide the respective services; in particular, it must be ensured that the medical profession remains capable of providing such services (cf., as concerns the professional group of lawyers, BVerfGE 97, 12 <31>). 39

It follows from this that the limitation of costs is only one of the objectives that are pursued by the legislature to ensure the functioning of the system as a whole. At the same time, the legislature aims to ensure that the amount of contributions that is considered economically justifiable, and which determines the health insurance schemes' financial volume, is not exceeded, and that the allocation of funds lives up to the aims of providing the insured persons with sufficient and adequate protection in case of illness. If the objective is to avoid an increase of premiums, increased spending in one sector necessarily results in cuts elsewhere. 40

b) When pursuing its overall objective, the legislature has, in the past decades, involved all the actors in the system in the sharing of responsibility for the functioning of the statutory health insurance. Also the effort to achieve a just distribution of burdens belongs to the aims of a balanced structure of the statutory health insurance scheme, which have been legitimately defined by the legislature. 41

aa) An increase in revenue was achieved by enlarging the group of insured persons and by increasing the contribution rates (*Kassenärztliche Bundesvereinigung* [ed.], *Grunddaten zur vertragsärztlichen Versorgung in der Bundesrepublik Deutschland,* 1999, G 11). Over the last 20 years, the maximum monthly contribution in the statuto- 42

ry health insurance increased by more than 100 per cent (cf. the figures in: *Verband der Privaten Krankenversicherung* [ed.], *Die private Krankenversicherung, Zahlenbericht* 1996/97, pp. 16, 21, 22; information on the percentage of persons insured in the statutory health insurance can be found in*: Der Bundesminister für Gesundheit* [ed.], *Daten des Gesundheitswesens*, 1997 issue, p. 293; as regards the evolution of the composition of the group of insured persons cf. Bloch, in: Schulin [ed.], *Handbuch des Sozialversicherungsrechts*, vol. 1, Krankenversicherungsrecht, 1994, § 15 marginal numbers 4 *et seq.*; von Stillfried, *Gesundheitssysteme im Wandel*, 1996, p. 85).

bb) The insured persons had to accept service restrictions when specific and necessary pharmaceuticals (for instance, cold remedies, bandages, spectacle frames) were eliminated from the catalogue of services provided by the scheme (§ 34 SGB V). The insured persons must pay for these pharmaceuticals themselves. Through prescription fees, those covered by the scheme take part in the cost sharing for pharmaceuticals (§ 31.3 SGB V), and through additional payments, they also bear part of the cost of hospital treatments (§ 39.4 SGB V) and rehabilitation (§ 40.5 and § 41.3 SGB V). In dental medicine, cost sharing is especially pronounced as regards services that are connected with artificial dentures (§ 30.2 of the SGB V). 43

cc) For the services providers, the range of services the cost of which can be settled with the health insurance funds has narrowed (§ 135 SGB V). The following measures have been imposed on service proivders: cuts in remuneration (lowering of physicians' remuneration for specific services, budgeting of physicians' remuneration - §§ 84, 85 SGB V), attempts to restrict the use of high-cost medical equipment, (cf. the *Großgeräte-Richtlinien Ärzte* [Directives For the Use of Large-Scale Techno-Medical Equipment by Physicians] of 16th October, 1990, which has in the meantime been repealed, reproduced in Schulin [ed.], *Gesetzliche Krankenversicherung, Soziale Pflegeversicherung, Textsammlung,* 1997, number 270); and the responsibility for the quantity of medical drugs consumed (i.e. physicians' liability to recourse if their expenditure for medical drugs exceeds the budget, a measure with which physicians have been threatened time and again, but which has not been executed as yet - § 84.1, sentence 4 to § 84.1, sentence 7 of the SGB V). The service providers' remuneration was lowered several times or was not increased for a certain period of time (cf. BVerfGE 62, 354; 70, <1>); the allocation of the service providers' remuneration was regulated in detail, and an increase in remuneration was linked to the contributory earnings (§ 85 SGB V). Physicians eligible to provide services under the statutory health insurance scheme must undergo an assessment of their economic efficiency (§ 106 SGB V), to the extent that they bear the responsibility for the necessity of the services that they prescribe or order to be provided (§ 27 in conjunction with § 72.2 SGB V); and for sufficient and appropriate medical treatment (§ 28.1 in conjunction with § 72.2 SGB V). Requirements planning in the hospital sector has resulted in the closure of in-patient institutions. A regulation that sets fixed maximum amounts for pharmaceuticals (§ 35 SGB V) is supposed to influence pricing in the pharmaceutical industry (cf. *Bundestag* document, *Bundestagsdrucksache* – BT- 44

Drucks 11/3480, p. 24, and 12/3608, pp. 73, 81); before, a moratorium on prices had frozen the prices for medical drugs directly (§ 35 of the SGB V - in this context, cf. Order of the 2nd Chamber of the First Senate of the Federal Constitutional Court, SozR 3-5407 Article 30.1 = NJW [*Neue Juristische Wochenschrift*] 2000, p. 1781).

dd) The statutory provisions that regulate the access of service providers to the statutory health-insurance scheme have also been amended many times. On the one hand, the legislature had to take into account that more recent findings concerning the provision of the necessary medical care to the insured persons required the admission of new professions to the statutory health insurance scheme; psychological psychotherapists, for instance, were admitted to the group of service providers who are entitled to settle their cost with the health insurance funds (in this context, cf. BVerfGE 78, 165 <178>; § 95.10 SGB V, added by the Act Governing the Professions of Psychological Psychotherapists and of Psychotherapists who Specialise in Working with Children and Adolescent (*Gesetz über die Berufe des Psychologischen Psychotherapeuten und des Kinder- und Jugendlichenpsychotherapeuten)* of 16 June, 1998 [Federal Law Gazette, *Bundesgesetzblatt* – BGBl I, p. 1311]). On the other hand, attempts were made to reduce the number of admissions of physicians to the statutory health insurance scheme when the legislature considered as refuted by empirical evidence the Federal Constitutional Court's assumption (cf. BVerfGE 11, 30 <44 et seq.>) that an increasing number of practitioners would not have an effect on the amount of expenses of the statutory health insurance scheme (cf. the synchronic and diachronic comparisons in: Breyer/Zweifel, *Gesundheitsökonomie*, 2nd ed., 1997, pp. 241 *et seq.*, 257-258; Adam, *Ambulante ärztliche Leistungen und Ärztedichte*, 1983, pp. 106-107, 158-159, 179 *et seq.; Sachverständigenrat Konzertierte Aktion, Sachstandsbericht* 1994, marginal numbers 76-77 f and BTDrucks 12/3608, p. 98). The extension of the duration of medical training until the licensing to practice medicine (§ 1 of the Order Regulating the Licensing of Physicians – *Approbationsordnung für Ärzte*) in the version of 14 July, 1987 [BGBl I, p. 1593]) and the introduction of a provision that makes a physician's admission to the lists of physicians eligible to provide services under the statutory health insurance scheme contingent on training as a medical specialist (§ 95a SGB V) have slowed down the increase of physicians eligible to provide services under the statutory health insurance scheme (cf. *Kassenärztliche Bundesvereinigung* [ed.], *Grunddaten zur vertragsärztlichen Versorgung in der Bundesrepublik Deutschland* 1999, A 18). This tendency was enhanced by ordinances on requirements planning (§ 368.3 of the German National Insurance Code, *Reichsversicherungsordnung* – RVO, as amended by the Act Regulating the Improvement of Requirements Planning Concerning Physicians Eligible to Provide Services Under the Statutory Health Insurance Scheme (*Gesetz zur Verbesserung der kassenärztlichen Bedarfsplanung*) of 19 December 1986 [BGBl I, p. 2593]; §§ 99 *et seq*. of the SGB V; cf. BTDrucks 10/5630, p. 12; 10/6444, pp. 5 and 6). § 95.7 SGB V, which was inserted in the Code of Social Law on account of the Healthcare Reform Act (*Gesundheitsstrukturgesetz)* provides that physicians aged 68 or over lose their eligibility to provide services under the statutory health insurance

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scheme.

c) In principle, the measures that have been described are, and have been, a suitable contribution to the financial stability of the statutory health insurance scheme, although none of the individual measures has had a sustainable effect. They affect different groups of persons and have different economic effects. It is incumbent upon the legislature to decide which measures are taken; with a view to the complexity of the legislature's task in this context, its leeway for the assessment of the situation, and its legislative discretion, are broad. For the assessment of the situation, the legislature can establish a panel of experts and make use of its work. The legislature also has to observe and to assess the success of the measures that have been taken, and, if necessary, it has to state that there is new need for action (Establishment of the commission of inquiry by way of resolution of 3 June, 1987, cf. BTDrucks 11/414; Order by the Federal Minister for Labour and Social Affairs of 12 December, 1985 on the Establishment of the Panel of Experts for the Concerted Action in the Healthcare System – cf. now § 141 SGB V). The Constitution does not prescribe any political options. In particular, the question whether the overall aim could have been achieved in a different, and better, way is not a question of constitutional law. 46

4. In order to ensure the availability of services provided by physicians under the statutory health insurance scheme, the legislature was, *inter alia*, justified in restricting the access of physicians to the statutory health insurance system who can provide their services under the statutory health insurance system only for a short period of time, if at all, 47

a) The challenged provisions are a suitable contribution to the realisation of the legislative concept. 48

aa) The group of those affected by § 98.2, number 12 SGB V and by § 25 Ärzte-ZV is the group of prospective physicians, including the complainant, wishing to provide services under the statutory health-insurance scheme; among these physicians, only licensed physicians who are already aged 55 or over are affected. So far, most existing hurdles to admission to the eligibility lists did not apply to them. The legislature had already introduced obstacles to the access to the statutory health insurance scheme for younger physicians at an earlier time. When the challenged provision was enacted, the obstacles for younger physicians were aggravated by way of § 103. SGB V (in the version of the Healthcare Reform Act) by making the admission to the lists of eligible physicians contingent on the completion of a one-year practical professional training (cf. BTDrucks 11/2237, p. 195). By way of introducing the age limit of 68 years, the legislature later ensured that the age structure of the physicians eligible to provide services under the statutory health insurance scheme will remain balanced in the future; and that younger physicians get an opportunity to be included in the lists in spite of the existing bars to admission (§§ 101, 103 SGB V). 49

The age limit that is challenged in the proceedings at hand has been a first step in this direction. The age limit reduces the number of physicians who, in the assessment 50

of the legislature, particularly contribute to jeopardising the economic efficiency of the statutory health insurance scheme (BTDrucks, *loc.cit.*, pp. 151, 195).

bb) The legislature could expect major savings from denying admission to the statutory health insurance scheme to persons who will only provide services as physicians under the statutory health insurance scheme for a relatively short period of time. The legislature could base this expectation on plausible assumptions. 51

Particularly in the first years after opening their practice, the percentage of physicians' returns that can be retained as income is relatively low. Studies undertaken by the German Chemists' and Physicians' Bank *(Deutsche Apotheker- und Ärztebank*) show that it often takes as long as three to five years to repay a short-term operating credit, which is granted at the beginning of a physician's professional activities, and which serves to pre-finance the start-up cost and to meet the cash requirements of the practice and of the physician's cost of living. It takes, on average, 12 years for a physician to repay all the loans he or she has taken out in order to buy an existing practice or to open a new one (cf. *Deutsche Apotheker- und Ärztebank* [ed.], *Praxisgründung*, 3rd ed., 1996, p. 89; also see the figures for 1989/90 provided in: *Arzt und Wirtschaft*, offprint from issue 18 of 17th September, 1991). If physicians can only make profits from their professional activities for a few years, and if they nevertheless want to generate average profits, they must strive for higher returns, a phenomenon that can result in an increase in the number of services provided; this is undesirable from the perspective of the statutory health insurance scheme. The legislature was therefore right to think it expedient to preclude, by means of restriction of admission to the eligibility lists, exactly such physicians who, in view of the economic pressure put on them, seem less inclined to conduct their activities in the overall system in a cost-conscious manner. 52

cc) This aspect is of particular importance because physicians who provide their services under the statutory health-insurance system are at the same time the health insurance scheme's agents for the management of their entire funds. The authorisation, and the obligation, of administrating the funds of the health insurance schemes in an economically efficient manner has been entrusted to the physicians who provide their services under the statutory health insurance scheme. It is the physicians who decide about the suitability and the economic efficiency of a medical treatment. 53

To fulfil this task, physicians in the statutory health-insurance scheme must have specific knowledge about the legislation that governs the practice of their profession in the statutory health insurance scheme; moreover, they must be willing to organise economically justifiable medical treatment in an economically sensible manner. This also means that they must be willing to acquire experience with the legal and economic particularities of a practice under the statutory health insurance scheme; as a general rule, physicians who worked in a hospital, in a laboratory or in research before becoming eligible to provide services under the statutory health insurance scheme have not been able to acquire such experience. In this respect, they are sig- 54

nificantly different from the group of physicians of the same age who have been participating in the statutory health insurance system for years.

b) The legislature could not have achieved the entirety of the aims that it pursued in this context by a means that impairs the complainant's interests to a lesser extent. Less burdensome means that are equally effective for the group of physicians already aged 55 or over are not apparent. 55

In this context, changes in the structure or the amount of the physicians' remuneration, or stricter control of the physicians' behaviour as concerns prescriptions and their settlement of accounts with the health insurance funds, would not have been suitable means for achieving this objective. Such means would, essentially, have affected physicians who had already been admitted to the eligibility lists. Physicians who are newly admitted to the eligibility lists cannot assess the consequences of such changes from their own experience. If at all, such measures could have decreased the number of physicians willing to be admitted to the lists only if the remuneration losses had been so substantive that physicians willing to be admitted to the lists would have regarded other professional perspectives as more interesting from an economic point of view. This is hardly imaginable because physicians, on average, earn a good income compared to other freelance professionals (cf. *Statistisches Bundesamt, Unternehmen und Arbeitsstätten*, 1991 issue, Professional series 2, series 1.6.1., p. 13 and series 1.6.2., p. 14, and 1995 issue, series 1.6.1., p. 14 and series 1.6.2., p. 14; cf. also Bedau, *Zur Einkommenslage in den freien Berufen*, *DIW-Wochenbericht* 1999, pp. 2 *et seq.*). 56

c) The age limit also satisfies the principle of proportionality in a narrower sense. 57

aa) For a limit for first-time admission, the age limit has been set very high; it is at an age in which many employed persons may already qualify for pre-retirement part-time work or for early retirement. As a general rule, hurdles to the access to an occupation or profession that become effective so late in life are not very burdensome because the persons who are affected by them have already established themselves in their profession. The fact that they are not granted admission to the eligibility lists does not deny them the practice of a profession for which they have already acquired specific experience in their long professional life 58

Neither does the age limit affect this group of persons in a severe manner. Until the age of 55, physicians can freely decide whether they want to establish themselves as physicians who are eligible to provide services under the statutory health insurance scheme to the extent that the requirements planning allows for this. Those affected by the age limit are neither denied the continued practice of their profession as a physician nor the change to a different form of practising it; they only have to meet a deadline for their decision. 59

bb) In comparison, the public interests which the age limit is supposed to serve carry much weight. The safeguarding of the effectiveness and of the financial stability of the 60

statutory health insurance are high-ranking tasks of the common good. Every individual step with which the legislature seeks to achieve these objectives is of considerable importance even though every individual measure only contributes to realising part of the overall aim. The public interests do not lose importance if they can only be realised through many small steps.

cc) This means that the provision in question solves the conflict in an adequate manner. It is proportionate in particular because it makes it possible for the admission boards to take decisions that deviate from the regulations if this is necessary in order to avoid unnecessary hardship. Thus, the legislature takes into account that there may be particular circumstances in individual cases. The principle of the rigid age limit can be departed from because sometimes, the course that an individual life takes does not fit into the categorisation that is provided by legislation. The wish for a change, for instance, is not always based on the physician's free decision. The admission boards, and the ordinary courts, are called upon to take the importance of Article 12.1 of the Basic Law as concerns the establishment of objective fundamental values into consideration when they decide upon hardship cases. 61

II. 62

§ 98.2, number 12 SGB V and § 25 Ärzte-ZV are also compatible with the general principle of equality that is enshrined in Article 3.1 of the Basic Law. 63

[…] 64-68

Papier Jaeger Haas

Hömig Steiner Hohmann-Dennhardt

Hoffmann-Riem

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 20. März 2001 - 1 BvR 491/96

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