H e a d n o t e s

to the judgment of the First Senate of 22 February 2011

– 1 BvR 699/06 –

1. **Like public enterprises that are in the sole ownership of the state and are organised in the forms of private law, enterprises owned both by private shareholders and the state (gemischtwirtschaftliche Unternehmen) over which the state has a controlling influence and which are organised in the forms of private law are directly bound by the fundamental rights.**
2. **The fact that an airport is especially sensitive to disruptions justifies, under the precept of proportionality, more extensive restrictions of the freedom of assembly than are permissible in public street space.**

FEDERAL CONSTITUTIONAL COURT

**- 1 BVR 699/06 -**

Pronounced
on 22 February 2011
Kehrwecker,
Court Official,
as Registrar
of the Court Registry

**IN THE NAME OF THE PEOPLE**

**In the proceedings**
**on**
**the constitutional complaint**

of Ms. K…

- authorised representatives:

1. Professor Dr. Günter Frankenberg,
2. Prof. Dr. Andreas Fischer-Lescano LL.M.,
   University of Bremen - Centre of European Law and Politics (ZERP) – Universitätsallee GW 11, 28359 Bremen

against the judgment of the Federal Court of Justice (Bundesgerichtshof) of 20
a) January 2006 - V ZR 134/05 -,

b) the judgment of the Frankfurt am Main Regional Court (Landgericht) of 20 May 2005 - 2/1 S 9/05 -,

c) the judgment of the Frankfurt am Main Local Court (Amtsgericht) of 20 December 2004 - 31 C 2799/04 - 23 -

the Federal Constitutional Court - First Senate - with the participation of the justices

Vice-President Kirchhof,
Hohmann-Dennhardt,
Bryde,
Gaier,
Eichberger,
Schluckebier,
Masing,
Paulus

on the basis of the oral hearing from 23November 2010 delivered the following

**Judgment**

1. The judgment of the Federal Court of Justice of 20 January 2006 - V ZR 134/05 -, the judgment of the Frankfurt am Main Regional Court of 20 May 2005 - 2/1 S 9/05 - and the judgment of the Frankfurt am Main Local Court of 20 December 2004 - 31 C 2799/04 - 23 - violate the complainant's fundamental right to freedom of expression under Article 5.1 sentence 1 of the Basic Law (Grundgesetz - GG) and to freedom of assembly under Article 8.1of the Basic Law. The judgments are annulled. The matter is remitted to the Frankfurt am Main Local Court for a new ruling.
2. The Federal Republic of Germany must reimburse the complainant's necessary expenses.

**Grounds:**

**A.**

The complainant's constitutional complaint is directed at the judgments of the civil courts affirming a ban on the stock corporation that operates Frankfurt airport and in which the majority of shares are publicly owned; such ban permanently prohibits the complainant from using the airport for expressions of opinion and demonstrations without the stock corporation's permission. 1

**I.**

1. Frankfurt am Main Airport is operated by Fraport Aktiengesellschaft, the defendant in the original proceedings (hereinafter: the defendant), who also owns the airport premises. At the time of the "airport ban" on the complainant in 2003 that gave rise to the civil-law dispute, the *Land* (state of) Hesse, the City of Frankfurt am Main and the Federal Republic of Germany together owned approximately 70% of the shares in the defendant, while the rest were privately held. Since the sale of the Federal Republic of Germany's shares, the *Land* Hesse and the City of Frankfurt have together held about 52% of the shares; the City of Frankfurt's shares are held via a wholly owned subsidiary. The remaining shares are in free float. 2

2. At the time of the ban on expressions of opinion and demonstrations, there were a large number of shops and service facilities as well as restaurants, bars and cafés both on the "air side", the area behind the security controls, which can only be accessed with a boarding pass, as well as on the "land side", the area in front of the security controls, which can be accessed without a boarding pass. The defendant continually expanded the shopping and leisure facilities over the course of time. Thus the airport offers its visitors extensive shopping opportunities on the land side through shops in the following categories: "books and magazines", "beauty and wellness", "tobacco products and spirits", "fashion and accessories", "shoes and leather goods", "flowers and souvenirs", "photo and electronics", "watches and jewellery" and "optician and chemist". In addition, the airport has a variety of food and drinking establish- 3

ments ranging from elegant restaurants to cafés, bars and fast-food restaurants. Moreover, there are a multitude of service providers whose offerings include, for example, a hairdresser's, a wellness studio, a bank, a post office branch with internet access, two drycleaners and several travel agents. Finally, there is a Christian chapel and prayer rooms for members of other faiths. The defendant advertises with the slogan: "Airport shopping for all!", "Our new marketplace, spread across 4,000 m², awaits your visit!"

3. The defendant regulated the use of the airport premises by air passengers and other customers through its regulations for the use of the airport, as approved by the *Land* Hesse; the version of 1 January 1998 was the version relevant for the original proceedings. The regulations contained, among other provisions, the following provision in Part II (Provisions on Use): 4

4.2 Collections, Advertisements and the Distribution of Leaflets 5

Collections, advertisements and the distribution of leaflets and other printed matter require the consent of the airport operator. 6

The current version of the regulations for the use of the airport dated 1 December 2008 expressly prohibits assemblies in the airport buildings. 7

4. Assemblies often took place on the airport premises in the past. The defendant states that a total of forty-five demonstrations and rallies were held at different locations, including in terminals 1 and 2, between 2000 and 2007. The assemblies were activities arranged by organisers of different sizes with different agendas; some had been registered with the authorities competent for assemblies, some had not, some had been agreed with the defendant, some had not. The smallest assembly comprised three persons, the largest about 2,000. The defendant itself repeatedly organised activities and publicity events to entertain the public on the land side in the publicly accessible area of the airport such as, for example, a large screen for viewing the 2010 football world cup. 8

5. The complainant, together with five other activists belonging to an "Initiative against Deportations", entered terminal 1 of the airport on 11 March 2003; she spoke to some Lufthansa employees at a check-in counter and distributed leaflets regarding a forthcoming deportation. Employees of the defendant and federal border guards terminated the activities. 9

6. By a letter of 12 March 2003 the defendant imposed an "airport ban" on the complainant and informed her that it would initiate a criminal complaint against her for unlawful entry should she "again be found to be on the airport premises without justification". In an explanatory letter dated 7 November 2003, Fraport AG informed the complainant, making reference to its regulations for the use of the airport, that "for reasons of smooth operational procedure and for safety reasons," it did, "as a matter of principle, not" tolerate "demonstrations in the terminal that had not been coordinated [with Fraport AG] beforehand". 10

7. The Local Court dismissed the action brought by the complainant against Fraport AG, which was aimed at the removal of the ban on expressions of opinion and demonstrations. It held that the defendant as owner of the airport was entitled to rely on its right to undisturbed possession. It did not consider the defendant to be directly bound by the fundamental rights. Nor did the fact that the majority of its shares were publicly owned mean that it was bound by the fundamental rights since it was not completely state owned. The Local Court determined that there was nothing to indicate that the defendant had been especially founded for the purpose of evading the binding force of the fundamental rights. In addition, the defendant was not exercising any sovereign powers in connection with the deportations. The Local Court found that the defendant - like all private-law entities - was only indirectly bound by the fundamental rights, and that the fundamental rights had to be given due consideration when construing the applicable laws from which the defendant's rights and duties flowed. After weighing the defendant's right as owner and the complainant's right to freedom of expression and assembly, it concluded that the defendant did not have to tolerate expressions of opinion and demonstrations on its premises. In its opinion freedom of expression and freedom of assembly are defensive rights against the state; they do not, however, give rise to any rights against an owner who does not wish to tolerate an assembly on its premises. For the purposes of § 903 of the German Civil Code (*Bürgerliches Gesetzbuch* - BGB), it was not significant whether the specific exercise of a fundamental right actually interrupted operations on the defendant's premises. According to the Local Court, the airport ban was neither arbitrary nor disproportionate since it only related to a presence in the airport which was illegal pursuant to no. 4.2 of the regulations for the use of the airport. 11

8. The Regional Court dismissed the appeal by the complainant as unfounded, making reference to the judgment handed down by the Local Court. It added the following: It was decisive in the specific case that the defendant did not perform any public-sector tasks. The public-sector tasks performed by the defendant on behalf of the state in the field of aviation administration were limited to safeguarding the safety and efficiency of aviation. On the other hand, the provision of the infrastructure for deportations was not one of the public-sector tasks connected with aviation administration. The indirect binding force of the fundamental rights only required the defendant to allow access to its premises for travel purposes. The ban itself neither violated the law, nor was it against public policy or discriminatory. 12

9. The Federal Court of Justice dismissed the complainant's appeal on points of law as unfounded (see *Neue Juristische Wochenschrift* – NJW 2006, pp.1054 et seq.). 13

In its opinion the defendant's power to issue the ban was based on its right deriving from §§ 858 et seq., 903 and 1004 BGB as the owner of premises to undisturbed possession; in principle, such right allows its bearer to decide freely who it will allow to enter its premises and who will be denied access. Such right encompasses the right to only allow access for certain purposes and the right to enforce compliance with such purposes through a ban. 14

The court found that the defendant's right to undisturbed possession as the owner of the premises was restricted by its obligation to contract with passengers who fulfilled the public-law requirements for using the airspace, and restricted by the opening of the airport to persons accompanying passengers and other visitors and customers of the restaurants and shops on the airport premises. The defendant thus granted a general right of access to the airport to all persons using it for ordinary purposes who did not interfere with its operations without examining each case individually. This did not, however, give rise to a right on the part of the complainant to use the airport for activities such as those carried out on 11 March 2003. According to the Federal Court of Justice, such conduct exceeded the purposes for which the airport could be used. The defendant did not make the airport available for the general distribution of leaflets or for conducting protests or other assemblies. These kinds of uses were also incompatible with the function of an airport. 15

The fundamental rights of the complainant under Article 5.1 and Article 8.1 GG did not oblige the defendant to lift its ban on the complainant entering its premises. In this connection, the court found it unnecessary to determine whether the exercise by the defendant of public-sector tasks was a prerequisite for a direct binding force of the fundamental rights on its part or whether such binding force existed independently. Nor would the ban violate the complainant's rights even if one assumed that the defendant was subject to a direct binding force of the fundamental rights. 16

Article 8.1 GG will not, in the court's view, establish a right of use that does not already exist according to general legal principles; instead it requires that the person concerned be legally entitled to use the place of assembly (with reference to Decisions of the Federal Administrative Court (*Entscheidungen des Bundesverwaltungsgerichts* - BVerwGE) 91, 135 <138>). In addition, the court held that the complainant could not support her case by arguing that the defendant was possibly not entirely free to decide, at will, requests relating to the use of the airport premises for purposes outside its intended purpose, but could instead be obliged to take into account the interests of the respective applicant in the exercise of his or her fundamental rights to freedom of assembly and opinion. An obligation to tolerate the complainant's presence in this context could only come into consideration if the demonstrators did not, or at most only slightly, interfere with the intended use of the airport. The Federal Court of Justice found in addition that, even taking into account Article 8.1 GG, the defendant did not in any event have to tolerate assemblies which were suitable for interfering with airport operations. The complainant was, however, it the court's opinion seeking to hold assemblies that interfered with the handling of air traffic. 17

In addition, Article 5.1 sentence 1 GG did not impose an obligation on the defendant to lift its ban. An airport operator's right to undisturbed possession protects the functioning of an airport and thus ensures that it is able to fulfil its statutory duty to keep the facilities that serve air traffic in working order and to protect them from interference. According to the court, if the exercise of the airport operator's right to undisturbed possession would - as was the case here - serve to prevent specific imminent 18

interferences with operations, the associated restriction on freedom of expression would have to be tolerated. In the eyes of the court, the ban was proportional in light of Article 5.1 sentence 1 and Article 8.1 GG. The defendant had no less burdensome means available to it than the ban to force the complainant to comply with the permitted purposes of use in the future. In addition, the ban only related to activities not agreed with the defendant. The defendant thus indicated that it was willing in principle, as required by no. 4.2 of the regulations for the use of the airport, to decide on the grant of permission on a case-by-case basis.

10. By a letter of 10 March 2006 the complainant informed the defendant that she would take a few minutes the next day to express her opinion in terminal 2 of the airport on the deportations to Afghanistan currently taking place, but that she did not wish to disturb airport operations in any way. In addition, she informed the defendant that she had registered a small half-hour assembly in terminal 1 of the airport with the responsible administrative authority for the same day. The complainant requested the defendant's permission for both activities. The defendant used its ban to explain its refusal of both activities. It informed the complainant that, if she conducted the activities in spite of the ban, it would have her removed from the terminal immediately and initiate a criminal complaint against her for unlawful entry. 19

**II.**

The complainant alleges a violation of her fundamental rights under Article 5.1 sentence 1 and Article 8.1 GG in the constitutional complaint brought by her on 15 March 2006. 20

She asserts that the defendant must allow itself to be directly subject to her fundamental rights. This arises from the fact that the majority of its shares are publicly owned. In her view, the state cannot avoid the binding force of the fundamental rights by "seeking refuge in private law". In addition, the defendant as the operator of a civil airport within the meaning of § 38.2 no. 1 of the Air Traffic Licensing Regulations (*Luftverkehrs-Zulassungs-Ordnung* - LuftVZO) provides public infrastructure and performs public-sector tasks on behalf of the state in the field of aviation administration. According to the complainant, the operation of the airport is one of the public services of general interest offered by it. Irrespective of this, private entities are also directly bound, as far as substance is concerned, by the fundamental rights if they cause a danger to autonomous areas protected by the fundamental rights which is similar to the dangers to freedom in the relationship between the state and its citizens. 21

Even if one assumes that the defendant is only indirectly bound by the fundamental rights, the challenged decisions do not satisfy the constitutional requirements of Article 5.1 sentence 1 and Article 8.1 GG. 22

The complainant alleges in addition that the ban that was upheld by the civil courts violates her right to freedom of assembly. Where private owners (as the defendant in the present case) make an area available to the public for strolling and shopping, 23

then they are bound by Article 8.1 GG to also make this space available for assembly purposes. According to the complainant, the provision of an area for communicative purposes gives rise to duties to tolerate on the part of the defendant from which it cannot escape with a blanket assertion that airport operations would be disrupted; it is prevented from doing so by its shareholder structure, the public-sector tasks that it performs, the social acceptability of the conduct by the complainant which is being disputed and the direct geographical connection between the airport and the subject of the protest. In addition, the fundamental right to freedom of assembly in enclosed spaces is not subject to the reservation in Article 8.2 GG and may thus only be restricted in respect of conflicting constitutional values. The complainant alleges that the unlimited ban on her presence on the entire airport premises, whose breach is punishable and which is subject to a proviso that permission is required, represents a disproportionate restriction of her freedom of assembly because less burdensome means are available to the defendant; it could, for example, require her to give it notice of her assemblies or it could make distinctions on the basis of the size of the assembly or it could ban assemblies in certain areas of the airport. In addition, the ban makes spontaneous assemblies impossible.

24 The complainant also alleges that the ban infringes her freedom of expression. She argues that the civil-law courts failed to recognise the significance of generally accessible space for freedom of expression. She alleges that the defendant has created with the airport a space for the large-scale presentation of shops, restaurants and service providers. She claims that the distribution of leaflets in this publicly accessible space does not exceed the bounds of the general traffic permitted by the defendant. In her opinion the defendant has to accept visitors to its “Flight and Adventure World” exchanging communications that criticise; the defendant, she says, is just as unable to forbid them as it is unable to influence the content of daily newspapers sold at the newspaper stands on the airport premises. In her opinion, the defendant’s duty to tolerate is increased by the close connection between the criticism being expressed and the airport location. After all a large number of the deportations from Germany against which her protest is directed are carried out from the airport. Finally, in the complainant’s view, the encroachment on her freedom of expression is also disproportionate because the ban subjects her freedom of expression to a proviso that permission is required and the ban is for an unlimited period and its breach is punishable.

**III.**

25 The Federal Administrative Court (*Bundesverwaltungsgericht*), the Hesse State Chancellery and the defendant in the original proceedings, Fraport AG, commented on the constitutional complaint.

26 1. The Federal Administrative Court advises that under its case-law (see BVerwGE 113, 208 <211>) a private enterprise controlled by the state is directly bound by the fundamental rights. However, according to its case-law, the defensive right in Article 8.1 GG does not in principle give rise to a claim for performance against the state;

thus it also does not give rise to a claim against the state authorities responsible for a public institution to allow their property to be used for the purposes of a demonstration (see BVerwGE 91, 135 <138 et seq.>). Article 8.1 GG does not establish a right of use which does not already exist under general principles. However, when exercising their discretion to grant a special use permit, the state authorities responsible for a public institution are not excused from the obligation to properly take into account the importance of the interest that an applicant for a special use permit has in exercising his or her fundamental right to freedom of assembly.

2. The Hesse State Chancellery regards the constitutional complaint as admissible only insofar as it alleges a violation of freedom of expression pursuant to Article 5.1 sentence 1 GG. In its opinion the constitutional complaint is otherwise inadmissible since, in part, it is not properly substantiated and, in part, the entitlement to file a specific constitutional complaint is missing. In any event, it believes that the constitutional complaint is unfounded. 27

a) The Hesse State Chancellery takes the view that the defendant is not directly bound by the fundamental rights. As a company constituted under private law, it does not fall within the ambit of Article 1.3 GG. The fact that the majority of shares in the defendant are publicly held does not mean that it itself holds sovereign powers. Instead the defendant is as the operator of a civil airport the subject of numerous air-law duties (§ 19a, § 27d.2 and § 29a of the Civil Aviation Act (*Luftverkehrsgesetz* - LuftVG) and § 45.1 sentence 1 LuftVZO)). It cannot be inferred from this that the defendant is integrated in the state administrative structure in the same way as a public authority and thus the “extended arm of the state”. Nor does the possibility of transferring sovereign powers to private persons, which is provided for in the Civil Aviation Act, alter this fact. In the case of enterprises such as the defendant, which are owned both by private shareholders and the state, only the public shareholders are bound by the fundamental rights. The participation of the state should not result in the participation of private shareholders, which for its part is protected by the Basic Law, being restricted more than usual due to the fundamental rights of third parties. In addition, company law does not permit public shareholders to exercise a determining influence on the individual decisions of the board of management. Nor do the public infrastructure services provided by the defendant result in a direct binding force of the fundamental rights. It cannot be assumed from their assumption of responsibilities that they are bound by the fundamental rights in precisely those instances where they seek to prevent their institutions from being used for purposes other than those intended. 28

b) Nor would an indirect binding force of the fundamental rights establish an obligation to make private property available so that third parties could exercise their fundamental rights. According to the Hesse State Chancellery, the defendant is only obliged to allow every user without discrimination the right to participate in air transport. To the extent that it is possible to infer from the case-law of the civil courts an obligation to contract in an individual case on the basis of the effect of the fundamen- 29

tal rights between private parties, no such inference can be drawn in the present case. The reason for this is that the use in such cases, unlike in the present case, always concerned use in accordance with the purpose for which the institution was established. Nor does the advertising engaged in by the defendant expand the purposes for which it was established to unspecific general traffic. In the case of a large airport such as the Frankfurt airport, the existence of shopping possibilities are is in any case indirectly in keeping with the purposes for which it was established. This notwithstanding, the establishment of shops does not give rise to a general right of entry for everyone, which cannot be restricted by the owner of the premises' right to undisturbed possession. Instead the space dedicated to shops should not be regarded any differently to space owned by other private persons, such as department stores or shopping centres. They are not comparable with pedestrian precincts or public places, which traffic law dedicates to public traffic.

c) In the opinion of the Hesse State Chancellery, even if one assumes that the defendant is directly bound by the fundamental rights, the challenged decisions are constitutionally unobjectionable. It believes that the defendant is not required to tolerate assemblies - such as the activities of the complainant - which are likely to disrupt airport operations. Apart from that, if terminal space was made generally available for the objectives pursued by the complainant, this would conflict with the defendant's public-law operational safety obligations under § 45.1 sentence 1 LuftVZO. The defendant can only comply with such obligations if it is able to deny access to persons not wanting to travel by air. The airport provides an attractive forum for communication for a multitude of social groups. According to the Hesse State Chancellery, if the defendant were required to tolerate the complainant's activities, it would also be obliged in view of Article 3.1 GG to tolerate such activities by other groups; this would lead to a hard-to-control, conflict-ridden politicisation of the terminal area, which is a sensitive area as far as security is concerned. 30

3. The defendant considers the constitutional complaint unfounded both with regard to the alleged violation of freedom of expression and the alleged violation of freedom of assembly. 31

a) It claims that it is not itself directly bound by the fundamental rights. It argues that its shareholder structure cannot be the basis for a decision since otherwise whether an entity was bound by the fundamental rights would depend on the coincidences of the stock exchange, and the sale of a small stake in a company would result in a complete change in its status with respect to the fundamental rights. The right to ownership of property of private shareholders, who cannot simultaneously be the holders as well as the targets of fundamental rights, prevents an assumption that an enterprise which is owned both by private shareholders and the state can be fully bound by the fundamental rights. 32

It cannot be inferred from a public-sector task of the defendant, i.e. its duty to safeguard the safety and efficiency of aviation, that it will also be bound by the fundamen- 33

tal rights in precisely those cases which are not concerned with the transportation of passengers, but concerned with a use over and beyond same. In the defendant's view, the public nature of its task does not after all lead to its relationship with passengers and airport customers being of a public-law nature either. The complainant is just as unable to rely on the close association between the place of assembly - the airport - and the topic of her protest. The defendant argues that it is not responsible for this purely geographical connection. Arrangements for the transportation of deportees are made by the responsible authorities who book a normal passenger seat with an airline company. In this context, the defendant is obliged to assist the responsible authorities in the performance of their duties. Thus, the defendant claims, it is itself the target and not the executor of sovereign measures. Consequently, it is only bound by the indirect binding force of the fundamental rights that applies to all private-law traffic. This does not give rise to a third-party right to use the premises which it owns.

b) Nor is the complainant's right to freedom of expression violated. According to the defendant, Article 5.1 sentence 1 GG does not protect expressions of opinion in the form of the distribution of leaflets in an airport. The defendant asserts that it is true that freedom of expression does in principle cover the choice of the means of expression and the place for expression. It does, however, presuppose that the chosen place is a place which is in principle freely accessible to the holder of fundamental rights. Article 5.1 sentence 1 GG does not in comparison provide a right to receive access to a place which would otherwise be inaccessible. The free development of communication protected by the Basic Law applies, in the opinion of the defendant, to public streets and places; it does not, however, apply unrestrictedly to private or public institutions in a manner extending over and beyond the tasks and purposes for which they were established. Nor does the public stake in its ownership or its opening to traffic make the airport buildings public space which must be available for every exercise of fundamental rights involving communication. 34

The defendant argues that if the airport it operates were operated by the state, it would not be available for public use, but simply as an institution. The conduct permitted would be limited from the outset to the institutional purpose for which the airport was established. Even if one were to classify an airport as a public institution used by the general public, the permitted use would be limited to the purpose for which it was established. Any special use outside of this purpose would in any case require a permit. In the defendant's opinion, this applies all the more so in the case of private institutions which are only partly responsible for carrying out public-sector tasks. In addition, dissemination of opinion on public streets should not be regarded as general use, but rather as special use if it could interfere with the general use of others. In this case, what matters are the local conditions. What amounts to general use in the case of a street could already be special use in the case of a large airport due to its confined space and the many purposes for which it is used. In the case of an airport, even smaller groups of demonstrators and a person distributing leaflets to 35

persons waiting in a queue could interfere with the latter's paying attention to announcements or block passengers' access. The defendant argues that the discretion which the state authorities responsible for a public institution have in relation to the grant of a special use permit is the equivalent of the right of a private operator to make uses which are outside the purposes for which the institution was established subject to a proviso that permission for such use is required.

Nor does the provision of "shopping landscapes" and "adventure worlds" extend the purpose for which the airport was established. The only purpose of such institutions is to entertain passengers before and after a flight. They do not in practice significantly extend the purposes for which the airport was established. In 2006 there were about 52 million passengers and 6 million people who accompanied them as compared with approximately 4 million customers who visited the airport purely for shopping and viewing purposes. Furthermore, an extension of the purpose of establishment and thus of the scope of protection of freedom of expression does not follow from the geographical relationship between the airport and the criticised deportation practice. 36

Even if the distribution of leaflets in airport buildings is in principle deemed to be covered by freedom of expression, incitement to commit a crime - as was the case in relation to the complainant in June 2004 when she urged passengers not to turn off their mobile phones on board to prevent a deportation - is not. Accordingly, in the eyes of the defendant, the encroachment on the complainant's freedom of expression was in any case justified. The operator of an airport must be allowed to control certain forms of expression of opinion, especially leaflet campaginscampaigns, if same are suitable for interfering with operations. This is precisely the purpose of requiring a permit. The right of an owner of premises to undisturbed possession under § 858 and § 903 BGB is the statutory basis and general-law provision within the meaning of Article 5.2 GG for this. At least in the case of private shareholders, this right is also anchored in the constitution through Article 14 GG. The defendant argues that it exercised this right to undisturbed possession in conformity with Article 5 GG. Even if its public-sector task and the extended binding force of the fundamental rights in the sense of being a public space for communication take precedence over its property, its ban restricting freedom of expression was justified as an allocation of different fundamental rights in the sense of a resolution of conflicts for the purpose of averting danger. 37

According to the defendant, the ban on the distribution of leaflets without express permission was also proportionate. In this context, the fact that the complainant still had the possibility of drawing attention to her opinion in the immediate vicinity of the airport, such as at the charter bus station in front of terminal 1, has to be taken into account. On the other hand, the opening of the airport for various expressions of opinion would lead to a politicisation of transport facilities. Conflicts would be bound to occur and tend to be impossible to control. Passengers could feel cornered by certain opinions without - as would be the case in a public area - a means of escape. In 38

the defendant's opinion, none of this is compatible with the safety duties of an airport operator.

c) According to the defendant, the complainant is just as unable to claim that her fundamental right under Article 8.1 GG has been violated. Neither the public-sector task, nor the public accessibility of the airport created a right on the part of the complainant to hold a demonstration on premises not made available for these purposes. The freedom of determination in relation to the place of assembly protected by the fundamental right to freedom of assembly does not extend to real property and facilities owned by third parties. As is the case with the provisions of the Assemblyies Act (*Versammlungsgesetz*), the fundamental right to freedom of assembly is tailored solely to the requirements of public street space. The situation is only different in respect of assemblies in confined spaces, which is not the issue here since the terminal is freely accessible. 39

If one were to place the terminals on a par with public street space, this would have serious consequences for the functioning of the airport. According to general principles of assembly law, every registered assembly and every spontaneous assembly would initially have to be tolerated. Intervention could not be justified on grounds of public order. The obstruction of third parties would have to be tolerated until they ceased to be peaceful. Isolated criminal acts would not result in the entire assembly becoming unpeaceful. The image of the Federal Republic of Germany and the sensitivities of state guests would not be relevant. Freedom of assembly would in principle also extend to the use of megaphones and banners. The costs of cleaning up would have to be assumed by the body subject to the obligation to construct and maintain. In the event of this scenario, the responsibilities would have to be reallocated between the defendant, the City of Frankfurt am Main and the *Land* police. According to the defendant, this kind of allocation of responsibility could only be regulated by the legislature. In any event, it would require a drastic increase in the number of *Land* police present at the airport. 40

Even if freedom of assembly does in principle encompass demonstrations in the terminals, the ban which is at issue here is justified to avert danger. The airport is an institution especially sensitive to disruption, which can only function if all of the parties involved are extremely disciplined. The noise made by persons taking part in an assembly, in particular the noise caused by whistles, could make it more difficult to hear and understand loudspeaker announcements. Groups standing around could result in escape routes and emergency exists being blocked; they could also interfere with fire protection and impede the work of rescue teams. Where there were crowds of people, it would no longer be possible to check the area for unattended luggage. It would be easier for terrorist attacks to be made from a crowd of people. There would be hardly any possibility of redirecting passengers from one terminal area to another. In addition, one would have to expect confrontations between persons taking part in an assembly and passengers worried about missing their plane. Thus the airport cannot be compared with a city pedestrian precinct. 41

The defendant argues that a general ban on demonstrations at airports is also proportionate. Resort has already regularly been had to less burdensome means such as recommending that persons taking part in assemblies use the outside areas of the airport. The consequences of the ban for the complainant are slight in view of the geographical alternatives available. If assemblies were permissible in the terminals of the airport, it would have to be feared that they would develop into one of the “main demonstration arenas” of the Republic. Safety and the proper handling of traffic would no longer be guaranteed or only after unreasonable upgrading and alterations to the entire terminal area. For this reason, the defendant has decided, in consultation with the police, to close the relevant terminal and only allow entry to passengers with tickets if demonstrators threaten to become uncontrollable. This kind of action generally results in a flood of complaints and damages claims and means ultimately that the defendant is obstructing its own operations. 42

**IV.**

At the oral hearing, the complainant and the defendant as persons entitled to make a statement gave evidence; the representatives of the German Section of Amnesty International (*Amnesty International - Sektion der Bundesrepublik Deutschland e.V.*), the German Association of Public Services (*Bundesverband Öffentliche Dienstleistungen - Deutsche Sektion des CEEP e.V.),* the Hesse-Thuringian branch of the Confederation of German Trade Unions (*Deutscher Gewerkschaftsbund - Bezirk Hessen-Thüringen)* as well as the Frankfurt/Main Federal Airport Police (*Bundespolizeidirektion Flughafen Frankfurt/Main*) and the Frankfurt am Main Police Headquarters - Airport Police (*Polizeidirektion Flughafen des Polizeipräsidiums Frankfurt am Main*) as informed providers of information also gave evidence. 43

**B.**

The admissible constitutional complaint is well-founded. The challenged decisions violate the fundamental rights of the complainant under Article 8.1 and Article 5.1 sentence 1 GG. 44

**I.**

In its relation to the complainant, the defendant is directly bound by the fundamental rights. Accordingly, it may not rely on its own fundamental rights to justify the airport ban that it issued. 45

1. The use of civil-law forms does not release state authority from its being bound by the fundamental rights under Article 1.3 GG. This applies both to the use of the civil-law forms of action and the use of organisational and corporate forms under private law. Like public enterprises that are in the sole ownership of the state and are organised in the forms of private law, enterprises owned both by private shareholders and the state over which the state has a controlling influence are directly bound by the fundamental rights. 46

Pursuant to Article 1.3 GG, the fundamental rights shall bind the legislature, the executive and the judiciary as directly applicable law. They apply not only to certain areas, functions or forms of action of the state in its assumption of its responsibilities, but comprehensively bind state authority in its entirety. The term “state authority” should be construed broadly in this context and not only as extending to imperative measures. Decisions, expressions and actions which can aspire - at the respective state decision-making level - to have been made in the name of and with the authority of all citizens are subject to the binding force of the fundamental rights. Accordingly, every action by a state body or organisation is state authority bound by the fundamental rights within the meaning of Article 1.3 GG because the state authority performs such action in the exercise of its duty to act in the public interest. 47

In this context, Article 1.3 GG is based on a fundamental distinction: while the citizen as a matter of principle is free, the state as a matter of principle is bound. Through the fundamental rights, the citizen finds recognition as a free person who is him or herself responsible for the development of his or her personality. The citizen and the associations and institutions he or she establishes are free to plan their actions in accordance with their subjective preferences without in principle being accountable in respect of same. The imposition of obligations on them by the legal order is relative and, as a matter of principle, limited from the outset - especially under the precept of proportionality. In contradistinction to this, the state assumes its responsibilities in a fiduciary capacity on behalf of the citizens and is accountable to them. Its activities do not constitute an expression of free, subjective convictions through which personal individuality is realised. Instead, they keep a respectful distance to the different convictions held by the citizens and accordingly, the constitution comprehensively commits the state’s activities to the fundamental rights. This commitment is not subject to a proviso that such activities be useful and functional. As soon as the state assumes responsibilities, it will also be bound by the fundamental rights in the performance of such responsibilities irrespective of the legal form it is acting in at the time. This also applies where the state makes use of the civil law when assuming its responsibilities. It does not have available to it the option of avoiding the binding force of the fundamental rights by seeking refuge in private law and thereby obtaining private-entity treatment and exemption from the application of Article 1.3 GG. 48

b) The direct binding force of the fundamental rights does not only apply to enterprises which are completely in public ownership, but also to enterprises owned both by private shareholders and the state over which the state has a controlling influence. 49

aa) It is recognised in the case of public enterprises organised in the forms of private law that are completely in public ownership that not only the state authorities responsible for the respective enterprise are bound by the fundamental rights, but the enterprise itself (see BVerwGE 113, 208 <211>; Rüfner, in: Isensee/Kirchhof, *HStR V*, 2nd ed. 2000, *§ 117,* marginal no. 49; Ehlers, Opinion E for the 64th German Jurists Forum (DJT) <2002>, p. E 39; Dreier, in: Dreier, *GG*, Vol. 1, 2nd ed. 2004, Art. 1 Abs. 3, marginal nos. 69-70; Pieroth/Schlink, *Grundrechte Staatsrecht II*, 25th 50

ed. 2009, marginal no. 187; Höfling, in: Sachs, *GG*, 5th ed. 2009, Art. 1, marginal no. 104). This corresponds to the enterprise's nature as a single operating entity; this assumption ensures an effective binding force of the fundamental rights irrespective of whether, to what extent and in what form the owner or owners can exert an influence under company law on the management of business and of how, in the case of enterprises with different public shareholders, a coordination of the rights of influence of several public owners could be guaranteed. Activities of public enterprises remain - independent of how the corporate rights of influence are regulated - a form used by the state for assuming responsibilities whereby the enterprises themselves are directly bound by the fundamental rights.

bb) The same must apply to enterprises owned both by private shareholders and the state where these are controlled by the state. 51

(1) In the case of enterprises which are owned both by private shareholders and the state, the issue of the binding force of the fundamental rights also relates to each enterprise in its entirety and may only be answered uniformly. They too are single operating entities. The binding force of the fundamental rights on the public owners who are behind the companies and their corporate powers of influence alone are not suitable substitutes for the binding force of the fundamental rights on such companies and in particular do not make it superfluous. As a matter of principle, the binding force of the fundamental rights cannot be achieved on the basis of percentages. In addition, the rights of influence of such shareholders on the day-to-day management are limited in many cases under company law so that under company law in particular (see, for example, § 119.2 of the Stock Corporation Act (*Aktiengesetz* - AktG)) and taking into account the provisions of co-determination law, the binding force of the fundamental rights is frequently not enforceable even by a majority of the owners. Moreover, the assertion of fundamental rights indirectly via rights of influence would be too cumbersome from a procedural point of view and with regard to the amount of time that would be involved - especially if an enterprise had several different public owners - for it to be possible to guarantee effective fundamental rights protection in this way. 52

(2) An enterprise which is owned both by private shareholders and the state is directly bound by the fundamental rights if it is controlled by its public shareholders. As a general rule, this is the case if more than half of the shares are publicly owned. To this extent it is possible in principle to rely on corresponding civil-law assessments (see § 16 and § 17 AktG, Article 2(1)(f) of Directive 2004/109/EC). Whether or not this criterion should be expanded on in special cases does not need to be decided here. 53

Controlling influence as a criterion which is based on who owns the majority of the shares in an enterprise does not rely on specific powers of influence in relation to management, but rather on overall responsibility for the respective enterprise. Unlike in those cases in which the state only has a minor share in a private enterprise, what 54

is involved in principle are not private activities with state involvement, but rather state activities with private involvement. The general commitments that apply to the assumption of state responsibilities apply to such activities irrespective of their purpose or content. In performing these activities publicly controlled enterprises are directly bound by the fundamental rights and conversely may not rely on their own fundamental rights vis-à-vis citizens.

(3) This does not unjustifiably curtail the rights of private shareholders: It is their free decision whether or not to participate in an enterprise over which the state has a controlling influence. Even if the majority ownership changes only subsequently, they are, as is the case with other changes of majority ownership, free to react to such change. If private persons acquire shares in such an enterprise, they will participate equally in the risks and rewards arising from the conditions under which the state acts. Their legal position as holders of fundamental rights, especially of the fundamental right to property, directly vis-à-vis the public shareholders or vis-à-vis the state in general remains unaffected at any rate. 55

c) Publicly controlled enterprises which are subject to the direct binding force of the fundamental rights and thus have no entitlement to rely on their own fundamental rights in a civil-law dispute with private persons are limited by specific restrictions, which do not limit as far as substance is concerned private or, as the case may be, privately controlled enterprises. The implications of this binding force of the fundamental rights are, however, limited since they are restricted to the civil law. In particular, this does not in principle prevent the state from making adequate use of the instruments available under civil law on a largely equal footing with private persons so that it may exercise its responsibilities and otherwise engage in private commerce. Conversely, this does not, however, exclude the possibility of private persons being burdened similarly or to exactly the same degree through the indirect application of the fundamental rights, irrespective of their own fundamental rights, in particular if they come to acquire in practice comparable positions as duty holders or guarantors as the state. 56

aa) Many of the usual dangers for the protection of the fundamental rights do not arise in the first place under private law since the state itself does not have at its disposal specific powers of intervention in respect of same. The state only has very limited opportunities for taking binding action under private law - for example, as in the present case by resort to its civil-law ownership rights, in particular its right to undisturbed possession as the owner of premises. If, on the other hand, the issue of fundamental rights arises in connection with a contractual relationship, it is possible that the state does not encroach on fundamental rights since it has no unilateral decision-making power or, if it does restrict fundamental rights, the fact that the citizen voluntarily entered into the contract has to be taken into account in the specific case. Nor does the direct binding force of the fundamental rights on publicly controlled enterprises prevent them from engaging in commerce. In particular, Article 3.1 GG also does not prevent distinctions based on market-relevant criteria such as product qual- 57

ity, reliability and solvency so as to make it possible for the enterprise to operate profitably.

bb) Nevertheless, the binding force of the fundamental rights and the corresponding lack of entitlement to be the holder of a specific fundamental right are not insignificant. They bar publicly controlled enterprises in particular from relying on the subjectivity of voluntary freedom. The state may indeed use civil-law ownership rights - such as in the present case the right of the owner of premises to undisturbed possession; this does not, however, release the state from the duty to justify in particular unilaterally binding decisions on the basis of legitimate public purposes according to the standards of the fundamental rights and the proportionality principle. The binding force of the fundamental rights gains practical significance primarily as an obligation to observe the neutrality present in a state governed by the rule of law in connection with the formation of contracts on the part of the state. Public, including publicly controlled, enterprises may indeed structure their customer relationships according to the logic of the marketplace; they are not, however, free to link their economic activities, at will, to subjective ideological preferences or objectives and distinctions based thereupon. 58

cc) Thus, the direct binding force of the fundamental rights on publicly controlled enterprises differs in principle from the generally indirect binding force of the fundamental rights, which also binds private and state enterprises - in particular according to the principles of the indirect effect of fundamental rights between private parties and on the basis of protective duties of the state. Whilst one is based on a fundamental duty of accountability to citizens, the other serves to balance the freedom of citizens inter se and is thus from the outset relative. This does not, however, mean that the effect of the fundamental rights and thus the burden on private persons - whether it be direct or indirect - is in any event less far-reaching. Depending on the content of the guarantee and the circumstances of the case, the indirect binding force of the fundamental rights on private persons may instead come closer to or even be the same as the binding force of the fundamental rights on the state. This is relevant to the protection of communications, in particular when private enterprises themselves take over the provision of public communications and thus assume functions which were previously allocated to the state as part of its services of general interest - such as the provision of postal and telecommunications services. To what extent this also applies today in relation to freedom of assembly and freedom of expression in relation to private enterprises that establish space for public traffic and thus create places of general communication does not need to be decided here. 59

2. The defendant as a stock corporation in which public shareholders hold a majority is consequently directly bound by the fundamental rights contained in the Basic Law. 60

**II.**

The challenged judgments violate the fundamental right of the complainant under Article 8.1 GG. 61

1. The ban on the holding of assemblies at Frankfurt airport without the defendant's permission, which was upheld in the challenged decisions, encroaches on the scope of protection of freedom of assembly pursuant to Article 8.1 GG. 62

a) aa) Article 8.1 GG protects a person's freedom to gather together with other people at one place for the purposes of jointly joining in a debate or rally aimed at the shaping of public opinion (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* - BVerfGE) 104, 92 <104>; 111, 147 <154-155>). As the freedom to collectively express opinion, the right to freedom of assembly is constitutive for a free democratic governmental order (see BVerfGE 69, 315 <344-345>). In their usual form, demonstrations constitute the collective physical manifestation of convictions; on the one hand, the participants can experience confirmation of these convictions in community with others and, on the other hand, already through their mere presence, the nature of their appearance and the choice of the location, take a position – literally – and bear outward testimony to their standpoint (see BVerfGE 69, 315 <345>). 63

bb) Article 8.1 GG also guarantees holders of fundamental rights the right to themselves determine when, where and under what conditions an assembly will take place. As a defensive right that also and primarily benefits minorities with differing opinions, Article 8 GG guarantees holders of fundamental rights not just the freedom to take part in or stay away from a public assembly, but at the same time freedom of self-determination as regards the place, time, nature and content of an event (see BVerfGE 69, 315 <343>). Citizens should thus be able to decide for themselves where they can most effectively advance their concerns - if necessary, also taking into account connections with certain places or institutions. 64

(1) However, freedom of assembly does not thereby provide them with a right of access to any location. In particular, it does not grant citizens a right of access to locations which are not generally accessible to the public or which according to the external circumstances are available to the general public only for specific purposes. The conduct of assemblies, for example, in buildings used for administrative purposes or in enclosed facilities that are not open to the general public is just as much outside the scope of protection of Article 8.1 GG as the conduct of assemblies in for instance a public swimming pool or hospital. 65

(2) Instead, freedom of assembly ensures that assemblies can be held in other places which are open to general traffic. 66

This affects - apart from ordinary traffic-law provisions - initially public street space. Public street space is the natural forum that citizens have used historically to express their concerns especially effectively in public and to thus prompt communication. Lo- 67

cal streets and places in particular are regarded today as locations where people may exchange information and views and cultivate their personal contacts. This applies even more so in the case of pedestrian precincts and reduced-traffic areas; the allowance of general traffic for communication purposes is the main purpose of such domains (see Stahlhut, in: Kodal, *Straßenrecht*, 7th ed. 2010, p. 730). The law of assembly is based on this function. It takes into account general road and traffic laws, but, in part supersedes them where this is necessary in order to ensure people are able to effectively exercise their right to freedom of assembly. It provides public assemblies and marches with the conditions they need for voicing their demands publicly and quite literally carrying their protests or dissatisfaction “to the streets”.

The same also applies, however, to locations other than public street space which are similarly open to public traffic and where places of general communication develop. If today the communicative function of public streets and places is supplemented to an increasing extent by other forums such as shopping centres, shopping malls or other meeting places, the traffic areas of such facilities cannot be exempted from freedom of assembly insofar as the fundamental rights are directly binding or private persons can be burdened through the indirect effect of the fundamental rights between private parties. This applies irrespective of whether the areas are located in premises of their own or are connected with infrastructure facilities, and irrespective of whether they are indoors or outdoors. From a constitutional point of view, it is also irrelevant whether this kind of space for communication can be created using public road law or civil law. Nor it is possible to regard a ban on assemblies as a disadvantage resulting from the non-opening of the premises, and thus as simply the refusal of a voluntary service. Instead there is an irreversible connection between the opening of space to traffic for the purposes of public communication and freedom of assembly. In those places where space is opened for the purposes of public communication, the state, which is directly bound by the fundamental rights, may not resort to freely determined goals or purposes to eliminate use for communication purposes from the admissible uses: If it did so, it would be acting contrary to its own decision to open space to the public. 68

(3) Apart from public street space, places of general traffic for communicative purposes that can be used for conducting assemblies are first of all only those places which are open and accessible to the general public. However, those places where access is controlled individually and is only permitted for individual, restricted purposes are excluded from such use. If an institution carries out individual entrance checks such as those in the security areas leading to the departure area so as to ensure that only certain persons - such as passengers wishing to travel - have access, then the place is not open to general traffic. It is not possible for individuals to demand that they be allowed to exercise their right to freedom of assembly in such places. 69

Otherwise, the question of whether such a place that is located outside public streets and places can be deemed a public space for communication can be answered according to the concept of the public forum (for examples of the use of sim- 70

ilar criteria, see Supreme Court of Canada, *Committee for the Commonwealth of Canada v. Canada*, <1991> 1 S. C. R. 139; Supreme Court of the United States, *International Society for Krishna Consciousness <ISKCON> v. Lee*, 505 U.S. 672 <1992>). A public forum is characterised by the fact that it can be used to pursue a variety of different activities and concerns leading to the development of a varied and open communications network. Public forums must be distinguished from locations which due to external circumstances are only available to the general public for specific purposes and which are designed accordingly. If in actual fact a place serves only or mainly one purpose, individuals may not request that they be allowed to conduct assemblies there pursuant to Article 8.1 GG - except where they have private rights of use in respect of such place. This is different, however, in places where the combination of shops, service providers, restaurants and recreational areas provide an opportunity for strolling and thus result in the creation of a place for people to spend time and meet. If space is made available in this way for the coexistence of different uses, including communicative uses, and becomes a public forum, it is not possible according to Article 8.1 GG to exclude from it political debate in the form of collective expressions of opinion through assemblies. Article 8.1 GG guarantees citizens in respect of the traffic areas of such facilities the right to confront the public with political debate, social conflicts or other topics. It is the aim of freedom of assembly to provide individuals with such opportunities to attract attention since they are the basis for the democratic formation of will and are a constitutive element of the democratic governmental order.

b) On this basis, the challenged decision's confirmation of the airport ban issued by the defendant encroaches on the complainant's freedom of assembly. 71

The complainant's request to be allowed to conduct assemblies at Frankfurt airport is not in and of itself outside the scope of protection of freedom of assembly. Significant parts of Frankfurt airport are designed as places of general traffic for communicative purposes. Admittedly, this does not apply to the entire airport. Accordingly, individuals may not rely on freedom of assembly in relation to security areas which are not generally accessible; the same applies in respect of those areas which exclusively serve certain functions (for example, luggage collection). However, the airport also includes large areas with shops and restaurants, which can be used as places for strolling and socialising, and which are open to public traffic. The defendant which views itself as the "City in the City" advertises on the internet under the heading "Shop and Enjoy": "Airport shopping for all!", "Our new marketplace, spread across 4,000 m², awaits your visit!" Here are places that are obviously designed as generally accessible public forums whose traffic areas are thus in principle open to assemblies. 72

On the other hand, the defendant has issued a ban prohibiting the complainant from conducting assemblies in the future indefinitely without its permission; this ban extended to the entire airport area and thus fails to consider the specific imminent interferences with operations posed by a particular assembly. By affirming the challenged decisions, this ban encroaches on the complainant's freedom of assembly. 73

2. No constitutional reservations exist in respect of the encroachment in terms of the formal constitutionality of the basis of authority for restricting the fundamental right of freedom of assembly. In principle, the defendant may rely on its ownership rights under the German Civil Code for the restriction of assemblies at Frankfurt airport. It must, however, align its exercise of such rights with the fundamental right to freedom of assembly. 74

a) Freedom of assembly is not unconditionally guaranteed. On the contrary, Article 8.2 GG allows outdoor assemblies to be restricted by or pursuant to a law. Assemblies inside Frankfurt airport are also subject to this proviso of legality. 75

aa) Assemblies in places of general traffic for communicative purposes are outdoor assemblies within the meaning of Article 8.2 GG and are subject to the proviso of legality. This applies irrespective of whether the places which are open to the public are located out in the open or in enclosed buildings. What is decisive is that assemblies in such places take place in a public space, i.e. in the midst of the general public and not spatially separate from it. 76

The term “outdoor assembly” in Article 8.2 GG may not be construed narrowly as a reference to a place which is not covered by a roof. Its meaning instead first becomes clear if its underlying assembly-law concepts are compared. While the usual “outdoor assembly” is one which is held in a public street or public place, its opposite is the assembly in space shielded from the public, such as the back room of a restaurant. In such places, persons taking part in the assembly remain among themselves and are shielded from the general public so that conflicts which would require resolution are less likely to occur. In contrast, “outdoor “assemblies necessitate a direct confrontation with uninvolved members of the public (see Arbeitskreis Versammlungsrecht, *Musterentwurf eines Versammlungsgesetzes*, Enders/Hoffmann-Riem/Kniesel/Poscher/Schulze-Fielitz <editors>, 2011, *Begründung zu § 10*, p. 34). The meeting between the persons taking part in the assembly and third parties gives rise to a greater, less controllable potential for danger. Emotions triggered through confrontations with the general public can escalate faster and possibly provoke a counter-reaction. The assembly can easily attract a crowd since it represents a collective expression of opinion in a public space. Article 8.2 GG allows the legislature to ward off such conflicts and settle them. It takes into account the circumstance that a special need for regulation exists for such contact with the outside world, namely, organisational and procedural regulation, in order to create the physical conditions for the exercise of the right of assembly on the one hand and to adequately protect conflicting interests on the other hand (see BVerfGE 69, 315 <348>). 77

bb) On this basis, the assemblies at Frankfurt airport desired by the complainant are subject to the proviso of legality in Article 8.2 GG. It is true that the places where the complainant wishes to exercise her right to freedom of assembly are mainly inside the airport and are thus indoors. The intended assemblies are not, however, intended to be conducted in separate areas which are shielded from the other passengers, but 78

in the middle of the general airport public to whom the collective expression of opinion is directed. For this reason, assemblies in such areas are “outdoor assemblies” within the meaning of Article 8.2 GG, which may, according to general principles, be restricted by law.

b) Resort may be had to the provisions of the German Civil Code as a statute restricting freedom of assembly within the meaning of Article 8.2 GG. Accordingly, the civil-law right of an owner of premises to undisturbed possession pursuant to § 903 sentence 1 and § 1004 BGB is in principle suitable for justifying encroachments on freedom of assembly. This is without prejudice to the assembly legislation as the relevant legal basis for the power of the authorities competent for assemblies at all places of general traffic for communicative purposes. 79

aa) The proviso of legality in Article 8.2 GG allows the legislature to establish a basis for restricting freedom of assembly. The legislature may under certain conditions grant state authorities power to attach restrictions to assemblies or, if necessary, also to prohibit them. If specific sovereign decision-making rights are created in this way and the corresponding decisions are unilaterally enforceable, Article 8.2 GG requires the legislature to enact a deliberate and express regulation related to the citizens’ freedom of assembly. The legislature itself must at least lay down in a sufficiently certain and clear normative manner the basic requirements for encroachment. This means that the citation requirement in Article 19.1 sentence 2 GG applies and performs its inherent warning function. 80

The legislature utilised this proviso of legality through the federal Assemblyies Act, which applies pursuant to Article 125a.1 sentence 1 GG in the *Land* Hesse until the *Land* enacts its own assemblyies act. The Assemblyies Act is not limited to assemblies in public street space, but covers all public assemblies irrespective of whether or not they are held on private or public land. It thus applies to assemblies at Frankfurt airport. 81

bb) This is without prejudice to the fact that the state when acting in the forms of private law may in addition base restrictions on freedom of assembly on the provisions of the German Civil Code, in this case, § 903 sentence 1 and § 1004 BGB. These provisions also concretise Article 8.2 GG in this case. This is not altered by the fact that the relevant provisions are not as such related to assemblies and thus the extent to which their scope extends to assemblies has not been defined in detail by the legislature. Since the state makes use of the general civil-law provisions like every private person in such cases, i.e. it is not granted any specific sovereign powers and also cannot in principle enforce its decisions unilaterally, the requirements otherwise placed on encroaching legislation are withdrawn. The citation requirement in Article 19.1 sentence 2 GG is unable to perform a warning function in respect of such unspecific provisions and does not apply. Encroachments on fundamental rights in Article 8.1 GG which are based solely on general private-law powers are not in and of themselves unconstitutional because they lack a sufficient statutory basis. This is 82

a consequence of the fact that the state is able to act in the forms of private law at all.

cc) Decisions that restrict freedom of assembly which a public or publicly controlled enterprise bases solely on private law cannot, however, extend the powers of encroachment of state authorities in respect of assemblies or even justify them. If the authorities competent for assemblies make decisions relating to an assembly in the airport area or the police intervene to enforce rights, they must in principle involve the operator of the airport as the affected party and, where applicable, take account of its assessments - as expressed in particular in the regulations for the use of the airport; they are, however, solely bound by the guidelines contained in the legislation which is the basis for their authority and thus primarily bound by the Assemblyies Act. 83

3. The challenged decisions violate, however, the fundamental right of the complainant under Article 8.1 GG because they uphold a disproportionate assembly ban. 84

When governmental bodies construe and apply laws pursuant to Article 8.2 GG that restrict freedom of assembly, they must always construe them in the light of the fundamental importance of the freedom of assembly in a democratic state and limit their measures to that which is necessary for the protection of other legal interests of equivalent importance (see BVerfGE 69, 315 <349>). In this connection, the principle of proportionality must be strictly adhered to. The challenged decisions do not meet these requirements. 85

a) According to the principle of proportionality, an encroachment on freedom of assembly has to have a legitimate purpose. A ban against assembling on the airport premises cannot simply be based on the owner’s private right to determine at will how the owner’s private property is used. The binding force of the fundamental rights on the defendant and the defendant’s inability to rely on its fundamental right to property in its relation to other private parties mean that § 903 sentence 1 BGB should not be applied here in the way it would be applied between two private parties as the expression of an autonomous and essentially discretionary free decision of an owner; instead it should be applied as a law enabling the legitimate purposes of the public good to be pursued in concretisation of the limits of the freedom of assembly. Recourse to § 903 sentence 1 BGB thus requires that there be an operative connection to such tasks and recourse will only be justified if it serves to protect individual legal interests or the pursuit of legitimate tasks sufficiently central to the public good. 86

In the case of assemblies which are conducted at an airport, these include primarily the security and functioning of airport operations. An airport is a traffic hub for the flow of goods and people; it is integrated in a complex system of global networks and relies on the perfect operation of sensitive technical equipment and the smooth functioning of logistic processes, which in the case of disruption or even failure can possibly lead to the loss of fundamental legal interests. Consequently, interferences with operations may profoundly affect an indeterminate number of people. In light of the ensuing specific danger situation which may possibly still increase due to the direct connection between areas of the airport designed as spaces for public communica- 87

tion and the facilities serving traffic operations, the safety and functioning of airport operations gain considerable weight and can justify restrictions on freedom of assembly. Therefore, measures that serve the safety and smoothness of operations as well as the safety of the passengers, visitors and the facilities of the airport may in principle be based on the owner of premises' right to undisturbed possession.

b) Furthermore, restrictions on assembly for achieving these purposes must according to the principle of proportionality be suitable, necessary and appropriate. At the same time, measures taken on the basis of the right of an owner of premises to undisturbed possession must take into account the fundamental importance of freedom of assembly in a free democratic state. The constitutional principles that otherwise apply to the restrictions on freedom of assembly apply in principle. These make it possible to effectively take into account the special danger situation of an airport. In order to guarantee the functioning of the complex logistics system of an airport, it is permissible in an individual case to apply less stringent conditions to measures taken that restrict freedom of assembly than would be the case for a similar assembly in public street space. 88

aa) Article 8.1 GG guarantees in principle the conduct of assemblies without notification or permission. Consequently, assemblies may not be subjected to a general proviso that permission is required. This means in any case that an entity that is directly bound by the fundamental rights will not be able to impose a general permit requirement for assemblies in places in the airport open to general traffic for communication even on the basis of its right as the owner of premises to undisturbed possession. On the other hand, no constitutional reservations exist in principle in respect of the imposition of a notification duty, including one imposed by an airport operator; this is the case especially since it is possible for notification to be given at short notice at an airport. The notification duty will, however, only be proportional if its applications allow for exceptions such as spontaneous assemblies or ones that have to be held urgently, and a breach of the notification duty does not automatically result in a ban on the assembly (see BVerfGE 69, 315 <350 - 351>; 85, 69 <74 - 75>). 89

The banning of an assembly only comes into consideration if there is a direct danger, which can be ascertained from identifiable circumstances, to fundamental legal interests that are of equal rank with freedom of assembly. For there to be a "direct" danger, a forecast of a specific danger is needed. The inconvenience to third parties which results from the involvement of a group of people in the exercise of this fundamental right and which cannot be avoided without detriment to the purpose of the assembly is not sufficient in this case. As a rule, such inconvenience must be tolerated. If a direct danger to legal interests is to be feared, this must be countered mainly through the imposition of conditions. Only where there is no other way to prevent the adverse effects on third parties may an assembly ban be considered as a last resort (see BVerfGE 69, 315 <353>). 90

These principles do not, however, stand in the way of an airport owner combating 91

the special potential danger which assemblies in an airport harbour through a specific response or to its paying due regard to the rights of other holders of fundamental rights. In particular, the principle of proportionality readily permits, for example, the airport owner to consider the confined space of the terminal in the various stages of its assessment. For this reason, it is possible to forbid a big demonstration at an airport which would be too large for the amount of space available and refer it to another location - just as it would be possible to forbid one in a narrow pedestrian precinct or a densely built, historic old town. In this connection, it is possible to limit the number of participants to a number appropriate for the local conditions. It is also obvious that certain forms or methods of assembly or assemblies with a certain noise level are more likely to pose a danger in an airport and thus can be more easily restricted than similar assemblies in a market place or at the site of a public festival. Similarly, the fact that an airport is especially sensitive to disruptions since it is a place whose primary function is to handle air traffic justifies restrictions that would not have to be tolerated under the precept of proportionality in public street space. This applies in particular to measures that ensure compliance with the special safety requirements of an airport. In addition, the possibilities for preventing blockades are greater in relation to an airport than in relation to public streets due to the need to safeguard the safety and functioning of the airport. Thus, for example, large, spontaneous assemblies that exceed a fixed number of people may be forbidden if they are likely to become uncontrollable because the airport operator did not have sufficient opportunity to take proper precautions. On the other hand, it is of course true that a certain degree of interference with the public through assemblies must also be tolerated at airports.

bb) Accordingly, the range of options for action which the defendant as an entity directly bound by the fundamental rights has on the basis of its rights as the owner of premises begin to converge with the scope of powers available to the authorities competent for assemblies. In any event, its authorisations under civil law cannot be interpreted in such a way as to exceed the limits set by constitutional law on the authorities competent for assemblies. This does not, however, prevent the defendant from defining limitations on the freedom of assembly at the airport that are in conformity with the constitutional standards outlined and from laying them down, in a generalising manner, on the basis of its right as the owner of premises to undisturbed possession in regulations for the use of the airport. In this way, it can establish transparent rules for the exercise of the right of assembly in the airport which are adapted to the space available at the airport and in particular to its specific operating conditions such as the potential dangers presented there. This can be achieved, for example, through creating clear demarcations between multi-functional traffic areas and special operational areas on the basis of the actual conditions at the airport, through designating zones in which assemblies would in principle directly pose a danger to the safety of airport operations, or also through banning the carrying of objects such as whistles, drums or megaphones insofar as they give rise to concern that they would interfere with the safety and functioning of airport operations. In addition, it can, for example, add a duty to notify the airport operator to the duty to notify the authori- 92

ties competent for assemblies.

These kinds of rules that are based solely on the right of the owner of premises to undisturbed possession are, of course, limited in effect to private law. They do not affect the sovereign powers of the authorities competent for assemblies or the police on location or their responsibility for the interpretation of such powers. Nevertheless, in connection with the exercise of their assembly-law powers, the authorities may use the provisions contained in such regulations for the use of the airport to determine the normal requirements for ensuring the security and functioning of the airport; they must, however, examine whether such provisions satisfy constitutional requirements or whether the situation in an individual case requires them to deviate from the provisions. 93

c) The challenged decisions do not comply with these requirements. The full confirmation by the civil courts of the airport ban imposed on the complainant is not - especially in view of the direct binding force of the fundamental rights on the defendant - compatible with the principle of proportionality. 94

The ban imposed on the complainant prohibits her from organising assemblies in any area of the airport unless permission to organise such assemblies has been granted beforehand by the defendant on the basis of what is a fundamentally discretionary decision. Consequently, the ban does not limit itself to averting specific imminent dangers to fundamental legal interests which are equivalent to freedom of assembly, but instead views itself as a general demonstration ban on the complainant. The Federal Court of Justice also understands the airport ban in such a way. It is true that it relies on specific assemblies previously conducted by the complainant to justify its decision, and bases its decision on the premise that the defendant as the airport operator does not have to tolerate “comparable activities” (see Federal Court of Justice, judgment of 20 January 2006 - V ZR 134/05 -, NJW 2006, p. 1054 <1056>). The Federal Court of Justice infers from this, however, a legitimate interest on the part of the airport operator in imposing a complete ban without any further limitations. This extends generally to every kind of assembly and all areas of the airport for an unlimited period of time. Accordingly, the complainant must obtain permission for future assemblies in all areas of the airport. In this context, the conditions upon which permission would be granted are not clear; instead the court recognises the defendant’s freedom to decide itself. The confirmation by the court of a general assembly ban at the airport, a place largely designed as a public forum, does not satisfy the requirements of proportionality. 95

**III.**

The challenged decisions violate the fundamental right of the complainant under Article 5.1 sentence 1 GG. 96

1. a) Article 5.1 sentence 1 GG protects the expression of an opinion not just in respect of its content, but also in respect of the form of its dissemination (see BVerfGE 97

54, 129 <138-139>; 60, 234 <241>; 76, 171 <192>). This includes in particular the distribution of leaflets containing expressions of opinion. In addition, the choice of the place for the expression and the time for the expression are protected. Persons expressing an opinion not only have the right to express their opinions, but they are entitled to choose the circumstances in which they express them so as to achieve the greatest dissemination of the opinions and the strongest effect (see BVerfGE 93, 266 <289>).

Nonetheless, Article 5.1 sentence 1 GG does not grant an individual a right of access to places to which he or she would otherwise have no access. Freedom of expression is guaranteed to citizens only in places to which they actually have access. Unlike in the case of Article 8.1 GG, the scope of protection provided by expression of opinion is broader, and is not in and of itself restricted to public forums that serve communication. For in contrast to freedom of assembly which is a right exercised collectively, the exercise of freedom of expression as the right of an individual does not as a general rule imply a particular need for space, and also does not initiate traffic of its own that usually results in a nuisance. Instead freedom of expression and the right to disseminate opinions that derives from it have no specific geographical connection. As a right of the individual, citizens are fundamentally entitled to it wherever they happen to be at a given moment. 98

b) The challenged decisions confirm the airport ban imposed by the defendant and construe it to mean that the complainant may only enter and use the airport on the conditions set out in the regulations for the use of the airport, which for their part make the distribution of leaflets and other printed material subject to advance permission. As a result, the complainant is refused access to the airport - which is otherwise generally accessible to the public - when she wishes to distribute leaflets there. This constitutes an encroachment by the defendant - which for its part is directly bound by the fundamental rights - on freedom of expression pursuant to Article 5.1 sentence 1 GG. 99

2. Freedom of expression - like freedom of assembly - is not unconditionally guaranteed. Instead it is subject to the restrictions imposed by the general laws. These also include in particular the provisions of the German Civil Code, including the right of the owner of premises to undisturbed possession that derives from § 903 sentence 1 and § 1004 BGB. This means in principle that the defendant can base restrictions on expressions of opinion in the area of the airport on its right as the owner of premises to undisturbed possession. 100

3. Laws which are used as the basis for restricting freedom of expression must, however, as has been explained with regard to freedom of assembly, for their part be construed in the light of the restricted fundamental right. In this context, the constitutive significance of freedom of expression for a free democratic order has to be taken into account (see BVerfGE 7, 198 <208 - 209>; 101, 361 <388>; established case-law). In particular, the requirements of the principle of proportionality must be com- 101

plied with.

a) aa) Encroachments on freedom of expression of opinion must for a start be based on a legitimate purpose. That which applies to freedom of assembly applies here too. In view of its directly being bound by the fundamental rights and its correlating inability to rely on its own fundamental rights vis-à-vis the complainant, the defendant's restriction of the complainant's freedom of expression through the exercise of its right as the owner of premises to undisturbed possession is in principle also limited. Unlike a private citizen, it may not in principle use such right to enforce its own interests at its own discretion. Instead it may only use such right to prevent expressions of opinion if this would serve the public interest. 102

Therefore, in particular the wish to create a "feel-good atmosphere" in a sphere which is strictly reserved for consumer purposes and which remains free from political discussions and social conflicts cannot be used as the basis for prohibiting the distribution of leaflets. The state may not restrict fundamental rights in order to ensure that the carefree mood of citizens is not disturbed by the misery of the world (see BVerfGE 102, 347 <364>). Consequently, the fact that third parties are annoyed by being confronted with topics which they find unpleasant is irrelevant. What is particularly out of the question are bans which serve the purpose of preventing certain expressions of opinion for the sole reason that the defendant does not share them, disapproves of their content or regards them as discrediting the business of an enterprise because of the critical statements it contains. 103

On the other hand, the defendant is not prevented from using its right as the owner of premises to undisturbed possession to restrict the distribution of leaflets and other forms of expression of opinion to the extent necessary to guarantee the safety and functioning of airport operations. As in the case of freedom of assembly, this is in the case of freedom of expression also an important common interest which can justify encroachment on fundamental rights. 104

bb) The restrictions on freedom of expression must be suitable, necessary and appropriate for achieving the purpose. This excludes in any event the possibility of a general ban on the distribution of leaflets in the airport or making same dependent on the obtaining of permission. On the other hand, restrictions which relate to certain types of expressions of opinion or places or times for expressions of opinion in order to prevent disturbances are not excluded in principle (see Supreme Court of Canada, *Committee for the Commonwealth of Canada v. Canada*, <1991> 1 S. C. R. 139, pp. 86 et seq.; Supreme Court of the United States, *International Society for Krishna Consciousness <ISKCON> v. Lee*, 505 U.S. 672 <1992>, p. 699 et seq.). As is the case in public traffic law, the use of airport space to disseminate opinions may be restricted and regulated according to practical considerations. Article 5.1 sentence 1 GG thus does not prohibit the banning or restriction of the dissemination of opinions in part or in certain forms. What matters here is - not unlike in the case of public street space - the space available and the interference with its various purposes, in particu- 105

lar the activities connected with the airport's air traffic operations.

According to these standards, the defendant is not generally prevented from making the distribution of leaflets subject to permission in certain areas such as the air side behind the security controls or in the area of the conveyor belts in order to guarantee the functioning of airport operations or, if necessary, to forbid it completely. On the other hand, a total ban on expressions of opinion or even a comprehensive permit requirement which includes the simple distribution of leaflets is at any rate disproportionate in certain areas which are designed as spaces for public communication. In this case, the defendant, who is directly bound by the fundamental rights, is subject to the same principles as apply in pedestrian precincts in public street space. The Basic Law guarantees individuals in principle the opportunity for public debate in all places of general traffic for communicative purposes. If such spaces are open to the general public, due regard must be had in them to the fundamental rights of communication. In addition, what matters is to what extent the expression of opinion is likely to permanently disrupt operations. It is also possible to prohibit the distribution of leaflets in an individual case, for example, where their content is directed at interfering with airport operations and specific serious disturbances have to be feared; examples of such would be calls and appeals to violate the airport's safety rules or those of air law. 106

b) The challenged decisions do not comply with these requirements. They confirm the airport ban, including its general and unlimited ban on the complainant distributing leaflets at Frankfurt airport without prior permission in the future. Irrespective of the legality of the previous leaflet campaigns conducted by the complainant, which were not the subject of the present proceedings, a ban of this kind that is general and divorced from a specific interference with airport operations is disproportionate. 107

**IV.**

Whether or not the challenged decisions violate additional fundamental rights of the complainant does not have to be answered here because the violation of Article 8.1 and Article 5.1 sentence 1 GG leads to the annulment of the challenged decisions. 108

**V.**

The decision on the costs is based on § 34a.2 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* - BVerfGG). 109

The vote on the decision was seven in favour and one against. 110

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| Kirchhof | Hohmann-Dennhardt | Bryde |
| Gaier | Eichberger | Schluckebier |
| Masing | | Paulus |

Dissenting opinion of Justice Schluckebier
on the judgment of the First Senate of 22 February 2011

- 1 BvR 699/06 -

I disagree with the judgment. In my opinion the complaint should in any event have been unsuccessful in respect of the asserted violation of the fundamental right of freedom of assembly. I would like to add the following comments to this aspect as well as the other aspects of the judgment which are in my opinion important: 111

I also believe *in the final analysis* that Fraport Aktiengesellschaft is directly bound by the fundamental rights. However, the Senate majority does not make the necessary distinctions in its reasoning since it fails to take into account whether the various state operators, which are minority shareholders, have ensured that they can coordinate their influence potentials under company law. The reasoning which the Senate relies on instead is not sufficiently sound (I.). The extension of the scope of protection of the fundamental right to freedom of assembly into the terminals of the airport buildings of Frankfurt airport as an open forum is not convincing (II.). When examining the proportionality of Article 8 GG, the Senate does not properly take into account special considerations such as the confined space available or the hustle and bustle of an international airport and its ensuing fragility or the inevitable effect on an exceptionally large number of other holders of fundamental rights. Its assessment of these circumstances is not realistic (III.). The court would have been justified in finding that the challenged civil-court decisions in respect of the small assembly by only a few persons which was the subject of the original proceedings were objectionable had an admissible objection to this effect been raised, if the court had applied the principle of equal treatment because Fraport AG has in the past tolerated or permitted other small assemblies which did not disturb operations (IV.). 112

**I.**

The direct binding force of the fundamental rights on Fraport AG, in its capacity as a stock corporation owned both by private owners and the state (*gemischtwirtschaftliche Aktiengesellschaft*), due to the controlling influence held by several holders of public authority, which, seen individually, are only minority shareholders besides being private shareholders, can only be justified if the public shareholders have subjected their added participations in the share capital to a legally binding coordination of their influence potential, or if a synchronisation of interests is otherwise ensured. Only under these preconditions is there control (what is known as multi-parent control). These preconditions, which are also laid down in the company-law provisions referred to by the Senate (see § 17 AktG and Article 2 (1) (f) Directive 2004/109/EC), are fulfilled in this case through the consortium agreement between the Federal Republic of Germany, the *Land* Hesse and a holding company of the City of Frankfurt, which is mentioned in Fraport AG's annual report (in the section called "Controlled Companies Report"). The Senate does not, however, make the necessity for a legally binding agreement to coordinate influence potentials a requirement; nor 113

does it demand any other sufficiently certain foundation based on the actual circumstances for a coordination of interests, which is recognised under company law as the standard for assuming the existence of a controlling influence (see, for example, Hüffer, AktG, 9th ed. 2010, § 17 marginal nos. 13 - 16). This would, however, have been necessary in order to give the term “controlling influence” substance.

The Federal Republic of Germany, the *Land* Hesse and a holding company of the City of Frankfurt am Main were each only minority shareholders of Fraport AG at the time the airport ban was issued in 2003. The same still applies currently as far as the *Land* and the indirect holding of the City are concerned. It is evident that the “public shareholders”, which are of course each bound by the fundamental rights, may pursue divergent, possibly even opposite interests, with regard to the airport - especially since they may be influenced by politically different majorities. Under these circumstances one cannot allow the fact that the shares of different holders of public authority at various state levels add up to over 50% to be sufficient for a finding that the *company itself* is directly bound by the fundamental rights. The “overall responsibility” and “controlling influence” assumed by the Senate thus results in the original case in the decision to acquire shares in the stock corporation being used as the sole reason for the existence of “overall responsibility”. This does not do justice to the situation under company law or in real life. 114

2. The reasoning used by the Senate instead does not appear sufficiently sound to me. 115

The Senate majority regards the company-law powers of influence as limited in many respects and generally assumes that the powers of influence of the public owners with a controlling majority in the case of an enterprise owned both by private shareholders and the state - irrespective of its corporate form - is not a suitable substitute for the binding force of the fundamental rights on such companies. For this reason, it holds that Fraport AG is also directly bound by the fundamental rights as the “executive” within the meaning of Article 1.3 GG in order to compensate for a lack of influence or to treat such as unimportant from the outset. This argument is flawed: If, on the one hand, the state shareholders’ lack of opportunity to control and influence are taken into account, it does not, on the other hand, seem logical for this very reason and for such a case to assign the stock corporation itself to the executive within the meaning of Article 1.3 GG. 116

Through its reasoning the Senate majority creates a relationship with Article 20.2 GG which is not free from strain. According to Article 20.2 GG, the “executive” power as exercised state power is tied to its legitimation by the people. Article 20.2 GG links the requirement of sufficient possibilities of exerting influence with the democratic legitimation of the “executive”. If the state-controlled enterprise which is owned both by private shareholders and the state is the “executive”, its actions must necessarily be sufficiently democratically legitimised (see Dreier in: Dreier, *GG*, Volume 2, 2nd ed. 2006, *Art. 20 <Demokratie>*, marginal nos. 136 et seq.). Insufficient possibilities for 117

exerting influence on the part of the responsible state authorities do not, however, sufficiently guarantee democratic legitimation. In relation to the original case under company law, the Senate majority does not reconcile the contradiction between the postulated binding force of the fundamental rights due to a possible lack of influence and the lack of democratic legitimation simultaneously associated with such deficit. From its perspective, on the basis of its premise, i.e. that the public owners possibly had insufficient influence on the management of Fraport AG, it should have also considered the permissibility of in particular a corporate involvement of regional and local authorities in enterprises owned by both private shareholders and the state and the preconditions for and details of such (see on this also Dreier, op cit., *Art. 20 <Demokratie>*, marginal nos. 138, 140).

**II.**

The extension of the scope of protection of the fundamental right to freedom of assembly into the terminals of the airport buildings of Frankfurt airport as an open forum is not convincing. 118

1. The fundamental right of freedom of assembly does not grant a right of access to any location, in particular, it does not grant citizens a right of access to locations which are not generally accessible to the public or which according to the external circumstances are available to the general public only for specific purposes. The Senate majority also initially proceeds on the basis of these principles; however, it extends the right of access for assemblies to what are known as “public forums”, which are generally open and accessible to the public. It distinguishes them from locations which according to the external circumstances are available to the general public only for specific purposes, or which *predominantly* serve one specific function. It allocates the land-side area of the terminals of a large airport to the category of a publicly accessible forum, and thus deprives the airport operator of the opportunity of limiting its use to a purpose which excludes assemblies. 119

2. This abstract description of the scope of protection by the Senate majority would in and of itself be reason to exclude the terminals of a large airport from the scope of protection. After all these airport terminals serve *predominantly* one specific function, namely the checking-in of passengers; it is true that they provide other offerings for them, the persons dropping them off or picking them up as well as for other interested parties. However, the restaurants and shops serve predominantly to provide travellers and the persons dropping them off or picking them up with travelling requisites in accordance with international standards in the 21st century. In light of its general impression and the fact that the number of passengers and persons dropping them off or picking them up at a big airport exceeds the number of all other visitors, the fact that the airport operator aggressively advertises the shops and restaurant area does not change the fact that the absolutely dominant function of the airport is its “airport function”. The terminals are *predominantly* only available for specific purposes; the advertised “market place and forum character” do not change this in any way. Under 120

these circumstances there can be no question of a forum for communication which is comparable to a public street or place.

3. In addition, it does not appear logical that the airport operator who is bound by the fundamental rights should lose its right to exclude certain kinds of use by making the terminal generally available to the public. That is not convincing if for no other reason than because the Senate still explicitly considers a decision in favour of restricted use in certain operational areas permissible on the basis of civil-law property rights. 121

The only consideration which the Senate puts forward in favour of the extension of the scope of protection is basically that “today, the communicative function of public streets and places” is “supplemented” to an increasing extent by public forums within the meaning of the Senate majority’s decision. This is a value judgement which is currently not sufficiently supported by empirical studies. Shopping centres and restaurants have been integrated into major train stations and airports for a long time - primarily for the purpose of supplying travelling requisites - without them having been regarded as considerable “competition” to public street space as a place for assemblies and without them even bringing about a devaluation of public street space as a place for assemblies. At present, there is no reason to fear that the communicative function of the street spaces which are conventionally used by the general public is being undermined or even systematically reduced. It may be necessary to reconsider this if, in the future, there are indications that the state is attempting to significantly reduce the space available for assemblies by formally or substantively privatising public space or if events occur that otherwise noticeably curtail the use of public streets as places for assemblies. At present, the actual circumstances do not justify the Senate majority’s extension of the scope of protection. 122

4. The grounds of the judgment promote an understanding which also suggests integrating forums that are exclusively borne privately into the scope of protection of the fundamental right of freedom of assembly. This is apparent alone from the fact that they mention the (exclusive) imposition of obligations on private owners in connection with the question of the binding force of the fundamental rights and the opening of what are referred to as forums although the original case provides no basis for doing so - particularly following the detailed justification for a direct binding force of the fundamental rights. In this connection, the fact that in such circumstances the fundamental right to property (Article 14 GG) guarantees a contrary constitutional position which “publicly controlled” enterprises which are directly bound to the fundamental rights cannot rely on is largely ignored. This notwithstanding, the general extension of the scope of protection of Article 8 GG to general traffic areas of forums such as shopping centres, shopping malls or other meeting places would constitute a prior decision with regard to the conflict between the two fundamental rights which would be taken at the level of the scope of protection, and which would from the outset be in favour of the fundamental right of freedom of assembly. Where such a view is adopted, the only way of taking the fundamental right to property into account 123

would be at the level of justification in relation to the manner in which the assembly was conducted. Since the grounds of the judgment indicate that private persons could also be subjected to a binding force of the fundamental rights similar to or approaching that of a state authority, the result of this would be to impose an obligation on private owners - in spite of what is only an indirect effect of the fundamental rights between private parties - as if Article 8 GG applied directly to them with the scope of protection extended by the Senate majority. There is no reasonable justification for this.

124 In addition, the extension of the scope of protection of the fundamental right of freedom of assembly also to forums operated by fully private bodies, which is evident in the obiter dicta in the grounds of the judgment on the imposition of obligations on private individuals and on the general inclusion of forums in “shopping centres, shopping malls or other meeting places”, means that the Senate majority adopts the legal policy considerations contained in the draft for an assemblyies act produced by the Assembly Law Working Group (see Arbeitskreis Versammlungsrecht, Musterentwurf eines Versammlungsgesetzes, Enders/Hoffmann-Riem/ Kniesel/Poscher/Schulze-Fielitz <editors>, 2011, at § 21 and pp. 60 et seq.) through constitutional interpretation.

**III.**

125 When examining the proportionality of Article 8 GG, the Senate does not properly take into account or assess in a realistic way special considerations such as the confined space available or the hustle and bustle of an international airport and its ensuing fragility or the inevitable effect on an exceptionally large number of other holders of fundamental rights due to its understanding of the scope of protection.

126 The Senate majority extends the scope of protection of the freedom of assembly to a “public forum”, which due to the physical absence of an operational demarcation is directly connected with the land-side operational areas of a large international airport in the Federal Republic of Germany. The land-side areas of the terminals constitute an assembly location in the bustling, created by the travelling spirits, of a confined, enclosed space which is known worldwide as a “hub” due to its great significance for passenger air traffic. An interference that is merely slight can rapidly turn into a considerable, far-reaching disruption of operations, in particular if certain areas of a terminal must be closed, which may, due to the close interconnectivity of air traffic, have effects on many other airports and their passengers (i.e. may lead to a chain reaction). Due to the inevitability of the disruptive consequences for an exceptionally large number of passengers, and thus other holders of fundamental rights, air passengers who wish to exercise their freedom of movement and their general freedom of action can be affected much more severely by disruptions to the operating procedures and possible closures of the terminal than is generally the case with assemblies in public streets and places. In view of the closeness and density of bustling crowds, it is obvious that assemblies of more than a small, manageable group of persons can lead to

aggressive and annoyed reactions from passengers in a rush who feel they are being held up. Moreover, it is likely that escape and rescue routes will be obstructed and that - unlike in the case of assemblies that are really outdoors - the possibility of avoiding such assemblies, if they attract a considerable number of participants, will only be possible to a limited extent. In addition, the Senate majority's approach of dispersing an assembly in a terminal that "is becoming too large" for the confined space appears to me to involve far larger risks if one is realistic.

127 In addition to this, particularly due to the fragility of a "large airport" as a system and the multitude of people who can be targets for an assembly's goals, the extension of the scope of protection to the interior of the terminal promises especially great media effect and multiplication of the message sought to be conveyed; this makes large airports particularly "attractive" as places of assembly. It is precisely for this reason that an airport requires special protection in relation to the fundamental rights of the other holders of fundamental rights using it in the way it is meant to be used. The Senate majority does in principle recognise these circumstances and regards measures that restrict freedom of assembly as permissible under less stringent conditions than would be the case for a similar assembly in public street space. However, it could in addition have used the opportunity to make more compelling and, in particular, more detailed remarks on the possibilities for restricting the conduct of assemblies in specific places. For this reason, it would in my opinion also have been appropriate for the Senate to clarify the powers of the legislature to introduce a significantly more restrictive regime into assembly law itself in relation to such special "forums", which are in many respects fragile, while taking into account the importance of the fundamental right of freedom of assembly and paying attention to the fundamental rights of third parties to which it is necessary to have special regard here. In this context, it should be possible for the legislature - like the airport operator in its regulations for the use of the airport - to resort to general rules that are not based on a forecast of a specific danger. In addition, it would have been appropriate for it to have defined the requirements placed on the peacefulness of an assembly in view of the specific place of assembly. It should also have clarified the fact that restrictions on freedom of assembly that limit assemblies to a numerically small group from the outset and exclude demonstrations in airport buildings are permissible.

**IV.**

128 The application of the principle of equal treatment (Article 3.1 GG) to the exercise of Fraport AG's right as the owner of premises to undisturbed possession could have helped the constitutional complaint to be successful because the airport operator had previously tolerated smaller assemblies. However, the complaint did not contain such an objection in a manner that was admissible.

Schluckebier

**Bundesverfassungsgericht, Urteil des Ersten Senats vom 22. Februar 2011 - 1 BvR 699/06**

**Zitiervorschlag** BVerfG, Urteil des Ersten Senats vom 22. Februar 2011 - 1 BvR 699/06 - Rn. (1 - 128), http://www.bverfg.de/e/rs20110222_1bvr069906en.html

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