Headnotes

to the Order of the First Senate of 19 December 2017

– 1 BvL 3/14 –

– 1 BvL 4/14 –

1. **Pursuant to Article 12(1) first sentence in conjunction with Article 3(1) of the Basic Law, every applicant for university admissions is entitled to equal participation in the range of public study programmes and thus to equality-based admission to the study programme of their choice.**

2. **Rules on the allocation of scarce university admission spots must, in principle, follow the criterion of aptitude. Besides, the legislature must also consider the public interest and take into account the social state principle. The criteria applicable to the allocation of scarce admission spots must reflect the diversity of the potential considerations for assessing aptitude.**

3. **The legislature must itself regulate the essential questions pertaining to the allocation of scarce admission spots for medical studies. In particular, it must define the selection criteria, in regard of their nature, by itself. However, it may leave a certain leeway to the universities for specifying these selection criteria.**

4. **Relying on the average *Abitur* grade in the context of key quotas is unobjectionable under constitutional law. However, giving priority to the indicated location preferences within the admission procedure, as well as only allowing six university locations to be indicated on applications for admission is not justifiable, within the context of the quota of best *Abitur* graduates, under constitutional law.**

5. **The statutory provisions on university admissions are unconstitutional to the extent that**

   - the legislature leaves the universities the right to define their own admissions criteria,

   - the aptitude assessments of the universities themselves are not conducted in a standardised and structured manner,

   - in addition to statutory aptitude-related criteria, the universities may also unrestrictedly weight the criterion of their rank in the location preference, freely determined by the universities, in their admissions decisions,

- *Abitur* grades can be taken into account in university-specific admission procedures, without providing a mechanism for balancing their limited comparability across the federal *Länder,*

- for a sufficient number of admissions, no other selection criteria of significant weight are taken into account apart from the average *Abitur* grade.

6. **The establishment of a waiting-period quota is permissible under constitutional law, although it is not required. It may not exceed the current 20% of university admissions. The duration of the waiting period must be limited.**

7. **Should the *Länder* wish to deviate from federal law within the framework of Article 125b(1) third sentence of the Basic Law, they must enact new legislation or a substantive provision with a direct connection to already existing state law. Editorial changes alone are not sufficient. The express declaration of the intent to deviate is not required.**

FEDERAL CONSTITUTIONAL COURT

– 1 BvL 3/14 –

– 1 BvL 4/14 –

Pronounced
on 19 December 2017
Wagner
Amtsinspektorin
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

**In the proceedings
for judicial review**

of whether §§ 31, 32 of the Framework Act for Higher Education (*Hochschulrahmengesetz* – HRG) as amended by the Seventh Act to Amend the Framework Act for Higher Education (*Siebtes HRG-Änderungsgesetz*) of 28 August 2004 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 2298) and the [*Länder*] provisions on the ratification and implementation of the State Treaty on the Establishment of a Joint Centre for University Admissions (*Staatsvertrag über die Errichtung einer gemeinsamen Einrichtung für Hochschulzulassung*) [for details see the German original] [...]

are compatible with the Basic Law (*Grundgesetz* – GG), to the extent that they provide for an admission procedure for medical studies in which, after deduction of several advance quotas, 20% of admissions are exclusively based on the level of qualification (while establishing *Länder* quotas), 60% of admissions are mainly based on the level of qualification (without establishing *Länder* quotas) and 20% of admissions are based on the duration of the waiting period (without limiting it to the semesters for which an application was received), and in which the number of semesters applicants are required to wait for admissions by way of the waiting-period quota regularly exceeds the duration of a regular study programme

– Order of Suspension and Referral of the Gelsenkirchen Administrative Court (*Verwaltungsgericht*) of 18 March 2014 (6z K 4455/13) –

– 1 BVL 3/14 –

of whether §§ 31, 32 of the Framework Act for Higher Education as amended by the Seventh Act to Amend the Framework Act for Higher Education of 28 August 2004 (BGBl I p. 2298) and the [*Länder*] provisions on the ratification and implementation of the State Treaty on the Establishment of a Joint Centre for University Admissions [for details see the German original] [...]

are compatible with the Basic Law, to the extent that they provide for an admission procedure for medical studies in which, after deduction of several advance quotas, 20% of admissions are exclusively based on the level of qualification (while establishing *Länder* quotas), 60% of admissions are mainly based on the level of qualification (without establishing *Länder* quotas) and 20% of admissions are based on the duration of the waiting period (without limiting it to the semesters for which an application was received), and in which the number of semesters applicants are required to wait for admissions by way of the waiting-period quota regularly exceeds the duration of a regular study programme

– Order of Suspension and Referral of the Gelsenkirchen Administrative Court of 18 March 2014 (6z K 4229/13) –

– 1 BvL 4/14 –

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Kirchhof,

Eichberger,

Schluckebier,

Masing,

Paulus,

Baer,

Britz,

Ott

held on the basis of the oral hearing of 4 October 2017:

Judgment:

1. **a) § 32(3) first sentence nos. 2 and 3 and § 32(3) second and fourth sentence of the Framework Act for Higher Education in the version of 28 August 2004 (BGBl I p. 2298)**

b) and [the relevant *Länder* provisions, for details see the German original] [...]

are incompatible with Article 12(1) first sentence in conjunction with Article 3(1) of the Basic Law, to the extent that they concern admissions to medical studies.

2. **Pursuant to Article 31 of the Basic Law, § 8a of the Berlin University Admissions Act (*Berliner Hochschulzulassungsgesetz* – BerlHZG) in the version published on 18 June 2005 (Berlin Law and Regulations Gazette, *Gesetz- und Verordnungsblatt für Berlin*, p. 393) is void, to the extent that it applies to selecting applicants within the quota of best *Abitur* graduates and within the waiting-period quota pursuant to § 32(3) first sentence nos. 1 and 2 of the Framework Act for Higher Education in the version of 28 August 2004 (BGBl I p. 2298).**

3. **The provisions declared incompatible with the Basic Law continue to apply until new provisions have been enacted. New provisions must be enacted by 31 December 2019.**

R e a s o n s:

A.

[…] 1

[Excerpts from press releases no. 112/2017 of 19 December 2017 and no. 69/2017 of 8 August 2017]

The Gelsenkirchen Administrative Court (*Verwaltungsgericht*) referred the question whether the provisions on university admissions to medical studies set forth in the Framework Act for Higher Education (*Hochschulrahmengesetz* – HRG) and in the *Länder* provisions on the ratification and implementation of the State Treaty on the Establishment of a Joint Centre for University Admissions (*Staatsvertrag über die Errichtung einer gemeinsamen Einrichtung für Hochschulzulassung*) are compatible with the Basic Law (*Grundgesetz* – GG) to the Federal Constitutional Court for decision.

In study programmes subject to admission restrictions throughout Germany spots available are currently allocated based on quotas. For certain sets of circumstances advance quotas (*Vorabquoten*) are provided. Apart from that, there is a quota of the best *Abitur* graduates (*Abiturbestenquote;* 20% of spots) and a waiting-period quota (*Wartezeitquote*, 20% of spots). Within these quotas, the Foundation for University Admissions (*Stiftung für Hochschulzulassung*) centrally allocates admission spots. The remaining spots (60%) are allocated in independent university-specific admission procedures (*Auswahlverfahren der Hochschulen*) according to specific criteria that universities are largely free to choose and combine, subject to certain requirements. As the number of applicants for medical studies has risen dramatically while

the number of spots available has almost remained constant, the capacity situation has increasingly been exacerbated. For instance, while 7,366 spots were available for 15,753 applicants in the winter semester of 1994/95, only 9,001 spots were available for 42,999 applicants by the winter semester of 2014/15. By now, the duration of the waiting period for being admitted via the waiting-period quota is 15 semesters.

[…]

The referring Gelsenkirchen Administrative Court holds that, given the lack of comparability of the *Abitur* grades from different *Länder*, dispensing with so-called *Länder* quotas within the university-specific admission procedures violates university applicants' right to participation derived from the freedom of occupation and the general guarantee of the right to equality in the context of university admissions. Moreover, according to the court, the waiting-period quota violates equality requirements, since the waiting period is based on the time elapsed since the *Abitur* has been obtained. As a consequence, persons who have waited for many years may be "overtaken" by so-called casual applicants who have only begun to apply for admission later. Finally, the Administrative Court challenges an overemphasis on the *Abitur* grade (level of qualification) in the overall system due to its importance both in the quota of best *Abitur* graduates and in the university-specific admission procedures.

[End of excerpts]

I.

II.

III.

IV.

B.

C.

Art. 3(1) GG).

Pursuant to Article 12(1) first sentence in conjunction with Article 3(1) GG, every applicant for university admissions is entitled to equal participation in the range of public study programmes and thus to equality-based admission to the study programme of their choice (I 1). The legislature must provide for the allocation of scarce admission spots in accordance with the constitutional requirements (I 2). In part, the applicable legal provisions do not meet the constitutional requirements (II). Insofar as individual *Land* laws deviate from the federal framework law for higher education, this is covered by the authorisation of the *Länder* to deviate [from federal law] under Art. 125b(1) third sentence GG, which has been in place for university admissions since 1 August 2008. Only the *Land* provision introducing a criterion for cases of equal rank within the quota of best *Abitur* graduates and the waiting-period quota in the *Land* of Berlin (§ 8a Berlin University Admissions Act, *Berliner Hochschulzulassungsgesetz* – BerlHZG) is void under Art. 31 GG due to the precedence of federal law, in this case the Framework Act for Higher Education (III). 102

I.

1. Persons fulfilling the personal admission requirements hold a right to equal participation in the range of public study programmes and thus a derived entitlement to equality-based admission to the study programme of their choice resulting from the freedom of training and occupation of Art. 12(1) first sentence GG in conjunction with the general guarantee of the right to equality of Art. 3(1) GG (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 33, 303 <331 and 332>; 43, 296 <313 and 314>; 85, 36 <53 and 54>; 134, 1 <13 para. 36>). Where the number of study places available is limited, it is for the legislature to organise their equality-based allocation. The legislature must also take into account the social state principle (*Sozialstaatsprinzip*) when shaping rules for admission (Art. 20(1), Art. 28(1) first sentence GG; cf. BVerfGE 33, 303 <331>; 43, 296 <313>; 85, 36 <54>; 134, 1 <13 paras. 36, 40 and 41>). 103

a) Art. 12(1) first sentence GG guarantees the right to freely choose one's place of training. This guarantee is closely linked to the right to freely choose one's occupation, given that training is usually the preliminary stage of taking up an occupation. Thus, both are integral elements of one interrelated part of life (BVerfGE 33, 303 <329 and 330>; 134, 1 <13 and 14 para. 37>). If taking up an occupation requires specific training – as is the case for doctors (cf. § 2(1), § 3(1) first sentence no. 4 of the Federal Medical Practitioners' Act, *Bundesärzteordnung* – BÄO) –, not being admitted to this type of training rules out the possibility of taking up the occupation later (cf. BVerfGE 33, 303 <330>). In this context, protection of fundamental rights under constitutional law does not just aim to avert interferences by public authority, but also, in conjunction with Art. 3(1) GG, to ensure equality-based participation in public services and – in this case – public study programmes (cf. BVerfGE 33, 303 <330 et seq.>; 43, 291 <313 et seq.>; 134, 1 <13 and 14 para. 37>). 104

b) The right to participation does not go so far as to afford an individual entitlement to the creation of education capacities to an extent that meets the respective demand. The question of calculating the number of education places available is for the democratically legitimated legislature to decide. In addition to the fundamental rights of university applicants, the legislature also takes into account other public interests in its budgetary decisions (cf. BVerfGE 33, 303 <333>; 75, 40 <68>; 87, 1 <35>; 90, 107 <116>; 97, 332 <349>; 103, 242 <259>; 105, 73 <132>; 112, 50 <66>). The right to equal opportunities in the context of admission to university thus only exists to the extent of the education capacities actually made available by the state (cf. similarly ECtHR, Tarantino et al./Italy, Judgment of 2 April 2013, no. 25851/09 et al., § 51, on Art. 2 of the First Additional Protocol to the ECHR). 105

c) The right to participate in the existing range of study programmes, which were created by the state from public means, results from the freedom to choose one's place of training, as guaranteed by fundamental rights, in conjunction with the general guarantee of the right to equality (Art. 12(1) first sentence GG in conjunction with Art. 3(1) GG). It is a derived right to participation. Persons fulfilling the personal requirements for admission hold a right to equality-based admission to the study programme of their choice (cf. BVerfGE 33, 303 <331 and 332>; 43, 291 <313 et seq.>; 85, 36 <53 and 54>; 134, 1 <13 para. 36>). However, the right to participation does not go so far as to afford an individual entitlement to every *Abitur* graduate to actually be admitted to the study programme of their choice at some point – independent of school results and other relevant professional qualifications. In subjects such as medical studies, in which the number of applications by far exceeds the places available, the entitlement to participation cannot guarantee actual admission to the study programme (cf. BVerfGE 43, 291 <316>). The principle of equal opportunities, as required under constitutional law, involves the risk that an application for university admission may fail, given that in the context of the allocation of scarce, indivisible goods any selection system – no matter how it is set up – can only offer real prospects of actual success to some of the applicants. It is essential that equality-based criteria govern the allocation of places in study programmes (cf. BVerfGE 43, 291 <316 and 317>). 106

2. The legislature must establish rules for university admissions that comply with the Constitution and with the fundamental right to equal participation in the range of public study programmes (see 1 above) if admission spots are scarce. University admissions must then be regulated in such a way that their equality-based allocation is ensured (a). In addition, the legal provisions must satisfy the requirement of a statutory provision (b). 107

a) If spots are scarce, university admissions must be based on rules that, in principle, follow the criterion of aptitude. In addition, the legislature must also consider other public interests, such as patient care, and take into account the social state principle. 108

aa) The requirement of equality-based decisions results in the fact that the rules on university admissions must, in principle, be guided by the criterion of aptitude. This may also serve to justify the unequal treatment inevitably associated with university admissions if the number of admission spots is too low to meet demand. 109

The requirements of the specific study programme and the professional activities that usually follow determine the aptitude relevant to university admissions. In this regard, the establishment of differentiated criteria is constitutionally required if this is the only way to sufficiently reflect the aptitude profile that is specifically necessary. It must include practical as well as social and communication skills, in addition to qualifications already acquired in medical professions. 110

bb) The criteria applicable to scarce admission spots must reflect the variety of potential aspects to be considered in aptitude assessments. 111

The extent to which a criterion can predict aptitude is a question of fact. The legislature must take into account that the actual significance of individual aptitude criteria is limited. The legislature must not provide for a criterion as the only selection criterion that does not allow sufficiently reliable predictions or only reflects partial elements of the requirements relevant to a study programme, as this would render these shortcomings absolute in the selection process. It may, however, counteract this effect by adding other criteria that also have to be significant for aptitude. It may also take into account shortcomings of one criterion by providing for admission quotas for applicants who meet another criterion that also indicates their aptitude. 112

The legislature is not constitutionally bound to using a defined criterion of aptitude or a defined combination of criteria. However, the criteria must, in their entirety, guarantee a sufficient predictive value. Accordingly, the question whether the statutory set-up of university admissions is compatible with the fundamental right to equal participation in public study programmes cannot be concluded from a single criterion; rather, it requires an overall assessment of the regulatory framework chosen by the legislature. If elements of admission rules fall short in a specific regulatory context, it does not rule out the possibility that they may be constitutionally permissible as part of a different context. The Federal Constitutional Court reviews the rules within the specific regulatory framework of admission rules currently chosen by the legislature, which is composed of several parts – in particular due to the establishment of different allocation quotas. 113

b) In the context of entitlements to participation based on fundamental rights – particularly in competitive situations – the realisation of the substantive content of fundamental rights requires procedures designed in a way that is appropriate to the protection of fundamental rights, as their design can impact the outcome of the selection decision (cf. BVerfGE 39, 276 <294>; 52, 380 <389 and 390>; 53, 30 <65 and 66>; 73, 280 <290, 296>). Thus, not only the substantive selection criteria, but also the admission procedure itself must be based on equal opportunities. This includes sufficiently transparent procedures (cf. in this respect BVerfGE 33, 303 <357>). 114

c) Since it affects interests that are essential with regard to fundamental rights, it is for the legislature to organise the allocation of admission spots at public universities and thus to decide on the applicants' right to participation as an element of freedom of occupation combined with the requirement of equal treatment (Art. 12(1) first sentence in conjunction with Art. 3(1) GG). 115

aa) This follows from the requirement of a statutory provision according to which the parliamentary legislature is obliged to establish essential provisions that are material for realising fundamental rights by itself, rather than leaving it to other legislative authorities or to the executive (cf. on the so-called essential-matters doctrine, *Wesentlichkeitsgrundsatz,* BVerfGE 34, 165 <192 and 193>; 40, 237 <248 and 249>; 41, 251 <260>; 45, 400 <417 and 418>; 47, 46 <78 and 79>; 61, 260 <275>; 83, 130 <142>; 98, 218 <251>; 105, 279 <305>; 108, 282 <311>; 116, 24 <58>; 128, 282 <317>; 134, 141 <184 para. 126>; 141, 143 <170 para. 59>). University admissions are a regulatory matter that is essential for realising the right to participation protected by the fundamental rights under Art. 12(1) first sentence in conjunction with Art. 3(1) GG. It constitutes the core of the admissions system and is therefore subject to the requirement of a parliamentary decision (cf. BVerfGE 33, 303 <345 and 346>; see also Decisions of the Federal Administrative Court, *Entscheidungen des Bundesverwaltungsgerichts* – BVerwGE 139, 210 <216 para. 20>). 116

bb) The legislature itself must regulate the essential questions pertaining to study programmes in which admissions are subject to restrictions. 117

(1) Given that the selection criteria significantly predetermine whether a decision for a study programme can be realised and given the consequences for the university applicants' freedom of training and occupation , the democratically legitimated legislature itself must define these criteria as regards their nature (cf. already BVerfGE 33, 303 <345>). 118

(2) In principle, it is not permissible under constitutional law to leave the universities an autonomous right to invent criteria. Under constitutional law, secondary regulatory authorities may not be granted the competence to add to and to expand the statutory list [of criteria] enacted by parliament by selection criteria that they have developed themselves. Only the legislature is democratically legitimated to regulate this issue, which is essential for realising fundamental rights. It must not delegate its responsibilities to third parties; rather, it must conclusively regulate the nature of the selection criteria. Therefore, the universities' authorisation to enact bylaws for their admission procedures must be limited to selecting criteria from a list determined by statutory law that sufficiently defines the criteria as regards their nature. In any case, this holds true for undergraduate mass study programmes that determine access to a broad professional field, such as medical studies. The situation may be different for specialised study programmes in the context of a specific teaching and research profile. 119

(3) However, the legislature may leave a certain leeway to universities with respect to specifying the criteria, which are, in regard to their nature, statutorily defined and 120

which serve to assess the university applicants' aptitude. Such leeway is justified by both the direct experiences of universities and the constitutionally protected freedom of research and teaching. This freedom includes the universities' own specialisations, which also enable them to develop university-specific profiles (cf. in this respect BVerfGE 35, 79 <112 et seq.>; 93, 85 <95>; 111, 333 <354 and 355>). Under Art. 5(3) GG, universities are entitled to shape their study programmes according to their own academic criteria, including their own specialisation. Such a – limited – authorisation of universities to specify their own criteria translates, in particular, into the possibility that universities determine their own aptitude assessments, which may be carried out in the context of the university-specific admission procedure under current law (subject-specific tests of aptitude for studies and selection interviews). Yet in this respect, the requirement of a statutory provision requires legal safeguards to ensure that universities carry out their aptitude assessments using standardised and structured procedures. It is sufficient if the legislature requires the universities to implement their own transparent standardisation and structuring; also in order to prevent the risk of discriminatory application (cf. Art. 3(3) GG). The legislature must also ensure that only the applicants' aptitude is assessed in the context of university tests of aptitude for studies and in selection interviews. The authorisation of the universities to specify their own criteria may only relate to the applicants' aptitude – also in light of the study programmes' curricular set-up and specialisation, including the development of university-specific profiles.

II.

According to these standards, the referral of the provisions is admissible. They are in part unconstitutional. 121

However, it is within the legislature's latitude to divide university admissions into advance and key quotas (1). Yet university admissions within the so-called quota of best *Abitur* graduates satisfy the constitutional requirements only in part. While admissions based on the average *Abitur* grade as a selection criterion are not objectionable under constitutional law – when including a balancing mechanism for ensuring their comparability across the different *Länder* –, the limitation of location preferences and the way these are taken into consideration are, however, incompatible with the requirements of equal participation (2). The provisions on the so-called university-specific admission procedures do not satisfy the constitutional requirements in several respects, either. They do not fully meet the requirement of a statutory provision and in part violate the requirements of equal participation, also in substantive terms. This applies to the set-up of the pre-selection procedure, in particular to the significance of location preferences; it also applies to the lack of a mechanism to ensure comparability of *Abitur* grades across different *Länder* and to the insufficient consideration of selection criteria that are not based on school grades (3). Finally, the current design of the so-called waiting-period quota is also incompatible with constitutional requirements (4). 122

1. The set-up and division of the university admissions system into advance quotas and three key quotas (§ 32(2) and (3) HRG; Art. 9 and 10 of the 2008 State Treaty) are within the bounds of the legislature's latitude. 123

a) The legislature provides for advance quotas for cases of hardship, for areas of particular public needs (such as medical officers of the *Bundeswehr)*, for foreign nationals and stateless persons who are not accorded the same treatment as German nationals pursuant to § 27(1) second sentence HRG, for persons with special university entrance qualifications – such as persons who have completed basic studies at a university of applied sciences –, for persons who have acquired the necessary qualifications by way of vocational training and for applicants who have already completed another course of study. 124

In doing so, the legislature pursues particular and specific goals that are intended to compensate for disadvantages or to take into account particular public or academic needs. [...] At the same time, advance quotas enhance the chances of admission for persons who might otherwise be disadvantaged, or for areas in which specific public interests have to be recognised. 125

b) The division of the key quotas is also unobjectionable under constitutional law. In this respect, the legislature has broad leeway. […] The only relevant factor is that each selection, individually or as a combination of the different procedures, must satisfy the constitutional requirements. 126

2. It is unobjectionable under constitutional law if the legislature centrally relies on the average *Abitur* grade for a proportion of 20% of all university admissions (quota of best *Abitur* graduates) in the context of key quotas. However, in this respect it is not compatible with the constitutional requirements that the chances of being admitted to university currently depend on location preferences. 127

a) By making the average *Abitur* grade the basis for university admissions, the legislature draws on performance evaluations of university applicants which were carried out by the schools upon completion of general education in the context of the *Abitur*. From an overall perspective, it makes sense to draw on this criterion for university admissions – at least as one criterion among several. Based on the relevant findings, there are no constitutional concerns with regard to the *Abitur* grade as a proper aptitude criterion even for admissions to medical studies. 128

aa) Studies have shown that the *Abitur* grade is highly significant for predicting academic success in medical studies [for sources, see the German original]. […] Experts attribute a high level of aggregation to the average *Abitur* grade, which has positive impacts on accuracy and prognostic quality, as factors that adversely affect these qualities, such as teachers' grading tendencies, are evened out […]. At the same time, average grades are assumed to be well suited for providing information on general cognitive skills and personality-based traits such as interest, motivation, diligence and attitude […]. Accordingly, empirical studies have confirmed a significant correla- 129

tion between *Abitur* grades and factors that determine academic success such as duration of studies and exam results, mainly for the first, pre-clinical stage of medical studies […]. Information provided by the experts in the oral hearing has confirmed this.

It is true that, according to the experts' statements […] in the oral hearing, the high predictive value of *Abitur* grades mainly concerns the first, pre-clinical part of medical studies until the first part of the medical exam (*Erster Abschnitt der Ärztlichen Prüfung*) […]. The correlation between performance at school and at university is less significant in the clinical part of the studies, in which factors other than purely cognitive performance become more relevant […]. However, this does not call into question the general suitability of *Abitur* grades for predicting academic success. 130

Also in other respects, the equality-based access to medical studies is not called into question where part of the admissions are based on the best *Abitur* grades only. This may result in excluding applicants with special individual skills that are not sufficiently reflected in the average *Abitur* grades. Yet admissions based on the quota of best *Abitur* graduates only concern 20% of all admissions, after deduction of advance quotas. The *Abitur* grade is a practical criterion that is easy to measure. In addition, it is determined on a broad basis of evidence rather than by a one-off assessment, and it is based on several assessments in different subjects by different persons over a longer period of time. Moreover, the experts' statements have shown that very good *Abitur* grades reliably predict a low university drop-out rate and relatively swift completion of the study programme […]. 131

bb) However, negative developments may adversely affect the significance of *Abitur* grades and thus call into question their suitability as a selection criterion in particular in the marginal areas of top grades. In addition to the comparability of *Abitur* grades across all *Länder*, in particular the overall development of grades has to be taken into consideration. For instance, a significant increase in top grades (so-called "grade inflation") may limit the suitability of *Abitur* grades as a criterion of differentiation and further diminish their suitability as a criterion for distinction in the range of tenths of grade points. The legislature must keep an eye on this development and, if applicable, adapt the university admissions system accordingly. 132

cc) Drawing on the average *Abitur* grade (pursuant to § 32(3) first sentence no. 1 HRG, Art. 10(1) first sentence no. 1 of the 2008 State Treaty) is not objectionable under constitutional law, even given possible differences in school education and grading among the *Länder.* While compensation between the different *Länder* standards is constitutionally required on the basis of current knowledge (see 3 b cc below), the legislature has already made legislative arrangements in that respect. For the time in which comparability of average *Abitur* grades among the *Länder* is not guaranteed, the legislature has established, as a means of compensation, *Länder* quotas within the quota of the best *Abitur* graduates in the context of the centralised university admissions system. It is not apparent that this arrangement does not satisfy constitu- 133

tional requirements.

b) By contrast, in the context of the centralised university admissions system based on the quota of best *Abitur* graduates, which draws only on average *Abitur* grades as the selection criterion, it is not compatible with the constitutional requirement of equal participation to give priority to the mandatorily indicated location preferences. The fact that university admissions are based mainly on location preferences while applications are at the same time limited to six locations (Art. 8(1) second, fourth and fifth sentence of the 2008 State Treaty – incorporated into *Land* law by way of the respective ratification acts) cannot be justified in the context of the quota of best *Abitur* graduates and violates Art. 12(1) first sentence in conjunction with Art. 3(1) GG. By contrast, § 32(1) second sentence, (3) first sentence no. 1 HRG is not unconstitutional, since it is a framework provision that does not contain an exhaustive arrangement. 134

aa) […] 135

[…] The standard aptitude criterion of the average *Abitur* grade is pushed aside and devalued by the priority of location preference, a criterion which does not have any significance for the aptitude for studies. The *Abitur* graduates' chances of being admitted to university thus depend predominantly on the location preference they indicated and only secondarily on their aptitude for the study programme. […] As a result, some applicants identified in the context of the quota of best *Abitur* graduates are not taken into consideration, although they have better average *Abitur* grades than others who are admitted. This is compounded by the fact that the respective effects of indicating location preferences cannot be predicted before applying. […] 136

bb) Within the framework of centralised university admissions on the basis of the average *Abitur* grade, this is not justifiable under constitutional law. […] The objective of taking into account the individual location preferences of university applicants is no viable justification for giving priority to location preferences [over other criteria]. […] At least with respect to a study programme that determines access to a wide professional field, the question whether an applicant will be admitted to university at all must take precedence over location preferences […]. […] From a constitutional law perspective, the indication of location preferences may only be used as a secondary criterion, i.e. only as a lower-priority criterion, for allocating places available in the study programmes to selected applicants. […] 137

Accordingly, it is not justified under constitutional law to only allow the indication of six university locations on applications for admission. In particular, it cannot be justified by procedural efficiency requirements. Given the possibilities of data processing, it is not apparent that the practical implementation of an allocation procedure allowing for unlimited location preferences would inevitably result in difficulties that could justify excluding applicants from exercising their aptitude-related claim to participation that is based on fundamental rights. 138

cc) […] 139

By contrast, the corresponding federal framework provisions are not unconstitutional. These provisions do not contain mandatory requirements on this matter. § 32(1) second sentence HRG provides that, in accordance with more detailed *Land* law stipulations, at least six location preferences may be indicated in a ranking for study programmes that are subject to the selection procedures within the centralised system of university admissions. It thus does not define a limitation of location preferences; rather, it guarantees that such a limitation is not too narrow. […] 140

3. For further 60% of the university admissions within the key quotas, the legislature provides for university-specific admission procedures. The set-up of these procedures does not comply with the standards of the requirement of a statutory provision (a). In various regards, it also does not meet the substantial requirements of the right to equal participation in the range of public study programmes (b). 141

a) The legal provisions on university-specific admission procedures do not satisfy the requirement of a statutory provision (see I 2 c above) in every respect, given that the legislature authorises the universities to make decisions on the set-up of their admission procedures, without sufficiently regulating the essential questions itself. 142

aa) Yet the aptitude criteria to be applied in the university-specific admission procedures have been determined by the legislature as regards their nature. To that extent, it has created a legal basis that satisfies the constitutional requirements. Given the requirement of a statutory provision and independent of further fundamental rights requirements resulting from the applicants' right to participation, it is equally unobjectionable under constitutional law that universities are granted leeway with respect to the selection of aptitude criteria from the statutory list of criteria. In the context of determining criteria for assessing the aptitude of university applicants, the legislature may, also in light of Art. 5(3) first sentence GG, leave a certain leeway to universities to specify the criteria which are statutorily defined as regards their nature (see I 2 c bb (3) above). 143

bb) However, it is not compatible with the requirement of a statutory provision that *Land* laws in Bavaria and in Hamburg provide universities with the possibility of autonomously defining further selection criteria which are not mentioned in the statutory list of criteria. It is impermissible under constitutional law to grant universities an autonomous right to invent criteria for admission to medical studies (see I 2 c bb (2) above). 144

(1) In this regard, the framework provisions of § 32(3) first sentence no. 3 HRG and the *Länder* provisions that further shape them by providing for definitive lists of criteria are, however, unobjectionable. 145

[…] 146

The provisions of most *Länder,* implementing § 32(3) first sentence no. 3 HRG and Art. 10(1) first sentence no. 3 second sentence of the 2008 State Treaty, explicitly in- 147

clude a definitive list of criteria adopted by a parliamentary act. […]

(2) It is also not objectionable under constitutional law that individual *Länder* have confined themselves to the ratification of the 2008 State Treaty at statutory level […]. This can be interpreted in conformity with the Constitution in such a way that the respective legislature has definitively determined that all selection criteria listed in Art. 10(1) first sentence no. 3 second sentence of the 2008 State Treaty apply. 148

(3) However, the provisions under the *Land* laws in Bavaria and in Hamburg are unconstitutional, since neither provides for a definitive list of criteria for the university-specific admission procedures. 149

[…] 150-151

cc) The referred provisions also violate the requirement of a statutory provision, insofar as a rule on standardisation and structuring of the universities' own aptitude assessments is lacking. The legislature can provide for such rules itself or require the universities to do so (see I 2 c bb (3) above). The same applies to the option open to the universities to take related professional training or experience into consideration in the context of selection. 152

(1) The legislature must ensure that universities, if they choose to exercise the statutorily provided options to conduct their own aptitude assessments (subject-specific study aptitude tests and selection interviews) or to take into account professional training or experience, do so in a standardised and structured manner. In the context of university-specific aptitude assessments, university admissions must be equality-based, in line with standardised criteria, based exclusively on the applicants' aptitude in principle. 153

In this regard, it is sufficient if universities themselves standardise and structure their tests and selection interviews in a transparent manner. However, in order to satisfy the requirement of a statutory provision, the legislature then has to enact a provision that requires the universities to do so. The legislature must then also provide that only the applicants' aptitude is assessed in the university tests of aptitude for studies and in selection interviews. The universities' authorisation to specify their own criteria may only relate to the study programmes' curricular set-up and specialisation, including the development of university-specific profiles. 154

(2) The referred provisions do not fully meet these requirements. Both the Framework Act for Higher Education and the *Länder* provisions lack the necessary statutory stipulations regarding the standardisation and structuring of aptitude assessments and selection criteria. The pre-selection and selection criterion of subject-specific tests of aptitude for studies, the selection criterion of selection interviews and the pre-selection and selection criterion of professional training or experience […] have neither been sufficiently specified by the legislature itself nor has the legislature required the universities to implement transparent standardisation and structuring. The provisions give extensive leeway to the universities regarding their set-up, without requir- 155

ing sufficient structuring and standardisation or directly providing for it.

(3) Yet this only results in an objection to the *Länder* provisions on the implementation [of federal law], but not to the framework laws on higher education. […] It is inherent in the nature of federal framework law that it does not have to set out requirements that satisfy the standards of specificity in every respect – unless it enacts comprehensive provisions by exception. To the extent that the provisions are only partial ones that have not been sufficiently defined and thus have to be specified further […], it is incumbent on the *Länder* to fill these gaps. 156

b) Also in substance, the organisation of university admissions in the context of the university-specific admission procedure does not satisfy the requirements of equality-based access in various respects. 157

Yet statutorily limiting location preference to six locations in the context of university-specific admission procedures is not objectionable (aa). By contrast, it is not compatible with the right to equal participation in the range of public study programmes that universities, when conducting pre-selections, may unrestrictedly weight the criterion of their rank in the location preference, freely determined by the universities (bb). It is also unconstitutional that the legislature provides for taking into consideration *Abitur* grades without providing for mechanisms to ensure their comparability across the *Länder* (cc). The provision regarding the criteria to be applied by the universities does not satisfy the constitutional requirements either. While the criteria provided are viable in themselves, sufficient statutory stipulations are lacking (dd). In the context of the current overall system of university admissions, a provision is lacking which ensures that other sufficiently weighty selection criteria apart from the *Abitur* are taken into account for a sufficient proportion of admissions (ee). 158

aa) In the context of university-specific admission procedures, statutory provisions limiting location preference to six locations are not objectionable under constitutional law. 159

[…] Unlike in case of the quota of best *Abitur* graduates, such a limitation can be constitutionally justified regarding the university-specific admission procedures. 160

(1) Yet limiting the location preferences considerably reduces chances of admission in this procedure as well. It means that applications to 29 of the currently 35 faculties of medicine in the university-specific admission procedure are ruled out from the outset. In this context, deciding on location preferences entails practical uncertainties. […] 161

(2) Still, the legislature was free to limit possible applications in the university-specific admission procedure to six universities, as this is necessary to make the university-specific admission procedure manageable in practical terms. Given the practical requirements of setting up university-specific admission procedures – as a step towards diversifying the selection standards brought about by this procedure –, it is justified that chances of admission are reduced. 162

[…] In the context of university-specific admission procedures, the applications received must be processed in only a few months, namely the time period between applicants leaving school and starting university. In addition, there is a legitimate interest in ensuring that offers of a place in the study programme are highly likely to be accepted and in avoiding multiple allocations of places (*Mehrfachvergabe*), unnecessary reserve-list procedures (*Nachrückverfahren*) or even unclaimed places remaining vacant, despite complex admission procedures. The statutory provision based on which applicants must limit their applications to six universities at which they may participate in the university-specific admission procedures reduces multiple applications and ensures that universities deal with applicants who have a particular interest in studying precisely at that university. This makes them likely to accept an offer in case they are selected. This is a very significant factor given the high number of applicants who apply for study programmes subject to admission restrictions (*Numerus clausus*) such as medical studies. Applications for the winter semester most recently amounted to 43,184 applications for 9,176 admission spots (cf. Foundation for University Admissions, data for study programmes subject to admission restrictions throughout Germany at universities for the winter semester 2017/18, p. 2, available at www.hochschulstart.de). For the summer semester, there were 18,799 applications for 1,627 admission spots (cf. Foundation for University Admissions, data for study programmes subject to admission restrictions throughout Germany at universities for the summer semester 2017, p. 2, available at www.hochschulstart.de). Under these circumstances, it is justified that the legislature is free to limit the number of location preferences and thus of applications in the university-specific admission procedure to some extent. This becomes clear when considering that otherwise all applicants could apply to all 35 universities that currently offer a medical studies programme. This would entail repeated reserve-list procedures, which would not be practical or would result in a great number of unclaimed places given the narrow timeframe of the procedures. […] 163

bb) In principle, it is also unobjectionable that the legislature allows the universities to conduct pre-selection procedures and thus to limit the number of applications to be considered within the actual selection procedure. However, it is not compatible with the requirements of equal participation that universities may, in addition to statutory aptitude-related criteria, also unrestrictedly weight the criterion of their rank in the location preference, freely determined by them, in their admission decisions. 164

(1) […] 165

To the extent that the legislature takes account of the general standards for selection by the universities (see cc-ee below), first conducting such a pre-selection procedure is in principle not constitutionally objectionable. It does not impair the entitlement to equal participation if a pre-selection according to automated criteria is made as a first step, in order to then conduct a more individualised selection procedure as a second step. The only relevant factor is that both stages of the procedure are equality-based. 166

(2) However, it is incompatible with the Constitution that the legislature affords universities the possibility of simply taking their rank in the location preference indicated by the applicants as the basis of their pre-selection (cf. § 32(3) fourth sentence HRG, Art. 10(1) fourth sentence 2008 State Treaty). While using the location preference ranking to pre-screen applications for the individually elaborate selection processes of the universities may be justified to a limited extent, insofar as universities decide on admissions according to criteria that can be applied automatically, they may not rely on the location preference ranking. 167

(a) The rank of location preference is a criterion unrelated to the aptitude for a study programme or profession and its use can result in substantially minimising an applicant's chances. […] 168

(b) However, the criterion of the location preference rank is justified if it is used for admissions within the context of a complex individualised selection procedure and only a sufficiently limited proportion of overall admissions is affected by it. 169

The legislature may consider complex individualised selection procedures as an important part of the overall system of university admissions. However, such procedures can only be successful if the effort they require is limited to applicants who will accept an offer with a sufficiently high probability. Yet it is not apparent that a similarly significant criterion like the indication of location preference is available to guarantee a high probability of acceptance. […] However, this only applies if such complex selection procedures are indeed conducted subsequently, as, in particular, the qualified interviews provided in the list of criteria might be […]. Only in such cases is it necessary to limit [the number of applicants] by way of location preferences to ensure that it is possible to conduct the selection procedures. […] 170

In that respect, it is also required under constitutional law that overall, only a sufficiently limited number of admissions be dependent on a high rank of location preference. […] 171

(3) On this basis, § 32(3) fourth sentence HRG and Art. 10(1) fourth sentence of the 2008 State Treaty, incorporated into *Land* law by way of the respective ratification acts, are not compatible with the constitutional requirements. […] They violate the entitlement to equality-based admissions to university pursuant to Art. 12(1) first sentence in conjunction with Art. 3(1) GG. 172

cc) It is also not compatible with the right to equal participation that the legislature provides for taking into consideration *Abitur* grades in the university-specific admission procedures without ensuring their comparability across the *Länder* – if necessary by way of balancing mechanisms. 173

(1) […] 174

Unlike in university admissions within the quota of best *Abitur* graduates, the legislature dispenses with mechanisms that compensate for the insufficient comparability of 175

average *Abitur* grades beyond *Länder* boundaries. It thus accepts that in the university-specific admission procedure, differences in the *Abitur* of the different *Länder* do not play any role for admissions. Only nominal grades are taken into account, without considering the different significance of the grades from different *Länder*.

(2) This set-up results in considerable inequalities. Given the current state of development of *Abitur* grades, the *Abitur* results of the different *Länder* cannot be considered as sufficiently comparable on their own. 176

Currently, the legislature itself does not assume that the *Abitur* grades are comparable across the *Länder* based on the underlying requirements and performance evaluations. Thus, the transitional arrangement of *Länder* quotas, which was introduced when the Framework Act for Higher Education entered into force in 1976, still applies in the context of the quota of best *Abitur* graduates, as long as the comparability of qualifications across the *Länder* is not guaranteed […]. The legislature does not consider that sufficient comparability has been achieved yet, in particular in the range of tenths of grade points of average grades, which is often decisive for the selection of students […]. 177

A comparison of average *Abitur* grades in the *Länder* and empirical studies have confirmed this assessment. [for details and sources, see the German original] […] 178

(3) Disregarding these differences leads to substantial unequal treatment. Thereby, it is accepted that a large number of applicants will suffer considerable disadvantages depending on the *Land* in which they obtained their *Abitur*. […] 179

(4) There is no justification for this situation. 180

(a) It cannot be justified by the fact that there are structural limits to the comparability of *Abitur* grades from the outset. In fact, the possibility of comparing school grades is always limited. Even within the *Länder,* it is, by its nature, influenced by subjective elements such as the teachers' margin of assessment or reference group effects, i.e. the effect that individual learning performance and its assessment are dependent on classmates and the learning environment (e.g. class size, differences in performance, social environment). These are not differences inherent in the system, but ambiguities that can only be registered in a generalised way and be balanced to a limited extent. The broad basis of *Abitur* grades also partially compensates for these ambiguities. Within the limits applying to the assessment of exams, they have to be accepted (cf. in this respect BVerfGE 84, 34 <50 et seq.>) […]. 181

The lack of comparability of *Abitur* grades across the *Länder* is a different matter. It is not based on individual ambiguities that are inherent in any comparison of exam grades, but results from the different education and – in particular – assessment systems of the different *Länder* […]. As long as such differences in assessment persist, balancing mechanisms that at least allow for an approximate comparability of grades are required. 182

(b) Dispensing with balancing mechanisms cannot be justified by the fact that such differences result from federalism, which is constitutionally guaranteed, and the attribution of competences in the Basic Law […]. Due to the legislative and administrative competence of the *Länder* with regard to the school system (Art. 30, 70 GG), university applicants cannot, based on the general guarantee of the right to equality, request an alignment of *Land* specific school laws if these result in worse *Abitur* results in federal comparison. For within their own area of competence, the *Land* legislatures are free to enact provisions that deviate from one another – independent of the existing efforts of coordination in the context of the Standing Conference of Ministers of Education and Cultural Affairs for the *Länder* (*Kultusministerkonferenz*). Yet conversely, it does not follow from this that university admission laws may take the *Abitur* results obtained in the *Länder* as a basis for admissions without any constraints – despite the fact that the lack of comparability results precisely from the *Land* specific characteristics of the education systems. The entitlement to equal participation under Art. 12(1) first sentence in conjunction with Art. 3(1) GG requires that aptitude for studies be assessed in an equality-based way, rather than being determined by the *Abitur* from certain *Länder*. 183

(c) […] Additional criteria cannot compensate for the lack of significance of the unadjusted, nominal *Abitur* grades with regard to aptitude assessments of university applicants resulting from their limited comparability. […] 184

[…] 185

(d) Ultimately, the legislature's authority to use typification and the universities' practical difficulties cannot justify dispensing with a mechanism for balancing the limited comparability of *Abitur* grades across the *Länder*. 186

It is true that the legislature has leeway to universalise by way of generalisations, consolidations or standardisations in order to render the law practical and simple where necessary, in particular in mass procedures such as university admissions. In this regard, particular circumstances that are known as matters of facts may be neglected in a generalising manner (cf. BVerfGE 111, 115 <137>), even if, by its very nature, this is at the expense of justice in the individual case (cf. BVerfGE 84, 348 <359>; 100, 138 <174>; 103, 310 <319>; 113, 167 <236>; 126, 268 <279>; established case-law). Yet the considerable differences in the significance of *Abitur* grades across the *Länder* are too weighty to disregard them drawing upon a generalising perspective. 187

A balancing mechanism need not be associated with practically insurmountable difficulties for the universities. In the past, the legislature already provided for practical mechanisms that aimed to establish approximate comparability of *Abitur* grades across the *Länder*. […] 188

(5) In summary, there is no plausible and reliable factual reason for the unequal treatment brought about by the undifferentiated use of nominal *Abitur* grades as an 189

allocation criterion in light of the disregard of the limited comparability across the *Länder*. […]

[…] 190-192

dd) With regard to the university-specific admission procedure, the Framework Act for Higher Education and the 2008 State Treaty define various criteria which can be used by the universities for the selection of applicants (§ 32(3) first sentence no. 3 second sentence letters a to f HRG, Art. 10(1) first sentence no. 3 second sentence letters a to f 2008 State Treaty). Independent of the question of how they are weighted in relation to each other, each of these criteria taken separately is in principle constitutionally unobjectionable as an indicator in an aptitude-focused selection procedure, (see ee below). However, further statutory stipulations are in part necessary (see a cc above). 193

(1) § 32(3) first sentence no. 3 second sentence letters a to f HRG, Art. 10(1) first sentence no. 3 second sentence letters a to f 2008 State Treaty determine the criteria the universities may draw on for their admission decision. They are, in principle, not objectionable. This does not just apply to the average *Abitur* grade ([…] see 2 a above), but also to the criterion of weighted individual *Abitur* grades according to letter b of the provisions, if they are interpreted and applied appropriately. It is reasonable to assume that individual grades can provide insights into specific interests, talents and skills (cf. Recommendation for Resolution and Report of the Committee on Education, Research and Technology Assessment, *Bundestag* document, *Bundestagsdrucksache* – BTDrucks 15/3475, p. 11). It cannot be denied that they have a certain predictive value with regard to particular talents and interests in subdisciplines relevant to the specific study programme. 194

In principle, tests of aptitude for studies and qualified interviews to be conducted by the universities are equally viable for a substantive selection based on aptitude […]. However, it must be taken into account that their significance materially depends on how they are set up. In particular selection interviews run the risk of being dominated by subjective snap judgments, in which case they no longer guarantee sufficient appropriateness and comparable results. Therefore, it must be ensured that they are sufficiently structured, aimed at determining aptitude and that a discriminatory application is prevented. The same applies with regard to the criterion of taking related professional training or experience into consideration, with which the legislature has provided the universities for their selection [procedures] […]. This criterion can also provide indications of aptitude for medical studies. Due to its vagueness, however, this criterion must be specified in the context of transparent rules. These were established neither in the 2008 State Treaty nor in the corresponding *Land* laws, nor in the stipulations for specification by the universities in these *Land* laws. To that extent, the provisions do not satisfy the constitutional requirements. 195

(2) This applies in principle both to the pre-selection and the actual selection procedure by the universities. For the pre-selection procedure, only selection interviews 196

(letter e of the provisions) have been left out, as they are not suited for pre-screening. This is not objectionable under constitutional law. In principle, the legislature has the leeway to decide which criteria it provides for the universities. It is only relevant that the criteria are aptitude-related.

ee) Finally, it is unconstitutional that the legislature does not provide sufficiently broad aptitude criteria for the selection of applicants in the university-specific admission procedures. In the overall system of admission rules, the criterion of the *Abitur* grade must be complemented by other selection criteria to a sufficiently substantial degree in order to ensure an equality-based arrangement for admissions to medical studies […] 197

[…] 198-199

(1) Under Art. 12(1) first sentence in conjunction with Art. 3(1) GG, the legislature must create an equality-based admission procedure. In case of excess demand, this requires selection decisions aimed at identifying the most suitable applicants. 200

[…] 201

In any case, this holds true for the current situation, in which the number of applicants far exceeds the available spots for medical studies, only a small proportion of *Abitur* graduates are admitted and average *Abitur* grades have become so similar at the top level that the significance of their remaining differences, expressed in decimal points, is substantially diminished. If only the applications of those who have obtained the very best grades can succeed on the basis of their average *Abitur* grade, and only by way of a narrow differentiation among decimal points, *Abitur* grades are not a sufficient selection criterion to guarantee equality-based admissions on the basis of aptitude. It is very likely that there are many persons who are equally or even better suited for medical studies, in particular among the many applicants who have also obtained very good *Abitur* grades, but whose grades are some decimal points lower. In such a situation, aptitude can no longer be determined with sufficient certainty based on the *Abitur* grade. The minor differences between *Abitur* grades are not sufficiently reliable to indicate differences in aptitude. 202

If used as such a narrow screening mechanism, the average *Abitur* grade does not do justice to the different aspects that can make up the aptitude and ability for medical studies. In this respect, it has to be considered that both the study programme and the subsequent fields of activity require very diverse talents. Thus, consideration of only the best *Abitur* graduates carries the risk of one-sidedly focussing on cognitive and intellectual skills, while disregarding other equally important skills. This is illustrated by the fact that the *Abitur* grade has a lower predictive value for success in the clinical part of the study programme, in which practical skills and care for patients become more important, than for the pre-clinical part, which is more theoretical (see 2 a aa above). Professions that are open to medical studies graduates in many cases require skills that are not reflected in top *Abitur* grades. In addition, *Abitur* grades are 203

obtained in certain surroundings and at a certain time; they do not take into consideration the applicants' later development.

This also corresponds to the discussions in higher education policy. […] 204

(2) The legislature must take into account the limited significance of the respective selection criteria. Under applicable law, the legislature has laid down the *Abitur* grade as a central criterion; therefore, it must accommodate its limited significance by including further criteria. 205

When defining the criteria that are decisive for selection, the legislature has broad leeway for assessment and design. […] This matter is closely related to further matters of school policy, such as the set-up of the school system, the number of *Abitur* graduates or the level and significance of grades. Deciding on these matters is thus primarily a political responsibility. 206

[…] In order to ensure an equality-based selection that sufficiently takes into account the various aspects of aptitude, the legislature must ensure that the *Abitur*, on which selection is based in large parts, is complemented by further selection criteria. Under constitutional law, these criteria do not necessarily have to be taken into consideration independent of *Abitur* results. However, they must be aimed at covering different aspects of aptitude and thus be independent of school grades, and they must have sufficient weight for university admissions in an overall view. 207

(3) It is also part of the legislature's latitude to decide how and on what level such further criteria of aptitude are applied in the context of university admissions. Just as the Constitution does not include any statements on a centralised or decentralised system or on the establishment of quotas, it also does not prescribe at which level and in which procedure selection criteria are to be applied. […] 208

[…] To that extent, it is necessary that the legislature require that universities decide on their admissions based not only or even predominantly on the criterion of the *Abitur* grade, but to additionally include at least one criterion that is not based on school grades yet also relevant for aptitude. The legislature may also allow for the exclusive use of the average *Abitur* grade for a proportion of admissions in the university-specific admission procedure. Yet it must then ensure that, for a sufficient proportion of admissions, universities additionally take into consideration at least one further criterion of substantial weight that is not based on school grades. As these criteria are integrated into the university-specific admission procedure in which universities – also drawing upon the development of university-specific profiles managed by them (cf. Art. 5(3) GG) – may choose from different criteria that can be shaped, the legislature may presume that, in an overall view, the aptitude criteria are sufficiently broad. 209

(4) The current legal situation does not meet these requirements. Neither under the Framework Act for Higher Education nor under the 2008 State Treaty are universities obliged to consider another criterion that is not based on school grades in the context 210

of selection as required under constitutional law. As a result, 80% of university admissions within the key quotas could potentially be based exclusively on *Abitur* grades. The provisions supplementing the State Treaty in some *Länder* do not sufficiently ensure that further criteria are used either. […]

[…] 211-214

4. Finally, the legislature provides for admissions based on the waiting period (waiting-period quota) for 20% of the university admissions in the context of the key quotas. To that extent, the provisions also do not satisfy the constitutional requirements. 215

Establishing a waiting-period quota is permissible under constitutional law in itself, but must meet certain requirements to be compatible with Art. 12(1) first sentence in conjunction with Art. 3(1) GG. Such a quota is not required under constitutional law. The current set-up of the waiting-period quota under federal framework law and *Land* laws (cf. § 32(3) first sentence no. 2 HRG; *Länder* provisions on the implementation of Art. 10(1) first sentence no. 2 2008 State Treaty) does not satisfy the constitutional requirements and is thus unconstitutional. In particular, the waiting time is not limited to an appropriate time period. 216

a) […] 217

aa) It is true that elapsed waiting time in itself is not an adequate admission criterion. In particular, it does not directly provide information on the applicants' aptitude. Moreover, the legislature is not constitutionally required to provide for an additional compensation mechanism, in the form of the waiting-period quota, that offsets the high obstacles to admissions within the quota of best *Abitur* graduates and with regard to the substantial weight of the *Abitur* grades in the university-specific admission procedures […]. In fact, the legislature could also dispense with admissions based on waiting period completely. Under constitutional law, not every applicant who has obtained the *Abitur* must ultimately be able to realise the entitlement to admission to the study programme of their choice (see I 1 c above). In the context of the selection of applicants for admission, the entitlement to participate afforded by fundamental rights only requires the mandatory consideration of aptitude for studies and – as far as predictable – for the profession. The selection criteria must be suitable for assessing aptitude as comprehensively as possible. 218

bb) Still, in the context of its latitude, the legislature is authorised to provide for a waiting-period quota for admissions in order to mitigate the shortcomings of the aptitude criteria used in the context of the other key quotas. The waiting-period quota may provide persons with a chance of admission who might have just failed to be admitted by a slight margin in the context of the other quotas, but who are equally well-suited for medical studies and the profession. To a certain extent, drawing upon waiting time is adequate because the willingness to wait reflects a high motivation for the desired study programme. 219

b) However, admitting part of the applicants for medical studies based on the waiting-period quota is only compatible with Art. 12(1) first sentence in conjunction with Art. 3(1) GG under certain requirements. The current legal situation does not satisfy these requirements. 220

aa) The legislature may only provide for the waiting-period quota as the decisive criterion for a limited proportion of university admissions. […] The legislature may, however, not raise the waiting-period quota beyond the proportion of 20% of university admissions within the key quotas. 221

bb) So far, the waiting period has been calculated on the basis of the date when the *Abitur* was obtained, which is not objectionable under constitutional law. […] No reasons are apparent that could require a differentiation between applicants who have not applied for university admissions, rather opting for relevant professional training or professional activities, and applicants who have repeatedly applied for university admissions during the waiting period. On the contrary, university admissions law particularly rewards professional experience in the university-specific admission procedure (§ 32(3) first sentence no. 3 second sentence letter d HRG; Art. 10(1) first sentence no. 3 second sentence letter d 2008 State Treaty). 222

cc) However, it proves to be unconstitutional that the legislature has not appropriately limited the duration of the waiting period. […] 223

The waiting-period quota can only fulfil its complementary function if the waiting period is not excessively long, as a very long waiting period is dysfunctional. After the currently long waiting time, students who have been admitted based on the waiting-period quota have a lower success rate in their studies on average and are more likely to drop out of university than other students [for data, see the German original]. […] According to the available evidence, the significantly higher drop-out rate cannot be attributed to the usually lower grades previously obtained at school […]. Waiting too long substantially impairs the chances of academic success and therefore the possibility to actually realise one's choice of profession. At the same time, as the admission spots are scarce and some of them are claimed by applicants in the waiting-period quota, they are not available to applicants with higher prospects of success. 224

If the legislature thus provides that a small part of the applicants be selected based on their waiting time, the Constitution requires that, in light of its negative consequences, the waiting period be limited to an appropriate duration from the outset. It is for the legislature to determine the appropriate duration of the waiting period. Its appropriateness also depends on its detailed set-up, including its link to aptitude-related factors. The oral hearing has shown that a mere waiting period of four years and longer is dysfunctional. 225

[…] 226

dd) Finally, it is not justified that the location preferences are statutorily limited to six in the context of the waiting-period quota, just as it is not justified within the quota of 227

best *Abitur* graduates. Procedural efficiency requirements that could require a limitation of the number of location preferences are not apparent in this case either (on this see 2 b bb above).

In this context, just as regarding the quota of best *Abitur* graduates, only the respective *Land* laws, but not the federal framework law, are objectionable, since the federal framework law does precisely not provide for a limitation of location preferences under § 32(1) second sentence HRG (on this see 2 b cc above). […] 228

In addition, the lower priority of the protection of individual location preferences within the waiting-period quota, too, leads to the result that […] admissions giving higher priority to the location preference rank and lower priority to the waiting period are not compatible with the constitutional requirements of equal participation. To that extent, the provisions are unconstitutional. […] 229

III.

Art. 31 GG and the precedence of the Framework Act for Higher Education as a federal law do mostly not conflict with the provisions in *Land* laws on university admissions to medical studies. 230

1. In principle, the precedence of federal law laid down in the Constitution leads to the result that provisions of *Land* law conflicting with it are void (cf. BVerfGE 26, 116 <135>). […] 231

[…] 232-237

a)

2. […] 238

a) […] 239

b) […] 240

c) […] 241

The broadening of the pre-selection criteria compared to § 32(3) third and fourth sentence HRG for the university-specific admission procedures in the *Land* laws […] are covered by the authorisation of the *Länder* to deviate [from federal law] pursuant to Art. 125b(1) third sentence GG as they are based on new laws enacted after 1 August 2008 or confirmed by law amendments after this date. These deviations thus do not constitute constitutionally relevant conflicts of laws. 242

d) By contrast, the provision of the *Land* Berlin (§ 8a BerlHZG: under-representation of a gender as a differentiating criterion in cases of equal rank) is objectionable, insofar as it concerns the quota of best *Abitur* graduates and the waiting-period quota. 243

§ 32(4) HRG contains a definitive and comprehensive provision with regard to deal- 244

ing with cases of equal rank in the quota of best *Abitur* graduates and in the waiting-period quota. […]

[…] 245

D.

I.

[…] 246-250

II.

With the exception of § 8a BerlHZG, which deviates from the provisions of the Framework Act for Higher Education and is therefore void pursuant to Art. 31 GG, the challenged provisions are merely declared incompatible with the Basic Law. At the same time, their limited further application is ordered and the competent *Land* legislatures are enjoined to enact new provisions. 251

1. Merely declaring an unconstitutional provision incompatible with the Basic Law is regularly necessary if the legislature has different options to remedy the violation of the Constitution. This generally holds true for violations of the principle of equality (cf. BVerfGE 99, 280 <298>; 105, 73 <133>; 107, 27 <57>; 117, 1 <69>; 122, 210 <245>; 126, 400 <431>; 138, 136 <249 para. 286>; established case-law). Not declaring [a law] void (§ 82(1) in conjunction with § 78(1) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG) is also necessary if declaring it void resulted in a situation which was even further from the constitutional order than the unconstitutional provision. This is the case if the disadvantages that result from the law immediately ceasing to have effect outweigh the disadvantages associated with its preliminary continued application (cf. BVerfGE 33, 303 <347 f.>; 61, 319 <356>; 83, 130 <154>; 85, 386 <401>; 87, 153 <177 and 178>; 100, 313 <402>; 128, 282 <321 and 322>; established case-law). 252

2. Accordingly, in the present case it is necessary to only declare incompatibility, since voiding the challenged provisions on university admissions to study programmes subject to restrictions would result in an unregulated situation. That would lead to considerable consequences harming university applicants' interests even more. Moreover, the legislature has leeway to design regarding the decision on how it intends to remedy the current unconstitutional situation. Also in light of the complexity of the university admissions system, the legislature must be granted an appropriate transitional period until new provisions have to be enacted (cf. in this respect BVerfGE 43, 291 <321>). To this extent, the Senate deems it necessary that the provisions that are incompatible with the Basic Law continue to apply until new provisions have been enacted. It considers a transitional period until 31 December 2019 appropriate. By that date at the latest, the *Länder* are required to enact new provisions that remedy the constitutional concerns, if and to the extent that the Federation has not made use of its concurrent power to legislate (cf. Art. 72(3) first sentence no. 6 GG). 253

Kirchhof Eichberger Schluckebier

Masing Paulus Baer

Britz Ott

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