

Headnotes

to the Judgment of the Second Senate of 27 February 2018

– 2 BvE 1/16 –

1. Not only during election campaigns does the principle of equal opportunities of political parties require that the principle of state neutrality be observed.
2. The negative assessment of a political event by state organs that could have a deterrent effect and thereby influence the behaviour of potential participants in the event interferes with the right of the party concerned to equal opportunities under Art. 21(1) first sentence GG.
3. The Federal Government's authorisation to explain its measures and future projects includes the right to deal with critical remarks thereto in an objective way. There is no "right to counter-attack" that would allow state organs to react to unobjective and defamatory attacks in kind.



IN THE NAME OF THE PEOPLE

**In the proceedings
on
the application to declare**

that by publishing press release no. 151/2015 “Red Card for the AfD” on the website of the Federal Ministry of Education and Research, the respondent violated the applicant’s rights to equal participation in the political competition and to freedom of assembly under Art. 21(1) first sentence of the Basic Law (*Grundgesetz – GG*),

Applicant: Alternative for Germany (*Alternative für Deutschland – AfD*),
represented by the chairpersons,
Prof. Dr. Jörg Meuthen and Dr. Alexander Gauland,
Schillstraße 9, 10785 Berlin,

– authorised representative: Rechtsanwalt Marc Vallendar,
Uhlandstraße 12, 10623 Berlin –

Respondent: Federal Minister of Education and Research,
Prof. Dr. Johanna Wanka,
Kapelle-Ufer 1, 10117 Berlin,

– authorised representative: Prof. Dr. Joachim Wieland, LL.M.,
Gregor-Mendel-Straße 13, 53115 Bonn –

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Voßkuhle,

Huber,
Hermanns,
Müller,
Kessal-Wulf,
König,
Maidowski,
Langenfeld

held on the basis of the oral hearing of 24 May 2017:

Judgment:

- 1. By publishing press release no. 151/2015 of 4 November 2015 on the website of the Federal Ministry of Education and Research, the respondent violated the applicant's right to equal opportunities of political parties under Art. 21(1) first sentence of the Basic Law.**
- 2. [...]**

R e a s o n s :

A.

The applicant claims that the content of a press release published on the website of the Federal Ministry of Education and Research violates its rights under Art. 21(1) first sentence GG to equal opportunities in the competition of political parties and to freedom of assembly. 1

I.

[Excerpt from Press Release No. 10/2018 of 27 February 2018]

The applicant, the party "Alternative for Germany", was the organiser of the assembly "Red Card for Merkel – Asylum Needs Limits!" registered to take place in Berlin on 7 November 2015. With reference to this assembly, the respondent, then Federal Minister of Education and Research, published a press release on the website of her ministry on 4 November 2015. In this press release, she commented on the planned demonstration as follows: "The red card should be shown to the AfD and not to the Federal Chancellor. Björn Höcke and other spokespersons of the party foster the radicalisation of society. Right-wing extremists who openly incite hatred and violence, such as Mr Bachmann, the Head of Pegida (*Patriotische Europäer gegen die Islamisierung des Abendlandes*, Patriotic Europeans against the Islamisation of the Occident), thus receive intolerable support."

[End of excerpt]

[...].	2-4
II.	
Upon the applicant's application, the Senate, due to the particular urgency of the case pursuant to § 32(7) first sentence of the Federal Constitutional Court Act (<i>Bundesverfassungsgerichtsgesetz</i> – BVerfGG), issued a preliminary injunction on 7 November 2015 (Decisions of the Federal Constitutional Court, <i>Entscheidungen des Bundesverfassungsgerichts</i> – BVerfGE 140, 225) through three of its Justices. Thereby, the respondent was obliged to temporarily remove the press release from the website of the Federal Ministry of Education and Research. The respondent complied with the obligation.	5
III.	
1. In the principal proceedings, the applicant now seeks a declaration that the publication of press release no. 151/2015 violated its rights under Art. 21(1) first sentence GG to equal participation in the political competition and to freedom of assembly.	6
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I.	
1. The applicant is a political party that takes part in <i>Bundestag</i> and <i>Landtag</i> elections on a regular basis. Thus, it is legally able to be a party to <i>Organstreit</i> proceedings to the extent that it claims a violation of its right to equal participation in political competition, thereby invoking its particular status under constitutional law described in Art. 21 GG (cf. BVerfGE 4, 27 <30 and 31>; 11, 239 <241 and 242>; 14, 121 <129>; 20, 18 <22 and 23>; 24, 260 <263>; 24, 300 <329>; 44, 125 <136 and 137>; 60, 53 <61>; 73, 40 <65>; established case-law).	27

2. The respondent's legal ability to be party to legal proceedings follows from Art. 93(1) no. 1 GG in conjunction with § 63 BVerfGG. Federal ministers, as parts of the Federal Government – a supreme state organ –, are vested with rights of their own pursuant to the Basic Law (Art. 65 second sentence GG) and the Federal Government's rules of procedure (§§ 9 to 12, 14a of the Rules of Procedure of the Federal Government, *Geschäftsordnung der Bundesregierung* – GOBReg). Therefore, they are "other parties" within the meaning of Art. 93(1) no. 1 GG (cf. BVerfGE 45, 1 <28>; 90, 286 <338>; 138, 102 <107 para. 22>). 28

The fact that pursuant to Art. 69(2) GG, the respondent's tenure of office as a federal minister ended when the 19th German *Bundestag* convened on 24 October 2017 does not lead to the result that the respondent is unable to be a party to the *Organstreit* proceedings. For the purposes of determining the legal ability to be a party to *Organstreit* proceedings, the decisive factor is generally the party's status the moment constitutional proceedings are initiated (cf. BVerfGE 4, 144 <152>; 102, 224 <231>; 108, 251 <270 and 271>; 136, 277 <299 and 300 para. 60>; 139, 194 <220 para. 96>; 140, 115 <138 para. 55>; Federal Constitutional Court, *Bundesverfassungsgericht* – BVerfG, Judgment of the Second Senate of 7 November 2017 – 2 BvE 2/11, para. 162). 29

II.

The applicant has standing to assert a possible violation of rights (*Antragsbefugnis*) because it cannot be ruled out from the outset that the respondent exceeded the boundaries set by constitutional law to the right of members of the Federal Government to make statements through the press release of 4 November 2015, which is in dispute, and that thereby the applicant's rights under Art. 21(1) first sentence GG to equal participation in the formation of the political will were violated. 30

Insofar as the applicant claims a violation of its right to freedom of assembly (Art. 8 GG) in this context, it cannot directly challenge such violation in *Organstreit* proceedings. In such proceedings, political parties can only assert rights resulting from their particular status under constitutional law. Therefore, the alleged violation of a fundamental right by another constitutional organ can be relevant in *Organstreit* proceedings only to the extent that the party thereby challenges a special treatment that violates the principles of freedom from interference by the state and of equal opportunities (cf. BVerfGE 84, 290 <299>). 31

The applicant has set forth this possible violation: The parties' mandate under constitutional law to participate in the formation of the political will is set out in Art. 21(1) first sentence GG and also covers the protection of communication activities that are typical of political parties. Within the boundaries set by law, parties are free to choose the media they want to use when fulfilling their mandate to participate in the formation of the political will (cf. BVerfGE 121, 30 <57>). Accordingly, Art. 21(1) first sentence GG protects the parties' right to organise an assembly in order to present their political aims, to advertise them and draw attention to them in public discourse. On this ba- 32

sis, it is not ruled out from the outset that the respondent, through her press release of 4 November 2015, influenced the applicant's right to communication activities in a way that violates its right to equal opportunities under Art. 21(1) first sentence GG.

III.

The party has a recognised legal interest in bringing proceedings as is also required in *Organstreit* proceedings (cf. BVerfGE 62, 1 <33>; 67, 100 <127>; 68, 1 <77>; 119, 302 <307 and 308>; 124, 78 <113>; 140, 115 <146 para. 80>; BVerfG, Judgment of the Second Senate of 7 November 2017 – 2 BvE 2/11, para. 178). The recognised legal interest is not precluded by the preliminary injunction issued on 7 November 2015 and the fact that the press release in dispute was thereupon removed from the website of the Ministry [...]. The recognised legal interest is also not precluded by the fact that the demonstration organised by the applicant to which the press release had referred has meanwhile taken place [...] or that the respondent's tenure of office as a federal minister has ended pursuant to Art. 69(2) GG.

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IV.

[...]

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D.

The application is well-founded. The publication of press release no. 151/2015 on the website of the Federal Ministry of Education and Research violates the applicant's right to equal opportunities to participate in political competition under Art. 21(1) first sentence GG.

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I.

The principle of equal opportunities following from Art. 21(1) first sentence GG covers the right of political parties to participate in the formation of the political will of the people through demonstrations and assemblies (1.) It is generally incompatible with this principle if state organs one-sidedly influence the announcement or organisation of political demonstrations (2.) As far as the Federal Government exercises its power to inform and to maintain public relations, it must observe the principle of neutrality of state organs (3.) This does not rule out countering criticism levelled at its policies; in doing so, however, it is restricted to informing about its work in an objective way and to dealing with objections raised thereto (4.) The same applies if an individual member of the Federal Government takes part in such a debate by using his or her governmental authority (5.).

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1. a) In the free democracy under the Basic Law, all state authority is derived from the people, who exercise it in elections and other votes and through specific legislative, executive and judicial organs (Art. 20(1) and (2) GG). Only if they are free can elections and other votes provide democratic legitimation within the meaning of Art. 20(2) GG. This not only requires that the act of voting be free of coercion and undue pressure, but also that voters can reach and pass their judgment in a free and open opinion-forming process (cf. BVerfGE 20, 56 <97>; 44, 125 <139>; 138, 102 <109 para. 27>). 40

b) In modern parliamentary democracy, political parties are of vital importance in this process (cf. BVerfGE 44, 125 <145>; 138, 102 <110 para. 29>). Art. 21 GG expresses this by acknowledging parties as institutions that are necessary under constitutional law for the formation of the political will of the people, and by elevating them to the rank of constitutional institutions. [...]. They have a specific function as mediators between state and society. They are units of political action that democracy needs for organising voters in groups capable of acting politically, and thereby enabling them to effectively influence state matters (cf. BVerfGE 11, 266 <273>; 69, 92 <110>; 73, 40 <85>; 107, 339 <358 and 359>; 121, 30 <53 and 54>). 41

c) In order to ensure an open formation of the political will as required under constitutional law, it is indispensable that parties participate in political competition as equally as possible. [...]. Not only does Art. 21(1) GG guarantee the freedom to establish political parties and their opportunity to participate in the formation of the political will, but also that such participation is based on equal rights and equal opportunities (cf. BVerfGE 44, 125 <139>; 138, 102 <110 para. 29>). 42

d) Within the scope of the freedom of action as guaranteed under Art. 21(1) GG, it is generally left to the parties themselves to decide, in compliance with the statutory requirements, which media or other communication channels they use when fulfilling the constitutional mandate assigned to them (cf. BVerfGE 121, 30 <57>). Therefore, the principle of equal opportunities also includes the parties' right to participate in political competition by organising assemblies. In a free democracy, demonstrations are essential means for expressing opinions, which can have a considerable impact on the formation of the political will of the people. They are an important medium for political competition for the parties – particularly if they are in opposition. 43

2. Equal opportunities to participate in the formation of the political will of the people require that state organs be neutral in the political competition of parties. Accordingly, it interferes with the parties' entitlement to equal opportunities under Art. 21(1) first sentence GG if state organs take a one-sided stand when reacting to the announcement or organisation of political demonstrations. 44

a) The Senate has already decided that state interference with election campaigns to the benefit or detriment of a political party or candidates in the election contradicts the parties' status resulting from Art. 21(1) GG. State organs, as such, must serve everyone and be neutral during election campaigns (BVerfGE 44, 125 <144>). Tak- 45

ing a one-sided stand during an election campaign violates the neutrality of the state vis-à-vis political parties and the integrity of the formation of the political will of the people in elections and votes (cf. BVerfGE 44, 125 <144>; 136, 323 <333 para. 28>; 138, 102 <110 f. para. 31>).

b) Not only during election campaigns does the principle of equal opportunities of political parties require that the principle of state neutrality be observed (cf. BVerfGE 140, 225 <227 para. 9>) because the formation of political opinions is an ongoing process that is not restricted to election campaigns. [...]. While political competition between parties intensifies during election campaigns, it is, however, not limited to them, and affects the electoral decisions of voters. There is no need to decide whether the principle of neutrality results in stricter requirements for the behaviour of state organs during election campaigns [...]. At any rate, the requirement of state neutrality not only applies to the election process and the preparation of elections (cf. BVerfGE 14, 121 <132 and 133>; 44, 125 <146>; 104, 14 <19 and 20>; 138, 102 <110 para. 30>), but to all activities of parties that are aimed at fulfilling their constitutional mandate under Art. 21(1) first sentence 1 GG (with regard to party donations, cf. BVerfGE 8, 51 <64 and 65>). Art. 21(1) first sentence GG protects the parties' right to equal opportunities in the entire political competition (cf. BVerfGE 140, 225 <227 para. 9> [...]).

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c) It is generally not compatible with this if state organs use the announcement or organisation of a political demonstration as an opportunity to take a one-sided stand on the demonstration or on the party organising it, thereby violating the principle of neutrality.

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aa) This applies if actions of state organs are intended to influence the organisation of political demonstrations or the behaviour of potential participants. If a party organises a political demonstration, it fulfils its constitutional mandate under Art. 21(1) GG. With respect to their obligation to be neutral, state organs must accept this. It is not for them to prompt citizens to participate, or not to participate, in demonstrations announced by political parties (cf. Constitutional Court of Thuringia, *Thüringer Verfassungsgerichtshof* – Thüringer VerFGH, Judgment of 3 December 2014 – VerFGH 2/14 –, juris, para. 72). In this context, it not only amounts to an interference with the parties' right to equal participation in political competition if state organs directly call for the boycott of a specific political demonstration (cf. Thüringer VerFGH, Judgment of 8 July 2016 – VerFGH 38/15 –, juris, para. 43), or if they threaten with legal or factual sanctions for participating. As any negative assessment of a political event that could have a deterrent effect and thereby influences the behaviour of potential participants in the event (cf. BVerfGE 140, 225 <228 para. 11>) adversely affects the parties' equal participation in the formation of political will, already such behaviour interferes with the right of the party concerned to equal opportunities under Art. 21(1) first sentence GG.

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bb) Moreover, it also constitutes an interference with this right if state organs, on oc-

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casation of a political demonstration, pass negative or positive value judgments on the party organising it. Also in this respect, the principle of neutrality requires that state organs refrain from openly or covertly advertising to the benefit or detriment of individual parties that compete with each other (cf. BVerfGE 44, 125 <149>).

3. If the Federal Government exercises its power to inform and to maintain public relations, it is also not exempt from its obligation to observe the principle of neutrality. 50

a) The Federal Government is the supreme organ of the executive (cf. BVerfGE 9, 268 <282>; 138, 102 <113 para. 39>). It has the responsibility of governance, which it has to fulfil in concert with the other competent constitutional organs (cf. BVerfGE 11, 77 <85>; 26, 338 <395 and 396>; 105, 252 <270>; 105, 279 <301>). This includes the power to inform and to maintain public relations (cf. BVerfGE 138, 102 <114 para. 40>) as an integral part – and thus irrespective of – separate statutory authorisation (cf. in this respect BVerfGE 105, 252 <270>; 105, 279 <304 and 305>). [...]. This power comprises the presentation and explanation of government policies regarding measures taken and future projects relevant to current or foreseeable problems. It also includes adequate, objective information about issues immediately concerning citizens and about important matters, even if they are beyond or far prior to the government's own policy-shaping activities (cf. BVerfGE 20, 56 <100>; 44, 125 <147>; 63, 230 <243>; 105, 252 <269>; 105, 279 <302>). In this context, the Federal Government may also give recommendations and warnings (cf. BVerfGE 105, 252 <271>; 105, 279 <306 and 307>). 51

b) It must, however, be considered that the Federal Government's authority, and the state resources at its disposal, put it in a position where it can strongly influence the formation of the political will of the people. This carries the risk that political competition of the parties is considerably distorted and the formation of the political will as a process taking its way from the people to the state organs is reversed (cf. BVerfGE 138, 102 <115 para. 45>). 52

Therefore, it must be accepted as part of the political process in a free democracy, as envisaged under the Basic Law, that government actions have a considerable impact on election prospects of competing political parties (cf. BVerfGE 44, 125 <140>; 138, 102 <114 and 115 para. 44>). This must, however, be differentiated from targeted interference with the competition of political parties by the Federal Government. Even if it makes use of its power to inform and to maintain public relations, the Constitution prohibits the Federal Government from identifying with individual parties or using state means and opportunities to their benefit or detriment (cf. BVerfGE 44, 125 <141 et seq.>; 138, 102 <115 para. 45>). 53

Accordingly, the permissibility of the Federal Government's public relations activities ends where advertising for individual competing political parties begins [...]. 54

4. Against that background, the Federal Government is entitled to refute attacks against its policies publicly (a); it must, however, observe the required objectivity 55

when presenting government actions and responding to criticism of such actions (b).

a) The Federal Government's authorisation to explain its measures and future projects includes the right to deal with critical remarks thereto in an objective way. In particular, the Federal Government does not have to tolerate attacks on its work that are based on incorrect statements of facts or voiced in an unobjective and defamatory manner [...]. Therefore, the Federal Government may react to objections raised against its policies, rectify incorrect statements of facts, and refute unobjective attacks. 56

This also applies inasmuch as political parties attack government policies. [...]. Art. 21(1) first sentence GG does not protect political parties from the Federal Government's dealing with criticism raised against its actions in an objective way (cf. Thüringer VerfGH, Judgment of 8 June 2016 – VerfGH 25/15 –, juris, para. 101). 57

b) Also in these cases, however, the Federal Government is obliged under the principle of neutrality to refrain from statements in which it takes a one-sided stand to the benefit or detriment of individual political parties. [...]. 58

Like all state action, the Federal Government's information and public relations activities are subject to the requirement of objectivity (cf. BVerfGE 57, 1 <8>; 105, 252 <272>). This does not exclude the clear and unequivocal rejection of incorrect representations of facts or of discriminatory value judgments. In contrast, the Federal Government must refrain from making statements which exceed these limits and which are not, in substance, relevant to the criticism of government actions, and which are distorting or disparaging (cf. BVerfGE 44, 125 <149 and 150>; 105, 252 <272 and 273>). Even if they are only made in reaction to criticism, such unobjective, discriminatory or defamatory statements about parties constitute an impermissible one-sided stand in political competition, which violates the principle of equal opportunities under Art. 21(1) first sentence GG (cf. Constitutional Court of the Saarland, *Verfassungsgerichtshof des Saarlandes* – VerfGH des Saarlandes, Judgment of 8 July 2014 – Lv 5/14 –, juris, para. 36; Thüringer VerfGH, Judgment of 8 June 2016 – VerfGH 25/15 –, juris, para. 101). 59

There is no "right to counter-attack" that would allow state organs to react to unobjective and defamatory attacks in kind. The respondent is mistaken in assuming that statements made in response to verbal attacks are covered by the principle of neutrality inasmuch and as far as they remain within the frame set by the critical statement. This assumption could have the consequence that the Federal Government would itself be entitled to disseminate incorrect information if its policies were attacked on the basis of incorrect statements. This is precluded by the fact that state organs are obliged to correctly represent facts they refer to (cf. BVerfGE 57, 1 <8>). It is argued that society has developed in such a way that only what is said "loudly" is heard, and that it is unacceptable that a political party claims the right to participate in the public debate in a discrediting manner while at the same time calling for restraint by state organs with regard to their language (cf. VerfGH des Saarlandes, Judgment 60

of 8 July 2014 – Lv 5/14 –, juris, paras. 42, 45). This, however, does not alter the fact that the principle of equal opportunities under Art. 21(1) first sentence GG generally precludes the disparaging assessment of individual political parties by state organs. In the context of its public relations activities, the Federal Government is limited to informing about government actions, to dealing with the substance of objections raised thereto, and to refuting defamatory attacks. On the basis of the principles of neutrality and objectivity, the Federal Government may not exceed these limits by influencing political competition and the parties participating in it in an evaluative manner – even if its statements are mere reactions.

5. a) What applies to the Federal Government in its entirety regarding its right to make statements must also apply to its individual members. Pursuant to Art. 20(3) GG, members of the Federal Government must observe the constitutionally guaranteed principle of equal opportunities of parties in the same way as the Federal Government when exercising their ministerial functions. 61

b) This, however, does not exclude government members from participating in the political debate outside their official functions. Merely assuming government office does not lead to the result that the office holder can no longer be involved in party-political activities because this would place parties supporting the government at an unjustified disadvantage (cf. BVerfGE 44, 125 <141>; 63, 230 <243>; 138, 102 <117 paras. 50 et seq.>; Constitutional Court of Rhineland-Palatinate, *Verfassungsgerichtshof Rheinland-Pfalz* – VerfGH Rheinland-Pfalz, Order of 21 May 2014 – VGH A 39/14 –, juris, para. 22). It must, however, be ensured that means and opportunities connected with the government function that are not available to the political competitors will not be used. 62

c) It is not contrary to the principle of neutrality that holders of government office are regularly perceived in their dual role as federal ministers and party politicians [...]. [The] fact that it is not possible to strictly separate the spheres of “federal minister”, “party politician” and “politically active private individual” [does] not [lead to the result that] the principle of neutrality is inapplicable in the ministerial field of activity (cf. BVerfGE 138, 102 <117 and 118 paras. 53 and 54>). 63

Rather, it can be assumed that already carrying out the responsibility of governance, either by the Federal Government in its entirety or by individual ministers, has an influence on the formation of the political will of the people in various ways (cf. *supra* D. I. 3. b) paras. 52 et seq.). Even though this must be accepted as a consequence of the present competitive situation in the political process (cf. BVerfGE 44, 125 <140>; 138, 102 <115 para. 44>), any further influence on the competitive situation by state action must be avoided (cf. BVerfGE 73, 40 <89>; 78, 350 <358>; 85, 264 <287>). Therefore, equal opportunities in political competition are adversely affected if government members, when participating in political debates, use opportunities and means that are open to them due to their government office and that are not available to their political competitors (cf. BVerfGE 138, 102 <118 para. 55>). Accordingly, a 64

statement by which a federal minister takes sides in the political debate violates the principle of equal opportunities of parties and the integrity of the formation of the political will as a process taking its way from the people to the organs of the state, if it is made either using resources connected with ministerial functions or recognisably referring to the government function in order to lend it special credibility or weight derived from the authority of the office (cf. BVerfGE 138, 102 <118 para. 55>). The members of the Federal Government are bound by the principle of neutrality in their official field of activity; this corresponds to an understanding of the office they hold that is expressed in the official oath pursuant to Art. 64(2), Art. 56 GG, according to which the ministerial function must be exercised impartially vis-à-vis everyone and for the well-being of the (entire) German people. However, it is precluded for constitutional reasons that the authority of government functions or of the resources connected with them are specifically used for taking sides in political competition.

d) In this respect, it cannot be argued that applying the principle of neutrality to statements made in an official government capacity makes it more difficult for members of the Federal Government to exercise their responsibility towards Parliament and results in a “depoliticisation” of government actions [...]. Such a line of argument fails to take into consideration that the principle of neutrality does not prevent the Federal Government and its members from informing about political projects and measures and, in compliance with the requirement of objectivity, from refuting attacks and objections (cf. *supra* D. I. 4. paras. 55 et seq.). [...]. The principle of neutrality merely prevents members of the Federal Government from taking a one-sided stand when exercising government functions, or from using the specific means and opportunities of the ministerial functions when participating in the general political competition.

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e) It is erroneous to assume that a difference between ministerial statements which are subject to the principle of neutrality and those which are not appears artificial and remote from everyday life and cannot be made with a sufficient degree of legal certainty either [...]. Whether a government member made a statement in exercise of his or her function as a minister must be determined with regard to the circumstances of each individual case (cf. BVerfGE 138, 102 <118 para. 56>; VerfGH Rheinland-Pfalz, Order of 21 May 2014 – VGH A 39/14 –, juris, para. 25). The Senate has developed criteria to that end that facilitate differentiating the use of the authority of the government function, and of the resources connected with it, on the one hand from mere participation in the political debate on the other hand (cf. BVerfGE 138, 102 <118 et seq. paras. 57 et seq.>). In doing so, the Senate has clarified in particular that government authority is relied on if office holders make official statements in the form of official publications, press releases or on the official website of their portfolio, or if state symbols and national emblems are used (cf. BVerfGE 138, 102 <118 and 119 para. 57> [...]). [...].

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II.

According to these standards, the respondent violated the applicant’s right to equal

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opportunities under Art. 21(1) first sentence GG through her press release no. 151/2015 of 4 November 2015. By publishing the press release on the website of her ministry, she attributed the authority of her ministerial functions to it (1.). The content of the press release disrespects the applicant's right to equal participation in political competition (2.). This interference is not justified by the respondent's right to present and defend government actions publicly (3).

1. a) When issuing press release no. 151/2015 of 4 November 2015, the respondent exercised her government functions. She published the statement on the website of her ministry, using the ministry's official coat of arms, thereby using resources available to her because of her ministerial functions. By publishing the press release on the official website of her ministry, and by using the official coat of arms, she drew on the authority of this function in a specific manner.

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b) The fact that the respondent did not explicitly refer to her function as a minister in the text of the press release, but made the statement under her real name, does not contradict her acting in an official capacity. The website of a federal ministry serves to communicate messages concerning matters within its field of competence. Therefore, the press release of 4 November 2015 gives the objective appearance of being a statement by the respondent in her capacity as Federal Minister of Education and Research. The fact that the [respondent's] official title is not mentioned is not sufficient to demonstrate that the respondent acted in a non-official capacity. Moreover, the respondent herself admits that she acted in an official capacity when publishing the press release in dispute when referring to the fact that she, as a member of the Federal Government exercising her functions as a minister, refuted an attack to government politics using her official resources.

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2. By disseminating the press release on the website of her ministry, the respondent disrespected the principle of neutrality of state organs in political competition, thereby violating the applicant's right under Art. 21(1) first sentence GG. The press release contains one-sided, negative assessments of the applicant as well as an attempt to influence the behaviour of potential participants in the demonstration planned for 7 November 2015.

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a) In her press release, the respondent calls for showing the applicant the "red card". In order to support that, she puts forward that spokespersons of the applicant "foster the radicalisation of society". Moreover, the applicant is explicitly blamed for "right-wing extremists who openly incite hatred and violence, such as Mr Bachmann, the Head of Pegida, [receiving] intolerable support" through the behaviour of Björn Höcke and other spokespersons of the applicant. These statements include derogatory characterisations of the applicant as a party that fosters right-wing extremism and the radicalisation of society. This characterisation can undermine the party's position in the political debate. By using the "red card" metaphor, the respondent clearly urges people to distance themselves from the applicant and thereby one-sidedly influences political competition to the applicant's detriment.

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b) Apart from this, the press release aims at influencing the behaviour of potential participants in the demonstration planned by the applicant for 7 November 2015. 72

aa) It does not contain an explicit call for the boycott of the demonstration announced by the applicant. Potential participants in the demonstration are neither threatened with sanctions, nor is their participation factually obstructed or made impossible in any other way. 73

bb) Contrary to the respondent's view, the press release does not refrain from assessing the participation in this demonstration at all. Rather, the planned demonstration is explicitly identified as the reason for issuing the press release. At the same time, the press release recognisably expresses the respondent's opinion that participation in this demonstration would strengthen a party whose spokespersons foster the radicalisation of society and support right-wing extremists. Against that background, the claim to show such a party the "red card" is at least an indirect prompt to stay away from the planned demonstration. In doing so, she disregards the principle of the neutrality of state organs in political competition. 74

3. The interference with the applicant's right to equal opportunities resulting from the press release of 4 November 2015 is not justified by the respondent's right to publicly explain government actions and to refute attacks thereon. 75

a) [...]. 76

As a general rule, the power of state organs to maintain public relations requires them to observe the existing order of competences (cf. BVerfGE 44, 125 <149>; 105, 252 <270>). The Federal Government's competences are assigned according to Art. 65 GG. Thus, the respondent cannot invoke Art. 65(2) GG in the case at hand because the press release in dispute lacks any reference to education and research policy, the area of competence assigned to her. [...]. 77

b) Irrespective of this, a justification of the respondent's interference with the applicant's right to equal participation in political competition is at any rate precluded by the fact that press release no. 151/2015 exceeds the boundaries of the government's official public relations activities, which result from the principles of neutrality and objectivity. The press release neither informs about government actions, nor refutes criticism thereof in an objective way. 78

Indeed, the press release refers to the demonstration that was announced by the applicant for 7 November 2015 and directed against the Federal Government's refugee policies. However, the press release does not contain any explanatory information on the actions of the Federal Government with regard to its refugee policies or another area of policy. Moreover, the press release lacks any objective appraisal of the objections raised against actions taken by the Federal Government or by the Federal Chancellor. Instead, it merely criticises that the applicant's spokespersons foster the radicalisation of society and providing intolerable support to right-wing extremists. Moreover, it contains the respondent's call to show the applicant the "red card", and 79

thus at least a prompt to stay away from the demonstration on 7 November 2015. Conversely, however, it does not contain any information on political measures and projects of the Federal Government or a rejection of objections raised thereto. Instead, it attacks the applicant in political competition by taking sides on the occasion of the announcement of a political demonstration. Thus, the respondent exceeds the boundaries of the Federal Government's permissible public relations work and of that of its members.

c) Nothing different may be inferred from the respondent's argument that publishing the press release on the website of the ministry had been her only possibility of taking part in the political debate because she had not been a member of the *Bundestag*. This argument completely fails to recognise the importance and the function of the principle of neutrality resulting from the principle of equal opportunities of parties. The fact that the respondent was not a member of the *Bundestag* does not justify impairing equal opportunities of parties in political competition by using the resources of the government function exercised by her. The respondent is free to use the means and opportunities that parties have at their disposal in the political debate. However, state resources may not be used because this would open the door to distortions of the present competitive situation that would be incompatible with Art. 21(1) first sentence GG.

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E.

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Voßkuhle

Huber

Hermanns

Müller

Kessal-Wulf

König

Maidowski

Langenfeld

**Bundesverfassungsgericht, Urteil des Zweiten Senats vom 27. Februar 2018 -
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