Headnotes

to the Order of the First Senate of 11 April 2018

– 1 BvR 3080/09 –

1. **Even in conjunction with the doctrine of the indirect horizontal effects of fundamental rights (*mittelbare Drittwirkung*), Article 3(1) of the Basic Law does not give rise to an objective constitutional principle according to which legal relationships between private actors would be generally subject to equality guarantees. In principle, all persons have the freedom to choose – according to their own preferences – when, with whom and under what circumstances they want to enter into contracts.**

2. **Under specific circumstances, however, equality requirements relating to relationships between private actors may derive from Article 3(1) of the Basic Law. Article 3(1) of the Basic Law does have horizontal effects, *inter alia*, where private actors exercise their right to enforce house rules (*Hausrecht*) under private law to exclude individual persons from events organised, of the private actors' own volition, for large audiences to the effect that admission is granted without distinguishing between individual persons, and where such exclusion has a considerable impact on the ability of the persons concerned to participate in social life. Event organisers may not use their discretionary powers to exclude specific persons from such events without factual reasons.**

3. **Imposing a stadium ban is not contingent upon proving that the person in question has committed a criminal offence; rather, it is sufficient to demonstrate that factual indications give rise to concerns that the affected persons will cause future disturbances. Before a ban is imposed, the persons concerned must, in principle, be heard; they may request that reasons be given for the stadium ban, to allow for legal recourse.**

FEDERAL CONSTITUTIONAL COURT

– 1 BvR 3080/09 –

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaint

of Mr M(...),

- authorised representatives: Anwaltskanzlei Zuck,
Vaihinger Markt 3, 70563 Stuttgart –

against a) the Judgment of the Federal Court of Justice (*Bundesgerichtshof*) of 30 October 2009 – V ZR 253/08 –,

b) the Judgment of the Duisburg Regional Court (*Landgericht*) of 20 November 2008 – 12 S 42/08 –,

c) the Judgment of the Duisburg Local Court (*Amtsgericht*) of 13 March 2008 – 73 C 1565/07 –

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Kirchhof,

Eichberger,

Masing,

Paulus,

Baer,

Britz,

Ott,

Christ

held on 11 April 2018:

The constitutional complaint is rejected.

R e a s o n s :

A.

The constitutional complaint concerns a nationwide stadium ban imposed on the complainant by a football club [the defendant in the initial proceedings]. 1

I.

[Excerpt from press release no.29/2018 of 27 April 2018]

In 2006, the complainant, a then sixteen-year-old fan of the football club FC Bayern Munich, attended a football match against MSV Duisburg in the opposing team's stadium. After the end of the match, verbal and physical altercations involving a group of FC Bayern Munich fans, among them the complainant, and fans of MSV Duisburg resulted in personal injury and damage to property. Subsequently, approximately 50 persons, including the complainant, were placed in police custody for the purposes of establishing their identities. The public prosecution office opened investigation proceedings on suspicion of rioting charges against the complainant. Following this, MSV Duisburg imposed a ban on the complainant at the suggestion of the local chief of police, prohibiting him from entering any stadium in Germany until June 2008. In this respect, MSV Duisburg acted as agent on behalf of the German Football Association (*Deutscher Fußball-Bund e.V.* – DFB), the League Association (*Ligaverband*) as well as all *Bundesliga* football clubs, as the clubs have mandated each other as agents with the authority to impose such stadium bans, to exercise the owner's right to enforce house rules and to enforce bans on entering the grounds of their respective football venues. In imposing the stadium ban, MSV Duisburg invoked its right to enforce house rules and the DFB's "Guidelines on Stadium Bans" in the version valid at the time. The criminal investigation proceedings were discontinued on the grounds that the charges were classified as misdemeanours involving only minor personal guilt pursuant to § 153(1) of the Code of Criminal Procedure (*Strafprozessordnung* – StPO). Nonetheless, MSV Duisburg decided, without having heard the complainant, that the stadium ban be kept in place. FC Bayern Munich subsequently expelled the complainant from the club and cancelled his annual membership pass.

The complainant brought an action requesting that the nationwide stadium ban be lifted. After the initial application filed by the complainant had been rendered moot, the complainant modified his application in the appeal proceedings to an application seeking a declaration that the stadium ban had been unlawful. The initial action and the appeal on points of fact and law, as well as the appeal on points of law before the Federal Court of Justice (*Bundesgerichtshof*), were unsuccessful.

[End of excerpt]

1. […] 2-5

2. […] 6-8

3. […] 9

4. […] 10-11

5. […] 12-18

6. With his constitutional complaint, the complainant claims a violation of his fundamental rights, contending that he was banned from entering stadiums on the basis of a mere suspicion without viable justification or reasons. The complainant argues that in light of the paramount significance of football for social life and the importance attached to it by the general public and society, the stadium ban was not merely in breach of ordinary law but also violated his fundamental rights. In this respect, the complainant invokes Art. 2(1) in conjunction with Art. 20(3) of the Basic Law (*Grundgesetz* – GG) and his general right of personality deriving from Art. 2(1) in conjunction with Art. 1(1) GG. 19

[…] 20-21

II.

The DFB submitted a statement in the constitutional complaint proceedings. The DFB contends that the constitutional complaint was not even inadmissible, but also unfounded. […] 22

[…] 23-24

B.

I.

The constitutional complaint is admissible. 25

1. The complainant has standing to lodge a constitutional complaint. [...] The complainant's submission sufficiently substantiates a possible violation of fundamental rights in accordance with § 23(1) first sentence of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG). 26

[…] 27

2. […] Furthermore, the complainant can demonstrate a recognised legal interest in bringing constitutional complaint proceedings (*Rechtschutzbedürfnis*). The stadium ban initially challenged by the complainant has expired and thus become moot. However, even if a legal action for specific relief is rendered moot, complainants may still assert a legal interest in continuing the proceedings on the grounds of having an interest in obtaining a declaration of unlawfulness (*Feststellungsinteresse*). Such an interest has been recognised in cases where there is a risk of repetition [regarding the 28

alleged violation of rights] (*Wiederholungsgefahr*); where persisting detrimental consequences are yet to be rectified; where a serious interference with fundamental rights results in severe detriment and the direct impact of the challenged act of public authority is limited to such a short period of time that it would hardly be feasible, given the regular course of proceedings, to obtain a timely decision from the Federal Constitutional Court, or where complainants have a demonstrated interest in rehabilitation in terms of restoring their reputation (*Rehabilitierungsinteresse*) (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 81, 138 <140 and 141>; 104, 220 <232 and 233>; 110, 77 <92>).

Based on these standards, [...] the complainant has an interest in obtaining a declaration of unlawfulness. For more than two years, the complainant was barred from attending any matches of the national football team and of teams playing in the national and regional leagues. Furthermore, the Bayern Munich football club cancelled his annual stadium pass and expelled him from the official fan club. He was registered on the DFB list of persons subject to nationwide stadium bans; the football clubs receive regular updates of the list and forward the relevant information to [...] [law enforcement agencies]. These circumstances are still capable of tarnishing the complainant's reputation, even after expiry of the stadium ban. In addition, legal recourse in civil proceedings spanning all three court levels typically exceed the duration of the challenged stadium ban; therefore, it would be virtually impossible to seek a constitutional review of these types of cases if the expiry of the ban were to cancel the general interest in bringing proceedings. 29

II.

The constitutional complaint is unfounded. The challenged decisions do sufficiently take into account the principle that fundamental rights permeate private law (*Ausstrahlungswirkung*). 30

1. The standard of review applicable to the challenged decisions under constitutional law is informed by the doctrine of the indirect horizontal effects of fundamental rights (*mittelbare Drittwirkung der Grundrechte*). 31

a) The challenged decisions concern a legal dispute between private actors relating to the scope of rights of ownership and possession vis-à-vis third parties under private law. According to the established case-law of the Court, fundamental rights may have a bearing on such disputes by way of indirect horizontal effects (cf. BVerfGE 7, 198 <205 and 206>; 42, 143 <148>; 89, 214 <229>; 103, 89 <100>; 137, 273 <313 para. 109>; established case-law). Fundamental rights do not generally create direct obligations between private actors. They do, however, permeate legal relationships under private law; it is thus incumbent upon the regular courts to give effect to fundamental rights in the interpretation of ordinary law, in particular by means of general clauses contained in private law provisions and legal concepts that are not precisely defined in statutory law. These effects are rooted in the decisions on constitutional values (*verfassungsrechtliche Wertentscheidungen*) enshrined in fundamental rights, 32

which permeate private law in terms of “guiding principles” (cf. BVerfGE 73, 261 <269>; 81, 242 <254>; 89, 214 <229>; 112, 332 <352>); accordingly, the case-law of the Federal Constitutional Court has referred to the fundamental rights as an “objective order of constitutional values” (cf. BVerfGE 7, 198 <205 and 206>; 25, 256 <263>; 33, 1 <12>). In this context, the fundamental rights do not serve the purpose of consistently keeping freedom-restricting interferences to a minimum; rather, they are to be developed as fundamental values informing the balancing of the freedoms of equally entitled rights holders. The freedom afforded one right holder must be reconciled with the freedom afforded another. For this purpose, it is necessary to assess conflicting fundamental rights positions in terms of how they interact, and to strike a balance in accordance with the principle of practical concordance (*praktische Konkordanz*), which requires that the fundamental rights of all persons concerned be given effect to the broadest possible extent (cf. BVerfGE 129, 78 <101 and 102>; 134, 204 <223 para. 68>; 142, 74 <101 para. 82>; established case-law).

In this regard, the extent to which fundamental rights indirectly permeate private law depends on the circumstances of the individual case. In order to sufficiently lend effect to the constitutional values enshrined in fundamental rights, it is imperative that a balance be sought between the spheres of freedom of the various rights holders. Decisive factors may include the inevitable consequences resulting from certain situations, the disparity between opposing parties, the importance attached to certain services in society, or the social position of power held by one of the parties (cf. BVerfGE 89, 214 <232 et seq.>; 128, 226 <249 and 250>). 33

b) […] 34

2. The challenged decisions are based on §§ 862, 1004 of the Civil Code (*Bürgerliches Gesetzbuch* – BGB) with regard to determining the scope of the right to enforce house rules under private law on the part of stadium operators vis-à-vis football fans seeking access. In this context, constitutional law requires that the guarantee of private property under Art. 14(1) GG and the protection against arbitrary unequal treatment under Art. 3(1) GG be taken into consideration. 35

a) The defendant in the initial proceedings invokes the right to enforce house rules in its capacity as a stadium operator. This right is protected under the guarantee of private property in Art. 14(1) GG. §§ 862, 1004 BGB [...] and the right to enforce house rules deriving from ownership and possession under private law lend shape to the constitutional guarantee of private property in the area of private law. In this respect, the rights of stadium operators must be interpreted in civil proceedings in a manner that takes into account the content of the freedom of property pursuant to Art. 14(1) GG. 36

b) In the case at hand, the complainant cannot invoke the general freedom of action (*allgemeine Handlungsfreiheit*) guaranteed in Art. 2(1) GG against the right of ownership of the defendant in the initial proceedings. The general freedom of action provides a defensive right vis-à-vis the state that can be invoked against any unjustified 37

prohibitions, especially on the grounds of disproportionality; as such, it is also applicable to bans [imposed by the state] restricting stadium access during football matches. This is a manifestation of the asymmetry of the rule of law, under which citizens are free, in principle, whereas the state is subject to limitations and held accountable when interfering with this freedom (cf. BVerfGE 128, 226 <244 and 245>). However, the constitutional guarantee of the general freedom of action does not encompass a similarly general constitutionally enshrined value which would ensure that in every private law dispute, the unspecified freedom to engage in any kind of self-determined conduct would guide the interpretation of private law, by way of indirect horizontal effects. To this end, the freedom to engage in any conduct one subjectively pleases – in this case to attend a football match –, based on the general freedom of action, cannot generally be invoked to restrict the ownership rights of private actors organising certain events.

In specific situations, however, the protection provided under Art. 2(1) GG may extend into private law relations. This applies, for instance, in certain typical case categories where a particularly heavy burden is imposed, or where one contracting party is placed at a structural disadvantage (cf. BVerfGE 89, 214 <232>). Moreover, in individual cases, Art. 2(1) GG may serve as a catch-all fundamental right (*Auffanggrundrecht*) (cf. BVerfGE 85, 214 <217 et seq.>). The constitutional complaint at hand does not fall within any of these specific categories in which the general freedom of action would have to be indirectly taken into consideration as a decision on values enshrined in the Constitution. [...] The central issue in the current proceedings is that the complainant was treated unequally compared to persons that were granted access to the stadium. [...] 38

c) In the current proceedings, the general requirement of equal treatment under Art. 3(1) GG must be considered opposite the stadium operator’s right of ownership under Art. 14(1) GG. 39

Yet Art. 3(1) GG does not give rise to an objective constitutional principle according to which legal relationships between private actors would be generally subject to equality guarantees. Requirements to that effect cannot be derived from the doctrine of indirect horizontal effects, either. In principle, all persons have the freedom to choose – according to their own preferences – when, with whom and under what circumstances they want to enter into contracts, and how they want to make use of their property in this context. This freedom is further shaped and variously restricted through statutory law and in particular through private law; in this regard, it can also be subject to specific requirements arising under constitutional law. In contrast, no general principle according to which legal relationships between private actors would generally be subject to equality guarantees follows from Article 3(1) of the Basic Law even when read in conjunction with the doctrine of indirect horizontal effects. It is not within the scope of the current proceedings to decide whether stricter standards could be derived from specific equality rights such as Art. 3(2) and (3) GG. 40

However, under specific circumstances, equality requirements relating to relationships between private actors may arise from Art. 3(1) GG. The nationwide stadium ban in dispute constitutes such a circumstance. The indirect horizontal effect of the requirement of equal treatment comes into play here because the stadium ban imposes – based on the right to enforce house rules – a one-sided exclusion from events, which the organisers, of their own volition, had opened up to a large audience without distinguishing between individual persons, and this ban has a considerable impact on the ability of the persons concerned to participate in social life. By undertaking to organise such events, private actors also take on a special legal responsibility under constitutional law. They may not use their discretionary powers, which here result from the right to enforce house rules – in other cases they might potentially arise from a monopoly or a position of structural advantage –, to exclude specific persons from such events without factual reasons. In this case, the constitutional recognition of ownership as an absolute right *in rem* and the resulting one-sided discretionary powers of the owner to enforce house rules must be balanced – in light of the principle that property entails a social responsibility for the public good (*Sozialbindung des Eigentums*) (Art. 14(2) GG) – against the principle, which is binding upon the regular courts, that the guarantee of equal treatment permeates private law. 41

Factually, this also lends effect to the right to take part in cultural life pursuant to Art. 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (entry into force on 3 January 1976, UNTS vol. 993, p. 3, Federal Law Gazette [*Bundesgesetzblatt* – BGBl] II p. 428; regarding sporting events open to everyone cf. Committee on Economic, Social and Cultural Rights, General Comment No. 21 [2009], 43rd session, UN Doc E/C.12/GC/21, paras. 13 and 16). 42

d) […] 43

3. When reviewing a stadium ban issued on the basis of the right to enforce house rules under private law, it is primarily incumbent upon the civil courts to resolve the conflict between ownership rights and the principle of equal treatment. The courts are afforded a wide margin of assessment in this respect. The Federal Constitutional Court intervenes only in the event of manifest errors of interpretation that are based on a fundamentally incorrect understanding of the significance of the relevant fundamental right (cf. BVerfGE 34, 269 <279 and 280>; 85, 248 <257 and 258>; 110, 226 <270>; established case-law). In this respect, it is irrelevant whether the civil courts directly invoke fundamental rights in their decision or, alternatively, give effect to these values by way of considerations rooted in ordinary law in conjunction with the established principles of interpretation under private law, thereby leaving the legal order more open for further development. What matters is that, ultimately, the values enshrined in fundamental rights are sufficiently taken into account. 44

a) Consequently, the civil courts must ensure, in light of the principle of equal treatment, that stadium bans are not arbitrarily imposed, but are based on factual reasons. In particular, the courts are called upon to further specify how to achieve the neces- 45

sary balancing with ownership rights in light of the factual circumstances under which stadium bans are imposed, the intended effects of the bans as well as the responsibility of the persons concerned. It is not objectionable under constitutional law if courts already consider it to be a sufficient factual reason justifying a stadium ban if there are well-founded concerns that a person poses a risk of future disturbances. In this context, evidence of previous criminal conduct or unlawful behaviour is not a necessary prerequisite, given that stadium operators have a legitimate interest in ensuring undisturbed football matches and are responsible for the safety of athletes and the public. It is sufficient to demonstrate that the concerns regarding future disturbances caused by the persons affected by the measures are supported by specific and proven facts of sufficient weight. This in line with other areas of private law that allow sanctions to be imposed when there are reasonable grounds for suspicion. […]

b) The requirement that stadium bans be based on factual reasons gives rise to procedural requirements. In particular, stadium operators must make reasonable efforts to investigate the facts of the case. This includes, at least in principle, that the persons concerned be given a hearing prior to the imposition of a stadium ban. Furthermore, reasons for the decision must be provided upon request in order to enable the persons concerned to seek legal recourse. 46

Recognising such procedural guarantees does not conflict with the nature of private law disputes. It is true that there is no basis for recognising such guarantees in private law relations where the parties freely determine their mutual contractual obligations. Where it is clear from the outset that decisions in the domain of private law do not come into conflict with the protected rights of third parties, and where these decisions can be made without regard to the concerns of the other party, it is not necessary, at least not generally, to put in place such procedural guarantees. The situation is different, however, insofar as the legal relationship between the parties is permeated by the principle of equal treatment deriving from fundamental rights, and it requires that the denial of a service be based on justifying reasons. When decisions made on the basis of house rules have a factually punitive effect, thus requiring that the persons concerned be given viable reasons, certain basic standards must be met: the persons concerned must be given the opportunity to address the allegations against them and, in submitting their view, to exercise their rights in a timely manner. This does not rule out that the decision may initially be taken without a hearing in certain justifiable cases; the person concerned may then be heard at a later date. [...] 47

In this respect, it is again primarily incumbent upon the regular courts to further specify the relevant requirements. […] In this context, the courts must take into consideration the largescale nature of major sporting events, the specific threats posed by violent fan groups and the interests of those banned from entering stadiums. 48

4. Based on these considerations, the challenged decisions by the regular courts are not objectionable. The relevant subject of review is the decision of the Federal Court of Justice [in the proceedings of appeal on points of law], which affirms, by way 49

of final decision, the previous decisions rendered by the courts of first instance and appeal.

a) The Federal Court of Justice finds the stadium ban imposed on the complainant to be lawful on the grounds that it was based on a factual reason. The relevant considerations satisfy the constitutional requirements pertaining to the horizontal effects of Art. 3(1) GG. 50

aa) In its reasoning, the Federal Court of Justice does not endorse the view that event organisers could take the decision on whether to impose a stadium ban at their free discretion; instead, the Federal Court of Justice requires that such bans be based on factual reasons. According to Federal Court of Justice's reasoning, the risk of possible future disturbances at sporting events constitutes such a factual reason. It further states that the assertion of such a risk must not be based on subjective concerns, but on objective facts. 51

These considerations satisfy the constitutional requirements set out above. The Federal Court of Justice affirms the complainant's right not to be subject to arbitrary decisions, which derives from the values enshrined in Art. 3(1) GG and which must also be given effect in the private law relationship underlying the case at hand; subsequently, it weighs this right against the stadium operator's right to organise football matches in its stadium in accordance with its own ideas and, in particular, in accordance with the safety measures for which the stadium operator is responsible. In this respect, the Federal Court of Justice submits that "no overly strict standards" should be applied when assessing whether concerns regarding a risk of disturbances are justified; in light of the unique nature of major sporting events, elaborated upon by the court, this approach is within the margin of appreciation afforded regular courts. 52

bb) The challenged decisions are consistent with the arguments put forward by the stadium operators in finding that the factual reason justifying the original stadium ban was the initiation of investigation proceedings by the public prosecution office which had not yet been concluded at the time. By law, investigation proceedings may only be initiated where there is a fact-based initial suspicion (*Anfangsverdacht*). Given that event organisers generally do not dispose of any better evidentiary means, they may rely on the assessment of the security authorities where investigations are still ongoing. In this context, the Federal Court of Justice also confirms that Art. 4(3) of the DFB Guidelines on Stadium Bans (*Stadionverbots-Richtlinie* – SVRL) is compatible with the law and, as an internal league regulation, provides a reasonable guiding standard. 53

This assessment is not objectionable under constitutional law. As it explicitly states, the Federal Court of Justice does not relieve event organisers of the duty to examine the plausibility of the allegations against the person concerned, so that criminal proceedings initiated in a manifestly arbitrary manner or based on incorrect factual assumptions can be ruled out. However, it is not unreasonable to let stadium operators rely on the assessment of the public prosecution office or of the police while investi- 54

gation proceedings are still pending. As the stadium operators have a legitimate interest in taking measures as early as possible in order to ensure safety, it cannot be asked of them to await the conclusion of the investigations before taking action.

cc) Furthermore, the Federal Court of Justice holds that the subsequent discontinuation of the investigation proceedings did not suppress the factual reason for the stadium ban. While it could not be presumed, once the proceedings were discontinued pursuant to § 153 StPO, that the complainant himself had committed any criminal offence, the circumstances that had not only given rise to the initial suspicion of criminal conduct resulting in the investigation proceedings, but also to concerns that the complainant may cause further disturbances in the future, still persisted despite the fact that the criminal investigations were discontinued. The complainant knowingly frequented groups prone to violence that had indeed committed considerable acts of violence. [...] 55

The Federal Court of Justice did not err in considering this to be a factual reason for justifying the stadium ban. In this respect, the court did not accept at face value that the investigation proceedings could continue to provide a justification for the stadium ban even after they had been discontinued. Rather, the court upheld the stadium ban based on findings that, taken on their own, would suffice to establish a justified concern that the complainant would cause future disturbances, irrespective of the discontinuation of the criminal investigation proceedings. In contrast to the internal league regulation in the former version of § 6(1) SVRL, the decision to impose a stadium ban was, in particular, neither contingent on a reversal of the burden of proof nor solely based on the assertion that the complainant had failed to prove his innocence. Rather, the stadium ban was based on an independent assessment of the circumstances giving rise to the concern [that the complainant was likely to cause further disturbances] – which also appears to be the standard set out in the currently applicable DFB Guidelines on Stadium Bans (cf. § 7(2) SVRL, version dated July 2014). For the rest, the fact that stadium operators base their decisions on unified guidelines further ensures that stadium bans observe uniform standards, promoting objectivity. 56

b) As regards the procedural requirements, the constitutional complaint is also unsuccessful. 57

[...] At least for the future, the now updated Guidelines on Stadium Bans provide that the person concerned has a right to be heard and that, as a rule, this must take place before a stadium ban is imposed (cf. § 6(1) SVRL). Likewise, based on a reasonable interpretation of the Guidelines, decisions issuing a stadium ban must provide reasons, at least in cases where the decision is under review (cf. § 7(2) SVRL). With regard to the specific stadium ban at issue, which has by now expired, the complainant did for that matter have the opportunity in the proceedings before the civil courts to at least retroactively address the reasons put forward for the stadium ban and to be heard in this regard. 58

Kirchhof Eichberger Masing

Paulus Baer Britz

Ott Christ

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 11. April 2018 - 1 BvR 3080/09

Zitiervorschlag BVerfG, Beschluss des Ersten Senats vom 11. April 2018 - 1 BvR 3080/09 - Rn. (1 - 58), http://www.bverfg.de/e/rs20180411_1bvr308009en.html

ECLI ECLI:DE:BVerfG:2018:rs20180411.1bvr308009