

Headnotes

to the Order of the First Senate of 18 December 2018

– 1 BvR 142/15 –

(Automatic number plate recognition II)

1. Automatic number plate recognition constitutes an interference with the fundamental right to informational self-determination of any person whose number plates are automatically recorded, even if the result is a “no match” and the data is deleted immediately (deviation from Decision BVerfGE 120, 378).
2. In order to distinguish between matters of law enforcement for which the Federation has legislative competence pursuant to Art. 74(1) no. 1 of the Basic Law and matters of public security, which lie in principle within the legislative competence of the *Länder*, it is essential to determine the purpose of the provisions, as can objectively be read from their design.

A Land legislature is not prevented from issuing provisions that serve public security purposes merely because their effects also serve law enforcement purposes. However, the provisions must be strictly defined by the purpose for which the *Land* has legislative competence.

3. In accordance with the principle of proportionality, police measures conducted in search of persons or objects generally require objectively defined and limited grounds for an interference with fundamental rights. This distinguishes them from measures targeting risky activities or special sources of danger, which may be justified without specific grounds.
4. Given the weight of its interference, automatic number plate recognition must serve to protect legal interests of at least considerable weight, or comparably weighty public interests. The range of number plate information in police database records used for cross-checking must be limited in relation to the specific purpose of the automatic number plate recognition.
5. Automatic number plate recognition used as a support at police checkpoints set up to prevent the commission of serious offences or of criminal offences under assembly law complies with constitutional law, if the establishment of such checkpoints is itself based on sufficiently weighty grounds. This is satisfied where a specific danger is required for the establishment of a police checkpoint.

- 6. Automatic number plate recognition used in the context of random sweep searches requires a special justification. It is provided by the abolition of border checks within the European Union and the aim of combatting criminal acts facilitated by the lack of internal border checks, under the condition that the automatic number plate recognition measures have a clear connection with the border, both factually and spatially.**

FEDERAL CONSTITUTIONAL COURT

- 1 BvR 142/15 -



IN THE NAME OF THE PEOPLE

In the proceedings on the constitutional complaint

of Mr E...,

- authorised representative: Rechtsanwalt Dr. Udo Kauß,
Herrenstraße 62, 79098 Freiburg –

1. directly against

- a) the Judgment of the Federal Administrative Court
(*Bundesverwaltungsgericht*) of 22 October 2014 – BVerwG 6 C 7.13 –,
- b) the Judgment of the Bavarian Higher Administrative Court (*Bayerischer
Verwaltungsgerichtshof*) of 17 December 2012 – 10 BV 09.2641 –,
- c) the Judgment of the Bavarian Administrative Court (Munich) (*Bayerisches
Verwaltungsgericht*) of 23 September 2009 – M 7 K 08.3052 –,

2. indirectly against

Art. 33(2) second to fifth sentences, Art. 13(1) nos. 1 to 5, Art. 38(3) of the
Bavarian Police Act (*Bayerisches Polizeiaufgabengesetz – BayPAG*)

the Federal Constitutional Court – First Senate –

with the participation of Justices

Masing,

Paulus,

Baer,

Britz,

Ott,

Christ,
Radtke

held on 18 December 2018

1. a) Article 33(2) second sentence in conjunction with Article 13(1) number 5 of the Bavarian State Police Act (*Polizeiaufgabengesetz*) in the version of the Ordinance to Adapt *Land* Law to the Current Allocation of Responsibilities of 22 July 2014 (Bavarian Law and Ordinance Gazette – *Bayerisches Gesetz- und Verordnungsblatt*, page 286) as well as the amendment thereof in Article 39(1) sentence 1 in conjunction with Article 13(1) number 5 of the Bavarian Police Act in the version of the Act to Reform Bavarian Police Law of 18 May 2018 (Bavarian Law and Ordinance Gazette, page 301) are incompatible with Article 2(1) in conjunction with Article 1(1) of the Basic Law given the violation of Article 71, Article 73(1) number 5 of the Basic Law and they are void to the extent that they authorise automatic number plate recognition for the purposes of preventing or suppressing the illegal crossing of borders.

b) Article 13(1) number 5 of the Bavarian Police Act in the version of 22 July 2014 and in its subsequent versions is incompatible with Article 71, Article 73(1) number 5 of the Basic Law and void to the extent that it provides for identity checks for the purposes of preventing or suppressing the illegal crossing of borders.

2. a) Article 33(2) second to fifth sentences of the Bavarian Police Act in the version of 22 July 2014 and its amended version in Article 39(1) in the version of 18 May 2018 are incompatible with Article 2(1) in conjunction with Article 1(1) of the Basic Law to the extent that they

- fail to limit automatic number plate recognition pursuant to Article 13(1) number 1 of the Bavarian Police Act in the version of 22 July 2014 and its subsequent versions to the protection of legal interests of at least considerable weight,

- provide for automatic number plate recognition pursuant to Article 13(1) number 5 of the Bavarian Police Act in the version of 22 July 2014 and its subsequent versions for “transit routes ([...] other routes of considerable importance for cross-border movement)” and

- do not provide for a duty to document the basis upon which the automatic number plate recognition is carried out.

b) Article 38(3) second sentence of the Bavarian Police Act in the version of 22 July 2014 and its amended version in Article 39(3) second sentence in the version of 18 May 2018 are incompatible with Article 2(1) in conjunction with Article 1(1) of the Basic Law to the extent that they fail to limit the use of number plate data for further purposes to the protection of legal interests of at least considerable weight or comparably weighty public interests.

3. The provisions stipulated under 2. shall continue to apply in their version of 18 May 2018 in accordance with the reasons provided until the legislature has enacted new provisions, or until 31 December 2019 at the latest.

4. The Judgments of the Federal Administrative Court (*Bundesverwaltungsgericht*) of 22 October 2014 – BVerwG 6 C 7.13 –, of the Bavarian Higher Administrative Court (*Bayerischer Verwaltungsgerichtshof*) of 17 December 2012 – 10 BV 09.2641 – and the Bavarian Administrative Court (Munich) (*Bayerisches Verwaltungsgericht München*) of 23 September 2009 – M 7 K 08.3052 – violate the complainant’s right under Article 2(1) in conjunction with Article 1(1) of the Basic Law (*Grundgesetz – GG*). The judgment of the Federal Administrative Court is reversed and the matter is remanded to the Federal Administrative Court.

5. For the rest, the constitutional complaint is rejected.

6. The Federal Republic of Germany and the Free State of Bavaria must each reimburse the complainant one-half of his necessary expenses.

Reasons:

A.

With his constitutional complaint, the complainant challenges administrative court decisions rejecting his application seeking that the Free State of Bavaria shall refrain from using automatic number plate recognition pursuant to Bavarian police law. Indirectly, the constitutional complaint challenges the statutory provisions governing automatic number plate recognition.

[Excerpt from Press Release no. 8/2019 of 5 February 2019]

Bavarian police are authorised to use automatic number plate recognition. In this regard, the number plates of passing vehicles are covertly and automatically recorded by means of number plate reading devices; the recorded data is temporarily stored together with information on location, date, time and direction of travel, and cross-checked against number plate information in police database records (*Fahndungsbestand*). To this end, a separate database is set up which, in the practice of Bavarian

authorities, only contains those number plates numbers related to the specific purpose for which the number plate recognition measure is carried out. If cross-checking does not result in a match (“no match”), the respective data including the recorded number plate is deleted from the system automatically and without undue delay. In case the system identifies a match, a police officer visually checks on a computer screen whether the captured image of the number plate indeed matches the number plate from the respective database record. If that is not the case, for example because the automatic reading of the number plate was incorrect (“false positive match”), the entire process is manually deleted by the police officer. If there is a correct match (“true positive match”), the data is kept on record and further police measures may be taken.

The complainant has a primary residence in Bavaria and another residence in Austria. He is a registered vehicle owner and uses his car to travel between his residences and on federal motorways in Bavaria. Fearing that he might become subject to automatic number plate recognition measures as authorised by the Bavarian provisions, he filed an application with the Administrative Court (*Verwaltungsgericht*), seeking an order that the Free State of Bavaria refrain from using number plate reading systems to record the number plates of any vehicle registered to him, and from cross-checking them against police database records. He thus indirectly challenged the statutory provisions governing automatic number plate recognition.

The Administrative Court and the Bavarian Higher Administrative Court (*Verwaltungsgerichtshof*) held that the application for injunctive relief was admissible but unfounded. The Bavarian Higher Administrative Court held that in the event of a “no match”, the measures did not amount to an interference with fundamental rights at all, given that the data was deleted automatically and without undue delay. However, the sufficient probability that the measure might result in a false positive match, was held to constitute an interference with the right to informational self-determination. Yet according to the court, the interference had a constitutional statutory basis given the relevant provisions on number plate recognition.

The Federal Administrative Court (*Bundesverwaltungsgericht*) rejected the complainant’s appeal on points of law against this decision as unfounded on the grounds that an interference with fundamental rights arose neither in the event of no matches nor in the event of false positive matches. It reasoned that in case of a false positive match, the police officer only took note of the number plate information in order to account for the imperfect nature of the automatic reading system by deleting the falsely matched data without undue delay. It held that it was impossible for the complainant’s number plate to yield a true positive match, given that it was not stored in any police database record. As the Federal Administrative Court thus ruled out any potential interference with the complainant’s fundamental rights, the question whether the indirectly challenged provisions were constitutional was considered irrelevant; the court therefore refrained from making an assessment in this regard.

With his constitutional complaint, the complainant claims that the court decisions violate his fundamental right to informational self-determination under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law (*Grundgesetz* – GG). He contends that in holding that no matches or false positive matches did not amount to an interference with fundamental rights, the courts failed to sufficiently recognise the scope of protection of the right to informational self-determination. Being subjected to number plate recognition in itself already amounts to an interference with fundamental rights. He argues that the relevant statutory provisions are formally unconstitutional, given that they do not serve public security purposes but law enforcement purposes, a matter for which the Federation has legislative competence. Furthermore, he claims that the statutory provisions governing number plate recognition violate the constitutional requirements of legal specificity and of proportionality.

[End of excerpt]

I.

1. In Bavaria, the police are authorised to carry out automatic number plate recognition measures. At the time of the challenged decision [...], such measures were carried out on the basis of [the following provisions ...]. These read as follows:

2

Art. 33

Special Means of Data Collection

(1) (...)

(2) ... ²In addition, and notwithstanding Art. 30(3) second sentence, the police are authorised to record vehicle number plates, place, date, time and direction of travel by use of covert automatic number plate recognition systems if relevant information on the situation in the cases of Art. 13(1) nos. 1 to 5 is present. ³The number plates may be cross-checked with police data records established:

1. in relation to vehicles or number plates that are missing in connection with criminal acts or otherwise,

2. in relation to persons sought by the police,

a) for police observation, targeted checks or covert registration,

b) for reasons of criminal prosecution, enforcement of sentences, extradition or surrender,

c) for carrying out measures under the law on foreign citizens,

d) for conducting police security measures against them.

⁴Cross-checking with police data records that were established to avert a danger in a specific case or a general danger that exists with

regard to particular events is only authorised if the cross-check is in fact necessary to avert such a danger and this danger provided the grounds for the automatic number plate recognition measure. ⁵Automatic number plate recognition may not be carried out in an unlimited area.

(3) - (7) ...

Art. 38

Storage, Change and Use of Data

(1) - (2) ...

(3) ¹The number plates recorded pursuant to Art. 33(2) second sentence must be deleted without undue delay following the cross-check. ²In deviation from this, paragraphs (1) and (2) and the provisions of the Code of Criminal Procedure apply if a number plate is listed in the cross-checked data records or databases and its storage or use is necessary to avert a danger in a specific case or for purposes for which the data records or databases were established. ³Except in the cases of Art. 33(2) third sentence no. 2 letter a, separately recorded data may not be combined to create a movement profile.

(4) - (5) ...

As a condition for permitting automatic number plate recognition measures, Art. 33(2) second sentence BayPAG referred to Art. 13(1) nos. 1 to 5 BayPAG, which, at the time of decision rendered by the Federal Administrative Court, read as follows:

3

Art. 13

Identity checks and residence permit checks

(1) The police are authorised to check the identity of a person

1. for the purpose of averting a danger,

2. if that person is in a place,

a) where, on the basis of factual indications, it must be assumed that, there,

aa) persons plan, prepare or commit criminal acts,

bb) is a meeting point for persons not holding a necessary residence permit, or

cc) offenders are hiding, or

b) persons are involved in prostitution,

3. if that person is inside or in the immediate vicinity of a transportation or utility system or facility, a means of public transportation, an official building or another particularly endangered object, and if, based on facts, the assumption is justified that criminal acts will be committed inside or close to these objects and by which persons inside or in the vicinity of these objects, or these objects themselves, will be directly endangered,

4. at a checkpoint set up by the police in order to prevent the commission of criminal offences within the meaning of § 100a of the Code of Criminal Procedure (*Strafprozessordnung – StPO*) or Art. 20(1) nos. 1 and 3, (2) no. 5, or of administrative offences within the meaning of Art. 21(1) nos. 8 and 9 of the Bavarian Assemblies Act (*Bayerisches Versammlungsgesetz – BayVersG*),

5. within 30 km from the border and on transit routes (motorways, European routes and other routes of considerable significance for cross-border movement) and in public facilities serving international traffic in order to prevent or suppress the unlawful border crossing or unlawful residence and to combat cross-border crime, or

6. ...

(2) - (3) ...

[...] 4-10

II.

[...] 11-20

III.

[...] 21-24

IV.

The Government of the Free State of Bavaria provided a statement in the constitutional complaint proceedings. [...] 25

[...] 26-28

B.

The constitutional complaint is admissible. 29

I.

With his constitutional complaint, which is admissible, the complainant challenges 30

the administrative court decisions – of which the final decision was rendered by the Federal Administrative Court – rejecting his application for injunctive relief seeking an order that the Free State of Bavaria refrain from conducting automatic number plate recognition measures which might potentially record his number plates. Indirectly, he challenges Art. 33(2) second to fifth sentences, Art. 13(1) nos. 1 to 5 and Art. 38(3) of the Bavarian Police Act (*Bayerisches Polizeiaufgabengesetz – BayPAG*).

The complainant has standing to lodge a constitutional complaint. He claims that automatic number plate recognition, to which he is subjected as a road user in Bavaria, and the administrative court decisions denying him legal protection against these measures violate his fundamental right to informational self-determination (Art. 2(1) in conjunction with Art. 1(1) GG). [...]

II.

[...] 32-33

C.

The constitutional complaint is well-founded, in part. The challenged decisions violate the complainant's fundamental right to informational self-determination under Art. 2(1) in conjunction with Art. 1(1) GG. The provisions directly challenged in the constitutional complaint interfere with the complainant's fundamental right to informational self-determination and fail, in part, to meet constitutional requirements. 34

I.

Automatic number plate recognition used to search for specific persons or objects constitutes an interference with the complainant's fundamental right to informational self-determination (Art. 2(1) in conjunction with Art. 1(1) GG). 35

1. Number plate recognition affects the scope of protection of the right to informational self-determination. 36

a) The right to informational self-determination addresses risks to and violations of an individual's personality resulting from information-related measures, in particular in the context of modern data processing. This right supplements and expands the constitutional protection of free conduct and private life; this protection already takes hold when the right of personality is at risk. Such risk to the right of personality can occur even before there are specific threats to legal interests. By means of electronic data processing, specific information concerning an individual's personal or material circumstances can be stored indefinitely and retrieved at any time and regardless of distance in a matter of seconds. In addition, the data in question can be aligned with data collected from other sources, allowing for diverse possibilities of use and linking. These possibilities of use and linking may yield further information and thus lead to conclusions that may result in the impairment of the constitutionally protected confidentiality interests of the person concerned as well as the subsequent interference 37

with their freedom of conduct. Furthermore, there is particular potential for interference given the amount of data that can be processed by means of electronic data processing, which could definitely not be handled by conventional means. The increased risk associated with such technical possibilities is matched by the corresponding fundamental rights protection (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 120, 378 <397 and 398> with further references; established case-law).

The scope of protection of the right to informational self-determination is not limited to information that is sensitive itself and thus already subject to protection through fundamental rights. The handling of personal data of even only marginal informational value may, depending on its aim and the existing possibilities of processing and linking, have a constitutionally relevant impact on the privacy and freedom of conduct of the person concerned. Accordingly, there simply is no insignificant personal data in the context of modern data processing, regardless of the context in which the data is used (BVerfGE 120, 378 <397 and 398> with further references; established case-law).

Nor does the constitutional protection cease only because the information concerned is publicly accessible. Even if an individual enters the public sphere, the right to informational self-determination will still protect their interest in not having linked personal information be recorded in the course of an automatic data collection measure and stored with the possibility of further use (cf. BVerfGE 120, 378 <399>).

b) Accordingly, conducting automatic number plate recognition pursuant to Art. 33(2) second to fifth sentence BayPAG falls within the scope of protection of the right to informational self-determination (Art. 2(1) in conjunction with Art. 1(1) GG). Automatic number plate recognition is used to record individual number plates that are matched with one specific vehicle and its owner and are cross-checked with other data for the performance of public functions. This constitutes processing of personal data. The number plates are attributed to the respective individual vehicle owners. By means of the number plates, the owner's name, address and other information can be obtained. The fact that number plates are openly visible and that they do not display the name of the vehicle owner does not change the fact that personal data can be obtained through this measure. The only decisive factor is that the recorded number plate can be unequivocally attributed to a specific person and thus provide access to personal data (cf. BVerfGE 65, 1 <42>; 118, 168 <184 et seq.>; 120, 378 <400 and 401>; 128, 1 <42 et seq.>; 130, 151 <184>). Automatic number plate recognition records vehicle number plates, location, date, time and direction of travel of the vehicle; this data can be connected to a particular person through the retrieval of registered owner information.

2. Automatic number plate recognition, as it applies to the complainant, interferes with his fundamental right to informational self-determination.

a) Provisions authorising state agencies to handle personal data generally result in

various interferences that build upon one another. In this regard a particular distinction must be made between the collection, storage and use of data (BVerfGE 130, 151 <184> with further references; established case-law). If the cross-checking of data is authorised in this context, in principle, the collection and the cross-checking constitute two separate interferences with fundamental rights.

Thus, in principle, the collection of personal data constitutes an initial interference. It makes the data available to the authorities and forms the basis for a subsequent cross-check with search terms. This amounts to an interference, except where data is recorded in a non-targeted manner and exclusively for technical reasons and deleted immediately thereafter anonymously, without any trace nor interest on the part of authorities in obtaining knowledge thereof (cf. BVerfGE 100, 313 <366>; 115, 320 <328>). In contrast, where the collection of larger amounts of data ultimately only serves the purpose of further reducing the number of matches, the collection of data itself may already constitute an interference. The decisive factor is whether, in an overall assessment based on the purpose of the surveillance measure and the intended use of the data, the interest of the authorities in specific data records has already taken such specific shape that the persons concerned must be considered to be directly affected in such a way that it qualifies as an interference with fundamental rights (cf. BVerfGE 115, 320 <343>; 120, 378 <398>).

The cross-checking of data and the subsequent use of filtered data constitute a further interference.

b) Accordingly, automatic number plate recognition pursuant to Art. 33(2) second to fifth sentences BayPAG constitutes an interference with the complainant's fundamental rights. It is irrelevant here whether his number plate yields a match or not. Even if the complainant's number plate results in a no match, the collection and the cross-checking of his number plate data interferes with his fundamental right to informational self-determination. To the extent that this contradicts the decision of the First Senate of 11 March 2008 (BVerfGE 120, 378), the First Senate no longer upholds that view.

aa) Automatic number plate data collection pursuant to Art. 33(2) second to fifth sentences BayPAG consists of two data processing steps: firstly, the recording of number plates pursuant to Art. 33(2) second sentence, Art. 13(1) nos. 1 to 5 BayPAG, and secondly, the cross-checking of number plates pursuant to Art. 33(2) third and fourth sentences BayPAG. Both are directly related to one another: number plate data collection directly serves the cross-checking of number plates with the database records named in the provision; by combining these measures, data is extracted that is important for the police to further exercise their functions.

bb) In this context, the collection of number plate data and the cross-check that follows constitute interferences with the fundamental rights of persons whose number plates are subject to automatic number plate recognition.

(1) However, according to the established case-law of the Federal Constitutional Court, an interference with fundamental rights is generally not found where personal data of third persons is incidentally recorded within the scope of electronic data processing measures and deleted immediately thereafter, anonymously, without any traces nor interest on the part of authorities in obtaining knowledge thereof. As stated, the standard is that there can only be an interference with fundamental rights where the authorities have a specific interest in the data records concerned (cf. para. 43 above). 48

(2) Given the possibilities offered by modern information technology for cross-checking key indicators or personal characteristics with large amounts of data in a very short time period, such specific interest exists where measures such as the number plate recognition at hand are conducted. Where the cross-checking of data is used specifically to verify whether persons in public spaces or the objects with them are sought by the police, a specific interest on the part of the authorities exists even if such data is immediately deleted following the verification. 49

In this regard, it is essential that the collection and cross-checking of data be carried out in a single measure, which specifically covers and is intended to cover all persons subject to the number plate recognition. The inclusion of data from persons that does not yield a match is not unintentional nor solely for technical reasons; rather, it is a necessary and intended part of these measures, as they would otherwise not achieve their purpose. In the ex ante view of the authorities, which is decisive for the carrying out of number plate recognition, there is a specific interest in recording the number plates of all vehicles that pass the number plate recognition device or are otherwise included in the measure, because the measure specifically aims at checking these vehicles. For this purpose, the data is intentionally collected and it is also essential that it be attributable to a specific person. The fact that the data is analysed automatically does not change anything; rather, this method considerably expands the possibilities of these police measures. 50

The fact that the persons concerned face no inconvenience or consequences in case of a no match also does not change anything. For the fact remains that automatic number plate recognition subjects these persons to a state measure, and a specific search interest by the authority is thus applied to them. With this measure, the persons concerned are checked against whether they or the objects with them are sought by the authorities. At the same time, they may only continue their journey unhindered on the condition that the police records do not contain relevant information on them. In view of this, it is not just the consequences of the measure, but the measure as such that results in an impairment to the freedom of the persons concerned. It is integral to a free society that anyone may in principle move freely, without having their movements arbitrarily registered by the state, without having to prove their integrity as law-abiding citizens, and without the feeling of constantly being under surveillance (cf. BVerfGE 107, 299 <328>; 115, 320 <354 and 355>; 120, 378 <402>; 122, 342 <370 and 371>; 125, 260 <335>). The possibility that a person could 51

be registered at any time and in any place without noticing it and checked against police search lists or otherwise appear in data records would be incompatible with this principle. To the contrary, such measures affecting the freedom of the individual require specific grounds and must be justified since they interfere with the fundamental right to informational self-determination.

(3) Since the automatic recognition of vehicle number plates records personal data, it differs from measures conducted in respect of an indefinite number of persons without recording personal data, where specific persons' data is recorded only in the case of a match. This is for instance the case with speeding or red-light cameras. Within the scope of these measures, driving behaviour is monitored without recording number plates and thus independent of the attribution of the vehicle to a person. Personal data is collected only if a violation is established, which triggers the taking of a photo. The fact that in such cases an interference with fundamental rights can only be found in case of a match does not carry over to automatic number plate recognition. Moreover, traffic-safety-related police measures cannot be compared to automatic number plate recognition measures because they target risky activity and their greater scope is thus substantively justified (cf. para. 94 below).

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(4) Like other monitoring measures, automatic number plate recognition must be assessed uniformly and independent of its result in a specific case. When weighing the substantive interference within the scope of an overall assessment, it must be considered that automatic number plate recognition does not target highly personal features such as, for instance, a person's face but rather public number plates which deliver limited data on the vehicle owner only indirectly, as well as that adverse consequences can be ruled out in respect of those persons who do not turn up as a match. Also to be considered, vice versa, are the number of persons affected by the measure, its covert nature and the type and relevance of the data records included in the cross-check.

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II.

Formally, Art. 33(2) sentences 2 to 5, Art. 38(3) BayPAG mostly meet the constitutional requirements. However, the Free State of Bavaria does not have legislative competence insofar as the reference to Art. 13(1) no. 5 BayPAG authorises the use of automatic number plate recognition for the purposes of preventing or suppressing the unlawful crossing of borders and thus governs border protection issues. For the rest, the Free State of Bavaria has legislative competence for the provisions.

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1. Art. 33(2) second to fifth sentences and Art. 13(1) no. 5 BayPAG violate the exclusive legislative competence of the Federation in relation to border protection under Art. 73(1) no. 5 GG, to the extent that automatic number plate recognition is authorised to prevent or suppress unlawful border crossing.

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[...]

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2. Otherwise, there are no constitutional objections against the legislative competence of the Free State of Bavaria. Pursuant to Art. 70(1) GG, the *Länder* have legislative competence unless the Basic Law confers to the Federation the power to enact legislation. With regard to the other provisions challenged in the case at hand, there is no legislative competence of the Federation that rules out the competence of the Free State of Bavaria. 59

a) [...] 60

b) [...] 61

For the attribution of legislative competence with regard to Art. 33(2) second to fifth sentences, Art. 13(1) nos. 1 to 5 and Art. 38(3) BayPAG, it is decisive to distinguish between matters of law enforcement for which the Federation has legislative competence and matters of public security, which lie, in principle, within the legislative competence of the *Länder*, and for which one must look to the purpose of the provision to determine its subject matter [...]. According to their purpose, the provisions are not a matter of law enforcement but of public security [...]. 62

[...] 63-80

III.

Substantively, too, the challenged provisions, when interpreted in conformity with the Constitution, are largely, but not entirely, compatible with the Constitution. 81

Authorisations to conduct automated number plate recognition interfere with the right to informational self-determination and must therefore be measured against the principle of proportionality. Pursuant to this principle, they must have a legitimate purpose, and in relation to that purpose they must be suitable, necessary and proportionate in the strict sense (cf. BVerfGE 67, 157 <173>; 120, 378 <427>; 141, 220 <265 para. 93>; established case-law). The provisions must, particularly in the field of data processing, also satisfy the principle of legal clarity and specificity (cf. BVerfGE 113, 348 <375 et seq.>; 120, 378 <407 and 408>; 141, 220 <265 para. 94>; established case-law). In part, Art. 33(2) second to fifth sentences, Art. 13(1) nos. 1 to 5 and Art. 38(3) BayPAG do not meet these requirements. 82

1. Art. 33(2) second to fifth sentences, Art. 13(1) nos. 1 to 5 and Art. 38(3) BayPAG serve legitimate purposes. 83

Art. 33(2) second to fifth sentences authorises automatic number plate recognition measures based on Art. 13(1) nos. 1 to 5 BayPAG. Therein, the legislature defines the purposes of these measures. Their purpose is to protect against threats in specific cases, to restrict places serving to hide or to initiate criminal acts or violations of the law on residency, and to protect endangered locations of importance to society. In support of police checkpoints, automatic number plate recognition measures also serve to protect against the commission of serious criminal offences and to ensure 84

the peaceful course of assemblies, as well as to protect against cross-border crime or to prevent violations of the law on residency by means of random sweep searches. The legislature pursues legitimate purposes with these measures. This also applies to Art. 38(3) BayPAG, which provides that besides data use for these specific purposes, data may also be used for other purposes, subject to further provisions.

2. In principle, the authorisation of automatic number plate recognition is suitable for achieving these purposes. 85

Automatic number plate recognition as authorised by Art. 33(2) second to fifth sentences BayPAG contributes to achieving these purposes by identifying persons or objects sought by the police. Since they help to find persons or objects whose arrest might contribute to achieving the purposes stated in Art. 13(1) nos. 1 to 5 BayPAG, such measures are, in principle, suitable for such purposes. The fact that cross-checks themselves only directly involve vehicle number plates so that in case of a match the vehicle owner is identified only indirectly and that the vehicle owner will not necessarily be the person sought, does not change this. For the probability of also finding the persons or objects sought in order to achieve the specific purpose of the measure is thereby, in any case, increased. This is sufficient for considering that a measure is suitable for achieving a legitimate purpose (cf. BVerfGE 67, 157 <175>; 125, 260 <317 and 318>; 141, 220 <266 para. 97>; established case-law). 86

However, the legislative framework on number plate recognition must also consider the requirements of suitability in respect of each specific purpose. These requirements concern, in particular, the relation of these purposes to the data records used for cross-checking (see para. 107 below). 87

3. Automatic number plate recognition is also necessary for achieving these purposes. There are no indications that this purpose can be achieved in an equally effective way through other measures with less weight of interference. 88

4. Automatic number plate recognition is only compatible with the principle of proportionality in the strict sense if the authorisation to conduct the measure is sufficiently limited and overarching requirements pertaining to the measure and the use of data are observed (a). The challenged provisions do not fully satisfy these requirements (b). 89

a) Automatic number plate recognition only satisfies the principle of proportionality in its strict sense as a prohibition of excessive measures if the purpose pursued by this measure is not disproportionate to the weight of the interference inherent in it. To meet this requirement, the measures must generally be conducted for a sufficiently specific objective reason (aa) and must serve to protect legal interests of at least considerable weight or comparably weighty public interests (bb). This means that the legislative framework on number plate recognition, by means of an overall balancing of the measures' characteristic circumstances, must be reasonable with regard to the fundamental right to informational self-determination and thus tenable under consti- 90

tutional law (cc). Moreover, each individual constituent element of the measure is overarchingly subject to the requirements of proportionality which include requirements relating to transparency, individual legal protection and supervisory measures, as well as provisions governing data use and deletion (dd).

aa) Police measures carried out in public spaces in search of specific persons or objects, as authorised under Art. 33(2) second to fifth sentences, Art. 13(1) nos. 1 to 5 BayPAG, generally require objectively defined and limited grounds for an interference with fundamental rights. The legislature must define a threshold for the exercise of powers that makes state action subject to foreseeable conditions that allow for the review of compliance (cf. BVerfGE 141, 220 <271 et seq. para. 109 et seq.> with further references).

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(1) Merely the general interest in identifying and seizing persons or objects sought by the police is not sufficient to justify automatic number plate recognition measures. Although a separate legitimate state interest in finding such persons or objects must be recognised, this does not justify the conduct of random checks targeting all passers-by. Even if the search alert entered into the records does have its own legal basis, this does not mean that any measure may be used to carry out the search. Rather, it requires its own grounds. Carrying out checks on a purely speculative basis, at any time and place, is fundamentally incompatible with the rule of law.

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(2) The authorisation to carry out checks is proportionate only if it is based on grounds that make police actions foreseeable and reviewable. In this respect, the legislature could require the presence of specific dangers. However, besides naming a specific danger, the legislature may also set out generalised types of situations of danger as grounds justifying the conducting of checks. For the rest, the legislature may also authorise checks if in the specific case or in a general situation of danger the likelihood of finding persons or objects of interest is specifically higher; thus, within its scope of competences, the legislature is free to directly take into account the public search interest even without reference to any further purposes of the check. This would require, however, that each specific check be based on justifying grounds that have a sufficient factual basis and place verifiable limits on state action.

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(3) This does not completely rule out measures not based on specific grounds. If police measures targeting dangerous or risky activities or special sources of danger are carried out, these may already constitute grounds satisfying the principle of proportionality. In such cases, the justification to carry out measures may be found in the special responsibility the parties subject to the measures bear vis-à-vis the general public, and therefore does not require more specific grounds. In respect of automatic number plate recognition measures, this might apply if they are carried out to combat dangers occurring in connection with the operation of motor vehicles; for instance, in the context of the enforcement of compulsory insurance, where measures are carried out to find uninsured vehicles. In this respect, the situation is not different from many other types of police checks not at issue here, such as random road traffic checks

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carried out without specific grounds or checks without specific grounds carried out in a wide range of environmental or commercial administrative matters.

bb) A further requirement of the prohibition of excessive measures is that number plate recognition must be justified by protecting sufficiently significant legal interests when measured against the resulting interference with fundamental rights. Given the weight of the interference, automatic number plate recognition is only permissible if it serves to protect legal interests of at least considerable weight, or comparably weighty public interests. 95

(1) Overall, automatic number plate recognition used to search for persons or objects constitutes an interference of considerable weight. 96

The fact that automatic number plate recognition is conducted in public traffic lessens the weight of the interference. Vehicle number plates as well as the recorded movements are easily visible to everyone. The automatic recognition targets only number plates and is not used to directly identify personal features or characteristics; the link to a specific person can only be made indirectly. In this respect, however, it should be noted that the specific purpose of number plates is indeed that of identification (cf. BVerfGE 120, 378 <404>). In this connection, it is also relevant that pursuant to Art. 33(2) second sentence BayPAG only the place, date, time and direction of travel are recorded, but not the persons or the vehicles. Furthermore, account should be taken, in particular, of the fact that for the majority of persons concerned, the checks have no direct negative consequences and leave no trace. The weight of the interference with fundamental rights is significantly lessened by the fact that the data cross-check is performed within seconds and that the data is immediately deleted without becoming known to anyone in case of a no match. 97

Increasing the weight of the interference is the fact that, typically, automatic number plate recognition is not limited to persons who are factually involved in a situation of danger but rather affects an indefinite number of persons who provided no prior grounds whatsoever to be subjected thereto. In practice, any person can be subjected to these measures. Generally, the intensity of the interference of such data collection methods is higher. Also increasing the weight of the interference is the fact that the measures are carried out covertly. Particularly investigation measures indiscriminately affecting a large number of people – such as that in the case at hand – where, for investigative purposes, serial checks of a large number of persons are conducted in a public space, may solicit the feeling of being watched. The weight of the interference inherent in this measure is not mitigated by the fact that in case of a no match, the persons recorded in the course of automatic number plate recognition are not aware of it. While this does relieve the measures of their inconvenience, it does not do away with their nature as a police measure and the impairment of individual freedom inherent therein, which at the same time affects free society as a whole (cf. BVerfGE 120, 378 <402 and 403> with further references). 98

(2) The considerable weight of the interference of automatic number plate recogni- 99

tion requires that justification for such measures must be based on reasons serving to protect legal interests of at least considerable weight, or comparably weighty public interests, in order to justify them. These include particularly protected legal interests like life, limb and liberty of the person and the existence and security of the Federation and the *Länder* (cf. BVerfGE 120, 274 <328>; 125, 260 <330>; 141, 220 <270 para. 108>). In addition, they may also include legal interests situated below the threshold determined for surveillance measures constituting significant interferences, such as the protection of considerable material assets. The legislature can specify further details regarding this threshold [...]. A review as to constitutionality examines the entire legislative framework of the authorisation. In this respect, both the purposes set out by the legislature in the provisions on automatic number plate recognition, as well as the scope and content of the data records the legislature authorises in the context of data cross-checking would have to be examined.

cc) Finally, while considering all its characteristic circumstances, the legislative framework regarding automatic number plate recognition must also be proportionate in an overall assessment. In this respect, the legislature must preserve the balance between the type and intensity of the impairments of fundamental rights on the one hand and the causes justifying the interference on the other hand, for instance by establishing requirements regarding the threshold for the exercise of powers, the necessary factual basis, or the weight of the protected legal interests (cf. BVerfGE 120, 378 <429>). It also follows from this that the measures may not be conducted to cover an unlimited area. However, the requirements to specify the spatial limits within which number plate recognition measures are to take place become less strict, the more serious and urgent the danger to be averted is in a specific case. In any case, the proportionality of the application of number plate recognition measures pursuant to general principles must be ensured. 100

dd) Furthermore, to protect the right to informational self-determination, requirements with regard to transparency, individual legal recourse and supervisory measures follow from the principle of proportionality (cf. BVerfGE 65, 1 <44 et seq.>; 125, 260 <334 et seq.>; 141, 220 <282 para. 134>; established case-law). The scope of these requirements is determined by the intensity of the interference of the number plate recognition measure and is therefore not as far-reaching as when it applies to cases of covert surveillance measures whose intensity of interference is particularly high. Also constitutionally required are tenable provisions on data use and deletion (cf. BVerfGE 65, 1 <46>; 133, 277 <366 para. 206>; 141, 220 <285 para. 144>; established case-law). 101

b) With regard to the specification of their individual constituent elements, the challenged provisions do not satisfy the aforementioned requirements in every respect. Nor are the overarching requirements fully complied with. 102

aa) As a first option, the Act provides that automatic number plate recognition measures may be implemented to avert a danger (Art. 33(2) second to fifth sentences, 103

Art. 13(1) no. 1 BayPAG). This does not satisfy the constitutional requirements insofar as number plate recognition is not limited to the protection of legal interests that would satisfy the principle of proportionality. For the rest, the provision complies with the principle of proportionality when interpreted in conformity with the Constitution.

(1) The unrestricted authorisation of number plate recognition to avert any danger is not compatible with the prohibition of excessive measures. Such measures must be limited to the protection of legal interests of at least considerable weight. 104

By referring to Art. 13(1) no. 1 BayPAG, the legislature authorises automatic number plate recognition for the purpose of averting a danger. Pursuant to Art. 11(1) BayPAG, such measures firstly require that a “specific danger“ exist in an individual case (cf. Constitutional Court of Bavaria – *Bayerischer Verfassungsgerichtshof*, BayVerfGH, Judgment of 28 March 2003 – Vf. 7-VII-00 u.a. – juris, para. 199; generally on the concept of specific danger cf. BVerfGE 115, 320 <364>; 141, 220 <271 para. 111>; Decisions of the Federal Administrative Court – *Entscheidungen des Bundesverwaltungsgerichts*, BVerwGE 116, 347 <351>). This is not objectionable under constitutional law. Thus, the legislature focuses on the threshold for the exercise of powers, as is common in security law, and makes automatic number plate recognition measures subject to sufficiently specific grounds (see para. 91 above). [...]

However, the provision opens the possibility of using number plate recognition to avert any danger and hence to use it generally for the protection of public security and order. This refers to the inviolability of the legal order in its entirety without weighing the legal interests concerned. This does not satisfy the abovementioned requirements with regard to the protection of sufficiently weighty legal interests. In light of the weight of the interference by automatic number plate recognition, the prohibition of excessive measures requires that these measures be limited to averting dangers to legal interests of at least considerable weight. A mere reference to the integrity of the legal order as a whole, which forms the basis of the term “danger” in the general police law clause, is not sufficient. 106

(2) When interpreted in conformity with the Constitution, the provision concerning the cross-checking of data is not objectionable under constitutional law. 107

Art. 33(2) third and fourth sentences BayPAG authorises the automatic cross-checking of recorded number plates against the data records named in these provisions. The cross-check only satisfies the requirements of proportionality if the data records to be checked are limited to such persons or objects sought by the authorities that could be relevant for the specific purpose of the number plate recognition. However, this can be ensured if the provision is interpreted in conformity with the Constitution. 108

(a) The provision does not clearly specify the scope of the data cross-check authorised by Art. 33(2) third sentence BayPAG. It can, however, be interpreted in such a 109

way that the data to be cross-checked must be selected in connection with the grounds for the automatic number plate recognition.

[...] 110

(b) [...] It follows from the principle of proportionality that interferences with fundamental rights are only justified to the extent that they are suitable and necessary for achieving a legitimate aim. If automatic number plate recognition is authorised for averting a specific danger, the cross-checking of data must also be limited to this purpose. If data records not related to this purpose are to be included in the cross-check, a separate tenable reason is required. Without such a reason, a cross-check against data records that do not serve the purpose of the automatic number plate recognition measure from the outset is disproportionate. Against this backdrop, one cannot assume that the legislature intended to use Art. 33(2) third sentence BayPAG to undermine the purposes it clearly defined in its reference to Art. 13(1) nos. 1 to 5 BayPAG, and to contradict this limitation in order to establish a general police search interest separate from these purposes. Rather, the breadth of the data records named in Art. 33(2) third sentence BayPAG must be interpreted in conformity with the Constitution, as an overall description of all potential data records authorised for cross-checking, in respect of all the different variations of automatic number plate recognition, and that the police must choose which data is relevant with regard to the purpose of the measure. With this interpretation, the scope of the data records covered by Art. 33(2) third sentence BayPAG is not constitutionally objectionable. 111

(c) This provision also satisfies the requirements with regard to specificity. In particular, the fact that Art. 33(2) third sentence BayPAG defines the data records authorised for cross-checking only abstractly rather than referring to specific data is not objectionable under constitutional law. This neither constitutes an impermissible dynamic reference that would refer to both the current version and future versions of a statute nor does it violate the requirement of specificity. Rather, the legislature has made a sufficiently clear decision, the substance of which can be determined by way of interpretation, and that restricts access to data records not specifically collected for automatic number plate recognition purposes to that which is relevant. On this basis, the specific selection from amongst the mentioned data records may be left up to the authorities, who must exercise due discretion and consider the principle of proportionality in their selection. It is not incompatible with the Constitution that the authorities have a certain prerogative of assessment when making that selection. 112

(3) For the rest, the proportionality of automatic number plate recognition as laid out in the provision's first option – subject to the procedural requirements with regard to documentation applicable to all options – is sufficiently ensured. 113

[...] 114

To protect against the excessive spatial extension of the powers, the legislature has further limited the extent of such measures insofar as they may not be carried out in 115

an unlimited area (Art. 33(2) fifth sentence BayPAG). The exact meaning of this is not very clear and it requires interpretation. What is meant is that measures may only be conducted at individual locations where success is likely, i.e. it is limited in time and space, but not for the purpose of ruling out free movement over a wide area or even over a public authority's entire territory. Thus, the carrying out of such measures is further limited in accordance with the prohibition of excessive measures and, insofar as it supplements the other constituent elements, is not objectionable in respect of the requirements of specificity.

The provision contains no requirements on whether automatic number plate recognition measures are to be carried out in a mobile or stationary manner, permanently or temporarily. Thus, the relevant decision lies within the discretion of the police. This is neither objectionable with regard to the requirement of specificity nor on its face. The discretion in question must be exercised subject to the principle of proportionality. Setting up a permanent automatic number plate recognition measure to avert specific individual dangers is ruled out from the outset. 116

bb) In its second option, the Act regulates automatic number plate recognition in 'dangerous places' (Art. 33(2) second to fifth sentences, Art. 13(1) no. 2 BayPAG). This provision is not objectionable under constitutional law when properly interpreted and applied in the individual case. 117

(1) The provision authorises automatic number plate recognition in places where, based on factual indications, it must be assumed that persons plan, prepare or commit criminal acts, persons not holding a necessary residence permit meet, offenders hide or persons are involved in prostitution. 118

Upon reasonable interpretation of the provision in light of the principle of proportionality, it does not meet with constitutional objections. The justification for this provision is the aim of contributing to the safety of these places and preventing their becoming a sheltered point of origin of criminal acts. Insofar as the provision focuses on places where people are involved in prostitution, it does not target prostitutes but is intended as a protection against crime committed in connection with prostitution - and thus ultimately as protection of the prostitutes themselves. Irrespective of the weight of any individual violations of the law, the aim of counteracting the danger that such places will become gathering places for offenders and people without the right of residence ties in to a structurally increased risk of danger and thus serves a public interest of considerable weight. 119

In doing so, the provision does not attach to a merely abstract danger which certain places might constitute but rather it limits the measures to places for which there are factual grounds to believe that they are indeed frequented by the persons specified in the provision. Thus, the provision does not provide a general authorisation to carry out automatic number plate recognition at practically all major traffic hubs or gathering places for large numbers of people. Rather, such measures are only authorised at places about which the police have specific relevant information. This also applies 120

to the precise details of the actual carrying out of a specific measure. It may not be carried out just anywhere in the broader area surrounding such places, but only in those places that directly fulfil the statutory requirements. This is further ensured by the requirement under Art. 33(2) second sentence BayPAG, applicable to all of the options, that there must be relevant information on the situation. In this context, it is essential that the place that has been identified as dangerous based on police information actually be frequented with motor vehicles (cf. *Landtag* of Bavaria document 15/10522 p. 2)

(2) The scope of the data cross-check authorised by Art. 33(2) third and fourth sentences BayPAG is also not objectionable under constitutional law. In this context, too, the provision must be interpreted to mean that only such data records may be included in the cross-check as might be relevant to the purposes of the number plate recognition authorised under Art. 13(1) BayPAG (here, no. 2) (see para. 107 et seq. above). This means that the data records selected to create the data base for cross-checking must be strictly limited to seeking such persons or objects with regard to which there are factual indications that they might actually be found at the places specified for the purposes set out in the provision. Data records without considerable relevance for achieving the purpose set out in Art. 13(1) no. 2 BayPAG may not be included in the database to be cross-checked. 121

(3) Thus, in an overall assessment, the provisions of Art. 33(2) second to fifth sentences, Art. 13(1) no. 2 BayPAG are constitutionally sound with regard to their constituent elements. If one balances the public interest in carrying out these measures at the places specified in the provision against the impairment of the rights of the persons affected by the number plate recognition measures while taking into consideration the additional standards included in the provision, which also include, in particular, the prohibition of carrying out measures in an unlimited area (see para. 100 above), carrying out such measures is not disproportionate, provided the provisions are interpreted in conformity with the Constitution. 122

cc) Nor is the provision objectionable under constitutional law with regard to its third option, authorising automatic number plate recognition in “endangered places” (Art. 33(2) second to fifth sentences, Art. 13(1) no. 3 BayPAG). 123

(1) The provision authorises automatic number plate recognition to be carried out in transportation and utility systems or facilities, in means of public transportation, in official buildings or other particularly endangered objects, or in their immediate vicinity. The explanatory memorandum to the draft act lists the examples of airports, train stations, public transportation services, military installations, nuclear power plants and other endangered objects, such as the consulates of foreign states requiring special protection on the basis of the current assessment of threats. The memorandum thus focuses on the protection of the objects themselves, their function in public life and of the persons located therein. These are legally protected interests of at least considerable weight. 124

The legislature has also provided for a constitutionally sufficient threshold for the exercise of powers with regard to automatic number plate recognition measures. Such measures are only authorised on the basis of facts indicating that criminal acts will be committed inside or close to objects of this type, directly endangering persons located inside or close to these objects. This is supplemented by the requirement of Art. 33(2) second sentence BayPAG, applicable to the Act in its entirety, that relevant information on the situation must be present. 125

(2) The scope of data records set out in Art. 33(2) third and fourth sentences BayPAG is not objectionable if it is duly regarded as a framework requiring specification (see para. 107 et seq. above). Since the creation of the database for cross-checking requires that only those records may be selected from the overall volume of data records which are likely to be relevant to ensuring security in or around the endangered objects pursuant to Art. 13(1) no. 3 BayPAG, a sufficient limitation as well as its focus on a sufficiently weighty legal interest is ensured. 126

(3) Also in an overall assessment, the specification of the constituent elements in the provision is not objectionable under constitutional law. Subject to the general requirements under Art. 33(2) second to fifth sentences BayPAG and if applied in a specific case in accordance with the principle of proportionality, as required by general principles, the provision does not raise constitutional concerns. 127

dd) As a fourth option the Act provides for automatic number plate recognition at police checkpoints (Art. 33(2) second to fifth sentences, Art. 13(1) no. 4 BayPAG). If one interprets Art. 13(1) no. 4 BayPAG in accordance with the principles of general security law pursuant to which the establishment of such checkpoints requires a specific danger, this provision, too, is compatible with constitutional law. 128

(1) The provision authorises automatic number plate recognition in support of police checkpoints insofar as these are established to prevent acts qualified as serious criminal offences on the one hand, or to prevent acts qualified as criminal offences under assembly law or administrative offences (*Ordnungswidrigkeiten*) on the other hand. Protection against these acts as well as the protection of assemblies involve legal interests of considerable weight that justify automatic number plate recognition measures. Upon reasonable interpretation of the provision, the carrying out of automatic number plate recognition is limited to sufficiently specified grounds. 129

(a) Pursuant to the first alternative of the fourth option, the aim of automatic number plate recognition is – corresponding to the aim of the police checkpoints themselves – to prevent the commission of criminal offences within the meaning of § 100a of the Code of Criminal Procedure (*Strafprozessordnung* – StPO) and thus to protect against acts qualified as serious criminal offences. Thus, it concerns legal interests of at least considerable weight. The same also holds true for the criminal offences under assembly law and administrative offences mentioned in the provision. Even if the criminal and administrative offences set out in the provision do not each individually serve the protection of legal interests of at least considerable weight, these auto- 130

matic number plate recognition measures are not solely carried out to prevent specific offences but to protect assemblies as such. Herein lies a protective purpose of considerable weight.

(b) Upon reasonable interpretation of Art. 13(1) no. 4 BayPAG in accordance with the principles of general security law, the carrying out of such measures is restricted to sufficiently limited cases. 131

The carrying out of automatic number plate recognition pursuant to Art. 33(2) second to fifth sentences, Art. 13(1) no. 4 BayPAG presupposes a police checkpoint and is meant to support it. Art. 13(1) no. 4 BayPAG sets out the conditions for when a police checkpoint may be set up. Yet this article, too, does not explicitly address the details of setting up checkpoints. Rather, the wording of the article presupposes police checkpoints as the basis for identity checks. With this provision, the legislature evidently intended to address the setting up of checkpoints and identity checks in a single context. 132

Given that no further standards are set out, Art. 13(1) no. 4 BayPAG must be interpreted in accordance with the common principles of general security law. Thus, for public security measures to be authorised, actual danger of imminent criminal acts – which are to be prevented by the police checkpoint – must exist in the specific case (cf. Art. 11(1) BayPAG). In light of the provision’s openness regarding its constituent elements, this is the only constitutionally sound interpretation. It is not the Constitution that limits the setting up of police checkpoints to situations where a specific danger exists. To the contrary, the legislature may permit checkpoints below this threshold, for instance, for the protection of potentially dangerous major events or in the context of specific police investigation strategies. The legislature must, however, provide for such cases by setting up sufficiently clear and limited requirements. To the extent that the legislature does not set out further standards in this regard, one must assume that the provision incorporates the requirement of a specific danger from general security law, thereby giving it a constitutionally required limitation. Such an interpretation does not deprive the provision of its content; rather, it is in line with the general objective of Art. 13(1) BayPAG, whose main purpose is to authorise identity checks independent of potential threats. Elsewhere, it also presupposes the objective existence of a specific danger (cf. Art. 13(1) nos. 1 and 3 BayPAG). 133

This interpretation also does not raise constitutional objections against the authorisation of number plate recognition measures at such checkpoints in respect of the requirement of sufficiently specific grounds. Accordingly, number plate recognition is only permitted if there is specific information on acts qualifying as serious criminal offences or considerable criminal offences or administrative offences in connection with a specific assembly and, based on this, a police checkpoint has been set up. This constitutes grounds that satisfy the requirements of proportionality. 134

(c) The authorisation to carry out automatic number plate recognition at police checkpoints set up to prevent the commission of criminal offences under assembly 135

law or for the protection of assemblies is also compatible with Art. 8 GG.

While number plate recognition at a police checkpoint controlling access to an assembly does constitute an interference with Art. 8(1) GG (cf. BVerfGE 69, 315 <349>; 84, 203 <209>), the interference is justified. In respect of the special protection afforded to the freedom of assembly in particular, it also satisfies the requirements of the principle of proportionality. According to this principle, number plate recognition measures do not have to be limited to situations of immediately imminent danger. The threshold for the exercise of powers in case of immediately imminent danger was developed by the judiciary with regard to bans on and dissolutions of assemblies. This threshold does not have to be applied to measures carried out prior to an assembly which are at issue here. With respect to assembly bans or dissolutions such measures carry less weight of interference since they do not as such impair the independent organisation of the assembly and actually protect it. As justification for such measures prior to an assembly it is sufficient that there be specific indications with regard to a particular assembly that criminal offences under assembly law or the administrative offences stated in the provision will be committed with sufficient probability. This also corresponds to the question whether, on the basis of a probability prognosis, a specific danger exists, which is relevant to the interpretation of Art. 13(1) no. 4 BayPAG and thus also determines the requirements for number plate recognition. Regarding the interference with Art. 8 GG, the formal requirement to expressly specify the affected fundamental rights has been complied with (cf. Art. 74 BayPAG).

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(2) Based on the above-described interpretation of Art. 33(2) third sentence BayPAG, the scope of data records, too, is not disproportionate. Since specifically those records which may be relevant to achieving the purpose of the measure must be selected from the data records listed in the provision, a sufficient limitation as well as the focus on the protection of a legal interest of at least considerable weight are ensured.

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(3) If one interprets the provision as described, the specification of its constituent elements is, from an overall perspective, also compatible with the Constitution. With respect to the general standards of Art. 33(2) second to fifth sentences, which are to be taken into account within the scope of an overall balancing, reference is made to what was mentioned above (see para. 113 et seq. above).

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ee) As its fifth option, the provision authorises the use of automatic number plate recognition in the context of random sweep searches (*Schleierfahndungen*) (Art. 33(2) second to fifth sentences, Art. 13(1) no. 5 BayPAG). This option does not fully satisfy the constitutional requirements.

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(1) From a constitutional perspective, the provision is justified as an offsetting measure aiming to combat specific criminal acts the commission of which may have been facilitated through the abolition of border checks. It is imperative, however, that automatic number plate recognition measures be subject to consistent and clear limitations regarding their purpose and location that correspond to these considerations.

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The provision does not satisfy this requirement in every respect.

(a) Art. 33(2) second to fifth sentences, Art. 13(1) no. 5 BayPAG authorise the use of automatic number plate recognition within 30 km from the border, on transit routes, and at public facilities serving international traffic. Such measures are permitted to prevent or suppress unlawful residence and to combat cross-border crimes subject to relevant information being present. 141

This gives the provision a broad scope. Its general purpose is to combat violations of the law on residency and cross-border crime without limiting the automatic number plate recognition measures to the prevention of acts qualified as significant criminal offences or to the protection of legal interests of a specified weight. Nor does it limit the measures to objectively specified grounds. While the provision refers generally to the requirement that relevant information on the situation must be present in order to carry out automatic number plate recognition, it fails to specify the criteria based on which that relevant information is to justify the measures. Ultimately, the police power to carry out this measure is only defined by the broad objective pursued. Such power to carry out measures practically without specific grounds is – insofar as it does not require specific responsibility of the persons concerned (see para. 94 above) – in principle incompatible with constitutional requirements. Thus, it can only be justified under special conditions. 142

(b) Such a justification is that the provision serves to offset the abolition of border checks within the European Union. 143

The legislature introduced the random sweep search to offset the abolition, under European law, of border checks within the European Union (cf. *Landtag* of Bavaria document 13/36, p. 4). According to domestic law, these border checks could be carried out without further grounds. The right of a state to carry out checks at its borders without further conditions in order to decide who enters and leaves the country belongs to the traditional instruments used to ensure territorial sovereignty and to guarantee law and security in its national territory. If the Federal Republic of Germany opens its borders and abolishes border checks based on European Union law, it is principally justified in offsetting this by specifically extending the general powers with regard to public security. 144

This is not altered by the fact that the automatic number plate recognition measures are not limited to persons crossing the border, thereby affecting persons who did not cross the border. These measures are only intended as and only can be an offset measure concerning security, not a different form of border check. This already follows from European Union law, which establishes the abolition of border checks in Art. 67(2), Art. 77(1) letter a TFEU (for further details cf. Art. 20 and 21 of [EC] Regulation no. 562/2006 of 15 March 2006 [Schengen Borders Code], OJ L 105 of 13 April 2006, p. 1; today: Art. 22 and 23 of [EU] Regulation no. 2016/399 of 9 March 2016 [Schengen Borders Code], OJ L 77 of 23 March 2016, p. 1). In this context, the Court of Justice of the European Union repeatedly held that checks on persons not sus- 145

pected of a crime carried out close to borders may not be of the same nature as border checks (cf. CJEU, Judgment of 22 June 2010, Melki and Abdeli, C-188/10 and C-189/10, EU:C:2010:363, paras. 69 and 70 and 74 and 75; Judgment of 21 June 2017, A., C-9/16, EU:C:2017:483, paras. 34 et seq. and 63). Thus, an offsetting of the abolition of border checks based on European Union law may only be sought in measures that are not specifically limited to persons crossing the border but that may also affect third persons.

This is not disproportionate. It is within the legislature's political discretion to regard the occasional impairment by automatic number plate recognition measures carried out without specific grounds in order to combat the increased dangers brought about by opening borders as balanced by the freedom gained by opening the borders. Also, this opening of borders benefits everyone. In addition, it can be assumed that persons living near the border cross the border more frequently than those living inland. The fact that people living in the border area may thus occasionally be subject to measures even if they did not cross the border does not make the measures unreasonable towards them under the prohibition of excessive measures. 146

(c) Obviously, automatic number plate recognition measures are only proportionate to the extent that they have a clear connection with the border, and that the connection is set out in statutory provisions satisfying the requirements of specificity. This is mostly, but not completely, satisfied by the provision. 147

In this context, the protection of legal interests pursued by automatic number plate recognition is not objectionable under constitutional law. The protection of legal interests has a clear connection to the border. Automatic number plate recognition serves to suppress unlawful residence and to combat cross-border crime and thus to combat dangers that have become particularly urgent through the opening of borders. In this context, the term cross-border crime is subject to interpretation and sufficiently specific. It targets the type of crimes that take advantage of the factual and legal characteristics that exist in a border situation or close to the border, in particular the difficulty of cross-border searches and law enforcement (cf. Constitutional Court of the Free State of Saxony, *Sächsischer Verfassungsgerichtshof – SächsVerfGH*, Judgment of 10 July 2003 – Vf. 43-II-00 –, juris, para. 212). 148

In contrast, the determination of the places in which automatic number plate recognition measures may be carried out is constitutionally sound only in part. In this regard, the legislature must ensure that only places with a clear connection with the border are chosen. Unspecific provisions that could lead to the practice of carrying out measures without any connection with the border and of moving them generally farther inland are incompatible with this. Accordingly, the authorisation of automatic number plate recognition within an area of 30 km from the border is not objectionable under constitutional law. Nor is it objectionable to authorise number plate recognition at public facilities serving international traffic. These obviously have a spatial connection to the border. Also, the term 'public facilities serving international traffic' is sub- 149

ject to interpretation (cf. BayVerfGH, Judgment of 28 March 2003 – Vf. 7-VII-00 u.a. –, juris, para. 103; also SächsVerfGH, Judgment of 10 July 2003 – Vf. 43-II-00 –, juris, para. 196). In contrast, automatic number plate recognition measures authorised for places outside the 30 km area is not sufficiently specified and limited. An authorisation to generally carry out such measures on transit routes on the entire territory of the *Land* does not comply with specificity requirements and goes too far. The statutory explanation of the term transit route that follows in parentheses does not change this: a sufficiently clear limitation of such checks is not ensured given that “other routes of considerable significance for cross-border movement” are mentioned in addition to federal motorways and European routes.

(2) Also with regard to this variant of the constituent elements of the provision, the cross-checking of number plates with the data records on persons and objects sought pursuant to Art. 33(2) third and fourth sentences BayPAG must be suited to the purpose of Art. 13(1) no.5 BayPAG. Only such data records may be fed into the database used for cross-checking as might be significant in preventing or suppressing violations of the law on residency or in combatting cross-border crime. As set out above, Art. 33(2) third and fourth sentences can and must be interpreted accordingly.

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(3) Provided that the places located outside the 30 km area in which automatic number plate recognition may be carried out in the context of random sweep searches are limited in a sufficiently specific provision, the drafting of these constituent elements is, for the rest, not objectionable under constitutional law, even from an overall perspective. While the measures here have the potential to be particularly extensive and objectively not very limited, this is constitutionally justified, as an offset to the opening of the borders and the abolition of border checks, if one balances all considerations while taking into account the general requirements of Art. 33(2) second and fifth sentences BayPAG, which also include the prohibition of number plate recognition measures carried out in an unlimited area (see para. 113 et seq. above).

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In this context, it is significant that the impact of random sweep searches is further mitigated by the standards of EU law giving effect to the rule of law. According to the case-law of the European Court of Justice, provisions concerning random sweep searches are not in conflict with EU law only if they are embedded within a legal framework that ensures that in practice they cannot have the same effect as border checks. In particular where there are indications that they do have the same effect as border checks, specification and limitation must ensure that the practical carrying out of random sweep searches is framed in a manner so as to avoid having the same effect as border checks. Finally, the legal framework must be sufficiently precise and detailed so that the necessity of the sweep searches as well as the specifically authorised measures themselves can be subject to review (cf. CJEU, Judgment of 21 June 2017, A., C-9/16, EU:C:2017:483, para. 37 et seq.). According to the case-law of the regular courts, which must measure German law against these requirements, provisions like the challenged ones do not satisfy EU law standards and may not be applied in this form without a specifying binding and transparent rule on the intensity,

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frequency and selectivity of the measures; the provisions must be amended to comply with this requirement (cf. Baden-Württemberg Higher Administrative Court, *Verwaltungsgerichtshof Baden-Württemberg*, Judgment of 13 February 2018 – 1 S 1468/17 –, juris, para. 76 et seq. and 86; Judgment of 13 February 2018 – 1 S 1469/17 –, juris, para. 38 et seq. and 43 – on the relevant questions concerning the Federal Police Act – *Bundespolizeigesetz*). Insofar, the standards of EU law subject the power to carry out measures to further requirements and thereby contribute to its proportionality.

ff) For the most part, the challenged provisions satisfy the overarching standards regarding transparency, individual legal protection and supervisory measures that follow from the principle of proportionality. However, it is objectionable under constitutional law that the statutory framework does not require documentation on the part of the authorities. 153

(1) It is constitutionally unobjectionable that automatic number plate recognition is generally carried out covertly (cf. Art. 33(2) second sentence BayPAG). This is suitable and necessary for achieving the purposes aimed for and it is justified by them. Unlike covert surveillance measures, which have a high intensity of interference (cf. BVerfGE 141, 220 <269 para. 105 and 282 and 283 para. 134 et seq.>), covert automatic number plate recognition does not as such require an obligation to notify about the measure. This also applies in case of a match. Rather, in view of proportionality, it is sufficient that the affected persons are informed of the automatic number plate recognition only within the scope of follow-up measures taken against them and that they may then have the lawfulness of the automatic number plate recognition reviewed by a regular court. It must further be considered that beyond this, the general right to information under data protection law also exists (cf. Art. 48 BayPAG), even if in practice it will only exceptionally be of use in the context of automatic number plate recognition. 154

(2) As required under constitutional law (cf. BVerfGE 65, 1 <46>; 67, 157 <185>; 133, 277 <369 and 370 paras. 214 and 215>; 141, 220 <284 para. 141>; established case-law), the Act provides for supervisory measures. In addition to technical administrative supervision, data protection oversight by the Bavarian data protection officer is ensured (Art. 49 BayPAG in conjunction with Art. 30 of the Bavarian Data Protection Act, *Bayerisches Datenschutzgesetz – BayDSG*). 155

(3) In contrast, it is not compatible with the principle of proportionality that the Act does not provide for an obligation to document the basis on which a decision to use automatic number plate recognition was taken. 156

Particularly relevant for this is the fact that the decision to carry out automatic number plate recognition – unlike in the case of administrative acts requiring justification – is not and cannot be communicated to the persons concerned. Conducted as a covert measure, automatic number plate recognition only becomes known in case of a match and even then, the grounds for the measure are, in principle, not stated. In 157

general, the decision to carry out automatic number plate recognition is taken solely within the public authority. In light of these circumstances, the authorisation to carry out automatic number plate recognition can only be considered proportionate if the basis for the decision to carry out such a measure is documented in a comprehensible and verifiable manner (cf. BVerfGE 133, 277 <370 para. 215>; 141, 220 <284 and 285 para. 141>; SächsVerfGH, Judgment of 10 July 2013 – Vf. 43-II-00 –, juris, para. 218 et seq.). This concerns in particular the requirement of “relevant information on the situation” which is applicable to all constituent element options and which only takes on shape through specification by a public authority. In addition, it concerns the selection of the police data records to be used. In respect of proportionality, this requirement is – for all cases of automatic number plate recognition – relevant in three ways: Firstly, having to account for the basis of one’s decisions rationalises and moderates the decision taken by the authorities. Secondly, oversight by the data protection officer, which is of increased relevance where possibilities of individual legal recourse are limited, as is the case here, is only possible through documentation. Finally, it makes review by administrative courts easier, if such measures are documented.

gg) In principle, the Act also provides constitutionally tenable provisions with regard to the use of the data and data deletion. However, use of the data for further purposes is not sufficiently limited. 158

(1) The second sentence of Art. 33(2) BayPAG regulates the collection of data and the third and fourth sentences set out, in respect of its use, the authorisation to cross-check them to the specified extent with the aim of obtaining information on persons or objects sought in pursuit of the purposes examined above. A reasonable interpretation of the provision requires that the cross-check be conducted without undue delay, and is consistent with current practice. The recognition of a number plate and its cross-checking are carried out within a split second. 159

Furthermore, Art. 38(3) first sentence BayPAG ensures that the recorded number plates are to be deleted after the cross-check without undue delay. This is in line with the constitutional requirements (cf. BVerfGE 120, 378 <397, 399>). The false positive matches are also subject to the requirement of deletion as soon as it has been determined that the number plates are not the ones sought. 160

In accordance with the purpose of automatic number plate recognition, pursuant to Art. 38(3) second sentence BayPAG, data is not to be deleted, however, in case of a match and where the data is needed in order to avert a danger. Insofar as the provision refers to those dangers which it is the purpose of the automatic number plate recognition to avert, this cannot be constitutionally objectionable given that it follows from the justification of the number plate recognition measure itself and thus fulfils the purpose thereof. For the further use of the data, the provision refers to Art. 38(1) and (2) BayPAG, which are not at issue in these proceedings. 161

(2) Insofar as Art. 38(3) second sentence BayPAG authorises the use of data for 162

further tasks beyond the purpose of the individual number plate recognition measure, this constitutes a change in purpose that does not fully satisfy the constitutional requirements.

In any case, such a change in purpose is present where use of the information is authorised generally and for all the purposes for which the police data records were compiled or databases created. The idea is to enable the police to use coincidental findings resulting from number plate recognition, meaning that the police could take measures with regard to persons or objects that were identified without contributing to the original purpose of the number plate recognition measure.

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Authorising such use is in principle not objectionable under constitutional law. It constitutes a new interference because the use of data is extended to new purposes, which may be justified and, in principle, is indeed justified by the purposes of the search. The fact that the searches are law enforcement measures falling within the legislative competence of the Federation also does not make the provision constitutionally objectionable. The authorisation only makes it possible to use the information for further purposes but does not finally govern its use; if necessary, the federal legislature will finally decide on the use of this data for new purposes within the scope of this authorisation (see para. 80 above).

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It is, however, constitutionally required that, in respect of a change in purpose, it would also have had to be permissible – on the basis of the changed purpose – to use comparably intrusive investigation measures to obtain the data in question pursuant to constitutional standards (cf. BVerfGE 141, 220 <327 and 328 para. 286 and 287> with further references; established case-law). Therefore, data use for further purposes is only proportionate if the new purpose serves the protection of legal interests that would also have justified the carrying out of a number plate recognition measure. In accordance with the criteria developed above, this is, in principle, only the case in respect of the protection of legal interests of at least considerable weight or comparably weighty public interests (see para. 99 above), which in criminal law terms means for the prosecution of criminal offences of at least considerable importance. Since Art. 38(3) second sentence BayPAG does not fulfil this requirement in that it provides for data use for further purposes, this provision is not compatible with the Constitution in this regard.

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(3) In contrast, Art. 38(3) third sentence BayPAG is not constitutionally objectionable in that it specifies that the individual pieces of data collected may not be combined with other data to create a movement profile except in the case described in Art. 33(2) third sentence no. 2 letter a BayPAG. Cross-checking with databases pursuant to the latter provision intentionally refers to the carrying out of a specific observation over a longer period of time and thus, in a limited sense, also the creation of a – limited – movement profile. In principle, this may be constitutionally justified insofar as the relevant requirements are satisfied (cf. BVerfGE 120, 378 <416 et seq.>). Insofar, Art. 38(3) third sentence BayPAG only makes affirmative reference to the pro-

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visions concerning observation, targeted checks and covert registration carried out by the police. The provisions concerning these measures are themselves not at issue in these proceedings.

D.

I.

The challenged provisions must be declared void in part and, for the rest, incompatible with Art. 2(1) in conjunction with Art. 1(1) GG. 167

[...] 168-173

II.

Since the challenged administrative court decisions are based on the partially unconstitutional provisions, they violate the complainant’s fundamental right under Art. 2(1) in conjunction with Art. 1(1) GG. The decision of the Federal Administrative Court, as the final judgment in the matter, must be set aside and the decision as to costs is remanded to the Court. 174

III.

The decision on expenses is based on § 34a(2) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*). 175

IV.

With regard to the decision that automatic number plate recognition constitutes an interference with fundamental rights even in cases of a no match (see paras. 45 to 53 above), the decision was taken with 5:2 votes, and with regard to the general statements, following therefrom, on the requirement of specific grounds for police measures of the type at issue here (see paras. 91 to 94 above) it was taken with 6:1 votes; for the rest, it was unanimous. 176

Masing	Paulus	Baer
Britz	Ott	Christ
	Radtko	

**Bundesverfassungsgericht, Beschluss des Ersten Senats vom 18. Dezember 2018 -
1 BvR 142/15**

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