Headnotes

to the Judgment of the Second Senate of 26 February 2020

2 BvR 2347/15 -

2 BvR 651/16 -

2 BvR 1261/16 -

2 BvR 1593/16 -

2 BvR 2354/16 -

2 BvR 2527/16 -

1. a) As an expression of personal autonomy, the general right of personality (Art. 2(1) in conjunction with Art. 1(1) of the Basic Law) encompasses a right to a self-determined death.

b) The right to a self-determined death includes the freedom to take one's own life. Where an individual decides to end their own life, having reached this decision based on how they personally define quality of life and a meaningful existence, their decision must, in principle, be respected by state and society as an act of personal autonomy and self-determination.

c) The freedom to take one's own life also encompasses the freedom to seek and, if offered, make use of assistance provided by third parties for this purpose.

2. Even state measures that only have indirect or factual effects can amount to impairments of fundamental rights and thus require constitutional justification. The criminalisation of assisted suicide services in § 217(1) of the Criminal Code renders it *de facto* impossible for persons wanting to commit suicide to make use of assisted suicide services as their chosen form of suicide.

3. a) The prohibition of assisted suicide services must be measured against the standard of strict proportionality.

b) When reviewing whether the provision in question is reasonable (*zumutbar*), it must be taken into account that suicide assistance is subject to various conflicting protections under constitutional law. Respect for the fundamental right to self-determination, encompassing self-determination in decisions regarding the end of one's life, of a person making the free and voluntary decision to end their life and seeking assistance to this end collides with the state's duty to protect the autonomy of persons wanting to commit suicide and, additionally, its duty to protect life, a legal interest of high standing.

4. The high standing the Constitution accords to autonomy and life can in principle justify effective preventive protection of these interests, including by means of criminal law. If the legal order criminalises certain forms of suicide assistance that jeopardise personal autonomy, it must ensure that suicide assistance provided voluntarily can in practice still be accessed in the individual case.

5. The prohibition of assisted suicide services in § 217(1) of the Criminal Code reduces the options for assisted suicide to such an extent that there is *de facto* no scope for the individual to exercise their constitutionally protected freedom.

6. No one can ever be obliged to assist in another person's suicide.

FEDERAL CONSTITUTIONAL COURT

- 2 BvR 2347/15 -

- 2 BvR 651/16 -

- 2 BvR 1261/16 -

- 2 BvR 1593/16 -

- 2 BvR 2354/16 -

- 2 BvR 2527/16 -

Pronounced
on 26 February 2020
Fischböck
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings
on

I. the constitutional complaints

1. of Mr F...,

2. of Dr. L…,

– authorised representatives: … –

- 2 BvR 2347/15 -,

II. the constitutional complaint

of registered association S…,
represented by its board members, Chairman Dr. K…,
Vice-Chairman B…,
and Secretary S…,

– authorised representative: … –

- 2 BvR 651/16 -,

III. the constitutional complaints

1. of D…,-
   represented by its Secretary General M…,

2. of registered association D…,
   represented by its board members L… and M…,

3. of Mr M…,

4. of Ms. L...,

5. of Ms G...,

6. of Mr G...,

– authorised representatives: … –

- 2 BvR 1261/16 -,

IV. the constitutional complaint

of Dr. med. d. R…,

– authorised representatives: … –

- 2 BvR 1593/16 -,

V. the constitutional complaints

1. of Dr. med. B…,

2. of Dr. med. V…,

3. of Dr. med. S…,

4. of Dr. med. V…,

– authorised representatives: … –

- 2 BvR 2354/16 -,

VI. the constitutional complaints

1. of Mr A...,

2. of Dr. med. P…,

3. of Prof. R…,

4. of Ms S...,

5. of Mr S...,

– authorised representative: … –

- 2 BvR 2527/16 -

against § 217 of the Criminal Code (*Strafgesetzbuch*) as amended by the Act Criminalising Assisted Suicide Services (*Gesetz zur Strafbarkeit der geschäftsmäßigen Förderung der Selbsttötung*) of 3 December 2015 (Federal Law Gazette I, *Bundesgesetzblatt* page 2177)

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Voßkuhle,

Masing,

Huber,

Hermanns,

Kessal-Wulf,

König,

Maidowski,

Langenfeld

held on the basis of the oral hearing of 16 and 17 April 2019:

Judgment:

1. **The proceedings are combined for joint decision.**

2. **§ 217 of the Criminal Code, as amended by the Act Criminalising Assisted Suicide Services of 3 December 2015 (Federal Law Gazette I page 2177) violates the fundamental right under Article 2(1) in conjunction with Article 1(1) of the Basic Law (*Grundgesetz*) of the complainants in proceedings I. 1, I. 2, and VI. 5, the fundamental right under Article 2(1) of the Basic Law of the complainants in proceedings II. and III. 2, the fundamental rights under Article 2(1) and Article 2(2) second sentence in conjunction with Article 104(1) of the Basic Law of the complainants in proceedings III. 3 to III. 5 and VI. 2, and the fundamental rights under Article 12(1) and Article 2(2) second sentence in conjunction with Article 104(1) of the Basic Law of the complainants in proceedings III. 6, IV., V. 1 to V. 4 and VI. 3. The provision is incompatible with the Basic Law and void.**

3. **The constitutional complaints of the complainants in proceedings VI. 1 and VI. 4 have been rendered moot by their death.**

4. **The constitutional complaint of the complainant in proceedings III. 1 is dismissed as inadmissible.**

5. **The Federal Republic of Germany must reimburse the complainants – except for the complainant in proceedings III. 1 – for necessary expenses.**

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R e a s o n s:

A.

I.

The constitutional complaints directly challenge § 217 of the Criminal Code (*Strafgesetzbuch* – StGB), as amended by the Act Criminalising Assisted Suicide Services (*Gesetz zur Strafbarkeit der geschäftsmäßigen Förderung der Selbsttötung*) of 3 December 2015 (Federal Law Gazette I, *Bundesgesetzblatt* – BGBl p. 2177). 1

The complainants are seriously ill persons who want to end their lives with the help of assisted suicide services provided by third parties, as well as associations based in Germany and Switzerland providing such suicide assistance, the associations' representatives and employees, doctors working in outpatient or inpatient care and lawyers providing legal advice on and arranging suicide assistance. 2

In their constitutional complaints, the complainants who want to make use of suicide assistance derive a right to a self-determined death in particular from the general right of personality (Art. 2(1) in conjunction with Art. 1(1) of the Basic Law, *Grundgesetz* – GG). They claim that, as an expression of personal autonomy and self-determination, the general right of personality also encompasses the right to use suicide assistance provided by third parties and that this right is violated by § 217 StGB. They assert that their chosen form of suicide assistance is no longer available to them given that pro- 3

viding assisted suicide services (*geschäftsmäßige Förderung der Selbsttötung*) was made a punishable offence.

In their constitutional complaints, the associations claim that their fundamental rights under Art. 12(1), Art. 9(1) and Art. 2(1) GG have been violated; the persons working for them additionally claim a violation of their freedom of conscience (Art. 4(1) second alternative GG). They state that the suicide assistance they offer fits the constituent elements of § 217 StGB. Therefore, they can no longer provide suicide assistance without committing a criminal offence; furthermore, the associations could become liable to a fine pursuant to § 30(1) no. 1 of the Act on Administrative Offences (*Ordnungswidrigkeitengesetz* – OWiG) or could be prohibited pursuant to § 3 of the Associations Act (*Vereinsgesetz* – VereinsG). 4

With their constitutional complaints, the doctors essentially assert a violation of their freedom of conscience and their occupational freedom (Art. 4(1) second alternative and Art. 12(1) GG). 5

In their constitutional complaints, the lawyers also contend that § 217 StGB violates their occupational freedom under Art. 12(1) GG, given that providing legal advice relating to suicide and arranging suicide assistance have been criminalised. 6

All complainants assert that the challenged provision lacks specificity. They claim that § 217 StGB does not sufficiently ensure that individual suicide assistance in isolated cases remains exempt from punishment. They also assert that it is not clear whether and to what extent § 217 StGB also encompasses forms of assisted dying (passive assisted dying and discontinuation of treatment) and palliative care that were exempt from punishment before. They claim that § 217 StGB thus prevents doctors from practising their profession in a way that is guided by the best interests of their patients. 7

II.

1. § 217 StGB was introduced into the Criminal Code by the Act Criminalising Assisted Suicide Services of 3 December 2015 (BGBl I p. 2177) with effect from 10 December 2015. 8

a) The provision reads as follows: 9

> Assisted suicide services
>
> (1) Whoever, with the intention of assisting another person to commit suicide, provides, procures or arranges the opportunity for that person to do so as a professionalised service incurs a penalty of imprisonment for a term not exceeding three years or a fine.
>
> (2) A participant whose actions are not provided as a professionalised service and who is either a relative of or is close to the person referred to in subsection (1) is exempt from punishment.

b) This version of § 217 StGB is based on the Draft Act Criminalising Assisted Suicide Services (*Bundestag* document, *Bundestagsdrucksache* – BTDrucks 18/5373), which was adopted by a cross-party majority of the German *Bundestag* on 6 November 2015 following intense parliamentary debate (*Bundestag* Minutes of plenary proceedings, *BT-Plenarprotokoll* 18/134, p. 13101); it was then promulgated as the Act Criminalising Assisted Suicide Services in the Federal Law Gazette on 9 December 2015 (BGBl I p. 2177). In the legislative procedure, four proposals were put to the vote that provided for different legislative approaches to deal with the wish to end one's own life in self-determination: the Draft Act Criminalising Assisted Suicide Services (BTDrucks 18/5373), the Draft Act Governing Medical Assistance in Dying (Suicide Assistance Act, BTDrucks 18/5374), the Draft Act on Exemption From Punishment for Suicide Assistance (BTDrucks 18/5375) and the Draft Act Criminalising Participation in Suicide Assistance (BTDrucks 18/5376). 10

aa) The draft law that was ultimately adopted was the Draft Act Criminalising Assisted Suicide Services (BTDrucks 18/5373), which defines a specific form of assisted suicide as a criminal offence. This is the law at issue in the present proceedings. 11

bb) The Draft Act Governing Medical Assistance in Dying (Suicide Assistance Act, BTDrucks 18/5374) was not designed to change the existing framework under criminal law and merely provided for a civil law provision specifically authorising suicide assistance provided by doctors to improve legal certainty. The drafters intended to codify the right of adult patients who have capacity to consent to make use of the voluntary assistance of a doctor in ending their own life. In the draft law, this right was merely subject to the conditions that the patient has a serious and final wish to commit suicide, that the doctor informs the patient about other treatment options and the procedure of suicide assistance, that the doctor establishes that the medical condition is irreversible and in all likelihood terminal and that the patient's wish and their capacity to consent is confirmed by a second doctor. 12

cc) The Draft Act on Exemption From Punishment For Suicide Assistance (BTDrucks 18/5375) aimed to expressly enshrine in law a general exemption from punishment for suicide assistance provided to persons who want to end their life based on a free decision, and was thus not limited to suicide assistance provided by doctors. It only provided for criminal sanctions in the event that statutory waiting periods or counselling and documentation obligations were breached, or in the event that suicide assistance was provided as a professionalised service. This draft law also provided for a specific legislative framework regarding suicide assistance provided by doctors, laying down that doctors are not obliged to provide suicide assistance, while at the same time stipulating that they could not be barred from providing it by the laws and codes governing the medical profession. Conflicting provisions were expressly to be declared ineffective. 13

dd) By contrast, the Draft Act Criminalising Participation in Suicide Assistance (BTDrucks 18/5376) went beyond the now applicable § 217 StGB, as it was intended to 14

criminalise incitement to and assistance of suicide in general.

c) The legislative initiative was accompanied by the Act to Improve Hospice and Palliative Care in Germany (Hospice and Palliative Care Act, *Hospiz- und Palliativgesetz* – HPG, BGBl I p. 2114), which was adopted on 5 November 2015 and signed into law on 1 December 2015. This Act concerns the expansion of the outpatient and inpatient hospice and palliative care infrastructure. […] 15

2. When the Act Criminalising Assisted Suicide Services was adopted, certain instances of participation in the suicide of a person acting on their own initiative were made a punishable offence for the first time since a uniform criminal law system was introduced in Germany in 1871. 16

[…] 17-22

3. Suicide is not a punishable offence under criminal law as it currently stands. Therefore, suicide assistance, too, is in principle exempt from punishment if the participant providing assistance in the suicide of a person acting on their own initiative is not responsible for the act (*nicht tatherrschaftliche Beteiligung*) (cf. Decisions of the Federal Court of Justice in Criminal Matters – *Entscheidungen des Bundesgerichtshofes in Strafsachen* – BGHSt 2, 150 <152>; 6, 147 <154>; 32, 262 <264>; 32, 367 <371>; 53, 288 <290>; […]). This notion of suicide assistance must be distinguished from assisted dying. The term assisted dying comprises a large number of different situations which, in contradistinction to suicide assistance, have in common conduct controlled by external third parties which has a life-shortening effect or is otherwise conducive to such shortening ([…]). By definition, assisted dying is only provided if someone suffers. The element “assisted” excludes acts (terminating life) that are performed against the explicit or implied will of affected persons ([…]). The courts distinguish between different constellations in which assisted dying is exempt from punishment. On the one hand, they include passive assisted dying resulting in an earlier, unintended death, which is accepted as the consequence of pain management or treatment otherwise alleviating suffering (cf. BGHSt 42, 301 <305>); on the other hand, they include discontinuation of treatment, which covers any active or passive restrictions or termination of life-sustaining or life-prolonging treatment in accordance with the actual or implied will of the patient (cf. BGHSt 55, 191 <202 *et seq*. para. 30 *et seq*.>). Apart from these constellations, killing someone with that person’s consent is a criminal offence pursuant to § 216 StGB (termination of life on request, *Tötung auf Verlangen*). 23

4. § 217 StGB was designed to further differentiate this distinction between conduct that is subject to punishment and conduct that is exempt from punishment in relation to the wish to die. The provision does not call into question that suicide and participation in suicide is in principle exempt from punishment; however, it aims to serve as a corrective where assisted suicide provided as a professionalised service jeopardises self-determination and life (cf. BTDrucks 18/5373, pp. 2, 11 and 12, 17). 24

The provision is not limited to criminalising acts aiding (*Beihilfe*) suicide as a professionalised service within the meaning of § 27 StGB, i.e. providing intentional assistance in – at least – a specific attempt to commit suicide; rather, the provision defines assisted suicide services as an offence based on the abstract danger they pose (*abstraktes Gefährdungsdelikt*). It criminalises the providing, procuring or arranging of the opportunity to commit suicide as a professionalised service, which are considered acts posing an abstract danger to life (cf. BTDrucks 18/5373, pp. 3, 14). Actual implementation or even the mere attempt to commit suicide is not required (cf. BT-Drucks 18/5373, p. 19). 25

III.

Most European countries prohibit and criminalise suicide assistance ([…]). Switzerland, the Netherlands and Belgium have a more liberal regime. In Switzerland, only suicide assistance is permissible, whereas in the Netherlands and Belgium, termination of life on request, if it is performed by doctors, is exempt from punishment under certain conditions, too. Outside Europe, the US state of Oregon and Canada exempt medical assistance in dying from punishment under certain conditions. 26

1. In Switzerland, termination of life on request is prohibited, including for doctors (cf. Art. 114 of the Swiss Criminal Code). Yet under Art. 115 of the Swiss Criminal Code, assistance in suicide (whether attempted or completed) is only a punishable offence if it is done for selfish motives. The provision applies to doctors and other persons alike. An act is considered a punishable offence if it is committed with intent and for “selfish motives”, i.e. if the person providing assistance pursues a personal advantage, in particular material gain. Fees charged by organisations providing suicide assistance in Switzerland do not fit the element of selfish motives insofar as the fees merely cover their administrative expenses; persons working for such organisations are thus not penalised under Art. 115 of the Swiss Criminal Code. While it is not only doctors who can provide suicide assistance in Switzerland, they *de facto* act as gatekeepers when it comes to suicide assistance: in a decision from 2006, the Federal Supreme Court of Switzerland (*Schweizer Bundesgericht* – BGE) expressly maintained the requirement that pentobarbital sodium or similar substances used to commit suicide be prescribed by a doctor. In the context of suicide assistance, this prescription requirement is meant to prevent criminal acts and counter risks of abuse. In addition, it is meant to ensure that a doctor, in accordance with professional duties and the duty of care incumbent upon medical professionals, establishes a diagnosis, defines indications and provides information to the patient, and also assesses the patient’s capacity and medical records as well as whether the patient has undergone all available treatment measures. Accordingly, the prescription requirement constitutes a procedure for review designed to ensure that a decision to commit suicide does indeed correspond to the free and considered will of the person concerned (cf. BGE 133 I 58 <71 and 72>, confirmed by ECtHR, Haas v. Switzerland, Judgment of 20 January 2011, no. 31322/07). Thus, doctors must be involved in any assisted suicide carried out using a substance falling under the laws on controlled substances or 27

therapeutic products ([…]).

2. In the Netherlands, both termination of life on request and suicide assistance (insofar as it is completed) are punishable offences (cf. Arts. 293(1) and 294(2) first sentence of the Netherlands Criminal Code). Yet since 2002, doctors can be exempt from punishment on special grounds (cf. Arts. 293(2) and 294(2) second sentence of the Netherlands Criminal Code). According to these provisions, doctors actively participating in assisted dying or suicide assistance are exempt from punishment if they comply with certain duties of care under Art. 2 of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act (so-called Assisted Suicide Act) and if they report the procedure. Under Art. 2 of the Assisted Suicide Act, the doctor must first assess whether the patient in question wishes to terminate their life voluntarily and after careful consideration. Furthermore, the doctor must inform the patient about their situation and medical prognosis and at least consult one other independent doctor who examines the patient and submits a written statement on compliance with the criteria of due care. A psychiatric examination is not mandatory. Acts of assisted dying or suicide assistance must be carried out in line with medical standards. Termination of life on request and suicide assistance are not restricted to terminal illnesses. It is sufficient that there is no prospect of improvement, the patient is enduring "intolerable suffering" and there is no "other acceptable solution" in their situation. Under certain conditions, minors who are at least twelve years old can receive assistance in dying. Regional medical review boards for assisted suicide examine whether the due care criteria set out in Art. 2 of the Assisted Suicide Act have been fulfilled. Doctors are not obliged to perform acts of assisted dying or suicide assistance ([…]). 28

3. Belgian law on this matter is similar. In Belgium, too, a law enacted in 2002 sets out the conditions for the exemption from punishment for doctors carrying out termination of life on request, which otherwise is a punishable offence – either manslaughter or murder (cf. Arts. 393 and 394 of the Belgian Criminal Code); yet unlike in the Netherlands, suicide assistance is not a punishable offence in Belgium. Under Art. 3 of the Assisted Dying Act, the doctor providing assistance in dying must ascertain that the patient is competent, is conscious at the time of making the request and that the request has been made voluntarily, deliberately and repeatedly and no pressure has been put on them by others. Like in the Netherlands, assisted dying is not restricted to cases of terminal illness. It is merely required that the patient is in a medically futile situation, and has to endure continual and unbearable physical or mental suffering that cannot be alleviated. In addition, this suffering must result from a serious and irremediable condition, either caused by an accident or by illness. In order to be exempt from punishment, doctors must observe the conditions and procedures set out in detail in the law. These include that the doctor must inform the patient about their medical condition and life expectancy and discuss remaining treatment and palliative care options. Moreover, the doctor must consult another independent and qualified doctor to assess the patient's physical or mental suffering; this second doctor must inspect the medical records and examine the patient. […] Within four days 29

of providing assistance in dying, the doctor must report it to the competent Federal Commission for the Control and Evaluation of Euthanasia, which then examines whether the assistance in dying provided conformed to the statutory conditions and the required procedures (cf. Arts. 5 and 8 of the Assisted Dying Act). Minors may request assistance in dying with no age limit set out in the law. Yet like in the Netherlands, doctors are not obliged to provide assistance in dying in Belgium either ([…]).

4. In the US state of Oregon, too, doctors can provide assistance in realising a patient's wish to die. Unlike in the Netherlands or Belgium, however, medical assistance in dying is only exempt from punishment if the patient suffers from a terminal illness. Doctors can prescribe their patients lethal medication without being subject to punishment if they observe the requirements of the Oregon Death with Dignity Act, which entered into force in 1997. According to the provisions of this Act, capable and adult patients living in Oregon can request a prescription for lethal medication. They must be diagnosed with a terminal illness that, based on a sound medical assessment, will lead to death within six months. The treating physician must confirm that the patient has been diagnosed with a terminal illness, that the patient is capable and that it is the patient's voluntary wish to die. Another physician must be consulted who must submit a written confirmation of the treating physician's opinion after examining the patient and inspecting the medical records. If there is any doubt, a psychiatric examination is required. In addition, the treating physician must comply with comprehensive duties to provide information to the patient: they must inform the patient about their medical diagnosis and prognosis, potential risks and the anticipated outcome of taking the lethal medication as well as about possible alternatives including palliative care, hospice care and pain management, and thus ensure that the patient can make an informed end-of-life decision. Formally, the person wanting to die must orally express their wish at least twice, and once declare it in writing in the presence of two witnesses, who must also be satisfied that the person wanting to die is capable and that their wish to die is voluntary. […] 30

5. In Canada, the Supreme Court, in its judgment Carter v. Canada (cf. Supreme Court of Canada, Judgment of 6 February 2015, - [2015] 1 S.C.R. 331 -), declared unconstitutional the criminal law prohibitions of aiding or abetting a person to commit suicide under any circumstances, which had been applicable until the Supreme Court rendered its judgment. Following this judgment, in 2016 a law (Bill C-14) entered into force that sets out the requirements under which assistance in dying and suicide assistance – which are still punishable offences under other circumstances – are exempt from punishment. According to this law, no medical practitioner or nurse practitioner commits culpable homicide if they provide a person with medical assistance in dying; the term medical assistance in dying encompasses both the administering by a medical practitioner or nurse practitioner of a substance to a person at their request and suicide assistance, whereby a medical practitioner or nurse practitioner provides a substance to a person at their request, so that they may self-administer the substance and in doing so cause their own death (cf. Arts. 227(1) and 241(2) of the Crim- 31

inal Code). Likewise, any other person aiding a medical practitioner or nurse practitioner to provide medical assistance in dying or aiding a patient, at the patient's explicit request, to self-administer a (prescribed) lethal substance is exempt from punishment (cf. Arts. 227(2), 241(3) and 241(5) of the Criminal Code). Pharmacists dispensing the lethal medication are also exempt from punishment. Art. 241.2(1) and (2) of the Criminal Code set out in detail under which circumstances medical assistance in dying is permissible. In particular, patients must be at least 18 years of age and capable of making decisions. They must have made a voluntary request for medical assistance in dying that was not made as a result of external pressure. Moreover, patients must have been informed of alternative treatments, including palliative care. In addition, they must have a grievous and irremediable medical condition causing enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable. Also, their natural death must be "reasonably foreseeable", taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining.

The procedure for medical assistance in dying is governed by Art. 241.2(3) to (6) of the Canadian Criminal Code: before providing medical assistance in dying, a medical practitioner or nurse practitioner must be of the opinion that the person wanting to die meets all of the criteria set out above. Another independent medical practitioner or nurse practitioner must provide a written opinion confirming that the patient meets the criteria. The patient must make the request for assisted suicide or assisted dying in writing – after they were informed by a medical practitioner or nurse practitioner that they have a grievous and irremediable medical condition – before two independent witnesses who must also sign and date the request. The patient must be informed that they may, at any time and in any manner, withdraw their request. The waiting period between the request and its implementation is generally at least 10 days. The medical practitioner or nurse practitioner can only provide medical assistance in dying if the patient again gives express consent to receive it. Moreover, the pharmacist dispensing the lethal substance must be informed for which purpose the substance is intended. Failure to comply with these requirements is a punishable offence (cf. Art. 241.3 of the Criminal Code). In Canada, too, no one is obliged to provide medical assistance in dying. 32

IV.

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V.

1. The German *Bundestag*, the *Bundesrat*, the Federal Government (the Federal Chancellery and the Federal Ministry of Justice and Consumer Protection) as well as all *Land* Governments were given the opportunity to submit a statement pursuant to § 94(4) in conjunction with § 77 no. 1 of the Federal Constitutional Court Act (*Bun-* 88

desverfassungsgerichtsgesetz – BVerfGG).

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2. Upon request, the President of the Federal Court of Justice (*Bundesgerichtshof*) advised that its criminal divisions (*Strafsenate*) had not yet dealt with proceedings concerning the application of § 217 StGB. She decided not to submit a statement. 124

3. According to the Public Prosecutor General (*Generalbundesanwalt*) at the Federal Court of Justice, not only suicide based on a free decision as such, but also the use of suicide assistance provided voluntarily by third parties is protected under constitutional law. However, he considers the restriction of this right to be constitutionally justified. 125

[…] 126-141

4. Furthermore, statements pursuant to § 27a BVerfGG were submitted by the Commissariat of German Bishops (*Kommissariat der deutschen Bischöfe*), the Protestant Church in Germany (*Evangelische Kirche in Deutschland*), the Central Council of Jews in Germany (*Zentralrat der Juden in Deutschland*), the German Medical Association (*Bundesärztekammer*), the doctors' association *Marburger Bund*, the German Nurses Association – National Office (*Deutscher Berufsverband für Pflegeberufe – Bundesverband e.V.*), the German Association for Palliative Medicine (*Deutsche Gesellschaft für Palliativmedizin e.V.)*, the German Palliative Care Foundation (*Deutsche PalliativStiftung*), the German Patient Protection Foundation (*Deutsche Stiftung Patientenschutz*), the German Association for Hospice and Palliative Care (*Deutscher Hospiz- und PalliativVerband e.V.*) and the Humanist Union (*Humanistische Union*), the German Humanist Association – National Office (*Humanistischer Verband Deutschland – Bundesverband e.V.*) as well as the German Lawyers' Association (*Deutscher Anwaltverein e.V.*). 142

No statements were submitted by the Federal Bar Association (*Bundesrechtsanwaltskammer)*, the German Association of Judges (*Deutscher Richterbund*), the New Association of Judges (*Neue Richtervereinigung*), the doctors' association *Hartmannbund*, the International Association for End-of-Life Care and Assistance in Life (*Internationale Gesellschaft für Sterbebegleitung und Lebensbeistand e.V.*), the German Nursing Council (*Deutscher Pflegerat e.V.*) and the German Nursing Association (*Deutscher Pflegeverband e.V.*) . 143

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5. In addition, the G. B. Foundation, the F. ideological community, the E. and the K Working Groups submitted briefs on their own initiative, and practitioners and academics submitted specialist articles. 174

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VI.

On 16 and 17 April 2019, the Court conducted an oral hearing, in the course of which the parties specified their submissions. 178

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B.

I.

1. The complainant in proceedings VI. 1 died on 12 April 2019. Therefore, his constitutional complaint has become moot (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 6, 389 <442 and 443>; 12, 311 <315>; 109, 279 <304>). […] 181

[…] 182

2. The same applies to the constitutional complaint of the complainant in proceedings VI. 4, who has also died since. 183

II.

The constitutional complaint of the complainant in proceedings III. 1, an assisted suicide association based in Switzerland, is inadmissible. The complainant cannot assert that § 217 StGB violates its fundamental rights or rights that are equivalent to fundamental rights. Insofar as it invokes substantive fundamental rights as a legal person based in Switzerland, it does not have the legal ability to lodge a constitutional complaint given that it does not have legal personality with regard to fundamental rights (see 1. below). It also does not demonstrate that it is affected by the lack of specificity (Art. 103(2) GG) of the prohibition of assisted suicide services (see 2. below). 184

1. As an association based in Switzerland, the complainant in proceedings III. 1 cannot invoke substantive fundamental rights under Art. 19(3) GG. 185

a) Pursuant to Art. 19(3) GG, fundamental rights only apply to domestic legal persons insofar as the nature of such rights permits. By contrast, foreign legal persons can only invoke the procedural fundamental rights under Art. 101(1) second sentence and Art. 103(1) GG (cf. BVerfGE 3, 359 <363>; 12, 6 <8>; 18, 441 <447>; 19, 52 <55 and 56>; 21, 362 <373>; 64, 1 <11>), but they cannot invoke substantive fundamental rights and thus also cannot challenge a violation of such rights with a constitutional complaint (cf. already BVerfGE 21, 207 <209>; 23, 229 <236>; 100, 313 <364>; 129, 78 <91, 96 and 97>). Foreign legal persons based in the EU are an exception to this rule. Within the scope of application of EU law, the legal ability to hold fundamental rights must be extended to them if there is a sufficient link to domestic matters that makes it appear necessary that the fundamental rights apply to them in the same way as they apply to domestic legal persons (cf. BVerfGE 129, 78 <97 *et seq*.>). 186

Third-country nationals, including legal persons based in third countries (cf. CJEU, Phil Collins v. Imtrat Handelsgesellschaft mbH and Others, Judgment of 20 October 1993, C-92/92 and C-326/92, EU:C:1993:847, para. 30; International Jet Management GmbH, Judgment of 18 March 2014, C-628/11, EU:C:2014:171, para. 34 *et seq*.), cannot directly derive any claims from EU law (cf. CJEU, Athanasios Vatsouras and Others v. Arbeitsgemeinschaft Nürnberg, Judgment of 4 June 2009, C-22/08 and C-23/08, EU:C:2009:344, para. 52 <in relation to Art. 12 of the EEC Treaty>; Land Hessen v. G. Ricordi & Co. Bühnen- und Musikverlag GmbH, Judgment of 6 June 2002, C-360/00, EU:C:2002:346, para. 31 <in relation to Art. 6 of the EEC Treaty>; Office national d'allocations familiales pour travailleurs salariés (ONAFTS) v. Radia Hadj Ahmed, Judgment of 13 June 2013, C-45/12, EU:C:2013:390, para. 38 *et seq*.; Raad van bestuur van de Sociale verzekeringsbank v. F. Wieland and Others, Judgment of 27 October 2016, C-465/14, EU:C:2016:820, para. 67 *et seq*.). They can only invoke the fundamental freedoms of the Treaty on the Functioning of the European Union (TFEU) and the protection of Art. 18 TFEU in cases where they are granted a legal position that provides them with protection under the principle of non-discrimination enshrined in Art. 18 TFEU and its specifications ([…]; cf. also CJEU, United Kingdom of Great Britain and Northern Ireland v Council of the European Union, Judgment of 27 February 2014, C-656/11, EU:C:2014:97, para. 56 e*t seq*.). 187

Thus, the complainant in proceedings III. 1 cannot invoke fundamental rights under Art. 19(3) GG. Given that it is based in Switzerland, it cannot derive fundamental rights protection from the fact that the ability to hold fundamental rights extends to foreign legal persons based in the EU. There is no need to answer the question whether the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons (OJ 2002 L 114 p. 6), which only contains guarantees based on the specific prohibitions of discrimination in the context of the fundamental freedoms, grants the complainant the freedom to provide services under Art. 56 TFEU. In any case, the complainant's activities do not fall within the substantive guarantee of this fundamental freedom. The complainant is a non-profit organisation, as set out in its bylaws ([…)]. 188

b) An ability of foreign legal persons to hold fundamental rights and lodge constitutional complaints does not follow from the European Convention on Human Rights (ECHR) either. The prohibition of discrimination set out in Art. 14 ECHR does not include a general guarantee of a right to equality, but can only be invoked in conjunction with another Convention right ([…]). To the extent that Art. 13 ECHR requires an effective remedy before a national authority for persons whose Convention rights have been violated, it does in any case not require a remedy directly against a law (cf. ECtHR, Leander v. Sweden, Judgment of 26 March 1987, no. 9248/81, § 77; Lithgow and Others v. the United Kingdom, Judgment of 8 July 1986, no. 9006/80 *inter alia*, § 206). 189

2. […] 190-191

III.

The other constitutional complaints are admissible. 192

[…] 193-199

C.

To the extent that the constitutional complaints are admissible, they are well-founded. 200

§ 217 StGB violates the right to a self-determined death deriving from the general right of personality (Art. 2(1) in conjunction with Art. 1(1) GG) of the complainants in proceedings I. 1, I. 2 und VI. 5 (see I. below). In respect of the other complainants, the prohibition of assisted suicide services violates their fundamental right to occupational freedom (Art. 12(1) GG), insofar as they want to provide suicide assistance in the context of their professional activities and are German nationals, and, for the rest, their general freedom of action (Art. 2(1) GG). By providing for the possibility of a prison sentence, § 217 StGB also violates the right to liberty under Art. 2(2) second sentence in conjunction with Art. 104(1) GG of the complainants in proceedings III. 3 to III. 6, IV., V. 1 to V. 4 as well as VI. 2 and VI. 3. As the criminalisation of assisted suicide services may lead to administrative fines being imposed on the complainants in proceedings II. and III. 2 under § 30(1) no. 1 OWiG, § 217 StGB also violates the fundamental right of these associations under Art. 2(1) GG (see II. below). § 217 StGB cannot be interpreted in conformity with the Constitution (see III. below). Therefore, the provision is incompatible with the Basic Law and void (see IV. below). 201

I.

The prohibition of assisted suicide services set out in § 217 StGB violates the general right of personality (Art. 2(1) in conjunction with Art. 1(1) GG) in its manifestation as a right to a self-determined death of persons who decide to end their own life. Even if the provision were interpreted strictly to the effect that it only applied to suicide assistance rendered with the intention to offer such services on a recurring basis to persons taking their own life themselves, such interpretation does not lead to a different conclusion. 202

Art. 2(1) in conjunction with Art. 1(1) GG guarantees the right to choose, in self-determination, to take one’s own life based on an informed and deliberate decision and to make use of the assistance of third parties when doing so (see 1. below). § 217 StGB interferes with this right (see 2. below). This interference is not justified (see 3. below). The recognition of a right to suicide and the limits to how far it can be restricted set out here are in accordance with the European Convention on Human Rights (see 4. below). 203

1. The right to take one’s own life of persons capable of self-determination and per- 204

sonal responsibility forms part of the guarantees deriving from the general right of personality (Art. 2(1) in conjunction with Art. 1(1) GG).

a) Respect for and protection of human dignity and freedom are fundamental principles of the constitutional order, informed by the central notion that human beings are capable of self-determination and personal responsibility (cf. BVerfGE 5, 85 <204>; 45, 187 <227>). As a “non-listed” freedom, the general right of personality protects aspects of one's personality that are not covered by the specific freedoms of the Basic Law, but are equal to these freedoms in terms of their constitutive significance for one’s personality (established case-law, cf. BVerfGE 99, 185 <193>; 101, 361 <380>; 106, 28 <39>; 118, 168 <183>; 120, 274 <303>; 147, 1 <19 para. 38>). 205

The protective guarantee of the general right of personality is determined by its specific link to Art. 1(1) GG: when determining the content and scope of the protection afforded by the general right of personality – which is not defined exhaustively –, it must be taken into account that human dignity is inviolable and must be respected and protected by all state authority (cf. BVerfGE 27, 344 <351>; 34, 238 <245>). Rooted in the notion that personal autonomy and the development of one’s personality are integral to human freedom (cf. BVerfGE 45, 187 <227>; 117, 71 <89>; 123, 267 <413>), the guarantee of human dignity encompasses in particular the protection of one’s individuality, identity and integrity (cf. BVerfGE 144, 20 <207 para. 539>). This implies that every person has a right to value and respect from society (*sozialer Wert- und Achtungsanspruch*); this right makes it impermissible to turn a person into the “mere object” of state action or to expose them to treatment which generally questions their quality as a conscious subject (cf. BVerfGE 27, 1 <6>; 45, 187 <228>; 109, 133 <149 and 150>; 117, 71 <89>; 144, 20 <207 paras. 539 and 540>). Thus, inalienable human dignity means that any human being is unconditionally recognised as an individual with personal responsibility (cf. BVerfGE 45, 187 <228>; 109, 133 <171>). 206

The specific guarantees deriving from the general right of personality give effect to the notion of autonomous self-determination that is rooted in human dignity (cf. BVerfGE 54, 148 <155>; 65, 1 <41, 42 and 43>; 80, 367 <373>; 103, 21 <32 and 33>; 128, 109 <124>; 142, 313 <339 para. 74>). This right ensures the basic conditions for the individual to find, develop and protect their identity and individuality in self-determination (cf. BVerfGE 35, 202 <220>; 79, 256 <268>; 90, 263 <270>; 104, 373 <385>; 115, 1 <14>; 116, 243 <262 and 263>; 117, 202 <225>; 147, 1 <19 para. 38>). Notably, the self-determined protection of one’s personality requires that the individual can control their life on their own terms and is not forced into ways of living that are fundamentally irreconcilable with their idea of self and their personal identity (cf. BVerfGE 116, 243 <264 and 265>; 121, 175 <190 and 191>; 128, 109 <124, 127>). 207

b) As an expression of personal autonomy, the general right of personality encompasses a right to a self-determined death, which includes the right to suicide (see aa) 208

below). Protection afforded by fundamental rights also encompasses the freedom to seek and, if offered, make use of assistance provided by third parties for this purpose (see bb) below).

aa) (1) In terms of human personality, the decision to end one's own life is of the most vital significance to one's existence. It reflects one's personal identity and is a central expression of the person capable of self-determination and personal responsibility. For the individual, the purpose of life, and whether and for what reasons they might consider ending their own life, is a matter of highly personal beliefs and convictions. The decision to commit suicide concerns fundamental questions of human existence and has a bearing on one's identity and individuality like no other decision. Therefore, the general right of personality in its manifestation as right to a self-determined death is not limited to the right to refuse, of one's own free will, life-sustaining treatments and thus let a terminal illness run its course (cf. in terms of the outcome BVerfGE 142, 313 <341 para. 79>; BGHSt 11, 111 <113 and 114>; 40, 257 <260, 262>; 55, 191 <196 and 197 para. 18, 203 and 204 para. 31 *et seq*.>; Decisions of the Federal Court of Justice in Civil Matters, *Entscheidungen des Bundesgerichtshofes in Zivilsachen* – BGHZ 163, 195 <197 and 198>). The right to a self-determined death also extends to cases where the individual decides to take their own life. The right to take one's own life guarantees that the individual can determine their fate autonomously in accordance with their ideas of self and can thus protect their personality ([…]). 209

(2) The right to a self-determined death, as an expression of personal freedom, is not limited to situations defined by external causes. The right to determine one's own life, which forms part of the innermost domain of an individual's self-determination, is in particular not limited to serious or incurable illness, nor does it apply only in certain stages of life or illness. Restricting the scope of protection to specific causes or motives would essentially amount to an appraisal of the motives of the person seeking to end their own life, and thereby a substantive predetermination, which is alien to the Basic Law's notion of freedom. Such a restriction would lead to considerable difficulties in drawing distinctions; furthermore, it would come into conflict with the concept of human dignity and the free development of one's personality in self-determination and personal responsibility, which is fundamental to the Basic Law (cf. BVerfGE 80, 138 <154> regarding general freedom of action). The right to a self-determined death is rooted in the guarantee of human dignity enshrined in Art. 1(1) GG; this implies that the decision to end one's own life, taken on the basis of personal responsibility, does not require any explanation or justification. Art. 1(1) GG protects human dignity, the way humans understand themselves as individuals and become aware of themselves (cf. BVerfGE 49, 286 <298>; 115, 1 <14>). What is decisive is the will of the holder of fundamental rights, which eludes any appraisal on the basis of general values, religious precepts, societal norms for dealing with life and death, or considerations of objective rationality (cf. BVerfGE 128, 282 <308>; 142, 313 <339 para. 74> regarding medical treatment). Self-determination regarding the end of one's own life forms part 210

of the “most foundational domain of human personality”, in which the person is free to choose their own standards and to decide accordingly (cf. BVerfGE 52, 131 <175> dissenting opinion of Justices Hirsch, Niebler and Steinberger regarding medical treatment). This right is guaranteed in all stages of life. Where an individual decides to end their own life, having reached this decision based on how they personally define quality of life and a meaningful existence, their decision must, in principle, be respected by state and society as an act of autonomous self-determination.

(3) The right to end one’s own life may not be denied on the grounds that a person committing suicide forfeits their dignity given that, by ending their life, they also give up the very basis of self-determination and thus their quality as a conscious subject ([…]). While life is the fundamental basis of human dignity (cf. BVerfGE 39, 1 <41 and 42>; 88, 203 <252>; 115, 118 <152>), it cannot be inferred that committing suicide of one’s own free will is contrary to human dignity guaranteed by Art. 1(1) GG. Where persons are capable of free self-determination and personal responsibility, human dignity, which guarantees the individual personal autonomy, does not conflict with the decision to end one’s own life. Rather, the self-determined act of ending one’s life is a direct, albeit final, expression of the pursuit of personal autonomy inherent in human dignity. A person committing suicide of their own free will makes the decision to die as a conscious subject (cf. BVerfGE 115, 118 <160 and 161>). They give up their life in self-determination and in pursuit of their own goals. Thus, human dignity does not limit a person’s self-determination, but rather is the very reason for self-determination: The person only remains an individual with personal responsibility, and thus a conscious subject, and their right to value and respect can only be upheld if they can determine their existence based on their own, self-defined standards ([…]). 211

bb) The right to take one’s own life, protected by Art. 2(1) in conjunction with Art. 1(1) GG, also encompasses the freedom to seek and, if offered, make use of assistance provided by third parties for this purpose. 212

The development of one’s personality, as guaranteed by the Basic Law, also protects the freedom to engage with others, who, for their part, are also acting freely. Therefore, the constitutionally protected freedom also includes the possibility of approaching others, seeking their assistance and accepting the assistance they offer in the exercise of their own freedom. In particular, this also applies to persons who consider taking their own life. Especially those persons often only feel they are in a position to take such a decision, and, as the case may be, put it into practice in a manner that is reasonable (*zumutbar*) to them, if they receive expert help provided by competent and willing third parties, especially by doctors. Where the exercise of a fundamental right depends on the involvement of others, and the free development of one’s personality hinges on the participation of another person ([…]), the general right of personality also provides protection from restrictions that take the form of prohibiting this other person from offering such assistance in the exercise of their own freedom. 213

2. § 217 StGB interferes with the general right of personality of the complainants in 214

proceedings I. 1, I. 2 and VI. 5, even though the provision is not directly addressed to them (see a) below). The effects of the provision are not merely a reflex of a law serving other objectives (see b) below).

a) Fundamental rights protection is not limited to interferences that are directly addressed to the persons affected by them. Even state measures that only have indirect or factual effects can amount to impairments of fundamental rights and thus require sufficient constitutional justification. As regards their objective and effects, such measures can be equivalent to a direct interference provided for by law and must then be treated as such an interference (cf. BVerfGE 105, 252 <273>; 110, 117 <191>). 215

The criminalisation of assisted suicide services in § 217(1) StGB renders it *de facto* impossible for the complainants to make use of assisted suicide services as their chosen form of suicide because providers of such services have ceased their activities after § 217 StGB came into force so as to avoid sanctions under criminal law and under the law on administrative offences. Given that the provision's constituent elements define assisted suicide services as an offence based on the abstract danger they pose, with the aim of protecting legal interests beyond the protection of individuals ([…]), affected persons cannot, by consenting to the use of assisted suicide services, render them lawful (*rechtfertigende Einwilligung*). Therefore, the prohibition also adversely affects persons who made a deliberate and self-determined decision to end their life and arrived at this decision without external pressure – which is what the complainants in proceedings I. 1, I. 2 and VI. 5 claim. 216

b) These impairments are not merely a reflex of a law serving other objectives (cf. BVerfGE 116, 202 <222 and 223>). Rather, in view of the law's purpose, these impairments are deliberate elements of the law, and thus, both as regards their aims and their indirect and factual effects, also amount to an interference vis-à-vis persons wanting to commit suicide (cf. BVerfGE 148, 40 <51 para. 28> with further references). According to the legislative intent, the prohibition of assisted suicide services is meant to serve as effective protection of self-determination and the fundamental right to life; the legislator sought to achieve this protection precisely by no longer making available such services to persons wanting to commit suicide (cf. BTDrucks 18/5373, pp. 2 and 3). 217

The indirect interference arising from § 217 StGB objectively has the effect of restricting the freedom to commit suicide. Individuals wanting to end their life in self-determination with the help of others who are providing assisted suicide services are forced to resort to alternatives, with the considerable risk that they cannot realise their decision given that other reasonable (*zumutbar*) options for a painless and safe suicide are not actually available (see also para. 280 *et seq*. below). The interference with the complainants' general right of personality is particularly serious given the vital significance that self-determination in decisions about one's own life carries for personal identity, individuality and integrity and given that the provision at least considerably impedes the exercise of this fundamental right. 218

3. The interference with the general right of personality is not justified. 219

Restrictions of the general right of personality require a constitutional legal basis (see a) below). The prohibition of assisted suicide services in § 217 StGB must be measured against the principle of proportionality (see b) below). § 217 StGB does not satisfy the requirements arising from this principle (see c) below). 220

a) The general right of personality is not completely beyond the reach of public authority. Every person must tolerate state measures serving overriding public interests or the interests of others protected by fundamental rights where these measures are taken in accordance with the requirement of proportionality (cf. BVerfGE 120, 224 <239> with further references). As regards proportionality, interferences with the general right of personality are subject to stricter justification requirements than interferences with the general freedom of action protected under Art. 2(1) GG. Justification requirements are particularly strict for guarantees that have a specific link to the guarantee of human dignity under Art. 1(1) GG. These guarantees are more extensive the more the individual is within their closest private sphere; they diminish the more the individual interacts with the outside world within a social context ([…]). 221

The free decision to end one's life with the help of third parties does not exclusively fall within the closest private sphere. While it is a highly personal decision, it also depends on the conduct of others ([…]). When a person wants to realise their decision to end their life by making use of assisted suicide services provided by others and requests such assistance, this person interacts with the public. Assisted suicide services therefore not only affect the relationship between the person who has made a voluntary decision to commit suicide and the person providing suicide assistance. Assisted suicide services also have advance effects and consequences that include considerable risks of abuse and risks to the autonomous self-determination of others. 222

b) The prohibition of assisted suicide services must be measured against the standard of strict proportionality (cf. BVerfGE 22, 180 <219>; 58, 208 <224 *et seq*.>; 59, 275 <278>; 60, 123 <132>). A law restricting fundamental rights only satisfies this standard if it is suitable and necessary for achieving its legitimate purpose, and reflects an appropriate balance between the purpose pursued and the restrictions of the freedom afforded by the respective fundamental rights (cf. BVerfGE 30, 292 <316>; 67, 157 <173>; 76, 1 <51>). When reviewing whether the provision is reasonable (*zumutbar*), it must be taken into account that a legal framework on suicide assistance must reflect various conflicting facets of protection under constitutional law. Respect for the fundamental right to self-determination, encompassing self-determination in decisions regarding the end of one's life, of a person who makes the free and voluntary decision to end their life and seeks assistance to this end (see para. 208 *et seq*. above), collides with the state's duty to protect the autonomy of persons wanting to commit suicide and, additionally, its duty to protect life, a legal interest of high standing. These legal interests must be kept free from undue influence and pressure that could result in affected persons having to justify why they do not want to 223

make use of suicide assistance.

It generally falls to the legislator to resolve these conflicts. The state's duty of protection must be given more specific shape (cf. BVerfGE 88, 203 <254>). In this respect, the legislator has a margin of appreciation and evaluation as well as latitude (cf. BVerfGE 96, 56 <64>; 121, 317 <356>; 133, 59 <76 para. 45>). The scope of this latitude depends on various factors, including in particular the specific nature of the matter in question, the ability to make a sufficiently certain assessment, especially regarding future developments and the effects of a provision, as well as the significance of the affected legal interests (cf. BVerfGE 50, 290 <332 and 333>; 76, 1 <51 and 52>; 77, 170 <214 and 215>; 88, 203 <262>; 150, 1 <89 para. 173>). 224

Constitutional review also extends to whether the legislator has sufficiently taken into account these factors and has exercised its margin of appreciation in a tenable manner (cf. BVerfGE 88, 203 <262>). The legislator must have adequate regard to the conflict between the freedom granted by the fundamental right on the one hand, and the protection it affords on the other. 225

c) The prohibition of assisted suicide services in § 217 StGB does not satisfy these requirements. It is true that it serves legitimate purposes in the interest of the common good (see aa) below) and is suitable for achieving these purposes (see bb) below). While it has not been definitively determined whether the prohibition is necessary (see cc) below), it is in any case not appropriate (see dd) below). 226

aa) With the prohibition of assisted suicide services, the legislator pursues a legitimate purpose. The provision serves to protect the individual's self-determination over their life and hereby to protect life as such (see (1) below). This purpose is tenable under constitutional law. It is within the mandate of protection that is incumbent upon the legislator under constitutional law (see (2) below). The legislator's assumption that it is precisely the absence of legal restrictions on assisted suicide services that could result in risks to self-determination and to life is sufficiently tenable (see (3) below). 227

(1) The legislator intended the prohibition in § 217 StGB as a measure to curb assisted suicide services in order to protect self-determination and the fundamental right to life (cf. BTDrucks 18/5373, pp. 2 and 3). 228

One aim of the law is to prevent suicide assistance from becoming a "regular service in the healthcare system" that could prompt people to end their life (cf. BTDrucks 18/5373, p. 2). According to the legislator's assessment, which is based on the rising number of assisted suicide cases in Germany and Switzerland (cf. BTDrucks 18/5373, p. 9), there is a risk that the wide-spread availability of assisted suicide services could give suicide a "semblance of normality" or even lead to the perception of suicide as a social imperative, thus creating certain expectations pressuring individuals to make use of such services. This could result in a "societal normalisation" of assisted suicide (cf. BTDrucks 18/5373, p. 2). Where such services are available – thus 229

suggesting that suicide is considered normal – old and ill persons in particular could be led to commit suicide or feel directly or indirectly pressured to do so (cf. BTDrucks 18/5373, pp. 2, 8, 11, 13, 17).

The other aim of the law is to counter “conflicts of interest jeopardising autonomy” so as to protect integrity and personal autonomy (cf. BTDrucks 18/5373, p. 17) and to prevent the risk, generally arising from such conflicts of interest, of “undue outside influence in situations where self-determination is jeopardised” (cf. BTDrucks 18/5373, p. 11). The prohibition of assisted suicide services is based on the assumption that efforts [on the part of providers of suicide assistance] focussing on the technical implementation of suicide are not [necessarily] based on a firm decision of the affected person to end their life (cf. BTDrucks 18/5373, p. 11). It is conceivable that the involvement of a provider of assisted suicide services pursuing their own specific interests, typically with the aim that persons making use of their services go through with the suicide, could influence the free will and decision-making and thus the personal responsibility of affected persons (cf. BTDrucks 18/5373, pp. 11, 12, 17, 18). According to the legislator’s view, this situation must be countered through a legal arrangement that safeguards personal autonomy (cf. BTDrucks 18/5373, p. 11). 230

(2) In aiming to protect autonomy and life, the prohibition in § 217 StGB serves to fulfil the state’s duty of protection arising from constitutional law and thus pursues a legitimate purpose. 231

(a) Under Art. 1(1) second sentence GG in conjunction with Art. 2(2) first sentence GG, the state has a duty to protect the individual’s autonomy in deciding whether to end their own life, and hereby to protect life as such. The Basic Law calls for respect for the autonomous self-determination of the individual (cf. BVerfGE 142, 313 <344 para. 86>), which requires free and autonomous decision-making on the part of the individual. Given that the realisation of a decision to commit suicide is irreversible, the significance of life as one of the highest values within the constitutional order (cf. BVerfGE 39, 1 <42>; 115, 25 <45>) requires that suicides be discouraged if they are not based on free self-determination and personal responsibility. The state must ensure that the decision to commit assisted suicide is really based on the free will of the affected person. Thus, the legislator pursues a legitimate purpose in seeking to counter risks to the free will and its free formation as prerequisites of autonomous self-determination in decisions regarding one’s own life. 232

(b) In fulfilling this duty of protection, the legislator may not only act to protect personal autonomy against impending risks in the specific case arising from the conduct of others. In aiming to prevent assisted suicide from becoming recognised by society as a normal way of ending one’s life, the legislator also pursues a legitimate purpose. 233

However, preserving an existing or implied consensus on values and moral principles may not be a direct aim of criminal legislation (cf. BVerfGE 120, 224 <264>, dissenting opinion of Justice Hassemer). Therefore, it is not a legitimate legislative aim to prohibit suicide assistance merely on the grounds that suicide and suicide assis- 234

tance contradict the majority opinion in society regarding how to handle one's own life, particularly for old and ill people. A prohibition of assisted suicide services merely for the purpose of keeping the number of assisted suicides low is therefore impermissible; likewise, it is impermissible to pursue the aim of disapproving, placing under a taboo or framing as inferior in any other way the decision of a holder of fundamental rights, who acts of their own free will and in personal autonomy, to deliberately end their own life with the assistance of others.

However, the legislator may intervene to counteract developments that potentially create social expectations which might pressure individuals in certain situations to take their own life, for example based on what is considered expedient. Even in the absence of specific influence exercised by others, individuals must not be exposed to certain expectations held by society. The free will is not the same as the complete freedom from any outside influence when making decisions. Human decision-making is typically influenced by social or cultural factors; self-determination is always understood to be relative. The Constitution guarantees the individual protection of life as an intrinsic value which does not require justification; this protection is based on the unconditional recognition of the person and their existence as such. Therefore, the legislator may, and must, effectively counteract social influences which might amount to pressure and make it appear necessary that affected persons explain their refusal of suicide services. The legislator can thus take precautions ensuring that persons in difficult stages of life do not face a situation where they have to consider such services in detail or have to adopt an explicit position on them. 235

(3) The legislator assumes that the availability of assisted suicide services poses risks to self-determination in end-of-life decision-making, which must be countered to fulfil the state's duty of protection. The basis of this assumption is not objectionable under constitutional law. 236

(a) It must be reviewed under constitutional law whether the assessment and prognosis of impending risks to the individual or the public has a sufficiently sound basis (cf. BVerfGE 123, 186 <241>). Depending on the specific nature of the matter in question, the significance of the affected legal interests and the legislator's possibilities of making a sufficiently certain assessment, constitutional review can range from a mere review of evident errors to a review of reasonableness or even to a more comprehensive substantive review (cf. BVerfGE 50, 290 <332 and 333> with further references; 123, 186 <241>; 150, 1 <89 para. 173>). 237

Where – as in the case at hand – a serious interference with a fundamental right that is accorded high standing is at issue, uncertainties in assessing facts generally must not adversely affect the holder of fundamental rights (cf. BVerfGE 45, 187 <238>). However, the prohibition in § 217 StGB serves to give effect to the state's duty of protection, which also relates to weighty constitutional law interests of equal standing. According to the expert third parties in the oral hearing, there has so far been little research on the extent of actual risks posed to these interests by assisted 238

suicide services – just as on the phenomenon of assisted suicide in general. At present, no reliable scientific findings exist on the long-term implications of legalising assisted suicide services. It is therefore sufficient that the legislator was guided by a factually accurate and tenable assessment of the available information and possibilities of obtaining knowledge (cf. BVerfGE 50, 290 <333and 334>; 57, 139 <160>; 65, 1 <55>).

(b) The risk assessment conducted by the legislator satisfies these constitutional standards. The legislator tenably assumed that assisted suicide services pose risks to autonomous self-determination in decisions regarding one's own life. 239

(aa) A decision to commit suicide is based on an autonomous and free will if the individual has made this decision on the basis of a realistic weighing of the pros and cons that is determined by their idea of self. 240

Thus, a free decision to commit suicide requires the ability to freely form one's will, without being influenced by an acute psychological disorder, and to act accordingly. In its case-law, the Federal Constitutional Court has recognised that the right to freedom cannot be assessed in isolation from the actual possibility of forming a free will (cf. BVerfGE 58, 208 <224 and 225>; 128, 282 <304 and 305>; 142, 313 <340 para. 76 *et seq*.>; 149, 293 <322 para. 74>). 241

Moreover, the affected person must be aware of all aspects that are relevant for the decision. They must have all available information and thus be able to realistically weigh the pros and cons on the basis of sufficient knowledge. In particular, the formation of one's free will requires that the decision-maker is aware of alternatives to suicide, assesses their respective consequences and makes their decision knowing all the relevant circumstances and options. In this respect, the standards for consenting to curative medical treatment apply accordingly. In that situation, too, affected persons must be aware of the circumstances relevant for their consent, including alternative courses of action, so that they can make a decision based on personal responsibility and in self-determination (cf. BVerfGE 128, 282 <301>; BGHZ 102, 17 <22>; 106, 391 <394>; 168, 103 <108 para. 13>). 242

It is also required that affected persons not be subject to undue influence or pressure (cf. BVerfGE 128, 282 <301> regarding consent to medical treatment). 243

Finally, it can only be assumed that a person made the decision to end their life of their own free will if the decision is "lasting" to some degree and based on "a certain internal stability" (cf. BGH, Judgment of 3 July 2019 - 5 StR 132/18 -, Neue Juristische Wochenschrift – NJW 2019, p. 3092 <3093 and 3094> with further references). According to the expert third parties, the wish to commit suicide is typically motivated by a complex set of reasons. The wish to die is often ambivalent and prone to change. Empirical data shows that an unpremeditated decision to commit suicide – in case the suicide attempt fails – is, in hindsight, considered a mistake by 80% to 90% of affected persons. Thus, even where a wish to commit suicide appears to be a plausi- 244

ble decision that was taken following a weighing of the pros and cons, it is mostly limited in time and not permanent. Expert third parties, too, consider the criterion of a lasting decision as suitable for assessing the seriousness of a wish to commit suicide and for ensuring that it is not prompted by a temporary crisis.

(bb) According to the expert third parties, psychological conditions seriously jeopardise a free decision to commit suicide. They stated that according to global empirical studies, in about 90% of suicides committed, the person doing so had a psychological condition, most notably depression (in about 40% to 60% of cases). Depression, which is often hard to detect even for doctors, leads to limited capacity to consent in about 20% to 25% of persons committing suicide ([…]). Especially among persons who are elderly and seriously ill, the share of persons committing suicide who suffer from depression is high; their risk of suicidal thoughts increases when they suffer from depression. 245

Insufficient information provided to affected persons also seriously jeopardises a free decision to commit suicide. The expert third parties argued that the wish to die was often based on misconceptions as well as unrealistic assumptions and fears. Wishes to commit suicide were often reconsidered and taken back when persons wanting to commit suicide were informed about their situation and alternative courses of action. Therefore, a free decision necessarily requires that affected persons be provided with comprehensive advice and information regarding possible alternatives so as to ensure that the person wanting to commit suicide does not act on misconceptions, but is actually capable of realistically and rationally assessing their situation. This is the only way to ensure that affected persons know all relevant circumstances and can thus make a decision regarding their own death. 246

Finally, according to the expert third parties, a free decision to commit suicide can also be jeopardised by forms of influence other than coercion, threats or deception (cf. BGH, Judgment of 3 July 2019 - 5 StR 132/18 -, NJW 2019, p. 3092 <3094> with further references), where these are likely to prevent or significantly impair an informed and considered decision in line with one's idea of self. Suicidal tendencies can arise and become stronger in view of psychosocial aspects and interaction between persons wanting to commit suicide and their social environment, but also as a result of sociological factors. 247

(cc) In light of the foregoing, the legislator's assumption that in the absence of legal restrictions, assisted suicide services jeopardise the autonomy and thus the life of affected persons is sufficiently tenable (see (α) below). The same applies to the legislator's assessment that assisted suicide services could become recognised as a normal way of ending one's life, especially for elderly and ill persons, which might create social expectations and pressure endangering personal autonomy (see (β) below). 248

(α) The oral hearing confirmed that it was at least tenable for the legislator to consider assisted suicide services, as they were practised in Germany until § 217 StGB came into effect, unsuitable for ensuring protection of the free will and thus protection 249

of free self-determination in every case. In the oral hearing, the chairman of the complainant in proceedings II. explained that before an assisted suicide could be performed, the doctor giving the prescription for lethal medication assessed whether there were indications that the affected person's comprehension or capacity was limited. Apart from that, however, the assessment of whether a wish to commit suicide was based on the free will of the person concerned was often limited to opaque plausibility considerations; notably, suicide assistance was provided to persons with physical or psychological conditions without checking the affected person's medical records or ensuring that medical examination, consultation and information had been provided by a specialised practitioner. Accordingly, it is plausible for the legislator to assume that where suicide assistance is offered as a professionalised service, the focus is largely on those services that assist persons in actually carrying out the suicide and that the free will and free decision-making of the individual are therefore not sufficiently ensured.

(β) Further, the legislator's assessment is comprehensible in that assisted suicide services could lead to a 'societal normalisation' of suicide assistance and that assisted suicide could become recognised as a normal way of ending one's life, especially for elderly and ill persons, which might create social expectations and pressure endangering personal autonomy. Not least in view of increasing cost pressure in the long-term care and healthcare systems, it does appear plausible that allowing assisted dying and assisted suicide services without any legal restrictions could have such an effect. Likewise, the legislator may consider that a risk of normalisation of assisted suicide arises when persons may be faced with a situation, prompted by their social contacts and their family, in which they must deal with the question of suicide against their will, and where they may come under pressure to do what is considered expedient. 250

[…] 251

(αα) […] 252-255

(ββ) It is true that current scientific findings do not provide any proof that assisted suicide services subject elderly and ill persons to social expectations and pressure. It seems plausible that aspects such as advances in medical science and longer life expectancies may influence the individual decision to make use of assisted dying or suicide assistance (cf. also ECtHR, Pretty v. the United Kingdom, Judgment of 29 April 2002, no. 2346/02, § 65); however, there are no statistical surveys on this issue yet. The increase [in cases of suicide assistance and assisted dying in Switzerland, the Netherlands and Belgium] can also be explained by greater acceptance of assisted dying and suicide assistance within society, a strengthening of the right to self-determination or growing awareness that the terms of one's own death need not invariably be accepted as fate that is beyond one's control. 256

(γγ) Nevertheless, the legislator could tenably assume that in the absence of legal restrictions, professionalised assisted suicide services could put self-determination at 257

risk, namely through social expectations and pressure. In the oral hearing, the expert third parties pointed to the developments in the Netherlands and the US state of Oregon, where suicide assistance and assisted dying are taking hold in the long-term care and healthcare system. In the Netherlands, assisted dying is openly offered in care homes and nursing homes, which has led some elderly people in border regions to move to a home in Germany. In Oregon, healthcare is subject to the principle of cost-effectiveness, according to which the costs of certain treatment options for terminal illnesses are not covered, but expenses for assisted suicide can be reimbursed. These developments suggest that there is a risk that assisted dying and suicide assistance – also in view of increasing cost pressure in the long-term care and healthcare systems – can turn into normal forms of ending one's life in a society and are likely to give rise to social expectations and pressure, constraining individual choices and leeway to make decisions. This is especially true given that healthcare and long-term care services struggle to meet demands; this may prompt individuals to fear a loss of self-determination and could thus encourage them to decide to commit suicide.

[…] 258-259

bb) As a criminal law provision, § 217 StGB is in principle a suitable means for protecting the affected legal interests, since the criminalisation of dangerous acts can at least contribute to achieving the aim of protection (cf. BVerfGE 90, 145 <172>; regarding the criterion of suitability in general BVerfGE 30, 292 <316>; 33, 171 <187>). 260

[…] 261-262

cc) In view of the lack of empirical findings regarding the effectiveness of alternative and less intrusive measures of protection, such as those considered in the legislative procedure, it may be doubtful whether § 217 StGB is necessary to achieve the legislator's legitimate aim of ensuring protection. Yet there is no need to make a decision on this issue in the present proceedings. 263

dd) The restriction of the right to a self-determined death resulting from the provision is in any case not appropriate. Restrictions of individual freedom are only appropriate if the burden imposed on the individual is in reasonable proportion to the benefits arising for the common good (see (1) below). The burden § 217 StGB imposes on persons wanting to die goes beyond what is reasonable. The criminalisation of assisted suicide services causes the right to suicide, as a manifestation of the right to a self-determined death, to effectively be largely vitiated in certain constellations. This suspends self-determination in a key part of end-of-life decision-making, which is incompatible with the vital significance of this fundamental right (see (2) below). 264

(1) Restrictions of freedom are only appropriate if the burden imposed on the individual is in reasonable proportion to the benefits arising for the common good (cf. BVerfGE 76, 1 <51>). In order to establish whether this is the case, the interests of the common good that the interference with fundamental rights serves to protect must 265

be balanced against the effects on the legal interests of persons affected by the interference (cf. BVerfGE 92, 277 <327>). The more severely individual freedom is restricted, the weightier the pursued interests of the common good must be (cf. BVerfGE 36, 47 <59>; 40, 196 <227>; […]). Yet the need to protect the common good becomes all the more pressing, the greater the detriment and dangers that would potentially arise if the exercise of fundamental rights were free of any restriction (cf. BVerfGE 7, 377 <404 and 405>). In the context of such a review based on the standard of the prohibition of excessive measures, the protection which, as such, has been sought in a legitimate manner may have to stand back if the means chosen led to an impairment of the rights of affected persons that is not appropriate. This is the only way to ensure that the review of whether interferences caused by state measures are appropriate can fulfil its purpose: examining whether the means used to carry out suitable and, as the case may be, necessary measures are in adequate proportion to the protection of legal interests they serve to achieve, in consideration of the restrictions of fundamental rights they entail for affected persons (cf. BVerfGE 90, 145 <185>).

Where the legislator's decision involves serious interferences with fundamental rights, as is the case with the prohibition of assisted suicide services under review here, it is subject to a strict standard of review (cf. BVerfGE 45, 187 <238>). The vital significance attached to self-determination, in particular for protecting personal individuality, identity and integrity in decisions regarding one's own life (see para. 209 above), imposes strict limits on the legislator when designing a legal framework for protection in the context of suicide assistance. 266

(2) When enacting the prohibition of assisted suicide services by way of § 217 StGB, the legislator exceeded the limits for restricting the right to self-determination, which follow from its vital significance. § 217 StGB is aimed at protecting autonomy and life, which are recognised as constitutional interests of high standing. In principle, it may thus be legitimate to use criminal law – including offences based on an abstract danger – as a means for protecting these interests (see (a) below). However, the exemption of suicide, and of suicide assistance, from punishment reflects the – constitutionally mandated – recognition of individual self-determination; as such, it is not at the legislator's free disposal (see (b) below). The prohibition of assisted suicide services under criminal law reduces the possibilities for assisted suicide to such an extent that, regarding this aspect of self-determination, there is *de facto* no scope for the individual to exercise their constitutionally protected freedom (see (c) below). 267

(a) The high standing that constitutional law accords to autonomy and life, and which § 217 StGB aims to protect, may, in principle, warrant the use of criminal law for protecting these interests. 268

Criminal law serves an indispensable function when it comes to fulfilling the state's responsibility to establish, safeguard and enforce a rule-based social co-existence by 269

protecting the fundamental values of the community (cf. BVerfGE 123, 267 <408>). In certain cases, the state's duty of protection may indeed require the state to provide for a legal framework designed to reduce even the risk of fundamental rights violations (cf. BVerfGE 49, 89 <142>).

In criminalising assisted suicide services, the legislator pursues the concept of protecting legal interests in a specific domain. § 217 StGB criminalises acts of providing, procuring or arranging the opportunity to commit suicide as a professionalised service on the grounds that these acts pose an abstract danger to life (cf. BTDrucks 18/5373, pp. 3, 14; see also para. 25 above). […]. 270

Given that protection under criminal law is afforded at an early stage [where such acts do not pose a specific danger yet], the provision necessarily also criminalises conduct that could in retrospect not have led to danger in the specific case ([…]). Under constitutional law, the legislator is in principle not barred from preventing, on general preventative grounds, acts at an early stage that are merely generally capable of endangering legal interests (cf. BVerfGE 28, 175 <186, 188 and 189>; 90, 145 <184>; cf. also BVerfG, Order of the First Chamber of the First Senate of 11 August 1999 - 1 BvR 2181/98 and others -, para. 92; critical view BVerfGE 90, 145 <205 and 206>, dissenting opinion of Justice Graßhof). If this were not possible, the legislator would be deprived of the possibility to counter dangers to legal interests of high standing which cannot be precisely appraised due to a lack of reliable scientific or empirical findings ([...]). In the individual case, it is primarily the significance of the legal interest to be protected that determines whether it is permissible to resort to such abstract categories for protecting legal interests ([…]). 271

The high standing the Constitution accords to life and autonomy can in principle justify effective preventive protection of these interests, especially given that suicide assistance poses particular risks to them. Empirical findings support the conclusion that a decision to commit suicide is fragile, ([…]), and the fragility of such a decision is a particularly weighty consideration given that a decision to end one's own life is, by its nature, irreversible once acted upon. 272

(b) However, where criminal law no longer protects free decisions of the individual but renders such decisions impossible, it exceeds the limits of what constitutes a legitimate means for protecting personal autonomy in the decision on ending one's life. 273

The exemption of suicide, and of suicide assistance, from punishment reflects the – constitutionally mandated – recognition of individual self-determination; as such, it is not at the legislator's free disposal. At the heart of the Basic Law's constitutional order lies a central notion of human beings informed by human dignity and the free development of one's personality through self-determination and personal responsibility (cf. BVerfGE 32, 98 <107 and 108>; 108, 282 <300>; 128, 326 <376>; 138, 296 <339 para. 109>). This notion must be the basis of any normative framework. 274

It follows that the state's duty to protect self-determination and life can only take 275

precedence over the individual's freedom where the individual is exposed to influences that endanger their self-determination over their own life. The legal order may counteract these influences through preventive measures and safeguards. Beyond this, however, an individual's decision to end their own life, based on their personal understanding of what constitutes a meaningful existence, must be recognised as an act of autonomous self-determination.

Recognising the right to a self-determined death does not bar the legislator from taking general measures to prevent suicide. In particular, the legislator may take measures to expand and strengthen palliative care in order to counter wishes to commit suicide born out of illness. The state does not fulfil its duty to protect personal autonomy by merely preventing threats to autonomy posed by other persons. It must also counter risks to autonomy and life arising from current and foreseeable life circumstances that are capable of influencing an individual to choose suicide instead of life (cf. BVerfGE 88, 203 <258> regarding unborn life). 276

Yet the legislator must not evade its social policy obligations by trying to counteract risks to autonomy through the complete suspension of individual self-determination. The legislator may not set aside the constitutionally protected right to self-determination altogether in response to developments that prompt fears of a loss of self-determination and may lead to decisions to commit suicide, such as deficiencies in healthcare services and social infrastructure or negative aspects of overtreatment. The individual must still be afforded the freedom to refuse life-sustaining treatment and to act upon a decision to end their own life with the assistance of others based on their personal understanding of what constitutes a meaningful existence. Where the protection of life undermines the protection of autonomy, it contradicts the central understanding of a community which places human dignity at the core of its order of values and thus commits itself to respecting and protecting the free human personality as the highest value of its Constitution. Given the vital significance for self-determination and respect for one's personality that can be attached to the freedom to commit suicide, it must always be ensured that realistic possibilities of committing suicide are available (see para. 208 *et seq*. above). 277

(c) The prohibition of assisted suicide services violates constitutional law insofar as it fails to leave the required scope for the pursuit of autonomous self-determination. § 217 StGB in principle recognises the constitutionally mandated exemption from punishment of suicide and suicide assistance by merely criminalising professionalised assisted suicide services, which the legislator considers a form of suicide that poses particular risks to personal autonomy (cf. BTDrucks 18/5373, p. 2). However, the prohibition is not an isolated legal act (see (aa) below). As the law stands, the introduction of the provision criminalising assisted suicide services causes the right to suicide to effectively be largely vitiated because the resulting restriction of constitutionally protected freedom cannot be compensated by the continued exemption from punishment of suicide assistance that is not offered as a professionalised service, by the expansion of palliative and hospice care mandated by law or by the availability of sui- 278

cide assistance in other countries. Where the choice of the individual is limited to these alternatives, their right to self-determination is violated (see (bb) below).

(aa) In providing protection through an absolute prohibition of assisted suicide services, § 217 StGB suspends individual self-determination in the domain covered by the provision given that it places any decision to commit suicide under an irrefutable blanket suspicion of lacking freedom and reflection. This upends the Constitution's central notion of human beings as free beings capable of self-determination and personal growth (cf. BVerfGE 32, 98 <107 and 108>; 108, 282 <300>; 128, 326 <376>; 138, 296 <339 para. 109>). Thus, in this case the generally legitimate aim of protecting legal interests by creating an offence based on an abstract danger must stand back behind less intrusive measures safeguarding autonomy; the individual must be given actual scope for self-determination and must not be pressured to lead a life that contradicts their idea of self and their personal identity. 279

It is true that the prohibition set out in § 217 StGB is limited to assisted suicide services, i.e. a specific form of suicide assistance. However, the resulting loss of autonomy is disproportionate insofar as and as long as the remaining options available to the individual provide only a theoretical but no actual prospect of self-determination. The detrimental effects on personal autonomy brought about by § 217 StGB are further aggravated precisely because in many situations, individuals will be left with no actual, reliable options to act upon a decision to commit suicide if assisted suicide services are not available. 280

(bb) Under a strict interpretation of § 217 StGB, the option of providing suicide assistance in an isolated case remains exempt from punishment (see (α) below); other options include palliative care (see (β) below) and suicide assistance provided in other countries. Yet all of these options fail to give sufficient effect to self-determination regarding the end of one's life as required under constitutional law. 281

(α) The legislator deems the prohibition of assisted suicide services to be appropriate on the grounds that providing suicide assistance in an isolated case in a manner that is not professionalised remains exempt from punishment. Thus, within its own legislative concept, it accords decisive importance to the option of making use of such suicide assistance in an isolated case for upholding and realising the right to self-determination (cf. BTDrucks 18/5373, pp. 2, 13, 14). 282

Yet in tacitly assuming that options for suicide assistance other than professionalised assisted suicide services are actually available, the legislator fails to consider the legal order as a whole. If the legislator excludes specific ways of exercising freedom with reference to remaining alternatives, these remaining courses of action must be actually suitable for ensuring the effective exercise of the fundamental rights in question. In particular in the context of the right to suicide, such alternatives must really exist. In this respect, the individual's knowledge of actually being able to act according to their own wishes is in itself a crucial element of asserting one's identity. This corresponds to the experiences of the complainants, who have latent intentions 283

of committing suicide in case they reach an individually determined threshold of personal suffering. In particular the complainant in proceedings I. 2 comprehensibly set out in the oral hearing that the commitment [by an association offering assisted suicide services] to provide suicide assistance, given before § 217 StGB was introduced, helped him accept his illness and not immediately evade his fate by committing suicide. The expert third parties from the fields of psychiatry and suicide research confirmed that the knowledge of having the option of assisted suicide can, at least to a limited extent, have the effect of preventing affected persons from committing suicide.

Consequently, if the legal order criminalises certain forms of suicide assistance that jeopardise personal autonomy, especially assisted suicide services, it must be ensured that suicide assistance provided voluntarily can in practice still be accessed in the individual case. The fact that the legislator chose not to criminalise all forms of suicide assistance unconditionally does not, by itself, satisfy this standard. In the absence of professionalised assisted suicide services, the individual largely depends on the willingness of doctors, either their treating physician or another doctor, to provide assistance at least in the form of prescribing the substances necessary to commit suicide. Realistically, a doctor will only be willing to do so in exceptional cases. This is precisely why associations providing suicide assistance offer their services. Firstly, doctors can never be obliged to provide suicide assistance (see (αα) below); secondly, the prohibitions of providing suicide assistance, which have largely been incorporated into the laws and codes governing the medical profession, at least guide doctors' actions in practice (see (ββ) below). 284

(αα) […] 285-288

Individuals must generally accept the decision of an individual doctor, protected by their freedom of conscience, not to provide suicide assistance. The right to a self-determined death does not give rise to a claim vis-à-vis others to be assisted in one's plan to commit suicide (see already paras. 212 and 213 above). 289

(ββ) The laws and codes governing the medical profession set further limits to doctors' individual willingness to provide suicide assistance that go beyond or even disregard what individual doctors decide in accordance with their conscience. Therefore, suicide assistance that is not provided as a professionalised service is normally not a real option in practice, but merely a theoretical one. Yet such a real option would be required to safeguard the constitutionally mandated freedom to exercise individual self-determination. The laws and codes governing the medical profession, which differ according to the *Land* in which a doctor practises, provide for prohibitions of suicide assistance in large parts of Germany […]. 290

(ααα) […] 291-293

(βββ) The prohibition of suicide assistance provided by doctors largely excludes any real prospect of assisted suicide that is in line with one's own self-determination. This 294

restriction carries particular weight given that the divergent designs of the different laws and codes governing the medical profession make the effective exercise of self-determination contingent on geographical coincidences for the individual, who may have a grievous medical condition and whose mobility may be limited or even non-existent.

(γγγ) The prohibitions of suicide assistance provided by doctors under the laws governing the medical profession guide doctors' actions; in this respect, it is irrelevant whether the prohibitions in their current form as mere bylaws are formally unconstitutional given that they would have to be set out in legislation enacted by parliament ([…]). 295

In view of the objections as to their constitutionality, it is unclear whether the prohibitions of suicide assistance provided by doctors under the laws governing the medical profession are valid. They do, however, guide the actions of their addressees in practice. It cannot be assumed that options for suicide assistance can actually be accessed because doctors who are personally willing to provide suicide assistance will deviate from written law, albeit law that raises constitutional concerns, and will disregard it on their own authority by invoking their constitutionally guaranteed freedom. 296

As long as this situation persists, it creates a factual need for associations offering assisted suicide services ([...]), which typically set up contact with doctors and pharmacists who, despite the legal risks, are willing to provide the necessary medical and pharmaceutical assistance to commit suicide, thus giving effect to the individual's self-determination that is protected under constitutional law. 297

(β) Improvements in palliative care (see para. 15 above) mandated by the Act Improving Hospice and Palliative Care in Germany, which accompanied the introduction of the prohibition of assisted suicide services, cannot compensate for the disproportionate restriction of the individual's self-determination. They may well remedy existing deficiencies in palliative care services, in quantitative and qualitative terms, and thus be a suitable means for reducing the number of cases in which terminally ill patients wish to die as a consequence of such deficiencies. However, improvements in palliative care are not a suitable corrective to compensate for the restrictions resulting from the challenged provision in cases in which the decision to commit suicide is taken despite these improvements or independent of them, on the basis of free self-determination. 298

No one is obliged to make use of palliative care. In order to ensure that medical treatment, including palliative care, remains an offer to patients, rather than turning it into an obligation jeopardising personal autonomy, the patient's will must not be set aside – notwithstanding cases in which the individual is exposed to risks and cannot freely ensure their own protection (cf. BVerfGE 142, 313 <341 para. 79>). The decision to end one's own life, insofar as the patient took it freely, was aware of all relevant circumstances and weighed them against one another, also encompasses the decision against existing alternatives. It must be accepted as an act of autonomous 299

self-determination in that negative dimension, too.

(γ) The state may also not simply refer the individual to the option of using suicide assistance offered in other countries. Under Art. 1(3) GG, the state must guarantee protection afforded by fundamental rights within its own legal order (cf. already Decisions of the Federal Administrative Court, *Entscheidungen des Bundesverwaltungsgerichts* – BVerwGE 158, 142 <158 para. 36>). 300

(cc) Finally, the restriction of individual self-determination resulting from § 217 StGB cannot be justified by the protection of others. Given that the individual is connected to and bound by the social community, they must accept those restrictions of their constitutionally protected freedom that the legislator, within the limits of what is reasonable (*zumutbar*) in the relevant circumstances, imposes for the purposes of maintaining and fostering social co-existence. However, the individual autonomy of the person must be upheld (cf. BVerfGE 4, 7 <15 and 16>; 59, 275 <279>). Measures of suicide prevention can be justified by the aim of protecting others – e.g. by seeking to prevent assisted suicide services from prompting copycat behaviour or to curtail a strong pull on persons that are fragile in terms of self-determination and thus vulnerable. However, the aim of protecting others does not justify forcing the individual to accept that their right to suicide is effectively vitiated (see para. 273 *et seq*, in particular para. 281 *et seq*. above) 301

4. This assessment is in accordance with the European Convention on Human Rights (ECHR), which serves as a guideline for interpretation when determining the content and scope of fundamental rights (cf. BVerfGE 111, 307 <317 and 318>; 149, 293 <328 para. 86>), and with the interpretation of the Convention set forth by the European Court of Human Rights (cf. BVerfGE 148, 296 <354 para. 132, 379 and 380 paras. 173 and 174>). 302

The European Court of Human Rights recognises the right of the individual to choose when and how to die as a manifestation of the right to respect for private life under Art. 8(1) ECHR; the Court holds that, while this right may be restricted to protect the life and autonomy of others, it must not be completely vitiated. 303

According to the case-law of the European Court of Human Rights, Art. 8(1) ECHR encompasses the right to live one's life in self-determination and in a manner of one's own choosing. In its decision Pretty v. the United Kingdom, which raises the question whether a person suffering from a severe physical illness has a right to assisted suicide, the Court emphasises that the notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Art. 8 ECHR (cf. ECtHR, Pretty v. the United Kingdom, Judgment of 29 April 2002, no. 2346/02, § 61). Having regard to the very essence of the Convention – respect for human dignity and freedom – the European Court of Human Rights holds that notions of the quality of life take on significance under Art. 8 ECHR. According to the Court, in an era of growing medical sophistication combined with longer life expectancies, nobody should be forced to linger on in old age or in states of advanced physical or mental decrepitude 304

which conflict with strongly held ideas of self and personal identity. State and society must respect the decision to end physical and mental suffering through assisted suicide (cf. ECtHR, Pretty v. the United Kingdom, Judgment of 29 April 2002, no. 2346/02, §§ 64 and 65). In Haas v. Switzerland, a case concerning a mentally ill complainant, the European Court of Human Rights further specified its case-law, expressly holding that an individual's right to decide by what means and at what point their life will end, provided they are capable of freely reaching a decision and acting in consequence, is one of the aspects of the right to respect for private life within the meaning of Art. 8 ECHR (cf. ECtHR, Haas v. Switzerland, Judgment of 20 January 2011, no. 31322/07, § 51).

However, the European Court of Human Rights also recognises that restrictions of this right may be necessary for the protection of the life of others under Art. 8(2) ECHR. In balancing the individual's right to self-determination against the state's duty to protect life derived from Art. 2 ECHR, the Court acknowledges that the Contracting States have a significant margin of appreciation in this sensitive area (cf. ECtHR, Pretty v. the United Kingdom, Judgment of 29 April 2002, no. 2346/02, §§ 70 *et seq*.; Haas v. Switzerland, Judgment of 20 January 2011, no. 31322/07, §§ 53, 55; Koch v. Germany, Judgment of 19 July 2012, no. 497/09, § 70). Thus, it is primarily for states to assess the risk and the likely incidence of abuse arising from suicide assistance (cf. ECtHR, Pretty v. the United Kingdom, Judgment of 29 April 2002, no. 2346/02, § 74). Where a country adopts a liberal approach, appropriate implementing measures for such an approach and preventive measures are necessary; such measures must also prevent abuse (cf. ECtHR, Haas v. Switzerland, Judgment of 20 January 2011, no. 31322/07, § 57). Art. 2 ECHR obliges the national authorities to prevent an individual from taking their own life if the decision has not been taken freely and with full understanding of what is involved. The right to life guaranteed by Art. 2 ECHR obliges states to protect vulnerable persons, even against actions by which they endanger their own lives, and to establish a procedure capable of ensuring that a decision to end one's life does indeed correspond to the free will of the individual concerned (cf. ECtHR, Haas v. Switzerland, Judgment of 20 January 2011, no. 31322/07, §§ 54, 58). On the other hand, the European Court of Human Rights also emphasises that the right to choose the time and manner of one's death must not be merely theoretical or illusory (cf. ECtHR, Haas v. Switzerland, Judgment of 20 January 2011, no. 31322/07, §§ 59 *et seq*.). 305

II.

The constitutional complaints lodged by the other complainants are also well-founded. The restrictions of their occupational freedom (Art. 12(1) GG), and, subsidiarily, their general freedom of action (Art. 2(1) GG) that result from § 217 StGB are not constitutional (see 1. below). The provision violates the right to liberty under Art. 2(2) second sentence in conjunction with Art. 104(1) GG of the complainants who are natural persons and thus face a possible prison sentence (see 2. below). § 217 StGB also violates the fundamental right under Art. 2(1) GG of the complainants in pro- 306

ceedings II. and III. 2 as the criminalisation of assisted suicide services may lead to administrative fines being imposed on these associations under § 30(1) OWiG (see 3. below).

1. Insofar as they are German nationals, the complainants who are doctors or lawyers are afforded constitutional protection against the prohibition of assisted suicide services under Art. 12(1) GG (see a) below). The complainant in proceedings VI. 2, a Swiss doctor, as well as the German associations, the associations' representatives and employees are in any case protected by the general freedom of action (see b) below). The interference with these fundamental rights is not justified under constitutional law (see c) below). 307

a) […] 308-312

b) […] 313-330

c) The interferences with fundamental rights are not justified. Given that it is incompatible with the general right of personality of individuals who made a self-determined decision to commit suicide (see para. 202 *et seq*. above), the prohibition of assisted suicide services violates objective constitutional law; therefore, the challenged provision is void, including in relation to the persons who are directly addressed by that provision (cf. BVerfGE 61, 82 <112 and 113>). The constitutional protection of acts criminalised under § 217 StGB is informed by the functional interconnectedness between, on the one hand, the fundamental rights of the complainants in proceedings II., III. 2 to III. 6, IV., V. 1 to V. 4 and VI. 2 and VI. 3 [who want to provide suicide assistance] and, on the other hand, the right to a self-determined death deriving from Art. 2(1) in conjunction with Art. 1(1) GG. The freedom of the individual to end their own life with the assistance of others who are willing to help them, which is constitutionally protected as a manifestation of the right to a self-determined death, is, in substance, dependent on the protection of suicide assistance that is afforded by fundamental rights. In order to act upon the decision to commit suicide, an individual is not just *de facto* dependent on the willingness of others to provide, procure or arrange the opportunity to commit suicide. Others must also *de jure* be allowed to act in accordance with their willingness to provide suicide assistance. Otherwise, the individual's right to suicide would be effectively vitiated. In such cases of legal dependence, there is a functional interconnectedness between the actions of those involved. The fundamental rights protection of the action of one party is a prerequisite for the exercise of a fundamental right by the other ([…]). The fundamental rights protection of the right to a self-determined death only becomes effective where two persons can exercise their respective fundamental rights in pursuit of a common goal, in this case the realisation of the wish to commit assisted suicide. Therefore, the constitutional guarantee of the right to suicide corresponds to an equally far-reaching constitutional protection of the acts carried out by persons providing suicide assistance. 331

2. By providing for the possibility of a prison sentence, the prohibition of assisted suicide services violates the right to liberty under Art. 2(2) second sentence in con- 332

junction with Art. 104(1) GG of the complainants in proceedings III. 3 to III. 6, IV., V. 1 to V. 4 as well as VI. 2 and VI. 3 given that, as natural persons, these complainants are directly addressed by § 217 StGB.

3. The potential imposition of administrative fines under § 30(1) no. 1 OWiG, which is directly linked to the criminalisation of assisted suicide services, violates the fundamental right under Art. 2(1) GG of the complainants in proceedings II. and III. 2; this fundamental right also encompasses the right not to (wrongfully) become liable to a fine (cf. BVerfGE 92, 191 <196>) – unlike the guarantee of private property under Art. 14(1) GG, which was specifically invoked by the complainant in proceedings III. 2, yet does not protect assets as such (cf. BVerfGE 4, 7 <17>; 74, 129 <148>; 81, 108 <122>; 96, 375 <397>). 333

III.

§ 217 StGB cannot be interpreted in conformity with the Constitution. An interpretation restricting its scope of application, which declared assisted suicide services to be permissible under certain circumstances, would contradict the legislative intent and thus amount to outright judicial law-making that would be incompatible with the requirement of sufficient specificity (Art. 103(2) GG) (cf. BVerfGE 47, 109 <120>; 64, 389 <393>; 73, 206 <235>; 105, 135 <153>). 334

This applies in particular to an interpretation that exempts acts assisting in suicide based on a free decision from punishment ([…]). Such an interpretation would be contrary to the legislative intent (cf. BTDrucks 18/5373, p. 3). Ultimately, it would undermine the provision in practice ([…]). 335

Nor can the provision be interpreted in such a way that doctors are exempted from the prohibition in § 217(1) StGB. The legislator designed § 217 StGB as a general offence and deliberately refrained from privileging medical professionals (cf. BTDrucks 18/5373, p. 18). 336

IV.

1. Due to the violations of constitutional law set out above, § 217 StGB must be declared void (§ 95(1) first sentence BVerfGG). The requirements for a mere declaration of incompatibility are not met (cf. BVerfGE 128, 282 <321 and 322>; 129, 269 <284>). 337

2. The fact that § 217 StGB is unconstitutional does not mean that the legislator must completely refrain from regulating suicide assistance. It is not objectionable under constitutional law that the legislator derived a mandate to take action from its duty to protect personal autonomy in end-of-life decision-making (see para. 231 *et seq*. above). However, any legislative concept of protection must be guided by the notion – which is at the heart of the Basic Law's constitutional order – of human beings as intellectual-moral beings that seek to freely pursue self-determination and personal growth (cf. BVerfGE 32, 98 <107 and 108>; 108, 282 <300>; 128, 326 <376>; 138, 338

296 <339 para. 109>). The constitutional recognition of the individual as a being capable of self-determination requires that state intervention be strictly limited to measures protecting self-determination, which may be complemented with elements ensuring medical or pharmaceutical quality assurance and protecting against abuse.

In the context of organised suicide assistance, a wide array of options is available to the legislator for ensuring protection of self-determination in decisions regarding one's own life. These include enacting procedural safeguards such as statutory obligations to provide information or to observe waiting periods; requirements to obtain administrative approval, which ensure the reliability of the assisted suicide services offered; as well as the prohibition of particularly dangerous forms of suicide assistance in accordance with the legislative intent underlying § 217 StGB. In view of the importance of the legal interests these options serve to protect, the legislator may also resort to the use of criminal law, or at least provide for criminal sanctions in case of breaches (see already para. 268 *et seq*. above) 339

Given that the right to suicide, including the motives underlying an individual decision to commit suicide, is recognised under constitutional law and these motives thus elude any appraisal on the basis of objective rationality standards (see para. 210 above), the permissibility of suicide assistance may not be linked to substantive criteria, e.g. by requiring a diagnosis of incurable or terminal illness. Nonetheless, different requirements may be set, depending on the relevant life circumstances, for establishing that an individual's decision to commit suicide is serious and lasting. The legislator is free to develop a framework of procedural safeguards. 340

However, any legislative restriction of assisted suicide must ensure that sufficient scope remains in practice for the individual to exercise their constitutionally protected right to depart this life based on their free decision and with the assistance of others. This not only requires legislative coherence in the design of the legal framework applicable to doctors and pharmacists, but potentially also adjustments of the law on controlled substances. 341

The requirement of legislative coherence does not preclude the legislator from retaining certain elements of consumer protection and abuse prevention in the laws on therapeutic products and on controlled substances, and from incorporating them into a concept of protection relating to suicide assistance. Regardless of all the foregoing, no one can ever be obliged to assist in another person's suicide. 342

D.

[…] 343

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