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Sources in law:

BGB[1] § 133
GG[2] Art. 1, 2 para. 1, Art. 12 para. 1, Art. 14 para. 1, Art. 19 para. 4, Art. 20 para. 3
GVG[3] § 17a
VwGO[4] § 108 para. 1, § 121
ZPO[5] § 265 para. 1

Key words:

Lost Art Internet Database; cultural property; looted art; losses resulting from Nazi persecution; Coordination Office; search notice; deletion; public law claim to remediation of consequences; designated purpose; Washington Principles; government action to disseminate information; encroachment on basic rights; interference with basic rights; indirect factual encroachment; requirement for a specific enactment; change in parties; legal recourse; prohibition on review; sovereign act not subject to judicial review; subsequently ordered liquidation; standing to conduct litigation; claims under the law of property; legitimate interest in legal action; subjective scope of legal effect.

Headnotes:

1. The Internet database operated by the Magdeburg Coordination Office[6] at www.lostart.de is a part of the government's actions to disseminate information.

2. Because of the absence of statutory stipulations the continued publication of a search notice in the Lost Art Internet Database by the Coordination Office is unlawful only if it is not within the scope of the database's designated purpose or if it violates superior law, in particular basic rights.

3. The purpose of a search notice included in the register by the Coordination Office on the grounds of suspected looted art is not achieved simply upon discovery of the sought cultural asset, if the ultimate fate of that asset remains uncertain.

4. The compatibility of a search notice which the Coordination Office continues to disseminate with the Basic Law is determined according to the principles developed for the government's actions to

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[1] Civil Code (*Bürgerliches Gesetzbuch*; "BGB")
[2] German constitution or Basic Law (*Grundgesetz*; "GG")
[3] Courts Constitution Act (*Gerichtsverfassungsgesetz*; "GVG")
[4] Code of Administrative Procedure (*Verwaltungsgerichtsordnung*; "VwGO")
[5] Code of Civil Procedure (*Zivilprozeßordnung*; "ZPO")
[6] Coordination Office for Lost Cultural Assets in Magdeburg (*Koordinierungsstelle Magdeburg*)

disseminate information (see in particular BVerfG[7], orders of June 26, 2002 - 1 BvR 558/91 et al. - BVerfGE 105, 252 and - 1 BvR 670/91 - BVerfGE 105, 279). Accordingly, the body undertaking the actions must have an assigned task and compliance with the boundaries of competence is required. In addition, the provision of information must not be non-objective, incorrect or otherwise disproportionate, and its effects must not be such as to make it the equivalent of a government measure that would have to be categorized as an interference with basic rights. If these preconditions are met, then the search notice is not unlawful, even if it is not based on an explicit statutory authorization.

Judgment of the First Division, February 19, 2015 - BVerwG 1 C 13.14

I. VG Magdeburg, January 17, 2012
Case VG 7 A 326/10 MD

II. OVG Magdeburg of October 23, 2013
Case OVG 3 L 84/12

FEDERAL ADMINISTRATIVE COURT[8]

IN THE NAME OF THE PEOPLE

JUDGMENT

BVerwG 1 C 13.14
OVG 3 L 84/12

Delivered
on February 19, 2015
...
as Registrar of the Court Registry

In the administrative case

the First Division of the Federal Administrative Court –
upon the oral hearing of February 19, 2015
by Presiding Federal Administrative Court Justice Prof. Dr. Berlit,
and Federal Administrative Court Justices Prof. Dr. Dörig, Prof. Dr. Kraft,
Fricke and Dr. Rudolph –

[7] Federal Constitutional Court (*Bundesverfassungsgericht*; “BVerfG”)
[8] Federal Administrative Court (*Bundesverwaltungsgericht*; “BVerwG“)

has decided:

> Upon the further appeals on point of law submitted by the Defendant and the subpoenaed participants[9], the judgment of the Higher Administrative Court of[10] Sachsen-Anhalt of October 23, 2013 and the judgment of Magdeburg Administrative Court[11] of January 17, 2012 are amended. The complaint is denied.
>
> The Plaintiff shall bear the costs of the proceedings at all instances including the out-of-court costs incurred by the subpoenaed participants.

Reasons

I

1 The Plaintiff, a limited liability company in liquidation[12], wishes a search notice for a painting to be deleted from the Internet database www.lostart.de. The information in this database includes search notice and found-object reports on cultural property of which Jewish owners were deprived as a result of persecution under the Nazi regime and on cultural objects where, because of gaps in their provenance, such a story of loss cannot be ruled out as a possibility. It was established by the Coordination Office in Magdeburg, an autonomous organizational unit at the Ministry of Education and Cultural Affairs of the defendant *Land*,[13] on the basis of a Federal Government-*Länder* Agreement.

2 In 2005 the Coordination Office received a search notice for the painting made on behalf of the community of heirs of Rosa and Jakob O. on the grounds that all the shares in the Plaintiff had been bequeathed to the Jewish couple Mr. and Mrs. O. in 1929. The Plaintiff was said to have been deprived of the picture in 1935 by an auction held as a result of Nazi persecution. In 2009 a further search notice was made by members of communities of heirs – meanwhile deceased and succeeded by the current subpoenaed participants – who succeeded to the estates of the Jewish shareholders of the former J. & S. bank. The request was made on the grounds that the painting had been transferred to the bank as security in 1933; that the bank acquired it at auction in 1935 and that it was lost to the Jewish shareholders in 1938 during the course if the so-called "Aryanization" of the bank. Because of the competing search notices the painting has been published on the Internet without naming names.

3 The painting has meanwhile been discovered in Namibia. In early 2010 the person in possession of the painting, the Plaintiff and the members of the community of heirs of Mr. and Mrs. O. agreed to have the

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[9] *Beigeladene*
[10] Higher Administrative Court (*Oberverwaltungsgericht*)
[11] Administrative Court (*Verwaltungsgericht*)
[12] *GmbH in Liquidation*
[13] Federal state/s (*Land/Länder*)

picture auctioned at Sotheby's in Amsterdam in May 2010 and to divide the proceeds equally between the person in possession of the picture and the community of heirs of Mr. and Mrs. O. The auction fell through after the Coordination Office refused to delete the search notice in the absence of approval by the second requester.

4 In a judgment dated January 17, 2012 the Administrative Court ordered the Defendant to delete the search notice for the painting from the Lost Art Internet Database. In a judgment dated October 23, 2013 the Higher Administrative Court rejected the appeals filed by the Defendant and the subpoenaed participants. Its stated reasons for doing so were essentially that the Plaintiff had a public law claim to remediation of the consequences entitling it to demand that the Defendant delete the search notice. The lawfulness of the entry was said to be determined by the standards developed for the area of – non-regulatory – activity by the government to disseminate information. The court said that the question of whether this meant that statutory authority was needed for the operation of the database could remain open. Continued dissemination of the search notice was said to be unlawful whatever the situation, as its purpose had already been fulfilled. The documents upon which the establishment of the Coordination Office was based were said to show that the purpose of operating the database is limited to publishing search notices and found-object reports relating to cultural property within the scope of the Washington Principles and the Joint Statement by the Federal Government, the *Länder* and the national associations of local authorities of 1999. This purpose was said to have been achieved when the picture was found. The database was said not to serve the more far-reaching purpose of securing claims. Continuance of the entry was said to violate the Plaintiff's general freedom of action[14]. The documentation of suspected looted art in the search list was said to lead a reduction in market value and in individual cases to it becoming temporarily impossible to effect a sale. This limitation need be tolerated only for as long as necessitated by the purpose behind the search list, namely that of providing support for the search for missing looted art.

5 During the course of the further appeal proceedings on points of law the Federal Government, the *Länder* and the national associations of local authorities set up the German Lost Art Foundation (*Stiftung Deutsches Zentrum Kulturgutverluste*), established with effect from January 1, 2015 in the form of an incorporated foundation under civil law[15], whose tasks include continuing the work of the Coordination Office.

6 In its further appeal on points of law the Defendant is claiming that the dispute is not of a public law nature and does not involve a legitimate interest in the proceeding. It alleges that, whatever else, the action became inadmissible upon establishment of the foundation. It says that the Plaintiff is not entitled to the public law claim to remediation of consequences which it is making and which has to be seen as subject to further appeal on points of law. It says that the search notice did not violate the Plaintiff's rights. The only possible standard to apply is said to be that of Art. 12 para. 1 GG. However, it says,

[14] *allgemeine Handlungsfreiheit*
[15] *rechtsfähige Stiftung des bürgerlichen Rechts*

according to the standards developed for the area of the government's non-regulatory activity to disseminate information there is no interference with a basic right and that the task of disseminating information has not been ended by the discovery of the painting and the agreement on realizing its value.

7 In their appeals on points of law the subpoenaed participants are claiming that the liquidator does not have the standing to bring an action and lacks a legitimate interest in legal action. They claim that there is no need for a statutory basis either for the establishment of the database or for the disputed publication and that the search notice does not violate the Plaintiff's basic right under Art. 2 para. 1 GG. The purpose of the database is said to also include documenting cases of suspected looted art in the interest of the general public, in the interest of persons pursuing justified reparation claims, and in the interest of fair competition.

8 The Plaintiff is defending the challenged decision. In addition it is also claiming that the awarded claim to remediation of consequences is not open to appeal on points of law and was awarded correctly. It says that according to the binding judicial findings of fact, the search notice is of significant importance for the marketability of the painting and that the purpose of the database is limited to supporting the search for missing looted art. It says that continuance of the search notice is no longer justified due to the relevant effect it has on basic rights. It also claims that there is no statutory authorization.

II

9 The appeals on points of law brought by the Defendant and the subpoenaed participants are upheld. By rejecting their appeals the appeal court violated federal law (§ 137 para. 1 No. 1 VwGO). It is true that it was ultimately correct in assuming that the decision is a matter for the administrative courts (1.). The action is admissible in other respects as well (2.). It is however unfounded (3.). The court of appeal confirmed a public law claim to remediation of consequences on grounds which are incompatible with points of law open to further appeal. Its assumption that the purpose of the search notice made inter alia by the legal predecessors of the subpoenaed participants was met upon discovery of the painting is based on a too narrow factual basis and is incorrect (3.1). Furthermore, the continuance of the search notice is not (objectively) unlawful on other grounds (3.2). It has thus also not been shown that the Plaintiff's own rights were violated (3.3).

10 The action is also directed against the defendant *Land*. The circumstance that the tasks of the Coordination Office are meanwhile being continued by an incorporated foundation under civil law does not mean that a change in the defendant parties has occurred by operation of statute. Insofar as a change in parties that has to be taken into account ex officio may be assumed in administrative court proceedings also in cases where there is a change in the competence of a public authority (BVerwG, judgments of November 2, 1973 - 4 C 55.70 - BVerwGE 44, 148 <150> and December 13, 1979 - 7 C 46.78 - BVerwGE 59, 221 <224>) or where a successor to responsibilities is ordered under special legislation (BVerwG, judgment of October 20, 1989 - 5 C 33.88 - Buchholz 310 § 142 VwGO No. 12), this is done on the basis of the exclusive nature of allocations of responsibilities regulated by statute. The situation is

not comparable with that of the transfer of the Coordination Office's tasks to a private foundation. Given the absence of a statutory legal basis that transfer resembles legal succession by virtue of a voluntary decision, which does not lead by operation of statute to a change in the composition of the group of parties in proceedings.

11 1. Contrary to the Defendant's opinion recourse to the administrative courts is available (1.1) and the dispute is not generally removed from the scope of review by the courts (1.2).

12 1.1 As regards the admissibility of the chosen path for seeking legal redress, according to § 17a para. 5 GVG a court deciding on legal remedies against a decision in the main matter is not called upon to review whether the legal recourse chosen is admissible or not. However, this prohibition on review does not apply where the court of first instance has acted contrary to § 17a para. 3 sentence 2 GVG by failing to make an advance decision on admissibility of recourse even though an objection has been raised (settled case law, see BVerwG, order of January 28, 1994 - 7 B 198.93 - Buchholz 310 § 40 VwGO No. 268; BGH[16], order of September 23, 1992 - I ZB 3/92 - BGHZ 119, 246 <250>; BAG[17], judgment of August 21, 1996 - 5 AZR 1011/94 - NJW 1997, 1025; BFH[18], order of June 24, 2014 - X B 216/13 - BFH/NV 2014, 1888).

13 Applying this provision shows that the court of appeal was precluded from reviewing the question of recourse. Its contrary opinion was based on the assumption made contrary to the facts on record, that despite the objection raised at first instance the Administrative Court had not confirmed the availability of recourse to the administrative courts until making its judgment. As the court files show, the first time that the Defendant asserted that the dispute was not of a public law nature was in the reasoning for the motion requesting permission to appeal; before then it had merely objected that the legal entity responsible for the Coordination Office was not the proper Defendant, and that the Plaintiff should instead take action against the heirs of the bank (before the civil courts). The allegation to the contrary made by the appeal court – which forms part of the findings made by the judges of fact – is not binding on the Federal Administrative Court. For procedural facts, i.e. the factual basis for the question of admissibility which the court of further appeal too must review ex officio and preconditions for the decision on the merits, do not belong to the factual findings referred to in § 137 para. 2 VwGO (Kraft, in: Eyermann, VwGO, 14th Ed. 2014, § 137 mn. 46 with further references). Nevertheless, this mistake was not fundamental to the challenged decision, as the appeal court's ruling on the question of legal recourse did not differ from that made by the Administrative Court and as it was substantively correct in also regarding recourse to the administrative courts as being available.

14 1.2 The request for deletion is not directed against a sovereign act which by its nature is outside the scope of judicial review. A review of this question is not within the scope of the prohibition pursuant to

[16] Federal Court of Justice (*Bundesgerichtshof*; "BGH")
[17] Federal Labor Court (*Bundesarbeitsgericht*; "BAG")
[18] Federal Finance Court (*Bundesfinanzhof*; "BFH")

§ 17a para. 5 GVG, as the question is not that of which court has jurisdiction but rather one of whether the dispute is removed from judicial review of any kind.

15 As part of the executive the Coordination Office – like any other government body – is bound by the law and in particular by basic rights (Art. 1 para. 3, Art. 20 para. 3 GG) and its actions are subject to review by the courts (Art. 19 para. 4 sentence 1 GG). According to that provision, citizens have a right to as effective as possible protection against acts of public authorities where such acts interfere with their rights (settled case law, see BVerfG, judgment of July 18, 2005 - 2 BvR 2236/04 - BVerfGE 113, 273 <310> with further references). Other than in the case of a few narrowly defined exceptions (see for example, Art. 10 para. 2 sentence 2 and Art. 44 para. 4 GG) the Basic Law does not recognize the existence of any government acts which are generally exempted from such judicial review. Contrary to the opinion put forward by the Defendant this means that legal protection has to be granted against acts setting out the direction of government policy (*staatsleitende Akte*), if and to the extent that they affect an individual's public-law rights (*subjektiv-öffentliche Rechte*); the question of the level of the intensity of scrutiny involved in a judicial review of such acts is another issue.

16 In this case neither the nature of the activity undertaken by the Coordination Office nor its inner structure give reason for a different conclusion. The Lost Art Internet Database documents search notices and found-object reports from third parties. Even if no liability for their accuracy is accepted, the decision to register or delete reports is a matter to be undertaken solely by the operator of the database according to its own assessment of plausibility (see the "General principles for the registration and deletion of reports on cultural artefacts"[19], published at: http://www.lostart.de/Content/04_Datenbank/DE/Grundsätze-Checkliste_DL.pdf?__blob=publicationFile). The fact that following the Federal Government-*Länder* Agreement on the Coordination Office of September 15, 2009 the work of the Coordination Office is supervised by an Advisory Board (*Fachbeirat*), that all fundamental decisions are made by a Board of Trustees (*Kuratorium*) and that the Coordination Office is bound internally by the decisions made by those two bodies, is due above all else to circumstance that the institution is not only funded by several public authorities but also one whose activity is not based on specific statutory specifications.

17 2. The action is admissible in other respects as well, in particular the subsequently appointed liquidator[20] acting on behalf of the Plaintiff has standing to conduct the proceedings (2.1) and the Plaintiff does not lack the required legitimate interest in legal action (2.2).

18 2.1 The request for deletion is within the scope of the liquidator's powers of representation. According to the court order appointing the liquidator, her responsibilities include representing the company and upholding its interests in connection with the assertion of claims under the law of property (*vermögensrechtliche Ansprüche*). In this respect the literal meaning of the term "*vermögensrechtlich*" shows that this it is not limited to disputes arising under the Open Property Issues Act (*Vermögensgesetz*).

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[19] *Grundsätze der Koordinierungsstelle zur Eintragung and zur Löschung von Meldungen zu Kulturgütern*
[20] *Nachtragsliquidatorin*

In the absence of indications to the contrary it should be understood in its broader sense and is distinguished from the (non-property related) rights of individuals and families in that it covers not only claims derived from a legal relationships governed by the law of property but also claims derived from legal relationships not governed by the law of property, provided that such claims relate directly to a valuable performance (*vermögenswerte Leistung*) or that pursuing such claims serves essentially also to uphold economic interests, unless this is limited to no more than a mere reflex effect (Toussaint, in: Beck'scher Online-Kommentar ZPO, updated: January 1, 2015, § 20 ZPO mn. 1, with further references from the settled case law of the BGH).

19 In the case at hand the Plaintiff is claiming that it remains the owner of the painting and that the search notice prevents it from realizing its value. Although according to the agreement entered into by the Plaintiff in January 2010, the proceeds of an auction are to be divided equally between the person in possession of the painting and the community of heirs of Mr. and Mrs. O. (excluding the Plaintiff), this agreement related to an auction-sale of the picture at the auction of old master paintings held at Sotheby's in Amsterdam on May 18, 2010, which did not occur. There is no need to make a final decision on the question of whether this means that the agreement as a whole has become obsolete, or whether the parties to that agreement remain obligated to sell the painting and to divide the proceeds according to the agreed distribution ratio. Even if only in view of the fact that the ownership situation remains uncertain and of the legal uncertainty concerning the extent of the contractual obligation undertaken by the Plaintiff it is currently impossible to assume that a deletion would (now) only serve to uphold the economic interests of its shareholders and not its own interests as well.

20 2.2 The Plaintiff does not lack the necessary legitimate interest in legal action. This means that the court must not refuse to grant legal protection unless there is no conceivable aspect deserving of legal recognition which could mean there is an interest in obtaining the requested judicial decision. The standard to be applied is strict (see Rennert, in: Eyermann, VwGO, 14th Ed. 2014, before § 40 mn. 11 ff. with further references).

21 The appeal court rightly assumed that, in view of the factual and legal difficulties associated with the question of ownership, taking action against the subpoenaed participants before the civil courts would not be a clearly preferable alternative for the Plaintiff. Moreover, any such legal dispute would not necessarily have to be conducted before a German court. Yet, according to the Principles set out by the Coordination Office only a decision by domestic court can give rise to a right to deletion.

22 Similarly, one cannot rule out in advance the possibility that the requested deletion might bring the Plaintiff an advantage deserving of legal recognition. This is not precluded by the fact that the action is directed against the state of Sachsen-Anhalt, although since early 2015 the database has not been operated by the Coordination Office attached to that state's Ministry of Education and Cultural Affairs but by a civil law foundation. Although this means that any request for performance of a material act (*Realakt*) can now be fulfilled only by the foundation, according to § 121 VwGO the legal effect of an administrative court judgment extends to include the legal successors of the parties. Thus, seen from a temporal

perspective, it is also binding upon anyone succeeding to the right which is the subject of a dispute before the decision becomes final, but after the matter becomes pending (§ 173 VwGO in conjunction with § 265 para. 1 ZPO). It follows that an approving judgment made after reregistration of title could be enforced against the foundation. The agreement of January 2010 does not preclude the existence of a legitimate interest in legal action either, as the agreed auction date fell through and as the question of which legal obligations the Plaintiff faces as a result remains open. Similarly, the objection raised by the subpoenaed participants that a deletion would not remove the existing looted art suspicion does not alter the fact that the Plaintiff has a legally recognizable interest in the deletion of an entry in the register which it believes to be unlawful and a hindrance to a sale.

23 3. The action is unfounded, however. The relevant factor for judging whether the action seeking performance (*Leistungsklage*) is well founded in the factual and legal situation obtaining at the time of the last oral hearing before the appeal court. To that extent it is thus irrelevant that the operation of the database is now being continued by a civil law foundation. Although changes in the law occurring during the further appeal proceedings on points of law do have to be taken into account if the appeal court would have to take them into account were it called upon to make the decision instead of the Federal Administrative Court (settled case law, see BVerwG, judgment of November 1, 2005 - 1 C 21.04 - BVerwGE 124, 276 <279 f.>), the establishment of a civil law foundation to continue tasks performed by the Coordination Office and the database it built up amounts to a change in the facts and not a change in the legal assessment criteria relevant for a review of the disputed claim.

24 The appeal court correctly assumed that the only possible type of claim for the requested deletion is a general public-law claim to remediation of consequences (*allgemeiner öffentlich-rechtlicher Folgenbeseitigungsanspruch*). This type of claim arises where a public authority intervention interfering with an individual's rights has given rise to an unlawful situation which still persists. A claim of this type is not limited to situations where an unlawful administrative act has been implemented prematurely; it may also be brought against unlawful encroachment of any kind, even where this results from a simple action on the part of the administration (*Verwaltungsrealakt*). An action claiming remediation of the consequences is directed towards achieving restitution of the lawful obtaining situation; remedial action should rectify all the unlawful consequences that can be attributed to the public authority concerned which resulted from that authority's official acts (BVerwG, judgments of August 25, 1971 - 4 C 23.69 - Buchholz 310 § 113 VwGO No. 58, of July 19, 1984 - 3 C 81.82 - BVerwGE 69, 366 <370 ff.> and of May 23, 1989 - 7 C 2.87 - BVerwGE 82, 76 <95> with further references).

25 A further review on points of law of the claim awarded by the appeal court is not precluded by the fact that the Coordination Office is part of one of the public authorities of a *Land* and as such gives effect to the law of that *Land*. As the claim to remediation of consequences is a legal instrument derived from sources which include the Basic Law – in particular from the respectively affected basic rights and the rule of law principle – the remediation of consequences is a principle and a claim which forms part of

federal law and which is thus also amenable to further appeal on points of law pursuant to § 137 para. 1 No. 1 VwGO (BVerwG, judgment of August 25, 1971 - 4 C 23.69 - Buchholz 310 § 113 VwGO No. 58).

26 Contrary to the opinion expressed by the appeal court, the preconditions for a general public-law claim to remediation of consequences directed towards achieving a deletion of the search notice are not met. The continuance of the search notice by the Coordination Office does have to be regarded as administrative action governed by public law (3.1). It has not, however, resulted in an unlawful situation (3.2). Thus the Plaintiff's own rights have not been violated (3.3).

27 3.1 The registration and deletion of reports relating to cultural assets published by the Magdeburg Coordination Office on the www.lostart.de website forms part of the state's actions to disseminate information in connection with the performance of public tasks. The fact that no liability is accepted for the accuracy of search notices and found-object reports submitted by third parties is irrelevant. For the registration of entries takes place exclusively according to the Coordination Office's own principles which it itself established. According to those principles, before a report is entered in the register a plausibility assessment has to be conducted, relating in particular to the reporting party's statements as to the object concerned, the history of its loss and the person of the reporting party. Similarly, the way in which competing reports are handled and the deletion of reports are governed by the Coordination Office's own rules, established by the Office itself. The Lost Art Internet Database is thus not merely a platform made freely available to the general public, for whose content the state accepts no liability.

28 3.2 The failure to delete the search notice has not, however, resulted in an unlawful situation. The Internet Database operated by the Coordination Office is in the non-technical sense of the term a public institution, made available to the general public within the framework set by its designated purpose (*Widmungszweck*). The actions of the Coordination Office can therefore be reviewed by the courts only to check whether they comply with that designated purpose (a) and are compatible with superior law, in particular basic rights (b).

29 a) The continuance of the search notice is within the scope of the database's designated purpose. According to that designation, the purpose of a search notice included in the register because of suspected looted art is not achieved simply by the discovery of the cultural asset being sought if uncertainty remains as to the ultimate fate of that asset. The contrary assumption made by the appeal court, namely that the purpose of the register is only to support the persons affected in searching for missing looted art, is based on too narrow a factual basis and thus insufficient to meet the requirements that apply to the formation of judicial conviction. According to § 108 para. 1 sentence 1 VwGO, the court is obliged to rule in accordance with its free conviction gained from the overall outcome of the proceedings. It is thus not allowed to proceed in a way that means it fails to note or fails to consider individual significant facts or results of evidence. This requirement is breached where a court proceeds on the basis of an incorrect or incomplete factual background, and in particular if it ignores circumstances whose relevance to the decision should have been obvious. In such cases there is a lack of a sustainable basis for the internal formation of judicial conviction by the court and at the same time also for the review of its decision to

check whether it oversteps the boundaries delimiting an assessment which is objectively free from arbitrary decisions and which takes due account of the laws of nature and human thought (*Natur- und Denkgesetze*) as well as of rules gained from general experience (*allgemeine Erfahrungssätze*). The question of whether the factual basis upon which the court made its decision was too narrow is a question of the assessment of facts and evidence, which on principle must be regarded as one of substantive law (BVerwG, judgment of July 5, 1994 - 9 C 158.94 - BVerwGE 96, 200 <210 ff.> with further references).

30 The approach adopted by the appeal court is correct in assuming that the absence of specific legislative provisions to determine the purpose of the search register contained in the database means that reference has to be made to the declarations of intent made by the bodies which established it (UA p. 16). In this context it referred inter alia to the Federal Government-*Länder* Agreement of September 15, 2009 underlying the establishment of the Coordination Office, which for its part made reference to the "Principles with Respect to Nazi-Confiscated Art" adopted at the Washington Conference on Holocaust Era Assets on December 3, 1998 (Washington Principles). The appeal court concluded from the documents it consulted, without providing any further explanation, that the purpose of the search notice was fulfilled upon discovery of the painting (UA p. 18). In doing so it overlooked the fact that the designated purpose does not depend solely on the statements made by the bodies concerned at the time the Coordination Office was established. For the designated purpose can also be given further shape by subsequent declarations of intent. When determining that purpose the appeal court should therefore have also considered the General principles for the registration and deletion of reports adopted by the Coordination Office with the approval of the entities behind it.

31 As the contents of the declarations of intent relevant for determining the designated purpose are undisputed in this case, the Federal Administrative Court may interpret and evaluate them itself without having to refer the matter back to the appeal court for further clarification. An interpretation based on the true intention (see § 133 BGB) shows that the purpose of a search notice included because of a suspicion of looted art is not fulfilled simply by the discovery of the cultural asset being sought. According to the Federal Government-*Länder* Agreement of 2009 the tasks incumbent on the Coordination Office include documenting search notices and found-object reports from this country and abroad relating to cultural assets lost because of Nazi persecution and presenting them at www.lostart.de. It does not show that the publication of search notices is to be limited to cultural assets whose current location in unknown to the persons searching for them. Indeed, that would be incompatible with the historical responsibility expressly emphasized in the Preamble in the form of approval of the 1998 Washington Principles. According to those Principles, works of art which were confiscated by the Nazis and not subsequently restituted should not just be identified (No. 1), rather the pre-war owners and their heirs should be “encouraged to come forward and make known their claims” (No. 7) and supported in their efforts “to achieve a just and fair solution” (No. 8). Deleting search notices after a work has been found but before the person currently in possession of the work and – possibly competing – pre-war owners and their heirs have achieved a solution determining the work’s further fate or at least a binding clarification of the question of ownership would run counter to these Principles. This is also confirmed by the General

principles for the registration and deletion of reports adopted by the Coordination Office with the approval of the entities behind it, which add further shape to the designated purpose. According to those General principles the requirements for deletion to take place are that the person who submitted the report requests deletion, or that the plausibility of a report has been lastingly destroyed, or that a third party requests deletion after his or her ownership has been established under a legally absolute judgment of a German court. These grounds for the deletion of a report also show that the purpose is not achieved simply when a sought object is found, if clarity as to the ultimate fate of that object has not yet been achieved. The question of whether the database serves any purposes beyond that need not be decided.

32 If the purpose of the search register lies not only in discovering cultural assets confiscated as a result of Nazi persecution but also in the publication of a search notice so as to encourage achievement of an amicable solution by the parties concerned, then contrary to the assumption made by the appeal court the purpose of the search notice in dispute here has not yet been fulfilled, independently of whether the subpoenaed participants have had sufficient opportunity to secure any potential claims. Moreover, achievement of the purpose did not occur as a result of the agreement on realization of the painting's value entered into between the person currently in possession, the Plaintiff and the members of the community of heirs of Mr. and Mrs. O., as the agreement was reached without involvement by the subpoenaed participants. Similarly it is irrelevant whether the subpoenaed participants might perhaps be – as the Administrative Court assumed – secondary injured parties (*Zweitgeschädigte*), for the purpose of the database lies in the documentation of losses resulting from Nazi persecution and not in their legal assessment.

33 b) The continuance of the search notice is also compatible with law of superior rank. Given the absence of statutory provisions in this case a violation of basic rights should be reviewed in particular.

34 The only basic rights that might potentially be affected are – in view of the sales difficulties associated with a search notice – occupational freedom (Art. 12 para. 1 GG) and general freedom of action (Art. 2 para. 1 GG). Art. 14 para. 1 GG cannot apply, even if simply because the scope of protection afforded by the constitutional right to property is not affected by the publication (see BVerfG, order of June 26, 2002 - 1 BvR 558/91 et al. - BVerfGE 105, 252 <277 f.>). The same applies with regard to the right to informational self-determination derived from Art. 2 para. 1 in conjunction with Art. 1 para. 1 GG (see BVerfG, judgment of December 15, 1983 - 1 BvR 209/83 et al. - BVerfGE 65, 1 <41 ff.>), as in the case at hand the Coordination Office did not publish any personal data because of the competing reports. No decision need be made on the question of whether as far as the Plaintiff is concerned Art. 2 para. 1 GG or Art. 12 para. 1 GG should apply as the more specific norm, because neither according to the one norm nor according to the other did the continuance of the search notice lead to interference with fundamental rights of the persons whose economic interests were negatively affected to an extent that would require a specific enactment.

35 The appeal court correctly assumed that the question of compatibility with superior rules of law has to be decided with reference to the principles developed by the Federal Constitutional Court with regard to

violations of basic rights caused by government action to disseminate information. According to those principles not every instance of government action to disseminate information and not every instance of government participation in the process of forming public opinion can be regarded as an interference with basic rights (BVerfG, order of May 24, 2005 - 1 BvR 1072/01 - BVerfGE 113, 63 <76>). Even if an encroachment upon basic rights resulting from government action to disseminate information does not meet the criteria defining interference in the classic sense, in particular as they are not based directly on a regulatory effect (BVerfG, order of August 17, 2010 - 1 BvR 2585/06 - NJW 2011, 511 <512>), action by the government to disseminate information can lead to an indirect factual encroachment on basic rights (BVerfG, orders of August 12, 2002 - 1 BvR 1044/93 - NVwZ-RR 2002, 801 and of August 16, 2001 - 1 BvR 1241/97 - NJW 2002, 3458 <3459>). However, the provision of market-related information by the government does not encroach upon the scope of protection afforded by Art. 12 para. 1 GG, provided the influence on factors relevant under competition law takes place without distorting the market situation and in accordance with the legal requirements for government actions to disseminate information. Thus the dissemination of information by the government presupposes a task incumbent on the body undertaking the actions and compliance with the boundaries of competence. In addition, the requirements as to the accuracy and the objective nature of the information must be observed and the intended purpose and actual effects of the government's actions to disseminate information must not make it equivalent to a government measure that would have to be categorized as an interference with basic rights (BVerfG, order of June 26, 2002 - 1 BvR 558/91 et al. - BVerfGE 105, 252 <268 ff.>). In the non-commercial sector too, the government has authority to disseminate information, derived from the power to guide general public policy (*Staatsleitung*), provided the information-related actions remain within the scope of competence to disseminate information and that the persons affected do not suffer disproportionate encroachment on their basic rights (BVerfG, order of June 26, 2002 - 1 BvR 670/91 - BVerfGE 105, 279 <301>). If these preconditions are met then the actions undertaken to disseminate information will be covered by the government's authority to perform its tasks even if they are associated with an indirect, factual encroachment on basic rights. For the allocation of a task in principle brings with it the right to disseminate information in connection with performance of that task, even if it is possible that this could result in indirect, factual encroachment on basic rights. In such a case the requirement for a specific enactment does not mean that a more far-reaching special authorization by the legislature is required (BVerfG, order of June 26, 2002 - 1 BvR 670/91 - BVerfGE 105, 279 <303>).

36 aa) The activity of the Coordination Office constitutes performance of a government task. It is based on the Federal Government-*Länder* Agreement of 2009. The search notice is in conformity with the task of documentation and information assigned to the Coordination Office under that Agreement. In the field of information the authority for government action results also from the publicity work attributable to the role of guiding general public policy (*Staatsleitung*). It includes the right to disseminate information for the purpose of informing the general public about important matters and enabling citizens to play an independent part in helping to cope with problems (BVerfG, orders of June 26, 2002 - 1 BvR 558/91 et al. - BVerfGE 105, 252 <268 ff.> and - 1 BvR 670/91 - BVerfGE 105, 279 <302>). In view of Germany's historic responsibility, society as a whole has an interest in the publication of information about cultural

property where there is suspicion that property might be looted art, as a means towards enabling interested citizens to play a responsible part of their own in addressing the unlawful consequences of the Nazi regime which persist to this day. It is not necessary to decide the question of whether, in addition to that, the publication of incidences of loss which have been finally dealt with might also be covered by the government's authority to disseminate information.

37 bb) The provision of information by the Coordination Office does not violate the federal system of division of powers (see BVerfG, order of June 26, 2002 - 1 BvR 670/91 - BVerfGE 105, 279 <308>). The Coordination Office's activity serves not only to help enforce interests in obtaining reparation but also to protect cultural property; authority to disseminate information exists not only at federal level but also at the level of the *Länder*, derived from the allocation of responsibilities in the federation. Insofar as this means that competencies exist in parallel, seen in light of the federal system of division of powers the fact that – although under the Federal Government-*Länder* Agreement the Coordination Office is funded jointly by the Federal Government and the *Länder* – in legal terms the provision of information is undertaken only by the Defendant, is unobjectionable.

38 cc) The disputed publication is neither unobjective nor incorrect. In this respect the question of substantive accuracy does not depend on whether the actual reason the painting was lost to the legal predecessors of the subpoenaed participants was Nazi persecution. For the publication of search notices in the Lost Art Internet Database is limited to documentation of reports submitted by third parties, which the operator merely has to subject to a rough plausibility assessment. Consequently, the substantive accuracy of a suspicion that an object is looted art raised in a search notice submitted by a third party is thus not a subject about which the government is providing information. It follows that – leaving aside cases of evident inaccuracy – the question is not whether the supposed facts upon which loss report is based are correct nor whether the party submitting the report drew the proper legal conclusions from those supposed facts. The aim of the database is not to recognize and/or categorize restitution claims; the publication of search notices and found-object reports is intended simply to bring the pre-war owners and their heirs together with those currently in possession of the objects and to support them in achieving a just and fair solution.

39 dd) The continuance of the search notice does not have a disproportionate impact on the persons whose economic interests are negatively affected or on their basic rights for other reasons either. The aim pursued is to support the subpoenaed participants, who have made a plausible claim that the painting was lost to their legal predecessors as a result of Nazi persecution, until such time as the ownership question and any potential claims to restitution have been finally clarified, which, bearing in mind Germany's historic responsibility, its approval of the Washington Principles and the efforts to put these into actual practice with the help of the Lost Art Internet Database, is a legitimate purpose. Continuing to disseminate the search notice until final clarification is both suitable and necessary to achieve that purpose. In particular, it is not apparent that the purpose of the database could have been achieved by means of a less burdensome but equally effective form of government information. Finally, the measure is

also reasonable, as the parties involved have the option of achieving clarification, if necessary by recourse to the civil courts.

40 ee) Furthermore, the continuance of the search notice is not unlawful on the grounds that it has no basis in statute. Leaving aside the question of government bodies' powers to disseminate information, the scope of protection afforded by the basic rights affected in this case will only be encroached upon if the actions are not limited to the publication of information that can serve as a basis for users of the government source of information to make self-determined decisions in line with their own interests. More specifically, the provision of information by the government is capable of encroaching upon the scope of protection afforded by the basic rights, if the intended purpose and actual effects of disseminating information make it equivalent to a government measure that would have to be categorized as an interference with basic rights in the classic sense. The special binding requirements under the legal system including the requirement for a statutory basis cannot be circumvented by choosing such a functional equivalent of interference; in such cases the relevant legal requirements applying to an encroachment upon basic rights must be met (BVerfG, orders of June 26, 2002 - 1 BvR 558/91 et al. - BVerfGE 105, 252 <273> and - 1 BvR 670/91 - BVerfGE 105, 279 <303>).

41 Considered in this sense the continuance of the search notice does not constitute a functional equivalent for a (final) interference with basic rights. The information contained in the report is limited to the documentation of a suspicion voiced by a third party, namely that the painting is looted art. Based on this information users of the database can make self-determined decisions in line with their own interests, for example whether in their capacity as a person in possession of the picture they are willing to surrender it voluntarily or cooperate in achieving another solution, or whether in their capacity as auctioneers or a party interested in buying the painting they wish to accept the painting for sale at auction or acquire it at auction despite the existing suspicion and the associated risks. In contrast to that, the search notice has no impact at all on the question of ownership, the authority to dispose of the painting or the validity of any potential restitution claims. These are questions which if disputed must be clarified between the parties involved by recourse to the civil courts. Any potential impacts on the market value and salability of the picture result primarily from the history of loss alleged by the subpoenaed participants. Keeping up the entry in the register does no more than make the resulting "taint" public. Deletion would not cause it to lapse and the subpoenaed participants could pursue the matter further by other means – including means that would attract great public attention. To that extent the case differs from the facts considered in the "E-Cigarettes Decision" made by Münster Higher Administrative Court on September 17, 2013 - 13 A 2541/12 - (DVBl 2013, 1462) which involved a ministerial warning against selling e-cigarettes, where the finding that the effects were similar to those of a ban resulted inter alia from the fact that trading in and selling the goods had been categorized as a breach of the law that was also capable of leading to severe consequences under criminal law.

42 The theory of materiality ("*Wesentlichkeitstheorie*") developed by the Federal Constitutional Court and cited by the Plaintiff does not show there to be any necessity for a statutory basis in this case either.

According to that theory the principle of democracy and the rule of law require the legislature to make all material decisions itself rather than leave them to be decided by the executive. As far as the area relevant to basic rights is concerned, the question of whether a measure is material and thus a matter that must be reserved for parliament to decide, or at least one that can only be decided on the basis of powers of defined scope granted by parliament, is one which as a rule depends on whether it is material for the implementation of basic rights (BVerfG, order of December 21, 1977 - 1 BvL 1/75 et al. - BVerfGE 47, 46 <79> with further references). In that respect the rulings made by the Federal Constitutional Court relating to the constitutional requirements for admissible government activity to disseminate information show that, even when the aspect of materiality is taken into consideration, if the requirements established in those rulings are complied with then there is no need for a basis in statute. Even if only for that reason, the Plaintiff's additional statements concerning the requirement of specific enactments for institutions (*institutioneller Gesetzesvorbehalt*) is not relevant in this case, as the Coordination Office is not a legally independent public institution but merely a legally dependent institution (*unselbständige Anstalt*).

43 3.3 If in light of the above the continued publication of the search notice is objectively lawful, then at the same time there is an absence of the violation of the Plaintiff's own rights which would be required for the Plaintiff to have a valid public law claim to remediation of consequences. There is also no need to make a decision on the procedural objections that were raised either.

44 4. The decision on costs is based on § 154 para. 1, § 162 para. 3 VwGO. As by submitting motions of their own the subpoenaed participants participated in the cost risk, it is fair to require the Plaintiff to reimburse the out of court costs incurred by the subpoenaed participants as well.

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