EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 27547/18
John BÜTTNER and Jutta KREBS
against Germany

The European Court of Human Rights (Fourth Section), sitting on 4 June 2024 as a Chamber composed of:

Gabriele Kucsko-Stadlmayer*, President*,
Tim Eicke,
Faris Vehabović,
Branko Lubarda,
Armen Harutyunyan,
Anja Seibert-Fohr,
Anne Louise Bormann*, judges*,

and Andrea Tamietti, *Section Registrar,*

Having regard to the above application lodged on 8 June 2018,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

INTRODUCTION

1. The application concerns the alleged impairment of the applicants' ability to effectively challenge a planning decision concerning Berlin Brandenburg Airport because incorrect information about the projected flight paths had been given by the authorities during the planning approval procedure. The applicants alleged a violation of their rights under Article 6 § 1 and Article 8 of the Convention.

THE FACTS

2. The applicants, Mr John Büttner ("the first applicant") and Ms Jutta Krebs ("the second applicant"), are German nationals, who were

born in 1967 and 1939 respectively and live in Zeuthen. They were represented before the Court by Ms F. Hess, a lawyer practising in Leipzig.

3. The Government were represented by one of their Agents, Mr H.-J. Behrens, of the Federal Ministry of Justice.

The circumstances of the case

4. The facts of the case may be summarised as follows.

1. Background to the case

5. Berlin was originally serviced by three airports, Tempelhof, Tegel and Schönefeld. In the early 1990s the authorities began making plans to consolidate the German capital's air traffic capacity into a single airport. In 1996 a political decision was taken to further develop the site of the existing Berlin Schönefeld Airport, situated 18 km south-east of Berlin, as the new Berlin Brandenburg Airport ("the airport").

6. The applicants are homeowners in the municipality of Zeuthen, which is situated south of Berlin. Their homes are situated respectively 7.5 km and 9 km east of the centre of the airport's southern runway.

7. The body dealing with the planning approval procedure (*Planfeststellungsverfahren*) for the airport was the Ministry of Urban Development, Habitation and Transport of the *Land* of Brandenburg (*Brandenburgisches Ministerium für Stadtentwicklung, Wohnen und Verkehr* – hereinafter "the planning authority"). In 1998 the planning authority created a working group to prepare an outline plan (*Grobplanung*) of the arrival and departure flight paths. The outline plan was a prerequisite for the assessment within the planning approval procedure of the expected impact of the airport on the surrounding area. The working group included, *inter alia,* the company in charge of German air traffic control (*Deutsche Flugsicherung GmbH* – hereinafter "DFS") and the Project Planning Company Schönefeld Ltd (*Projektplanungsgesellschaft Schönefeld GmbH* – hereinafter "the PPS"), a publicly owned company created by the *Länder* (federal States) of Berlin and Brandenburg to carry out the development of the airport.

8. On 30 March 1998 DFS presented the outline plan for the arrival and departure flight paths for the airport's two runways. The flight paths in both operating directions (eastwards and westwards) were intended to run in parallel for several kilometres extending in a straight line from the respective runways (hereinafter "straight flight paths"). While this was not expressly indicated in the plan, the flight paths were based on the premise that the runways would not be used for simultaneous independent departures. On the basis of those plans, the PPS calculated the configuration of the flight paths for the data acquisition system (*Datenerfassungssystem* – hereinafter "the DES"), the dataset required for conducting the necessary health and environmental studies. The appropriate environmental studies, notably with

regard to the noise impact of the airport on the surrounding area, were commissioned on the basis of those data.

9. On 20 August 1998 DFS informed the planning authority that simultaneous independent departures could not be realised with the planned straight flight paths. To use the runways simultaneously would require the flight paths to diverge (*abknicken*) to the north or south by at least 15 degrees shortly after take-off. At a meeting on 29 September 1998 DFS informed the PPS that it would prepare a modified outline plan for the arrival and departure paths taking this requirement into account.

10. On 7 October 1998 the PPS's managing director, Mr H., wrote to the Federal Ministry of Transport (*Bundesministerium für Verkehr* – hereinafter "the BMV"). His letter, in so far as relevant, read as follows:

> "...DFS requires a divergence of 15 degrees for all departures and will shortly modify its outline plan. As a consequence, it will be necessary to rework the DES, notably because of the modified flight path configuration. Reworking the DES will require the revision of the entirety of the health and environmental studies which have been conducted on the basis of the reliability of DFS's outline plan. This will significantly increase the costs and cause a delay in the planning process of about three months.
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> Proposed solution:
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> We ask the BMV to use its influence with DFS to have DFS modify its statement regarding the current DES. DFS's statement is important for the planning approval procedure. It should make it clear that the current flight path configuration can be accepted in principle. The statement could point out that additional coordination of departures by DFS would be necessary, which, assuming unchanged technical and technological conditions, could lead to movement restrictions during peak periods when the runway system reaches the limit of its capacity. The situation would be similar to that at Munich Airport and would be acceptable to the applicant. Finally, it should be noted that DFS's final determination of the flight paths will occur only when the runway system becomes operational and the technical and technological conditions at that time will have to be taken into account."

11. After corresponding with both the BMV and the planning authority, DFS decided to forgo modification of the outline plan. On 26 October 1998 DFS notified the planning authority that the flight path configuration used in the health and environmental studies commissioned by the PPS corresponded in principle to DFS's current plans, but it again stated that simultaneous independent departures would require departure routes with a 15-degree divergence.

12. On 17 December 1999 the company dealing with the airport development filed a request for planning permission with the planning authority. Because of the size of the project and its symbolic significance as the new airport for the German capital, the planning approval procedure received considerable coverage in the national media.

13. In 2000 the public consultation about the airport development began. On 5 July 2000, during the consultation process, DFS issued a statement

which essentially repeated its statement of 26 October 1998, including the reference to the need for divergence in the departure routes.

14. The planning documents were subsequently publicised in the municipalities which the outline plan had indicated would be most affected by aircraft noise. The documents made available to the public included maps showing the projected flight paths and the extent to which different areas would be impacted. DFS's letter of 26 October 1998 and the statement of 5 July 2000 were not among the documents publicised.

15. On 13 August 2004 the planning authority approved the planning application in its decision (*Planfeststellungsbeschluss*) approving the development of the new single airport on the site of Berlin Schönefeld Airport. The decision stated that the creation of a system of parallel runways with simultaneous independent departures was one of the main reasons for the development of the airport, as simultaneous independent use of both runways was required to handle the predicted volume of flight operations. With regard to the flight paths, the planning decision stated, in particular:

> "7.1.3.1 Arrival and departure procedures
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> The determination of arrival and departure procedures are not the subject of this planning approval procedure. Under Article 27a of the Air Traffic Regulations, flight procedures including flight paths, flight levels and reporting points are determined by order of the BAF [*Bundesaufsichtsamt für Flugsicherung* – the Federal Supervisory Authority for Air Navigation Services, hereinafter 'the BAF']. Given that arrival and departure procedures are an important input variable, especially for determining the air pollution and noise emissions of the expansion for which permission is sought, an outline plan of the arrival and departure procedures was prepared by DFS. The flight paths are based on the current flight paths for Berlin Schönefeld Airport and the location of DFS's existing radio navigation systems and ensure full integration of the airport as it is to be developed with DFS's national and international flight path system. From the planning authority's point of view, the existing flight paths represent a persuasive concrete basis for determining the impact of the planned expansion.
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> ...
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> 10.1.4 Determination of the exposure to aircraft noise
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> The noise pollution caused by aircraft noise in the vicinity of the airport was determined with reference to the expansion for which approval was sought, taking into account the nature and scope of the flight operations foreseen. This meant, firstly, that it was necessary to produce a detailed projection of the flight operations. The company developing the airport submitted traffic volume predictions for this purpose, including a model flight schedule. Secondly, aircraft noise exposure in the vicinity of an airport can only be calculated on the basis of information concerning approach and departure procedures. The arrival and departure procedures are not the subject of this planning approval procedure and will only be determined immediately before the airport starts operating after expansion, by way of a statutory instrument made by the Federal Aviation Office on the basis of plans produced by DFS. In order to ensure that the necessary aircraft noise calculations can nevertheless be carried out to the extent required, DFS – acting on behalf of the Federal Ministry of Transport, Construction and Housing – has drafted an outline plan of approach and departure procedures for the

expanded Berlin Schönefeld Airport, which has been used as the basis for the aircraft noise calculations."

16. On the basis of the straight flight paths (see paragraph 8 above), the planning decision also determined the areas where residents could demand protective measures or compensation (*Schutz- und Entschädigungsgebiete*, hereinafter "protected areas"). Sound insulation could be provided on request for homeowners in areas with a LAeq (equivalent continuous sound level) of 60 dB(A) (decibels weighted to frequencies in the middle of human hearing) during the day (6 a.m. to 10 p.m.) or a LAeq of 50 dB(A) during the night (10 p.m. to 6 a.m.) or, alternatively, six noise events per night with a noise level of 70 dB(A). The noise levels were assessed on the basis of the six months with the heaviest volume of air traffic. The planning decision stated, furthermore, that the designation of the protected areas would be subject to change when a modification of the flight paths led to a change of more than 2 dB(A).

17. Approximately 4,000 residents brought actions in the Federal Administrative Court against the planning decision. On 16 March 2006 the court ruled on several test cases. It dismissed the applications for the planning decision to be quashed, finding that the planning authority had properly balanced the competing interests. However, the court ordered the planning authority to add further protective measures, in particular, additional restrictions on night flights. On 20 October 2009 the planning authority issued a supplementary decision with the required modifications.

18. On 6 September 2010 DFS presented its plans for the final flight paths. In contrast to the outline plan, the flight paths for aircraft taking off westwards from the northern runway diverged northwards by more than 15 degrees so that the aircraft would overfly Teltow, Stahnsdorf and Kleinmachnow. Aircraft taking off from the southern runway would diverge approximately 15 degrees to the south in either direction.

19. On 10 December 2010 a newspaper published the letter from Mr H. to the BMV (see paragraph 10 above). Further investigations brought to light the sequence of events outlined above which had led to the planning decision being based on straight flight paths despite DFS's initial objections.

20. DFS's outline plan, on which the planning decision was based, projected a noise level or LAeq during the day of 51.8 dB(A) for the first applicant and 50.5 dB(A) for the second applicant and a night-time LAeq of 44.4 dB(A) and 43 dB(A) respectively. The Government's projected levels, based on the flight paths presented by DFS on 6 September 2010 (see paragraph 18 above), were increased to a daytime LAeq of 57.2 dB(A) for the first applicant and 55.9 dB(A) for the second applicant and a night-time LAeq of 49.7 dB(A) and 48.4 dB(A) respectively. On 12 February 2012 the BAF issued the 247th Ordinance Implementing Air Traffic Regulations (*247. Durchführungsverordnung zur Luftverkehrs-Ordnung*; hereinafter "the 247th DVO"), which determined the flight paths for the planned start of

operations at the airport in 2012. The flight paths had been determined on the basis of the plans presented by DFS on 6 September 2010 (see paragraph 18 above). According to the Government, the projected noise levels based on the 247th DVO were a daytime LAeq of 54.1 dB(A) for the first applicant and 52.7 dB(A) for the second applicant and a night-time LAeq of 49.1 dB(A) and 48 dB(A) respectively, based on the 247th DVO. The applicants' homes were therefore outside the protected areas (see paragraph 16 above), as they still are. The applicants asserted that the maximum noise level to which they could be exposed went up to 89 dB(A) during the day and that during the night they could expect it to rise to 57 dB(A) and 54 dB(A) at least six times.

Because of delays, the airport was not opened until 31 October 2020.

2. The proceedings brought by the applicants

21. On 15 December 2010 the applicants, whose homes are located approximately 7.5 km and 9 km east of the centre of the southern runway of the airport (see paragraph 6 above), asked the planning authority to revoke the planning approval or, in the alternative, to amend that decision by prohibiting the simultaneous independent operation of both runways. They argued that the planning decision was unlawful, as it was based on the simultaneous independent operation of both runways and the use of straight flight paths, even though those two premises could not be reconciled, as had become apparent when DFS had presented its plan for the final flight paths on 6 September 2010 (see paragraph 18 above). Simultaneous independent departures from both runways, which had been authorised, required the use of diverging flight paths. The use of such flight paths led to different areas and residents being affected by the noise of the airport from those projected when the planning decision was taken. The planning authority had knowingly used unfeasible flight paths in the planning approval procedure and had thereby deceived the applicants about the expected flight paths and noise impact of the project. The applicants would be subjected to significantly more noise impact if divergent flight paths were to be used. The use of straight flight paths would require prohibiting the simultaneous independent operation of both runways.

22. After the planning authority rejected their request, the applicants brought an action in the Federal Administrative Court on 23 March 2011. Besides reiterating in essence the submissions they had made to the planning authority, they added that the incorrect projection of the flight paths rendered the choice of location for the airport flawed. The precise number of residents living in the zone where the noise level would reach 62 dB(A) had been decisive for that choice. The planning decision had assessed the noise impact based on a projection of the residents who were going to be affected by the use of straight flight paths; the modification of the flight paths resulted in modifications in the noise impact assessment and rendered that assessment flawed in respect of the protected areas, the runway configuration and the

planning decision as a whole. Only a revocation of the planning decision could prevent the process representing a circumvention of the applicants' right to be heard, in breach of constitutional and European Union law.

23. On 21 September 2011 the planning authority declared that the designated protected areas would be modified in accordance with the flight paths without requiring the change in flight routes to be followed by a change of 2 dB(A) in the tolerated noise impact (see paragraph 16 above).

24. Following an oral hearing, the Federal Administrative Court dismissed the applicants' action as ill-founded by a judgment of 31 July 2012. It found that Article 48 of the Code of Administrative Procedure, which allowed for the revocation of an unlawful administrative act even after it had become final (*unanfechtbar*) (see paragraph 48 below), was applicable to the planning decision. However, the right to have a planning decision revoked did not go further than the right to have a planning decision quashed in cases where the application for quashing had been made within the appropriate time-limit. Provisions concerning project stability (*Planerhaltungsvorschriften*) also modified the right to have a planning decision revoked. The applicants could not request the revocation of the planning decision because there were no legal errors in it which could have led to a right to have the decision quashed.

25. The Federal Administrative Court found that the outline plan based on straight flight paths was adequate for an estimation of the noise impact in the event of diverging flight paths, with regard to both the choice of location for the airport and the decision to approve the development of the airport at the site of Berlin Schönefeld Airport, and the planning authority's use of the original outline plan had not been based on inappropriate considerations (*sachfremde Erwägungen*). The planning decision did not give insufficient weight to the applicants' interests (see paragraphs 26-32 below). While the planning approval procedure had some procedural defects, namely as to the carrying out of the public consultation and the assessment of the airport's environmental impact, clearly the procedural defects had not influenced the planning decision (and so were inconsequential errors) and, therefore, the planning decision could not be revoked on those grounds (section 10, subsection (8), second sentence, of the Civil Aviation Act and Article 1 of the Code of Administrative Procedure for Brandenburg taken in conjunction with Article 46 of the Code of Administrative Procedure; see paragraphs 33-37, 44 and 48 below), for the following reasons.

26. With respect to the choice of the airport's location, the court observed that the appropriate planning authority, which had issued the decision regarding the development of the airport at the site of the old Berlin Schönefeld Airport in a separate procedure on 28 October 2003, had compared the noise impact of the three airports operating in and around Berlin with the single-airport model. To that end, the planning authority had compared the number of residents who lived within a noise contour of at least

62 dB(A) and had concluded that the new, single airport would significantly reduce the number of residents affected by airport noise. At the time, approximately 136,000 residents were living within a 62 dB(A) noise contour of the three airports operating in and around Berlin, compared with only 31,000 residents based on the plans for the new airport. The planning authority had not relied on the exact number of persons affected by airport noise, but on a rough estimate. In particular, it had not adjusted the number of passengers (12.59 million in 2001 for the three operating airports) to the projected number of 30 million passengers which it had used with respect to the new, single airport; had the planning authority done so, the comparison would have come down even more in favour of locating the airport at Schönefeld, given that the areas around the Tegel and Tempelhof airports were more densely populated. In view of that rough estimate, the planning authority was not required to make a separate assessment with respect to flight paths with a divergence of up to 15 degrees north or south. While the departure routes of such diverging flight paths would to some extent affect different areas from those affected by the straight flight paths on which the estimate had been based, the areas affected by the diverging flight paths were not, or not significantly, more densely populated than the areas affected by straight flight paths. The modified flight paths therefore did not change on a significant scale (*Größenordnung*) the number of residents within a 62 dB(A) noise contour.

27. The Federal Administrative Court rejected the submission made by other plaintiffs in separate proceedings that an additional 80,000 to 100,000 residents were impacted by airport noise based on the flight paths presented by DFS on 6 September 2010 (see paragraph 18 above) compared to those affected under the outline plan. That submission was not plausible in so far as the number of residents within a 62 db(A) noise contour was concerned. Kleinmachnow, Teltow and Stahnsdorf would not fall within that contour even if aircraft directly overflew those municipalities. The court found that between 6,500 and 7,000 residents of various municipalities, including Zeuthen, would be newly affected by noise based on diverging flight paths, while between 3,000 and 4,000 residents would be less affected. The court rejected the claim that the requirement for flight paths to have a 15-degree divergence upset the balancing exercise which had led to the choice of site for the airport, finding that that claim had no basis in fact.

28. The Federal Administrative Court went on to find that the planning decision was not rendered flawed, in the sense of having been based on an inappropriate balancing of interests, by the fact that the planning authority had relied on the outline plan with straight flight paths and had not considered the requirement for the flight paths to diverge by 15-degrees. The planning authority had examined the noise impact of the airport on the surrounding residential area based on DFS's outline plan and the population density was broadly similar in the areas under the straight flight paths and the modified

flight paths with a 15-degree divergence. The diverging flight paths did not suggest that the location of the airport should be assessed differently from the way the possible locations had been assessed on the basis of the straight flight paths. As a rule, the approval of the chosen location for an airport remained valid if flight paths other than those used in the planning approval procedure were decided on, provided that the nature and scope of the expected noise impact, and the overall number of persons affected, had been realistically reflected in the planning decision. It would not be appropriate to base a decision to approve the development of an airport on specific flight paths without having regard to the possibility that the paths might be changed in a way which might, in turn, entail changes in who would be affected by aircraft noise.

29. The Federal Administrative Court reiterated the finding at which it had arrived in separate proceedings brought by different plaintiffs, to the effect that in assessing the noise impact on the basis of the outline plan in coordination with DFS, the planning authority had not been required to consider that flight paths with a divergence of more than 15 degrees might be set. In those separate proceedings, the court had found that the planning authority, in particular, did not have to base its assessment on the flight path subsequently presented by DFS which diverged by more than 15 degrees to the north and led over Stahnsdorf, Teltow and Kleinmachnow (see paragraph 18 above).

30. As for the applicants' submission that the planning authority's decision to use the original outline plan had been based on inappropriate considerations (*sachfremde Erwägungen*), the court observed that the decision to use the original outline plan despite DFS's warning had indeed posed a legal risk since the planning authority could not have foreseen the domestic courts' requirements regarding the precision of the planning data. An obvious means to avoid such risk would have been to revise the outline plan to reflect the 15-degree divergence. However, this would not have ruled out the possibility of setting flight paths other than those originally projected. Given the residential areas around the airport, it was apparent even at the time that the basis of the balancing exercise would not differ significantly if the arrival routes remained the same and the departure routes diverged by 15 degrees. For that reason, the decision to continue with the plans based on the straight flight paths did not appear unreasonable. The letter from the PPS's managing director, Mr H., which stated that modifying the flight paths in the outline plan would mean that studies commissioned before that point would have to be revised, causing additional delay and expense (see paragraph 10 above), did not change that assessment. While such aspects of procedural economy could not by themselves justify relying on the original outline plan, the court reiterated that the outline plan was an adequate basis for estimating the scale of the noise impact in the event of simultaneous independent use of the runways. The flight paths had not been determined in

the planning decision but had merely been the basis for estimating the impact of the air traffic. The feasibility of the simultaneous independent use of both runways exactly as suggested in the outline plan had not been a decisive element in the decision.

31. The Federal Administrative Court further found that it could be left open whether the failure to take the 15-degree divergence requirement into account had led to a flawed analysis of the runway configuration, as such a flaw would not, in any event, have infringed the applicants' rights. Only a constant noise impact of a daytime LAeq of 62 dB(A) was considered relevant for the balancing exercise performed in analysing the runway configuration. The applicants were not affected to a great extent if the flight paths diverged by up to 15 degrees. With regard to flight paths diverging by up to 15 degrees southwards, the planning authority had submitted in the proceedings in the Federal Administrative Court that it had calculated a daytime LAeq of 53 dB(A) for the first applicant and 55 dB(A) for the second applicant. The applicants had not contested those calculations. It was plausible that the daytime LAeq for the applicants would not reach 62 dB(A). The area which would become part of the 62 dB(A) noise contour because of departure routes which diverged by 15 degrees south would not include the applicants' properties, which were located some 6.3 km and 8 km respectively away from the eastern end of the southern runway.

32. The Federal Administrative Court added that the planning authority had to examine the entirety of the area surrounding the airport which could be affected by the noise from it, as it had to consider the possibility that flight paths other than those projected in the outline plan might be set later. Where the projection of the flight paths was made in coordination with DFS or the BAF, the planning authority could, as a rule, assume that flight paths which the BAF might later determine would not significantly increase the nature and extent of the impact of the noise from that estimated in the planning approval procedure. As a general rule, a planning authority would be able to indicate in a planning decision that noise from heavy use of departure paths had to be avoided in certain areas, for example because they were densely populated, and any such indication in a planning decision had to be taken into account by the BAF when it subsequently determined the flight paths. The fact that no provision had been made in the planning decision for the possibility that the BAF would subsequently set flight paths that differed from those projected in the outline plan could not call the approval of the development of the airport at the Schönefeld site into question and therefore could not entitle the applicants to have the planning decision revoked.

33. As regards the procedural defect in the public consultation, the court observed that the plans had been put on display in all the municipalities near the airport which, on the basis of the diverging flight paths, fell within the relevant 62 dB(A) noise contour except the municipality of Teltow, and also

beyond that area. The plans should have been put on display in Teltow, as well as possibly some additional municipalities located in the outskirts of the area affected by aircraft noise, even though they were outside the 62 dB(A) noise contour. The planning authority had defined areas as likely to be affected by airport noise if they were located in a 55 dB(A) noise contour, or within a certain designated area extending beyond that noise contour, and the plans had to be displayed in any areas which would be affected by aircraft noise so as to provide data for the balancing exercise based on the divergent flight paths.

34. However, having regard to the considerable margins used to compare the relative noise impact of the planned airport and the existing airports in and around Berlin, the court ruled out any conclusion that the participation of the public in Teltow, Kleinmachnow and possibly other municipalities where the plan had not been put on display would have led

(i) to a different choice of site for the airport;

(ii) to the development of the airport at the site of the existing Berlin Schönefeld Airport not being approved; or

(iii) to a different outcome as regards the runway configuration.

The classification of the site of the airport as being within the rural suburban area (*Verflechtungsbereich*) – close to the city, but outside the most densely populated area (*Verdichtungsbereich*) – would not have been different if the public in municipalities located further away from the airport had been consulted. The planning authority had relied, first and foremost, on the noise impact within the protected areas. In view of the considerable weight attached to those severely impacted by noise, the potential additional participation of residents who were subject to a lesser degree of noise impact would not have changed the outcome of the balancing exercise. Those residents could not have raised different issues about the noise impact from those raised by the residents who did participate in the planning approval procedure. At most they could have argued that the planning authority had to examine whether to provide guidelines for the determination of flight paths, so as to ensure that the approval of the development of the airport at the Schönefeld site was proportionate if flight paths set later were to differ from those projected in the outline plan. However, the absence of such guidelines as to setting flight paths in the planning decision could, at the most, warrant an amendment of the planning decision, but not its revocation. The court observed that the municipalities in which the plans should have been put on display were located north of the pre-existing northern runway, which had not been considered in the analysis of the runway configuration, and that none of those municipalities were located in the area relevant to the runway configuration analysis. The idea that that assessment would have had a different outcome if the plans had been put on display in the municipalities in question could therefore be ruled out.

35. The Federal Administrative Court added that the finding of a lack of a causal link between the procedural error and the planning decision was compatible with European Union (EU) law. Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, and formerly Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, was only applicable where legal action were taken against planning decisions. The proceedings at issue concerned the possibility of the revocation of a planning decision which had become final, that is, an additional type of process provided for under domestic law and outside the scope of the above-mentioned directives, it being noted that the applicants had not challenged the planning decision of 13 August 2004 at the time, even though they had had the opportunity to do so.

36. The court observed that the applicants had been heard: the plans had been put on display in the municipality of Zeuthen, where they lived, and the material put on display had the necessary "trigger effect" (*Anstoßwirkung*), that is to say, it had allowed members of the public to assess whether and to what extent they could be affected by the environmental impact of the project. It could be discerned from the location of their homes and the noise contours indicated in the outline plan whether they could possibly be affected by aircraft noise in a manner relevant for the balancing exercise. Their homes were located less than 1,500 metres outside the area of the daytime LAeq 55 dB(A) noise contour based on the outline plan. The flight paths themselves were, by law, to be set by a separate process rather than as part of the planning approval procedure, which entailed the possibility that the final flight paths would differ from those described in the outline plan.

37. With regard to the procedural defect in the assessment of the environmental impact of the airport, the Federal Administrative Court considered that the assessment should not have been limited to the areas that would have been impacted under the outline plan prepared by DFS. Rather, the assessment should have extended to the entire area which might be affected, including at least the area affected by the departure routes when they diverged by 15 degrees, as required by DFS for simultaneous independent departures. However, the failure by the planning authority to take that area into account could not possibly have influenced the outcome of the planning approval procedure, and therefore that procedural defect could not have led to the revocation of the planning decision. As far as the residential areas were concerned, the court relied on, *inter alia*, the reasons set out in paragraphs 25-30 above. As far as recreational areas were concerned, it observed that there were no large recreational areas close to the airport which

were located under either the straight or the diverging departure routes and that there were no indications that the impact of departure routes with a 15-degree divergence on recreational areas located further away was significantly more disadvantageous than had the flight paths been straight. The lack of environmental assessment with regard to areas not affected by departure routes with a 15-degree divergence could, at the most, have resulted in guidelines for the determination of flight paths.

38. Lastly, the Federal Administrative Court rejected as ill-founded the applicants' alternative claim by which they had sought the prohibition of the simultaneous independent use of both runways. It found that modifying the protected area (see paragraph 16 above) was sufficient.

39. On 27 December 2012 the applicants lodged a constitutional complaint with the Federal Constitutional Court, alleging a breach of a number of their fundamental rights, including their property rights under Article 14 § 1 of the Basic Law (*Grundgesetz*) and their right to effective legal protection under Article 19 § 4 of the Basic Law (see paragraph 43 below). They complained, in particular, that the Federal Administrative Court had wrongfully found that the planning decision had been lawful, despite acknowledging that that decision had knowingly been based on incorrect flight paths. The application of Article 46 of the Code of Administrative Procedure to a procedural error arising from officials' deliberate acts had disregarded the procedural aspects of the applicants' constitutional rights, as well as the requirement of an effective remedy. By assessing whether the impact of the airport on residential areas based on divergent flight paths was comparable to that based on straight flight paths instead of reviewing the lawfulness of the planning authority's decision, the Federal Administrative Court had carried out all appropriate steps of the balancing exercise for the first time and thereby breached their rights.

40. On 24 October 2017 the Federal Constitutional Court declined to accept the applicants' constitutional complaint for adjudication. It found, in particular, that the Federal Administrative Court's application of Article 46 of the Code of Administrative Procedure did not infringe the applicants' rights of property or their right to effective legal protection. That court had shown that neither the location nor the runway configuration would have been different if the public consultation and the environmental impact assessment had been carried out correctly and it did not follow from the applicants' submissions in their constitutional complaint that the considerations on which the Federal Administrative Court had based its application of Article 46 of the Code of Administrative Procedure were incorrect. They had not substantiated their assertion that the outcome of the planning decision would have been more favourable to them if the parts of the procedure which had been flawed had been carried out correctly.

41. The Federal Constitutional Court criticised the Federal Administrative Court for not having properly addressed the applicants' argument that they

had been led to expect the actual flight paths to correspond to the plans on display during the public consultation, even though that had been unlikely from the start. It considered that the applicants could legitimately have assumed that the actual flight paths would correspond to the plans on display, given that the planning authority had coordinated the projected routes with DFS and that the facts which had given rise to doubts as to the feasibility of the projected flight paths – that is to say, the critical view expressed by DFS as early as 1998, the planning authority's decision to remain with the initial plan, and the fact that the international legal framework would prevent simultaneous independent departures given the distance between the runways – had not been disclosed. The material put on display during the public consultation process had therefore not enabled the applicants to assess the likelihood that they would be affected by the airport. However, this did not mean the court should accept the applicants' constitutional complaint. It was clearly foreseeable that the applicants would not be successful if the case were remitted to the Federal Administrative Court, as that court had found that other, structurally similar, procedural errors had not influenced the outcome of the planning approval procedure and found that those errors could not have led to the revocation of the planning decision, given the terms of Article 46 of the Code of Administrative Procedure (on inconsequential errors). There was every indication that the Federal Administrative Court would arrive at the same conclusion again with respect to the alleged procedural error at issue. In fact, the planning authority had respected the function of public consultation to a large extent. There was ample reason to assume that the applicants' arguments would not have had an impact on the outcome of the proceedings, since the effects on the applicants were qualitatively and quantitatively similar to those considered with respect to other plaintiffs and the applicants, in any event, had not asserted otherwise.

42. The Federal Constitutional Court found, moreover, that the Federal Administrative Court's findings as to the substantive legality of the planning decision were in conformity with constitutional law, and notably that the Federal Administrative Court's finding that the outline plan had been adequate for an estimation of the noise impact of simultaneous independent departures and therefore for the purposes of choosing the appropriate site for the airport and approving its development at the Schönefeld site. Constitutional law did not require the Federal Administrative Court to find that the planning authority should have prepared plans which were more specific than the outline plan. There was no requirement that the plan on which the choice of site for the airport was based should reflect the noise impact on specific individuals, given that the precise flight paths were not determined in the planning decision but at a later stage. The Federal Constitutional Court added that the Federal Administrative Court had complied with the constitutional requirement to review the planning authority's balancing exercise and to amend certain elements; it had not

replaced the planning authority's balancing exercise with its own. In particular, while the planning authority had focused on straight flight paths, it was evident that it had at all times considered it possible that other flight paths would eventually be set, as illustrated, for example, by the explicit statement in the planning decision that the flight paths would be set by the BAF shortly before the airport became operational; by the fact that the planning authority had indicated that it might change the designation of the protected areas if the actual flight paths differed from those projected (see paragraphs 15 and 16 above); and that the overall plan for the airport would remain valid in such a scenario. The Federal Administrative Court had regarded the authority's plan as being based on projected flight paths and as allowing for the comparison of the noise impact on different areas. It had merely carried out its own assessment for the purposes of reviewing the authority's balancing of interests when it determined that the nature and extent of the noise impact from diverging flight paths did not differ "significantly" from those on which the planning authority had based its balancing exercise.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

A. Domestic law and practice

1. The Basic Law

43. The relevant provisions of the Basic Law are worded as follows:

Article 14 (Property – Inheritance – Expropriation)

"(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by laws.

..."

Article 19 (Restriction of basic rights – Legal remedies)

"(4) Should any person's rights be violated by public authority, he or she may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by this paragraph."

2. Civil aviation, air traffic and aircraft noise

(a) Civil Aviation Act

44. Section 8 of the Civil Aviation Act, as in force at the time the planning decision in the present case was taken and in so far as relevant, read:

"(1) Airports, landing strips and pads with a limited building restriction zone within the meaning of section 17 of this Act may be constructed or, if already in existence, may be altered only if the plan has previously been approved in accordance with

section 10 of this Act. In the planning approval procedure, consideration shall be given as part of the balancing exercise to public and private interests affected by the project, including its environmental impact. ...”

The provision has since been amended.

Section 10 of the same Act, as in force at the relevant time and in so far as relevant, read as follows:

“(8) Deficiencies in the balancing of public and private interests affected by the project are significant only if they are manifest and have influenced the result of the balancing exercise. Serious deficiencies in the balancing exercise or an infringement of procedural or formal provisions shall result in the withdrawal of the planning decision ... only if they cannot be remedied by means of a supplementary plan or a complementary procedure; the foregoing shall be without prejudice to Articles 45 and 46 of the Code of Administrative Procedure and the corresponding provisions of the *Land* law.”

(b) Air Traffic Regulations

45. The determination of final flight paths is not part of the planning approval procedure for an airport. Rather, the routes are determined by the BAF in a separate process once an airport is ready to begin operations. Regulation 27a of the Air Traffic Regulations, as in force at the relevant time and in so far as relevant, read:

“(2) The BAF is authorised to determine flight procedures ... including flight paths, altitudes and reporting points, by means of an ordinance.”

(c) Aircraft Noise Act

46. The Aircraft Noise Act, which came into force in 2007 (and thus after the planning decision in the present case), provides in section 2, subsections 2 and 3, in so far as relevant:

“(2) The noise zone of an aerodrome shall be divided into two protection zones for daytime and one protection zone for night-time. Protection zones are areas in which the equivalent continuous noise level LAeq caused by aircraft noise and, in the case of the night-time protection zone, the maximum aircraft noise level LAmax exceed the values set out below, the frequency being determined on the basis of the mean value for the six months in the forecast year with the heaviest volumes of air traffic (annex to Section 3):

1. Values for new or significantly structurally extended civil aerodromes within the meaning of section 4(1), points 1 and 2:

Day protection zone 1: daytime LAeq = 60 dB(A),

Day protection zone 2: daytime LAeq = 55 dB(A),

Night protection zone

(a) up to 31 December 2010: night-time LAeq = 53 dB(A), LAmax = 6 times 57 dB(A),

(b) from 1 January 2011: night-time LAeq = 50 dB(A), LAmax = 6 times 53 dB(A) ...

> (3) No later than 2017 and at least every ten years thereafter, the Federal Government shall present a report to the German Bundestag containing an evaluation of the values referred to in subsection 2, taking into account the latest developments in the fields of noise impact research and aviation engineering."

The Federal Government's first report pursuant to section 2, subsection 3 of the Aircraft Noise Act, dated January 2019, stated, *inter alia*:

> "Noise impact research has seen advances in knowledge in various areas since 2007 as a result of key scientific studies and investigations, and further evidence of causal relationships has been gained as regards the wide-ranging adverse impact of aircraft noise pollution on local residents. This does not, however, call into question the adequacy or appropriateness of the values specified in 2007 by the legislature in section 2, subsection 2, of the Aircraft Noise Act on the basis of a comprehensive balancing exercise. The Federal Government does not, therefore, recommend a lowering of the thresholds in section 2, subsection 2 of the Aircraft Noise Act that pre-empts the procedural steps proposed above."

(d) Relevant practice of the Federal Administrative Court

47. According to the case-law of the Federal Administrative Court, residents in the vicinity of an airport may bring a legal challenge against the ordinance by which the BAF determines the flight paths, with reference notably to the noise impact of the flight paths on their homes. However, the Federal Administrative Court has equally held that the overall impact of the air traffic was predetermined by the planning decision. The subsequent BAF decision could merely redistribute the resulting noise disturbance (see Federal Administrative Court, file no. 11 C 13/99, judgment of 28 June 2000). Furthermore, while the role of the BAF was to limit the noise disturbance caused by the flight paths, the oversight of its decisions by the domestic courts was limited by the legal provisions in question. The mere fact that a certain set of flight paths would result in additional noise disturbance would therefore not necessarily make it unlawful. The BAF's decision could only be successfully challenged in court where alternatives existed which were clearly superior with regard to the noise impact on the population while providing a similar level of compliance with aviation safety requirements (see Federal Administrative Court, no. 4 C 11/03, judgment of 24 June 2004).

3. Administrative law

48. Under Article 48 of the Code of Administrative Procedure, a public authority may revoke an unlawful administrative act even after it has become final (*unanfechtbar*). Article 46 of the same Code provides that an application for the quashing of an administrative act cannot be made solely on the grounds of a procedural defect where it is evident that the defect did not influence the decision on the matter (that is, where it was an inconsequential error). Article 1 of the Code of Administrative Procedure for Brandenburg makes the Code of Administrative Procedure, a federal law, applicable to the acts of the Brandenburg authorities.

49. Under Article 74 of the Code of Administrative Court Procedure, an application for the quashing of a decision must be made within one month of its delivery. Applications for leave to proceed out of time following a missed deadline (*Wiedereinsetzung in den vorigen Stand*) are governed by Article 60 of the Code of Administrative Court Procedure. In particular, an application lodged more than one year after a missed deadline is inadmissible unless it would have been impossible to make the application prior to the expiry of the one-year deadline as a result of *force majeure*.

50. With regard to the reopening of administrative court proceedings, Article 153 of the Code of Administrative Court Procedure refers to Article 580 of the Code of Civil Procedure, which states that proceedings will be reopened where the party submits a record or document would have resulted in a more favourable decision.

B. Relevant European Union law

51. Article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, provided:

> "Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:
>
> (a) having a sufficient interest, or alternatively,
>
> (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,
>
> have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.
>
> Member States shall determine at what stage the decisions, acts or omissions may be challenged.
>
> What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice ..."

Directive 85/337/EEC was repealed by Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (Article 14 of Directive 2011/92/EU). Article 6 and Article 11 of Directive 2011/92/EU provide:

Article 6

"...

2. The public shall be informed, whether by public notices or by other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

(a) the request for development consent;

(b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies;

(c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;

(d) the nature of possible decisions or, where there is one, the draft decision;

(e) an indication of the availability of the information gathered pursuant to Article 5;

(f) an indication of the times and places at which, and the means by which, the relevant information will be made available;

(g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned:

(a) any information gathered pursuant to Article 5;

(b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;

(c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information (6), information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 of this Directive and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.

4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States.

6. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article."

Article 11

"1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively;

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.

3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice ..."

C. Relevant case-law of the Court of Justice of the European Union (CJEU)

52. In its judgment in *Gemeinde Altrip and Others* (C-72/12, EU:C:2013:712, 7 November 2013), the CJEU found that subparagraph (b) of Article 10a of Directive 85/337, as amended by Directive 2003/35, had to be interpreted as not precluding national courts from refusing to recognise impairment of a right within the meaning of that article if it is established that it is conceivable, having regard to the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked by the applicant. None the less, that will be the case only if the court of law or body hearing the action does not in any way make the burden of proof fall on the applicant and makes its ruling, where appropriate, on the basis of the evidence provided by the developer or the competent authorities and, more generally, on the basis of all the documents submitted to it, taking into account, *inter alia*, the seriousness of the defect invoked and ascertaining, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making, in accordance with the objectives of Directive 85/337 (operative provision no. 3). In its judgment in *Land Nordrhein-Westfalen* (C-535/18, EU:C:2020:391, 28 May 2020), the CJEU reiterated that, where a procedural defect had no consequences that could possibly have affected the purport of the contested decision, that procedural defect could not be regarded as impairing the rights of the party relying on it (§ 58). Thus, in view of the fact that Article 11 of Directive 2011/92 left the Member States significant discretion to determine what constituted impairment of a right within the meaning of Article 11(1)(b) of that Directive, it was permissible for national

law not to recognise such an impairment if it was established that it was conceivable, in view of the circumstances of the case, that the contested decision would not have been different without the procedural defect referred to (§ 59). It concluded that Article 11(1)(b) of the said Directive had to be interpreted as permitting Member States to provide that, when a procedural defect vitiating the decision approving a project did not alter the meaning of that decision, an application for annulment of that decision was admissible only if the irregularity at issue had denied the claimant his or her right, guaranteed by Article 6 of that directive, to participate in the environmental decision-making process (operative provision no. 1).

D. Relevant international material on environmental noise

53. The World Health Organization (WHO) provides the following examples for various noise levels: 70 dB(A) = washing machine; 60 dB(A) = normal conversation; 40 dB(A) = refrigerator hum.[1]

COMPLAINTS

54. The applicants complained under Article 6 § 1 of the Convention of violations of their right to a fair hearing and their right of access to a court. They also complained under Article 8 of the Convention that the domestic authorities had violated their procedural rights under that Article, in that they should have had access to all the relevant information to allow them to make an effective challenge to the planning decision.

THE LAW

A. Alleged violation of Article 6 § 1 of the Convention

55. The applicants alleged a violation of their rights under Article 6 § 1 of the Convention, the relevant part of which reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

1. The parties' submissions

(a) The Government

56. The Government emphasised that the applicant's complaint was of a fourth-instance nature and therefore inadmissible. They asserted, in particular, that the application of Article 46 of the Code of Administrative

[1] World Health Organization, "Hearing loss due to recreational exposure to loud sounds", Geneva 2015.

Procedure by the Federal Administrative Court had not been arbitrary. That court had identified procedural errors in the public consultation process and the scope of the environmental studies and had then provided detailed reasons why neither the choice of site for the airport nor the runway configuration would have been different if the procedural errors identified had not occurred. They added that the present case concerned a situation for which EU law did not set particular requirements, as had been established by the Federal Administrative Court.

(b) The applicants

57. The applicants argued that both the Federal Administrative Court and the Federal Constitutional Court had breached Article 6 § 1 of the Convention in that those courts had not remedied the procedural defects which they themselves had established but had treated those defects as irrelevant. The Federal Administrative Court's decision to apply Article 46 of the Code of Administrative Procedure and not to order the revocation of the planning decision had been arbitrary and had disregarded the applicants' right of access to a court. That court had found that the proper participation of the applicants in the planning approval procedure would not have led to a different outcome since the applicants' concerns were similar to those of other residents in the area surrounding the airport. In coming to that conclusion, the court had failed to consider the nature and seriousness of the procedural shortcomings from the applicants' perspective and had essentially declared the public's involvement in the decision-making process irrelevant. In that connection, the applicants also argued that the Federal Administrative Court's application of Article 46 of the Code of Administrative Procedure was not in conformity with EU law: it followed from judgments of the CJEU that the domestic court had to take into account the seriousness of the defect referred to and ascertain, in particular, whether that defect had deprived the public concerned of one of the guarantees which was supposed to allow the public to have access to information and to be empowered to participate in decision-making.

2. The Court's assessment

58. In so far as the applicants alleged that their right of access to a court had been disregarded, the Court observes that the Federal Administrative Court had not dismissed as inadmissible the applicants' action for the revocation of the airport planning decision, or alternatively for simultaneous independent departures to be prohibited. Rather, that court had rejected the applicants' action after examining it on the merits, concluding that the planning decision should not be revoked since the procedural defects that had been identified were inconsequential in so far as the outcome of the planning decision was concerned, and that the planning decision was lawful in substance (see paragraphs 24-38 above). The Federal Constitutional Court

subsequently also examined the merits of the applicants' constitutional complaint (see paragraphs 40-42 above). Accordingly, there are no indications that the applicants' right of access to a court was restricted (see, more generally, *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, §§ 84-90, 29 November 2016).

59. In essence, the applicants' complaint is directed at the application of domestic law by the domestic courts, including with respect to EU law. The Court reiterates that under the terms of Article 19 and Article 32 § 1 of the Convention, it is not competent to apply or examine alleged violations of EU rules unless and in so far as they may have infringed rights and freedoms protected by the Convention (*Jeunesse v. the Netherlands* [GC], no. 12738/10, § 110, 3 October 2014). It is primarily for the national authorities to interpret the applicable domestic law provisions, if necessary, in conformity with EU law (see *K.I. v. France*, no. 5560/19, § 123, 15 April 2021). The Court should not act as a court of fourth instance and will not therefore question under Article 6 § 1 the judgment of the national courts, unless their findings can be regarded as arbitrary or manifestly unreasonable (see *López Ribalda and Others v. Spain* [GC], nos. 1874/13 and 8567/13, § 149, 17 October 2019). Having regard to the documents in its possession and the detailed reasons given by the Federal Administrative Court and the Federal Constitutional Court for the finding that the procedural defects identified had not influenced the outcome of the planning approval procedure, the Court considers that there are no indications that the findings of the domestic courts were arbitrary or manifestly unreasonable.

60. In view of the foregoing, the Court concludes that the complaint is manifestly ill-founded and that, as such, it must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

B. Alleged violation of Article 8 of the Convention

61. The applicants alleged a breach of the procedural aspect of their right to respect for their homes and their private and family life under Article 8 of the Convention. They argued that they had not been given sufficient opportunity in the planning approval procedure to raise objections about the impact on them of the noise from the airport so that they had been unable to make an effective challenge to the development of the airport at the planning stage. The planning approval procedure had been unfair. It had been clear at the time of the public consultation that diverging flight paths would be required for the simultaneous independent use of both runways; the domestic authorities had deliberately misled the public regarding the expected flight paths. Article 8 of the Convention reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1. The parties' submissions

(a) The Government

62. The Government submitted that the applicants had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention. They had not made use of the possibility of bringing actions for the quashing of the 2004 planning decision within the appropriate time-limit. Actions for the quashing of the planning decision were effective remedies within the meaning of Article 35 § 1. Some 4,000 residents had brought actions against the planning decision, including some who had not been affected in a relevant manner by aircraft noise based on the outline plan. Those plaintiffs had asked for the planning decision to be amended to provide for additional protective measures if the flight paths were modified. The applicants could have argued that a subsequent determination of the flight paths that deviated from the outline plan might result in additional aircraft noise affecting their properties. It had been evident that in domestic law flight paths were not determined in a planning decision and that the flight paths that would eventually be set could differ from those in the outline plan. The applicants had tried to circumvent the time-limit for an action for the quashing of the planning decision. The applicants had also not made use of the possibility of bringing actions against the subsequent determination of the flight paths by the 247th DVO in 2012. Numerous other residents had made use of that possibility.

63. The Government further pointed out that the applicants had alleged a violation of the procedural obligations arising under Article 8 of the Convention, but that they had not alleged a substantive violation. Referring to the low noise levels affecting the applicants (see paragraph 20 above), they asserted that Article 8 of the Convention was not applicable in the present case. They also added that the applicants had chosen to live in densely populated municipalities in the metropolitan area of Berlin and thus in locations affected by urban noise and that the noise from the airport affecting the applicants did not exceed the threshold of section 2, subsection 2, point 1, of the Aircraft Noise Act (see paragraph 46 above). That threshold had been arrived at on the basis of a comprehensive assessment of noise impact research, including the medical and psychological research on the impact of aircraft noise.

64. The Government rejected the applicants' allegation that the domestic authorities had deliberately deceived them as to the noise levels that would affect them from the flight paths used in the outline plan. There was no evidence that the applicants had been misled about the potential for being

individually affected. Individuals affected by airport approval procedures could reasonably be expected to inform themselves about the relevant domestic law, as well as the subject matter, content and limits of a planning approval decision, even more so as representation by a lawyer had been required to bring an action against the planning decision in the present case. In reaching its decision, the planning authority had even made explicit reference to the fact that that decision did not entail a determination of the flight paths, and, for that reason, had included a reservation concerning subsequent amendments of regulatory requirements. The statement in the planning decision that the flight paths were a "plausible basis" for its decision could therefore only be interpreted to mean that they were a suitable starting-point for the required examination of noise impact. All that was necessary for that purpose was a prediction that put the approving authority in a position to ascertain the nature and extent of the noise impact and for it to take into account in its balancing exercise all problems that might result from flight paths being determined at a later date. At the time the planning decision was taken, it had been impossible for the planning authority to know what flight paths would ultimately be determined by the BAF and hence which properties would be overflown. It had been impossible to determine the specific noise impact affecting individual residents, including the applicants, at that time and such a determination did not form part of the planning approval procedure. For that reason, anyone who might be affected by aircraft noise as a result of a planning decision had the opportunity to bring an action against that decision. This included the applicants. The fact that the planning documents had been put on display in the municipality of Zeuthen, where they lived, made it clear that that municipality lay within the zone that would be exposed to noise by the expansion of the airport.

65. Even assuming that Article 8 of the Convention was applicable, the alleged interference with the applicants' rights had had a legal basis and had been justified. The separation of the planning approval procedure from the subsequent determination of the flight paths by the BAF followed from the relevant provisions of the domestic law. The separation into a site-related planning approval procedure and an operations-related procedure to determine the flight paths was based on practical considerations and allowed the flight paths to be updated regularly to satisfy security requirements. Flight paths were not static. The precise flight path of an aircraft was dependent on numerous factors, such as the traffic configuration at the time, the weight of the aircraft or the weather conditions. Flight paths might also have to be adapted because of technical innovations and changes to the European network of air routes, which might occur for many different reasons. It was therefore justifiable for the planning authority to treat the outline plan with the projected flight paths as a plausible basis for assessing the noise impact of the airport.

66. Lastly, the Government submitted that residents might be entitled to protective measures, such as the installation of soundproofing, or to compensation. However, the applicants' properties were not located in a protection zone and the level of noise pollution affecting their properties was below the threshold at which there was an entitlement to protective measures and/or compensation.

(b) The applicants

67. The applicants argued that they had exhausted domestic remedies in respect of their complaint, at the core of which lay the fact that the planning authority had given them incorrect and misleading information about the projected flight paths. On the basis of that incorrect information in the planning documents, which indicated that the municipality of Zeuthen would not be directly overflown, the applicants had refrained from bringing actions for the quashing of the planning decision at the time. They had only learned years later about the authorities' deception as to the projected flight paths and the flaws in the planning approval procedure; they had taken immediate action once they had learned about that fact and had made use of the remedies provided for in domestic law for such situations. Their request for the revocation of the planning decision had not been an attempt to circumvent the time-limit for bringing an action for the quashing of the planning decision. They asserted that they would have brought actions against the planning decision if the outline plan had made them aware of the possibility that the departure flight paths might diverge by 15 degrees after take-off and might therefore overfly their properties. The applicants added that an action against the ordinance determining the flight paths would only pertain to the legality of the new flight paths and would not allow the applicants to challenge the procedural defects of the planning approval procedure. Such an action was therefore not capable of providing redress for their Convention complaint, which related to the authorities' use of incorrect and unrealistic flight paths during the planning approval procedure, which had misled them regarding the noise impact of the airport on their properties and which had prevented them from effectively challenging the planning decision in time.

68. The applicants argued that they had not had access to all relevant information and had thus not been able to make an effective challenge to the planning decision within the time-limit. In their view, the projected flight paths had been an essential element in the planning approval procedure and it was a prerequisite for their effective legal protection that the flight paths should remain unchanged. The public at large had not known that different flight paths from those indicated in the planning documents could subsequently be determined. The authorities had put a lot of effort into preparing material for the public which indicated the expected noise levels for residents of each street based on unrealistic flight paths and had thus deliberately provided wrongful information to residents. The present case did

not concern a subsequent modification of the flight paths based on changed circumstances; rather, the planning authority had been aware as early as 1998 that the flight paths used in the planning approval procedure were not compatible with the planned simultaneous independent use of both of the airport's runways. The public consultation had been a farce and had prevented them from taking informed decisions. They had taken decisions based on the misleading information provided by the authorities, including decisions to move to or not to move away from Zeuthen, which had been taken in the belief that they would not be affected by significant aircraft noise or have their properties directly overflown. The noise pollution to which the applicants were exposed by the flight paths which were subsequently set was more significant than that indicated in the outline plan. Aircraft had been flying directly over the municipality of Zeuthen since August 2021, with between forty and fifty flights per day. They asserted that the noise pollution to which they were exposed was such that Article 8 of the Convention was applicable.

69. The applicants acknowledged that they were not entitled to passive noise protection measures and stated that they were not concerned with such measures, even though they pointed out that the noise pollution to which they were exposed was only slightly below the threshold entitling residents to passive noise protection measures. They emphasised that the case was about the judicial recognition of the fact that they, like thousands of others, had been deceived in the course of the planning process as to what areas would be affected by aircraft noise.

2. The Court's assessment

70. The Court observes that what lies at the heart of the applicants' complaint is the allegation that the planning authority had knowingly used unfeasible flight paths as a basis for the planning approval procedure and had thereby deceived the applicants about the projected flight paths and noise impact of the airport; the flight paths used in the planning approval procedure would have resulted in a lesser degree of noise disturbance to the applicants' properties and, on the basis of that information, they had refrained from bringing actions to have the planning decision quashed. After the publication of Mr H.'s letter in 2010 had revealed the deliberate use in the planning approval procedure of flight paths which DFS had said were unrealistic (see paragraphs 9, 10, 11, 13, 15, 18 and 19 above), the applicants had brought proceedings requesting the revocation of the planning decision or, in the alternative, its amendment, arguing that the authorities had deceived them about the projected flight paths and noise impact of the airport (see paragraph 21 above). Before the Court they alleged that the deliberate use of unrealistic flight paths during the planning approval procedure constituted deceit, had impaired their ability to make an effective challenge to the development of the airport at the Schönefeld site and had thereby breached

their procedural rights of the right to respect for their homes and their private and family life under Article 8 of the Convention (see paragraphs 61, 67 and 68 above).

71. While it is not in dispute between the parties that the applicants could have brought actions to have the planning decision of 2004 quashed, as well as actions to challenge the lawfulness of the flight paths determined by the BAF in the 247th DVO, the Court finds that neither action would have been or would now be capable of providing redress in respect of the applicants' alleged Convention grievance (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 71, 17 September 2009). The Court observes that an action to have the planning decision of 2004 quashed had to be lodged within one month of its delivery (see paragraph 49 above) and that the applicants did not, and could not, know that the authorities had already known at that time that the straight flight paths on which the planning documents had been based were unrealistic. Furthermore, the procedural defects of the planning approval procedure would fall outside the scope of an action against the determination of the flight paths by the 247th DVO; such an action would concern the lawfulness of the flight paths as determined by the BAF in a separate process (see paragraph 45 above). It follows that the Government's objection as to the non-exhaustion of domestic remedies must be dismissed. Having regard to the Government's submission that Article 8 of the Convention was not applicable in the present case (see paragraph 63 above), the Court considers that this question can be left open, as the applicants' complaint is, in any event, manifestly ill-founded for the following reasons.

72. The Court cannot ignore the fact that the applicants in the present case alleged only a breach of their procedural rights under Article 8 of the Convention. They did not make any substantiated submissions alleging that the findings by the domestic courts as to the substantive lawfulness of the planning decision and its impact on the substance of their Article 8 rights were wrong. The case thus differs from cases regarding airport planning decisions hitherto examined by the Court, where the applicants had also challenged the substantive aspects of the contested decisions (see, in particular, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, ECHR 2003-VIII, and *Flamenbaum and Others v. France*, nos. 3675/04 and 23264/04, 13 December 2012). In essence, the applicants in the present case were seeking to rely on procedural rights of an autonomous nature in an airport planning procedure.

73. The Court reiterates that the procedural requirements established under Article 8 for governmental decision-making processes concerning complex issues of environmental and economic policy serve to ensure that due weight is accorded to rights affected and thus to allow the authorities to properly balance the competing individual rights and the interests of the community as a whole (see *Hatton and Others*, §§ 99 and 128, cited above, and *Flamenbaum and Others*, cited above, § 138). In other words, the

procedural obligations under Article 8, such as the provision of adequate information in a planning procedure to those potentially concerned, are not an end in themselves, but they seek to ensure, ultimately, that the authorities properly balance the competing interests at stake and act within their margin of appreciation (see also, more generally, *Verein Klimaseniorinnen and Others v. Switzerland* [GC], no. 53600/20, § 539, 9 April 2024). Therefore, while a defect in the implementation of the procedural requirements established under Article 8 in a planning procedure does, as a rule, put into question whether due weight has been accorded to the interests of the individual and whether the planning decision complied with the requirements of Article 8, there is no basis for finding a violation of Article 8 if the domestic courts demonstrate that the authorities took into account and balanced the rights at stake and if they rule out, in accordance with the law and without there being any indications of arbitrariness, that the procedural defect has influenced the outcome of the balancing exercise to the detriment of the applicant (see also the CJEU in respect of EU law, cited at paragraph 52 above), and if there is no other indication that the authorities overstepped their margin of appreciation. It follows that the entirety of the domestic proceedings, including those before the domestic courts, needs to be examined to determine whether there has been a breach, on account of shortcomings in the planning procedure, of the applicants' Article 8 rights.

74. In the present case, the domestic courts recognised that procedural defects had occurred in the planning approval procedure. Specifically, the Federal Administrative Court established that there had been procedural defects in the public consultation and in the assessment of the environmental impact of the airport (see paragraphs 25, 33 and 37 above). The Federal Constitutional Court further found that the material put on display during the public consultation had not enabled the applicants to assess the likelihood of being affected by the airport, in that they could reasonably have assumed that the actual flight paths would correspond to the plans on display, whereas the planning authority had coordinated the projected routes with DFS and had not disclosed the facts which had given rise to doubts as to the feasibility of the projected flight paths (see paragraph 41 above).

75. The Federal Administrative Court ruled out the idea that the procedural defects of the planning approval procedure had affected its outcome (see paragraphs 25, 34 and 37 above) and found that the planning decision was not deficient in balancing the applicants' interests against those of the planners (see paragraph 25 above). To arrive at those conclusions, the Federal Administrative Court thoroughly examined the noise impact implications of the diverging flight paths compared to the straight flight paths on which the planning documents had been based. It found that the diverging flight paths partly affected different areas from those affected by the straight flight paths, but that the population density in the areas affected by straight flight paths and flight paths with a 15-degree divergence was broadly similar

(see paragraphs 26-28 above). As the planning decision realistically reflected the overall number of persons affected and the nature and extent of the expected noise impact, the outline plan based on projected straight flight paths had been an adequate basis for the estimation of the noise impact of the airport. The planning decision was not flawed, in the sense of having failed to balance the competing interests appropriately, because it had relied on the outline plan with projected straight flight paths and had not considered the 15-degree divergence requirement (see paragraphs 25, 28 and 30 above).

76. Subsequently, the Federal Constitutional Court held that the Federal Administrative Court's findings that the procedural defects had not influenced the outcome of the balancing exercise in the planning procedure did not infringe the applicants' rights of property and their right to effective legal protection. The Federal Administrative Court had shown that neither the siting of the airport nor the runway configuration would have been different if the public consultation and the environmental impact assessment had been carried out correctly. The applicants had not substantiated any assertion that the outcome of the planning decision would have been more favourable to them if the parts of the procedure which had been flawed had been carried out correctly (see paragraph 40 above). The Federal Constitutional Court, while criticising the Federal Administrative Court for not considering the applicants' claim that the material put on display during the planning approval procedure had not enabled them to assess the likelihood of them being affected by the airport, found that it was clearly foreseeable that the Federal Administrative Court would arrive at the same conclusion, that is, that the procedural defect had not influenced the outcome of the planning approval procedure and that it could not lead to the revocation of the planning decision, with respect to this alleged procedural defect as well. The Federal Constitutional Court found that there was ample reason to assume that the applicants' arguments would not have had an impact on the outcome of the proceedings, since the effects on the applicants were qualitatively and quantitatively similar to those considered with respect to other plaintiffs and the applicants, at any rate, had not stated otherwise (see paragraph 41 above). The Federal Constitutional Court further found that the Federal Administrative Court's finding as to the substantive legality of the planning decision was in conformity with constitutional law and explained that residents' fundamental rights did not require the planning documents to reflect the noise impact on specific individuals, given that the exact flight paths were not determined in the planning decision but at a later stage. It also found that the planning documents in the present case had provided an adequate basis for the estimation of the noise impact of the airport in the event of divergent flight paths as the nature and extent of the noise impact on account of diverging flight paths did not differ significantly from those on which the planning authority had based its balancing exercise (see paragraph 42 above).

77. While the Court concurs with the applicants that the planning authority's conduct as regards the information about the projected flight paths provided in the planning approval procedure ought to be criticised, it observes that the defects were recognised by the domestic courts. The Court's task is to determine whether the procedural defect in the planning approval procedure, which lies at the heart of the applicants' complaint, infringed their rights under Article 8 of the Convention. Having regard to the reasons advanced by the domestic courts, the Court sees no reason to question their findings and considers that there are no indications that the domestic authorities failed to strike a fair balance between the competing interests under Article 8 of the Convention, despite the defects which occurred in the planning approval procedure and which were recognised by the domestic courts. In the present case the domestic authorities were not required to carry out an individualised assessment of the noise impact on the applicants' properties, given that their interests were sufficiently taken into account by the more general assessment of the noise impact on residents living in the various areas surrounding the airport.

78. The Court therefore takes the view that the domestic courts, after examining the applicants' arguments in court proceedings that provided all necessary procedural safeguards (see, *Hatton and Others*, cited above, § 104), properly reviewed the planning authority's conduct of the balancing exercise and found that the balancing was not deficient. They found that the procedural defects of the planning approval procedure had not affected its outcome with respect to the applicants. In these circumstances, there is no basis for finding that the planning authorities' failure to mention during the planning approval procedure that it was possible, if not likely, that flight paths with a 15-degree divergence would eventually be set infringed the applicants' rights under Article 8 of the Convention (see paragraph 73 above). It is noteworthy that the applicants themselves did not argue before the Court that the diverging flight paths affected them in such a manner as to constitute a substantive violation of their right to respect for their homes and their private and family life under Article 8 of the Convention.

79. In view of the foregoing, the Court concludes that the complaint is manifestly ill-founded and, as such, it must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 27 June 2024.

Andrea Tamietti Registrar	Gabriele Kucsko-Stadlmayer President