Bundesverfassungsgericht

The Federal Constitutional Court reviews the domestic application of legislation that is fully harmonised under EU law on the basis of EU fundamental rights***When reviewing claims for injunctive relief against search engine operators, courts must take into account the freedom of expression afforded publishers of online contents

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Order of 6 November 2019 - 1 BvR 276/17 - Right to be forgotten II

The order in the proceedings "Right to be forgotten II" published today, which supplements the order issued on the same day in the parallel proceedings "Right to be forgotten I" (cf. Press Release No. 83/2019), concerns a legal dispute governed by legislation that is fully harmonised under EU law. Therefore, the Federal Constitutional Court applied the Charter of Fundamental Rights of the European Union as the relevant standard of review, rejecting a constitutional complaint directed against a judgment of the Celle Higher Regional Court (*Oberlandesgericht*). In the challenged judgment, the Higher Regional Court had refused to grant the injunctive relief sought by the complainant against a search engine operator. The complainant's action was lodged on the grounds that the search engine's list of results for searches of her name contained a link to the transcript of a TV broadcast that was uploaded to an online archive in 2010; in the broadcast, the complainant is identified by name and accused of unfair treatment of an employee, who was dismissed by her company.

As the starting point for its review, the Federal Constitutional Court held that the ordinary legislation relevant in this case is fully harmonised under EU law and that the fundamental rights of the Basic Law are thus not to be applied. To the extent that the application of EU legislation takes precedence over German fundamental rights, the Federal Constitutional Court reviews the application of such legislation by German authorities on the basis of EU fundamental rights; this ensures that there are no gaps in fundamental rights protection. By applying this standard of review, the Federal Constitutional Court discharges its responsibility with regard to European integration under Art. 23 of the Basic Law.

On the merits, the First Senate of the Federal Constitutional Court held that the fundamental rights of both the Basic Law and the EU Charter are not limited to protecting citizens vis-à-vis the state, but also afford protection in disputes under private law; in this regard, the review must strike a balance between the conflicting rights. In the present case, the Higher Regional Court satisfied this requirement, as it conducted a balancing in which it appropriately considered the fundamental rights interests of the parties to the proceedings as well as relevant fundamental rights of third parties, specifically the freedom of expression on the part of the NDR broadcasting corporation as the publisher of the online contents in dispute.

Facts of the case:

1. On 21 January 2010, the NDR broadcasting corporation aired a segment of the TV show *Panorama* titled "Dismissal: the dirty practices of employers", featuring an interview with the complainant in her capacity as CEO of a company. Towards the end of the broadcast, the case of a dismissed employee is presented, and the complainant is accused of unfair treatment vis-à-vis that employee after he had tried to establish a works council in her company.

Under the title "The dirty practices of employers", the NDR uploaded a file containing a transcript of the broadcast to its website. When the complainant's name was typed into Google, the link to this content was displayed among the top search results. After the search engine operator refused the complainant's request to remove the site from the search results, the complainant lodged an action that was later rejected by the Higher Regional Court. In its reasoning, the Higher Regional Court states that the complainant could not request the removal of the relevant links (hereinafter: de-

referencing), as she could neither establish a claim under § 35(2) second sentence of the Federal Data Protection Act (former version) (*Bundesdatenschutzgesetz* – BDSG) nor under § 823(1), § 1004 of the Civil Code (*Bürgerliches Gesetzbuch* – BGB) in conjunction with Art. 1(1), Art. 2(1) of the Basic Law (*Grundgesetz* – GG).

2. With her constitutional complaint, the complainant claims a violation of her general right of personality und her right to informational self-determination. She contends that the title displayed in the search results was already misleading as she had never used any "dirty practices". The search results portrayed her in a negative light, which was capable of disparaging her in her private life. Moreover, the complainant asserts that a long time has passed since the broadcast originally aired and that the public thus no longer has a legitimate interest in this information.

Key considerations of the Senate:

I. The proceedings provided an occasion for the Federal Constitutional Court to specify its standard of review in the context of EU law.

1. The complainant's claim for de-referencing pursued in the ordinary court proceedings is governed by legal provisions that are fully harmonised under EU law and thus apply uniformly in all Member States of the European Union – this holds true with regard to both the former Data Protection Directive that was initially applicable in the proceedings and the General Data Protection Regulation (GDPR) that is currently applicable. The question of what personal data may be displayed by search engines in their lists of results does not fall under the so-called media privilege for which the Member States are afforded leeway to design (thus, the legal situation differs from the one discussed in the order issued on the same day in the parallel proceedings "Right to be forgotten I", cf. Press Release No. 83/2019).

2. Regarding the application of legal provisions that are fully harmonised under EU law, the relevant standard of review does not derive from German fundamental rights, but solely from EU fundamental rights. In this scenario, EU law takes precedence of application (*Anwendungsvorrang*) over the fundamental rights of the Basic Law. As regards the review whether fully harmonised legal provisions violate fundamental rights, this has already been recognised in established case-law of the Federal Constitutional Court. It applies accordingly to the review whether fully harmonised ordinary legislation has been applied in conformity with fundamental rights.

a) The precedence of application accorded to EU fundamental rights derives from the transfer of sovereign powers to the European Union. Where the EU enacts legislation that is applicable, and must be applied uniformly, in all Member States, it follows that the fundamental rights protection afforded in this context must be based on uniform standards, too. From the outset, this prevents the Member States from relying on their domestic fundamental rights standards in these cases. At present, it cannot be assumed that the respective fundamental rights standards in the Member States are congruent beyond the common fundament that is the European Convention on Human Rights. Rather, domestic fundamental rights frameworks reflect factual differences between the Member States resulting from various factors, as well as country-specific historical experiences. It can also not be assumed that the fundamental rights protection under the Charter of Fundamental Rights specifically matches the fundamental rights framework set out in the German Basic Law. Thus, the EU fundamental rights and domestic fundamental rights must be regarded as distinct regimes.

b) According to the Federal Constitutional Court's established case-law, the precedence of application accorded to EU law is subject to the reservation that the protection afforded under EU fundamental rights must be sufficiently effective. It is thus required that the level of protection under EU law essentially be comparable to the fundamental rights standards that are regarded as indispensable under the Basic Law. The current state of EU law – most notably with the binding Charter of Fundamental Rights – satisfies this requirement.

3. In the present proceedings, the Federal Constitutional Court has decided for the first time that where EU fundamental rights take precedence over German fundamental rights, the Court itself can directly review, on the basis of EU fundamental rights, the application of EU law by German authorities.

a) In its past decisions, the Federal Constitutional Court has not yet expressly considered the possibility of directly invoking EU fundamental rights in its review. In cases where the fundamental rights of the Basic Law were found to be inapplicable due to the precedence of EU law, the Federal Constitutional Court has so far completely refrained from conducting a review of the asserted fundamental rights violations; rather, it has left the review of whether fundamental rights were respected in the relevant case to the ordinary courts in cooperation with the Court of Justice of the European Union (CJEU). All past decisions of the Federal Constitutional Court in this context directly or indirectly concerned challenges to the validity of EU law, rather than its application.

b) By contrast, the present case concerns the question whether German courts and authorities, when applying fully harmonised EU law, observed the requirements deriving from EU fundamental rights in the individual case. In this scenario, the Federal Constitutional Court cannot refrain from exercising a fundamental rights review entirely; rather, the Federal Constitutional Court is then called upon to ensure fundamental rights protection on the basis of EU fundamental rights. The Basic Law's openness to EU law under Art. 23(1) GG does not relieve the German state of its responsibility in matters for which competences have been transferred to the EU; to the contrary, this provision provides for the participation of German state organs, which includes the Federal Constitutional Court, in developing and giving effect to European integration. By incorporating the fundamental rights of the European Union into its standard of review, the Federal Constitutional Court thus discharges its responsibility with respect to European integration.

What is decisive here is that under current EU law there would otherwise be a gap in protection regarding the application of EU fundamental rights by the ordinary courts. This is due to the fact that individuals have no direct access to the CJEU to assert a violation of EU fundamental rights in such cases. In contrast to the German legal order, EU law does not recognise an equivalent to a constitutional complaint procedure. Even though, in its past decisions, the Federal Constitutional Court has already exercised a review as to whether ordinary courts have observed their duty to make a referral to the CJEU, this type of review does not by itself suffice to fill the existing gap in protection.

4. To the extent that the Federal Constitutional Court relies on the fundamental rights of the Charter as the relevant standard of review, it seeks close cooperation with the CJEU. Such cooperation is merited here because the CJEU has the final authority for interpreting EU law, which includes the fundamental rights of the Charter. Where a relevant question of interpretation has not yet been clarified in the CJEU's case-law, and the answer is also not clear from the outset based on established principles of interpretation – for instance, by drawing on the case-law of the European Court of Human Rights –, the Federal Constitutional Court will refer the question for a preliminary ruling pursuant to Art. 267(3) of the Treaty on the Functioning of the European Union (TFEU). In the present proceedings, it was not necessary for the Federal Constitutional Court to decide whether the ordinary courts – to the extent that they render a final judgment as court of last instance – would also remain obliged to make a referral to the CJEU.

5. As set out in the two orders published today ("Right to be forgotten I and II"), the determination whether to apply the fundamental rights of the Basic Law or the rights of the Charter as the standard of review essentially hinges on the distinction between fully harmonised EU law on the one hand, and EU law that leaves leeway to design on the other. The qualification of EU law according to this distinction depends on the interpretation of the respective provisions of ordinary law. In German law, doctrine commonly distinguishes between legal provisions containing undefined legal concepts (*unbestimmte Rechtsbegriffe*) and provisions affording discretion (*Ermessen*); however, this cannot be applied accordingly here, as EU law does not recognise this doctrine in the same way German law does. Rather, the specific provisions of EU law at issue must be assessed as to whether or not they seek to accommodate diversity and different value decisions.

6. It is true that, in the present case, the First Senate of the Federal Constitutional decided to directly apply EU fundamental rights as the standard of review in constitutional complaint proceedings for the first time ever; yet it was not necessary to refer this question to the Plenary of the Court. A decision of the Plenary pursuant to § 16 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG) is only required if one Senate wants to deviate from a legal view of the other Senate that was material to the other Senate's decision. The order of the First Senate in the present proceedings results in no such deviation; most notably, it does not deviate from the case-law developed by both Senates on the basis of the so-called *Solange II* decision rendered by the Second Senate (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 73, 339 <387>). The relevant point of law decided in that case was whether and to what extent EU law and, by extension, fully harmonised domestic law is to be reviewed as to its conformity with the Basic Law. In the *Solange II* case, the Court did not at all consider, neither explicitly nor implicitly, the applicability of EU fundamental rights – let alone the Charter, which did not enter into force until 2009 – and consequently made neither a negative nor a positive determination on this matter. More recent decisions of the Second Senate also do not merit a different conclusion.

II. In the specific case at hand, the constitutional complaint is admissible but unsuccessful on the merits.

1. The complainant has standing as she can assert a possible violation of EU fundamental rights. By claiming a violation of her right to the free development of her personality, she essentially asserts that her fundamental rights to respect for private and family life and to the protection of personal data pursuant to Art. 7 and Art. 8 of the Charter are violated. The fact that, in her submission, she refers to the fundamental rights of the Basic Law, and not to the fundamental rights of the Charter, is immaterial to her legal standing. Where a complainant sufficiently substantiates the asserted rights violation, failure to cite the correct legal provisions does not render the constitutional complaint inadmissible.

2. The constitutional complaint is, however, unfounded.

Generally, when the Federal Constitutional Court conducts its review based on the fundamental rights enshrined in the Basic Law, it does not review whether ordinary law (i.e., in the present case, the provisions of the former Data Protection Directive and the Federal Data Protection Act) as such was applied correctly; this also holds true when the Court invokes the EU fundamental rights as the relevant standard of review. Rather, the Federal Constitutional Court limits its review to whether the challenged decisions of ordinary courts sufficiently give effect to the EU fundamental rights and reflect the required balancing of conflicting rights with a tenable outcome. Measured against these standards, the Federal Constitutional Court did not find the challenged decision of the Higher Regional Court objectionable.

a) The fundamental rights of both the Basic Law and the Charter are not limited to protecting citizens vis-à-vis the state, but also afford protection in disputes under private law. On the part of the complainant, the balancing must take into account the fundamental right to respect for private and family life under Art. 7 of the Charter and the fundamental right to the protection of personal data under Art. 8 of the Charter. These guarantees correspond to Art. 8 of the European Convention on Human Rights.

b) On the part of the search engine operator, as defendant in the ordinary court proceedings, the balancing must take into account its freedom to conduct a business under Art. 16 of the Charter, whereas the search engine operator cannot invoke the right to freedom of expression under Art. 11 of the Charter in relation to the search results disseminated by its search engine. What must, however, be taken into account are the fundamental rights of third parties directly affected by the legal dispute; in the case at hand, this concerns – in addition to the Internet users' interest in receiving information – the freedom of expression on the part of the NDR broadcasting corporation. The issue in dispute is whether the search engine operator can be prohibited from disseminating contents published by third parties, in this case the NDR broadcasting corporation. Such a prohibition may give rise to a separate impairment of the third party's freedom of expression. This results from the fact that the prohibition deprives the third party of the services provided by the search engine operator, which to some extent also excludes the third party from an important platform for disseminating its publication. These consequences are not merely unintended side effects of the prohibition imposed on the search engine operator. Rather, the decision to prohibit the listing of the relevant contribution in search results is directly tied to the statements contained therein, and thus to the exercise of freedom of expression, given that the prohibition specifically seeks to restrict the dissemination of an online publication for content-related reasons.

c) Assessing the activities carried out by the search engine operator is central to the required balancing; this assessment must distinguish between the different fundamental right impairments arising in this context. The question whether the search engine operator acted lawfully must be distinguished from the question whether the publication of the contested contents by the third party as such was lawful, even though these questions are somewhat interrelated. This also means that there is no obligation to hold the third party primarily responsible and only allow recourse against the search engine operator as a subsidiary course of action.

d) With regard to the balancing of interests, the Federal Constitutional Court held in its decision that the search engine operator's economic interests as such are in principle not sufficiently weighty to justify a limitation of the affected person's right to protection. However, greater weight may be attached to the interest of the public in receiving information and, even more so, the fundamental rights of third parties that must also be taken into account in the balancing. In the present case, the balancing must take into account the freedom of expression on the part of the NDR broadcasting corporation as a directly affected fundamental right of third parties, which would be negatively impacted by the prohibition sought by the complainant. Thus, in the present case – in contrast to some of the cases decided by the CJEU, which concerned different scenarios – it cannot be presumed that protecting the right of personality takes precedence; rather the conflicting fundamental rights must be balanced on an equal basis. It is not for the individual to determine unilaterally what information may be disseminated about them in the course of public communication processes, neither vis-à-vis the media nor vis-à-vis the search engine operators.

e) The weight attached to the restrictions of the affected fundamental rights in the balancing significantly depends on the extent to which the dissemination of the contested online publication impairs affected persons in the free development of their personality, especially in light of the possibility that Internet users can conduct online searches of the affected person's names. This determination must not be limited to merely appraising the relevant online contents in the context of the original publication, but must also take into consideration the easy access to and continuing availability of the information. In this respect, the time passed between the original publication and its listing in search results must be accorded particular significance, which in current law also finds a normative reflection in Art. 17 GDPR based on by the central notion of a "right to be forgotten".

f) Measured against these standards, the challenged decisions are ultimately not objectionable. The Higher Regional Court undertook the necessary balancing, taking into account both the protection of the complainant's right of personality and the search engine operator's freedom to conduct a business; the court also correctly viewed this freedom in conjunction with the freedom of expression on the part of the NDR broadcasting corporation and the Internet users' interest in access to the relevant information. The balancing undertaken by the Higher Regional Court remains within the margin of appreciation afforded ordinary courts.

Yet the Higher Regional Court does err in finding that the complainant is only affected in her social sphere. In today's reality, due to the possibilities to retrieve and combine information via online searches based on a person's name, it has become almost impossible to distinguish between the social sphere and the private sphere regarding the effects on the person concerned. However, even though this distinction can no longer be upheld when it comes to weighing the effects on the person concerned, it does remain relevant for weighing the contents of the online publication in dispute. In this respect, the Higher Regional Court tenably states that the NDR broadcast relates not to matters exclusively belonging to the complainant's private life, but to her professional conduct that reaches into public life and thus justifies the continuing public interest in this information, although this justification diminishes over time. The complainant can be expected to tolerate the resulting negative effects – including possible effects on her private life – to a greater extent than would be the case for contents that only focused on her as a private person.

It was also tenable for the Higher Regional Court to invoke, as an additional consideration, the fact that the complainant agreed to the interview featured in the contested broadcast. Furthermore, the Higher Regional Court was right not to qualify the broadcast and the corresponding online link as calumny (*Schmähung*), as the portrayal of the complainant is not inherently disparaging without any connection to the factual subject matter.

The Higher Regional Court also considered time as a relevant factor. Specifically, the Higher Regional Court examined whether the further dissemination of the publication, including the complainant's name, continues to be justified despite the time that had passed since the broadcast was originally published; in this respect, the court recognised that the time factor may modify both the weight attached to the interest of the public in this information and the weight of the resulting fundamental rights impairments (cf. the order issued on the same day in proceedings 1 BvR 16/13, with Press Release No. 83/2019). Ultimately, the Higher Regional Court concluded that, at present, the complainant is not entitled to request the de-referencing of the NDR contribution, at least not yet; this conclusion is not objectionable under constitutional law. In its decision, the Higher Regional Court did not fail to sufficiently give effect to the Charter of Fundamental Rights nor is it ascertainable that the court based its decision on a fundamentally incorrect understanding of the significance and scope of the affected fundamental rights of the Charter.

III. It was not necessary to request a preliminary ruling from the CJEU pursuant to Art. 267(3) TFEU. In the present case, the application of the EU fundamental rights does not raise any questions of interpretation to which the answer is not already clear from the outset nor questions that have not been sufficiently clarified in the case-law of the CJEU (as read in light of the case-law of the European Court of Human Rights, which serves as a supplementary source of interpretation in this regard, cf. Art. 52(3) of the Charter).
