Headnotes

to the Order of the First Senate of 6 November 2019

- 1 BvR 16/13 -

(Right to be forgotten I)

1. a) The Federal Constitutional Court reviews domestic law that is not fully determined by European Union law on the basis, primarily, of the fundamental rights of the Basic Law, including in cases where the relevant provisions of domestic law serve to implement European Union law.

b) The application of the fundamental rights of the Basic Law as the primary standard of review is informed by the assumption that European Union law, where it affords Member States latitude in the design of ordinary legislation, is generally not aimed at uniformity in fundamental rights protection, but allows for fundamental rights diversity.

This then leads to the presumption that the application of the fundamental rights of the Basic Law simultaneously ensures the level of protection of the Charter of Fundamental Rights of the European Union.

c) An exception to the assumption in favour of fundamental rights diversity in cases where Member States are afforded latitude in the design of ordinary legislation, or a rebuttal of the presumption that the application of the Basic Law's fundamental rights simultaneously ensures the level of fundamental rights protection of the Charter, should only be considered where there is specific and sufficient indication therefor.

2. a) In respect of the protection against risks to one's personality stemming from the dissemination, in the context of public communication processes, of articles and information relating to one's person, the applicable standard of review under constitutional law derives from the general right of personality in its manifestation as a right protecting against statements affecting one´s person, rather than in its manifestation as a right to informational self-determination.

b) Given the realities of Internet communication, time is a specific factor to be considered when deciding on a person's claim for protection. The legal order must protect the individual against the risk of being indefinitely confronted in public with their past opinions, statements or actions. Only when it is possible for matters to stay in the past do individuals have a chance at a new beginning in freedom. The possibility for matters to be forgotten is part of the temporal dimension of freedom.

c) There is no right derived from the general right of personality to request that all information relating to one's person that was disseminated through communication processes be deleted from the Internet. In particular, the individual has no right to filter the publicly accessible information related to them according to their free discretion and own preferences, thus restricting such information to aspects that they themselves might regard as relevant or appropriate to the self-perceived image of their personality.

d) In balancing the fundamental rights of a media outlet uploading its articles to an online archive with the fundamental rights of a person affected by such articles, it must be taken into account to what extent the media outlet disposes of means to effectively block access to and dissemination of old press articles on the Internet in order to protect affected persons – especially in respect of how these articles are listed in the results of an Internet search for the affected person's name.

3. The right protecting against statements affecting one´s person must be distinguished from the right to informational self-determination, which constitutes another separate manifestation of the general right of personality. The right to informational self-determination, too, may bear on relationships between private actors. Its indirect effects on private law relationships differ from its direct effects vis-à-vis the state. Between private actors, it provides the individual the possibility of influencing, in nuanced ways, the context and manner in which their data is accessible to and can be used by others, thus affording the individual considerable influence in deciding what information is available on them.

FEDERAL CONSTITUTIONAL COURT

- 1 BvR 16/13 -

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaint

of Mr T…,

– authorised representatives: … –

against the Judgment of the Federal Court of Justice (*Bundesgerichtshof*) of 13 November 2012 – VI ZR 330/11 –,

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Harbarth,

Masing,

Paulus,

Baer,

Britz,

Ott,

Christ,

Radtke

held on 6 November 2019:

1. **The Judgment of the Federal Court of Justice of 13 November 2012 - VI ZR 330/11 - violates the complainant's fundamental right under Article 2(1) in conjunction with Article 1(1) of the Basic Law (*Grundgesetz* – GG).**

2. **The Judgment is reversed. The matter is remanded to the Federal Court of Justice.**

3. **The Federal Republic of Germany must reimburse the complainant for necessary expenses.**

R e a s o n s:

A.

The constitutional complaint is directed against a private law judgment of the Federal Court of Justice (*Bundesgerichtshof*). In the challenged judgment, the Federal Court of Justice had rejected the complainant's action seeking injunctive relief against the availability, in an online archive, of press articles from more than 30 years ago; in the respective articles, which cover the complainant's conviction for murder, the complainant is identified by name. 1

I.

[Excerpt from Press Release No. 83/2019]

In 1982, the complainant was convicted of murder and sentenced to life imprisonment for having killed two persons by shooting them on board a yacht on the high seas in 1981. In 1982 and 1983, the magazine *DER SPIEGEL* ran three articles on the case in its print edition, which identified the complainant by name. In 1999, the *Spiegel Online GmbH* – the defendant in the ordinary court proceedings – uploaded the articles to the magazine's online archive, where the articles are accessible free of charge and without any restrictions. When the complainant's name is entered into one of the common Internet search engines, the articles in question are listed among the top search results.

In 2002, the complainant was released from prison. In 2009, after learning that the articles were available online, he sent a cease-and-desist letter to the defendant without success. He subsequently lodged an action seeking to enjoin the defendant from disseminating any information on the crime containing the complainant's last name. The Federal Court of Justice rejected the action. In its reasoning, the Federal Court of Justice stated that the interest of the general public in obtaining information, an interest that is promoted by the defendant here, and the defendant's right to freedom of expression outweigh the complainant's interest in the protection of his personality. The court held that the public has a recognised interest in obtaining information on significant events of contemporary history – such as the aforementioned murder trial, which is inextricably linked to the complainant's name and person – by accessing the unaltered original news reports.

With his constitutional complaint, the complainant claims a violation of his general right of personality. The complainant submits that he himself did nothing to reignite public attention regarding his case and that he wishes, in his present life situation, to cultivate social relationships without the burden of being associated with the crime. Yet the current reality is that whenever people enter his name into an online search engine, as is commonplace today, they find the archived articles at the top of the

search results. The complainant claims that this severely impairs the free development of his personality. The complainant does not contest that the murder trial from 30 years ago constitutes a significant event of contemporary history; he argues, however, that this does not necessarily mean that the public continues to have an interest in knowing his name even after so much time has passed.

[End of excerpt]

1. […] 2-3

2. […] 4-5

3. […] 6-8

4. […] 7-10

5. Providing the backdrop to these proceedings are provisions of EU law. At the time the challenged decision was rendered, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281 of 23 November 1995, p. 31; hereinafter: Directive 95/46/EC) was in force. This directive obliged Member States to protect the right to privacy of natural persons with respect to the processing of personal data. Art. 9 of Directive 95/46 EC entitled Member States to provide for exemptions under the so-called media privilege. […] 11

On 25 May 2018, the directive was replaced with the General Data Protection Regulation (Regulation [EU] 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119 of 4 May 2016, p. 1; hereinafter: GDPR). In Art. 17, the General Data Protection Regulation contains a right to erasure, which is also referred to as the “right to be forgotten” in brackets. The regulation also affords Member States some leeway in the form of a media privilege (cf. Art. 85 GDPR). 12

II.

Statements concerning the constitutional complaint were submitted by the defendant, the Data Protection Officers (*Datenschutzbeauftragte*) of the *Länder* Hamburg and Hesse, the Federal Association of German Newspaper Publishers (*Bundesverband Deutscher Zeitungsverleger e.V.*), the German Federation of Journalists (*Deutscher Journalisten-Verband e.V.*), the association *BITKOM e.V.*, the German Association of Law and Information Technology (*Deutsche Gesellschaft für Recht und Informatik e.V.*), Google Germany GmbH, the eco Association of the German Internet Industry (*eco-Verband der deutschen Internetwirtschaft e.V.*) and the German Media Association (*Deutscher Medienverband e.V.*). 13

[…] 14-35

B.

The constitutional complaint is admissible. 36

[…] 37-39

C.

The constitutional complaint is well-founded. The challenged decision of the Federal Court of Justice violates the complainant's general right of personality (Art. 2(1) in conjunction with Art. 1(1) of the Basic Law, *Grundgesetz* – GG). 40

I.

The standard of review applicable to the constitutional complaint are the fundamental rights of the Basic Law. This applies irrespective of whether in the challenged decision the Federal Court of Justice had to take into consideration provisions of ordinary domestic legislation that constitute an implementation of EU law within the meaning of Art. 51(1) first sentence of the Charter of Fundamental Rights of the European Union. 41

1. The Federal Constitutional Court reviews domestic law and its application against the standard of the fundamental rights of the Basic Law even where the domestic law falls within the scope of application of EU law but is not fully determined by it. This already follows from Art. 1(3), Art. 20(3) and Art. 93(1) no. 4a GG. The binding effect of fundamental rights is a corollary of the political responsibility for decisions, and thus corresponds to the respective responsibilities of the legislator and the executive. It falls to the German courts, and in particular to the Federal Constitutional Court, to ensure that fundamental rights are observed in the exercise of this responsibility. 42

2. This does not rule out that in certain cases the Charter of Fundamental Rights of the European Union (hereinafter: the Charter) may also lay claim to applicability. However, this can only be considered to be the case in the context of the EU Treaties and thus in cases where Member States are "implementing Union law" within the meaning of Art. 51(1) first sentence of the Charter. This deliberately limits the domestic scope of application of the Charter: in cases not concerning the implementation of EU law, fundamental rights protection is left to the Member States and their domestic fundamental rights guarantees, on the common basis of the European Convention on Human Rights (ECHR). Accordingly, the Charter does not provide comprehensive fundamental rights protection for the entire European Union; rather, through the limitation of its scope of application, it acknowledges the diversity (cf. Art. 4(2) of the Treaty on European Union – TEU, cf. also Art. 23(1) first sentence GG) of the fundamental rights guarantees of the Member States. Thus, limits to the simultaneous applicability of EU fundamental rights and the fundamental rights of the Basic Law are set. They may not be circumvented by an untenably broad interpretation of Art. 51(1) first sentence of the Charter (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 133, 277 <316 para 43

91>).

Conversely, the limitation of the Charter's scope of application does not rule out the possibility that domestic provisions may be judged to be provisions implementing EU law within the meaning of Art. 51(1) first sentence of the Charter in cases where EU law affords Member States latitude in the design of such provisions, but also provides for a sufficiently substantial framework for this design, and it is ascertainable that the framework is to be specified in consideration of EU fundamental rights. In such a scenario, the EU fundamental rights are applicable in addition to the fundamental rights guarantees of the Basic Law. This does not fundamentally call into question the binding effect of the Basic Law. 44

3. Even where EU fundamental rights are applicable pursuant to Art. 51(1) first sentence of the Charter in addition to the fundamental rights of the Basic Law, the Federal Constitutional Court primarily relies on the fundamental rights of the Basic Law as its standard of review (see, however, para. 63 *et seq*. below). 45

This is in line with the general role of the Federal Constitutional Court and its constitutional engagement to participate in the European integration process (see a) below). With a view to the more specific requirements of EU law, the Federal Constitutional Court can rely on the assumption that where Member States are afforded legislative latitude, there is usually also scope for fundamental rights diversity, as well as on the presumption that the protection afforded by German fundamental rights simultaneously ensures the level of protection of the Charter (see b) below). The application of German fundamental rights as the primary standard of review also implies their interpretation in light of the Charter (see c) below). 46

a) Reviewing acts of German public authority on the basis of the Basic Law is in line with the general role of the Federal Constitutional Court, which is precisely that of guardian of the Constitution. In particular, it is also in keeping with Art. 23(1) GG in conjunction with the EU Treaties. Art. 23(1) GG imposes a duty on the Federal Republic of Germany to participate in the development of the European Union, which is committed to federal principles and to the principle of subsidiarity. This is also in accordance with the European Treaties and the case-law of the Court of Justice of the European Union (CJEU). 47

In their preambles, both the Treaty on European Union (TEU) and the Charter of Fundamental Rights recognise the diversity of cultures and traditions in Europe (cf. Preamble, Recital 3 of the Charter; Preamble, Recital 6 TEU); similarly, Art. 51(1), (2), Art. 52(4), (6) and Art. 53 of the Charter affirm respect for the diversity of fundamental rights frameworks. This is set out in more detail in Art. 5(3) TEU, which declares the principle of subsidiarity to be a basic principle of the European Union, a commitment that is expressly reiterated in Art. 51(1) first sentence of the Charter in respect of the protection of fundamental rights. This diversity of fundamental rights protection enshrined in the Treaties is reaffirmed and safeguarded in the case-law of the Court of Justice of the European Union. By recognising domestic standards of 48

protection in the Charter's scope of application where this does not encroach on the primacy, unity and effectiveness of EU law, the Court of Justice of the European Union provides the Member States with the possibility of giving effect to their own fundamental rights standards in areas where ordinary EU law affords them latitude and, in doing so, also provides for diversity. However, it must be ensured that the level of protection provided for by the Charter, as interpreted by the Court of Justice, is not compromised (cf. CJEU, Judgment of 26 February 2013, Åkerberg Fransson, C-617/10, EU:C:2013:105, para. 29; cf. also CJEU, Judgment of 26 February 2013, Melloni, C-399/11, EU:C:2013:107, para. 60; Judgment of 29 July 2019, Pelham and Others, C-476/17, EU:C:2019:624, paras. 80 and 81). When conducting a constitutional review against the standard of fundamental rights, the Federal Constitutional Court must take this into account (see para. 63 *et seq*. below).

b) The primacy of the fundamental rights of the Basic Law as the standard of review for cases where EU law has been implemented (cf. Art. 51(1) first sentence of the Charter) is informed by the fact that EU law, where it affords Member States legislative latitude, is generally not aimed at uniformity in fundamental rights protection (see aa) below); it equally rests on the presumption that the application of German fundamental rights simultaneously ensures the level of protection required under EU law, which seeks to accommodate diversity (see bb) below). 49

aa) If the EU legislator affords the Member States legislative latitude for implementing EU law, it can be presumed that this also extends to the relevant fundamental rights protection. In this regard, it can generally be assumed that the European level of protection of fundamental rights, within the outer limits set by EU law, allows for fundamental rights diversity. 50

(1) For areas in which Member States are afforded discretion in terms of implementation and that are therefore subject to different iterations, the level of protection of the Charter is generally not aimed at achieving uniformity in fundamental rights protection according to the case-law of the Court of Justice of the European Union (cf. CJEU, Judgment of 26 February 2013, Åkerberg Fransson, C-617/10, EU:C:2013:105, para. 29; cf. also CJEU, Judgment of 29 February 2013, Melloni, C-399/11, EU:C:2013:107, para. 60; Judgment of 29 July 2019, Pelham and Others, C-476/17, EU:C:2019:624, paras. 80 and 81). Rather, the extent to which there is scope for the Member States to embrace different values is essentially determined by ordinary EU legislation. For instance, when it comes to giving shape to the media privilege, the Court of Justice of the European Union imposes a duty on the Member States to limit restrictions of the right to privacy of natural persons to purposes that fall within the scope of freedom of expression, yet it also considers that the reconciliation of these fundamental rights is a task for the Member States (cf. CJEU, Judgment of 16 December 2008, Satakunnan Markkinapörssi and Satamedia, C-73/07, EU:C:2008:727, para. 52 *et seq*.; cf. also Judgment of 14 February 2019, Buivids, C-345/17, EU:C:2019:122, para. 48 *et seq*.). Thus, for ordinary EU legislation in respect of which Member States are afforded legislative latitude, the Court of Justice of 51

the European Union derives from the Charter a level of protection that establishes only a broad framework; this differs from the Charter's level of protection for fully harmonised areas of law. It can be assumed that a balancing of the conflicting interests that is limited to weighing the fundamental right to privacy on the one hand against the fundamental right to freedom of expression on the other will normally fall within this framework.

Accordingly, the Court of Justice of the European Union holds that directives must be interpreted in light of the relevant fundamental rights of the Charter, but it also acknowledges that the Member States enjoy broad discretion when directives are worded openly, provided that they do not frustrate the directives and the fundamental rights interests protected by them (cf. CJEU, Judgment of 21 July 2011, Fuchs and Others, C-159/10 *inter alia*, EU:C:2011:508, paras. 61 and 62 – with reference to Art. 15(1) of the Charter –; Judgment of 15 January 2014, Association de médiation sociale, C-176/12, EU:C:2014:2, paras. 26 and 27; cf. broad discretion in CJEU, Judgment of 14 February 2008, Dynamic Medien, C-244/06, EU:C:2008:85, para. 41 *et seq*.; Judgment of 19 June 2014, Specht and Others, C-501/12 *inter alia*, EU:C:2014:2005, para. 46 *et seq*.; Judgment of 11 November 2014, Schmitzer, C-530/13, EU:C:2014:2359, para. 38; Judgment of 14 March 2017, G4S Secure Solutions, C-157/15, EU:C:2017:203, para. 34 *et seq*.). To that effect, where the Court of Justice of the European Union holds that ordinary EU legislation offers broad legislative latitude to Member States, fundamental rights standards, in particular the standard of proportionality, will be loosely limited to measures not being "unreasonable" (cf. CJEU, Judgment of 16 October 2007, Palacios de la Villa, C-411/05, EU:C:2007:604, para. 68 *et seq*.; Judgment of 12 October 2010, Rosenbladt, C-45/09, EU:C:2010:601, paras. 41, 51, 69). 52

Ordinary EU legislation determines the degree of harmonisation of ordinary [domestic] legislation. Ordinary EU legislation may contain fundamental rights requirements for the implementation of the legislative latitude afforded Member States (cf. CJEU, Judgment of 26 February 2013, Åkerberg Fransson, C-617/10, EU:C:2013:105, para. 29; Judgment of 29 July 2019, Pelham and Others, C-476/17, EU:C:2019:624, paras. 80 and 81); yet, in accordance with the principle of subsidiarity (see para. 48 above), these requirements generally allow for fundamental rights diversity. In this regard, the relationship between ordinary legislation and fundamental rights is less static under EU law than is the case under the German Constitution. This follows from the dynamic scope of application of the Charter, which depends on the degree of harmonisation of ordinary law, given that its application is contingent on the "implementing [of] Union law", pursuant to Art. 51(1) first sentence of the Charter; it is also reflected in the institutional set-up of the Court of Justice of the European Union, which examines both ordinary law and fundamental rights. The EU legislator thereby lays out the framework for the application of the fundamental rights of the Member States, striking a federative balance between the EU and the Member States. The basis of this framework lies in accountable political decision-making, which must satisfy the 53

principle of subsidiarity.

(2) In this dynamic addition to EU fundamental rights, incidental to ordinary legislation, and as provided by Art. 51(1) first sentence of the Charter and further developed in the case-law of the Court of Justice of the European Union, shape is given to the diversity of European fundamental rights regimes as a structural principle of the EU (cf. Preamble, Recital 3 of the Charter, Recital 6 TEU, see also the references in para. 48 above). Moreover, the dynamic nature of EU fundamental rights reflects the principle of subsidiarity (Art. 5(3) TEU). Accordingly, the Court of Justice of the European Union has already acknowledged by way of the general principles of law that are equivalent to fundamental rights and which govern the design of fundamental rights protection that latitude must be given to the Member States so as to take into consideration the differing circumstances in each one (cf. CJEU, Judgment of 14 October 2004, Omega Spielhallen, C-36/02, EU:C:2004:614, para. 31 *et seq*.) and recognised – with reference to the case-law on the concept of margin of appreciation of the European Court of Human Rights (ECtHR) – a certain margin of appreciation in determining whether an interference with fundamental rights is proportionate to the aim pursued (cf. CJEU, Judgment of 6 March 2001, Connolly, C-274/99, EU:C:2001:127, para. 48 *et seq*.). Moreover, it stands to reason that in scenarios where ordinary EU legislation provides for diversity, Art. 53 of the Charter, too, must be interpreted to the effect that conflicts arising from the value decisions inherent in fundamental rights can, in principle, be resolved on the basis of the fundamental rights of the respective Member State; it can also be assumed that this provision, too, allows for diversity with regard to the level of protection provided for by the Charter – unlike in the case of fully harmonised legislation (cf. CJEU, Judgment of 26 February 2013, Melloni, C-399/11, EU:C:2013:107, para. 57 *et seq*.) […]. 54

bb) If it can generally be assumed that ordinary EU legislation, where it affords Member States legislative latitude, also seeks to accommodate diversity in fundamental rights protection, then the Federal Constitutional Court can draw on the presumption that constitutional review against the standard of German fundamental rights will in general simultaneously ensure the level of protection of the Charter, as interpreted by the Court of Justice of the European Union. 55

(1) This presumption arises from overarching links between the Basic Law and the Charter shaped by a common European tradition of fundamental rights. Like the general principles of law, which are equivalent to fundamental rights and which were initially developed through the case-law of the Court of Justice of the European Union (cf., e.g., CJEU, Judgment of 12 June 2003, Schmidberger, C-112/00, EU:C:2003:333, para. 71), the Charter, too, relies on the different constitutional traditions of the Member States (cf. Preamble, Recital 5 first sentence, Art. 52(4) of the Charter). It combines these, further expands them and lets them unfold into an EU law standard. 56

It is significant in this respect that the different fundamental rights regimes of the 57

Member States now have a common foundation in the European Convention on Human Rights, which even the EU Treaties themselves as well as the Charter of Fundamental Rights draw upon. Both Art. 6(3) TEU and the Preamble of the Charter make explicit reference to the Convention. Essentially, by way of Art. 52(3) and Art. 53, the Charter for the most part incorporates the guarantees of the Convention. For the Member States, the Convention provides an overarching common foundation of fundamental rights protection. The Convention is a binding international treaty that has not only been implemented by all Member States with domestic effect but has also, through the work of the Council of Europe and in particular the European Court of Human Rights, gained particular effectiveness. It is true that the European Union itself has not yet acceded to the Convention, as is provided for in Art. 6(2) TEU. Yet the Convention serves as a significant guideline for the interpretation of the Charter and is used by the Court of Justice of the European Union, drawing upon the case-law of the European Court of Human Rights for such interpretation, in accordance with Art. 52(3) first sentence of the Charter (cf. CJEU, Judgment of 8 April 2014, Digital Rights Ireland and Seitlinger and Others, C-293/12 and C-594/12, EU:C:2014:238, paras. 54 and 55; Judgment of 3 September 2015, Inuit Tapiriit Kanatami and Others, C-398/13 P, EU:C:2015:535, para. 46; Judgment of 14 March 2017, G4S Secure Solutions, C-157/15, EU:C:2017:203, para. 27; Judgment of 15 March 2017, Al Chodor and Others, C-528/15, EU:C:2017:213, paras. 37 and 38).

Just as the Convention serves as a guiding principle for the Charter, the fundamental rights of the Basic Law, too, are interpreted in light of the Convention. According to the established case-law of the Federal Constitutional Court, Art. 1(2) and Art. 59(2) GG give rise to a duty to use the Convention and its interpretation by the European Court of Human Rights as a guideline for interpretation when applying the fundamental rights of the Basic Law. Such use as a guideline for interpretation does not confer direct constitutional status on the Convention, nor does it require that the provisions of the Basic Law be schematically aligned in parallel to the guarantees provided for in the Convention. Rather, the value decisions inherent in the Convention must be taken up, provided that this is both tenable in accordance with established methodology and compatible with the requirements of the Basic Law (cf. BVerfGE 111, 307 <315 *et seq.*>; 128, 326 <366 *et seq.*>; 131, 268 <295 and 296>; 148, 296 <355 para. 133>). However, this shows that the fundamental rights of the Basic Law, just like the fundamental rights of the Charter, are interpreted and applied in light of the European Convention on Human Rights and generally incorporate its guarantees. 58

(2) Given the common foundation that is the European Convention on Human Rights, it can be presumed that, for areas of law where EU law does not require uniformity, the fundamental rights of the Basic Law will simultaneously ensure the level of protection of the Charter. Such interactions between the Charter, the Convention and Member State constitutions form the basis of a fundamental rights regime that allows for diversity, but still relies on a common basis; this is particularly evident from Art. 52(3) and (4) of the Charter, according to which “the meaning and scope [of the 59

Charter rights] shall be the same" as the meaning and scope of corresponding Convention rights, and the Charter rights are to be interpreted in harmony with the constitutional traditions from which they result. This is not altered by the fact that, in part, the Charter also recognises rights without an equivalent in the Convention and can also provide more extensive protection than the Convention pursuant to Art. 52(3) second sentence of the Charter. Insofar as such additional guarantees are relevant in the context of non-harmonised EU law, to which the level of protection of the Charter nevertheless applies, and insofar as these guarantees have no equivalent in the Basic Law, the Charter can, and must, be applied directly in certain cases (see para. 69 below).

c) The application of the fundamental rights of the Basic Law as the primary standard of review does not mean that the EU Charter of Fundamental Rights will not also be taken into consideration. Rather, given that both the Basic Law and the Charter are rooted in a common European fundamental rights tradition, the fundamental rights of the Basic Law, too, must be interpreted in light of the Charter. 60

Just as the Charter developed from the Member States' different fundamental rights traditions – including Germany's – and must be interpreted in harmony with these traditions (cf. Art. 52(4) of the Charter), the Charter must also be taken into consideration as a guideline for interpretation when it comes to the guarantees of the Basic Law. According to the principles of the Basic Law's openness to international and European law, which follow from its Preamble as well as from Art. 1(2), Art. 23(1), Art. 24, Art. 25, Art. 26 and Art. 59(2) GG, the interpretation of fundamental rights and the further development of the protection of fundamental rights is to be informed by the development of international human rights protection, in particular by the European fundamental rights tradition (cf. BVerfGE 111, 307 <317 *et seq*.>; 112, 1 <26>; 128, 326 <366 *et seq*.>; 148, 296 <350 *et seq*. para. 126 *et seq*.>). 61

This approach disregards neither the autonomy of the fundamental rights of the Basic Law (*Eigenständigkeit der Grundrechte des Grundgesetzes*) nor the fact that their interpretation is in part informed by Germany's historical experiences and must take into account the specific structures of the legal order and the social realities in the Federal Republic of Germany. An interpretation that is open to European and international law, takes into consideration other supranational fundamental rights catalogues and draws inspiration from their interpretation does not require – based on the open wording of the fundamental rights – every interpretation made by international or European courts to be adopted (cf. BVerfGE 128, 326 <368 *et seq*.>; 142, 313 <345 *et seq*. para. 87 *et seq*.>; 149, 293 <330 and 331 para. 91>). The significance of other sources of fundamental rights guarantees for interpreting the fundamental rights of the Basic Law can only be determined on a case-by-case basis; in particular, this assessment will depend on the status and contents of these interrelated legal norms as well as their relationship to one another. Despite close similarities in terms of content, an interpretation of the fundamental rights of the Basic Law in light of the Charter may, in certain points, emphasise different aspects or arrive at a different 62

weighting than an interpretation in light of the European Convention on Human Rights. This is because the Convention's status in the European fundamental rights regime differs considerably from that of the Charter. Pursuant to Art. 51(1) first sentence of the Charter, the Charter's scope of application is limited, leaving room to accommodate the different fundamental rights traditions of the various Member States. An autonomous interpretation of German fundamental rights that arrives at different value decisions on individual points can also be significant in light of the consequences it may entail for matters that are not determined by EU law. This applies at least to the extent that the Charter itself does not merely protect the guarantees of the Convention, which are binding anyway, but also yields its own specified guarantees specifically for EU law. By contrast, the scope of application of the Convention is comparable to the scope of the Basic Law's fundamental rights. It seeks to guarantee an overarching European foundation in the rule of law that the Member States – their broad latitude in designing their fundamental rights regimes notwithstanding – may not defy at the domestic level, at least in terms of outcomes.

4. The fundamental rights of the Basic Law do not apply in every case as the sole standard of review for domestic law that implements EU legislation with legislative latitude (see a) below). Constitutional review cannot rely solely on German fundamental rights as the applicable standard where, in exceptional cases, there is specific and sufficient indication that this standard might not guarantee the level of fundamental rights protection of EU law (see b) below). Such a scenario requires domestic law serving the implementation of EU law to be reviewed directly in light of the fundamental rights of the Charter (see c) below). 63

a) The assumption that ordinary law affording Member States legislative latitude allows for a level of fundamental rights protection that seeks to accommodate diversity does not hold true without restriction (see aa) below). Even in cases where ordinary EU legislation is open to fundamental rights diversity, it may be possible in certain cases to rebut the presumption that the fundamental rights of the Basic Law guarantee an adequate level of protection (see bb) below). 64

aa) In line with the Charter, which seeks to accommodate diversity, it can be assumed that the Member States can generally embrace different values in terms of fundamental rights in areas where ordinary EU law affords them latitude; however, ordinary EU law may exceptionally contain stricter fundamental rights requirements even when it comes to Member States' discretion in terms of implementation, and thereby further restrict the scope of the fundamental rights of the Basic Law as national standards of protection within the meaning of the case-law of the Court of Justice of the European Union (cf. Judgment of 26 February 2013, Åkerberg Fransson, C-617/10, EU:C:2013:105, para. 29) where EU law is implemented (see para. 59 above). In such cases, it must be reviewed in detail to what extent the fundamental rights of the Basic Law – which are still applicable within the scope of Member States' discretion in terms of implementation – satisfy the requirements set by EU law (cf. CJEU, Judgment of 26 February 2013, Åkerberg Fransson, C-617/10, 65

EU:C:2013:105, para. 29; Judgment of 26. February 2013, Melloni, C-399/11, EU:C:2013:107, para. 60; Judgment of 29 July 2019, Pelham and Others, C-476/17, EU:C:2019:624, paras. 80 and 81). Yet this is only to be considered in cases where ordinary EU law provides specific and sufficient indication to this effect (see b) below).

bb) Insofar as EU law is open to fundamental rights diversity when it comes to latitude in terms of implementation afforded the Member States, it is presumed that the fundamental rights of the Basic Law provide adequate fundamental rights protection (see para. 55 *et seq*. above). However, it is possible to rebut this presumption, given that it cannot be assumed in every case that the fundamental rights of the Basic Law simultaneously ensure the Charter's level of fundamental rights protection. Even though substantial congruence can be found in the fundamental rights guarantees deriving from the European Convention on Human Rights, the Member States' fundamental rights traditions, which are shaped by their own history and social realities, differ with regard to the reconciliation and juridification of fundamental rights conflicts. While the Charter may seek to reconcile the guarantees deriving from these different traditions, it cannot, nor does it strive to, fully harmonise them. Therefore, the Charter's scope of application is limited, and this is also why it cannot be assumed from the outset that its guarantees are in all respects congruent with those of the Member States, including the guarantees of the Basic Law. Rather, the fundamental rights of both the Charter and the Basic Law must be interpreted autonomously, irrespective of their interactions. Accordingly, it cannot simply be asserted that the rights of the Charter are always simultaneously protected by the German Constitution – be it in the standard case of fundamental rights diversity or the exceptional case of stricter requirements under EU law. While this can generally be presumed, it is rebuttable. 66

b) Constitutional review solely on the basis of German fundamental rights as the applicable standard will only be insufficient from the outset where there is specific and sufficient indication that the level of fundamental rights protection required under EU law might not be met. A more extensive review may thus be required in cases where there is specific and sufficient indication either that, despite affording Member States legislative latitude, ordinary EU legislation exceptionally contains stricter fundamental rights requirements for its implementation, or that, despite fundamental rights diversity being permissible, the presumption that the level of protection of the Charter is simultaneously ensured by the fundamental rights of the Basic Law could be rebutted. 67

aa) Such a more extensive review must be considered where there is specific and sufficient indication that ordinary EU legislation – even though it affords Member States legislative latitude – exceptionally does not seek to accommodate fundamental rights diversity, but contains stricter fundamental rights requirements (see para. 65 above). An indication for asserting that ordinary EU legislation affording Member States legislative latitude exceptionally does not seek to accommodate fundamental rights diversity must objectively derive from the wording and legislative context of the 68

ordinary law provisions in question. However, the mere fact that ordinary EU legislation calls for full respect of the Charter of Fundamental Rights or of certain individual provisions of the Charter, as is current practice, for example, in the recitals of directives (cf. Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM [2010] 573 final), does not by itself suffice to establish stricter fundamental rights requirements. With regard to areas of law for which Member States are afforded latitude, the Charter – in recognition of the principle of subsidiarity – does not as such rule out applying national standards of protection of fundamental rights; rather, it remains open to diversity. Therefore, more specific indication is needed in order to show that EU legislation exceptionally contains specific fundamental rights standards regarding the legislative latitude afforded Member States.

bb) Where EU legislation affords Member States latitude to accommodate fundamental rights diversity, the possibility of rebutting the presumption that the application of the fundamental rights of the Basic Law simultaneously ensures the level of fundamental rights protection required under EU law must only be considered if there is specific and sufficient indication to this effect. Such indication may, in particular, derive from the case-law of the Court of Justice of the European Union. If it can be specifically shown that the Court of Justice recognises a specific fundamental rights standard that is not guaranteed to the same extent by German fundamental rights, this EU standard must be incorporated into domestic review. It can no longer be presumed that the Basic Law simultaneously ensures the Charter's level of protection if and to the extent that the specific level of protection required in the individual case derives from rights guaranteed by the Charter that have no equivalent guarantee in the Basic Law as interpreted in the case-law. 69

cc) In both scenarios (aa and bb), it must then be assessed in detail whether a review relying solely on the fundamental rights of the Basic Law as the applicable standard meets the level of fundamental rights protection of EU law. Notably, this requires a more detailed examination of decisions of the Court of Justice of the European Union where these are capable of rebutting the presumption that the application of the fundamental rights of the Basic Law simultaneously ensures adequate protection as required under EU law. This applies accordingly to indications deriving, for example, from established legal expert opinion or from decisions of other courts on the Charter of Fundamental Rights. 70

dd) Thus, a review on the basis of the fundamental rights of the Basic Law ultimately does not always require a prior determination whether the legislative latitude afforded by ordinary EU law also includes openness to fundamental rights diversity and what protections are provided for by the Charter. To the extent that the review in respect of fundamental rights concerns areas of the law for which Member States are afforded latitude under EU law, such review can in principle directly rely on the fundamental rights of the Basic Law as the applicable standard, which, as usual, are to be interpreted in light of the Convention and the Charter. Given that the principle of diversity 71

applies, the application of the fundamental rights of the Basic Law is also not already precluded by the fact that the relevant fundamental rights questions have not yet been clarified domestically – or, in other contexts, under EU law –, nor by the fact that these questions are disputed or subject to different assessments in the Member States. What is decisive is whether there is specific and sufficient indication that the level of protection of the Charter applicable to the specific context might be compromised by the exclusive application of German fundamental rights. In the absence of such indication, there is no need to decide on the prospective question of whether and to what extent the Charter, under its Art. 51(1) first sentence, is even applicable in the specific constellation.

c) If it is concluded that German fundamental rights exceptionally do not simultaneously ensure the level of protection of the Charter, the corresponding rights of the Charter must be included in the review. In the event that this gives rise to unresolved questions regarding the Charter's interpretation, the Federal Constitutional Court will request a preliminary ruling from the Court of Justice of the European Union pursuant to Art. 267(3) of the Treaty on the Functioning of the European Union (TFEU). If, however, the questions at issue are so obvious as to leave no scope for any reasonable doubt based on the case-law of the Court of Justice, or previous decisions of the Court of Justice have already dealt with them (cf. CJEU, Judgment of 6 October 1982, Cilfit, C-283/81, EU:C:1982:335, para. 14; BVerfGE 140, 317 <376 para. 125>; 142, 74 <115 para. 123>) and only the matter of their specific application remains, it is for the Federal Constitutional Court to incorporate the EU fundamental rights in its review, and in principle also to give effect to them (cf. in this respect – including remaining possibilities for review reserved by the Federal Constitutional Court – BVerfG, Order also issued today - 1 BvR 276/17 -, paras. 42 *et seq*., 50 *et seq*.). 72

5. In primarily relying on the fundamental rights of the Basic Law, alongside those of the Charter, as the applicable standard of review, the Federal Constitutional Court does not call into question the direct applicability of the Charter of Fundamental Rights – as far as its scope of application is concerned (Art. 51(1) first sentence of the Charter). Accordingly, under Art. 267(2) TFEU, the ordinary courts may refer any question on the interpretation of EU law arising in this context to the Court of Justice (cf. BVerfG, Order also issued today - 1 BvR 276/17 -, para. 76). This applies without prejudice to the obligation incumbent upon the ordinary courts to also give effect to the fundamental rights of the Basic Law pursuant to Arts. 1(3) and 20(3) GG where EU law affords Member States latitude. As regards the substantive relationship between German fundamental rights and EU fundamental rights, the principles set out above apply (see paras. 49 *et seq.*, 60 *et seq.,* 63 *et seq.* above). 73

6. Given these principles, there is no doubt that the legal dispute at hand must be assessed on the basis of the fundamental rights of the Basic Law. The underlying legal dispute must be decided on the basis of §§ 823 and 1004 of the Civil Code (*Bürgerliches Gesetzbuch* – BGB), applied *mutatis mutandis*. It is true that this dispute does fall within the broader scope of application of EU law, at least in general, 74

as it was initially governed by the former Directive 95/46/EC, now replaced by the General Data Protection Regulation. However, the application of the provisions in the case at hand falls within an area of law in respect of which EU law affords Member States legislative latitude, both as the law currently stands and as it stood in the past (cf. Art. 9 Directive 95/46/EC, Art. 85 GDPR – so-called media privilege; see para. 11 *et seq*. above). Ultimately, the reference to specific fundamental rights in Art. 9 of Directive 95/46/EC does not result in fundamental rights requirements that specifically restrict Member States' legislative latitude (see para. 55 *et seq*. above regarding the presumption that the fundamental rights of the Basic Law simultaneously ensure the Charter's level of fundamental rights protection). Notwithstanding the question whether the design and application of domestic law in the context of media privilege must also be considered an implementation of EU law pursuant to Art. 51(1) first sentence of the Charter, and whether the fundamental rights of the Charter therefore also apply, the Federal Constitutional Court thus will review the legal dispute at hand – as it has always done in similar cases – primarily on the basis of the fundamental rights of the Basic Law.

II.

The constitutional complaint concerns the protection of fundamental rights in relations between private actors. In such relations, fundamental rights have indirect horizontal effects (*mittelbare Drittwirkung*) (see 1. below). In respect of the complainant, the review must take into account his general right of personality (Art. 2(1) in conjunction with Art. 1(1) GG) in its general manifestation as the right protecting against statements affecting one´s person (see 2. below); in respect of the defendant in the ordinary court proceedings, the review must take into account freedom of expression and freedom of the press (Art. 5(1) first sentence and (2) GG) (see 3. below). 75

1. The complainant challenges a private law decision rendered in a legal dispute between the complainant and the media outlet he sued. Fundamental rights have a bearing on such disputes between private actors by way of indirect horizontal effects. While fundamental rights do not generally create direct obligations between private actors, they do, however, permeate legal relationships under private law; it is thus incumbent upon the ordinary courts to give effect to fundamental rights in the interpretation of ordinary law, in particular by means of private law provisions containing general clauses and indeterminate legal concepts (*unbestimmte Rechtsbegriffe*). The effect of the decisions on constitutional values enshrined in fundamental rights thus comes into play and, in the form of "guidelines", permeates private law. In this context, fundamental rights do not serve the purpose of consistently keeping freedom-restricting interferences to a minimum; rather, they are to be developed as fundamental values informing the balancing of the freedoms of equally entitled rights holders. The freedom afforded one rights holder must be reconciled with the freedom afforded another. For this purpose, conflicting fundamental rights positions must be considered in terms of how they interact and must be balanced in accordance with the principle of achieving maximum equilibrium between conflicting fundamental rights of equal 76

weight (*Grundsatz der praktischen Konkordanz*), which requires that the fundamental rights of all persons concerned be given effect to the broadest possible extent (cf. BVerfGE 7, 198 <204 *et seq*.>; 148, 267 <280 para. 32> with further references).

The extent to which fundamental rights indirectly permeate private law is subject to a balancing that takes into consideration the circumstances of the individual case. It is important that sufficient effect be given to the decisions on constitutional values underlying fundamental rights. In particular, the inevitability of certain situations, the disparity between opposing parties, the societal significance of certain services, or the social position of power held by one of the parties may all play a role in this balancing (cf. BVerfGE 89, 214 <232 *et seq*.>; 128, 226 <249 and 250>; 148, 267 <280 and 281 para. 33>). 77

In principle, the interpretation and application of civil law falls to the ordinary courts. It is generally not for the Federal Constitutional Court to direct the civil courts as regards the outcome of their decisions (cf. BVerfGE 129, 78 <102>). However, when interpreting and applying civil law provisions, the competent courts must be guided by the fundamental rights concerned to ensure that the values enshrined in them are upheld when applying the law (cf. BVerfGE 7, 198 <205 *et seq*.>; 85, 1 <13>; 114, 339 <348>; established case-law). 78

2. In respect of the complainant, the balancing must take into account his general right of personality following from Art. 2(1) in conjunction with Art. 1(1) GG in its manifestation as a right protecting against statements affecting one´s person that has been developed by the courts (see a) below). This manifestation is to be distinguished from the right to informational self-determination, which constitutes another separate manifestation of the general right of personality that also affects private law (see b) below). However, the right to informational self-determination is not relevant here (see c) below). 79

a) The general right of personality protects the free development of one's personality; in particular, it also affords protection against media reporting and the dissemination of information relating to one's person, where these are capable of severely impairing the free development of one's personality. Notably, it guarantees protection against statements which could tarnish a person's reputation, particularly their public image (cf. BVerfGE 114, 339 <346>). This Court has held that different manifestations arise from this fundamental right, including the protection of an inviolable core of private life, the guarantee of the private sphere, the right to one's own image or speech and the right to determine the portrayal of one's person, the right to social recognition and to personal honour (cf. BVerfGE 27, 1 <6>; 27, 344 <350 and 351>; 32, 373 <379>; 34, 238 <245 and 246>; 47, 46 <73>; 54, 148 <153 and 154>; 99, 185 <193 and 194>; 101, 361 <384>; 106, 28 <39>; 114, 339 <346>; 120, 180 <198>). Yet these protective contents are not understood as exhaustive guarantees, distinct from one another; rather, they are to be understood as manifestations that must be worked out in accordance with the specific need for protection in each indi- 80

vidual case (cf. BVerfGE 54, 148 <153 and 154>; 65, 1 <41>).

This case-law was mainly developed in respect of constellations involving indirect horizontal effects, guided by the requirement of achieving maximum equilibrium between conflicting fundamental rights of equal weight. Therefore, the relevant manifestations of the protection of the general right of personality are always determined in each individual case with due regard to the fundamental rights of third parties. Thus, the determination of the protection this right affords and the balancing with conflicting freedoms go hand in hand. The protection afforded by the general right of personality is thus flexible and relativised by viewing a person in the context of their social relationships (cf. BVerfGE 101, 361 <380>; 141, 186 <202 para. 32>; 147, 1 <19 para. 38>; established case-law […]). 81

It follows that the general right of personality does not confer upon the individual an exclusive right to determine the portrayal of their person in all respects. It does, however, aim to safeguard the basic conditions enabling the individual to develop and protect their individuality in a self-determined manner (cf. BVerfGE 35, 202 <220>; 79, 256 <268>; 90, 263 <270>; 117, 202 <225>; 141, 186 <201 para. 32>; 147, 1 <19 para. 38>). Thus, from its inception, this right protects the right of the individual to decide themselves whether, when and how they enter the public sphere. Accordingly, the general right of personality in principle affords protection against the covert interception of communications, against the dissemination of photos from one's private life or against statements being falsely attributed to one's person (cf. BVerfGE 34, 269 <282 and 283>; 54, 148 <154>; 101, 361 <382>; 120, 180 <199>). Different burdens of justification apply in view of the tension between protection and freedom with respect to the question of which information, accessible to third parties or the public, may be further communicated in society. The respective burden of justification depends on the constellation at issue. In principle, the case-law distinguishes in particular between the spoken or written dissemination of true facts, which is generally permissible, on the one hand, and the dissemination of images, which generally requires justification, on the other (cf. BVerfGE 101, 361 <381>; 120, 180 <197 and 198>; established case-law). However, this is only an initial point of departure from which further diverse – both in terms of procedure and content – balancing rules follow, which are designed to reach a differentiated determination of the specific need for protection and to most adequately take this need into account. Ultimately, there is thus no general rule on which interest takes precedence in the balancing; rather, a differentiated balance must be struck between the presumption of freedom and the right to protection in the individual case. 82

b) The right to informational self-determination is a separate manifestation of the general right of personality (see aa) below). This right, too, has a bearing in principle on the relationship between private actors (see bb) below). Under the principle of indirect horizontal effects, the decisions on constitutional values enshrined in this right permeate private law and must be balanced against the fundamental rights of third parties. In this respect, its effects differ from those arising when it is invoked directly 83

vis-à-vis the state (see cc) below). In relation to the protections against statements affecting one´s person deriving from the general right of personality, the right to informational self-determination does not constitute an all-encompassing guarantee of protection; rather, it has a separate content that must be distinguished from those protections (see dd) below).

aa) According to established case-law, a distinct manifestation of the general right of personality is the right to informational self-determination (cf. BVerfGE 65, 1 <42>; 78, 77 <84>; 118, 168 <184>; established case-law). In the context of modern data processing, the free development of one's personality requires that the individual be protected against the unlimited collection, storage, use and sharing of their personal data. This fundamental right confers upon the individual the authority to, in principle, decide themselves on the disclosure and use of their personal data (cf. BVerfGE 65, 1 <42 and 43>; 120, 274 <312>). If individuals cannot, with sufficient certainty, determine what kind of personal information is known in certain areas of their social environment, and if it is difficult to ascertain what kind of information potential communication partners are privy to, this could greatly impede their freedom to make self-determined plans or decisions (BVerfGE 65, 1 <43>). 84

bb) Initially, this Court developed the right to informational self-determination in its case-law as a right protecting against data collection and processing measures carried out by the state and its authorities (cf., e.g., BVerfGE 65, 1 <42 and 43>; 113, 29 <46>; 118, 168 <184>; 133, 277 <320 *et seq*. para. 105 *et seq*.>; 141, 220 <264 and 265 paras. 91 and 92>; 150, 244 <263 and 264 para. 37>). There is no reason, however, why the protection of fundamental rights should not also be extended, in accordance with general rules, to the relationship between private actors, and thus give effect to such protection in the context of private law disputes via indirect horizontal effects. This applies, firstly, to the question under what conditions what types of data must be disclosed in the context of private law obligations (cf. BVerfGE 84, 192 <194>). Yet it also applies to the conditions on when personal data may be processed and used by private third parties, and to what ends […]. The impact of the technical possibilities of data processing, too, is becoming increasingly important in the relationship between private actors. In all aspects of life, basic services for the general public are increasingly provided by private companies – often with a strong market position – on the basis of comprehensive personal data collection and data processing measures; these companies play a decisive role in forming public opinion, providing or denying opportunities, allowing participation in social life and basic activities of daily life. It is hard for individuals to avoid disclosing personal data to companies on a large scale if they do not want to be excluded from these basic services. Given that the data can be manipulated, reproduced and disseminated virtually without limit in terms of place and time and that the data can be recombined in unforeseen ways through opaque processing measures by means of incomprehensible algorithms, individuals may become caught in extensive dependencies or severe contractual obligations. Thus, these developments can give rise to major risks to the development of 85

one's personality, which the right to informational self-determination serves to counteract.

cc) The right to informational self-determination has a bearing on the relationships between private actors by way of indirect horizontal effects. As a decision on constitutional values enshrined in this right, and as a "guideline", it thus permeates private law (see paras. 76 and 77 above). In this respect, its effects differ from the direct protection it affords vis-à-vis the state, where – as a defensive right against state interference – it is determined by the asymmetry of the rule of law, under which citizens are free, whereas the state is subject to limitations. Based on the state's duty to generally justify its actions, the right to informational self-determination, as a defensive right against state interference, ties the constitutional requirements for data processing to a formalised differentiation of the individual steps of data collection and processing, which amount to separate interferences; these interferences then require a sufficiently specific statutory basis that restricts processing measures to specific purposes, and that can, and must, be reviewed as to its adherence to proportionality requirements. 86

By contrast, the right to informational self-determination, as a decision on values enshrined in the Constitution concerning the relationships between private actors, seeks to reconcile conflicting fundamental rights from the outset. In this respect, this right must be balanced against the freedom to gather, process and use information for one's own purposes, including for changing purposes. Unlike the standards applicable vis-à-vis the state, the requirements and burden of justification applicable to relationships between private actors cannot be determined in the abstract but are contingent upon a balancing to assess the need for protection arising between private actors in the various case constellations, which are frequently multipolar. As is the case with the right to determine the portrayal of one's person, the right to informational self-determination does not confer upon the individual a general, let alone an unconditional, right to self-determination regarding the use of their data. It does, however, allow the individual the possibility of influencing, in a differentiated manner, the context and manner in which their data is accessible to and can be used by others. Thus, it guarantees the individual substantial influence in deciding what information is attributed to their person (cf. similarly BVerfGE 120, 180 <198>). 87

The permeating effect on private law of the decisions on constitutional values enshrined in this fundamental right does not mean that the requirements this right entails are always less far-reaching or less strict than the ones it entails in its function as a direct right against state interference. Depending on the circumstances, especially where private companies take on a position that is so dominant as to be similar to the state's position, or where they provide the framework for public communication themselves, the binding effect of the fundamental right on private actors can ultimately be close, or even equal to, its binding effect on the state (cf. BVerfGE 128, 226 <249 and 250>). In this respect, strict requirements regarding the structuring of data processing as well as linking and limiting it to a specific purpose – especially in com- 88

bination with requirements to obtain consent – can constitute suitable, and possibly constitutionally required, means for protecting informational self-determination.

dd) In the case-law, the right to informational self-determination was developed as a separate manifestation of the general right of personality, and the protective contents it guarantees are distinct from those of other manifestations, even where the decisions on constitutional values underlying it permeate private law. Thus, it does not constitute a comprehensive right to protection against any and all use of information that would cover the other manifestations of this fundamental right and unify them; rather, it does not bear on the value decisions and balancing rules of these other manifestations. 89

Given that the right to informational self-determination aims to afford protection against the risks arising from novel possibilities of data processing (cf. BVerfGE 65, 1 <42>), it must primarily be understood as a guarantee that – besides affording protection against the unintended disclosure of data in private law relationships (cf. BVerfGE 84, 192 <194>) – particularly protects against opaque data processing and use by private actors. It affords protection against third parties appropriating certain data on individuals and instrumentalising it in opaque ways in order to attribute to those individuals personal characteristics, types or profiles over which they have no control but which significantly bear on the free development of their personality and equal participation in society. The contents of this right are receptive to new developments, allowing it to potentially extend to further developments in information processing that pose risks to one's personality. 90

This is to be distinguished from the protection against the dissemination of media reports and information relating to one's person as a result of communication processes. In such cases, the need for protection does not arise from third parties making opaque use of an individual's personal data to attribute personal characteristics or personality profiles, but from the tangible dissemination of certain information in the public sphere. In this context, risks to the free development of one's personality primarily result from the type and contents of the publication itself. The general right of personality in its manifestation as a right protecting against statements affecting one´s person affords protection against such risks, whereas the right to informational self-determination is not relevant here. While the way in which information was obtained can be decisive for the protection afforded by the right protecting against statements affecting one´s person, it is only relevant as a preliminary question in the assessment of how a certain statement is subsequently handled and thus how a person's image is conveyed to the public. 91

c) According to the distinguishing carried out above, the right to informational self-determination is not the standard of constitutional review applicable to the legal dispute at hand; rather, it is the protection afforded by the general right of personality in its manifestation as a right protecting against statements affecting personal honour that applies. The complainant does not challenge any obligation to disclose data or 92

the opaque use of his data, but rather articles about him that serve to inform the public and are readily accessible to him, too. […]

3. On the part of the defendant in the ordinary court proceedings, the balancing must take into account the relevant fundamental rights of freedom of expression and freedom of the press. 93

The dissemination of articles covering events of public life is subject to freedom of expression under Art. 5(1) first sentence GG; it protects the dissemination of opinions and facts regardless of their form or the means of communication (cf. BVerfGE 85, 1 <12 and 13>). At the same time, freedom of the press under Art. 5(1) second sentence GG is affected. Beyond the freedom to express opinions, this fundamental right also protects the institutional independence of the press. It spans from the obtaining of information to its dissemination (cf. BVerfGE 10, 118 <121>; 62, 230 <243>; established case-law). This also includes the decision of media outlets to make past press articles permanently available to the public in archives. More than being simply about the publication of the contents of an article, this constitutes an important independent decision by a media outlet on the form in which it disseminates its products, and thus on both the effects of its products as well as its own visibility. 94

By contrast, freedom of broadcasting under Art. 5(1) second sentence GG is not affected. Contrary to the views of some legal scholars […], the dissemination of information is not automatically covered by freedom of broadcasting simply because it is carried out by means of electronic information or communication systems […]. […] 95

III.

The conflicting fundamental rights must be balanced against one another. Such a balancing requires a determination of their respective guaranteed contents. In this regard, particular consideration must be given to the realities of Internet communication. 96

1. The general right of personality affords protection against the dissemination of publications tarnishing the reputation of individuals in a manner that poses risks to the development of their personality. This also applies in respect of the coverage of crimes by the press. Conversely, one of the tasks of the press is to cover crimes and those committing them (cf. BVerfGE 35, 202 <230 *et seq*.>). Therefore, whether individuals enjoy a right to protection is determined by the specific conditions of the reporting, such as its type, extent and circulation. Time in particular is a significant aspect to be considered, too. 97

a) There is nothing novel about the significance of the time of publication for the constitutional review of the press coverage of crimes. With regard to current media coverage of crime, the case-law generally accords precedence to the interest in obtaining information and, in principle, finds it permissible that news coverage identifies the offender, at least in cases where a conviction has become final (cf. BVerfGE 35, 202 <231 *et seq*.>); at the same time, the applicable case-law has emphasised that 98

the interest in media reporting changes the more time has passed since the crime was committed. The interest justifying such media reporting changes from an interest that is focussed on the crime and the offender to an interest in analysing the conditions and consequences of the crime (cf. BVerfGE 35, 202 <231>). When the interest of the public in obtaining current information on the crime has been satisfied, the "right to be left alone" of the person affected gains significance (cf. BVerfGE 35, 202 <233>). It is impossible to determine a general rule stating after how many months or years one would have to draw the line between news coverage, which is in principle permissible, and a later portrayal or discussion, which is impermissible. The decisive criterion is whether the respective coverage might have a significantly new or an added adverse effect on the offender (cf. BVerfGE 35, 202 <234>). In this respect, the offender's interest in social reintegration can be a particularly significant benchmark.

[…] 99

These standards are also set out in the case-law of the European Court of Human Rights. In order to assess the weight of interference of a publication, the European Court of Human Rights, too, expressly considers the time of publication, posing the question whether the dissemination of reports relating to a specific person is in the public interest at the time when the reports are published. In this respect, it also takes into consideration whether an offender seeks to reintegrate into society after release from prison (cf. ECtHR, Österreichischer Rundfunk v. Austria, Decision of 25 May 2004, no. 57597/00). 100

b) The present day realities of information technology and the dissemination of information on the Internet add a new legal dimension to the requirement that information be considered in the context of time. 101

aa) Whereas the earlier case-law of the Federal Constitutional Court addressed the question whether past events may be revisited through new coverage, the fundamental problem today is that information is available in the long term on the Internet and on storage media. In the past, information disseminated solely in print media and radio broadcasts was accessible to the public only for a limited period of time beyond which it was largely forgotten. Today, however, information – once it is digitalised and published online – remains available in the long term. The lingering effects of information over time are no longer limited to a fleeting recollection in public discourse; rather, the information can be directly and permanently retrieved by everyone. 102

bb) Moreover, it can be retrieved at any time and can be combined with other data. For affected persons, this considerably changes the significance of the coverage relating to them. At present, such information can be obtained by complete strangers at any time and without specific reason; it can become the subject of online discussions by groups communicating via the Internet, regardless whether it concerns issues relevant to the public; it can be taken out of context and presented in a new narrative; and it can be combined with other information to create partial or complete personal- 103

ity profiles, with name-related searches via search engines being widely used for this purpose. This results in far-reaching consequences for public communication processes, which fundamentally change the conditions for the free development of one's personality […].

cc) It is not for constitutional law to halt such trends as a whole or to neutralise any advantages and disadvantages of the consequences they entail. However, where such trends give rise to specific risks to the free development of one's personality, this must be taken into consideration when interpreting and applying the Basic Law. The unlimited availability of information on the Internet warrants such consideration. 104

(1) Freedom involves forming, developing and changing one's personal beliefs and behaviour in interaction with others on the basis of communication in society. This requires a legal framework that allows the individual to exercise their freedom without intimidation, and offers them the chance to move on from errors and mistakes. Thus, the legal order must protect the individual against the risk of being indefinitely confronted in public with their past opinions, statements or actions. Only when matters are allowed to stay in the past do individuals have a chance at a new beginning in freedom, because society then forgets past events. The possibility for matters to be forgotten forms part of the temporal dimension of freedom. This applies in particular with regard to the objective of reintegrating offenders. 105

Legal scholars also acknowledge that to safeguard the development of one's personality such a need for protection exists; figuratively, it is also called the "right to be forgotten" ([…] see also Art. 17 GDPR). This need for protection is also recognised by the European courts. Thus, the European Court of Human Rights acknowledges the offender's interest in no longer being confronted with their acts after a certain period of time has elapsed, with a view to their reintegration in society, which it expressly considers a human rights issue (cf. ECtHR, M. L. and W. W. v. Germany, Judgment of 28 June 2018, nos. 60798/10 and 65599/10, § 100). Similarly, the Court of Justice of the European Union holds that in view of Arts. 7 and 8 of the Charter and having regard to the sensitivity of the information in question for their private life or their commercial reputation, affected persons can, under certain circumstances, request that certain events no longer be linked to their name (cf. CJEU, Judgment of 13 May 2014, Google Spain, C-131/12, EU:C:2014:317, para. 98; Judgment of 9 March 2017, Manni, C-398/15, EU:C:2017:197, para. 63; Judgment of 24 September 2019, GC and Others, C-136/17, EU:C:2019:773, para. 77). The inclusion of time as a factor in the assessment of the constitutional requirements for the dissemination of information has arisen as a development resulting from the exchange about fundamental rights in Europe. 106

(2) It must be noted, however, that the general right of personality does not confer upon the individual a "right to be forgotten" in a strict sense, given that it does not grant the individual an exclusive right to decide what information about them is to be "forgotten". One's personality is also formed in communication processes and thus in 107

interaction with the free judgment of third parties and of the public to a greater or lesser extent. It is not for the individual to decide unilaterally what information about them is to be remembered as interesting, admirable, offensive or reprehensible. The general right of personality does not encompass a right to request that all information relating to one's person that is disseminated in the context of communication processes be deleted from the Internet. In particular, the individual does not have a right to filter all publicly accessible information about them based on their free discretion and own preferences, allowing them to restrict such information to aspects that they themselves regard as relevant or appropriate to the self-perceived image of their personality. The Basic Law certainly does not call into question that a permanent examination of crimes and offenders is permissible in cases where the offenders are public persons with an impact on the self-image of the community as a whole. The general right of personality does not afford protection against events being remembered in a historically responsible manner.

(3) Included in such a balance, the effective protection of the general right of personality is not only significant to individuals, but is also in the public interest. Where individuals can be confronted with their social activities, unusual personal traits, unpopular views or errors and transgressions at any time and these may be used to agitate the public, this not only impairs their possibilities of personal development, but also the common good. This is because self-determination over time is a fundamental prerequisite for the functioning of a free and democratic society which relies on the agency and participation of its citizens. Individuals can only be expected to participate in the state and in society if they are afforded sufficient protection in this respect. This applies not only to the right to informational self-determination (cf. BVerfGE 65, 1 <43>), but also more generally to the general right of personality. 108

dd) Therefore, when assessing and weighing the constitutional significance of reports relating to one's person, their effects must also be assessed in their temporal dimension. It is necessary to consider the circumstances of the individual case, which, in addition to other factors, include the time passed since the events in question occurred. Such an assessment can adhere to previous case-law (cf. BVerfGE 35, 202 <218 *et seq*.>). Yet it is not sufficient that the publication of a piece of information was initially justified; rather, its dissemination must be justifiable at any point in time during which it is accessible. Even where reporting was initially permissible, its later dissemination may become impermissible – just as it can become permissible again when new circumstances arise. 109

2. At the same time, the balancing must give appropriate consideration to the protective guarantees of freedom of expression and freedom of the press. 110

a) Art. 5(1) first sentence GG protects the free reporting on events that are of public significance, which generally includes providing complete information to the public on crimes and the events that led to crimes being committed, including information on the offender (cf. BVerfGE 35, 202 <230>). Limiting media reporting to anonymised 111

information substantially restricts the public's possibilities to obtain information, and requires justification (cf. BVerfGE 119, 309 <326>). These protective contents are also confirmed in the case-law of the European Court of Human Rights. According to this case-law, the inclusion of individualised information in a report on crime is an important aspect of the press's work. Requirements arising from the protection of one's personality must not be designed in such a way that the press is discouraged from publishing individualised reporting (cf. ECtHR, M. L. and W. W. v. Germany, Judgment of 28 June 2018, nos. 60798/10 and 65599/10, §§ 104 and 105; on the significance of individualised coverage cf. also ECtHR, F. v. Germany, Judgment of 19 October 2017, no. 71233/13, § 37).

b) As regards the freedom of the press protected by Art. 5(1) second sentence GG, the balancing must take into account the right of the press to make its own decisions on what to report, when, for how long, and in what manner (cf. BVerfGE 101, 361 <389 and 390>; 120, 180 <196 and 197>; established case-law). The possibility of archiving unaltered press reports in their entirety, retaining them as reflections of contemporary history, is an important element of this freedom. In this respect, the contents of freedom of the press, too, must be assessed in light of the developments in information technology. Given that they are ubiquitous and available at any time, articles available on the Internet are of great importance for the press – especially as a supplement to print versions, which, on their own, can no longer satisfy the public interest in obtaining information and cannot financially sustain a media outlet. 112

Online archives do not merely serve the interests of media outlets, but are also in the public interest. The general availability of information on the Internet opens up participation in knowledge communication to a broader circle of people and creates new opportunities for citizens to convey and obtain information, including across borders. Online press archives provide easy access to information and are important resources for journalistic research and for research on contemporary history. In this respect, there is considerable interest in archives providing complete and accurate information. Such archives constitute an important source for education and historical research as well as for public debate in a democracy (cf. also, in this regard, ECtHR, M. L. and W. W. v. Germany, Judgment of 28 June 2018, nos. 60798/10 and 65599/10, § 90 with reference to ECtHR, Times Newspapers Ltd v. the United Kingdom, Judgment of 10 March 2009, nos. 3002/03 and 23676/03, §§ 27 and 45 as well as ECtHR, *W*ęgrzynowski and Smolczewski v. Poland, Judgment of 16 July 2013, no. 33846/07, § 59). 113

IV.

The scope of the rights to protection against the dissemination of press reports is determined in the individual case in a balancing of the conflicting fundamental rights with due consideration to the specific circumstances. Having regard to the principles developed in the case-law, such a balancing must take into account the specific need for protection, and in particular assess the circumstances surrounding and the sub- 114

ject matter of a publication, as well as its form, type and reach. This includes both its dissemination on the Internet and the significance of the reporting over time. In this balancing, the different factors are generally considered in relation to one another.

The proceedings at hand are notable in that the initial lawfulness of the reporting is not disputed. […] The proceedings only concern the question whether an article that was lawful when it was first published may be further disseminated even though many years have passed and the circumstances have therefore changed. Thus, what is at issue in these proceedings is the significance of the passage of time for the further dissemination of the articles in question. 115

This requires – as per usual – a comprehensive balancing between the conflicting fundamental rights of the individual case, which primarily falls to the ordinary courts. Yet such a balancing raises particular questions. Procedural requirements apply for determining the constellations in which changes in circumstances resulting from the passage of time must be taken into account (see 1. below). Moreover, there are substantive criteria for assessing the increasing passage of time between the initial publication of information and its further dissemination (see 2. below). Finally, various other forms of protection against the further dissemination of old articles on the Internet must be taken into account in the balancing (see 3. below). 116

1. Firstly, a balance between the interests of a media outlet as the content provider responsible for online publication and the interests of affected persons must be found in respect of when, in procedural terms, new review obligations arise for the content provider. 117

In principle, the press is responsible for the dissemination of its articles and must review their lawfulness when publishing them. Given that uploading articles to the Internet results in their further dissemination, the press remains responsible for the lawfulness of its articles, including when the relevant circumstances change with the passage of time. However, this cannot give rise to an obligation for the press to regularly review the continued lawfulness of any articles made available online on its own initiative. Such a proactive review obligation would put pressure on media outlets to either omit individualised elements in their reporting or to refrain from keeping such articles in their online archives altogether, which would lead to media outlets no longer fulfilling an important aspect of their role of providing information (cf. […] ECtHR, M. L. and W. W. v. Germany, Judgment of 28 June 2018, nos. 60798/10 and 65599/10, § 104). This would be incompatible with freedom of expression and freedom of the press. 118

Therefore, a media outlet may assume that an article that was initially lawful may be made available to the public in an online archive unless affected persons challenge its continued publication in a qualified manner. An obligation on the part of the press to take protective measures is only reasonable (*zumutbar*) if affected persons notify the media outlet and specifically demonstrate a need for protection. This is also a reasonable requirement for affected persons; it allows them to assert in which re- 119

spects they are adversely affected in a plausible manner, thus setting out the framework for review by the media outlet.

2. If publication was initially lawful, and protection is claimed at a later date, the significance of the passage of time must be assessed in consideration of the specific need for protection of affected persons, which must be balanced against conflicting fundamental rights and the importance of the information in question for the general public. 120

a) Key aspects in this respect are the effects and the subject matter of the article in question. The more the dissemination of news articles on past events impairs the private life of affected persons and their opportunities for personal development as such, the greater the weight that can be accorded to their claim for protection. This is closely related to the subject matter of the article and the reasons for publishing it. The long-term availability of articles covering someone's conduct in the social sphere may be accorded more weight than the availability of articles merely covering private conduct or misconduct that was deliberately not displayed openly. In particular, the public interest in the continued availability of the information is significant in this respect. 121

b) Furthermore, it is also important to consider to what extent the events covered in the article in question subsequently give rise to other related occurrences. Past events are more likely to remain significant in the long term if they form part of a sequence of socio-political or commercial activities or gain new relevance through subsequent occurrences than if they are unrelated to other occurrences. 122

Thus, it may have to be considered if and to what extent affected persons have contributed to keeping alive interest in the events and in their person in the meantime. Where someone has unnecessarily sought public attention and revived public interest in the original articles, their interest in not being confronted with the original news articles may be accorded lower weight. Thus, the chance at being forgotten also requires conduct reflecting the "wish to be forgotten". 123

c) The weight of the burden will also depend on the specific circumstances surrounding the communication of the information on the Internet. For instance, it makes a difference whether an event that occurred a long time ago is covered in a personal blog post aiming to scandalise or whether such an event is covered on a review site, where old posts are relativised by newer entries and where the availability of information on long ago events may thus still be permissible. What matters is thus the actual burden on affected persons. 124

The burden on affected persons cannot be determined in the abstract merely on the basis that information is somehow available online; rather, it also depends on whether this information actually reaches a larger audience. One factor that may be significant is whether it is featured among the top search results in search engines. Given that the realities of Internet communication are volatile and differ from case to 125

case, there is no objective standard. However, on the Internet, too, the significance of information hinges upon the context in which it is communicated, and its dissemination and visibility varies. It is thus the overall burden from the perspective of affected persons at the time of the judicial decision on their claim for protection that must be assessed – and subsequently balanced against the communication-related freedoms [i.e. freedom of expression, information and the press].

d) It is not possible, however, to take schematic rules on the use, publication and deletion of information from other contexts and apply these to determine whether the passage of time has given rise to a right to protection. […] 126

e) All in all, a decision on the claim for protection invoked by affected persons and based on changes in circumstances resulting from the passage of time requires a new balancing. According to the general rules, this balancing must fully take into account all currently relevant circumstances. This does not call into question the fact that the initial lawfulness of articles may also be a factor to be considered in the balancing. 127

3. In striking a balance between the interests of the media and the interests of affected persons, it must be borne in mind that the type of protection to be granted may vary, with different levels of protection corresponding to the changing relevance of information over time. 128

a) For the question at issue here, on claims for protection against the availability of past media articles in online archives, a solution might be found by beginning with the two extremes of the complete deletion of individualised information on the one hand and the unlimited toleration of the availability of such information on the other, which reflect the interests of the opposing parties. These focus on different elements. 129

The press generally has an interest in the full and unaltered documentation of old articles. This interest is accorded great weight under constitutional law. An obligation to permanently delete or alter articles previously published, possibly also applying to print versions, would be generally incompatible with Art. 5(1) second sentence GG. The importance of complete archives, not only as a basis for communication and agreement in society, but also as a basis for later research, conflicts with the interest of affected persons in subsequently making permanent and substantive changes to such documents (cf. ECtHR, M. L. and W. W. v. Germany, Judgment of 28 June 2018, nos. 60798/10 and 65599/10, § 90 with reference to ECtHR, Times Newspapers Ltd v. the United Kingdom, Judgment of 10 March 2009, nos. 3002/03 and 23676/03, §§ 27 and 45 as well as ECtHR, Węgrzynowski and Smolczewski v. Poland, Judgment of 16 July 2013, no. 33846/07, § 59). In this regard, both the press and the general public have a significant interest in the availability of old articles on the Internet and thus in rendering them directly accessible to the general public (see para. 112 *et seq*. above). Particularly in regard to older articles, an interest in making these available for research must primarily be recognised where such articles provide a reasonable basis for factual research. Making such articles available as general sources of infor- 130

mation relating to the individuals mentioned in them, however, is not justified by a comparable weight.

By contrast, the legitimate interest of affected persons is not so much directed against the availability of initially lawfully published articles for factual research purposes, as against the fact that they are repeatedly confronted with these articles in their daily lives. It is particularly intrusive for affected persons when the old articles can be found via online searches for their name, and thus become known to their personal circle of acquaintances and bear on their social relationships. In comparison, it is less intrusive if such articles only become known to persons who, for particular reasons, are specifically interested in the past events covered in the article. 131

b) These different interests must be taken into account when determining the nature and scope of claims for protection arising after initial publication. In this regard, it must be taken into account to what extent the media outlet operating an online archive disposes of possibilities to ensure the protection of affected persons by influencing access to and the dissemination of old press articles on the Internet. This particularly applies to search engines, which play a key role in determining dissemination on the Internet. 132

aa) According to the statements submitted by the experts in these proceedings, there are considerable possibilities, which are not limited to a permanent deletion of the names of affected persons in the documents in question. For instance, the experts pointed out that the publisher of a website can create sections that cannot be searched by programmes browsing the web (so-called web crawlers), for example by protecting such sections with access codes or by providing instructions to search engine operators. Articles that are stored in these sections of a website are thus in principle not displayed in search results. At the same time, such articles remain accessible online – for instance when the website of the online archive is directly accessed – and can be found using internal search programmes. 133

bb) This suggested solution, however, leads to the entire file – and thus, as a general rule, the article as such – being stored in such a protected section out of reach of web crawlers. Such an approach does not conceal only names. If an online archive uses this option, it must accept that the entire “locked” text will not be found or listed by search engines at all. 134

In order to compensate for this disadvantage, the relevant literature suggests combined solutions that refer the web crawlers used by search engine operators to a site on which the article is available and searchable in principle, but on which the name in question cannot be found – because it was, for instance, deleted or image files were used […]. In that case, searches for the protected name generally will not generate a hit, but searches for other terms related to the event in question will. If users access the site following such a hit, the content provider can redirect the user to the original version of the article so that the full article, including the name, is accessible. Such a layering of two different versions of an article is designed to ensure that 135

searches for a specific name are generally unsuccessful, while searches for the respective subject matter provide access to the unaltered report – including individualised information. This can reduce the burden on affected persons, also when taking into account that other factors can potentially also influence search results.

c) It is not for the Federal Constitutional Court to make a conclusive determination on the technical feasibility of such solutions – which are always in flux – or the results they can attain. Yet ordinary courts must take such solutions into account when balancing conflicting fundamental rights, taking into consideration their practical effectiveness and reasonableness for the media outlet concerned. 136

aa) In order to determine which measures provide what type of protection, a balancing focussing on the sufficiently practical effectiveness of such measures is needed. Thus, such measures cannot generally be held to be unsuitable merely on the grounds that they do not guarantee comprehensive protection or do not rule out hits generated by third-party links to or the mirroring of an article on other websites. In this respect, too, the balancing hinges on an assessment of the remaining burden in the specific case, which must also take into account whether such measures at least reduce the burden, for instance by making affected persons feature less prominently in the list of search results […]. 137

bb) In addition, the ordered measures must be reasonable (*zumutbar*) for the media outlets concerned. In this regard, it must be ensured that the measures are not so cumbersome that they might altogether discourage media outlets from publishing articles relating to one's person or from making online archives available (see para. 111 above). Yet this does not mean that protective measures may not at all entail technical efforts or costs. Rather, it is only logical that new possibilities for disseminating information may also give rise to new protection requirements vis-à-vis affected persons, which will involve certain burdens. 138

It cannot be argued that such obligations on the part of the media are generally unreasonable because posting articles on the Internet about past events only poses a risk to the development of one's personality once search engines are involved and that these risks should therefore only be attributed to the search engines. When a media outlet posts its articles on a site that is generally accessible, it is also responsible itself for the possibilities of access this entails. It is a desired effect of posting articles on the Internet that these are then accessed, including via search engines, and the respective media outlet must assume responsibility in this regard. Measures may be unreasonable in the individual case if they do not yield the desired result – for instance because an article has already been taken up by many other sites – or if other means can readily provide more effective protection. However, this does not call into question that measures protecting affected persons against old articles about them being found through searches for their name are generally reasonable if these persons have a special need for protection. 139

To what extent the nature and implementation of protective measures that may be 140

necessary must be informed by relevant organisational decisions by the respective content provider is a separate issue. It may be possible to allow operators of online archives some influence when deciding between different protection options. What is decisive is that sufficient protection is ultimately afforded.

cc) It is primarily incumbent upon the ordinary courts to decide which detailed requirements operators of online archives must meet to protect persons affected by an article from the burdens that arise over time. The aim is to strike a balance that preserves unrestricted access to the original texts to the greatest extent possible, while also ensuring that where protection is merited in the individual case – especially in relation to name-based searches via search engines – sufficient limitations are put in place. […] 141

Given that technical developments are ongoing and that they entail uncertainties regarding how and to what extent content providers can influence the dissemination of their articles on the Internet in interaction with search engines, it will fall to the ordinary courts to continue to shape effective and reasonable protective measures. Where reasonable, the courts, which have a considerable margin of appreciation in respect of all these measures, can also require the actors to develop new instruments. 142

V.

The decision of the Federal Court of Justice does not fully satisfy these requirements. 143

1. The starting point of the challenged decision is persuasive in that it balances the relevant fundamental rights of the complainant against those of the media outlet. It correctly finds, in accordance with the case-law of the European Court of Human Rights, that the press, when fulfilling its tasks in relation to the coverage of crime, must not generally be limited to anonymised coverage. It is true that, in principle, violations of the legal order and impairments of the legal interests of individuals or of the general public give rise to a recognised interest in obtaining detailed information on the crime or perpetrator; thus, true statements must generally be tolerated, even if they adversely affect the person concerned. The court also rightly takes into consideration that the article was fact-based and concerned a spectacular capital crime and that the trial in question was a significant event of contemporary history, inextricably linked to the complainant’s name and person. 144

2. However, the challenged decision does not sufficiently take into account that the further dissemination of the articles, under the changed circumstances resulting from the passage of time, results in burdens for the complainant. […] 145

a) The court did not sufficiently assess how direct and how far-reaching the complainant’s confrontation with the coverage identifying him is today, nor does it assess to what extent this can be justified given that more than 30 years have passed since the complainant committed the crime and he has served his sentence. 146

The Federal Court of Justice assumed that finding the article requires a targeted search for it […], thereby disregarding the profound changes that the ubiquitous availability, at any time, of information on the Internet entail. Given today's Internet habits, it is highly likely that friends, neighbours and in particular new acquaintances, be it out of superficial interest in obtaining information or for other minor reasons, will enter the complainant's name into a search engine. If the hits they generate relate mainly to his previous crimes, this gives rise to the risk that the way he is perceived in his social environment is lastingly shaped by these crimes. This bears all the more heavily on the complainant given that he has to integrate into a new social environment after having served his long prison sentence. 147

In this respect, the court should also have taken into account that, the factual frequency of name-based searches that it could have ascertained notwithstanding, the permanent threat of the possibility, and the related fear, of being confronted with his past at any time and without prior warning could result in the complainant being cautious of new social contacts, retreating into himself and avoiding the public. The Federal Court of Justice correctly points out that the coverage as such was not sensational, but that it was rather balanced, with a psychological angle. However, it should still have accorded more weight to the fact that the articles were permanently available; given the multi-faceted portrayal of the crime and the comprehensive discussion of the perpetrator's personality, this fact may considerably impede the complainant's reintegration into society after having served his prison sentence, resulting in serious adverse effects on his chance at a new beginning. 148

Furthermore, it must be taken into account that the information about the complainant, unlike information provided by review sites, is not part of a sequence of updated, more current information. According to the findings on which the decision is based, the articles in question are effectively the only top search results listed when the complainant's name is entered into leading search engines; thus, even today, the portrayal of the complainant is still dominated by the particularly serious crimes he committed in 1981 that were highly publicised at the time. 149

b) At the same time, the challenged decision does not accord sufficient weight to the complainant's conduct since his release from prison. Having served a 17-year prison sentence, the complainant was released from prison many years ago. After his release, he did nothing to reignite public attention regarding his case. […] 150

This is different from the cases decided – on the basis of a decision of the Federal Court of Justice – first by the First Chamber of the First Senate of the Federal Constitutional Court and subsequently by the European Court of Human Rights (ECtHR, M. L. and W. W. v. Germany, Judgment of 28 June 2018, nos. 60798/10 and 65599/10). In those cases, two offenders sought protection against publications in an online archive covering a crime they committed; their applications were unsuccessful both at the domestic and the international level. The European Court of Human Rights expressly based its decision on the fact that the complainants went far beyond the mere 151

use of regular legal remedies, but tried all possible and conceivable means, in a public campaign, to lend weight to their applications in public, and even contacted the press themselves. The Court also noted that still even a year before legal protection was sought, numerous news articles on one of the complainants could be found on his defence lawyer's website. In one of the two cases, the articles could only be accessed by subscribers, in another of the three proceedings, they were protected by a paywall and not accessible free of charge. The European Court of Human Rights expressly considered this point, too (cf. ECtHR, M. L. and W. W. v. Germany, Judgment of 28 June 2018, nos. 60798/10 and 65599/10, §§ 98, 108 and 109, 113).

Moreover, it expressly pointed out that the Contracting Parties are afforded a wide margin of discretion (cf. ECtHR, M. L. and W. W. v. Germany, Judgment of 28 June 2018, nos. 60798/10 and 65599/10, § 94), finding that denial of protection is in conformity with human rights, although it is also not required by Art. 10(1) of the Convention. 152

3. Furthermore, given that the general availability of the articles seriously impairs the complainant's rights, the challenged decision fails to address nuanced possibilities for protection and thus a compromise that, as a less restrictive means, may be more reasonable for the defendant than removing the article or altering it by redacting the name. […] It is true that the necessary measures may not be minor. However, it is not ascertainable that they are, from the outset, unreasonable for the media outlet if they remain restricted to a limited number of cases that are as serious as the present case. 153

VI.

It is not relevant in the present case that the Charter of Fundamental Rights may be applicable in addition to the fundamental rights of the Basic Law according to Art. 51(1) first sentence of the Charter and the case-law of the Court of Justice of the European Union. The matter at issue concerns legislation that is not fully harmonised under EU law and that seeks to accommodate fundamental rights diversity (see para. 74 above). There is no indication to suggest that the fundamental rights of the Basic Law do not simultaneously ensure the Charter's level of protection. The examination of the constitutional complaint set out above is based on a balancing of fundamental rights, which – based on the case-law of the European Court of Human Rights – correspond to guarantees of the Convention; in turn, pursuant to Art. 52(3) of the Charter, the Convention also informs the interpretation of the Charter (Arts. 7, 8 and 11 of the Charter). Thus, it can be presumed that the application of the fundamental rights of the Basic Law does not call into question the level of protection of the Charter. 154

D.

In light of the foregoing, the challenged decision is to be reversed and the matter remanded to the Federal Court of Justice. 155

[…] 156

E.

The decision was unanimous. 157

Harbarth Masing Paulus

Baer Britz Ott

Christ Radtke

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 6. November 2019 - 1 BvR 16/13

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