Headnotes

to the Order of the First Senate of 6 November 2019

- 1 BvR 276/17 -

(Right to be forgotten II)

1. **To the extent that fundamental rights of the Basic Law are inapplicable due to the precedence of EU law, the Federal Constitutional Court reviews the domestic application of EU law by German authorities on the basis of EU fundamental rights. By applying this standard of review, the Federal Constitutional Court fulfils its responsibility with regard to European integration under Article 23(1) of the Basic Law.**

2. **Regarding the application of legal provisions that are fully harmonised under EU law, the relevant standard of review does not derive from the fundamental rights of the Basic Law, but solely from EU fundamental rights; this follows from the precedence of application of EU law. This precedence of application is subject, *inter alia*, to the reservation that the fundamental right in question be given sufficiently effective protection through the EU fundamental rights that are applicable instead.**

3. **Where the Federal Constitutional Court applies the Charter of Fundamental Rights of the European Union as the relevant standard of review, it conducts its review in close cooperation with the Court of Justice of the European Union, requesting a preliminary ruling in accordance with Article 267(3) of the Treaty on the Functioning of the European Union where necessary.**

4. **Just like the fundamental rights of the Basic Law, those of the Charter are not limited to protecting citizens vis-à-vis the state, but also afford protection in disputes between private actors. Thus, in such disputes, the parties' conflicting fundamental rights must be reconciled on the basis of the applicable ordinary legislation. When conducting its review, the Federal Constitutional Court – just as when dealing with the fundamental rights of the Basic Law – does not review the application and interpretation of ordinary legislation but only whether the ordinary (non-constitutional) courts gave sufficient effect to the fundamental rights of the Charter and struck a tenable balance.**

5. **Where affected persons request that search engine operators refrain from referencing and displaying links to certain online contents in the list of search results, the necessary balancing must take into account not only the right of personality of affected persons (Articles 7 and 8 of the Charter), but must also consider, in the context of search engine operators' freedom to conduct a business (Article 16 of the Charter), the fundamental rights of the respective content provider as well as Internet users' interest in obtaining information.**

   Insofar as a prohibition of the display of certain search results is ordered on the basis of an examination of the specific contents of an online publication, and the content provider is thus deprived of an important platform for disseminating these contents that would otherwise be available to it, this also constitutes a restriction of the content provider's freedom of expression.

FEDERAL CONSTITUTIONAL COURT

- 1 BvR 276/17 -

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaint

of Ms B...,

- authorised represenatives:…

against the Judgment of the Celle Higher Regional Court (*Oberlandesgericht*) of 29 December 2016 – 13 UF 85/16 –

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:

The constitutional complaint is rejected.

R e a s o n s:

A.

The constitutional complaint concerns a claim for injunctive relief demanding that a search engine operator refrain from displaying a search result that appears when the 1

complainant's full name is entered into the search engine.

I.

[Excerpt from Press Release No. 84/2019]

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

Under the title "The dirty tricks of employers", the NDR uploaded a file containing a transcript of the broadcast to its website. When the complainant's name was typed into Google, the link to this content was displayed among the top search results. After the search engine operator refused the complainant's request to remove the site from the search results, the complainant lodged an action that was later rejected by the Higher Regional Court (*Oberlandesgericht*). In its reasoning, the Higher Regional Court states that the complainant could not request the removal of the relevant links (hereinafter: dereferencing), as she could neither establish a claim under § 35(2) second sentence of the Federal Data Protection Act (former version) (*Bundesdatenschutzgesetz* – BDSG) nor under § 823(1), § 1004 of the Civil Code (*Bürgerliches Gesetzbuch* – BGB) in conjunction with Art. 1(1), Art. 2(1) of the Basic Law (*Grundgesetz* – GG).

[End of excerpt]

1. […] 2-4

2. […] 5-6

3. […] 7-12

4. With her constitutional complaint, the complainant claims a violation of her general right of personality and her right to informational self-determination (Art. 2(1) in conjunction with Art. 1(1) GG). 13

She contends that the title displayed in the search results ("The dirty tricks of employers") was already misleading as she had never used any "dirty tricks" vis-à-vis employees and the *Panorama* segment was based on false assertions made by the former employee. She claims that the search result and the broadcast it links to portrayed her in a very negative light given that her name was associated with the broadcast's title. She further claims that this was capable of disparaging her in her private life. 14

[…] 15-17

5. Providing the backdrop to these proceedings are provisions of EU law. At the time 18

the challenged decision was rendered, Data Protection 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. 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.

II.

Statements concerning the constitutional complaint were submitted by the Federal Government, the Federal Court of Justice (*Bundesgerichtshof*), the Federal Commissioner for Data Protection and Freedom of Information (*Bundesbeauftragte für den Datenschutz und die Informationsfreiheit*), the Hamburg Commissioner for Data Protection and Freedom of Information (*Hamburgische Beauftragte für Datenschutz und Informationsfreiheit*) and Google LLC as the defendant as well as the NDR broadcasting corporation. 19

[…] 20-28

B.

The constitutional complaint is admissible. 29

I.

[…] 30-31

II.

The complainant has standing to bring a constitutional complaint. It is true that the fundamental rights of the Basic Law are not applicable in this case given that the legal dispute in the initial proceedings concerns a matter that is fully harmonised under EU law. However, the complainant can invoke the fundamental rights of the Charter of Fundamental Rights of the European Union. In the constellation under review here, the application of the Charter falls within the jurisdiction of the Federal Constitutional Court. 32

1. As the legal provisions applicable to this legal dispute are fully harmonised under EU law, the Charter of Fundamental Rights of the European Union (hereinafter: the Charter) is in principle the sole standard of review in this case. 33

a) The complainant’s claim for dereferencing pursued in the ordinary court proceedings is governed by data protection law, which is comprehensively harmonised under EU law. This holds true with regard to both the law that was applicable at the time of 34

the ordinary court proceedings and the law that is currently applicable.

aa) At the time the Higher Regional Court rendered its decision, the legal dispute was governed by German legislation implementing the comprehensive and binding standards set by Directive 95/46/EC. 35

(1) At that time, what personal data a search engine was allowed to reference by displaying links following a search request fell within the scope of application of Directive 95/46/EC and was set out in detail in that directive (cf. Arts. 2, 4, 6, 7, 12 and 14 Directive 95/46/EC; cf. CJEU, Judgment of 13 May 2014, Google Spain, C-131/12, EU:C:2014:317, paras. 28, 41, 73 *et seq*.). This question did not fall under the so-called media privilege in respect of which the Member States are afforded legislative latitude pursuant to Art. 9 of Directive 95/46/EC, and thus benefit from derogations from the requirements laid down by the directive (this differs from the constellation discussed in the Order of the First Senate also issued today - 1 BvR 16/13 -). Data processing by the search engine operator cannot be considered data processing for journalistic purposes within the meaning of that provision (cf. CJEU, Judgment of 13 May 2014, Google Spain, C-131/12, EU:C:2014:317, para. 85). 36

(2) Therefore, the directive's substantive requirements in respect of the protection against the processing of personal data apply. In light of the subsequent development of the law, these requirements must in any case be considered fully harmonised under EU law at the time the Higher Regional Court rendered its decision. 37

Of course, the fact that these requirements are only set out in a directive appears, initially, contrary to full harmonisation. Typically, it must be assumed that the EU, when choosing a directive to regulate a matter, does not seek full harmonisation of the matter, but intends to leave the Member States legislative latitude. This assumption is supported by Art. 288(3) of the Treaty on the Functioning of the European Union (TFEU), according to which a directive leaves the Member States the choice of form and method to achieve binding aims, and by Art. 288(2) TFEU, which distinguishes regulations from directives. It is also supported by the principle of subsidiarity under Art. 5(3) of the Treaty on European Union (TEU). Nevertheless, the extent to which a directive is binding ultimately depends on its specific contents. This means that a directive may even fully harmonise certain matters (cf. CJEU, Judgment of 25 April 2002, Commission v France, C-52/00, EU:C:2002:252, para. 16 *et seq*.; Judgment of 24 January 2012, Dominguez, C-282/10, EU:C:2012:33, para. 33 *et seq*.; Judgment of 21 November 2018, Ayubi, C-713/17, EU:C:2018:929, para. 37 *et seq*.; Judgment of 29 July 2019, Funke Medien NRW, C-469/17, EU:C:2019:623, para. 35 *et seq*.; Judgment of 29 July 2019, Pelham and Others, C-476/17, EU:C:2019:624, para. 58 *et seq*.; cf. also Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 118, 79 <95 and 96>). 38

In its established case-law, the Court of Justice of the European Union (CJEU) assumes that Directive 95/46/EC fully harmonises the substantive requirements for da- 39

ta processing. With reference to the recitals and the objective of the directive, the Court of Justice concludes that the harmonisation of the national laws regarding the protection of personal data is not limited to minimal harmonisation, but amounts to harmonisation which is generally complete. According to the Court of Justice of the European Union, the relevant provisions in Arts. 6 and 7 of Directive 95/46/EC are unconditional, exhaustive and restrictive and must be applied consistently throughout the EU. The Member States may neither fall short of nor exceed its requirements (cf. CJEU, Judgment of 20 May 2003, Österreichischer Rundfunk and Others, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, para. 100; Judgment of 6 November 2003, Lindqvist, C-101/01, EU:C:2003:596, para. 95 *et seq*.; Judgment of 16 December 2008, Huber, C-524/06, EU:C:2008:724, paras. 51 and 52; Judgment of 24 November 2011, ASNEF and FECEMD, C-468/10 and C-469/10, EU:C:2011:777, para. 28 *et seq*.; Judgment of 7 November 2013, IPI, C-473/12, EU:C:2013:715, para. 31; Judgment of 19 October 2016, Breyer, C-582/14, EU:C:2016:779, para. 57; Judgment of 29 July 2019, Fashion ID, C-40/17, EU:C:2019:629, paras. 54 and 55). Accordingly, the Court of Justice of the European Union holds that the concept of necessity laid down by Art. 7 lit. e of Directive 95/46/EC, which requires specification, has its own independent meaning in EU law that cannot vary between the Member States (cf. CJEU, Judgment of 16 December 2008, Huber, C-524/06, EU:C:2008:724, para. 52).

Currently, there is no need to decide whether these considerations by themselves are a sufficient basis for assuming that legislation is fully harmonised, or whether such an assumption would require a more solid basis given that the directive also contains indications to the contrary (cf. Recital 9 and Art. 5 of Directive 95/46/EC). In any case, this interpretation of the directive was confirmed through the enactment of the General Data Protection Regulation by the EU legislator as the politically responsible body, thus creating legal certainty. While the General Data Protection Regulation was not yet applicable at the time of the Higher Regional Court decision, it had already been finally adopted and had entered into force pursuant to Art. 99(1) GDPR. In light of the GDPR, the interpretation of the directive as “fully harmonising” the substantive requirements for the processing of personal data can be regarded as sufficiently certain. 40

bb) As the law currently stands, with the GDPR being applicable, it must be assumed all the more that the matter in question is fully harmonised; if the challenged decision were reversed and remanded to the Higher Regional Court, the court would have to observe the GDPR. In enacting the GDPR, the EU chose a regulation to create directly applicable law in all Member States so as to counter fragmentation in the implementation of data protection law across the EU and to better give effect to a consistent level of data protection throughout the EU (cf. Recitals 9 and 10 GDPR). While the GDPR does contain an opening clause on giving shape to the “media privilege” (Art. 85(2) GDPR) and, in various regards, even allows Member States – subject to notification – exemptions on certain points, it is not ascertainable that such 41

opening clauses are relevant to the constellation at hand or that they contradict the objective of the regulation, overriding the fully harmonised level of substantive data protection that the GDPR seeks to ensure.

b) Regarding the application of legal provisions that are fully harmonised under EU law, the relevant standard of review does not derive from German fundamental rights, but solely from EU fundamental rights; this follows from the precedence of application of EU law (see aa) below). The possibilities of review reserved by the Federal Constitutional Court in the event of a general erosion of such protection remain unaffected (see bb) below). 42

aa) It is in line with established case-law that German fundamental rights are not applicable in a review concerning the validity of legislation fully harmonised under EU law (cf. BVerfGE 73, 339 <387>; 102, 147 <162 *et seq*.>; 118, 79 <95 *et seq*.>; 121, 1 <15>; 123, 267 <335>; 125, 260 <306 and 307>; 129, 78 <103>; 129, 186 <199>). The same holds true for the application of legislation specifying such EU law. 43

The application of EU fundamental rights as the standard of review follows from the transfer of sovereign powers to the European Union under Art. 23(1) second sentence GG. Where the EU enacts legislation that is applicable, and must be applied uniformly, throughout the EU, it follows that the fundamental rights protection afforded in this context must be based on uniform standards, too. The Charter of Fundamental Rights of the European Union guarantees such protection of fundamental rights. In such a case, German fundamental rights are not applicable as this would run counter to the objective of harmonisation of the law. While the fundamental rights of the Basic Law can, as a rule, simultaneously ensure the level of protection of the Charter in areas allowing for fundamental rights diversity that are not fully harmonised (cf. BVerfG, Order of the First Senate also issued today - 1 BvR 16/13 -, paras. 50 *et seq*., 55 *et seq*.), in respect of fully harmonised EU legislation, it cannot be assumed that the Basic Law simultaneously ensures such a level of protection. Here, EU law in fact requires that the law be applied uniformly. This prevents, from the outset, Member States from applying their domestic fundamental rights standards because the application of these standards would lead to divergences in the application of fully harmonised legislation. At present, it cannot be assumed that there are fundamental rights standards in the EU that are congruent beyond the common foundation of the European Convention on Human Rights (ECHR), which consolidates different fundamental rights traditions, but does not seek uniformity. It must be noted that the Charter interacts with very diverse legal orders, which also have differing approaches with regard to fundamental rights protection. Such differences already manifest in the external form and the institutional integration of fundamental rights protection. They are also evident in the requirements for restricting fundamental rights as regards the weighing of public interests or the resolving of conflicting value decisions enshrined in different fundamental rights. Finally, they can also be found in the basic principles setting out to what extent and with what intensity judicial review on the basis of fundamental rights is permissible or required. These differences in domestic fundamen- 44

tal rights frameworks reflect factual differences between the Member States resulting from various factors, including country-specific historical experiences.

It cannot be assumed that the Charter, insofar as uniform fundamental rights protection is to apply in all Member States to fully harmonised EU law, corresponds with the Basic Law and is congruent with its guarantees in all details (cf. also BVerfG, Order of the First Senate also issued today - 1 BvR 16/13 -, para. 62). This holds true all the more given that fundamental rights protection in Germany is based on a long tradition of comprehensive case-law on fundamental rights that gives specific shape to the fundamental rights on the basis of the broad procedural powers of the Federal Constitutional Court within the German legal order. An interpretation of fully harmonised EU law in light of the fundamental rights of the Basic Law would thus run the risk of prematurely applying to EU law the standards developed domestically – this would then imply that these standards would also have to apply to the other Member States. 45

Thus, in relation to the legal order under the Basic Law, EU fundamental rights and domestic fundamental rights must be regarded as distinct regimes – irrespective of how other Member States handle this issue. The Charter of Fundamental Rights is the standard for the specific application of fully harmonised EU law by domestic authorities and courts. 46

bb) It is solely on the basis of the recognition of the precedence of application of EU law that the German fundamental rights are not applied as the relevant standard of review (cf. BVerfGE 123, 267 <398 *et seq*.>; 126, 286 <301 and 302>; 129, 78 <99>; 140, 317 <335 *et seq*. para. 37 *et seq*.> with further references); the validity of the fundamental rights of the Basic Law as such remains unaffected. They remain in force as the underlying dormant framework. In its established case-law, the Federal Constitutional Court only recognises the precedence of application of EU law, which rules out a review on the basis of the fundamental rights of the Basic Law, subject to the reservation that the protection afforded by the EU fundamental rights that apply instead must be sufficiently effective (cf. BVerfGE 73, 339 <376, 387>; 102, 147 <162 *et seq*.>; 118, 79 <95>; 129, 186 <199>; established case-law). The Basic Law puts the individual and the individual's fundamental rights at the centre of its order, declares their essence and the core of human dignity to be inviolable (cf. Art. 19(2), Art. 79(3) GG) and also guarantees this protection with regard to the EU Treaties (cf. Art. 23(1) third sentence GG). Therefore, EU law can only prevail over the guarantees afforded by domestic fundamental rights if the protective guarantees of these fundamental rights are upheld in substance. It is thus necessary that the level of protection under the Charter be essentially equivalent to the fundamental rights protection that is regarded as indispensable under the Basic Law and that the Charter guarantee the essence of the fundamental rights in general (cf. BVerfGE 73, 339 <376, 387>; 102, 147 <162 *et seq*.>; 118, 79 <95>; 129, 186 <199>; established case-law). This examination of equivalence of the level of protection must be made on the basis of a general assessment of the respective fundamental rights guarantee in question. 47

As EU law currently stands – most notably with the binding Charter – it must be assumed, in line with established case-law, that these elements are satisfied in principle (cf. BVerfGE 73, 339 <387>; 102, 147 <162 *et seq*.>; 118, 79 <95 *et seq*.>; 129, 186 <199>; established case-law). In this respect, the fundamental rights of the Basic Law only serve as a backup guarantee. A constitutional complaint invoking this backup guarantee is subject to strict substantiation requirements (cf. BVerfGE 102, 147 <164>). 48

The other review options reserved by the Federal Constitutional Court, the review on the basis of the *ultra vires* doctrine (*ultra vires* review) and the review on the basis of constitutional identity (identity review) (cf. BVerfGE 123, 267 <353 and 354>; 126, 286 <302 *et seq*.>; 134, 366 <382 *et seq*. para. 22 *et seq*.>; 140, 317 <336 and 337 paras. 42 and 43>; 142, 123 <194 *et seq*. para. 136 *et seq*.>; 146, 216 <252 *et seq*. para. 52 *et seq*.>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14 *inter alia* -, para. 120 *et seq*.), are not engaged by the proceedings at hand. 49

6. To the extent that the fundamental rights of the Basic Law are inapplicable due to the precedence of EU law, the Federal Constitutional Court reviews the domestic application of EU law by German authorities on the basis of EU fundamental rights (regarding constitutional court review on the basis of the Charter, cf. Constitutional Court of Austria, Judgment of 14 March 2012, U 466/11 *inter alia*, AT:VFGH:2012:U466.2011, sub. 5.5; cf. also Constitutional Court of Belgium, Judgment of 15 March 2018, No. 29/2018, B.9., B.10.5., B.15. *et seq*.; Conseil constitutionnel, Judgment of 26 July 2018, no. 2018-768 DC, paras. 10, 12, 38; Corte costituzionale, Decision of 23 January 2019, no. 20/2019, IT:COST:2019:20, paras. 2.1, 2.3). 50

c) In its past decisions, the Federal Constitutional Court has not yet expressly considered the possibility of directly conducting a review on the basis of EU fundamental rights. In cases where the fundamental rights of the Basic Law were found to be inapplicable due to the precedence of EU law, the Federal Constitutional Court has so far completely refrained from conducting a review of the asserted fundamental rights violations and instead left the review of whether fundamental rights were respected in the relevant case to the ordinary courts in cooperation with the Court of Justice of the European Union. Those decisions of the Federal Constitutional Court directly or indirectly concerned challenges to the validity of EU law. In those cases, the Federal Constitutional Court had to decide whether it can review the validity of certain EU decisions (cf., e.g., BVerfGE 129, 186 <198 and 199> – Investment Subsidies Act –), provisions of EU law (cf., e.g., BVerfGE 73, 339 <374 *et seq*.> – Solange II –; 102, 147 <160 *et seq*.> – The Common Organisation of the Market in Bananas –), or German legal provisions for the domestic implementation of binding EU law (cf., e.g., BVerfGE 118, 79 <95 and 96> with further references). Given that it is only for the Court of Justice of the European Union to annul EU law or declare it void, the Federal Constitutional Court has completely refrained from conducting a review on the basis of fundamental rights in such cases. There is no need to decide whether and to what 51

extent this must be upheld for those constellations.

In the case at hand, however, what is at issue is not the validity or applicability of EU law, but the proper application of fully harmonised EU law in light of the fundamental rights of the Charter, which must be specified in the individual case. The constitutional complaint concerns a decision of a German ordinary court, which must be reviewed as to whether, in applying EU law in line with its role, the court observed the requirements of the Charter that must be met in this case. At least in such cases, the Federal Constitutional Court cannot entirely refrain from conducting a fundamental rights review; rather, it is called upon to ensure fundamental rights protection on the basis of EU fundamental rights. 52

d) The Federal Constitutional Court's competence for conducting a review on the basis of EU fundamental rights follows from Art. 23(1) GG in conjunction with the provisions of the Basic Law concerning the Federal Constitutional Court's role with regard to fundamental rights protection. In conducting a review on the basis of the fundamental rights of the Charter in constitutional complaint proceedings pursuant to Art. 93(1) no. 4a GG where the scope of application of fully harmonised EU law is concerned, the Federal Constitutional Court exercises its responsibility with regard to European integration (*Integrationsverantwortung*) under Art. 23(1) first sentence GG, which is in line with its role to provide comprehensive fundamental rights protection vis-à-vis German state authority. 53

aa) According to Art. 23(1) GG, the Federal Republic of Germany participates in the realisation of a united Europe and may transfer sovereign powers to the EU to that end. Together with the other Member States, Germany has transferred powers to the EU, by way of the Treaties, to allow the EU to adopt its own legal acts. The Member States have worked together to create the Charter of Fundamental Rights, which stands alongside EU law and the powers transferred to the EU. On this basis, the German acts of approval to the EU Treaties open the German legal order to EU law, recognising EU legal acts as directly applicable at the domestic level. Thus, the German legal order also respects, in principle, EU law's claim to precedence of application vis-à-vis domestic law, including German constitutional law (cf. BVerfGE 129, 78 <100>; 142, 123 <187 para. 118> with further references). 54

The Basic Law's openness to EU law under Art. 23(1) GG does not relieve the German state of its responsibility in matters for which competences have been transferred to the EU; to the contrary, this provision provides for the participation of Germany in developing and giving effect to European integration. This presupposes a close interlinking of the legislative levels, in accordance with the substance of the Treaties. These provide that the implementation of EU law falls only to a limited extent to EU institutions and to a large extent to the Member States. Thus, effect is given to EU law at the domestic level in Germany in accordance, in principle, with the requirements concerning the organisation of the state as set out in the Basic Law. It provides that all state organs have a responsibility with regard to European integra- 55

tion when it comes to the participation of the Federal Republic of Germany in the European Union (cf. also BVerfGE 123, 267 <356>; 142, 123 <180 para. 98>; BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14 *inter alia* -, para. 141 *et seq*.). According to general rules, the national parliaments, at the federal or *Land* level, the Federal or *Land* Governments and public administrative authorities are primarily competent to give effect to this responsibility, subject to their role in the federal order.

The same applies to the courts. The competent courts, under the general law governing the judicial system, must apply directly applicable EU law and domestic law implementing EU law in accordance with the rules set out in the respective codes of procedure – irrespective of whether the provisions at issue are directly applicable provisions of EU law or domestic provisions implementing EU law. 56

aa) Thus, when reviewing decisions of the ordinary courts, it is incumbent upon the Federal Constitutional Court to also include, where necessary, the EU fundamental rights in its standard of review. 57

(1) Guaranteeing effective fundamental rights protection is one of the key tasks of the Federal Constitutional Court. This is reflected in particular in the possibility of lodging a constitutional complaint against court decisions, which constitutes a type of procedure that particularly shapes the Court's work. The constitutional complaint is deliberately broad and comprehensive in scope. Under Art. 93(1) no. 4a GG, any person who asserts that their fundamental rights have been violated is entitled and has standing to lodge a constitutional complaint, challenging any act of public authority. The constitutional complaint thus seeks to provide comprehensive fundamental rights protection vis-à-vis the entire German state authority in all its manifestations. 58

(2) Today, EU fundamental rights, too, are part of this fundamental rights protection that can be enforced vis-à-vis German state authority. Pursuant to Art. 51(1) of the Charter, EU fundamental rights are applicable at the domestic level and constitute a functional equivalent to the fundamental rights of the Basic Law. Embedded in a comprehensive fundamental rights catalogue, the EU fundamental rights, as regards their contents and objectives, fulfil largely the same function for EU law and its interpretation as German fundamental rights do for the law within the ambit of the Basic Law: within their scope of application, they serve to protect the freedom and equality of citizens and prevail – before the courts if necessary – over any type of action under EU law, irrespective of its legal form and the responsible body. Already in its Preamble, the Charter places itself within the tradition of inviolable and inalienable human rights; in its Arts. 52 and 53, it binds its interpretation to the European Convention on Human Rights. Thus, it invokes the same tradition as the one in which Art. 1(2) GG places the fundamental rights of the Basic Law. 59

(3) Accordingly, as EU law currently stands, fundamental rights protection vis-à-vis the ordinary courts and their application of the law would remain incomplete if EU fundamental rights were not included in the Federal Constitutional Court's standard 60

of review. This particularly applies to matters that are fully harmonised under EU law. Given that German fundamental rights are generally not applicable in such constellations, fundamental rights protection can only be guaranteed if the Federal Constitutional Court applies EU fundamental rights as its standard when reviewing the application of the law by the ordinary courts. If it were to withdraw from fundamental rights protection in such constellations, it would be able to fulfil this role less and less, given that EU law governs ever more areas of life. Therefore, complete fundamental rights protection requires that EU fundamental rights be taken into account where, in exceptional cases, the level of protection of the Charter in matters that are not fully harmonised sets out requirements that are not covered by the fundamental rights of the Basic Law (cf. BVerfG, Order of the First Senate also issued today - 1 BvR 16/13 -, para. 67 *et seq*.).

Legal recourse under EU law is not sufficient to fill the gap in protection arising from the application of EU fundamental rights by the ordinary courts. This is because individuals have no direct recourse to the Court of Justice of the European Union for asserting a violation of EU fundamental rights in such cases. 61

(4) The extension of Federal Constitutional Court review to EU fundamental rights is not rendered unnecessary by the fact that, in applying EU law, the ordinary courts must also provide the protection required by EU fundamental rights. The Federal Constitutional Court can only effectively fulfil its responsibilities under the Basic Law if it can review ordinary court decisions specifically as to their respect of fundamental rights. 62

(a) The constitutional complaint, which allows for independent review by the Federal Constitutional Court, is an instrument deliberately created to complement legal protection by the ordinary courts. It opens up the additional nationwide possibility of reviewing ordinary court decisions from a specialised fundamental rights perspective so as to safeguard the special weight accorded to fundamental rights vis-à-vis ordinary law and afford citizens protection in this regard. Today, EU law partially takes precedence over fundamental rights protection under constitutional law, yet there is no reason why citizens should not be able to lodge a constitutional complaint regardless. On the contrary, it follows from the participation of the Federal Republic of Germany and of the Federal Constitutional Court in the development of the EU provided for in Art. 23(1) first sentence GG that this legal remedy is extended to the enforcement of EU fundamental rights. Otherwise, there would be no possibility, other than the possibility afforded in Art. 267 TFEU, to review whether the application of the law by the ordinary courts is compatible with fundamental rights. 63

(b) Given that the constitutional complaint guarantees a comprehensive fundamental rights review, including whether fundamental rights were applied correctly in the individual case, it is not sufficient to merely review whether the ordinary courts, in light of the right to one’s lawful judge (Art. 101(1) second sentence GG; cf. BVerfGE 147, 364 <378 and 379 para. 37> with further references; BVerfGE 149, 222 64

<284 para. 138> with further references), satisfy their duty of referral to the Court of Justice of the European Union under EU law. Indeed, the ordinary courts' responsibility with regard to fundamental rights is not limited to complying with their duty of referral, and thus to ascertaining the principles of interpretation that their review must be based on under EU law. Rather, insofar as the interpretation of fundamental rights has been clarified, it falls to the ordinary courts to apply them in the individual case. In applying ordinary law in light of fundamental rights, they must typically reconcile different fundamental rights positions – as in the legal dispute at hand –, which requires a balancing that takes into consideration the specific circumstances and differs from case to case.

The ordinary courts themselves are responsible for this specific application of the law; they cannot shift this responsibility to the Court of Justice of the European Union by making referrals to it. When interpreting fundamental rights, the Court of Justice of the European Union sets out general principles that must be applied to the specific case; it expects the national courts to duly implement these and to give specific shape to them, including in subsequent cases. In part, it leaves considerable latitude to the national courts in this respect (cf., e.g., CJEU, Judgment of 6 November 2003, Lindqvist, C-101/01, EU:C:2003:596, paras. 86 *et seq*., 90; Judgment of 9 March 2017, Manni, C-398/15, EU:C:2017:197, paras. 62 and 63; Judgment of 27 September 2017, Puškár, C-73/16, EU:C:2017:725, para. 72; cf. also Judgment of 19 October 2016, Breyer, C-582/14, EU:C:2016:779, para. 62). When it comes to matters that are fully harmonised under EU law, this latitude does not imply that the Court of Justice of the European Union recognises room for Member State diversity. Rather, through this arrangement the CJEU acknowledges that fundamental rights can only protect individuals effectively if they are specified in the context of the circumstances of the individual case, even in areas where the application of the law is meant to be uniform and homogeneous throughout the EU. Such specification falls to the ordinary courts in the Member States. 65

As the organ guaranteeing comprehensive fundamental rights protection at the domestic level, the Federal Constitutional Court must review the decisions of the ordinary courts in this respect. Yet this requires that the review exercised by the Federal Constitutional Court also include the EU fundamental rights, in addition to the standard of Art. 101(1) second sentence GG. 66

(5) Such an inclusion of EU fundamental rights is not precluded by the Constitution's wording, in particular Art. 93(1) no. 4a GG. It is true that, despite the open wording of this provision, its legislative history is such that it only refers to the fundamental rights of the Basic Law. However, as Art. 23(1) first sentence GG mandates that the Federal Constitutional Court participate in the application of EU law within the framework of its responsibility with regard to European integration, it follows that Art. 93(1) no. 4a GG is to be applied accordingly to challenges asserting a violation of rights under the Charter. To the extent that this contradicts earlier decisions of the First Senate of the Federal Constitutional Court – which, in any case, did not refer specifically to the 67

Charter – where it generally held that rights arising under Community law are not part of the fundamental rights that can be invoked by way of a constitutional complaint pursuant to Art. 93(1) no. 4a GG, § 90(1) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), the First Senate no longer upholds that view when it comes to the domestic application of EU fundamental rights to the extent set out above (para. 60). A review that relies on EU fundamental rights as the applicable standard can be carried out without any difficulties on the basis of applicable procedural law (cf. §§ 90 *et seq*. BVerfGG).

6. To the extent that the Federal Constitutional Court relies on the fundamental rights of the Charter as the relevant standard of review, it seeks close cooperation with the Court of Justice of the European Union. 68

a) According to Art. 19(1) subpara. 1 second sentence TEU and Art. 267 TFEU, the Court of Justice of the European Union has final authority for interpreting EU law. This includes the interpretation of the fundamental rights guaranteed by the Charter and the development of principles deriving from them for their application. Yet the Federal Constitutional Court has authority to review the correct application of EU fundamental rights. In that regard, it is a domestic court of last instance within the meaning of Art. 267(3) TFEU and can, as the case may be, be obliged to bring a matter before the Court of Justice of the European Union (cf. CJEU, Judgment of 6 October 1982, Cilfit, C-283/81, EU:C:1982:335, para. 21). 69

The Federal Constitutional Court can thus only apply EU fundamental rights where a relevant question of interpretation has been clarified in the case-law of the Court of Justice of the European Union or the answer is clear from the outset based on established principles of interpretation – for instance, by drawing on the case-law of the European Court of Human Rights (ECtHR), which, in the individual case, may also define the contents of the Charter (cf. Art. 52(3) and (4) of the Charter). Where this is not the case, the Federal Constitutional Court is required to refer the respective questions to the Court of Justice of the European Union. Given that the questions of interpretation arising in this scenario are generally directly relevant for deciding a matter, referrals will have to be considered to a far greater extent than in cases where the Charter applies in addition to the Basic Law (cf. BVerfG, Order of the First Senate also issued today - 1 BvR 16/13 - paras. 43 and 44) but the Federal Constitutional Court – as it has done until now – conducts its review on the basis of German fundamental rights (cf. *loc. cit.*, paras. 45 *et seq*., 154). 70

In this context, uncertainties generally cannot be resolved through recourse to domestic case-law on German fundamental rights. While fundamental rights protection under the Basic Law and under the Charter may often be congruent and principles of interpretation may be transferrable from one system to the other, caution should be exercised in this respect in light of the uniformity of EU law. In principle, the interpretation must be directly based on the fundamental rights of the Charter and the case-law of the European courts, and links back to the overall understanding of fundamen- 71

tal rights in the EU Member States. A key indicator for a duty of referral to the Court of Justice of the European Union is if the application of the law in the Member States reflects different interpretations of EU fundamental rights beyond the individual case. Where that EU law seeks to be uniform, it falls to the Court of Justice of the European Union to resolve any differences – just as any other uncertain questions regarding the interpretation of EU fundamental rights, which precedes their application, must be referred to the CJEU under Art. 267(3) TFEU.

e) In the present proceedings, it was not necessary to decide whether the ordinary courts – insofar as the Federal Constitutional Court has a duty of referral as a court of last instance within the meaning of Art. 267(3) TFEU – would no longer be obliged to make a referral or whether they would remain obliged to do so insofar as they render a final judgment as a court of last instance. 72

If the ordinary courts remained subject to a duty of referral in such a scenario, the result would be that two courts could simultaneously be regarded as a court of last instance within the meaning of Art. 267(3) TFEU. Yet this does not appear plausible in a scenario where constitutional courts and ordinary courts co-exist (cf. Constitutional Court of Austria, Judgment of 14 March 2012 U 466/11 *inter alia*, AT:VFGH:2012:U466.2011, sub. 5.7, in case of doubt, this court considers itself to be the only court with a duty of referral; confirmed CJEU, Judgment of 11 September 2014, A, C-112/13, EU:C:2014:2195, paras. 39 *et seq*., 46). Nevertheless, given the particular features of the constitutional complaint, which constitutes an extraordinary legal remedy, it is not ruled out that the ordinary court of last instance may, in principle, be qualified domestically as the last instance even in respect of the interpretation of EU fundamental rights. 73

According to established case-law, where doubts arise regarding the interpretation of EU fundamental rights, the Federal Constitutional Court can review an ordinary court decision against the limited standard of Art. 101(1) second sentence GG, examining whether the way the ordinary court handled the duty of referral under Art. 267(3) TFEU was tenable (cf. BVerfGE 147, 364 <380 *et seq*. para. 40 *et seq*.>). Where the ordinary court decision under review is found not to have violated Art. 101(1) second sentence GG, the Federal Constitutional Court will also review whether the ordinary court's interpretation of legislation determined by EU law is compatible with the Charter; moreover, where necessary, the Federal Constitutional Court itself can refer questions regarding the interpretation of EU fundamental rights to the Court of Justice of the European Union, pursuant to Art. 267(3) TFEU. 74

From the outset, the duty of referral incumbent upon ordinary courts and its review against the standard of Art. 101(1) second sentence GG will not be affected where the constellations in question do not concern the contents of the fundamental rights of the Charter. Thus, to the extent that an interpretation of EU law independent of the rights of the Charter is at issue, it is solely for the ordinary courts to make decisions in this regard; therefore, the ordinary courts may also be subject to a duty of referral 75

since they are the domestic court of last instance. This concerns the interpretation of both EU primary and secondary law. Given that the Federal Constitutional Court does not have the authority to review ordinary court decisions in this regard, it only reviews whether they observed the right to one's lawful judge deriving from Art. 101(1) second sentence GG.

The right of the ordinary courts under Art. 267(2) TFEU to refer to the Court of Justice of the European Union questions on the interpretation of the Charter where these are relevant to a matter they must decide is also not affected. 76

4. In light of the foregoing, the determination whether to apply the fundamental rights of the Basic Law or those of the Charter as the standard of review essentially hinges on the distinction between fully harmonised EU law on the one hand, and EU law that affords Member States legislative latitude on the other. This can give rise to questions regarding the extent of harmonisation. 77

a) Whether EU law is considered to be fully harmonised depends on the interpretation of the respective provisions of ordinary law. The question whether EU law affords Member States legislative latitude must be examined in relation to the specific provisions applicable to the case at hand and its context, rather than in relation to the general area of law in question. Thus, even where it is assumed that a certain matter of German law is determined by the provisions of a directive, this does not necessarily mean that the directive also determines all other matters governed by it (cf. BVerfGE 142, 74 <114 para. 119>; CJEU, Judgment of 29 July 2019, Spiegel Online, C-516/17, EU:C:2019:625, para. 28 *et seq*.; Judgment of 29 July 2019, Funke Medien NRW, C-469/17, EU:C:2019:623, para. 40; Judgment of 29 July 2019, Pelham and Others, C-476/17, EU:C:2019:624, para. 80 *et seq*.). 78

Yet this does not alter the fact that in assessing whether EU legislation is intended to fully harmonise a matter, its entire legislative context and its objective must be taken into account. It can also be relevant in this regard whether the legislation in question is a directive or a regulation. The type of legal act chosen, however, does not in itself give rise to definitive conclusions: regulations, too, can contain opening clauses affording Member States latitude, just as directives can set definitive and binding standards. Nevertheless, it must be assumed that legislation is fully harmonised if a regulation definitively determines a certain matter. In such a case, the provisions of a regulation do not afford overall latitude if they merely provide for a possibility of exemptions for special cases within narrow limits. Such opening clauses afford latitude only to the extent set out therein, but do not allow for a review of their general application on the basis of the fundamental rights of the Basic Law. 79

b) German law commonly distinguishes between legal provisions containing indeterminate legal concepts (*unbestimmte Rechtsbegriff*e) and provisions explicitly affording discretion (*Ermessen*); however, this distinction cannot simply be applied to determine whether EU legislation affords latitude, as EU law – just as the law in other Member States – does not distinguish these concepts the same way German law 80

does […]. Rather, the specific provision of EU law at issue must be assessed as to whether it seeks to accommodate diversity and different value decisions, or whether it only serves to give effect to special factual circumstances in a sufficiently flexible manner, but still generally pursues the aim of uniform application of the law (cf. CJEU, Judgment of 29 July 2019, Funke Medien NRW, C-469/17, EU:C:2019:623, para. 40 with further references).

c) Distinguishing between fully harmonised EU law and EU law that affords Member States latitude is necessary to determine whether the fundamental rights of the Basic Law or those of the Charter are applicable. In cases where it is found that the application of the different fundamental rights regimes does not lead to different results under the specific circumstances of the case, the ordinary courts – in line with general procedural law – may refrain from deciding on difficult questions concerning the extent of harmonisation. 81

The assumption by an ordinary court that the applicable EU law does not afford latitude for implementation into domestic law may fail to recognise the significance and scope of the fundamental rights of the Basic Law; in that case, the Federal Constitutional Court is not limited to reviewing only whether a court decision is arbitrary (cf. BVerfGE 129, 78 <102 and 103>). 82

5. The complainant's standing is based on a possible violation of Arts. 7 and 8 of the Charter. […] 83

With her constitutional complaint, the complainant claims a violation of her right to the development of her personality through the challenged court decision. She asserts and substantiates that the link displayed by the search engine operator in the results of searches for her name impairs her dealings with her social contacts, thus affecting her deep within her private life. She essentially claims that her fundamental rights to respect for private and family life and to the protection of personal data under Arts. 7 and 8 of the Charter are violated. The fact that, in her submission, she refers to the fundamental rights of the Basic Law, and not to the fundamental rights of the Charter, is immaterial to her legal standing. Where a complainant sufficiently substantiates the asserted rights violation, failure to cite the correct legal provisions does not render the constitutional complaint inadmissible. The correct application of the law falls to the Federal Constitutional Court. 84

III.

It was not necessary to refer this question to the Plenary of the Court pursuant to § 16 BVerfGG. 85

1. A matter must be referred to the Plenary of the Court if one Senate intends to deviate from a legal view put forward in a decision by the other Senate and that legal view was material to that Senate's decision (cf. BVerfGE 4, 27 <28>; 77, 84 <104>; 96, 375 <404>; 112, 1 <23>; 112, 50 <63>; 132, 1 <3 para. 10>; established case-law). […] 86

2. In using the Charter of Fundamental Rights of the European Union as the applicable standard for reviewing the judgment of the Higher Regional Court challenged in the constitutional complaint, the First Senate does not deviate from legal views that are material to decisions of the Second Senate. 87

a) Extending the scope of Federal Constitutional Court review to EU fundamental rights does not amount to a deviation from the case-law of either Senate (cf. BVerfGE 73, 339 <387>; 102, 147 <164>; 118, 79 <95>; 121, 1 <15>; 123, 267 <335>; 125, 260 <306>; 129, 78 <103>; 129, 186 <199>) which is based on the so-called Solange II decision of the Second Senate (BVerfGE 73, 339). 88

This decision and subsequent ones address the issue of whether and to what extent EU law and, by extension, domestic law implementing binding EU law is to be reviewed as to its conformity with the Basic Law. The Second Senate clarified that this was generally not required on the basis of EU law as it stood at the time, but that reservations should apply to certain situations. In the *Solange II* decision and the case-law based on it, the Court did not at all consider, either explicitly or implicitly, the applicability of EU fundamental rights – let alone the Charter, which did not enter into force until 2009 – and consequently made neither a negative nor a positive determination in this regard. Treating the constitutional complaints challenging this point as inadmissible was not based on an independent finding made in that case-law that EU fundamental rights were not applicable, but was merely an automatic side-effect of the inapplicability of the Basic Law. 89

Even if it were assumed that this implicitly meant that EU fundamental rights were not applicable, the case-law above in fact concerns a different constellation than the case at hand: both the restraint in German fundamental rights protection and the dismissal as inadmissible of corresponding constitutional complaints concerned cases that dealt with the validity or applicability of EU law. The Federal Constitutional Court withdrew from a fundamental rights review in those cases in order to prevent a constellation from arising where German constitutional law could be invoked to call into question binding EU decisions. The Federal Constitutional Court thus merely remarked in the material part of its decisions that it would not exercise its jurisdiction with regard to the applicability of derived Community or EU law which domestic authorities and courts use as a legal basis for their actions and that it would not review such law as to its compatibility with the fundamental rights of the Basic Law (cf., e.g., BVerfGE 73, 339 <387>; 102, 147 <163>). In contrast, the proceedings at hand do not challenge EU law, but concern its correct application in light of the contents of EU fundamental rights in the sense of an *acte claire* or *acte éclairé*. The case-law of the Second Senate does not contain any explicit or implicit statement regarding such a scenario. 90

The Decision of the Second Senate of 15 December 2015 on the European Arrest Warrant (cf. BVerfGE 140, 317 <334 *et seq*. para. 35 *et seq*.> – Identity Review I –), too, does not warrant a different conclusion. That decision did not concern the appli- 91

cation of EU fundamental rights, but rather the scope of the possibility of identity review by the Federal Constitutional Court, which is not the subject matter of the decision at hand. […]

c) The First Senate is also not deviating from the Decision of the Second Senate of 19 December 2017 on extradition (cf. BVerfGE 147, 364 <378 *et seq*. para. 35 *et seq*.>). That decision mainly concerns a duty of referral by the ordinary court of last instance in respect of questions on the interpretation of EU fundamental rights. The decision at hand does not contradict that case-law (see para. 72 *et seq*. above). 92

d) The extension of the Federal Constitutional Court's review to include EU fundamental rights also does not constitute a deviation from the Decision of the Second Senate of 28 January 2014 on the levy to support the film industry (cf. BVerfGE 135, 155 <229 para. 172>) […]. In those proceedings, the Second Senate merely decided on the Federal Constitutional Court's competence to review matters on the basis of EU state aid rules. The decision at hand, which only concerns the Court's competence to review adherence to EU fundamental rights, does not deviate from that decision. 93

C.

The constitutional complaint is unfounded. 94

I.

1. The complainant challenges a judicial decision in a private law dispute between the complainant and the search engine operator she sued. In the challenged decision, the Higher Regional Court essentially relied on §§ 29 and 35 of the Federal Data Protection Act (former version) (*Bundesdatenschutzgesetz* – BDSG), which, at the time, implemented Art. 7 lit. f, Art. 12 lit. b and Art. 14 of Directive 95/46/EC in the German legal order. Both the provisions of this directive, which fully harmonises the substantive level of protection, and the domestic provisions implementing it must be interpreted in light of the Charter (cf. CJEU, Judgment of 24 November 2011, ASNEF and FECEMD, C-468/10 and C-469/10, EU:C:2011:777, para. 40 *et seq*.; Judgment of 13 May 2014, Google Spain, C-131/12, EU:C:2014:317, para. 68; Judgment of 11 December 2014, Ryneš, C-212/13, EU:C:2014:2428, para. 29; Judgment of 6 October 2015, Schrems, C-362/14, EU:C:2015:650, para. 38; Judgment of 9 March 2017, Manni, C-398/15, EU:C:2017:197, para. 39; Judgment of 24 September 2019, GC and Others, C-136/17, EU:C:2019:773, para. 53; Judgment of 24 September 2019, Google [Portée territoriale], C-507/17, EU:C:2019:772, para. 45; Vedsted-Hansen, in: Peers/Hervey/Kenner/Ward, The EU Charter of Fundamental Rights, 2014, para. 07.72A). 95

Like the fundamental rights of the Basic Law, those of the Charter are not limited to protecting citizens vis-à-vis the state, but also afford protection in disputes under private law (cf. CJEU, Judgment of 29 January 2008, Promusicae, C-275/06, EU:C:2008:54, para. 65 *et seq*.; Judgment of 16 July 2015, Coty Germany, C-580/ 96

13, EU:C:2015:485, para. 33 *et seq*.; Judgment of 29 July 2019, Spiegel Online, C-516/17, EU:C:2019:625, para. 51 *et seq*.; see also Streinz/Michl, Europäische Zeitschrift für Wirtschaftsrecht – EuZW 2011, p. 384 <385 *et seq*.>; Frantziou, Human Rights Law Review – HRLR 2014, p. 761 <771>; Fabbrini, in: de Vries/Bernitz/Weatherill, The EU Charter of Fundamental Rights as a Binding Instrument, 2015, p. 261 <275 *et seq*.>; Lock, in: Kellerbauer/Klamert/Tomkin, The EU Treaties and the Charter of Fundamental Rights, 2019, Art. 8 of the Charter para. 5). In particular, this also applies to Arts. 7 and 8 of the Charter, which the Court of Justice of the European Union has repeatedly used, regardless of the type of law applicable to the legal dispute in question, as a basis for interpreting ordinary EU legislation. This also corresponds to the understanding of Art. 8 ECHR, which, particularly in relation to disputes between private parties, comes to the fore in the case-law of the European Court of Human Rights. On the basis of the relevant ordinary legislation, the fundamental rights of one party must be reconciled with the conflicting fundamental rights of the other party (cf. CJEU, Judgment of 29 January 2008, Promusicae, C-275/06, EU:C:2008:54, para. 68; Judgment of 16 December 2008, Satakunnan Markkinapörssi and Satamedia, C-73/07, EU:C:2008:727, para. 53; Judgment of 24 November 2011, ASNEF and FECEMD, C-468/10 and C-469/10, EU:C:2011:777, para. 43; Judgment of 29 July 2019, Spiegel Online, C-516/17, EU:C:2019:625, paras. 38, 42). Given that the data processor and the affected person are afforded equal freedom under private law, a balancing must determine the extent of fundamental rights protection.

In contrast to the German legal order, EU law does not recognise a doctrine of indirect horizontal effects (*mittelbare Drittiwirkung*) (cf. BVerfG, Order also issued today - 1 BvR 16/13 -, paras. 76 and 77). Nevertheless, EU fundamental rights ultimately have similar effects in regard to the relationship between private actors. In individual cases, the fundamental rights of the Charter may have an effect on private law matters. 97

4. In respect of the complainant, the necessary balancing must take into account the fundamental right to respect for private and family life under Art. 7 of the Charter and the fundamental right to the protection of personal data under Art. 8 of the Charter. 98

Art. 7 of the Charter confers upon individuals the right to respect for their private and family life, home and communications; Art. 8 of the Charter confers the right to the protection of personal data. These guarantees correspond to Art. 8 ECHR, which protects the right to respect for one's private and family life, one's home and one's correspondence – including in particular protection against the processing of personal data (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. 35, 47, 54 and 55; Constitutional Court of Austria, Judgment of 27 June 2014, G 47/12 *inter alia*, AT:VFGH:2014:G47.2012, para. 146; Marauhn/Thorn, in: Dörr/Grote/Marauhn, EMRK/GG Konkordanzkommentar, 2nd ed. 2013, ch. 16, para. 29 *et seq*.; Kranen- 99

borg, in: Peers/Hervey/Kenner/Ward, The EU Charter of Fundamental Rights, 2014, para. 08.50; Fabbrini, in: de Vries/Bernitz/Weatherill, The EU Charter of Fundamental Rights as a Binding Instrument, 2015, p. 261 <266 and 267>; Docksey, International Data Privacy Law – IDPL 2016, p. 195 <196 *et seq*.>; Meyer-Ladewig/Nettesheim, in: Meyer-Ladewig/Nettesheim/von Raumer, EMRK, 4th ed. 2017, Art. 8 para. 32 *et seq*.; Kühling/Raab, in: Kühling/Buchner, DS-GVO/BDSG, 2nd ed. 2018, Einführung para. 17 *et seq*.; Lock, in: Kellerbauer/Klamert/Tomkin, The EU Treaties and the Charter of Fundamental Rights, 2019, Art. 7 of the Charter para. 1). The guarantees of Arts. 7 and 8 of the Charter are thus closely interrelated. At least insofar as the processing of personal data is concerned, these two fundamental rights constitute a uniform guarantee (cf. CJEU, Judgment of 9 November 2010, Volker und Markus Schecke and Eifert, C-92/09 and C-93/09, EU:C:2010:662, para. 47; Judgment of 24 November 2011, ASNEF and FECEMD, C-468/10 and C-469/10, EU:C:2011:777, paras. 40 and 42; Judgment of 17 October 2013, Schwarz, C-291/12, EU:C:2013:670, paras. 39 and 46; Judgment of 2 October 2018, Ministerio Fiscal, C-207/16, EU:C:2018:788, para. 51; Constitutional Court of Belgium, Decision of 11 June 2015, No. 84/2015, B.11; *Korkein hallinto-oikeus* [Highest Administrative Court of Finland], Decision of 15 August 2017, No. 3736/3/15, FI:KHO:2017:T3872; High Court of Ireland, Decision of 18 June 2014, [2014] IEHC 310, para. 58). This applies in particular with regard to the protection of affected persons against information relating to them obtained through the list of results displayed by a search engine (cf. CJEU, Judgment of 13 May 2014, Google Spain, C-131/12, EU:C:2014:317, paras. 69 and 80; Judgment of 24 September 2019, GC and Others, C-136/17, EU:C:2019:773, para. 44; Judgment of 24 September 2019, Google [Portée territoriale], C-507/17, EU:C:2019:772, para. 45).

Arts. 7 and 8 of the Charter protect against the processing of personal data and call for “respect for private life”. Personal data in this sense is understood – just as it is understood in German constitutional law under Art. 2(1) in conjunction with Art. 1(1) GG – as any information relating to an identified or identifiable individual (cf. CJEU, Judgment of 9 November 2010, Volker und Markus Schecke and Eifert, C-92/09 and C-93/09, EU:C:2010:662, para. 52; Judgment of 24 November 2011, ASNEF and FECEMD, C-468/10 and C-469/10, EU:C:2011:777, para. 42; regarding the Basic Law cf. BVerfGE 150, 244 <265 para. 40> with further references). Accordingly, the right to respect for private life is not to be interpreted restrictively; in particular, it is not limited to highly personal or especially sensitive information (cf. CJEU, Judgment of 20 May 2003, Österreichischer Rundfunk and Others, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paras. 73, 75; cf. also Lock, in: Kellerbauer/Klamert/Tomkin, The EU Treaties and the Charter of Fundamental Rights, 2019, Art. 7 of the Charter para. 5). Notably, business and professional activities are not excluded from its scope of application (cf. CJEU, Judgment of 14 February 2008, Varec, C-450/06, EU:C:2008:91, para. 48; Judgment of 9 March 2017, Manni, C-398/15, EU:C:2017:197, para. 34). 100

Thus, Arts. 7 and 8 of the Charter protect the self-determined development of one's personality against data processing by third parties. At least in principle, under Art. 52(3) of the Charter, the requirements deriving from this protection can also be determined by reference to the case-law of the European Court of Human Rights (cf. CJEU, Judgment of 22 December 2010, DEB, C-279/09, EU:C:2010:811, para. 35). 101

3. In respect of the search engine operator, the balancing must take into account its freedom to conduct a business under Art. 16 of the Charter (see a) below). However, the search engine operator cannot invoke Art. 11 of the Charter in relation to the search results disseminated by its search engine (see b) below). Yet what must be taken into account are the fundamental rights of third parties that may be directly affected by the legal dispute; in the case at hand, this concerns the freedom of expression of content providers (see c) below). In addition, users' interest in obtaining information must also be reflected in the balancing (see d) below). 102

a) The freedom to conduct a business guarantees the pursuit of economic interests by providing goods and services. The protection afforded by Art. 16 of the Charter covers the freedom to exercise an economic or commercial activity, the freedom of contract and free competition (cf. CJEU, Judgment of 17 October 2013, Schaible, C-101/12, EU:C:2013:661, para. 25; Everson/Correia Gonçalves, in: Peers/Hervey/Kenner/Ward, The EU Charter of Fundamental Rights, 2014, para. 16.34 *et seq*.). This also covers the providing of search engines (cf. CJEU, Judgment of 13 May 2014, Google Spain, C-131/12, EU:C:2014:317, paras. 81 and 97; High Court of Justice [Queen's Bench Division], Decision of 13 April 2018, [2018] EWHC 799 [QB], para. 34). 103

The search engine operator in question falls within the scope of protection of Art. 16 of the Charter. EU fundamental rights generally protect both natural and legal persons (cf. with regard to Art. 47 of the Charter CJEU, Judgment of 22 December 2010, DEB, C-279/09, EU:C:2010:811, para. 38 *et seq*.; with regard to Arts. 7 and 8 of the Charter, CJEU, Judgment of 9 November 2010, Volker und Markus Schecke and Eifert, C-92/09 and C-93/09, EU:C:2010:662, para. 53; cf. also Oliver, in: de Vries/Bernitz/Weatherill, The EU Charter of Fundamental Rights as a Binding Instrument, 2015, p. 287 <292 *et seq*. and 301 *et seq*.>; specifically on Art. 16 of the Charter Wollenschläger, in: von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 7th ed. 2015, Art. 16 of the Charter para. 6). In respect of the freedom to conduct a business, this already follows from the provision's wording, which uses the term "business", which typically designates a legal person. Protection under Art. 16 of the Charter is also not ruled out by the fact that the defendant is a legal person not based in the EU. The fundamental rights of the Charter generally apply to EU citizens and non-EU citizens equally, in relation to both natural and legal persons (cf. CJEU, Judgment of 30 July 1996, Bosphorus v Minister for Transport, Energy and Communications, C-84/95, EU:C:1996:312, para. 21 *et seq*.; GCEU, Judgment of 6 September 2013, Bank Melli Iran v Council, T-35/10 and T-7/11, EU:T:2013:397, para. 70; Judgment of 29 April 2015, Bank of Industry and Mine v Council, T-10/13, EU:T:2015:235, 104

para. 58; cf. also Sasse, Zeitschrift Europarecht 2012, p. 628 <636 e*t seq*.>; Jarass, in: *id*., EU-Grundrechte-Charta, 3rd ed. 2016, Art. 51 para. 52). In this respect, the legal situation differs from the domestic situation under Art. 19(3) GG (on the right to invoke fundamental rights of foreign businesses, albeit only those based in the EU, cf. BVerfGE 129, 78 <94 *et seq*.>).

b) By contrast, the search engine operator cannot invoke freedom of expression under Art. 11 of the Charter in relation to its activities. It is true that the services it provides and the means used to process search results cannot be considered neutral, as they can have a considerable impact on the formation of users' opinions. However, these services do not serve to disseminate specific opinions. Nor does the search engine operator itself claim to do so. According to its submission, the services it provides aim only, as far as possible, to satisfy the potential interests of users, regardless of specific opinions, and thus to make its services as attractive as possible, which is in its own economic interest. The Court of Justice of the European Union, too, has held that search engine operators cannot invoke the media privilege (cf. CJEU, Judgment of 13 May 2014, Google Spain, C-131/12, EU:C:2014:317, para. 85). 105

c) The balancing between the interests of affected persons and search engine operators must, however, also include the fundamental rights of the content providers whose publications are at issue. 106

aa) Where, in a legal dispute between an individual and a search engine operator, a decision is made to dereference certain contents, this decision will necessarily also entail a restriction of the fundamental rights of third parties, which must also be taken into account in the judicial decision. In such a case, whether the decision vis-à-vis third parties is lawful becomes part of the objective lawfulness requirements that must be met in order to restrict the freedom to conduct a business; the search engine operator can assert these requirements by invoking their own fundamental right under Art. 16 of the Charter. Yet this does not mean that direct effect is given to the fundamental rights of third parties. A search engine operator can thus not be ordered to carry out any measures that violate the fundamental rights of third parties. 107

bb) A legal dispute concerning the question whether a search engine operator should be prohibited from displaying certain search results often also involves the question of a violation of the fundamental right under Art. 11 of the Charter afforded a content provider as a person making a statement. In this respect, it is irrelevant whether and to what extent a content provider may require the search engine operator to disseminate its contents; this question is not within the scope of the current proceedings. This is because the constellation at hand does not concern the question whether an obligation can be imposed on the search engine operator to reference a search result, but whether a prohibition can be imposed on the search engine operator, against its will, to disseminate articles made available by a content provider. Such a prohibition may at the same time entail a separate restriction of the freedom of the 108

content provider as the person making a statement pursuant to Art. 11 of the Charter. This is because the prohibition deprives the content provider of the services provided by the search engine operator, which to some extent also excludes the content provider from an important platform for disseminating its articles.

Where the decision on whether to impose a prohibition on the search engine operator is based on the specific contents of the site in question, for which the content provider is responsible, the impact on the content provider is no mere side-effect of a prohibition imposed on the search engine operator. Rather, the decision is then directly based on the statement at issue and the exercise of freedom of expression (cf. Spiecker genannt Döhmann, Common Market Law Review – CMLR 2015, p. 1033 <1046>; Fabbrini, in: de Vries/Bernitz/Weatherill, The EU Charter of Fundamental Rights as a Binding Instrument, 2015, p. 261 <284>; Peguera, Journal of Entertainment & Technology Law – JETLaw 2016, p. 507 <555 and 556>; Tambou, Revue Trimestrielle de Droit Européen – RTDE 2016, p. 249 <266 and 267>; Jonason, European Review of Private Law – ERPL 2018, p. 213 <219>). Such a decision specifically aims to restrict the dissemination of an article because of its content. In such a case, a decision on the request by the affected person that the search engine operator refrain from referencing search results cannot be made without regard to the question whether and to what extent content providers are entitled, vis-à-vis affected persons, to disseminate the information at issue pursuant to Art. 11 of the Charter. 109

f) The balancing must also take into account Internet users' interest in having access to the information in question (cf. CJEU, Judgment of 13 May 2014, Google Spain, C-131/12, EU:C:2014:317, para. 81; Judgment of 24 September 2019, GC and Others, C-136/17, EU:C:2019:773, paras. 53, 57, 59, 66, 68 and 75 *et seq*.; Judgment of 24 September 2019, Google [Portée territoriale], C-507/17, EU:C:2019:772, para. 45; High Court of Justice [Queen's Bench Division], Decision of 13 April 2018, [2018] EWHC 799 [QB], paras. 133 and 134; *Korkein hallinto-oikeus* [Highest Administrative Court of Finland], Decision of 17 August 2018, No. 3580/3/15, FI:KHO:2018:112; *Hoge Raad*, Decision of 24 February 2017, No. 15/03380, NL:HR:2017:316, paras. 3.5.1 *et seq*.; Article 29 Working Party on Data Protection, Guidelines on the Implementation of the Judgment in Case C-131/12 "Google Spain and Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja-González" of 2 November 2014, 14/EN WP 225, p. 6; cf. also Frantziou, HRLR 2014, p. 761 <769>; Spiecker genannt Döhmann, CMLR 2015, p. 1033 <1046>; Fabbrini, in: de Vries/Bernitz/Weatherill, The EU Charter of Fundamental Rights as a Binding Instrument, 2015, p. 261 <284>). In this respect, the Court of Justice of the European Union requires that the interest of the general public in access to information be taken into account as a manifestation of the right to free information guaranteed by Art. 11 of the Charter. The role of the press in a democratic society must also be reflected in the balancing. However, at issue in this regard are not the individual user rights, deriving from Art. 11 of the Charter, to access information on the specific website in question, but rather freedom of information as a principle to be taken into account in 110

the balancing when restricting Art. 16 of the Charter.

II.

111 The Federal Constitutional Court does not review whether ordinary law was applied correctly. Rather, in the context of constitutional complaint proceedings, it limits its review to whether the fundamental rights, in this case EU fundamental rights, have been observed (cf. BVerfGE 18, 85 <92 and 93>; 142, 74 <101 paras. 82 and 83>; established case-law). Therefore, in the case at hand, the Federal Constitutional Court neither reviews whether Directive 95/46/EC, which was applicable at the time the challenged decision was rendered, was applied correctly, nor whether the provisions of the Federal Data Protection Act relevant at the time were applied correctly. It limits its review to whether the decisions of the ordinary courts give sufficient effect to the fundamental rights of the Charter and whether they have struck a tenable balance (cf. regarding the fundamental rights affected here BVerfGE 7, 198 <205 *et seq*.>; 85, 1 <13>; 114, 339 <348>; established case-law).

112 1. Such a review must be based on the consideration that the actions of the defendant's search engine constitute a stand-alone act of data processing, which must therefore also be assessed separately with regard to the fundamental rights restrictions it entails. In particular, the question whether the search engine operator acted lawfully must be distinguished from whether the publication of the article by the content provider was lawful. Given that the rights, interests and burdens that are relevant may be different when affected persons sue the search engine operator from when they sue the content provider, a separate balancing of interests is required. Thus, recourse against the search engine operator is also not subsidiary to recourse against the content provider (cf. CJEU, Judgment of 13 May 2014, Google Spain, C-131/12, EU:C:2014:317, para. 83 *et seq*; Judgment of 24 September 2019, GC and Others, C-136/17, EU:C:2019:773, paras. 36 and 37; Judgment of 24 September 2019, Google [Portée territoriale], C-507/17, EU:C:2019:772, para. 44; cf. also Decisions of the Federal Court of Justice in Civil Matters, *Entscheidungen des Bundesgerichtshofes in Zivilsachen* – BGHZ 217, 350 <368 and 369 para. 45>). […]

113 The ordinary courts give effect to this separate balancing of fundamental rights by setting different requirements for claims for protection against the dissemination of a text vis-à-vis a search engine operator than vis-à-vis a content provider. Thus, for instance, a search engine operator can only be obliged to dereference content based on the principle of "notice and take down", i.e. when it receives a request for dereferencing. Unlike when a content provider first uploads an article, the search engine operator does not have to examine the contents of its search results on its own initiative (cf. BGHZ 217, 350 <361 and 361 para. 34>; cf. also CJEU, Judgment of 13 May 2014, Google Spain, C-131/12, EU:C:2014:317, para. 94 *et seq*; Judgment of 24 September 2019, GC and Others, C-136/17, EU:C:2019:773, paras. 48, 66, 68 and 77). In substantive terms, too, different liability requirements apply – similar to those developed by the Federal Court of Justice (*Bundesgerichtshof*) on the basis of,

among other things, the distinction between direct liability for persons having caused a disturbance and indirect liability for persons otherwise responsible for the disturbance, which is a distinction that also pervades all other areas of liability law – and can in particular give rise to differing examination and substantiation obligations for different types of data processors (cf. BGHZ 217, 350 <360 *et seq*. para. 32 et *seq*.>). The ordinary courts thus give shape to ordinary law provisions that require specification, reflecting the different situations in which data processors and individuals face one another and specifying the requirements of Directive 95/46/EC – or, today, the General Data Protection Regulation – in light of the conflicting fundamental rights.

2. For the balancing of conflicting fundamental rights, it is necessary to distinguish between the different data processors, even though their actions are somewhat interrelated and the situation of the affected person vis-à-vis the content provider may also have to be considered when deciding on a claim for injunctive relief vis-à-vis a search engine operator. As set out above, in deciding whether a search result must be dereferenced, it may be necessary to assess specifically whether this entails a restriction of the fundamental right of the content provider to disseminate its articles using available means. 114

a) Merely because it is permissible to upload an article to the Internet, however, does not automatically imply that it is also permissible to reference the same article as a search result. The claim for protection vis-à-vis a search engine operator may be more extensive than vis-à-vis the content provider where, under domestic ordinary law [of some Member States], only the truthfulness of a publication is relevant when balancing the interests of affected persons and content providers, without the effects of its dissemination on the Internet being taken into account, and the need for protection of affected persons arising from the dissemination of the publication is thus not considered at this level. In particular in cases where affected persons did not, or could not, assert changes in circumstances resulting from the passage of time vis-à-vis content providers, recourse against the search engine operator can afford more extensive protection. 115

The case underlying the decision of the Court of Justice of the European Union in Google Spain (Judgment of 13 May 2014, C-131/12, EU:C:2014:317) was one such case. In that case, the ordinary courts in Spain had decided that the affected person did not have any claim for protection vis-à-vis the press against the continued availability of the announcement in dispute given that it was initially lawful; they had not considered the changed circumstances arising from the passage of time. The decision of the Court of Justice of the European Union in GC (Judgment of 24 September 2019, C-136/17, EU:C:2019:773) arose from equivalent constellations. For those cases, too, it is not ascertainable that relevant domestic law required taking into account the realities of Internet communication, and in particular the possibility of publications being retrieved by search engines, when determining the scope of the right of content providers to disseminate articles concerning affected persons. 116

Accordingly, affected persons can invoke separate claims for protection vis-à-vis a search engine operator if they, from the outset, only challenge a certain search result and its referencing by search engine operators on the grounds that the effects of this information have changed over time. In that case, the initial lawfulness of the uploading of an article to the Internet does not mean that the search engine operator may continue to reference it for any type of search request. If a search engine operator is ordered to dereference a certain article in such a case, this does not automatically also amount to a violation of the content provider's fundamental rights, given that the content provider cannot infer from the initial lawfulness of the publication that it has the right, in relation to affected persons, to continue permanently disseminating the publication (or having it disseminated) in any form (cf. regarding German law BVerfG, Order of the First Senate also issued today - 1 BvR 16/13 -, para. 114 *et seq*.). 117

b) By contrast, [in legal orders] where the effects on affected persons arising from the dissemination of an article on the Internet by a content provider are taken into account when assessing lawfulness – as is typically done in German law pursuant to §§ 823 and 1004 BGB, as applied analogously – (cf. BVerfG, Order of the First Senate also issued today - 1 BvR 16/13 -, paras. 101 *et seq*., 114 *et seq*.), the decision on whether such dissemination by the content provider is lawful must generally also inform the decision concerning the search engine operator. If, after taking account both of the realities of Internet dissemination (including the possibility of retrieving information via online searches based on a person's name) and the passage of time, a content provider is entitled to disseminate a publication, the same must hold true for the referencing of such sites by a search engine operator. 118

c) Regardless, the balancing of the interests of affected persons against the interests of search engine operators will be subject to the tension between the reasonableness (*Zumutbarkeit*) of potential protective measures imposed on the search engine operator and the reasonableness of other possibilities for protection open to affected persons; in this respect as well, the balancing may, and in some cases must, have different outcomes for different data processors. In the context of the differentiations developed by the ordinary (non-constitutional) courts (see para. 113 above), differences may have to be taken into account that relate to the ease with which protection can be obtained or to the effectiveness of protective measures. For instance, more extensive possibilities of recourse may be allowed against a search engine operator, as the entity indirectly liable for the content in question, if legal protection against a content provider based abroad can hardly be obtained than if the content provider were based in the EU and legal recourse could thus easily be obtained. More extensive possibilities of recourse against the search engine operator may also be allowed if they are more efficient, for example where an article has been published by various online platforms. It is primarily incumbent upon the ordinary courts to specify these standards. It falls to the Federal Constitutional Court to review whether the standards are tenable from a fundamental rights perspective. 119

3. Thus, an assessment whether a claim for protection invoked vis-à-vis a search engine operator is to be granted requires a comprehensive balancing of the conflicting fundamental rights of the person affected by the referencing and of the search engine operator, as well as the fundamental rights of the content provider and the interest of the public in obtaining information. In such a balancing, the weight of the search engine operator's economic interests by itself is generally not sufficient to restrict the claim for protection of affected persons (cf. CJEU, Judgment of 13 May 2014, Google Spain, C-131/12, EU:C:2014:317, para. 81; Judgment of 24 September 2019, GC and Others, C-136/17, EU:C:2019:773, para. 53; Judgment of 24 September 2019, Google [Portée territoriale], C-507/17, EU:C:2019:772, para. 45). In contrast, greater weight is accorded to the interest of the public in obtaining information and, even more so, to the fundamental rights of third parties that must also be taken into account in the balancing. 120

In the present case, the balancing must include the freedom of expression of the content provider as a directly affected fundamental right – and not merely as an interest to be taken into account; the content provider is adversely affected by the decision and is holder of the fundamental right in question (cf. on independent public broadcasting organisations as holders of fundamental rights CJEU, Judgment of 26 April 2012, DR and TV2 Danmark, C-510/10, EU:C:2012:244, paras. 12 and 57 – regarding Art. 16 of the Charter; Jarass, in: *id*., EU-Grundrechte-Charta, 3rd ed. 2016, Art. 11 para. 19 - regarding Art. 11(2) of the Charter; ECtHR, RTBF v. Belgium, Judgment of 29 March 2011, no. 50084/06, §§ 5 and 94 – regarding Art. 10 ECHR; to the same effect cf. BVerfGE 31, 314 <321 and 322>; 59, 231 <254>; 74, 297 <317 and 318>; 78, 101 <102 and 103>; 107, 299 <310>). Therefore, it cannot be presumed that protecting the right of personality takes precedence; rather, the conflicting fundamental rights must be balanced on an equal basis. Just as it is not for the individual to determine unilaterally vis-à-vis the media what information may be disseminated about them in the course of public communication processes (cf. relating to German law BVerfG, Order also issued today - 1 BvR 16/13 -, para. 107), neither is it for them to do so vis-à-vis search engine operators. 121

Where affected persons – as in the present case – do not challenge the possibility to search for their name, but rather the effects of individual publications that adversely affect them, the weight of fundamental rights restrictions must be determined on the basis of the effects of the dissemination of these publications. Decisive factors include – as part of the general liability requirements set out by the civil courts on the basis of criteria for reasonableness – the effects of the dissemination of the publication in question on the development of personality that specifically follow from the search results, particularly having regard to the possibility of searches for a person's name. This determination must not be limited to merely appraising the relevant online contents in the context of the original publication, but must also be informed by the easy access to and continuing availability of the information through the search engine. In particular, the significance of the time passed between initial publication and 122

a later search result must be taken into account, as set out in current law under Art. 17 GDPR in the sense of a “right to be forgotten” (cf. CJEU, Judgment of 13 May 2014, Google Spain, C-131/12, EU:C:2014:317, para. 92 *et seq*.; Judgment of 24 September 2019, GC and Others, C-136/17, EU:C:2019:773, paras. 53, 74 and 77; Judgment of 24 September 2019, Google [Portée territoriale], C-507/17, EU:C:2019:772, para. 45 *et se*q.; regarding how this affects the interpretation of the Basic Law cf. BVerfG, Order of the First Senate also issued today - 1 BvR 16/13 -, paras. 105 and 106); regarding the “right to be forgotten” cf. Diesterhöft, Das Recht auf medialen Neubeginn, 2014, p. 24 *et seq*.; Frantziou, HRLR 2014, p. 761 *et seq*.; Spiecker genannt Döhmann, CMLR 2015, p. 1033 *et seq*.; Sartor, IDPL 2015, S. 64 ff.; Tambou, RTDE 2016, p. 249 *et seq*.; Auger, Revue de Droit Public – RDP 2016, p. 1841 *et seq*.; Jonason, ERPL 2018, p. 213 *et seq*.; Becker, Das Recht auf Vergessenwerden, 2019, p. 49 *et seq*.).

III.

According to the above, the challenged decision is ultimately not objectionable. 123

1. The Higher Regional Court correctly considered the name-related finding, indexing, temporary storage and display of the link to the NDR article in dispute to constitute processing of personal data. It also acknowledged that the complainant may have the right to claim for protection and deletion specifically vis-à-vis the search engine operator, which must be determined in a balancing of interests. The court undertook the necessary balancing, taking into account both the protection of the complainant’s right of personality and the defendant search engine operator’s freedom to conduct a business; the court also correctly viewed this freedom in conjunction with the freedom of expression on the part of the NDR broadcasting corporation and with Internet users’ interest in access to the relevant information. Thus, in its balancing, it recognised and reflected the substantive fundamental rights positions of the parties and the interests of third parties that had to be taken into account. It is irrelevant in this respect whether the court correctly distinguished between the fundamental rights of the Charter and those of the Basic Law. If it duly considered the substantive value decisions under constitutional law, the court satisfies the requirements of fundamental rights protection. In the present case, the Higher Regional Court cited both Art. 2(1) in conjunction with Art. 1(1) GG and Arts. 7 and 8 of the Charter in its balancing. Thus, it essentially satisfied the fundamental rights requirements. 124

2. […] 125

Ultimately, the challenged decision is within the margin of appreciation afforded ordinary courts. 126

3. The Higher Regional Court rightly focussed primarily on criteria that determine whether the airing of the NDR broadcast in dispute and its continued availability on the Internet are permissible in relation to the complainant. It was correct in also considering to what extent the broadcast can be found through search engines, in partic- 127

ular through searches for the complainant's name.

Yet the Higher Regional Court did err in finding that the complainant is only affected in her social sphere. In today's reality, given the possibilities for retrieving and combining information via online searches for a person's name, it has become almost impossible to distinguish between the social sphere and the private sphere as regards the effects on the person concerned – a fact that is specifically asserted by the complainant. The Higher Regional Court tenably posited that the broadcast, which concerns the practical effectiveness of protection against dismissal, addresses a topic that is of general public interest. According to the Higher Regional Court, the NDR broadcast relates not to matters exclusively belonging to the complainant's private life, but to her professional conduct, and the conduct of the company she manages, which both have an impact on public life and thus justify the continuing public interest in this information, although this justification diminishes over time. The complainant can be expected to tolerate the resulting burden – including possible effects on her private life – to a greater extent than would be the case for contents that only focused on her as a private person. The distinction between the social and the private sphere does remain relevant for assessing the contents of the online publication in dispute, but not for weighing the effect on the affected person. 128

It was also tenable for the Higher Regional Court to invoke, as an additional consideration, the fact that the complainant agreed to the interview featured in the contested broadcast. […] 129

Furthermore, the Higher Regional Court was right not to qualify the broadcast and the corresponding online link as calumny (*Schmähung*). Even though the broadcast's title "The dirty tricks of employers" may portray the complainant in a negative light when listed in search results for her name, it does not amount to calumny, which would be impermissible from the outset. A contribution only amounts to calumny if it serves solely to disparage someone, without any connection to the factual subject matter. This is not the case here. Rather, the broadcast is directly related to a dispute between the complainant, in her capacity as managing director of a company, and her employees. As a value judgment, the broadcast unequivocally falls within the scope of freedom of expression, which means that a balancing of interests must be undertaken to determine whether the statement is lawful. The Higher Regional Court, considering among other things the personal responsibility assigned to the complainant and the realities of Internet communication – i.e. that searches for the complainant's name will yield results –, held that the dissemination of the broadcast is justified in principle, which is not objectionable under constitutional law. 130

1. The Higher Regional Court also considered time as a relevant factor. Specifically, the Higher Regional Court examined whether the further dissemination of the publication, including the complainant's name, continues to be justified despite the time that had passed since the broadcast was originally published. The passage of time may modify both the weight attached to the interest of the public in this information 131

and the weight of the resulting fundamental rights impairments (cf. BVerfG, Order of the First Senate also issued today - 1 BvR 16/13 -, para. 120 *et seq*.).

On the one hand, the court took into account that there is continued public interest in the topic. It correctly found that the criterion of “achieving one’s purpose” is not generally suitable for determining the permissible duration of the lawful dissemination of publications where these serve the process of public opinion-forming. This is because the dissemination of such publications is not contingent on a specific permission for a certain purpose, but is rooted in the communication-related freedoms [i.e. freedom of expression, information and the press] and the right they entail to oneself determine, alter or leave entirely open the purposes of communication. 132

On the other hand, the court did not rule out that the passage of time may render a search engine’s dissemination of such publications identifying affected persons unreasonable and thus impermissible. It recognised that the negative effects on affected persons of the dissemination of publications critical of the conduct of individuals may grow considerably with the passage of time and may be less and less justified – particularly where they are featured among the top search results in searches for someone’s name many years later. Thus, the court in principle took into account that the possibility of negative information being forgotten is of great significance for the free development of one’s personality. 133

Ultimately, the Higher Regional Court concluded that, at present, the complainant was not entitled to request the dereferencing of the contribution in question, at least not yet. It essentially held that, by giving the interview, the complainant attracted public attention herself, there was a continued public interest in the topic, she continued to work as a managing director and the seven years that had passed since the interview were not overly long, given that the topic continued to be relevant. This gives sufficient effect to the guarantees of the Charter; it is not ascertainable that the court based its decision on a fundamentally incorrect understanding of the significance and scope of the affected fundamental rights of the Charter. The decision is also tenable under ordinary law, and thus does not raise any constitutional objections in this regard either. 134

c) As the Higher Regional Court rejected the complainant’s action and the content provider’s possibilities for disseminating the contribution were thus not restricted, the court was neither required to hear the content provider in respect of its fundamental rights, nor to involve it in the proceedings by granting it its own avenues of legal protection. 135

d) Ultimately, the challenged decision stays within the margin of appreciation afforded ordinary courts. The constitutional complaint must therefore be rejected as unfounded. 136

IV.

A request for a preliminary ruling from the Court of Justice of the European Union pursuant to Art. 267(3) TFEU is not required. In the present case, the application of the EU fundamental rights neither raises questions of interpretation to which the answer is not already clear from the outset nor questions that have not been sufficiently clarified in the case-law of the Court of Justice of the European Union (as read in light of the case-law of the European Court of Human Rights, which serves as a supplementary source of interpretation in this regard, cf. Art. 52(3) of the Charter). 137

1. It has been clarified that the activities of a search engine must be measured independently against Arts. 7 and 8 of the Charter, that they do not fall under the so-called media privilege and that affected persons do not have to first invoke their claims for protection primarily vis-à-vis content providers. It has likewise been clarified that the question when a search engine operator must delete a search result hinges on a balancing of interests in the individual case, which is not the same as balancing the rights of content providers and affected persons, but requires that the different situations be taken into account (cf. on all of the foregoing CJEU, Judgment of 13 May 2014, Google Spain, C-131/12, EU:C:2014:317, paras. 35 *et seq*. and 74; Judgment of 24 September 2019, GC and Others, C-136/17, EU:C:2019:773, paras. 68 and 77; Judgment of 24 September 2019, Google [Portée territoriale], C-507/17, EU:C:2019:772, para. 44). 138

2. It is also not necessary to clarify that the fundamental rights of the content providers must be taken into consideration in the balancing. That all affected fundamental rights must be taken into account in the balancing between different fundamental rights follows not only from the principle of the comprehensive applicability of fundamental rights, on which the Charter is based, but also from the case-law of the Court of Justice of the European Union and of the European Court of Human Rights (cf., e.g., CJEU, Judgment of 29 January 2008, Promusicae, C-275/06, EU:C:2008:54, para. 65 *et seq*.; Judgment of 7 August 2018, Renckhoff, C-161/17, EU:C:2018:634, paras. 41 and 42; ECtHR [GC], von Hannover v. Germany, Judgment of 7 February 2012, nos. 40660/08 and 60641/08, § 106 with further references). 139

This is also in accordance with the decisions of the Court of Justice of the European Union Google Spain, GC and Google – Portée territoriale – (cf. CJEU, Judgment of 13 May 2014, C-131/12, EU:C:2014:317, paras. 21 *et seq*. and 74; Judgment of 24 September 2019, C-136/17, EU:C:2019:773, paras. 68 and 7753, 57, 59, 66 *et seq*., 75 *et seq*.; Judgment of 24 September 2019, C-507/17, EU:C:2019:772, para. 40 *et seq*.). In those decisions, the Court of Justice of the European Union derives from freedom of information under Art. 11 of the Charter that the interests of the public must be taken into account in the balancing (cf. CJEU, Judgment of 24 September 2019, GC and Others, C-136/17, EU:C:2019:773, paras. 75 and 76). If this applies to the interests of an indirectly affected public, which are not specific to certain individuals, it must apply all the more with regard to content providers, whose freedom of ex- 140

pression is individually and directly affected by a decision on dereferencing. Accordingly, the Court of Justice of the European Union holds that, with regard to the rights of the Charter, also without reserve to their applicability to search engines, a determination of the lawfulness of data processing under Directive 95/46/EC necessitates a balancing of the opposing rights and interests concerned (cf. CJEU, Judgment of 13 May 2014, Google Spain, C-131/12, EU:C:2014:317, para. 74). Thus, a decision ordering the dereferencing of a search result must also take into consideration the content provider's fundamental rights. Where such a decision ordering dereferencing is based on the specific contents of an online publication, it results in a direct limitation of the content provider's fundamental rights given that it deprives the content provider of an important platform for disseminating its publication, which would otherwise be available to it.

Unlike in the case-law of the Court of Justice of the European Union (cf. CJEU, Judgment of 13 May 2014, Google Spain, C-131/12, EU:C:2014:317, para. 81; Judgment of 24 September 2019, GC and Others, C-136/17, EU:C:2019:773, paras. 53 and 66), the constellation at hand does not give rise to the presumption that the protection of one's personality must take precedence in the balancing; however, this is not a question of interpretation that must be clarified by the Court of Justice. The presumption of the Court of Justice, too, was determined by the specific constellations of the cases before it. For instance, in the Google Spain case, the freedom of expression of the affected content providers did not have to be taken into account in the balancing given that the publication at issue was an announcement issued by a public authority (cf. CJEU, Judgment of 13 May 2014, C-131/12, EU:C:2014:317, paras. 14, 16). In the GC case, the protection of one's personality was accorded special weight from the outset because the case concerned special categories of data affecting one's personality within the meaning of Art. 8(1) and (5) of Directive 95/46/EC (cf. CJEU, Judgment of 24 September 2019, C-136/17, EU:C:2019:773, paras. 24 *et seq*., 39 and 40, 44, 67 *et seq*.). However, neither the Charter of Fundamental Rights as such nor the case-law of the Court of Justice indicate in any way that the protection of the right of personality and freedom of expression are not generally accorded equal weight when they are balanced against one another. Rather, it can be inferred from the case-law of the Court of Justice that the Court of Justice consistently takes into account freedom of expression in its balancing, insofar as it is applicable, and that other fundamental rights do not generally take precedence over this freedom. The European Court of Human Rights, too, holds that the rights guaranteed under Arts. 10 and 8 ECHR deserve equal respect as a matter of principle (cf. ECtHR [GC], von Hannover v. Germany, Judgment of 7 February 2012, nos. 40660/08 and 60641/08, § 106 with further references; Delfi v. Estonia, Judgment of 16 June 2015, no. 64569/09, § 139). Accordingly, in a legal dispute involving intermediaries, too, the European Court of Human Rights requires a fair balancing between the right of personality of the affected person and the freedom of expression of the person making a statement (cf. ECtHR, Kucharczyk v. Poland, Decision of 24 November 2015, no. 72966/13, §§ 25 *et seq*.). 141

D.

The decision is unanimous. 142

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Baer Britz Ott

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