# Dialogue and diversity. The "right to be forgotten" - decisions of the Federal Constitutional Court

Eva Herzog

**BVerfG, Beschluss des Ersten Senats vom 06. November 2019 - 1 BvR 16/13 -, Rn. (1-157) (Recht auf Vergessen I)**

**BVerfG, Beschluss des Ersten Senats vom 06. November 2019 - 1 BvR 276/17 -, Rn. (1-142) (Recht auf Vergessen II)**

In two landmark decisions the First Senate of Germany's Federal Constitutional Court (FCC) reinterprets the Court's role in the European fundamental rights architecture. German fundamental rights will remain the standard of review in Karlsruhe even in the context of EU law where the European Charter of Fundamental Rights could also apply. And, even more remarkable, the Court will review the domestic application of legislation fully determined by EU law on the basis of EU fundamental rights. Moreover, the Court fleshes out its conception of the "right to be forgotten". Online press archives may have to take measures to avoid that articles containing personal information are retrievable for an indefinite period of time via search engines. For delisting claims against search engine operators, the Court emphasizes that the freedom of expression of content providers must be taken into account.

## Summary



## Keywords

Federal Constitutional Court - fundamental rights - multilevel legal system - right to be forgotten - data protection

## 1. The context and importance of the cases

The "right to be forgotten" that is an individual's claim to delist or delete personal data retrievable online has kept the lower courts and the CJEU busy for quite a while. Two cases of individuals invoking their right to privacy against the permanent availability of past media coverage gave the FCC an opportunity to hand down landmark decisions on domestic and EU fundamental rights. The decisions are the latest milestones in a long-standing dispute between the FCC and the CJEU about the scope of EU as opposed to German fundamental rights in the context of EU law. They affect the interplay between the two Fundamental Rights regimes as well as the constitutional complaint procedure in Germany. Moreover, the Court adds new facets to the "right to be forgotten". The decisions are ground-breaking. Commentators compare them to landmark cases of German constitutional case law like Solange I and II or talk about a November Revolution for the fundamental rights architecture in the EU multi-level system.[1] The Court's comprehensive and intricate reasoning will be discussed and understood in the years to come. This short article gives a cursory overview of the Court's arguments. It will proceed by summarizing the facts of the cases (2.), the European Fundamental Rights architecture as developed by the Court (3.) and the Court's stance on the "right to be forgotten" (4.). It concludes with some brief observations on the judgments' consequences (5.).

## 2. The facts of the cases

"Right to be forgotten I" is based on a spectacular criminal case: the complainant of Order of 6 November 2019 - 1 BvR 16/13 - was convicted of murder for having killed two people on a sailing yacht crossing the Atlantic Ocean in 1981. The trial was covered in depth by the weekly "Der Spiegel" and mentioned the complainant's full name. Having served his sentence, the complainant discovered that the articles - now in the internet archive of "Der Spiegel" - appear at the top of the Google search results when entering his name. He sought remedy in court against Der Spiegel claiming that the free development of his personality was severely impaired as he wished to develop social relationships without being associated with the crime.
The Order of 6 November 2019 - 1 BvR 276/17 - Right to be forgotten II - concerns the manager of a company suing Google for delisting a 2010 television piece featuring inter alia an interview with the claimant and reproaches by a former employee who had planned to establish a works council in the company. When googling the manager's name, the piece appeared among the top search results. The complainant claims a violation of her personality right, contending inter alia that she was impaired in her private life and that the public lacked a legitimate interest in the information as a long

[1] See W. Michl, *In Vielfalt geeinte Grundrechte*, in *Verfassungsblog*, 27 November 2019; J. Kühling, *Neue Juristische Wochenschrift 2020*, 275.

time had passed.
Thus, both cases concern initially lawful media coverage, one about criminal proceedings and the other about socially criticized behavior. In the first case, the affected individual proceeds against the press providing content online, in the second against the search engine operator.

## 3. The European fundamental rights architecture according to the FCC

When Member States apply rules in the context of EU Law, two fundamental rights regimes claim authority, i.e. the Charter of Fundamental Rights of the European Union (CFR) and the fundamental rights guarantees in Art. 1 - 19 of the German Basic Law. Correspondingly, there is an institutional aspect, namely whether fundamental rights conflicts are ultimately decided by domestic constitutional courts or the CJEU.
According to the FCC, the question of whether to apply the EU or the German fundamental rights essentially hinges on one central aspect: the distinction between *fully harmonized* EU law and legal provisions *not fully determined* by EU law. The two cases differ accordingly: in Right to be forgotten I, the decisive legal rule was the so-called media privilege in Art. 9 Directive 95/46/EC, now Art. 85 GDPR, giving leeway to Member States. Right to be forgotten II, on the other hand, concerned the right to de-listing according to Arts. 2, 4, 6, 7, 12, 14 Directive 95/46/EC, see now Art. 17 GDPR, legal provisions which are fully harmonized under EU law.

### 3.1. Unity in diversity[2] - the diversity of fundamental rights traditions in the European Union according to Right to be forgotten I

According to prior case law, where EU law refrains from full harmonization (be it partial harmonization or vaguer obligations) the FCC applied a test strictly separating the EU and German fundamental rights: either the Member State Germany was „implementing Union law" in the sense of Art. 51 (1) CFR and was thus fully bound by it or it did not implement Union Law, with the consequence that the fundamental rights of the Basic Law applied. The FCC even went so far as to assume a violation of the German constitutional right to have a case decided by the legally competent judge (Recht auf den gesetzlichen Richter) if a lower court asked for a preliminary ruling by the ECJ outside the „implementation of Union law".[3]
This strict separation is abandoned by the Court. Instead, the FCC now squares the circle, opting for a more diverse approach towards the Member States' fundamental rights traditions whilst at the same time acknowledging the relevance of the Charter. No matter whether a Member State „implements" Union law in the sense of Art. 51

[2] The motto of the European Union, see also *europa.eu*.

[3] W. Michl, *op. cit.*

(1) CFR or not,

> «the Federal Constitutional Court reviews domestic law and its application on the basis of the fundamental rights enshrined in the Basic Law; in principle, this standard also prevails if a domestic legal provision falls within the scope of application of EU law but is not determined in its entirety by EU law, as is the case here. This holds true even where the Charter of Fundamental Rights of the European Union, pursuant to its Art. 51(1) first sentence, is also applicable in the individual case».[4]

*Prima facie*, the Court thus gives priority to the German fundamental rights tradition in cases not fully determined by EU law.

How does it justify such priority? It reasons that this corresponds to the FCC's role as guardian of the Constitution and to constitutional provisions (Art. 23 of the Basic Law) that bind Germany's participation in the EU to federal principles and the principle of subsidiarity. Also, relying on German fundamental rights is seen as fully in accordance with EU law, as it, too, recognizes the diversity of cultures, traditions and fundamental rights as well as the principle of subsidiarity in Art. 5 (3) TEU, Art. 51 (1) CFR.[5]

More significantly, the Court's reasoning is grounded in two fundamental assumptions: firstly, it draws a parallel and assumes that EU law gives leeway to diverse fundamental rights traditions in different Member States where there is leeway for different national traditions in specific legislation. Insofar, the Court observes:

> «Relying on the fundamental rights enshrined in the Basic Law as the primary standard of review is informed by the fact that EU law, where it affords Member States leeway to design, is generally not aimed at uniformity in fundamental rights protection; it equally rests on the presumption that the application of German fundamental rights simultaneously ensures the level of protection required under EU law, which in this scenario seeks to accommodate diversity. […] If the EU legislator affords the Member States leeway to design in the implementation of EU law, it can be presumed that this also extends to the relevant fundamental rights protection. Drawing on the CJEU's case-law, it can generally be assumed in this regard that the level of protection under EU fundamental rights sets certain outer limits while also seeking to accommodate fundamental rights diversity».[6]

Variety at the level of specific legislation results in variety of fundamental rights traditions; because Art. 51 (1) of the Charter implies that the EU fundamental rights regime is ancillary to specific legislation. Moreover, the Court cites case law by the CJEU

[4] See the partial translation here available at *bundesverfassungsgericht.de*.

[5] § 48, where the Court cites CJEU, C-617/10, *Akerberg Fransson* (2013), § 29.

[6] See the partial translation at *bundesverfassungsgericht.de*.

granting a margin of appreciation to Member States in matters of fundamental rights,[7] as it is also well known in the case law of the European Court of Human Rights.[8]
This is corroborated by the Court's second assumption: the level of protection offered by constitutional review based on German fundamental rights is presumed to ensure the level of protection required under the Charter. It explains that

> «this presumption arises from overarching ties between the Basic Law and the Charter shaped by a common European fundamental rights tradition, which is notably rooted in the European Convention on Human Rights».[9]

However, even though German fundamental rights will be applied primarily, the FCC is eager to avoid a contradiction to EU law. Firstly, it softens the relationship of rule (German fundamental rights) and exception (European Fundamental Rights) in areas not fully determined by EU law: In the future, German Courts will have to bear in mind the provisions of the Charter when applying domestic fundamental rights in the context of EU law, because the fundamental rights of the Basic Law will be interpreted in light of the Charter, in parallel to the European Convention on Human Rights.[10] Secondly, there are two exceptions from the principle to apply the German fundamental rights standard:[11] German courts have to consider an exception to the assumption of diversity of national fundamental rights in case specific EU legislation provides otherwise.[12] Furthermore, they have to consider whether the assumption of equal level protection under the Basic Law is rebutted by the Charter as interpreted by the CJEU. Nonetheless, these exceptions are meant to be narrowly construed: the FCC demands specific and sufficient indicators.[13] Should such indicators be present, a review of domestic fundamental rights will not be sufficient. Domestic courts would then have to examine whether the domestic fundamental rights standard offers sufficient protection for the Charter rights. If answered in the negative, the courts have to apply the Charter Right. This includes the preliminary ruling procedure under Art. 267 (3) TFEU if need be, i.e. if not for an *acte claire or éclairé*.[14]
Scholars disagree as to the potential for conflict with the CJEU lying in this doctrinal move. However, it is probably true that the judgment will refocus attention: as it is no longer decisive whether the domestic application of EU law constitutes an "implementation" of Union law, the conflict about Art. 51 (1) CFR could potentially be replaced by substantive arguments on the interpretation of fundamental rights.[15]

---

7 § 54, where the Court cites CJEU, C-36/02, *Omega Spielhallen* (2004), §§ 31 ss.

8 *Ibidem*.

9 § 56.

10 §§ 60 ss.

11 §§ 63 ss.

12 § 65.

13 §§ 63 ss.

14 § 72.

15 W. Michl, *op. cit.*

## 3.2. Welcome back - European fundamental rights before the Federal Constitutional Court in Right to be forgotten II

Even more spectacular is the FCC's second decision: in a phoenix-like move, the FCC returns on the stage of constitutional review in areas fully-harmonized by EU law. Since the so-called Bananas decision in 2000,[16] the Court had refrained from measuring EU law against the standard of national fundamental rights unless a claimant was able to prove that the *general* standard of fundamental rights protection in the EU had fallen below the one set in the Solange II - decision[17] in the 1980ies. Given the recent emphasis on fundamental rights in CJEU case law and the enactment of the Charter of fundamental rights with the Lisbon Treaty, this requirement proved factually impossible to fulfill. As the FCC only applied the fundamental rights of the Basic Law, this meant that there was factually no constitutional complaint procedure against Member States' acts fully determined by EU law. The FCC had slightly softened its stance in two later rulings. Particularly, in exceptional cases and subject to strict conditions, it had conceded that the protection of fundamental rights by the FCC may include the fundamental rights review of sovereign acts determined by Union law should this be indispensable to protect the constitutional identity under Art. 79 (3) of the Basic Law.[18] Nonetheless, the standards remained extremely high.[19]

In Right to be forgotten II, the Court now flings its doors wide open: even though the general standard of protection afforded under EU fundamental rights is sufficiently effective, acts fully determined by EU law will be reviewed. However, - and this is the decisive move - it will not return to applying domestic fundamental rights but will apply the Charter rights instead. The Court reasons:

> «Regarding the application of legal provisions that are fully harmonised under EU law, the relevant standard of review does not derive from German fundamental rights, but solely from EU fundamental rights. In this scenario, EU law takes precedence of application (*Anwendungsvorrang*) over the fundamental rights of the Basic Law. As regards the review whether fully harmonised legal provisions violate fundamental rights, this has already been recognised in established case-law of the Federal Constitutional Court. It applies accordingly to the review whether fully harmonised ordinary legislation has been applied in conformity with fundamental rights. […] Where the EU enacts legislation that is applicable, and must be applied uniformly, in all Member States, it follows that the fundamental rights protection afforded in this context must be based on uniform standards, too».[20]

16 BVerfGE 102, 147.

17 BVerfGE 73, 339.

18 BVerfGE 140, 317.

19 W. Michl, *op. cit.*

20 See the partial translation of the judgment at *bundesverfassungsgericht.de*.

Although the individual could already invoke his right to be heard by the legally competent judge claiming that the lower courts had not observed their duty to make a referral under Art. 267 (3) TFEU, the Court diagnosed a gap in protection: If the lower courts violated EU fundamental rights when applying EU law, there was no legal remedy.[21] To effectively fulfill it's constitutional task of protecting fundamental rights, the Court deemed it necessary to review judgments by the lower courts applying fully-determined EU law.[22]
Therefore,

> «the Federal Constitutional Court has decided for the first time that where EU fundamental rights take precedence over German fundamental rights, the Court itself can directly review, on the basis of EU fundamental rights, the application of EU law by German authorities».[23]

assuming a task it had hitherto left to the lower courts in cooperation with the CJEU. It follows quite naturally that the FCC emphasizes it's intention to seek close cooperation with the CJEU when applying the Charter rights, including the preliminary ruling procedure under Art. 267 (3) TFEU.

## 4. The FCC's stance on the "Right to be forgotten"

Concerning substantive law, the cases flesh out the Court's understanding of the "right to be forgotten", relating centrally to the protection of personality rights. Compared to prior case-law of the CJEU, the FCC emphasizes the importance of freedom of expression. Nonetheless, the Court does not shy away from imposing obligations on press archives if they put their content online. Obviously, the considerations applying to search engine operators have to be distinguished from those applying to the publishers of contested contents when balancing the conflicting rights and interests, even though the questions are intertwined.

### 4. 1. Criteria for online press archives/content providers - Right to be forgotten I

As the data processing by the magazine Der Spiegel in its internet archive constitutes data processing for journalistic purposes, it is governed by the so-called media privilege in Art. 9 Dir. 95/46/EC, Art. 85 GDPR, leaving leeway to Member States. Following the above-mentioned distinction, the FCC therefore applies the fundamental

[21] §§ 60 ss. Sceptical insofar M. Breuer, *Wider das Recht auf Vergessen … des Bundesverfassungsgerichts!*, in *Verfassungsblog*, 2 December 2019.

[22] § 62.

[23] See the partial translation of the judgment at *bundesverfassungsgericht.de*.

rights of the Basic Law. Fundamental rights apply between private parties because of the German constitutional doctrine of "indirect effect" (*mittelbare Drittwirkung*).[24]
The Court balances the claimant's personality right (Art. 2 (1), 1 (1) Basic Law)[25] against freedom of expression and the press (Art. 5 (1) Basic Law). It draws on a long line of cases in press law on the publication of personal details in criminal proceedings, especially the convict's name. In this respect, the Court emphasizes that the changed conditions of communication in the internet must be taken into account. Particularly, the aspect of the time of publication is considered crucial:[26] the Court observes that whilst prior case law centrally asked whether mentioning the personal name anew amounted to a new or additional negative impact on the claimant, especially on his interest in social reintegration, the conditions of publications have changed: articles citing a convict's name are potentially indefinitely available, retrievable and combinable.[27] By contrast, the Court underscores that the individual's freedom includes the chance to leave past mistakes and errors behind. The possibility of forgetting is part of the temporal dimension of freedom and has to be enabled by the legal framework, it states.[28] This is also in the public interest in a democratic polity because citizens will only be willing to participate if offered adequate protection.[29] However, this doesn't mean that the individual is allowed to control her public image at will, the Court stresses. Particularly, the rights of the press have to be taken into account: it is central for both the press and the common good that journalistic articles are available on the Internet, also over time.[30]
The balance between these two rights has to be struck on the merits of the individual case.[31] Nonetheless, the Court's criteria for this balancing operation hint at some directions for future cases: Firstly, publishing houses do not have to anticipate the individuals' interests but may wait for them to contact them and explain their concerns.[32] Moreover, the time since the initial publication plays a decisive role depending also on the article's content, the negative impact on the claimant and his behavior in the meantime.[33] Likewise, the lower courts have to consider whether technical compromises between complete deletion of an article, anonymization and full retrievability via search engines are possible. Even if technically intricate, a publishing house could for instance use technical means to avoid the retrievability of the article by search engines whilst at the same time leaving it online, as the Court explains.[34] Thus, «online press archives

[24] §§ 76 ss.

[25] On the Court's elaborations distinguishing between two groups of cases under the umbrella of the personality right, namely the right to informational self-determination and personality rights in the context of press law see K.N. Peifer, *GRUR 2020*, 34 ss., spec. 36.

[26] §§ 96 ss.

[27] §§ 101 - 103.

[28] § 105.

[29] § 108.

[30] §§ 112 ss.

[31] §§ 109, 114 ss.

[32] § 119.

[33] §§ 121 ss.

[34] §§ 132 ss.

may be required to take measures protecting against the indefinite dissemination via search engines of news publications containing information relating to an individual». Given the facts of the case, the Court stated that the lower courts had not given due consideration to the claimant's situation,[35] particularly the claimant's behavior after serving his sentence and the wide-ranging impact of the article appearing at the top of the search results. The lower courts should have examined reasonable technical compromises that the publisher could take to protect the claimant at least against the article appearing among the search engine results when entering his name.

## 4.2. Criteria for search engine operators - Right to be forgotten II

As the decisive legal provision was fully harmonized EU law, the Court applied EU fundamental rights, interpreting Art. 7 f, 12b, 14 Dir. 95/46/EG in the light of the conflicting Charter rights. On behalf of the claimant, the Court invoked Art. 7, 8 CFR. On behalf of the search engine operator, the Court referred to her freedom to conduct a business under Art. 16 CFR, whereas she is not protected by the right to freedom of expression, Art. 11 CFR. However, Art. 11 CFR remains relevant regarding the rights of third parties, because the operator may not be obliged to violate third parties' rights to free expression and information.[36] Therefore, the fundamental rights of content providers in Art. 11 CFR have to be taken into account, including the question whether the content provider was entitled to disseminate the information vis-a-vis the affected individuals,[37] an addition to the CJEU's stance.[38] Moreover, the interests of internet users seeking access to articles have to be taken into consideration as well.[39] As to the balancing, the FCC held - in line with CJEU case law - that the search engine operator's economic interests as such are in principle not weighty enough to justify a limitation of the affected person's, but that greater weight must be given to the interest of the public and the fundamental rights of third parties. Relevant aspects for the balancing between the different interests are especially whether the dissemination online affected the claimant in the free development of her personality, especially taking into account that internet users conduct online searches of the affected person's name, thus the easy access and continuing availability of the information.[40] Also, the time passed between the initial publication and the listing will be of particular importance.[41]
Interestingly, the Court held that the personality rights in the case did not take precedence over freedom of expression and thus differs from CJEU case law. It justifies this

35 §§ 143 ss.

36 §§ 103 ss.

37 § 109.

38 See CJEU, C-131/12, *Google Spain* (2014), §§ 81, 99.

39 §§ 108 ss.

40 § 122.

41 § 117.

difference by pointing out the factual differences of the cases:[42]

> «Thus, in the present case – in contrast to some of the cases decided by the CJEU, which concerned different scenarios – it cannot be presumed that protecting the right of personality takes precedence; rather the conflicting fundamental rights must be balanced on an equal basis. It is not for the individual to determine unilaterally what information may be disseminated about them in the course of public communication processes, neither vis-à-vis the media nor vis-à-vis the search engine operators».[43]

Against this standard, the constitutional complaint was unsuccessful on the merits,[44] with the FCC highlighting that the claimant had deliberately agreed to be interviewed for the television piece.

## 4.3. The Karlsruhe right to be forgotten

The decisions illustrate once more that the conditions for lawfully disseminating personal information via a search engine differ from the conditions for publishing contested content. For content providers, the FCC draws on long-standing German case-law concerning the personal information of convicts and adapts it to the conditions of communication on the internet. It follows that even lawfully published articles are not completely immune from restrictions of their retrievability: the FCC approves the "notice-and take-down" approach. As a rule, the Court excludes that articles will have to be substantively changed ex post.[45] Rather, the Court's reasoning amounts to a range of graded responses between deletion, anonymization and technically restricting the retrievability for search engine operators while keeping the full-text article online.[46] It is for the lower courts to develop feasible solutions. As to the de-listing right against search engine operators, the FCC applies the Charter rights and deviates from the CJEU's presumption that protecting the right of personality takes precedence, as not only the interests of the internet users, but also the freedom of expression of publishers has to be taken into consideration.

---

[42] In CJEU, *Google Spain*, C-131/12, cit., §§ 81, 99 and CJEU, C-136/17, *GC v. CNIL* (2019), § 53, the CJEU held that as a rule the data subject's rights override not only the economic interest of the operator, but also the interest of the general public in having access to that information upon a search relating to the data subject's name.

[43] See the partial translation at *bundesverfassungsgericht.de*.

[44] §§ 123 ss.

[45] § 130.

[46] See J. Milker, *Karlsruhe im Luxemburger Gewand, aber dennoch eigenständig*, in *Verfassungsblog*, 29 November 2019.

## 5. An intensified fundamental rights dialogue between Karlsruhe and Luxembourg

The judgments combine conciliatory bows to the CJEU with more conflict-prone arguments. The intricate doctrinal consequences have yet to be discovered and discussed in detail. Many commentators applaud the Court for easing a lingering tension between Karlsruhe and Luxembourg.[47] Some raise concerns as to the Court's unanimity, as both judgments have been issued by the Court's First Senate who - quite extensively - refused to invoke the Court's plenary.[48] The institutional aspect of the ruling is central: in areas fully harmonized by EU law, Karlsruhe is back on the constitutional review stage and offers its most influential procedure,[49] the constitutional complaint procedure, for Charter rights. The FCC thus follows the example of the Austrian, Belgian, French and Italian constitutional courts[50] and takes its place in the "multilevel cooperation of courts" or *Gerichtsverbund* in the European Union. For certain, whether the fundamental rights architecture sketched out by the rulings will result in conflict or dialogue will hinge decisively on the FCC's willingness to make use of the preliminary ruling procedure. So far, it has been reluctant as to fundamental rights. Moreover, the quality of the dialogue will depend on the depth of its considerations of CJEU case law with commentators lamenting the rather brief analysis in Right to be forgotten I.[51] Nonetheless, it seems likely that the new conception will result in intensified doctrinal elaborations about EU fundamental rights in Luxembourg, as the CJEU has to answer in detail to future questions by the FCC with its extensive body of fundamental rights case-law.[52] May the dialogue be fruitful.

[47] See W. Michl, *op. cit.*; J. Kühling, *op. cit.,* 279 ss.; M. Schramm, *‚Grundrechtsvielfalt' als Allzweckwaffe im Rechtsprechungsverbund*, in *Verfassungsblog*, 5 December 2019; T. Kleinlein, *Neue starke Stimme in der europäischen Grundrechts-Polyphonie*, in *Verfassungsblog*, 1 December 2019; M. Breuer, *op. cit.*; more cautious J.M. Hoffmann, *Neue Zeitschrift für Verwaltungsrecht 2020*, 33 ss., spec. 37; K.N. Peifer, *op. cit.*, 34.

[48] §§ 85 ss. See J.M. Hoffmann, *op. cit.,* 36 ss.

[49] C. Möllers, *Legalität, Legitimität und Legitimation*, in M. Jestaedt-O. Lepsius-C. Möllers-C. Schönberger-T. Allert, *Das entgrenzte Gericht*, Berlin, 2011, 298.

[50] See the references in Order of 6 November 2019 - 1 BvR 276/17 - Right to be forgotten II, para 50; inter alia citing the Italian Corte Costituzionale, No. 20/2019, IT:COST:2019:20, §§ 2.1., 2.3.

[51] M. Schramm, *op. cit.*

[52] W. Michl, *op. cit.*; J. Kühling, *op. cit.*, 279.