# mediaLAWS

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*Sono stati sottoposti a referaggio a doppio cieco i contributi di: Maria Romana Allegri, Andrea Buratti, Ylenia Maria Citino, Caterina Di Costanzo, Federica Giovanella, Angela Mendola, Daniela Messina, Cristina Evanghelia Papadimitriu, Alberto Randazzo.*
*Su determinazione della direzione, sono inoltre stati sottoposti a referaggio anonimo i contributi di: Filippo Donati, Simone Lonati e Vincenzo Zeno Zencovich.*

# Note a sentenza

# The relationship between European law and German law regarding the protection of the right to be forgotten as a fundamental right: the right to oblivion in the judgement of the German Constitutional Court "Right to be forgotten I" from a comparative point of view

Carloalberto Giusti - Filippo Luigi Giambrone

**German Federal Constitutional Court, Order of the First Senate of 6 November 2019, 1 BvR 16/13**

The case note analyses the resolution of 6 November 2019 of the 1st Senate of the German Federal Constitutional Court (BVerfG) (register number 1 BvR 16/13), concerning the right to be forgotten. It deals with the application of the fundamental rights of the German Basic Law as the primary standard of examination with regard to the enforcement of specialised law under EU law (namely, media privilege under data protection law). It delves into the scope of protection of the expression of general personality rights against threats caused by the dissemination of personal reports and information as part of public communication in an online press archive.

## Summary



## Keywords

right to be forgotten – comparative law – data protection – German Civil Code – personality rights

## 1. Introduction

The discussion about a right to be forgotten – or rather a right to be forgotten – is becoming increasingly important as every aspect of life is digitised. Regarding the increasingly existential online archives for press publishers, the question arises to what extent the unlimited availability and availability of information is covered by freedom of expression[1] and freedom of the press[2] and under what circumstances the general right of personality of those affected is contrary to this[3]. With regard to media privilege, it was important, among other things, to what extent the fundamental rights of the Basic Law constitute the standard of assessment in matters with points of contact with EU law to be applied as a matter of priority. The German federal constitutional Court (BVerfG) has recently dealt with this very issue in two decisions.[4] In the case of non-fully harmonised EU law, the fundamental rights of the Basic Law constitute the primary standard of assessment. Moreover, the German Constitutional Federal Court states that, within the diversity of fundamental rights provided for by European law, the presumption is represented by the fact that the fundamental rights of the Charter of Fundamental Rights of the European Union (GrCh) are co-guaranteed by those of the GG.[5] This decision note clearly highlights that presumption can only be rebutted if there is concrete and sufficient evidence to support it.[6] Threats from the dissemination of personal reports and information as part of public communication affect the scope of protection of the expressions of general personality law, not that of the right to informational self-determination. The aim and pursued objective of this scientific work undoubtedly support the decisions of the German Federal Constitutional Court.[7] The general right of personality does not give way to filtering and restricting publicly available information about one's own person according to his own ideas.[8] The unlimited public confrontation with previous positions, statements

[1] With regard of a better understanding and a comparative overview on recent case law developments within the US and Europe relating to the legal status of social networks, which embodies a relevant topic in view of the forthcoming reform which the European Union institutions are arranging in relation to digital services, see M. Bassini, *Libertá di espressione e social network, tra nuovi "spazi pubblici" e "poteri privati". Spunti di comparazione,* in *Rivista di diritto dei media,* 2, 2021, 67 ss.

[2] See M. Bassini-G. Finocchiaro-O. Pollicino, *L'UE verso il digital Services Act: quale equilibrio tra democrazia e potere*, in *agendadigitale.eu*, 15 February 2021; F. Gallo, *Democrazia 2.0. La Costituzione, i cittadini e la partecipazione,* Conversano, 15 September 2013, in *cortecostituzionale.it*. For a better overview of the rights in matter guaranteed in Europe see A. Uricchio-F. Giambrone, *European Finance at the Emergency Test*, Bari, 2020, 288 ss.; Ch. Smekal-E. Thöni, *Österreichs Föderalismus zu teuer,* in *Föderalismusdokumente,* 8, 2000, 1 ss.*;* A.F. Uricchio - F.L. Giambrone, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses,* Bari, 2020, 63 ss.

[3] P.K. Büttel, *„Recht auf Vergessen I": Online-Pressearchive müssen zeitlich unbegrenzte Verbreitung personenbezogener Berichte auf Beanstandung hin verhindern,* in *jurisPraxisReport-ITRecht*, 2, 2020, 1.

[4] See Ch. Smekal, *Steuerpolitik in Deutschland und Österreich: 2 Nachbarn- verschiedene Wege?*, in V. Ulrich - W. Ried (eds.), *Effizienz, Qualität und Nachhaltigkeit im Gesundheitswesen,* Baden-Baden, 2007, 93 ss.; 1 BvR 16/13, ord. 6 November 2019; 1 BvR 276/17, ord. 6 November 2019.

[5] 1 BvR 16/13, ord. 6 November 2019.

[6] *Ibid.*

[7] 1 BvR 16/13, ord. 6 November 2019.

[8] P.K. Büttel, *„Recht auf Vergessen I",* cit; 1 BvR 16/13, ord. 6 November 2019.

and actions, on the other hand, is not appropriate. On the contrary, it is necessary to strike a balance with the interests of the content provider, with specific emphasis on the temporal aspect, availability, and context of the information in relation to the communication conditions of the Internet.[9]The decision remark will highlight in the second paragraph the content of the decision, in the third paragraph the decision will be European fundamental rights and the European jurisprudence will be integrated into the European framework. Moreover the fifth paragraph will highlight the point of views of the doctrine and case law, with particular regard of the European and German legal order. Finally the last paragraph will draw the concluding remarks in this matter.

## 2. Content and subject-matter of the decision

The complainant was convicted of murder in 1982 and sentenced to life imprisonment for shooting two people aboard a yacht on the high seas in 1981. He wanted to have the reports about the crime, in which his full family name was mentioned, deleted in the course of the digitization of old Spiegel articles in an online archive, originally published in 1982/1983. Access to the articles through the archive is free and unlimited, finding them by entering the complainant's name into a common search engine very easily[10]. The man had been released from custody in 2002 after serving his sentence and is now claiming an injunction under Sections 823, 1004 of the German Civil Code (BGB) analogously, Art. 2, para. 1, in conjunction with Art. 1, para. 1, GG, since the publication of his name unlawfully infringes his general right to personality. The BVerfG has upheld the constitutional complaint. The BVerfG first deals with the standard of examination in national law that is not fully determined by EU law. Both the old provisions of Art. 9 of the Data Protection Directive (DSRL 95/46/EC) and Art. 85 GDPR, which is now in force, provide for media privilege with regard to the restriction of the privacy of natural persons for the purposes of expression and the exercise of freedom of the press, the practical implementation of which would be left to the Member States[11]. Art. 85(1) requires Member States to bring the right to the

[9] 1 BvR 16/13, ord. 6 November 2019.

[10] P.K. Büttel, *„Recht auf Vergessen I",* cit.

[11] See ECJ, C-73/07, *Satakunnan Markkinapörssi and Satamedia* (2008) – para. 52. For a deeper insight of the European Court of Justice jurisprudence relating to data protection requirements for video recording of police officers see ECJ, *Sergejs Buivids c. Datu valsts inspekcija,* 345/17 (2019). In this regard two questions, one on Art. 3 and one on Art. 9 of Directive 95/46/EC, were referred to the ECJ by the Latvian Supreme Court for a preliminary ruling. The case concerned whether a citizen violated national law by publishing on YouTube a self-filmed video of the recording of his statement in a Latvian National Police office in the context of administrative offence proceedings. The Supreme Court referred two questions to the ECJ for a preliminary ruling: (1) Do activities such as the recording of police officers in a police station carrying out procedural acts at issue in the present case and the publication of the recorded video on the website www.youtube.com fall within the scope of Directive 95/46 ? (2) Is Directive 95/46 to be interpreted as meaning that those activities may be regarded as processing of personal data for journalistic purposes within the meaning of Art. 9 of that directive? Relating to the decion of European Court of Justice, it has been sentenced, that the recording and publication of the video recording fell within the scope of the Directive and could constitute processing

protection of personal data under the GDPR into line with the right to freedom of expression and information, including processing for journalistic and scientific, artistic or literary purposes, by means of legislation. In particular, separate from the second paragraph of Art. 85, the first paragraph may well be understood as a separate "general opening and balancing clause",[12] according to which the Member States are to establish consistency between the two conflicting legal positions referred to[13]. In particular, the list of the specific purposes is not conclusive on the basis of the word "inclusive" in contrast to para. 2[14]. This suggests, first of all, that Art. 85(1) in any event contains an opening and balancing clause for other purposes. Together with Art. 85(2) and (3), ErwG 153 and against the background of the regulatory purpose of the GDPR, however, it is objected that Art. 85(1) should not be regarded as a separate opening clause. For, on the one hand, only Art. 85(2) expressly requires the provision of derogations and exceptions, and only for privileged purposes. The diversity of cultures and traditions, and thus also the design of the guarantees of fundamental rights, is an expression of the principle of subsidiarity[15] (recital 48 with further evi-

of personal data solely for journalistic purposes within the meaning of Art. 9 of Directive 95/46. Relating to the interpretation of the journalistic activity, it should be at this very point highlighted that, in view of the Court, freedom of expression and journalism should be interpreted broadly. The exemptions and exceptions of the Directive would apply to anyone engaged in journalistic activities. Journalistic activities were those whose purpose was to disseminate information, opinions or ideas to the public, by whatever means of transmission. See F.L.Giambrone, *Tax Treatment of professional football players remuneration in Germany and Italy. A comparative and EU analysis of a sector with tax gaps from a fiscal and administrave angle,* in *amministrativamente.com*, 13 April 2022. The fact that the creator of the film was not a professional journalist did not preclude the video and the publication on YouTube from falling under these exceptions. The means by which the processed data was transmitted was not decisive for assessing whether the activity was solely for journalistic purposes. However, it could not be assumed that any information published on the internet that referred to personal data fell under the concept of journalistic activity. Morover Limitation of exemptions and exceptions: The right to privacy and the right to freedom of expression would have to be reconciled. In order to strike a balance, exceptions and limitations in relation to data protection must be limited to what is absolutely necessary. The ECtHR had developed relevant criteria to be taken into account for the purposes of this balancing exercise, including: Contribution to a debate of general interest, notoriety of the person concerned, subject matter of the report, previous conduct of the person concerned. In view of the Consequences for practice it may be stated that it remains the case that the exceptions for processing personal data for journalistic purposes only apply if it is intended to serve exclusively journalistic purposes. The ECJ considers the conditions for the privilege under Art. 9 of Directive 95/46 to be met only under very strict and narrow conditions.

[12] See C.A. Giusti, *Big Data ed internet delle cose: quale destino per la tutela della privacy,* in *comparazionedirittocivile.it,* 2, 2017.

[13] See A. Lauber-Rönsberg-A. Hartlaub, *Personenbildnisse im Spannungsfeld zwischen Äußerungs- und Datenschutzrecht,* in *Neue juristische Wochenschrift*, 15, 2017, 1057 ss.

[14] S. Kühling-M. Martini, *Die Datenschutz-Grundverordnung und das nationale Recht*, Erste Überlegungen zum inerstaatlichen Regelungsbedarf, 2016, 287 ss.

[15] See Ch. Smekal-E. Thöni, *Österreichs Föderalismus zu teuer,* in *Föderalismusdokumente,* 8, 2000, 1 ss. According to Ch. Smekal, from an economic point of view, this well-known subsidiarity principle requires that the lower or smaller local authority should take precedence in the provision of public goods and services when the preferential or frustration costs play a significant role in relation to production/provisioning costs and can thus be reduced. This principle is even interpreted to the extent that, in the event of a conflict - i.e. when deployment costs rise more than preferential costs fall - preference costs are more heavily weighted and the performance of tasks remains at the lower level. A particular problem of the application of this principle is the case of interpretations of the 'subsidiarity principle' in the EU Treaties. In contrast to the above, the EU Treaties are also interpreted in part as

dence). The presumption that the level of protection of the Charter of Fundamental Rights of the European Union (Charter of Fundamental Rights), which is specified by interpretation, is co-guaranteed by an examination of the fundamental rights of the Basic Law is supported by the overarching affinity of the GG and the Charter of Fundamental Rights in a common European tradition of fundamental rights. According to the BVerfG, it is not to be assumed, according to the BVerfG, a schematic parallelisation of the guarantees, but rather (only) a recording of assessments of the Charter of Fundamental Rights, as far as this is methodologically justifiable and compatible with the requirements of the GG. However, the fundamental rights of the GG are understood based on the Convention on Human Rights and in principle take up their guarantees[16]. Any differences in the level of protection must be considered in the context of the substantive examination. In the present case, both the interpretation of the GrCh and that of the GG provided for a largely identical balance between freedom of expression and the right of personality as fundamental rights in principle[17]. The fundamental application of fundamental rights among private individuals derives from the principle of indirect third-party effect[18]. Although the fundamental rights of the Union are not aware of any doctrine of 'direct third-party effect', a similar effect is ultimately recognised for the relationship between private individuals.[19]The decisive factor in terms of content here was the weighing up of the complainant's general right of personality against the freedom of expression and the press of the publisher.[20] The BVerfG emphasises that the right to informational self-determination, as a stand-by expression of the general right of personality, is not relevant to its own content. While the general right of personality, in its expression law, provides protection against the processing of personal reports and information of a communication process, the right to informational self-determination offers protection against dangers through novel possibilities of data processing[21]. In simpler terms, the former concerns the communication route,[22] while the latter concerns the form and content of the publication. Since in the present case the dissemination of statements in the context of social communication – the reports on the complainant's person and their freedom of access – was criticised as a burden, in this case, irrespective of the point of contact with the way in which it was disseminated via the Internet, only the general right of personality in its expression under the law of expression must be regarded as a constitutional standard of examination. The possibility of dissemination was regarded

follows: if the EU level can perform tasks equally well or better than the national levels, it should take over the performance of the tasks. In the meantime, however, the majority of people are asking for the interpretation that, if the EU were to take up or take on tasks, it, and not the national levels, must prove the "benefit".

16 P.K. Büttel, *„Recht auf Vergessen I",* cit.

17 See 1 BvR 276/17, ord. 6 November 2019.

18 See 1 BvR 400/51, 15 January 1958; BVerfGE 7, 198 (1958); 1 BvR 3080/09, ord. 11 April 2018; BVerfGE 148, 267 (2018).

19 1 BvR 276/17, ord. 6 November 2019.

20 P.K. Büttel, *„Recht auf Vergessen I",* cit.

21 Including 1 BvR 209/83, 15 December 1983; BVerfGE 65, 1 (1983).

22 P.K. Büttel, *„Recht auf Vergessen I",* cit., 1-5.

only as a preliminary question for the assessment of the further handling of a particular statement and the image thus made public of a person himself[23]. The main consideration had to be to protect those affected from the dissemination of reports which reduce their reputation as a person in a manner that jeopardises the development of personality, against the stated task of the press to report on criminal offences and perpetrators, thereby satisfying the public's interest in information. The BVerfG also recognized the possibility of fully archiving reports in unaltered form as a "mirror of contemporary history" as an important element of the freedom of the press protected by Art. 5 sec. 1 sentence 2 GG. However, the public interest in information decreases with increasing time lag, so that there is a shift in the weighting of the interests. This does not take place schematically after a certain period of time, but must be assessed on a case-by-case basis. In particular, the interest of the offender (and of the general public in legal policy) in his reintegration into society should not be neglected.[24]The decisive factor in terms of content here was the weighing up of the complainant's general right of personality against the freedom of expression and the press of the publisher. The BVerfG[25] emphasises that the right to informational self-determination, as a stand-by expression of the general right of personality, is not relevant to its own content.[26] While the general right of personality, in its expression law, provides protection against the processing of personal reports and information of a communication process, the right to informational self-determination offers protection against dangers through novel possibilities of data processing[27]. In simpler terms, the former concerns the communication route, while the latter concerns the form and content of the publication. Since in the present case the dissemination of statements in the context of social communication – the reports on the complainant's person and their freedom of access – was criticised as a burden, in this case, irrespective of the point of contact with the way in which it was disseminated via the Internet, only the general right of personality in its expression under the law of expression must be regarded as a constitutional standard of examination. The possibility of dissemination was regarded only as a preliminary question for the assessment of the further handling of a particular statement and the image thus made public of a person himself.[28] The main consideration had to be to protect those affected from the dissemination of reports which reduce their reputation as a person in a manner that jeopardises the development of personality, against the stated task of the press to report on criminal offences and perpetrators, thereby satisfying the public's interest in information. The

[23] *Ibid.*

[24] See F.L. Giambrone, *Finanzföderalismus als Herausforderung des Europarechts,* Bari, 2020.

[25] In this regard see Ch. Smekal, *Steuerpolitik in Deutschland und Österreich,* cit.

[26] *Ibid.*

[27] Including 1 BvR 209/83, 15 December 1983; BVerfGE 65, 1 (1983).

[28] For an overview of the elimination of double taxation in italian and in the German Federal Order see G. Corasaniti, *L'eliminazione della doppia imposizione nell'ordinamento italiano e nell'ordinamento federale tedesco*, in *Dir. prat. trib.,* III, 1997, 433 ss.; see F.L. Giambrone, *Finanzföderalismus als Herausforderung des Europarechts,* Bari, 2020.

BVerfG[29] also recognized the possibility of fully archiving reports in unaltered form as a "mirror of contemporary history" as an important element of the freedom of the press protected by Art. 5 sec. 1 sentence 2 GG. However, the public interest in information decreases with increasing time lag, so that there is a shift in the weighting of the interests. This does not take place schematically after a certain period of time, but must be assessed on a case-by-case basis. In particular, the interest of the offender (and also of the general public in legal policy) in his reintegration into society should not be neglected. The main consideration had to be to protect those affected from the dissemination of reports which reduce their reputation as a person in a manner that jeopardises the development of personality, against the stated task of the press to report on criminal offences and perpetrators, thereby satisfying the public's interest in information. The BVerfG[30] also recognized the possibility of fully archiving reports in unaltered form as a "mirror of contemporary history" as an important element of the freedom of the press protected by Art. 5 sec. 1 sentence 2 GG. However, the public interest in information decreases with increasing time lag, so that there is a shift in the weighting of the interests. This does not take place schematically after a certain period of time, but must be assessed on a case-by-case basis. In particular, the interest of the offender (and also of the general public in legal policy) in his reintegration into society should not be neglected[31]. In the context of EU law, reference should be made to the comparable standards of the ECtHR, which, in order to weigh up the intensity of intervention of a publication, expressly refers to the temporal circumstances in relation to the public interest.[32] Thus, the offender's need to be confronted with previous acts after a certain period of time in order to be able to reintegrate into society gains, to which the ECtHR explicitly gave human rights status[33] - increasingly important.[34]Based on the so-called "Google Spain" decision of the ECJ[35] of 13.05.2014, in which the court created for the first time a right to be forgotten, the article addresses the right to exclude hits from search engines. Further decision of the ECJ of 24.09.2019[36] (, by which the General Court answered questions raised in the above-

[29] For a comparison of the differences related to taxation in both Gemany and Austria see Ch. Smekal, *Steuerpolitik in Deutschland und Österreich,* cit.

[30] See A.F. Uricchio-F.L. Giambrone, *European Finance at the Emergency Test*, cit.

[31] P.K. Büttel, *„Recht auf Vergessen I",* cit., 4 ss.

[32] Confront in this regard the decision of the European Court of human rights: CEDU, *Österreichischer Rundfunk c. Austria*, 57597/00 (2004).

[33] See European Court of Human Rights, CEDU, *ML e WW c. Germania*, 60798/10 (2018); CEDU, *ML e WW c. Germania,* 65599/19 (2018). With regard of the orientation in this matter of the European Court of Justice´s jurisprudence see, CEDU, *Google Spain,* C-131/12 (2014); See Ch. Smekal, *Steuerpolitik in Deutschland und Österreich,* cit., 93 ss; F. Giambrone, *New fiscal monetary, financial banking and capital perspectives of the European Union,* Bari, 2021.

[34] C.A. Giusti, *Oltre il diritto all´ oblio: La deindicizzazione die dati e l´ adattamento alla sentenza google nell´ esperienza italiana e spagnola*, in *Giustizia Civile.com,* 6 October 2010.

[35] For an overview of ECJ cases related to direct taxation see M. Lang, *Recent Case Law of the ECJ in Direct Taxation: Trends, Tensions and Contradictions,* in *EC Tax Review,* 18, 2009, 99 ss.

[36] See M. Lang- A. Rust- J. Owens- P. Pistone- J. Schuch- C. Staringer- A. Storck- P.Essers- E. Kemmeren- C. Öner- D. Smit, *Tax Treaty Case Law around the Globe 2019*, Amsterdam- Vienna, 2020, vol. 126; ECJ, *GC e a. contro Commission nationale de l'informatique et des libertés (CNIL)*, C-136/17 (2019**),** in

mentioned decision. The ECJ decisions deal with the question of the geographical scope of Art. 17 GDPR.[37] More specifically, the scope of the claim under Art. 17 GDPR in the case of special types of personal data is then discussed. In particular, the examination of the commencement of the examination obligation with a search engine operator as well as the right to deletion in accordance with Art. 17 GDPR is highlighted. The limits of the claim and the balance of interests to be carried out are

*Gewerblicher Rechtschutz und Urheberrecht* 2019, 1310 ; CEDU, *Google c. Commission nationale de l'informatique et des libertés (CNIL)* C-507/17 (2019), in *Gewerblichem Rechtsschutz und Urheberrecht*, 2019, 1317. According to this judegement, the Court had to decide and rule on the question whether internet search engines have to comply with lawful delisting requests worldwide, only within the EU internal market or only in the version for the member state in which the delisting request was filed. In other words, it is about the territorial scope of the so-called "right to be forgotten".Since the fundamental "Google Spain" ruling of the ECJ (judgment of 13 May 2014 - C-131/12) on Art. 12(b), Art. 14(1)(a) Data Protection Directive 95/46/EC, the so-called "right to be forgotten" has been recognised within the EU data protection regime. This initially concerned search engine operators who, by indexing website content, became data controllers themselves. This dazzling term then even made it into the official title of Art. 17 of the GDPR, which basically deals with the deletion rights and obligations of the data controller. However, the "right to be forgotten" there is a legal "illusory giant" (Kühling/Martini, EuZW 2016, 448, 450), which does not live up to its promise. A right for a person to forget something cannot - of course - exist. In fact, it is a matter of a "right to delisting" by internet search engines (which is now also the preferred style of the ECJ) and thus ultimately a claim to more difficult discoverability **(**M. Hennemann, *Das Recht auf Löschung gemäß Art. 17 Datenschutz-Grundverordnung*, in *pingdigital.de,* 29.8.2016; F. Giambrone, *Protection in Germany of the fundamental rights of the European Union (GRCH). Case note of the BVerfG 1st Senate, resolution of 6.11.2019- 1 BvR 16/13 concerning the interpretation of the importance of the fundamental rights within the Basic law with regard to non fully harmonized law,* in *Journal of Modern Science*, 21 december 2021; P. Schantz- H. Wolff, *Das neue Datenschutzrecht, Datenschutz-Grundverordnung und Bundesdatenschutzgesetz in der Praxis,* 2017, München, 1211; see J. Drexl, *Recht und Ökonomie aus der Sicht der Rechtswissenschaften*, in, J. Haucap-O. Budzinski (a cura di), *Recht und Ökonomie. Wettbewerb und Regulierung von Märkten und Unternehmen*, Baden-Baden, 2020, 11 - 41.

This is then also a clear minus to the right of deletion, which Art. 17 GDPR in itself does provide for (Heinzke, GRURPrax 2019, 545, 547). Since Google's search results - despite country-specific top-level domains - originate from common databases and a common indexation, a deletion in this respect would inevitably lead to a universal irreversible removal of the hit links. See F.L.Giambrone, *Tax Treatment of professional football players remuneration in Germany and Italy. A comparative and EU analysis of a sector with tax gaps from a fiscal and administrave angle,* in, *amministrativamente.com*, 13 April 2022. In May 2015, the French data protection supervisory authority CNIL requested the search engine operator Google to remove the relevant links on all of its domains in the case of granted delisting requests regarding certain personal data, i.e. to globally delete search results displayed on the basis of the names of natural persons. However, Google then only de-indexed the domains of the member state search engine versions and also referred to the possibility of using geo-blocking technology to prevent third-country versions of the search engine from being accessed by member state IP addresses.The Court ruled, that «Articles 12(b) and 14(1)(a) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and Article 17(1) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data. April 2016 on the protection of individuals with regard to the processing of personal data, on the free movement of such data and repealing Directive 95/46 (the General Data Protection Regulation) must be interpreted as meaning that, where the operator of a search engine grants a delisting request in application of those provisions, it is not required to carry out the delisting in all versions of its search engine, but only in all Member State versions, if necessary, in conjunction with measures which comply with the legal requirements and which actually make it possible to prevent, or at least reliably deter, internet users carrying out a search from a Member State on the basis of the name of the person concerned from accessing the links which are the subject of the delisting request via the list of results displayed following that search».

[37] Compare C.A. Giusti-F.L.Giambrone, *The Biffi Judgement and the Suarez Case. Judicial decision of the ECJ and possible reforms of the italian civil code from an european point of view*, in *comparativelawreview.unipg.it*, 2019.

also mentioned. Finally, the author also deals with specifics of data on criminal offences and criminal convictions under Art. 10 GDPR. In a final assessment, the conclusion can be drawn that the terminology of the "right to delisting" now used by the ECJ is more appropriate, since the data concerned is not deleted but blocked in such a way that it no longer appears in the hit list. In addition, the ECJ recently transferred and supplemented its case law on the "right to be forgotten" developed on the Data Protection Directive to the GDPR.[38] This is also where the way in which it is disseminated comes into play: Whereas in the past a previously published article could only be operated with difficulty and effort, the time availability on the Internet is now practically unlimited. In addition, the finding of a particular report is no longer dependent on a cumbersome search; on the contrary, the article in question can be found solely by entering the name of the person concerned into a search engine and, since there are no access restrictions or paywalls, retrieved. Taking account of this, disclosure must be justified at any time when it is accessible. It must be said that for some time now, forgetting has played a greater role in the handling of personal data in a digitised society. Two decisions of the ECJ will then be discussed. The first is the decision of 24.09.2019,[39] in which Google should be required to remove links to sensitive clues from the results list. In the further decision of 24.09.2019[40] was about actually deleting such links from all versions of the search engine worldwide if successful applications were successful. Two decisions of the BVerfG of 06.11.2019 should be referred to, on the one hand on Decision 1 BvR 16/13[41] and secondly on decision 1 BvR 276/17.[42] It is pointed out that both decisions concern criminal law and international law and are therefore relevant to international law. The conclusion is that the decisions of the ECJ and BVerfG reflect a change caused by digitalisation.[43]

## 3. Context of the decision

While the complainant's interest in protecting his privacy was rated as higher than the publisher's freedom of the press and freedom of expression and the public's interest in information, the complainant's challenged assessment was classified as "nasty" in the decision "Right to Forget II"[44] as admissible expression.[45]Just as the European Economic Community has undergone a metamorphosis on the way to the present

[38] For a better understanding regarding the civil liability and other sources of obligations in Italy see P.Pardolesi, *Responsabilità civile e altre fonti delle obbligazioni,* in Codice della responsabilità civile e RC auto - Utet, 2015, 19.

[39] See C-136/17, *GC and Others* (2019)

[40] See C-507/19, *Google v CNIL* (2019)

[41] 1 BvR 16/13, ord. 6 November 2019.

[42] 1 BvR 16/13, ord. 6 November 2019.

[43] See C.A. Giusti, *Global take down: deindicizzazione e territorialitá. Un nuovo caso Google alla Corte di Giustizia,* in *comparazionedirittocivile,* 1, 2019.

[44] 1 BvR 276/17, ord. 6 November 2019.

[45] P.K. Büttel, *„Recht auf Vergessen I",* cit., 4 ss.
in the European context

European Union, the control of fundamental rights by the BVerfG, with reference to European law, adapted evolutionarily to this development, and not without friction. The famous "Solange" case law with its later additions to the "Ultra-Vires" control and the reservation of the "constitutional identity" is the cipher of a complicated, intricate and not tension-free coexistence of the supranational guarantee of fundamental rights by the ECJ and the national reserve control by the BVerfG. With the two resolutions of 6 November 2019, the BVerfG has rebalanced the rules for interaction in such a way that it is possible to speak of a "November revolution". The BVerfG relies on the Charter of Fundamental Rights in the fundamental law review of the application of the law in the area of EU law. At the same time, the General Court emphasises the final binding interpretation of the Charter in that regard before the ECJ. In this way, the BVerfG positions itself pragmatically and sensibly in the network of fundamental rights interpreters. The scope of the BVerfG's decision on the application of the Charter of Fundamental Rights in particular is already clear from the fact that the First Senate considered a decision of the plenary but rejected it, but explicitly marked the deviation from its previous case law as a benchmark for examination. Once again, the law of the information society is the area of application for the repositioning of the fundamental rights control of the ECJ and national (constitutional) jurisdiction. The ECJ has established itself as a fundamental rights court, particularly based on the standard of fundamental data protection rights, in rejecting the Agricultural Regulation and later the Data Retention Directive(s) and thus positioning itself as a central player in the horizontal and federal power structure. Finally, the Luxembourg Court of Justice, based on fundamental rights, drafted a 'right to be forgotten' against the internet search engine operator Google. This was then explicitly enshrined in EU secondary legislation under Art. 17 OF the GDPR. The Karlsruhe court has now used the abbreviated title "Right to Be Forgotten" as an opportunity to redefine its role in the control structure. In this context, it must be pointed out that the BVerfG[46] had identified differences in the standard of assessment under the fundamental law by the two decisions. In matters relating to laws which are finally unified throughout the European Union, the General Court does not examine German fundamental rights, but only the fundamental rights of the Charter of Fundamental Rights of the European Union.[47] They have priority over the provisions of the GG.[48] There remains a "reserve reservation" in the event of a fundamental break in european protection of fundamental rights.[49]A significant difference was that in the case of 'right to be forgotten', the complainant was concerned as a private individual; in the case of "Right to Forget II",[50] the relevant contribution concerned the complainant

[46] For an overview of the Austrian-German double taxation agreements see M. Lang-J. Schuch, *Doppelbesteuerungsabkommen Deutschland- Österreich:* Kommentar, München/Wien, 1997.

[47] For an overview of the elimination of double taxation in italian and in the German Federal Order see. G. Corasaniti, *L'eliminazione della doppia imposizione nell'ordinamento italiano e nell'ordinamento federale tedesco*, cit.

[48] See Ch. Smekal, *Steuerpolitik in Deutschland und Österreich,* cit.

[49] See U. von der Leyen, *A Union that strives for more, My agenda for Europe*, 2020; juris Literaturnachweis zu Ory, AfP 2020, 119 ss.

[50] See C.A. Giusti, *Oltre il diritto all'oblio: La deindicizzazione die dati e l´adattamento alla sentenza Google*

as a private individual (not least because of the blurring of the boundaries between the private and social spheres as a result of the discoverability and merging of information by means of name-related search queries on the Internet), but also in her function and activity as managing director.[51] In any case, she agreed with the coverage and took the step into the public sphere herself – without pressure or surprise from the journalists[52]. On the other hand, the BVerfG[53] expressed even greater importance to the public's interest in "nasty" practices by some employers even after seven years.[54] In both decisions, the BVerfG[55] stressed that the right to protection against a search engine operator could go further than that against the content provider; in the context of the case-by-case assessment, however, the interactions between the request for an injunction with regard to the search engine operator and the situation of the content provider must also be taken into account.[56]The BVerfG also dealt with the question of the standard of examination in both cases. Overall, it declared the Basic Law to be applicable in so far as Eu law is not fully harmonised.[57] In the case of fully harmonised rules, the invocation of basic legal data is possible and harmless, but the fundamental rights of the Union are applicable in that case. No equal coverage of both constitutional arrangements could be assumed.[58] However, the application of EU fundamental rights (also) by the BVerfG is nevertheless possible in so far as its interpretation has already been clarified by the ECJ.[59]

## 4. The dominant doctrinal and case-law discussion within Europe with particular regard of the German legal order

Europe does not appear to have made any advances even though it was the "crib" of the theory of the *Drittwirkung,* which agrees to recognise an effectiveness with horizontal indirect effects to constitutional norms. In this regard the German view is skeptical of the position that the fundamental law should apply only to the "public" realm. This position should even apply even one's assuming that such a realm can be

*nell'esperienza italiana e spagnola*, in *Giustizia Civile*, 6 October 2017.

51 BVerfG, schl. v. 06.11.2019 - 1 BvR 276/17 para. 128.

52 P.K. Büttel, *„Recht auf Vergessen I",* cit., 1-5.

53 For an overview related to the austrian legal system see Ch. Smekal, *Finanzkraft und Finanzbedarf von Gebietskörperschaften, Analyse und Vorschläge zum Gemeindefinanzausgleich in Österreich.*

54 1 BvR 276/17, ord. 6 November 2019.

55 For a better understanding oft he new perspectives in Europe see A.F. Uricchio, *New future perspectives: the cost of rights between debt control, extraordinary finance tools and windfall taxes,* in A.F. Uricchio-F. Giambone, *European Finance at the emergency test,* cit.

56 1 BvR 276/17, ord. 6 November 2019.

57 See A.F. Uricchio, *Die zwischen der Haushaltsaufsicht, den ausserordentlichen Finanzinstrumenten und der sogenannten windfall taxes anfallenden Kosten der Sozialrechte*, in A.F. Uricchio-F.L. Giambrone, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses,* cit.

58 1 BvR 276/17, ord. 6 November 2019.

59 See Ch. Smekal, *Steuerpolitik in Deutschland und Österreich,* cit.

clearly outlined.[60] Certain constitutional values, according to the dominant doctrine, are so fundamental in view of a decent life for all citizen, that those values should pervade the state and society, wherever the line between the two, if such a line even exists, is to be drawn.[61]

Despite the circumstance that the conventional and constitutional provisions of reference leave a wider margin, using a wording based on the recognition of rights and not only the prohibition of interference.[62] In some cases, although it is true that the case-law of the European Court of Human Rights on Art. 10 of the ECHR has also recognised, the existence of positive obligations on the part of the contracting States, with practical results which are in part similar in substance to that of horizontal effectiveness of fundamental rights, it is above all the Court of Justice which has shown a more pronounced sensitivity than enforcement with horizontal effects of certain rights, privacy on all.[63] Perhaps the most well-known and obvious case of this process is that of the right to de-referencing from search engines, which dates back to the famous pronunciation of Google Spain. This case reveals an attempt to extend the application of the rules to the protection of personal data horizontally.[64] The fact remains that even in Europe service providers are not formally bound by the relevant constitutional provisions, so that they can hypothetically introduce more stringent content moderation policies than the rules laid down by law identifying illegal content. In this way, it seems, the possibility of establishing a differential linked to the possible divergence between moderation policies (more restrictive) and rules of order is preserved.[65] The problem that seems to arise in Europe and the United States is similar, despite the difference between the mechanisms inherent in the reference framework, namely can social networks censor what would not be (necessarily) prohibited by the law of the State? It is necessary, once again, to verify the sensitivity shown by the case-law in relation to the legal status of social networks, in order to redirect this question to an answer. This may have significant implications for the extension of the 'censors' they possess.[66] In May 2019, the Bundesverfassungsgericht ordered Facebook to restore access to the page of a far-right political party that had been obscured a few months before the European Parliament elections were held.[67]While recognising the

[60] P. Quint, *Free Speech and Private Law in German Constitutional Theory*, in *Maryland Law Review*, 48, 1989, 247 ss; M. Bassini, *L'Unione europea al grande passo: verso una regolazione di mercati e servizi digitali*, in *Quaderni costituzionali*, 1, 2021, 224 ss.

[61] P. Quint, *Free Speech and Private Law in German Constitutional Theory*, cit.

[62] M. Bassini, *L'Unione europea al grande passo: verso una regolazione di mercati e servizi digitali*, cit.; F. Gallo, *Democrazia 2.0,* cit.

[63] See M. Bassini, *Libertá di espressione e social network, tra nuovi "spazi pubblici" e "poteri privati",* cit.

[64] M. Bassini-G. Finocchiaro-O. Pollicino*, L'UE verso il Digital Services Act: quale equilibrio tra democrazia e potere*, cit. G.M. Ruotolo, *Le proposte di disciplina di digital services e digital markets della Commissione del 15 dicembre 2020*, cit.

[65] M. Bassini, *L'Unione europea al grande passo: verso una regolazione di mercati e servizi digitali,* cit.; F. Gallo, *Democrazia 2.0*, cit.

[66] See M. Bassini, *Libertá di espressione e social network, tra nuovi "spazi pubblici" e "poteri privati",* cit.

[67] *Ibid.*; see also O. Pollicino-M. Bassini-G. De Gregorio, *Verso il Digital Services Act: problemi e prospettive. Presentazione del simposio*, in *medialaws.eu*, 23 November 2020. See also M. Bassini-G. Finocchiaro-O. Pollicino*, L'UE verso il Digital Services Act: quale equilibrio tra democrazia e potere*, cit. G.M. Ruotolo, *Le*

possibility for constitutional rights to explain, under certain conditions, horizontal indirect effects by the courts of first instance before the precautionary authorities, they rejected the appeal and stated that freedom of expression did not in any case know absolute protection.[68] Referring to its settled case-law on the indirect third-party effect of fundamental rights, in particular the stadium ban decision, The German Federal constitutional Court came to the conclusion that without commenting on the prospects of success in the main proceedings, that at least in interim legal protection the foreseeable disadvantages of a (minor inadmissible) blocking for the party "considerably [outweigh]"[69] the disadvantages that Facebook would suffer if the blocking were to turn out to be admissible in retrospect but were now lifted for the time being. It emphasises the "paramount importance" of Facebook for the dissemination of political messages and the decreasing media visibility of the "Third Way" in the event of a blocking in the context of the European election campaign.[70]If these reasonings have some foundation, then the question on the legal status of social networks cannot be hastily dismissed by appealing to the albeit indisputable contractual nature of the relationship with users (a perspective that risks failing to capture an important part of the problem); and it can be further developed by trying to understand whether and to what extent one can witness an 'interpenetration' with horizontal effects of freedom of expression.[71] These questions arise, moreover, in the aftermath of what promises to be a turning point at European level, marked by the presentation on 15 December 2020 of a proposal for a regulation on a single market for digital services[72] (the so-called Digital Services Act). This step should lead to a comprehensive reform that will modify the structure of the E-Commerce Directive (Directive 2000/31/EC), which in the European Union represents the only general act specifically dedicated to digital services and contains a meagre regulation on the liability of providers, which has been bogged down by more than a decade of, at the very least, creative

*proposte di disciplina di digital services e digital markets della Commissione del 15 dicembre 2020*, cit., and M. Bassini, *L'Unione europea al grande passo: verso una regolazione di mercati e servizi digitali,* cit.

[68] F. Gallo, *Democrazia 2.0.,* cit.; See M. Bassini, *Libertá di espressione e social network, tra nuovi "spazi pubblici" e "poteri privati",* cit.

[69] 1 BvQ 42/19, ord 22 May 2019. See E. Turchtfeld, *Marktplätze, soziale Netzwerke und die BVerfG-Entscheidung zum III.Weg, in verfassungsblog.de*, 26 May 2019; M. Bassini, *L'Unione europea al grande passo: verso una regolazione di mercati e servizi digitali*, cit.

[70] 1 BvQ 42/19, ord. 22 May 2019. For a comment, see E. Turchtfeld, *Marktplätze, soziale Netzwerke und die BVerfG- Entscheidung zum III.Weg,* cit.

[71] See M. Bassini, *Libertá di espressione e social network, tra nuovi "spazi pubblici" e "poteri privati",* cit.

[72] For an overview of hot contributions on the Commission proposal, please refer to the online symposium towards the "Digital Services Act" *in medialaws.eu*, where among others see the introduction by O. Pollicino-M. Bassini-G. De Gregorio, *Verso il Digital Services Act: problemi e prospettive,* cit. See also M. Bassini-G. Finocchiaro-O. Pollicino, *L'Ue verso il Digital Services Act: quale equilibrio tra democrazia e potere*, cit. G.M. Ruotolo, *Le proposte di disciplina di digital services e digital markets della Commissione del 15 dicembre 2020,* cit., and M. Bassini, *L'Unione europea al grande passo: verso una regolazione di mercati e servizi digitali*, cit. See G. Caggiano, *La proposta di Digital Service Act per la regolazione dei servizi e delle piattaforme online nel diritto dell'Unione europea*, in *Annali AISDUE*, 3, 2021, Forum Servizi e piattaforme digitali, no. 1, 10 February 2021. Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, Brussels, 15.12.2020, COM(2020) 825 final, 2020/0361(COD).

case law.[73]On the other hand, the Federal Costitutional Court, which was subsequently seized of the matter, upheld the applicants' complaints, pointing out that the option of temporarily restoring a page which a subsequent full-knowledge judgment might have reversed was certainly less risky than to confirm briefly a stay down which could then be regarded as unlawful. The Bundesverfassungsgericht reached that conclusion not without having observed that Facebook, on the basis of its market characteristics, constituted an area of particular importance for the mutual exchange of expressions so as to show that refusing access to a political party, especially in the context of an electoral campaign, would have meant to deprive the latter of an essential facility for the dissemination of its ideas.[74]

## 5. Conclusion

It is important to note that, in the case of rules which are not fully harmonised, the fundamental rights of the Basic Law are the primary standard of assessment, as long as the level of protection of the fundamental rights of the Charter of Fundamental Rights of the European Union is not more comprehensive on a case-by-case basis. This means, on the one hand, that the constitutional complaint before the BVerfG can now also explicitly challenge fundamental rights of the Charter of Fundamental rights of the EU and thus close a legal protection gap, since European Fundamental Rights were previously only examined in an incidental way. This development is significant both in terms of the protection of citizens under fundamental rights and in terms of the importance of the BVerfG in the context of European law.[75] The BVerfG[76] also found that reporting, which was once admissible, could also be inadmissible by the addition of new circumstances, and vice versa.[77] However, press publishers may, in principle, assume that initially lawfully published reporting may be made available to the public in an online archive until a complaint is made qualified; mandatory protective measures must only be taken.[78] In the context of a complaint, affected persons must present their complaints in a comprehensible manner. The relevant criteria are in particular the effect and the subject of the reporting, a (missing) current relevance,

[73] M. Bassini, *La Cassazione e il simulacro del provider attivo: mala tempora currunt,* in *Rivista di diritto dei media*, 2, 2019, 248 ss.; see also L. Tormen, *La linea dura della Cassazione in materia di responsabilità dell'hosting provider (attivo e passivo)*, in *La nuova giurisprudenza civile commentata*, 5, 2019, 1039 ss.

[74] See M. Bassini, *Libertà di espressione e social network, tra nuovi "spazi pubblici" e "poteri privati",* cit.; O. Pollicino-M. Bassini-G. De Gregorio, *Verso il Digital Services Act: problemi e prospettive,* cit. See F. Gallo, *Democrazia 2.0,* cit. M. Bassini-G. Finocchiaro-O. Pollicino, *L'UE verso il Digital Services Act: quale equilibrio tra democrazia e potere*, cit. G.M. Ruotolo, *Le proposte di disciplina di digital services e digital markets della Commissione del 15 dicembre 2020,* cit., and M. Bassini, *L'Unione europea al grande passo: verso una regolazione di mercati e servizi digitali*, cit.

[75] See U. von der Leyen, *A Union that strives for more,* cit.

[76] Ch. Smekal, *Steuerpolitik in Deutschland und Österreich,* cit.

[77] Meeting decision, para. 109; the original legality of the articles was not in question here, see para. 115.

[78] P.K. Büttel, *„Recht auf Vergessen I",* cit., 1-5.

the wide-ranging dispersion[79] in the network or the context in which the information is communicated. A possible intervening contribution by the data subject to keep the interest awake or the embedding in further, more up-to-date information may also have an impact on the assessment.[80]A schematic solution, on the other hand, was explicitly excluded by the BVerfG.[81] The nature and extent of the necessary reaction of a publisher also depends on the specific facts. If, as in this case, the social stigma is mainly problematic due to the targeted name searches in the circle of acquaintances, an interest-oriented solution can be found even with minor adjustments such as the use of the initials or a combination solution for the discoverability of the name by search engine crawlers. For example the Higher Regional Court of Hamburg, in its judgment of 7.7.2015 - 7 U 29/12 focused on the question of how long an initially lawful reporting on a suspect, after the end of the proceedings, could still be found in an archived article, with his name mentioned. In this context, it refers first of all to the judgment of the ECJ of 13.05.2014[82], in which the Court dealt with the "right to be forgotten". The higher regional court (Oberlandesgerichtshof) Hamburg made it clear that a media house had to examine whether and what specific measures were necessary to grant the person concerned the anonymity interest only after an article had been challenged.[83] The problem seems to be whether the media houses can be required to influence the search engine results. The search engine results could not be influenced 100 percent. For that reason, it is all the more important that the General Court to disclose precisely obligations the media house must fulfil. The approach of the higher regional court (Oberlandesgerichtshof) Hamburg is correct, but not yet formed to the end.[84]

[79] For an italian perspective See C.A. Giusti, *Global take down: deindicizzazione e territorialitá. Un nuovo caso Google alla Corte di Giustizia,* cit.

[80] 1 BvR 16/13, ord. 6 November 2019; 1 BvR 276/17, ord. 6 November 2019.

[81] 1 BvR 276/17, ord. 6 November 2019.

[82] ECJ, C-131/12*, Google Spain* (2014); K&R 2014, 502.

[83] See Ch. Smekal, *Steuerpolitik in Deutschland und Österreich,* cit.

[84] 1 BvR 276/17, ord. 6 November 2019.

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