



INSIGHT

A NEW EUROPEAN FUNDAMENTAL RIGHTS COURT: THE GERMAN CONSTITUTIONAL COURT ON THE RIGHT TO BE FORGOTTEN

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ABSTRACT: This *Insight* concerns two judgments of the German Federal Constitutional Court from 6 November 2019, *Right to be Forgotten I* and *II*. The judgments present an overhaul of the Court's own positioning within the system of EU multilevel fundamental rights adjudication and bring substantial novelties to the EU law doctrine on the right to be forgotten. This *Insight* details the Court's reasoning, which establishes a legal space of European and domestic fundamental rights co-regulation and for the first time asserts its competence to apply the Charter of Fundamental Rights of the European Union directly. Reconstructing how the Court's conceptualization of the right to be forgotten deviates from Court of Justice's jurisprudence both theoretically and practically, the *Insight* furthermore pinpoints the risks of the revised institutional setup.

KEYWORDS: EU multilevel fundamental rights adjudication – judicial cooperation – Art. 51 of the Charter of fundamental rights of the European Union – Bundesverfassungsgericht – right to be forgotten – data protection.

I. INTRODUCTION

On 6 November 2019 the German Federal Constitutional Court (GCC) handed down two judgments, *Right to be Forgotten I (RTBF I)*¹ and *Right to be Forgotten II (RTBF II)*,² which for several reasons are bound to enter into the Court's list of *all time classics*. Both judgments bring noteworthy, even historic modifications to EU multilevel fundamental rights adjudication (see *infra*, section II.) as well as EU data protection doctrine and the right to be forgotten (see *infra*, section III.). A back-to-back reading of the judgments

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¹ German Federal Constitutional Court, judgment of 6 November 2019, 1 BvR 16/13, *RTBF I*.

² German Federal Constitutional Court, judgment of 6 November 2019, 1 BvR 276/17, *RTBF II*.



presents us with a comprehensive account of the GCC's new positioning as a true European fundamental rights court with its very own jurisdiction over the Charter of Fundamental Rights, while also exposing the risks this recalibration holds for the primacy of EU law and European judicial dialogue.

II. A EUROPEAN CALLING: THE GCC'S NEW CONFIGURATION OF EU MULTILEVEL FUNDAMENTAL RIGHTS ADJUDICATION

II.1. PREVIOUS GCC JURISPRUDENCE ON EU MULTILEVEL FUNDAMENTAL RIGHTS ADJUDICATION

The new judgments are not the first time the GCC has deliberated on the legitimacy of different configurations of EU multilevel fundamental rights adjudication. The GCC's case law on these matters goes back to 1974's *Solange I* judgment. In *Solange I* the GCC found that the European Union did not yet provide a fundamental rights regime equivalent to the guarantees of the *Grundgesetz* and that the GCC itself was therefore obliged to review the constitutionality of EU legal acts under German constitutional law.³ 1986's *Solange II* judgment revised this assessment, finding that the Court of Justice's general principles-doctrine had then developed to such a degree that EU fundamental rights protection was effectively equivalent to the standards of the *Grundgesetz* and that the transitional review of EU legal acts under German constitutional law could therefore be suspended.⁴ The GCC would reassume jurisdiction only if an applicant could prove that the Union did *generally* not provide equivalent fundamental rights protection anymore.⁵ In absence of a decline of protection standards below *Solange II* standards, the GCC would only retain competence to assess violations against Germany's so-called constitutional identity, namely citizens' fundamental rights to vote and the inviolability of their human dignity (decisions *Lissabon* and *Europäischer Haftbefehl II*).⁶ Apart from these narrow exceptions however, legal review of legal acts stemming from the EU had in principle been delegated to the Court of Justice. Both for EU legal acts as well as EU law-predetermined domestic acts only Charter fundamental rights applied.⁷ The application of pertinent Charter rights was assigned to lower courts, with the preliminary reference mechanism granting the Court of Justice the last word on their interpretation.

³ German Federal Constitutional Court, judgment of 29 May 1974, BvL 52/71, paras 41-56.

⁴ German Federal Constitutional Court, judgment of 22 October 1986, 2 BvR 197/83, paras 107-133.

⁵ German Federal Constitutional Court, judgment of 7 June 1974, 2 BvL 1/97, para. 62.

⁶ German Federal Constitutional Court: judgment of 30 June 2009, 2 BvE 2/08, paras 208-218; judgment of 15 December 2015, 2 BvR 2735/14, *Europäischer Haftbefehl II*, paras 36, 43, 48; the concept of constitutional identity had already occurred in prior judgments albeit only as a safeguard against EU *ultra vires* acts.

⁷ GCC, *Europäischer Haftbefehl II*, cit., para. 36.

II.2. SERVING TWO MASTERS: PARALLEL APPLICABILITY OF *GRUNDGESETZ* AND CHARTER FUNDAMENTAL RIGHTS

However, the GCC's previous case law had remained somewhat vague on one particular question: in which cases should EU fundamental rights apply to *domestic* legal acts?

Many EU legal acts oblige Member States to reach certain legal goals, whilst leaving regulatory gaps or discretionary leeway as to how they want to do so. This can occur both intentionally, as well as unintentionally. These situations regularly occur in the transposition of directives, but may arise just as well in the implementation of other EU acts (framework decisions, regulations etc.) whenever these only partly harmonize a certain legal field. Furthermore, even when domestic measures do not serve the fulfilment of Union obligations, EU provisions might still incidentally influence their interpretation or legal assessment.

The question that all these kinds of co-regulation raise is: What should be the criterion to determine whether a specific legal issue is (rather) "European" - and thus requiring the application of European fundamental rights - or (rather) "domestic" - and thus requiring the application of German fundamental rights?

As commentators have pointed out many times,⁸ the pertinent Charter provisions do not give clear answers: While Art. 51, para. 1, of the Charter stipulates that "the provisions of this Charter are addressed [...] to the Member States only when they are implementing Union law", it leaves open which conduct should constitute such *implementation*. Art. 53 of the Charter on the other hand provides that "nothing in this Charter shall be interpreted as restricting [...] human rights [...] as recognised [...] by the Member States' constitutions", but does not address jurisdictional conflicts when both EU and domestic fundamental rights could apply.

In a first decision on this issue in 2007 the GCC seemingly found a balanced approach: The Court would apply German fundamental rights only when the domestic legal act could *not* be seen as the implementation of mandatory EU provisions and thus fell in Member States' margin of regulatory discretion. On the other hand, when EU law effectively predetermined the content of national German law, the GCC would declare that it had no competence on the matter and leave European fundamental rights adjudication to lower courts and the Court of Justice.⁹ In the GCC's eyes, the decisive criterion was thus *functional*. Other potential indicators such as the general level of harmonization in a specific legal field, the "proximity" of the contested provision to EU law or the

⁸ For good introductions into the extensive debate see K. LENAERTS, *Exploring the Limits of the EU Charter of Fundamental Rights*, in *European Constitutional Law Review*, 2012, p. 375 *et seq.*; F. FONTANELLI, *The Implementation of European Union Law by Member States Under Article 51(1) of the Charter of Fundamental Rights*, in *Columbia Journal of European Law*, 2014, p. 194 *et seq.*; B. DE WITTE, *The Scope of Application of the EU Charter of Fundamental Rights*, in M. GONZÁLEZ PASCUAL, A. TORRES PÉREZ (eds), *The Right to Family Life in the European Union*, Oxford 2016, p. 29 *et seq.*

⁹ German Federal Constitutional Court, judgment of 13 March 2007, 1 BvF 1/05, paras 69-72

purpose of the underlying EU provisions were not relevant. Only a narrow analysis of whether the specific content of the contested domestic provision was required by EU law or not, would determine the fundamental rights regime to be applied. The cases covered by this approach are generally referred to as *agency situations*.¹⁰

Following judgments somewhat muddled this distinction. Touching on the issue in two decisions concerning Germany's implementation law of the EU Data Retention Directive, the GCC formally confirmed its prior approach, but factually extended its review to provisions that were evidently required by EU law and which – according to the GCC's own approach – therefore should have been excluded from the Court's jurisdiction.¹¹ Not lacking audacity, the Court in 2013 even found that Member States' regulatory discretion not only entailed the application of domestic fundamental rights, but also necessarily excluded the application of the Charter.¹² The constitutional orders' scope and with it the Courts' jurisdictions (GCC and Court of Justice) were thus framed as mutually exclusive. No cases could occur where both fundamental rights regimes demanded application, thereby leaving each Court its own exclusive jurisdictional realm.

This interpretation of Arts 51, para. 1, and 53 of the Charter by the GCC stood in marked conflict with the Court of Justice's stance. Already before the Charter's advent in 2009, the Court of Justice had expanded the scope of European fundamental rights well beyond the mentioned *agency situations* and detached its application from the functional criterion that the GCC had determined. Instead, even domestic measures derogating from EU law would involve EU fundamental rights,¹³ with some judgments indicating that it was the "objective overlay of regulatory regimes"¹⁴ which triggered European protection.¹⁵ Although the precise limits of this pre-Charter doctrine remained notoriously evasive, it was clear that Member States were indeed bound by European fundamental rights, when adopting measures within the leeway deliberately allowed for by a directive.¹⁶

The much-discussed 2013 judgment in *Åkerberg Fransson*,¹⁷ which famously contented itself with a truly negligible relation between Union and domestic law, confirmed

¹⁰ Court of Justice, judgment of 13 July 1989, case C-5/88, *Wachauf*, was the decisive European judgment establishing the applicability of Charter fundamental rights in these agency situations.

¹¹ German Federal Constitutional Court, judgment of 11 March 2008, 1 BvR 256/08, paras 135-137; German Federal Constitutional Court, judgment of 2 March 2010, 1 BvR 256/08, para. 186.

¹² German Federal Constitutional Court, judgment of 24 April 2013, 1 BvR 1215/07, paras 88-91.

¹³ Court of Justice, judgment of 18 June 1991, case C-260/89, *ERT*; for further examples see P. CRAIG, G. DE BÚRCA, *EU Law*, Oxford: Oxford University Press, 2015, p. 413-414.

¹⁴ See F. FONTANELLI, *The Implementation*, cit., p. 202-205.

¹⁵ Notably, it was not the derogation from EU law itself, but the fact that the domestic acts "[fell] *within the scope of Community law*" (emphasis added) that lead to the application of EU fundamental rights in *ERT*; see also Court of Justice, judgment of 12 December 2002, Case C-442/00, *Fogasa* and judgment of 24 March 1994, case C-2/92, *Bostock*.

¹⁶ See only Court of Justice: judgment of 6 November 2003, case C-101/01, *Lindqvist*, para. 90; judgment of 20 May 2003, joined cases C-465/00, C- 138/01 and 139/01, *Rechnungshof*, para. 68.

¹⁷ Court of Justice, judgment of 26 February 2013, case C-617/10, *Åkerberg Fransson* [GC].

this extensive stance on EU fundamental rights applicability for the interpretation of Art. 51 of the Charter. The “*Fransson* formula” – according to which the Charter is applicable “in all situations governed by EU law, but not outside such situations”¹⁸ – is still regularly appearing in the Court of Justice’s case law and as *De Witte* has pointed out, the Court of Justice standardly presumes “implementation” when EU acts intentionally leave Member states with a discretionary choice.¹⁹

If the GCC was to adhere to the Court of Justice’s interpretation of “implementation” – and its own case law concerning the exclusivity of the two fundamental rights regimes – the solution for *RTBF I* would have been obvious: the relevant EU provision, Art. 85 GDPR,²⁰ presented a clear case of discretion intentionally left by the EU. Consequently, the GCC would have been bound to dismiss the relevance of *Grundgesetz* rights and accordingly declare its own lack of jurisdiction.

This, however, is not how the GCC proceeded. Instead, referencing the Court of Justice’s broad “scope of application”-doctrine,²¹ it expressively acknowledged that discretionary choice cases can constitute an “implementation” of EU law under Art. 51, para. 1, of the Charter.²² However, – and this might constitute the judgment’s most important finding – the Charter’s applicability was ultimately irrelevant, as domestic fundamental rights would apply to discretion cases such as the present one *even if* Charter rights needed to be respected simultaneously. This is to say that in discretion cases the scope of the two fundamental rights regimes would now overlap.²³ The GCC would preferentially apply domestic fundamental rights, meaning that *formally* the *Grundgesetz* was the decisive legal framework, while taking into consideration the Charter as an interpretive guideline.²⁴

The Court justified this approach firstly with the EU legal order’s own (alleged) objective to foster fundamental rights diversity.²⁵ Secondly, due to the common constitutional traditions and the unifying force of the European Convention on Human Rights, a

¹⁸ *Åkerberg Fransson*, cit. [GC], para. 19.

¹⁹ B. DE WITTE, *The Scope of Application*, cit., p. 33.

²⁰ Regulation (EU) 2016/679 of the European Parliament and the Council of the 14 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, Art. 85 “Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes”.

²¹ GCC, *RTBF I*, cit., para. 42.

²² *Ibid.*, para. 44.

²³ *Ibid.*, para. 44

²⁴ *Ibid.*, paras 45, 60.

²⁵ *Ibid.*, paras 50-54; it is true that both *Åkerberg Fransson*, para. 29, and *Melloni* (Court of Justice, judgment of 26 February 2013, case C-399/11 [GC]), para. 60, conceded that in discretion cases “[national] courts remain free to apply national standards of protection of fundamental rights”. However, this concession is made only provided that the Charter’s level of protection and the “primacy, unity and effectiveness of European Union law are not thereby compromised”. It seems an overstatement by the GCC to claim that the judgments imply fundamental rights diversity as a normative principle of EU law.

plausible presumption that domestic standards complied with and effectively co-ensured the Charter's level of protection existed (presumption of compliance).²⁶ Yet, this presumption was rebuttable: if specific evidence indicated that the Charter exceptionally demanded a higher level of protection, the preference for the domestic regime was to be abandoned.²⁷ In these (unlikely) cases, the GCC would instead apply the pertinent Charter provisions itself (see *infra*, section 2.3.).²⁸

In its entirety, this fundamentally revised approach to EU multilevel fundamental rights adjudication seems to hold significant potential to placate competence conflicts between the Court of Justice and national Constitutional Courts: accepting the Court of Justice's expansive interpretation of "implementation", the national fundamental rights regime is nevertheless not fully displaced while case-to-case interpretation will consider European guidelines and shift to Charter provisions when national law falls short of European standards.

However, the GCC's reconfiguration of inter-court cooperation also bears considerable risks: first of all, there can be concern that the compliance presumption does degenerate into an irrefutable legal fiction. According to the Court, it will only need to verify if the compliance presumption holds true, if there is "concrete and sufficient evidence" that *Grundgesetz* protection does indeed fall short of Charter standards.²⁹ In absence of such "exceptional indications", the Court will simply examine domestic guarantees, without even undertaking a cursory assessment of the convergence of the national and the European framework.³⁰

This seems particularly problematic for areas in which Court of Justice case law has already developed highly intricate fundamental rights jurisprudence, such as in media law, asylum law or criminal procedure. In these areas European fundamental jurisprudence is so elaborate that it effectively determines law's decisive details, rather than just outlining principles in need of specification. With such degrees of legal intricacy however, chances are small that a potentially diverging domestic interpretation will satisfy the European standard just as well. Consequently, in these areas, use of the compliance presumption seems generally inadequate.

Last and most importantly, the Court's reconfiguration of multilevel judicial protection requires honesty. If the primacy of EU law is not to be jeopardised, substantial ambiguities concerning both the Charter's scope and substance must be identified as such, and referred to the Court of Justice. That the GCC in particular has shown reluctance to do so casts doubt on the Court's true intentions to cooperate. Judicial dialogue however can only succeed if both sides are ready to listen.

²⁶ GCC, *RTBF I*, cit., paras 55-59.

²⁷ *Ibid.*, paras 63-72.

²⁸ *Ibid.*, para. 72.

²⁹ *Ibid.*, paras 67-71.

³⁰ *Ibid.*

II.3. THE GCC'S NEW-FOUND COMPETENCE TO APPLY THE CHARTER OF FUNDAMENTAL RIGHTS

RTBF II then presented the conceptual counterpiece to this first reconfiguration of EU multilevel fundamental rights adjudication in *RTBF I*.

Conforming to prior Court of Justice jurisprudence, the GCC first found that internet search engines do not fall under data protection's so-called media privilege (see *infra*, section 3.1.) and that Member States could therefore not claim to benefit from a regulatory margin of discretion.³¹ As the legal situation was thus one "fully determined" by EU law, in accordance with the findings in *RTBF I*, German fundamental rights were held to be inapplicable.³²

Indeed the GCC acknowledged that the unity and primacy of EU law could be endangered if domestic fundamental rights doctrine, loaded with its own legal heritage and interpretative idiosyncrasies, would be applied indiscriminately to cases outside of Member States' margin of discretion.³³

Disregarding this rather contradictory rationale,³⁴ the withdrawal from domestic constitutional review in fully EU law-determined constellations conformed to settled case law and was thus to be expected. As the German Constitution gives the GCC jurisdiction only for *Grundgesetz* rights, one could therefore also expect that the Court would declare its lack of jurisdiction *ratione materiae* and dismiss the complaint. In this scenario the GCC would have fully entrusted EU fundamental rights enforcement on lower courts, relying on their ability (and willingness) to resolve Charter interpretation issues by way of the Court of Justice's preliminary reference mechanism.

The GCC however chose a different, rather astonishing path: transcending its prior case law, the GCC proceeded to interpret and apply the pertinent Charter rights itself.

The GCC gave three substantial reasons: Firstly, the GCC possessed a constitutional mandate to protect citizens' fundamental rights. This mandate could not be surrendered simply because more and more government action was subject to European rather than German fundamental rights. The current system, which entrusted the application of European fundamental rights to lower courts as well as the Court of Justice, would lead to substantial gaps in protection. Notably, the GCC was the only (German) institution specialized in fundamental rights review, as well as the only institution providing for a direct constitutional complaint procedure (*Verfassungsbeschwerde*). If

³¹ GCC, *RTBF II*, cit., paras 33-41.

³² *Ibid.*, paras 42-46.

³³ *Ibid.*, para. 45.

³⁴ *Nota bene* it was precisely the alleged conformity between the Charter's and the *Grundgesetz*'s fundamental rights regime that allowed the GCC to develop its presumption of compliance in *RTBF I*.

these legal safeguards were to be maintained, the GCC had to extend its competence to European fundamental rights.³⁵

Secondly, the German *Grundgesetz* endowed the GCC with a “responsibility for European integration” (*Integrationsverantwortung*), which – much like the Court of Justice’s *effet utile*-doctrine – obliged all German public authorities to actively contribute to the development and full realization of the European Union. Primarily, this responsibility meant that all EU legal acts were to be enforced effectively. According to the GCC, this effective enforcement of the Charter could only be guaranteed if the GCC itself was actively involved in its application.³⁶

Thirdly, the Court ruled out that its prior case law constituted precedent *against* establishing its competence for Charter rights adjudication. The Court correctly pointed out that all prior cases (would have) concerned the *validity* of EU legal acts, unlike the present case, *RTBF II*, which merely concerned their “*correct application*”. While only the Court of Justice had authority to judge on EU legal acts’ validity, all Member States’ courts were entitled to judge on their “*correct application*”.³⁷

While in line with the Court of Justice’s *Foto-Frost* doctrine,³⁸ this last argument to distinguish *RTBF II* from the GCC’s previous case law, seems somewhat fallacious: Every application of a legal norm simultaneously includes its interpretation, which in turn can be seen as a decision on the norm’s true, lawful, material validity.³⁹

The bulk of the GCC’s reasoning however is convincing enough: The GCC abandons its institutional exceptionalism, vows to apply Charter rights like all other European courts, while also promising to respect the Court of Justice’s authority and readily relay any and all issues of dispute.

Yet, similar to its findings in *RTBF I*, the GCC’s self-appointment as a European fundamental rights court needs to be taken with a pinch of salt.

As mentioned above, the biggest danger lies in a potentially obstinate and non-cooperative execution of the GCC’s new role as a European fundamental rights court. The GCC’s exceptional domestic and international leverage could worryingly lead to influential alternative Charter interpretations. While the German Court promises to limit itself to clear-cut cases, its findings on the merits in both cases differ significantly from prior Court

³⁵ GCC, *RTBF II*, cit., paras 58-63.

³⁶ *Ibid.*, paras 51-55.

³⁷ *Ibid.*, paras 51-52; the Court also correctly mentions that according to the Court of Justice’s *CILFIT*-doctrine (Court of Justice, judgment of 6 October 1982, case C-77/83), as a Court of last resort the GCC may decide on the interpretation of the contested EU provisions only when the concerned legal norm is clear in itself (*acte clair*) or given shape through Court of Justice interpretation (*acte éclairé*), paras 68-70, 87-93.

³⁸ Court of Justice, judgment of 22 October 1987, case C-314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*.

³⁹ One might also say that a court’s authoritative interpretation of the law approves one interpretation as right and valid, while discarding all others as wrong and invalid. For a good discussion on this issue of “material validity” see G. PINO, *Positivism, Legal Validity, and the Separation of Law and Morals*, in *Ratio Juris*, 2014, pp. 206-210.

of Justice interpretation (see *infra*, section III.) and thus constitute a first cautionary tale. While hesitation to engage in Art. 267 TFEU's judicial dialogue is a problem in lower courts too, there is one big difference regarding the GCC: Whereas a lower court's reluctance to make use of the preliminary reference mechanism is reviewable under the *Grundgesetz's* right to a fair trial (Art. 101, para. 1, *Grundgesetz*), for obvious reasons, no such remedy exists against the GCC. It is therefore now possible that Charter rights are applied without any legal remedy to appeal their (alleged) misinterpretation.⁴⁰

Furthermore, as *Komarék* has noted, the expectation of obedience within the preliminary reference mechanism, the Court of Justice's often cursory style of legal reasoning as well as its frequent indifference regarding the specific domestic institutional framework speak against an all-out integration of Constitutional Courts into European inter-court dialogue.⁴¹ These problems would deteriorate if the GCC decided, that due to its new role, lower courts could be relieved from their duty to refer to the Court of Justice under Art. 267, para. 3, TFEU. This was indeed insinuated by the judges with reference to the Austrian stance on this issue.⁴²

Finally, one might be concerned that the GCC brings "too much baggage" to the EU fundamental rights ball. If the German Court wants to maintain its detailed, theory-laden judicial style, it will hardly be able to do without its own anthology of reasons, principles and legal concepts. This might warrant concern that, while formally Charter rights are applied, the substantive legal reasoning is determined by domestic doctrine. Again, as will further be discussed, the substantive findings of *RTBF I* nurture rather than dissipate this concern.

III. NEW LAWS OF FORGETTING: NOVELTIES FOR THE (EUROPEAN) RIGHT TO BE FORGOTTEN

As if these momentous institutional developments were not enough, the two judgments also brought substantial novelties for the (European) right to be forgotten and data protection more broadly. Specifically two issues call for attention: 1) The GCC's handling of the so-called media privilege in data protection law in *RTBF II* and 2) the GCC's normative recalibration of the right to be forgotten in *RTBF I*.

⁴⁰ Of course individuals may still claim compensation for damages suffered due to a court's failure to submit an obligatory preliminary reference. However, compensation is always subject to the condition that has indeed suffered (financial) damages for which compensation is due and that the breach is "manifest and sufficiently serious".

⁴¹ J. KOMARÉK, *The Place of Constitutional Courts in the EU*, in *European Constitutional Law Review*, 2013, pp. 432-433.

⁴² GCC, *RTBF II*, cit., paras 72-74.

As we will see in both cases, the GCC's findings deviate significantly from prior Court of Justice jurisprudence. Before elaborating on these emerging fault lines, we will have a short look at each case's facts.

III.1. *RTBF II*: AMBIGUITIES OF DATA PROTECTION'S MEDIA PRIVILEGE

RTBF II concerned the case of a company executive who in a 2010 public television broadcast was accused of using "nasty tricks" to dismiss unruly staff members. As a textual transcript of the interview was still available on the TV station's internet archive, users could, through a simple Google search for the executive's name, still access what she deemed libellous and reputation-damaging material. Having failed with her takedown request before the civil courts, the claimant now asked the GCC to declare the further indexing of the material unconstitutional. In the eyes of the claimant, the ongoing indexing of the material violated her fundamental rights, more specifically her general right of personality and her right to be forgotten (rtbf).

This right was first established in the Court of Justice's seminal 2014 *Google Spain SL*, in which the Court held that provisions of the Data Protection Directive (DPD) in conjunction with Arts 7 (right to privacy) and 8 (right to data protection) of the Charter "grant the data subject the right [...] to object at any time on compelling legitimate grounds [...] to the processing of data relating to him".⁴³ 2016 saw the rtbf gain statutory footing, with Art. 17 of the new GDPR stipulating that the data subject can demand removal *inter alia* when data are "no longer necessary in relation to the purposes for which they were collected" or when there are "no [longer] overriding legitimate grounds for the processing [of the data]".⁴⁴

One of the major issues of *RTBF II* concerned the possibility of applying data protection's so-called media privilege to Internet search engines (ISEs) like Google. The media privilege in Art. 9 DPD, now Art. 85 GDPR, stipulates that Member States shall provide for exemptions or derogations from data protection obligations for data processing carried out for "journalistic purposes" in order to reconcile the right to protection of personal data with the right to freedom of expression and information.

Although ISEs' data processing in rtbf cases consists in making third party journalistic content available, the Court of Justice in *Google Spain SL* held that ISEs' activity did not serve "journalistic purposes" and was therefore not covered by the media privilege.⁴⁵ Rights to freedom of expression were thus not even mentioned in the Court's balancing test, with online intermediaries' legal positions limited to a "merely [...] economic interest".⁴⁶

⁴³ Court of Justice, judgment of 13 May 2014, case C-131/12, *Google Spain SL* [GC], para. 74.

⁴⁴ Art. 17, para. 1, let. a) and c), GDPR.

⁴⁵ *Google Spain SL* [GC], para. 85.

⁴⁶ *Ibid.*, para. 81.

While *Satakunnan Markkinapörssi* and *Google LLC* seemingly tried to sidestep the issue of potential dispensations for online intermediaries under the media privilege,⁴⁷ *GC and others* made it clear that the Court of Justice would stick to its old approach and exclude ISEs from the exemptions;⁴⁸ although in *GC and Others* the Court of Justice showed increased acuity for (legal interests in) free speech and public discourse,⁴⁹ it did not accept that any fundamental rights for free speech required consideration in the assessment of a rtbf-claim.⁵⁰ Importantly, the Court has repeatedly emphasised the fact that the lawfulness of the original content creator's activity (i.e. providing journalistic content online) had to be strictly separated from and could not prejudice the lawfulness of the ISE's activity (i.e. indexing that content and making it available to users).⁵¹

The GCC formally followed this interpretation and rejected the pertinence of the media privilege for SIEs.⁵² However, its substantial argument moved into a remarkably different direction. This could be expected as already in a 2014 commentary on *Google Spain SL*, one of the sitting GCC judges heavily criticized the Court of Justice's approach as "unbalanced" and "simplistic" and specifically opposed the narrow definition of the media privilege.⁵³

Considering that the real intention of petitioners of a rtbf-claim was not the delisting of the search entry itself, but to suppress the information of the original source, the GCC held that the delisting of online content from ISE pages would inevitably also result in a restriction of content creators' ability to spread their opinions. Rtbf-claims thus *directly* interfered with content creators' rights to freedom of expression under Art. 11 of the Charter. This could not be ignored in the legal assessment.⁵⁴

The involvement of content creators' Art. 11 rights would furthermore mean that *as a rule* the lawfulness of the indexing of the content would be determined by and depend on the lawfulness of the original content.⁵⁵ Data protection tenets, such as the principle of purpose limitation, were discarded as inadequate.⁵⁶ Compared to the Court of Justice, the GCC thus adopts an approach decidedly more favourable to free speech.

⁴⁷ Court of Justice: judgment of 16 December 2008, case C-73/07 [GC], *Satakunnan Markkina-pörssi*, paras 50-62; judgment of 24 September 2019, case C-507/17, *Google LLC* [GC], para. 67.

⁴⁸ Court of Justice, judgment of 24 September 2019, case C-136/17, *GC and Others* [GC], compare paras 49 and 69.

⁴⁹ *GC and Others* [GC], cit., paras 75-78.

⁵⁰ See also J. MASING, *Vorläufige Einschätzung der „Google-Entscheidung“ des EuGH*, in *Verfassungsblog*, 14 August 2014, verfassungsblog.de.

⁵¹ See only *Google Spain SL* [GC], cit., paras 83-88 and *GC and Others* [GC], cit., paras 83-87.

⁵² GCC, *RTBF II*, cit., paras 36, 112.

⁵³ J. MASING, *Vorläufige Einschätzung*, cit., furthermore critical of the decision's neglect for the rights of content producers, the analytical separation of the publication and the indexing of information and the general preference for individuals privacy vis-à-vis free speech.

⁵⁴ GCC, *RTBF II*, cit., paras 107-109, 127.

⁵⁵ *Ibid.*, para. 118.

⁵⁶ *Ibid.*, para. 132.

It rejects the Court of Justice's "privacy-by-default" approach, and reworks the legal evaluation into an open-ended fundamental rights balancing.

This leads firstly to the contradictory finding that ISE operations are excluded from the media privilege, while their legal evaluation not only influences the rights of media makers, but in fact is largely prejudiced by the scope of these rights themselves. On the practical side, it remains to be seen if the Court of Justice will hold on to its marked distinction between claims against content providers and those against search engine operators or accept the GCC's view that these dimensions are necessarily intertwined and thus demand a holistic assessment.

If one thing becomes clear however, it is the GCC's determination to not only apply, but actively shape the interpretation of Charter fundamental rights doctrine. While the GCC goes to great lengths to disprove the necessity of a preliminary reference procedure,⁵⁷ substantially its judgment presents major novelties for rtbf doctrine.

III.2. *RTBF I*: A NEW NORMATIVE GROUNDING FOR THE RIGHT TO BE FORGOTTEN

The GCC's findings in *RTBF I* provoke further fault lines with the existing Court of Justice jurisprudence.

RTBF I concerned the case of A., who was convicted of murder in 1982. After being released from prison in 2002, A. became aware that news reports on his story were still available in the online archives of a large German newspaper. Since 2009, A. had therefore been undertaking civil action to obtain the reports' deletion. The GCC was seized to decide if the ultimate dismissal of A.'s request through the Federal Court of Justice (BGH) violated his fundamental rights.

As the controversy concerned the rights and duties of an original content provider, the media privilege was clearly pertinent. In contrast to *RTBF II*, the case was therefore to be decided on the basis of German *Grundgesetz* rights. Acting within its self-attributed domestic margin of discretion (see *supra* section II.2.), the GCC did not limit itself to striking a Member State-specific balance between the fundamental rights of data subject A. and of the data processing newspaper. Instead it based the conflict of rights on a new and altogether different normative grounding.

European data protection discourse consistently refers to the individuals' right to control over their data.⁵⁸ In Court of Justice rtbf-doctrine this notion of control has led to two central principles: 1) "[It] is not necessary in order to find [a right to be forgotten] that the inclusion of the information in question in the list of results causes prejudice to the data subject."⁵⁹ 2) Data subjects' rights to "request that the information in question

⁵⁷ *Ibid.*, paras 137-141.

⁵⁸ See only recitals 7, 68, 75, 85 GDPR; European Commission, *It's Your Data - Take Control*, ec.europa.eu.

⁵⁹ *Google Spain SL [GC]*, para. 99; *Google LLC [GC]*, para. 45; *GC and Others [GC]*, para. 53.

no longer be made available [...] override, *as a rule*, not only the economic interest of the operator of the search engine but also the interest of the general public”.⁶⁰

According to the GCC however, this notion of control was lopsided and inappropriate to assess the legal positions of a rtbf-conflict.⁶¹ Media coverage on an identifiable individual necessarily needed to be seen as a multipolar process of societal communication, in which all the communicating parties’ interests (individual, media, audience) had to be taken into account *ab origine* and in equal measure.⁶² Using individual control as the standard of review would not only mask the complexity of this clash of interests, but also unduly privilege the individual. Indeed, the GCC rejected the existence of any individual right to information control, when understood as a legal prerogative to determine the fate of “one’s own” information.⁶³ Rather data subjects would only be entitled to protection against information which overly restricted their personal development.⁶⁴

This is a profound theoretical departure from European data protection doctrine, which conceptualizes the rtbf as a fundamentally individual-controlled claim right and gives the individual the power to determine the fate of personal information *as a matter of principle*. It also has significant practical effects however: Individuals cannot claim “to be forgotten”, without establishing that the concerned information significantly hampers their autonomy or reputation⁶⁵ and, even if they can, this claim does not generally take precedence over clashing freedoms of expression.⁶⁶ Quite the contrary, the GCC indeed insinuates that a presumption in favour of free speech exists.⁶⁷

Although the GCC regards this interpretation of the European rtbf as Member States’ regulatory discretion (see *supra* section II.2.), one should not forget that according to Court of Justice doctrine even in these cases the “primacy, unity and effectiveness” of EU law must not be compromised.⁶⁸ Specifically for this last reason, it seems questionable that the Court of Justice will make concessions to its German colleagues and abandon its preference for individual privacy rights.

IV. CONCLUDING REMARKS

As other commentators have pointed out, the GCC’s new-found European calling could result in a mutually beneficial cross-fertilization: Karlsruhe contributes to the effective

⁶⁰ *Ibid.* (emphasis added).

⁶¹ GCC, *RTBF I*, cit., paras 87, 90, 107.

⁶² *Ibid.*, paras 89-92.

⁶³ *Ibid.*, para. 107, “[t]he general right of personality does not provide a legal title against remembering responsibly”.

⁶⁴ *Ibid.*, para. 80.

⁶⁵ *Ibid.*, paras 80, 97.

⁶⁶ *Ibid.*, para. 82.

⁶⁷ *Ibid.*, para. 82.

⁶⁸ See *supra* footnote 25.

enforcement of Charter rights, while Luxembourg develops deeper doctrine in response to the GCC's queries.⁶⁹ This however will require mindful attention to the mentioned pitfalls. Future cases will show if the GCC's reconfiguration can succeed in bringing about this next step in the EU's constitutional integration project.

⁶⁹ W. MICHL, *In Vielfalt Geeinte Grundrechte*, in *Verfassungsblog*, 27 November 2019, [verfassungsblog.de](https://www.verfassungsblog.de); F. GÄRDITZ, *Grundrechts-Mobile statt Starrer Kompetenzschichten*, in *Verfassungsblog*, 19 January 2020, [verfassungsblog.de](https://www.verfassungsblog.de).