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From claiming the last word vis-à-vis Luxembourg to claiming the first word – the Bundesverfassungsgericht’s repositioning within the multilayered system of fundamental rights protection in the EU

I. Broadening Europeanisation and its effect on the federal balance in fundamental rights protection in the EU

Broadening Europeanisation, i.e. the advancing transfer and exercise of competences towards the EU, does not only signify the increasing Europeanisation of many areas of national law,¹ but it also has a profound impact on the federal balance within the multilayered system of fundamental rights protection in the EU. As the ECJ stressed in its *Fransson* judgment: “Since the fundamental rights guaranteed by the Charter must ... be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.”² Or, to quote *Koen Lenaerts* and *José Antonio Gutiérrez-Fons*: “Metaphorically speaking, ... the Charter is the ‘shadow’ of EU law”.³

Expanding the scope of EU fundamental rights raises the question of balancing the various layers of fundamental rights protection in the EU. This is a sensitive issue in federal systems.⁴

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¹ See on this dimension of Europeanisation *F. Wollenschläger*, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (VVVDStRL) 75 (2015), 187 (233); *idem*, *REALaw* 10 (2017), 7 (55).

² ECJ, Case C-617/10, *Fransson*, EU:C:2013:105, para 21; further Case C-418/11, *Texdata*, EU:C:2013:588, para 73.

³ *K. Lenaerts* and *J.A. Gutiérrez-Fons*, *The charter in the EU constitutional edifice*, in: S. Peers/T. Hervey/J. Kenner/A. Ward (eds.), *The EU charter of fundamental rights. A Commentary*, Oxford 2014 (Hart), para 55.26.

⁴ On this and the following statements, see *P. Eeckhout*, *CML Rev* 39 (2002), 945; *X. Groussot/L. Pech/G.T. Petursson*, *The reach of fundamental rights on Member State action after Lisbon*, in: S.A. de Vries/U. Bernitz/S. Weatherill (eds.), *The protection of fundamental rights in the EU after Lisbon*, Oxford 2013 (Hart), p. 97 (100 et seq.); *P.M. Huber*, *Europarecht* (EuR) 43 (2008), 190 (190, 198 et seq.); *idem*, *Neue Juristische Wochenschrift* (NJW) 64 (2011), 2385 (2385 et seq.); *F. Kirchhof*, *Neue Juristische Wochenschrift* (NJW) 64 (2011), 3681 (3681 et seq.); *F.C. Mayer*, *Europarecht-Beiheft* 1/2009, p. 87 (93); *F. Wollenschläger*, *Grundrechtsschutz und Unionsbürgerschaft*, in: A. Hatje/P.-C. Müller-Graff (eds.), *Enzyklopädie Europarecht. Europäisches Organisations- und Verfassungsrecht*, Vol. 1, Baden-Baden 2014 (Nomos), § 8, paras 16 and 29 et seqq.

As already explained elsewhere,⁵ experience in federal systems (for example, in the German federal state or in the US) demonstrates that a considerable potential for unitarisation resides within central catalogues of fundamental rights – also in areas for which there are no, or only weak, competences at the federal level –, in particular if interpreted in activist case-law. This is accompanied by a marginalisation of the fundamental rights provided by the Member States, as well as of the (state) Constitutional Courts that are entrusted with their protection.⁶ This is problematical, and especially so with regard to well-functioning, differentiated systems of protection such as the protection of fundamental rights in Germany. On the other hand, federal experience also demonstrates that legal unity and the precedence of federal law require uniform fundamental rights standards.

Against this background, it is convincing to measure national legislation the enactment of which is required by EU law not against the yardstick of national fundamental rights, but against EU fundamental rights, even if national constitutional law loses its standard-setting function as a result of Europeanisation in this case⁷. For, the primacy and uniform application of EU law would otherwise be placed at risk. This has also been accepted in the case-law of the Bundesverfassungsgericht: It has been settled case-law that national fundamental rights do not apply to national measures implementing mandatory requirements of EU law provided that an adequate fundamental rights standard is guaranteed at EU level (Solange jurisprudence).⁸ It is important to see, though, that the scope of EU law, and thus the applicability of EU fundamental rights, go beyond implementing mandatory requirements of EU law. Transposing EU directives may open up discretion for the Member States, and even if not implementing specific requirements of EU law, the latter may nonetheless be relevant for national legislation (Fransson jurisprudence); the extent of the applicability of EU fundamental rights in these situations however remains controversial.⁹ National and EU fundamental rights apply in parallel as a matter

⁵ *F. Wollenschläger*, Fundamental Rights Regimes in the European Union: Contouring their Spheres, in: Y. Nakanishi (ed.), *Contemporary Issues in Human Rights Law. Europe and Asia*, Tokyo 2017 (Springer Japan), p. 23 (23 and 35).

⁶ Cf. already *H.P. Ipsen*, Gleichheit, in: F.L. Neumann/H.C. Nipperdey/U. Scheuner (eds.), *Die Grundrechte*, Vol. 2, 2nd ed., Berlin 1968 (Duncker & Humblot), p. 111 (125); further *J. Masing*, *EL Rev* 41 (2016), 490 (509 et seq.); *J. Snell*, *European Public Law* 21 (2015), 285 (286 et seq.).

⁷ See *F. Wollenschläger*, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDSStRL)* 75 (2015), 187 (218 et seq.); *idem*, *REALaw* 10 (2017), 7 (39 et seq.).

⁸ See only BVerfGE (reports) 118, 79 (95 et seq.); further BVerfGE (reports) 73, 339 (366 et seq.); BVerfGE (reports) 126, 286 (298 et seq.); BVerfGE (reports) 140, 317 (334 et seq.). In more detail *F. Wollenschläger*, Art. 23 GG, in: H. Dreier (ed.), *Grundgesetz*, Vol. 2, 3rd ed., Tübingen 2015 (Mohr Siebeck), paras. 172 et seq.; *idem*, *Fundamental Rights Regimes in the European Union: Contouring their Spheres*, in: Y. Nakanishi (ed.), *Contemporary Issues in Human Rights Law. Europe and Asia*, Tokyo 2017 (Springer Japan), p. 23 (36 et seq.).

⁹ See in more detail *F. Wollenschläger*, *Fundamental Rights Regimes in the European Union: Contouring their Spheres*, in: Y. Nakanishi (ed.), *Contemporary Issues in Human Rights Law. Europe and Asia*, Tokyo 2017 (Springer Japan), p. 23 (34 et seq.); *idem*, *Grundrechtsschutz und Unionsbürgerschaft*, in: A. Hatje/P.-C. Müller-Graff (eds.), *Enzyklopädie*

of principle in such situations, however wide or narrow their scope is assumed to be. Here, too, national constitutional law may de facto become bereft of its standard-setting function if EU law standards reveal themselves to be more stringent.¹⁰ In order to counter a too far-reaching scope of application of EU fundamental rights in such situations, the Bundesverfassungsgericht has formulated limits: A too expansive approach may be *ultra vires*; moreover, Germany's constitutional identity – limiting European integration – requires that substantial scope be preserved for fundamental rights protection at national level.¹¹

While this case-law, like the *Solange* jurisprudence, claims to have the last word when it comes to applying EU fundamental right to national legislation, the Bundesverfassungsgericht claimed in its recent decision of 21 March 2018 the first word *vis-à-vis* Luxembourg.¹² This new approach in the protection of fundamental rights in cooperation between the Bundesverfassungsgericht and the ECJ will be explained in the first section of this article (II.). A second part offers an analysis and shows that qualifications have to be made (III.).

II. Claiming the first word *vis-à-vis* Luxembourg: a new approach in the cooperative protection of fundamental rights between the Bundesverfassungsgericht and the ECJ

In its recent decision of 21 March 2018, the Bundesverfassungsgericht reacted to the relativisation of the standard-setting function of the German Basic Law (*Grundgesetz*) resulting from Europeanisation (1.), and affirmed its jurisdiction to review fundamental rights issues in an increasingly Europeanised legal order (2.). The importance of this aspect of the ruling is underlined by the fact that the Court has formulated a specific headnote (headnote 3), despite a rather short discussion in the reasons.

1st Europeanisation as relativisation of the standard-setting function of the Grundgesetz

In substance, the Bundesverfassungsgericht had to scrutinise the constitutionality of the obligation to publish undertakings having infringed food law standards stipulated for by section 40

Europarecht. Europäisches Organisations- und Verfassungsrecht, vol. 1, Baden-Baden 2014 (Nomos), § 8, paras. 16 et seqq.

¹⁰ See *F. Wollenschläger*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDSStRL) 75 (2015), 187 (222 et seq.); *idem*, REALaw 10 (2017), 7 (43 et seqq.)

¹¹ See notably BVerfGE (reports) 133, 277 (316); English translation available at http://www.bverfg.de/e/rs20130424_1bvr121507en.html (accessed 11 April 2019).

¹² BVerfG, Order of 21 March 2018, 1 BvF 1/13, English Press Release No. 32/2018 of 4 May 2018 available at https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-032.html;jsessionid=8F0803024D3E4AA7B2F94D492695DBC2.1_cid393 (accessed 11 April 2019).

subsection (1a) of the German Food, Commodities and Feed Code (*Lebensmittel-, Bedarfsgegenstände- und Futtermittelgesetzbuch* – LFGB). The substantive aspects will not be discussed here,¹³ but rather their relevance with regard to the multilayered system of fundamental rights protection in the EU. In this sense, the aforementioned provision must not only be measured against national fundamental rights standards. Rather, it is also subject to requirements formulated by secondary EU law. First, Art. 17 para. 2 subpara. 3 of Regulation (EC) No 178/2002 formulates a proportionality test for national measures and penalties reacting to infringements of food and feed law.¹⁴ Second, the Official Controls Regulation [Regulation (EU) No 2017/625], amended in 2017,¹⁵ sets standards for informing the public (Articles 8 and 11). Third, the fact that the transparency obligation stipulated in the LFGB falls within the scope of EU law in turn entails the applicability of EU fundamental rights (cf. Art. 51 para. 1 CFR).¹⁶

Thus, as a consequence of the Europeanisation of food and feed law, standards of primary and secondary EU law apply in juxtaposition to those of the Basic Law, resulting in a relativisation of the latter's standard-setting function. This development is not limited to the food and feed sector. Rather, the Europeanisation of the national legal order has become continually more broadened, densified and potentiated.¹⁷ This affects many branches of law which are also sensitive in terms of fundamental rights, such as, to name some recent examples, national data protection law in view of the EU General Data Protection Regulation, applicable since 25 May 2018,¹⁸ police law as a consequence of its Europeanisation by Directive (EU) 2016/680, to be transposed by 6 May 2018,¹⁹ or telecommunication surveillance including data retention against

¹³ See only *F. Wollenschläger*, *Juristenzeitung* (JZ) 2018, 981.

¹⁴ This provision reads: “Member States shall also lay down the rules on measures and penalties applicable to infringements of food and feed law. The measures and penalties provided for shall be effective, proportionate and dissuasive.”

¹⁵ Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products, OJ L 95, 7 April 2017, p. 1 (corrected in OJ L 137, 24 May 2017, p. 40).

¹⁶ See also *Oberverwaltungsgericht Nordrhein-Westfalen*, *Neue Zeitschrift für Verwaltungsrecht Rechtsprechungs-Report* (NVwZ-RR) 26 (2013), 627 (629); *E.M. Frenzel*, *Verfassungsblog* (VerfBlog) 2018/5/06, available at <https://verfassungsblog.de/staatlicher-hygienepranger-vor-dem-bundesverfassungsgericht/> (accessed 11 April 2019); *F. Wollenschläger*, *Europäische Zeitschrift für Wirtschaftsrecht* (EuZW) 24 (2013), 419 (422). See in detail on the reach of EU Fundamental Rights on Member State Action *idem*, *Grundrechtsschutz und Unionsbürgerschaft*, in: A. Hatje/P.-C. Müller-Graff (eds.), *Enzyklopädie Europarecht. Europäisches Organisations- und Verfassungsrecht*, Vol. 1, Baden-Baden 2014 (Nomos), § 8, paras. 16 et seqq.

¹⁷ Cf. *F. Wollenschläger*, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (VVDStRL) 75 (2015), 187 (233 et seqq.); *idem*, *REALaw* 10 (2017), 7 (55 et seqq.).

¹⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4 May 2016, p. 1 (last corrected in OJ L 127, 23.5.2018, p. 2).

¹⁹ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention,

the background of a broad interpretation of the E-Privacy Directive²⁰. Finally, the Europeanisation of a specific sector triggers, as shown, the applicability of EU fundamental rights (cf. Art. 51 para. 1 CFR).

2nd Confirming its role as guardian of fundamental rights

This development not only relativises, as analysed elsewhere, the significance of the Basic Law,²¹ but also the jurisdiction of its guardian, the Bundesverfassungsgericht. In its decision of 21 March 2018, Karlsruhe reacted to this development, and stated as follows in the third headnote: “The Federal Constitutional Court reviews whether a national law is compatible with the Basic Law, including in cases where compatibility with the secondary law of the European Union is also in doubt.”²²

The formulation of a stand-alone headnote affirms that this headnote is not a mere paraphrase of the test applied by the Bundesverfassungsgericht which is indeed limited to issues of German constitutional law, as stipulated by Article 93 para. 1 (No 2) GG.²³ Rather, Karlsruhe marks two fundamental points: It opts to uphold and assert a distinct national fundamental rights tradition (a), and it claims the first word vis-à-vis Luxembourg (b).

a) Upholding and asserting a distinct national fundamental rights tradition

With its decision to also review national legislation exclusively with regard to the Basic Law in cases in which compatibility with secondary EU law is in doubt, the Bundesverfassungsgericht has rejected an extension of its jurisdiction to measure national legislation also against EU (constitutional) law standards. In contrast, the Austrian Constitutional Court has followed the opposite path and extended its jurisdiction to review to include the EU Charter of

investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4 May 2016, p. 89 (corrected in OJ L 127, 23 May 2018, p. 6).

²⁰ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L 201, 31 July 2002, p. 37 (corrected in OJ L 241, 10 September 2013, p. 9). See on this only *F. Wollenschläger*, *Neue Juristische Wochenschrift* (NJW) 71 (2018), 2532; *idem/L. Krönke*, *Neue Juristische Wochenschrift* (NJW) 69 (2016), 906.

²¹ See *F. Wollenschläger*, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (VVDStRL) 75 (2015), 187 (218 et seq.).

²² BVerfG, Order of 21 March 2018, 1 BvF 1/13, English Press Release No. 32/2018 of 4 May 2018 available at https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-032.html;jsessionid=8F0803024D3E4AA7B2F94D492695DBC2.1_cid393 (accessed 11 April 2019).

²³ Article 93 para. 1 No 2 GG reads: “The Federal Constitutional Court shall rule: ... 2. in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law or Land law *with this Basic Law ...*” – emphasis added.

Fundamental Rights.²⁴ This path however entails the risk of marginalising national fundamental rights.

b) Claiming the first word vis-à-vis Luxembourg

Karlsruhe moreover modifies its relationship with Luxembourg. While the Bundesverfassungsgericht's case-law on the constitutional limits of European integration (constitutional identity including the preservation of adequate fundamental rights protection; ultra-vires control) claims the last word in view of applying EU law within the national legal order,²⁵ its recent decision claims the first word vis-à-vis Luxembourg in issues of fundamental rights protection.²⁶ Karlsruhe thus claims to rule on the case irrespective of competing EU law standards, even if the latter give rise to doubts in terms of the compliance of national legislation with EU law, and hereby also rejects a reference to the ECJ²⁷.

The approach followed in its recent decision allows the Bundesverfassungsgericht to formulate an interpretation of (national) fundamental rights at an early stage, to introduce this interpretation in the pan-European discourse, and thus to influence subsequent rulings of the ECJ on similar matters of fundamental rights interpretation.²⁸ This approach may be considered more effective in terms of promoting Karlsruhe's interpretation of fundamental rights than formulating questions in a reference for a preliminary ruling or by the constant threat of not following the ECJ's judgements in case of a violation of the national constitutional identity because of deficient fundamental rights standards (*Solange* jurisprudence), or too expansive fundamental rights standards (ultra-vires control; preservation of substantial scope for national fundamental

²⁴ See Austrian Constitutional Court (Österr. VerFGH), Order of 14 March 2012, U 466/11 – 18, U 1836/11 – 13, paras. 25 et seqq. On this *F. Wollenschläger*, Grundrechtsschutz und Unionsbürgerschaft, in: A. Hatje/P.-C. Müller-Graff (eds.), *Enzyklopädie Europarecht. Europäisches Organisations- und Verfassungsrecht*, Vol. 1, Baden-Baden 2014 (Nomos), § 8, para. 109.

²⁵ BVerfGE (reports) 73, 339 (366 et seqq.); BVerfGE (reports) 126, 286 (298 et seqq.); BVerfGE (reports) 140, 317, (334 et seqq.). See on this *F. Wollenschläger*, Art. 23 GG, in: H. Dreier (ed.), *Grundgesetz*, Vol. 2, 3rd ed., Tübingen 2015 (Mohr Siebeck), paras. 172 et seqq.

²⁶ See for a corresponding assessment of the judgement of the Corte Costituzionale Nr. 267/2017 *A. Guazzarotti*, Un "atto interruttivo dell'usucapione" delle attribuzioni della Corte costituzionale? In margine alla sentenza n. 269/2017, p. 2, available at http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2017/11/nota_269_2017_guazzarotti.pdf (accessed 11 April 2019); further *D. De Pretis*, in: SIPE 2018, forthcoming, 3.

²⁷ See on the issue of a referral to the ECJ also *F. Wollenschläger*, Art. 23 GG, in: H. Dreier (ed.), *Grundgesetz*, Vol. 2, 3rd ed., Tübingen 2015 (Mohr Siebeck), para. 173.

²⁸ See in general on the increase in significance of the Basic Law by setting standards for Europeanisation *F. Wollenschläger*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL) 75 (2015), 187 (236 et seqq.).

rights protection as a further constitutional limit to European integration), since its activation is limited to exceptional cases.²⁹

From a comparative perspective, it is interesting to note that, whilst it does raise a good deal of questions, the Italian Corte Costituzionale followed a comparable approach in an obiter dictum contained in its decision of 7 November 2017, at least in view of the objective of claiming the first word vis-à-vis Luxembourg: In this obiter dictum, it advocated the primacy of a reference to the national Constitutional Court if national legislation conflicts with both the Italian Constitution as well as with the EU Charter of Fundamental Rights.³⁰

Karlsruhe has not gone this far, though. With regard to concrete judicial review (Art. 100 para. 1 GG), the Bundesverfassungsgericht does not advocate such primacy of a reference to the national Constitutional Court – which would also clash with the ECJ’s Melki jurisprudence³¹ – , but sees both reference procedures on an equal footing; an exception is only made if non-conformity with EU law has been established because of a lack of relevance³². Moreover, even parallel standards of EU and national law do not justify an exemption from the duty to refer a case to the ECJ.³³

III. Analysis: Necessary Qualifications

Karlsruhe’s new approach in dealing with the competing fundamental rights regimes in the EU does however raise questions. Four points will be highlighted: First, it has to be noted that no more than the first word vis-à-vis Luxembourg may be claimed (1.). Second, the new approach creates tensions with the Solange jurisprudence (2.). Third, it may be accused of a certain blindness vis-à-vis EU law (3.). Fourth and last, its limitation to conflicts with secondary EU law is questionable (4.). One may therefore conclude that the final word has not been spoken on balancing the competing fundamental rights regimes within the EU.

²⁹ See in detail on these constitutional limitations of European integration *F. Wollenschläger*, Art. 23 GG, in: H. Dreier (ed.), *Grundgesetz*, Vol. 2, 3rd ed., Tübingen 2015 (Mohr Siebeck), paras. 81 et seq., 94, 103, 175 et seq.

³⁰ Sentenza N. 269/2017 of 7 November 2017. See on this *D. De Pretis*, in: SIPE 2018, forthcoming, 3.

³¹ ECJ, Joined Cases C-188/10 and C-189/10, *Melki and Abdeli*, [2010] ECR I-5667, paras. 41 et seq.; Case C-112/13, *A*, ECLI:EU:C:2014:2195, para. 37; Case C-322/16, *Global Starnet*, ECLI:EU:C:2017:985, para. 23.

³² BVerfGE (reports) 85, 191 (203 et seq.); BVerfGE (reports) 106, 275 (294 et seq.); BVerfGE (reports) 116, 202 (214 et seq.); BVerfGK (reports of chamber decisions) 14, 429 (432 et seq.).

³³ ECJ, Case C-322/16, *Global Starnet*, ECLI:EU:C:2017:985, paras. 21 et seq.

1st *No more than the first word vis-à-vis Luxembourg may be claimed*

In view of the primacy of EU law, the Bundesverfassungsgericht may not – if confirming the constitutionality of national legislation – claim more than the first word vis-à-vis Luxembourg. The ultimate relevance of Karlsruhe’s ruling will depend on whether the ECJ, vested with final authority to interpret EU law, also confirms the conformity of national legislation with primary and secondary EU law.

Our case may serve as an illustration: If the ECJ were to interpret the rules of secondary EU law, or the subsequently-applicable EU fundamental rights, as prohibiting the information of the public as stipulated by section 40 subsection (1a) LFGB, not only would Karlsruhe’s decision (confirming the constitutionality of such a publication in principle) lose relevance, but the Basic Law would also de facto lose its standard-setting function as a consequence of Europeanisation.³⁴ A further example is the fiercely-debated conformity of telecommunication data retention with fundamental rights. If deriving an absolute prohibition from EU law, following a strict interpretation of the ECJ’s obiter dictum in its Tele2 judgment³⁵ and contrary to the Bundesverfassungsgerichts’s judgement of 2 March 2010^{36, 37} the pending decision of the Bundesverfassungsgericht would, in substance, no longer be relevant.

Thus, even whilst claiming the first word vis-à-vis Luxembourg, Karlsruhe will not abolish the ECJ’s final authority to adjudicate on matters of EU law, which may moreover be activated by any court by lodging a reference for a preliminary ruling in accordance with to Article 267 TFEU, and thus halt the de facto loss of the standard-setting function of the Basic Law.

2nd *Tensions with the Solange jurisprudence*

If national legislation implementing mandatory requirements of EU law is subject to scrutiny, the Bundesverfassungsgericht sticks to its orthodox approach of not measuring it against national constitutional law standards as long as national constitutional identity is respected (paras. 20 et seqq.).³⁸ This case-law rejecting jurisdiction in case of mandatory requirements of EU law

³⁴ *F. Wollenschläger*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL) 75 (2015), 187 (222 et seq.). See on the phenomenon of ‘parallel constitutions’ *S. Unger*, Deutsches Verwaltungsblatt (DVBl.) 2015, 1069 (1074 et seq.).

³⁵ ECJ, Joined Cases C-203/15 and C-698/15, *Tele 2*, ECLI:EU:C:2016:970, paras. 108 et seqq.

³⁶ BVerfGE (reports) 125, 260 – not questioned by the interim judgments BVerfG, *Neue Zeitschrift für Verwaltungsrecht* (NVwZ) 35 (2016), 1240 (1241) and *Zeitschrift für Datenschutz* (ZD) 6 (2016), 433 (434).

³⁷ See in more detail on the relevance of the ECJ’s case-law *F. Wollenschläger*, *Neue Juristische Wochenschrift* (NJW) 71 (2018), 2532.

³⁸ BVerfGE (reports) 73, 339 (366 et seqq.); BVerfGE (reports) 140, 317 (334 et seqq.). Cf. further *D. Thym*, *Juristenzeitung* (JZ) 70 (2015), 53 (59 et seqq.).

creates a certain tension with Karlsruhe's decision of 21 March 2018 also claiming jurisdiction in cases of doubts regarding the conformity of national legislation with EU law.

The following example may serve as an illustration: Had EU law obliged the national legislature to introduce a rule such as section 40 subsection (1a) LFGB, the Bundesverfassungsgericht would not have claimed jurisdiction, provided that national constitutional identity was respected. Had the national legislature, in contrast, introduced such a rule without being obliged to do so by EU law, whilst EU law were to prohibit such a publication, because of e.g. a lack of proportionality of section 40 subsection (1) LFGB, we would also be faced with mandatory requirements of EU law. The recent decision of the Bundesverfassungsgericht however found these to be irrelevant in terms of jurisdiction.

Thus, the decision distinguishes between national legislation the enactment of which is required by EU law, and which is thus not subject to constitutional scrutiny on the one hand and national legislation the enactment of which is not required by EU law, but which is subject to EU law standards (which are however no less mandatory), and thus subject to constitutional scrutiny on the other hand. It remains to be seen whether this distinction may be applied consistently. At any rate, the ECJ made it clear in its *Melloni* jurisprudence that there is only room for parallel application of national fundamental rights if “the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.”³⁹

3. *EU law blindness?*

Not referring the case to the ECJ, and deciding merely on the basis of national constitutional law standards, even if the applicability of competing EU law standards is obvious and these moreover give rise to doubts as to the compliance of national legislation with EU law, may be equated with a certain blindness of the decision vis-à-vis EU law. One has to consider, though, that a reference to the ECJ not only prolongs litigation, but will also result in a significant caseload for the ECJ, since numerous cases will involve issues of EU law. Moreover, the alternative of extending jurisdiction to review – limited by Article 93 para. 1 (No. 2) GG to the National Constitution – to the EU Charter of Fundamental Rights would not abolish the jurisdiction of the ECJ to have the final say on the interpretation of EU law.

³⁹ ECJ, Case C-399/11, *Melloni*, ECLI:EU:C:2013:107, paras. 60 et seqq.

Finally, the decision does not reject outright EU law influences on the protection of (national) fundamental rights. An interpretation of national fundamental rights in the light of EU law does remain possible, albeit in the hands of the Bundesverfassungsgericht. In this sense, the decision takes note of the ECJ's case-law (see para. 36).

4th Questionable limitation to conflicts with secondary EU law

Finally, it seems unconvincing to limit the decision to conflicts between national law and secondary EU law. Rather, the fact that the headnote only refers to secondary EU law is misleading since its applicability entails the applicability of EU fundamental rights, and thus of primary EU law (Article 51 para. 1 CFR). Moreover, the EU regulations that are applicable to the case formulate standards concretising fundamental rights requirements, notably Article 17 para. 2 subpara. 3 of Regulation (EU) No 178/2002 containing positive and negative obligations (see above, II.1.).