

Fundamental Rights Obligations of Private Platform Operators Under the EU Digital Services Act

Legal opinion commissioned by the Gesellschaft für Freiheitsrechte e.V.

submitted by

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Simple translation of the German original

Summary

1. It will be examined whether and to what extent the standards developed by the German Federal Court of Justice (“Bundesgerichtshof” - BGH) for moderation decisions by platform operators drawing on the indirect horizontal effects of fundamental rights (“mittelbare (Dritt)wirkung von Grundrechten”) remain valid under the European Union’s Digital Services Act (DSA). In particular, clarification is needed on whether the requirement of an “objective reason,” which has not found any explicit textual expression in the DSA, is to be maintained.
2. First, it is shown that EU fundamental rights have an indirect horizontal effect that is largely comparable to the fundamental rights of the German Constitution. Due to norm hierarchy, the indirect horizontal effects of the DSA do not follow from Art. 14(4) DSA, but from the Charter of Fundamental Rights of the European Union (Charter) itself.
3. To date, the European Court of Justice (ECJ) has only commented on the indirect horizontal effect of the fundamental rights of the Charter in individual cases and has avoided making programmatic statements. However, if one extrapolates the standards applied in the case law, the picture is very similar to the German legal situation. In particular, there is no evidence in the ECJ’s case law that the indirect horizontal effect is limited to certain types of legal procedure, special matters such as labor law, or specific fundamental rights.
4. As far as the relationship between platform operators and users is concerned, freedom of expression (Art. 11 of the Charter) and the right to non-discrimination (Art. 21(1) of the Charter) require particular consideration in light of indirect horizontal effects. Their protection is only sufficiently taken into account as far as restrictions can be based on an objective reason. As a result, the requirements that can be derived from the Charter for the actions of private platform operators are largely congruent with those derived by the BGH from the fundamental rights of the German Constitution (“Grundgesetz” – GG). As a non-constitutional provision, Art. 14(4) DSA takes this into account.
5. Even if the relevant fundamental Charter rights thus have an indirect horizontal effect that is almost identical in result, clarification is finally needed on whether there is still room for BGH jurisdiction based on the German Constitution – or whether the BGH must replace the constitutional basis of its case law due to the DSA. According to the case law of the ECJ and the German Federal Constitutional Court (“Bundesverfassungsgericht” – BVerfG), this depends on whether domestic law is fully determined by Union law. For matters governed by Art. 14(4) DSA, this is the case. As a result, the German Constitution is superseded by the Charter.

6. Overall, it can be stipulated that Art. 14(4) DSA does not lead to any significant changes. However, the normative foundation of balancing fundamental rights (“grundrechtliche Abwägung”) changes. This is now based on the Charter instead of the German Constitution.

I. Background and question of the expert opinion

1. In 2021, the BGH ruled in two landmark decisions that providers of social networks may be subject to fundamental rights obligations when drafting their terms of use.¹ Following the case law of the BVerfG on the impact of fundamental rights on private law², the BGH justifies this with the “**indirect horizontal effects**” of fundamental rights.³ Specifically, the BGH derives substantive and formal requirements for terms and conditions (T&C) from the users’ freedom of expression (first sentence of Art. 5(1) GG) and the principle of equal treatment (“*Gleichheitssatz*” – Art. 3(1) GG) when the removal of (lawful) content and the suspension of user accounts is regulated.

2. From a **substantive** point of view, the BGH requires that there be an **objective reason** for the removal and suspension: “The defendant may not use the decision-making power resulting from its structural superiority to *arbitrarily* prohibit individual expressions of opinion [...]. This also follows from the fact that the communication platform [...] does not provide for any thematic limitation but serves the general exchange of communication and information. [...] A ban on the expression of *certain* political views, for example, would [therefore] not be compatible with users’ fundamental right to freedom of expression and the equal treatment requirement.”⁴ An arbitrary objective reason is likely to exist in particular if the rights of third parties are affected.⁵ The sanctions imposed by the networks must also be **proportionate**.⁶ In all of this, the BGH still recognizes that the companies can rely on their own fundamental rights concerns as well, which is particularly relevant for their power to remove *lawful* content.⁷

¹ BGH, Judg. of 29 July 2021 - III ZR 179/20 (NJW 2021, 3179) and III ZR 192/20 (ZUM-RD 2021, 612); confirmed by BGH, Judg. of 27 January 2022 - III ZR 12/21.

² See BVerfGE 7, 198 - *Lüth*; see also BVerfG NJW 2015, 2485 para. 6 - *Beercan Flash Mob*; BVerfGE 148, 267 para. 32 - *Stadium Ban*; NJW 2019, 1935 para. 15 - *III. Weg*; BVerfGE 152, 152 para. 85 *et seq.* – *Right to be Forgotten I*.

³ The dogmatic category of “indirect” horizontal effect will not be further problematized in the following. See more recently, for example, *Hellgardt* JZ 2018, 901; *Kulick*, *Horizontalwirkung im Vergleich*, 2020; *Neuner* NJW 2020, 1851.

⁴ BGH NJW 2021, 3179 para. 81 (emphasis added).

⁵ *Raue* JZ 2022, 232 (236).

⁶ *Raue* JZ 2022, 232 (236 *et seq.*): Obligation to create a tiered sanction concept by networks, depending for example on the frequency and duration of the violations.

⁷ *Raue* JZ 2022, 232 (233). On the previously partly different case law of the lower courts, see the comments in *Janal*, *Impacts of the Digital Services Act on the Facebook “Hate Speech” decision by the German Federal Court of Justice*, in: *Raue/von Ungern-Sternberg* (eds.), *Content Regulation in the European Union* (forthcoming), manuscript p. 2 *et seq.*

Furthermore, the right to delete content provided for in the T&C must not be linked “to merely subjective assessments or fears” of operators, but rather “to objective, verifiable facts.”⁸

3. The adherence to these substantive criteria is **procedurally safeguarded**: “The balancing of conflicting fundamental rights, demanded by the constitution, and the fact that an objective reason is required for the removal of individual contributions are linked to procedural requirements. In particular, network operators [...] must make reasonable efforts to *clarify* the facts [...]. Here, a *hearing* of the person making the statement represents an important means of clarification.”⁹

4. With the entry into force of the EU’s DSA, it is questionable to what extent this case law will continue to have effect. The BGH judge *Allgayer* expressed the widespread view that the **decisions of the BGH are “outdated” due to the entry into force of the DSA**, since the Act contains “not only provisions on the design of terms and conditions as well as their application and enforcement, but also those on notification and redress procedures in the case of potentially illegal content and criminal offences.”¹⁰ In fact, the DSA provides for far-reaching obligations for *providers of intermediary services*, which partly, but possibly not fully, correspond to the obligations established by the BGH. In addition, **Art. 14(4) DSA** contains a clause that obliges providers of intermediary services to respect EU fundamental rights, similarly to the BGH’s requirements:

“Providers of intermediary services shall act in a diligent, objective and proportionate manner in applying and enforcing the restrictions referred to in paragraph 1, with due regard to the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service, such as the freedom of expression, freedom and pluralism of the media, and other fundamental rights and freedoms as enshrined in the Charter.”¹¹

⁸ BGH NJW 2021, 3179 para. 82.

⁹ BGH NJW 2021, 3179 para. 83 (emphasis added); further concretized *ibid.* para. 85. Cf. accordingly for procedural requirements for the exercise of the civil law domiciliary right, BVerfGE 148, 267 para. 47 - *Stadium Ban*: those affected must be granted the right “to deal with the accusations and to assert their rights in a timely manner by presenting their point of view.”

¹⁰ *Allgayer*, F.A.Z. of 10 February 2023, <https://zeitung.faz.net/faz/medien/2023-02-10/f3461af315e914284c0a7ca0ca87ec0f/>.

¹¹ In the Commission draft (COM (2020) 825 final), the standard was known as Art. 12(2). On the fact that the German language version lacks the addition contained in other languages, according to which the rights mentioned there are to be taken into account “diligent[ly],”, see *Raue*, in: Hofmann/Raue, Digital Services Act, forthcoming 2023, Art. 14 DSA para. 88.

Academic opinion on **Art. 14 DSA** is **mixed**. Some attribute a “revolutionary potential” to the norm, especially its paragraph 4.¹² Others doubt that Art. 14 DSA, including its paragraph 4, is an adequate concretization of EU primary legislation, especially of EU fundamental rights.¹³ It is particularly noteworthy that the clause emphasizes the fundamental rights of users, while not explicitly mentioning those of companies and other parties concerned.

5. Against this backdrop, this expert study, prepared for the Gesellschaft für Freiheitsrechte (“Society for Civil Rights” - GFF), addresses the **following questions**:

- (1) Does the **Charter of Fundamental Rights of the European Union (Charter)** and/or Art. 14(4) DSA impose a fundamental rights obligation on platforms comparable to the obligations established by the BGH in relation to Facebook? In particular, is there a need for an objective reason if a platform takes measures vis-à-vis its users?
- (2) Does Art. 14(4) DSA stipulate that in private-law disputes between platforms and users concerning restrictions, the Charter be the relevant standard and not, as hitherto, the fundamental rights of the German Constitution? Within the scope of the DSA, is there still room for application of the BGH’s case law on indirect horizontal effects of fundamental rights?

6. Thus, a detailed analysis of the obligations set out in the DSA is not within this report’s focus. Nor does it comprehensively analyze the Member States’ remaining room for maneuver in regulating online platforms or the scope of the barrier effect originating from the DSA.¹⁴ Rather, this expert opinion solely aims to clarify the (EU) fundamental rights framework which the DSA and its application is bound to (→ II.) and to analyze how Art. 14(4) DSA affects the legal reasoning of Member State courts (→ III.).

¹² Quintas/Appelman/Fathaigh GLJ 2023 SSRN (forthcoming), 1.

¹³ Eifert/Metzger/Schweitzer/Wagner CMLR 2021, 987 (1013 *et seq.*). Skeptical also Wendel, Taking or Escaping Legislative Responsibility?, in: Raue/von Ungern-Sternberg (eds.), Content Regulation in the European Union (forthcoming), 3.3.1.

¹⁴ On this, *inter alia*, Cole/Ukrow, The EU Digital Services Act and Remaining National (Legislative) Scope, 2023.

II. The indirect horizontal effect of the Union's fundamental rights

7. EU fundamental rights primarily regulate the **vertical relationship** between the Union and EU citizens on the one hand, and between the Union and its Member States on the other. Accordingly, the institutions of the Union are directly bound by fundamental rights, in particular the rights, freedoms, and principles laid down in the Charter, when regulating platforms (Art. 6(1) Treaty on European Union (TEU)). Art. 51(1) of the Charter stipulates that this also applies to Member States insofar as they implement Union law.

8. The extent to which EU fundamental rights also have an indirect **horizontal effect**, i.e., demand compliance in disputes between two or more private parties (which are thus each entitled to fundamental rights), is not expressly regulated in Union primary legislation. Whereas in German constitutional law it was established early on that fundamental rights have an indirect horizontal effect – which is to be distinguished from the direct obligation of state powers to respect fundamental rights –,¹⁵ **the European Court of Justice (ECJ)** has so far **withheld programmatic statements** in this regard. In the following, it will therefore be examined whether and to what extent EU fundamental rights apply between private parties (→ II.2.) and how this affects the DSA (→ II.3.). First of all, it will be examined whether for the DSA, such an indirect horizontal effect has already been introduced in secondary legislation by means of Art. 14(4) DSA, which explicitly refers to the Charter (→ II.1.).

1. To begin with: Can Art. 14(4) DSA establish an indirect horizontal effect of the fundamental rights of the Union?

9. **Art. 14 DSA** restricts the entrepreneurial freedom of providers of intermediary services and imposes requirements on the design of T&C concerning the provider's content moderation. The norm contains transparency requirements (para. 1), information obligations (para. 2) and protection provisions for minors (para. 3), as well as qualified transparency requirements for large online platforms and search engines (paras. 5 and 6). According to the second sentence of Art. 14(1) DSA, these **"restrictions"** apply to all "policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review." In this context, Art. 14(4) DSA provides that "in applying and enforcing the restrictions referred to in paragraph 1," the providers must take into account "the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service, such as the freedom of expression, freedom and

¹⁵ Cf. the references at → fn. 2.

pluralism of the media, and other fundamental rights and freedoms as enshrined in the Charter.”

10. Irrespective of which obligations Art. 14(4) DSA implements for providers (→ para. 37 *et seqq.*), it is firstly to be discussed whether the provision in itself **can establish an indirect horizontal effect** of EU fundamental rights.¹⁶ This is cautiously considered in the academic literature.¹⁷ Ultimately, however, such a position must be completely rejected.

11. It is not contested that fundamental rights often only unfold their practical effect when they are **concretized** by legislation. This requirement is common in national law.¹⁸ Some fundamental rights even depend on a legislative implementation, as their scope of protection is only shaped by the legislator (they are thus “normgeprägt”).¹⁹ This applies for example to the right to property (Art. 14 GG; Art. 17 of the Charter). In addition, the Charter contains certain guarantees in which the legislator has conferred fundamental rights status on certain norm of secondary legislation. These include, for example, Art. 27 of the Charter (workers’ right to information and consultation within the undertaking) and Art. 30 of the Charter (protection in the event of unjustified dismissal) (for more on this, see → paras. 19, 21).

12. However, this link should not obscure the fundamental normative architecture of Union law, according to which the **Union legislator is bound by primary legislation and cannot dispose** of it.²⁰ Just as the Union legislator cannot divest itself of its fundamental rights obligations through secondary legislation, it cannot impose fundamental rights obligations with primary legislative effect on itself or third parties without a basis in primary legislation, as is the case with Art. 27 of the Charter. Art. 51(1) of the Charter does not alter this, insofar as the obligation of the Member States to adhere to EU fundamental rights depends on the applicability of secondary legislation; this (primary legislation) regulation concerns federal aspects, not the relationship between the Union constitutional legislature and the Union legislature. In sum: Art. 14(4) DSA has, concerning a possible indirect horizontal effect of EU fundamental

¹⁶ Corresponding questions also arise elsewhere in Union secondary legislation, for example in Art. 6(1)(f) GDPR. On the GDPR, see *Denga* EuR 2021, 569 (594); *Röhling/Weil*, in: Schrör et. al. (eds.), *Entscheidungsträger im Internet*, 2022, p. 151 (158). Generally also *Raue*, in: Hofmann/Raue, *Digital Services Act*, forthcoming 2023, Art. 14 DSA para. 18 with further references; *Quintas/Appelman/Fathaigh* GLJ 2023 SSRN (forthcoming), 11.

¹⁷ Formulated as a question in *Achleiter*, *Revision der Grenzen der Meinungsfreiheit?*, in: Bajilicz et. al. (eds.), *Recht im Umbruch - Umbruch im Recht*, 2022, p. 3 (24) with further references.

¹⁸ *Jestaedt*, *Grundrechtsentfaltung im Gesetz*, 1999.

¹⁹ *Cornils*, *Die Ausgestaltung der Grundrechte*, 2005; *Bumke*, *Ausgestaltung von Grundrechten*, 2009; *Michl*, *Unionsgrundrechte aus der Hand des Gesetzgebers*, 2018, esp. p. 80 *et seq.*

²⁰ Likewise *Wendel* (fn. 13), 3.3.1.

rights, no constitutive but **only declaratory quality**.²¹ Of course, this does not prevent Art. 14(4) DSA from being understood as affirming that providers of intermediary services are bound by fundamental rights, possibly arising from the Charter itself. This obligation will now be analyzed.

2. Indirect horizontal effect of EU fundamental rights: foundations and limits

13. Since indirect horizontal effect of EU fundamental rights cannot be imposed by secondary legislation, it must be clarified whether and to what extent **EU fundamental rights** themselves claim validity between private parties. As mentioned above, the **ECJ has not provided a conclusive answer**; especially in the case of the fundamental rights that are particularly relevant to platform regulation, first and foremost the freedom of expression (Art. 11 of the Charter), the Court has not yet explicitly referred to their indirect horizontal effect. Nevertheless, certain case law indicates that the fundamental rights of the Union as a whole have an effect on private-law relationships that is largely identical to that of the fundamental rights of the German Constitution. To elaborate:

a) Indirect horizontal effect as an “old and well-established idea” of Union law

14. The ECJ first developed the idea of an indirect horizontal effect of primary law norms in the context of the **fundamental freedoms**. In 1974, for example, the ECJ affirmed in *Walrave* that a private sports association was bound by the freedom to provide services with reference to *effet utile* considerations.²² This reasoning was later taken up in the *Bosman* decision, among others,²³ and then extended to the freedom of establishment.²⁴ Advocate General *Trstenjak* gave at least a favorable opinion on the indirect horizontal effect of the freedom of capital movements and payments.²⁵ The status of the indirect horizontal effect in the case of

²¹ An important consequence of this is that the catalogue of fundamental rights mentioned in Art. 14(4) DSA is not to be understood as exhaustive; see further → para. 33 *et seq.* In conclusion, this is also the case with *Röhling/Weil* (fn. 16), p. 162 *et seq.*; *Quintas/Appelman/Fathaigh* GLJ 2023 SSRN (forthcoming), 19.

²² ECJ, Judg. of 12. December 1974, C-36/74, para. 16/19 - *Walrave*; on this also *Unseid*, Zur Bedeutung der Horizontalwirkung von EU-Grundrechten, 2018, p. 133 *et seqq.* On the importance of *effet utile* in this context, see also *Prechal*, *Revista de Derecho Comunitario Europeo* 66 (2020), 407 (411 *et seq.*).

²³ ECJ, Judg. of 15 December 1995, C-415/93, para. 82 - *Bosman*.

²⁴ ECJ, Judg. of 11 December 2007, C-438/05, ECLI:EU:C:2007:772, para. 33 ff, 61 - *Viking*.

²⁵ *Trstenjak*, Opinion of 28 March 2012, C-171/11, ECLI:EU:C:2012:176, para. 44 - *Fra.bo*. See also *Kingreen*, in: *Calliess/Ruffert*, 6th ed., 2022, Art. 36 TFEU, para. 114.

the free movement of goods is disputed; the decisions of the ECJ on this matter are inconclusive.²⁶

15. Due to the **structural parallels** between fundamental freedoms and fundamental rights, this finding is at least **indicative** of the existence of an indirect horizontal effect of EU fundamental rights. The fact that the fundamental freedoms are primarily directed at Member States and only exceptionally at EU institutions themselves, while the fundamental rights of the Union are primarily directed at EU institutions and only exceptionally at Member States, does not contradict such a transferability.²⁷

16. The ECJ also recognized the indirect horizontal effect of **other provisions of primary legislation**; conflicting national law is therefore inapplicable.²⁸ This concerns, on the one hand, the predecessor provision of today's Art. 157 Treaty on the Functioning of the European Union (TFEU) ("equal pay for men and women").²⁹ On the other hand, this applies to the prohibition of age discrimination, which, according to the ECJ, is a general legal principle of Union law (now partly incorporated into Art. 21 of the Charter), the indirect horizontal effect of which was confirmed in the landmark decisions *Mangold*³⁰ and *Kücükdeveci*^{31,32}. These decisions illustrate that the ECJ determines the indirect horizontal applicability of a norm of primary legislation particularly on the basis of its **purpose** and with a view to **effectiveness**.³³

17. To this effect, the ECJ has also explicitly granted indirect horizontal effect to individual **fundamental rights** of the **Charter** in several recent decisions. Two decisions are worth highlighting:

- *Egenberger* (2018): According to a regulation of German anti-discrimination law that violated European law, courts could only examine to a limited extent whether the

²⁶ *Kingreen*, in: Calliess/Ruffert, EUV/AEUV, 6th ed., 2022, Art. 36 TFEU para. 15, 114, 225 *et seq.*, rejecting an indirect horizontal effect (but nevertheless relying on a state duty to protect as a solution), with further references also to the opposing view, which affirms an indirect horizontal effect, in particular to *Müller-Graff* EuR 49 (2014), 3 (15 *et seq.*).

²⁷ In more detail *Unsel* (fn. 22), p. 142.

²⁸ Insofar as the national law in the cases also infringed upon a directive, this did not have the same legal consequence, as the directive does not have any effect between private parties, see → paras. 17 and 23 and *Kamambrou*, Der Einfluss der Grundrechte-Charta auf das deutsche Arbeitsrecht, in: Heiderhoff/Lohsse/Schulze (eds.), EU-Grundrechte und Privatrecht - EU Fundamental Rights and Private Law, 2016, 167 (175 *et seq.*, 187 *et seq.*).

²⁹ ECJ, Judg. of 8 April 1976, C-43/75, paras. 30/34, 40 - *Defrenne II*.

³⁰ ECJ, Judg. of 22 November 2005, C-144/04, ECLI:EU:C:2005:709 - *Mangold*.

³¹ ECJ, Judg. of 19 January 2010, C-555/07, ECLI:EU:C:2010:21 - *Kücükdeveci*.

³² *Frantziou* CYELS 2020, 208 (215).

³³ *Unsel* (fn. 22), p. 139.

conditions for a discrimination on grounds of religious affiliation were permissible by way of exception. The ECJ ruled that in cases where national law cannot be interpreted in conformity with the directive due to the *contra legem* prohibition,³⁴ Arts. 21 and 47 of the Charter are also directly applicable in a legal dispute between private individuals; a concretizing secondary legislative regulation was hence not required.³⁵ Apart from the reference to the “mandatory character” of Art. 21 of the Charter and the fact that Arts. 21 and 47 of the Charter are “sufficient in [themselves] and do[] not need to be made more specific by provisions of EU or national law,” the decision does not contain any further justification for the indirect horizontal effect.³⁶ From the indirect horizontal effect, the Court concludes that within the balancing process, both the (fundamental) legal interests of all parties involved, as well as the evaluation of the secondary legislator must be taken into account.³⁷ As a result, the ***contra legem prohibition*** is thus circumvented by taking recourse to the indirect horizontal effect of EU fundamental rights.³⁸

- *Bauer and Broßonn* (2018): According to a German law that was contrary to EU law, holiday entitlements did not fall within the inheritance, so that the legal successors of deceased persons were not entitled to subsequent remuneration. In this case, the ECJ had to clarify what followed from this for the legal relationship between private individuals.³⁹ Since an interpretation of national law in conformity with EU law was again not possible (*contra legem*), it was questionable whether the Directive had direct effect between private individuals. The settled case law denies this, *inter alia* because the differences between a regulation and a directive would otherwise be blurred.⁴⁰ However, in *Bauer and Broßonn*, the ECJ recognized that the right to annual leave (Art. 31(2) of the Charter), as an essential principle of the Union’s social order, has “mandatory character.”⁴¹ In particular, the norm does not require any further

³⁴ On the context of the case – the Danish Supreme Court’s refusal to comply with the ECJ’s decision in Case C-441/14, ECLI:EU:C:2016:278 - *Dansk Industri* – see *Kulick* (fn. 3), p. 68 *et seq.*

³⁵ ECJ, Judg. of 17 April 2018, C-414/16, ECLI:EU:C:2018:257, paras. 76-78 - *Egenberger*.

³⁶ ECJ, Judg. of 17 April 2018, C-414/16, ECLI:EU:C:2018:257, paras. 76, 78 - *Egenberger*.

³⁷ ECJ, Judg. of 17 April 2018, C-414/16, ECLI:EU:C:2018:257, paras. 80 *et seq.* - *Egenberger*.

³⁸ The *Egenberger* case is (still) the subject of proceedings before the BVerfG, in which the ECJ decision is being reviewed for its compatibility with constitutional identity and the *ultra vires* principle (reference: 2 BvR 934/19). These questions are not considered here.

³⁹ ECJ, Judg. of 6 November 2018, C-569/16 and others, ECLI:EU:C:2018:871 - *Bauer and Broßonn*.

⁴⁰ On the strongly casuistic case law, see *Ruffert*, in: Calliess/Ruffert, EUV/AEUV, 6th ed., 2022, Art. 288 paras. 58 *et seqq.*

⁴¹ ECJ, Judg. of 6 November 2018, C-569/16 and others, ECLI:EU:C:2018:871, para. 83 - *Bauer and Broßonn*.

concretization.⁴² From this, the ECJ concludes that the provision also takes effect between private parties; it also points out that the right of employees to paid leave is “by its very nature, a corresponding obligation on the employer.”⁴³ Consequently, the conflicting national law must remain inapplicable.⁴⁴ Once again, the **prohibition of *contra legem* interpretation** and the **limited direct effect of directives between private parties** are “trumped” by recourse to the indirect horizontal effect of fundamental rights.

Furthermore, in *Bauer and Broßonn*, the ECJ clearly rejects the counterargument frequently raised that Art. 51(1) of the Charter conclusively regulates the circle of addressees of the Charter and does not mention private individuals.⁴⁵ As the ECJ convincingly states, Art. 51(1) of the Charter “does not, however, address the question whether those individuals may, where appropriate, be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility.”⁴⁶ Rather, the regulatory effect of Art. 51(1) of the Charter is limited to the vertical relationship between the Union and its Member States.⁴⁷

- Other ECJ decisions, essentially operating in analogy to *Egenberger* and *Bauer and Broßonn*, include *IR* (2018)⁴⁸, *Max Planck Society* (2018)⁴⁹ and *Cresco* (2019)⁵⁰.

⁴² Cf. *Schlachter ZESAR* 2019, 53 (57). Critically, *Wank RdA* 2020, 1 (8).

⁴³ ECJ, Judg. of 6 November 2018, C-569/16 and others, ECLI:EU:C:2018:871, para. 90 - *Bauer and Broßonn*.

⁴⁴ ECJ, Judg. of 6 November 2018, C-569/16 and others, ECLI:EU:C:2018:871, paras. 91 *et seq.* - *Bauer and Broßonn*.

⁴⁵ See, for example, *Trstenjak*, Opinion of 8 September 2011, C-282/10, ECLI:EU:C:2011:559, para. 128 – *Dominguez*; references in *Unselde* (fn. 22), p. 226; *Denga* EuR 2021, 569 (585). In contrast, with reference to the wording and the legislative history: *Kainer NZA* 2018, 894 (898); *Frantziou*, *The Horizontal Effect of Fundamental Rights in the European Union*, 2019, p. 72; *Frantziou* EuConst 15 (2019), 306 (317); *Prechal* *Revista de Derecho Comunitario Europeo* 66 (2020), 407 (418); *Krause* CMLR 58 (2021), 1173 (1195 *et seq.*).

⁴⁶ ECJ, Judg. of 6 November 2018, C-569/16 and others, ECLI:EU:C:2018:871, para. 87 - *Bauer and Broßonn*.

⁴⁷ See also *Cruz-Villalón*, Opinion of 18 July 2013, C-176/12, ECLI:EU:C:2013:491, paras. 28-32 - *AMS*; *Lenaerts*, *The Role of the Charter in the Member States*, in: Bobek/Adams-Prassl (eds.), *The EU Charter of Fundamental Rights in the Member States*, 2020, p. 19 (25).

⁴⁸ ECJ, Judg. of 11 September 2018, C-68/17, ECLI:EU:C:2018:696 - *IR*. The decision reiterates the line of *Egenberger* that Art. 21 of the Charter also operates in indirect horizontal relations.

⁴⁹ ECJ, Judg. of 6 November 2018, C-684/16, ECLI:EU:C:2018:874 – *Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V.* The decision was rendered on the same day as *Bauer and Broßonn* and repeats the reasoning there; it also refers to Art. 31(2) of the Charter.

⁵⁰ ECJ, Judg. of 22 January 2019, C-193/17, ECLI:EU:C:2019:43 – *Cresco Investigation GmbH*: The decision transfers the reasoning developed in *Bauer and Broßonn* to Art. 21(1) of the Charter.

18. The relevant ECJ case law also includes decisions that are only partially associated with the indirect horizontal effect of EU fundamental rights in the literature, probably because the ECJ there does not explicitly refer to this concept. In a number of decisions, the Court has ordered Member States to balance the fundamental rights of one side with the conflicting fundamental rights of the other side on the basis of the relevant specific legislation when **interpreting Union law norms that affect private law relationships**, such as those of copyright and data protection law.⁵¹ In this regard, a recent decision states that “in striking the balance which is incumbent on a national court between the exclusive rights of the author [...], and [...]the rights of the users of protected subject matter [...], a national court must, having regard to all the circumstances of the case before it, rely on an interpretation of those provisions which, whilst consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter.”⁵² In doing so, the Court explicitly refers to the freedom of expression and information guaranteed by Art. 11 of the Charter. The fact that the ECJ here as well as in further decisions considered (Union) law to be sufficiently flexible to allow room for the required interpretation of national law in conformity with EU law, and thus – unlike in *Bauer and Broßonn* – did not correct the (national) legislator, does not change the fact that the existence of an indirect horizontal effect of the Union’s fundamental rights was hence assumed.⁵³ Admittedly, the decisions are only directly addressed to Member State legislatures or courts. However, the result is that EU fundamental rights, in line with the classical concept of indirect horizontal effects of fundamental rights, indirectly take effect in **private legal relationships** via these state actors. The consequence of the judgments is also – and this further relativizes the difference to the decision in *Bauer and Broßonn* – that the ECJ would have had to correct the legislator with recourse to the Charter if the attempt to give effect to the fundamental rights through the interpretation of national law had failed.⁵⁴

19. However, there are also decisions of the ECJ that **explicitly reject** an indirect horizontal effect of individual guarantees of the Charter:

⁵¹ ECJ, Judg. of 29 January 2008, C-275/06 et al., ECLI:EU:C:2008:54, paras. 65 et seq. - *Promusicae*; ECJ, Judg. of 16 December 2008, C-73/07, ECLI:EU:C:2008:727, paras. 53 et seq. - *Satakunnan Markkinapörssi and Satamedia*; ECJ, Judg. of 16 July 2015, C-580/13, ECLI:EU:C:2015:485, paras. 33 et seq. - *Coty Germany*; ECJ, Judg. of 29 July 2019, C-516/17, ECLI:EU:C:2019:625, paras. 51 et seq. - *Spiegel Online*. On this constellation in general also *Jarass*, EU-Grundrechte und Privatrecht, in: Heiderhoff/Lohsse/Schulze (eds.), EU-Grundrechte und Privatrecht - EU Fundamental Rights and Private Law, 2016, 31 (46 et seq.); *Jarass*, in: Jarass, Charta der Grundrechte der EU, 4th ed., 2021, Art. 51 para. 39. That this was originally the sole approach of the ECJ is emphasized by *Kulick* (fn. 3), p. 67.

⁵² ECJ, Judg. of 29 July 2019, C-516/17, ECLI:EU:C:2019:625, para. 59 - *Spiegel Online*.

⁵³ Correspondingly also ECJ, Judg. of 26 April 2022, C-401/19, ECLI:EU:C:2022:297, para. 98 - *Upload-Filter*.

⁵⁴ For detailed information on the remaining differences in the dogmatic construction and on the institutional consequences, which can of course be ignored for the purposes here, see *Kulick* (fn. 3), p. 74 et seqq.

- *AMS* (2014): In this decision on collective labor law, the ECJ had to clarify whether **Art. 27 of the Charter** (workers' right to information and consultation within the undertaking) applies directly between private parties. The Court rejected this, referring to the fact that Art. 27 of the Charter, according to its wording, "must be given more specific expression in European or national law" in order to "be fully effective."⁵⁵ The rejection of an indirect horizontal effect is thus based on the **specific structure of the fundamental right in need of concretization**.
- *Glatzel* (2014): Even though the decision deals with the "vertical" application of fundamental rights, it refers to the *AMS* decision in the context of interpreting **Art. 26 of the Charter** (integration of persons with disabilities); the ECJ also understands Art. 26 of the Charter as a fundamental right that requires concretization and does **not** grant the individual a **subjective right**.⁵⁶ It is therefore obvious that, in the opinion of the ECJ, Art. 26 of the Charter also does not have any indirect horizontal effects.

20. **Summarizing the case law**, it can be concluded that the ECJ essentially justifies the application of indirect horizontal effects with the principle of effectiveness and thus provides it with a firm basis and a very broad scope of application in Union law. Accordingly, Advocate General *Cruz-Villalón* stated in his opinion on *AMS* that the indirect horizontal effect of primary legislation is an "**old and well-established**" **idea of Union law** for which a restrictive approach is "highly problematic."⁵⁷ Furthermore, the academic literature argues with the order of values, known in the German discourse as "Werteordnung" (cf. Art. 2 TEU), and points to a great practical need, since private actors have attained an importance that is at least as relevant for the actual exercise of fundamental rights and freedoms as state bodies; in order to ensure effective protection of fundamental rights, these rights must therefore also take effect in relationships between private individuals.⁵⁸ In addition, the recognition of an indirect horizontal effect of fundamental rights in Union law is the result of a development that has already been in progress for some time in numerous constitutional law systems of different Member States.⁵⁹

21. However, according to the explicit case law of the ECJ in this respect, this **only** applies to those **fundamental rights that take effect "in themselves."** There is no indirect horizontal

⁵⁵ ECJ, Judg. of 15 January 2014, C-176/12, ECLI:EU:C:2014:2, para. 45 - *AMS*.

⁵⁶ ECJ, Judg. of 22 April 2014, C-356/12, ECLI:EU:C:2014:350, para. 78 - *Glatzel*.

⁵⁷ *Cruz-Villalón*, Opinion of 18 July 2013, C-176/12, ECLI:EU:C:2013:491, para. 34 - *AMS*; on this also *Achleiter* (fn. 17), p. 19.

⁵⁸ *Prechal* *Revista de Derecho Comunitario Europeo* 66 (2020), 407 (418 *et seq.*).

⁵⁹ *Frantziou* *CYELS* 2020, 208 (211).

effect if the right's scope of protection is "only" linked to existing provisions of Union law or national law which are merely constitutionalized by the Charter; in addition to Arts. 26 and 27 of the Charter, for which this has already been decided, this would also include Art. 30 of the Charter (protection in the event of unjustified dismissal, which is subject to "national laws and practices"), Art. 34 of the Charter (social security and social assistance) and possibly also Art. 31 of the Charter (fair and just working conditions) as well as Art. 33(2) of the Charter (maternity and parental leave).⁶⁰ In this regard, the ECJ has denied, or is likely to deny, an indirect horizontal effect, as it is not possible to identify a primary legislative scope of protection or a genuine protected interest that exceeds secondary legislation and that could take effect between private parties.⁶¹

22. It remains unclear whether in these cases, as suggested by the President of the ECJ *Koen Lenaerts*, the "essence" (Art. 52(1) of the Charter) of such fundamental rights, which is also to be determined in consideration of international agreements, may nevertheless take effect⁶². So far, there are no indications in the case law that this essence plays any role in such a context. Moreover, the ECJ's reasoning in *AMS* and *Glatzel* is based on the view that these fundamental rights do not have a genuine primary-legislative essence. Ultimately, it remains to be seen whether *Lenaerts* has actually paved the way for an extension of the indirect horizontal effect to all fundamental rights of the Charter, i.e., an abandonment of *AMS*. In any case, the intervention confirms that the trend in Luxembourg is preponderantly directed towards an extension rather than a restriction of the indirect horizontal effect.

b) Open questions of the ECJ case law

aa) Limitation of the indirect horizontal effect to directives?

23. Insofar as the ECJ has recognized an indirect horizontal effect of fundamental rights, this has always concerned directives. The ECJ has not yet commented in detail on the indirect horizontal effects of regulations. However, this does not mean that it does not apply to regulations such as the DSA. On the contrary, case law has so far probably only explicitly addressed the indirect horizontal effect of directives because the ECJ **needs the concept for directives** in order to **justify exceptions to established doctrinal positions**. Unlike with regulations, the national legislator can undermine the EU fundamental rights' claim to protection within a directive through inaction or an incorrect implementation, since the ECJ recognizes the *contra*

⁶⁰ *Michl* (fn. 19), p. 165 *et seqq.*

⁶¹ Likewise *Michl* (fn. 19), p. 191 *et seq.* On the legal effects of these fundamental rights, which nevertheless do not include the indirect horizontal effect, cf. *ibid.*, p. 174 *et seqq.*

⁶² See *Lenaerts* GLJ 20 (2019), 779 (790 *et seq.*).

legem limit when interpreting national law. In order to explain the deviation from the general rule, according to which private parties cannot directly invoke directives against private individuals and are instead referred to state liability, the ECJ refers to the argument of indirect horizontal effect.⁶³ This becomes particularly obvious in the Court's dealing with the Opinions of Advocates General *Bobek* in the *Cresco* case⁶⁴ and *Tanchev* in the *Egenberger* case⁶⁵, who, also with reference to the *AMS* decision, had suggested that the cases should not be resolved via indirect horizontal effect but via state liability. In both cases, the ECJ decided differently.⁶⁶ The detailed reasoning, which in particular *Bobek* had developed countering an indirect horizontal effect of Art. 21(1) of the Charter,⁶⁷ was reversed by the Grand Chamber with a brief reference to the "mandatory character" of the norm.⁶⁸ If the ECJ, despite these prominent reservations, recognizes an indirect horizontal effect of EU fundamental rights in the case of directives, then this must apply **a fortiori to regulations**, the direct effect of which vis-à-vis private individuals is not even in question. In the same vein, the literature does not distinguish between regulations and directives when it comes to indirect horizontal effects, but consistently refers to such an effect in the scope of (all) secondary legislation.⁶⁹

bb) Limitation of the indirect horizontal effect to labor and discrimination law?

24. Thematically, the ECJ has so far only activated the indirect horizontal effect in **labor and anti-discrimination law**, respectively recognizing it for the relevant individual fundamental rights in this realm (Arts. 21 and 31 of the Charter), as well as for Art. 47 of the Charter.⁷⁰ In

⁶³ Cf. in particular ECJ, Judg. of 19 November 1991, C-6/90 and others - *Francovich*. See also ECJ, Judg. of 24 January 2012, C-282/10, ECLI:EU:C:2012:33 - *Dominguez*; on the indirect effect issue in this case see *Trstenjak*, Opinion of 8 September 2011, C-282/10, ECLI:EU:C:2011:559, para. 83 - *Dominguez*. See also *Ciacchi* EuConst 15 (2019), 294 (300).

⁶⁴ *Bobek*, Opinion of 25 July 2018, C-193/17, ECLI:EU:C:2018:614, paras. 186 *et seq.* - *Cresco Investigation GmbH*.

⁶⁵ *Tanchev*, Opinion of 9 November 2017, C-414/16, ECLI:EU:C:2017:851, para. 119 - *Egenberger* with reference to ECJ, Judg. of 15 January 2014, C-176/12, ECLI:EU:C:2014:2, para. 50 - *AMS*.

⁶⁶ What consequences this has for the state liability claim have not yet been clarified. On this, *Frantziou* CYELS 2020, 208 (222 *et seqq.*).

⁶⁷ *Bobek*, Opinion of 25 July 2018, C-193/17, ECLI:EU:C:2018:614, paras. 186 *et seq.* - *Cresco Investigation GmbH*, presents four general and one fundamental rights-specific argument against the horizontal effect of Art. 21(1) of the Charter: (i) The private party should not be held "morally" responsible for errors caused by the state. (ii) The indirect horizontal effect does not have a sufficient deterrent effect, or the state as the truly relevant actor is not deterred. (iii) There is a duplication of court proceedings if employees can satisfy their claims by suing their employer for having applied the law and the employers in turn suing the state. (iv) Indirect horizontal effect does not fit into the current system whereby private parties cannot directly invoke a directive against private individuals. The fundamental rights argument concerns the need for building comparable groups.

⁶⁸ ECJ, Judg. of 22 January 2019, C-193/17, ECLI:EU:C:2019:43, paras. 76 *et seq.* - *Cresco Investigation GmbH*.

⁶⁹ *Kingreen*, in: Calliess/Ruffert, EUV/AEUV, 6th ed., 2022, Art. 51 Charter para. 26.

⁷⁰ For a summary, see also *Frantziou* CYELS 2020, 208 (209 *et seq.*).

labor and anti-discrimination law, recourse to an indirect horizontal effect is particularly obvious since private individuals are typically in a power-asymmetrical **position** as employee and employer, which triggers a special need for normative correction. Moreover, there are Member States such as France or Italy where even the direct horizontal effect of fundamental rights in labor law is recognized.⁷¹

25. However, in the relevant decisions, the ECJ has **justified** the indirect horizontal effect **partly not at all, partly to a very limited extent** with the (labor or anti-discrimination law) **specifics** of the **respective fundamental rights** (the latter in the case of Art. 31(2) of the Charter⁷²). Its reasoning is therefore in principle transferable to all fundamental rights of the Charter⁷³ that are directly applicable and have a mandatory, independent nature, which – as seen – is only not the case in limited circumstances.⁷⁴ Accordingly, it does not matter whether the provision is a “right” (Art. 52(1)-(4) of the Charter) or a so-called “Charter principle” (Art. 52(5) of the Charter).⁷⁵ Also, indirect horizontal effect may not only apply to such fundamental rights whose content simultaneously constitutes a general legal principle of Union law.⁷⁶ Rather, the legal effect must be clear from the provision itself, which is the case if the **provision is unconditional** and may **not be** derogated from.⁷⁷ This is obvious for Arts. 7 and 8 of the Charter, for example.⁷⁸

26. Part of the academic literature rejects the expansion of the circle of fundamental rights for which an indirect horizontal effect is to be recognized, since this would turn private law into balancing law (“Abwägungsrecht”). This objection is too unspecific to be dogmatically

⁷¹ *Ciacchi* EuConst 15 (2019), 294 (304) with further references.

⁷² ECJ, Judg. of 6 November 2018, C-569/16 and others, ECLI:EU:C:2018:871, para. 90 - *Bauer and Broßonn*.

⁷³ Not so *Denga* EuR 2021, 569 (586), who wants to apply the indirect horizontal effect only to EU labor law.

⁷⁴ *Achleiter* (fn. 17), p. 20; *Frantziou* EuConst 15 (2019), 306 (317, 319 *et seq.*); *Frantziou* CYELS 2020, 208 (217); *Kainer* NZA 2018, 894 (899); *Prechal* Revista de Derecho Comunitario Europeo 66 (2020), 407 (419).

⁷⁵ But see *Schlachter* ZESAR 2019, 53 (56). In general, on the different treatment of fundamental rights and principles under the Charter, see *Unselde* (fn. 22), p. 227; *Müller-Graff*, in: Müller et. al. (eds.), *Festschrift für Wolfgang Portmann*, 2020, p. 543 (547). On the definition of the Charter principles, see *Jarass*, in: *Jarass, Charter of Fundamental Rights of the EU*, 4th ed., 2021, Art. 52 para. 72.

⁷⁶ *Prechal* Revista de Derecho Comunitario Europeo 66 (2020), 407 (420); *Schlachter* ZESAR 2019, 53 (58); *Frantziou* EuConst 15 (2019), 306 (317).

⁷⁷ *Prechal* Revista de Derecho Comunitario Europeo 66 (2020), 407 (420).

⁷⁸ Cf. BVerfGE 152, 216 para. 96 - *Right to be Forgotten II*: “Like the fundamental rights of the Basic Law, those of the Charter are not limited to protecting citizens vis-à-vis the state, but also afford protection in disputes under private law [...]. In particular, this also applies to Arts. 7 and 8 of the Charter, which the Court of Justice of the European Union has repeatedly used, regardless of the type of law applicable to the legal dispute in question, as a basis for interpreting ordinary EU legislation. This also corresponds to the understanding of Art. 8 ECHR, which, particularly in relation to disputes between private parties, comes to the fore in the case-law of the European Court of Human Rights.”

persuasive.⁷⁹ That the ECJ is not inclined to listen to such fundamental objections to the concept of indirect horizontal effect is evidenced by the way in which the opinions of the Advocates General in *Egenberger* and *Cresco* were dealt with.

cc) Indirect or direct horizontal effect?

27. Whereas in Germany there is an intensive discussion about the exact nature of the fundamental rights obligation of private parties, the central distinction between indirect and direct effect only plays a **subordinate role** in the European debate.⁸⁰ In Germany, case law and prevailing doctrine deny that private individuals are directly bound by fundamental rights; rather, they are only indirectly bound by fundamental rights insofar as these rights – mediated by the norms of private law – have an effect on the legal relationship between private individuals.⁸¹

28. **Considerations of principle** that speak against a state-like binding of private individuals to fundamental rights do not only apply in national law. This applies in particular to the concept of private freedom, which is generally alien to the system of direct horizontal effects and thus in need of justification, as well as to the principle that public authorities may only act on the basis of laws (“Vorbehalt des Gesetzes” – cf. Art. 52(1) of the Charter), which private individuals cannot effectuate.⁸² From a **practical** point of view, however, it is also recognized in the German debate that the distinction between indirect and direct horizontal effect with regard to the intensity of the binding effect is **only gradual**. This becomes particularly clear when courts – such as the ECJ in *Bauer and Broßonn* or the BVerfG in the *Stadium Ban* decision – do not apply fundamental rights values by way of interpreting simple private law in conformity with the constitution. Rather, they derive concrete factual or procedural obligations from fundamental rights,⁸³ which are not compatible with the written regulations which may therefore not be applied or only be applied in a modified manner.⁸⁴ In this case, **fundamental rights**

⁷⁹ In this direction, *Kainer* NZA 2018, 894 (899 *et seq.*), who relies on the protection through a direct horizontal effect of directives; cf. also *Wank* RdA 2020, 1 (4).

⁸⁰ For a discussion, see *Jarass* (fn. 51), p. 54 *et seq.*; see *Jarass*, Charter of Fundamental Rights of the EU, 4th ed., 2021, Art. 51 paras. 38 *et seq.*

⁸¹ Clearly BVerfGE 148, 267, headnotes 1, 2 - *Stadium Ban*.

⁸² On this point, *Trstenjak*, Opinion of 8 September 2011, C-282/10, ECLI:EU:C:2011:559, para. 83 - *Dominguez*. Similar considerations in *Jarass* ZEuP 2017, 311 (331).

⁸³ This was somewhat the constellation in ECJ, Judg. of 29 January 2008, C-275/06 and others, ECLI:EU:C:2008:54, para. 70 - *Promusicae*.

⁸⁴ This was the constellation in ECJ, Judg. of 6 November 2018, C-684/16, ECLI:EU:C:2018:874 - *Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V.* and ECJ, Judg. of 17 April 2018, C-414/16, ECLI:EU:C:2018:257, para. 82 - *Egenberger*.

have a direct, practical effect.⁸⁵ The same applies if obligations for a private person are derived from fundamental rights without a basis in or even contrary to parliamentary law.⁸⁶ Even if a general clause can be found, and even if it is ultimately the courts that, either directly through individual decisions or indirectly through their general decision-making practice, give effect to fundamental rights: from a private individuals' point of view, the **constructive difference** between an **indirect fundamental rights obligation** and a **"direct,"** state-like fundamental rights obligation is **negligible**. This is also recognized by the **BVerfG** with regard to the indirect horizontal effects of the right to informational self-determination: "The permeating effect on private law of the decisions on constitutional values enshrined in this fundamental right does not mean that the requirements this right entails are always less far-reaching or less strict than the ones it entails in its function as a direct right against state interference. Depending on the circumstances, especially where private companies take on a position that is so dominant as to be similar to the state's position, or where they provide the framework for public communication themselves, the binding effect of the fundamental right on private actors can ultimately be close, or even equal to, its binding effect on the state."⁸⁷

29. The fact that the ECJ imposes a fundamental rights obligation on private individuals, as in *Bauer and Broßonn*, **without recourse to concrete norms or general clauses**, is therefore not unparalleled in the national legal order. As a result, we must agree with the BVerfG in its assessment that EU **fundamental rights have an indirect horizontal effect comparable to that of national fundamental rights**, even if the ECJ – perhaps rightly so – does not use the categories in this way.⁸⁸

dd) Indirect horizontal effect only within relationships of subordination?

30. Finally, it is debatable whether the indirect horizontal effect of EU fundamental rights is tied to certain preconditions on the part of the private actors involved. As mentioned, the labor law cases in which the ECJ has recently referred to the indirect horizontal effect are typically characterized by relationships of **subordination** and **power asymmetries**.⁸⁹ This

⁸⁵ With regard to German law, *Hellgardt* JZ 2018, 901 (908 and *passim*).

⁸⁶ This was the constellation in ECJ, Judg. of 6 November 2018, C-569/16 and others, ECLI:EU:C:2018:871, para. 92 – *Bauer and Broßonn*.

⁸⁷ BVerfGE 152, 152 para. 88 – *Right to be Forgotten I*. Cf. also *Kulick* (fn. 3), p. 207-214.

⁸⁸ BVerfGE 152, 216 para. 97 – *Right to be Forgotten II*: "In contrast to the German legal order, EU law does not recognise a doctrine of indirect horizontal effects (*mittelbare Drittwirkung* [sic]) [...]. Nevertheless, EU fundamental rights ultimately have similar effects in regard to the relationship between private actors. In individual cases, the fundamental rights of the Charter may have an effect on private law matters." See also *Jarass* ZEuP 2017, 311 (332 et seq.).

⁸⁹ *Müller-Graff* (fn. 75), p. 552 et seq.

aspect also plays a role in older decisions on the indirect horizontal effect of fundamental freedoms (e.g., in the case of a sports association). However, the ECJ's more recent fundamental rights case law contains no such explicit reference. Nevertheless, in the academic literature – following the case law of the BVerfG⁹⁰ – it is argued that above all, the indirect horizontal effect can be considered for private actors who can have a “state-like” influence on the exercise of the fundamental rights of the individual. This can be measured, *inter alia*, by their dominant position in the market, by the platform's orientation and by the degree of dependence on precisely this platform.⁹¹ However, even under (German) constitutional law, social power is **not an unconditional prerequisite** for an indirect horizontal effect of fundamental rights, **but one aspect** that must be taken into account in the context of **balancing** mutual interests.⁹² Union law as well should not oppose the underlying argument and recognize the social power of private individuals as a criterion within the balancing of fundamental rights, while not acknowledging it as a constituent element.

c) Interim conclusion

31. The ECJ has so far only commented on the indirect horizontal effect of the fundamental rights of the Charter in individual cases. The dogmatic development has apparently not yet been completed. If one extrapolates the standards applied in the case law, the picture is very similar to the German legal situation. For the DSA, it means that the relevant fundamental rights must be examined concerning their indirect horizontal effectiveness on the basis of the ECJ's criteria, whereby the “balance of power” between the platform and the user can play a role in the context of the concrete balancing of the fundamental rights in question.

3. Effects of the indirect horizontal effect on the DSA and its application

32. The fact that EU fundamental rights have, to a large extent, indirect horizontal effect has considerable consequences for the DSA and its application in view of the sensitive and complex matter of platform regulation (→ a.) (→ b.).⁹³

⁹⁰ Cf. BVerfG, NJW 2019, 1935 para. 15; see also BVerfGE 89, 214 (232 *et seq.*) - *Guarantee Contracts*; 128, 226 (249 *et seq.*) - *Fraport*; 148, 267 para. 33 - *Stadium Ban*; 152, 152 para. 77 - *Right to be Forgotten I*. With reference to this, also BGH, NJW 2021, 3179 para. 122.

⁹¹ For example, *Frantziou* (fn. 45), p. 209 *et seq.*

⁹² Cf. the references in fn. 90.

⁹³ Cf., for the structurally similar constellation of upload filters the explanations on the binding of fundamental rights in ECJ, Judg. of 26 April 2022, C-401/19, ECLI:EU:C:2022:297, para. 98 - *Upload-Filter*.

a) Relevant fundamental rights with indirect horizontal effect

33. Due to the DSA, in the relationship between platform operators and users, the Charter principally applies, see also the first sentence of Art. 51(1) of the Charter.⁹⁴ Within the framework of indirect horizontal effects, at least the following fundamental rights must be taken into account by the Union legislator and in the application of the DSA: On the part of **operators**, these are the freedom to choose an occupation (Art. 15 of the Charter), freedom to conduct a business (Art. 16 of the Charter), the right to property, which also includes the right to intellectual property (Art. 17(1), (2) of the Charter), as well as, to an extent that is to be clarified in more detail in individual cases, freedom of expression and information (Art. 11(1), (2) of the Charter).⁹⁵ On the part of **users**, these are human dignity (Art. 1 of the Charter), the right to respect for private and family life (Art. 7 of the Charter), the right to protection of personal data (Art. 8 of the Charter), freedom of expression and information⁹⁶ (Art. 11(1) of the Charter), the right to (intellectual) property (Art. 17 of the Charter), the right to non-discrimination (Art. 21 of the Charter) and the rights of the child (Art. 24 of the Charter) – whereby these rights must also be taken into account on the part of those who are negatively **affected by** illegal or legal (“lawful but awful”) communication on the platform. In addition, all sides must be guaranteed the right to an effective remedy and to a fair trial (Art. 47 of the Charter).⁹⁷

34. Art. 14(4) 4 DSA does not fully reflect this complexity but only makes a general reference to the “fundamental rights of users” and mentions individual examples. Since the norm only has a declaratory effect (→ para. 12), this does no harm; however, the fundamental rights examination must neither be limited to the fundamental rights explicitly mentioned in Art. 14(4) DSA, nor overlook the fundamental rights positions of other stakeholders.

35. According to Art. 52(3) of the Charter, the fundamental rights of the Charter shall be interpreted in conformity with the fundamental rights of the **European Convention on Human**

⁹⁴ On the scope of application → III.

⁹⁵ Cf. *Röhling/Weil* (fn. 16), p. 164 *et seqq.*; *Quintas/Appelman/Fathaigh* GLJ 2023 SSRN (forthcoming), 18 *et seq.*; *Schiedermaier/Weil* DÖV 2022, 305 (307 *et seqq.*), as well as *Paal* MMR 2018, 567 (568).

⁹⁶ On users’ freedom of information *Mamaar*, in: Kraul (ed.), *Das neue Recht der digitalen Dienste*, 2023, § 4 para. 46.

⁹⁷ Elsewhere, too, there is no systematic stocktaking, but individual particularly important fundamental rights are singled out or only sweeping references are made to the Charter, cf. recitals 3, 47, 52, 63, 81, 109, 153, 155, as well as Arts. 1(1), 14(4), 34(1)(2)(b), 48(4)(e), 51(6) DSA. *Denga* criticizes a structural neglect of the fundamental rights positions of digital corporations in the DSA EuR 2021, 569 (593).

Rights (ECHR). According to Art. 52(4) of the Charter, this also applies to the **constitutional traditions common** to the Member States.

36. In practice, however, the **right to non-discrimination** (Art. 21 of the Charter) and the **freedom of expression** (Art. 11 of the Charter) of users are likely to be of particular importance with regard to interventions by platform operators. While the ECJ has already explicitly recognized the indirect horizontal effect of Art. 21 of the Charter, as mentioned above (→ para. 17), it has not yet expressed a similarly clear opinion on **Art. 11 of the Charter**. However, it is probably hardly debatable that Art. 11 of the Charter can be interpreted in conformity with fundamental rights as being applicable between private parties,⁹⁸ especially if the person concerned has a “special need for protection against social powers and intermediary powers.”⁹⁹ *Firstly*, this is supported by the above-mentioned judgments, which interpret Art. 11 of the Charter in this sense, albeit without reference to the concept of indirect horizontal effect (→ para. 18). *Secondly*, according to the case law, Art. 11 of the Charter is “sufficient in itself”¹⁰⁰, i.e., it does not require any concretization by the legislature, and is “by its very nature” accompanied by corresponding obligations on the part of those affected by the statements.¹⁰¹ *Thirdly*, the ECJ has recognized the freedom of expression as a fundamental right even before the Charter entered into force and, following the European Court of Human Rights (ECtHR), characterized it as a “fundamental pillar[] of a democratic society”.¹⁰² If one considers that the ECJ justified the indirect horizontal effect of Art. 31(2) of the Charter, *inter alia*, by stating that this provision regulates one of the fundamental principles of social law, this must apply all the more to Art. 11 of the Charter. *Fourthly*, this also follows from Art. 52(3) of the Charter. For procedural reasons, the ECtHR can only sanction violations of human rights by state actors, so that cases of indirect horizontal effect are addressed when a violation of the state’s duty to protect

⁹⁸ Cf. *Augsberg*, in: von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 7th ed., 2015, Art. 11 Charter para. 11; *Denga* EuR 2021, 569 (595); *Ehlers*, in: Ehlers, Europäische Grundrechte und Grundfreiheiten, 4th ed., 2015, § 14 para. 81; *Frosio/Geiger* ELJ 2022 SSRN (forthcoming), 35; *Jarass*, in: Jarass, 4th ed., 2021, Art. 11 Charter para. 7; *Prechal* Revista de Derecho Comunitario Europeo 66 (2020), 407 (419); *Raue*, in: Hofmann/Raue, Digital Services Act, 2023, Art. 14 DSA paras. 75, 92; *Walter*, in: Grabenwater, Enzyklopädie Europarecht Band 2, 2nd ed., 2021, § 13 para. 31.

⁹⁹ *Knebel*, Die Drittwirkung der Grundrechte und Grundfreiheiten gegenüber Privaten, 2018, p. 102.

¹⁰⁰ Cf. on this criterion ECJ, Judg. of 17 April 2018, C-414/16, ECLI:EU:C:2018:257, paras. 76, 78 - *Egenberger*.

¹⁰¹ See ECJ, Judg. of 6 November 2018, C-569/16 and others, ECLI:EU:C:2018:871, para. 90 - *Bauer and Broßonn*.

¹⁰² ECJ, Judg. of 12. June 2003, C-112/00, ECLI:EU:C:2003:333, para. 79 - *Schmidberger*; see also *Streinz*, in: Streinz, EUV/AEUV, 3rd ed., 2018, Art. 11 Charter para. 4; *Cornils*, in: Gersdorf/Paal, BeckOK Informations- und Medienrecht, 39th ed., 2021, Art. 11 Charter para. 1 with further references; *Calliess*, in: Calliess/Ruffert, EUV/AEUV, 6th ed., 2022, Art. 11 Charter para. 4; *Frosio/Geiger* ELJ 2022 SSRN (forthcoming), 5, 15 et seq. with further references to relevant ECtHR case law.

(*positive obligations*) is in question.¹⁰³ However, to the extent that the **ECTHR** has provided state authorities, including courts deciding on private law disputes, with differentiated criteria for balancing Art. 8 ECHR (right to respect for private and family life) and Art. 10 ECHR (freedom of expression), it has therewith also **recognized the effect of freedom of expression on private law**.¹⁰⁴

b) Consequences of the indirect horizontal effect for the limitation of user rights

37. For the DSA, indirect horizontal effect first and foremost means that civil courts must, in the context of balancing rights, interpret the relevant norms in a way that, in the words of the ECJ, "whilst consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter."¹⁰⁵ Since the DSA is a **regulation** and not a directive, the problem of inadequate state implementation does not arise. Indirect horizontal effect need not be invoked here in order to spare those affected the rocky path via state liability law (→ para. 23).

38. According to the ECJ, the **values of the Union legislator** must be taken into account in the **balancing process**.¹⁰⁶ Secondary legislation is therefore not irrelevant to the indirect horizontal effect but can provide impulses for structuring the balancing of fundamental rights. Criteria of consideration relevant to this report are listed in recitals 3, 47 and 48 DSA, among others. According to these, large platforms are central infrastructures of social communication and can only be avoided by the structurally inferior users at high cost.¹⁰⁷ Especially large digital corporations, which dominate the digital public sphere and which set "law" through their terms of use, are therefore held particularly strongly responsible under Union law.¹⁰⁸ This

¹⁰³ See generally *Grabenwater/Pabel*, EMRK, 7th ed., 2021, § 19 para. 8; *Krieger*, in: Dörr/Grote/Marauhn, EMRK/GG, 3rd ed., 2022, ch. 6 paras. 86 *et seq.*; *Röben*, in: Dörr/Grote/Marauhn, EMRK/GG, 3rd ed., 2022, ch. 5 para. 149. See also *Kingreen*, in: Calliess/Ruffert, EUV/AEUV, 6th ed., 2022, Art. 51 Charter para. 24.

¹⁰⁴ On the subject, cf. *Brings-Friesen/Damberg-Jänsch* UFITA 2020, 284 (310 *et seq.*, 318) with further references; *Grote/Wenzel*, in: Dörr/Grote/Marauhn, EMRK/GG, 3rd ed., 2022, ch. 18 para. 59; *Röhling/Weil* (fn. 16), p. 173; *Quintas/Appelman/Fathaigh* GLJ 2023 SSRN (forthcoming), 2 with further references. A direct horizontal effect of the Charter is therefore also almost universally denied. See also *Johann*, in: Karpenstein/Mayer, Charter, 3rd ed., 2022, Art. 1 Charter para. 9; *Payandeh* JuS 2016, 690 (692).

¹⁰⁵ Cf. ECJ, Judg. of 29 July 2019, C-516/17, ECLI:EU:C:2019:625, para. 59 - *Spiegel Online*.

¹⁰⁶ ECJ, Judg. of 17 April 2018, C-414/16, ECLI:EU:C:2018:257, para. 81 - *Egenberger*.

¹⁰⁷ For a summary, see *Knebel* (fn. 99), p. 77.

¹⁰⁸ Cf. *Knebel* (fn. 99), p. 76; *Hornkohl*, Die politische Theorie von Unternehmen und situativ mittelbare Grundrechtsbindung Privater vor dem Hintergrund neuer Rechtsprechung und dem Einfluss digitaler Großunternehmen, in: Croon-Gestefeld et. al. (eds.), Das Private im Privatrecht, 2021, p. 129 (144); *Prechal* Revista de Derecho Comunitario Europeo 66 (2020), 407 (418 *et seq.*); *Frosio/Geiger* ELJ 2022 SSRN (forthcoming), 35; *Raue*, in: Hofmann/Raue, Digital Services Act, 2023, Art. 14 DSA para. 75, 92; *Wendel* (fn. 13), 3.3.1.

assessment corresponds to the opinions of the BVerfG and the BGH, which have taken such aspects into account when interpreting Art. 3(1) GG and the first sentence of Art. 5(1) GG.¹⁰⁹ In terms of content, Art. 14(4) and the further obligations of the DSA applying to providers of intermediary services express that these providers may not act freely in their decisions on content moderation, but must observe procedural and – as will be shown – substantive requirements.¹¹⁰

39. **The starting point for balancing fundamental rights** is in particular the act's **aim** defined in Art. 1(1) DSA as well as the **general clause** of Art. 14(4) DSA. The latter is to be consulted when interpreting the specific obligations of the DSA and explicitly enables the ECJ and Member State courts to include considerations of fundamental Union law. Once again, this norm does not establish the indirect horizontal fundamental rights obligation of service providers but presupposes it. Moreover, the standard does not list all fundamental rights concerns to be taken into account in the balancing process, but only selected ones.

40. Against this background, the question is raised whether the **Union legislator has fulfilled its responsibility to EU fundamental rights** by enacting the general-clause-like provision of Art. 14(4) DSA. It might have been obliged to regulate the matter more concretely and to resolve the potential fundamental rights conflict situations that arise in content moderation, itself, instead of entrusting this to (Member State) courts.¹¹¹ Similar to the BVerfG, which derives corresponding requirements from the **“theory of materiality”** (“Wesentlichkeitstheorie”) and the principle of legal certainty (“Bestimmtheitsgebot”), the ECJ does so from the requirement of proportionality.¹¹² Accordingly, “legislation which entails an interference with fundamental rights must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards, so that the persons whose exercise of those rights is limited have sufficient guarantees to protect them effectively against the risk of abuse. That legislation must, in particular, indicate in what circumstances and under which conditions such a measure may be adopted, thereby ensuring that the interference is limited to what is strictly necessary. The need for such safeguards is all the greater

¹⁰⁹ Cf. in the context of Union law, for example, *Achleiter* (fn. 17), p. 4 *et seqq.* with further references; *Denga* EuR 2021, 569 (570); *Knebel* (fn. 99), p. 107 *et seqq.*

¹¹⁰ *Frosio/Geiger* ELJ 2022 SSRN (forthcoming), 36.

¹¹¹ On the following in detail *Wendel* (fn. 13), 3.3.2.

¹¹² Instead, in favor of a derivation from Art. 52(1) of the Charter: *Cruz Villalón*, Opinion of 12 December 2013, C-293/12, ECLI:EU:C:2013:845, paras. 108 *et seqq.* - *Digital Rights Ireland*.

where the interference stems from an automated process.”¹¹³ Violations of the principles of proportionality and certainty can lead to the invalidity of the legal act.¹¹⁴

41. However, it must also be taken into account that the encroachments on fundamental rights of users are not carried out by bodies of the Union or Member States but are based on decisions of private platform operators. In this respect, the ECJ has recently indicated that the EU legislator does not have to legally pre-structure the scope of action in such detail as would probably be the case with state authorities.¹¹⁵ However, *Wendel* has pointed out that the Digital Single Market Directive, on which this decision is based¹¹⁶, nevertheless provides very concrete guidelines for providers, at least in its interpretation by the ECJ.¹¹⁷ In contrast, according to *Wendel*, the DSA does not contain any comparably concrete requirements for providers, even in light of its increased fundamental rights sensitivity and considering that it allows platforms not only to filter illegal, but also lawful content (“lawful but awful”). Even considering that the justification requirement (Art. 17(1) DSA), the various transparency requirements (including Arts. 15, 24, 27, 39, 42 DSA), the notification and redress procedure (Art. 16 DSA), the complaint and dispute resolution mechanisms (Arts. 20 and 21 DSA) and the requirement of a warning before suspension (Art. 23 para. 1 DSA) provide far-reaching procedural safeguards,¹¹⁸ there is still a complete lack of content-related requirements for the providers.¹¹⁹ Therefore, according to *Wendel*, the **constitutionality of the DSA must be doubted**.¹²⁰ On the merits, *Wendel* complains that the DSA does not explicitly require that platform operators may only conduct restrictions if there is an objective reason.

¹¹³ ECJ, Judg. of 26 April 2022, C-401/19, ECLI:EU:C:2022:297, para. 67 - *Upload-Filter*, referring to ECJ, Judg. of 16 July 2020, C-311/18, ECLI:EU:C:2020:559, para. 176 - *Facebook Ireland and Schrems*, and the case law cited therein.

¹¹⁴ See, by way of example, ECJ, Judg. of 8 April 2014, C-293/12 and others, ECLI:EU:C:2014:238 - *Digital Rights Ireland*.

¹¹⁵ ECJ, Judg. of 26 April 2022, C-401/19, ECLI:EU:C:2022:297, para. 76 - *Upload-Filter*; previously and similar ECJ, Judg. of 27 March 2014, C-314/12 ECLI:EU:C:2014:192, para. 52 - *UPC Telekabel Wien*.

¹¹⁶ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L, No 130, 17 May 2019, p. 92.

¹¹⁷ *Wendel* (fn. 13), 3.3.2. with reference to *Raue* ZUM 2022, 624 (628 et seq.).

¹¹⁸ For the differences in detail that exist here between the BGH decisions (→ fn. 1) and the DSA, see in depth *Janal* (fn. 7), III.2.c., d. and e.

¹¹⁹ *Wendel* (fn. 13), 3.3.2. with reference to *Eifert/Metzger/Schweitzer/Wagner* CMLR 2021, 987 (1013): “unfettered discretion.” On procedural safeguards, see also *Frosio/Geiger* ELJ 2022 SSRN (forthcoming), 28 et seq.

¹²⁰ *Wendel* (fn. 13), 3.3.2. In contrast, *Röhling/Weil* (Fn. 16), p. 176, argue that the DSA grants stronger substantive protection of freedom of expression through Art. 14(4) DSA than the BGH, which “merely” requires a substantive reason in substantive terms.

42. Nonetheless, the **assumption that the DSA allows providers to take moderation decisions without an objective reason**, if they only observe the procedural requirements, is **not viable**. Rather, the indirect horizontal effect of the users' fundamental rights, mediated by Art. 14(4) DSA, results in the prohibition of arbitrarily prohibiting individual expressions of opinion and discriminating against certain views. Consequently, operators must not only fulfil procedural requirements, but also observe substantive criteria. To elaborate:

43. It is already clear from **Art. 21 of the Charter** that differential treatment based on the named criteria without a corresponding justification is prohibited (cf. also the first sentence of recital 47 and Art. 20(4) DSA).¹²¹ Conversely, service providers may only base their decisions on specific, i.e., non-discriminatory, grounds; a measure can only be justified if such objective grounds exist and are put forward. With regard to the other fundamental rights, including the **freedom of expression**, the indirect horizontal effect of fundamental rights of the providers implies nothing else than an obligation to gather and assess the relevant fundamental rights concerns. This presupposes that their own decision can be factually justified. In general, **procedural control** is both **meaningless** and **ineffective if it is not aimed at protecting a substantive interest**. The assumption that freedom of expression or other fundamental rights are upheld if a decision has met all procedural requirements, but is substantially arbitrary, is untenable. The existence of a material interest or a factual reason is thus *a priori* a benchmark of procedural control, not an *aliud* or additive.

44. Incidentally, the wording of **Art. 14(4) 4 DSA** also takes this into account. According to this provision, providers of intermediary services must proceed "in a diligent, objective and proportionate manner" when applying and enforcing content restrictions (largely analogous to Art. 20(4) DSA and Art. 16(6) DSA).¹²² The requirement of a decision that is as "**objective**" as possible, i.e., largely free of subjective arbitrary elements – which can be found almost identically in the BGH case law mentioned at the beginning¹²³ – can only be satisfied by providers if they provide comprehensible and verifiable reasons for their decision.¹²⁴ This becomes even clearer considering that Art. 16(6) and 20(4) DSA furthermore require – again largely in line

¹²¹ For ECJ case law, see the references in *Jarass*, in: Jarass, Charter of Fundamental Rights of the EU, 4th ed., 2021, Art. 21 paras. 27-29.

¹²² According to recital 47, the requirements of Art. 14(4) DSA apply not only to the application and enforcement of restrictions, but also to their "design," according to *Raue*, in: Hofmann/Raue, Digital Services Act, 2023, Art. 14 DSA paras. 16, 74 *et seqq.* and in detail below → para. 53.

¹²³ Cf. BGH NJW 2021, 3179 para. 82: Operators may not link to "mere subjective assessments or fears," but only to "objective, verifiable facts."

¹²⁴ See also *Raue*, in: Hofmann/Raue, Digital Services Act, 2023, Art. 14 DSA para. 81 with concrete examples of impermissible clauses and practices.

with the BGH¹²⁵ – a **“non-arbitrary”** decision; evidently, the terms of use must meet the requirements of the principle of equal treatment, i.e., require a consistent decision-making practice, which again implies the determination of a factual reason. Finally, the service providers decision must also be **“proportionate”** – a principle which in turn takes into account the indirect horizontal effect of fundamental rights. For (also) according to the dogmatics of Union law, the objectives of a measure must be balanced with the relevant (fundamental rights) interests in a process that is further structured by the principles of appropriateness, necessity, and proportionality in the narrow sense (*“Verhältnismäßigkeit im engeren Sinne”*).¹²⁶ This process equally presupposes that the providers have reasons for their decisions that can be verified for their viability.¹²⁷

45. Concluding, both due to the indirect horizontal effect of fundamental rights and its specific requirements, the DSA indubitably does not pursue a solely **procedural regulatory approach** and does not dispense with the requirement of an objective reason. However, the **weight that the objective reasons** must have in each case in order to be able to support the restrictive decision of an operator is yet to be determined. There are some indications that Union law does not differ significantly from the case law of the BGH or the BVerfG in this regard either. Whether the extent to which the **asymmetry of power** between the service provider and the user is (also) a relevant aspect under Union law has already been commented on (→ para. 30).¹²⁸ Another indication that especially **very large online platforms** are held to especially high standards, i.e., that particularly *“good”* reasons are required for moderation decisions, is Art. 34(1)(2)(b) and (c) DSA, according to which adverse effects of the moderation rules on fundamental rights and on *“civic discourse”* must be reviewed. From this, *Raue* deduces that platforms serving social interaction must *“as a rule provide for justifications and exceptions with which they can take account of, for example, social criticism, satire or art”*.¹²⁹ In addition, the (consistent) exclusion of certain opinions (e.g., all political or religious

¹²⁵ Cf. BGH NJW 2021, 3179 para. 81.

¹²⁶ On the principle of proportionality in Union law, see, e.g., ECJ, Judg. of 17 December 2020, C-336/19, ECLI:EU:C:2020:1031 para. 64 - *Centraal Israëlitisch Consistorie van België*; ECJ, Judg. of 26 April 2022, C-401/19, ECLI:EU:C:2022:297 paras. 63, 65 - *Upload-Filter*.

¹²⁷ On the fact that service providers must develop a graduated sanction concept with regard to the principle of proportionality from Art. 14(4) DSA in order to ensure effective protection of freedom of expression, see *Raue*, in: Hofmann/Raue, Digital Services Act, 2023, Art. 14 DSA para. 102 (previously already largely analogous to the GG: *Raue JZ 2022, 232 (236 et seq.)*); *Röhling/Weil* (fn. 16. In this context, service providers can also take into account their own fundamental rights in the balancing process, cf. *Raue*, in: Hofmann/Raue, Digital Services Act, 2023, Art. 14 DSA para. 103 *et seqq.* (previously already largely analogous to the GG: *Raue JZ 2022, 232 (233)*).

¹²⁸ On this also in detail *Raue*, in: Hofmann/Raue, Digital Services Act, 2023, Art. 14 DSA paras. 93 *et seqq.*

¹²⁹ *Raue*, in: Hofmann/Raue, Digital Services Act, 2023, Art. 14 DSA para. 101; with reference to *Spindler CR 2019, 238 (para. 28)*.

opinions) can hardly be justifiable on such very large online platforms, whereas on smaller, specialized platforms it can be an expression of the platform's own evaluative opinion and may not generally be excluded as a justification for moderation decisions.¹³⁰

4. Preliminary conclusion

46. The above explanations have illustrated that the fundamental rights obligation does not result directly from Art. 14(4) DSA, but from an indirect horizontal effect of the relevant fundamental rights. Considering the importance of fundamental rights even under the DSA, measures against users can only be justified if there is an **objective reason** for doing so, although it is necessary to consider the fundamental rights concerns of online platforms. **In substance, this creates a broad convergence between the DSA and the previous case law of the BGH.** One **striking difference** should be mentioned at this point, precisely concerning the procedural requirements: whether the user must be **heard before a restriction is imposed**. While the BGH has (arguably) made such a hearing mandatory, at least in the case of measures with a sanctioning character such as account suspensions,¹³¹ the DSA does not provide for any rigid hearing requirement. Considering both the practical need for an accelerated procedure and that objections can still be raised in the subsequent appeal proceedings, this is acceptable.¹³² Nevertheless, in light of the Union law principle of proportionality, whenever no particular urgency is apparent, a prior warning (cf. Art. 23(1) DSA) combined with a hearing must be given.¹³³ The BGH must therefore slightly modify its case law in this regard.

¹³⁰ Cf. *Raue*, in: Hofmann/Raue, Digital Services Act, 2023, Art. 14 DSA paras. 105 *et seq.* (with instructive examples). Also on this point, BGH NJW 2021, 3179 para. 81, according to which, in the case of large platforms, the "prohibition of the expression of certain political views is not compatible with the users' fundamental right to freedom of expression and the principle of equal treatment." On the differentiation of the DSA's duties depending on the type of service provider, critically *Janal* (fn. 7), p. 7 *et seq.* (bullet point III.2.f): "The distinctions drawn by the DSA between different types of service providers are neither self-explanatory nor entirely satisfactory."

¹³¹ BGH NJW 2021, 3179 para. 85.

¹³² For more details, see *Raue*, in: Hofmann/Raue, Digital Services Act, 2023, Art. 14 DSA paras. 86 *et seq.*; according to Art. 20(4) DSA, online platforms must process complaints against sanctions in a "timely" and "non-arbitrary manner."

¹³³ Thus, convincingly *Raue*, in: Hofmann/Raue, Digital Services Act, 2023, Art. 14 DSA para. 87.

III. Effects of Art. 14(4) 4 DSA on the applicability of the fundamental rights of the Constitution

47. Even if the result of the examination is so far that EU fundamental rights impose requirements on the application of the DSA between private parties that are largely congruent with the requirements that German courts have derived from the fundamental rights of the Constitution,¹³⁴ the question should nevertheless be raised as to whether there is still room for the BGH's reasoning, which is based on the German constitution – or whether the BGH will have to replace the fundamental rights foundation of its case law when the DSA enters into force.

1. On the relationship between Union fundamental rights and national fundamental rights

48. From the perspective of Union law, the Member States may only use their “own” fundamental rights as a standard of review when **implementing** Union law – which is to be interpreted broadly according to the ECJ¹³⁵ – if the secondary law does **not intend full harmonization**¹³⁶ and the so-called *Melloni* criteria are fulfilled. The latter is the case, “provided that 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.”¹³⁷

49. Whether the Union legislator intended full harmonization cannot be determined for a legal act as a whole but must be **examined on a norm-specific basis**.¹³⁸ In particular, the form of action chosen by the Union – directive or regulation – is also no reliable indicator. This is because directives can contain fully harmonizing provisions, and regulations can contain opening clauses.¹³⁹ In practice, numerous Union legal acts grant Member States leeway, which they must fill on their own account.¹⁴⁰

¹³⁴ For further (subtle) changes to which the concrete regulations of the DSA may force the BGH, especially with regard to the procedural requirements for service providers, see *Janal* (fn. 7).

¹³⁵ ECJ, Judg. of 26 February 2013, C-617/10, ECLI: EU:C:2013:105, para. 21 - *Åkerberg Fransson*.

¹³⁶ ECJ, Judg. of 29 July 2019, C-476/17, ECLI:EU:C:2019:624, para. 81 - *Pelham et al.*

¹³⁷ ECJ, Judg. of 26 February 2013, C-399/11, ECLI:EU:C:2013:107, para. 60 - *Melloni*.

¹³⁸ On the criterion of wording and legislative intent (“the degree of the harmonisation of the exceptions and limitations intended by the EU legislature”) in this context: ECJ, Judg. of 29 July 2019, C-469/17 ECLI:EU:C:2019:623, para. 40 - *Funke Medien*; ECJ, Judg. of 29 July 2019, C-516/17, ECLI:EU:C:2019:625, para. 25 - *Spiegel Online*. On the need to answer the question of harmonization on the basis of a “microanalysis, looking at a specific rule”: *Bobek*, Opinion of 25 July 2018, C-310/16, ECLI:EU:C:2018:623, para. 74 - *Dzivev*.

¹³⁹ BVerfGE 152, 216 para. 79 - *Right to be Forgotten II*.

¹⁴⁰ *Wendel* EuR 2022, 327 (353 et seqq.).

50. The **BVerfG** examines whether national law is “fully determined” by Union law (then: examination according to the standard of Union fundamental rights) or whether Union law “affords Member States latitude in the design of ordinary legislation” (then: examination according to the standard of national fundamental rights).¹⁴¹ When the application of both standards leads to the same result, it may be irrelevant whether there has been full harmonization, as the Second Senate of the BVerfG decided in the *Ökotox* case in 2021.¹⁴² However, it would be premature to assume that there are generally no differences between the fundamental rights of the Union and those of the German Constitution (or other Member State constitutions).

2. Full harmonization by means of Art. 14(4) DSA

51. Following from the above, neither the character of the DSA as a regulation within the meaning of Art. 288(2) TFEU, nor the statement in DSA **recital 9** – that the DSA fully harmonizes “the rules applicable to intermediary services in the internal market with the objective of ensuring a safe, predictable and trusted online environment” – exempts from the examination of whether a specific provision of the DSA actually has a fully harmonizing character. The second sentence of recital 9 DSA explicitly recognizes that provisions of the DSA may give **Member States leeway** to adopt or maintain additional national requirements “relating to the matters falling within the scope of this Regulation.” Moreover, the harmonization effect is limited to the scope of the regulation. Art. 3(h) DSA furthermore refers to the law of Member States for the determination of what constitutes “illegal content” within the meaning of the regulation. Authorizing – and arguably also obliging – Member States to grant the competent national authorities powers of investigation and enforcement, Art. 51(6) DSA constitutes an explicit opening clause.¹⁴³ And according to Art. 52(1) DSA, it is also up to Member States to enact provisions on sanctions in case of legal infringements. Lastly, good reasons indicate that the DSA also leaves Member States room for maneuver in the area of civil liability and its enforcement.¹⁴⁴

52. Against this backdrop, the standard of review formulated by **Art. 14(4) DSA** for the restrictions regulated in T&C does not, at first glance, indicate that the national legislator should be provided with any leeway. At second glance, however, the standard of review is **intertwined with national law** in several aspects, mainly because the restrictions relating to illegal content can regularly only be identified as such by taking recourse to the corresponding

¹⁴¹ BVerfGE 152, 152 headnote 1 - *Right to be Forgotten I*; see also 152, 216 headnote 2 - *Right to be Forgotten II*. On this and on parallel developments in other Member States, see *Wendel* CMLR 2020, 1383 *et seq.*

¹⁴² BVerfGE 158, 1 para. 81 - *Ökotox*.

¹⁴³ For more details, see *Rademacher*, in: Hofmann/Raue, Digital Services Act, 2023, Art. 51 paras. 2 *et seqq.*

¹⁴⁴ On this subject in detail *Cole/Ukrow* (fn. 14).

national act. Moreover, Art. 14(4) DSA is not only relevant in the context of procedural self-regulation of the platforms, but also serves as a benchmark for the authorities to monitor the T&C within their national powers.¹⁴⁵

53. However, irrespective of this interrelationship, Art. 14(4) 4 DSA still **conclusively regulates the standard for review** considering the restrictions of use, whereas **national provisions**, such as Sections 307 *et seq.* German Civil Code (“BGB”), are **superseded** in this respect.¹⁴⁶ That the illegality results from national law, which in turn is usually (also) measured against national fundamental rights¹⁴⁷, does not determine the balancing required by Art. 14(4) DSA, but only paves the way for it. The (national) determination of illegality is therefore already taken into account on the factual side of the restriction decision, not on the side of legal consequence regulated by Art. 14(4) DSA. Similarly, the fact that the standard regulated in Art. 14(4) DSA is (also) implemented by Member State authorities on the basis of national competencies does not alter the substance of the standard.

54. Finally, the **material scope of Art. 14(4) DSA** is of major importance. According to its wording, the norm applies to “applying and enforcing” and not to the “creation” of T&C. Thus, a decision is expressly made only regarding the control of the exercise of (effective) T&C. This could mean that in determining the legality of T&C themselves, (solely) national fundamental rights are the correct point of reference. However, systematic and historical reasons substantiate that this should also be determined by EU law, namely the first sentence of recital 45 DSA and the first sentence of recital 47 DSA.¹⁴⁸ Furthermore, the purpose of Art. 1(1) DSA would not be served by a restrictive interpretation.¹⁴⁹ If, finally, Art. 14(4) DSA is understood as a declaratory provision that primarily functions as an outlet for the indirect effect of those fundamental rights of the Union that have an effect “in themselves,” it cannot be **regarded as supporting a decision towards Member State capabilities to pass legislation**.

¹⁴⁵ *Rademacher*, in: Hofmann/Raue, Digital Services Act, 2023, Vor Art. 49 ff. DSA para. 15.

¹⁴⁶ See also *Raue*, in: Hofmann/Raue, Digital Services Act, 2023, Art. 14 DSA para. 89.

¹⁴⁷ Cf. *Rademacher*, in: Hofmann/Raue, Digital Services Act, 2023, Art. 56 DSA para. 5.

¹⁴⁸ *Raue*, in: Hofmann/Raue, Digital Services Act, 2023, Art. 14 DSA para. 76; likewise *Janal* (fn. 7) III.2.a.

¹⁴⁹ *Raue*, in: Hofmann/Raue, Digital Services Act, 2023, Art. 14 DSA para. 75.