Optimation or Conflict?:
the interplay of multiple fundamental rights catalogues in the European Union

A closer examination of the relationship of the European Court of Justice and the Bundesverfassungsgericht

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Abstract
The European Union is a unique system; a coalition currently formed by 27 sovereign Member States. In the light of this constitutional pluralism, the arising of conflicts between the European Union and its Member States is unavoidable and foreseeable. One often discussed issue concerns the field of fundamental rights protection within the EU in which the European Court of Justice along with the national constitutional courts experienced tensions. With the now legally binding European Charter of Fundamental Rights another applicable fundamental rights catalogue came on the scene and raised questions concerning its scope of application and its interplay with the national fundamental rights catalogues. Following this situation, the justified question can be raised whether this existence of multiple fundamental rights catalogues leads to an optimised or rather conflictual protection. In order to achieve a closer examination in this complex field of fundamental rights protection in the European legal order, the focus will lie on the relationship between the European Court of Justice and the Bundesverfassungsgericht as a representative of the Member States.
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## Abbreviations

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<tr>
<td>ATDG</td>
<td>Antiterrordateigesetz</td>
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<td>BVerfG</td>
<td>Bundesverfassungsgericht - German Constitutional Court</td>
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<td>BVerfGE</td>
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<td>BVerfGG</td>
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<td>CFREU/Charter</td>
<td>Charter of Fundamental Rights of the European Union</td>
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<td>ECHR</td>
<td>European Convention of Human Rights</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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1. Introduction

1.1 Relationship between Karlsruhe and Luxembourg

The progresses that take place in Luxembourg, the home of the European Court of Justice (hereinafter ECJ), are closely monitored in Germany and now and then the jurisdiction of the Court causes controversies. Vice versa, the reactions and the jurisdiction of the Federal Constitutional Court of Germany (hereinafter BVerfG) concerning European Law related issues are eagerly awaited but also critically commented. The relationship between both courts was, and still is, special. On one side people may wish for a less interfering European Court of Justice in national matters, in general, and German legislation, in particular. On the other hand, the Bundesverfassungsgericht's approach to European law is also critically observed and often viewed as a “Sonderweg”\(^1\).

When it comes to challenging the European Court of Justice, the BVerfG, along with the Italian Constitutional Court or the French Constitutional Court, is famous for its critical considerations. As the highest court of Germany, a founding member of the (nowadays) European Union, their relationship dates far back. This relationship truly has had its ups and downs. In the beginning of the European integration process the negative attitude towards a transfer of national competences adopted by the BVerfG elucidated its general reluctance concerning the new 'European idea'. Over the following years a specific issue came into the focus: the need for a sufficiently guaranteed fundamental rights protection on the European level. In this process the challenging relationship of both courts helped especially to establish and enhance a sufficient European fundamental rights protection.

\(^1\) Colloquial: separate path; A Grosser, “The Federal Constitutional Court's Lisbon Case” (2009), 10/8 GLJ, p. 1263.
Nowadays the former tangible tension seems to have eased. In good times Andreas Voßkuhle, president of the BVerfG, even speaks of a “Europäischer Verfassungsgerichtsverbund” which is formed by the different European constitutional courts to which he classes the European Court of Human Rights (ECtHR) and the ECJ among the national supreme and constitutional courts. But a jurisdiction system in which more than one court is involved is not frictionless. This comes to light every now and then and can be documented by recent reporting. Just a year and a half ago, the central topic at the conference of the Federal Ministry of Economy on fundamental rights was the anxiety about a possible extension of European Union competences through the application of EU fundamental rights. With like sentiments, Karlsruhe observed the ECJ's judgement in the case Åkerberg Fransson in February 2013 which raised concerns regarding a too far-reaching jurisdiction in the field of fundamental rights. These deep-seated concerns came to light in a most recent judgement of the BVerfG concerning the establishment of a Counter-Terrorism Database. The Court used this judgement to criticise the ECJ for its approach in Åkerberg Fransson and its too far reaching jurisdiction when it comes to fundamental rights.

As mentioned above, the relationship of the ECJ and the BVerfG always has been and still is exceptional. Nowadays, the ECJ and the BVerfG convene on equal terms to protect the fundamental rights of the citizens which enables a good and interesting basis for an examination of their interaction. Hence, in view of the BVerfG's

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5 Case C-617/10, Åklagaren v Hans Åkerberg Fransson [2013] (not yet published in ECR).
7 BVerfG, judgement of 24 April 2013, 1 BvR 1215/07 (not yet published in BVerfGE).
influence on the evolution of EU fundamental rights and its, still existing, challenging relationship with the ECJ, the Bundesverfassungsgericht is an attractive, manifold and significant 'opponent' of the ECJ in the analysis of the interplay of the different fundamental rights catalogues within the European legal order.

1.2 Purpose and delimitation

With the legally binding Charter of Fundamental Rights of the European Union (hereinafter Charter or CFREU)\(^8\), introduced by the Treaty of Lisbon\(^9\) in 2009, the European citizens find themselves now in the situation in which three different protection systems are applicable: the Charter, the European Convention of Human Rights (hereinafter ECHR or Convention)\(^10\) and the national fundamental rights catalogues. This system in Europe for protecting fundamental rights is very complex\(^11\) and it is therefore not surprising that in this steady development frictions arise.

In this context, due to the purpose of the thesis, the focus will shift towards the European fundamental rights protection, ensured by the ECJ, and the national system, exemplified by Germany. Therefore, the ECHR and the decisions of the European Court of Human Rights (ECtHR) will only be of interest when the situation and the discussion requires it. The exclusion of the ECHR and the judgements of the ECtHR follows from the limitation of the examination in question and should therefore not be understood in a way which would lower the importance of the ECHR and the ECtHR. This importance will also be clarified later on.

Over the years the BVerfG identified three relevant situations in which the

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compatibility of European provisions need to be assessed with the German constitution when interpreting national provisions in the light of EU law: 1. ultra vires acts 2. an insufficient protection provided by the European Court of Justice and 3. matters of constitutional identity.\textsuperscript{12}

The issue of competences might be the most noted and complex discussed area since the fear of an extension of European competences to the detriment of Member States' competences is omnipresent. However, problems that could spring from a multilevel protection of fundamental rights seem to be less perceived in the general public as long as protection for the citizens is palpable. But as one would expect, when going beyond the reception of the public, this situation of a multilevel protection system opens a conflict zone, especially between the 'guardians' of the different fundamental rights catalogues – the courts. The very recent processes shown above, demonstrate again how every judgement can lead to new discussions about the limits of jurisdiction and the scope of the different fundamental rights catalogues.

Consequently, the aim of this thesis is to scrutinise whether the protection by Union fundamental rights and national fundamental rights (German Basic law as a representative) leads to an optimization and addition of protection or rather to ambiguity and conflict.

That a mere existence of multiple applicable fundamental rights catalogues in the European system of constitutional pluralism does not necessarily lead to an enhanced protection seems to be comprehensible. Therefore, the positions, views and the interaction of the ECJ and the BVerfG will play a crucial role for identifying the potential areas of tension in the field of fundamental rights protection and the approaches for conflict solutions. For understanding the situations in which

\textsuperscript{12} P Popelier (et al), Human Rights Protection in the European Legal Order: The interaction between the European and the national courts (2011), p. 11.
problems can arise in the field of fundamental rights protection between the jurisdictions of the ECJ and the national courts, it is necessary to observe the evolution of the ECJ's jurisprudence which will also illustrate the Court's attitude towards the interaction with the national courts. Furthermore, the decisions and reactions of the BVerfG regarding the European fundamental rights protection will be examined to gain a more comprehensive picture of the situation.

Following this, the question will come into the focus how to handle upcoming situations of conflict. These approaches will be divided into the European perspective and the Member States' perspective. Therefore, proposed solutions by scholars and practitioners and solutions deduced from the jurisdictions of the courts will be presented and analysed with regard to their practicability and effect.

With respect to the European side, the ECJ's case-law will be of special interest to identify the limits of the ECJ's jurisdiction to either refute or approve the concerns of the Member States regarding a too invasive ECJ. Furthermore, it will help to clarify the question when Member States act in the scope of EU law and are therefore bound by EU fundamental rights. The Member States' view, represented by Germany that has a comprehensive fundamental rights protection system on a high standard, deals primarily with the problem how to integrate and respect the constitutional values of the Member States.

Finally, a test case will illustrate how delicate the relationship between the European Union and its Member States can be when it comes to the question of whether the actions of Member States fall into the scope of European Union law. For that purpose, the abovementioned judgement concerning the Counter-Terrorism Database will be scrutinised with regard to possible violations of fundamental rights, the BVerfG's understanding of the scope of the Charter and its reaction to the Åkerberg Fransson case.
1.3 Methodology

This thesis deals with the interplay of fundamental rights protection mechanisms within the European Union and its Member States, in particular the protection in the German legal order ensured by the BVerfG and the resulting question whether this situation leads to an optimisation of protection or to tension. Due to the comparative approach, European Constitutional Law and the Charter and German Constitutional Law will be particularly on the focus of this paper. Subsequently, the methodology will refer to the specific fields of law.

The German legal order, as the representative of a Member States' legal order, will serve as the 'opponent' to the European legal order in the scrutinised issue and will have a significant contribution to the comparison of the respective jurisdiction on fundamental rights and concerning scholarship meanings and annotations on European Law. Following the German methodology means that, first of all, the potentially applicable law will be sought in the written law, in this case in the Basic Law which contains the fundamental rights. The scope and the definitions of the criteria have been developed by the Constitutional Court in its case-law during the last 60 years and can be found carried together in the different commentaries on the German Basic Law. Therefore, in the area of Constitutional Law, the legal sources are the Basic Law and the case-law of the Constitutional Court. For that, the Court generally uses a predominant objective interpretation method, which means that the law will be regarded in an objective way, broken away from the historical will of the legislator.\(^\text{13}\) When fundamental rights and a potential violation need to be examined this follows the approved scheme for defence rights: scope, infringement, justification. Furthermore, when necessary, for the interpretation of the law, the general methods will be used, consisting of four elements: 1. the linguistic-grammatical element, 2. the systematic element, 3. the historical element and 4. the

teleological element.\textsuperscript{14}

When it comes to fundamental rights protection within the European legal order (next to the included national legal orders) two main instruments come to the scene: the Charter and the ECHR. Therefore, the applicable provisions will be sought in these two fundamental rights catalogues, the Treaties but also in the case-law of the European Court of Justice, which plays a crucial role.

For delimiting the scope of the conflict area between the European Court of Justice and the German Constitutional Court, it is paramount to understand the evolution of fundamental rights in both legal orders and to observe the relationship the two authorised Courts developed over the years. But this is only comprehensible when looking into the jurisdiction of the ECJ and the 'responses' of the BVerfG concerning the ECJ's fundamental rights protection approaches. Thus, the case-law of both courts will be the important sources of use.

In that progress, the case-law of the ECJ is of great importance since there was no written fundamental rights catalogue before the introduction of the Charter which left the Convention as the main source for identifying fundamental rights in Europe\textsuperscript{15}. Although the focus of the thesis will lie on the relationship between the ECJ and the BVerfG and, thus, exclude the ECtHR, the ECHR needs to be contemplated because of its influences, especially on the fundamental rights protection by the ECJ and its applicability within the national legal orders. The ECJ uses the ECHR as a source of inspiration and referred directly to Articles of the ECHR and the jurisdiction of the Strasbourg Court in several cases.\textsuperscript{16} Although the ECJ draws inspiration from two equal sources, the common traditions of the

\textsuperscript{14} Referring to the legal methodology of Savigny in E.A. Kramer, Juristische Methodenlehre (2005), p. 50.


Member States and the ECHR (Art. 6 Treaty on European Union (hereinafter TEU)), the increasing direct resort only on the ECHR seems to imply a preference for this source.\textsuperscript{17} Therefore, the ECHR is not only an interpretation aid but rather has become a real source of fundamental legal principles.\textsuperscript{18} However, in this thesis the ECHR will only come into the picture when its content and interpretation is necessary.

For the following discussion concerning approaches and resolutions of tensions arising out of the applicability of EU fundamental rights on Member States and the scope of the Charter, views of scholars and practitioners will be used and analysed. Therefore, these will be divided into a European perspective and the Member States' (German) perspective. Previous and recent case-law of the ECJ will be of great value along with other thoughts, in particular from Roman Herzog, Ferdinand Kirchhof and Juliane Kokott. Herzog is former president of the BVerfG and former Federal President of Germany. In this context his thoughts are of special interest in view of the fact that he chaired the Convention responsible for drafting the Charter and due to his continuous critical observations of the European integration process. Kirchhof is vice president of the BVerfG and his deliberations concerning the relationship of the BVerfG and the ECJ are vital for this debate. Although he represents the views and fears from a distinct German perspective, he still clearly supports the ‘European idea’ and aims for a right and fair balance. Kokott is Advocate General at the ECJ and her thoughts are of great value because of her close connection to both sides, the ECJ and the BVerfG.

Finally, the debate about the interplay of the two fundamental rights protection mechanisms will be concluded by examining a recent judgement of the German Constitutional Court, the Counter-Terrorism Database ruling. Therefore, the author

\textsuperscript{17} W Frenz, Handbuch Europarecht – Europäische Grundrechte (2009), p. 16.  
\textsuperscript{18} Ibid, p. 16.
will give some information about the background, the content and the raised points of accusation. Furthermore, the outcome of the ruling will be shortly presented before dealing with the crucial part, the reference of the BVerfG to European Law in general, and in particular to the Åkerberg Fransson case. For that purpose, the decision will be analysed with regard to its effect and understanding and commented.
2. Constitutional Pluralism

The European Union is an institution consisting of 27 Member States which is not easy to classify according to the general theory of the state. The construct of the European Union is so unique that terms for it needed to be invented. The German Constitutional Court named it a “Staatenverbund” in its Maastricht ruling\(^{19}\) and often one can find the term of an “entity sui generis”\(^{20}\) for the European Union. Anyway, an institution that combines 27 different already existing states also faces 27 different legal orders with own backgrounds. This framework of multiple constitutional jurisdictions has been described as 'constitutional pluralism'.\(^{21}\) Over the years, through integration and various introductions of treaties, the European Union developed a growing compilation of written law which has also increasing noticeable influences on the national legislation. Therefore, the today's EU-citizens finds themselves in a situation in which they seem to have two fundamental laws: the national and the supranational.\(^{22}\) Of significance for this thesis will not be the problem of the mere existence of two legal orders in general but rather the existence of different fundamental rights protection systems. More specifically, the interest will refer to the potential situation in which the European protection and the national protection clash, using the example of Germany. Due to the long history of both courts responsible for protecting fundamental rights in their legal order, they provide a good example for examining tension between two well-developed fundamental rights systems and possible solutions.

Therefore, for understanding the circumstances and current occurrences that caused tension, it is indispensable to illustrate the evolution of the fundamental rights

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19 BVerfGE 89, 155 (186).
20 Among others: A v. Bogdandy, “Die Verfassung der europäischen Integrationsgemeinschaft als supranationale Union“ (1993), p. 120.
protection within the European Union and the positions of the ECJ and the BVerfG on this issue.

2.1 European Court of Justice

2.1.1 Protection mechanisms

The European Court of Justice (ECJ) was established in 1952 and according to Article 19 TEU the court shall ensure the law is observed in the interpretation and application of the Treaties.

The Rome Treaties from 1958 that established the European Economic Community (EEC), nowadays the European Union, and the European Atomic Energy Community (EURATOM)\(^{23}\), as well as the Treaty establishing the European Coal and Steel Community (ECSC)\(^{24}\) did not contain any written fundamental rights or any other references to fundamental rights.

There are various explanations for this in the literature.\(^{25}\) It is argued that the prior aim of the ECSC Treaty was to overcome the ramifications of the second world war and to re-establish the economy in the coal and steel sector in Europe.\(^{26}\) Another one is that it was seen as obvious that the national courts are, despite this development, still the ones in charge to observe the fundamental rights protection for the Community.\(^{27}\) Furthermore, at this point of time an agreement of the Member States on the rank and relevance of social and economic fundamental rights did not seem easy to be achieved and that the effect of a formal fundamental rights catalogue was

\(^{24}\) Treaty establishing the European Coal and Steel Community, signed 18 April 1951, entered into force 23 July 1952, expired 23 July 2002.
not intended. 28 Although the various theories have different starting points, it becomes clear that all of them at least coincide in the point that written fundamental rights were neither necessary nor intended.

Due to the lack of a written catalogue and the evolution and transformation of the European Community that also brought fundamental rights issues to the scene, the ECJ developed judge-made higher law on fundamental rights 29. The development of the fundamental rights protection by the ECJ and its case-law will be illustrated hereafter.

Finally, the crucial change with an “important symbolic meaning” 30 on the field of fundamental rights protection was made by the introduction of the Treaty of Lisbon in 2009 that implemented a legally binding Charter of Fundamental Rights. According to Article 6 Treaty on European Union (hereinafter TEU), the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted in Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. To distinguish, the Charter did not only codify the already established fundamental rights and material from the various sources of inspiration but also codified new rights that have not been explicitly protected as fundamental rights yet (although they already existed on the EU level). 31 This Charter is seen as the consequence of continually preserving the previous jurisprudence of the ECJ 32 and is considered to be a new dimension in the field on the European fundamental right protection 33.

28 B Schima, “Der Schutz der Menschenrechte durch den Europäischen Gerichtshof” (2001) 1/01 Die Union, p. 34.
On a related note, one must once again highlight the importance of the ECHR and its interplay with the fundamental rights jurisdiction of the ECJ. The Convention which dates back to 1950 was the first existing fundamental rights catalogue in Europe and, in fact, remained the only one until the introduction of the Charter on the European level. As mentioned above, the ECHR as an elevated importance for the ECJ which draws on the ECHR and the judgements of the norms contained in it by the Strasbourg Court. The ECJ borrows the interpretations of the ECtHR and takes these as a basis for their own decisions.\footnote{W Frenz (2009), p. 31.} The close relationship was also manifested when creating the Charter which takes account of the ECHR at various points as for example in the Preamble or in the limitation clauses Art. 52 (3), Art. 53 CFREU.

Leaving aside the much discussed question of the precise relationship of the ECtHR and the ECJ, it can, therefore, be said that the today's European fundamental rights protection is a double protection ensured by two courts and based on two written and comprehensive fundamental rights catalogues.

### 2.1.2 Position on fundamental rights

As shown above, the protection of fundamental rights within the European Union has come a long way from a coalition of states with a purely economical interest towards a union with a written fundamental rights Charter. Consequently, it was the development of the European Economic Community towards a more political, social and cultural Community where the first problems arose and revealed a need for certain measures in the protection of fundamental rights.

Over the following years, these measures were developed by the ECJ in its case-law, and although there were no explicitly mentioned power in the Treaties, the jurisprudence was widely supported\footnote{J.H.H. Weiler (1986), p. 1106.} and is now adjudged to be well-developed (even before the introduction of the Charter of Fundamental Rights in the Lisbon
Treaty) and a sufficient protection\textsuperscript{36}. For understanding the situations in which problems can arise between the jurisdictions of the ECJ and the national courts in the field of fundamental rights protection, it is necessary observe the evolution of the ECJ’s jurisprudence concerning this area of law on the one hand. On the other hand, examining the case law, especially recent developments to give a fuller picture, will also demonstrate the position the Court holds concerning the interaction and coherence with the national supreme/constitutional courts.

The first time the ECJ had to deal with human rights in connection with national law was in its \textit{Stork}-judgement\textsuperscript{37}, where the Court adopted a passive attitude and denied its competence to rule over national law, including constitutional law and the contained human rights. It stated:

\begin{quote}
\textit{“Under Article 8 of the Treaty the High Authority is only required to apply Community law. It is not competent to apply the national law of the Member States. Similarly, under Article 31 the Court is only required to ensure that in the interpretation and application of the Treaty, and of rules laid down for implementation thereof, the law is observed. It is not normally required to rule on provisions of national law. Consequently the High Authority is not empowered to examine a ground of complaint which maintains that, when it adopted its decision, it infringed principles of German constitutional law […].”}\textsuperscript{38}
\end{quote}

Temporarily, the Court maintained this position. However, over the following years the position of the ECJ changed. In the important cases \textit{Van Gend en Loos}\textsuperscript{39} and

\begin{itemize}
\item \textsuperscript{36} S Iglesias Sánchez (2012), p. 1565.
\item \textsuperscript{37} Case 1-58, Friedrich Stork v High Authority of the European Coal and Steel Community [1959] ECR 17.
\item \textsuperscript{38} Case 1-58, Friedrich Stork v High Authority [1959] ECR 17 (26).
\item \textsuperscript{39} Case 26/62, Van Gend en Loos v Netherlands [1963] ECR 1.
\end{itemize}
Costa/E.N.E.L\textsuperscript{40} the ECJ stated that Community law has supremacy over national law and that Community Law prevails whenever any national legislation contravened Community Law. On the one hand, in Costa/E.N.E.L the Court solved the disputes over the nature of the Treaties under international law\textsuperscript{41} by stating that “the EEC Treaty has created an own legal system”\textsuperscript{42}. On the other hand, as a consequence of this new 'doctrine of supremacy', it is possible to question whether this was already the situation where the ECJ transferred the power of solving upcoming conflicts concerning the protection of fundamental rights between national law and European law to himself, although it was heretofore seen as a traditional area of the Member States by the Court. However, in view of the fact that there was not even a barely developed fundamental rights protection this would have been presumptuous.

Finally, the turnaround of the Court's position on fundamental rights started with the Stauder case\textsuperscript{43}. In this obiter dictum the Court made a direct reference to the protection of fundamental rights for the first time. It held that fundamental human rights are enshrined in the general principles of Community law and that the adherence of these should be ensured by the Court.\textsuperscript{44} Meanwhile, this judgement is considered to be the birth of the fundamental rights judicature of the ECJ.\textsuperscript{45} This approach was confirmed and extended in the landmark decision Internationale Handelsgesellschaft where the court stated:

“However an examination should be made as to whether or not any analogous guarantee inherent in Community Law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law

\begin{thebibliography}{99}
\bibitem{40} Case 6/64, Costa v ENEL [1964] ECR 585.
\bibitem{42} Case 6/64, Costa v ENEL [1964] ECR 585 (593).
\bibitem{43} Case 29/69, Stauder v City of Ulm [1969], ECR 419.
\bibitem{44} \textit{Ibid}, p. 425, paragraph 7.
\bibitem{45} T Kingreen in Calliess/Ruffert, EUV/AEU, Art. 6 EUV, recital 21.
\end{thebibliography}
protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.”

Fundamental rights were now seen as an integral part of the general principles that must be ensured by the Community. Noticeable is that also the language of the Court experienced a slight change in comparison to the Stauder judgement as the Court now speaks of the respect of general fundamental rights and not specifically of fundamental human rights. This could be interpreted as a broadening of the scope of protection. Furthermore, the Court made a first reference to the Member States in mentioning their constitutional traditions as its source of inspiration.

Already four years later followed another important decision for the development of the fundamental rights case-law, the Nold judgement. In that decision the Court confirmed that fundamental rights are an integral part of the General Principles of Law but also broadened the formula of the Internationale Handelsgesellschaft judgement by adding:

“Similarly, International Treaties for the protection of human rights on which Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community Law.”

Although the Court made a specific reference to the ECHR not until the Rutili case, the Convention was already included as a further source of inspiration.

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47 Case 4/73, Nold KG v Commission [1974], ECR 491.
48 Ibid, paragraph 13.
In reconciling these judgements, there is a situation where the Court states that, on the one hand, the fundamental rights as general principles are independent from the principles secured by the individual constitutions of the Member States but, on the other hand, these fundamental rights, as an integral part of the general principles, derive from national constitutional traditions. Thus, one can not only see the synergy between the European Law and the domestic legal orders, but also the distinction made by the ECJ. The Court confirmed its derivation of fundamental rights and its task to protect them in various following cases and in this way recognised more and more specific fundamental rights, for example the respect for family life\textsuperscript{50} or the inviolability of the home\textsuperscript{51}.

Finally, as shown above, the introduction of the Charter – as the most important step towards a comprehensive protection of fundamental rights on the European level – and its binding legal force introduced through the Lisbon Treaty was widely appreciated. Furthermore, it is even arguable to say that this was a necessity of the rule of law. A legal order that has direct effect on the citizens and regulations in the Member States can only have a claim to validity and acceptance if it possesses fundamental rights guidelines.\textsuperscript{52}

Subsequently, it is fair to say that the fundamental rights protection in Europe has made extraordinary progress. Over a period of only about 50 years the European Union went from an institution with no own written fundamental rights catalogue and a court with no intention of ruling in this area to a union with a comprehensive defined protection system.

\textsuperscript{52} \textit{G Hirsch} (2000), p. 1820.
2.2 Bundesverfassungsgericht

2.2.1 Protection mechanisms

With the evolution of the European Economic Community towards a more political Union, naturally, conflicts arose with the Member States. The Federal Republic of Germany was not only a founding state of the European Economic Community and experienced the whole integration process, but it also had a highly developed constitutionally established fundamental rights protection system that was refined by the Constitutional Court over the previous 60 years. Considering further influences and sources in this field as e.g. fundamental rights written down in the Constitution of St. Paul's Church in 1848 or guaranteed in the Weimar Constitution of 1919, the German system of fundamental rights protection can look back on a long evolution. The jurisdiction of the BVerfG is laid down in Article 93 of the Basic Law (GG)\(^53\). According to Article 93 (4a) GG the Court decides about constitutional complaints that can be brought to the Court by any person alleging that one of his fundamental rights (or one of the other listed rights) has been infringed by public authority.

Furthermore, the ECHR serves as another fundamental rights protection mechanism. In virtue of Article 46 (1) ECHR the Contracting Parties undertake to abide by the final judgement of the Court in any case to which they are parties. But the decisions of the ECtHR do not have the same comparable effect as the decisions of the BVerfG, but rather the nature of an assessment\(^54\).

Within the German legal order the ECHR ranks on the same level as a federal law.\(^55\) This leads to the application and the allowance of the Convention by the German courts in a methodical and reasonable manner, but is, however, not an immediate constitutional standard of review.\(^56\) However, in practice, the impact the ECHR has

\(^{53}\) English version provided by the German Bundestag, translated by C Tomuschat, D.P. Currie in cooperation with the Language Service of the German Bundestag, (https://www.btg-bestellservice.de/pdf/80201000.pdf).

\(^{54}\) BVerfGE 111, 307 (320).

\(^{55}\) BVerfGE 74, 358 (370).

\(^{56}\) BVerfGE, 111, 307 (317).
on the interpretation of the fundamental rights enshrined in the Basic Law conforms more or less with the question how much value the BVerfG assigns the jurisdiction of the ECtHR.  

2.2.2 Position on fundamental rights protection

Bearing the above-mentioned facts in mind, it is not surprising that during the development of the European Union situations occurred in which there was conflict with the developed jurisprudence of the ECJ concerning the fundamental rights protection. Naturally, the evolution of the jurisprudence of the German Court has not been linear and has had its ups and downs. This jurisdiction, often referred to as the “Solange-jurisdiction”, was invented by the BVerfG because of the announced “Supremacy doctrine” of the ECJ and the uprising clashes with the national constitutions of the Member States that secure the protection of fundamental rights.

The case Solange I marks the beginning of the development of this jurisprudence. The Court held that in cases of a conflict with Community Law and the German fundamental rights, the rights guaranteed by the Basic Law would prevail as long as there is no catalogue of fundamental rights which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law. For the BVerfG, it was a necessity to emphasise the lack of sufficient fundamental rights protection at the European level, and therefore, stated that it would not accept an exclusive ECJ jurisdiction in this area.

Since this ruling, the Court always steadfastly maintained its position that the supremacy of European Law in Germany is always conditioned on an adequate

60 BVerfGE 37, 271.
61 Ibid.
protection on the European level. The tension between the courts eased when the BVerfG held its Solange II judgement in 1986. The Court relinquished his strict point of view and stated that as long as the Communities and the case law of the European Court of Justice generally provide an effective protection of fundamental rights against the sovereign powers of the Communities which are similar to the protection of rights guaranteed by the German Constitution, the Federal Constitutional Court will no longer exercise its jurisdiction in reviewing European Community Law measures.

Because of this decision where the BVerfG found that the evolution of protection measures are now adequate enough to meet the German standards, the relationship between the ECJ and the BVerfG has improved. However, this does not mean that the BVerfG gave up on reviewing Community measures; it was just “merely refraining its - still existing –jurisdiction”.

New tensions arose when the Maastricht Treaty, the founding Treaty of the European Union, was concluded in 1992. The BVerfG decided on the ratification in Germany in its Maastricht ruling. Concerning the protection of fundamental rights, the Court held:

“Acts of the particular public power of a supranational organisation which is separate from the State power of the Member States may also affect those persons protected by fundamental rights in Germany. Such acts therefore affect the guarantees provided under the Basic Law and the duties of the Federal

63 D Grimm, “The European Court of Justice and national courts: The German constitutional perspective after the Maastricht decision” (1979) 3 ColumJEurL, p. 231.
64 BVerfGE 73, 339.
65 Ibid.
69 BVerfGE 89, 155.
Constitutional Court, which include the protection of fundamental rights in Germany, and not only in respect of German governmental institutions[...]. However, the Federal Constitutional Court exercises its jurisdiction regarding the applicability of derivative Community law in Germany in a “co-operative relationship” with the European Court of Justice.”

In this judgement, the BVerfG was now defining the relationship with the ECJ as a cooperative one, which means that the ECJ guarantees fundamental rights protection in every individual case for the entire area of the European Communities and the BVerfG limits itself to a general guarantee of indispensable fundamental rights standards. However, the Court still reserved judicial review concerning the protection of fundamental rights in cases where German institutions apply Community law. The BVerfG therefore maintained its point of view in not exercising jurisdiction despite still reserving the right to do so if the circumstances change. In terms of progress, its decision could be interpreted in both directions. Nevertheless, it is reasonable to say it is neither a step backwards nor a step forwards in defusing this conflict. Instead the decision of the Court was criticised by many authors pointing out, among other things, that the BVerfG put an indistinct emphasis on the Courts' relationship concerning fundamental rights and accusing the Court of blurring the question of the 'right to the final decision' on fundamental rights. However, despite the criticism, the term 'cooperation relationship' continues to exist to this day.

The definition of the requirements that need to be fulfilled for the stated drop under

70 BVerfGE 89, 155, english translation based on Wegen (et al) 33 ILM (1994) p. 388 as found in: (http://www.judicialstudies.unr.edu/JS_Summer09/JSP_Week_1/German%20ConstCourt%20Maastricht.pdf).
71 BVerfGE 89, 155 (175).
74 P Szczekalla in Heselhaus/Nowak “Handbuch der Europäischen Grundrechte” (2006), recital 27.
75 Ibid, recital 28.
the German standard was specified by the BVerfG in its *Bananenmarkt* decision. In this judgement the Court set a high standard for the admissibility of a constitutional complaint (Art. 93 GG in conjunction with §§ 13, 90 et seq. BVerfGG) against Community acts and held that it is not sufficient that the individual situation does not meet the same standard provided by the Basic Law but rather the protection needs to drop in general under the German one.

Although, one might assume the *Lisbon decision* as a further remarkable case in this development of the 'distribution of roles' the BVerfG does not scrutinise the adequacy of the protection of fundamental rights existing in the European Union in this judgement (which it had already stated in former decisions). The Court focussed mainly on the question of competences and therefore, did not deal with the application of the guarantees of fundamental rights as secured by the German Basic Law to European law. However, the issue of fundamental rights was not left completely undiscussed. The BVerfG used this situation as the first constitutional/supreme court in the European Union to define the scope of the newly introduced term of the "national identity". According to this, fundamental rights are part of the inviolable core of the constitutional identity of the Basic Law (Art. 23 (1) GG in conjunction with 79 (3) GG) and the BVerfG and that "the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area". During the further discussion the issue of national identity will be returned to.

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76 BVerfGE 102, 147.
77 *Ibid*.
78 BVerfGE 113, 273.
80 Art. 4 (2) TEU: The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.
81 BVerfGE 113, 273.
To conclude, the actual position of the BVerfG concerning the protection of fundamental rights has not really changed after the creation of the term 'cooperative relationship' in the *Maastricht ruling*. Although the Court emphasises the principle of the Basic Law’s openness towards European Law, the situation of the proclaimed reserved jurisdiction remains unaffected but will only be triggered in the case the European protection drops below the protection ensured by the German Constitution.

### 2.3 Conclusion and Potential conflict zone

Looking at the two different histories it becomes clear that the relationship between the ECJ and the BVerfG has become less and less complicated over the years. At first glance the distribution of roles appears to be clear; the BVerfG as a national Court accepts the supremacy of the European Union law and only remains a 'reserved jurisdiction' and has strived to interpret upcoming issues more and more 'pro-European'. This seems to be supported by observing the later judgements of the BVerfG and its growing reluctance to assess European fundamental rights with the Basic Law. But when carrying out a more in-depth examination the picture might not be so decisive anymore. However, over all these years the BVerfG never explicitly distanced itself from its position of intervening in case of emergency and its self-awarded task of critically observing the fundamental rights process in the European Union.

Regarding the relationship of the BVerfG and the ECJ, it is often argued that there is only a slight practical chance of a clash between the jurisdictions of both courts and that, therefore, the dispute is more theoretically based.\(^2\) However, this does not mean that the relationship will steadily proceed in a peaceful way. This can neither be concluded by looking at the jurisdiction of the BVerfG nor by paying attention to

various controversially discussed cases in the area of fundamental rights. Considering the recent events and detailed reading of the case-law, there are also scholars that argue that the situation is heating up\textsuperscript{83}.

As already mentioned, the protection of fundamental rights by the BVerfG and the concomitant protection of the German citizen is one of the three limits to the acceptance of supremacy among competences and the \textit{ultra-vires lock} and the constitutional identity.\textsuperscript{84} When talking about the problems that can arise when Member States have to apply European fundamental rights, it needs to be noted that the area of fundamental rights is not clearly separated from the areas of competences and from the BVerfG's created national identity but taking these other fields into account is sometimes even necessary for a comprehensive examination. This becomes apparent when looking at the situations Member States need to consider European fundamental rights: 1. when implementing EU law (directives, regulations or other framework decisions), 2. when fundamental rights are invoked as justification for violating fundamental freedoms, 3. when deviating from the fundamental freedoms.\textsuperscript{85}

Consequently, this enumeration describes the potential conflict zone in the area of fundamental rights between the EU and the Member States very well and can therefore be regarded as a further guideline for the debate.


\textsuperscript{84} P Craig/ G de Búrca (2011), p. 273.

\textsuperscript{85} S.A. de Vries, “The protection of fundamental rights within Europe’s internal market after Lisbon – An endeavour for more harmony” (2010), The Europa Institute Working Paper 04/10, p. 5.
3. Conflict solution approaches

As shown above, the fact that the European Union is an organisation formed by already existing constitutional states with their own legal orders can create problems because of this constitutional pluralism. The development of the European legal order is a continuous process of progress which is supported by the Member States as the “guardians of the Treaties”. Frictions in the steadily growing Union are not avoidable and are even needed. Hence, the situation induced to find ways of solution which should be advantageous and lead to practicable success.

After examining the scope of conflicts than can arise in the area of fundamental rights and the concerns addressed to the ECJ, this thesis will now proceed in having a closer look on how those conflicts, caused by the consilience of legal orders with their own fundamental rights catalogues between the scrutinised 'opponents', the BVerfG (for the German legal order) and the ECJ (for the European legal order), could be eased or handled in a better way.

3.1 European perspective

3.1.1 Supremacy and Effectiveness

The doctrine of the supremacy of EU law was early established by the ECJ in its Costa/E.N.E.L judgement. Although it was very likely not intended that fundamental rights were already included at this time, the direction was clear. Many Member States, especially Germany, were challenging the Court to create a fundamental rights protection, otherwise they would not accept supremacy in this area. As shown above, nowadays the provided level of protection and the precedence of EU fundamental rights when acting within the scope of EU law is, despite some reservations by the BVerfG, widely accepted. However, many scholars and practitioners acting in the legal order of the European Union are aware of the problem that the range of application of EU fundamental rights in the Member
States could lead to problems.

General Advocate Kokott and Christoph Sobotta identified the possible scenarios in which Member States act within the scope of EU law and examined how the application of EU fundamental rights should be handled in these situations. Due to their field of work and their expressed views, they are suitable representatives for a European perspective.

In the field of directives, which need to be implemented into the national legal order, problems can occur when provisions of the directive infringe national fundamental rights. The provided solution therefore is as simple as foreseeable. Since national fundamental rights differ from each other, the implementation of a directive within the whole European Union would be impossible when the national fundamental rights are used as a criterion for an examination.86 Thus, when problems arise concerning the validity or interpretation of fundamental rights they must be assessed against the EU fundamental rights standard, since otherwise this could lead to a non-uniform application of EU law.87 Furthermore fundamental rights can come into the picture in the balancing process between restriction on fundamental rights based on public policy, public security and public health.88 However, here too, the outcome cannot be a different than the previous one, although the situation is distinct. Due to the varying national fundamental rights and the protected values, Member States could apply stronger protection clauses than another State which would again lead to non-uniformity of the application of Union law.89 Finally, concluding from the position of EU fundamental rights, Member States are generally bound by them when acting in the scope of EU law.90 The Member States have been taken into account by referring to

90 *Ibid*, p. 11.
the common traditions of the Member States in the general principles and the newly introduced national identity clause in Art. 4 (2) TEU. Although Kokkott and Sobotta also discuss if national fundamental rights are always excluded when acting in the scope of EU law, this issue is right now not needful and will become of significance later on. Concluding, the rule is simple and clear: when dealing with the EU legal order the standard is defined by the EU fundamental rights. Otherwise a homogeneous application of EU law in the entire European Union cannot be secured.

The European Court of Justice's view on the status of EU fundamental rights and their interactions with the national provisions is (among other judgements) recently highlighted in its Melloni judgement91. Although the Court primarily dealt with the provision of Art. 53 CFREU, its point of view concerning the understanding of the importance and the rank of the EU fundamental rights became obvious. In Melloni the Court held that an interpretation of Art. 53 CFREU in a way that would allow Member States to apply a higher standard than the one of the Charter would undermine the principle of the primacy of EU law.92 Hence, even national constitutional law cannot be allowed to undermine the effectiveness and the unity of EU law and must therefore be set aside.93 In this context it must be noted that this applies when Member States do not have any margin of discretion. Consequently, the European Court of Justice also (naturally) requires supremacy of the EU fundamental rights.

Summarising, the prevalence of EU fundamental rights required by the representatives of the European legal order is a logical conclusion and is not surprising result. They follow the stringent principle of effectiveness to ensure a

91 Case C-399/11, Stefano Melloni v Ministerio Fiscal, judgement of 26 February 2013 (not yet published in ECR)
92 Ibid, paragraphs 56 – 58.
93 Ibid, paragraphs 59, 60.
uniform application of EU law throughout the European Union. Therefore, the primacy of the Union law with its fundamental rights is absolutely essential.

### 3.1.2 Applicability of European fundamental rights

After pointing out the European point of view of absolute supremacy of the EU fundamental rights, now enshrined in the Charter, the next step must be a more in-depth look regarding the Charter and its scope of applicability in the Member States.

#### 3.1.2.1 Binding effect on Member States

At first glance, one might think that the applicability of the European fundamental rights on the Member States’ national legal order is governed by a well structured system which clearly allocates the different matters to the respective law sector. If one takes the general rule as the basis, saying that European fundamental rights come on the scene in every situation related to EU provisions, this seems to apply. That this is already practicably difficult to transform is quite obvious. When going further beyond this very general rule, the first problems already become apparent. It is therefore hardly surprising that the question in what way Member States are bound by the fundamental rights of the Union is one of the most controversial issues in the area of the European protection of fundamental rights.

As shown above, the fundamental rights protection by the ECJ dates further back to the introduction of a written catalogue. Before the introduction of the Charter the Court already defined the scope of applicability of EU fundamental rights on Member States in its previous case-law. In its landmark decision, *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* the European Court of Justice confirmed that the application of European fundamental rights can also be extended

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“[...] Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements.” 97

Considering the achievement of, a written fundamental rights catalogue which became legally binding with the Lisbon Treaty, one might assume that the determination of the applicability was facilitated, since there is now an Article that defines the scope. According to Article 51 (1) CFREU the Charter is addressed to the institutions and bodies of the Union. Member States are only bound when they are implementing EU law. Ergo, it could be concluded that conflicts between the national and the Union fundamental rights catalogue cannot arise when the action or legislation in question can be either clearly placed in the scope of EU law or in the area of “pure” national law.

But as mentioned above, the Charter with its provision in Article 51 (1) did not solve the problems of attribution. The obscurities already start in defining what the term 'implementing European Law' actually means. In the explanations relating to the Charter of Fundamental Rights one can unfortunately find no interpretation aid. It is only stated that this formulation is borrowed from the case-law of the ECJ, such as in Wachauf, and that the deliberations outlined in this case-law also applies to the Member States when they implement Community rules. 98 However, as mentioned above, this was already the case before the introduction of the Charter and therefore provides no further assistance.

Consequently, the dispute on this issue still exists, which gets even more difficult regarding the different national translations. While exponents of a narrow interpretation argue that implementation of European Law only means the situation

when a Member State acts as a representative of the European Union, representatives of a broader interpretation argue that this term should cover more generally every national legislation that falls within the scope of European Law.\footnote{Status of the dispute in: Opinion of Advocate General Bot, delivered on 5 April 2011, Case C-108/10, paragraph 117.}

Therefore, one could argue that the stronger a Member State desires a clear division of jurisdiction, the narrower it would interpret what 'implementation' means.

A clear distinction on the European level that is neither decisive nor favoured, can be exemplified by the remarks of the Advocates General of the Court. With respect to the question of interpretation Advocate General Bot favours a broader interpretation of Art. 51 (1) CFREU, saying that otherwise the level of protection of fundamental rights would be weakened and could lead to separate systems of fundamental rights, resulting either from the general principles of law or the Charter.\footnote{Opinion of Advocate General Bot, Case C-108/10 Ivana Scattolon v Ministero dell’Istruzione, dell’Università e della Ricerca, paragraph 120.}

With a similar outcome General Advocate Villalón argues in favour of a wider understanding when he just recently stated that: “the ‘implementation’ scenario of itself sets an essentially fluid boundary as far as the distribution of responsibility for guaranteeing fundamental rights”\footnote{Opinion of Advocate General Villalón, Case C-617/10 Åkerberg Fransson, paragraph 29.}.

Consequently, both argue with the already mentioned principle of effectiveness to ensure a homogeneous fundamental rights protection in the entire European Union.

### 3.1.2.2 Clarification through Åkerberg Fransson and Melloni?

In this situation of uncertainty, recent developments that took place in Luxembourg could be able to shed light on this situation. In February the ECJ gave the eagerly awaited judgement in Åkerberg Fransson. On the same day the Court also ruled in the case Stefano Melloni v Ministerio Fiscal\footnote{Case C-339/11, Stefano Melloni v Ministerio Fiscal [2013] (not yet published in ECR).}. Both rulings dealt with the scope of application of the Charter and the interplay with national fundamental rights
protections. Due to the connected contents and, hence, the delivery of the judgements on the same day both cases should be examined in conjunction. In Åkerberg Fransson the Court dealt with a Swedish case of double penalty and in this context also referred to the scope of the European Charter of Fundamental Rights. In Melloni the question referred to the ECJ concerned the interpretation of a provision of the Framework decision on the European arrest warrant and the possibility of refusing an execution on the basis of Art. 53 CFREU.

In these judgements the ECJ took further steps towards the developing of a general theory on the scope of the Charter which might help to remedy the situation. Since the Court dealt more specifically with the applicability of the European Fundamental Rights Charter in the Åkerberg Fransson case, this case will be of greater value for the following examination. Nevertheless, although the scope of the Charter was not challenged in the Melloni case, one can also deduce further information on this issue from this ruling.

First of all, when observing the ruling in Åkerberg Fransson, the presumed preference of a broad interpretation by the Court can be clearly discerned. With regard to the implementation formulation in Art. 51 (1) CFREU, the Court held that:

“the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations”\(^{103}\) and that “a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction”\(^{104}\).

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103 Case C-617/10, Aklagaren v Hans Åkerberg Fransson [2013], paragraph 19.  
104 Ibid, paragraph 22.
Basically, this is just a confirmation of what was already stated in the previous jurisdiction. Moreover, it is fair to say that this decision, especially from the Member States' perspective, is unsatisfying. The ECJ draws back on its case-law and the explanations to the Charter provisions but does not provide greater clarity. Actually, the Court held that 'implementation of EU law' and, therewith, the compulsory application of EU fundamental rights occurs in every situation where national law falls within the scope of European Union Law. But this could even mean that a mere abstract connection to Union law could be sufficient for triggering the Charter provisions. How broad the interpretation of Court is, becomes even more obvious when having a look at national translation of the term “implementing”. In the German version of the Charter the term “implementation” is for example translated into 'Durchführung' which might best be translated into 'execution' in English. Therefore, the extensive scope is even more widened when taking the German understanding as a basis.

Furthermore, the apprehension that a simple effect on Union law is sufficient to trigger the Charter provisions, is supported by observing the reasoning of the ECJ. Although the national legislation in question was not adopted in order to transpose the Directive 2006/112/EC on the common system of value added taxes, the Court argues that they still constitute implementation of Directive provisions and do therefore fall into the scope of European law. Hence, the ECJ applied the broadest possible interpretation concerning the applicability of the Charter. Thus, the Member States are left in a situation in which they have to take the Charter into account basically every time when provisions could touch the scope of EU law.

However, one should not forget that the Melloni case could give further helpful indications, since they are considered to be in conjunction. When looking at the

105 Case C-617/10, Åklagaren v Hans Åkerberg Fransson [2013], paragraph 19, 20.
106 Ibid, paragraph 21.
108 Case C-617/10, Åklagaren v Hans Åkerberg Fransson [2013], paragraphs 27, 28.
Åkerberg Fransson ruling in conjunction with the Melloni decision, one could at least deduce a kind of rule when Member States remain free to apply own standards. The starting point is the question whether a Member State has a margin of discretion when implementing an EU legal act. If a Member State has a certain margin of discretion, the outcome would be as in the Åkerberg Fransson case; thus, the state could apply its own higher standards but only as long as these do not interfere with the primacy, unity and effectiveness of EU law. If they do not have a margin of discretion, the result is the same as in the Melloni case and Member States have to apply the Charter provisions. At first, this approach might sound theoretically reasonable but when given some thought, this approach is lacking in substance. Giving the Member States the chance to apply their own higher standards when having a margin of discretion when implementing EU law seems to be more a symbolic gesture than a practical way of integration of the Member States legal orders. Due to the limits the ECJ sets, a situation is barely imaginable in which the national standards would not interfere in the principle of effectiveness, since every deviation from the uniform application of EU fundamental rights could be theoretically possible to interfere with the set limits.

3.1.3 Expansion of competences through fundamental rights?

As one can see, it is already difficult to define the scopes of application that dedicate the applicable legal order with its fundamental rights. Subsequent to the discussion about the scope of application the question arises whether there is actual support for the German Constitutional Court’s fear of an expansion of competences through the area of fundamental rights. Although this paper does not specifically deal with the field of competences, the problems that can arise in this area when dealing with European fundamental rights in the interplay with the national legal orders are

109 Case C-617/10, Åklagaren v Hans Åkerberg Fransson [2013], paragraph 29.
110 Case C-339/11, Stefano Melloni v Ministerio Fiscal [2013], paragraph 60.
111 Cf. D Ritleng, “Seminar: ne bis in idem” at Uppsala University (2013)
sometimes inextricably linked with each other.

The written European law contains two applicable provisions concerning this issue. Art. 6 (1) TEU clearly states that the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. Art. 51 (2) CFREU covers the same assertion in saying that the Charter does not establish any new power or task for the Community or the Union nor does it modify powers and tasks defined by the Treaties. Thus, according to the written legal order, there seems to be no support for some of the Member States' fears that the ECJ could expand their jurisdiction through the field of fundamental rights protection.

Provisions concerning a limitation of EU competences are not new, since this was demanded by the Member States from the beginning. With respect to the Charter limitation clauses were not only introduced for the purpose of a clear division of responsibilities but also to serve as safeguards. Thus, Art. 51 (2) CFREU does not only have a certain function of order but is also the result of several actions by the ECJ concerning fundamental rights in previous case-law that were critically commented and seen as a transgression. In this context there are some noticeable decisions in the case-law of the European Court of Justice which are worth being outlined hereinafter.

In 2000 the ECJ gave a judgement in the highly observed case Tanja Kreil. In this decision the Court had to deal with the question whether women should be allowed to be in military service despite the fact that this was only designed for German men at the time. The complainant argued that the refusal of her application is incompatible with the Directive 76/207/EEC on the implementation of the principle of equal treatment. Germany alleged that the field of common foreign and security

113 Ibid, p. 28.
policy is part of the Member States' sovereignty and is principally not in the scope of Community law; and even if the Directive would be applicable the limitation is justifiable under Article 2(2) and (3) of the Directive.\textsuperscript{116} Although the ECJ agreed that the Member States are responsible for adopting appropriate measures, it disagreed that the field of internal and external security is not in the scope of Community law.\textsuperscript{117} Furthermore, it decided that an entire exclusion of women is not covered by the differences allowed by Article 2(3) of the Directive\textsuperscript{118} and that, as a result, the German provisions are precluded by the Directive\textsuperscript{119}. This decision earned criticism because of the Court interfering in a 'traditional' sphere of the Member States\textsuperscript{120} and especially for going that far and declaring the German provisions invalid. It could have also just addressed the German government and leave the solving to it. Hence, the speculations are understandable that this judgement would have earned even more criticism if it would not have met the political trend at this time.\textsuperscript{121}

A further decision that took place in one of the 'conflict zones': the scope of European fundamental rights when implementing EU law, was the Steffensen case.\textsuperscript{122} The case addressed the German civil procedure law and the question referred for a preliminary ruling dealt with the interpretation of certain provisions in the Directive 89/397/EEC\textsuperscript{123}. When answering the question the ECJ also made reference to the European fundamental rights according to settled case-law.\textsuperscript{124} The case showed that measures of national procedure law can also be compared to the European fundamental rights if they are capable of jeopardising European rights.\textsuperscript{125}

\begin{footnotes}
\item[116] Case C-285/98, \textit{Tanja Kreil v Bundesrepublik Deutschland} [2000] ECR I-69, paragraph 12.
\item[117] \textit{Ibid}, paragraph 15.
\item[118] \textit{Ibid}, paragraph 31.
\item[119] \textit{Ibid}, paragraph 32.
\item[122] Case C-276/01, \textit{Joachim Steffensen} [2003] ECR I-3735.
\item[124] Case C-276/01, \textit{Joachim Steffensen} [2003] ECR I-3735, paragraph 69, 70.
\item[125] W Frenz (2009), recital 255.
\end{footnotes}
This became a contentious issue because the usage of general national procedure rules governing the taking of evidence does not support the implementation of EU law.\textsuperscript{126} At the same time it was argued that the ECJ had created a new category on how Member States are bound by the European fundamental rights.\textsuperscript{127} Nevertheless, even this decision was not just seen 'black and white'\textsuperscript{128} but it shows very well how blurry the boarders are for Member States' actions falling in the scope of EU law.

A quite recent and heavily criticised judgement that rounds out the case discussion was the \textit{Mangold case}\textsuperscript{129}. The question which was submitted by the Munich Labour Court dealt particularly with the compatibility of fixed term contracts of employment for older employees with the Directive establishing a general framework for equal treatment in employment and occupation\textsuperscript{130}. This directive had not been implemented in Germany at this point of time but the time limit for the transposition had not expired then. This judgement was criticised for various reasons from which two expressed arguments are the most relevant, especially with regard to the German point of view. One of the points of criticism stands in line with the fear of the ECJ expanding the competences of the EU. Labour market and social policy is after all a core competence of the Member States and therefore the question arises why the EU wants to regulate different treatments in this sector and whether this suffices to comply with the principle of subsidiarity.\textsuperscript{131} Furthermore, the Court justified its decision by referring to the 'various international instruments' and 'the constitutional traditions common to the Member States' and stating that "the

\begin{flushright}
\textsuperscript{126} W Frenz (2009), recital 256. \\
\textsuperscript{127} D.H. Scheuing, “Zur Grundrechtsbindung der EU-Mitgliedstaaten” (2005) 40 EuR, pp. 162 (168); \\
EuGRZ, pp. 470. \\
\textsuperscript{128} Cf. in favour of an application e.g. W Frenz (2009), p. 257. \\
\textsuperscript{129} Case C-144/04, Werner Mangold v Rüdiger Helm [2005] ECR I-9981. \\
\textsuperscript{131} R Herzog/ L Gerken, “Stoppt den Europäischen Gerichtshof” (2008), published in F.A.Z, 08.09.2008, \\
page numbering used from: \\
(http://www.cep.eu/fileadmin/user_upload/Pressemappe/CEP_in_den_Medien/Hertzog-EuGH- \\
Website.pdf) \\
\end{flushright}
principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law”. Thus the Court did not mainly refer to the Directive and its scope but rather said that discrimination of age is a general principle of Community Law. However, if one has a look at the named sources, the constitutional traditions of the Member States and international treaties, support is hard to find. At that time the Union only consisted of 25 Member States and only two had a constitutionally granted prohibition of the discrimination of age and there are also no provisions buttressing provisions in international agreements. Hence, this judgement created a stir due to the question of transgressing competences.

Finally, to close the circle, the Åkerberg Fransson decision is also a suitable case for this enumeration. As mentioned above, the ECJ found that the Charter provisions are triggered, although the applicable Swedish national provisions on tax penalty and criminal proceedings were not a transposition of the Directive 2006/112 in question but created the same intended effect. Applying such a wide scope can actually not be the pursued aim of a homogeneous application of EU law, when in those situations the spheres of the Member States are disregarded.

These judgements illustrate well how court decisions (of course not only the ones of the ECJ) are in principal received with mixed feelings and how they give rise to interpretations and discussions, especially when they have a strong impact. Although judgements can always be selected for supporting one or the other position, it seems to be just right to compare decisions of such a powerful court as the ECJ especially to its much noticed cases that deviate from the other case-law and gave rise to concerns.

132 Case C-144/04, Werner Mangold v Rüdiger Helm [2005] ECR I-9981, paragraphs 74, 75.
133 R Herzog/ L Gerken (2008).
3.1.4 Conclusion

First of all, it is not surprising that the opinions on how Member States should handle upcoming conflicts when applying EU fundamental rights is not very diverse on the European perspective. That is convincing and reasonable, especially with regard to the aim for a uniform enforcement of EU law in all the Member States. To ensure effectiveness there must be a coherent standard which consequently must be the European one since the 27 different national orders cannot be seen as homogeneous. But nevertheless, there are still obscurities that are able to nurture concerns of the Member States.

Summarising, the definition of the scope of EU fundamental rights did not become much clearer after the introduction of the Charter and even the case-law of the Court does not provide full clarity. However, it is not the situation that supremacy of EU law (despite some existing reservation in some Member States) is questioned. Rather, problems only arise when the scope of the EU law is not clear which can result in different point of views on the applicability of the Charter by the national court or the ECJ.

Furthermore, one can indeed find support for the Member States' concerns of a potential expansion of EU competences through the 'gateway' of fundamental rights. As shown above, it is fair to say that the Court overtook cases that could have been left to the national institutions to handle it or that were at least at the outermost end of interpretation. Furthermore, it was not always clear why several issues were considered to be in the scope of European Law and therefore handled by the ECJ. Consequently, the ECJ has to put up with the reproach of sometimes rather creating a link to Union law than applying an existing connection.

Nevertheless, it would be presumptuous to accuse the Court of secretly expending the limits of the European Union since this is definitely not the aim of the ECJ and 'transgressional' cases, in line with the above mentioned ones, are still an exception. However, critical observation by courts throughout the EU is, to the necessary
extent, good and needful to preserve a balance between the national legal orders and the European legal order in the European Union.

### 3.2 Member States' perspective

As shown above, the scope of application of the Union fundamental rights in the Member States is not always easy to determine. However, it would be wrong to connote that there is a general reluctance of the Member States towards EU fundamental rights. In fact, most concerns relate to certain situations for which representatives of the Member States reflect on possible solutions. These controversial situations apply when Member States invoke a national reasoned exemption to the European fundamental freedoms, implement directives or have to face the difficulty of different levels of protection.\(^{135}\)

Consequently, there is extensive literature considering possible ways of handling those situations.

First of all, it is necessary to make clear that a purely national point of view concerning fundamental rights that utterly denies the applicability of European fundamental rights is most probably hard to find and thus will not be of interest for this discussion. In fact, of interest shall be expressed thoughts regarding solution approaches of conflicts between the EU and the Member States in the above mentioned 'conflict zones'. More particularly, the thesis will primarily use German considerations of practitioners and scholars since the focus lies on the constellation between the European fundamental rights and the German protection of fundamental rights. This is important because the national fundamental rights protections can vary considerably. Hence, the examined situation is compared to a comprehensive well-established national fundamental rights protection which was developed over a long period of time and stems from a country which was strongly involved in the

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\(^{135}\) J Kokott/ C Sobotta (2010), pp. 7, 8.
evolution of the European protections system. Consequently, the conflict solution approaches discussed hereinafter are more of a mediatory kind but are still mostly based on the German protection background ensured by the BVerfG. These approaches and theories will be scrutinised whereas the analysis will especially concentrate on the practicability and the potential effect on the European Union.

### 3.2.1 Absolute division

One envisaged scenario is the absolute division into the areas of action of the both courts when it comes to exercising control.\(^{136}\)

That means that there would be a parallel application of both legal orders but with a strict demarcation into a German and an European area of action. This approach is plausible where there is no interference of both legal orders, in other words, if German authorities execute national law and the European Union bodies execute European law.

One can already see that this theory will not be of good practical use. On the one hand, there is a compulsory interleaving of the two legal orders, especially in the field of implementing directives. On the other hand, due to the far-reaching jurisdiction of the ECJ's on fundamental freedoms, the boarders between the different legal orders are blurred.\(^{137}\) This is convincing since the fundamental freedoms are addressed to the Member States and therefore national provisions are also the object of control when applying fundamental freedoms. Another argument, which is in my opinion not far to seek, is that a strict division is not even intended by the BVerfG. When looking at the jurisdiction of the court on European Law matters one can find no indication that one of the court would favour such a solution.


\(^{137}\) Ibid, p. 161.
3.2.2 Exclusion

Another presented solution strategy that flows directly from the one mentioned above is that in cases of an interleaving of both legal orders one court should be completely excluded from its jurisdiction.138 Naturally, this approach is not sustainable since it cannot be legally justified. Both legal orders contain provisions that give a mandate to the courts that oblige and legitimate them to exercise fundamental rights control. Furthermore, it is inconceivable that one of the courts would voluntarily give up every control in favour for the other court.

3.2.3 Principal of Subsidiarity

When observing the discussion about ways of solving upcoming tension between the EU and the Member States a further aspect can be identified: the compliance with the principle of subsidiarity.

Representative Roman Herzog139 can be quoted. Noteworthy is that he chaired the Convention responsible for drafting the Charter of Fundamental Rights. In the context with the Mangold judgement he and Lüder Gerken140 criticised the European Court of Justice harshly for its conduct. And although this case was not a pure fundamental rights case, the expressed critic can be transferred well to this area and thus, creates a space for interpreting his position concerning a correct handling of the Court's sphere of competences. The authors argue that the ECJ violates the principle of subsidiarity141 laid down in Art. 5 (3) TEU142. Since this principle

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139 Roman Herzog is former Federal president and was judge and president of the German Constitutional Court.
140 Lüder Gerken is president of the 'Centrum für Europäische Politik ‘.
142 Art. 5 (3) TEU: Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.
provides protection for the Member States and their actions, Herzog and Gerken argue that (referring to Mangold) issues that do not have an impact on other countries due to a missing transborder element should be handled by the Member States. Furthermore, another expressed concern can be related to this approach. The authors disagree with the ECJ’s method in basing the reasoning partly on the traditions of the Member States disregarding the fact that there was actually no support in the national constitutions. This remark underlines their desire of respecting the powers of the Member States with a restricted jurisdiction of the ECJ on national provisions.

Kirchhof also reflects about considerations concerning the principle of subsidiarity. With regard to this principle he suggests a rewording, in the way that the wording should only refer to the respective Member State, instead of referring to the Member States in general. Therewith, one would take the different evolved fundamental rights catalogues and systems of the European Member States into account and would safeguard a higher standard of protection by a Member State in comparison to the Charter.

However, the author himself repels this line of thought by pointing to the principle of proportionality which should fulfil the task of correcting too extensive measures and therefore has a balancing function. This reasoning next to the already expressed counter arguments by Kirchhof of the other aspects of this line of thought is also questionable which will play a role in the evaluation.

3.2.4 National identity

Further thoughts regarding conflict solution approaches concern the matter of national identity. Basically, two manifestations can be put under the topic national identity.

143 R Herzog/ L Gerken (2008), p. 2.
144 Ibid, pp. 2, 3.
identity; the new national identity clause in Art. 4 (2) TEU, introduced with the Lisbon Treaty, and the German understanding and definition what this national identity encompasses. According to Art. 4 (2) TEU the Union shall respect the national identities of the Member States. This new provision led to various debates and different interpretations.

One the one hand it is argued that Art. 4 (2) TEU “provides a perspective for overcoming the idea of absolute primacy of EU law”\textsuperscript{146} and can therefore be understood as a step towards the national constitutional courts for a better integration including the possibility for the courts to invoke certain constitutional limitations with regard to EU law.\textsuperscript{147} Thus, the identity clause could help to support the cooperation between the national constitutional courts and the ECJ.\textsuperscript{148} But on the other hand the ECJ does not seem to favour direct references to the concept of national identities under Art. 4 (2) TEU. After the introduction of the national identity clause the Court held in Sayn-Wittgenstein that “in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States”\textsuperscript{149} but only referred to the provision as a subsidiary point.\textsuperscript{150}

In its Lisbon decision the BVerfG already started to define what falls under the German national identity by taking an “expansive view”\textsuperscript{151}. Since then is another identified 'lock' to the supremacy of EU law. In its Counter-Terrorism Database judgement the Court even referred to these limitations with regard to the position of the ECJ in Åkerberg Fransson. That national identity concerning differences of fundamental rights in the Union and in the Member states can play a crucial role and be preserved, as can be seen in the Omega case\textsuperscript{152}. Although this case stood in

\textsuperscript{147}Ibid, p. 3.
\textsuperscript{148}Ibid, p. 3.
\textsuperscript{149}Case C-208/09, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien [2010] ECR I-13693, paragraph 92.
\textsuperscript{151}Ibid, p. 22.
\textsuperscript{152}Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004], ECR I-09609.
connection with fundamental freedoms and was decided before the identity clause was introduced, it is widely seen as a case of national identity. 153 The stronger protection of human dignity in the German constitution was a reasonable justification for the ECJ of the non-admission of laser tag games in Germany. Hence, one could propose a solution approach in which the ECJ has to take the respective national fundamental rights into account and compare them to the rights in the Charter. If a difference in the level of protection is ascertained and the fundamental right in question is strongly connected to the national identity of the state, the court should apply the higher standard. Surely, the ECJ will only allow this to the limits of effectiveness and primacy of EU law but the room that opens below that limit should be used by the Court to include the Member States national orders.

3.2.5 Minimum standard

In the field of potential conflicts between the Union and the Member States concerning fundamental rights protection, one major discussion concerns the level of protection. That the Charter provides a high standard, which is especially important for countries with a low protection standard or with an ineffective implementation of fundamental rights, is without doubt. But when the Charter encounters a fundamental rights catalogue, like the Basic Law, that provides an even higher standard in some points, this can cause problems. When acting in the scope of European law this could lead to a situation in which a Member State could be forced to set aside its own higher standards because it is bound by the Charter. Therefore, it is discussed whether the national fundamental rights catalogue or at least certain provisions could take precedence over the European Charter when they would ensure a higher protection in the specific case.

Taking the thought as a starting point that the intended level of protection by the Charter is a minimum one154, a provided higher standard in a Member State should,

at first glance, not cause problems. That this is not really convincing from a practical point of view, becomes quickly apparent. Thus, the question is how the application of a higher standard by a Member State should be designed.

One proposed system attributes the Charter to a kind of catch-all function.\textsuperscript{155} The Charter could serve as a “catch-all” minimal protection concerning fundamental rights – which means that the ECJ could suspend itself from protecting fundamental rights in these cases in which equal or higher protection guarantees exist.\textsuperscript{156}

Another proposed handling can be inferred from \textit{Melloni} and the application of Art. 53 CFREU. The Spanish Constitutional Court envisaged an interpretation of Art. 53 CFREU that gives general authorisation to a Member State to apply its own fundamental rights standards when these ensure a higher protection than the Charter.\textsuperscript{157} The fact that the ECJ rejected this interpretation is not surprising since it would undermine the primacy of EU law.

Another thought is addressing the margin of discretion of the Member States to support the expression of differences in the manner of a justification of the restriction of a fundamental right.\textsuperscript{158} The ECJ could grant the Member States a wider margin of discretion in the field of not directly applicable EU acts by taking the existence of parallel domestic fundamental rights into account.\textsuperscript{159}

All approaches have the same aim but totally different starting points. Regarding the proposed handlings, a certain understanding of the Charter's function, the argumentation with provisions enshrined in the Charter and the suggestion that the ECJ could leave a wider margin of discretion to the Member States, the last approach could at least have a chance of being implemented. Since the Court decides about the interpretation of the Charter and certainly does not agree with Art. 53 CFREU being an exception rule, only the Court itself can grant the Member States a wider margin of discretion.

\begin{footnotes}
\item[\textsuperscript{155}] F Kirchhof (2009), pp. 167, 168.
\item[\textsuperscript{156}] Ibid, p. 167.
\item[\textsuperscript{157}] Case C-339/11, Stefano Melloni v Ministerio Fiscal [2013], paragraph 56.
\item[\textsuperscript{158}] J Kokott/ C Sobotta (2010), p. 12.
\item[\textsuperscript{159}] Ibid, p. 12.
\end{footnotes}
States and their national fundamental rights more room and authority

3.2.6 Evaluation of the theories

Many of the proposed theories have a significant problem when it comes to their practicability. Although many of them are theoretically reasonable and able to ease upcoming tension, they face obstacles. The biggest one and the major argument to almost all of the proposed theories is the European Court of Justice. It decides about the interpretation of the Treaties and the scope of the Charter and has therefore the 'last word' on EU provisions, even if Member States suggest own, more favourable, approaches or interpretations.

Basically, the first two considered options, the absolute division between the courts and the exclusion of one of the courts, can quickly be discarded since they are not of further use for the debate. However, a positive aspect of these theories would at least be a clear division of jurisdiction. But in a “modern” European Union this is neither executable nor helpful concerning a judicial communication of the courts in the EU. Moreover, the situation that would be created is not intended by any court. Consequently, both approaches are not suitable for a conflict solution.

The thoughts concerning the principle of subsidiarity have some good theoretical starting points but having a lack of practicability. The approach of Herzog/ Gerken shows good starting points in refocussing on the important role of the Member States as the 'Masters of the Treaties' and their appreciation, but is more a statement and claim than a solution. The question of practicability remains. Pointing out the mistakes is one part but the execution another. Hoping for a solution through an intervention of the BVerfG or another national court does not help to calm the situation but would rather lead it to another phase of tension.

The approach of Kirchhof has to face similar reservations. First of all, it is conceivable that a changing of the wording in order to address a specific Member
State would not eventuate in the desired effect. There are many interpretative steps which could lead to different readings in every Member State and on the European level. Moreover, it is still the task of the European Court of Justice to interpret the provisions so that the outcome could still be the same with or without a change of the wording. The approaches concerning the subsidiarity principle are not feasible and are therefore not convincing.

Basically, the approaches with regard to the standard and the national identity point in the same direction. They try to solve the problem that a Member State provides higher protection than the Charter which can lead to violations of national fundamental rights when acting in the scope of European law. That viewing the Charter as a minimum protection is not supported by the European Court of Justice and will therefore never be their starting point in their considerations. This is underlined by the Opinion of General Advocate Bot in the Melloni case, where he clearly rejects the interpretation of Art. 53 CFREU as just providing a minimum standard of fundamental rights protection above which Member States would be free to apply a higher own standards.\textsuperscript{160} Therefore, considering the limit by the fact that the ECJ decides about range and interpretations, approaches seem to be favourable that address directly to the European Court of Justice and its power. Thus, the suggestion that the ECJ should leave more room for the Member States different constitutional rights when they act in the scope of not directly applicable to EU law. Consequently, leaving a wider margin to the Member States and their fundamental rights and national identities could be a suitable and satisfying solution and is a step in the right direction.

\textsuperscript{160} Opinion of Advocate General Bot, Case C-399/11, delivered on 2 October 2012, paragraphs 91, 96.
4. Test case: Counter-Terrorism Database

Recently the German Constitutional Court gave a judgement concerning the establishment of a Counter-Terrorism Database in Germany. After having examined the different positions on the scope of EU fundamental rights and the limitations of Union law, this ruling is a test case concerning this debate and the relationship of the ECJ and the BVerfG. Moreover, with the BVerfG commenting on the highly observed Åkerberg Fransson judgement of the ECJ, this judgement is a potential starting point for the courts in Europe to react to this decision.

Another good example for the effect and reach of the Åkerberg Fransson ruling is the Swedish Supreme Court. At the present time it deals with another case concerning the ne bis in idem principle whose violation was challenged in Åkerberg Fransson. Cases concerning the Swedish situation of double penalty, have been brought to the Supreme Court before and were not queried by it. But after the ECJ's decision, in which the Charter was found to be applicable, the situation might have changed. That this case is even discussed in plenum is just another sign for an exceptional situation. The outcome will be worthwhile.

4.1. Background and Content

The Counter Terrorism Database was created for the purpose of providing more security for the German citizens as a reaction to the failed attempts to ignite suitcase bombs in trains and stations in Western Germany in 2006. The Antiterrordateigesetz (hereinafter ATDG) laid down the legal basis for the

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161 BVerfG, 1 BvR 1215/07, judgement of 24 April 2013.
database which purpose was the fight against international terrorism. The aim of the database is to facilitate and quicken the exchange of information between the involved police authorities and intelligence services (federal government and Länder) in enabling access to information gained from single authorities in connection with the fight against terrorism.\(^{165}\)

According to the Ministry of the Interior's information about the Counter-Terrorism Database, there are currently 17,000 personal data sets.\(^{166}\)

Approximately 84% of the registered persons do not live in Germany but belong to foreign Islamic fundamentalist organisations with connections to Germany.\(^{167}\)

Targeted people or objects are: members or supporters of terrorist organisations and whose contact persons, suspected members or supporters of groups that support terrorist organisations (e.g. collecting donations for 'martyrs') and extremists that are willing to resort to violence and their contact persons (e.g. hatemonger, single terrorist perpetrators).\(^{168}\)

The claimant of the constitutional complaint against the ATDG argues a violation of several fundamental rights enshrined in the Basic Law: the right to informational self-determination (Art. 2 (1) GG in conjunction with Art. 1 Abs.(1) GG), the privacy of correspondence, posts and telecommunication (Art. 10 GG), the inviolability of the home (Art. 13 GG), Art. 19 (4) GG (guarantee of judicial review).\(^{169}\) In addition to that he argues that the ATDG violates the principle of separation of police authorities and intelligence services which results from Art. 87 (1) (sentence 2) GG, a manifestation of the rule of law and the protection of fundamental rights.\(^{170}\)

The German government alleges that the ATDG does not cause an uncontrolled

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\(^{165}\) BVerfG, 1 BvR 1215/07, judgement of 24 April 2013, paragraph 3.
\(^{166}\) Bundesinnenministerium, Die Antiterrordatei, 06.02.2013, (http://www.bmi.bund.de/DE/Themen/Sicherheit/Terrorismusbekaempfung/Antiterrordatei/antiterrordatei_node.html)
\(^{167}\) Ibid.
\(^{168}\) Ibid.
\(^{169}\) BVerfG, 1 BvR 1215/07, judgement of 24 April 2013, paragraph 41.
\(^{170}\) Ibid, paragraph 44.
dataflow but rather only creates the possibility of communication between the different listed authorities and is therefore not violating the principle of separation.\textsuperscript{171} Furthermore, it argues that if there are actual intrusions of the fundamental rights in question, they are justified.\textsuperscript{172} Additionally, the rule of law is also maintained since the information about a registration in the database can be enforced through administrative proceedings.\textsuperscript{173}

4.2. Ruling of the Court

Naturally, the actual judgement of the BVerfG is particularly interesting with regard to national law and the rights of the citizens concerning potential violations of their data protection rights. Hence, there are several interesting aspects of this ruling but not all of them are worth being outlined in the context of this thesis. Therefore, only the general outcomes of this decision will be illustrated, since data fundamental rights in the context of fight against crime is also an European wide issue at the moment (when for example thinking of the Data Retention Directive that caused heated discussions throughout the European Union). The second important topic will be the direct addressing of European Law in this judgement which will be examined afterwards.

Generally, the BVerfG ruled: “The counter-terrorism database is in its fundamental structures compatible with the Basic Law. However, it does not meet the constitutional requirements regarding specific aspects of its design. [...] Under certain conditions, the unconstitutional provisions can continue to be applied until new regulation has been enacted, but no later than until 31 December 2014.”\textsuperscript{174}

Specifically, the database is in its fundamental structures compatible with the

\textsuperscript{171} BVerfG, 1 BvR 1215/07, judgement of 24 April 2013, paragraph 57.
\textsuperscript{172} Ibid, paragraphs 58, 63.
\textsuperscript{173} Ibid, paragraph 66.
fundamental right of informational self-determination. Moreover, its normative configuration also meets the requirements of the principle of proportionality.\textsuperscript{175} It is to be noted that all intrusions of fundamental rights in the German legal order must be proportionate, which follows the scheme: legitimate aim, suitability, necessity, proportionality in a narrow sense (weighing the restrictions of fundamental rights and the pursued aim against the individual and general interests\textsuperscript{176}). The principle of separation of information that follows from the right of informational self-determination applies to every situation in which data is exchanged between police authorities and intelligence services.\textsuperscript{177} Thus, the database can constitute a severe infringement when data is exchanged between these authorities and is therefore only admissible in exceptional cases and has to serve a highly important public interest.\textsuperscript{178} However, the establishment of the Counter-Terrorism Database is in principal compatible with the proportionality principle, since it is justified by the public interest of protection against threads to public safety in emergency cases.\textsuperscript{179} Nevertheless, the configuration of the database is in several aspects unconstitutional. This regards for example the provision concerning the involvement of other police authorities which violates the principle of legal certainty.\textsuperscript{180} Furthermore, the provision regulating the range of persons that are registered in the database is too uncertain concerning the people that are only suspected to support terrorist organisations.\textsuperscript{181} This can lead to the danger that people could be registered that supported those organisations in the forefront without the knowledge of such a connection. Furthermore, the simple requirement of 'advocating' violence is insufficient for recording a person in the database.\textsuperscript{182} Moreover, the Court demands more transparency, legal protection, recording and regular controls which the

\textsuperscript{175} BVerfG, 1 BvR 1215/07, judgement of 24 April 2013, paragraph 105 et seq.

\textsuperscript{176} Constant jurisdiction of the BVerfG, e.g. BVerfGE 100, 313 (375 et seq); 120, 378 (428).

\textsuperscript{177} BVerfG, 1 BvR 1215/07, judgement of 24 April 2013, paragraph 123.

\textsuperscript{178} Ibid, paragraphs 111, 123.

\textsuperscript{179} Ibid, paragraph 130 et seq.

\textsuperscript{180} Ibid, paragraph 139 et seq.

\textsuperscript{181} Ibid, paragraph 147 et seq.

\textsuperscript{182} Ibid, paragraphs 152, 161.
legislator needs to ensure. Finally, the statutorily prescribed complete and unrestricted incorporation of all data collected through infringements of Art. 10 (1) GG and Art. 13 (1) GG is incompatible with the constitution. As a result of the considerations the Court does not declare the challenged provisions being void but unconstitutionally and sets a time limit for the legislator until which the improvements must be made.

Summarising this outcome, it becomes clear how difficult it is to weigh infringements of fundamental rights against the public interest of safety. Nevertheless, the BVerfG provided a very detailed examination without subordinating principles of law when faced with the national aim of fighting international terrorism.

4.3. European law component

This Counter-Terrorism Database judgement is, in many respects, interesting regarding the connection to European law. On the one hand, it is relevant with regard to the German point of view concerning the applicability of EU fundamental rights. On the other hand, it illustrates further the relationship of the BVerfG and the ECJ. It is striking that the BVerfG addresses the 'European law question' in a relatively long paragraph, although it deals with a constitutional complaint against a national law. This can definitely be seen as an indication for the Court's desire to comment on this issue.

4.3.1 Preliminary ruling

First of all, the BVerfG makes clear that it sees no need for a preliminary ruling to the European Court of Justice concerning the clarification of the scope of data communication fundamental rights in the European legal order, especially with

183 BVerfG, 1 BvR 1215/07, judgement of 24 April 2013, paragraph 205 et seq.
regard to Art. 8 CFREU. This statement might sound strongly worded but it stands in line with earlier case-law and is therefore not surprising. So far, the German Constitutional Court has never made a reference for a preliminary ruling. However, this does not mean that it generally supports national jurisdiction without inclusion of European law through preliminary rulings. The BVerfG early started to specify in which situations a national court and especially the courts of last instance have to make a reference for a preliminary ruling to the ECJ (Art. 267 TFEU). Since the ECJ is the lawful judge under Article 101 (1) sentence 2 GG, a claimant can be violated in his rights when the court does not refer a respective question to the ECJ. But the BVerfG always made clear that it only monitors, whether this rule of jurisdiction is handled in a obvious unconstitutionally way. That the Constitutional Court also reacts when such a situation occurs can be seen in a judgement from 2010 in which it plainly criticised the German Federal Labour Court for not asking for a preliminary ruling, although the court could, in its opinion, not have validly made the decision without referring the question to the European Court of Justice. Nevertheless, the situation remains that the BVerfG itself never made such a request.

4.3.2 Scope of EU fundamental rights

In the Counter-Terrorism Database judgement the Court goes on in stating that the actions based on the questioned ATDG do not constitute an 'implementation of EU law' which alone would trigger the applicability of EU fundamental rights; therefore the Charter does not apply in this case. However, it would be wrong to suppose that the BVerfG only judges from a pure national point of view. Rather, it is fair to say that the Court use this case to point out its understanding of the border between the application of EU fundamental rights

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185 BVerfG, 1 BvR 1215/07, judgement of 24 April 2013, paragraph 88.
186 BVerfGE 82, 159 (192 et seq).
187 BVerfGE 73, 339 (366 et seq).
188 BVerfGE 82, 159 (192 et seq).
189 BVerfG, 1 BvR 230/09, judgement of 25.2.2010, paragraph 23.
190 Ibid, paragraph 88.
and national fundamental rights. The Court recognises that the actions based on the ATDG, which supports the possibility of data communication for the purpose of the fight against international terrorism, partly do touch the scope of European Union Law since the EU does have sundry competences and legal bases to regulate data protection (e.g. Art. 16 TFEU) or the fight against terrorism.\footnote{BVerfG, 1 BvR 1215/07, judgement of 24 April 2013, paragraph 89.} In the past the European Union also used these for adopting several bodies of legislation concerning data protection, as for example the Data Protection Directive 95/46/EC\footnote{Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, OJ L 281, 23.11.1995, pp. 31 – 50.} or the controversially discussed Data Retention Directive 2006/24/EC\footnote{Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006, OJ L 105/54.}. Hence, the BVerfG states that also the Counter-Terrorism Database could at least have an indirect effect on the scope of the Union's reporting obligations when the collected information in the database would help to obtain further results.\footnote{BVerfG, 1 BvR 1215/07, judgement of 24 April 2013, paragraph 89.} Therefore, the situation can occur that the collected data needs to be used for an effective cooperation in matters of judicial cooperation.\footnote{Ibid, paragraph 89.} Consequently, it becomes clear that the BVerfG makes a detailed examination of the legal nature of the ATDG including its possible effects it can exert on European Union law.

Nevertheless, after these deliberations the Court confirms again that the Counter-Terrorism Database is not assessed as an implementation of EU law according to Art. 51 (1) CFREU.\footnote{Ibid, paragraph 90.} Observing the ruling, the language of the Court becomes noticeable when it states that this drawn conclusion is 'undoubted' and 'does not require further clarification'. It even underlines this with EU provisions and case-law of the ECJ and alludes in this context that the European Union has according to Art. 51 (2) CFREU and Art. 6 (1) TEU fixed competences that cannot be extended.\footnote{Ibid, paragraph 90.}
Consequently, the BVerfG does take into account that the ATDG could fall into the scope of EU fundamental rights. But it becomes also clear that the Court wanted to point out why it rejects this interpretation and thereby illustrates its understanding of the scope including the hint of a potentially too wide interpretation by the European Court of Justice.

4.3.3 Åkerberg Fransson critique

Finally, the BVerfG even specifically refers to the decision the ECJ made in the Åkerberg Fransson decision. After it reasoned that the European Court of Justice is not the lawful judge according to Art. 101 (1) GG in the present case, it states that this should have been the same conclusion in the Åkerberg Fransson case. However, since the BVerfG always pointed out that it maintains a cooperative relationship with the ECJ, it emphasises that it does not understand the ruling as an ultra vires act or a situation that would endanger the protection and enforcement of the German constitutional identity.198 As shown above, these are the situations the BVerfG identified over the years as limits to the acceptance of the supremacy of EU law. Hence, it is obvious that the Court felt the need to comment on this issue because it disagreed with it, but did not want to create an open conflict.

But in addition to that, it also stated that the Åkerberg Fransson decision should not be understood in a way that every objective connection of a provision to the pure abstract scope of Union law or a mere actual impact on Union law is sufficient to bind the Member States to the Charter provisions.199 However, despite the intricately wording of the Court in its ruling, the message to the European Court of Justice and its approach is clear.

4.4. Evaluation

This judgement demonstrates exceptionally well how difficult the interplay of

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198 BVerfG, 1 BvR 1215/07, judgement of 24 April 2013, paragraph 91.
199 Ibid , paragraph 91.
several fundamental rights protection mechanisms and the involvement of several courts ensuring this protection can be.

First of all, with regard to the compatibility with German law, the ruling shows how delicate it is to weigh citizens' fundamental rights against the public interest and the high aim of providing public safety in the fight against international terrorism. But the very detailed examination of this executed by the BVerfG also demonstrates that the Court sees itself, first of all, as the 'guardian' to protect German citizens from infringements on their fundamental rights. Although it rates the purpose of the database high, it aims for a balance of both interests and points out limits. Observing other developments in this area, as for example the Al-Quaida Sanctions List\(^{200}\), one becomes aware of the fact that fundamental rights are often subordinated in the fight against international crime or terrorism as it is perceived as a 'higher goal'. In view of the actual brisance of this topic, the approach of the BVerfG is exemplary.

Regarding the passage on European Law, three main points arise: the renewed situation of not asking for a preliminary ruling, the discussion why the Counter-Terrorism Database does not fall within the scope of EU law and the reference to the \(\text{Åkerberg Fransson}\) judgement.

The fact that the BVerfG did not refer the question to the ECJ is explicitly stated but does not surprise considering the history. The fact that the Court never made a reference for a preliminary ruling is indeed controversially discussed. Some people presume that the BVerfG avoids a reference for a preliminary ruling because it would see it as a 'subordination'.\(^{201}\) However, on the other hand, the practice of the Court is still reasonable. Until now, none of the cases the BVerfG had to deal with,


in relation to EU law, can be rated as situation in which the Court had the obligation to refer questions to the ECJ. The requirement of doubt concerning an interpretation did not occur yet; at least not officially. This raises the question whether the BVerfG ensures the necessary consensus in order to not address the ECJ or that they really saw no need to do so because the line of interpretation was clear. However, many would like the BVerfG to finally make a reference for a preliminary ruling for the aim of a better judicial dialogue.\(^{202}\) Without clarifying and stating their way of interpretation in a dialogue with the ECJ, the development of law can at least not be promoted.

That the BVerfG felt the urge to comment on the *Åkerberg Fransson* ruling is a demonstrative example for the public discussion this judgement caused. The press release statement that the Senate decided unanimously on this issue, underlines the Court's standpoint once more. Generally, the passage concerning European law can be read as an indirect hint but also as a signal to the European Court of Justice that the BVerfG would have favoured a more restrictive interpretation. The BVerfG alludes that the ECJ transgressed its limits and decided about a case it should not have taken over. Moreover, it provided an own reading of the case, thereby implying that it hopes for the ruling to be an individual exceptional situation. It becomes quite clear that the Court tries to avoid excessive criticism while saying how they would have assessed the question of jurisdiction. One could see it as an expression of aspiration for the respect for the Member States' national legal orders but also as a signal. While not mentioning it in the actual judgement, the press release also speaks of the Court's assumption that the ECJ's ruling expresses no general view but rather only referred to the individual circumstances.\(^{203}\) The BVerfG obviously attempts to avoid direct confrontation looking at how it points out its disagreement with

\(^{202}\) Wolfgang Weiß in LTO, 8.5.2013, p. 2.

Åkerberg Fransson. However, even its diplomatic formulations do not conceal the obvious criticism.

Summarising, the Counter-Terrorism Database ruling is a suitable test case for the dealing and protection of fundamental rights on the one side, and for seeing the different approaches and interactions of the courts on the other hand. Furthermore, it gives some indication of the national reception of judgements of the ECJ and the problems that can arise in the Member States with regard to the scope of the Charter and the applicability of EU fundamental rights on Member States national orders.
5. Conclusion

This thesis dealt with the interplay of different fundamental rights catalogues in the European Union, focussing on the protection ensured by the European Court of Justice and by the German Constitutional Court. Due to the existence of various fundamental rights catalogues the questions arose whether this situation would lead to an optimation of protection or to tension and conflict.

The Bundesverfassungsgericht was chosen as the 'opponent' of the European Court of Justice because of its long history of fundamental rights jurisdiction based on the Basic Law, its influence on the evolution of EU fundamental rights and the challenging relationship between both courts. The ECJ and the BVerfG convene on equal terms to protect the fundamental rights of the citizens and this circumstance enabled an interesting and significant examination.

For a better understanding of the situations in which tension can arise, it was inevitable to, first of all, have a look at the different protection mechanisms of the courts and their positions on fundamental rights. In this context the evolution of the European fundamental rights protection, from the first recognition of the necessity of protection till the introduction of the written Charter, formed an essential part. The 'reactions' of the BVerfG and its altered position towards the fundamental rights protection on the European level revealed conflict zones. The reservations held by the BVerfG concerning the supremacy of EU law are limited to *ultra vires* acts, the national identity and the standard of EU fundamental rights protection. Furthermore, it showed that difficulties exist concerning the question which actions actually fall within the scope of EU law and how Member States' interest can be respected when acting in this scope, e.g. when implementing directives or invoking fundamental rights as a justification for a violation of fundamental freedoms.
With respect to the detected areas of tension, solution approaches were presented and analysed following the division into two views; the European view of following supremacy and securing uniformity and effectiveness and the German wish for respecting the national competences and fundamental rights catalogues including the possible application of own higher standards.

The evaluation of the different solution approaches showed that the Member States’ fear of an expansion of EU competences through the field of fundamental rights is not ungrounded. Some selected examples of cases, as for example Kreil or Mangold, showed that it is tenable that the ECJ transgressed its limits. They also showed that many cases that caused debates about the limitations of the jurisdiction of the ECJ were German cases which highlights why the Bundesverfassungsgericht, especially, is so critical and watchful.

It should be noted as one of the main results that the addition of several fundamental rights catalogues does not necessarily lead to a higher and better protection. The European Union needs a homogeneous system for the protection of fundamental rights ensured in every Member State which can only be achieved when the provided protection is sufficient and the scopes of application of the different fundamental rights catalogues are clear.

The most important step towards a uniform European system must therefore be cooperation and judicial dialogue between national courts and the European Court of Justice. Without expressing opinions and different interpretations by the national courts the cooperation is aggravated. How important this dialogue is was just recently concretely demonstrated by other powerful European constitutional courts. With Melloni the Spanish Constitutional Court made its first request of a preliminary ruling just in July 2012. Moreover, only in April 2013, even the French Conseil constitutionnel, another big 'opponent' of the ECJ, referred its first question to
Consequently, the Bundesverfassungsgericht should not avoid requests for preliminary rulings to achieve and improve a better judicial cooperation and thus act according to its proclaimed cooperative relationship. Otherwise the BVerfG could find itself in an isolated situation in the future.

Furthermore, the thesis showed that a major problem in the interplay of the Charter and national fundamental rights catalogues is the non-existence of clear distinctions between the jurisdictions of the courts and with that the fears of the Member States of losing influence on national matters which should fall in their jurisdiction. This was in particular underlined by the attempt of finding solution approaches on the Member States' side. Many thoughts about potential limitations of jurisdiction and improving the positions of the Member States founder on the final authority of the ECJ and will therefore most probably remain theories. And although the practicability of creating clearer boarders is a high obstacle, there are suggested ways that aiming towards this direction.

After all, the Member States are the 'guardians of the Treaties' and need to be integrated and not downgraded. A European Court of Justice interfering too much in the national areas without having clear reasons for it will not help to support the judicial cooperation and could, in the worst-case scenario, even lead to exasperated national courts which will raise their reservations to European law supremacy or completely refuse the cooperation.

Therefore, considering the strong position of the ECJ, it is necessary and to be appreciated that national courts are observing ongoing progresses and are expressing concerns and their own interpretations. Hence, the judicial dialogue should not only

be supported by the national courts but as well by the ECJ in scrutinising more thoroughly the different areas of authority and ways of integrating domestic constitutional values.

That there are indeed ways of giving more space to the Member States values even when acting in the scope of European law can be deduced from Åkerberg Fransson and Melloni and is suggested by Kokott (as shown above). Leaving a wider margin of discretion to the Member States when providing higher standards and when applying EU fundamental rights in their internal legal order can be a good way of guaranteeing high standards for the citizens and harmonising the interplay of the different fundamental rights catalogues.

As one can see the debate on how to handle this complex system of different fundamental rights catalogues is still vigorous, although it shifted over the years of evolution to more subtleties of the European Union system. An interesting change could take place when the European Union will accede the ECHR. The European Court of Human Rights could move up to a court more on eye level with the ECJ and therefore provide more influence and control. The evolving structure and the handling of this new situation by the involved courts could create new tensions but also ease existing conflicts. Nevertheless, this situation will be exciting.
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