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**The Interrelationship between the EU Charter of Fundamental Rights and
the discourse of fundamental rights of the EU Member States**

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I. Thesis

In the last decade, the fundamental rights architecture that has emerged in the institutional compound between the European Union and its Member States has undergone fundamental change.¹ A number of factors have contributed to this change. Particularly visible is the fact that with the Treaty of Lisbon, the Charter of Fundamental Rights of the European Union was made binding law. It has thus become an instrument that the Court of Justice of the European Union (CJEU) uses in its daily judicial practice as directly applicable law. It is important to note, however, that the European Court of Justice's basic understanding of the nature of the legal association between the European Union and the Member States has also changed significantly in the last decade. The Court of Justice is in the process of transforming the European Union into a federally organized association in which the European institutions exercise supervision over Member State behavior. The Court of Justice exercises this supervision not only through its case law on Art. 2 TEU, in which it makes obligations of the Member States out of the value statements of this provision and thus establishes constitutional supervision of the exercise of Member State constitutional powers.² It has also assumed fundamental supervision over the conduct of the Member States of the European Union in the area of fundamental rights jurisdiction.

As a consequence, the basic relationship between the Court of Justice and the Member State courts has been reversed. Whereas until a few years ago the Court of Justice operated under the control of the Member State courts, namely the German Federal Constitutional Court (“Bundesverfassungsgericht”) and was primarily concerned with enforcing fundamental rights standards against the organs, institutions and other bodies of the European Union, today it is the Court of Justice that adjudicates far into the areas of competence of the Member States. The Member State courts, especially the German Federal Constitutional Court, continue to search for their role in this new situation and have taken a defensive position. While decades ago the German Federal Constitutional Court aggressively called for an active role of the Court of Justice in the area of fundamental rights, it has recently submitted to the fundamental rights of the European Union and has thus functionally become subordinate to the Court of Justice in this area. The federalization of the association of the European Union and the Member States is thus now also very impressively evident in the area of fundamental rights.

This thesis will be substantiated in more detail in the following.

¹ See, e.g., Thomas Oppermann/Claus D. Classen/Martin Nettesheim, *Europarecht*, 9th ed. 2021.

² See Martin Nettesheim, *Die „Werte der Union“: Legitimationsstiftung, Einheitsbildung, Föderalisierung*, in: *Europarecht* 57 (2022), vol. 5, p. 525-545.

II. The Structure and Scope of the EU Fundamental Rights Order

1. Development

The development of an independent European fundamental rights order began over 50 years ago. In the late 1960s, the CJEU³ was confronted with cases in which measures taken by the then European Economic Community (EEC) clearly interfered with the freedoms of businesses and citizens. At a time when an awareness of the constitutional law necessity and of the political value of liberal fundamental rights was spreading in the Member States of the EEC, supported by the growing importance of the European Convention on Human Rights (ECHR), the judges of the Court of Justice could not and would not stand aside. Initially, they judged on the basis of general legal principles of Community law, and also with recourse to the provisions of the ECHR. The level of control applied by the CJEU was low; openly or implicitly, it granted the political institutions of the EEC a wide margin of appreciation. The restrictions resulting from the jurisprudential oversight by the CJEU over for the political organs of the EEC was thus insignificant. However, the development of a system of fundamental rights was of central importance for the political self-image of the EEC and for its standing vis-à-vis the Member States; fundamental rights provided legitimacy.

In December 2000, the Conference of Heads of State and Government of the EU Member States in Nice formally adopted the Charter of Fundamental Rights drafted by a Convention. This political proclamation initially did little to change the fundamental rights architecture in the EU. The CJEU was reluctant to invoke this document. Politically, the document was seen primarily as an instrument of self-binding for the EU; it was also intended to compensate for the fact that the EU was not a member of the ECHR. The legal interpretation of the Charter changed with the entry into force of the Lisbon Treaty, which provided that the Charter would become binding law and have the status of primary law (Article 6 (1) TEU). In the legal practice of the EU institutions and in the case law of the CJEU, this initiated a profound process of change.

The importance of EU fundamental rights in the Brussels political sphere increased sharply: the number of political documents in which the EU institutions referred to fundamental rights rose considerably in the following period. This was not so much a matter of the liberal dimension of fundamental rights, which were already secured in the primary law of the European Union, especially in the fundamental freedoms. The political significance of Charter's now binding fundamental rights lay primarily in the area of equality rights and social entitlement rights. In the jurisprudence of the Court of Justice, too, a strong increase

³ At the time, it was informally called “European Court of Justice” (ECJ). For the sake of clarity, I will use “CJEU” in this paper.

in the importance of fundamental rights could be observed. The Court of Justice still does not see itself as a “fundamental rights court”, as does the European Court of Human Rights or, in some areas, the German Federal Constitutional Court. The members of the European Court of Justice refer to the institution rather as a kind of “Supreme Court of Europe”. However, the Court of Justice has recognized that concern for the maintenance of EU fundamental rights lends legitimacy to the integration process. Moreover, it has discovered the fundamental rights Charter as an instrument with which the development of the political process within the Member States can be steered. Against this background, the fundamental rights of the European Union have become a central pillar of the jurisprudence of the Court of Justice of the EU.

2. Scope of Application

This increase in importance is particularly noticeable in the following fields.

a) Applicability

It was always clear and undisputed that the fundamental rights of the European Union should bind the institutions of the European Union. In this respect, the European Charter of Fundamental Rights was first and foremost an instrument of self-limitation for the public powers of the European Union. In the nineteen-eighties, the Court of Justice established that these fundamental rights would also apply if Member State institutions implemented the law of the then European Economic Community. This jurisprudence was immediately obvious because in such a case the member state bodies acted as agents of the EEC (“agency situation”). This jurisprudence was later reflected in Art. 51 (1) of the European Charter of Fundamental Rights Charter by stating that the provisions of the Charter shall apply not only to the institutions, offices and agencies of the Union,⁴ but also to the Member States exclusively when they are implementing the law of the European Union. The CJEU's review in this regard extends to both the validity of EU secondary law⁵ and the interpretation of secondary law in light of EU fundamental rights.⁶ In 2013, however, the European Court of

⁴ See, e.g., CJEU, 20 September 2016, Ledra Advertising/KOM and ECB (C-8/15 P bis C-10/15 P, EU:C:2016:701).

⁵ See, e.g., CJEU, 8 April 2014, Digital Rights Ireland et . al. (C-293/12 and C-594/12, EU:C:2014:238, Rn. 69); CJEU, 15 February 2016, N. (C-601/15 PPU, EU:C:2016:84,); CJEU, 21 December 2016, Associazione Italia Nostra Onlus (C-444/15, EU:C:2016:978; CJEU, 5 July 2017, Fries (C-190/16, EU:C:2017:513); CJEU, 16 July 2020, Facebook Ireland v. Schrems (C-311/18, EU:C:2020:559).

⁶ See, e.g., CJEU, 20 May 2003, Österreichischer Rundfunk et. al. (C-465/00, C-138/01 and C-139/01, EU:C:2003:294); CJEU, 13 May 2014, Google Spain

Justice then ruled that Carter fundamental rights, beyond the wording of this provision, should also apply to Member States wherever they act within the scope of European Union law.⁷

Today, the substantive law of the European Union has developed a breadth that makes it almost impossible, at least in principle, to identify areas in which the Charter of Fundamental Rights of the European Union cannot be applied to member state action. This danger was recognized at an early stage and prompted the Federal Constitutional Court, for example, to make a critical remark. In the almost ten years since the “Åkerberg Fransson” decision, however, the Court of Justice has not made use of the possibility of an excessive extension of the scope of the Charter. For example, it has held that a dispute between employees and their insolvent employer and a Member State concerning the payment of outstanding salaries does not fall within the scope of Union law.⁸ The same applies to a case in which there was a dispute about the opening hours of stores.⁹ In a 2019 decision, the Court of Justice also classified disputes over the reduction of judges' salaries as cases that cannot be reviewed against the standard of European fundamental rights.¹⁰ The same applies to disputes over the reimbursement of taxes levied on the basis of a state law that was later declared unconstitutional.¹¹

Moreover, the Court of Justice has developed three criteria for determining whether a case under Article 51 (1) GRCH is to be measured against the yardstick of EU fundamental rights. The CJEU assumes that the EU Charter of Fundamental Rights always applies if the facts of the case are within the scope of application of a specific provision of Union law or involve a Member State measure that is directly or indirectly covered by an obligation under Union law.¹² The CJEU has also held that EU fundamental rights apply whenever a Member State measure restricts a legal position under EU law or actually makes its

and Google (C-131/12, EU:C:2014:317); CJEU, 6 October 2015, Schrems (C-362/14, EU:C:2015:650); CJEU, 21 December 2016, Tele2 Sverige and Watson et. al. (C-203/15 und C-698/15, EU:C:2016:970).

⁷ CJEU, 26 February 2013, Åkerberg Fransson (C-617/10, EU:C:2013:105).

⁸ CJEU, 10 July 2014, Julián Hernández et. al. (C-198/13, EU:C:2014:2055).

⁹ CJEU, 8 May 2014, Pelckmans Turnhout (C-483/12, EU:C:2014:304) .

¹⁰ CJEU, 15 Mai 2019, Corte dei Conti et. al. (C-789/18 und C-790/18, EU:C:2019:417) .

¹¹ CJEU, 30 April 2020, Marvik Pastrogor and Rodes – 08 (C-818/19 and C-878/19, EU:C:2020:314).

¹² CJEU, 6 March 2014, Siragusa (C-206/13, EU:C:2014:126); CJEU, 16 May 2017, Berlioz Investment Fund (C-682/15, EU:C:2017:373); CJEU, 13 June 2017, Florescu et. al. (C-258/14, EU:C:2017:448); CJEU, 19 November 2019, A. K. et. al. (C-585/18, C-624/18 and C-625/18, EU:C:2019:982); CJEU, 19. November 2019, TSN and AKT (C-609/17 und C-610/17, EU:C:2019:981).

enjoyment difficult or impossible.¹³ EU fundamental rights now also reinforce the rights arising from EU citizenship.¹⁴

The CJEU claims to apply EU fundamental rights also in areas where EU law gives the MS room for maneuver.¹⁵

A close look at the cases decided by the CJEU will lead to the conclusion that the decisions on the application or non-application of the EU Charter of Fundamental Rights are less determined by doctrinal rules. More important seems to be the question whether a case has European political significance. Thus, it is not doctrinal stringency that determines the determination of the scope of application of the Charter under Article 51 (1) CFR, but the interest of the CJEU to intervene in a case.

b) EU fundamental rights as entitlement claims/horizontal effect of the Charter of Fundamental Rights

The second development of significance is of a substantive nature. The CJEU has held that the provisions of the EU Charter of Fundamental Rights have the quality of giving rise to performance rights of individuals. The CJEU addressed this issue in cases where an employer had refused to provide a former employee or the heirs of a deceased employee with financial reimbursement for paid annual leave that they had not taken before the end of the employment relationship.¹⁶ In these cases, the CJEU not only held that Article 31(2) of the Charter applied; it also relied on the consideration that a directive of EU law obliged Member States to grant paid annual leave. It also stated that the persons concerned can derive subjective rights from Art. 31(2) of the Charter, with the consequence that the conflicting state law must remain inapplicable.

The CJEU has also moved to give individual provisions of the EU Charter of Fundamental Rights horizontal effect between private parties. Thus, the Charter of Fundamental Rights is developing into an instrument with which statutory legal relations in the market or in private social relations are superimposed and can be corroborated by the CJEU. This development has also been triggered by

¹³ CJEU, 30 April 2014, Pflieger et. al. (C-390/12, EU:C:2014:281); CJEU, 13 September 2016, Rendón Marín (C-165/14, EU:C:2016:675) and C.S. (C-304/14, EU:C:2016:674); CJEU, 18 June 2020, EU Commission/Hungary (C-78/18, EU:C:2020:476); CJEU, 6 October 2020, EU Commission/Hungary (C-66/18, EU:C:2020:792).

¹⁴ CJEU, 15 July 2012, C.G. (C-709/20).

¹⁵ CJEU, 26 February 2013, Melloni (C-399/11, ECLI:EU:C:2013:107).

¹⁶ CJEU, 6 November 2018, Bauer and Willmeroth (C-569/16 und C-570/16, EU:C:2018:871); CJEU, 6 November 2018, Max-Planck-Gesellschaft zur Förderung der Wissenschaften (C-684/16, EU:C:2018:874).

the decisions of November 6, 2018.¹⁷ So far, it is unclear which other provisions of the EU Charter of Fundamental Rights can have this horizontal effect; however, the door has thus been opened for a corresponding development, especially of the fundamental rights of equal treatment.

c) Development of the substantive content

In the years since the entry into force of the Lisbon Treaty, the individual provisions of European fundamental rights have acquired different significance. Particular importance has been given to the provisions of Art. 8 of the Fundamental Rights Charter (right to adequate data protection) and Art. 7 of the Fundamental Rights Charter (protection of privacy¹⁸). The European Court of Justice has not only derived a right to be forgotten from the provisions of the fundamental rights Charter, but in a longer line of decisions also founded fundamental rights claims against the Member State data retention. In November 2022, the Court held that a provision of EU secondary legislation requiring the disclosure of beneficial owners in EU-registered companies was incompatible with the right to data protection and the right to privacy.¹⁹

Another important area of development of EU fundamental rights is entrepreneurial freedom. Article 16 protects the right to conduct a business which covers the freedom to exercise an economic or commercial activity including the freedom of contract.²⁰ The freedom of contract protects, in particular, the freedom to choose with whom to do business and the freedom to determine the price of a service.²¹ Similarly, the fundamental freedom of services (like the freedom of establishment) protects the offering of particular services for a particular form of remuneration.²² The freedom of contract can be exercised by an undertaking also vis-à-vis users without any bargaining power by way of a standard form contract. In that case the freedom of contract of the user consists, essentially, in deciding whether or not to accept the terms of such a contract.²³ A restriction of the right to conduct a business is, inter alia, the obligation to take measures which may represent a significant cost for an economic operator, have a

¹⁷ CJEU, 6 November 2018, Max-Planck-Gesellschaft zur Förderung der Wissenschaften (C-684/16, EU:C:2018:874).

¹⁸ CJEU, 13 May 2014, Google Spain (C-131/12, EU:C:2014:317), para. 74; CJEU, 24 September 2019, GC/CNIL (C-136/17, EU:C:2019:773), para. 59.

¹⁹ CJEU, 22 November 2022, WM and Sovim SA (C-3720 und C-601/20, EU:C:2022:912).

²⁰ CJEU, 22 January 2013, Sky Österreich (C-283/11, EU:C:2013:28), para. 42.

²¹ CJEU, 20 December 2017, Polkomtel (C-277/16, EU:C:2017:989), para. 50.

²² CJEU, 5 October 2004, Caixa Bank France (C-442/02, EU:C:2004:586), para. 12 et seq.

²³ CJEU, 15 April 2021, Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and others (C-798/18, EU:C:2021:280), para. 60.

considerable impact on the organization of his or her activities, or require difficult and complex technical solutions.²⁴ In order to respect Article 16 rights and to bring it into fair balance with other fundamental rights, such as Articles 7 and 8 of the Charter, restrictions imposed on internet service providers, to take measures (i.e. change their offering) to ensure that data protection rights of users are complied with when their services are used, it is necessary to leave those service providers to determine the specific measures to be taken in order to achieve the result sought; accordingly, they can choose to put in place the measures which are best adapted to the resources and abilities available to them and which are compatible with the other obligations and challenges which they will encounter in the exercise of their activity.²⁵

d) Limited Sensitivity to Member State Perspectives

The Court of Justice of the EU does not consider itself bound by Member State precedents and the practice of Member State courts when interpreting and applying the provisions of the European fundamental rights Charter. The provisions of the Charter are much more autonomously interpreted by the European Court of Justice and understood in the light of the specific aims and purposes of European integration. This does not mean, of course, that the Court does not take note of how Member State courts interpret parallel fundamental rights, provisions of national law. For structural reasons alone, however, the European Court of Justice cannot follow the lead of certain Member States. In individual cases, however, the Court has taken specific account of individual Member States. The so-called "Tarico" case has gained particular importance in this respect. This case dealt with the question of whether European law precluded Member State regulations on the statute of limitations for the possibility of prosecuting serious tax fraud. In the original case, the European Court of Justice answered in the affirmative.²⁶ After the Italian Constitutional Court made it clear that it considered this case law to be a violation of Italian constitutional identity, the European Court of Justice corrected its case law and gave the Italian court leeway to give scope to the state's fundamental rights values.²⁷

It is not yet foreseeable to what extent this flexibility of the CJEU will also be shown in other areas. One will have to assume that the CJEU will only retreat where it is confronted with the most serious constitutional concerns of a Member State court, which are based on an insightful understanding of fundamental rights that is capable of consensus throughout Europe.

²⁴ CJEU, 27 March 2014, UPC Telekabel Wien (C-314/12, EU:C:2014:192), para. 50.

²⁵ CJEU, 26 April 2022, Poland/Parliament and Council (C-401/19, EU:C:2022:297), para. 75.

²⁶ CJEU, 8 September 2015, Taricco (C-105/14, EU:C:2015:555).

²⁷ CJEU, 5 December 2017, M.A.S. (C-42/17, EU:C:2017:936).

III. Reaction of Member State Courts

The above description of the development of the case law of the European Court of Justice on fundamental rights illustrates by way of example the importance that fundamental rights have now acquired in the interpretation of European law. How have the state courts reacted to this?

1. Fertilization of member state legal spaces

In many Member States of the European Union, fundamental rights are applied by the national courts in parallel with the respective substantive law, without a special constitutional jurisdiction reviewing the conformity of the application of the law with fundamental rights separately and specifically at the end. In these cases, fundamental rights regularly do not develop the special legal-political significance they have when a separate and specialized fundamental rights court stands at the top of the hierarchy of jurisdiction. By their very nature, such specialized fundamental rights courts are functionally dependent on attributing particular significance to fundamental rights as their standard of review.

In Member States with a rather less developed tradition of fundamental rights, the development of fundamental rights at the EU level has a stimulating effect: on the one hand, because the substantive EU law applied in these states is understood in terms of fundamental rights; on the other hand, because the awareness of fundamental rights that has grown at the EU level influences policy and law in these states even in areas where the application of EU law is not at issue.

2. Struggle to secure one's own position

In those Member States that have a special fundamental rights jurisdiction, the development of EU fundamental rights and CJEU jurisprudence affects the position of these jurisdictions. This will be illustrated in the following using the example of the German Federal Constitutional Court.

In principle, the German Federal Constitutional Court welcomes the development of an expanded EU fundamental rights system. The same applies to the CJEU's intention to apply fundamental rights vis-à-vis the EU institutions, bodies and agencies. In the "Solange I" decision (1974), the Federal Constitutional Court urged the development of effective protection of fundamental rights at the

EU level,²⁸ and in a decision in 1986 it stated that the EEC at that time had reached the required level of development.²⁹ In this decision, the Federal Constitutional Court stated that sufficiently effective protection of fundamental rights had been achieved at the EEC level and that, therefore, measures taken by the European institutions and German implementing measures would no longer be measured against the yardstick of German fundamental rights. In a 2015 decision, the court made clear that the guarantee of human dignity in Article 1 (1) of the Basic Law (as part of Germany's constitutional identity) could never be called into question by overriding European law.³⁰ Most recently, the Federal Constitutional Court has again emphasized that it refrains from examining EU law against the yardstick of German fundamental rights only because sufficiently effective protection of fundamental rights is guaranteed at the level of the European Union. In a decision of 27 April 2021, the court states: "In accordance with Article 23 (1) 1 GG, the primacy of application of Union law, which excludes recourse to the fundamental rights of the German Basic Law, presupposes, however, according to the established case law of the Federal Constitutional Court, that a sufficiently effective protection of fundamental rights is guaranteed by the application of the fundamental rights of the European Union. Against this background, the fundamental rights enshrined in the German Basic Law can be overlaid by Union law only to the extent that their promise of protection is preserved in substance."³¹ In this context, the court expressly speaks of a reserve function of German fundamental rights (para. 40).

Moreover, the German Federal Constitutional Court has profoundly changed its case law on the relationship between EU fundamental rights and German fundamental rights as well as its case law on its standards of review in 2019. Until then, it had taken the position that EU fundamental rights always apply where German state institutions implement EU law and are fully bound in doing so. In these cases, the Federal Constitutional Court did not consider itself competent to review because its standard of review is only German constitutional law. In cases in which German state institutions had leeway in implementing EU law, on the other hand, the Federal Constitutional Court assumed that German fundamental rights applied when exercising this leeway.³²

In two decisions of November 6, 2019, the court abandoned this view. In cases where the decision of a German state body is conclusively bound by EU law,

²⁸ German Federal Constitutional Court, Decisions ("BVerfGE") vol. 37, p. 271. All decisions can be found here: www.bundesverfassungsgericht.de.

²⁹ German Federal Constitutional Court, Decisions ("BVerfGE") vol. 73, p. 339.

³⁰ German Federal Constitutional Court, 15 December 2015, Decisions ("BVerfGE") vol. 140, p. 317.

³¹ German Federal Constitutional Court, 17 April 2021, Decisions ("BVerfGE") vol. 158, p. 1 (translation by the author of this paper).

³² German Federal Constitutional Court, Decisions ("BVerfGE") vol. 118, p. 79 (p. 95 et. sub.); vol. 121, p. 1 (p. 15).

the court continues to assume that only EU fundamental rights apply. However, it then stated that in the future it would review such acts against the yardstick of European fundamental rights. In this way, the Federal Constitutional Court extended its supervisory jurisdiction beyond the scope of German constitution law and assumed that it would also have the power to enforce European fundamental rights in the future. This has been welcomed in some academic literature. Others saw and still see this as an act of exceeding competence (“ultra-virus”), which is not provided for in the German Basic Law and in the statute on the Federal Constitutional Court (“Bundesverfassungsgerichtsgesetz”).

As a result of the change in jurisdiction, the Federal Constitutional Court will in future also be involved in the concretization and further development of European fundamental rights. Formally, the Federal Constitutional Court states that in case of doubt about the interpretation of European fundamental rights, it will refer the matter to the Court of Justice under Article 267 TFEU. In fact, however, it can already be seen that the Federal Constitutional Court will certainly go its own way and will not always refer all questions to the European Court of Justice. It is therefore clear that institutional tensions will arise between the two courts in the future. Even in the short time that has passed since then, a number of decisions of the Federal Constitutional Court have been handed down that would have given rise to a referral. This applies, for example, to a decision of the Second Senate of 1 December 2020.³³

In its new role as a court that can also interpret the European fundamental rights charter, the Federal Constitutional Court has also come to emphasize the need to interpret the provisions of the European fundamental rights Charter in the light of the common constitutional traditions of the Member States of the European Union and in the light of the case law of state courts. In a decision of 27 April 2021 it states: "Not only the interpretation of the fundamental rights guaranteed in the Fundamental Law receives directives from the European Convention on Human Rights, the Charter of Fundamental Rights and the common constitutional traditions of the Member States, as well as their concretization by the highest courts. The interpretation of the Charter of Fundamental Rights must also be guided by the European Convention on Human Rights and the common constitutional traditions of the Member States in the form of their concretization by the highest courts."³⁴ The wording makes it clear that the Federal Constitutional Court will insist in the future that the Court of Justice understands the fundamental rights of the European fundamental rights charter as a joint project, in the development of which not only the European level, but also the courts at the state level cooperate. In its decision of 27 April 2021, the Federal Constitutional Court undertakes a detailed examination of Article 16 CFR. It

³³ German Federal Constitutional Court, 1 December 2020, Decisions (“BVerfGE”) vol. 156, p. 182.

³⁴ German Federal Constitutional Court, 27 April 2021, Decisions (“BVerfGE”) vol. 158, p. 1 (translation by the author of this paper).

seems as if it wants to explain to the CJEU how to properly understand the provision. These efforts can be understood as part of a judicial dialogue between national courts and the CJEU. There is, of course, a latent threat behind this: if the CJEU were to deviate from it in subsequent decisions, the Federal Constitutional Court could find a violation of the minimum standards required by the German constitution.

In the areas in which EU law opens up scope, the German Federal Constitutional Court postulates the applicability of German fundamental rights in the above-mentioned decisions, albeit in close connection with EU fundamental rights. There is thus a conflict here between the CJEU, which assumes that there is competition between EU fundamental rights and state fundamental rights, with EU law taking precedence,³⁵ and the view of the German Federal Constitutional Court, which assumes that German fundamental rights take precedence.

IV. Conclusion

The picture drawn above makes clear how offensively and broadly the European Court of Justice has come to grasp its function as a fundamental rights court. The EU fundamental rights, which were initially designed as an instrument for the self-education of the EU institutions, now have an important steering function in the Member States. As a consequence, the member state courts are forced to redefine their own mandate and their own competences. In Member States without specific fundamental rights jurisdiction, this has been relatively easy for the courts. In states with specific basic jurisdiction, however, the bold realization of the European basic legal order has had functional and substantive consequences. The co-member state constitutional courts had to redefine their role. In Germany, it could be observed that the proud and enormously influential Constitutional Court had to subordinate itself functionally to the European Court of Justice, even if it tries to continue to raise a loud, audible and weighty voice in the interpretation of fundamental rights, now precisely those of European law. Ultimately, however, even the Federal Constitutional Court does not question the fact that a process of federalization is taking place in the area of fundamental rights, which has led to a redistribution of legal responsibilities and power-political influence. This process is not yet at an end.

³⁵ CJEU, 26 February 2013, Melloni (C-399/11, ECLI:EU:C:2013:107).