RIVISTA DI
DIRITTI COMPARATI

The Federal Constitutional Court as European law-friendly watchdog of the European Court of Justice – The 'Egenberger' case *

Andreas Haratsch

CONTENTS: 1. Introductory Remarks. – 2. The Initial Legal Dispute. – 3. The Decision of the Federal Constitutional Court. – 3.1. The Applicability of the Fundamental Rights of the Basic Law – 3.2. The Interpretation of the Scope of Protection of the Fundamental Right. – 3.3. The Interpretation of the Fundamental Right's Limits in the light of EU Law. – 3.4. Possible Exceptions to the Primacy of Application. – 3.5. The Unconstitutionality of the Federal Labour Court's decision. – 4. The Federal Constitutional Court as the final authority on EU law. – 4.1. The EU-friendly Tone of the Decision. – 4.2. The Federal Constitutional Court as 'Supreme Court of Appeal'. – 5. Conclusion.

1. *Introductory Remarks*

As we all know, relations between the European Court of Justice (ECJ) and the German Federal Constitutional Court (FCC, in German: BVerfG) are extremely tense. As early as 1974, the Federal Constitutional Court claimed the right to review measures taken by the European Community on the basis of the fundamental rights enshrined in the Basic Law due to inadequate protection of European fundamental rights[1]. Admittedly, this 'Solange' ruling by the FCC has lost some of its sharpness as a result of the second 'Solange' decision, which recognised the fundamental rights jurisdiction of the ECJ and represented a certain withdrawal of the FCC's right of review[2]. Nevertheless, the national reservation remains in place in the event that the protection of fundamental rights guaranteed by EU law should no longer prove to be equivalent to the protection of fundamental rights under national law.

In addition to this 'Solange' reservation, two further reviews have been introduced by the FCC. The first of these is the ultra vires review, which was first invoked in the ruling on the Maastricht Treaty[3]. Here, the FCC examines whether legal acts of the European Union fall within the scope of the powers transferred to the European Union by German law or whether they exceed these powers. Secondly, in its ruling on the Treaty of Lisbon, the FCC developed an identity review. According

* The article has been submitted to a double-blind peer review process according to the journal's guidelines.

1 BVerfGE 37, 271 (285), *Solange I.*

2 BVerfGE 73, 339 (387), *Solange II.*

3 BVerfGE 89, 155 (188), *Maastricht.*

to this, the court examines whether measures taken by the European Union violate the inviolable core identity of the German Basic Law, which is protected from change, in accordance with Article 79(3) of the Basic Law[4].

All three national reservations – fundamental rights review, ultra vires review and identity review – represent a breach of the primacy of application postulated by the European Court of Justice, as national constitutional law would prevail over European Union law in this respect. This stands in stark contrast to the case law of the ECJ, according to which EU law must take precedence over national law, even over constitutional law.

The low point in relations between Germany's highest court and the European Court of Justice was marked by the Federal Constitutional Court's PSPP ruling on 5 May 2020[5]. This ruling concerned the legality of a European Central Bank programme to purchase government bonds. After the ECJ had ruled that this programme was covered by the powers of the European Union and the European Central Bank, the German Federal Constitutional Court disagreed. It ruled that both the ECB's decisions and the ECJ's ruling were to be classified as ultra vires acts. The FCC certified that the European Court of Justice's interpretation of the treaties with regard to the delimitation of powers was simply not comprehensible and therefore objectively arbitrary[6]. These statements were a blatant snub to the European Court of Justice. In my contribution to the 'Festschrift' in honour of *Paolo Ridola*, I attempted to explain that the reasoning of the FCC was in no way convincing[7]. The ruling is not only extremely questionable from a constitutional point of view, but also, from a legal policy perspective, a blatant mistake on the part of the FCC. There was no question here of the FCC exercising its right of review in a restrained and European law-friendly manner, as it had actually imposed on itself[8].

The PSPP ruling was perceived as a bombshell, not least because it had previously been believed that the relationship between the two courts had eased somewhat. This assessment was based on the two 'right to be forgotten' rulings handed down by the Federal Constitutional Court on 6 November 2019[9]. Here, the Constitutional Court had – at first glance – taken a more conciliatory and EU law-friendly tone. In the first ruling, the FCC states that it reviews domestic law and its application against the yardstick of the fundamental rights of the Basic Law if national law falls within the scope of EU law but is not completely determined by it[10]. Where EU law grants Member States leeway, it does not generally aim at uniformity in the

[4] BVerfGE 123, 267 (354), *Lissabon*.
[5] BVerfGE 154, 17, *PSPP*.
[6] BVerfGE 154, 17 (94 f.), *PSPP*.
[7] A. Haratsch, *Der entfesselte Prometheus oder Karlsruhes Spiel mit dem Feuer – Ein europäisches Drama*, in *Riv. it. sc. giur.*, 10/2019, p. 843 ff.
[8] BVerfGE 126, 286 (303 f.), *Honeywell*.
[9] BVerfGE 152, 152, *Recht auf Vergessen I*; BVerfGE 152, 216, *Recht auf Vergessen II*.
[10] BVerfGE 152, 152 (169), *Recht auf Vergessen I*.

protection of fundamental rights, but allows for pluralism of fundamental rights[11]. However, the fundamental rights of the German Basic Law must be interpreted in the light of the European Charter of Fundamental Rights[12].

While this is already a remarkable step, the second 'right to be forgotten' decision goes even further. The decision dealt with cases in which national law is completely determined by EU law. In such cases, the Member States have no room for manoeuvre. According to the FCC, when applying provisions that are completely harmonised under EU law, it is not German fundamental rights that are applicable, but solely EU fundamental rights[13]; EU law takes precedence over the fundamental rights enshrined in the Basic Law[14]. The conclusion drawn by the Federal Constitutional Court is revolutionary. Insofar as the fundamental rights of the Basic Law are superseded by the primacy of EU law, the Constitutional Court will review its application by German authorities against the yardstick of EU fundamental rights[15]. Functionally, the German Constitutional Court thus becomes partly an EU court[16]. In both constellations, the Federal Constitutional Court recognises that a referral to the ECJ pursuant to Article 267(3) TFEU should first be made if unresolved questions arise regarding the interpretation of the Charter[17].

2. *The Initial Legal Dispute*

This is the legal background to the Egenberger case, which has been occupying the German and European judiciary for almost 14 years now and which will be the focus of my following remarks. In 2012, the 'Protestant Agency for Diakonia and Development' (EWDE) in Berlin advertised a position in the project 'Parallel Reporting on the UN Anti-Racism Convention'. The Agency is a private-law association that was formed through the merger of the Social Welfare Organisation of the Protestant Church in Germany and the Protestant Development Service. In the job advertisement, the Protestant Agency stated that membership of a Protestant church and identification with the diaconal mission were required. Vera Egenberger, who is not a member of any religious denomination, applied for the position without commenting on her religious affiliation. She was not invited to an interview. She then filed a lawsuit with the labour court and demanded compensation on the basis of the General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz, AGG)

[11] BVerfGE 152, 152 (171 f.), *Recht auf Vergessen I*.
[12] BVerfGE 152, 152 (177), *Recht auf Vergessen I*.
[13] BVerfGE 152, 216 (233), *Recht auf Vergessen II*.
[14] BVerfGE 152, 216 (235), *Recht auf Vergessen II*.
[15] BVerfGE 152, 216 (236 ff.), *Recht auf Vergessen II*.
[16] A. Haratsch - Christoph Brömmelmeyer - Alexander Thiele, *Europarecht*, 14th ed., Tübingen 2026, para. 658.
[17] BVerfGE 152, 152 (183), *Recht auf Vergessen I*; BVerfGE 152, 216 (244 ff.), *Recht auf Vergessen II*.

because she had been discriminated against on religious grounds. After the labour court awarded her compensation[18], the regional labour court dismissed the claim in the second instance[19]. It ruled that she was not entitled to compensation because the difference in treatment on the basis of religion was justified in any case.

In the appeal proceedings, the Federal Labour Court initiated a preliminary ruling procedure before the ECJ pursuant to Article 267 TFEU[20]. The issue at stake was the interpretation of Article 4 (2) of Directive 2000/78 on equal treatment in employment and occupation[21]. Ultimately, the question to be answered was whether and under what conditions a church employer may require membership of a church for a specific position to be filled and to what extent the state courts may review this with regard to the right to religious self-determination.

In its 2018 ruling[22], the ECJ recognised that the rejection of an applicant must be subject to effective judicial review. A justification according to which religion, in view of the ethos of this church, is subject to judicial review as 'a genuine, legitimate and justified occupational requirement' in view of the nature of the activities concerned[23]. The courts must take into account, on the one hand, that the legitimacy of the ethos of the church or organisation in question must not be assessed and, on the other hand, that the right of employees not to be discriminated against on grounds of religion must not be infringed[24].

On the basis of this preliminary ruling by the ECJ, the Federal Labour Court ordered the Protestant Agency to pay compensation to Vera Egenberger[25]. Parts of the German General Act on Equal Treatment were not compatible with EU law and had to remain unapplied[26]. Furthermore, there was no justification for the unequal treatment[27]. The Federal Labour Court acknowledged that there was a direct link between the occupational requirements and the advertised position[28]. However, church membership did not constitute a genuine, legitimate and justified occupational requirement[29]. The Protestant Agency filed a constitutional complaint with the Federal Constitutional Court against this decision.

---

[18] ArbG Berlin, 18 December 2013, 54 Ca 6322/13.

[19] LArbG Berlin-Brandenburg, 28 May 2014, 4 Sa 157/14 4 Sa 238/14, ZMV 2014, p. 232 ff.

[20] BAGE 154, 285, *Egenberger*.

[21] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

[22] ECJ, 17 April 2018, C-414/16, ECLI:EU:C:2018:257, *Egenberger*.

[23] ECJ, 17 April 2018, C-414/16, ECLI:EU:C:2018:257, para. 53, 55, *Egenberger*.

[24] ECJ, 17 April 2018, C-414/16, ECLI:EU:C:2018:257, para. 61, *Egenberger*.

[25] BAGE 164, 117, *Egenberger*.

[26] BAGE 164, 117, para. 38 ff., *Egenberger*.

[27] BAGE 164, 117, para. 59, *Egenberger*.

[28] BAGE 164, 117, para. 72, *Egenberger*.

[29] BAGE 164, 117, para. 93 ff., *Egenberger*.

3. *The Decision of the Federal Constitutional Court*

In September 2025, the Federal Constitutional Court upheld the constitutional complaint and ruled that the Agency's fundamental right to religious self-determination (Article 4 (1) and (2) in conjunction with Article140 Basic Law and Article 137 (3), first sentence, Weimar Constitution) had been violated[30].

3.1. *The Applicability of the Fundamental Rights of the Basic Law*

a) Granting Member States latitude

After the FCC has affirmed the admissibility of the constitutional complaint, it first examines whether German or European fundamental rights are applicable. Based on the criteria of the 'right to be forgotten' rulings, the court asks whether EU law affords Member States any latitude. If Member States were granted a certain latitude, this would suggest the possibility of a pluralism of fundamental rights and would allow for the application of national fundamental rights[31]. After very thorough examination, the FCC affirms the applicability of national fundamental rights, as the relevant European directive affords Member States room for manoeuvre[32]. The purpose of Directive 2000/78 is to establish a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation in employment and occupation. Article 4(2) of the Directive grants Member States discretion in view of the different national legal traditions regarding the relationship between the state and religion[33]. The provision allows Member States to adopt or maintain regulations that permit churches and other public and private organisations whose ethos is based on religious principles to treat people differently on grounds of religion under certain conditions. In this regard, the Federal Constitutional Court also refers to the case law of the European Court of Justice, according to which Directive 2000/78 establishes a general framework for the implementation of equal treatment, leaving Member States a margin of discretion[34]. The Constitutional Court further refers to Article 17(1)

[30] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, *Egenberger*.

[31] Cf. M. Mahlmann, *Winning by Losing: The Egenberger Decision and the Reconfiguration of Religious Freedom in Germany*, in *VerfBlog*, 2025/11/06, https://verfassungsblog.de/winning-by-losing-egenberger/, DOI: 10.59704/c1743dd2eb54f028.

[32] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 144 ff., *Egenberger*; approvingly M. Wendel - S. Geiger, *Pluralism of Fundamental Rights with an Element of Surprise*, in *VerfBlog*, 2025/12/22, https://verfassungsblog.de/egenberger/, DOI: 10.59704/c0daea35fab0fe1e.

[33] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 155 ff., *Egenberger*.

[34] ECJ, 15 July 2021, Joined Cases C-804/18 and C-341/19, para. 86, *WABE and MH Müller Handel*.

TFEU[35]. According to this, the Union respects the status enjoyed by churches and religious associations or communities in the Member States under national law. EU law thus safeguards national identities in the field of constitutional law on religion[36].

b) Possible restriction of Member States' leeway

The application of the fundamental rights enshrined in the Basic Law as the standard for review, does not apply without exception. A review based solely on the standard of German fundamental rights is insufficient where there are concrete and sufficient indications that the level of protection afforded by fundamental rights under EU law is, exceptionally, not guaranteed[37]. The Federal Constitutional Court therefore examines whether stricter fundamental rights requirements might arise from Article 21 of the Charter of Fundamental Rights of the European Union, which prohibits any discrimination on grounds of religion or belief. Stricter requirements under EU law could arise from the fact that the prohibition of discrimination under Article 21 has direct effect in private law relationships[38]. However, the Court rejects the view that the prohibition of discrimination under Article 21 leads to a restriction of the discretion afforded to Member States. It refers to Article 3 (3), first sentence, of the Basic Law, which states that no person may be favoured or disfavoured because of faith or religious opinions.

In the view of the Federal Constitutional Court, it is irrelevant that this fundamental right does not have direct horizontal effect in relations between private individuals. The court expressly reaffirms its previous case law and states that fundamental rights have only an indirect effect in private law relationships[39]. Whilst the Federal Constitutional Court had previously rejected the indirect third-party effect of the general right to equality between private individuals under Article 3 (1) of the

[35] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 161, *Egenberger*.

[36] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 161, *Egenberger*; so too W. Michl, *Art. 17 TFEU*, in M. Pechstein - C. Nowak - U. Häde (eds.), *Frankfurter Kommentar zu EUV, GRC und AEUV*, 2nd ed., Tübingen, 2023, para. 12; R. Streinz, *Art. 17 TFEU*, in R. Streinz (ed.), *EUV/AEUV*, 3rd ed., München, 2018, para. 2; different however F. Schmidt, *Art. 17 TFEU*, in J. Schwarze - U. Becker - A. Hatje - J. Schoo (eds.), *EU-Kommentar*, 4th ed., München, 2019, para. 13; E. Hartmeyer, *Burgfrieden zwischen Karlsruhe und Luxemburg?!*, in *EuZA*, 2026, p. 333 (339 ff.); P. Ermacora, *Zwischen Integrationsfreundlichkeit und Grundrechtsföderalismus*, in *EuZW*, 2026, p. 386 (392).

[37] BVerfGE 152, 152 (179), *Recht auf Vergessen I*.

[38] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 169, *Egenberger*; cf. P. Gori, *Between ECHR and Horizontal Effect: the Egenberger Case-Law*, in A. Pahladsingh - R. Grimbergen (eds.), *The Charter and the Court of Justice of the European Union: Notable Cases from 2016-2018*, Tilburg, 2019, p. 183 (199 ff.).

[39] BVerfGE 7, 198 (207), *Lüth*; BVerfGE 73, 261 (269); BVerfGE 89, 214 (229); BVerfGE 96, 375 (398); BVerfGE 112, 332 (358).

Basic Law[40], it had left this open with regard to the specific prohibitions on discrimination under Article 3 (2) and (3) of the Basic Law[41]. In 2022, the Court subsequently amended its jurisprudence and affirmed an indirect effect of specific prohibitions on discrimination under certain conditions. The prerequisite is that a prohibition on discrimination involves an objective decision on values enshrined in the constitution, in particular one that has a direct connection to the guarantee of human dignity. The Federal Constitutional Court had already ruled in this regard concerning the prohibition of discrimination on grounds of disability under Article 3 (3), second sentence, of the Basic Law[42]. Continuing this line of jurisprudence, the Federal Constitutional Court states in the Egenberger ruling that the prohibitions on discrimination under Article 3 (3), first sentence, of the Basic Law do not only codify subjective fundamental rights of the individual, but also objective decisions on values[43]. Here, too, the close connection with the principle of human dignity is emphasised[44].

This objective decision on values must be taken into account when applying and interpreting private law[45]. In Germany, the protection against discrimination has been extensively implemented in the ordinary law provisions of the General Act on Equal Treatment. These provisions implement the protection against discrimination in the area of labour law in particular and thereby restrict the occupational freedom of employers and the right to self-determination of religious and ideological communities or associations in their capacity as employers. In this sense, the General Act on Equal Treatment gives comprehensive effect to the constitutional prohibitions of discrimination, including the prohibition of discrimination on grounds of religion or belief, for relationships between private parties. In interpreting and applying its provisions, Courts must take into account the great importance of Article 3 (3) of the Basic Law, which the legislator intended to give effect when it created the General Act on Equal Treatment[46]. Therefore, the Federal Constitutional Court finds that the national prohibition of discrimination pursuant to Article 3 (3) of the Basic Law in

[40] Cf. BVerfGE 92, 26 (50 f.), *Zweitregister*; BVerfGE 148, 267 (283), *Stadionverbot*; cf. also A. Thiele, *Art. 3 (1)*, in F. Brosius-Gersdorf (ed.), *Dreier-Grundgesetz-Kommentar*, 4th ed., Tübingen, 2023, para. 85.

[41] BVerfGE 148, 267 (283), *Stadionverbot*; BVerfG, 27 August 2019, 1 BvR 879/12, NJW 2019, p. 3769, para. 10 f.

[42] BVerfGE 160, 79 (114), *Triage*.

[43] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 172, *Egenberger*, with reference to BVerfGE 17, 1 (27).

[44] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 172, *Egenberger*; cf. also BVerfG, 2 November 2020, 1 BvR 2727/19, NZA 2020, p. 1704, para. 18; also A. Nußberger – J. Hey, *Art. 3*, in M. Sachs – C. von Coelln (eds.), *Grundgesetz für die Bundesrepublik Deutschland*, 10th ed., München, 2024, para. 233, 236; S. Baer – N. Markard, *Art. 3*, in P. Michael Huber/A. Voßkuhle (eds.), *Grundgesetz*, 8th ed., München 2024, para. 407.

[45] Cf. BVerfGE 7, 198 (201 ff.), *Lüth*; BVerfGE 73, 261 (269); BVerfGE 148, 267 (280 ff.), *Stadionverbot*; BVerfGE 152, 152 (185), *Recht auf Vergessen I*; cf. also M. Eichberger, *Art. 2*, in P. Michael Huber – A. Voßkuhle (eds.), *Grundgesetz*, 8th ed., München 2024, para. 63 ff.

[46] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 174 ff., *Egenberger*.

conjunction with the General Act on Equal Treatment provides comparable protection of the respective fundamental right[47]. National fundamental rights therefore remain applicable and are not superseded by more restrictive provisions under EU law.

3.2. *The Interpretation of the Scope of Protection of the Fundamental Right*

After affirming the applicability of national fundamental rights, the Federal Constitutional Court turns to the determination of the scope of protection of the right to religious self-determination in accordance with Article 4 (1) and (2) in conjunction with Article 140 of the Basic Law and Article 137 (3), first sentence, of the Weimar Constitution[48]. Article 140 of the Basic Law incorporates Article 136 to Article 139 of the Weimar Constitution into the Basic Law. These Articles contain provisions concerning the position of religious communities. Article 137 (3) of the Weimar Constitution, which, pursuant to Article 140 of the Basic Law, forms part of current German constitutional law, protects the right of religious communities to self-determination[49]. It encompasses the freedom to organise and manage their own affairs independently[50]. The examination proves to be unproblematic in this respect. The Agency is affiliated with the Protestant Church and is called upon to fulfil its mission in accordance with the Church's self-perception as defined by its faith. The respective fundamental right encompasses all measures that serve to secure the religious dimension of the organisation's activities in accordance with its religious self-perception and to preserve the direct relationship between its activities and the fundamental mission of the religious community[51]. It entitles the religious community to organise its activities, including maintaining an internal organisational structure, selecting its employees and determining the religious principles that are to form the basis of its activities[52]. The concept of religious practice is to be interpreted broadly, based on the self-perception of the church. However, the mere assertion by a religious community that a matter is its own is not sufficient in itself to assume that it falls within the scope of protection[53]. Rather, it is incumbent upon the state authorities to examine the plausibility of this assertion[54]. Based on this assumption, the activities of the Agency fall within the scope of protection of the fundamental right. The recruitment

[47] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 169, 175, *Egenberger*.

[48] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 176 ff., *Egenberger*.

[49] Ph. Ermacora, *op. cit.*, p. 386 (388); see also G. Anschütz, *Die Verfassung des Deutschen Reiches vom 11. August 1919*, 14th ed., Berlin, 1933, Art. 137 WRV, 4. (p. 634).

[50] G. Anschütz, *op. cit.*, Art. 137 WRV, 4 (p. 634); see also A. von Ungern-Sternberg, *Constitutional Law on religion*, in M. Herdegen – J. Masing - R. Poscher - K. Ferdinand Gärditz (eds.), *Constitutional Law in Germany*, München, 2025, § 21 para. 7 ff., 78.

[51] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 182, *Egenberger*.

[52] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 184, *Egenberger*.

[53] A. von Ungern-Sternberg, *op. cit.*, § 21 para. 82, with a critical view on this.

[54] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 186, *Egenberger*.

criterion of 'membership in a Protestant church and identification with the diaconal mission' is covered by the right to religious self-determination[55].

3.3. *The Interpretation of the Fundamental Right's Limits in the light of EU Law*

While EU law did not play a role in determining the scope of protection, the legal situation is different when it comes to the question of the limits of the fundamental right concerned. According to Article 137 (3) of the Weimar Constitution, which is relevant here, the fundamental right exists 'within the limits of the law that applies to all'. This includes the relevant provisions of the General Act on Equal Treatment[56]. According to Section 7 AGG, employees may not be discriminated against on the basis of their religion. However, the General Act on Equal Treatment also takes into account the special interests of religious communities and privileges them over other employers by creating an additional justification for discrimination on the basis of religion in Section 9 AGG[57]. The provisions of the General Act on Equal Treatment must therefore be interpreted in the light of the constitutional significance of religious self-determination[58]. On the other hand, this must not lead to the purpose of the General Act on Equal Treatment, namely to protect employees from discrimination on grounds of religion, being neglected. According to the case law of the FCC, this interaction between religious self-determination and the purpose of the legal restrictions must be taken into account by weighing up the interests involved in a two-stage examination[59].

The first stage of review ties in with the plausibility test to be applied for the establishment of the scope of protection[60]. This serves to clarify the question of which matters are considered religious and what significance they have for the realisation of religious ethos according to the church's self-perception. In the second stage of the examination, the Federal Constitutional Court has always assumed an 'open overall assessment' of the interests concerned[61].

At both stages of the review, the standards for justification are now being tightened and specified on the basis of the requirements of EU law[62]. The Constitutional Court outlines the effect of European Union law very clearly and unambiguously. The Court states that, with the constitutional authorisation to transfer sovereign rights to the European Union (Article 23 (1), second sentence, of the Basic Law), the Basic Law approves the granting of primacy of application in favour of EU

[55] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 193 ff., *Egenberger*.
[56] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 198, *Egenberger*.
[57] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 201, *Egenberger*.
[58] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 202, *Egenberger*.
[59] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 202, *Egenberger*.
[60] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 204, *Egenberger*.
[61] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 206, *Egenberger*.
[62] According to M. Mahlmann, *op. cit.*

law according to the German Parliamentary Act of Consent to the Treaties[63]. According to the Constitutional Court, the primacy of EU law over national law also applies in principle to national constitutional law. In the event of a conflict, national constitutional law must remain inapplicable[64] unless an interpretation in accordance with EU law is possible[65]. The clarity with which the Constitutional Court expresses this is remarkable. It is followed by a detailed interpretation of the limitations on fundamental rights under German law based on the provision of Article 4 (2) of Directive 2000/78[66].

The plausibility test at the first stage of the examination is tightened by the ECJ's guidelines, as the courts are no longer limited to examining whether the professional requirement is generally a plausible expression of a religious belief according to the religious community's self-perception[67]. Rather, they are obliged to determine whether the nature of the activity or the circumstances in which it is carried out objectively establish a direct link between the professional requirement imposed – in this case, church membership – and the activity in question[68]. This requires a case-by-case assessment that takes into account the specific job[69]. It is incumbent on the religious community to explain, on the basis of its self-perception, in a comprehensible, coherent and consistent manner, what the connection is between the professional requirement imposed and the specific activity concerned. The principle applies that the further the tasks of the advertised position deviate from what determines the religious profile and religious identity formation of the religious community concerned, the greater the requirements for the explanation[70].

At the second stage of review, the manner of balancing the criteria of Article 4 (2) of Directive 2000/78, as interpreted by the ECJ, is also specified in a way that has an impact on German law[71]. Whereas the Federal Constitutional Court had previously based its assessment on the concept of 'practical concordance' («praktische Konkordanz»; *Konrad Hesse*[72])[73], it now applies the criteria set out in the Directive. According to these criteria, unequal requirements for the performance of a job must

[63] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 210, *Egenberger*.

[64] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 210, *Egenberger*; like that already BVerfGE 126, 286 (301), *Honeywell*.

[65] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 210, *Egenberger*; cf. also BVerfGE 140, 317 (352); A. Haratsch - Ch. Brömmelmeyer - A. Thiele, *op. cit.*, para. 179.

[66] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 211 ff., *Egenberger*.

[67] Like that earlier BVerfGE 137, 273 (305 ff.), *Chefarzt*.

[68] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 217, *Egenberger*.

[69] Cf. Malte Seyffarth, *Kirchenmitgliedschaft kann zulässige Einstellungsvoraussetzung sein*, GWR 2026, p. 87; M. Wendel/S. Geiger, *op. cit.*

[70] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 219, *Egenberger*.

[71] M. Wendel - S. Geiger, *op. cit.*

[72] K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th ed., Heidelberg, 1999, para. 72

[73] BVerfGE 137, 273 (319), *Chefarzt*; cf. Ph. Ermacora, *op. cit.*, p. 386 (388).

be 'genuine, legitimate and justified' in view of the ethos of the organisation[74]. The Constitutional Court sees this as overlapping with the criteria of suitability, necessity and appropriateness in the sense of the proportionality test according to German constitutional law doctrine[75]. The professional requirement must be suitable and necessary for the preservation of religious identity. Furthermore, it must not go beyond what is necessary to achieve the objective. It should be noted in the context of the balancing of interests that the fundamental right to freedom of religion pursuant to Article 4 (1) and (2) of the Basic Law is formulated without any express reservation of restrictions. According to the Constitutional Court, this speaks for the special importance of freedom of religion and must also be taken into account in the context of Article 137 (3) of the Weimar Constitution, which here is applicable and which provides for a restriction clause[76]. The greater the significance of the position in question for the religious identity of the religious community internally or externally, the greater the weight of the requirement of church membership. When it comes to filling such positions that are significant for religious identity within the framework of a private-law employment relationship, the church's requirement of church membership is likely to prevail over the conflicting interests of the employees concerned[77]. However, the less relevant the position is to the preservation or realisation of the religious ethos, the more likely it is that protection against discrimination will be given preference[78].

3.4. *Possible Exceptions to the Primacy of Application*

Since the interpretation of national law only needs to be adapted to EU law if EU law takes precedence, the Constitutional Court examines whether a reservation regarding the primacy of EU law may apply[79]. In the Egenberger case, an ultra vires review and a review of fundamental rights in accordance with the Solange case law are being considered. The Federal Constitutional Court emphasises that the reservations of control must be applied with restraint and in a manner consistent with European law[80], and that a preliminary ruling procedure before the ECJ must first be completed[81]. As we have seen, the latter had already happened in the present case, as the Federal Labour Court had sought a preliminary ruling from the European Court of Justice.

---

[74] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 224, *Egenberger*.

[75] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 224, *Egenberger*; criticising this parallelization by the FCC: M. Wendel - S. Geiger, *op. cit.*

[76] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 225, *Egenberger*.

[77] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 225, *Egenberger*.

[78] A. von Ungern-Sternberg, *op. cit.*, § 21 para. 78.

[79] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 226 ff., *Egenberger*.

[80] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 234, *Egenberger*.

[81] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 234, *Egenberger*; cf. previously BVerfGE 126, 286 (304); BVerfGE 134, 366 (383); BVerfGE 142, 123 (204); BVerfGE 152, 216 (244); BVerfGE 164, 193 (287 f.).

a) Ultra vires Review

First, the Federal Constitutional Court examines whether an exception could exist under ultra vires review, whether there is a treaty assignment of power to the Union under the principle of conferral of powers, or whether the acts in question are ultra vires. According to the case law of the Constitutional Court, the assumption of ultra vires acts requires that there be a sufficiently qualified exceeding of competence. This is the case if the exceeding of competence is obvious and leads to a structurally significant shift in competence between the Union and the Member States[82].

Applying these standards, the Constitutional Court examines whether the interpretation of the ECJ is legally justifiable according to general methodological standards or whether it appears objectively arbitrary. The FCC does not classify the Egenberger ruling of the European Court of Justice as a derogating legal act[83]. The fact that the ECJ qualifies the provision of Article 17 TFEU, according to which the Union respects the status enjoyed by churches in the Member States, as a requirement to balance interests and not as an area of exemption is not undisputed, but it is legally justifiable[84]. The ECJ's assessment of the balance of interests is also methodologically justifiable[85]. The adoption of the Anti-Discrimination Directive is covered by the competence norm of Article 19 (1) TFEU. Nor does the ECJ's interpretation of Article 4 (2) of Directive 2000/78 give rise to any serious concerns[86]. There is therefore no exception to the primacy of Union law under the ultra vires doctrine[87].

b) Fundamental Rights Review in accordance with the 'Solange' Case Law

The ultra vires review is followed by a fundamental rights review. The review examines whether the Equal Treatment Directive, as interpreted by the ECJ, falls short of the level of protection of fundamental rights required by the Basic Law[88]. After thorough examination of the protection of fundamental rights at EU level, the Federal Constitutional Court rejects such a shortfall. The provisions guaranteeing freedom of religion in Article 10 of the European Fundamental Rights Charter and Article 9 of the European Convention on Human Rights are examined in detail[89]. The interpretation

[82] BVerfGE 126, 286 (304), *Honeywell*; BVerfGE 154, 17 (90), *PSPP*; BVerfGE 164, 193 (283 f.).
[83] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 236, *Egenberger*.
[84] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 237 ff., *Egenberger*.
[85] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 246 ff., *Egenberger*.
[86] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 251 ff., *Egenberger*.
[87] Likewise M. Wendel - S. Geiger, *op. cit.*
[88] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 254 ff., *Egenberger*.
[89] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 255 ff., 259 ff., *Egenberger*.

of the relevant provisions of the Equal Treatment Directive by the ECJ is also not in conflict with freedom of religion[90]. Even according to the 'Solange' case law, there is therefore no exception to the primacy of EU law[91]. The interpretation of national law in the light of European Union law therefore remains unchanged.

3.5. *The Unconstitutionality of the Federal Labour Court's decision*

Now that the Federal Constitutional Court has developed its standard of review in a very comprehensive examination, it can begin reviewing the contested ruling of the Federal Labour Court[92]. Based on the case law of the European Court of Justice on Article 4 (2) of Directive 2000/78, the Constitutional Court agrees with the Federal Labour Court that Section 9 (1) 1st alternative of the German General Act on Equal Treatment is inapplicable, as the provision violates European Union law[93]. In this case, EU law takes precedence. This is consistent, as according to this provision, unequal treatment on grounds of religion is to be justified solely on the basis of the self-perception of the religious community, without regard to the nature of the activity. In this respect, the decision of the Federal Labour Court is therefore in conformity with both EU law and the German constitution.

However, the Federal Constitutional Court reached a different conclusion with regard to the Federal Labour Court's ruling on Section 9 (1) 2nd alternative AGG[94]. According to this ruling, unequal treatment is permissible if it constitutes a justified occupational requirement based on the nature of the work. The Federal Constitutional Court emphasises here that Article 4 (2) of Directive 2000/78, as interpreted by the European Court of Justice, leaves Member States with a margin of manoeuvre in terms of fundamental rights. Within this scope, German fundamental rights, in this case Article 4 (1) and (2) of the Basic Law in conjunction with Article 140 of the Basic Law and Article 137(3) of the Weimar Constitution, are decisive[95]. In this respect, however, the Federal Labour Court did not sufficiently consider the significance of the right to religious self-determination in its decision. At the first stage of the examination, it is recognised that there is an objective connection between the requirement of church membership and the nature of the specific activity according to the church's self-image. The preparation of a report on the Anti-Racism Convention is about the credible representation of the church to the outside world, to politicians, the public and human rights organisations[96]. The report must be based on the Christian view of humanity, so that the opinion differs from the secular view of other reports. However, the

[90] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 258, *Egenberger*.
[91] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 266, *Egenberger*.
[92] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 267 ff., *Egenberger*.
[93] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 269, *Egenberger*.
[94] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 270 ff., *Egenberger*.
[95] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 272, *Egenberger*.
[96] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 274, *Egenberger*.

Constitutional Court accuses the Federal Labour Court of not taking sufficient account of this religious self-perception in its second-stage assessment. The Federal Labour Court had overstretched the requirements to be observed according to the case law of the ECJ at the expense of the religious self-determination in its interpretation of Section 9(1) 2nd alternative AGG. This constituted a violation of the fundamental right concerned. The Federal Constitutional Court has consequently overturned the ruling of Germany's highest labour court and referred the case back to it[97]. The Federal Labour Court must now render a new ruling in the Egenberger case on the basis of the Karlsruhe decision.

4. *The Federal Constitutional Court as the final authority on EU law*

4.1. *The EU-friendly Tone of the Decision*

If we now ask how the Egenberger ruling by the Federal Constitutional Court fits into previous case law and how it affects the relationship with the European Court of Justice, the conclusion is ambivalent. It goes without saying that church employers are extremely satisfied with this supreme court ruling. But there are other reasons to welcome the decision as well. What is striking are the very clear and unambiguous statements on the primacy of European Union law over national law, including constitutional law[98]. At first glance, the decision has a largely EU-friendly tone[99]. Consequently, the Federal Constitutional Court's ruling is regarded by some as «wise from a legal policy perspective» and «diplomatic»[100]. The Federal Constitutional Court emphasises once again that its reservations must be applied with restraint and in a manner consistent with European law, since the interpretation of Union law – including the determination of the method to be applied in this regard pursuant to Article 19 (1), first subparagraph, second sentence, of the TEU – is primarily the responsibility of the Court of Justice of the European Union. For the purpose of ultra vires review, this means that there must be a qualified exceeding of competence. Such an excess of competence is to be affirmed if it is manifest and of structural significance for the division of competences between the European Union and the Member States. It is also noteworthy that the Federal Constitutional Court takes EU law seriously and engages very intensively with the interpretation of the provisions by the European Court of Justice. Through the proportionality test, the Federal Constitutional Court is even incorporating a key element of the European Court of Justice's Egenberger

[97] BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 278 ff., *Egenberger*.

[98] M. Mahlmann, *op. cit.*

[99] So too C. Dieter Classen, *Anmerkung zu BVerfG, Beschl. v. 29.09.2025 – 2 BvR 934/19*, in *EuZW*, 2026, p. 63 (64); J. Gundel, *Anmerkung zu BVerfG, Beschl. v. 29.09.2025 – 2 BvR 934/19*, in *GPR*, 2026, p. 15 (16); M. Wendel - S. Geiger, *op. cit.*

[100] E. Hartmeyer, *op. cit.*, p. 333 (342).

judgment into German constitutional law[101]. It is surprising that EU law occupies more space in the decision than the reasoning on national law. This is astonishing, and as a professor of European law, one is extremely grateful for this fact. Furthermore, the Federal Constitutional Court does not shy away from interpreting and applying national constitutional law in the light of European Union law. The commitment to the primacy of application is therefore not merely lip service, but is also put into practice. This distinguishes the Egenberger decision from the PSPP decision in a positive way. Although there had also been talk of restraint and compliance with European law, the final PSPP decision was the exact opposite. One might therefore think that the relationship between the Federal Constitutional Court and the European Court of Justice is now characterised by harmony and that the fundamental conflict has been resolved.

4.2. *The Federal Constitutional Court as 'Supreme Court of Appeal'*

However, this is not totally accurate. Although the Federal Constitutional Court pays close attention to EU law and incorporates the European Court of Justice's interpretations into its case law, this is only one side of the coin. The flip side is that the Constitutional Court is at least as meticulous in examining reservations about the primacy of EU law. In this respect, too, the examination of European Union law and the case law of the ECJ is extremely intensive and detailed. It examines whether the ECJ's reasoning is valid and tenable, also drawing on differing views in academic literature. Reading the judgement's reasoning for reviewing the abuse of power and fundamental rights, one could get the impression that a university professor is sitting over a student's exam and correcting it. It feels as though one is reading the margin notes on a student's case study, which the examiner repeatedly marks with the comments 'acceptable' or 'still acceptable'. It is thus argued that the European Court of Justice's interpretation of Article 4 (2), first subparagraph, of the Equal Treatment Directive is 'acceptable'. Likewise, its understanding of Article 17 TFEU as a requirement to weigh up interests rather than as a sectoral exception, and of its significance for the interpretation of Article 4 (2) of the Equal Treatment Directive, is said to be «acceptable in its conclusion'[102].

The Federal Constitutional Court does indeed claim that it exercises its review of the ECJ's judicial practice solely by applying general methodological standards of historical, grammatical, systematic and teleological interpretation. However, how these standards are to be understood and from what they are derived remains curiously unclear. Looking at the Egenberger decision, it is striking that the Federal Constitutional Court is apparently not concerned solely with the 'methodological justifiability' of the ECJ's case law, but also carries out a review of the outcome when

---

101 M. Mahlmann, *op. cit.*

102 BVerfG, 29 September 2025, 2 BvR 934/19, NJW 2025, p. 3765, para. 237, *Egenberger*.

it states that the ECJ's balancing of interests is acceptable. It is also striking that, in assessing whether the ECJ's decision – for instance, in the interpretation of Article 17 TFEU – falls within the bounds of what is justifiable, reference is made exclusively to German-language literature. This gives the impression that a German understanding of the law is being made the benchmark for the interpretation of European Union law[103]. There are good reasons to doubt whether 'generally recognised methodological standards' are in fact consistently used as the benchmark for this judicial review.

The case law of the European Court of Justice is examined in detail and ultimately assessed for its compatibility with the enabling clauses of the EU Treaties and with the Basic Law. In this case, the Federal Constitutional Court acts as a kind of supreme court of appeal, examining the rulings of a lower court for legal errors. From the perspective of the Federal Constitutional Court, this answers the question of who has the final say in interpreting European Union law: it is not the European Court of Justice. Although it is prepared to accept the ECJ's rulings, it nevertheless reserves the right to correct the ECJ and call it to order if this should prove necessary from a national perspective. Under no circumstances does the Federal Constitutional Court wish to subordinate itself to the European Court of Justice[104].

5. *Conclusion*

Ultimately, the Egenberger ruling by the Federal Constitutional Court did not redefine the relationship with the European Court of Justice. What is striking, however, is the detailed examination of provisions of European Union law and their interpretation by the European Court of Justice. For some, this may be a reason to be pleased[105], an example of a successful judicial dialogue[106], while for others it may be a cause for concern[107]. Overall, it must be noted that, through the line of case law on European law issues that it has been following for many years, the Federal

---

103 Likewise M. Wendel - S. Geiger, *op. cit.*

104 Cf. the assessment by J. Gundel, *op. cit.*, p. 15 (16).

105 Positive assessments by M. Ruffert, *Europarecht und Religionsverfassungsrecht. Grundrechtliche Spielräume*, in *JuS*, 2025, p. 1176 (1179); H. Reichold, *Kehrtwende im kirchlichen Arbeitsrecht – Karlsruhe korrigiert Luxemburg im Fall „Egenberger"*, in *RdA*, 2025. p. 376 (378); P. H.M. Rambach - A. Rambach, *Kirchenmitgliedschaft als Einstellungsvoraussetzung? – Spagat zwischen kirchlichem Selbstbestimmungsrecht und Antidiskriminierung*, in *ZTR*, 2026, p. 69 (75).

106 Cf. S. Diethelm Meyer, *Anmerkung zu BVerfG, Beschl. v. 29.09.2025 – 2 BvR 934/19*, in *NVwZ*, 2025, p. 1895 (1895); positive also H-J Kalb, *Anmerkung zu BVerfG, Beschl. v. 29.09.2025 – 2 BvR 934/19*, in *jM*, 2025, p. 363 (364).

107 A. Sagan, *Anmerkung zu BVerfG, Beschl. v. 29.09.2025 – 2 BvR 934/19,* in *GPR*, 2026, p. 12 (14); J. Gundel, *op. cit.*, p. 15 (16 f.); J. Wichert, *Die Kirchenmitgliedschaft als Einstellungsvoraussetzung: Unionsrecht vs. deutsches Recht*, in *MDR*, 2026, p. 420 (424 f.).

Constitutional Court is securing an ever-greater role in the interpretation of European Union law[108].

On the one hand, this is understandable and reasonable, as there are hardly any areas left in the national legal system today that are not permeated or even determined by EU law. If the Federal Constitutional Court were to withdraw its oversight from all these areas, it would face a significant loss of influence. Wherever EU law supersedes national law, including constitutional law, the Federal Constitutional Court would be 'out of the picture'. It counteracts this by also acting as a guardian of compliance with EU legal requirements, as has happened, for example, in the area of the protection of fundamental rights with the 'right to be forgotten' case law. The Federal Constitutional Court is thus effectively transforming itself into a court of the Union.

On the other hand, this intervention by the Federal Constitutional Court in European Union law cannot be accepted without reservation. With its apparent tendency to scrutinise in detail the 'reasonableness' of the European Court of Justice's interpretation of EU law, the Federal Constitutional Court is effectively setting itself up as the supreme guardian of the EU legal order[109]. It is therefore rightly said that the Federal Constitutional Court's ultra vires review is excessive[110]. The Court itself will certainly reject this with indignation. After all, it states – including in the Egenberger ruling – that the primacy of EU law would effectively be undermined and the uniform application of EU law would be jeopardised if every Member State were simply to claim the right to have its own courts decide on the validity of EU legal acts. Notwithstanding this assurance from the highest court, one gets the impression that the Federal Constitutional Court ultimately does not adhere to this maxim which it has itself established. The European Court of Justice may only be proved right in so far as the Federal Constitutional Court approves this following its own thorough examination[111].

***

ABSTRACT: The decision of the German Federal Constitutional Court in the Egenberger case, delivered on 29 September 2025, addresses a highly contentious issue in Germany: whether—and under what conditions—a religious institution may require its employees to be members of the respective church. The dispute had previously come before Germany's highest labor court, which referred the matter to the European Court of Justice (ECJ). Based on the ECJ's ruling, the Federal Constitutional Court has now set aside the final judgment of the German Federal Labour Court and

[108] Ph. Ermacora, *op. cit.*, p. 386 (391).
[109] Similarly J. Gundel, *op. cit.*, p. 15 (17).
[110] J. Gundel, *op. cit.*, p. 15 (16); very critical too A. Sagan, *op. cit.*, p. 12 (14).
[111] In this direction also points Ph. Ermacora, *op. cit.*, p. 386 (390).

has aligned its own prior case law—concerning the scope of a religious institution's right to self-determination—with European jurisprudence. In doing so, the Federal Constitutional Court has also positioned itself as a guardian of compliance with European Union law, asserting its own right to review whether the European Court of Justice's interpretation of EU law is reasonable and acceptable.

KEYWORDS: German Federal Constitutional Court, Egenberger, European Charter of Fundamental Rights, European Court of Justice, Religious Institutions and Antidiscrimination

***

Andreas Haratsch – The Author holds the Chair of German and European Constitutional and Administrative Law and Public International Law at the University of Hagen (Germany) and is Director of the Dimitris-Tsatsos-Institute of European Constitutional Sciences at the University of Hagen (Germany) (andreas.haratsch@fernuni-hagen.de)