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The power of the principle of proportionality and data protection – Does the CJEU converge to an ECtFR (*European Court of Fundamental Rights)*?

It is not difficult to anticipate the importance of proportionality and data protection in a more and more digitalized world. Artificial intelligence and virtual reality may cause legal challenges difficult to cope with due to its missing physical appearance and complexity. The legislator has reacted on these technological and social developments by implementing the CFR. With the Lisbon treaty proportionality is now codified as the essential principle applicable to all fundamental rights and data protection is anchored as autonomous right. Although the CFR to a great extent corresponds to the ECHR and the common traditions of the member states, the question is if the CFR or the ECJ by its interpretation provides a *new legal ground or dogmatic* (germ. *Rechtsdogmatik*)? The principle of proportionality in art. 52 I CFR functions as a *horizontal provision* (germ. *Querschnittsklausel*). In the case law of the German Constitutional Court the principle of proportionality has been strongly elaborated and together with the results of Germany legal theory proportionality has received a rather consistent structure of examination. The question is if the ECJ now follows this way. After a few essential judgments of the ECJ since 2009 the court seems to examine proportionality in this spirit. This has to be verified. It has to be evaluated to what extent the court limits itself to the interpretation of secondary law or directly interprets primary law. With respect to art. 52 III, IV CFR, it has to be evaluated how coherent the proportionality test of the ECJ is in comparison to the ECtHR and the constitutional courts of the member states. Does the ECJ conform to the standards of the ECtHR or even stipulates higher standards?

All these questions are reinforced by the relevance the ECJ assigns to data protection. The cases *Digital Rights Ireland* as of 2014 or *Tele 2 Sverige* as of 2016 regarding *preventive retention of data* (germ. *Vorratsdatenspeicherung*) together with the other case law regarding data protection gives the impression that this fundamental right takes an extraordinary role requiring higher standards of justification. However, the ECJ leaves many open issues regarding the scope, characteristics and functions of data protection. Although art. 8 CFR is an individually constituted right the ECJ follows the ECtHR by linking Art. 8 to art. 7 CFR. Does this proceeding indicate that the ECJ follows the understanding of the ECtHR? The German Constitutional Court has enhanced the meaning of data protection to a rather strong subjective right expressing self determination and human dignity. In its judgment Digital Rights Ireland the ECJ several times emphasizes that data protection enjoys a higher degree of protection by the principle of proportionality. The question arises if limitations of data protection have to be more justified or data protection is a more valuable right. Does the ECJ since the CFR entered into force converge to a *European Court of Fundamental Rights* (germ. *Grundrechtsgericht*)?