



On the Allocation of Competences between the European Union and its Member States in the Media Sector

An Analysis with particular Consideration of Measures
concerning Media Pluralism

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Executive Summary

Introduction

1. The “digital decade” of Europe proposed by EU Commission President *von der Leyen* in her first State of the Union Address on 16 September 2020 can build on EU rules such as the Audiovisual Media Services Directive amended in 2018 and the so-called DSM Directive on Copyright and Related Rights in the Digital Single Market from 2019, which also aimed to make the EU “fit for the digital age”. Already this regulatory fitness program of the EU raised concerns about potential collisions of the future development of the EU legal framework with the regulatory framework for the media on Member State level. The new “digital decade” will pose new challenges for media regulation in the EU at the interface of Union and Member State competences. The different effects of digitization for media regulation, concerning the prevention of disinformation to the digitalization of the relevant infrastructure, have become even more apparent during the Corona pandemic. A comprehensive success of the European digital initiative can only be guaranteed if the responsibilities and competences of the Member States are strictly adhered to. For the Member State Germany this means the Länder according to the fundamental decision of the German constitution for a federal state structure. This applies not least in view of the aim of safeguarding media pluralism, which is laid down in both the European and national fundamental rights systems: the limitations of the EU’s harmonization and coordination competences do not only exist with regard to traditional media concentration law, but also with regard to safeguarding pluralism in view of the digital and global challenges for the media ecosystem.

Legal Framework for the Allocation of Competences on Primary Law Level

2. Even in the course of the repeated, in some instances fundamental changes to the founding Treaties of the European Union, the EU Member States remain the “Masters of the Treaties” which includes the aspects concerning the regulation of the media contained therein. The European multilevel constitutionalism is characterized by a synthesis: the openness of each of the constitutional systems of the Member States for a European integration – however, with a limited dimension and a continuing limitation to the level of integration, which includes a digital single media market – and a constitution of the EU, which in turn is not oriented towards an unrestricted integration perspective, but – irrespective of possibilities for a dynamic interpretation of the integration goal – is bound to the purpose of an ever closer Union below unitary federal statehood of the EU.
3. At the intersection of the perspective of integration under Union law and the fundamental principles of the German constitution, which are barred from any revision and in light of the significance of the regulatory framework for the media as basis of the democratic and federal understanding of the constitution in the Basic Law, there are both reservations and absolute limits set by German constitutional law towards the EU regulating the media in the EU and its Member States in a way that is directed

towards their democratic function. Similar reservations also exist in constitutional systems of other EU Member States.

4. The extent of the EU's integration program as defined in the Treaties with regard to the possibilities of media regulation is especially important in the event of a conflict between Member States' provisions ensuring media pluralism and any possible positive integration via steps towards an own EU pluralism legislation and/or negative integration by setting limits to the Member States' frameworks for the protection of media pluralism by referring to EU internal market and competition law. In this respect, ensuring pluralism continues to be subject to a collision of national law and European law.
5. This collision is resolved by the principle of primacy of EU law, the scope of which is, however, disputed between European and Member State constitutional jurisdictions. The Federal Constitutional Court (*Bundesverfassungsgericht*, FCC) claims in this respect reservations of control with regard to the EU protection of fundamental rights, the exercise of competence by the EU ("ultra vires (beyond powers) control") and the constitutional identity of the German Basic Law. All these reservations may also become significant in the further development of EU media regulation.
6. The EU – unlike a state – has no competence to create its own competences ('competence-competence'). Rather, according to the principle of conferral it may only act within the limits of the competences which the Member States have assigned to it in the Treaties – Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) – to achieve the objectives laid down therein. However, neither the TEU nor the TFEU provide a negative list of areas that are comprehensively excluded from EU law. There is no cultural exception in the Treaties in general, nor a media-related exception in particular. The principle of conferral does not per se impede EU media regulation from the outset. However, the more the EU regulates the media in a way that is relevant for the goal of pluralism, the greater – as a minimum requirement – the EU's burden of proof is to show a continued respect of the clauses of the Treaties that are designed to protect Member State regulatory discretion.
7. The existing division of competences under EU law also applies to matters relating to digitization: digital transformation does not create additional EU competences. Conversely, however, existing legal bases creating competence are not limited to dealing with issues that were known at the time the founding Treaties were adopted. The interpretation of primary EU law is always an interpretation in time and with openness towards new challenges. However, such openness to an interpretation oriented towards digitization finds its limits in the actual wording of the legal bases.
8. The jurisprudence developed by the FCC regarding the possibility of control based on the principle of democracy is of equal importance with regard to the transfer of federal or Länder competences. The basic structure of the German constitutional system, which is barred from any revision and cannot be amended in any context, including the EU law dimension, can be regarded to include the element of federal division of the power to regulate the media. This is to be explained with a view of the constitutional history according to which a "never again" of totalitarian rule was to be achieved. An opening of the German constitutional state for a full harmonization of media regulation by the

EU would therefore be an extremely risky process from a legal perspective, not last with regard to the democratic relevance of 'media federalism' in Germany.

9. With regard to the exclusive, shared and supporting competences assigned to the EU under primary law since the Treaty of Lisbon, the media are not mentioned as such in the relevant catalogs of competences. From a legal comparative perspective, this alone speaks in favor of a restrictive understanding of the Treaties concerning the possible granting of media-related regulatory competences to the EU, which would be connected with the function of the media as cultural factor and guarantor of diversity. However, effects of internal market-related EU measures, which are directed in a general manner at all types of market participants, on the more specific question of media regulation can be observed. Such effects exist in all areas of EU competence. There is no absolute blocking effect of EU law with regard to Member State rules aiming at other objectives, even in the area of exclusive EU competences such as the determination of competition rules under Art. 3(1)(b) TFEU.
10. The EU's supporting competences, where the EU has no original regulatory competence aiming at legal harmonization, include those in the field of culture, including the media in their cultural dimension and educational policy. Media literacy is at the intersection of these competence titles. It is a soft but important component of a system of media regulation which can meet digital challenges in a democratic and socially acceptable manner. The compatibility of an increasing policy of informal regulation of the EU concerning media literacy with the requirement of "fully respecting the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity" expressly recognized in Art. 165(1) TFEU is questionable.
11. The division of competences in the EU Treaties does not prevent enhanced cooperation between individual Member States in the field of media policy. Provided that this cooperation does not relate to the economic dimension of media regulation but to the cultural and diversity dimension of media regulation, there is no need to comply with the primary law requirements for enhanced cooperation. However, it is then a matter of cooperation between these Member States within the scope of their reserved competence, which is possible under EU law, but not governed by it.
12. By granting the EU, within the primary law concept of an integrated community, a competence to review the legal frameworks of the Member States – which encompasses the aspects of freedom and pluralism of the media – a certain conflict arises between the supposed restrictive understanding of the Treaties with regard to a positive media order on EU level and the reviewing authority of the Union bodies. The imperative to shield the Member States' media regulation from intervention by EU law, as it can be deduced not least from an overall view of the rules and limits on the exercise of competences in the EU Treaties, argues in favor of a very restricted approach to the exercise of reviewing authority in this area by the EU.
13. The cross-border activities of traditional audiovisual media companies such as broadcasters as well as new media actors such as media intermediaries are to be classified as services within the meaning of Art. 56 TFEU. A permanent establishment of a media company in another EU Member State is a branch within the meaning of Art.

49 et seq. TFEU. As media regulators, the Länder are obliged to ensure that this category of regulation is in conformity with the EU fundamental freedoms. Media law provisions of the German Länder which are intended to guarantee diversity of opinions and plurality of the media are restrictions of the fundamental freedoms which are justified by overriding reasons of general interest, as long as the measures comply with the prohibition of discrimination and the principle of proportionality.

14. The EU's internal market competences do not entitle the EU to harmonize legislation in the area of media pluralism. The competence title of freedom of establishment must be interpreted narrowly, because only such an interpretation corresponds to the character of a Union consisting of Member States whose national identity must be preserved. In particular, a possible regulatory approach which would reduce the level of freedom of undertakings in the internal market would not be compatible with the internal market concept laid down in Art. 26 TFEU, which is geared at achieving progress towards free cross-border development. A further argument against resorting to regulatory competences in relation to the freedom to provide services is that this fundamental freedom is regularly only indirectly affected by national rules in the area of ensuring pluralism.
15. Competition law and the law relating to the safeguarding of pluralism are two distinct areas. However, market dominance and dominance over public opinion forming are not unrelated phenomena. In particular, competition law is in principle capable of achieving the objective of diversity of offer as a side-effect. EU primary law is not limited in its approach to a television-centered exercise of supervision authority concerning competition. It is rather open to a dynamic understanding, especially concerning the definition of the relevant market and of whether a dominant position is reached. The latter aspect also enables a supervisory response that takes account of intermediaries as such as well as network effects of the digital platform economy. Moreover, the consideration of democratic, fundamental rights and cultural principles and requirements in the context of competition policy is required in the same way and is, for example, according to Art. 167(4) TFEU, at the intersection between the protection of cultural competence of the Member States and the duty of supervision by the Commission in applying the competition rules. This means that when applying competition law, that course of action must be chosen which is most suitable for respecting and supporting the actions of Member States directed at media pluralism.
16. With regard to the cultural dimension of the media, the derogation in Art. 107(3)(d) TFEU on rules governing state aid is of particular importance. The so-called Amsterdam "Protocol on the system of public broadcasting in the Member States" reflects this imperative of an interpretation of Union law which preserves the Member States' margin for maneuver. This protocol openly addresses the tension that can arise between the democratic, social and cultural dimension of the media and their economic relevance – a tension that is not limited to public service broadcasting as a media (sub)category. While the former argues for a regulatory competence of the Member States, the potential internal market dimension of cross-border media activities is obvious with regard to the economic relevance.
17. The restriction for the EU to provide a positive regulatory framework for the media is affirmed for the "audiovisual sector" by the culture clause of Art. 167 TFEU. In

particular, the so-called horizontal clause in paragraph 4 of this Article with the obligation to take cultural aspects into account gives rise to a whole set of requirements which are conducive to and promote diversity and which the EU must take into account in its legislative work and in monitoring the compliance of Member States' activities with EU law. Art. 167 TFEU does not preclude harmonizing media regulation on the part of the EU if it could be developed on a legal basis from the catalog of its exclusive or shared competences. However, it sets out the condition that the EU must take cultural aspects into account in any activity, which regularly amounts to a balancing of cultural and other regulatory goals (e.g. economic aspects in EU competition law). Furthermore, it follows from the system of the TFEU that cultural aspects, in particular those which ensure pluralism, cannot be the focus of rules in EU legislative acts.

18. In addition to the principle of conferral and the catalog of EU competences, substantive legal protection mechanisms such as rules and limits on the exercise of competences under the EU constitutional system should additionally ensure that the conferred powers existing at EU level are exercised in a way that does not encroach on the competences of the Member States. These rules include the requirement to respect the national identity of the Member States (Art. 4(2) TEU), the principle of sincere or loyal cooperation (Art. 4(3) TEU), the principle of subsidiarity (Art. 5(1) sentence 2 and (3) TEU) and the principle of proportionality (Art. 5(1) sentence 2 and (4) TEU).
19. The principle of subsidiarity has so far impacted the EU's use of its competences in particular in a preventive manner; no successful proceedings before the Court of Justice of the European Union (CJEU) based on a violation of this principle have been concluded. Moreover, subsidiarity complaints and actions, given the interplay between the national and European division of competences for the Federal Republic of Germany as a Member State, have an organizational deficit insofar as the exercise of the legislative competences of the Länder is carried out without sufficient coordination between the federal body in charge, the Bundesrat, and the individual Länder parliaments with the goal of safeguarding the legislative competences of the Länder against the EU's overreaching intervention with regard to the subsidiarity principle.
20. The principle of proportionality as a limit to the exercise of powers is also likely to become more important than it has been so far with regard to the division of powers of the EU and its Member States in media regulation matters. This is due to the decision of the FCC of 5 May 2020 on the European Central Bank's government bond purchase program, irrespective of the justified scholarly criticism of this decision, which will impact at least the relationship between the EU and Germany. With this decision, the FCC has for the first time, in a way that reaches beyond the specific case and defines a scrutiny standard, stated that an EU institution acted beyond its powers (*ultra vires*).
21. This decision of the FCC argues for a restraint of legislative action by the EU in areas which are particularly sensitive to fundamental rights from the perspective of the constitutional framing of communication freedoms in the Member States. For example, a full harmonization of the area of media pluralism in the digital media ecosystem would strongly raise questions about exceeding the *ultra vires*-limits in the relationship between the CJEU and the FCC. Such an extension of the scope of application of EU media regulation *ratione personae* and/or *ratione materiae* disregarding Member State competences would further endanger the interaction between the EU and the Member

States which is based on an approach of cooperation and could further strain the relationship between the CJEU and the FCC.

22. The approach of a multi-level system EU in which “democracy” and “pluralism” as addressed as values in Art. 2 TEU are based on a division across the levels, clearly speaks against a “supplementary competence” of the EU to regulate media pluralism in an overarching manner across all levels of the European integration community with the supposed goal of safeguarding democracy as a value. Such a regulation across all levels is also inconceivable in the context of the regulation of the election procedure for the European Parliament under Art. 223 TFEU.
23. The increasing significance of a growing “democracy community” does not imply any competence on the part of the EU for regulating media as a pre-legal prerequisite for a further deepening of this democratic bond either. The EU constitution is not designed to derive powers under integration law from integration policy objectives. To the extent the Union may deal with the prevention of disinformation campaigns, for example, then this has to happen from the perspective of the internal market: there should be no barriers to the free movement of goods and services as a result of differing approaches by the Member States concerning the prevention of such campaigns. However, this does not justify an own approach to a regulation by the Union to safeguard pluralism overall.

On the importance and legal sources of media pluralism at EU level

24. The fundamental rights of media freedom and pluralism enshrined in the Charter of Fundamental Rights of the EU (CFR) and the European Convention on Human Rights (ECHR) imply that, although it is not one of the EU's original competences, safeguarding freedom and pluralism in the media has a special role to play also at the level of EU measures. The EU is obliged to respect fundamental rights in all its actions, just like the Member States. This does not lead to the creation of a competence for media regulation, but on the contrary to a need to respect diversity, whereby the EU must choose in its actions that alternative which best enables media pluralism and correspondingly any regulation by the Member States which is necessary to attain that objective.
25. On the one hand, this applies firstly from a negative rights perspective: the EU must not interfere in an unjustified (specifically: disproportionate) way with fundamental rights protected by the CFR and the ECHR, which means that the impact of any EU action, whether legislative or executive, on the (broadly understood) freedom of the media must be considered and, where appropriate, be balanced with other legitimate interests – whether recognized by the Union as public interest objectives or the need to protect rights and freedoms of others. This also applies to measures relating to completely different areas of regulation, such as the economic sector or consumer protection. On the other hand, the positive dimension of fundamental rights in the CFR and the ECHR requires those who are bound by fundamental rights to make every effort to ensure that the conditions for the effective exercise of fundamental rights are met. These preconditions of freedom include not least the pluralism of the media. Irrespective of the extent to which one wants to see this as an active duty to take action to establish, if necessary by a regulatory approach, an appropriate level of

protection, which would only be addressed to Member States, because of the way the competences have been divided and how this is laid down in CFR and TFEU, it can be maintained that freedom of expression and freedom of the media and the principles and rights derived from them can justify interferences with other rights and freedoms under EU primary law.

26. Safeguarding media pluralism has always been a key issue in this context. In its case-law, the European Court of Human Rights (ECtHR) has repeatedly emphasized that media can only successfully exercise its essential role in democratic systems as “public watchdog”, if the principle of plurality is guaranteed. In that context the ECtHR addresses the Convention States as guarantors of this principle. Referring to the explicit inclusion of the obligation to respect media pluralism in Art. 11(2) CFR, the CJEU also underlines the importance of this guiding principle at EU level, referring not only to the CFR, but the ECHR and case law of the ECtHR, too. The CJEU stresses that media pluralism is undeniably an objective of general interest, the importance of which cannot be overemphasized in a democratic and pluralistic society. Pursuing this objective is therefore also capable of justifying interferences with freedom of the media and freedom of expression itself, any other fundamental rights and, last but not least, the fundamental freedoms guaranteed at EU level.
27. The significance and scope of this conclusion for the regulation of the media sector become clear when considering the fundamental freedoms guaranteed in the TFEU and the relevant case law of the CJEU in a media-related context. Especially as the rights to free movement of goods, services and establishment, the fundamental freedoms protect comprehensively the internal market and EU undertakings operating in this market in the cross-border provision of their offers by way of prohibiting restrictions and discrimination. The media, in their role as economic operators in the EU, are therefore in principle free to distribute their content, whether in digital or analogue form, in tangible or intangible form, beyond the borders of the Member State in which they are established. In doing so, they are entitled not to be treated differently from other providers or to be hindered or restricted in any other way. However, this freedom is not guaranteed without restrictions. In addition to explicit limitations to the individual fundamental freedoms, restrictions can be justified by the pursuit of recognized general interest objectives, which, according to the settled case law of the CJEU, include the upholding of media pluralism.
28. Not only because of the rules concerning the division of competences, but also in light of recognizing a related concept of a cultural policy which may be characterized by different national (constitutional) traditions with regard to media regulation, the CJEU grants the Member States a wide margin of discretion in the fulfilment of this objective. Acknowledging that considerations of a moral or cultural nature may differ from one Member State to another, it is for the Member States to decide how to determine an adequate level of protection for the achievement of their cultural policy objectives, including media pluralism objectives, taking into account national specificities. This discretion also extends to the type of instruments they implement to achieve this level of protection. This freedom of defining and structuring the approach, which is recognized for all fundamental freedoms, is limited above all by the general principle of proportionality. Thus, fundamental freedoms and rights do not prevent the Member

States from taking account of deficits in the area of media pluralism in regulatory terms, even if this affects undertakings based in other EU Member States.

29. This result of placing the safeguarding of pluralism at Member State level is also supported and underlined, as already mentioned above, by other aspects of primary law, in particular in the framework of EU competition law. Although this is clearly driven by the economic objective of establishing and protecting a free and fair internal market and leaves little room for taking into account non-economic aspects, the competition rules can indirectly contribute to media pluralism, as they keep markets open and competitive, counteract concentration, limit state influence and prevent market abuse. However, there is no explicit legal provision at EU level, nor is it recognized in the practice of monitoring, to exert an influence in the area of ensuring media pluralism besides the field of state aid control. Evaluations of measures from a cultural, in particular media pluralism perspective outside of economic market considerations – such as, for example, taking into account the emergence of predominant power over opinions – are therefore not possible at EU level.
30. Rather, opening clauses and exceptions allowing for Member States' cultural policy are provided for both in the context of monitoring market power and abuse and in the context of state aid control carried out by the European Commission when assessing EU relevant mergers, practices and state aids. For example, media concentration law is deliberately excluded from the scope of economic concentration law, as illustrated by Art. 21(4) of the EU Merger Regulation, which authorizes Member States to adopt specific rules to safeguard legitimate interests, namely to ensure media pluralism besides the applicable EU competition provisions. This can result in Member State authorities, even in cases for which the Commission has exclusive competence to assess a merger because of its relevance for the EU market, being able to prohibit such a merger for reasons of ensuring pluralism in the “opinion market”, irrespective of the Commission's previous clearance from a market power perspective. The state aid rules also provide for exceptions in which state funding of (media) companies is exceptionally permitted, provided that a cultural focus is set and cultural policy is conceptualized at national level. Thus, although EU competition law is deliberately not a suitable instrument for ensuring pluralism, it does not contradict the efforts of Member States to achieve this goal.

Framework for “media law” and media pluralism at secondary law level

31. Due to the described lack of competence to adopt legislative acts in this area, secondary law in the field of safeguarding pluralism which directly pursues this objective cannot exist. Corresponding attempts at EU (and formerly European Community) level were therefore quickly dismissed. However, due to the twofold nature of media as an economic and cultural asset and the convergence of the media and their distribution channels, there is nevertheless a framework of media law at EU secondary law level, within which numerous points of reference for pluralism can be found. These impact the shaping of media regulation by the Member States in different ways.
32. One category of such references concerns the establishment of explicit margins of maneuver for Member States with regard to national cultural policy, in particular the

safeguarding of media pluralism, in the Union's secondary legislation relating to economic affairs. On the one hand, such exceptions can be found in the rulesets that are relevant to the distribution of media content: the European Electronic Communications Code (EECC), which provides for telecommunications rules, and the Directive on electronic commerce (e-commerce Directive, ECD), which provides a partially harmonized legal framework including liability exemptions for information society services and thus in particular for intermediaries involved in the online distribution of media content, do not affect the ability of Member States to take measures to promote cultural and linguistic diversity. In addition, the EECC allows Member States to provide for so-called must carry-obligations in national law, i.e. to oblige network operators to transmit certain radio and television channels and related complementary services, thus extending the already existing derogation for diversity measures to this area coordinated by the EECC. The Audiovisual Media Services Directive (AVMSD), the heart of European "media law", also contains a derogation option for Member States to adopt stricter rules, which relates to the areas coordinated by the AVMSD and which, moreover, has hardly changed in substance over the years despite the development steps of the AVMSD.

33. Another category of references, however, concerns the EU's efforts, particularly in recent times, which contain elements of preserving pluralism and which can be found in secondary legislation which is not based on a competency for cultural policy. In particular, the reforms of the AVMSD and the new Directive on Copyright in the Digital Single Market (DSM Directive) have established rules which provide for a certain degree of protection of pluralism, or at least contain references to it, which is also underlined by indications of this kind in the relevant recitals. While the new copyright rules on the protection of press publications concerning online use and on the use of protected content by certain online content-sharing service providers take such diversity considerations into account, but essentially aim at the appropriate financing of (also) media offerings and thus decisively at economic factors, the new rules of the AVMSD on the promotion of European works, on the prominence of content of general interest, on media literacy and on the establishment of independent regulatory bodies assign greater weight to cultural aspects. However, in this respect too, broad discretionary powers of Member States are maintained and emphasized.
34. This aforementioned category also includes the recently introduced Platform-to-Business (P2B) Regulation, which due to its legal nature is more intrusive than Directives in terms of its impact on the Member States' legal systems. The Regulation imposes transparency obligations on online intermediary services and search engines with regard to ranking systems vis-à-vis undertakings, which potentially include media companies whose content is found through these gatekeepers. Although the Regulation is based on the internal market competence and aims to respond to or prevent an unequal balance of power in the digital economy, and therefore represents an economic-oriented piece of legislation, the P2B Regulation provides for important means of making the conditions for findability of content transparent also from the perspective of ensuring diversity. However, the P2B Regulation does not have a blocking effect on the media legislation of the Member States even when this regulates comparable transparency obligations for certain platform providers based on the need to guarantee pluralism.

35. The fact that more media-related initiatives such as the combating of hate speech and disinformation, which are particularly relevant in the context of the fundamental right of freedom of expression, are being shifted to the level of coordination and support measures based on self-regulation mechanisms, shows that the EU also respects the sovereignty of the Member States with regard to media regulation. This corresponds to the limitation of the EU's competence for supporting measures in such a way that support measures must not prejudice the Member State's exercise of regulatory discretion. With regard to future measures announced by the EU concerning the media sector in particular, such as those envisaged in the Media and Audiovisual Action Plan and the European Democracy Action Plan, it will be essential that stronger regulatory steps at Union level continue to be carried out with due attention to the division of competences, such as, for example, when it comes to the responsibility of Member States to actually implement possible common standards. In view of the announcements made in connection with these initiatives, in particular the intention to support competitiveness and diversity in the audiovisual sector through, inter alia, the use of EU funding instruments, as well as to strengthen efforts in the area of disinformation, hate speech and media literacy, these are at the intersection with media pluralism at national level. The inclusion of democratic, cultural and also diversity policy aspects in regulation has recently become a trend that can be observed to a greater extent than before at the level of legally binding secondary law and at the (tertiary EU law) level of implementing provisions, but also in the case of legally non-binding initiatives. This increases the tension with national rules which were adopted with the aim of ensuring pluralism.

Key problems of public international law in the regulation of the “media sector” with regard to possible conflicts with EU law

36. When considering possible tensions between the regulatory levels of the EU and its Member States, the question of responsibility for the execution of legislation plays a particularly important role. This applies especially to the decision on who is to carry out enforcement against providers in a specific case. In the national context of the Federal Republic of Germany, the state media authorities – on the basis of a teleological and historical interpretation of the relevant international treaties – are authorized to take enforcement measures against foreign providers for violation of substantive provisions of the State Media Treaty (*Medienstaatsvertrag*, MStV) and the Youth Media Protection State Treaty (*Jugendmedienschutzstaatsvertrag*, JMStV). This empowerment is confirmed by an interpretation of these interstate treaties in conformity with EU law, in which the meaning of the provisions of the AVMSD and ECD is interpreted in the light of the Member States' competence to ensure pluralism, including in relation to situations involving providers based in other EU Member States. The European Commission's critical remarks, in particular on the rules concerning media intermediaries in the MStV as a reaction to the notification by Germany, are therefore erroneous.

37. In enforcement, a tiered regulation can differentiate according to whether offers originate in or outside a given Member State. However, refraining from enforcement attempts against foreign providers, where there are only limited alternative efforts by the other Member State in containing potential risks, would provoke the constitutional

question of whether the absence of enforcement is reconcilable with the principle of equality. Such a regulation of foreign providers is determined by the fundamental rights framework of the Basic Law with regard to the media (in particular broadcasting) freedom under Article 5(1) sentence 2, seen through the lens of the decision of the FCC of 19 May 2020 concerning the German intelligence service, at least if the provider is either a natural person or (in the broader interpretation of the FCC) a legal entity with its registered office in the EU.

38. The FCC doctrine of duties to protect leads to an advance protection of fundamental rights when it comes to minimizing risks in the course of modern technological and societal developments as it was formulated by the Court. Where state duties to protect exist, these basically entail the duty to prevent, stop and sanction violations of rights, whereby legislative as well as judicial and administrative measures may be required, while maintaining a wide scope for implementation by the individual states. In this context, the increased margin for maneuver of state authorities in matters of international relations must also be taken into account with regard to the protective dimension of fundamental rights: if the exercise of the protective dimension of a fundamental right inevitably affects the legal systems of other states, the power of state authority to decide how to act is greater than when regulating legal relations with a domestic focus. In line with the so-called 'Solange-jurisprudence' of the FCC, it can be argued that the duties to protect under the Basic Law need not result in action as long as a comparable level of protection exists due to the activities of other states.
39. Although there is no comparable understanding of duties of protection in the framework of the TEU and TFEU based on the CFR as is in the domestic constitutional situation, it is also not apparent that the Treaties establish limits by EU law to such an understanding. Both in the recognition of a prerogative of the Member States to assess the "how" of measures to eliminate infringements of the fundamental freedoms caused by private parties and in defining the limits of the scope of this assessment, the interpretation of fundamental freedoms shows a considerable similarity to that of the FCC on duties to protect.
40. Territorial sovereignty and the principle of non-intervention in the internal affairs of a state set limits to the legislative and executive powers in cross-border cases under international law. The *Lotus* decision of the Permanent Court of International Justice is of continued relevance for the determination of these limits. As public international law is characterized by a territorial understanding of the state, sovereignty is exercised in principle on the national territory. On the territory of another state, international law therefore in principle prohibits the state from enforcing its legal system. An exception in this respect requires a rule in international treaty law or recognition by customary international law. This is also important in distinguishing between *jurisdiction to prescribe* and *jurisdiction to enforce*.
41. Based on the principle of territorial jurisdiction, the territoriality principle and the effects doctrine associated with it are recognized as connecting factors to establish jurisdiction. In addition, nationality (active personality principle) and the protection of certain state interests (passive personality and protection principle) are applied to establish such a connection (genuine link). The MStV takes appropriate account of this distinction under international law. Furthermore, an effect in Germany is particularly given if an offer

specifically or exclusively deals with the political, economic, social, scientific or cultural situation in Germany in the present or past. In particular, there is a genuine link with regard to the constitutional identity of the Federal Republic of Germany and the significance of the experience with National Socialism for the German legal system, which shapes identity in an exemplary manner, in the event of violations of Article 4(1) sentence 1 nos. 1, 2, 3, 4 and 7 JMStV. Even if it is a non-domestic, foreign provider that exercises influence on the process of attracting attention for specific content by means of aggregation, selection and presentation, in particular as regards search engines, e.g. by encouraging a prioritized use of that offer in response to search queries from Germany, it creates a *genuine link* according to the interpretation of jurisdiction under international law.

42. Apart from procedural problems regarding the treatment of foreign providers in the enforcement of media law rules, several recent legal provisions have been criticized by some as raising substantive concerns about their compatibility with European law, in particular the country of origin principle. With regard to both the MStV and the *Netzwerkdurchsetzungsgesetz* (NetzDG) – although there are indeed questions regarding the aspect of an independent supervision of the rules in the latter law – it is shown that the tension with EU law does not lead to an actual violation of it. This also applies to further changes, for example in copyright law. However, these areas of tension show that there should be an explicit recognition at EU level – beyond existing approaches – that, if the country of origin principle is retained in principle, national rules and enforcement measures can also be based on the market location principle under certain conditions.

The planned Digital Services Act

43. The European Commission has announced that it will present a new legislative proposal (Digital Services Act) which “will upgrade our liability and safety rules for digital platforms, services and products, and complete our Digital Single Market”. Various options regarding the scope of this new framework are discussed, including, in addition to considerations directly related to the ECD, rules to safeguard democratic procedures in the EU and its Member States and to deal with network effects of the digital platform economy. With regard to the latter, *ex ante* measures based on competition law will also be considered. In the light of the results of this study, particular attention should be paid to improving information and transparency requirements, clarifying the understanding of “illegal content” and how it can be distinguished from content previously considered merely as “harmful”, clarifying the extent to which self-regulatory approaches are sufficient and where co-regulation should be used as a minimum, strengthening the effective enforcement of public interest considerations, including when dealing with content from non-EU third countries, updating the rules on liability of providers and organizational aspects to improve enforcement in a cross-border context.
44. Based on the results of this study, in the further political process of negotiating new or amended EU legal acts, as well as in the case of supplementary initiatives by the Member States, in addition to working towards a clear recognition of the delimitation of competences, early and intensive participation at EU level by the German Länder

responsible for this sector should be actively sought with the aim of proposals that better consider and coordinate measures at both EU and Member State levels.

Conclusion and Political Options

Mark D. Cole / Jörg Ukrow

I. Content-related Aspects

The presence of a tension between the level of the EU and that of its Member States in the exercise of competences is not a new phenomenon. It is inherent in a system in which the EU, as a supranational organization, has been given certain regulatory powers by the Member States in accordance with the principle of conferral, but at the same time these allocations of powers are neither clear in themselves, nor do they automatically identify areas of competence in which the EU Member States retain the unrestricted possibility of exercising their powers. The Member States as “Masters of the Treaties” are the only responsible entities to authorize the EU on the basis of the international law treaties which created the EU (originally as a purely “European Economic Community”) and clarified its functional modalities. However, these treaties, as interpreted by the CJEU, provide the basis for a dynamic understanding of the EU’s competences, which deprives the principle of conferral of much of the power that it is supposed to place on the Member States’ position. It is precisely in the area of media regulation, which – due to the complexity of the regulatory elements involved – cannot be attached to a single legal basis alone, for which the tension is particularly intense. Indeed, media regulation always concerns the cultural and social foundations of the Member States as well as the functioning of democratic societies and is particularly influenced by Member State traditions and differences. Against this background, the present study clarifies fundamental questions of a European and specific media law nature regarding the distribution of competences between the EU and the Member States, especially with regard to measures that are intended to ensure media pluralism.

The concrete division of competences between the EU and the Member States is defined in EU law on the basis of three different types: exclusive competences of the EU, competences shared between the EU and its Member States, and merely supporting or supplementary options for action on the part of the EU. There is no negative catalog explicitly listing specific areas that are completely unaffected by EU law – neither a cultural nor a media-related exception to the EU’s competences exists. In addition, the allocation of actual competences between the EU and its Member States is also structured by the Treaties in a highly complex manner that makes it prone to disputes: for example, in the case of shared competences, on the one hand the Member States may only act to the extent that the EU has not yet taken final action, but the EU must be able to justify its actions based on a need to use the competence at EU level in lieu of the Member State level. In accordance with the principle of subsidiarity, action must be limited to what is necessary to provide added value at EU level. Beyond that, the EU must also respect the principle of proportionality and may only act to the extent necessary to achieve the desired objective above Member States’ approaches. On the other hand, even where competences are shared, for example concerning rules to improve the functioning of the internal market, the question arises in specific aspects of media regulation as to whether the respective rule is actually based on economic considerations and thus falls under the competence of the internal market or whether aspects which ensure media pluralism are possibly even in the

focus of the rules and thereby reach into an area that is reserved for the Member States. Safeguarding pluralism is actually the key objective of media law altogether.

This particular tension can also lead to conflicts. The application of the principle of subsidiarity, which is still not very well developed in practice, at least as a subject for review by the CJEU with regard to the monitoring of EU legal actions, is a reason for national constitutional courts to issue critical opinions on the scope and manner in which the EU institutions exercise their competences in some areas. For example, the FCC has recently clarified that action by the Union outside its field of competence – i.e. ultra vires – and the accompanying consequence that a legal act is not being needs not be observed in the national context, is not a purely theoretical assumption. Taking account of the national identity of the Member States and of the principle of sincere or loyal cooperation, which applies not only in relations between the Member States and the EU but also vice versa, requires the EU to exercise its powers, in particular for the establishment of an internal market and the adoption of competition rules necessary for its operation, in such a way as to preserve to the extent possible the Member States' room for maneuver and their margin of appreciation.

For media regulation, this means that even the seemingly obvious shift of rules to the supranational level, in particular with regard to online services which by their very nature have a cross-border distribution and reception, is only possible insofar as the undisputed primary competence of the Member States to establish rules ensuring media pluralism remains unaffected. Irrespective of the recognition of the objective of pluralism in the EU's system of values and the important supporting measures the EU adopts to this end, culture and diversity related media regulation remains within the priority of the Member States. This is particularly important with a view to preserving local and regional diversity as a starting point for a continued experience of democratic participation in a world characterized by digitalization and globalization. The particular importance which the FCC attaches to a positive media order by the Länder (in the sense of an explicit legislative framework) for safeguarding the democratic and federal foundations of the constitutional order of the Basic Law, illustrates the continuing relevance of the Member States' prerogative in safeguarding and promoting pluralism especially for the Federal Republic of Germany. Safeguarding media pluralism in a federally distributed system is at the heart of the national identity of this Member State, which the EU must respect in accordance with Art. 4(2) TEU.

The question of whether EU legal acts and other measures with an impact on media regulation are permissible, can only ever be answered on a case-by-case basis because there is no clear sectoral exception for the media sector as a potential object of EU rules. Especially the EU's internal market competence, which is aimed at facilitating cross-border trade, can be just as relevant for the actions of media undertakings as the EU competition law monitoring. In cases of doubt, however, the EU must exercise restraint with regard to harmonizing or even unifying regulatory approaches aimed at opening up markets and safeguarding competition, if disproportionate negative effects on the regulatory powers of the Member States directed at the objective of ensuring pluralism can occur, particularly in view of national specificities. This applies not only to EU legislation, but also where the Commission has a supervisory role with regard to compliance with EU law by the Member States and by media companies in the Member States. Such a monitoring role also exists in the enforcement of Member States' rules that safeguard media pluralism (and other rules that remain entirely in the Member State competence) and with regard to the

coordinated practices of companies directed towards ensuring pluralism. The EU and its institutions must take into account this duty to consider the Member State sphere also when responding to the challenges identified by Commission President *von der Leyen* in order to make the EU fit for the digital age and when proposing future legislative acts.

This result on the division of competences is further supported – and not at all qualified – by the emphasis placed on recognizing the objective of media pluralism in the EU legal system. Beyond the importance of media pluralism as a legitimate aim when restricting fundamental freedoms, which has been emphasized by the ECtHR with regard to the ECHR, the CJEU has for decades been referring to this objective with the same understanding in its own case law. This jurisprudence of the Strasbourg Court is also repeatedly referred to by the EU's legislative bodies. Beyond this "Convention approach", media pluralism is even explicitly mentioned as a parameter to be observed both in the EU's system of values according to Art. 2 TEU and in Art. 11(2) CFR.

This does not mean that the EU institutions themselves are addressed in order to take legislative action to safeguard media pluralism – neither Art. 2 TEU nor the CFR establish new EU competences. In fact, the Charter explicitly stipulates this. That explicit restriction reaffirms the principle of conferral and underlines the obligation to take account of the exercise of Member State competences in order to safeguard aspects of diversity of opinion and the media in a way that is relevant to the Member State concerned, including in enforcement measures by the Union institutions. Since the Member States of the EU as parties to the ECHR must meet the obligation to guarantee or protect the special role of the media as developed by the ECtHR and in addition the EU, for its part, must take the utmost account of the requirements of the ECHR, even without being a signatory to the ECHR, the protection of freedom of expression and media pluralism must be considered by the EU as an objective in the general interest. This also means that it cannot restrict action by the Member States when they restrict fundamental freedoms on the basis of this legitimate aim. The differences in considerations of a democratic, ethical, social, communicative or cultural nature between the Member States justify that they decide themselves which is the appropriate level of protection and the instruments to best achieve their general interest objectives in this respect. This includes that they can exercise them in such a way, as long as limitations imposed by EU law in particular by means of the principle of proportionality are respected, that they affect undertakings established in other Member States.

Irrespective of the finding that the EU does not only have any legislative competence with regard to rules aimed at safeguarding media pluralism in a targeted way, but that it must additionally take account of the Member State's competence for this field when applying the EU legal framework, there is nonetheless a range of harmonizing secondary law relating to the internal market that is relevant for media pluralism aspects. The economic dimension of the media and other offers which are important for the formation of public opinion, which in the audiovisual sector are mostly considered to be services in the meaning of the TFEU, but may also (as in the case of user interfaces of receivers) involve a variety of relevant forms of goods, allows EU action as long as it respects the limits of primary law. For this reason, the relevant legal acts contain, to varying degrees, explicit exceptions to their scope of application, for which then only Member State law applies, or references to reserved competences of the Member States, which are to remain unaffected by the relevant EU legislative act. These include, for example, the EEC and the ECD, which explicitly refer to the continued competence of Member States to ensure pluralism. The

AVMSD, which already achieves a high degree of harmonization in some areas of content-related rules, continues to allow for room for maneuver in implementation of the Directive and even for Member States to deviate from the country of origin principle so that national enforcement against providers established in other EU countries is also possible under certain conditions.

However, it should be pointed out that, despite the lack of competence for rules directly aimed at protecting pluralism, there are increasingly at least indirect effects arising from acts which are not aimed at this goal directly. This applies in particular for two recent legislative acts which address the role and obligations of online platforms in a new way (namely the DSM-Directive and P2B-Regulation). These approaches include transparency requirements and thereby an instrument that is known from measures securing pluralism. Irrespective, they do not trigger a blocking effect for measures at Member State level either, which go beyond this level of action but are taken with a different objective, such as transparency obligations to disclose information for the purpose of monitoring media plurality.

In addition to binding legislative acts, supplementary, legally non-binding EU measures, such as recommendations or resolutions, should also be taken into account, especially as they may be a preliminary stage to subsequent binding secondary legislation. Such non-binding acts currently exist, for example, concerning illegal content or disinformation. Due to the non-binding nature of recommendations and other communications, there may be less emphasis in practice on existing Member State reserved competences by these, because the potential conflict does not seem so pertinent. However, the division of competences in the EU legal order also applies to such non-binding legal acts. If, following such preparatory work, binding legal acts are developed at a later stage, failure to take Member State competences into account at an early stage can become problematic, which is why it is recommended – as is also emphasized below – that the Member States, in the case of Germany in the area of media regulation the Länder, develop a comprehensive regulatory early warning system and take an early position on such measures presented by the Commission in a way that preserves competences or at least protects them from further infringement. Currently, this monitoring and presence recommendation refers for example to the Media and Audiovisual Action Plan or the European Democracy Action Plan. These are intended to defend or find an agreement on common standards based on core European values, which in terms of strengthening the EU as a union of values seems reasonable, especially in view of the new threats to this foundation of values both within the EU and from outside. However, any implementing measures must also ensure that they do not undermine national approaches to ensuring pluralism in the media or Member State reserved competences for the execution of the laws.

In addition, law enforcement which ensures that Member States' legitimate interests are protected and which can also take account of particular national characteristics in specific cases, is best carried out at Member State level and in accordance with national procedural rules, which must, however, comply with the principles of non-discrimination and effectiveness. In Germany, this essentially concerns the state media authorities, which, irrespective of agreement on common standards and certain rules on jurisdiction at EU level, can in principle also take action against foreign providers not based in one of the EU Member States in the event of a breach of substantive legal requirements, for example under the future State Media Treaty. Such action necessitates that the limits of jurisdictional power under customary international law are observed. Although it is

appropriate to differentiate the enforcement of rights according to the degree of the possibility of access, foreign providers cannot be permanently ignored when it comes to enforcement of rights in cases where no enforcement measures which achieve a comparable level of protection are taken abroad. However, the obligation to respect fundamental rights in enforcement also applies if, and in particular if, the provider concerned has its registered office in another EU Member State. There is a need to ensure equal treatment in the application of measures restricting fundamental rights, as well as compliance with EU law requirements in order to derogate from the otherwise applicable principle of a control by the country of origin.

Although limitations imposed by international law on a jurisdiction approach as described above which extends even to “foreign” providers result from the requirement to respect state sovereignty, it is in principle possible to enforce such a limitation against these providers if a genuine link exists between a provider and the domestic territory – for example, by services which focus on or exclusively deal with the political, economic or social situation in a state, in this case namely the Federal Republic of Germany. Although, in the case of secondary law based on the country of origin principle as regards jurisdictional sovereignty, any enforcement by other states faces a tension with this principle, so that enforcement is only possible under certain circumstances, it is however already not excluded in the legal acts relevant to the present. Nevertheless, it would be welcomed if – for example in new horizontally applicable provisions in Union law – it were to be explicitly clarified that, under certain circumstances, enforcement of the law according to common standards may be based on the market location principle despite the continued application of the country of origin principle.

II. Procedural Aspects

The substantive analysis thus clearly shows that the allocation of competences between the EU and the Member States is non-negotiable and follows, in principle, clear rules. Not least in light of deficits in attempting a clear-cut delimitation of competences between the EU and its Member States at the substantive level, procedural aspects are of particular importance in resolving resulting tensions in the division of competences. In this respect, too, resolving the tensions in the area of shared competences and also with a view to safeguarding the primary competence of the Member States to regulate media pluralism proves to be no easy task.

The mechanisms existing in the run-up to a legislative act, such as the complaint procedure for disregarding the principle of subsidiarity, are used only very cautiously because they can be understood as being confrontational in nature. This applies all the more to possible reactions to legal acts that have already entered into force, such as actions for annulment by a Member State before the CJEU, which are very rare in practice – in contrast to infringement proceedings by the European Commission against Member States. In terms of content, the question also arises for Member States as to whether they will oppose an initiative for reasons of competence law, because they regard it to be exceeding the limits of the EU’s competences, in case they subscribe to an actual necessity for such an approach, its objective and the meaningfulness of the legislative initiative by the EU. However, such considerations which only focus on the content of specific initiatives threaten to undermine the EU’s competence restrictions – and this without certainty that

the EU's exercise of competences will continue to be fulfilling also the media regulatory policy of each Member State in a satisfactory manner.

However, from the Commission's perspective, the question of taking account of competences presents itself in a different light: the Commission is obliged under the Treaties to initiate legislative procedures with presenting proposals whenever it sees a need for such action. Furthermore, as the "Guardian of the Treaties", the Commission is obliged to investigate any Member State behavior which it considers to be an infringement of EU law and, where appropriate, to initiate infringement proceedings before the CJEU if it identifies unjustified obstacles to the free movement of services.

In view of the European Commission's dynamic approach to integration, which is geared towards an ever closer Union by means of harmonization of the laws, it is obvious that, particularly in view of the global challenges of digitization, the Commission emphasizes the need for the EU to take action to meet these challenges. It should be noted that this need is not only affirmed if previous action by the Member States had proven to be insufficient. Accordingly, a certain tendency can be observed for the EU to make proposals for action at Union level – based on the principle of precaution – even before Member States have approached an issue with a regulatory dimension. The efforts to achieve digital sovereignty for Europe might encourage consideration of relying more strongly than in the past on the instrument of Regulations – and thus of accepting a benefit in terms of speed of reaction due to the lack of a transposition requirement at the price of a loss of the opportunity to take account of special characteristics in the Member States when transposing EU Directives. Such an increased use of Regulations could be further stimulated by positive experiences with the effectiveness of the General Data Protection Regulation (GDPR) also vis-à-vis non-EU based entities.

This implies that in the future, even more important than in the past, there will be a differing view on the competence division between the EU institutions Commission and Parliament focused towards integration and the Member States. This likely will include the organizational form as well as the institutional set-up and can therefore lead to increased tensions even in clearly assigned competence areas such as the safeguarding of pluralism.

For this reason, it is also particularly important that Member States – in the case of federal states with a corresponding distribution of responsibilities, the individual federal states such as the Länder – involve themselves in the political (negotiation) process at EU level at an early stage and in a comprehensive manner. This applies not only (and only when) concrete proposals for binding legislative acts are made, but also to supplementary initiatives and generally in the run-up to the discussion on possible priorities being set. This way of "showing presence" should help to demonstrate on EU level specific features of national approaches through participation in various fora and in order to promote appropriate consideration of such approaches. In addition to formal and informal participation through exchanges in the legislative process, this may include scientific activities or activities aimed towards the general public. In the actual legislative process, it is recommended to identify, in cooperation with other EU Member States, points of tension in the exercise of Member State competences which are caused by EU rules and proposals and to take a joint position at an early stage in cooperation with other Member States which share similar backgrounds, in particular with regard to the protection of media pluralism, or which, for different reasons, have the same concerns on the same issues with regard to a too far-reaching harmonization trend.

Specifically in the area of media regulation, this means for the German Länder that they should further develop and strengthen the pathways already taken to make their interests known “in Brussels” and reflect the full consideration of EU measures affecting the media and the online sector by an appropriately broadly based response to these measures. For the current discussion on a Digital Services Act, this means that a position should be worked out not only with regard to the expected content-related legal proposal, but also – insofar as there are points of contact with media regulation – for the further component of the (also new, *ex ante*) competition law instruments for reacting to the platform economy, which is one of the important elements from an EU perspective. This may also involve showing how comparable instruments on different levels can nevertheless coexist in different ways because they have different objectives, as is the case with transparency obligations.

On the one hand, it is a matter of actively participating in proposals on how certain rules at the level of EU law can best be updated. Such issues include clarifying the notion of illegal content compared to harmful content and whether the latter should be introduced as a separate category, to be further defined, or specifying responsibilities alongside liability of service providers. On the other hand, from the perspective of the Member States, it is important to work towards a functioning interaction between the EU and the national level. This includes, for example, the establishment of new or more concrete forms of cooperation between competent authorities or bodies, both in terms of their scope of responsibilities and, in particular, in cross-border cooperation regarding enforcement.

However, this also includes examining whether existing regulatory models can be transferred to the area relevant for the present context and proposing them accordingly at Union level: an example of this could be that even when the GDPR was established as a directly applicable Regulation, the competence of the Member States was respected, *inter alia*, by including clauses that reserved the creation of rules concerning e.g. data processing for journalistic purposes for the Member States level (Art. 85 GDPR). Such opening clauses, which can be considered not only for Regulations but also with regard to the scope which defines the transposition requirement of a Directive, or an explicit recognition of “reserved” competences of the Member States, are promising ways of linking the two systems, which promise better interaction in the multi-level framework between Member States and the EU. Such recognition and respecting of Member State characteristics not only at the enforcement level allows the constitutional traditions and specific characteristics of the Member States to be taken into account when adopting more far-reaching rules. This applies even in the case of Regulations – in actual fact, as far as there is a link to EU competition law, new instruments in this area are likely to be proposed as Regulations – but even more so in the case of Directives (e.g. where horizontal rules for platforms are introduced but additional Member State rules or basic rules to be further detailed by Member States, e.g. in relation to “media platforms”, are explicitly provided for).

This endeavor to take account of the Member States’ competence to regulate media pluralism also requires institutional safeguards. Thus, for example, it is particularly important that any legally non-binding agreement on standards of pluralism and democracy does not have to lead to uniformity in enforcement or – without prejudice to the control over compliance with the EU’s values under Art. 7 TEU – to a transfer of monitoring tasks to the level of the EU. As long as the Member States ensure effective enforcement by authorities or bodies set up on national level, where appropriate within the

framework of the requirements of EU secondary legislation, by means of appropriate authorization and equipment, common standards can be enforced by different actors cooperating in a defined way. Not least, the organizational law dimension of the subsidiarity principle in the area of EU media regulation also argues in favor of the Member State regulatory bodies being equipped in line with their functions and needs. Indeed, without such resources, the thresholds set by the subsidiarity principle for EU activities instead of Member State action will be lower because it can be argued that there would then be a lack of visibility of impact of the regulatory framework for the media in a digital environment.

Understood in this way, the tension can at least be defused by ensuring that the achievement of the objectives through EU action does not lead to a permanent erosion of Member State competences. In view of the fact that the case law of the CJEU still tends to be in favor of integration – which in individual cases results in a narrowing of the Member States’ room for maneuver by too far-reaching substantive review of a specific disputed measure of a Member State – it is particularly important to attempt to achieve a balance already when legislative acts are created and not only when they are later reviewed or implementing measures are checked by the Court. In relevant proceedings, which are sometimes restricted by the CJEU in its review to the fundamental freedoms perspective without sufficiently considering the effect on the Member State's competence to safeguard pluralism, a clear positioning of the Länder should nevertheless be achieved. Insofar as such a position can also be defined at European level while maintaining the (German) constitutional allocation of competences between the Federal and the Länder level in accordance with Art. 23 of the Basic Law, this will further promote the protection of the objective of ensuring pluralism in terms of the competent level.