

A. Introduction and background to the study

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In her first State of the Union address to the plenary session of the European Parliament on 16 September 2020, the President of the European Commission, Ursula von der Leyen, stated that:¹

“We must make this Europe’s Digital Decade.”

Irrespective of the symbolic political significance associated with this appeal – a level of significance that in the past was not associated with exclusively positive effects in terms of integration policy and law² – this warning also expresses the fundamental importance that digitization has for the objectives of the process of European integration. This digital dimension also shapes the further development of the European framework for the media. However, the effects of digital disruption of traditional business and communication processes that can be observed in the media ecosystem are not simultaneously linked to a logic of digital transformation of constitutional structures and guidelines for the media constitution of and in the EU. Digital waves of change are thus breaking on the quay walls of the EU’s competence restrictions.

In her State of the Union address, the President of the Commission said next:

“We need a common plan for digital Europe with clearly defined goals for 2030, such as for connectivity, skills and digital public services.”

As this study shows, the “common ground” of the plan for a digital Europe cannot only be an organizational common ground of the Council and the Commission, the two institutions that have traditionally taken a special position in the promotion of the integration of Europe. Rather, the proposed plan requires an architectural design in which not only the EU and

1 State of the Union Address by President von der Leyen at the European Parliament Plenary, 16.09.2020, https://ec.europa.eu/commission/presscorner/detail/en/speech_20_1655.

2 Cf. on the failure of a gesture-political enrichment of the European Treaties with the European Constitutional Treaty e.g. Häberle, Nationalflaggen: Bürgerdemokratische Identitätselemente und Internationale Erkennungssymbole, p. 39.

its institutions but also the Member States will continue to play a decisive role. A digital Europe can only emerge from a respect for the different competences in the European multi-level system.

Incidentally, none of the areas identified as relevant to the plan are congruent with the media sector, namely the press, broadcasting and new media, although the latter were only able to develop in the process of digitization of the media ecosystem itself. But none of these areas is up to date even without touching on a media regulation that takes into account convergence phenomena at the interface of infrastructure and content as well as the interaction of regulation and the promotion of competence to achieve objectives such as the protection of human dignity, the protection of minors and consumer protection. These interfaces also raise questions about the allocation of Union and Member State competences.

Finally, the President of the Commission points out that the EU and its Member States share the same values in their commitment to digital policy. The corresponding “clear principles” are identified by von der Leyen as

“the right to privacy and connectivity, freedom of speech, free flow of data and cybersecurity”.

The references of these principles to a digital media order for the EU are evident.

Even if the thematic areas of “data” and “infrastructure”, which receive special attention in the President’s speech, also show similar references to the digital media ecosystem, the object of investigation of the present study refers to a problem which, in connection with the “digital decade” approach, is also relevant to the third area highlighted in the speech: “technology – and in particular artificial intelligence”. This is because the topic of “algorithm regulation” highlights in a particular way problems that may arise from a competence and fundamental rights perspective in the further development of media regulation by the EU and its Member States in a regulatory environment that has been and will continue to be increasingly shaped by the megatrends of digitization and globalization:

“We want a set of rules that puts people at the centre. Algorithms must not be a black box and there must be clear rules if something goes wrong. The Commission will propose a law to this effect next year.

This includes control over our personal data which still have far too rarely today. Every time an App or website asks us to create a new digital identity or to easily log on via a big platform, we have no idea what happens to our data in reality.

That is why the Commission will soon propose a secure European e-identity.

One that we trust and that any citizen can use anywhere in Europe to do anything from paying your taxes to renting a bicycle. A technology where we can control ourselves what data and how data is used.”

To this regard, the President of the Commission stresses:

“None of this is an end in itself – it is about Europe’s digital sovereignty, on a small and large scale.”

With the objective of European sovereignty, von der Leyen takes up a topos that was first introduced into the integration law finality discussion by President Macron and which was subsequently referred to in the Franco-German “Agreement on Franco-German Cooperation and Integration”³, hence made binding under international treaty law for the first time. This “sovereignty” perspective raises not inconsiderable legal problems with regard to the correlation between the EU and the Member States in the integration order.⁴ These problems must also be kept in mind if the EU and Member States want to take the European path into the digital age together, including a media-regulatory room in the digital house Europe.

Now that the work of the previous “Juncker Commission” on the digital single market has been completed, the establishment of a legal framework for the “digital society” at the level of the European Union (EU) still remains a clear focus of the Commission’s work, according to the State of the Union Address.⁵ In addition to the strategies and work plans published to date by the Commission, for example on data strategy⁶ or possible regu-

3 Gesetz zu dem Vertrag vom 22. Januar 2019 zwischen der Bundesrepublik Deutschland und der Französischen Republik über die deutsch-französische Zusammenarbeit und Integration of 15.11.2019 (Law on the Treaty of 22 January 2019 between the Federal Republic of Germany and the French Republic on Franco-German Cooperation and Integration of 15.11.2019), BGBl. 2019 II, p. 898 et seq.

4 Cf. *Ukrow* in: ZEuS 2019, 3, 21 et seq.

5 Cf. Commission Work Programme 2020, A Union that strives for more, of 29.01.2020, COM(2020) 37 final, https://ec.europa.eu/info/sites/info/files/cwp-2020_en.pdf.

6 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European strategy for data, of 29.02.2020, COM(2020) 66 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1606205225168&uri=CELEX%3A52020DC0066>. In the meanwhile, the European Commission has presented a Proposal for a Data Governance Act, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0767>.

latory steps regarding the use of artificial intelligence systems⁷, particularly the legislative proposals of 15 December 2020 for a “Digital Services Act”⁸ and a “Digital Markets Act”⁹ and thus the link to the e-Commerce Directive (ECD)¹⁰ is of central importance for the – no longer clearly definable – “media market”. With this package the Commission intends to propose clear rules that define the responsibilities of digital services, ensure a modern system of cooperation in the monitoring of and enforcement against platforms, and propose ex-ante rules for major online platforms to ensure the competitiveness of the European market. And it is precisely here – as in the regulation of audiovisual media services and the reform of the corresponding Directive 2018¹¹, which is still in the process of transposition in the Member States¹² – that potential conflicts arise between the two levels

7 European Commission, White Paper On Artificial Intelligence – A European approach to excellence and trust, of 19.02.2020, COM(2020) 65 final, https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf.

8 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0825&qid=1614595537069>. For a first discussion see *Ukrow*, Die Vorschläge der EU-Kommission für einen Digital Services Act und einen Digital Markets Act, and in detail *Cole/Etteldorf/Ullrich*, Updating the Rules for Online Content Dissemination.

9 <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN>.

10 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), OJ L 178 of 17.07.2000, p. 1–16, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32000L0031&qid=1606205584504>.

11 Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, OJ L 303 of 28.11.2018, p. 69–92, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L1808&qid=1606206126950>.

12 The transposition period ended on 19 September 2020, until which only four Member States had notified transposition. In the meanwhile Germany, Austria, Bulgaria, Denmark, Finland, France, Hungary, Latvia, Lithuania, Malta, the Netherlands, Portugal, and Sweden have adopted a final transposition and Luxembourg and Spain a partial one in national law. In the other Member States legislative projects are ongoing. Cf. the overviews by the Commission (<https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32018L1808&qid=1599556794041>) and in the European Audiovisual Observatory database (<https://www.obs.coe.int/en/web/observatoire/avmsd-tracking>).

of the EU and the Member States with regard to the allocation of competences for regulating these areas.

In the EU's multi-level system, the division of competences is not always clear, and in federal states such as the Federal Republic of Germany this is reinforced by further subdivision. This is particularly true with regard to media law, which regulates the "media" sector, because here it is not possible to allocate competences referring to only a single legal basis. Thus, it is an old insight that media have a "cultural" component, but that they are also – and in some contexts primarily – economic in nature and thus, in the EU context, internal market-related. This already existing tension between Member States' cultural competence and EU regulation of the internal market aspects takes on a further dimension when it comes to restrictions imposed on service providers in this sector. Thus, in addition to the protection of freedom of expression, the primary objective of any media regulation is to ensure a diversity of opinions and the media that is specific to the respective Member State or its regional subdivision. The competence for such restrictive rules must lie at the Member State level and both the Court of Justice of the European Union (CJEU) and, in a comparable manner, the European Court of Human Rights (ECtHR) therefore recognize the Member States' margin of appreciation and scope for design when deciding on measures to ensure diversity which at the same time have a restrictive character with regard to fundamental freedoms and/or fundamental rights.

The apparently undisputed recognition of regulatory competence reserved for Member States in this area, on the other hand, is often confronted in practice with the actual or alleged limit of regulatory power, insofar as it radiates into areas regulated by Union law. Especially recently, there have been several cases that illustrate this conflict. For instance, after the notification of the German State Media Treaty (*Medienstaatsvertrag*, MStV)¹³ the Commission in its reaction gave clear indications that it takes

13 Staatsvertrag zur Modernisierung der Medienordnung in Deutschland (State Treaty on the Modernization of the Media Order in Germany), cf. Beschlussfassung der Konferenz der Regierungschefinnen und Regierungschefs der Länder (Resolution of the Conference of the Heads of Government of the Länder) of 5 December 2019, available at https://www.rlp.de/fileadmin/rlp-stk/pdf/Dateien/Medienpolitik/ModStV_MStV_und_JMStV_2019-12-05_MPK.pdf. The MStV came into force on 7 November 2020, cf. the Rundfunkkommission (Broadcasting Corporation) press release of 06.11.2020, available at <https://www.rlp.de/de/aktuelles/einzelansicht/news/News/detail/medienstaatsvertrag-tritt-am-7-november-2020-inkraft-1/>.

a different view of the Member States' scope for action in regulating online players based on the provisions of the e-Commerce Directive against the background of the fundamental freedom dimension and the inclusion of the country of origin principle.¹⁴ In particular, the Commission expressed "certain doubts" as to "whether some of the measures contained in the notified draft could disproportionately restrict the free movement of information society services protected in the internal market", referring to its efforts (also) in the context of the at that time planned Digital Services Act to promote media diversity and media pluralism in the online environment. Furthermore, a provision in the Interstate Broadcasting Treaty that was expressly introduced to safeguard media diversity in the regional area – § 7(11) RStV as a provision that was taken over in § 8(11) MStV in substantive terms, even if not editorially identical in content – has been attacked for an alleged infringement of the freedom to provide services with the case being decided by the CJEU in February 2021.¹⁵

On the other hand, in addition to the MStV, which has since been signed and ratified by the state parliaments, there are further regulatory approaches in German law – such as the Federal Network Enforcement Act (NetzDG)¹⁶, which is currently undergoing an amendment procedure¹⁷ – as well as in the law of other Member States, the details of which could

14 European Commission, Notifizierung 2020/26/D, C(2020) 2823 final of 27.04.2020, <https://dokumente.landtag.rlp.de/landtag/vorlagen/6754-V-17.pdf> (available in German only, hereinafter own translations). Jörg Wojahn, representative of the European Commission in Germany, is even quoted as follows in the accompanying press release: "[...] The Commission has already announced its intention to propose a legislative package for digital services by the end of this year [...]. This will clarify the responsibilities of major online platforms across the internal market, also with a view to promoting *the objective of media diversity* [...]" (own translation, emphasis by authors).

15 CJEU, case C-555/19, *Fussl Modestraße Mayr*, judgment of 03.02.2021, see also the opinion of Advocate General Szpunar of 15.10.2020. See on the judgment Ory in: NJW 2021, 736, 736 et seq.; Ukrow, Sicherung regionaler Vielfalt – Außer Mode?. Cf. on the matter also Cole in: AfP 2021, 1, 1 et seq., and in detail *id.*, Zum Gestaltungsspielraum der EU-Mitgliedstaaten bei Einschränkungen der Dienstleistungsfreiheit.

16 Netzwerkdurchsetzungsgesetz (Network Enforcement Act) of 1 September 2017 (BGBl. I, p. 3352), as amended by Art. 274 of the Regulation of 19 June 2020 (BGBl. I, p. 1328), <https://www.gesetze-im-internet.de/netzdg/BJNR335210017.htm>.

17 There are currently two draft laws that address the NetzDG with various changes; cf. Deutscher Bundestag, Entwurf eines Gesetzes zur Änderung des Netzwerkdurchsetzungsgesetzes (Draft law to amend the Network Enforcement Act), Printed paper 19/18792 of 27.04.2020, <https://dip21.bundestag.de/dip21/btd/19/187/19>

possibly trigger questions on the part of the EU regarding the allocation of competences. The same applies to other measures planned by the EU itself, such as the proposal for a regulation on preventing the dissemination of terrorist content online (TERREG)¹⁸, which is still in the legislative process, and in particular the proposed Digital Services Act.

Against this background, it is necessary to comprehensively present in a study the status quo of the distribution of competences in the area of media regulation with special consideration of the regulatory goal of media diversity. Due to the existing regulatory instruments at EU level, the study focuses mainly on the area of audiovisual media. The press, especially in the online sector, as well as film, are only included in the study at relevant points. Following this general clarification, it is also necessary to show which options for action exist for the Member States in the future design of the media and “online sector” and how these, in this respect, can react to EU proposals.

Although there is existing scientific work on the question of securing media diversity and deducible questions of competence, it is based on the early case-law of the CJEU – and this in turn on that of the ECtHR – and requires updating and contextualization with regard to new rulesets and developments of recent years. In addition, findings can be derived – based on a detailed analysis – for the currently pending legislative processes at the EU level as to how these are to be shaped in view of the results found, how the Federal Republic of Germany as an EU Member State is to be involved in shaping them and, in particular, where the limits of EU regulatory activity must lie.

18792.pdf, and Entwurf eines Gesetzes zur Bekämpfung des Rechtsextremismus und der Hasskriminalität (Draft law to combat right-wing extremism and hate crime), Printed paper 19/17741 of 10.03.2020, <https://dip21.bundestag.de/dip21/btd/19/177/1917741.pdf>. With regard to the latter amendment, the Office of the Federal President (Bundespräsidialamt) has, according to available information, suspended the signing procedure due to data protection concerns; cf. <https://www.sueddeutsche.de/politik/hate-speech-gesetz-das-koennt-ihr-besser-1.5059141>. On the application of the NetzDG to date, cf. the Federal Government’s report on the evaluation of the Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (law to improve law enforcement in social networks) and *Eifert*, Evaluation des NetzDG, both available at https://www.bmjbv.de/SharedDocs/Artikel/D E/2020/090920_Evaluierungsbericht_NetzDG.html.

- 18 Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online, COM(2018) 640 final of 12.09.2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0640&qid=1606214807269>.

Given the examples mentioned, it is not surprising that the issue of media pluralism has recently gained in importance again. This is also a consequence of the threats to existing structures on the media market, which are perceived as increasingly intense. In this context, options are also being discussed that go beyond mere regulation, such as active support models for providers of editorially responsible media content¹⁹. But even in this respect, there are intensive links to EU law, so that an overall view, detached from individual procedures or situations, is appropriate.

The aim of the study is to identify the existing area of competence of the Member States. To this end, the primary legal framework for the division of competences between the EU and the Member States is comprehensively analyzed in a first chapter B. In particular, this chapter shows, in view of the recent case law of the Federal Constitutional Court, the limits that the principle of conferral sets for EU action. In addition, the EU's system of values in its significance for the media sector, the individual relevant competence titles from primary law and the influence of the EU's aims are presented in detail. The chapter concludes with an examination of the restrictions on the exercise of competences for the EU and the significance of fundamental rights. The following Chapter C. analyzes the way the general public interest objective of media diversity is legally enshrined at EU level. For this purpose, the fundamental rights basis in European Convention on Human Rights (ECHR) and Charter of Fundamental Rights of the EU (CFR) as well as primary law aspects are addressed. The reference in and the influence of secondary law will be analyzed separately for each legislative act in Chapter D. In addition to the Audiovisual Media Services Directive (AVMSD), which was amended in 2018, the European Electronic Communications Code (EECC), which is also still in the process of being transposed in the Member States, and the Platform-to-Business (P2B) Regulation, which has recently become applicable, will be examined in this context. Current legislative projects and initiatives of the EU as well as non-legally binding measures are also included in the analysis.

Chapter E. then deals with core problems under public international law that arise in regulating the "media sector" due to the tension between national and EU law. The focus is to explain, using the example of the approach of the MStV and the Interstate Treaty on the protection of minors

19 In the meanwhile, the European Commission has presented its Communication on Europe's Media in the Digital Decade: An Action Plan to Support Recovery and Transformation (Media and Audiovisual Action Plan), COM/2020/784 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0784>.

(*Jugendmedienschutzstaatsvertrag*, JMStV), which public international and European legal framework conditions have to be adhered to when dealing with the question of the addressees of a national regulation – i.e. in particular the question of a cross-border application of German media law rules – as well as the enforcement of the law against foreign providers. The fundamental rights dimension comprises not only the question of fundamental rights adherence in enforcement measures but also the issue of a duty to protect and the corresponding call for action by the state. The difficulties involved in the practical implementation of such measures will be pointed out with regard to the different legal levels, developing a respective solution. Concluding, this chapter deals with examples of disputed (with regard to the European legal requirements) substantive law aspects of specific rules that have an impact on German media law. Due to its significance for the currently ongoing legislative process for future regulation in the form of the EU Digital Services Act, certain aspects of the Commission proposal are addressed and classified in the light of the results of the study. Finally, Chapter G. provides some guidance on policy options for action based on the results of the study. The study is preceded by a detailed Executive Summary.

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