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 (AVMSD) 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 ar-

eas 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 suspensory 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 undertakings 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 undertaking 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 pluralism 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 pluralism 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 gen-

eral 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 il-

lustrated 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) undertakings 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 law 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 na-

tional 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 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 law which is not based on a competently 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 undertakings 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 suspensory effect on the media legislation of the Mem-

ber 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 prejudge 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 Interstate Treaty on the protection of minors (*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 Art. 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 person 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 public 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, public 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 public 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 Art. 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 public 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 (Network Enforcement Act, 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 proposed Digital Services Act

43. In December 2020, the European Commission has presented a 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 sup-

plementary 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.