# D. Secondary legal framework on "media law" and media pluralism

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## *I. Overview*

In 1996, the European Commission presented an internal draft for a directive on media diversity[403], which was withdrawn after opposition even before it was introduced into the legislative process at the Commission level. This was primarily due to doubts relating to competences, since the very title of the directive would not have justified an invocation of the internal market competence and the content could not have been based on any existing legal basis.[404] A subsequent draft for a directive on media ownership in the internal market[405] was not primarily aimed at securing media diversity, but was intended to achieve this goal indirectly by making the internal market a reality, although the invocation of internal market-related competences was also strongly questioned.[406] The draft was also eventually withdrawn due to opposition from Member States.[407] Moreover, numerous attempts by the European Parliament, especially in the 1990s and the first decade of the 21st century, to persuade the European Commission to take concrete measures to safeguard media diversity have also been unsuccessful.[408] Taking into account the competence of the Member States in

403 Unpublished. Cf. on this and the following in detail *Ress/Bröhmer*, Europäische Gemeinschaft und Medienvielfalt; *Cole*, Europarechtliche Rahmenbedingungen für die Pluralismussicherung im Rundfunk, p. 93, 94 et seq.

404 *Paal*, Medienvielfalt und Wettbewerbsrecht, p. 178.

405 Unpublished. Cf. on this and the following in detail *Ress/Bröhmer*, Europäische Gemeinschaft und Medienvielfalt. Further notes on the content of the draft *van Loon* in: Media Law & Policy 2001, 11, 17 et seq.; *Westphal* in: European Business Law Review 2002, 459, p. 465 et seq.

406 Cf. *Ress/Bröhmer*, Europäische Gemeinschaft und Medienvielfalt; *van Loon* in: Media Law & Policy 2001, 11, 17 et seq.; *Westphal* in: European Business Law Review 2002, 459, p. 465 et seq; see also *Paal*, Medienvielfalt und Wettbewerbsrecht, p. 179, with further references.

407 *Frey* in: ZUM 1998, 985, 985.

408 On this: *Valcke*, Challenges of Regulating Media Pluralism in the European Union, p. 26.

this area, there is to date no secondary law of the European Union which directly regulates media diversity.[409] Media law as a whole – also in the sense of a broad concept of a horizontal issue – is not and could not be fully harmonized within the framework of the distribution of competencies at EU level.

However, there are a number of acts of secondary law that either directly address the media or at least have a relevant impact on the media themselves or their distribution channels and thus serve as components of a "European media law", which, however, essentially only makes specifications for implementation but does not aim for full harmonization. First and foremost in this context is the AVMSD, which – as the only one of the legislative acts to be presented below – focuses on the regulation of (in this case audiovisual) media in the sense of content regulation and can therefore be seen as the centerpiece of "European media law". However, against the backdrop of the modern media landscape, in which the boundaries between content providers and platforms are becoming increasingly blurred, intermediaries are acting as gatekeepers for information gathering from a user perspective and for visibility from a media provider perspective on the one hand, but are also competing with traditional media undertakings on the other, the e-Commerce Directive (ECD) is also becoming increasingly importan. As a horizontal legal instrument that in particular provides liability privileges for information society services, it also plays a central role with regard to the dissemination of media content. Since it has not been amended since its adoption in 2000, the strongest need for action in this respect is recognized at the EU level, after numerous relevant acts of secondary law have been amended or newly adopted on the initiative of the last Commission.[410] This also includes rules of copyright law, telecommunications law and consumer protection law, in particular to the extent that they contain special provisions or exceptions for the media. In addition, the concretizations of competition law through secondary law also play an

409 Cf. on the pros and cons of shifting the safeguarding of pluralism to the EU level also *Gounalakis/Zagouras* in: ZUM 2006, 716, 716 et seq., who, for understandable reasons, argue in favor of an (at that time) EC safeguarding of pluralism without, however, in this context going into the problem of competences in more detail, but instead justify it in favor of the EC on the basis of differences in national regulations (724 et seq.); objecting in turn with convincing arguments *Hain* in: AfP 2007, 527, 532 et seq.; generally at a glance *Cole*, Europarechtliche Rahmenbedingungen für die Pluralismussicherung im Rundfunk, p. 93 et seq.

410 Cf. on this at a glance *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content, p. 91 et seq.

important role, with the Merger Regulation being the most relevant here due to its connection with safeguarding diversity.

These legal bases under secondary law will be considered in this chapter and examined with regard to the connection with the Member States' competence for safeguarding media diversity. This section is supplemented by a look at planned legal acts at EU level, which shed light on emerging trends and possibly also conflicts. The chapter concludes with an overview of current EU measures in the form of coordination and support measures, which are worth examining especially in light of the fact that these can be precursors to legislative measures or are chosen as instruments in areas in which the EU has no genuine regulatory competence. The chapter thus considers and summarizes in the conclusions which implications are to be drawn from the secondary law foundations for the (competence to) safeguarding media diversity and the adoption of corresponding regulation.

## *II. Links in existing secondary law*

### *1. E-Commerce-Directive*

The aim of the e-Commerce Directive (ECD)[411] was to provide a coherent framework for Internet commerce. The core of the directive is therefore also the elimination of legal uncertainties for cross-border online services and the guarantee of the free movement of information society services between the Member States.[412] This is in line with the objective as laid down in Art. 1 ECD: The Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States and, to this end, by approximating certain national rules applicable to information society services. To ensure this, the ECD establishes the country of origin principle as well as the principle excluding prior authorisation for information society services on a

411 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/ALL/?uri=celex%3A32000L0031.

412 In detail on the ECD as well as on the question of whether it still meets the realities of the digital age in relation to the media sector cf. *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content. On the historical development cf. *Valcke/Dommering* in: Castendyk/Dommering/Scheuer, p. 1083.

binding basis and sets out requirements with which such services must comply.[413] These include information requirements (including in relation to commercial communications), provisions on the handling of electronic contracts, extrajudicial dispute resolution, court actions, and on cooperation. In contrast, the ECD does not contain concrete requirements for the supervision of the services covered by it, but leaves the task of ensuring the enforcement of the ECD entirely to the Member States (Art. 20 ECD). The minimum harmonization approach pursued within the framework of the ECD is already documented in its recital 10, which states that, in accordance with the principle of proportionality, the measures provided for in the directive were strictly limited to the minimum needed to achieve the objective of the proper functioning of the internal market for information society services – from the perspective of the time.[414]

The centerpiece of the ECD is the horizontally applicable tiered liability system set forth in Art. 12 to 15. In the form of a categorization of different providers into caching, access, and hosting providers, it privileges these (without having to go into detail here on the individual provisions and their interpretation by the CJEU[415]). However, the precondition for exemption from liability for illegal content available via the service is that they are merely passive providers of services for the distribution of third-party content and have no knowledge of the illegality of the content in question. Moreover, no active monitoring obligations may be imposed on these providers. For media regulation, these provisions are relevant on the one hand because media undertakings regularly have a presence on such platforms themselves, i.e., the information society services act as distributors, and on the other hand because media undertakings in certain cases compete with the platforms for the same or similar recipient and advertising market (although and to the extent that the platforms provide third-party, for example user-generated, content and are not themselves content creators, because they then fall under a different category of responsibility anyway) or compete on the platforms with other content providers.

While, e.g., the liability privileges in Art. 12 to 15 ECD must be observed by the Member States when implementing rules that affect the

413 On the differences as to the country of origin principle in the ECD compared to the AVMSD (or TwF Directive) *Cole*, The Country of Origin Principle, 113, 113 et seq.

414 Cf. in detail on the ECD e.g. *Büllesbach et al.*, Concise European IT Law, Part II; *Valcke/Dommering* in: Castendyk/Dommering/Scheuer, p. 1083 et seq.

415 In detail *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content, p. 169 et seq.

question of liability for content that can be accessed via platforms, this does not apply if a regulation – for example within the framework of media regulation in the Member States – also affects providers that fall within the scope of the ECD. The broad definition of information society services in the Information Procedures Directive[416] results in many services that did not exist at the time the ECD was adopted nevertheless being covered by it. This also applies, and especially against the backdrop of the digital transformation and the blurring of the boundaries between media providers and intermediaries, to forms of offerings that play an important role in the dissemination of information as information society services, such as VSP or search engines. Calls for the creation of a new category of platform providers for content (distribution) in the ECD or another piece of legislation, which were already made during the last revision of the AVMSD[417] and then again during the discussions on the reform of the ECD or prior to the legislative proposal for the Digital Services Act[418] have not yet been taken up. For the time being, the traditional internal market orientation of the ECD applies, which does not differentiate according to the type of intermediary – apart from the distinction within the categories in the case of liability privileges.

With regard to the assignment of competence for safeguarding media pluralism to the Member State level, the ECD therefore refers to media pluralism as an objective of general public interest in such a way that, despite the broad scope of the Directive, existing rules – or such to be created in the future – of the Member States – and of the Union – with this objective remain unaffected.[419] Art. 1(6) ECD states in this regard:

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416 Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 aying [sic] down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, OJ L 204 of 21.07.1998, p. 37–48, repealed by Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241 of 17.09.2015, p. 1–15. Cf. also the consolidated text of Directive 98/34/EC, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01998L0034-20151007.

417 Cf. *Bárd/Bayer/Carrera*, A comparative analysis of media freedom and pluralism in the EU Member States, p. 75, who want to address separately such services that consist in the transmission or distribution of information provided by another person.

418 Cf. on this *ERGA*, Position Paper on the Digital Services Act, which advocates the introduction of a new category in the form of online content platforms.

419 See also *Valcke*, Challenges of Regulating Media Pluralism in the EU, p. 27, with reference to Art. 8(1), 9(4) and 18(1) of the Framework Directive and its rec. 5, 6

> *This Directive does not affect measures taken at Community or national level, in the respect of Community law, in order to promote cultural and linguistic diversity and to ensure the defence of pluralism.*

This is to be emphasized first of all insofar as Art. 1(6) ECD also speaks of *Community* (from the point of view of that time; today therefore "the European Union") measures that serve to promote cultural diversity. However, this must not be misunderstood to mean that it was a legal basis for rules on safeguarding diversity. First, Union action requires a legal basis under primary law, as has been considered in detail above. This is precisely what is lacking with regard to rules on safeguarding diversity. Second, primary law explicitly limits Union action in the cultural sphere to funding opportunities, as can be seen from the cultural clause of Art. 167 TFEU. Accordingly, the ECD provision refers to measures aimed, e.g., at promoting cooperation between Member States and, where appropriate, supplementary measures in the cultural segment, such as preserving cultural heritage. This is confirmed by the related recital 63, which defines the exception of Art. 1(6) ECD in more detail and in this context only addresses measures of the Member States and in particular recognizes the diversity of cultural objectives:

> *The adoption of this Directive will not prevent the Member States from taking into account the various social, societal and cultural implications which are inherent in the advent of the information society; in particular it should not hinder measures which Member States might adopt in conformity with Community law to achieve social, cultural and democratic goals taking into account their linguistic diversity, national and regional specificities as well as their cultural heritage, and to ensure and maintain public access to the widest possible range of information society services; in any case, the development of the information society is to ensure that Community citizens can have access to the cultural European heritage provided in the digital environment.*

Member State rules on safeguarding diversity are thus unaffected by the ECD, if only for systematic reasons of competence.[420] This equally refers both to rules already in place at the time and to any regulation issued in

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and 31. See on this for the comparable area of network regulation especially under D.II.5.

420 Cf. on this *Paal*, Intermediäre: Regulierung und Vielfaltssicherung, p. 38, who, however, does not rely on Art. 1(6) in the sense of an derogation, but sees measures for safeguarding diversity in publishing as already not covered by the coor-

the future. However, the Member States are limited by the fact that the measures taken must be in line with Community (today: Union) law, in particular with general legal principles such as fundamental rights.[421]

In addition to this exception, there is – again comparable to a procedure also known from the AVMSD – also another option to deviate from the country of origin principle enshrined in the Directive, which is relevant in connection with the regulation of the media. While this principle, as just mentioned, normally prevents Member States from restricting the free movement of information society services from another Member State for reasons falling within the coordinated field, there is a possibility to derogate from it for the protection of overriding important legal interests: According to Art. 3(4) ECD, Member States may deviate from this principle in individual cases if this is necessary for reasons of protection of minors or the fight against any incitement to hatred on grounds of race, sex, religion or nationality. The authority to deviate is also subject to the condition of appropriateness and the existence of interference with or serious danger to the above-mentioned protected interests. In addition, a procedure explained in Art. 4(b), 5 and 6 must be followed – unless urgent cases are involved – which provides for the involvement of the Member State of establishment of the respective provider and the European Commission.

Both aspects, the exception as well as the power to deviate, document that the ECD has not led to a standardization in the sense that Member States' action to protect general interests such as media pluralism or the fight against certain crimes is excluded. This takes account of the fact – apart from the abstract problem that Union action must be fully covered by the respective legal basis and must not make action by the Member States in these reserved areas impossible – that the Member States are in a better position to assess certain contexts, such as in this case the necessary measures to safeguard pluralism.

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dinated area of the Directive according to Art. 3(2) in conjunction with Art. 2(h) ECD. These provisions require Member States not to impede cross-border access to services for reasons that fall within the coordinated scope of the Directive. However, the coordinated field does not refer to every regulation on information society services, but only for certain aspects of their activity. The Union also has no legislative competence in other areas.

421 Cf. on this in detail unter D.II.2.c. *Liesching* (Das Herkunftslandprinzip nach E-Commerce- und AVMSD, p. 78 et seq.) does not go into more detail on Art. 1(6) against the background of the question examined there limited solely on the country of origin principle (and thus not in the focus of aspects of safeguarding diversity) and merely refers to the Commission's comments in the notification procedure for the MStV in connection with the country of origin principle.

## 2. AVMS Directive

### a. Historical analysis in the context of safeguarding diversity

As a predecessor to the AVMSD, the Television without Frontiers Directive (TwF Directive)[422] was created in 1989 with the aim of establishing rules for the cross-border transmission of television broadcasts that would ensure the transition from national markets to a common market for the production and distribution of programs and that would guarantee fair conditions of competition, without prejudice to television's function of safeguarding the general interest.[423] This objective was pursued with the approach of minimum harmonization[424] on the underlying country of origin principle[425] as the core element of regulation.

In substantive terms, the key points of the TwF Directive were quota regulations for the promotion of European works – regulations that the German states felt were outside the EU competences[426] –, the regulation of advertising and sponsorship, provisions on the protection of minors and on content inciting hatred, and the right of reply. In total and as regards its scope, the Directive should regulate only the "minimum rules needed" to enable the free movement of broadcasts, but should not interfere with the competence of the Member States with regard to organization, financing or program content.[427] In particular, autonomous cultural developments in the Member States and the preservation of cultural diversity in the Community should not be affected by the Directive.[428] Safeguarding diversity played less of a role as an independent regulatory goal than as a side

422 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 298 of 17.10.1989, p. 23–30, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31989L0552.

423 Rec. 3 TwF Directive.

424 Directive 89/552/EEC already contains the wording that this directive regulates "the minimum rules needed to guarantee freedom of transmission in broadcasting".

425 Cf. on this *Cole*, The Country of Origin Principle, 113, 113 et seq.

426 Cf. BVerfGE 92, 203 (205 et seq.).

427 Cf. rec. 13 TwF Directive.

428 Cf. rec. 13 TwF Directive. Cf. on the history of the TwF and AVMS Directives against the background of an economic approach also *Broughton Micova*, The Audiovisual Media Services Directive: Balancing liberalisation and protection (DRAFT).

effect therein: By preventing actions that could interfere with the free flow of broadcasts or encourage the emergence of dominant positions, potential threats to pluralism and freedom of information could also be countered.[429] Ensuring this, however, remained a task for the Member States. This is documented in particular by three factors that could be identified in the TwF Directive:

(1.) the deliberately chosen approach of minimum harmonization, documented by the recitals to the Directive,
(2.) granting in part wide latitude even within harmonized rules – e.g. in the sense of setting targets through the Directive, but leaving the way to do so to the Member States –[430], and
(3.) the introduction of a general power of derogation in Art. 3(1) TwF Directive.

The latter allows Member States to lay down stricter or more detailed provisions for television broadcasters under their jurisdiction in the areas covered by the Directive, for example to allow for an active policy in favor of a particular language or for other "certain circumstances"[431], including the pursuit of cultural objectives.[432]

In contrast, it is not possible to identify a distinct cultural policy focus in the individual regulatory areas of the TwF Directive. Rather, they served to protect other legally protected interests, in particular consumer protection (e.g. advertisement labeling and sponsoring), youth protection (e.g. advertising that impairs development) and the internal market (e.g. country of origin principle). This also applies to the rules for the promotion of (independent) European works, which at first glance appear to be measures for the protection of cultural diversity and the preservation of European film culture, but in fact – as the recitals (especially 20, 23) demonstrate – were in particular aimed at favoring the formation of markets for television productions in the Member States, the promotion of new

429 Cf. on this rec. 16 TwF Directive.
430 For example, with regard to the promotion of independent European works, Art. 5 sentence 1 TwF Directive formulated – as one of the core concerns in establishing the Directive – that Member States should ensure "where practicable and by appropriate means" that broadcasters reserve "at least" ten percent of their broadcasting time for independent works.
431 Rec. 25, 26 TwF Directive.
432 See on this in detail below in chapter D.II.2.c. Cf. on the wording of Art. 3 TwF Directive also *Dommering/Scheuer/Adler* in: Castendyk/Dommering/Scheuer, p. 857 et seq.

sources for television productions as well as of small and medium-sized enterprises in the television industry and the creation of employment opportunities, i.e. aimed at industry, fairness of trade and competition.[433] This strengthening of the European film and TV industry occurred not least because of the influence of major U.S. content providers, whose channels penetrated the European market.[434] The background for the special emphasis on economic motives for the regulation in this context was probably also the lack of a competence basis for creating a regulation that focused on cultural policy. The wording of the Directive, which left it to the Member States to assess whether appropriate measures should be taken, was therefore accordingly cautious.

This line was also maintained in the reform of the Directive, which took place once every decade in the following period.[435] In an effort to adapt the provisions of the TwF Directive to a new advertising environment and technological developments in television broadcasting, Directive 97/36/EC[436] introduced important innovations in the areas of teleshopping and the broadcasting of major events, and deepened the provisions of the law on the protection of minors from harmful content. From the procedural point of view, the provisions on jurisdiction were concretized in the form of the criteria for determining jurisdiction and the Contact Committee was established. However, the basic concept of minimum harmonization was retained, in particular also with the reaffirmation that the concept of basic harmonization chosen by the TwF Directive was still necessary, but also sufficient, to ensure the free reception of television broadcasts in the Community.[437] Accordingly, the objectives in the form of protection of the right to information (e.g. broadcasting of major events), improved

433 Accordingly, in its 1986 proposal for a directive, the Commission also already emphasized that "the vulnerability of European cultural industries is not due to lack of creative talent, but to fragmented production and distribution systems", OJ C 179 of 17.07.1986, p. 4–10, 6.

434 *Broghton Micova*, The Audiovisual Media Services Directive: Balancing liberalisation and protection (DRAFT), p. 4 et seq.

435 In detail on the genesis of the TwF Directive *Weinand*, Implementing the Audiovisual Media Services Directive, p. 70 et seq.

436 Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 202 of 30.07.1997, p. 60–70, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31997L0036.

437 Rec. 44 Directive 97/36/EC.

competitiveness of the programme industry (e.g. revision of the provisions and exceptions for the promotion of European works), consumer protection (e.g. regulation of teleshopping) and protection of minors (e.g. prohibition of content that seriously impairs development) were also at the forefront of the reform. In this context, cultural aspects were only taken into account in activities based on other provisions, as the obligation under the cultural horizontal clause already required at that time.[438]

While the power to derogate under Art. 3(1) of the TwF Directive remained essentially untouched by the reform, the recitals now specified the other "certain circumstances" in which Member States were to be able to adopt stricter provisions. Recital 44 listed for this purpose, in particular and among other things, the protection of the public interest in terms of television's role as a provider of information, education, culture and entertainment, the need to safeguard pluralism in the information industry and the media, and the protection of competition with a view to avoiding the abuse of dominant positions. Although such Member State rules must be compatible with Community law, the safeguarding of pluralism in the (audiovisual) media is thus clearly seen here as being within the competence and interests of the Member States, even in areas in which the European legislature has already documented its regulatory intent and competence for legal and economic aspects relating to services by harmonizing precisely those rules in the Directive.

This line was continued with the next reform. Ten years after the previous revision of the Directive, Directive 2007/65/EC[439] aimed to respond once again to new technical circumstances, in particular against the background of the growing importance of the Internet, and to adapt the legal framework to the convergence of the media. To this end, provisions were introduced for on-demand services as part of a tiered regulatory approach that, while separating linear and non-linear offerings, recognized the television-like nature of audiovisual on-demand offerings on the Internet and therefore introduced similar obligations in certain areas. There was a renewed concretization of the provisions on jurisdiction, information re-

438 So explicitly rec. 25 with reference to Art. 128(4) TEC (Amsterdam consolidated version), OJ C 340 of 10.11.1997, p. 173–306 (now Art. 167 TFEU).

439 Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332 of 18.12.2007, p. 27–45, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007L0065.

quirements for providers were introduced or revised, the right to short news reports was established, and adjustments were made in the area of commercial communications, in particular with regard to product placement. In the context of Art. 3, approaches of self-regulation and co-regulation were also introduced into the Directive for the first time by stipulating that the Member States promote such regulations in the coordinated field – but only to the extent permitted under national law. However, the concretization and scope of the use of such regulatory instruments was left to the Member States – in line with a minimum harmonization approach.

While aspects of safeguarding diversity in the media played a greater role in the general considerations for Directive 2007/65/EC than in the predecessor directives[440], safeguarding pluralism is not taken up as a direct objective in the text of the Directive – in line with the lack of a legal basis in terms of competence. In its 2003 Green Paper on services of general interest, the Commission also explicitly emphasized that "[A]t present, secondary Community legislation does not contain any provisions directly aiming to safeguard the pluralism of the media"[441]. However, individual innovations were framed in the context of media pluralism. Thus, the clarification of competence rules was placed under the point of view that in order to "enhance media pluralism throughout the European Union", only one Member State should have jurisdiction over an audiovisual media service provider and that "pluralism of information should be a fundamental principle of the European Union"[442]; the introduction of the right to short news reports was justified by the absolute essentiality to promote pluralism through the diversity of news production and programming across the EU[443]; the obligation to promote European works on the part of on-demand audiovisual media service providers was underpinned at least by the fact that the providers thereby (also) contribute actively to the promotion of cultural diversity[444].

However, this greater emphasis on media diversity was not accompanied by a reorientation of the Directive to the effect that safeguarding diversity would have become an objective of the EU, pursued with concrete

440 Cf. rec. 1, 3, 4, 5, 8, which refer to the general direction of the EU's regulatory policy in the audiovisual area, understanding diversity of opinion and the media as a cornerstone in this context.

441 Green paper on services of general interest, COM/2003/0270 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52003DC0270, para. 74.

442 Rec. 28 Directive 2007/65/EC.

443 Rec. 38 Directive 2007/65/EC.

444 Rec. 48 Directive 2007/65/EC.

rules at the level of secondary law. Rather, the stronger inclusion of diversity considerations was probably also due to corresponding statements in the EU Commission's communication on the future of European regulatory audiovisual policy, which immediately preceded the reform.[445] However, it is pointed out therein that the protection of pluralism in the media is primarily the responsibility of the Member States, but that some Community legal acts nevertheless contribute more or less indirectly to the protection of media pluralism, such as in competition law and certain provisions of the TwF Directive (esp. as regards the promotion of European works). Accordingly, the 2007 reform also emphasizes that the Member States are free to choose the appropriate instruments according to their legal traditions and established structures when transposing the Directive, whereby the instruments chosen should contribute to the promotion of media pluralism.[446]

In 2010, a codification of the Directive took place, which brought together in one text all the adaptations set out in the amending Directives up to that point and re-promulgated the act as the Audiovisual Media Services Directive. This was not coupled with a change in content. In particular, the recitals of Directive 2007/65/EC dealing with aspects of safeguarding diversity have also been incorporated verbatim and in full into Directive 2010/13/EU, i.e. their continued validity has been recognized.[447] A change in audiovisual policy and the previous line of locating safeguarding diversity at Member State level – albeit as an important principle at EU level – had therefore not taken place.

445 Communication from the Commission of 15 December 2003 on the future of European regulatory audiovisual policy, COM(2003) 784 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52013DC0784&qid=1614597375820.

446 Rec. 65 Directive 2007/65/EC.

447 Comparing Directive 2007/65/EC with (Directive 2010/13/EU): 1(4), 3(5), 4(6), 5(7), 8(12), 28(34), 38(48) and 65(94).

b. AVMSD reform 2018

With a comprehensive reform[448], the AVMSD, initiated by a Commission proposal in May 2016[449], was revised in 2018 and significantly expanded in terms of scope to adapt it – once again – to the realities of a rapidly evolving media landscape. The requirements of the Directive were to be transposed by the Member States by 19 September 2020, with only Germany and Denmark having adopted a final transposition and Austria a partial one in national law by the end of the transposition period. In other Member States, however, legislative projects have already been initiated.[450]

The reform was triggered in 2013 by the Green Paper on media convergence, in which the Commission in particular raised the question of the timeliness of existing regulation and the impact of media convergence on media diversity.[451] With regard to aspects of safeguarding diversity against the backdrop of the changing media landscape, the Commission emphasized, among other things, that the AVMSD and competition rules contribute to the preservation of media pluralism both at EU and Member

448 For an overview of the developments in the trilogue procedure, cf. the synopsis by EMR, available at https://emr-sb.de/synopsis-avms/. A comparison of the versions of the Directive before and after the changes made by the directive adopted in 2018 can also be found there, as well as a (non-official) consolidated version of the AVMSD.

449 Proposal for a Directive of the European Parliament and of the Council 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 in view of changing market realities, COM(2016) 287 final, 25.5.2016, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52016PC0287. An initial assessment of the proposed amendment can be found at *Weinand*, Implementing the Audiovisual Media Services Directive, p. 719 et seq.; *Burggraf/Gerlach/Wiesner* in: Media Perspektiven 10/2018, 496, 496 et seq.; as well as *Cole/Etteldorf*, Von Fernsehen ohne Grenzen zu Video-Sharing-Plattformen, Hate Speech und Overlays – die Anpassung der EU-Richtlinie über audiovisuelle Mediendienste an das digitale Zeitalter.

450 Cf. on this the overviews in the databases of the Commission (https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32018L1808&qid=1599556794041) and the European Audiovisual Observatory (https://www.obs.coe.int/en/web/observatoire/home/-/asset_publisher/9iKCxBYgiO6S/content/which-eu-countries-have-transposed-the-avmsd-into-national-legislation-?_101_INSTANCE_9iKCxBYgiO6S_viewMode=view/).

451 European Commission, Green Paper Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values, COM(2013) 231 final, 24.4.2013, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52013DC0231&qid=1614597256678.

State level. In this context, the Commission explained in a footnote that the AVMSD supports media pluralism (only) by allowing audiovisual media services to freely circulate within the single market, based on the country of origin principle and e.g. through Art. 14, which in turn, together with the specific rules on the promotion of European works, supports media pluralism.[452] Also in a different context dealing with the values underlying the regulation of audiovisual media services, the Commission emphasizes in the Green Paper that the promotion of media pluralism and cultural diversity should be seen in the context of Art. 167(4) TFEU and that these regulatory objectives were not paramount for the purposes of the AVMSD.[453] Potential threats to the diversity of opinion and the media were identified in the Green Paper in particular with regard to the filtering and highlighting of content by gatekeepers such as search engines and other intermediary platforms, since these – although they can also strengthen the citizen's ability to obtain information – can influence the spectrum of accessible media offerings without the users' knowledge. Further considerations were made on the general legal framework, commercial communication, protection of minors, accessibility of audiovisual content for persons with disabilities, and other complementary aspects.

These considerations are reflected in the amending Directive (EU) 2018/1808, which was adopted later.[454] One of the significant changes is the (renewed) expansion of the scope of the AVMSD, to include the newly introduced category of video-sharing platforms (VSP). These are covered by the new version of the Directive for the first time – provided they were not previously already providers of non-linear services with own editorial responsibility and therefore subject to the AVMSD since the 2007 revision – and are thus held more accountable, in particular with regard to the protection of the general public from certain illegal content, commercial communication and the protection of minors. The rules for non-linear audiovisual media services were also adjusted again, aligning them even further (but not completely) with the provisions for television providers. These

452 European Commission, Green Paper Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values, COM(2013) 231 final, 24.4.2013, p. 13, fn. 63.

453 European Commission, Green Paper Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values, COM(2013) 231 final, 24.4.2013, p. 10, fn. 50.

454 For an overview on the reform cf. also *Cole/Etteldorf*, Von Fernsehen ohne Grenzen zu Video-Sharing-Plattformen, Hate Speech und Overlays – die Anpassung der EU-Richtlinie über audiovisuelle Mediendienste an das digitale Zeitalter.

changes were made in consideration of the fact that newer players in the audiovisual market, in particular streaming providers such as Netflix (in the VoD area) and video distribution/access platforms such as YouTube (in the VSP area), compete with providers of traditional services such as television for the attention of the same recipients and advertisers and should therefore be subject to at least approximately similar regulation.

Other amendments include a minimal concretization to clarify responsibility criteria with regard to the country of origin principle[455], the requirements for the protection of minors[456] and hate speech,[457] the modernization of the obligation to promotion of European works[458], the tightening of qualitative and liberalization of quantitative advertising rules[459], the so-called signal integrity[460] as well as the obligation of the Member States to contribute to the promotion of media literacy. In addition, institutional and formal arrangements were made, which in turn may have significant implications for the overall shape of media regulation in the future: so-called codes of conduct (including European codes of conduct) are emphasized as new forms of regulation in the context of the overall strengthening of self-regulation and co-regulation, and there is a commitment to greater cooperation among regulators.[461]

With regard to aspects of safeguarding diversity as an objective in general, the reform has not brought any significant changes. Although recital 53 (in the context of the fulfillment of tasks by the national regulatory authorities) speaks, among other things, of media pluralism and cultural diversity as "objectives", the implementation of this objective is ultimately also confirmed by recital 61 insofar as it is to be located at the level of the Member States: These are to respect the freedom of expression and information and

455 Cf. in detail *Cole*, The AVMSD Jurisdiction Criteria concerning Audiovisual Media Service Providers after the 2018 Reform.

456 On this *Ukrow*, Por-No Go im audiovisuellen Binnenmarkt?.

457 On this *Cole/Etteldorf* in: Medienhandbuch Österreich, 56, 60 et seq.

458 On this *Cole*, Guiding Principles in establishing the Guidelines for Implementation of Article 13 (6) AVMSD; also *Etteldorf* in: UFITA 2019, 498, 506 et seq. with regard to the implementation of promotion obligations in national law.

459 On this *Etteldorf*, Zwischen Fernsehen ohne Grenzen und Werbung ohne Grenzen.

460 On this *Cole*, Die Neuregelung des Artikel 7 b Richtlinie 2010/13/EU (AVMD-RL).

461 A detailed overview of the changes can be found at *Weinand*, UFITA 2018, 260, 260 et seq.; further *Jäger,* ZUM 62(2019)6, 477, 477 et seq. On the institutional and formal reforms cf. in detail *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content, 101 et seq., 152 et seq.

media pluralism, as well as cultural and linguistic diversity, in accordance with the Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions[462] in any measure taken under the Directive.

With regard to certain rules in particular, however, the idea of (also) safeguarding media diversity plays a greater role in the context of the recent reform of the AVMSD. Areas in the context of which the safeguarding of pluralism is particularly emphasized are the obligation (now enshrined for the first time at EU level in the audiovisual field) to establish independent regulatory bodies[463], the ability of creating national rules to appropriately ensure prominence of content of general interest[464], transparency requirements regarding ownership structures[465], and the (amended obligation to) promote European works, which are described in detail in chapter D.II.2.d.

It should be noted in general and with regard to safeguarding media diversity that despite the fact that the scope of application and harmonization of the AVMSD has been constantly expanded over time, full harmonization at this level is far from being achieved and the TwF Directive's approach of minimum harmonization is being continued in certain areas. This is expressed not only in general and further by the character of the AVMSD as a directive[466], but also by the explicit power of the Member States, provided for in Art. 4(1), to deviate from the rules. Also the CJEU only recently emphasized in its *Vivendi* decision as follows:

462 UNESCO, 2005 Convention for the Protection and Promotion of the Diversity of Cultural Expressions, https://en.unesco.org/creativity/sites/creativity/files/passeport-convention2005-web2.pdf.

463 Cf. rec. 54 and 55 as well as the remarks in the ex post REFIT evaluation prior to the reform, Commission staff working document SWD/2016/0170 final – 2016/0151 (COD), https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1596711526774&uri=CELEX:52016SC0170, in the context of which the existence of independent regulatory bodies at the national level was assessed as a prerequisite for the protection of media diversity.

464 Cf. on this rec. 25 Directive (EU) 2018/1808.

465 Cf. rec. 16 Directive (EU) 2018/1808.

466 By choosing the instrument of a directive, which according to Art. 288(3) TFEU leaves the choice of form and methods of transposition to the national authorities, the Union legislature has at the same time taken into account the horizontal cultural policy clause in Art. 167 TFEU with its effect of protecting the sovereignty of the Member States in terms of media policy in a manner related to the type of legal act. Cf. on this *Ukrow/Ress* in: Grabitz/Hilf/Nettesheim, Art. 167 TFEU, para. 148 et seq.

> *"[…] both the Framework Directive and the Audiovisual Media Services Directive effect a non-exhaustive harmonisation of national rules in their respective fields, leaving the Member States with a margin of discretion to adopt decisions at national level. In particular, in accordance with Article 1(3) of the Framework Directive, the Member States remain competent to pursue general interest objectives, in particular relating to content regulation and audiovisual policy, having due regard for EU law."*[467]

c. The relevance of Art. 4(1) AVMSD

Art. 4(1) AVMSD regulates the Member States' power of derogation, which relates to the regulatory fields coordinated by the Directive. This can therefore also lead to stricter rules in national law with regard to the harmonized regulations of the AVMSD, but these may then only be applied to providers under their own jurisdiction and – in line with the country of origin principle – not to services received from other EU countries. Thus, this regulation is one of the key elements of the discretion left to the Member States in the regulation of audiovisual media services or the key element for determining Member State powers when it comes to areas which are already (partially) harmonized by the Directive. However, Art. 4(1) AVMSD does not apply in cases where Member States' regulations refer to or have an effect on services covered by the Directive but do not concern the field coordinated by the AVMSD, even if they have cross-border effects[468]. In this respect, there is room for maneuver for the Member States anyway.

The power to derogate already existed in the original TwF Directive. While the prohibition of circumvention (Art. 4(2) AVMSD) and the procedure of recourse to providers under other jurisdiction (Art. 4(4) and (5) AVMSD) were established only over time, namely with Directives 1997/36/EC[469] and 2007/65/EC, and amended by Directive (EU)

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467 CJEU, case C-719/18, *Vivendi SA / Autorità per le Garanzie nelle Comunicazioni*, para. 47.

468 On this in particular CJEU, joined cases C-244/10 and C-245/10, *Mesopotamia Broadcast A/S METV and Roj TV A/S / Bundesrepublik Deutschland*, para. 37. On this in detail *Cole in:* R.D.T.I. 47/2012, 50, 50 et seq.

469 Thus, in particular, settled case law of the CJEU to that date (e.g. cases 33/74, *Van Binsbergen / Bedrijfsvereniging voor de Metaalnijverheid*, and C-23/93, *TV10 SA / Commissariaat voor de Media*) has found its way into the Directive, according to which a Member State retains the right to take action against a broadcaster

2018/1808, para. 1 has changed little since its creation, as can be seen from the following synopsis.

| 89/552/EEC | 97/36/EC | 2007/65/EC | (EU) 2018/1808 |
|---|---|---|---|
| Member States shall remain free to require television broadcasters under their jurisdiction to lay down more detailed or stricter rules in the areas covered by this Directive. | Member States shall remain free to require television broadcasters under their jurisdiction to **comply with** more detailed or stricter rules in the areas covered by this Directive. | Member States shall remain free to require **media service providers** under their jurisdiction to comply with more detailed or stricter rules in the **fields coordinated** by this Directive **provided that such rules are in compliance with Community law**. | Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive, provided that such rules are in compliance with **Union** law. |

The general necessity of this rule and its substance in the form of the ability to derogate from the harmonized fields of the Directive has never been questioned. For example was merely clarified that the rules adopted by the Member States must comply with Community or Union law – a requirement which, as shown in the previous chapters, already results from general principles of Union law anyway and thus has only declaratory effect. In the context of imposing stricter obligations on audiovisual media service providers, consideration should be given in particular to fundamental freedoms, fundamental rights and general principles of Union law, in particular the freedom to provide services (Art. 56 et seq. TFEU), the freedom of the media (Art. 11 CFR) and the general principle of equal treatment.[470]

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which establishes itself in another Member State but whose activities are wholly or mainly directed towards the territory of the first Member State, if the broadcaster has established itself with the intention of evading the rules which would be applicable to it if it were established in the territory of the first Member State.

470 Cf. on this in particular CJEU, case C-234/12, *Sky Italia srl / Autorità per le Garanzie nelle Comunicazioni*, para. 15 et seq.

The definition of the objective of "general interest" does not follow from the Directive itself. However, certain objectives which the EU legislature in particular included and includes under this term can be inferred rom the recitals. These include, e.g., goals that are geared to language criteria[471] or serve the realization of language policy goals[472] (which in turn are intrinsically linked to cultural measures[473]), consumer protection, protection of minors, and cultural policy.[474] However, the lists there are by no means exhaustive. Rather, with Art. 4(1), the EU legislature takes up the long-established case law of the CJEU, developed over decades, on the definition of the general interest.[475] Accordingly, in its case law on Art. 4 AVMSD (or Art. 3 TwF Directive)[476], the CJEU does not initially examine the existence of an objective of general interest in order to justify the applicability of Art. 4(1) AVMSD, but shifts this examination to the level of the assessment of the violation of Union law, in particular of fundamental freedoms, in the context of which it is equally a matter of pursuing overriding reasons of general interest.[477] Therefore, reference can be made here to the explanations on the determination of an objective of general interest in the light of the justification of restrictions of fundamental rights and freedoms in chapters C.II, C.III and C.IV.1, which in particular conceive safeguarding diversity as such an objective, which, as explained there, is based on an approach of the ECtHR that again goes back a long way. It follows that, irrespective of whether a measure taken by a Member State falls within the fields covered by the Directive, Member States remain in

471 Rec. 26 Directive 89/552/EEC.

472 Rec. 44 Directive 1997/36/EC.

473 So expressly CJEU, C-222/07, *Unión de Televisiones Comerciales Asociadas (UTECA) / Administración General del Estado,* para. 33.

474 Rec. 32 Directive 2007/65/EC.

475 So expressly with reference to the case law on Art. 43 and 49 TEC rec. 32 Directive 2007/65/EC.

476 In particular CJEU, case C-6/98, *Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) / Pro Sieben Media AG*; CJEU, case C-500/06, *Corporación Dermoestética SA / To Me Group Advertising Media*; CJEU, case C-222/07, *Unión de Televisiones Comerciales Asociadas (UTECA) / Administración General del Estado*; CJEU, case C-234/12, *Sky Italia srl / Autorità per le Garanzie nelle Comunicazioni*; CJEU, case C-314/14, *Sanoma Media Finland Oy – Nelonen Media / Viestintävirasto*.

477 Cf. on this e.g. CJEU, case C-6/98, *Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) / Pro Sieben Media AG*; CJEU, case C-500/06, *Corporación Dermoestética SA / To Me Group Advertising Media*, para. 31 et seq.

principle competent to adopt such a measure, provided that they comply with Union law.[478]

As far as the definition of the "fields coordinated by this Directive" is concerned, to which Art. 4(1) AVMSD alone applies, while in other areas Member States' rules with regard to the services covered by the Directive are "only" to be measured against higher-ranking law such as fundamental rights and freedoms, the case law of the CJEU must also be referred to. In its *de Agostini* decision[479] the CJEU clarified in this context firstly that the coordinated fields can only relate to those services which fall within the scope of the Directive (at that time only television programs) and secondly that the coordination by the Directive must also have reached a certain degree in order to influence the scope of the Member States' regulatory leeway, and in particular that partial coordination is not sufficient for this purpose.[480] In this context, the CJEU assumed only such partial coordination even in the area of advertising, for which the then version of the Directive contained a number of principles of both a quantitative and qualitative nature[481]. The decision dates back to 1997 and therefore still refers to the TwF Directive as it stood at that time, so one could question the continued validity of these principles. However, the decision related to the area of advertising, which was similarly extensively regulated then as now. Furthermore, even more recent decisions on Directive 2010/13/EU still make reference to the de Agostini decision and the comments made there on the coordinated field, emphasizing the non-exhaustive nature of the Directive.[482]

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478 CJEU, case C-222/07, *Unión de Televisiones Comerciales Asociadas (UTECA) / Administración General del Estado*, para. 19, 20; as well as CJEU, joined cases C-244/10 and C-245/10, *Mesopotamia Broadcast A/S METV and Roj TV A/S / Bundesrepublik Deutschland*, para. 34.

479 CJEU, joined cases C-34/95, C-35/95 and C-36/95, *Konsumentombudsmannen (KO) / De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB*.

480 CJEU, joined cases C-34/95, C-35/95 and C-36/95, *Konsumentombudsmannen (KO) / De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB*, para. 26 and 32. On this in detail the annotations of *Novak* in: DB 1997, 2589, 2589 et seq.; *Lange* in: EWS 1998, 189, 190; *Heermann* in: GRUR Int 1999, 579, 588 et seq., *Stuyck* in: CMLRev. 1997, 1445, 1466 et seq.

481 Provisions on the manner of broadcasting, the use of certain advertising techniques and broadcasting time, content requirements (human dignity, discrimination, cigarettes and tobacco products, medicines and medical treatment, alcoholic beverages), and the protection of minors.

482 Cf. for instance CJEU, joined cases C-244/10 and C-245/10, *Mesopotamia Broadcast A/S METV und Roj TV A/S / Bundesrepublik Deutschland*, para. 32, 36 et seq. With reference to the fields of public order, morality and safety; C-622/17, *Baltic*

Moreover, the following conclusion can be drawn from the provision of Art. 4(1) AVMSD: if already the only set of regulations at EU level that directly addresses the media sector in regulatory terms provides Member States with leeway and explicitly allows them to adopt stricter provisions in the field coordinated by the EU for domestic providers[483], in particular in the cultural policy area of safeguarding media diversity, then corresponding possibilities must not be blocked in principle with regard to other (coordinated) sectors that are affected by measures to safeguard diversity. In particular, the power of derogation deliberately created by Art. 4(1) AVMSD against the background of cultural policy and constitutional considerations in the various Member States cannot be completely undermined by other sectoral provisions at the level of EU secondary law. This applies in particular against the background that the use of the derogation power by enacting stricter rules is often not very attractive for reasons of competition policy and law: On the one hand, it is important for the individual Member States not to lose or reduce their attractiveness as a location for media undertakings due to economic interests (tax revenues) and also cultural policy interests (diverse media landscape), and on the other hand, not to impair the competitiveness of domestic media undertakings in competition with foreign undertakings.[484] A fortiori, therefore, if the objective of Art. 4(1) AVMSD to give the Member States the opportunity to create their own framework conditions for media policy in certain fields, can no longer or less sensibly be achieved, this objective must not be further hindered or even restricted by the fact that harmonization is taking place in other areas, which regularly affects the media sector only as a reflex.

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*Media Alliance Ltd / Lietuvos radijo ir televizijos komisija*, para. 73 et seq., however, against the background of Art. 3(1) AVMSD with reference to the pursuit of objectives in the public interest.

483 *Liesching* (Das Herkunftslandprinzip nach E-Commerce- und AVMD-Richtlinie, p. 40) comes to the conclusion with regard to the adoption of national rules also for foreign providers with regard to general media law regulation (outside of specifically diversity-securing regulatory objectives) that the transmitting state principle according to Art. 3 AVMSD in the coordinated field in principle does not permit national abstract-general rules with regard to providers of audiovisual media services with an establishment in another Member State, insofar as these rules in their application mean impediments to the further dissemination of their services. This does not apply if the rules serve a purpose other than the fields and objectives harmonized by the Directive. These include measures to safeguard media pluralism, which is the focus of this study.

484 Cf. on this etwa *Harrison/Woods*, Jurisdiction, forum shopping and the 'race to the bottom', 173, 174 et seq.; *Vlassis* in: Politique européenne 2017/2, 102, 102 et seq.

d. Specific provisions

Although, as described in detail above, the AVMSD is still not aimed at creating rules with cultural policy implications, but rather at enabling the free movement of audiovisual media services in the European internal market and removing obstacles in this regard, there are also links to safeguarding diversity by the Member States, either by actively promoting certain media content through them or their regulatory frameworks, or by reacting restrictively to certain negative developments or dangers (also in the light of pluralism). In the following, we will therefore look at those rules that are related to safeguarding diversity in the media, in order to draw conclusions for the delimitation of competences between the Union and the Member States from the way they are structured in terms of the exercise of competences.

(1) Promotion of European works

Already under the TwF Directive, television broadcasters were obliged to reserve the majority of their broadcasting time, which did not consist of news, sports reports, game shows or advertising and teletext services, for the transmission of European works. 10 % of broadcasting time or, alternatively, at the choice of the Member State, 10 % of the budget should be reserved for European works by independent producers. Broadcasters must report on compliance with this quota requirement. However, these rules – then as now – do not apply to television broadcasts aimed at a local audience that are not connected to a national television network, thus privileging these providers to that extent by exempting them from broadcasting and reporting requirements.[485] It is true that the quota regulations have been critically evaluated both from a perspective of legal competence and against the background of the entrepreneurial freedom of media providers and their organization, not only in the FCC's ruling on the TwF Directive (there at least in connection with the federal government's observance of federal states' rights in the legislative process in the Council as an expres-

485 In detail on the exception for local providers: *Ukrow/Cole*, Förderung lokaler und regionaler Medienvielfalt, p. 91 et seq.

sion of the obligation to act in a way that is friendly to the federal states),[486] but also in the literature.[487] Notwithstanding the question, which has not yet been conclusively clarified or discussed by either the CJEU or the FCC, as to whether the EU's service-related competence title provides a sufficient legal basis for audiovisual quota regulations, these quotas do, however, prove to be an important means of promoting cultural aspects and have been described by the Commission in its regular reports to the European Parliament and the Council as very successful, based on information from the Member States, at least with regard to the regulations in the AVMSD and the respective national transposition.[488] As indirect addressees of a binding European quota regulation, media providers are initially burdened by this, so that it could be inferred that the main objective cannot be safeguarding media diversity. However, it is not only the film production landscape that benefits from the quota obligation or the greater variety of offerings from the viewer's perspective. Rather, the resulting effect of also promoting the production of national works and European co-productions leads to the situation, also advantageous for media providers, that a greater range of program material is available on the market, from which they can profit (for the providers of linear and non-linear services, as the case may be, also reciprocally[489]).

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486 Cf. BVerfGE 92, 203 (238 et seq.). Cf. on this *Bethge*, Deutsche Bundesstaatlichkeit und Europäische Union. Bemerkungen über die Entscheidung des Bundesverfassungsgerichts zur EG-Fernsehrichtlinie, p. 55 et seq.; *Holtz-Bacha*, Medienpolitik für Europa, p. 127 et seq.; *Deringer* in: ZUM 1995, 316, 316 et seq.; *Gerkrath* in: RTDE 1995, 539, 539 et seq.; *Kresse/Heinze* in: ZUM 1995, 394, 394 et seq.; *Martín y Pérez de Nanclares* in: Revista de Instituciones Europeas 1995, 887, 887 et seq.; *Müller-Terpitz*, Ein Karlsruher "Orakel" zum Bundesstaat im europäischen Staatenverbund, p. 568 et seq.; *Trautwein* in: ZUM 1995, 614, 614 et seq.; *Winkelmann* in: DöV 1996, 1, 1 et seq.

487 Cf. for the area of television: *Broughton Micova*, Content quotas: what and whom are they protecting; *Middleton* in: Denver Journal of International Law and Policy 31/2020, 607, 614 et seq.

488 Cf. for instance Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, First Report on the Application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2009–2010 Promotion of European works in EU scheduled and on-demand audiovisual media services, COM/2012/0522 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52012DC0522.

489 Cf. for instance recently the securing by Netflix of the U.S. broadcasting rights for the series "Babylon Berlin," which was co-produced by ARD, among others. Cf. on this furthermore also *Etteldorf* in: UFITA 2019, 498, 506 et seq.

As mentioned at the beginning of the historical observation, however, the main focus of the introduction of this rule was not the establishment of cultural policy guidelines, but was primarily motivated by aspects of an economic nature, which was (and continues to be) in particular a consequence of the lack of a legal competence for setting cultural policy priorities at the Union level. Attractive markets for television productions should be favored at the European level – through a step-by-step approach – as far as the general conditions[490] in the respective Member States allow. This gradual introduction of rules, which, however, was to leave the choice of appropriate means to the Member States, in particular did not contain any concrete and strictly prescriptive regulations, in this context demonstrates the cautious approach – at least in comparison to original regulatory considerations[491]. The 1997 reform, which further harmonized national legislation promoting European works, maintained this economic focus – strengthening and improving the competitiveness of the program industry in Europe (recitals 26, 28 Directive 1997/36/EC).

The 2007 reform, whose most significant amendment was the inclusion of non-linear audiovisual media services in the scope of the Directive, also partially changed the approach to the promotion of European works. Although the harmonization of the regulatory framework between linear and non-linear services for some regulatory areas was based on the consideration that, due to the similarity of these services to television and a similar audience and advertising market, a level playing field should consequently apply (recital 7), and therefore the original (mainly economic) efforts to introduce existing rules should also continue to apply, the introduction of promotion obligations for European works of on-demand audiovisual media services was (also) justified by the consideration that these providers "should, where practicable, promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity"[492]. However, as with the origin rule for linear providers, the specific implementation of this objective was largely left to the Member States ("shall ensure […] where practicable and by appropriate means"). Unlike the quota requirement for linear services ("majority proportion of their transmission time"), the provision regarding non-linear services was more open, with the Directive listing examples of possible re-

490 Exemptions for Member States were already provided for at that time, in particular for Member States with a low audiovisual production capacity or a restricted language area, cf. rec. 22 Directive 89/552/EEC.

491 Cf. on this BVerfGE 92, 203 (243 et seq.).

492 Rec. 48 Directive 2007/65/EC.

quirements for achieving this promotion by such providers (imposition of financial contribution obligations or obligations to ensure prominence).[493] The regulations issued on this basis in the individual Member States, if they exist at all, are therefore very diffuse and regularly distinguish between models of quotas, prominence, investment obligations and indicators.[494]

The latest 2018 amending directive further aligned the rules for linear and non-linear providers. Accordingly, on-demand audiovisual media service providers are now also subject to a fixed quota obligation as a direct result of rules at EU level (Art. 13 AVMSD). However, in contrast to television broadcasters (50 % – since "majority proportion of transmission time"), these providers must make available in their catalogs only a minimum of 30 % of European works. In addition, providers should ensure appropriate prominence of European works in their catalogs. However, this obligation – equally with other financial contribution obligations that Member States may impose on linear and non-linear service providers – does not apply to media service providers with low turnover or low audience. Member States may also refrain from applying the rule to providers with regard to specific offerings if this would be impracticable or unjustified given the nature or theme of the audiovisual media services. Besides, during the deliberations on this Directive, the German states maintained, by means of a corresponding opinion of the Bundesrat, that it is the Member States alone that decide on the form of the promotion of European works.[495]

For the concrete calculation of the share of European works and for the definition of low audience and low turnover, the Commission, according to Art. 13(7) AVMSD, shall issue guidelines.[496] This codifies a practice according to which the Commission already in the past wanted to provide instructions through the provision of corresponding guidance within the framework of the Contact Committee in order to achieve a largely uni-

493 On implementation processes at the time at large: *Apa et al.* in: Nikoltchev, Videoabrufdienste und die Förderung europäischer Werke.

494 Cf. on this comprehensively *EAI*, Mapping of national rules for the promotion of European works in Europe; as well as *VVA et al*., study on the Promotion of European Works in Audiovisual Media Services, SMART 2016/0061.

495 Cf. https://www.bundesrat.de/SharedDocs/drucksachen/2016/0201-0300/288-2-16.pdf?__blob=publicationFile&v=5, cipher 20.

496 Cf. on this in detail *Cole*, Guiding Principles in establishing the Guidelines for Implementation of Article 13 (6) AVMSD.

form approach in the Member States when calculating the quotas.[497] The Commission published these guidelines in July 2020.[498] The guidelines are not legally binding on the Member States and do not preclude the application of special rules in the Member States, provided that they comply with Union law. However, they are an expression of the Commission's interpretation of the requirements of the AVMSD and can – and it is to be expected will – therefore be used by the Commission for future evaluation processes of Member States' implementation.[499] Due to this effect, too, it should ideally have been assumed that the Commission's guidelines were already available at a time when the Member States could still take them into account in their transposition. This is even more true for further guidelines that the Commission was entitled to issue to define the "essential functionality" criterion for defining video-sharing platforms and also published in parallel in July 2020 (on this see chapter D.II.2.d(5)). Since the guidelines regarding the promotion obligation were also only announced just before the end of the transposition period, it will be necessary to observe which Member States have taken them into account at all in greater detail when drafting the legal basis, or how the Commission will deal with non-inclusion of the guidelines at least in the application practice by the supervisory authorities. The approach taken in the MStV of authorizing the state media authorities in its § 77 sentence 3 to regulate details of the implementation of the quota regulations for providers of television-like telemedia by means of joint statutes is in this respect not only un-

497 Cf. *Cole*, Guiding Principles in establishing the Guidelines for Implementation of Article 13 (6) AVMSD, with further references; cf. also Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, First Report on the Application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2009–2010 Promotion of European works in EU scheduled and on-demand audiovisual media services, COM/2012/0522 final.

498 Communication from the Commission Guidelines pursuant to Article 13(7) of the Audiovisual Media Services Directive on the calculation of the share of European works in on-demand catalogues and on the definition of low audience and low turnover, OJ C 223 of 07.07.2020, p. 10–16, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2020.223.01.0010.01.ENG&toc=OJ:C:2020:223:TOC.

499 Cf. on this European Commission – Questions and answers, Guidelines on the revised Audiovisual Media Services Directive, 02.07.2020, available at https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_1208; in detail also *Cole*, Guiding Principles in establishing the Guidelines for Implementation of Article 13 (6) AVMSD.

objectionable under European law, but also a welcome form of integrating the guidelines into the implementing legislation.

In addition to the quota obligation itself, there is a comprehensive evaluation obligation for the transposition of the various promotion measures provided for in Art. 13 AVMSD. To this end, the Member States must first report to the Commission on the application of the national rules, and the Commission in turn must report to the European Parliament and the Council from this and from an independent evaluation of the application of these rules by the Member States. In this context, it should take into account the market and technological developments, as well as "the goal of cultural diversity" (Art. 13(5) AVMSD). On the one hand, this wording makes it clear that, irrespective of the emphasis on the economic objective – also due to the otherwise questionable legal basis – at the time of the introduction of the funding obligation, the promotion to safeguard (European, i.e. the Member States' own) cultural diversity has always existed as an objective in the background. In this context, Art. 13(5) AVMSD merely emphasizes that special attention should be paid to the extent to which the rule and the measures taken on its basis contribute to cultural diversity and its safeguarding (by guaranteeing production and distribution through broadcasting). Neither the directive nor the more technically oriented guidelines, which refer to calculation parameters for the catalog share of 30 % and the services to be excluded from the promotion obligations, call into question the sovereignty of the Member States to define the cultural policy aspect of the regulation. Overall, the Union provision is thus within the scope of competence and is in particular covered by Art. 167 TFEU, as it concerns the support (development) of cultures in the Union, which does not interfere with the cultural policy of the Member States and is also based on the competitiveness of the European audiovisual market.[500]

This only supplementary support dimension is also evident in the Commission's formulation of the guidelines. According to them, "it is thus important to find a right balance between the objectives of preserving a necessary innovation space for smaller audiovisual players and that of promoting cultural diversity through adequate financing for European works *under Member States' cultural policies*".[501] Nevertheless, care must also be taken in the future to ensure that the Commission is not able to curtail the re-

500 So *Harrison/Woods*, Television Quotas: protecting European Culture?.

501 Communication from the Commission Guidelines pursuant to Article 13(7) of the Audiovisual Media Services Directive on the calculation of the share of European works in on-demand catalogues and on the definition of low audience and low turnover, OJ C 223 of 07.07.2020, p. 10–16, at III.1.

serve of competences of the Member States, even in the transposition of directives, through only vague or narrowly conferral of the right to define the details by means of (again: legally non-binding) guidelines. In fact – and in case of doubt also in a sensible way – such guidelines will have a harmonizing effect for partial areas regardless of their legally non-binding nature, because de facto Member States will only disregard the guidelines in case of a need for deviation that is necessary and justifiable from their point of view.

A further leeway at the national level already lies in the broad definition (given at the EU level) of European works, which according to Art. 1(1)(n) AVMSD are to be understood as works originating in Member States and such originating in European third States[502] party to the European Convention on Transfrontier Television of the Council of Europe, as well as works co-produced within the framework of agreements related to the audiovisual sector concluded between the Union and third countries[503] and fulfilling the conditions defined in each of those agreements. This broad understanding of the term recognizes the possibility for Member States to clarify this definition in compliance with Union law and taking into account the objectives of the AVMSD for media service providers under their jurisdiction.[504] The latter means in particular that Member States can incorporate their own cultural considerations into this type of support for national providers, in particular responding to national peculiarities when they concretize the term. For example, in France – a Member State

502 In particular, safeguards are needed for EEA States if they are to benefit from such rules. On the impact of Brexit in this context cf. *Cole/Etteldorf/Ukrow*, Audiovisual Sector and Brexit: the Regulatory Environment. As a signatory to the Convention on Transfrontier Television, productions from the United Kingdom will continue to count as European works, but there will be no reporting obligation to the Commission. Following a consultation process, the government announced its intention to review the existing quota rules in UK law and (for the time being) came out against the introduction of a levy requirement. Cf. on this Department for Digital, Culture, Media & Sport, Consultation outcome Audiovisual Media Services, Government response to public consultations on the government's implementation proposals, 30.5.2019, https://www.gov.uk/government/consultations/audiovisual-media-services/outcome/audiovisual-media-services-government-response-to-public-consultations-on-the-governments-implementation-proposals.

503 Cf. e.g. the CoE Convention on Cinematographic Co-Production (1992, revised in 2017), which provides a comprehensive legal framework and standards for multilateral co-productions and bilateral co-productions between parties that have not concluded a bilateral treaty.

504 Cf. rec. 32 Directive 2010/13/EU.

that not only has a strong film industry, but in whose tradition French film plays a special role – media service providers are obliged to serve a large part of their broadcasting and delivery obligations with French-language works, while in the Netherlands the Dutch- or Frisian-language program is shaped by public service broadcasting quotas.[505]

Accordingly, the Member States are also free to impose investment obligations on media service providers under their jurisdiction, for example in order to safeguarding diversity. This was already the case under the previous regulation, as it was left to the Member States to decide how the funding obligation was to be structured in detail.[506] Through the explicit inclusion in the AVMSD, it has also been clarified since 2018 that the imposition of such investment or levy obligations is also possible vis-à-vis providers who target viewers in a Member State territory with their offerings, but are not under its jurisdiction as they are established in another Member State. In this respect, Art. 13(2) AVMSD merely requires that the relevant rules be proportionate and non-discriminatory.

(2) Prominence of general interest content

Art. 7 a AVMSD, which was newly inserted in 2018, also addresses aspects of safeguarding diversity, but on the basis of a different approach. It clarifies that the Directive is without prejudice to the possibility for Member

505 On this law-comparing *Etteldorf*, UFITA 2019, 498, 507 et seq.

506 Cf. on this, for example, the German regulation in § 152 of the Law on the funding of film production (Filmförderungsgesetz, FFG), which – or its approval by the European Commission – was challenged by both Apple and Netflix before the GCEU because, according to the plaintiff undertakings, it was not compatible with the country of origin principle enshrined in the AVMSD and the freedom to provide services and freedom of establishment, as well as the prohibition of discrimination, since it also imposed a levy obligation on undertakings not established in Germany depending on profits generated there. Both actions by Apple (case T-101/17, *Apple Distribution International / European Commission*) and Netflix (case T-818/16, *Netflix International BV and Netflix, Inc. / European Commission*) have been dismissed by the GCEU as already inadmissible due to a lack of proof of "individual concern" by the plaintiff undertakings. Among other things, the undertakings had failed to show that their services had been materially interfered with and individually concerned by the changes in the FFG. This could have been done, e.g., by filing national levy orders or such. A direct action before the GCEU requires a regulatory act which does not entail implementing measures, which was not the case here. The appeal to the CJEU initially filed by Apple against this (case C-633/18 P) was subsequently withdrawn.

States to impose obligations on service providers to ensure the appropriate prominence of content that is necessary and proportionate according to specified general interest objectives. Consequently, the issue at hand is not the presence of diverse content, as in the context of the quota regulations for European works just described, or the possibility of receiving certain content of general interest, as in the context of the must-carry obligations under telecommunications law, which will be described below[507], but rather the visibility of such content which has a particular value for society. The focus here is on the recipient's perspective, in other words, on the quality and variety of information presented to the user.

Against the background of the significance of information quality and diversity for the process of free democratic policy-forming and decision-making, however, these are also directly related to media diversity and the diversity of available sources from which users can obtain information respectively. A plural media landscape cannot fulfill its democratic function where the content is not perceived at all – a risk that exists above all on such platforms used by users (also) for information purposes, which make third-party content available collectively and therefore act as gatekeepers for media content, and is related to potentially risk-increasing phenomena such as disinformation[508] – this has become particularly illustrative against the background of the Covid19 pandemic[509] – and filter bubbles and echo chambers[510]. The effects of the latter two phenomena, insofar as they are algorithmically driven[511], on the pluralism of information, opinion, and

507 Cf. on this chapter D.II.5.

508 The relationship between media diversity on the one hand and disinformation on the other has not yet been conclusively studied scientifically. The existence of a risk potential in the absence of pluralism is likely, however, because in these cases there could be a lack of a strong and lively public discourse that confronts disinformation with rational argumentation and opposing views. Cf. on this *Bayer* in: Was ist Desinformation?, p. 46.

509 Cf. by way of example Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling COVID-19 disinformation – Getting the facts right, 10.06.2020, JOIN(2020) 8 final, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020JC0008.

510 On the conceptual and actual distinction between the two phenomena cf. *Stark/Magin/Jürgens*, Maßlos überschätzt. Ein Überblick über theoretische Annahmen und empirische Befunde zu Filterblasen und Echokammern (Preprint), with further references.

511 A distinction must be made between this and the user-controlled personalization of content (through the targeted selection, liking, following or indication of in-

media have been the subject of much discussion in recent times.[512] Although a connection between algorithm-driven personalization of content and the emergence of filter bubbles or echo chambers as well as their effects on pluralism of opinion have not yet been conclusively empirically investigated and/or proven, and in particular more recent studies relativize the actual negative effects in practice on large platforms, risk potentials cannot be dismissed out of hand.[513] The algorithmic steering and personalization of content can lead to the fact that, on the one hand, "extraneous" considerations in the form of economic interests of the providers are relevant for the selection of the content to be displayed and that these selection criteria are often not at all or not sufficiently transparent and controllable for the users, who therefore do not know why they see what and, above all, what they do not see. On the other hand, this type of steering also harbors the danger that media align their content with the dictates of algorithms in order to be seen (also for refinancing reasons), i.e., high-quality, plural content of general interest is no longer in the foreground.[514] The FCC formulated this in another context in such a way that "[s]uch ser-

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terests), which can also lead to users enveloping themselves in an "information cocoon" (cf. on this *Sunstein*, Infotopia: How Many Minds Produce Knowledge), but which is precisely an expression of democracy-based freedom of opinion and information through volitional action and can thus equally be an opportunity for pluralism.

512 Cf. on this also *Cole/Etteldorf* in: Cappello, Media pluralism and competition issues, p. 21 et seq.

513 Cf. for an overview and analysis of the state of research to date, instead of many, for instance *Stark/Magin/Jürgens*, Maßlos überschätzt. Ein Überblick über theoretische Annahmen und empirische Befunde zu Filterblasen und Echokammern (Preprint), which, while finding that the actual scope of filter bubbles and echo chambers is widely overestimated, nevertheless conclude that there is no question that algorithmic personalization influences individual and collective opinion formation. For an English-language overview and analysis of the state of research to date, see also *Zuiderveen Borgesius et al.* in: Internet Policy Review 1/2016, which come to a similar conclusion and refer to the further development possibilities of algorithmic technologies with regard to the risk potential. Leading further also *Helberger et al*., Implications of AI-driven tools in the media for freedom of expression, *Haim/Graefe/Brosius* in: Digital Journalism 3/2018, 330, 330 et seq.; *Nechushtai/Lewis* in: Computers in Human Behavior 2019, 298, 298 et seq.

514 EPRA refers to this danger as a "feedback loop", cf. Media plurality in the age of algorithms – New challenges to monitor pluralism and diversity, Background document 51st EPRA Meeting, https://www.epra.org/attachments/51st-epra-meeting-media-plurality-in-the-age-of-algorithms-new-challenges-to-monitor-pluralism-and-diversity-background-document.

vices do not aim to reflect diverse opinions; rather, they are tailored to one-sided interests or the rationale of a business model that aims to maximise the time users spend on a website, thus increasing the advertising value of the platform for its clients".[515] Factors influencing the extent of these risk potentials are, in addition to the transparency of algorithmic systems and, directly related to this, the media literacy of users, also the visibility and discoverability of quality content.

The new provision of Art. 7 a AVMSD is also interesting in the context of the present study because it underscores the existing distribution of competences in safeguarding media pluralism. On the one hand, recital 25, which is part of the provision, identifies media pluralism and cultural diversity in particular as objectives of general interest. In this context, it is emphasized that the Directive "is without prejudice to the ability of Member States" to impose obligations on service providers to ensure prominence. Neither are Member States obliged to do so, nor does the rule specify how such obligations are to be designed if the Member State decides to introduce them – unlike the new provision on signal and content integrity in Art. 7 b, which, due to its defining and more concrete wording as well as the corresponding explanations from the recitals, provides the Member States with a certain characterization in the transposition also from the perspective of consumer protection law[516]. It is merely stated in a declaratory manner that the obligations are only to be introduced taking into account the principle of proportionality and must therefore be compatible with Union law.

Although in the run-up to the reform proposal there were calls from some Member States and many regulatory authorities for a rule on the discoverability of content, this option was rejected by the Commission on the grounds that, on the one hand, no consensus could be found on the scope and limits of such a rule and, on the other hand, the AVMSD was not the right regulatory framework for this due to its scope, which is limited to audiovisual media services (and now VSP) and does not cover the platform area in particular.[517] The Commission's proposal therefore did not initially include any substantive regulation on the appropriate prominence of pub-

515 FCC, 1 BvR 1675/16, and others, para. 79.

516 On this in detail *Cole*, Die Neuregelung des Artikel 7 b Richtlinie 2010/13/EU (AVMD-RL).

517 Cf. Commission staff working document SW(2016) 168 final, impact assessment accompanying the Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States

lic value content. Only a recital[518] was to clarify that this can be an important instrument, but that it remains in the hands of the Member States to decide on it. Due to the importance for users, Art. 7 a in the draft – which, in contrast to the final version, still contained an exemplary enumeration of objectives of general interest in the norm text itself and not merely in the recitals – was included in the trilogue negotiations at the suggestion of the Parliament.[519] "In order to safeguard media pluralism and diversity, Member States shall have the right to take measures to ensure the appropriate prominence of audiovisual media services of general interests" – so the justification given by the European Parliament's Committee on Culture and Education for the corresponding initiative.[520] Even if the final wording of the rule is very brief and gives the Member States extensive discretion as to 'whether' but also 'how' to impose an obligation, it is interesting for this very reason: although it is recognized that not only the diversity of offerings but also the diversity of choice for the user is highly relevant, this issue is clearly located in the area of Member States' competence.

Art. 7 a therefore serves as a regulation that takes into account the consideration of (media) pluralism as a value also at EU level, without interfering with the structure of competences in the area of culture. The imperative of an appropriate balance of interests in the implementation of the re-

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concerning the provision of audiovisual media services in view of changing market realities, https://ec.europa.eu/digital-single-market/en/news/impact-assessment-accompanying-proposal-updated-audiovisual-media-services-directive.

518 Rec. 38, as in the Commission's proposal, read: "This Directive is without prejudice to the ability of Member States to impose obligations to ensure discoverability and accessibility of content of general interest under defined general interest objectives such as media pluralism, freedom of speech and cultural diversity. Such obligations should only be imposed where they are necessary to meet general interest objectives clearly defined by Member States in conformity with Union law. In this respect, Member States should in particular examine the need for regulatory intervention against the results of the outcome of market forces. Where Member States decide to impose discoverability rules, they should only impose proportionate obligations on undertakings, in the interest of legitimate public policy considerations".

519 Cf. EMR, AVMD-Synopse 2018, available at https://emr-sb.de/synopsis-avms/.

520 European Parliament, Committee on Culture and Education, Draft Report on the proposal for a directive of the European Parliament and of the Council 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 in view of changing market realities, 05.09.2016, https://www.europarl.europa.eu/RegData/commissions/cult/projet_rapport/2016/587655/CULT_PR(2016)587655_EN.pdf, p. 82.

spective provision applies – which is familiar in constitutional categories as the imperative of establishing practical concordance[521] – which is already opposed to an interpretation of the scope for implementation exclusively prescribed by the Union legislature because the respective balance of interests prescribed by Union law is predetermined by different constitutional traditions of the Member States in the field of basic rights. Ultimately, even without such a rule, the competence of the Member States to regulate prominence obligations would remain unaffected; however, from the perspective of the legislature, the inclusion of such a rule is supported by the fact that it serves as a reminder of the importance such measures can have for effectively safeguarding media pluralism and diversity of access to offerings. Member States are thus invited, so to speak, to consider intensively the introduction of corresponding obligations in order to achieve this goal. These are closely related to the actual regulation of the media, so that their location outside the infrastructure-related regulatory texts, namely the EECC (see below in chapter D.II.5), is understandable.

(3) Promotion of media literacy

Another area that is related to media pluralism in the context of previously described considerations of discoverability of content[522] disinformation, algorithmically controlled selection of content, and similar phenomena is also the promotion of media literacy. With the 2018 reform, this has for the first time explicitly found its way into the substantive regulations of the Directive. According to Art. 33 a AVMSD, Member States shall promote and take measures for the development of media literacy skills. ERGA shall also exchange experience and best practices in the area of media literacy (Art. 30b(3)(b)).

Media literacy refers to the skills, knowledge and understanding necessary for consumers to use media effectively and safely.[523] However, a legal definition of this term, which is understood very broadly in the EU con-

521 Cf. e.g. BVerfGE 41, 29 (51); 77, 240 (255); 81, 298 (308); 83, 130 (143).

522 Cf. on this also *Devaux et al*., Study on media literacy and online empowerment issues raised by algorithm-driven media services, SMART 2017/0081, https://ec.europa.eu/digital-single-market/en/news/study-media-literacy-and-online-empowerment-issues-raised-algorithm-driven-media-services-smart.

523 Cf. rec. 47 Directive 2010/13/EU.

text[524], is lacking, as are concrete rules on what the promotion of media literacy should look like. Thus, the Member States are not given any requirements for implementation. Solely recital 59 puts the regulation in the context that only the necessary literacy in the use of media will enable citizens to access information and to use, critically assess and create media content responsibly and safely. Citizens should be equipped with the critical thinking skills required to exercise judgment, analyse complex realities and recognise the difference between opinion and fact.

While the phenomenon of disinformation is thus also covered by this consideration, literacy in dealing with (especially digital) media is generally required in order to be able to navigate the digital information environment, in particular to access a variety of sources. Media literacy thus contributes indirectly to media pluralism and media diversity by reducing the digital divide on the user side, facilitating informed decision-making, and enabling the detection and combating of false or misleading information as well as harmful and illegal online content, thus promoting the provision of reliable or legal and non-harmful content.[525] As already considered above in the discussion of rules for ensuring prominence of specific content, the mere existence of a pluralistic media landscape is not purposeful if it is not perceived or cannot be perceived (completely or correctly) by users due to a lack of media literacy.[526] The implementation of methods from behavioral science towards users of, for example, social networks is discussed as a possible approach to counteract cognitive bias and promote plural media consumption.[527]

The cautiousness at EU level in regulating this matter ("promote", "take measures", each referring to the Member States) is due on the one hand to

524 The Council of the European Union includes among them "all the technical, cognitive, social, civic and creative capacities that allow us to access and have a critical understanding of and interact with both traditional and new forms of media", Developing media literacy and critical thinking through education and training – Council conclusions (30 May 2016), p. 6, http://data.consilium.europa.eu/doc/document/ST-9641-2016-INIT/en/pdf.

525 Recommendation CM/Rec(2018)1[1] of the Committee of Ministers to member States on media pluralism and transparency of media ownership, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680790e13, para. 10.

526 Cf. also *Cole/Etteldorf* in: Cappello, Media pluralism and competition issues, p. 21 et seq.

527 Cf. on this and on further proposals e.g. *Hoorens/Lupiáñez-Villanueva*, Study on media literacy and online empowerment issues raised by algorithm-driven media services (SMART 2017/0081).

the fact that the approaches to the promotion of media literacy in the Member States to date differ greatly, both in terms of scope and in terms of their nature and basis. In many Member States, the relevant promoters are civil society bodies that do not act on the basis of a statutory mandate.[528] Therefore, the general – but vaguely formulated – obligation to promote in Art. 33 a is supplemented by a reporting obligation on the part of the Member States. The Commission is to receive a regular overview of which approaches are being developed in the Member States, and through the reporting obligation – which takes place every three years – there is a certain pressure to take appropriate measures that can be used to prove implementation by the Member States. This is considered to be so important that, in order to ensure a comparable type of reporting under Art. 33a(3) AVMSD, the Commission must also publish guidelines defining the "scope" of such reports. In addition, there is a corresponding obligation of ERGA according to Art. 30b(3)(b) AVMSD to find a common basis at supranational level in the form of best practices.

On the other hand, (digital) education is an area that is clearly rooted in the cultural policies of the Member States, so that they have and must have a large degree of freedom to act and shape their own policies, and the EU may not intervene in a regulatory capacity via the AVMSD. However, initial recommendations for the Member States have already been developed at EU level in this context. The May 2020 Council of the EU conclusions on media literacy in an ever-changing world[529] not only ask Member States to engage in specific media literacy-related activities, also in light of experiences with the Corona crisis, but also, i.a., to (1.) continue to explore opportunities for promoting and strengthening professional journalism as a viable element of the global digital media environment and (2.) to improve existing training models for the development of digital competences in the European cultural and creative industries – and, if necessary, to design new models for this purpose – in order to promote the effective use of innovative technologies and to keep pace with technological progress.[530]

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528 *EAI*, Mapping of media literacy practices and actions in EU-28.

529 Council conclusions on media literacy in an ever-changing world, 8274/20, of 26.05.2020, https://www.consilium.europa.eu/media/44117/st08274-en20.pdf; cf. on this *Ukrow*, MMR aktuell 11/2020.

530 A similar form of inducement for measures of promotion aimed at strengthening professional journalism and thus the creative landscape in the EU can be seen in the Commission's declaration of intent to use a Media and Audiovisual Action Plan to support the media and audiovisual sector in its digital transfor-

(4) Establishment of independent regulatory bodies

Also with regard to media regulation, the basic distribution of competences applies with regard to the design of the administration or administrative procedures. Since (also) the application of EU law is carried out by national administrations, its exact definition is left to regulation by Member States' law. Insofar as a subject matter requires a specific form of the institution or authority responsible for implementation, this may also be specified by the respective EU legal act. This applies, for example, to the guarantee of the independence and functioning of authorities for monitoring compliance with data protection rules already under the validity of the Data Protection Directive[531] and even more so since the revision in the form of a Regulation ((EU) 2016/679)[532].[533]

As far as supervisory bodies or authorities, which monitor media undertakings' compliance with the provisions of media law, are concerned – including the national transposition of the AVMSD – there was a lack of requirements in the Directive for a long time, also because the Member States rejected harmonization through EU requirements. This was due to the existence of such requirements for the form of supervision on national level, closely linked to traditional understandings of media freedom in the domestic context – e.g., in Germany through internal control in the case of public broadcasting or state media authorities established independent from the state in the case of private broadcasting. In the 2007 revision of the TwF Directive on the AVMSD, the existence of independent regulatory authorities at the national level was also merely presupposed by Art. 23 b

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mation through the use of EU funding instruments. On this in more detail below in chapter D.III.3.

531 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 23.11.1995, p. 31–50.

532 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119 of 04.05.2016, p. 1–88.

533 Art. 51 et seq. GDPR, which in particular contain requirements to ensure the independence of supervisory authorities at the Member States level. Cf. on this e.g. CJEU, joined cases C-465/00, C-138/01 and C-139/01, Österreichischer Rundfunk and Others; CJEU, case C-288/12, *European Commission / Hungary*, para. 47; leading further also *Cole/Etteldorf/Ullrich*, Cross-border dissemination of Online Content, p. 134 et seq.

(which was renumbered to Art. 30 by codification in Directive 2010/13/EU)[534], without any specifications being made in this regard.[535] On the contrary, the original draft with more detailed requirements was explicitly rejected and the last version only mentioned in general terms the existence of these independent regulatory bodies[536], while recital 94 (of the codified Directive 2010/13/EU) reiterates the responsibility for the effective transposition of the Directive as a duty of the Member States which in this context are free "to choose the appropriate instruments according to their legal traditions and established structures, and, *in particular*, the form of their competent independent regulatory bodies" (emphasis added by the authors).

This only changed with the 2018 revision.[537] In the meantime, the Commission had commissioned several studies on the independence and effec-

534 Art. 30 Directive 2010/13/EU read: "Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of this Directive, in particular Articles 2, 3 and 4, in particular through their competent independent regulatory bodies".
The corresponding recitals read: "(94) In accordance with the duties imposed on Member States by the Treaty on the Functioning of the European Union, they are responsible for the effective implementation of this Directive. They are free to choose the appropriate instruments according to their legal traditions and established structures, and, in particular, the form of their competent independent regulatory bodies, in order to be able to carry out their work in implementing this Directive impartially and transparently. More specifically, the instruments chosen by Member States should contribute to the promotion of media pluralism.
(95) Close cooperation between competent regulatory bodies of the Member States and the Commission is necessary to ensure the correct application of this Directive. Similarly close cooperation between Member States and between their regulatory bodies is particularly important with regard to the impact which broadcasters established in one Member State might have on another Member State. Where licensing procedures are provided for in national law and if more than one Member State is concerned, it is desirable that contacts between the respective bodies take place before such licences are granted. This cooperation should cover all fields coordinated by this Directive.".

535 Cf. *ERGA* Report on the independence of NRAs; at large also *Schulz/Valcke/Irion*, The Independence of the Media and Its Regulatory Agencies, therein in particular *Valcke/Voorhoof/Lievens,* Independent media regulators: Condition sine qua non for freedom of expression?.

536 On this *Dörr* in: Dörr/Kreile/Cole, para. B 101; *Furnémont*, Independence of audiovisual media regulatory authorities and cooperation between them: time for the EU lawmaker to fill the gaps.

537 On this *Dörr* in HK-MStV, B4, para. 101 et seq.; *Gundel* in: ZUM 2019, 131, 136 et seq.

tiveness of the national institutions responsible for media supervision (or compliance with the requirements from the AVMSD).[538] Probably also the recognition of the very different approaches in the Member States, which were not always able to ensure a sufficient guarantee of the independence of the regulatory bodies, enabled a compromise to be reached between the legislative bodies Parliament and Council[539], which led to an explicit stipulation in the substantive part of the Directive. Since then, Art. 33(1) AVMSD has required Member States to designate one or more national regulatory authorities or bodies and to ensure that they are legally separate from government bodies and functionally independent of their respective governments and other public or private bodies, although this does not preclude the possibility of establishing "convergent regulatory bodies" with competence for multiple sectors.[540] Further details on the necessary competences and resources, the definition of the requirements related to the regulatory bodies in a clear legal basis, as well as requirements for the creation of rules on the appointment or dismissal of functionaries can be found in the following paragraphs.

This represents a clear departure from the previous cautious formulation of requirements and a level of detail comparable to that of data protection law. However, care has been taken to ensure that the fundamental authority for "official", i.e. by authorities, supervision remains within the

538 *Cole et al.*, AVMS-RADAR (SMART 2013/0083); INDIREG (SMART 2009/0001).

539 The Commission's proposal, which provided for the establishment of the characteristic of independence, was thus adopted by the Parliament. However, the Council initially deleted the feature in its General Approach of 24 May 2017 (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9691_2017_INIT&from=EN) and instead included the following wording in the recitals: "Member States should ensure that their national regulatory authorities are legally distinct from the government. However, this should not preclude Member States from exercising supervision in accordance with their national constitutional law. Regulatory authorities or bodies of the Member States should be considered to have achieved the requisite degree of independence if those regulatory authorities or bodies, including those that are constituted as public authorities or bodies, are functionally and effectively independent of their respective governments and of any other public or private body. […]". Cf. on the development of the rule in the trilogue the EMR synopsis, available at https://emr-sb.de/synopsis-avms/.

540 This now also standardizes requirements for the independence of supervision from politics, which are already known from the area of infrastructure regulators for telecommunications (cf. on this in chapter D.II.5.), energy and railroads and, as already mentioned at the beginning, data protection authorities. Cf. on this also *Gundel* in: ZUM 2019, 131, 136.

scope of competence of the Member States' administrative (procedural) law. In particular, constitutional particularities should be able to be included by Member States for this purpose, as recital 53 explicitly states. The AVMSD does not aim to standardize the "structure of authorities" in the new version either; rather, it sets minimum requirements that must be met in order to be able to adequately demonstrate the independent status of such a regulatory body.

The independence of supervision of the audiovisual sector is seen as central to achieving the objectives of the Directive when it is transposed, while preserving the independence of the media from the state – and thus also of their supervision – as stipulated by constitutional law. In this context, Art. 30(2) lists as objectives "in particular media pluralism, cultural and linguistic diversity, consumer protection, freedom from barriers and discrimination, the smooth functioning of the internal market and the promotion of fair competition". In an earlier opinion, ERGA described the regulatory responsibilities of the competent bodies somewhat differently, using the examples of audience protection, including the protection of minors, freedom of expression, diversity, pluralism and other areas such as media ownership.[541] It is noteworthy that since the revision of Art. 30 AVMSD, media pluralism as well as cultural and linguistic diversity have been explicitly included among the objectives of the Directive in connection with the need for independence of regulatory authorities. Also recital 54 stresses that the services covered by the Directive have as one purpose "to serve the interests of individuals and shape public opinion", and in order to inform "individuals and society as completely as possible and with the highest level of variety", an independence from any state interference and "influence by national regulatory authorities or bodies […] beyond the mere implementation of law" must be ensured.

In other EU legal acts, such target provisions and explanations of what is necessarily involved in achieving the target are also already found with the first version in the substantive part, often as an opening provision. Thus, the ECD is intended to contribute to the proper functioning of the internal market and the GDPR is intended to protect the fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data on the one hand and the free movement of data on the other. No such declaration was found in the substantive part of

541 ERGA statement on the independence of NRAs in the audiovisual sector, ERGA (2014)3, https://erga-online.eu/wp-content/uploads/2016/10/State_indep_nra_1014.pdf.

the AVMSD prior to 2018. In recital 7 of Directive 1997/36/EC, to "create the legal framework for the free movement of services" was stated as an objective of the Directive; in recital 67 of Directive 2007/65/EC, this was supplemented by the addition of "whilst ensuring at the same time a high level of protection of objectives of general interest, in particular the protection of minors and human dignity as well as promoting the rights of persons with disabilities". With the extension by Directive (EU) 2018/1808, additional objectives of general interest are now explicitly referred to and not only mentioned in the recitals. This also includes regulatory objectives that in themselves could not support (at least harmonizing) EU action. Rather, the purpose of the reference is to designate an overall goal that will be realized through transposition by the Member States. Nor can the objective of an EU regulatory framework be equated with the exercise of a corresponding competence, because, as in primary law, a distinction must be made between objectives (there: of the Union) and competences. The legal basis for the adoption of a legal act in each case will be found in the introductory part preceding the recitals. It could not be based on a provision of primary law under pluralism protection for the AVMSD, as there is no such provision. As mentioned above, Art. 30(2) refers to the establishment of independent regulatory bodies by the Member States and thus to an area which is incumbent on the Member States in terms of its design and is guided only by general guarantees or requirements under EU law.

### (5) Regulation of video-sharing platforms

As already mentioned before, one of the main innovations of Directive (EU) 2018/1808 is that since then, VSP are also covered by AVMSD. VSP services are defined as services the principal purpose of which or of a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have direct (editorial) responsibility, in order to inform, entertain or educate, by means of electronic communications networks. The organization of the broadcasts or videos must be determined by the VSP provider, which includes the use of algorithms or other automated means. Accordingly, the definition is very broad.

The AVMSD does not provide for a general exception, such as Art. 17(6) of the new DSM Copyright Directive (on this see chapter D.II.3.) for smaller providers with regard to responsibilities for the use of protected content. However, there is room for nuance in assessing the appropriateness of

measures to be taken. Thus, not only offerings such as YouTube are clearly covered by the definition of VSP, but also smaller platforms as well as, under certain circumstances, social networks[542] or – insofar as these do not already fall under the definition of a non-linear service due to editorial responsibility – stand-alone parts of online newspapers featuring audiovisual programmes or user-generated videos,[543] where those "parts can be considered dissociable from their main activity". The interpretation of the criterion "essential functionality" of the service will be decisive for the future assessment of ambiguous cases.[544] This means that services that are not already clearly identifiable as VSP can also be categorized as such if the main function of the service is to offer and share (also user-generated) videos. Even though, as mentioned, social networks were not the primary target of the regulation, this definition was intended to maintain an openness to development since greater use of video distribution functions also seemed likely on previously more text-based platforms.

In order to achieve some consistency in the transposition and application of the Directive's provisions, recital 5 of the Directive allows the Commission to issue guidelines on the meaning of essential function. Unlike the guidelines described above with regard to the provision on the promotion of European works, which constitute an obligation and are formulated in the substantive part as a duty of the Commission, it has discretion with regard to the VSP-related guidelines. However, although here the possibility is mentioned only in the recitals, the legal nature equally is the same as with the other guidelines and the text is not legally binding. The Commission has already exercised its guideline authority and presented guidelines on the practical application of the essential functionality criterion in July 2020[545]. Therein, the Commission considers the relationship of audiovisual content to other economic activities of the service, its qualitative and quantitative importance, how and whether audiovisual content is monetized, and whether tools are in place to increase the visibility or attractiveness of specifically audiovisual content in the service.

542 Cf. rec. 5 Directive (EU) 2018/1808.

543 Cf. rec. 3 Directive (EU) 2018/1808.

544 In detail on this *Kogler* in: K&R 2018, 537, 537 et seq.

545 Communication from the Commission Guidelines on the practical application of the essential functionality criterion of the definition of a 'video-sharing platform service' under the Audiovisual Media Services Directive, 2020/C 223/02, OJ C 223 of 07.07.2020, p. 3–9, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2020.223.01.0003.01.ENG&toc=OJ:C:2020:223:TOC.

In addition to the definition and a separate regulation on jurisdiction[546] in Art. 28 a AVMSD, the applicability of certain substantive regulations to VSP is found in Art. 28 b.

With regard to audiovisual commercial communication, VSP are subject to the same rules regarding in particular surreptitious advertising, subliminal techniques, tobacco products and alcoholic beverages as other (audiovisual) media service providers have been up to now (Art. 28b(2) in conjunction with Art. 9(1) AVMSD). Only the consequence of the applicability of the rules for the provider is different from the linear and non-linear services covered so far, because the question of the economic advantage for the platform providers is also relevant when deciding on their liability. Towards the users, the platforms (only) have to urge compliance with the provisions on commercial communication by means of suitable measures, whereas they themselves have to ensure compliance if they market, sell or compile the commercial communication themselves.

In addition, Art. 28 b establishes a set of obligations that VSP providers must comply with in order to protect minors and the general public from certain (developmentally harmful, punishable or inciting) content, and the Directive requires Member States to take appropriate measures leading to this result. However, the Directive already refers to concrete measures such as the adaptation of general terms and conditions, the establishment of categorization options for uploaders and of age verification tools as well as reporting and complaint systems, which Member States may provide for by way of example as obligations for the providers under their jurisdiction covered by the provision, whereby the (legal) determination of measures must be made by the Member States, but a selection of measures is reserved to them ("shall ensure", Art. 28 b (1) – (3) AVMSD). In order to implement the requirements, the Member States shall in particular use instruments of co-regulation pursuant to Art. 4a(1) AVMSD. In addition, Mem-

546 According to Art. 28a(1), a VSP provider is in principle under the jurisdiction of the Member State in which it is established. However, under (2), a VSP provider shall also be deemed to be established in the territory of a Member State for the purposes of the Directive if either a parent undertaking or a subsidiary undertaking of that provider is established in the territory of that Member State, or the provider is part of a group and another undertaking of that group is established on the territory of that Member State. This provision is noteworthy as it represents a departure from the country of origin principle, as an establishment of the provider itself is no longer mandatory for establishing competence, but a connection (also going beyond the jurisdiction criteria subsidiary to establishment applicable to media service providers) suffices.

ber States and also the Commission may promote self-regulation with the help of so-called Union codes of conduct pursuant to Art. 4a(2).

The list of obligations for VSP is, however, subject to a condition of expediency and the requirement that the obligations imposed on them by the Member States be aligned with the size of the platform, which in this respect may protect smaller or niche-specific offerings from excessive requirements. The AVMSD clarifies that "appropriate" measures must be taken, which can work both in favor of and against providers, in the sense that the requirements must not be disproportionate, but must also have an effective impact in view of the goals to be achieved. According to Art. 28b(5) AVMSD, the assessment of the appropriateness of the measures taken is the responsibility of Member States' regulatory bodies, which accordingly must be brought into a co-regulation system with decisive effect.

This therefore not only introduces a new category of providers into the AVMSD, but also a new type of transposition requirement for Member States and an increased emphasis on the instrument of self- and co-regulation. In principle, systems of co- and self-regulation have already been established in many Member States, in particular for the area of media regulation.[547] However, the specific regulation of VSP is new and will therefore, in addition to the providers covered by the rules for the first time, also pose new challenges to the regulatory bodies in terms of implementation, precisely because they are tasked with regularly assessing the appropriateness of the measures even within a co-regulatory solution.[548] In order to promote consistent application and implementation of these rules in the EU, in particular as the the rules will only be applied by a few Member States on large VSP providers, as there is only a very small number of such providers dominating the market in Europe (and also globally) as a whole, ERGA has already launched a working group to this effect. This focuses on studying and coordinating the implementation of the provisions of Art. 28 b.[549]

Although the rules on VSP in the Directive provide the Member States with a relatively detailed catalog of actions, they remain competent for the concrete design. In addition, the objective of the provision in Art. 28 b

547 *Cappello*, Selbst- und Ko-Regulierung in der neuen AVMD-Richtlinie.

548 Cf. on challenges and opportunities also *Kukliš*, Video-Sharing platforms in AVMSD – a new kind of content regulation (draft); as well as *id*. in: mediaLAWS 02/2020, 95, 95 et seq.

549 Cf. on this the Terms of Reference of the „Implementation of the revised AVMS Directive" working group, http://erga-online.eu/wp-content/uploads/2019/03/ERGA-2019-SG-3-ToR_adopted.pdf.

AVMSD is in particular the protection of consumers and minors, but not measures to promote diversity, for which it would have to be examined more closely with regard to competence whether the scope for action is not too restricted. Irrespective of this, however, the provision of Art. 28 b also needs to be clarified in some key elements. In addition to the definition of "editorial responsibility" or the "dissociable" part of a service, this primarily concerns the question of when content is illegal in the sense of the AVMSD, i.e. in particular incites hatred or is detrimental to development and therefore requires a response by the provider. Even if – similar to the concrete assessment of content relevant to the protection of minors[550] – differences between Member States may persist in this respect, taking into account national peculiarities or constitutional traditions, in practice there will be a concentration of the significant application of this rule in one (or a few) Member States.[551] This is due to the fact that the branches of the big VSP providers[552] are to a large extent concentrated in one Member State, as the jurisdiction for them can be clearly determined according to Art. 28a(1) AVMSD.[553] This makes the Irish regulator, as the competent supervisor, keeper of a very decisive role in monitoring the measures taken by providers and, where appropriate, in developing guidelines and best practices. For example, the Irish legislature in its first draft law appears to intend to leave to the competent Irish regulator the specific design, func-

550 See on this CJEU, case C-244/06, *Dynamic Medien Vertriebs GmbH / Avides Media AG*.

551 Same as here *Barata*, Regulating content moderation in Europe beyond the AVMSD.

552 Against the background of Brexit, the question of the design of cooperation mechanisms by and with Member State regulatory bodies outside the EU will also become interesting. The Plum Report (*Chan/Wood/Adshead*, Understanding video-sharing platforms under UK jurisdiction) identifies (with overlap to the Irish regulator's assessment, cf. next fn. 557) several major providers as falling under UK jurisdiction, including Twitch.tv, Vimeo, Imgur, TikTok, Snapchat, LiveLeak, and two major adult content providers.

553 In its submission to a Government Public Consultation on the Regulation of Harmful Content and the Implementation of the Revised Audiovisual Media Services Directive (BAI, Submission to the Department of Communications, Climate Action & Environment Public Consultation on the Regulation of Harmful Content on Online Platforms and the Implementation of the Revised Audiovisual Media Service Directive, http://www.bai.ie/en/download/134036/), the Irish Broadcasting Authority listed in particular YouTube, TikTok, Vimeo, DailyMotion and Twitch as VSP subject to its competence, as well as Facebook, Twitter, Instagram, Snapchat, LinkedIn and Reddit as (social network) services with an essential functionality of offering audiovisual content.

tionality and standards to be observed of the complaints system to be established by VSP.[554]

In order to address the situation described above, where the majority of regulatory bodies themselves cannot take action due to the jurisdiction of another Member State, even though the content distributed via the VSP is accessible in all Member States – to a much greater extent and with easier access – the regulatory bodies within ERGA work on forms of cooperation, for example to provide for expedited notifications of problematic content and response procedures.[555] As far as the Member States' regulatory sovereignty for aspects of media law is concerned, it can additionally be pointed out that in the provision of Art. 28b(6) AVMSD – corresponding to Art. 4(1) AVMSD (which applies to audiovisual media services only and thus not to VSP) – the Member States are free to provide for more detailed or stricter measures for providers under their own jurisdiction. In this form of "reverse discrimination", they are only limited by other requirements of Union law, in particular Art. 12 to 15 ECD or Art. 25 Directive 2011/93/EU.[556]. More extensive measures remain possible – similar to those applicable to information society services under Art. 1(6) ECD. Only (limited) partial coordination has taken place with regard to VSP, which does not block (stricter) Member States' rules for VSP against the background of safeguarding diversity or other general interest objectives.

554 Cf. General Scheme Online Safety Media Regulation Bill 2019 (https://www.dccae.gov.ie/en-ie/communications/legislation/Pages/General-Scheme-Online-Safety-Media-Regulation.aspx), explaining also *Barata*, Regulating content moderation in Europe beyond the AVMSD.

555 Cf. on this the announced ERGA work programs for 2020 (https://erga-online.eu/wp-content/uploads/2020/01/ERGA_2019_WorkProgramme-2020.pdf) and 2021 (https://erga-online.eu/wp-content/uploads/2020/08/ERGA_WorkProgramme2021.pdf) as well as the Terms of reference for the newly created Subgroup 1 – Enforcement (Subgroup 1 – 2020 Terms of Reference, https://erga-online.eu/wp-content/uploads/2020/03/ERGA_SG1_2020_ToR_Adopted_2-03-2020.pdf).

556 Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335 of 17.12.2011, p. 1–14, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0093.

e. Interim conclusion

The consideration of the AVMSD in particular against the background of diversity-securing links has documented a certain change in the EU's audiovisual regulatory policy. Whereas under the TwF Directive the focus of regulation was still clearly on economic policy objectives and ensuring a free internal market, the character of the AVMSD has changed to some extent in the course of the reforms. Although the freedom to provide services remains the main focus and the core principles have been retained in the form of the minimum harmonization approach, the power to derogate and the country of origin principle, new links have also been added that relate to cultural policy aspects. This is also in line with the European Commission's 2003 Communication on the future of European regulatory audiovisual policy[557], in which it emphasized that regulatory policy in this sector must continue to safeguard certain general interests such as cultural diversity, the right to information, media pluralism, the protection of minors and consumers, as well as promote awareness and media literacy among the general public.

At the same time, however, the Communication stated, with reference to the Commission's Green Paper on services of general interest[558] that the protection of pluralism in the media clearly falls within the competence of the Member States.[559] This position is repeatedly emphasized by the Commission in all relevant activities.[560] Nevertheless, some EU legal acts contribute at least indirectly to preserving media pluralism. A regulatory policy understood in this way[561] does not contradict the distribution of competences if a legal basis is to be found with regard to the primary objectives and care is taken in particular not to limit the possibility of Member

557 Communication from the Commission of 15 December 2003 on the future of European regulatory audiovisual policy, COM(2003) 784 final.

558 Commission of the European Communities, Green Paper on services of general interest, 21.05.2003, COM(2003) 270 final.

559 As here also rec. 16, 25, 53, 61 Directive (EU) 2018/1808.

560 Cf. e.g. most recently with regard to the preparation of the DSA in the context of the Digitalkonferenz on the occasion of the German Council Presidency, the remarks of *Anthony Whelan*, Digital Policy Adviser, Cabinet von der Leyen, VoD available at https://eu2020-medienkonferenz.de/en/session-1-en/.

561 There are also repeatedly attempts, in particular by the EU Parliament and the Commission, to open up the field of safeguarding pluralism to the EU as an area of active regulation under EU law; cf. on this and on the various (non-legally binding) initiatives of the Parliament and the Commission in detail *Komorek*, Media Pluralism and European Law, chapter 2.2.

States' rules (which are then aimed at establishing and safeguarding pluralism).

### 3. DSM Copyright Directive

Another focus of the last Commission's Digital Single Market Strategy was the copyright reform at EU level. First of all, the so-called Online SatCab Directive[562] was introduced, which ensures the cross-border availability of content by means of corresponding rules, without having to resort to instruments such as geo-blocking due to a lack of license clarifications, because a separate act requiring a license takes place when content is received or retransmitted in a Member State other than one's own. Most importantly, Directives 96/6/EC[563] and 2001/29/EC (the Copyright Directive)[564] have been adapted by the adoption of an entirely new Directive containing provisions designed to modernize copyright law: the Copyright in the Digital Single Market Directive (DSM Directive)[565] was intended to update copyright so that it can still be effective in the "digital age". This should, in turn, promote cultural diversity in Europe and the availability of content over the Internet by also establishing clearer rules for all Internet stakeholders with regard to copyright-triggered obligations.[566]

562 Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC, OJ L 130 of 17.05.2019, p. 82–91, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0789&qid=1612877506288.

563 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77 of 27.03.1996, p. 20–28, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31996L0009.

564 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167 of 22.06.2001, p. 10–19, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001L0029.

565 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130 of 17.05.2019, p. 92–125, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0790.

566 Cf. on this the press release of the EU Commission of 14 September 2016, https://ec.europa.eu/commission/presscorner/detail/en/IP_16_3010.

The DSM Directive contains rules on copyright contract law, text and data mining, neighboring rights for publishers of press publications, but also rules on the use of protected content by online services. In addition to the existing rules on copyright protection, the exploitation of protected works and copyright limitations, which are of course of outstanding importance in the media context, both in terms of the financing of offerings and in reporting, the latter two innovations are of particular interest in the context of this study.

In this context, it should first be generally noted that European copyright law leaves the Member States room for maneuver, in particular where aspects of safeguarding freedom of the media and freedom of information are concerned. For example, Member States may choose from a catalog of possible limitations and exceptions to the author's exclusive reproduction and distribution right (Art. 2 Copyright Directive) when it comes to reproductions by the press, reporting of current events, or use of the work by way of quotation for the purpose of criticism or review (Art. 5(3)(c) and (d) Copyright Directive) as well as other contexts. The same applies to exceptions and limitations to the other exclusive rights set forth in the Copyright Directive. In this context, it is also clear that the harmonization of copyright as a contribution to the better functioning of the internal market, in particular cross-border trade in copyrighted works, remains limited in order to allow Member States' traditions and differences to persist. Although there should be general agreement that copyright law must not prevent the reporting of current events and thus the informative contribution to the process of formation of public opinion, there is no harmonization in this respect; differences in the Member States are respected in that the selection of the exceptions is left to the Member States.[567]

In the context of measures to safeguard diversity, however, the aforementioned new rules on neighboring rights for publishers of press publications and the new rules for online services are more relevant, as they are related to the goal of safeguarding pluralism.

Art. 15 DSM Directive provides that the Member States shall establish a neighboring right for publishers of press publications which secures them an appropriate share of the revenues generated by the online use of their press publications by providers of information society services. According

567 However, the catalog of exceptions, from which Member States may implement those they deem necessary, is exhaustively set out in the Copyright Directive (now as amended by the DSM Directive). This was recently underlined by the CJEU, cf. CJEU, case C-476/17, *Pelham GmbH and Others / Ralf Hütter and Florian Schneider-Esleben.*

to its wording, the regulation even goes so far that in the future only mere acts of hyperlinking or the "use of individual words or very short extracts of a press publication" will be possible without a license, thus ensuring very far-reaching protection of this media content. In this context, the definition of an information society service is congruent with that of the ECD, so that a large number of providers can also be covered here. However, the reason for the establishment of the regulation were primarily news aggregators, media monitoring services, general news services and feeds, which compile press content and present it in excerpts using the original texts. The regulation aims to protect investments (and thus also recognizes the importance of investments in journalistic work), which indirectly also secures the financing of these media offerings, and thus also indirectly contains a regulation that safeguards diversity with regard to the preservation of externally pluralistic structures.[568] This is remarkable not only because a regulation is being created directly at EU level (and not, as hitherto, through the opening up of Member States' scope for action) which relates explicitly and exclusively to the protection of media undertakings[569], but also because it actively ensures that such media offerings should continue to have a prospect of refinancing. Recital 54 even explicitly states that the purpose of the new regulation is to ensure diversity: "A free and pluralist press is essential to ensure quality journalism and citizens' access to information". Recital 55 goes on to state that "[t]he organisational and financial contribution of publishers in producing press publications needs to be recognised and further encouraged to ensure the sustainability of the publishing industry and thereby foster the availability of reliable information".

Although economic policy objectives certainly played a role in the creation of the regulation – the press is, after all, also a service and labor market – cultural policy considerations at least also played a role, which the EU apparently wanted to see harmonized at EU level due to the cross-border activity of the information society services in question. The room for maneuver left to the Member States in this context is comparatively small. Despite the purpose of ensuring diversity, it should not go unmentioned at this point that the new regulation could also pose a threat to media diversity in the online sector. The norm addressees, such as news aggregators, could refrain from distributing content due to risk considerations or limit their aggregation out to cost considerations to those services that make

568 Cf. on this also *Cole/Etteldorf* in: Cappello, Media pluralism and competition issues, p. 21 et seq.

569 In particular, only journalistic publications are to be covered, cf. rec. 56.

their content freely available or agree to licensing terms favorable to the intermediaries. In this case, the selection of content would not depend on factors such as quality, topicality, or personalization by algorithms, but on economic factors, which would run counter to the desire for pluralism, in particular on the part of recipients.

The provision of Art. 17 also provides links in the area of safeguarding diversity. It refers to service providers whose activity is "online content-sharing services". The DSM Directive defines these in Art. 2(6) as providers of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes. In this context, recital 61 generally acknowledges that such services "enable diversity and ease of access to content" but nevertheless present challenges in the form of mass unauthorized use of copyrighted works without appropriate compensation to authors. Therefore, Art. 17 first clarifies that online content-sharing service providers perform an act of communication to the public in copyright terms when they give the public access to copyright-protected works, and then regulates that the providers are also responsible for copyright infringements (committed by their users) unless they provide evidence to the contrary, which is linked to the fulfillment of certain criteria.

This rule, which was intensively discussed during and in the run-up to the reform under the catchword of "upload filters"[570], is associated with increased obligations for the providers addressed, such as VSP, which must, for example, clarify the licensing of content before it is made available and must have systems in place (the concrete design of which is left to the transposition in the Member States, which is why the discussions about the rule and its adequate transposition continue[571]), that must enable the claiming, reporting and identification of copyrighted material in case of doubt. The DSM Directive therefore deviates significantly in this respect

570 Cf. on this *Henrich*, Nach der Abstimmung ist (fast) vor der Umsetzung.

571 Cf. on this in particular the issue of Zeitschrift für Urheber- und Medienrecht (ZUM 2020, issue 10) dedicated to the discussion draft of the German Federal Ministry of Justice and Consumer Protection on the DSM Directive, which comments on the draft transposition in particular with regard to Art. 17 with contributions by various authors; on the German transposition proposal of Art. 17 in detail also *Husovec/Quintais* in: Kluwer Copyright Blog of 26.08.2020.

from the principles on limited responsibility established within the ECD.[572] This provision is also primarily aimed at protecting the authors' (also economic) interests in the refinancing of their creative work, but unlike Art. 15, the protected addressees here do not only include media undertakings or journalistic publications.

Although it is therefore reflexively also about the (financial) preservation of a variety of diverse offerings, the two-sidedness of this regulation against the background of safeguarding pluralism is made clear by the wording in recital 61, which points out that online services are both an opportunity and a challenge for safeguarding a relevant diversity. The risks for the diversity of (also media) offerings in the online area, which results from the legal manifestation of filtering obligations or the practical establishment by providers due to risk considerations, was already discussed during the reform under the aforementioned catchword "upload filters". Without having to go into this discussion here, this new regulation clearly shows that rules in EU law that are not directly related to pluralism can and should also have (supporting) effects on the diversity of offerings, but also on the plurality of providers themselves by ensuring economic compensation for the investment in copyright-protected works – for example by media undertakings, but not only. This does not encroach on the area of competence of the Member States for safeguarding pluralism in the media sector; rather, one of the reasons for including both rules in harmonizing EU law is the recognition that the factual situation regarding the most relevant online providers covered by both rules argued for a supranational solution, and not one in the Member States only, for reasons of effectiveness.

### *4. Merger Regulation*

EU competition law – as is also the view of the European Commission in the media context[573] – also has at least an indirect effect in securing diversi-

572 Cf. *Kuczerawy*, EU Proposal for a Directive on Copyright in the Digital Single Market: Compatibility of Art. 13 with the EU Intermediary Liability Regime, 205, 205 et seq.; see also: *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content, p. 139 et seq.

573 Communication from the Commission of 15 December 2003 on the future of European regulatory audiovisual policy, COM(2003) 784 final.

ty.[574] Among other things, it prohibits mergers (including of media undertakings) that could lead to an impediment to cross-border competition if dominant market positions are achieved.[575] This means that mergers can already be prohibited in view of the market power situation, which can already ensure diversity in the case of undertakings in the media sector or with an influence on it. In addition, merger control law, which has otherwise a fully harmonizing approach at EU level due to its regulatory nature and the clear definition of competences, recognizes that other, non-market power related tests and reasons for prohibition may also exist. Art. 21(4) Merger Regulation (ECMR)[576] allows the Member States to prohibit mergers which should actually be cleared from a competition law perspective if they appear problematic for other legitimate interests of the Member States. The rule explicitly mentions "plurality of the media" as one such legitimate interest. In order to protect it, Member States enjoy a power of derogation, despite the actual EU competence for concentrations of Union-wide significance, which are decided exclusively on the basis of EU law and by the Commission. This means that the competent authorities in the Member States have the specific option of prohibiting mergers in order to protect media diversity, even if these mergers have been classified by the Commission as unobjectionable from a competition law perspective.[577] However, they cannot subsequently approve such mergers that have been prohibited by the Commission, for example with the argument of increasing the diversity of supply.[578]

The rules on media concentration law vary widely in the Member States and, above all, to varying degrees.[579] Many continue to limit themselves to

574 In detail on this *Cole*, Europarechtliche Rahmenbedingungen für die Pluralismussicherung im Rundfunk, p. 93, 102 et seq.

575 On this in detail supra, in chapter C.IV.2 on primary law.

576 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24 of 29.01.2004, p. 1–22, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004R0139&qid=1612892936591.

577 Cf. on this, e.g., the *Fox / Sky* case, which the Commission found to raise no competition concerns, but which the competent regulatory authority in the United Kingdom found to be contrary to the public interest against the background of media pluralistic concerns, Commission decision: M.8354 FOX / SKY, https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8354, Ofcom: https://www.gov.uk/government/collections/proposed-merger-between-twenty-first-century-fox-inc-and-sky-plc.

578 On this and the following *Cole/Hans* in: Cappello, Medieneigentum – Marktrealitäten und Regulierungsmaßnahmen, p. 27.

579 Cf. *European Institute for Media*, The Information of the Citizen in the EU.

monitoring concentration in the broadcasting sector; some also provide for the review of cross-media links.[580] But even if media concentration is limited by the establishment of rules on diversity, this does not automatically mean the creation of media pluralism. Rather, the implementation of further rules beyond competition law in the sense of e.g. support instruments is often required.[581]

In any event, the ECMR and thus the Commission's exclusive competence relate solely to the assessment of the effects of proposed mergers on competition in the various affected markets within the EEA. The assessment does not include those factors that would be relevant for the evaluation of a dominant power of opinion and thus provide information on whether a merger would have a negative impact on a pluralistic media landscape.[582] The purpose and legal framework for assessing competition and media plurality are very different. Competition rules broadly focus on whether consumers would face higher prices or lower innovation as a result of a transaction. An assessment of media plurality typically addresses the question of whether the number, scope, and diversity of individuals or undertakings controlling media undertakings are sufficiently plural. The Commission does recognize this difference and that this can lead to different assessments of mergers also.[583]

Media concentration law is therefore an area that is deliberately excluded from the law on economic concentration. Art. 21(4) ECMR is a significant confirmation that even in subject matters which are clearly within the competence of the EU, such as competition law, the regulatory sovereignty of the Member States is respected – in this case through the application in practice to merger projects – and made operational in the relevant acts of secondary law through a special provision.

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580 *Cole/Hans* in: Cappello, Medieneigentum – Marktrealitäten und Regulierungsmaßnahmen, p. 125 et seq.

581 *Cole/Hans* in: Cappello, Medieneigentum – Marktrealitäten und Regulierungsmaßnahmen, p. 127.

582 Cf. on this, but also on possibly unexploited potentials for taking into account also pluralism-relevant aspects within the framework of the EU competition regime *Bania*, The Role of Media Pluralism in the Enforcement of EU Competition Law.

583 Same as here the EU Commission in connection with the case of the merger of Fox and Sky, cf. press release of 7 April 2017, https://ec.europa.eu/commission/presscorner/detail/en/IP_17_902.

*5. European Electronic Communications Code*

The EECC[584] entered into force on 21 December 2018 and in particular both amended and consolidated Directives 2002/19/EC (Access Directive)[585], 2002/20/EC (Authorisation Directive), 2002/21/EC (Framework Directive) and 2002/22/EC (Universal Service Directive)[586] into a comprehensive regulatory framework for telecommunications services. The EECC regulates electronic communications networks and services, i.e., transmission paths and technically oriented services, but contains provisions that are highly relevant in the context of ensuring pluralism in the media sector.

According to Art. 61(2)(d) EECC (formerly Art. 5(1)(b) Access Directive), the regulatory authorities of the Member States may order undertakings with significant market power to provide digital radio and television broadcasting services and related complementary services, access to application programming interfaces (APIs) and electronic programme guides (EPGs) on reasonable and non-discriminatory terms. In addition, pursuant to Art. 114(1) EECC (formerly Art. 31 Universal Service Directive), the Member States may continue to provide for so-called 'must carry' obligations in national law, i.e., to oblige network operators to transmit certain radio and television broadcast channels and related complementary services. This addresses in particular operators of cable television networks, IP-TV, satellite broadcasting networks and terrestrial broadcasting networks, as well as possibly operators of other networks if they are used (now or in the future) by a significant number of end-users as their main means of receiving radio and television broadcasts. The imposition of obligations is subject to the condition that they are necessary for an (explicitly defined) objective of general interest and that they are proportionate and transparent. Such objectives include in particular safeguarding media diversity. Ac-

584 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), OJ L 321 of 17.12.2018, p. 36–214, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32018L1972.

585 Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ L 108 of 24.04.2002, p. 7–20, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002L0019.

586 Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108 of 24.04.2002, p. 51–77, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32002L0022.

cordingly, the rules were also introduced against the background of the need for Member States, in the light of their cultural sovereignty, to be able to ensure that certain programs and, above all, the information conveyed therein, are accessible to a wide audience.[587] In this context, it is important to note that, due to the high degree of harmonization of the regulations, the authorization for this must already be laid down in EU law, which, however, leaves the Member States free to introduce such 'must carry' obligations and also as regards their design only specifies the purpose and the framework conditions to be fulfilled, due to the relevance of the interference to fundamental rights. As will be considered in more detail below, this leaves the room for maneuver with the Member States. On the one hand, the concept of ensuring access for the "general public" to important content is close to the concept of a basic service, as laid down in German law, e.g., for telecommunications services as an infrastructure facility in Art. 87f(1) Basic Law.[588] On the other hand, this idea also originates from the establishment of public service providers or offerings whose state-initiated funding leads to a special status and a kind of "claim to access" for the citizens funding the service. In Germany, this is laid down in the basic service mandate, also confirmed by the Federal Constitutional Court, according to which public broadcasting has a comprehensive mandate not only in terms of content, but also in terms of accessibility, which in turn justifies its funding basis.[589]

According to Art. 1(2) EECC, its objectives (like those of the predecessor directives) are, on the one hand, to implement an internal market in electronic communications networks and services that results in the deployment and take-up of very high capacity networks, sustainable competition, interoperability of electronic communications services, accessibility, security of networks and services and end-user benefits. The second is to ensure the provision throughout the Union of good quality, affordable, publicly available services through effective competition and choice, to deal with circumstances in which the needs of end-users, including those with disabilities in order to access the services on an equal basis with others, are not satisfactorily met by the market and to lay down the necessary end-user rights. It is therefore a question of the internal market, competition, consumer protection and also network infrastructure within the EU. The men-

587 Cf. on this *Arino et al.* in: EAI, Haben oder nicht haben. Must-Carry-Regeln.

588 Same as here *Assion*, Must Carry: Übertragungspflichten auf digitalen Rundfunkplattformen, p. 207.

589 On this *Ukrow/Cole*, Aktive Sicherung lokaler und regionaler Medienvielfalt, p. 98.

tion of "choice" in the objectives (Art. 1(2)(b)) is not to be understood as a cultural policy orientation with regard to content services carried via the networks, but rather means the existence of a large number of (competing) offerings of communications networks within the EU from the consumers' point of view. This is also clarified by recital 7, which states that the EECC does not cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services. In addition, recital 7 makes it unambiguously clear however, that the EECC is without prejudice to measures taken at Union or national level in respect of such services, in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism. With regard to the increasing technical convergence of "infrastructure", recital 7 recognizes that the services carried over it from a regulatory perspective remain separate from it, although this does not prevent the "taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection". However, the EECC places this possibility of achieving cultural policy goals such as pluralism of the media and securing cultural diversity also via "technical" regulation essentially at the level of the Member States[590]. With regard to national regulators, recital 7 explicitly requires that "competent authorities should contribute to ensuring the implementation of policies aiming to promote those objectives".

As already mentioned above, this also applies explicitly to access rules and the so-called 'must carry' rules. Art. 61 and 114 EECC generally only open the possibility on EU level to introduce them by the Member States. They can, in particular with regard to the latter, decide whether 'must carry' obligations are to be introduced at all, and if so, which providers or which offerings (public broadcasting, private broadcasting etc.) are to be covered by them, whether, by whom and to what extent compensation and/or payments are to be made for the transmission, how many providers or offerings should benefit from 'must carry' obligations, and other general conditions. Most Member States[591] have made use of this option in vari-

590 Cf. rec. 115: "Those objectives should include the promotion of cultural and linguistic diversity and media pluralism, as defined by Member States in accordance with Union law".

591 Only Cyprus, Estonia, Spain, Italy (except for local offerings), and Luxembourg have no 'must carry' obligations; rules on discoverability in electronic program guides are in place in about half of the EU Member States so far. Cf. European Institute of Media, study to support Impact Assessment of AVMSD, p. 80.

ous forms, but in doing so, they have generally based the main rule on the wording of the (previously applicable) directives,[592] so that the specific application is carried out by the regulatory authorities or bodies.

The EECC, which was to be transposed by 21 December 2020, supplements the existing rules, to which the implementation in the Member States until now is still oriented, not insignificantly, as can be seen from the following extracts of a synoptic overview:

| Access Directive | EECC |
|---|---|
| Recital (10) Competition rules alone may not be sufficient to ensure cultural diversity and media pluralism in the area of digital television.<br>[…] | Recital (159) Competition rules alone may not **always** be sufficient to ensure cultural diversity and media pluralism in the area of digital television.<br>[…] |
| Universal Service Directive | **EECC** |
| Art. 31<br>(1) Member States may impose reasonable "must carry" obligations, for the transmission of specified radio and television broadcast channels and services, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts. | **Art. 114**<br>(1) Member States may impose reasonable 'must carry' obligations for the transmission of specified radio and television broadcast channels and **related complementary** services, **in particular accessibility services to enable appropriate access for end-users with disabilities and data supporting connected television services and EPGs,** on undertakings under their jurisdiction providing electronic communications networks **and services** used for the distribution of radio or television broadcast **channels** to the public**,** where a significant number of end-users of such networks **and services** use them as |

592 *EAI*, Must-Carry: Renaissance oder Reformation?; on this comprehensively with regard to Art. 31 Universal Service Directive also EAI, Access to TV platforms: must-carry rules, and access to free-DTT.

| | |
|---|---|
| | their principal means to receive radio and television broadcast **channels**. |
| Such obligations shall only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent. | Such obligations shall **be imposed only** where they are necessary to meet general interest objectives **as clearly defined by each Member State** and shall be proportionate and transparent. |
| The obligations shall be subject to periodical review. | (**2**) **By 21 December 2019 and every five years thereafter, Member States shall review the obligations referred to in the paragraph 1, except where Member States have carried out such a review within the previous four years.** |
| (2) Neither paragraph 1 of this Article nor Article 3(2) of Directive 2002/19/EC (Access Directive) shall prejudice the ability of Member States to determine appropriate remuneration, if any, in respect of measures taken in accordance with this Article while ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks. Where remuneration is provided for, Member States shall ensure that it is applied in a proportionate and transparent manner. | (**3**) Neither paragraph 1 of this Article nor **Article 59**(**2**) shall prejudice the ability of Member States to determine appropriate remuneration, if any, in respect of measures taken in accordance with this Article while ensuring that, in similar circumstances, there is no discrimination in the treatment of **providers of** electronic communications networks **and services**. Where remuneration is provided for, **Member States shall ensure that the obligation to remunerate is clearly set out in national law, including, where relevant, the criteria for calculating such remuneration.** Member States shall **also** ensure that it is applied in a proportionate and transparent manner. |

Further and additional clarifications can also be found in the recitals to the new Directive, which also go beyond the text of the previous recitals to the Universal Service Directive. For example, recital 308 clarifies that 'must

carry' obligations must relate to certain specified radio and television broadcast channels and complementary services thereto. It is even more strongly emphasized that the regulations for this must be transparent, proportionate and "clearly defined" and leave sufficient development opportunities for network operators to invest in their infrastructures. Under recital 309, the review period for such 'must carry' obligations is now specifically set at five-year periods in order to review to a specified extent whether market developments have rendered the obligations of network operators, which according to the following recital now also explicitly include "IP-TV", superfluous. It is also important to clarify that, "[i]n light of the growing provision and reception of connected television services and the continued importance of EPGs for end-user choice the transmission of programme-related data necessary to support connected television and EPG functionalities can be included in 'must carry' obligations" (recital 310).

While the Member States (and thus also the national regulatory authorities) continue to remain free as to "whether" to introduce must carry rules under the EECC, the Directive as part of the reform provides certain specifications as to "how" to do so. In particular, the objective of general interests, which is regularly the safeguarding of diversity when establishing 'must carry' obligations, must be explicitly enshrined in law. Where previously only a "periodical" review was required, the EECC now requires one every five years. The expansion of 'must carry' rules to include "complementary services" is also new. Such complementary services may include program-related services specifically designed to improve accessibility for end-users with disabilities (e.g., teletext, subtitles for deaf or hearing-impaired end-users, audio description, spoken subtitles, and sign language interpretation) and may include, where necessary, access to related source data; they may also include program-related connected television services.[593] Program-related data means such data as is necessary to support functions of connected television services and electronic program guides, and regularly includes information about program content and the method of access.[594] However, the clarifications, some of which also take up rulings of the CJEU[595], leave intact the principle that, despite the high degree of har-

593 On the term cf. also the European Parliament resolution of 4 July 2013 on connected TV, (2012/2300(INI)), https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0329+0+DOC+XML+V0//EN.

594 Cf. on this rec. 153 and 310 EECC.

595 Cf. CJEU, case C-250/06, *United Pan-Europe Communications Belgium SA and Others / Belgian State*, para. 31; CJEU, case C-353/89, *Commission / Netherlands*, para. 25.

monization in the area of electronic communications networks and services and also despite technological developments which, in principle, permit more diversity of offerings in terms of technical possibilities, complementary measures for safeguarding diversity must continue to be taken by the Member States and only by them. This recognizes that the assessments to be made to decide on the need for such 'must carry' obligations can only be made at the level of and by the Member States or national regulatory authorities.

This far-reaching recognition of the Member States' room for maneuver also does not affect the result of an earlier CJEU ruling, according to which 'must carry' obligations can lead to all program slot allocations being predetermined in the (analog) cable network without infringement of the proportionality requirement under EU law.[596] Admittedly, the question of analog cable coverage is hardly relevant any more, and the new EECC makes it clear that 'must carry' obligations in this respect are to be provided for only in exceptional cases. It remains the realization, however, that despite the interference with the freedom to provide services and fundamental rights of network operators, Member States have extensive possibilities for control. Excessive demands on network operators shall be prevented by the precise requirements as to which conditions have to be met in the context of 'must carry' obligations. But the purpose, emphasized by the CJEU, "to preserve the pluralist and cultural range of programmes available on television distribution networks and to ensure that all television viewers have access to pluralism and to a wide range of programmes"[597], remains relevant when it comes to other types of obligations imposed on network operators for the purpose of safeguarding pluralism. However, the Member States must specifically express this objective[598] in the legal regulation. In addition, as mentioned above, the rules must be proportionate and transparent, which in turn means, as in the previous sections, an examination of the national rules against Union law and the fundamental principles laid down therein, as specifically stated in Art. 61,

596 CJEU, case C-336/07, *Kabel Deutschland Vertrieb und Service GmbH & Co. KG / Niedersächsische Landesmedienanstalt für privaten Rundfunk*; cf. on this also *Cole* in: HK-MStV, § 51 b, para. 22 et seq., on the judgment in particular 27 et seq.

597 CJEU, case C-250/06, *United Pan-Europe Communications Belgium SA and Others / Belgian State*, para. 40.

598 The mere formulation of declarations of principle and general policy objectives in the recitals of the national regulation cannot be regarded as sufficient in this respect, cf. CJEU, case C-250/06, *United Pan-Europe Communications Belgium SA and Others / Belgian* State, para. 46.

114 EECC. In this respect, too, the CJEU leaves to the Member States, in this case to the competent courts, the assessment whether the criteria have been observed in the individual case.[599] The Member States therefore also have a wide scope for action in the context of infrastructure regulation in the light of their cultural policies.

Of particular relevance, however, is Art. 1(3)(b) EECC. It already clarifies at the beginning of the Directive with regard to its scope that measures taken at Union or national level, in accordance with Union law, to pursue general interest objectives remain unaffected by the EECC. The list of examples explicitly mentions "content regulation and audiovisual policy" in addition to data protection as one such objective. As noted above, the related recital 7 clarifies that this does not require a strict separation of rules on technical network-related areas and those that are content-related. However, the two areas must be distinguished from each other, and the competence for regulation must be located with the Member States in the case of content regulation, in particular when it is carried out with a view to safeguarding pluralism. This provision thus corresponds to the exemption as set forth in Art. 1(6) ECD (cf. chapter D.II.1.) and, in this respect, also against the background of telecommunications law, leaves the Member States room for (additional) regulations on safeguarding diversity which may affect providers covered by the EECC. However, in this respect, the EECC requires the Member States to regulate the two areas differently and not to include content-related rules in the law on the transposition of the EECC.

With view to national implementation in Germany also, this means that a deletion without replacement of existing broadcasting-related consideration requirements in the TKG does not appear to be readily compatible with the implementation obligation with regard to Art. 1(3) EECC. At the very least, an amendment to the TKG aimed at such a deletion without replacement would, not only for reasons of constitutional law, trigger an at least considerable effort to explain the compatibility of the amendment with higher-ranking law, i.e. also EU law – especially since even in the case of acts transposing EU directives, there is an obligation to respect the imperative of media pluralism enshrined in Art. 11(2) CFR.

599 However, the review must, in case of doubt, be carried out by national courts and not by the CJEU; cf. CJEU, case C-336/07, *Kabel Deutschland Vertrieb und Service GmbH & Co. KG / Niedersächsische Landesmedienanstalt für privaten Rundfunk*.

### 6. Platform-to-Business Regulation

As already mentioned in connection with the new rules for prominence of content in the general interest in the AVMSD (chapter D.II.2.d(2)), ensuring the visibility of media content is a significant element of safeguarding diversity. This idea of the "visibility" of content or information is not only found in secondary law with a media law orientation, but is also laid out in a legal act that has only recently become applicable, which refers to competition-oriented aspects of the economic sector of (certain) online service providers. The P2B Regulation[600], directly applicable in all Member States since 12 July 2020, must also be considered in more detail in the overall context of this study.

#### a. Scope and objective

This legislation was created with the aim of providing greater transparency, fairness and effective remedies in the area of online intermediation services. They are defined in the Regulation (Art. 2(2)) as information society services that allow business users, on the basis of contractual relationships, to offer goods or services to consumers with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded. Hence, the Regulation is about services that stand as intermediaries and thus, in many cases, gatekeepers (in particular with regard to SMEs) between sellers of goods or services and consumers. As a significant part of online commerce takes place with the involvement of such intermediaries, it is important from the perspective of the EU legislature that undertakings have confidence in these services and that they ensure transparency towards them. The Directive also separately addresses online search engines, which are understood to be a digital service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be

600 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.07.2019, p. 57–79; https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32019R1150.

found. Search engines also regularly serve as a link and gatekeeper between undertakings and consumers.

By specifically addressing search engines, the Regulation responds to well-founded concerns that they are not neutral in how they display and arrange their search results.[601] The Regulation focuses on the proper functioning of the internal market and responds to an (also potentially) unequal power structure in the digital economy and aims to prevent negative effects of this power structure respectively. Thus, there are parallels to the situation concerning the relationships between recipients, media intermediaries and content providers. The P2B Regulation does not refer to the general interest of safeguarding pluralism, which neither lies in its objective nor could be a link as regards competence, but the parallelism of the links means that the Regulation in its practical application can have at least an indirect effect on safeguarding diversity.

b. The transparency requirements

Art. 5 P2B Regulation stipulates that providers of online intermediation services and online search engines must make the main parameters that determine the order or weighting of the presentation or listing ("ranking") of their services comprehensible by means of explanations in plain and intelligible language in the GTCs or on the website of their own service. Essentially, this is about describing the algorithms that (co-)determine the display and thus also the discoverability. Online intermediation services are directly required by the Regulation itself to set up complaint systems for business users in order to ensure that the Regulation's requirements on complaints by business users are implemented in practice. This obligation does not apply directly to online search engines. However, Member States are required to ensure adequate and effective enforcement of the Regulation in relation to all providers covered by it (Art. 15). In addition, a concrete form of monitoring of the impact of the Regulation by the Commission is laid down (Art. 16). The development of codes of conduct is called for (Art. 17), which are to ensure the "proper application" of the Regulation, whereby the wording "contribute to the proper application" makes

601 As stated by the EU project CHORUS in its study from 2010: *Boujemaa et al.*, Cross-disciplinary Challenges and Recommendations regarding the Future of Multimedia Search Engines. Cf. furthermore also *Meckel*, Vielfalt im digitalen Medienensemble, p. 12 et seq.

it clear that they are meant as an instrument of substantiating co-regulation and should not lead to a pure self-regulation of the sector.

Since the definition of "business users"[602] or "users with a corporate website"[603], which are to be protected by the Regulation and the specified transparency obligations, potentially also includes media undertakings with their online offerings, (also) they are being given an important tool to strengthen their position vis-à-vis gatekeepers such as online search engines and social media[604] which play an important role in the online distribution and discoverability of their content.[605] In particular, (also) they may benefit from requiring intermediaries and search engines to disclose more detailed information about how their services work. Although the obligation arising from the Regulation does not entail disclosure of the detailed mode of operation or the algorithms themselves, it does entail a publicly available and constantly updated explanation of the significance and weighting assigned to individual parameters and whether the ranking is influenced by the payment of a fee (not only in the form of monetary payments).

In order to implement these requirements, the EU Commission – similar to the new provisions of the AVMSD – according to Art. 5(7) shall issue guidelines with regard to the most important content of the Regulation, the application of the rule on "ranking". These are currently still drafted.[606] Even if the concrete ramifications of the Regulation, as they will also result from the guidelines, are not yet foreseeable in detail (also) for the media sector, it is nevertheless a rule that is related to the undistorted perceptibility of relevant services (also: the offering of content) and therefore its impact should also be pursued from a diversity-safeguarding perspective. The transparency requirements could also improve the review of the

602 As per Art. 2(1) P2B Regulation, any private individual acting in a commercial or professional capacity who, or any legal person which, through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession.

603 As per Art. 2(7) P2B Regulation, any natural or legal person which uses an online interface, meaning any software, including a website or a part thereof and applications, including mobile applications, to offer goods or services to consumers for purposes relating to its trade, business, craft or profession.

604 Cf. on this rec. 11 P2B Regulation.

605 On the possibilities of safeguarding diversity through search engines cf. *Nolte* in: ZUM 2017, 552, 552 et seq.

606 On the current status cf. https://ec.europa.eu/digital-single-market/en/news/ranking-transparency-guidelines-framework-eu-regulation-platform-business-relations-explainer.

functioning of this sector in general, so that as a consequence, future regulatory proposals could be developed, if necessary, on the basis of research results found in this way.

c. The relationship to other rules by Member States

In light of the focus of this study, the P2B Regulation should also be examined for another reason: as a regulation, it is directly applicable law in all Member States. Its scope and the outlined obligations for service providers, which as shown can reflexively also have diversity-promoting effects in the media sector, leads to the question of whether the Regulation has a suspensory effect or otherwise limits Member States' regulatory approaches with regard to providers already covered by the Regulation and transparency requirements for them. It must be emphasized that, unlike the, e.g., AVMSD, the Regulation neither contains any explicit power to derogate from the coordinated field in favor of stricter regulations nor, as does the ECD, an additional power of restriction for the Member States for reasons such as the protection of minors. Art. 1(4) P2B Regulation merely refers to certain unaffected Member State rules from the respective national civil law. Regulations are binding in their entirety and not, like directives, merely as to the result to be achieved, so that transposing acts by Member States are unnecessary and even prohibited where they would conceal the direct applicability of the regulation.[607] This also includes a prohibition of repetition developed early on by the CJEU, according to which a merely repetitive presentation of the subject matter of a regulation in Member States' law is prohibited as this would create uncertainty about the author and legal nature of a legal act and jeopardize the simultaneous and uniform application of EU law.[608] This is different in the case of regulations that contain implementing provisions addressed to the Member States or are deliberately limited in their geographical scope[609] or, by means of often so-called "opening clauses", allow Member States room for maneuver with regard to certain rules of the regulation despite its character as such. However, the provisions of the P2B Regulation that are relevant here are not such types of rules.

607 *Ruffert* in: Calliess/id., Art. 288 TFEU, para. 19, with further references.
608 Cf. for instance CJEU, case 39/72, *Commission / Italy*, para. 17.
609 Cf. on this *Nettesheim* in Grabitz/Hilf/id., Art. 288 TFEU, para. 99 et seq.

However, the prohibition of Member States' rules in the area of a regulation only applies to the extent that a regulatory area – such as safeguarding diversity – is covered by it. The P2B Regulation addresses "potential frictions in the online platform economy" from a competition law and consumer protection law perspective (recitals 2 and 3) and therefore does not distinguish between specific undertakings that are to benefit from transparency, i.e. it is sector-neutral. However, this does not address the issue that there may be factors specific to certain sectors that make it particularly relevant for undertakings in that sector to learn more about how the service operates through a transparent presentation of ranking systems. Equally, the regulation does not address the general interest in displaying certain content according to certain criteria. In addition to the media sector and the dissemination of information there, where aspects of safeguarding diversity also play an important role in the perception of the end-user, examples of this include the pharmaceutical sector with regard to health protection or the political sector with regard to equal opportunities for political parties against the background of the principle of democracy. The distinction of requirements regarding the presentation of ranking factors between online intermediation services and search engine operators made in the Regulation also does not imply any consideration of sector-specific features, but is connected with the different relationships between the undertakings within the scope of protection of the Regulation and the service providers for these two categories, in particular the factor that search engines do not have a direct contractual relationship with the undertakings (or their websites) displayed in the context of search results.

General interests that require special protection of certain undertakings or the involvement of the public in the disclosure of information are thus not covered by the Regulation. It remains within the scope of the general competition-related considerations, as is also repeatedly apparent from the recitals. As a horizontally applicable legal instrument that aims to protect competition from unfair practices, distortions and unequal treatment in all sectors of the economy, the Regulation is not designed to take into account other sector-specific interests.[610]

In the online consultation process on the development of the guidelines on the transparency obligation, the Commission points out that one of the aims of the guidelines should be to also provide sector-specific guidance on

610 Cf. rec. 51, which explicitly states only the competition objective: "...ensure a fair, predictable, sustainable and trusted online business environment within the internal market".

the application of the transparency obligation where necessary.[611] However, there is no indication yet for which sectors such specific guidance might be provided or which aspects it might cover. However, the relevance of transparency requirements for such providers for media sector undertakings is also demonstrated by primarily stakeholders from this sector taking part in the survey, outlining media policy aspects.[612] According to the Commission's announcement, the guidelines should have been published by 12 July 2020, but they are still missing.

However, the Commission in its guideline authority is in any case bound by the requirements from the Regulation and cannot go beyond what is covered by it. Powers to issue guidelines are granted where more general rules need to be clarified and the underlying context is dynamically evolving. This also applies to the highly technical and digital area, as is the case here with the authorization under Art. 5(7) P2B Regulation. However, clarification should not be done simply because it seems reasonable. Rather, the Commission must remain within the scope of the competence and thus the regulatory context (here: of the Regulation), otherwise this would indirectly lead to a de facto transfer of powers to the Commission in the administrative network, although it does not have[613] or should not have such competence.[614] This also applies to the pursuit of cultural policy objectives with regard to transparency requirements for providers of certain online intermediation services or search engines, which may also not result from the guidelines due to the competence of the Member States and the limited content of the Regulation. Although the Commission has stated that it recognizes potential legal overlaps between the P2B Regu-

611 "Provide sector specific guidance, if and where appropriate."; cf. Targeted online survey on the ranking transparency guidelines in the framework of the EU regulation on platform-to-business relations, https://ec.europa.eu/digital-single-market/en/news/targeted-online-survey-ranking-transparency-guidelines-framework-eu-regulation-platform.

612 Cf. the opinions of e.g. the EBU or ACT, available at https://ec.europa.eu/digital-single-market/en/news/ranking-transparency-guidelines-framework-eu-regulation-platform-business-relations-explainer.

613 On the criticism regarding the granting of competence through guideline authority cf. *Lecheler* in: DVBl. 2008, 873, 873 et seq.; *Weiß* in: EWS 2010, 257, 257 et seq.

614 Cf. on this with further references *Ruffert* in Calliess/id., Art. 288 TFEU, para. 102, who also refers to the danger of a shift resulting from the fact that guidelines can have a high steering effect, but in contrast have only a weak enshrinement under primary law.

lation and Member States' media legislation[615] insofar as the latter imposes transparency requirements, this observation has no basis in the Regulation, which does not have the objective of safeguarding media diversity. Therefore, neither the Regulation nor, a fortiori, the legally non-binding guidelines yet to be issued impose a limit on the Member States' scope for action to achieve this general interest objective. Thus, the provisions of the P2B Regulation also do not conflict with Member States' regulations e.g. for promoting fairness and transparency among new media players such as media intermediaries and media agencies[616], as long as these are not aimed at economic consumer protection and cross-border marketability of online services, but rather at safeguarding media diversity under the conditions of digitization and globalization and tackling new threats to diversity through business models geared toward aggregation, selection and presentation of media content.

### d. The relationship with Directive (EU) 2019/2161

A brief consideration of Directive (EU) 2019/2161[617], which entered into force only a few months after the P2B Regulation, also proves that Member States retain scope for regulating media pluralism as an objective of general interest. The Directive contains various requirements for the enforcement and modernization of the Union's consumer protection legislation. In contrast to the P2B Regulation, it does not refer to the relationship between undertakings and the platforms covered by the act (online intermediation services and search engines), but to the relationship between final consumers and the platforms. In this context, too, the ranking or a highlighted placement of commercial offers in the results of a search query by providers of online search functions play a significant role, as these can have a considerable impact on the (purchasing) decision of consumers.[618]

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615 Cf. on this the comments of the Commission in the notification procedure, European Commission, Notifizierung 2020/26/D, C(2020) 2823 final of 27.04.2020, p. 9.

616 Cf. *Ukrow/Cole*, Zur Transparenz von Mediaagenturen, p. 52 et seq.

617 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328 of 18.12.2019, p. 7–28, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L2161&qid=1614597549259.

618 Cf. rec. 18 Directive (EU) 2019/2161.

As a result of an amendment to the Consumer Rights Directive 2011/83/EU, providers of online marketplaces[619] are subject to more far-reaching information requirements in their relationship with consumers (Art. 6 a): before a consumer is bound by a distance contract, or any corresponding offer, on an online marketplace, the provider of the online marketplace shall provide the consumer in a clear, comprehensible and recognizable manner about, i.a., general information on the main parameters determining ranking of offers presented to the consumer as a result of the search query on the online marketplace and the relative importance of those parameters as opposed to other parameters. This information must be made available in a specific section of the online interface that is directly and easily accessible from the page where the offers are presented. In parallel, a corresponding provision is incorporated into the Unfair Commercial Practices Directive[620], which defines such information as material and thus classifies its withholding as a misleading omission. However, the latter provision is expressly not intended to apply to online search engines within the meaning of the P2B Regulation, to which the Unfair Commercial Practices Directive otherwise applies. The purpose of this is not to construct an exception for them, but to avoid duplication of already existing obligations. This is clarified in recital 21, according to which the transparency requirements are to be ensured by the Directive also vis-à-vis consumers, in a comparable manner to the P2B Regulation. However, since with regard to search engines there is already a comprehensive obligation from the Regulation to provide publicly accessible information on the parameters, repetition is unnecessary in this respect.

The Directive thus ensures that consumers do not just reflexively benefit from increased transparency of ranking systems between undertakings and intermediaries introduced by the P2B Regulation, but that explicit guarantees also apply to the consumer. In this context, in addition to the provisions of the Directive, the Member States are not prevented from imposing

619 Defined as "a service using software, including a website, part of a website or an application, operated by or on behalf of a trader which allows consumers to conclude distance contracts with other traders or consumers", Art. 2(1) no. 17 Directive 2011/83/EU as amended by Directive (EU) 2019/2161.

620 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149 of 11.06.2005, p. 22–39, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32005L0029.

additional information requirements on providers of online marketplaces on grounds of consumer protection (Art. 6a(2)). This makes two things clear: From an EU law perspective already, transparency requirements for online service providers are possible for different purposes, so far regulated in EU law from a competition law (P2B Regulation) and consumer protection law (Directive (EU) 2019/2161) perspective. In addition, it is recognized that even if certain minimum requirements exist (here: from the Regulation), it is possible to go beyond them or to set more specific requirements to achieve the other objective. If, for example, there is a particular need for consumer protection, the transparency requirements can be specially designed. Equally, it remains possible for Member States to impose more far-reaching transparency requirements from yet another angle, the consideration of which falls within their competence. Accordingly, safeguarding media pluralism can justify such requirements for certain intermediaries that (also) play a significant role in the distribution of media content, and the corresponding possibility for action is not blocked by the P2B Regulation.

## *III. Current projects for legislative acts and initiatives with a media law context*

### *1. Proposal for a regulation on preventing the dissemination of terrorist content online*

In the fall of 2018, the European Commission presented a draft Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content on the Internet (TERREG)[621]. It intends to increase the effectiveness of current measures to detect, identify and remove terrorist content on online platforms. However, the proposal had not reached agreement in the trilogue process by the time the previous Commission's mandate expired.[622] On 17 April 2019, the European Parlia-

621 Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online. A contribution from the European Commission to the Leaders' meeting in Salzburg on 19–20 September 2018, COM/2018/640 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A640%3AFIN.

622 On the state of the proceedings cf. https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=COM:2018:640:FIN.

ment[623] had considered the proposal at first reading, adding a number of amendments, thereby allowing it to be referred again following the election of a new Parliament and the constitution of a new Commission. However, the General Approach of the Council is still pending, so that it is not foreseeable whether such a Regulation will actually enter into force in the near future and how it will relate to any newly adopted legal acts concerning the providers covered by the proposed Regulation.

TERREG, according to the Commission's proposal and – with regard to this point – in principle also approved by the Parliament, pursues an approach that is also found in the German Network Enforcement Act (NetzDG)[624]. The proposed rules primarily target hosting service providers within the meaning of Art. 14 ECD that offer their services within the EU, regardless of their place of establishment or size (in particular, no thresholds or exemptions for SMEs are foreseen).[625] In this context, however, the draft does not refer to the corresponding provision of the ECD, but itself defines "hosting service provider" in Art. 2(1) as a provider of information society services consisting in the storage of information provided by and at the request of the content provider and in making the information stored available to third parties. The definition thus circumscribes the hosting provider as somewhat passive by linking it to the function as order fulfiller, but does not (like the ECD) presuppose exclusive passivity as mandatory. Rather, providers defined in this way could at least also perform active acts in the provision of content. Under TERREG, the content provider is also the active part, as the "user who has provided information that is stored on his behalf by a hosting service provider". In particular, these may also include media undertakings that (also) distribute their offerings via hosting services. However, the focus of TERREG regulation is not directly on content providers, but on hosting service providers.

With respect to hosting service providers, the TERREG draft contains rules on duties of care to be applied by them in order to prevent the dissemination of terrorist content through their services and, if necessary, to

623 European Parliament legislative resolution of 17 April 2019 on the proposal for a regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online (COM(2018)0640 – C8–0405/2018 – 2018/0331(COD)), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=EP:P8_TA(2019)0421.

624 Network Enforcement Act (Netzwerkdurchsetzungsgesetz) of 1 September 2017 (BGBl. I, p. 3352), as amended by Article 274 of the Regulation of 19 June 2020 (BGBl. I, p. 1328).

625 Point 3.2. in the impact assessment of the draft.

ensure the prompt removal of such content. In addition, a number of measures are listed to be implemented by Member States to identify terrorist content, enable its rapid removal by hosting service providers, and facilitate cooperation with the competent authorities of other Member States, hosting service providers and, where appropriate, the competent Union bodies. For this purpose, Art. 4 of the draft TERREG provides in particular that the competent national authority is authorized to issue decisions requiring hosting service providers to remove or block terrorist content within one hour. In addition, providers must also take proactive measures to automatically detect and remove terrorist material in certain circumstances or at the instruction of the authority – although recital 5 of the draft emphasizes that the provisions of the ECD, in particular Art. 14, are to remain unaffected. In addition, the establishment of complaint mechanisms, transparency obligations and cooperation mechanisms are envisaged.

Thus, TERREG would not only create detailed regulation related to the online sector, but would also affect the media sector as producers of the distributed content, since when content is removed, freedom of expression or media freedom is also potentially at risk. This risk is addressed in recital 7 of the draft, which states that competent authorities and hosting service providers should only take strictly targeted measures which are necessary, appropriate and proportionate within a democratic society, taking into account the particular importance accorded to the freedom of expression and information, which constitutes one of the essential foundations of a pluralist, democratic society, and is one of the values on which the Union is founded. Hosting service providers are seen as playing a central role in this regard because they facilitate public debate and access to information.[626] Freedom and pluralism of opinion and media are therefore not the direct subject of regulation in the draft TERREG, which is primarily intended to protect public security. However, due to the (potential) impact on these, the limiting function of these goods protected by fundamental rights must also be taken into account in a possible application of TERREG, as the latter itself recognizes in the form of certain safeguard mechanisms. These include, in particular, notification requirements by hosting service providers vis-à-vis authorities and information requirements vis-à-vis content providers when content is blocked or removed, as well as the establish-

626 Cf. on the question of the extent to which the "general public" objective of a content is or can be a link to a media regulation that then takes effect *Cole* in: UFITA 2018, 436, 436 et seq., on TERREG p. 452.

ment of complaint mechanisms for content providers and the limitation of automated procedures in connection with the review of content.

Similar to the P2B Regulation, however, the scope for maneuver that would be left to the Member States within the regulatory scope of TERREG is limited – both in terms of the obligations of the providers and the safeguard mechanisms. This is a result not only of the character of TERREG as a regulation, but also of the design and wording of the individual rules themselves. They rely on appropriate and effective measures by hosting providers to achieve their goals, so that these are largely predetermined and it would be less important to adequately ensure that Member States "implement" these requirements. Due to the character of the Regulation as secondary law of the EU, the level would be on a par with the ECD, so that proactive obligations of the providers, when introduced, would either have to be coordinated with the liability privileges of the ECD, or the Regulation would – also due to its adoption subsequent to the ECD – mean a departure from the rules therein. However, the issue of the relationship would thus be clarified at EU level, whereby the question would then arise as to whether any liability privileges at Member State level could continue to exist in transposition of the ECD or would rather be superseded by higher-ranking Regulation law, directly binding due to the character of this legal act. However, depending on how the process of discussion on the TERREG draft develops, it should be observed that leeway or possibilities for exceptions for the Member States must be explicitly provided for, in particular in the area of safeguard mechanisms to ensure media freedom when removing or blocking content, in order to comply with the distribution of competences in this respect as well. In particular, it would be important to clarify how TERREG would relate to legislative acts at the national level[627] that also provide for procedures to delete certain illegal content, but not limited to terrorist content, in order to protect public safety and order.

627 Similar regulations already exist at the level of the Member States, such as the NetzDG in Germany or in France the *Loi visant à lutter contre les contenus haineux sur internet*, Loi n° 2020–766 (http://www.assemblee-nationale.fr/dyn/15/dossiers/lutte_contre_haine_internet), which, however, was declared partially unconstitutional by the French Constitutional Council (decision number 2020–801 DC of 18 June 2020). Nevertheless, many Member States continue to follow the approach, as illustrated, e.g., by the Austrian draft federal law on actions to protect users on communications platforms (https://ec.europa.eu/growth/tools-databases/tris/de/search/?trisaction=search.detail&year=2020&num=544#:~:text=Das%20Bundesgesetz%20%C3%BCber%20Ma%C3%9Fnahmen%20zum,mit%20bestimmten%20rechtswidrigen%20Inhalten%20vor.).

## 2. Overview of the proposed Digital Services Act

Already when taking up her duties, the new Commission President *Ursula von der Leyen* in her political guidelines announced her intention to make Europe fit for the digital age, under the title "A Union that strives for more". This included the announcement of a new digital services act to regulate liability and security on digital platforms. This intention became more concrete in the Commission's 2020 Work Program[628], in which a legislative proposal for the 4th quarter of 2020 was announced. The proposal was presented by the Commission on 15 December 2020.[629] In its announcement "Shaping Europe's Digital Future", the Commission places the planned actions in the area of digital services in an overall context that also affects content distribution and thus the media sector: It was essential that the rules governing digital services across the EU be strengthened and modernized by clarifying the roles and responsibilities of online platforms, in particular combating the distribution of illegal content online as effectively as offline.[630] The reform measures, now titled the "Digital Services Act package", comprise two main pillars:

First, to propose clear rules that define the responsibilities of digital services to address the risks faced by their users and protect their rights. To this end, a modern system of cooperation in monitoring platforms should in particular also be ensured, thus guaranteeing effective enforcement of

628 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2020: A Union that strives for more, COM(2020) 37 final, of 28 January 2020, p. 5, adapted against the Corona pandemic background by Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Adjusted Commission Work Programme 2020, COM(2020) 440 final, vom 27. Mai 2020, available at https://ec.europa.eu/info/publications/2020-commission-work-programme-key-documents. With regard to the act on digital services, however, the adjustment of the work program did not result in any changes; cf. p. 2 of the Adjusted Work Programme.

629 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0825&qid=1614597643982.

630 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Shaping Europe's digital future, COM(2020) 67 final, 19 February 2020, https://ec.europa.eu/info/publications/communication-shaping-europes-digital-future, p. 13.

the new obligations. In its impact assessment[631] on this complex, the Commission identifies in particular the dissemination of illegal content such as child pornography, but also hate speech and copyright infringing material on digital platforms, as well as the use of platforms for targeted disinformation campaigns and propaganda, and the lack of protection of particularly vulnerable Internet users, such as children in particular, as threats in the digital environment that will be addressed under the Digital Services Act package. In addition, the Commission points to information asymmetries between platforms, their users and authorities, as well as the insufficiently effective supervision of platforms. The measures deemed necessary[632], in particular a review of the liability rules of the ECD, are based by the Commission on the legal basis of Art. 114 TFEU. In view of the fundamentally cross-border nature of many digital services and the related risks and opportunities, the adaptation of the rules would have to take place at EU level, as the objectives could not be effectively achieved by any Member State alone.

Second, to propose ex ante rules for large online platforms that act as gatekeepers and can therefore impose requirements on their users equally as they do on competitors. The initiative is intended to ensure that platforms compete fairly so that new entrants and competitors can challenge them in a fair competition. The aim should be that consumers have the widest possible choice and that the internal market remains open to innovation.[633] Risk potentials are seen in existing dominant market positions – also based on considerable power over a large amount of data – of a few platforms, which make it considerably more difficult for smaller platforms to access the market due to closed platform systems and network effects.[634]

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631 European Commission, Combined evaluation roadmap/inception impact assessment on Digital Services Act package: deepening the Internal Market and clarifying responsibilities for digital services, Ref. Ares(2020)2877686 – 04/06/2020, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital-Services-Act-deepening-the-Internal-Market-and-clarifying-responsibilities-for-digital-services.

632 See on this in detail in chapter F.I.

633 Cf. the announcement of the European Commission, available at https://ec.europa.eu/digital-single-market/en/digital-services-act-package.

634 European Commission, inception impact assessment, Digital Services Act package: Ex ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union's internal market, Ref. Ares(2020)2877647 – 04/06/2020, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers.

Ex-ante measures[635], which the Commission intends to take in this area, should be based on Art. 114 TFEU. In this context, too, it is pointed out that individual approaches in the Member States do not promise success against the background of the cross-border nature of gatekeeper platforms and their offerings, and could even lead to the contradictory result that it would become even more difficult for startup platforms and smaller undertakings to access the market and compete with existing providers.

In both areas, the Commission had launched a public consultation process that ran until 8 September 2020, the results of which have in the meantime been presented[636]. The impact of the components of the Digital Services Act package on media regulation could be far-reaching. Therefore, based on the interim results of the study, important key points to be considered in the further discussion of the legislative proposals are elaborated below in chapter F.II.

### *3. Media and Audiovisual Action Plan and European Democracy Action Plan*

In its communication "Shaping Europe's Digital Future"[637], the Commission had also announced two further actions for the fourth quarter of 2020, presented on 3 December 2020, that are relevant in the present context, in addition to the specification of the Digital Services Act just mentioned.

First, a Media and Audiovisual Action Plan[638] will help support the digital transformation and competitiveness of the audiovisual and media sector, promote access to quality content and media pluralism. In response to

635 See on this in detail in chapter F.I.

636 See on this https://ec.europa.eu/digital-single-market/en/news/summary-report-open-public-consultation-digital-services-act-package.

637 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Shaping Europe's digital future, COM(2020) 67 final, 19 February 2020, p. 13 et seq.

638 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Europe's Media in the Digital Decade: An Action Plan to Support Recovery and Transformation (Media and Audiovisual Action Plan), COM/2020/784 final.

a question from the European Parliament[639] the Commissioner responsible, *Thierry Breton*, said that against the backdrop of ongoing convergence, the Commission saw the need for a holistic approach to the media sector, encompassing the legal framework and financial support instruments. In this context, the Commission would seek to present an action plan on the competitiveness and pluralistic diversity of the audiovisual sector and the media. In particular, the Commission intended to focus on the implementation of the AVMSD and smart use of EU financial programs and instruments to support the media and audiovisual sector in the digital transformation. This would be supplemented by the proposed Digital Services Act in relation to combating certain types of illegal content.[640]

Second, a European Democracy Action Plan[641], put forward in December 2020, aims to improve the resilience of democratic societies in the EU, support media pluralism, and counter the dangers of external intervention in European elections. With its Action Plan on Human Rights and Democracy 2020–2024, which continues its predecessor plan for 2015–2019, the EU reaffirms its determination to promote and protect these values worldwide, taking into account political change and new technologies. As key objectives, the Commission emphasizes strengthening EU leadership on human rights and streamlining its decision-making; intensifying partnerships with governments, undertakings and social partners; addressing accountability deficits and preventing the erosion of the rule of law, and identifying areas where new technologies can help strengthen human rights.[642] The legal basis is the affirmation in the TEU that EU external action is guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of hu-

639 Parliamentary question by Petra Kammerevert of 18 December 2019, P-004472/2019, https://www.europarl.europa.eu/doceo/document/P-9-2019-004472_EN.html.

640 Answer to parliamentary question P-004472/2019, Thierry Breton, 14 February 2020, https://www.europarl.europa.eu/doceo/document/P-9-2019-004472-ASW_EN.html.

641 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, On the European democracy action plan, COM/2020/790 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0790.

642 Roadmap EU Action Plan on Human Rights and Democracy 2020–2024, Ref. Ares(2020)440026 – 23/01/2020, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12122-EU-Action-Plan-on-Human-Rights-and-Democracy-2020-2024.

man rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and public international law. The Action Plan is, however, only intended to complement the policies of the Member States.[643] In a media law context, however, it is interesting to note that the EU's leadership role is also to be strengthened, among other things, where it is a matter of protecting fundamental and human rights with regard to disinformation and the intimidation of and threats to journalists and independent media.[644] Specifically, this shall involve supporting legislative initiatives in the areas of access to information, right to privacy and protection of personal data in line with European and international standards and the effective implementation of these rules; promoting independent media, quality and investigative journalism (including at the local level); and stepping up efforts to combat disinformation, incitement, extremist and terrorist content, including the promotion of online media literacy and digital competence.

Both initiatives operate in an area that is generally reserved for the policies of the Member States. Accordingly, the wording at EU level ("promote", "support", "intensify efforts", etc.) is cautious and located within the competence for support, coordination and supplementary actions in the sense of Art. 6 TFEU. Accordingly, in its Rule of Law Report 2020, the Commission deliberately addresses the areas of media freedom and media diversity only in an observational manner.[645] A restrictive effect on actions at Member State level, in particular in the area of safeguarding media diversity, cannot be derived from this. However, related actions taken by the EU in the areas addressed here, such as combating disinformation and hate speech, show that the concrete initiatives resulting from the Action Plan are not limited to mere support actions, but can, e.g., also take the form of

643 Roadmap EU Action Plan on Human Rights and Democracy 2020–2024, Ref. Ares(2020)440026 – 23/01/2020, p. 1.

644 Joint Communication to the European Parliament and the Council, EU Action Plan on Human Rights and Democracy 2020–2024, JOIN(2020) 5 final, 25 March 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020JC0005&qid=1614597685493.

645 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2020) 580 final. The Commission acknowledges in particular the existence of high standards of media freedom and diversity in the Member States, but expresses concerns about the independence and adequate funding (and thus effective performance of duties) of media authorities in some Member States, as well as the existence of threats to journalists.

a coordination of self-regulation, in the context of which the Commission is endowed with monitoring powers. In the area of combating disinformation, e.g., which is currently largely characterized by the voluntary commitment of platforms to the Code of Practice against Disinformation (on this see chapter D.IV.3) it is to be expected that the Commission will adopt stronger regulatory instruments, for example in the form of co-regulatory mechanisms – a demand that has already been expressed by many parties.[646] This applies not least in areas where existing regulatory means are deemed inadequate.[647]

### *IV. Links at the level of EU support and coordination actions*

The area of supporting, coordinating and supplementary actions at EU level comprises various instruments taken by the European Commission either in the context of exercising its powers under Art. 6 in conjunction with Art. 2(5) TFEU, if the EU does not have a competence to adopt binding legal acts, or to prepare legal acts (subsequently in the form of binding acts) for which it is responsible, for instance under shared competence (Art. 4 TFEU).[648] These (coordinating or preparatory) actions include, i.a., the preparation of "roadmaps" indicating how the Commission intends to address an issue in the future, the establishment of working groups composed of experts and stakeholders, and, finally, the preparation and issuance of recommendations adopted by the legislative bodies as non-binding instruments.

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646 Cf. e.g. the opinions of ERGA or ACT: ERGA Position Paper on the Digital Services Act, https://erga-online.eu/wp-content/uploads/2020/06/ERGA_SG1_DSA_Position-Paper_adopted.pdf, p. 9; ACT, Feedback on Roadmap on European Democracy Action Plan, 10 August 2020, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12506-European-Democracy-Action-Plan/F541816, p. 2.

647 Cf. on the code of practice on disinformation, e.g., the study by *VVA*, Assessment on the implementation of the code of practice on disinformation; as well as *ERGA*, Report on disinformation.

648 Under Art. 6, the EU is responsible to carry out actions to support, coordinate or supplement the actions of the Member States, which may also affect the area of culture, without the EU having a competence in this context that would replace the competence of the Member States (Art. 2(5) TFEU), cf. on this supra, chapter B.I.5.e.

Recently, the EU has been active in this area, particularly with regard to the media sector. In addition to the area of protection of minors[649], which has already long been considered in parallel with early regulatory approaches for the online sector, this now relates to combating disinformation as well as hate speech and other illegal content on digital platforms. These two areas will be outlined below, as they offer important links that are also relevant for diversity-safeguarding instruments. This applies both in thematic terms and with regard to specifications for technical regulatory instruments, at least for the area of disinformation. Furthermore, this (preparatory) work provides indications of what future EU regulatory approaches in the platform area might look like. Finally, experience related to self-regulatory mechanisms can also be derived from it.

### *1. Code of conduct on countering illegal hate speech online*

In May 2016, the Commission agreed with Facebook, Microsoft, Twitter, and Google (YouTube) on a "Code of conduct on countering illegal hate speech online" which aims to prevent and combat the spread of illegal hate speech online, help users report illegal hate speech on these platforms, and improve civil society support and coordination with national authorities.[650] In the meantime, Instagram, Snapchat, Dailymotion, Google+, TikTok, and Jeuxvideo.com have also joined this Code, so that almost all[651]

649 Cf. on this Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry, OJ L 378 of 27.12.2006, p. 72–77; Council Recommendation of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity, OJ L 270 of 07.10.1998, p. 48–55, in detail und leading further on this *Lievens,* Protecting Children in the Digital Era: The Use of Alternative Regulatory Instruments.

650 Available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en.

651 In its Assessment of the Code of conduct on hate speech online, State of Play, Progress on combating hate speech online through the EU Code of conduct 2016–2019, the Commission states that this means that 96 % of the EU market share of online platforms that may be affected by the illegal content covered are subject to the Code. This did not yet take into account the entry of TikTok (2020) and thus a platform that has recently gained significant market share,

relevant major market players in the EU have thus signed up to it. The Code of conduct builds on the 2008 Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law[652] and transfers the principles set out there to the new context of digital offerings. In this context, however, the focus is less on calls for effective criminal law protection against such content directed at states, but rather on the inclusion of service providers through whose offerings users distribute and consume such content.

The Code of conduct primarily addresses the problem that while robust systems exist at the national level to enforce criminal sanctions against individual perpetrators of hate speech, these systems need to be effectively complemented in the online sphere by measures taken by e.g. intermediaries and social networks. Signatories therefore commit to providing clear and effective procedures for reviewing reports of illegal hate speech on their services so that they can remove or block such content. According to the Code of conduct, a review of potentially illegal content should – at least in a majority of cases – take place within 24 hours of a report of such content. In addition, signatories commit to establishing rules or community guidelines that clarify that promoting incitement to violence and hatred is prohibited on these platforms. Other important points concern the announcement made by the signatories to improve the existing information requirements in practical application and to be more transparent to society in general, including by better providing notices to users and labeling content. The Commission evaluates the implementation of the Code "rules" by the signatories on a regular basis.

In its 2016–2019 assessment[653], the Commission concludes that the Code of conduct has helped make progress, in particular in the rapid review and removal of hate speech (on average, 72 % of reported content was removed in 2019 across all providers, compared to 28 % in 2016; 89 % of reported content was reviewed within 24 hours in 2019, compared to 40 % in 2016). The Code had strengthened trust and cooperation between IT

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https://ec.europa.eu/info/sites/info/files/aid_development_cooperation_fundamental_rights/assessment_of_the_code_of_conduct_on_hate_speech_on_line_-_state_of_play__0.pdf.

652 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328 of 06.12.2008, p. 55–58, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008F0913.

653 Assessment of the Code of conduct on hate speech online, State of Play, Progress on combating hate speech online through the EU Code of conduct 2016–2019.

undertakings, civil society organizations and Member States' authorities in the form of a structured process of mutual learning and knowledge sharing. However, the Commission believes that platforms need to further improve their feedback to users reporting content and provide more transparency overall.

Despite this fundamentally positive assessment of the impact of the Code of conduct by the Commission, it should be emphasized that it is not binding and that the signatories have only committed themselves voluntarily. Withdrawal from this agreement is possible unilaterally at any time. As such, it differs decisively from a legally binding regulation as in the German Network Enforcement Act[654] despite its in many respects similar approach. The Code of conduct also does neither contain any mechanisms for enforcing the law nor any sanctions[655]. This also applies to the data provided by participating providers, which form the basis for the Commission's evaluation reports. In this context, it is not clear what data must be made available and access to the data can be unilaterally restricted at any time.

The Code of conduct assumes that the parties involved are committed to freedom of expression, and it emphasizes the particular significance of protecting this fundamental right, but apart from information requirements vis-à-vis users, there are no explicit safeguard mechanisms for the (unjustified) blocking or deletion of content. This can be problematic, especially because of the very broad definition of illegal hate speech in the Code. In addition, concerns similar to those expressed about the German Network Enforcement Act[656], are raised about the Code, according to which in particular there was a lack of procedural guarantees, the risk of overblocking was increased, and the assessment of the illegality of content was left to the platforms' own responsibility.[657] However, the Code does not in itself have a suspensory effect on or limit measures taken by the Member States against illegal content, whether in the form of binding laws or comparable approaches to voluntary commitment in the form of soft

654 Cf. on this in detail chapter E.V.1.a.

655 The publication of the assessments by the Commission could at most be understood as a kind of "moral sanction".

656 Cf. on this in detail chapter E.V.1.a.

657 For critical evaluation cf. in particular *Bukovská*, The European Commission's Code of Conduct for Countering Illegal Hate Speech Online.

law. However, the evaluations and potentially best practices[658] resulting from the platforms' collaboration can be harnessed in the political process.

### 2. *Tackling illegal content online*

In the context of tackling illegal content online, it is also important to take into account the respective Communication published by the Commission in 2017[659], which subsequently led to Commission Recommendation (EU) 2018/334[660].

The initial Communication established a set of guidelines and principles for online platforms (in particular hosting services as defined in Art. 14 ECD) aimed at facilitating and intensifying the implementation of best practices to prevent, detect, remove and block access to illegal content. Accordingly, the aim is to ensure the effective removal of illegal content, increased transparency and the protection of fundamental rights also in the online sector. Furthermore, platforms should be given more legal certainty about their liability if they take proactive measures to detect, remove or block access to illegal content ("good samaritan measures").[661] The Communication calls for online platforms to systematically strengthen their cooperation with competent authorities in Member States, while the latter should ensure that courts are able to respond effectively to illegal content online, and facilitate greater (cross-border) cooperation between authorities. In this regard, online platforms and law enforcement or other

658 Cf. on this also the inclusion of and the work of the High Level Group on combating racism, xenophobia and other forms of intolerance, on this https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=51025.

659 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling Illegal Content Online, Towards an enhanced responsibility of online platforms, COM(2017) 555 final, of 28 September 2017, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017DC0555&qid=1613064172613.

660 Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, C/2018/1177, OJ L 63 of 06.03.2018, p. 50–61, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32018H0334.

661 The Commission's position here is that proactive measures taken by these online platforms to detect and remove illegal content they host – including the use of automated tools and resources to ensure that previously removed content is not re-uploaded – do not in and of themselves result in a loss of immunity from liability.

competent authorities should designate effective contact points in the EU and, where appropriate, establish digital interfaces to facilitate their interaction. In addition, the Commission promotes transparency, close cooperation between online platforms and so-called trusted flaggers, and the establishment of easily accessible and user-friendly mechanisms that allow users to report content deemed illegal. It also aims to promote the application of automatic filters against content re-uploads and procedures for counter-notifications.

The subsequent recommendation on tackling illegal content online, which takes up the descriptive approach from the prior Communication in a somewhat streamlined manner by translating it into the form of (more) concrete (but still legally non-binding) rules, is particularly interesting with regard to two aspects: firstly, the first section contains a list of definitions that are closely aligned with existing EU directives – such as the definition of "hosting service provider". "Illegal content" is defined here as "any information which is not in compliance with Union law or the law of a Member State concerned". On the other hand, the Recommendation focuses on cooperation between hosting service providers and Member States (e.g., regarding designated points of contact for matters relating to illegal content online and the provision of fast-track procedures to process notices submitted by competent authorities), (other) trusted flaggers (e.g. providing fast-track procedures to process notices submitted by certified experts, publishing clear and objective conditions for designating such specially highlighted internet referral units), and with other hosting service providers (e.g. by sharing experience, technological solutions and best practices).

The two documents contain – without being legally binding – a wide range of possible regulatory and technical measures for tackling illegal content online. Therefore, they are taken up in connection with legislative projects such as the proposals for TERREG or the Digital Services Act.[662]

662 Cf. e.g. Deutscher Bundestag, Kurzinformation Follow-up zur Empfehlung der Europäischen Kommission für wirksame Maßnahmen im Umgang mit illegalen Online-Inhalten, https://www.bundestag.de/resource/blob/571506/df067279aaaa45b3e95efae57f5194f2/PE-6-125-18-pdf-data.pdf; *Hoffmann/Gasparotti*, Liability for illegal content online, p. 23 et seq.; *Chapuis-Doppler/Delhomme* in: European papers 5(2020)1, 411, 426.

### 3. Code of Practice on Disinformation

At the EU level, measures to combat online disinformation took concrete shape, also in response to a European Parliament resolution, in the establishment of a High Level Group on Fake News and Online Disinformation in 2018. Following an investigation, it provided its assessment in a report[663], on the basis of which the Commission in turn drafted its Communication on tackling online disinformation[664] and published it in April 2018.[665] Therein, the Commission argues that economic, technological, political and ideological circumstances were the cause of the spread of disinformation. This included, e.g., the rise of platforms in the media sector, which in turn influenced the "more traditional" media in that they (have to) look for new ways to monetize their content, as well as the creation of new or the manipulation of existing technologies in the area of social networks that enable or at least facilitate the spread of disinformation. Against this background, the Commission concluded that the fight against disinformation could and would only be successful in the long term if it was accompanied by a clear political will to strengthen collective resilience and support democratic efforts and European values. In addition, on 5 December 2018, the Commission and the High Representative for Foreign Affairs and Security Policy presented an Action Plan against Disinformation[666], proposing concrete actions to tackling disinformation, including setting up an early warning system, facilitating the exchange of data between Member States, and providing additional funding for media literacy projects.

The measures proposed under the Action Plan also include closer monitoring of the implementation of a self-regulatory instrument that had been established just a few weeks earlier, and an increase in the resources re-

663 *De Cock Buning et al*., Report of the independent High level Group on fake news and online disinformation.

664 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling online disinformation: a European Approach, COM/2018/236 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0236.

665 On the whole process cf. in detail *Ukrow/Etteldorf*, Fake News als Rechtsproblem.

666 Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan against Disinformation, JOIN(2018) 36 final, of 05.12.2018, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018JC0036&qid=1613115235976.

quired for this purpose: the need for action seen by the Commission in the area of disinformation resulted in September 2018 in a Code of Practice on Disinformation (CPD)[667], which representatives of online platforms, leading social networks, and the advertising and platform industry agreed on with the Commission.[668] The CPD – while explicitly referring to the liability privileges under the ECD, which remain unaffected by this – sets out a wide range of (self-)obligations, ranging from transparency in political advertising to blocking fake accounts and demonetarizing the spreaders of disinformation. It includes commitments regarding the review of ad placements, political and topic-related advertising, the integrity of services, and the empowerment of consumers and the research community. With regard to monitoring effectiveness, the signatories undertake to publish an annual report on the actions they have taken in connection with combating disinformation. The Code also contains an appendix listing best practices that signatories commit to apply in order to implement the Code's provisions. In the area of advertising policy, stakeholders profess an effort to counter disinformation by applying "follow-the-money" approaches[669] and preventing disseminators of disinformation from benefiting financially. In the area of political advertising, online platforms are developing solutions to increase the transparency of such advertising and allow consumers to understand why they are seeing a particular ad. The platforms further announce plans to develop tools to enable civil society to better understand the online political advertising ecosystem. Platforms further want to try to protect the integrity of the services by applying policies that limit abuse of their service by inauthentic users or accounts, such as policies that limit the creation of fake profiles.[670] Finally, to put consumers and researchers in a better position, platforms announce they will provide users with information, tools, and support to empower consumers online. This is to include complaint and reporting systems.

667 Code of Practice on Disinformation, available at https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation.

668 Incl. Facebook, Twitter, Mozilla, Google, Microsoft and TikTok, cf. https://ec.europa.eu/digital-single-market/en/news/roadmaps-implement-code-practice-disinformation.

669 The "follow the money" approach generally aims to cut revenues from infringements. The Commission has committed to such an approach in its Communication on a Digital Single Market Strategy, which aims to reduce the revenue streams that monetize IPR infringement.

670 E.g. YouTube Policy on impersonation, https://support.google.com/youtube/answer/2801947?hl=en-GB.

From the best practices listed, it can be seen that the initiatives in the area of disinformation focus primarily on the areas of (misleading) advertising and election and political advertising. That disinformation can pose considerable dangers in other areas as well, however, was demonstrated by developments in the Corona pandemic. The abundance of circulating misinformation, which has led to considerable uncertainty in society, has prompted the Commission (together with the High Representative for Foreign Affairs and Security Policy) to also publish a specific communication on tackling disinformation in the context of COVID-19.[671] Therein, measures from the previous initiatives are taken up and specified once again, with a particular focus on transparency, cooperation and communication as a means of tackling (corona) disinformation. This could also play a role in the context of the proposed Digital Services Act.[672] On the other hand, the pandemic has also shown that platforms are quite capable, both actually and technically, of taking actions to tackle misinformation.[673] Certain conclusions can be drawn from this about the influence that these providers can exert.

Disinformation also plays a role in the context of safeguarding diversity, as the aforementioned Covid communication from the Commission points out: free and pluralistic media are central to tackling disinformation and providing fact-based information to citizens.[674] Even though disinformation can also be observed in countries with a pluralistically structured media landscape, disinformation without such plurality may have a particularly dangerous effect on the freedom of information and the formation

671 Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling COVID-19 disinformation – Getting the facts right, JOIN(2020) 8 final, of 10.06.2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020JC0008&qid=1613118073016.

672 Cf. on this e.g. Draft report with recommendations to the Commission on Digital Services Act: Improving the functioning of the Single Market (2020/2018(INL)) of 24.04.2020, no. 11 et seq., in which in particular the problem of disinformation on Covid-19 in the field of transparency regulations is addressed.

673 E.g., the search engine service Google listed information from the World Health Organization above all other search results and in a visually separated manner for search queries related to Corona or disease symptoms. Videos from specialist institutions were also visibly listed on the YouTube homepage.

674 Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling COVID-19 disinformation – Getting the facts right, JOIN(2020) 8 final, of 10.06.2020, p. 13.

of opinion and thus intensify the related risks. Such disinformation undermines trust in political institutions and in digital and traditional media. It damages the democratic process because citizens can no longer make informed decisions.[675]

Although the CPD, like the code of conduct on hate speech, is non-binding, it is more detailed and contains stronger wording and more specific requirements. However, again, there are no enforcement mechanisms or sanctions. A degree of monitoring is done at least externally through the reports. Both compliance with the CPD rules and the provision of the relevant data by undertakings to allow third parties to verify the activities are nevertheless currently merely voluntary and cannot be required by any authority or sanctioned in the event of non-availability or non-compliance. The resulting assessment problems were outlined by the association of Member States' regulatory bodies, the ERGA as provided for in the AVMSD, which was asked by the Commission to act as an advisory body to support the monitoring of the effectiveness of the implementation of the CPD rules, in its Report of the activities carried out to assist the European Commission in the intermediate monitoring of the Code of practice on disinformation as follows: "The platforms were not in a position to meet a request to provide access to the overall database of advertising, even on a limited basis, during the monitoring period. This was a significant constraint on the monitoring process and emerging conclusions"[676]. Also in its final report for 2019, ERGA concludes that more transparency was needed, in particular by providing more detailed data to assess the effectiveness of activities, and therefore suggests that platforms should provide datasets, data monitoring tools, and country-specific information that enables independent monitoring by national regulators. In addition, it is also pointed out in this context that many activities provided for in the CPD are very general in their wording, which would lead to very different implementation by the signatories. While the current self-regulatory model had proven to be an important and necessary first step, more effective action needed to be taken against disinformation on the Internet, for example by establishing a co-regulatory approach.[677] The Commission also picked up on these points in its final evaluation in 2020, although it did

675 *Ukrow* in: Cappello (ed.) media pluralism and competition issues, p. 10.

676 *ERGA*, Report of the activities carried out to assist the European Commission in the intermediate monitoring of the Code of Practice on Disinformation, 2019, p. 3, übersetzt aus dem Englischen.

677 *ERGA*, Report on Disinformation, 2020.

not address specific future actions to respond to the shortcomings found.[678]

The Commission's activities with regard to disinformation fit in with the projects in the area of the European Democracy Action Plan outlined in chapter D.III.3.

## V. *Conclusions and deductions on the regulatory competence for media pluralism*

Two things follow from current and developing EU secondary law, as well as from other EU actions and initiatives at the level of both coordination and support:

First, there are no rules or initiatives at this level that directly address the issue of safeguarding media pluralism or that set out guidelines with this goal in mind (alone), which would already be impossible for competence reasons. Rather, secondary law respects the regulatory power of the Member States in the area of media and diversity protection law by containing cultural policy exceptions that leave the Member States a broad scope for constitutional considerations, or by not including cultural policy aspects in the respective coordinated field. This applies both to legal acts that directly address the media, as shown by the exceptions in the AVMSD in the area of audiovisual media services and VSP, and to such secondary law that has a business-oriented and thus not media- and culture-related objective, as shown, e.g., by the possibility under the EECC to enact must-carry provisions or the ECMR with regard to options under media concentration law. The fact that more media-related projects, such as tackling hate speech and disinformation, which are relevant in particular in the context of freedom of expression protected by fundamental rights, are being shifted to the level of coordination and support action based on self-regulatory mechanisms shows that the EU respects this area of Member State sovereignty. This corresponds to the limitation of the EU's support competence to the effect that support action must not prejudice the Member States' exercise of regulatory leeway.

678 Assessment of the Code of Practice on Disinformation – Achievements and areas for further improvement, SWD(2020) 180 final, of 10.09.2020, https://ec.europa.eu/transparency/regdoc/rep/10102/2020/EN/SWD-2020-180-F1-EN-MAIN-PART-1.PDF.

Secondly, there are nevertheless links for safeguarding diversity in secondary law outside of the scope of discretion and exceptions for the Member States. In particular, this applies to the AVMSD, for example, in the context of the rules on the promotion of European works or the promotion of media literacy, although these are at least also justified by economic considerations. The P2B Regulation also contains elements that are likely to be relevant to safeguarding pluralism when it comes to discoverability of content and quality journalism. In particular, however, developments in the context of this Regulation indicate that media-related aspects will also play a role in a regulatory framework based on competition law, possibly through specifications in the Commission's guidelines. This approach of increasingly incorporating cultural policy aspects into regulation is a trend that has recently become more apparent at the level of secondary law and in sub-legislative initiatives than before. This creates a risk that the tension in relation to national regulations enacted with the aim of safeguarding diversity could intensify in the future.