G. Conclusion and political options for action

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I. Content-related aspects

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

The concrete division of competences between the EU and the Member States is defined in EU law on the basis of three different types: exclusive competences of the EU, competences shared between the EU and its Member States, and merely supporting or supplementary options for action on the part of the EU. There is no negative catalog explicitly listing specific areas that are completely unaffected by EU law – neither a cultural nor a

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media-related exception to the EU's competences exists. In addition, the allocation of actual competences between the EU and its Member States is also structured by the Treaties in a highly complex manner that makes it prone to disputes: for example, in the case of shared competences, on the one hand the Member States may only act to the extent that the EU has not yet taken final action, but the EU must be able to justify its actions based on a need to use the competence at EU level in lieu of the Member State level. In accordance with the principle of subsidiarity, action must be limited to what is necessary to provide added value at EU level. Beyond that, the EU must also respect the principle of proportionality and may only act to the extent necessary to achieve the desired objective above Member States' approaches. On the other hand, even where competences are shared, for example concerning rules to improve the functioning of the internal market, the question arises in specific aspects of media regulation as to whether the respective rule is actually based on economic considerations and thus falls under the competence of the internal market or whether aspects which ensure media pluralism are possibly even in the focus of the rules and thereby reach into an area that is reserved for the Member States. Safeguarding pluralism is actually the key objective of media law altogether.

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

For media regulation, this means that even the seemingly obvious shift of rules to the supranational level, in particular with regard to online services which by their very nature have a cross-border distribution and reception, is only possible insofar as the undisputed primary competence of the Member States to establish rules ensuring media pluralism remains unaf-

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fected. Irrespective of the recognition of the objective of pluralism in the EU's system of values and the important supporting measures the EU adopts to this end, culture and diversity related media regulation remains within the priority of the Member States. This is particularly important with a view to preserving local and regional diversity as a starting point for a continued experience of democratic participation in a world characterized by digitization and globalization. The particular importance which the FCC attaches to a positive media order by the Länder (in the sense of an explicit legislative framework) for safeguarding the democratic and federal foundations of the constitutional order of the Basic Law, illustrates the continuing relevance of the Member States' prerogative in safeguarding and promoting pluralism especially for the Federal Republic of Germany. Safeguarding media pluralism in a federally distributed system is at the heart of the national identity of this Member State, which the EU must respect in accordance with Art. 4(2) TEU.

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

This result on the division of competences is further supported – and not at all qualified – by the emphasis placed on recognizing the objective of media pluralism in the EU legal system. Beyond the importance of media pluralism as a legitimate aim when restricting fundamental freedoms,

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which has been emphasized by the ECtHR with regard to the ECHR, the CJEU has for decades been referring to this objective with the same understanding in its own case law. This jurisprudence of the Strasbourg Court is also repeatedly referred to by the EU's legislative bodies. Beyond this "Convention approach", media pluralism is even explicitly mentioned as a parameter to be observed both in the EU's system of values according to Art. 2 TEU and in Art. 11(2) CFR.

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

Irrespective of the finding that the EU does not only have any legislative competence with regard to rules aimed at safeguarding media pluralism in a targeted way, but that it must additionally take account of the Member State's competence for this field when applying the EU legal framework, there is nonetheless a range of harmonizing secondary law relating to the internal market that is relevant for media pluralism aspects. The economic dimension of the media and other offers which are important for the formation of public opinion, which in the audiovisual sector are mostly considered to be services in the meaning of the TFEU, but may also (as in the case of user interfaces of receivers) involve a variety of relevant forms of

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goods, allows EU action as long as it respects the limits of primary law. For this reason, the relevant legal acts contain, to varying degrees, explicit exceptions to their scope of application, for which then only Member State law applies, or references to reserved competences of the Member States, which are to remain unaffected by the relevant EU legislative act. These include, for example, the EECC and the ECD, which explicitly refer to the continued competence of Member States to ensure pluralism. The AVMSD, which already achieves a high degree of harmonization in some areas of content-related rules, continues to allow for room for maneuver in transposition of the Directive and even for Member States to deviate from the country of origin principle so that national enforcement against providers established in other EU countries is also possible under certain conditions.

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

In addition to binding legislative acts, supplementary, legally non-binding EU measures, such as recommendations or resolutions, should also be taken into account, especially as they may be a preliminary stage to subsequent binding secondary law. Such non-binding acts currently exist, for example, concerning illegal content or disinformation. Due to the non-binding nature of recommendations and other communications, there may be less emphasis in practice on existing Member State reserved competences by these, because the potential conflict does not seem so pertinent. However, the division of competences in the EU legal order also applies to such non-binding legal acts. If, following such preparatory work, binding legal acts are developed at a later stage, failure to take Member State competences into account at an early stage can become problematic, which is why it is recommended – as is also emphasized below – that the Member States, in the case of Germany in the area of media regulation the Länder, develop a comprehensive regulatory early warning system and take an early position on such measures presented by the Commission in a way that

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preserves competences or at least protects them from further infringement. Currently, this monitoring and presence recommendation refers for example to the Media and Audiovisual Action Plan or the European Democracy Action Plan. These are intended to defend or find an agreement on common standards based on core European values, which in terms of strengthening the EU as a union of values seems reasonable, especially in view of the new threats to this foundation of values both within the EU and from outside. However, any implementing measures must also ensure that they do not undermine national approaches to ensuring pluralism in the media or Member State reserved competences for the execution of the laws.

In addition, law enforcement which ensures that Member States' legitimate interests are protected and which can also take account of particular national characteristics in specific cases, is best carried out at Member State level and in accordance with national procedural rules, which must, however, comply with the principles of non-discrimination and effectiveness. In Germany, this essentially concerns the state media authorities, which, irrespective of agreement on common standards and certain rules on jurisdiction at EU level, can in principle also take action against foreign providers not based in one of the EU Member States in the event of a breach of substantive legal requirements, for example under the MStV. Such action necessitates that the limits of jurisdictional power under customary international law are observed. Although it is appropriate to differentiate the enforcement of the law according to the degree of the possibility of access, foreign providers cannot be permanently ignored when it comes to law enforcement in cases where no enforcement measures which achieve a comparable level of protection are taken abroad. However, the obligation to respect fundamental rights in enforcement also applies if, and in particular if, the provider concerned has its registered office in another EU Member State. There is a need to ensure equal treatment in the application of measures restricting fundamental rights, as well as compliance with EU law requirements in order to derogate from the otherwise applicable principle of a control by the country of origin.

Although limitations imposed by public international law on a jurisdiction approach as described above which extends even to "foreign" providers result from the requirement to respect state sovereignty, it is in principle possible to enforce such a limitation against these providers if a genuine link exists between a provider and the domestic territory – for example, by services which focus on or exclusively deal with the political, economic or social situation in a state, in this case namely the Federal Republic of Germany. Although, in the case of secondary law based on the country of origin principle as regards jurisdictional sovereignty, any en-

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forcement by other states faces a tension with this principle, so that enforcement is only possible under certain circumstances, it is however already not excluded in the legal acts relevant to the present. Nevertheless, it would be welcomed if – for example in new horizontally applicable provisions in Union law – it were to be explicitly clarified that, under certain circumstances, enforcement of the law according to common standards may be based on the market location principle despite the continued application of the country of origin principle.

II. Procedural aspects

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

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

However, from the Commission's perspective, the question of taking account of competences presents itself in a different light: the Commission is obliged under the Treaties to initiate legislative procedures with presenting

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proposals whenever it sees a need for such action. Furthermore, as the "Guardian of the Treaties", the Commission is obliged to investigate any Member State behavior which it considers to be an infringement of EU law and, where appropriate, to initiate infringement proceedings before the CJEU if it identifies unjustified obstacles to the free movement of services.

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

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

For this reason, it is also particularly important that Member States – in the case of federal states with a corresponding distribution of responsibilities, the individual federal states such as the Länder – involve themselves in the political (negotiation) process at EU level at an early stage and in a comprehensive manner. This applies not only (and only when) concrete proposals for binding legislative acts are made, but also to supplementary initiatives and generally in the run-up to the discussion on possible priorities being set. This way of "showing presence" should help to demonstrate on EU level specific features of national approaches through participation in various fora and in order to promote appropriate consideration of such approaches. In addition to formal and informal participation through ex-

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changes in the legislative process, this may include scientific activities or activities aimed towards the general public. In the actual legislative process, it is recommended to identify, in cooperation with other EU Member States, points of tension in the exercise of Member State competences which are caused by EU rules and proposals and to take a joint position at an early stage in cooperation with other Member States which share similar backgrounds, in particular with regard to the protection of media pluralism, or which, for different reasons, have the same concerns on the same issues with regard to a too far-reaching harmonization trend.

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

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

However, this also includes examining whether existing regulatory models can be transferred to the area relevant for the present context and proposing them accordingly at Union level: an example of this could be that even when the GDPR was established as a directly applicable Regulation, the competence of the Member States was respected, inter alia, by including clauses that reserved the creation of rules concerning e.g. data processing for journalistic purposes for the Member States level (Art. 85

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GDPR). Such opening clauses, which can be considered not only for Regulations but also with regard to the scope which defines the transposition requirement of a Directive, or an explicit recognition of "reserved" competences of the Member States, are promising ways of linking the two systems, which promise better interaction in the multi-level framework between Members States and the EU. Such recognition and respecting of Member State characteristics not only at the enforcement level allows the constitutional traditions and specific characteristics of the Member States to be taken into account when adopting more far-reaching rules. This applies even in the case of Regulations – in actual fact, as far as there is a link to EU competition law, new instruments in this area are likely to be proposed as Regulations – but even more so in the case of Directives (e.g. where horizontal rules for platforms are introduced but additional Member State rules or basic rules to be further detailed by Member States, e.g. in relation to "media platforms", are explicitly provided for).

This endeavor to take account of the Member States' competence to regulate media pluralism also requires institutional safeguards. Thus, for example, it is particularly important that any legally non-binding agreement on standards of pluralism and democracy does not have to lead to uniformity in enforcement or – without prejudice to the control over compliance with the EU's values under Art. 7 TEU – to a transfer of monitoring tasks to the level of the EU. As long as the Member States ensure effective enforcement by authorities or bodies set up on national level, where appropriate within the framework of the requirements of EU secondary law, by means of appropriate authorization and equipment, common standards can be enforced by different actors cooperating in a defined way. Not least, the organizational law dimension of the subsidiarity principle in the area of EU media regulation also argues in favor of the Member State regulatory bodies being equipped in line with their functions and needs. Indeed, without such resources, the thresholds set by the subsidiarity principle for EU activities instead of Member State action will be lower because it can be argued that there would then be a lack of visibility of impact of the regulatory framework for the media in a digital environment.

Understood in this way, the tension can at least be defused by ensuring that the achievement of the objectives through EU action does not lead to a permanent erosion of Member State competences. In view of the fact that the case law of the CJEU still tends to be in favor of integration – which in individual cases results in a narrowing of the Member States' room for maneuver by too far-reaching substantive review of a specific disputed measure of a Member State – it is particularly important to attempt to achieve a balance already when legislative acts are created and not only

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when they are later reviewed or implementing measures are checked by the Court. In relevant proceedings, which are sometimes restricted by the CJEU in its review to the fundamental freedoms perspective without sufficiently considering the effect on the Member State's competence to safeguard pluralism, a clear positioning of the Länder should nevertheless be achieved. Insofar as such a position can also be defined at European level while maintaining the (German) constitutional allocation of competences between the Federal and the Länder level in accordance with Art. 23 of the Basic Law, this will further promote the protection of the objective of ensuring pluralism in terms of the competent level.

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