B. Framework for the allocation of competences under EU primary law

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I. Basic principles of TEU/TFEU

1. Introduction

Since the late 1990 s, initiatives and demands for a European law on media concentration have been circulating repeatedly in the European Commission[20] and the European Parliament[21].[22] In the founding act of EU media law, the EEC Television Directive, the topic was addressed for the first time under secondary law – in the form of a warning notice with an incidental claim to regulatory countermeasures at the European level in the event of failure of the Member States to take precautionary measures:[23]

> "*Whereas it is essential for the Member States to ensure the prevention of any acts which may prove detrimental to freedom of movement and trade in television programmes or which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole.*"

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20 Already in Commission communication COM (90) 78 of 21.02.1990, the importance of pluralism for the functioning of the democratic community in the European Union (then the European Communities) is emphasized.

21 Cf. European Parliament, Resolution of 15 February 1990 on concentration in the media, OJ C 68 of 19.03.1990, p. 137; European Parliament, Resolution of 16 September 1992 on media concentration and diversity of opinions, OJ C 284 of 02.11.1992, p. 44; European Parliament, Resolution of 20 January 1994 on the Commission Green Paper 'Pluralism and media concentration in the internal market', OJ C 44 of 14.02.1994, p. 177.

22 Cf. *Jungheim*, Medienordnung und Wettbewerbsrecht im Zeitalter der Digitalisierung und Globalisierung, p. 356 et seq.; *Schwartz*, Rundfunk, EG-Kompetenzen und ihre Ausübung, p. 15.

23 Rec. 16 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.

The German states in particular have repeatedly denied the competence of the EU to issue a media concentration directive. Thus the Bundesrat already unanimously decided in its statement on the Commission's Green Paper on pluralism and media concentration in the internal market[24] on 7 May 1993[25]:

> *"1. […] Even after the entry into force of the Maastricht Treaty, the EC would not have the competence to adopt the measures proposed in the Green Paper.*
> *2. Also under the Maastricht Treaty, the competence to set media-specific laws remains with the Member States; in the Federal Republic of Germany, it is the responsibility of the Länder. This distribution of competence must not be circumvented by the Community using its competence for economic policy regulations to intervene in the media sector in a targeted manner.*
> *Ensuring diversity of opinion in broadcasting is of fundamental importance for the free and comprehensive formation of public opinion. It is thus the very essence of democracy in the Federal Republic of Germany.*
> *This role as a medium and factor in the formation of public opinion is fulfilled by broadcasting exclusively at Member State level, since democratic opinion-making currently takes place at this level only.*
> *3. In a Europe with different social structures and different national broadcasting systems, pluralism can therefore only be defined in relation to the Member States. This reinforces the reservations about Community regulations aimed at safeguarding diversity of opinion, because these would interfere with the core area of the social functions of broadcasting in the Member States. The principle of subsidiarity enshrined in Article 3 b of the Maastricht Treaty would also stand in the way of Community action, since the objective of preventing a concentration of power of opinion through normative measures in order to ensure diversity of information and opinion can be achieved to a sufficient extent by the Member States themselves.[…]"*

24 European Commission, Green Paper on Pluralism and media concentration in the internal market – an assessment of the need for Community action, COM (92) 480 final of 23 December 1992. On this e.g. *Hain* in: AfP 2007, 527, 531; *Holznagel*, Vielfaltskonzepte in Europa, p. 96; *Paal*, Medienvielfalt und Wettbewerbsrecht, p. 177.

25 Cf. Deutscher Bundesrat, Resolution Printed paper 77/93(B) of 7 May 1993, http://dipbt.bundestag.de/extrakt/ba/WP12/1576/157601.html (own translation).

As will be shown below, this determination of position[26] is of continuing importance despite the deepening of the European integration process under primary law since 1993 through the Treaties of Maastricht[27], Amsterdam[28], Nice[29], and Lisbon[30]. Limits to an EU harmonization and coordination competence exist however not only with respect to classic media concentration law, but also from the perspective of safeguarding pluralism with respect to digital and global challenges of the media ecosystem.

2. *Member States as "Masters of the Treaties" vs. openness for and dynamics of integration in multilevel constitutionalism*

Even in the course of the repeated, sometimes fundamental changes to the founding Treaties of the European Union (EU), which emerged from the former European Economic Community (EEC) and European Community (EC), through the aforementioned Treaties, the Member States of the EU remain "Masters of the Treaties", so as to take up an – albeit controversial – linguistic image, which is found not least in the judicature of the Federal Constitutional Court.[31] Each Member State has the enduring quality of a sovereign state. However, under the conditions of digitization, Europeanization, and globalization, the concept of sovereignty does not stand in the way of a development in which formerly autonomous decision-making powers are limited, interdependent, and interrelated for the benefit of European integration and the common good that can only be effectively

26 It was not necessary to take a position on the draft directive "Media Ownership in the Internal Market" because this so-called Monti-plan was not promoted further by the Commission; on the genesis and content of this draft *Ress/Bröhmer*, Europäische Gemeinschaft und Medienvielfalt; *van Loon* in: EAI, Fernsehen und Medienkonzentration, p. 68 et seq.

27 Cf. OJ C 224 of 31.08.1992, p. 1 et seq.

28 Cf. OJ C 340 of 10.11.1997, p. 1 et seq.

29 Cf. OJ C 80 of 10.03.2001, p. 1 et seq.

30 Cf. OJ C 306 of 17.12.2007, p. 1 et seq.; most recent consolidated version OJ C 326 of 26.10.2012, p. 1 et seq.

31 BVerfGE 75, 223 (242); 89, 155 (190, 199); 123, 267 (370 et seq.); FCC, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, para. 111; in the literature e.g. *Cremer* in: Calliess/Ruffert, Art. 48 TEU, para. 19; *Huber* in: VVDStRL 2001, 194, 222; *Kaufmann* in: Der Staat 1997, 521, 532; diff. op. *Everling*, Sind die Mitgliedstaaten der Europäischen Gemeinschaft noch Herren der Verträge?, p. 173 et seq.; *Franzius* in: Pechstein et al., Frankfurter Kommentar, Art. 48 TEU, para. 87 et seq.

achieved through cross-border cooperation.[32] In constitutional concordance, the Member States of the EU assume that there is no autonomous basis for the validity of EU law, which is of fundamental importance with regard to the competence order of the European constitutional order. Thus, the validity of Union law cannot be derived directly from the citizens of the Union or the EU itself, but is dependent in the Member States, both in the starting point and in the scope of its development, on an explicit order to apply the law in the respective Member State.[33] This European multilevel constitutionalism is thus characterized by a synthesis between the respective openness of the Member States' constitutional systems for a delimited and continuously delimitable program of European integration and a constitution of the EU[34] which for its part is not oriented toward an unrestricted integration perspective, but rather – regardless of dynamic options of interpretation – is bound to the purpose of an ever closer union below the qualitative level of unitary EU federalism. The diversity of Member State statehood remains untouched under the current EU Treaties framework[35] and the Member States' constitutional systems, which provide the Treaties with the possibility of regulation on Member State level.

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32 In some cases, Member States' constitutional systems permit participation in European integration only on condition that the Member State retains sovereignty and its quality as a state; cf. on this with respect to Germany Art. 23(1) sentence 1, 3 in conjunction with Art. 79(3) GG; law-comparing *Kirchhof*, Die rechtliche Struktur der Europäischen Union als Staatenverbund, p. 899 fn. 16.

33 Cf. *Huber* in: VVDStRL 2001, 194, 214 et seq.; *Puttler* in: EuR 2004, 669, 671; *Schwarze*, Die Entstehung einer europäischen Verfassungsordnung, p. 25 et seq.; 109 et seq.; 287 et seq.; 339 et seq.; 389 et seq.

34 On this "constitutional" quality of the founding Treaties of the EU – regardless of the failure of a Constitutional Treaty – from the perspective of the CJEU cf. CJEU, case 294/83, *Parti écologiste "Les Verts" / European Parliamen*t, para. 23; opinion 1/91, Reports of cases 1991 I-6079 para. 21 (in each case "constitutional charter"); CJEU, joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation / Council of the European Union and Commission of the European Communities*, para. 285 ("constitutional principles of the EC Treaty"). In literature, cf. e.g. *Bieber/Kotzur* in: Bieber/Epiney/Haag/Kotzur, p. 100 et seq.; *Giegerich*, Europäische Verfassung und deutsche Verfassung im transnationalen Konstitutionalisierungsprozeß: Wechselseitige Rezeption, konstitutionelle Evolution und föderale Verflechtung, p. 149 et seq.

35 On the federal development trend in the constitutionalization of the EU cf. *Giegerich*, Europäische Verfassung und deutsche Verfassung im transnationalen Konstitutionalisierungsprozeß: Wechselseitige Rezeption, konstitutionelle Evolution und föderale Verflechtung, p. 230 et seq., 251 et seq.

Most of the Member States' constitutional systems provide their institutions with more or less strict guidelines as to the conditions under which they may require their State to take further steps toward integration. In Germany, these requirements can be found in Art. 23(1) sentence 1 of the Basic Law: Accordingly, to realize a united Europe, the Federal Republic of Germany participates in the development of the European Union, "that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law". Part of this protection of basic rights is also the safeguarding of a free and diversity-oriented communication, as it is provided for in Art. 5 of the Basic Law. However, whether a positive imperative for an EU level media order is constitutionally prescribed in order to deepening Germany's integration readiness remains doubtful, since media federalism reflects the federal principles that the Basic Law's integration program is obliged to uphold. Furthermore, according to Art. 23(1) sentence 3 of the Basic Law, its Art. 79(2) and (3) applies with regards to the establishment of the European Union as well as to amendments to its Treaty foundations and comparable regulations which amend or supplement the content of the Basic Law or enable such amendments or supplements. According to Art. 79(3) of the Basic Law, an amendment to the Basic Law which affects the division of the Federation into Länder or the principles laid down in Arts. 1 and 20 of the Basic Law is inadmissible. At the interface of the integration perspective under Union law and fundamental norms of the Basic Law that are resistant to constitutional revision, and in view of the significance of the media order for the constitutional democratic and federal understanding in the Basic Law, this too speaks in favor of a reservation of at least German constitutional law over a final positive order of the media in the EU and its Member States by the EU. A similar reservation is likely to exist in other Member States' constitutional systems.

As long as and to the extent that control over the finality of the integration program lies with the Member States according to their constitutional law,[36] which – as will be shown in the following – is also recognized to some extent by the legal system of the EU itself, the Member States can only agree to a European integration program that develops along predictable

36 In a number of Member States, this understanding requires explicit constitutional amendments before the State can agree to a substantial enlargement or deepening of European integration; cf. *Gundel* in: EuR 1998, 371, 378 et seq.; *Huber* in: VVDStRL 2001, 194, 215 et seq.; *Kirchhof*, Die rechtliche Struktur der Europäischen Union als Staatenverbund, p. 898 fn. 15; *Puttler* in: EuR 2004, 669, 672.

lines. This also applies to the media-regulatory aspects of the integration program. In Germany, the Federal Constitutional Court refers to this requirement with the term "determinability": Accordingly, sovereign rights may only be conferred for the implementation of a sufficiently determinable integration program.[37] This integration program must also be sufficiently defined with regard to a deepening of media regulation – regardless of the the need for adaptability for dynamic change, which both media regulation and the European integration program have in common.

3. *Uniformity and primacy of Union law vs. constitution-based reserved power for control of Member States*

The scope of the EU integration program defined by primary law with regard to the possibilities of media regulation is important not least in the case of a collision of member state safeguards as regards diversity on the one hand and possible positive integration via the EU's own diversity law and/or negative integration via the setting of barriers to the safeguarding of diversity in the Member States through the internal market and competition law of the EU on the other. In this respect, safeguards for diversity can as well be subject to a collision of national law and European law.

In its judicature, the CJEU early on – depending on the point of view – identified or constructed the principle of the primacy of Community, now Union law as one of the pillars of the Community legal order as a sui generis legal order. According to this principle, all primary and secondary law of the EU claims precedence over the law of the Member State, regardless of its rank, and thus also over national constitutional law, including the protection of fundamental rights.[38] In contrast to the constitutions of some Member States and the envisaged European Constitutional Treaty[39], the German Basic Law – in the same manner as the European Treaties

37 Cf. BVerfGE 89, 155 (184 et seq., 187) (Maastricht); cf. also Supreme Court of Denmark, judgment of 06.04.1998 (Maastricht), cipher 9.2, German translation in EuGRZ 1999, 49, 50.

38 Cf. e.g. CJEU, case 6/64, *Costa / E.N.E.L.*, para. 8 et seq.; CJEU, case 11/70, *Internationale Handelsgesellschaft mbH / Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, para. 3; CJEU, case 106/77, *Amministrazione delle Finanze dello Stato / Simmenthal SpA*, para. 17 et seq. (settled case law).

39 Whose Art. I-6 read: "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States."

TEU[40] and TFEU[41] under the Lisbon Treaty – does not contain an explicit conflict-of-law rule for conflicts between German law, in particular German constitutional law, and European law. The Federal Constitutional Court, however, also recognizes the primacy of European law in its judicature – but only in principle and with different justification.[42] In view of the prominent constitutional significance of the protection of diversity in the German constitutional system, it is therefore not completely excluded from the outset that questions of primacy may arise with regard to the protection of diversity – just as is the case with other EU Member States whose recognition of primacy with regard to Union law is restricted by constitutional boundaries –, even if the potential cause of conflict and its resolution may differ from Member State to Member State.[43]

From the point of view of the FCC, the primacy of application under European law has also always been based on a constitutional authorization, now enshrined in Art. 23(1) of the Basic Law, so that it can only extend to European sovereignty exercised in Germany, including the control of media regulatory activities of the Länder, to the extent that the Federal Republic has agreed to it in the Treaty and was constitutionally permitted to do so. The FCC sees three reservations of control in this regard:

a) with regard to the EU protection of fundamental rights: In this respect, from Karlsruhe's perspective, the constitutional court's potential for control is subject to self-restriction only as long as and to the extent that a protection of fundamental rights generally comparable to the German standard is guaranteed at the EU level;

40 Consolidated version of the Treaty on European Union (TEU), OJ C 326 of 26.10.2012, p. 13–390, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT.

41 Consolidated version of the Treaty on the Functioning of the European Union (TFEU), OJ C 326 of 26.10.2012, p. 47–390, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.

42 The FCC – unlike the CJEU – does not derive this precedence from the legal nature of the Community as an autonomous legal system, but bases it on the German order for the application of law. Cf. BVerfGE 73, 339 (374 et seq.); objecting *Pernice* in: VVDStRL 2001, 148, 183 et seq. In addition, in the view of the FCC, primacy is limited by the restrictions of the enabling provision of the Basic Law, and therefore does not apply where the fundamental structural principles of the Basic Law and the core of Art. 79(3) of the Basic Law, which cannot be subject to constitutional revision, are at issue. Cf. on the whole *Puttler* in: EuR 2004, 669, 684.

43 Cf. *Puttler* in: EuR 2004, 669, 684.

b) with regard to the EU exercise of competence ("ultra vires control"): Until the judgment of the FCC in the matter of government bond purchases by the European Central Bank (ECB) of 5 May 2020[44] there were apparently insurmountable obstacles to an exception to the primacy of application of Union law in its application and interpretation by the jurisdiction of the EU: in formal terms, the FCC made a referral to the CJEU and in material terms, an obvious transgression of competences, which as a result leads to a structural shift of competences in the relationship between the EU and the Member States, preconditions for the determination of an "outbreaking legal act" of the EU;

c) with regard to the constitutional identity of the German Basic Law, which in Germany is expressed in the so-called eternity clause of Art. 79(3) of the Basic Law and protects core areas of democracy and the rule of law, including the concept of human dignity in the fundamental rights system.[45]

4. Ultra vires action, no EU competence-competence and the principle of conferral

a. The principle of conferral and its significance for media regulation

In contrast to a State, the EU has no competence-competence. Therefore, the Union is also unable to create a legislative, administrative-executive or judicial competence to regulate media in general and media diversity in particular. Rather, in accordance with the "principle of conferral" enshrined in Art. 5(1) sentence 1, (2) TEU, the EU may only act within the limits of the competences that the Member States have conferred on it in the Treaties – TEU and TFEU – to achieve the objectives laid down therein.[46] All competences not conferred upon the Union in the Treaties remain with the Member States under Art. 4(1), 5(2) sentence 2 TEU. These primary law provisions confirm incidentally that prior to the beginning of the European integration process, all powers were originally held by the Member States. The respective provisions thus also confirm the principle

44 FCC, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, para. 1–237, http://www.bverfg.de/e/rs20200505_2bvr085915.html.

45 Cf. *Calliess* in: NVwZ 2019, 684, 689 et seq.

46 Cf. on this recently also *Nielsen*, Die Medienvielfalt als Aspekt der Wertesicherung der EU, p. 35 et seq.

of the Member States' "universal competence" for sovereign action – regardless of the respective national division of powers in federally constituted Member States or States with local self-government.

This fundamental division of competences according to the principle of conferral affects the relationship between the EU and the Member States, but is obviously also important for the scope of the EU institutions' options for action. The actions of the EU and its institutions must remain within the limits of its powers: Thus, according to Art. 3(6) TEU, the EU shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties. According to Art. 13(2) sentence 1 TEU, each EU institution in turn shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. If one of these two basic provisions is infringed, there may be the possibility of an action for annulment before the CJEU.

According to the principle of conferral, for every legal act of the EU – i.e. also for non-binding legal acts – not only an explicit competence but also the correct legal basis must be sought.[47] The search for the right legal basis is of utmost importance as the choice of the correct legal basis can determine, among other things, the voting procedure in the Council of the EU – unanimity with the "veto option" of each Member State or majority – as well as the exact form of the institutional balance with regards to the respective legal act. To this extent, problems of vertical conflicts of jurisdiction (between Member States and the EU) can mix with questions of horizontal conflicts of jurisdiction (between the EU institutions involved in the legislative process).[48]

However, neither the TEU nor the TFEU contain a negative catalog of areas comprehensively excluded from EU law. In the European Treaties, there is neither an *exception culturelle*, i.e. a cultural exception in general, nor a media-related exception in particular. As well, a provision for the media regulation comparable with Art. 4(2) TEU is also missing: According to this provision, "national security remains the sole responsibility of each Member State".[49] When interpreted systematically, this does not apply to media regulation in a corresponding manner. Thus, the principle of con-

47 Cf. e.g. *Breier* in: EuR 1995, 47, 47 et seq.; *Ruffert* in: Jura 1994, 635, 635 et seq.

48 Cf. *Calliess* in: Berliner Online-Beiträge zum Europarecht 25 (2005), p. 3; *Nettesheim* in: EuR 1993, 243, 243 et seq.

49 With regard to Art. 4(2) TEU, the CJEU has recently – in connection with data protection law – reaffirmed – in reference to earlier case law – that although it is up to the Member States of the EU to define their essential security interests and

ferral does not per se impede EU media regulation from the outset. However, the more the EU regulates the media in a way that is relevant to the regulation of diversity, the greater the burden on the EU in terms of safeguarding the clauses of the European Treaties, which are designed to protect Member State regulatory leeway.

From the perspective of European law, the question of who decides whether EU institutions have remained within the framework of the integration program as provided for in primary law or acted ultra vires when adopting a Union act must be decided by the CJEU with ultimate binding effect in order to ensure the primacy and uniformity of the Union legal order. However, this understanding of European law has never been fully recognized, at least not by the FCC. The imperative of consideration for Member States' "Mastery" of the Treaties, which in the view of the constitutional judges in Karlsruhe had been assigned under the Basic Law, is indeed unanimously accepted by both European law and the constitutional courts in so far as they classify EU action ultra vires as unlawful. Nonetheless, the respective boundaries of the integration program and the question of who is allowed to define them conclusively are the subject of ongoing and recently intensified debate, not least in the wake of the FCC's decision on the ECB's government bonds purchase program. Even before that deci-

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to take measures to ensure their internal and external security, the mere fact that a national measure has been taken to protect national security cannot render Union law inapplicable and exempt the Member States from the need to respect that law. As a result, the CJEU adopts a narrow interpretation of Art. 4(2) TEU in this regard, while protecting as much as possible acts of secondary law against application of Art. 4(2) TEU with the objective of limiting their applicability (cf. CJEU, case C-623/17, judgment of 06.10.2020, *Privacy International*, ECLI:EU:C:2020:790, para. 44 et seq.). The CJEU acknowledges that the importance of the objective of maintaining national security enshrined in Art. 4(2) TEU goes beyond the importance of other objectives also recognized in EU data protection law in order to justify exceptions to data protection obligations, such as the fight against crime in general, including serious crime, and the protection of public security. Subject to compliance with the other requirements laid down in Art. 52(1) of the CFR, the objective of safeguarding national security is therefore capable of justifying measures which involve more serious encroachments on fundamental rights than those which could be justified by those other objectives. However, in order to comply with the requirement of proportionality, according to which the exceptions and limitations to the protection of personal data must remain within the limits of what is strictly necessary, national legislation which constitutes an interference with the fundamental rights enshrined in Arts. 7 and 8 of the Charter would have to satisfy the requirements of transparency and proportionality (cf. ibid., para. 74 et seq.).

sion, the FCC has emphasized that due to its constitutional mandate it was obliged to reserve a final and binding power of review in particular exceptional cases.[50] In the event of an an intensification of EU media regulation towards the direction of fully harmonized digital safeguarding of diversity, it cannot be ruled out that such a power of review may also take on a media-related orientation or even be extended to that regard, after the specific question of whether the funding instruments for European works and independent productions provided for in the then EEC Television Directive are still covered by the internal market competence of the EU lost much of their significance in terms of integration law after the FCC ruling of 22 March 1995[51].

In this context, however, it must be taken into account from the outset that the division of competences under EU law is fixed in a way that is resistant to digitization: Digital transformation does not create additional EU competence titles. On the other hand, existing competence titles are not limited to exclusively dealing with just those issues that were known at the time the founding Treaties were adopted. The standards of originalism or historical-traditional textualism[52] are unknown to the interpretation methodology of EU law. Such an understanding of originary interpretation of the EU's competences can be reconciled with a historical, but not with a telelogical interpretation. The interpretation of primary EU law is always an interpretation in present time and open to new challenges. This openness to interpretation with regard to digitization has its limits, however – comparable to the interpretation of EU law that is open to public international law and the interpretation of national law in conformity with European and constitutional law – in the wording of the competence provisions.

50 Cf. BVerfGE 73, 339 (370) (Solange II); 75, 223 (234) (Kloppenburg).

51 Cf. BVerfGE 92, 203 (242 et seq.); on this *Bethge*, Deutsche Bundesstaatlichkeit und Europäische Union. Bemerkungen über die Entscheidung des Bundesverfassungsgerichts zur EG-Fernsehrichtlinie, p. 55 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.

52 Cf. on this with regard to the Supreme Court's modes of interpretation of the US Constitution *Dregger*, Die Verfassungsinterpretation am US-Supreme Court, p. 40 et seq.; *Riecken*, Verfassungsgerichtsbarkeit in der Demokratie, p. 98 et seq.

b. Monitoring compliance with the principle of conferral through the requirement of democracy as interpreted by the FCC

The possibility of transferring sovereign rights to the EU, as provided for in Art. 23 of the Basic Law, may mean that not only tasks at the parliamentary level of the Federation but also those of the Länder are transferred to the supranational bodies of the EU. As a result, certain tasks can no longer be carried out by the members of the Länder parliaments, be it in the enactment of autonomous Länder legislation on media regulation or in the ratification of media-related state treaties. In such cases of transfer of legislative authority, state power no longer emanates from the people, or at least only to a limited extent.

This problem of democratic theory as to the Basic Law's openness to European integration was first taken account of by the FCC in its Maastricht decision by recognizing a power to constitutional complaint based on the violation of the principle of democracy on the occasion of legal acts transferring sovereignty to the EU. The FCC considers that the principle of democracy did not prevent the Federal Republic from being part of an international community. The only prerequisite for this was legitimacy and influence by the population also at the supranational level (within the "*Staatenverbund*" EU).[53] The FCC also points to the relationship between the Arts. 23(1) sentence 3 and 79(3) of the Basic Law: The possibility of openness towards European integration as enshrined in the Basic Law was tied to the core of its Art. 79(3), which cannot be subject of constitutional revision. This Article identified the limits of the authorization to participate in the development of the European Union. Thus, according to the Court's considerations, a discrepancy between Art. 38 and Art. 23 of the Basic Law was avoided.[54]

This judicature developed by the FCC with a view to the transfer of federal competences is equally important with regard to the transfer of competences of the Länder. The core of the German constitutional system, which is resistant to any revision and cannot be amended even in the EU law context, may as well include the element of a federal suspension in media regulation – not least in view of the constitutional-historical dimension of "never again" totalitarian rule. An opening of the German constitutional state to a full harmonization of media regulation by the EU, such as is the case in particular when abandoning the previous regulation by direc-

53 Cf. BVerfGE 89, 155 (184).
54 Cf. BVerfGE 89, 155 (179).

tives with the ability to take into account particularities of the Member States, would therefore – also in view of the democratic relevance of media federalism – be a process with considerable potential risks under constitutional law, notably with regard to the FCC.

Its reference to the connection between Arts. 23, 38 and 79(3) of the Basic Law is, moreover, accompanied by a special reference by the FCC to the requirement that the EU has no competence-competence and that it complies with the principle of conferral.[55] In this context, the FCC emphasizes that Union legal acts that are not covered by the Consent Act do not have any binding domestic effect and are therefore not applicable.[56] Accordingly, the Federal Constitutional Court was to examine whether legal acts of the European institutions and bodies remain within the limits of the powers granted to them or break out of them.[57] In addition, the Maastricht ruling reserves the right of the FCC to review Union institutions' actions in order to determine whether they are in accordance with the Consent Act.

5. Media regulation and the catalog of EU competences

a. Introduction

A formal protective mechanism to safeguard the principle of conferral and to ward off trends towards an EU competence-competence, introduced with the Treaty of Lisbon, is the categorization and classification of the competences of the European Union into exclusive and shared competences as well as competences for supporting, coordinating or supplementing measures.[58]

In its "Laeken Declaration", the European Council had explicitly mandated the Convention on the Future of the European Union (the "European Convention") to develop a better division and definition of compe-

55 Cf. BVerfGE 89, 155 (181).
56 Cf. BVerfGE 89, 155 (195).
57 Cf. BVerfGE 58, 1 (30 et seq.); 75, 223 (235, 242); 89, 155 (188); as well as *Moench/Ruttloff* in: Rengeling/Middeke/Gellermann, § 36 para. 28 et seq., 46 et seq.
58 Cf. BVerfGE 123, 267 (382) with reference to *Rossi*, Die Kompetenzverteilung zwischen der Europäischen Gemeinschaft und ihren Mitgliedstaaten, in: Scholz, Europa als Union des Rechts -- Eine notwendige Zwischenbilanz im Prozeß der Vertiefung und Erweiterung, 1999, p. 196, 201; cf. furthermore e.g. also *Folz* in: Gamper et al., p. 641 et seq.; *Nettesheim* in: von Bogdandy/Bast, p. 415 et seq.

tences in the European Union.[59] In this context, it should also be examined how to prevent a "creeping expansion of the competence of the Union" and its "encroachment on the exclusive areas of competence of the Member States and […] regions".[60] At the same time, the Convention should also take into account the need for the EU to be able to react to fresh challenges and developments and to explore new policy areas.[61] These megatrends undoubtedly include digitization – also in its effects on the media ecosystem.

Even though the Constitutional Treaty developed as a result of the European Convention failed, the Treaty of Lisbon now follows on from these reflections on competences and explicitly clarifies the division of competences between the EU and its Member States.[62] These competences are divided into three main categories:

- exclusive competences;
- shared competences and
- supporting competences.

The media are not explicitly mentioned as such in either these competence catalogs of the EU or elsewhere in the European Treaties.[63] Only the CFR breaks through this restraint under European law with regard to the allocation of competences in favor of the EU for the media and their regulation. This is remarkable not least since constitutions of EU Member States with a federal structure are familiar with media regulation that is also based on competence,[64] or – as in Germany – it has been clarified in a way that is also familiar to the European constitutional legislature that it is not the

59 Laeken Declaration on the Future of the European Union, Annex I to the Presidency Conclusions, European Council (Laeken), 14 and 15 December 2001, SN 300/1/01 REV 1, p. 21.

60 Laeken Declaration, p. 22; on the criticism of a gradual expansion of the EU's competences see e.g. BVerfGE 89, 155 (210); *Rupp* in: JZ 2003, 18, 18 et seq.

61 Laeken Declaration, p. 22; on the whole cf. *Puttler* in: EuR 2004, 669, 686.

62 Cf. on this also recently *Nielsen*, Die Medienvielfalt als Aspekt der Wertesicherung der EU, p. 39 et seq.

63 Cf. on this also *Nielsen*, Die Medienvielfalt als Aspekt der Wertesicherung der EU, p. 47 et seq.

64 Under the Austrian constitutional system, the enactment of regulations in the field of broadcasting (both in terms of content and technology) falls within the competence of the federal government. This results on the one hand from Art. 10(1) No. 9 B-VG "Postal and Telecommunications Services", on the other hand from Art. I of the Federal Constitutional Law on Safeguarding of the Independence of Broadcasting (of 10 July 1974, StF: BGBl. No. 396/1974 (NR: GP XIII AB 1265, p. 111. BR: p. 334.)), according to which more detailed provisions for

central state level but the subordinate units of the federal state that are competent for media regulation. This in itself suggests – without prejudice to any obligations to protect fundamental rights – that the European Treaties should be cautious in granting the EU media-related regulatory powers. However, it does not necessarily exclude the recourse of EU competences also to the field of media regulation as will be described in the following.

The transparency conveyed by the categorization of competences is, admittedly, limited not least by the fact that unwritten competences continue to exist[65], that the "parallel" competences claimed by both the Member States and the European Union are not clearly assigned to one competence category, and that the so-called open method of coordination is not at all referred to. "However, these derogations from the systematising fundamental approach do not affect the principle of conferral, and their nature and extent also does not call the objective of clear delimitation of competences into question."[66]

b. Exclusive competences of the EU and media regulation

According to Art. 2(1) TFEU, when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts. It is true that the catalog of exclusive competences laid down in Art. 3 TFEU does not contain an explicit reference to media. However, a relevance of this catalog for media regulation is not excluded from the outset insofar as the EU has

- according to Art. 3(1)(a) TFEU exclusive competence in the area of customs union pursuant to Art. 31 et seq. TFEU,

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broadcasting and its organisation are to be laid down by federal law. The Federal Constitutional Law on Safeguarding of the Independence of Broadcasting aims at declaring broadcasting a public task, which is to be fulfilled in compliance with the principles of objectivity, impartiality and diversity of opinion.

65 Cf. e.g. *Nettesheim* in: von Bogdandy/Bast, p. 415, 433 et seq.; *Rossi* in: Calliess/Ruffert, Art. 352 TFEU, para. 52; *Weber* in: Blanke/Mangiameli, Art. 5 TEU, para. 28; *Dony*, Droit de l'Union européenne, para. 120 et seq.

66 FCC, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08 and others (Lisbon), para. 303.

- according to Art. 3(1)(b) TFEU exclusive competence in the area of the establishing of the competition rules necessary for the functioning of the internal market pursuant to Part Three, Title VII, Chapter 1 of the TFEU,
- according to Art. 3(1)(c) TFEU exclusive competence in the area of monetary policy for the Member States whose currency is the euro,[67]
- according to Art. 3(1)(e) TFEU exclusive competence in the area of common commercial policy pursuant to Art. 207 TFEU and
- according to Art. 3(2) TFEU exclusive competence for the conclusion of an international agreement in terms of Art. 216 TFEU, when its conclusion is provided for in a legislative act of the Union or is necessary to

67 § 14(1) of the Bundesbank Act provides, that "[w]ithout prejudice to Article 128 (1) of the [TFEU], the Deutsche Bundesbank shall have the sole right to issue banknotes in the area in which this Act is law" and that banknotes denominated in euro shall be "the sole unrestricted legal tender". The State Treaty of the Länder on Public Broadcasting Fees (RBStV) stipulates in § 2(1) that the owner of each dwelling has to pay a broadcasting fee. § 9(2) RBStV authorizes the regional broadcasting to establish, by means of a regulation, the procedures for payment of the radio and television licence fee. In turn, the statutes issued on this basis stipulate that the party liable for the contribution can pay the broadcasting contributions in a cashless manner only. In the preliminary ruling proceedings currently before the CJEU against this background, the questions are now whether the exclusive competence under Art. 3(1)(c) TFEU covers monetary law and the definition of the legal tender status of the single currency, what effects the legal tender status of euro banknotes has and whether and, if so, within which limits the Member States whose currency is the euro may adopt national legislation restricting the use of euro banknotes.
In his Opinion, Advocate General *Pitruzzella* expresses doubts as to whether the exclusion without exception of the payment of the broadcasting fee in cash can be justified in the light of the importance of the exclusive competence under Art. 3(1)(c) TFEU for monetary powers. *Pitruzzella* considers that limits on payments in euro banknotes for reasons of public interest are compatible with the concept of legal tender status of euro banknotes as established in EU monetary law only if they do not lead *de jure* or *de facto* to the complete withdrawal of euro banknotes, if they are adopted for reasons of public interest and if other legal means exist for the settlement of monetary debts. They must also be capable of achieving the public interest objective pursued and must not go beyond what is necessary to achieve that objective. The Advocate General doubts the latter, if the function of social integration, which cash fulfills for vulnerable persons e.g. elderly fellow citizens, should not have been adequately considered when abolishing the cashless payment option; cf. Opinion of Advocate General *Pitruzzella* of 29.09.2020, CJEU, joined cases C-422/19 (*Dietrich / Hessischer Rundfunk*) and C-423/19 (*Häring / Hessischer Rundfunk*), ECLI:EU:C:2020:756, para. 162 et seq.

enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.[68]

The importance of the EU's exclusive trade competence and its potentially restrictive scope as to Member States' regulatory competences, even in areas such as education or culture, was again emphasized by the CJEU in a judgment of 6 October 2020 in connection with a Hungarian education policy measure that is controversial beyond questions of the EU Treaties' provisions on competences, particularly in terms of fundamental rights and the EU's fundamental values. The CJEU emphasized there that it has jurisdiction to hear and determine actions alleging violations of WTO law. In this context, the CJEU reiterated that an international agreement entered into by the Union was an integral part of EU law – such as the agreement establishing the WTO, of which the GATS is a part. Next, with regard to the relationship between the exclusive competence of the EU in the field of the common commercial policy and the broad competence of the Member States in the field of education, the CJEU clarified that the commitments entered into under the GATS, including those relating to the liberalisation of trade in private educational services, fall within the EU's exclusive competence of common commercial policy.[69]

There is little to argue against the assessment that the CJEU is unlikely to deviate from this attribution, which in the case of a collision would amount to an unrestricted precedence of trade policy obligations, when attributing exclusive trade competence of the EU and Member State competences in the field of culture, including aspects of media related to culture and diversity. This makes it all the more important to limit the EU's trade policy negotiation mandates in a way that preserves culture and diversity. Accordingly, the Member States take account of the risk potential of the EU's exclusive competence for the common commercial policy by regularly excluding audiovisual services from the negotiating mandate given to the EU by the Council of the EU.[70]

The resulting exclusion of audiovisual services from the scope of free trade rules protects the cultural sovereignty of the Member States. How-

68 Cf. on this *Calliess* in: id./Ruffert, Art. 3 TFEU, para. 5 et seq., 14 et seq.; *Klamert* in: Kellerbauer/id./Tomkin, Art. 3 TFEU, para. 16 et seq.; *Pelka* in: Schwarze, Art. 3 TFEU, para. 7 et seq., 14 et seq.; *Streinz/Mögele* in: Streinz, Art. 3 TFEU, para. 4 et seq., 11 et seq.

69 Cf. CJEU, case C-66/18, *Commission / Hungary*, para. 68 et seq.

70 Cf. on this also in context of Brexit: *Cole/Ukrow/Etteldorf*, Research for CULT Committee – Audiovisual Sector and Brexit: the Regulatory Environment, p. 14 et seq.

ever, this extensive protection comes with a not inconsiderable shortcoming: The comprehensive removal of the cultural sector from the trade agreements, as demanded by organized culture and achieved by broadcast and telemedia engaged in journalism, is at the same time associated with risks as regards the promotion of a culture of democratic discussion in the age of globalization on the one hand, and the strengthening of populist tendencies and new digital forms of opinion manipulation on the other.[71]

c. Shared competences of the EU and media regulation

According to Art. 2 (2) sentence 1 TFEU, when the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. Sentence 2 stipulates that Member States shall exercise their competence to the extent that the Union has not exercised its competence. Sentence three finally provides for Member States' ability to again exercise their competence to the extent that the Union has decided to cease exercising its competence.

According to Art. 4 (1) TFEU, the Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Arts. 3 and 6 TFEU. Neither of these contain such a specific provision on media-related competence. It is true that the catalog of shared competences regulated in Art. 4 (2) to (4) TFEU does not contain any explicit reference to media either. However, a relevance of the catalog of main areas of shared competence regulated in Art. 4 (2) TFEU for media regulation cannot be excluded from the outset as the EU has

- according to Art. 4(2)(a) TFEU a shared competence in the area of the internal market pursuant to Art. 26(2) in conjunction with Art. 114 TFEU,
- according to Art. 4(2)(f) TFEU a shared competence in the area of consumer protection pursuant to Art. 169 TFEU and

71 Cf. on the whole *Ukrow*, Ceterum censeo: CETA prohibendam esse? Audiovisuelle Medien im europäisch-kanadischen Freihandelssystem, p. 2 et seq.

- according to Art. 4(2)(j) TFEU a shared competence as regards the area of freedom, security and justice pursuant to Art. 67 et seq. TFEU.[72]

The internal market competence of the EU is particularly important in its previous legislation on media. According to Art. 26(1) TFEU, the Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties. To this effect, according to its definition in Art. 26(2) TFEU, the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties. Both the AVMSD[73] and the ECD[74] are based on EU competence provisions with regard to the free movement of services and the freedom of establishment as part of the internal market. In this respect, they complied with the established case law of the CJEU.

In view of the digitization of the media and the development of new business and communication models of a media nature, the shared competence of the EU in the areas of research and technological development pursuant to Art. 179 et seq. TFEU regulated in Art. 4(3) TFEU[75] can also be significant for media regulation. However, in the field of research and technological development, the Union's competence extends only to the adoption of measures, in particular to the preparation and implementation of programmes, without the exercise of that competence preventing the Member States from exercising theirs.

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72 Cf. on this *Calliess* in: id./Ruffert, Art. 4 TFEU, para. 4 et seq., 14, 18; *Klamert* in: Kellerbauer/id./Tomkin, Art. 4 TFEU, para. 3, 8, 12; *Pelka* in: Schwarze, Art. 4 TFEU, para. 6, 11, 15.

73 Both Directive 2010/13/EU and amending Directive (EU) 2018/1808 are "[h]aving regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) and Article 62 thereof". On the details of the regulatory content and objectives, see chapter D.II.2.

74 Directive 2000/31/EC is "[h]aving regard to the Treaty establishing the European Community, and in particular Articles 47(2) (today: Art. 53(1) TFEU), 55 (today: Art. 62 TFEU) and 95 (today: Art. 114 TFEU) thereof". On the details of the regulatory content and objectives, see chapter D.II.1.

75 Cf. on this *Calliess* in: id./Ruffert, Art. 4 TFEU, para. 20; *Klamert* in: Kellerbauer/id./Tomkin, Art. 4 TFEU, para. 15; *Pelka* in: Schwarze, Art. 4 TFEU, para. 17; *Dony*, Droit de l'Union européenne, para. 136.

d. In particular: Intensifying protection in the area of the digital single market

A Member State may only deviate from secondary law adopted in the context of legal harmonisation in the internal market within the framework of Art. 114(4) to (10) TFEU, providing for an even more intensified protection on domestic level: This clause allows Member States to maintain or introduce stricter national provisions for the protection of important legal interests in the sense of a "unilateral national action"[76] despite the fact that legislation has been harmonized at Union level. The following requirements must be met:

- The maintenance of existing stricter national provisions must be justified by major needs referred to in Art. 36 TFEU or relating to the protection of the environment or the working environment (Art. 114(4) TFEU).
- When introducing stricter national provisions, new scientific evidence relating to the protection of the environment or the working environment must be available and the emergence of a problem specific to the Member State concerned after the adoption of the harmonization measure must be demonstrated (Art. 114(5) TFEU).
- The national provisions must be notified to the Commission and approved by it in accordance with the procedure laid down in Art. 114(6) TFEU. The Commission has to take a decision within six months of the notification, after having verified whether or not the national provision are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market. In the absence of a decision by the Commission within six months, the national provision shall be deemed to have been approved. Before approval, a Member State is not entitled to apply the stricter national provision ("suspensory effect").[77]

The adoption of new national legislation following harmonization, as has been done in the field of the development of a (digital) media and commu-

76 Cf. on this *Herrnfeld* in: Schwarze, Art. 114 TFEU, para. 87 et seq.; *Korte* in: Calliess/Ruffert, Art. 114 TFEU, para. 68 et seq.; *Terhechte* in: Pechstein et al., Frankfurter Kommentar, Art. 114 TFEU, para. 80 et seq.; *Kellerbauer* in: id./Klamert/Tomkin, Art. 114 TFEU, para. 48 et seq.; *Dony*, Droit de l'Union européenne, para. 723 et seq.

77 Cf. CJEU, case C-41/93, *France / Commission*, para. 30.

nications internal market, especially by the AVMSD and the ECD, is therefore subject to particularly strict conditions, as such legislation on Member State level would increase the risk to the functioning of the internal market. Naturally, the Union institutions could not take account of national legislation when drawing up the harmonization measure. In this case, the requirements set out in Art. 36 TFEU in particular cannot be invoked. Only reasons of protection of the environment or the working environment are permissible.[78]

That these protective intensification clauses have or will have practical relevance in the field of media regulation at present or in the future is not apparent, at least with regard to the adoption of new legislation in the field of European coordination of communications and media law of the Member States. This may, however, be different for the maintenance of existing Member State provisions, especially if they – e.g. in the defense against media attacks on a free democratic discourse, such as those which can occur, for example, through disinformation and fake news – are aimed towards the protection of "public morality, public policy and public security" within the meaning of Art. 36 sentence 1 TFEU, functioning as components of a "well-fortified democracy 4.0"[79]. Moreover, from a systematic and teleological point of view, it is worth noting that if the sovereignty of the Member States is protected in areas such as the protection of the working environment or environmental protection or in (other) areas addressed by Art. 36 TFEU, which in non-economic terms are significantly less relevant than culture and the media, this must be possible *a fortiori* for the cultural and media sector.

e. Supporting competences of the EU and media regulation

Finally, according to Art. 6 sentence 1 TFEU, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The EU's action in this area of competence can therefore only be supplementary and requires prior action by the Member States. Moreover, without prejudice to the obligation of loyalty which ap-

78 Cf. CJEU, case C-512/99, *Germany / Commission*, para. 40 et seq.; case C-3/00, *Denmark / Commission*, para. 57 et seq. See in particular GCEU, joined cases T-366/03 and T-235/04, *Land Oberösterreich and Republic of Austria / Commission*; CJEU, joined cases C-439/05 P and C-454/05 P, *Land Oberösterreich and Republic of Austria / Commission*.

79 Cf. on this *Ukrow* in: ZEuS 2021, p. 65, 65 et seq.

plies in this type of competence also, EU action does not constitute a barrier to national action. These measures with a European objective can also be taken, in accordance with Art. 6 sentence 2 (c) TFEU, in the field of "culture" and, under letter (e) of the provision, in the field of "education [and] vocational training". Linked to this provision on competence are Art. 165 (relating to education only and not also to vocational training) and Art. 167 TFEU (relating to culture).[80]

For an understanding of these competences, Art. 2(5) TFEU is also of relevance: This Article, in its first sentence, emphasizes in the first place that in those areas where, under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, it does so without thereby superseding Member States' competence in these areas. The Article's second sentence specifies that "[l]egally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations".[81] This applies not least to the educational and cultural sectors. It would therefore be inadmissible to harmonize EU law explicitly on the basis of media freedom and diversity regulation rather than on the basis of the internal market, competition, taxation or any other EU competence title that explicitly permits legal harmonization.

f. In particular: Media literacy in the focus of EU regulation

Even for non-binding EU acts, the provisions on competence of the EU and their respective boundaries must be respected. This is also true with regard to the EU's ongoing efforts to strengthen media literacy.

Already the *Recommendation 2006/952/EC 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* included a number of possible measures to promote media literacy, such as e.g. continuing ed-

80 Cf. on this *Calliess* in: id./Ruffert, Art. 6 TFEU, para. 7, 9; *Klamert* in: Kellerbauer/id./Tomkin, Art. 6 TFEU, para. 6, 8; *Pelka* in: Schwarze, Art. 6 TFEU, para. 8, 10.

81 Cf. on this *Calliess* in: id./Ruffert, Art. 2 TFEU, para. 19 et seq.; *Häde* in: Pechstein et al., Frankfurter Kommentar, Art. 2 TFEU, para. 49 et seq.; *Pelka* in: Schwarze, Art. 2 TFEU, para. 22 et seq.; *Klamert* in: Kellerbauer/id./Tomkin, Art. 2 TFEU, para. 15; *Dony*, Droit de l'Union européenne, para. 139.

ucation of teachers and trainers, specific Internet training aimed at children from a very early age, including sessions open to parents, or the organization of national campaigns aimed at citizens, involving all communications media, to provide information on using the Internet responsibly.

In the 2010 Audiovisual Media Services Directive[82], media literacy was addressed for the first time in the legally binding audiovisual law of the EU. Art. 33 sentence 1 of this Directive provided for a regular report by the European Commission on the application of this Directive every three years, whereby the Commission if necessary, make[s] further proposals to adapt it to developments in the field of audiovisual media services, in particular in the light of recent technological developments, the competitiveness of the sector *and levels of media literacy in all Member States (emphasis by authors)*.

Thus, the Directive also directly addressed the connection between the teaching of media literacy and the effective safeguarding of protected interests such as the protection of minors from harmful media and media consumer protection.

In the recitals to the Directive, the EU further considered the understanding of media literacy and its meaning in the media context. Recital 47 read as follows:

> 'Media literacy' refers to skills, knowledge and understanding that allow consumers to use media effectively and safely. Media-literate people are able to exercise informed choices, understand the nature of content and services and take advantage of the full range of opportunities offered by new communications technologies. They are better able to protect themselves and their families from harmful or offensive material. Therefore the development of media literacy in all sections of society should be promoted and its progress followed closely.

Even if this initiative appeared to be welcome in a protection-oriented manner, it must not be overlooked that a certain definitional approach to the approximation of the regulation of media literacy in the Member

82 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95 of 15.04.2010, p. 1–24.
For details on the history of the directive and the new rules for the promotion of media literacy in the context of the 2018 reform cf. below, chapters D.II.2.a and D.II.2.d(3).

States was thereby achieved – a harmonization that is excluded by primary law in both the educational and cultural sectors as areas of supporting competence of the EU.

This process of gradually dissolving the purely supportive competence has been intensified by the 2018 reform of the AVMSD, an approach which is doubtful in terms of EU legal competences.[83] This is because its Art. 33 a, for the first time, enshrines a legally binding obligation of the Member States to take measures themselves to develop media literacy – combined with a competence of the Commission to issue guidelines regarding the scope of the Member States' reporting obligation to the Commission:

> (1) Member States shall promote and take measures for the development of media literacy skills.
> (2) By 19 December 2022 and every three years thereafter, Member States shall report to the Commission on the implementation of paragraph 1.
> (3) The Commission shall, after consulting the Contact Committee, issue guidelines regarding the scope of such reports.

To explain these obligations, recital 59 of the amending directive is significant. It reads:

> 'Media literacy' refers to skills, knowledge and understanding that allow citizens to use media effectively and safely. In order to enable citizens to access information and to use, critically assess and create media content responsibly and safely, citizens need to possess advanced media literacy skills. Media literacy should not be limited to learning about tools and technologies, but should aim to equip citizens with the critical thinking skills required to exercise judgment, analyse complex realities and recognise the difference between opinion and fact. It is therefore necessary that both media service providers and video-sharing platforms providers, in cooperation with all relevant stakeholders, promote the development of media literacy in all sections of society, for citizens of all ages, and for all media and that progress in that regard is followed closely.

Member States' obligation to promote under Art. 33a(1) of the Directive thus takes on a more concrete form, which is problematic in view of the mere supporting competence.

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83 For the content of the regulation cf. chapter D.II.2.d(3).

The path towards an increasing shift from mere EU support to the shaping of media literacy at the intersection of the EU's cultural and educational competences is continued in the conclusions on "media literacy in an ever-changing world" adopted by the Council of the EU on 25 May 2020.[84] In concrete terms, these read:

> The Council of the European Union … invites Member States … in due compliance with the principle of subsidiarity, to
> …
> • support the establishment and development of media literacy networks (national, regional, local, thematic) in order to bring together relevant stakeholders and enable them to cooperate and develop sustainable and long-term viable media literacy projects and initiatives;
> • develop a lifelong-learning approach to media literacy for all ages and provide support in that context for pilot and research projects, in order to create or develop and assess new methodologies, actions and content adapted to the specific needs of targeted groups;
> …
> • improve existing training models, and if necessary design new ones, for the development of digital skills within the European cultural and creative industries in order to foster the effective use of innovative technologies and keep pace with technological progress.

The compatibility of such a media competence-related policy of informal regulation with the imperative of "fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems", which is expressly recognised in Art. 165(1)(1) TFEU, seems increasingly doubtful.

g. Suspensory effect of EU law

Closely related to the question of the primacy of EU law is the question of whether EU law triggers a suspensory effect with regard to Member States' abilities to regulate.

As far as the exclusive competences of the EU are concerned, this question is clarified by the Treaty of Lisbon, as described above: The Member States are excluded from legislation in areas of exclusive EU compe-

84 Council conclusions on media literacy in an ever-changing world, 2020/C 193/06, ST/8274/2020/INIT, OJ C 193 of 09.06.2020, p. 23–28.

tence – unless there is an explicit recourse for Member State action by way of re-delegation under Art. 2(1) TFEU. The exclusion of Member States from regulation leads to a "general suspensory effect", without prejudice to the possibility of re-delegation[85]; Member State regulations that are adopted in violation of this requirement are inapplicable for this reason alone. The EU does not (yet) have to have adopted secondary law (suspensory effect *ex ante*). If the EU has in turn enacted secondary law, this does not have to have direct effect to supersede conflicting national law (suspensory effect *ex post*). Thus, in areas of exclusive competence, the adoption of measures is "entirely and definitively" the sole responsibility of the EU – regardless of whether the Union takes concrete action or not.[86] However, this suspensory effect of EU law does not preclude the adoption by the Member States of parallel or supplementary regulations having the same addressees as the EU law in question and which may also use comparable instruments (e.g. transparency and disclosure obligations or prohibitions of discrimination), but having different objectives (in particular to ensure diversity), at least if the Member State regulation does not materially conflict with the EU regulation (e.g. on the basis of the EU's exclusive competence under Art. 3(1)(b) TFEU for competition law) or hampers its practical effect.

There is no comparable explicit regulation on suspensory effects in the area of shared competences of the EU. Measures adopted under this type of EU competence do not have a suspensory effect in the sense of a "stop signal" for the regulatory competence of the Member States. However, the principle of loyalty laid down in Art. 4(3) TEU results in an obligation on the Member States not to infringe Union measures and not to impair their *effet utile*, i.e. their useful effect.[87]

In the case of shared competences, the question of a possible suspensory effect, especially in connection with EU law based on directives, arises in two respects: both with regard to transposed EU law based on directives and – in the sense of a suspending pre-effect – with regard to law based on directives yet to be transposed.

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85 Cf. *Streinz* in: id., Art. 2 TFEU, para. 5; *Klamert* in: Kellerbauer/id./Tomkin, Art. 2 TFEU, para. 5.

86 Cf. *Obwexer*, EU-rechtliche Determinierung mitgliedstaatlicher Kompetenzen, p. 1, 6.

87 Cf. *Calliess* in: id./Ruffert, Art. 2 TFEU, para. 22; *Eilmansberger/Jaeger* in: Mayer/Stöger, Art. 2 TFEU, para. 49; *Obwexer*, EU-rechtliche Determinierung mitgliedstaatlicher Kompetenzen, p. 1 (9).

With regard to national legal provisions adapted on the basis of a directive such as, for example, the relevant provisions of the State Treaty on the Modernization of the Media Order in Germany based on the amended AVMSD, this means that such provisions are no longer at the unlimited disposal of the national legislature. They may no longer be modified contrary to the specifications laid down in the directive.

However, a directive may produce legal effects even before the expiry of its transposition period and before transposition into national law of the Member States. From the date of publication of a directive pursuant to Art. 297(1) TFEU, the EU Treaty principle of loyalty prohibits the adoption in the Member States of acts which are liable to seriously compromise the result pursued by the directive.[88] Such a risk may also arise when the national telecommunications legislature disregards the scope for taking media diversity issues into account in domestic telecommunications legislation, as expressly provided for in the EECC, by deleting an obligation to take account of broadcasting interests under national telecommunications legislation when this law is amended.

However, there is no such advance effect as long as the "advance-effective" EU legal act is not published in the Official Journal of the EU. Mere intentions of the EU to introduce legislation cannot therefore have any advance effect. Consequently, the regulatory considerations in Austria with regard to the fight against hate and illegal content on the Internet – based on the German NetzDG – which were notified to the EU Commission on 1–2 September 2020,[89] do not raise any serious concerns, at least not from the perspective of the relationship between EU and Member State media regulation from the point of view of competence rules – irrespective of the considerations at that time for a Digital Services Act and a European Action Plan for Democracy and irrespective of the question of the compati-

88 Cf. *Streinz*, Europarecht, para. 514; *Thiele*, Europarecht, p. 114.

89 These are the drafts of (a) a Federal Act establishing civil legal and civil procedural measures to combat hate on the Internet (Combating Hate on the Internet Act [Hass-im-Netz-Bekämpfungs-Gesetz – HiNBG]) (https://ec.europa.eu/growth/tools-databases/tris/de/search/?trisaction=search.detail&year=2020&num=547), (b) a Federal Act establishing penal and media policy measures to combat hate on the Internet (https://ec.europa.eu/growth/tools-databases/tris/de/search/?trisaction=search.detail&year=2020&num=548) and (c) a Federal Act on measures to protect users on communication platforms (Communication Platforms Act [Kommunikationsplattformen-Gesetz – KoPl-G]) (https://ec.europa.eu/growth/tools-databases/tris/de/search/?trisaction=search.detail&year=2020&num=544).

bility of the planned regulations with the EU ECD. In this case, there is no unlawful intention to regulate.[90]

6. *Media regulation and enhanced cooperation between individual EU Member States*

Economic aspects of media regulation aiming at the creation of a digital internal market may also be the subject of enhanced cooperation under the European Treaties – although even in such enhanced cooperation, the cultural horizontal clause of Art. 167(4) TFEU would have to be observed, as would the obligation to respect fundamental rights, including the freedoms of communication and the imperative under Art. 11(2) CFR to respect the freedom and pluralism of the media.

The first prerequisite for establishing enhanced cooperation is the existence of an appropriate legal basis for the Union in the relevant policy area. According to Art. 20(1)(1) TEU, this may not fall within any policy area in which the EU has exclusive competence. However, as shown above[91], this is not the case with regard to the internal market competence – also with regard to the creation of a digital single market – as provided for in the unambiguous regulation in Art. 4(2)(a) TFEU.

According to Art. 20(1)(2) TEU, the aim of enhanced cooperation must be to further the objectives of the Union, protect its interests and reinforce its integration process. Enhanced cooperation in the area of regulation of media platforms and media intermediaries, with special consideration to their importance for ensuring diversity in the digital age, would promote this objective with a view to safeguarding pluralism from cross-border threats, as would the possible introduction of a digital tax, which would focus on this group of addressees of modern media regulation.[92]

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90 Cf. in detail below on the ECD (chapter D.II.1), on the Digital Services Act (chapters D.III.2 and F.) and on the European Democracy Action Plan (chapter D.III.3).

91 Cf. on this supra, chapter B.I.5.

92 Cf. on this, albeit after a number of Member States going ahead on their own (on this *Ukrow*, Österreich und Spanien wollen Digitalsteuer einführen, https://rsw.beck.de/cms/?toc=ZD.ARC.201902&docid=413844; *Ukrow*, Österreich: Ministerrat beschließt Digitalsteuerpaket, https://rsw.beck.de/cms/?toc=MMR.ARC.201904&docid=416999), the Conclusions of the Special meeting of the European Council of 17 to 21 July 2020 (https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf), which provide for the European Commission to submit a proposal for a "digital levy" in the first half of 2021

Art. 20(1)(2) sentence 2 TEU and Art. 328 TFEU require for the establishment of enhanced cooperation that it must be open to all other Member States if they fulfil the conditions of participation.

According to Art. 20(3) sentence 1 TEU, at least nine Member States must be involved in an enhanced cooperation.

However, pursuant to Art. 20(2) sentence 1 TEU, enhanced cooperation is only admissible as *ultima ratio* when the Council of the EU has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole. The Member States have a wide margin of maneuver in this respect; the review of the "reasonable period" itself has only limited justiciability.[93] However, it is requested that at least one attempt to reach agreement on a concrete legislative project involving all Member States must have been made.[94]

However, enhanced cooperation does not affect the bilateral or multilateral regulatory approach under public international law with respect to a positive order in the media landscape. This is because it does not follow from the enshrinement in primary EU law of the preconditions and mechanisms of enhanced cooperation that other forms of such cooperation are prohibited within the scope of application of the European treaties..[95]

In line with this openness to alternative forms of enhanced cooperation, Art. 9 of the Franco-German Treaty of Aachen stipulates that the two states recognize the crucial role that culture and the media play in strengthening Franco-German friendship. France and Germany are therefore determined to create a common space of freedom and opportunity for their peoples, as well as a common cultural and media space. With such a space, a contribution could be made to the development of a European (partial) public sphere, which, according to the FCC's perspective on its democratic legitimacy, is indispensable for the further development of the EU. The uncertainties of the digital communication space emphasized by the FCC also affect not least the continuing legitimacy of the European target perspective of an ever closer union. Counteracting this, for example through a common Franco-German media space, represents a cultural contribution

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so that it can be introduced "at the latest by 1 January 2023"; cf. ibid., para. A29 and para. 147. On this also chapter B.I.5.g.

93 *Ruffert* in: Calliess/id., Art. 20 TEU, para. 19; *Pechstein* in: Streinz, Art. 20 TEU, para. 13.

94 *Bribosia* in: CDE 2000, 57, 97; *Pechstein* in: Streinz, Art. 20 TEU, para. 13; *Ullrich* in: RdDI 2013, 325, 332; diff. op. *Blanke* in: id./Mangiameli, Art. 20 TEU, para. 38.

95 Cf. *Ukrow* in: ZEuS 2019, 3, 29 with further references.

to the self-assertion of a value-based Europe. The regulatory competence of the two states under the terms of Art. 9 of the Treaty could encompass not only a Franco-German digital platform for audiovisual content and information offerings, but also an ARTE radio station, a Franco-German search engine or a Franco-German Facebook, TikTok or WhatsApp counterpart.[96]

7. *Media regulation and the relevance of subsequent institutional practice under primary law*

The CJEU's methods of interpretation are widely viewed[97] as differing from the traditional methods of interpretation under public international law, in particular in that the CJEU does not attach any original relevance for the interpretation of Union law to the subsequent practice of the institutions, to which Art. 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT)[98] attaches considerable importance as a source of legal knowledge ("the Vienna Convention").

However, an examination of the CJEU's case law with regard to the interpretative relevance of subsequent institutional practice produces a "disparate picture".[99] Irrespective of this, subsequent practice may be of fundamental significance for an essential aspect of the functioning of Union law – namely the acceptance of a legal system with only limited means of coercion over the Member States.[100] Indeed, the acceptance by the Member States of EU media regulation aimed at deepening digital integration alone, however important it may be, cannot suffice as a basis of legitimacy in the EU as a union of law, one component of which is the preservation of the division of competences in the European Treaties.[101] Conversely, however, this acceptance inhibits the risk of judicial control over the observance of the integration program, at least in an interstate context. How-

96 Cf. *Ukrow* in: ZEuS 2019, 3, 49 et seq.

97 Cf. *Streinz*, Die Interpretationsmethoden des Europäischen Gerichtshofs zum Vorantreiben der Integration, 27, 32.

98 Vienna Convention on the Law of Treaties of 23.05.1969, BGBl. 1985 II, p. 927.

99 Cf. *Ukrow*, Richterliche Rechtsfortbildung durch den EuGH, p. 118 et seq.

100 *Streinz*, Die Interpretationsmethoden des Europäischen Gerichtshofs zum Vorantreiben der Integration, 27, 32, with reference to i.a. *Borchardt*, Richterrecht durch den Gerichtshof der Europäischen Gemeinschaften, in: Gedächtnisschrift für Eberhard Grabitz, 1995, p. 29, 39 et seq.

101 Cf. *Cornils*, Der gemeinschaftsrechtliche Staatshaftungsanspruch, p. 327 et seq.; *Dänzer-Vanotti*, Der Europäische Gerichtshof zwischen Rechtsprechung und Rechtsetzung, 205, 209 et seq.

ever, this does not affect the monitoring of media regulation for observance of the integration program by private entities – whether incidentally with respect to sovereign acts regulating an individual act that are based on acts of EU media regulation or with respect to adequate preservation of democratic principles as a limit to the Basic Law's openness to integration.

II. The EU value system and its protection as a means of ensuring freedom and diversity of the media in the EU Member States

1. The EU's core set of shared values

In view of digitization, Europeanization and globalization[102], the value-based elements of the European integration program play a prominent role in the EU's integration and value system[103]. These values are explicitly enshrined in Art. 2 TEU.[104]

Art. 2 TEU regulates that "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". In particular, the link in Art. 2 TEU to respect for human dignity and the principle of pluralism clearly demonstrates the relevance of the EU's fundamental values in terms of media law, especially also in relation to diversity. The diversity of the media is also protected by the union's value system.[105]

In dealing with current developments in individual EU Member States that are attempting to undermine the independence of the judiciary and

102 Cf. *Ruffert*, Die Globalisierung als Herausforderung an das Öffentliche Recht; *Schwarze*, Globalisierung und Entstaatlichung des Rechts.

103 Cf. *Calliess* in: Berliner Online-Beiträge zum Europarecht, 1(2004).

104 Cf. on this also the recent judicature of the CJEU, case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice)*, para. 48 and 63; CJEU, case C-619/18, *Commission / Poland*, para. 58.

105 Cf. also *Nielsen*, Die Medienvielfalt als Aspekt der Wertesicherung der EU, p. 109 et seq., 175 et seq.; *Ukrow/Cole*, Aktive Sicherung lokaler und regionaler Medienvielfalt, p. 55 et seq.

the media,[106] special[107] importance is attached to fundamental values, which also play a role in determining the supervisory mechanisms[108] of the European Treaties[109], such as the organizational structure of the supervisory bodies.

The core set of shared values in Art. 2 TEU commits the EU itself in all its internal and external actions. However, the legal content of the provision is not limited to this. Even if, according to its wording, this provision primarily addresses the EU itself, these fundamental values are also of EU law significance with respect to the legal systems of the Member States, as is already apparent from the second sentence of the provision.[110] At the same time, this set of values does not give the EU the power to adopt legislation. Art. 2 TEU does not constitute a "super-competence" that could ultimately undermine the principle of conferral.

However, as objects of protection for a militant democracy, the values of Art. 2 TEU also shape the German constitutional value system, even though the Basic Law lacks a comparable explicit catalog.[111] This can lead to a dialogical understanding of value orientation – as a result relativizing possible conflict situations with regard to parallel guard rails of regulatory activity – which can be promoted not least in the exchange between the

106 Cf. on this e.g. *Möllers/Schneider*, Demokratiesicherung in der Europäischen Union, p. 53 et seq., 68 et seq.

107 Cf. on this *Ukrow* in: vorgänge 55 (2016) # 216, 47, 55 et seq.; *id.* in: vorgänge 56 (2017) # 220, 69, 75 et seq.

108 Vera Jourová, Vice President of the current European Commission, is the Commissioner responsible for "Values and Transparency"; cf. https://ec.europa.eu/commission/commissioners/2019-2024/jourova_en.

109 Cf. Communication form the European Commission der Europäischen Kommission, "A new EU Framework to strengthen the Rule of Law", COM (2014) 158 final.

110 In the context of the EU, the provision is of operational relevance not only in accession procedures under Art. 49 TEU, but also in the suspension of Member State rights, including voting rights, as provided for in Art. 7 TEU. Cf. on concrete cases of application *Ukrow,* Jenseits der Grenze, p. 5.

111 On the core set of values in the Basic Law cf. from the judicature of the FCC with fundamental significance BVerfGE 7, 198 (205 et seq.); 25, 256 (263); 33, 1 (12) as well as recently e.g. BVerfGE 148, 267 (280 et seq., 283 et seq.); in the literature e.g. *Detjen*, Die Werteordnung des Grundgesetzes, 2009; *Reese*, Die Verfassung des Grundgesetzes. Rahmen- und Werteordnung im Lichte der Gefährdungen durch Macht und Moral; *von Danwitz*, Wert und Werte des Grundgesetzes, FAZ of 22.01.2019.

FCC and the constitutional courts of the EU Member States and the CJEU.[112] However, with regards to the relationship between the constitutional courts and the CJEU in its role as the European constitutional court, this approach of a value-oriented multilevel dialog of constitutional courts is at current heavily troubled, as a consequence of the FCC's decision on the ECB's government bond purchase program[113]. This decision fatally opened the political floodgates with regard to a risk to the unity of the EU as a union of law[114], since a Member State's constitutional court not only calls into question the primacy of Union law,[115] but also deprives instruments such as the preliminary ruling, which is designed for cooperation, of its practical effectiveness.

112 Recent topics of the corresponding expert discussions have included the "role of constitutional courts in advancing the protection of fundamental rights" (https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-111.html), "dialogue between national constitutional courts and European courts" as well as "fundamental rights in the digital age" (https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-055.html), "multi-level cooperation of European courts (*Europäischer Gerichtsverbund*)" (https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2019/bvg19-018.html), "impact of the decisions of the European Court of Human Rights and the European Court of Justice on the German legal system and on the work of the Federal Constitutional Court" (https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2019/bvg19-034.html) and "protection of fundamental rights in relation to private actors [as well as] data protection in the cooperation of European constitutional courts" (https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2019/bvg19-045.html).

113 FCC, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15.

114 Cf. the communication of the CJEU referring to the uniform application of Union law (Press release following the judgment of the German Constitutional Court of 5 May 2020; https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf) and the statement by the President of the European Commission (https://ec.europa.eu/commission/presscorner/detail/en/statement_20_846).

115 Corresponding problems already existed in the past; cf. *Mangold*, Der Widerspenstigen Zähmung, Legal Tribune Online of 13.05.2020 (https://www.lto.de/recht/hintergruende/h/bverfg-ezb-urteil-provokation-eugh-eu-vertragsverletzungsverfahren/).

2. *Securing media freedom and pluralism through the instruments of a value-based and militant democracy in the EU*

Both the Basic Law and the EU Treaty, as well as the ECHR,[116] take not only substantive legal but also procedural precautions to defend the value-based decision for a free and democratic basic order – which presupposes the freedom and pluralism of the media and protects them from threats – against efforts made to undermine it.[117] In the constitutional order of the Basic Law, this procedural effectuation of said value-based decision is expressed in particular in Art. 9(2) of the Basic Law with the possibility of banning unconstitutional associations as a "manifestation of a pluralist and at the same time militant constitutional democracy"[118], Art. 18 of the Basic Law with rules on the forfeiture of fundamental rights,[119] Art. 20(4) of the Basic Law with a subsidiary right of resistance of all Germans against anyone who undertakes to eliminate the free democratic order of the Basic Law, as a form of decentralized control of the militancy of democracy,[120] Art. 21(2) of the Basic Law, with its openness (subject to narrow substantive and formal conditions)[121] to a ban on unconstitutional

116 On the value-oriented integration and identity function of the ECtHR cf. *Keller/Kühne* in: ZaöRV 76 2016, 245, 299.

117 These constitutional safeguard mechanisms are, moreover, supplemented by the provisions of criminal law for the protection of the state and its free democratic order; cf. on this *Becker* in: Bucerius Law Journal 2012, 113, 114 et seq.

118 FCC, Order of the First Senate of 13 July 2018, 1 BvR 1474/12, para. 101.

119 For the course of the proceedings before the FCC cf. §§ 36 to 41 BVerfGG; on the low practical relevance cf. *Schnelle*, Freiheitsmissbrauch und Grundrechtsverwirkung, p. 94 et seq.

120 Cf. on this *Nowrot*, Jenseits eines abwehrrechtlichen Ausnahmecharakters – Zur multidimensionalen Rechtswirkung des Widerstandsrechts nach Art. 20 Abs. 4 GG, p. 21.

121 In the view of the FCC in its decision in the NPD party-ban proceedings, the party ban under Art. 21(2) of the Basic Law represents "the sharpest weapon, albeit a double-edged one, a democratic state under the rule of law has against an organised enemy" (FCC, Judgment of the Second Senate of 17 January 2017, 2 BvB 1/13, para. 405). It is intended "to counter risks emanating from the existence of a political party with a fundamentally anti-constitutional tendency and from the typical ways in which it can exercise influence as an association" (ibid., para. 514). In its view, the concept of the free democratic basic order within the meaning of Art. 21(2) of the Basic Law in this context covers only "those central fundamental principles which are absolutely indispensable for the free constitutional state" – human dignity (Art. 1(1) Basic Law), the principle of democracy with the possibility of equal participation by all citizens in the process of forming the political will as well as accountability to the people for the exercise of

parties, Art. 21(3) of the Basic Law with the possibility, introduced as a result of the FCC's NPD decision, of excluding from state funding parties whose objectives or the behavior of their supporters are aimed at undermining or abolishing the free democratic basic order or endangering the existence of the Federal Republic of Germany, and Art. 73(1) No. 10 (b) of the Basic Law, which contains provisions on the cooperation between the Federation and the Länder in the area of the protection of the constitution[122].

In the TEU, this value-based decision finds procedural recognition in particular in Art. 7 with the possibility, at least theoretically[123], of suspend-

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state authority (Art. 20(1) and (2) Basic Law), the principle that organs of the state be bound by the law – rooted in the principle of the rule of law – (Art. 20(3) Basic Law) and independent courts' oversight in that regard, as well as the reservation for the use of physical force for the organs of the state which are bound by the law and subject to judicial oversight; on these requirements cf. ibid., para. 535 et seq.
In order to prohibit a political party, it is not sufficient that its aims are directed against the free democratic basic order. Instead, the party must "seek" to undermine or abolish the free democratic basic order. The notion of "seeking" requires active behaviour in that respect. The prohibition of a political party does not constitute a prohibition of views or ideology. In order to prohibit a political party, it is necessary that a party's actions amount to a fight against the free democratic basic order. It requires systematic action of the political party that amounts to a qualified preparation for undermining or abolishing the free democratic basic order or aims at endangering the existence of the Federal Republic of Germany. It is not necessary that this results in a specific risk to the goods protected under Art. 21(2) GG. Yet it requires specific and weighty indications which suggest that it is at least possible that the political party's actions directed against the free democratic basic order of the Federal Republic of Germany or against its existence could be successful (ibid., headnote 6; cf. ibid., para. 570 et seq.).

122 Cf. Gesetz über die Zusammenarbeit des Bundes und der Länder in Angelegenheiten des Verfassungsschutzes und über das Bundesamt für Verfassungsschutz (Bundesverfassungsschutzgesetz – BVerfSchG) (Law on Cooperation between the Federal Government and the Länder in Matters Relating to the Protection of the Constitution and on the Federal Office for the Protection of the Constitution, Federal Constitutional Protection Act) of 20 December 1990 (BGBl. I, p. 2954, 2970), last amended by Art. 2 of the Law of 30 June 2017 (BGBl. I, p. 2097); *Cremer* in: Isensee/Kirchhof, vol. VII, § 278.

123 On the weaknesses of the Art. 7 TEU procedure cf. e.g. *Möllers/Schneider*, Demokratiesicherung in der Europäischen Union, p. 45 et seq., 120 et seq.; *Yamato/Stephan* in: DöV 2014, 58, 58 et seq.

ing Member State rights,[124] and in the ECHR in Art. 17 with the prohibition of the abuse of fundamental rights[125]. According to its factual and procedural design, Art. 7 TEU can be invoked in exceptional circumstances only. The political nature and special procedure of this particularly controversial and difficult-to-apply Article set an extremely high threshold for its application.[126]

By granting the EU a supervisory competence that also encompasses the freedom and diversity of the media with regard to the legal order of the Member States, a certain conflict arises with the restraint of the European Treaties in relation to a positive media order of the EU and its institutions. However, this supervisory competence is structurally parallel to the EU's respective supervisory competence – also with regard to the media regulations of the Member States – on the basis of the fundamental freedoms of the internal market and the EU's competition regime. The imperative of protecting the media regulation of the Member States from Union law, as can be derived not least from an overall view of the rules and limits on the exercise of competences in the European Treaties, speaks in favor of a restrained exercise of EU supervision. It is true that this does not affect the prerogative of the competent EU institutions to assess the existence of the factual prerequisites of Art. 7 TEU. Coordination as to the content of media diversity law in the Member States by way of not only procedural but also substantive harmonization of the constituent elements of Art. 7 TEU in conjunction with Art. 2 TEU – including harmonization of the requirements arising from the pluralism requirement of the TEU's set of values – could hardly be reconciled with the division of competences as laid down in the European Treaties and the imperative of mutual consideration between the TEU and its Member States anchored therein.

124 Cf. e.g. European Commission, Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based, COM(2003) 606 final; *Schmitt von Sydow* in: Revue du droit de l'union européenne 2001, 285, 288 et seq.

125 Cf. *Cannie/Voorhoof* in: Netherlands Quarterly of Human Rights 2011–1, 54, 56 et seq.; *Struth*, Hassrede und Freiheit der Meinungsäußerung, p. 206 et seq.

126 Cf. *Vīķe-Freiberga et al.* (High-Level Group on Media Freedom and Pluralism), Report on a free and pluralistic media to sustain European democracy, p. 21.

III. The competence areas of the EU with reference to media regulation – an overview

1. The internal market competence of the EU

a. Introduction

According to Art. 26(2) TFEU, "the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties".

In principle, there are two basic forms of effect of Union law to be distinguished which either promote an ever closer union of the European peoples (paragraph 1 of the Preamble to the TFEU) with regard to the EU's internal market objective also, or inhibit a contrary development: (1.) restrictions of the Member States' freedom of action related to the freedom dimensions of the internal market by conflicting Union law (passive-limiting integration) and (2.) active intervention of Union law by means of replacing and supplementing national rules (active-formative integration) – including EU activities below decisionmaking level, in particular financial support measures.[127]

In particular, the CJEU's jurisprudence, which is oriented toward dynamic interpretation of Union law, has promoted passive-limiting internal market integration. The case law of the CJEU points in the direction of a uniform doctrine regarding the fundamental freedoms of the internal market,[128] which, within the framework of the so-called negative integration of the EU, are directed towards the removal of all restrictions on the exer-

127 Cf. *Ukrow/Ress* in: Grabitz/Hilf/Nettesheim, Art. 167 TFEU, para. 22 with further references; *Garben* in: Kellerbauer/Klamert/Tomkin, Art. 167 TFEU, para. 6; cf. in general *Klamert/Lewis* in: Kellerbauer/Klamert/Tomkin, Art. 26 TFEU, para. 1.

128 Cf. on this *Classen* in: EWS 1995, 97, 97 et seq.; *Ehlers* in: id., p. 177 et seq., 184; *Frenz*, Handbuch Europarecht vol. 1, para. 447; *Hirsch* in: ZEuS 1999, 503, 507 et seq.; *Kingreen*, Die Struktur der Grundfreiheiten des Europäischen Gemeinschaftsrechts, p. 44 et seq.; *Klamert/Lewis* in: Kellerbauer/Klamert/Tomkin, Art. 26 TFEU, para. 11; *Mojzesowicz*, Möglichkeiten und Grenzen einer einheitlichen Dogmatik der Grundfreiheiten, p. 133 et seq.; *Mühl*, Diskriminierung und Beschränkung. Grundansätze einer einheitlichen Dogmatik der wirtschaftlichen Grundfreiheiten des EG-Vertrages, p. 30 et seq., 198 et seq.; *Plötscher*, Der Begriff der Diskriminierung im Europäischen Gemeinschaftsrecht; *Schleper* in: Göttinger Online-Beiträge zum Europarecht, No. 16 (2004), 1, 1 et seq.; *Streinz*, Konvergenz der Grundfreiheiten, 199, 206 et seq.

cise of the fundamental freedoms. This covers not only direct or indirect discrimination, but also other measures, even if they apply without distinction to national providers of services and to those of other Member States, if they are likely to prohibit or otherwise impede the exercise of a service or establishment.[129]

Regulations that are based on the EU's various internal market competences in the exercise of active-formative integration have in common that they are ultimately determined. They must contribute to the establishment or functioning of the internal market. This is because, according to Art. 26(1) TFEU, the EU "shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties". Pursuant to Art. 26(3) TFEU, it is the Council, acting on a proposal from the Commission, who "shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned".

This progressive dimension of the internal market – notwithstanding the changes that in the meantime have been made to the treaty provisions with regard to the definition of the internal market and the harmonization of laws governing the internal market – indicates the continuing relevance of the legal barriers placed by the CJEU on EU legislation based on the internal market clause in its fundamental ruling on the ban on tobacco advertising of 5 October 2000. Accordingly, a legal act based on Art. 114 TFEU must actually have the purpose of improving the conditions for the establishment and functioning of the internal market.

> *"If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article 100 a* [TEC, now: Art. 114 TFEU] *as a legal basis, judicial review of compliance with the the proper legal basis might be rendered nugatory*."[130]

Although, according to the CJEU, the European legislature may act on the basis of the internal market harmonization clause to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws, their emergence must be "likely and the measure in question must be designed to prevent them."[131]

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129 Cf. CJEU, case C-76/90, *Manfred Säger / Dennemeyer & Co. Ltd*.
130 CJEU, case C-376/98, *Germany / Parliament and Council*, para. 84.
131 CJEU, case C-376/98, *Germany / Parliament and Council*, para. 86.

This suggests that the internal market competence is to be exercised to remove obstacles and not to enact even greater obstacles to the exercise of fundamental freedoms[132] – without prejudice to the continuing competence of the Member States to provide for at least temporary restrictions to the fundamental freedoms in the non-harmonized area for reasons as laid down in the respective treaty exception clauses to the fundamental freedoms or for reasons of overriding public interest. This rules out measures whose goal is not at least some degree of deregulation as well. Such deregulatory measures can in principle also be of harmonizing nature, but not every measue of harmonization necessarily also removes obstacles to the internal market.[133]

b. The competence in relation to the freedom of establishment

According to Art. 49(1) TFEU and within the framework of the provisions on the freedom of establishment, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited.[134] Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Art. 49(2) TFEU provides that freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular undertakings or firms within the meaning of Art. 54(2) TFEU, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Treaty provisions relating to capital.

In order to attain freedom of establishment as regards a particular activity, Art. 50(1) TFEU confers on the European Parliament and the Council the competence, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, to act by means of directives. Such activity may also involve audiovisual production and distribution, including aggregation, selection and presentation of audiovisual offerings.

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132 Cf. CJEU, case C-233/94, *Germany / Parliament and Council*, para. 15, 19.

133 Cf. *Ress/Bröhmer*, Europäische Gemeinschaft und Medienvielfalt, p. 40.

134 On the question of possible impairments of fundamental freedoms by the Member States' exercise of competences cf. chapter C.IV.1.

The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under Art. 49 and 50(1) TFEU, in line with Art. 50(2)(a) TFEU, in particular by according, as a general rule, priority treatment to activities where freedom of establishment makes a particularly valuable contribution to the development of production and trade. In view of the importance of digitization for all existing and emerging business models, the fact that activities related to the creation of the digital single market should be given priority does not require any special explanation.

Pursuant to Art. 50(2)(f) TFEU, the EU legislature also effects the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State and as regards the subsidiaries in the territory of a Member State and as regards the conditions governing the entry of personnel belonging to the main establishment into managerial or supervisory posts in such agencies, branches or subsidiaries. This clause is of considerable importance, not least in view of the strategic expansion plans of the large U.S. Internet giants, many of which are also increasingly relevant in the process of safeguarding media freedom and diversity, if they develop their diversity-relevant business activities in EU Member States from a subsidiary based in another EU Member State, such as Ireland.

Art. 50(2)(g) TFEU provides that European Parliament and Council shall coordinate "to the necessary extent" the "safeguards" which are required by Member States of undertakings or firms within the meaning of Art. 54(2) TFEU for the protection of the interests of their members "and others", with a view to making such safeguards equivalent throughout the Union. Whether these "others" can also refer to the democratic public as such seems against the background of the individual-personal link mentioned in the provision highly doubtful. But also the position as a "third party" within the meaning of Art. 50(2)(g) TFEU of the individual user of media offerings produced, aggregated, selected, presented or disseminated by an undertaking – even taking into account a sovereign duty to protect media freedom and diversity which also determines legislation – appears more than questionable, especially since these duties to protect do not have an inherent dimension that gives rise to individual claims.

Art. 50(1) TFEU grants in principle a competence to abolish national non-discriminatory restrictions on the freedom of establishment or to replace them by a common provision of Union law, and this even if the Member State regulations are justified by overriding requirements in the

general interest and thus comply with Union law.[135] Such common rules facilitate the establishment in other Member States, since it is then in principle no longer necessary to deal with a multitude of regulations for the protection of the public interest.[136] This applies not only to safeguards with respect to familiar challenges, but also to new challenges that are just developing. This is because the concept of protection in relation to general interest does not necessarily have to be repressive, but can also be prophylactic-preventive in nature.

For the specification of the Union's competence to harmonize laws in the area of freedom of establishment, the question therefore arises whether the EU may regulate all aspects that in any way facilitate economic activity outside the own state. *De facto*, this would be tantamount to recognizing an all-encompassing economic competence of the EU, as in the age of comprehensive standardization, hardly any circumstances are conceivable in the area of economic activity in the broadest sense that are not regulated in some way by law. Harmonization under Union law would always be in conformity with Union law simply because of the resulting unification of law, as long as the rules and limits on the exercise of competence in Art. 4 and 5 TEU[137] are observed. The assertion of such a harmonization competence would be practically the same as a competence-competence rejected – as has been shown[138] – under Union and constitutional law.[139]

It is in line with the principle of conferral that also in connection with the realization of the freedom of establishment the authorization under Art. 50(1) TFEU is not infinite but clearly limited and – in contrast to the competence of the Member States – requires legitimation and justification.[140] An establishment-related coordination and harmonization competence does not therefore exist already in the case of every conceivable contact of different Member State legal systems with, or effect of their differences on the exercise of the freedom of establishment.

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135 Cf. *Lenz* in: EuGRZ 1993, 57, 60 et seq.; *Ress/Bröhmer*, Europäische Gemeinschaft und Medienvielfalt, p. 34.

136 Cf. *Liehr*, Die Niederlassungsfreiheit zum Zwecke der Rundfunkveranstaltung und ihre Auswirkungen auf die deutsche Rundfunkordnung, p. 249 et seq.

137 Cf. on this chapter B.V.

138 Cf. on this chapter B.V.

139 Cf. *Ress/Bröhmer*, Europäische Gemeinschaft und Medienvielfalt, p. 34.

140 Cf. *Jarass*, Die Kompetenzen der Europäischen Gemeinschaft und die Folgen für die Mitgliedstaaten, p. 6.; *Ress/Bröhmer*, Europäische Gemeinschaft und Medienvielfalt, p. 36.

Mere differences in national legislation – as e.g. in the case of licensing or concession systems in different professions – are not in themselves a reason for regulation on the part of the EU. Neither a single regime (uniform regulations) nor substantively aligned (coordinated) rules are necessary for the establishment or functioning of the internal market. In particular, if Member State regulations *de facto* discriminate against EU third-country nationals, there may be a need for regulation, but not already when the conditions for the provision of services or establishment in the Member States differ. Since safeguarding media diversity and establishing media pluralism are not internal market objectives as such, these objectives may not be made a regulatory means by way of an alleged de facto obstacle to establishment or service provision.[141]

c. The competence in relation to the freedom to provide services

Freedom to provide services, which is enshrined in Art. 56 et seq. TFEU, relates, according to Art. 57 TFEU, to services that are normally provided for remuneration, in so far as they are not subject to the other overriding fundamental freedoms.[142] Media services are also covered by this competence title: Although media are (also) cultural goods, their (also) economic aspects mean that, unless they are goods, they are also economic services within the meaning of the definition in Art. 57 TFEU.[143]

In addition to the active freedom to provide services – the freedom of the service provider to provide his service in another Member State under the same conditions as a service provider established there – the competence title regulating the freedom to provide services also covers the passive freedom to provide services[144], i.e. the right of the recipient to receive a service in another Member State from a service provider established

141 Cf. *Ress/Ukrow*, Die Niederlassungsfreiheit von Apothekern, p. 42 et seq.

142 On the scope of application of the freedom to provide services and the question of possible impairments of fundamental freedoms by the Member States' exercise of competences cf. chapter C.IV.1.

143 This classification also includes – as does the audiovisual sector within the meaning of Art. 167(2), fourth indent, TFEU (on this *Calliess/Korte*, Dienstleistungsrecht in der EU, § 5, para. 88), and in continuous contrast to the AVMSD amended in 2018 – radio broadcasts of both a linear and non-linear nature. Critical on the AVMSD's continued blindness to radio broadcasting *Ukrow*, Zum Anwendungsbereich einer novellierten AVMD-Richtlinie, p. 3.

144 Cf. on this *Randelzhofer/Forthoff* in: Grabitz/Hilf/Nettesheim, Art. 49/50 TFEU, para. 1, 51; *Dony*, Droit de l'Union européenne, para. 680.

there. In addition, the competence title also includes the so-called freedom to provide services by correspondence, where it is neither the provider nor the recipient of a service, but the service itself that crosses the border.[145] This type of freedom to provide services is of particular importance in connection with cross-border media offerings.[146] This also applies to services provided by media intermediaries such as media agencies: The regulation of services relating to the aggregation, selection or presentation of media content, whether of a journalistic or commercial-communicative nature, is also covered by the competence title of the regulation of the freedom to provide services.

However, there is little to suggest that the competence title as regards freedom to provide services could be used to regulate media diversity in the EU. Not least the approach to the area of audiovisual services in the practice of applying the possibilities opened up by primary law to regulate the freedom to provide services to date suggests against such a competence title.

Accordingly, in Art. 2(2)(g) of Directive 2006/123/EC on services in the internal market[147], the EU excluded "audiovisual services, including cinematographic services, whatever their mode of production, distribution and transmission, and radio broadcasting" from the scope of this directive.[148] The reason for this exception was not least the concern about a possible circumvention of the specific secondary law for audiovisual media in the EU[149] – and thus, incidentally, also the concern about a disregard of Member State competences and responsibilities for ensuring media diversity.

Moreover, there is no conceivable parallel between media diversity regulation by means of an EU directive and the AVMSD. This is because that directive continues – as was the case with the EEC Television Directive[150] – to focus on regulating certain minimum requirements for cross-border audiovisual offerings, in particular comparable requirements for the protection of minors, the protection of human dignity and commercial com-

145 Cf. e.g. *Calliess/Korte*, Dienstleistungsrecht in der EU, § 3, para. 25 et seq.
146 Cf. already CJEU, case 155/73, *Giuseppe Sacchi*, para. 6.
147 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376 of 27.12.2006, p. 36–68.
148 According to sentence 2 of rec. 24 of that directive, "[f]urthermore, this Directive should not apply to aids granted by Member States in the audiovisual sector which are covered by Community rules on competition".
149 Cf. *Calliess/Korte*, Dienstleistungsrecht in der EU, § 5, para. 86.
150 Cf. on this *Ress/Bröhmer*, Europäische Gemeinschaft und Medienvielfalt, p. 42.

munications (specifically advertising, sponsorship and teleshopping), on which depended the validity of both the principles of free cross-border retransmission of audiovisual offerings and of country of origin control – i.e. the freedom of the service to be offered in the country of origin and received in a third country – but also the freedom of the service from multiple controls itself. Requirements on the pluralism (internal and external pluralism) of radio and television broadcasters or of providers of telemedia such as video-sharing services would, however, have nothing to do with the transferability (marketability) of these audiovisual offerings.

However, something different could apply in the case of a must-be-found or findability regulation in the online area as a new form of digital diversity protection, as it is now provided for in the MStV. This is because such regulation can at least indirectly restrict the free reception of audiovisual services.

d. Interim conclusion

It is difficult to derive from the EU's internal market competences an authorization for the EU to harmonize the law in the area of media diversity protection. The competence title of freedom of establishment must be interpreted narrowly, as only this corresponds to the character of a Union of Member States whose national identity must be preserved. In particular, any regulatory approach that would reduce the degree of entrepreneurial freedom in the internal market would hardly be compatible with the internal market concept of Art. 26 TFEU, aimed at progress towards cross-border free development. Furthermore, against the use of regulatory competences in relation to the freedom to provide services can be argued that it is likely to be only indirectly affected by national regulations in the area of safeguarding diversity.[151]

2. The EU competition regime

Competition law focuses on market power, diversity protection law on power over opinions.[152] They are therefore two separate matters in which

151 Cf. *Ress/Bröhmer*, Europäische Gemeinschaft und Medienvielfalt, p. 43.

152 Cf. on the considerations beyond the references to competence rules that are in focus here in detail chapter C.IV.2. and on merger control chapter D.II.4.

the respective control of power is also carried out with different instruments. However, control of market and opinion power are not phenomena without any points of contact. Rather, antitrust law under competition law goes hand in hand with the law of securing diversity of opinion. In particular, the competition regime is generally suitable for achieving the goal of a diverse offering as a side effect, so to speak.[153]

In the area of competition policy, the EU not merely has a shared competence – as is the case with the internal market regime – but rather an exclusive one, as set out in detail in Art. 101 et seq. TFEU – in the form of the control of a ban on cartels (i.e. the prohibition of concerted practices by colluding in an anti-competitive manner, antitrust), the abuse of a dominant market position, merger and State aid.[154] With a view to ensuring diversity in the media sector, this is of recognizable relevance to the market organization of the media.

However, the practical significance of these supervisory instruments is put into perspective by the fact that most media markets are still essentially national in scope and strongly defined by national borders – even if a high proportion of the media in some Member States are foreign-owned.

Primary Union law does not a priori preclude an exercise of supervisory competence in which ownership concentration is considered not only with regard to specific media (sub)genres, such as press, radio and television, but also across different media and with regard to distribution channels. In this respect, Union law in its the starting point is not limited to a television-centric perception of control, in which media-relevant related markets are considered for purposes of illustration at best, but is open to a dynamic understanding not least of market definition as well as of a dominant position. The latter also enables a reaction in supervisory practice that takes into account network effects of the digital platform economy.

Intermediary digital platforms, such as search engines, news aggregators, social networks and app stores,[155] can also be subject to supervision of the media sector, without EU competition law being in conflict with this from the outset. However, their ever-increasing relevance for effectively safeguarding the freedom and diversity of the media is not an aspect that is

153 Cf. *Cole*, Europarechtliche Rahmenbedingungen für die Pluralismussicherung im Rundfunk, p. 93, 104 et seq.; *Jungheim*, Medienordnung und Wettbewerbsrecht im Zeitalter der Digitalisierung und Globalisierung, p. 249 et seq.

154 Cf. on this *Ukrow* in: UFITA 2019, 279, 279 et seq.

155 Cf. on these possible addressees of the competition regime *Vike-Freiberga et al.* (High-Level Group on Media Freedom and Pluralism), Report on a free and pluralistic media to sustain European democracy, p. 27.

allowed beyond doubt to (co-)shape the perception of competition rules under Union law.

Given its particular significance for the free formation of individual and public opinion, as well as for social cohesion in Member States and their cultural state characteristics, the media sector, to the extent that concentration tendencies are at issue, cannot indeed be measured exclusively against the standards of the general rules on antitrust and merger control. After all, as actors bound by fundamental rights and values, the EU institutions[156] are also required to take into account the effects of their actions on democracy, fundamental rights and culture. However, the consideration of fundamental rights as well as democratic and cultural principles and requirements is equally imperative in the context of competition policy and, for example, expressly required under Art. 167(4) TFEU at the interface of the protection of cultural opportunities for action and the duty of supervision under competition law.[157]

Competition can in fact promote pluralism, but it does not necessarily do so, as it can also lead to a greater uniformity and homogenization of the content on offer. In shaping competition policy, the Commission is required also against this background to pay attention to market concentration not only from the point of view of competition, but as well from that of pluralism. Media consumption should therefore be taken into account in the question of which facts the Commission subjects to scrutiny as well.[158]

With regard to the cultural dimension of the media, the exemption under State aid rules, provided for in Art. 107(3)(d) TFEU, is of particular importance: According to this provision, "aid to promote culture and heritage conservation" may be considered "to be compatible with the internal market" "where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest".

The so-called Amsterdam "Protocol on the system of public broadcasting in the Member States", "considering that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism" takes up this imperative of an interpretation of Union law that preserves the Member States' room for maneuver by providing, as "interpreta-

156 Cf. on this below, chapter B.VI.1.

157 Cf. *Ress/Bröhmer*, Europäische Gemeinschaft und Medienvielfalt, p. 45.

158 Cf. *Vike-Freiberga et al.* (High-Level Group on Media Freedom and Pluralism), Report on a free and pluralistic media to sustain European democracy, p. 27.

tive provisions" annexed to the TEU and the TFEU, that the provisions of these Treaties "shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account".[159]

The Amsterdam Protocol openly addresses the tension that can exist between the democratic, social and cultural dimensions of the media and their economic relevance – a tension that, incidentally, is not limited to public service broadcasting as a media (sub)genre. While the former dimensions argue for a regulatory competence of the Member States, the potential internal market dimension of cross-border media engagement is obvious with regard to the latter.

3. *The EU's cultural competence*

The EU's reluctance to exercise positive regulatory competence over the media is reinforced in relation to the "audiovisual sector" by the culture Article of the TFEU. Art. 167 TFEU gives the EU a mandate to promote culture at the European level while respecting the Member States' "cultural" right of self-determination. In this context, Art. 167(1) to (3) TFEU both enables and limits the EU's active cultural policy.

Paragraph 1 states that the Union "shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore". According to Art. 167(2), fourth indent, TFEU, "[a]ction by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas: […] artistic and literary creation, including in the audiovisual sector".[160] Media are hereby recognized under primary law as at least

159 In detail on this also *Ukrow/Cole*, Aktive Sicherung lokaler und regionaler Medienvielfalt, p. 72 et seq.

160 This area of creative activity covers video and film as well as the entire broadcasting sector – thus, in deviation from the scope of the AVMSD, also radio broadcasting – and the areas of on-demand audiovisual media services and audiovisual commercial communication. Cf. also *Blanke* in: Calliess/Ruffert, Art. 167 TFEU,

also a cultural phenomenon – a dimension that continues to exist at least on an equal footing with the economic significance of media, notwithstanding the increasing importance of this sector for value creation in the internal market of the EU as well as globally.

The cautious formulations of "contributing" and "encouraging" already indicate that the EU's cultural policy is not intended to counteract, standardize or replace the respective policies of the Member States, but (merely) to assume a role as the guardian of European cultural creation[161].[162] The activities of the EU in the field of culture are therefore secondary to those of the Member States, as can also be seen from an overall view with further rules enshrined in both the TEU and the TFEU. The General Court of the European Union (GCEU) has also emphasized this subsidiarity in a ruling of 10 May 2016.[163] However, it also follows from the mutual obligation of loyalty between the EU and its Member States that the latter must support the former in the performance of its tasks under Art. 167(1) and (2) TFEU, although a resulting, separate obligation to provide financing is not assumed.[164]

Art. 167(4) TFEU establishes a rule for EU action outside the areas of cultural policy referred to in paragraphs 1 to 3, according to which "[t]he Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures". This provision is commonly referred to as a 'cultural horizontal clause' or 'cultural compatibility clause' but does not, however, describe a cultural reserve.[165] The EU system of competences, for example in the sense of an "*exception culturelle*", is not affected by the pro-

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para. 12; *Ukrow/Ress* in: Grabitz/Hilf/Nettesheim, Art. 167 TFEU, para. 128 et seq.; *Vedder* in: id./Heintschel von Heinegg, Art. 167 TFEU, para. 7; *Moussis*, Access to the European Union, p. 272 et seq.

161 Cf. on this also the preamble to the TEU, which states that the EU acts "drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law".

162 *Blanke* in: Calliess/Ruffert, Art. 167 TFEU, para. 1; *Garben* in: Kellerbauer/Klamert/Tomkin, Art. 167 TFEU, para. 2 et seq.; *Vedder* in: id./Heintschel von Heinegg, Art. 167 TFEU, para. 6.

163 Cf. GCEU, case T-529/13, *Izsák and Dabis / European Commission*, para. 96.

164 Cf. in detail *Hochbaum* in: BayVBl. 1997, 680, 681.

165 Cf. e.g. *Ukrow/Ress* in: Grabitz/Hilf/Nettesheim, Art. 167 TFEU, para. 148 et seq. with further references; *Garben* in: Kellerbauer/Klamert/Tomkin, Art. 167 TFEU, para. 5.

vision, i.e. it neither constitutes an independent legal basis of competences for the EU nor does it affect existing competences.[166] The obligation to take into account cultural aspects gives rise to a whole range of diversity-friendly and diversity-promoting requirements, which the EU must take into account in its legislation as well as in its supervision of the conformity of Member State conduct with EU law. In this context, the effects of the horizontal clause on media, telecommunications, state aid and other competition law in the EU are also worthy of attention in terms of active safeguarding of diversity.[167]

Art. 167(5) TFEU then determines the instruments and procedures available to the EU in order to contribute to the achievement of the objectives mentioned above. Only recommendations adopted by the Council on a proposal from the Commission and incentive measures adopted by the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, however excluding any harmonization of the laws and regulations of the Member States[168], shall be eligible in this context. The latter negative clause within the framework of the prohibition of harmonization prohibits the EU from recourse to the general competence titles for the harmonization of laws according to Art. 114, 115 TFEU as well as special such provisions.[169] Thus, this provision does not represent a general prohibition of harmonization for measures with effects on the cultural sector of life, but rather a prohibition of harmonizing cultural measures, which is already not applicable to competence titles outside of Art. 167 TFEU and therefore has no effects on such harmonization efforts by the EU that focus on other regulatory areas.

It follows from this system in Art. 167 TFEU that the EU, provided that it can rely on a legal basis from its catalog of competences, can also act (in a regulatory manner) beyond the limits of the obligations under Art. 167 TFEU, in particular the prohibition of harmonization in Art. 167(5) TFEU – which applies only to primarily culture-oriented measures – and beyond

166 *Lenski*, Öffentliches Kulturrecht, p. 142.

167 Cf. e.g. *Ukrow/Ress* in: Grabitz/Hilf/Nettesheim, Art. 167 TFEU, para. 163 et seq. with further references.

168 The significance of this exclusion was also emphasized by the General Court of the European Union in its judgment of 10.05.2016; cf. GCEU, case T-529/13, *Izsák and Dabis / European Commission*, para. 101 et seq.

169 *Blanke* in: Calliess/Ruffert, Art. 167 TFEU, para. 19; similar *Niedobitek* in: Streinz, Art. 167 TFEU, para. 55; cf. *Craufurd Smith* in: Craig/de Búrca, 869, 883, 886 et seq.

mere incentive measures[170].[171] However, the prerequisite arising from the cultural horizontal clause is that in this context, the EU must take cultural aspects into account, which regularly amounts to a consideration between cultural and other regulatory interests (e.g. economic aspects in EU competition law[172]).[173] Moreover, it follows from the systematics of the TFEU that cultural aspects may not be the focus of a Union law-based regulation.[174]

However, what is to be understood by cultural aspects within the meaning of Art. 167 TFEU is not conclusively clarified, as EU law does not contain a definition in this regard.[175] In any case, the contours of the terminology must be drawn in accordance with Union law and must not be given

170 There is no common understanding of what is meant by incentive measures within the meaning of Art. 167(5) TFEU. In part (cf. *Blanke* in: Calliess/Ruffert, Art. 167 TFEU, para. 18), this is understood to mean only actual and administrative measures of the EU, both financial and non-material, but in part (*Ukrow/Ress* in: Grabitz/Hilf/Nettesheim, Art. 167 TFEU, para. 176) recourse to measures of a general regulatory nature without legally binding force is also considered permissible. Cf. further *Craufurd Smith* in: Craig/de Búrca, 869, 888 et seq.

171 *Lenski*, Öffentliches Kulturrecht, p. 142.

172 A special form of the horizontal effect derived from Art. 167 TFEU can be found in particular in Art. 107(3)(d) TFEU, which allows the European Commission to permit Member State cultural aid under certain circumstances.

173 Cf. on this also the judgment of the GCEU in case T-391/17, *Romania / European Commission*, which dealt with the question whether a European Citizens' Initiative notified to the Commission for registration with the aim of improving the protection of national and linguistic minorities and strengthening cultural and linguistic diversity in the Union was already outside the scope of competence for the adoption of legal acts by the EU and should therefore already be classified as unlawful and not be registered. Since the Commission at the registration stage excludes only initiatives aimed at legislative proposals manifestly outside the scope of competence, the question of the scope of use of the competences is not addressed in detail. However, in the context of Art. 167(5) TFEU, the General Court points out (para. 56, 61 et seq.) that legislative proposals intended to complement the Union's action in its areas of competence in order to ensure the preservation of the values listed in Art. 2 TEU and the rich cultural and linguistic diversity referred to in Art. 3(3)(4) TEU are not excluded from the outset, given that the Commission has to take into account the values and objectives of the Union in every legislative proposal and can thus also, in principle, make them the subject of a specific proposal, as long as this does not manifestly violate the values of the Union itself.

174 Settled case law of the CJEU, cf. for instance case C-155/91, *Commission of the European Communities / Council of the European Communities*.

175 Cf. also *Ukrow/Ress* in: Grabitz/Hilf/Nettesheim, Art. 167 TFEU, para. 150; *Garben* in: Kellerbauer/Klamert/Tomkin, Art. 167 TFEU, para. 4 et seq.

their imprint by the various conceptions of the Member States, as the latter would otherwise have it in their hands themselves to define the scope of the EU's duty of consideration contained in Art. 167 TFEU.[176] Incidentally, however, the various definitional approaches differ in particular with regard to their respective scope.[177] Regardless of whether, in the sense of a broad understanding, one understands it to mean "the combined spiritual, material, intellectual and emotional characteristics of a society or social group", which, "[i]n addition to literature and the arts, […] encompasses life-style, fundamental human rights, values, traditions and beliefs"[178], or whether one only understands certain areas of intellectual and creative human activity, which undisputedly include art, literature and music, but also the audiovisual sector, as a systematic interpretation of Art. 167 TFEU shows,[179] can in the present case be left aside against the background that the media serve at least as a forum for the activities that are already protected within the framework of the narrow understanding of the definition and thus not only transport culture, but themselves establish cultural products, not least in the form of journalistic-editorial contributions. Specifically for audiovisual media, this creative-artistic function is also explicitly recognized as such in Art. 167(2), fourth indent, TFEU. But even beyond that, the concept of culture or the "cultural aspects" enshrined in Art. 167 TFEU will also have to be attributed to activities of authors as well as – even if only content-related – activities of the media, their carriers, employees and products, and likewise the media-specific aspects of the protection of pluralism (with regard to the diversity of information and opinion) and the diversity of the media.[180]

176 *Roider*, Perspektiven einer Europäischen Rundfunkordnung, p. 57; cf. *Craufurd Smith* in: Craig/de Búrca, 869, 874 et seq.

177 Cf. on this and the following *Roider*, Perspektiven einer Europäischen Rundfunkordnung, p. 58; *Craufurd Smith* in: Craig/de Búrca, 869, 874 et seq.

178 Opinion on the Communication from the Commission on a fresh boost for culture in the European Community, 88/C 175/15, OJ C 175 of 04.07.1988, p. 40.

179 On a systematic interpretation of the TFEU, the areas of education and science, by contrast, are exempt in view of their regulation outside Art. 167 TFEU.

180 Same as here *Schwarz* in: AfP 1993, 409, 417 with further references.

IV. Objectives of the EU and their significance as regards competences in view of media regulation

1. Media regulation-related goals of the EU

Art. 3 TEU establishes objectives of the Union to be achieved through integration – in the sense of a target-oriented system of action and not solely 'for the sake of integration' itself.[181] Art. 3(3)(4) TEU contains in this context the objective that the Union shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced. The objective is therefore not to create a uniform European culture or 'Euroculture', but to preserve existing cultural diversity, whose strengths lie precisely in the diversity that has grown historically.[182] The cultural heritage is composed of the national cultures of the Member States, which in turn can also include individual regional and local aspects, although a European identity as a conglomerate of these cultures also appears alongside it.[183] Against this background, measures at domestic level that are necessary to protect national and regional languages and cultures are endorsed at European level, because this ultimately contributes to cultural diversity – one of the fundamental European values.[184]

For the media, this is significant insofar as they are seen as playing a key role in protecting local cultures (whether at the state or regional level) and thus also in protecting Europe's cultural diversity.[185]

It should be noted that Art. 3(3)(4) TEU, as is the case with Art. 2 TEU, strictly does not create an autonomous legal basis in terms of competence. In this respect, the objectives laid down in Art. 3 TEU are, from the perspective of competence, generally neutral or supplementary: They do not

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181 *Ruffert* in: Calliess/id., Art. 3 TEU, para. 3; generally on the target-orientation also *Müller-Graf* in: Pechstein et al., Art. 3 TEU, para. 1; *Heintschel von Heinegg* in: Vedder/id., Art. 3 TEU, para. 3; *Pechstein* in: Streinz, Art. 3 TEU, para. 2; *Klamert* in: Kellerbauer/id./Tomkin, Art. 3 TEU, para. 3 et seq.; *Sommermann* in: Blanke/Mangiameli, Art. 3 TEU, para. 1 et seq., and *Dony*, Droit de l'Union européenne, para. 54.

182 *Von Danwitz* in: NJW 2005, 529, 531.

183 *Neumann*, Das Recht der Filmförderung in Deutschland, p. 43, with further references.

184 Same as here *Vike-Freiberga et al.* (High-Level Group on Media Freedom and Pluralism), Report on a free and pluralistic media to sustain European democracy, p. 45.

185 *Vike-Freiberga et al.* (High-Level Group on Media Freedom and Pluralism), Report on a free and pluralistic media to sustain European democracy, p. 13.

create an original regulatory competence for the EU and its institutions in the sense of options for positive integration through legal acts based solely on Art. 3 TEU, but at the same time they also do not inhibit the exercise of competence titles of the EU that exist elsewhere, but rather give this exercise a aim and direction.

2. *The flexibility clause of Art. 352 TFEU to reach EU objectives and its significance for media regulation*

However, this neutrality of the EU's catalog of objectives as regards the EU's competences is affected by the so-called "dispositive powers" according to Art. 352 TFEU: If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, which comprise culture including the media sector, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.

To speak of a "flexibility clause" in this context seems misguided because the use of this opening clause as regards competences is linked to high hurdles:

- According to Art. 352(2) TFEU, the Commission shall draw national Parliaments' attention to proposals based on this Article by using the procedure for monitoring the subsidiarity principle referred to in Art. 5(3) TEU.
- Measures based on Art. 352 shall, according to its paragraph 3, not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation – which is the case with media-related regulation with an orientation towards culture or safeguarding of diversity pursuant to Art. 167(5) TFEU.
- Finally, a unanimous decision is required in the Council itself.

The CJEU has clarified that Art. 352 TFEU, "being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. […] [Art. 352 TFEU] cannot be used as a basis for the adoption of

provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose".[186]

This case law is also referred to in Declaration 42 of the Intergovernmental Conference on the Treaty of Lisbon[187]:

> *"The Conference underlines that, in accordance with the settled case law of the Court of Justice of the European Union, Article 352 of the Treaty on the Functioning of the European Union, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaties as a whole and, in particular, by those that define the tasks and the activities of the Union. In any event, this Article cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaties without following the procedure which they provide for that purpose."*

The FCC ruled in its Lisbon judgment that the formal approval of the Bundestag and the Bundesrat by law is required for Germany's representative in the Council to approve an act to be adopted on the basis of Art. 352 TFEU.[188] With regard to a legal act affecting media regulation, the approval of the state parliaments may also be required.[189]

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186 CJEU, opinion 2/94 of 28.03.1996, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Reports of Cases 1996 I-01759, para. 30.

187 OJ C 326 of 26.10.2012, p. 353.

188 FCC, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08, para. 417: "In so far as the flexibility clause under Article 352 TFEU is used, this always requires a law within the meaning of Article 23.1 second sentence of the Basic Law." This was stipulated in Art. 8 of the Act on the Exercise by the Bundestag and by the Bundesrat of their Responsibility for Integration in Matters concerning the European Union (Responsibility for Integration Act) (Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union (Integrationsverantwortungsgesetz – IntVG)) of 22 September 2009.

189 The Polish Cooperation Act also provides specific safeguards with respect to Art. 352 TFEU, which the Polish Constitutional Court considered necessary in its Lisbon judgment (judgment of 24.11.2010 (K 32/09, English version in "Selected Rulings of the Polish Constitutional Tribunal Concerning the Law of the European Union (2003–2014)", *Biuro Trybunału Konstytucyjnego*, Warsaw, 2014, p. 237 (available at http://trybunal.gov.pl/uploads/media/SiM_LI_EN_calosc.pdf). In contrast, the Czech and French constitutional courts have interpreted the flexibility clause as already being covered by the ratification of the European treaties. Other Member States, such as Austria, Denmark, Sweden, Finland, or Spain, have provisions that do not specifically refer to Art. 352

V. The exercise of competence rules and its limitations

1. Introduction

In addition to the principle of conferral and the catalog of competences for the EU, safeguard mechanisms under substantive law, namely rules and limits on the exercise of competences, should ensure that the individual competences existing at the European level are exercised in a manner that preserves the competences of the Member States. These rules include the imperative to respect the national identity of the Member States (Art. 4(2) TEU), the principle of sincere cooperation (Art. 4(3) TEU), the principle of subsidiarity (Art. 5(1) sentence 2, (3) TEU), and the principle of proportionality (Art. 5(1) sentence 2, (4) TEU). These principles were confirmed by the Treaty of Lisbon and had their content specified in some cases.

The tension that may exist between the objective enshrined in Art. 3(3) sentence 1 TEU, i.e. to establish a single European market for the benefit of EU citizens and undertakings based in the EU, and the requirements to respect the national identity of the Member States (Art. 4(2) TEU) and the richness of cultural diversity (Art. 3(3) TEU), may unfold in particular in connection with EU rules on safeguarding media diversity. Ultimately, resolving this tension is regularly a judicial task. This is because the rules and limitations on the exercise of competence outlined below are all justiciable.

In accordance with the wording of the Treaties, the CJEU has jurisdiction to make a comprehensive assessment of complaints concerning any breach of these principles. In this context, the core issues are the action for annulment pursuant to Art. 263 TFEU and the plea of illegality (collateral review) pursuant to Art. 277 TFEU. It is also possible to incidentally review the matter in the context of a preliminary ruling procedure as provided for in Art. 267 TFEU. This makes ex post control possible, even against overly "integration-friendly" legislative activities of the EU institutions in the area of media regulation.

Therefore, the question of the degree to which the relationship between the CJEU and the constitutional jurisdiction of the Member States develops in a cooperative or confrontational manner with regard to the understanding of the rules and limitations on the exercise of competences is of

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TFEU but rather generally authorize their national parliaments to require their ministers to discuss their positions before Council meetings. Cf. on the whole *Kiiver* in: German Law Journal 2009, 1287, 1295 et seq.

direct relevance to the question of competences itself. However, the jurisprudence of the CJEU to date is not very encouraging with regard to the success of action against legal acts based on an infringement of the rules and limitations on the exercise of competences. This carries the risk of judicial conflicts that may escalate into conflicts over the question of the continued legality of the EU as a community of law and over the willingness to adhere to the concept of an ever closer union.

2. *Respect for the national identity of the Member States*

According to Art. 4(2) sentence 1 TEU, the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. In this context, national identity basically includes a set of considerations and values that shape the self-perception and character of a state or a people and that can originate from different areas, such as language and culture.[190] In addition, the identity-building relevance of the region and the local context for people is also recognized in the EU Treaties.[191] Preserving regional and local concerns and diversity alongside national differences is repeatedly emphasized.[192] Also for this reason, they must be included in the assessment of Member State measures as to their compatibility with Union law.

In this context, the concept of national identity should be understood as an opening clause for Member State constitutional law, so that this must be taken into account when interpreting Art. 4(2) TEU.[193] This can also be-

190 *Puttler* in: Calliess/Ruffert, Art. 4 TEU, para. 14; *Streinz* in: id., Art. 4 TEU, para. 15; *Blanke* in: id./Mangiameli, Art. 4 TEU, para. 29 et seq., 32; *von Bogdandy/Schill* in: CMLRev. 2011, 1417, 1429. Cf. on this and the following *Cole*, Zum Gestaltungsspielraum der EU-Mitgliedstaaten bei Einschränkungen der Dienstleistungsfreiheit, p. 18 et seq.

191 Cf. on this *Menasse* in: Hipold/Steinmair/Perathoner, 27, 27 et seq.

192 Cf. for instance the third paragraph of the preamble of the CFR ("organisation of their public authorities at national, regional and local levels"), the wording of Art. 4(2) sentence 1 TEU on national identity or of Art. 167(1) TFEU, shown supra; at large on this *Ukrow/Ress* in: Grabitz/Hilf/Nettesheim, Art. 167 TFEU, para. 93 et seq. Cf. also the reference of Advocate General *Trstenjak*, CJEU, case C-324/07, *Coditel Brabant SA / Commune d'Uccle and Région de Bruxelles-Capitale*, para. 85.

193 Cf. for explanation and derivation comprehensively *von Bogdandy/Schill* in: ZaöRV 2010, 701, 701 et seq.

come relevant if, by overlapping competences, Member States' room for maneuver could apparently be superseded as a result of other objectives being pursued by the EU, such as the realization of fundamental freedoms. In particular, the regulation of media diversity may lead to different rules in the Member States, taking into account their respective national characteristics in terms of media and the needs to ensure a relevant media diversity. This question can therefore also reach the standard of national identity. Therefore, if necessary, the latter must also be consulted when determining the limits of the application of fundamental freedoms or Member State measures to restrict them[194], as well as when applying the competition regime in the state aid area when monitoring the financing of public service broadcasting.[195]

This is true even in the case of a CJEU review, as the Court has expressly recognized, although there have been few opportunities, at least so far, to rule on the meaning of the identity clause.[196] The fact that the CJEU regularly refrains from dealing with the principle of respect for the national identity of the Member States, even in cases in which Art. 4(2) TEU was expressly referred to in the proceedings, is not very conducive to promoting confidence in the role of the CJEU as a neutral court as regards the system of competences. At the same time, this reluctance may have resulted from the FCC's case law that national identity as defined in Art. 4(2) TEU does not coincide with constitutional identity, which the FCC reserves the right to preserve in the integration process.

As a special manifestation of the EU's obligation to respect, Art. 4(2) TEU is based on the concept that the constitutional identity of a Member State only in its core is an absolutely protected legal interest. Besides, in the interpretation and application of Art. 4(2) TEU, it is also important to create a practical concordance between the competence title under EU law and the limitation on the exercise of competence in the sense of a careful balance between Member State and European interests. In terms of procedural law, this is taken into account by the approach that the final determi-

194 Cf. on the importance of the duty to respect national identity recently also *Nielsen*, Die Medienvielfalt als Aspekt der Wertesicherung der EU, p. 63 et seq.

195 Cf. on this also *Nielsen*, Die Medienvielfalt als Aspekt der Wertesicherung der EU, p. 84 et seq.

196 Cf. however particularly CJEU, case C-208/09, *Ilonka Sayn-Wittgenstein / Landeshauptmann von Wien*, para. 83 ("In that regard, it must be accepted that […] as an element of national identity, may be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognised under European Union law.").

nation of the scope and effectiveness of the reservation of identity in EU multilevel constitutionalism and its judicial application in the corresponding multilevel system of constitutional courts requires dialogical cooperation between the CJEU and the respective national constitutional court.[197]

3. *The principle of sincere cooperation*

A characteristic feature of the multilevel constitutionalism between the EU and its Member States is the integration of the national constitutions with the European treaties, the latter of which can also be described as constitutions in terms of their content. The basis of this multilevel constitutionalism is the sincere cooperation of EU and Member State institutions to keep the EU functioning. As a "central constitutional principle of the European Union" with the function of coordinating the European multilevel system in in a way that enables the Union to achieve its objectives,[198] the principle of sincere cooperation can have a recognizable decisive influence on the respective exercise of competences by the institutions of the EU and its Member States.

Within the EU, there is now an obligation of loyalty between the EU and its Member States, as well as between the Member States themselves, which is expressly recognized under primary law and governed by Art. 4(3) TEU: Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.[199] The imperative of Union-friendly conduct, which can be derived from this principle, therefore obliges not

197 Cf. *Calliess*, Written statement on the public hearing of the Committee on European Union Affairs of the German Bundestag on the subject of "Urteil des Bundesverfassungsgerichts vom 5. Mai 2020 (2 BvR 859/15) in Sachen Staatsanleihekäufe der Europäischen Zentralbank", https://www.bundestag.de/resource/blob/697584/69ec62de394a6348f992c1e092fa9f4b/callies-data.pdf, p. 6.

198 Cf. *Hatje*, Loyalität als Rechtsprinzip in der Europäischen Union, p. 105; cf. on Community loyalty as a fundamental standard in need of concretization also *Blanke* in: id./Mangiameli, Art. 4 TEU, para. 92 et seq.; *Bleckmann*, Europarecht, para. 697 et seq.; *Kahl* in: Calliess/Ruffert, Art. 4 TEU, para. 3 et seq.; *Klamert* in: Kellerbauer/id./Tomkin, Art. 4 TEU, para. 28 et seq.; *von Bogdandy*, Rechtsfortbildung mit Art. 5 EGV, 17, 19 et seq.; *id./Bast* in: EuGRZ 2001, 441, 447 / in: CMLRev. 2002, 227, 263; *Zuleeg* in: NJW 2000, 2846, 2846 et seq.

199 This obligation of loyalty in the relationship of the EU to the Member States and of the Member States to each other is supplemented by the obligation of loyalty

only the Member States vis-à-vis the EU, but also the Union institutions vis-à-vis the Member States[200] – namely in the exercise of all functions granted to them by the European Treaties and in all stages of this exercise – and thus, for example, also already in the preparation of an EU legal act.

The loyalty obligations are i.a. taken into account in the case law of the CJEU when interpreting abstract legal terms as well as when deciding on the infringement of obligations. This principle of cooperation, which is fundamental to the EU, is also expressed in mutual consideration and respect in the implementation and application of primary Union law. Unlike in the federal state, there are thus no hierarchies in multilevel constitutionalism with regard to the relationship between European and national law, between the CJEU and national constitutional courts. National and European courts work together in a division of labor in the light of the principle of sincere cooperation; to this extent, it is not a matter of competition, but of cooperation and dialogue. The preliminary ruling procedure provided for in Art. 267 TFEU offers the appropriate procedural instruments for this dialogical approach.[201]

The principle of sincere cooperation is considered to be of paramount importance for the cooperation between the sovereign actors of the Member States and the European constitutional bodies. However, its vagueness raises concerns about the threat of arbitrariness in the application of the law and puts the focus on the concretization of the obligations of loyalty. To date, a respective interpretation has been largely lacking on the EU side – beyond references to administrative organization law –, at least insofar as it concerns questions of the EU's obligations arising from the principle. Recent efforts to contour the principle of sincere cooperation as an embodiment of the overall legal order and its concretization as the application of law in the specific area of sovereign relations and in the specific situation of "difficult" legal situations[202] have proven to be of only limited practicability.

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of the EU institutions to each other according to Art. 13(2) sentence 2 TEU, which is, however, not relevant for this study.

200 Cf. *Ress* in: DÖV 1992, p. 944, 947 et seq.

201 Cf. *Calliess*, Written statement on the public hearing of the Committee on European Union Affairs of the German Bundestag on the subject of "Urteil des Bundesverfassungsgerichts vom 5. Mai 2020, 2 BvR 859/15, in Sachen Staatsanleihekäufe der Europäischen Zentralbank", https://www.bundestag.de/resource/blob/697584/69ec62de394a6348f992c1e092fa9f4b/callies-data.pdf, p. 8.

202 Cf. *Benrath*, Die Konkretisierung von Loyalitätspflichten, p. 129 et seq.

In terms of content, the principle of sincere cooperation is not only aimed at prohibiting Member States from engaging in conduct that would impair the functioning of the EU as a community based on the rule of law. For its part, the EU is also prevented by the principle from exercising existing competences in a way that conflicts with the primary competence of the Member States to shape their internal cultural and democratic order, including its media diversity-related manifestations and conditions.

It is clear from the case law of the CJEU that the obligation of mutual consideration associated with the principle prohibits the Member States from taking steps that would jeopardize the legitimate interests and concerns of the EU. In positive terms, the principle aims to ensure that Member States not only respect but also promote the "effet utile" of Union law when implementing and applying it. In its case law to date, the CJEU has used the principle in particular to develop concrete requirements for the transposition and implementation of provisions of directives by the Member States on the basis of the principle. In particular, requirements for proper and effective administrative enforcement, the imperatives of publicity and implementation through binding provisions with external effect, and obligations to prevent and sanction infringements of EU provisions are the result of a so-called rule of efficiency as the central core of the loyalty requirement.[203]

Moreover, it is recognized that the principle of sincere cooperation cannot be used to correct, modify or override Union rules. The obligation of mutual loyalty rather builds on existing regulations and intensifies or makes them more effective, but without giving them a new substance.[204] Even if the relatively vague principle of loyalty under Union law may give the CJEU a wide scope for concretization, no legal consequences may be derived from Art. 4(3) TEU that undermine fundamental objectives or structural principles of the European Treaties or the constitutions of the Member States or the European Union.[205] In particular, no obligation to tolerate regulation of media diversity under European law, e.g. to avert threats to the democratic process in the EU itself or in individual Member States, can be derived from this principle.

For the area of indirect administrative implementation of Union law by the Member States, the principle of sincere cooperation is effective in par-

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203 Cf. CJEU, case C-349/93, *Commission / Italy*; CJEU, case C-348/93, *Commission / Italy*; CJEU, case C-24/95, *Land Rheinland-Pfalz / Alcan Deutschland GmbH*.

204 Cf. *Nettesheim*, Die Erteilung des mitgliedstaatlichen Einvernehmens nach Art. 4 Abs. 2 UAbs. 1 der FFH-Richtlinie, p. 30 et seq.

205 Cf. *Jennert* in: NVwZ 2003, 937, 939 with further references.

ticular to the point that the fundamental "administrative autonomy"[206] or "institutional and procedural autonomy"[207] is not affected by this principle. This does not preclude EU law requirements for a supervisory structure for a coordinated area such as the AVMSD. It does, however, argue for a cautious understanding of the application and interpretation of these requirements in the context of the monitoring of compliance with EU law by the European Commission and the CJEU, taking into account the constitutional traditions of the Member States.

4. The principle of subsidiarity

The principle of subsidiarity, which was originally a theological and sociopolitical principle, was increasingly applied in the context of the relationship between vertically organized levels of government in states and, in the process of deepening European integration, found an explicit constitutional embodiment in the EU's founding treaties.[208] Since the Maastricht Treaty, it has been enshrined in primary law – which, in a legal comparison with other federal or decentralized organizational units for the exercise of sovereign power, is remarkable, but by no means solitary.[209] Since the Treaty of Amsterdam, the Treaty provisions on the subsidiarity principle have additionally been supplemented by a Protocol on the application of the principles of subsidiarity and proportionality.[210] However, while this Protocol in the version of the Treaty of Amsterdam not only outlined the subsidiarity principle in procedural terms by means of extensive obligations to consult, report and provide justification, but also specified it in substantive terms, the Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality, which has been in force since the

206 Cf. *Schwarze* in: NVwZ 2000, 241, 244.

207 Cf. *Rodriguez Iglesias* in: EuGRZ 1997, 289, 289 et seq.

208 Cf. *Oesch*, Das Subsidiaritätsprinzip im EU-Recht und die nationalen Parlamente, 301, 301 et seq.; *Foster*, EU Law, p. 87; *Weber* in: Blanke/Mangiameli, Art. 5 TEU, para. 8.

209 Cf. Art. 118 of the Italian Constitution, according to which "[a]dministrative functions are attributed to the Municipalities, unless they are attributed to the provinces, metropolitan cities and regions or to the State, pursuant to the principles of subsidiarity, differentiation and proportionality, to ensure their uniform implementation".

210 Concolidated version (2016) of TEU and TFEU – Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, OJ C 202 of 07.06.2016, p. 206–209.

Treaty of Lisbon, largely omits substantive guidelines on the application of the principle of subsidiarity.[211]

Art. 5(3) TEU contains the substantive requirements which must be fulfilled in order for a planned EU measure to be compatible with the principle of subsidiarity. In this context, the substance of the principle, now enshrined in the aforementioned provision, appears to be largely undisputed. It establishes a prerogative of competence of the smaller unit vis-à-vis the larger one according to its capability. As a consequence, the principle of subsidiarity obliges a larger entity willing to act, such as the EU, to justify the necessity and added value of taking action. At the same time, however, the principle – even in the form it has taken in EU primary law – is notable for its persistent vagueness in terms of content and openness to interpretation.

According to Art. 5(3) TEU, the union principle of subsidiarity applies when the EU "act[s]". This means, in principle, any action by an institution or body of the Union. The subsidiarity test complements the requirements arising from the relevant competence provision for the EU.[212] The only legal acts excluded from this additional requirement of control are, according to Art. 5(3) TEU, those which are adopted under an exclusive competence of the Union[213] – an exception which, with regard to media regulation on the part of the EU, is of no significant importance insofar as it concerns regulation which does not exceed the jurisdiction of the EU, but which may become important should media regulation for the EU be coordinated with third countries under public international law. Against this background, the exceptions for the audiovisual sector, which can be found throughout the negotiating mandates for trade and investment agreements, also gain particular weight from a subsidiarity perspective.

Art. 5(3) TEU addresses two substantive criteria that must be met cumulatively for the EU to be able to exercise either shared competences under Art. 4 TFEU or competences to carry out actions to support, coordinate or supplement under Arts. 5 and 6 TFEU as well as for the EU to act within

211 Cf. *Oesch*, Das Subsidiaritätsprinzip im EU-Recht und die nationalen Parlamente, 301, 303; *Foster*, EU Law, p. 88; *Weber* in: Blanke/Mangiameli, Art. 5 TEU, para. 10 et seq.

212 Cf. *Bast/von Bogdandy* in: Grabitz/Hilf/Nettesheim Art. 5 TEU, para. 50 et seq.; *Weber* in: Blanke/Mangiameli, Art. 5 TEU, para. 7; cf. *Dony*, Droit de l'Union européenne, para. 144.

213 Cf. on this chapter B.I.2.

the framework of the Common Foreign and Security Policy (CFSP),[214] which can become relevant not least with a view to media-related reactions to behavior by third states that is contrary to public international law and at the same time has a direct disinformation effect in a particular way or promotes such disinformation.

- First, the EU – in this respect complementing the competence-related substance of the principle of proportionality – shall act only if and in so far as the objectives of the envisaged action cannot be sufficiently achieved by the Member States. With regard to the objectives, it must be demonstrated in accordance with this necessity or negative criterion that there is a regulatory deficit that cannot be satisfactorily remedied by the factual and financial resources available to the Member States. The control relates to both the "whether" and the "how" of the action; the necessity of the Union measure must relate to all the envisaged regulatory elements of a legal act.[215] To this end, provided that the planned regulation claims Union-wide validity, an overall assessment of the situation in the EU as a whole and in all Member States respectively must be carried out.[216] The Treaty of Lisbon explicitly codified the previous practice, according to which not only the central, but also the regional and local level is to be taken into account for the assessment of the regulatory capacities of the Member States – a further example of recognition under primary law of the Europe of the regions and the federal diversity of state organization law in the Member States, which the EU is equally obliged to safeguard as it is with regards to the – also – media-related conditions of its continued existence.
- Second, the principle of subsidiarity, in the sense of an efficiency or added value criterion, requires as a positive criterion that the regulatory objectives can be better achieved at Union level by reason of the scale or effects of the envisaged measures. According to Art. 5 of the Subsidiarity Protocol, qualitative and, as far as possible, quantitative criteria are to be taken into account in this context. This involves an evaluation

214 In the context of CFSP, however, the principle of subsidiarity is not subject to judicial review by the CJEU (cf. Art. 24(1) TEU in conjunction with Art. 275 TFEU); on this *Oesch*, Das Subsidiaritätsprinzip im EU-Recht und die nationalen Parlamente, 301, 304.

215 Cf. *Oesch*, Das Subsidiaritätsprinzip im EU-Recht und die nationalen Parlamente, 301, 305; *Klamert* in: Kellerbauer/id./Tomkin, Art. 5 TEU, para. 23.

216 Cf. *Bast/von Bogdandy* in: Grabitz/Hilf/Nettesheim, Art. 5 TEU, para. 54; *Klamert* in: Kellerbauer/id./Tomkin, Art. 5 TEU, para. 28; *Dony*, Droit de l'Union européenne, para. 145.

of the Union's problem-solving capacity or assessment of the effectiveness of the planned measure in comparison with the financial impact and administrative burden on affected authorities, economic operators and citizens.[217] An evaluative comparison between the additional integration gain and the Member States' loss of competence is required. As a result, EU powers are not to be exercised in full where the additional gain in integration is small, the encroachment on the competences of the Member States is considerable, or where the advantages of the gain in integration do not noticeably outweigh the disadvantages of the loss of Member State competence.[218]

The vagueness and openness of these criteria make it difficult, already at the outset, to reliably verify that the principle is being upheld. This diffuse picture of the control program is reinforced by the fact that both the negative and the positive criteria require that predictive decisions be taken:[219] It is focused on the future, to decide and demonstrate that Union action is necessary and implies European added value.[220]

In view of this understanding of the principle of subsidiarity as a competence oriented rule of reasoning[221] there is a strong case for a competence-based presumption in favor of preserving Member State abilities to regulate – also in the area of media regulation.[222] However, the case law of the CJEU to date speaks against a special suspensory effect conveyed by the principle of subsidiarity with regard to further Union access to subjects of regulation.[223] The methodological approach of the CJEU has so far not

217 Cf. *Bast/von Bogdandy* in: Grabitz/Hilf/Nettesheim, Art. 5 TEU, para. 57; *Klamert* in: Kellerbauer/id./Tomkin, Art. 5 TEU, para. 29.

218 Cf. *Calliess* in: id./Ruffert, Art. 5 TEU, para. 41.

219 Cf. *Lienbacher* in: Schwarze, Art. 5 TEU, para. 26.

220 Cf. *Oesch*, Das Subsidiaritätsprinzip im EU-Recht und die nationalen Parlamente, 301, 305.

221 Cf. *Oesch*, Das Subsidiaritätsprinzip im EU-Recht und die nationalen Parlamente, 301, 305.

222 Cf. on this recently also *Nielsen*, Die Medienvielfalt als Aspekt der Wertesicherung der EU, p. 60 et seq., as well as in general *Klamert* in: Kellerbauer/id./Tomkin, Art. 5 TEU, para. 24 with further references.

223 The CJEU has so far been very restrained both quantitatively with regard to any reference to the principle of subsidiarity and dogmatically with regard to the concrete content of the examination in individual cases. In its rulings on Art. 5 TEC, the Court has for the most part dispensed with a concrete subsidiarity test (cf. e.g. CJEU, case C-84/94, *United Kingdom of Great Britain and Northern Ireland / Council of the European Union*, para. 46 et seq.; CJEU, case C-233/94, *Germany / Parliament and Council*, para. 22 et seq.).

been consistent at all; as a rule, the Court examines the two substantive criteria under Art. 5(3) TEU together in a generalized and unstructured manner and does not distinguish between the necessity and the added value of action at Union level. In its judicial practice to date, it has never found an infringement of the principle and, remarkably, has regularly examined the added value criterion as a positive criterion aimed at regulation by the EU prior to the negative criterion of the necessity of action.[224] Accordingly, only evident infringements of the principle of subsidiarity, in which the Union institutions do not even provide a plausible justification for a regulation, appear to be contestable with any likelihood of success.[225]

The Subsidiarity Protocol contains specific procedural requirements for compliance with the principle of subsidiarity in EU legislative procedures. This takes account of the fact that the effectiveness of the principle of subsidiarity depends crucially on how the Union institutions implement the substantive requirements of Art. 5(3) TEU in day-to-day practice. Compliance with these requirements demands – in clear parallelism to the protection of fundamental rights by means of procedures – the protection of competences by means of procedures through appropriate procedural and organizational safeguards.

Art. 2 of the Subsidiarity Protocol requires the Commission to widely hold consultations before proposing a formal legislative act. This ensures that interested parties – both regulators and regulated stakeholders – can comment on any subsidiarity-critical aspects of planned media regulation at an early stage. Failure to hold such a hearing is likely to constitute a substantial procedural irregularity, which may result in the invalidity of the subsequent act.

Art. 5 of the Subsidiarity Protocol further obliges the Commission to justify draft legislative acts in detail with regard to compliance with the principle of subsidiarity. Proposals for new legal acts now regularly contain detailed statements on the compatibility of planned measures with the principle. Impact assessments are carried out as part of important initiatives and legislative projects, in which subsidiarity is also analyzed in detail.[226]

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224 Cf. on Art. 5(3) TEU CJEU, case C-508/13, *Estonia / Parliament and Council*, para. 44 et seq.

225 Cf. *Bickenbach* in: EuR 2013, 523, 523 et seq.; *Klamert* in: Kellerbauer/id./Tomkin, Art. 5 TEU, para. 24 with further references.

226 Cf. for instance recently in the context of the proposed Digital Services Act the "legal basis and subsidiarity check" within the impact assessments on ex post

The new centerpiece of the procedural safeguarding of the principle of subsidiarity is the formalized dialogue between the Union legislature and the national parliaments. Whether this opportunity for dialogue has helped to increase the practical relevance of the principle of subsidiarity is open to controversial debate. It also seems reasonable to assess that the procedural safeguarding of the importance of this principle through the subsidiarity early warning mechanism by means of a subsidiarity complaint and the possibility of a subsidiarity action under Protocol (No. 2) through Art. 12(b) TEU and Art. 4 et seq. of the Subsidiarity Protocol, as introduced by the Treaty of Lisbon, has not changed anything worth mentioning either.

Art. 12 TEU addresses the participation of national parliaments in the EU legislative process. In this context, Art. 12(b) TEU substantiates the provisions of Art. 5(3) TEU with regard to the principle of subsidiarity. Accordingly, national parliaments actively contribute to the good functioning of the Union by ensuring that the principle of subsidiarity is respected in accordance with the procedure laid down in the Subsidiarity Protocol. It is an instrument of preventive control, in the form of a parliamentary-initiated early warning system, aiming towards safeguarding this restriction on the exercise of competences.[227]

The starting point of a possible subsidiarity complaint is Art. 4 of the Subsidiarity Protocol: It obliges the Union institutions to send draft legislative acts to national parliaments. They or the chambers of one of these parliaments may, in accordance with Art. 6 of the Subsidiarity Protocol, state within eight weeks in a reasoned opinion why they consider that the draft in question does not comply with the principle of subsidiarity.[228] In this context, it is up to the respective national parliaments to consult re-

(Ref. Ares(2020)2877686 – 04/06/2020, p. 4) and ex ante (Ref. Ares(2020)2877647 – 04/06/2020, p. 3) regulation.

227 Cf. *Oesch*, Das Subsidiaritätsprinzip im EU-Recht und die nationalen Parlamente, 301, 308; *Weber* in: Blanke/Mangiameli, Art. 5 TEU, para. 10; *Dony*, Droit de l'Union européenne, para. 147.

228 According to § 11(1) of the Act on the Exercise by the Bundestag and by the Bundesrat of their Responsibility for Integration in Matters concerning the European Union (Responsibility for Integration Act) (Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union (Integrationsverantwortungsgesetz – IntVG)) of 22 September 2009 (BGBl. I, p. 3022); amended by Art. 1 of the Act of 1 December 2009 (BGBl. I, p. 3822) the Bundestag and the Bundesrat, in their Rules of Procedure, may stipulate how a decision on the delivery of a reasoned opinion in accordance with Art. 6 of the Protocol on the ap-

gional parliaments with legislative powers, if necessary. With regard to media regulation, such legislative powers of the German state parliaments are evident according to the constitutional order of the Basic Law. According to Art. 7(1) of the Subsidiarity Protocol, the Union institutions are required to "take account of" the reasoned opinions in the further course of the legislative procedure. This "obligation to take account of" is accompanied by the obligation to deal with the objections in a well-founded manner; in contrast, there is, however, no obligation to actually incorporate the opinions into the proposal. Where reasoned opinions represent at least one third[229] of all the votes allocated to the national Parliaments, the draft must be "reviewed". The outcome of this "review obligation" is also open; the national parliaments retain no right of veto. The Commission can therefore either adhere to, amend or withdraw a media regulatory proposal against which reasoned opinions have been submitted with regard to the principle of subsidiarity.[230]

However, under the ordinary legislative procedure, where the number of reasones opinions submitted reaches at least a simple majority of the total number of votes allocated to the national parliaments, further procedural steps must be taken into account – in addition to the review obligation: If it chooses to maintain the proposal, the Commission will have, in a reasoned opinion, to justify vis-à-vis the Union legislature, i.e. Parliament and

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plication of the principles of subsidiarity and proportionality is to be obtained. The President of the Bundestag or the President of the Bundesrat, in accordance with paragraph 2, shall transmit the reasoned opinion to the Presidents of the competent institutions of the European Union and shall inform the Federal Government accordingly. However, there is no such provision in the Rules of Procedure of the Bundesrat. This also means that the link between state parliamentary policy-forming and decision-making on the one side and the reprimanding opinion of the Bundesrat on the other is not regulated.

229 The threshold is at least a quarter of the votes in cases of drafts submitted on the basis of Art. 76 TFEU on the area of freedom, security and justice.

230 The national parliaments therefore have no possibility of imposing a legally binding obligation on the Commission to amend a legislative proposal. If the national parliaments do not succeed with their subsidiarity complaints, the best they can do is to influence the voting behavior of their government representative in the Council. Various Member States provide for corresponding procedures domestically; the approval of a legislative proposal by the government representative is made dependent on the approval by its own parliament (so-called ad referendum vote); on this *Huber* in: Streinz, Art. 12 TEU, para. 43. Thus, the early warning mechanism complements the existing channels of influencing one's own government. Cf. *Oesch*, Das Subsidiaritätsprinzip im EU-Recht und die nationalen Parlamente, 301, 309.

Council, why it considers that the proposal complies with the principle of subsidiarity and at the same time notify the reasoned opinions of the national parliaments for further consideration. Before concluding the first reading, the Union legislature shall consider whether the legislative proposal is compatible with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national Parliaments as well as the reasoned opinion of the Commission. Subsequently, if, by a majority of 55 % of the members of the Council or a majority of the votes cast in the European Parliament, the Union legislature is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration.

Art. 8 of the Subsidiarity Protocol opens the possibility for Member States and – according to the respective national legal order – national parliaments incl. their chambers to bring an action on grounds of infringement of the principle of subsidiarity.[231] This is a special form of the action for annulment under Art. 263 TFEU (to which Art. 8 of the Subsidiarity Protocol expressly refers). The subsidiarity action is also subject to the usual admissibility requirements of Art. 263 TFEU. Accordingly, the time limit for bringing an action is two months from the publication of the act in the Official Journal of the EU pursuant to Art. 263(6) TFEU.

Art. 8 of the Subsidiarity Protocol has constitutive significance only insofar as the decision on the initiation of legal action is also a matter for the parliaments or parliamentary chambers in the domestic context. Consequently, various Member States – including Germany – have set the quorums for bringing an action (significantly) below the simple majority. In this respect, the subsidiarity action has the function of a minority right,

231 According to § 12(1) of the Act on the Exercise by the Bundestag and by the Bundesrat of their Responsibility for Integration in Matters concerning the European Union (Responsibility for Integration Act) (Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union (Integrationsverantwortungsgesetz – IntVG)) the Bundestag is required, at the request of one quarter of its members, to bring an action under Art. 8 of the Subsidiarity Protocol. At the request of one quarter of the Members of the Bundestag who do not support the bringing of the action, their view shall be made clear in the application. According to § 12(2), in its Rules of Procedure, the Bundesrat may stipulate how a decision on the bringing of an action within the meaning of paragraph 1 is to be obtained. However, a corresponding regulation has not yet been issued. If a motion is tabled in the Bundestag or the Bundesrat for the bringing of an action under paragraph 1 or paragraph 2, the other institution may deliver an opinion, according to § 12(5).

since there is a realistic possibility for opposition forces also to bring an action.

If a parliament or a chamber brings a subsidiarity action, the government shall immediately submit the action to the CJEU. However, the conduct of the proceedings shall then be incumbent upon the plaintiff parliament or chamber. The right to file a subsidiarity action exists, moreover, independently of a prior subsidiarity complaint by national parliaments.

However, subsidiarity complaints and actions as instruments for implementing the principle of subsidiarity are associated with problems, not least when it comes to safeguarding the media regulation competence of the German federal states. For one thing, it is unclear to what extent the legal basis chosen for the legislative act must be reviewed in an examination limited solely to subsidiarity. This question arises in a subsidiarity action because Art. 8 Protocol (No. 2) expressly limits judicial review to the principle of subsidiarity.[232] The FCC drew attention to this in its decision of 30 June 2009 on the Treaty of Lisbon and emphasized that it would also depend on "whether the standing of the national parliaments and of the Committee of the Regions to bring an action will be extended to the question, which precedes the monitoring of the principle of subsidiarity, of whether the European Union has competence for the specific lawmaking project".[233] The Bundesrat assumes in its established decision-making practice that the subsidiarity complaint pursuant to Art. 12(b) TEU also covers the question of the competence of the EU.[234]

Furthermore, the FCC has already drawn attention in its Lisbon decision to the fact that the effectiveness of the early warning mechanism introduced by the Lisbon Treaty for monitoring compliance with the principle of subsidiarity depends on "the extent to which the national parliaments will be able to make organisational arrangements that place them in

232 Cf. *Oesch*, Das Subsidiaritätsprinzip im EU-Recht und die nationalen Parlamente, 301, 305; also allowing for an examination of infringements of the principle of conferral of powers *Weber* in: Blanke/Mangiameli, Art. 5 TEU, para. 11.

233 BVerfGE 123, 267 (383 et seq.) with reference to Wuermeling, Kalamität Kompetenz: Zur Abgrenzung der Zuständigkeiten in dem Verfassungsentwurf des EU-Konvents, EuR 2004, p. 216 (225); *von Danwitz*, Der Mehrwert gemeinsamen Handelns, Frankfurter Allgemeine Zeitung of 23.10.2008, p. 8.

234 Cf. on this e.g. the opinions of the Bundesrat of 9 November 2007, BR-Printed paper 390/07 (resolution), cipher 5; of 26 March 2010, BR-Printed paper 43/10 (resolution), cipher 2; and of 16 December 2011, BR-Printed paper 646/11 (resolution), cipher 2.

a position to make appropriate use of the mechanism within the short period of eight weeks".[235]

5. *The principle of proportionality*

The principle of proportionality is a general principle of Union law codified in Art. 5(1) sentence 2, (4) TEU, which – as the FCC rightly pointed out in its ECB decision – has its roots in common law in particular,[236] but also and especially in German law – there, however, not with regard to the clarification of questions of competence in multi-level systems, but particularly in the area of the protection of fundamental rights and administrative law.[237] From these roots, the principle of proportionality – as the FCC points out – has found its way into all European (partial) legal orders via the case law of the European Court of Human Rights[238] and the CJEU.[239]

Not only in Germany,[240] but also in other EU Member States such as France, Austria, Poland, Sweden, Spain and Hungary,[241] the assessment of whether the principle of proportionality has been met is carried out in the sections on monitoring the suitability, necessity and appropriateness of a sovereign measure. The Italian Constitutional Court takes a similar ap-

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235 BVerfGE 123, 267 (383) with reference to *Mellein*, Subsidiaritätskontrolle durch nationale Parlamente, 2007, p. 269 et seq.

236 The BVerfG (2 BvR 859/15) refers to "*Blackstone*, Commentaries on the Laws of England, 4th ed. 1899, p. 115; *Klatt/Meister*, Der Staat 2012, p. 159 (160 et seq.); *Saurer*, Der Staat 2012, p. 3 (4); *Peters* in: Festschrift für Daniel Thürer, Drei Versionen der Verhältnismäßigkeit im Völkerrecht, 2015, p. 589 et seq.; *Tridimas* in: Schütze/id., Oxford Principles of European Union Law, 2018, p. 243.

237 The case law and literature cited by the FCC in this respect (BVerfGE 3, 383 <399>; *Lerche*, Übermaß und Verfassungsrecht – zur Bindung des Gesetzgebers an die Grundsätze der Verhältnismäßigkeit und der Erforderlichkeit, 1961 <Nachdruck 1999>, p. 19 et seq.) also does not point in the direction of a significance of the principle of proportionality as regards making use of competences.

238 Cf. *von Danwitz* in: EWS 2003, 394, 400.

239 Cf. *Tuori* in: von Bogdandy/Grabenwarter/Huber, vol. VI, § 98, para. 84; cf. also Emiliou, The principle of proportionality in European Law, p. 169; *Craig* in: New Zealand Law Review 2010, 265, 267.

240 Cf. BVerfGE 16, 147 (181); 16, 194 (201 et seq.); 30, 292 (316 et seq.); 45, 187 (245); 63, 88 (115); 67, 157 (173); 68, 193 (218); 81, 156 (188 et seq.); 83, 1 (19); 90, 145 (172 et seq.); 91, 207 (221 et seq.); 95, 173 (183); 96, 10 (21); 101, 331 (347); 120, 274 (321 et seq.); 141, 220 (265, para. 93).

241 Cf. law-comparing FCC, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, para. 125.

proach and adds to its review the criterion of rationality, which is based on a balanced observance of constitutional values.[242]

The CJEU has recognized the principle of proportionality as an unwritten element of Union law even before it was expressly enshrined in the European Treaties,[243] requiring in this respect "that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives".[244] In the doctrine of the principle – (also in this respect) i.a. in contrast to its understanding in the FCC's case law –, the coherence criterion is of particular importance, in particular in CJEU case law on gambling[245]: Accordingly, a measure is suitable within the meaning of the principle of proportionality if it actually meets the objective of achieving the desired goal in a coherent and systematic manner.[246] In this context, the CJEU often limits itself to checking whether the measure in question does not appear to be manifestly unsuitable for achieving the objective pursued.[247] In the context of the assessment of the necessity of a measure, the CJEU examines – (also) in this re-

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242 Cf. FCC, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, para. 125, referring to *Bifulco/Paris* in: v. Bogdandy/Grabenwarter/Huber, vol. VI, § 100, para. 49 et seq.

243 Cf. *Nußberger* in: NVwZ-Beilage 2013, 36, 39; *Trstenjak/Beysen* in: EuR 2012, 265, 265; *Hofmann* in: Barnard/Peers, p. 198, 205; *Weber* in: Blanke/Mangiameli, Art. 5 TEU, para. 12; *Dony*, Droit de l'Union européenne, para. 151.

244 CJEU, joined cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, para. 46; cf. already CJEU, case 8/55, *Fédération Charbonnière de Belgique / High Authority of the European Coal and Steel Community*; cf. also CJEU, case C-491/01, *The Queen / Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*., para. 122; CJEU, case C-343/09, *Afton Chemical Limited / Secretary of State for Transport*, para. 45; CJEU, case C-283/11, *Sky Österreich GmbH / Österreichischer Rundfunk*, para. 50; CJEU, case C-101/12, *Herbert Schaible / Land Baden-Württemberg*, para. 29.
Recently, the CJEU has occasionally tended to examine the criteria of appropriateness and necessity together (cf. CJEU, case C-58/08, *Vodafone and Others*, para. 53 et seq.; CJEU, case C-176/09, *Luxembourg / Parliament and Council*, para. 63; CJEU, case C-569/18, *Caseificio Cirigliana and Others*, para. 43; cf. *Pache* in: Pechstein et al., Art. 5 TEU, para. 140; *Klamert* in: Kellerbauer/id./Tomkin, Art. 5 TEU, para. 36.

245 Cf. *Ukrow* in: ZfWG 2019, 223, 232.

246 Cf. CJEU, case C-64/08, *Engelmann*, para. 35; CJEU, case C-137/09, *Josemans*, para. 70; CJEU, case C-28/09, *Commission / Austria*, para. 126.

247 Cf. FCC, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, para. 126 with extensive references to the case law of the CJEU; *Bast* in: Grabitz/Hilf/

spect in accordance with procedures familiar from German constitutional law doctrine – whether the objective cannot be achieved equally effectively by other measures that impair the asset to be protected to a lesser extent.[248] In contrast, the examination of the appropriateness of a measure – i.e. proportionality in the narrower sense – plays at best a subordinate role in the case law of the CJEU.[249]

The FCC used the proportionality principle in its decision on the ECB's bond policy to find ultra vires action by an EU institution for the first time.[250] It considers the ECB's PSPP decisions to be disproportionate within the meaning of Art. 5(1) sentence 2, (4) TEU.[251] This decision has provoked justified criticism from EU lawyers.[252] Not least, it is unconvincing in its dogmatic approach. This is because the FCC fails to recognize that

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Nettesheim, Art. 5 TEU, para. 73; *Klamert* in: Kellerbauer/id./Tomkin, Art. 5 TEU, para. 39; *Weber* in: Blanke/Mangiameli, Art. 5 TEU, para. 12.

248 Cf. also in this respect FCC, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, para. 126 with further extensive references to the case law of the CJEU.

249 Cf. also in this respect FCC, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, para. 126 with further extensive references to the case law of the CJEU; *Calliess* in: id./Ruffert, Art. 5 TEU, para. 44; *von Danwitz* in: EWS 2003, 393, 395; *Lecheler* in: Merten/Papier, vol. VI/1, § 158, para. 31; *Pache* in: Pechstein et al., Art. 5 TEU, para. 149; *Trstenjak/Beysen* in: EuR 2012, p. 265, 269 et seq.; *Klamert* in: Kellerbauer/id./Tomkin, Art. 5 TEU, para. 36; *Weber* in: Blanke/Mangiameli, Art. 5 TEU, para. 12; cf. also *Emiliou*, The principle of proportionality in European Law, p. 134.

250 Contrary to what has been widely portrayed, the FCC did not qualify "the PSPP" as such as an ultra vires act. Rather, the court makes the "conclusive" assessment of the program "in its specific form" dependent on a "proportionality assessment by the Governing Council of the ECB, which must be substantiated with comprehensible reasons". In the FCC's view, ultra vires was merely the alleged failure to conduct such an examination, which is said to have led to a "lack of balancing and lack of stating the reasons informing such balancing". Cf. FCC, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, para. 177 et seq.; *Guber* in: ZEuS 2020, 625.

251 FCC, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, para. 177.

252 Cf. *Giegerich*, Mit der Axt an die Wurzel der Union des Rechts; *Ludwigs*, The consequences of the judgement of 5 May 2020 of the Second Senate of the German Constitutional Court (BVerfG), Committee on Legal Affairs Committee on Constitutional Affairs, Public Hearing, 14 July 2020 (https://www.europarl.europa.eu/cmsdata/210045/AFCO%20JURI%20Hearing%2014%20July%20-%20Prof%20Ludwigs.pdf); *Mayer*, Das PSPP-Urteil des BVerfG vom 5. Mai 2020. Thesen und Stellungnahme zur öffentlichen Anhörung, Deutscher Bundestag, Ausschuss für die Angelegenheiten der Europäischen Union, 25. Mai 2020 (https://www.bundestag.de/resource/blob/697586/cd

the treaty-based rule on the delimitation of competences between the EU and its Member States differs fundamentally in content and function from the principle of proportionality, as it has been established by the FCC in decades of settled case law as a fixed component and minimum of any fundamental rights review.[253]

In its *Kalkar II* decision of 22 May 1990, the FCC itself emphasized that, apart from the duty to act in a federal-friendly manner – a duty corresponding to the duty of sincere cooperation in the relationship between the EU and the Member States – there were no constitutional principles "from which limits could be derived for the exercise of competences in the federal-state relationship, which is determined by statehood and the common good. Restrictions on state intervention in the legal sphere of the individual derived from the principle of the rule of law are not applicable in the federal-state relationship as regards the rules on competences. This applies in particular to the principle of proportionality; it has a function of defending the individual sphere of rights and freedoms. The associated thinking in the categories of free space and encroachment cannot be applied specifically to the state's substantive competence, which is determined by a competitive relationship between the federal government and the state, nor to delimitations of competence in general."[254]

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f8025132586d197288f57569776bff/mayer-data.pdf); *Rath*, Ein egozentrischer deutscher Kompromiss, 05.05.2020 (https://www.lto.de/recht/hintergruende/h/bverfg-ezb-eugh-pspp-entscheidung-kommentar-konflikt-polen-ungarn/); *Thiele*, Das BVerfG und die Büchse der ultra-vires-Pandora, 05.05.2020 (https://verfassungsblog.de/vb-vom-blatt-das-bverfg-und-die-buechse-der-ultra-vires-pandora/); *Wegener*, Verschroben verhoben!, 05.05.2020 (https://verfassungsblog.de/verschroben-verhoben/).

253 Cf. *Guber* in: ZEuS 2020, 625.

254 Own translation ("…aus denen Schranken für die Kompetenzausübung in dem von Staatlichkeit und Gemeinwohlorientierung bestimmten Bund-Länder-Verhältnis gewonnen werden könnten. Aus dem Rechtsstaatsprinzip abgeleitete Schranken für Einwirkungen des Staates in den Rechtskreis des Einzelnen sind im kompetenzrechtlichen Bund-Länder-Verhältnis nicht anwendbar. Dies gilt insbesondere für den Grundsatz der Verhältnismäßigkeit; ihm kommt eine die individuelle Rechts- und Freiheitssphäre verteidigende Funktion zu. Das damit verbundene Denken in den Kategorien von Freiraum und Eingriff kann weder speziell auf die von einem Konkurrenzverhältnis zwischen Bund und Land bestimmte Sachkompetenz des Landes noch allgemein auf Kompetenzabgrenzungen übertragen werden", BVerfGE 81, 310 (338) with reference to BVerfGE 79, 311 (341)).
In a budgetary law case, the FCC also ruled that the defense against a disturbance of the macroeconomic balance and a limitation of borrowing do not oppose each other like an encroachment on fundamental rights and an area of

There was no reason to abandon this constitutional preconception on the occasion of the ECB decision. An effort to parallelize constitutional and Union law conceptions of the meaning of the principle of proportionality would also have argued in favor of a fundamental rights-centered understanding of the principle at the outset, as this also shapes the case law of the CJEU. Particularly in its decision in the preliminary ruling proceedings initiated by the FCC on the ECB's bond policy, however, the CJEU also recognized the importance of the principle in terms of competences.

In this decision, the CJEU – following up on an initial decision interpreting issues at the interface of monetary and economic policy[255] – emphasized that it follows from Arts. 119(2) and 127(1) TFEU in conjunction with Art. 5(4) TEU that a bond purchase program constituting part of monetary policy can only be validly adopted and implemented if the measures it covers are proportionate in view of the objectives of that policy. According to settled case law of the CJEU, the principle of proportionality requires "that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary in order to achieve those objectives".[256] As regards judicial review of compliance with those conditions, the CJEU held that, since the European System of Central Banks (ESCB) is required, when it prepares and implements an open market operations programme of the kind provided for in Decision 2015/774[257], to make choices of a technical nature and to undertake complex forecasts and assessments, it must be allowed, in that context, a broad discretion.[258]

In view of the information before the Court, it did not appear "that the ESCB's economic analysis — according to which the PSPP was appropriate, in the monetary and financial conditions of the euro area, for con-

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rights or freedom affected by this encroachment. Therefore, it could also not be understood from Art. 115(1) sentence 2 of the Basic Law that credit financing of consumptive expenditures may only take place subject to the principle of proportionality. This decision also argues against a significance of the principle of proportionality where it exceeds the limits of the fundamental rights review in the direction of a regulation limiting the exercise of competences in multi-level relationships.

255 CJEU, case C-62/14, *Peter Gauweiler and Others / Deutscher Bundestag*, para. 66 et seq.

256 CJEU, case C-62/14, *Peter Gauweiler and Others / Deutscher Bundestag*, para. 67.

257 Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10), OJ L 121 of 14.05.2015, p. 20–24.

258 CJEU, case C-493/17, *Heinrich Weiss and Others*, para. 73.

tributing to achieving the objective of maintaining price stability — is vitiated by a manifest error of assessment".[259]

In view of the foreseeable effects of the PSPP and given that it did not appear that the ESCB's objective could have been achieved by any other type of monetary policy measure entailing more limited action on the part of the ESCB, the Court held that, in its underlying principle, the PSPP did not manifestly go beyond what is necessary to achieve that objective.[260] The fact that that reasoned analysis is disputed did not, in itself, suffice to establish a manifest error of assessment on the part of the ESCB, since, given that questions of monetary policy are usually of a controversial nature and in view of the ESCB's broad discretion, nothing more could be required of the ESCB apart from that it use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy.[261] Finally, having regard to the information in the documents before the Court and to the broad discretion enjoyed by the ESCB, it was not apparent that a government-bonds purchase programme of either more limited volume or shorter duration would have been able to bring about – as effectively and rapidly as the PSPP – changes in inflation comparable to those sought by the ESCB, for the purpose of achieving the primary objective of monetary policy laid down by the authors of the Treaties.[262]

Lastly, according to the CJEU, "the ESCB weighed up the various interests involved so as effectively to prevent disadvantages which are manifestly disproportionate to the PSPP's objective from arising on implementation of the programme".[263]

This decision, which relates to the interplay of monetary and economic policy competences, cannot be easily applied to the interplay between the EU's internal market competence and the Member States' media and, in particular, diversity regulation competence. There is, however, much to suggest that, not least, a sufficient explanation of the process of consideration in the course of further legislation to create a digital single market, as well as the complex forecasts and assessments, which are also required in the case of preventive legislation to safeguard diversity with a view to threats to the diversity objective by new media players, such as media intermediaries in particular, are likely to limit from the outset the chances of

259 CJEU, case C-493/17, *Heinrich Weiss and Others*, para. 78.
260 CJEU, case C-493/17, *Heinrich Weiss and Others*, para. 81.
261 CJEU, case C-493/17, *Heinrich Weiss and Others*, para. 91.
262 CJEU, case C-493/17, *Heinrich Weiss and Others*, para. 92.
263 CJEU, case C-493/17, *Heinrich Weiss and Others,* para. 93.

success of proceedings based on a violation of the principle of proportionality. This would be true at least if the preventive safeguarding of diversity were not the main purpose of regulation on the part of the EU, but an accompanying purpose in the effort to make fundamental freedoms more effective for the new media players.

In terms of regulatory policy, however, in order to avoid deepening of the line of conflict between the CJEU and the FCC, originating in the ECB bond policy, on the interpretation of ultra vires limits in light of the principle of proportionality, this argues for restraint in European lawmaking in areas that are particularly sensitive to fundamental rights from the perspective of the constitutional doctrines of communications freedoms in the Member States. In particular, full harmonization of the law of diversity in the digital media ecosystem would provoke questions about overstepping the ultra vires boundaries in the relationship between the CJEU and the FCC. Such an insensitive extension of the scope of application of European "media regulation" *ratione personae* and/or *ratione materiae* would equally endanger the cooperation between the EU and its Member States and potentially further strain the relationship between the CJEU and the FCC.

6. *The significance of limitations to the exercise of competences in the practice of media regulatory – status and perspectives for development*

In the practice of media regulation to date, neither the principle of proportionality nor the principle of subsidiarity have played a role easily recognizable from the outside and have, to that extent, been of accordingly little relevance. In the recitals of the amended AVMSD, there is only a rudimentary reference to the principle of proportionality, which, moreover, is not based on competence but on fundamental rights, in connection with the so-called quota regulations.[264] With regard to the principle of subsidiarity, there is not even any recital specifically related to this principle.

264 After rec. 37 of the amended AVMSD first emphasizes that broadcasters currently invested more in European audiovisual works than providers of on-demand audiovisual media services, it concludes: "Therefore, if a targeted Member State chooses to impose a financial obligation on a broadcaster that is under the jurisdiction of another Member State, the direct contributions to the production and acquisition of rights in European works, in particular co-productions, made by that broadcaster, should be taken into account, *with due consideration for the principle of proportionality*" (own emphasis).

However, this does not mean that the principle of subsidiarity is without practical relevance: In its legislative proposals, including those with more or less intensive reference to media regulation, the European Commission regularly addresses the issue of compatibility with the principle of subsidiarity, thus enabling third-party regulators, but also the interested public, to raise critical objections as to the compatibility of the proposed regulation with the principle of subsidiarity. It is reasonable to assume that this procedural opening towards a subsidiarity-related burden of justification also takes into account the procedural effects of the principle of subsidiarity, in particular the early warning system.

In recent years, national parliaments have occasionally made use of the possibility to criticize insufficient compliance with the principle of subsidiarity in EU legislative proposals.[265] However, the state parliaments, which are ultimately responsible for media regulation in Germany, do not have the ability to reprimand. So far, they have not been able to make an institutional mark as "guardians" of the principle of subsidiarity.

However, as far as appears, the early warning mechanism has never led to the Commission subsequently amending a legislative proposal in a substantial way, even beyond the field of media regulation, although the views of the institutions and other actors, including national parliaments, on compliance with the principle of subsidiarity sometimes diverge strongly. The Commission's adherence to its own proposals can probably be explained to some extent by the fact that the quorums for triggering the special review requirement were reached only exceptionally in very few legislative proposals. In order for national parliaments to achieve the necessary clout, careful coordination and consultation would be required not only in the domestic sphere of cooperative parliamentary federalism, but also in transnational European parliamentary networking. A joint approach is essentially the prerequisite for the early warning mechanism to be used effectively. The Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) could be used as a "clearing house" for this purpose.

In addition, Art. 4a(2)(2) AVMSD now provides that "[i]n cooperation with the Member States, the Commission shall facilitate the development

265 Cf. on this and the following the Commission's annual reports on the application of the principles of subsidiarity and proportionality, most recently for 2019, COM(2020) 272 final, https://ec.europa.eu/info/sites/info/files/com-2020-272-en.pdf.

of Union codes of conduct, where appropriate, in accordance with the principles of subsidiarity and proportionality".[266]

The importance of both principles in the further development of the regulatory framework for media governance in the EU cannot be underestimated. This is because the reference in the Directive to EU codes of conduct is adressed in Art. 4a(1) and (2) of the Directive, providing for regulation by means of co- and self-regulation: According to Art. 4a(1) sentence 1, "Member States shall encourage the use of co-regulation and the fostering of self-regulation through codes of conduct adopted at national level in the fields coordinated by this Directive to the extent permitted by their legal systems".[267] Additionally, according to Art. 4a(2) sentence 1, "Member States and the Commission may foster self-regulation through Union codes of conduct drawn up by media service providers, video-sharing platform service providers or organisations representing them, in cooperation, as necessary, with other sectors such as industry, trade, professional and consumer associations or organisations".[268]

VI. The relevance of fundamental rights

1. Media-related protection of fundamental rights, the requirement of respect under Article 11(2) CFR and the question of competence

Freedom and pluralism of the media are not solely of fundamental importance for a functioning democracy at the level of the Member States of the EU. Without such protection of the media, an integration process committed to the fundamental values of Art. 2 TEU cannot be set in motion. Questions of media regulation thus touch on the foundation of the European Union – the "universal values of the inviolable and inalienable rights of

266 In detail on the AVMSD see chapter D.II.2.

267 According to Art. 4a(1) sentence 2 AVMSD, "[t]hose codes shall (a) be such that they are broadly accepted by the main stakeholders in the Member States concerned; (b) clearly and unambiguously set out their objectives; (c) provide for regular, transparent and independent monitoring and evaluation of the achievement of the objectives aimed at; and (d) provide for effective enforcement including effective and proportionate sanctions".

268 According to Art. 4a(2) sentence 2 AVMSD, "[t]hose codes shall be such that they are broadly accepted by the main stakeholders at Union level and shall comply with points (b) to (d) of paragraph 1". According to sentence 3, "[t]he Union codes of conduct shall be without prejudice to the national codes of conduct".

the human person, freedom, democracy, equality and the rule of law" as embodied in the preamble to the TEU.[269]

It is also against this background that freedom and pluralism of the media have always played a prominent role in the development of the EU's protection of fundamental rights. They are a central part of the rights, freedoms and principles enshrined in the ECHR as well as in the CFR and are deeply rooted in the constitutional traditions of the Member States. "They […] therefore form a normative corpus that has already had, and will potentially have, a role in the interpretation and application of European law"[270] – not least in shaping the digital transformation of (not only) the media ecosystem in a way that safeguards and promotes freedom and at the same time is compatible with democracy and socially acceptable.

In view of the focus of the study, the following does not deal in depth with the scope of the protection of fundamental rights, but with its significance from the perspective of competences. Nevertheless, a brief recourse to the media-related relationship between European and national fundamental rights protection is already at this point significant in terms of competences.[271]

The CFR contains civil, political, economic, social and Union citizenship rights. According to the first sentence of Art. 52(3) CFR, the rights guaranteed therein may not be inferior in meaning and scope to those guaranteed in the ECHR. This protection of the ECHR is to be understood as a minimum standard; the Charter can therefore offer more extensive protection, as is confirmed in its Art. 52(3) sentence 2. This is relevant also with regard to the protection of media fundamental rights.

According to Art. 10(1) sentence 1 ECHR, everyone has the right to freedom of expression. According to the second sentence, this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Under the third sentence of Art. 10(1) ECHR, this Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, according to Art. 10(2) ECHR, "carries with it duties and responsibilities [and hence] may be subject to such for-

269 Cf. on this context *Vike-Freiberga et al.* (High-Level Group on Media Freedom and Pluralism), Report on a free and pluralistic media to sustain European democracy, p. 20.

270 *Brogi/Gori*, European Commission Soft and Hard Law Instruments for Media Pluralism and Media Freedom, p. 67.

271 Cf. furthermore also below, chapters C.II and C.III.

malities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

The scope of protection of Art. 11 CFR goes further than the protection under Art. 10 ECHR. While Art. 11(1) sentence 1 CFR is identical in wording to Art. 10(1) sentence 1 ECHR and Art. 11(1) sentence 2 CFR is identical in wording to Art. 10(1) sentence 2 ECHR, Art. 11(2) CFR furthermore stipulates that "[t]he freedom and pluralism of the media shall be respected".

The term "media", already from its wording, goes beyond the classical terms of radio and television used in Art. 10(1) sentence 3 ECHR and also encompasses more than just this traditional broadcasting and the press. Even if Art. 10 ECHR is to be understood dynamically according to settled case law of the Strasbourg Human Rights Court, it is noteworthy that Art. 11(2) CFR already from its wording takes a broader personal scope of application of the fundamental right in question into consideration. Already on a semantic interpretation, this personal scope of application includes not only classic categories of media, but all – including future, i.e. not known at the time of the drafting and adoption of the Charter – transmission media for communication directed at the general public. This special openness to future and development[272] must also be taken into account in the further development of the regulation of communication beyond individual communication, i.e. also as regards regulation that relates to social networks and media intermediaries. Since the possibility of exercising fundamental rights in the digital space must also be protected by the state, there is an obligation in this respect also to protect against disruptions of a free mass-communicative discourse to the detriment of democratic freedom and participation through technical or other instruments such as network effects. The necessity of openness as regards the protection of fundamental rights against new threats, as emphasized by the FCC in its "III. Weg" decision, is therefore also important with regard to the protection of fundamental rights in Europe.

It is also evident that a decentralisation of media regulation can contribute to the pluralism of the media. In this respect, measures to safeguard

272 Cf. *Frenz*, Handbuch Europarecht, para. 1747.

regional and local diversity are not least also suitable for supporting the objective of Art. 11(2) CFR.

Under the Treaty of Lisbon, the CFR has acquired the status of primary law via Art. 6(1) TEU. According to Art. 51(1) sentence 1 CFR, the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union; they also apply to the Member States, insofar as they act within the scope of application of Union law, e.g. when implementing and enforcing Union law.[273]

Whether fundamental rights beyond their defensive function also imply the transfer of obligations to protect onto the sovereign is disputed and is open to differentiated consideration depending on the fundamental right in question. The "obligation to respect" of Art. 11(2) CFR speaks against a merely defensive quality of the pluralism dimension of that fundamental right. The CJEU has already affirmed – though not yet in relation to Art. 11(2) CFR – a function of objective law for certain fundamental rights.[274] In all cases in which an obligation to protect is to be affirmed, the public authority must intervene in the event of violations of fundamental rights, for example by private third parties, or even prevent them (by law), which would mean that the European legislature would have an obligation to act – however not beyond the EU's existing areas of competence. This is because neither the European recognition of media freedom as a fundamental right nor the obligation to respect the pluralism of the media gives rise to any additional competence title or even a regulatory primacy on the part of the EU. This follows from Art. 51(2) CFR: Accordingly, "[t]he Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties".

273 Cf. CJEU, case 12/86, *Meryem Demirel / Stadt Schwäbisch Gmünd*, para. 28; CJEU, case 5/88, *Hubert Wachauf / Bundesamt für Ernährung und Forstwirtschaft*, para. 17 et seq.

274 Cf. CJEU, case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others / Commissariaat voor de Media*, para. 22; CJEU, case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH / Heinrich Bauer Verlag*, para. 18. Cf. on this also chapter C.IV.1. in the context of the permissible restriction of fundamental freedoms in the area of diversity protection.

2. *Protection of fundamental rights in an area of friction between review by the CJEU and national constitutional courts*

Questions of fundamental rights protection have long shaped the relationship and assignment of EU law and national constitutional law. In the development of the relevant FCC case law, remarkable shifts of emphasis can be observed, which have continued into recent times.

The starting point for this jurisprudence on the conflict between European law and constitutional law was the so-called *Solange I* decision of the FCC. Therein, the FCC first emphasized that national law and supranational law were two independent and coexisting legal spheres.[275] More explosive – and at the time already open to legal criticism – was its suggestion that European protection of fundamental rights did not meet the requirements of such protection in Germany. Building on this (mis)judgment, the FCC concluded:

> *"As long as the integration process has not progressed so far that Community law receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, a reference by a court of the Federal Republic of Germany to the Federal Constitutional Court in judicial review proceedings, following the obtaining of a ruling of the European Court under Article 177 of the Treaty, is admissible and necessary if the German court regards the rule of Community law which is relevant to its decision as inapplicable in the interpretation given by the European Court, because and in so far as it conflicts withone of the fundamental rights of the Basic Law."*[276]

With its *Solange II* decision, the FCC – also in the light of the CJEU's case law on fundamental rights that had been handed down in the meantime – initiated a departure from this course of confrontation under conflict of laws. Therein, the Karlsruhe judges emphasized:

> "*As long as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential*

275 Cf. BVerfGE 37, 271 (278).

276 BVerfGE 37, 271 (285), translation available at https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588.

> *content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law; references to the Court under Article 100 (1) Basic Law for those purpose are therefore inadmissible."*[277]

With the FCC in this decision reserving its power of judicial review in theory but withdrawing it considerably in practice, the Karlsruhe Court continued to adhere to this case law in subsequent years. In particular, in its *Banana Market Regulation* decision, it considered the protection of fundamental rights at the European level as sufficient and emphasized that, even after its *Maastricht* decision[278], it would exercise its power of judicial review only under certain conditions. Therefore, references to the FCC were inadmissible if their justification did not show that the development of European law and the case law of the CJEU had fallen below the required standard of fundamental rights protection after the *Solange II* decision.[279] It would therefore be necessary to explain why a provision of secondary Community law in detail did not generally guarantee the protection of fundamental rights imperative in each case.[280]

More recently, however, the FCC has distanced itself from this case law designed towards cooperation with the CJEU, not only in its ECB decision in 2020, but already earlier in relation to fundamental rights.

As early as 2016,[281] for the first time, it added elements to its fundamental rights review of the preservation of constitutional identity by reserving the right to review the protection of human dignity in light of the German Basic Law not only in the event of a general drop in standards – in line with the *Solange II* approach – but also in individual cases. The reason for this widening of the extent of jurisdiction was that Art. 1 of the Basic Law is referred to in Art. 79(3) of the Basic Law – with the consequence that human dignity is as well part of the constitutional identity of the Basic Law and to that extent subject to identity review. While the decision, which in

277 BVerfGE 73, 339 (387), translation available at https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=572.
278 Cf. on this supra, chapter B.V.4.
279 BVerfGE 102, 147 (165).
280 BVerfGE 102, 147 (164).
281 BVerfGE 140, 317 (333 et seq.).

terms of content was about the compatibility of an extradition (apparently) mandatory under European law with the principle of guilt, was welcomed by some commentators as a call to the CJEU to take the protection of fundamental rights more seriously, it was classified by others as a "Solange IIa" or "Solange III" decision[282]; there was talk of an almost detonated "identity review bomb"[283]. It is evident that this decision already was not necessarily fully compatible with the CJEU case law on the role of national protection of fundamental rights in the multi-level system of fundamental rights.

The latter issue is made particularly virulent by the Order of the First Senate of 6 November 2019. Already the first headnote shows its fundamental significance in connecting to the "Solange" terminology:

> *"To the extent that fundamental rights of the Basic Law are inapplicable due to the precedence of EU law, the Federal Constitutional Court reviews the domestic application of EU law by German authorities on the basis of EU fundamental rights. By applying this standard of review, the Federal Constitutional Court fulfils its responsibility with regard to European integration under Article 23(1) of the Basic Law.*
> *Regarding the application of legal provisions that are fully harmonised under EU law, the relevant standard of review does not derive from the fundamental rights of the Basic Law, but solely from EU fundamental rights; this follows from the precedence of application of EU law. This precedence of application is subject, inter alia, to the reservation that the fundamental right in question be given sufficiently effective protection through the EU fundamental rights that are applicable instead."*[284]

This decision is also noteworthy in the context of the present study because it originates from a situation related to media regulation and in this context emphasizes the dimension of fundamental rights beyond their classic understanding as defensive rights against the state.

Just like the fundamental rights of the Basic Law, those of the Charter, in view of the FCC, are not limited to protecting citizens vis-à-vis the state, but also afford protection in disputes between private actors, as the court

282 Cf. on the debate e.g. *Bilz*, JuWissBlog, 15.03.2016, with further references.
283 "Identitätskontrollbombe", *Steinbeis*, Verfassungsblog, 26.01.2016.
284 FCC, Order of the First Senate of 6 November 2019, 1 BvR 276/17, Headnotes 1 and 2; cf. also ibid., para. 47, 50, 53.

emphasizes with reference particularly to the extensive case law of the CJEU.[285]

> *"Where affected persons request that search engine operators refrain from referencing and displaying links to certain online contents in the list of search results, the necessary balancing must take into account not only the right of personality of affected persons (Articles 7 and 8 of the Charter), but must also consider, in the context of search engine operators' freedom to conduct a business (Article 16 of the Charter), the fundamental rights of the respective content provider as well as Internet users' interest in obtaining information. Insofar as a prohibition of the display of certain search results is ordered on the basis of an examination of the specific contents of an online publication, and the content provider is thus deprived of an important platform for disseminating these contents that would otherwise be available to it, this also constitutes a restriction of the content provider's freedom of expression."*[286]

VII. Media regulation and the principle of democracy in the EU

According to Art. 2 sentence 1 TEU, "democracy" is also part of the value system of the EU, on which "[t]he Union is founded". At the same time, the relationship between democracy and "pluralism" is pointed out in Art. 2 sentence 2 TEU – there, however, not with regard to the EU, but with regard to Member States and society. This disconnection between democracy and pluralism in addressing the respective value in the multi-level system of the EU already argues against an "annex competence" of the EU, based on the importance of media pluralism for democracy, to regulate pluralism across all levels of the European integration system, aiming towards preserving the value of democracy. Such cross-level regulation is also out of the question on the occasion of the regulation of the election procedure to the European Parliament pursuant to Art. 223 TFEU.

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285 FCC, Order of the First Senate of 6 November 2019, 1 BvR 276/17, headnote 4 und para. 96 with reference to CJEU, case C-275/06, *Promusicae / Telefónica de España SAU*, para. 65 et seq.; CJEU, case C-580/13, *Coty Germany GmbH / Stadtsparkasse Magdeburg*, para. 33 et seq.; CJEU, case C-516/17, *Spiegel Online GmbH / Volker Beck*, para. 51 et seq.; on this also *Streinz/Michl* in: EuZW 2011, 384, 385 et seq.; *Frantziou* in: HRLR 2014, 761, 771; *Fabbrini* in: de Vries/Bernitz/Weatherill, p. 261, 275 et seq.; *Lock* in: Kellerbauer/Klamert/Tomkin, Art. 8 CFR, para. 5.

286 FCC, Order of the First Senate of 6 November 2019, 1 BvR 276/17, Headnote 5 and para. 114 et seq.

It is obvious that diversity of opinion and of the media are indispensable for maintaining a democratic order. The FCC emphasizes in a manner that is also applicable beyond the German constitutional order that

> *"Democracy, if it is not to remain merely a formal principle of attribution, depends on the existence of certain pre-legal preconditions, such as ongoing free debate between social forces, interests and ideas that encounter each other, in which political objectives too are clarified and change, and out of which public opinion pre-shapes political will."*[287]

That among these conditions is "that the citizen entitled to vote be able to communicate in his own language with the bodies exercising sovereign power to which he is subject"[288] cannot be disputed. However, a democratic European integration system does not presuppose that this communication has to take place only in a single common language. Linguistic diversity is not an obstacle to democratic cohesion, as has already been shown by countries with several official languages, such as Switzerland, and by countries that are increasingly moving away from the dominance of one language, such as the USA. A reduction of linguistic diversity is therefore not appropriate for the creation of transnational pluralism and would, moreover, be in obvious contradiction to imperatives of public international law with regard to cultural diversity, such as the protection and preservation of minority languages.

Insofar as the FCC emphasized in its *Maastricht* decision that the pre-legal prerequisites also include that

> *"both the decision-making process amongst those institutions which implement sovereign power and the political objectives in each case should be clear and comprehensible to all"*,[289]

one may at least speak of a clear facilitation of pre-legal prerequisites of a democratic shape of the EU when looking at the reform steps of constitutional nature that have taken place since the Maastricht Treaty, such as the reduction of different legislative procedures, the consolidation of cross-border partisan cooperation and the increasing transparency of the political objectives of the Commission and the European Parliament.

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287 BVerfGE 89, 155 (185) (partly own translation).

288 BVerfGE 89, 155 (185) (own translation).

289 BVerfGE 89, 155 (185); translation available at https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf, p. 18.

The European integration system is therefore increasingly also a democratic system – not only a group of democratic states designed for the dynamic development of the EU, but also, in the course of deepening European integration, increasingly a group of these states together with an EU that itself becomes a vehicle for the exercise of democratic rule. In its *Maastricht* decision of 12 October 1993, the FCC already emphasized that

> *"[a]s the functions and powers of the Community are extended, the need will increase for representation of the peoples of the individual States by a European Parliament that exceeds the democratic legitimation and influence secured via the national parliaments, and which will form the basis for democratic support for the policies of the European Union."*[290]

With the citizenship of the Union established by the Treaty of Maastricht, a lasting legal bond was created between the citizens of the individual Member States which, although it did not have an intensity comparable to common citizenship of a state, nevertheless did lend a legally binding expression to that level of existential community which already exists. The FCC then emphasizes that:

> *"The influence which derives from the citizens of the Community may develop into democratic legitimation of European institutions, to the extent that the […] conditions for such legitimation are fulfilled by the peoples of the European Union."*[291]

In the almost three decades since the Maastricht Treaty, to which the FCC's 1993 decision referred, such actual conditions have increasingly developed within the institutional framework of the European Union, not only as a legal instrument for action, but they have also become established in social reality. Not least the climate and Corona crises, but also populist attacks on value-based democratic cooperation are proving to be catalysts of a transnational formation of opinion in order to shape democratic processes of response to the threats.

However, this expanding democratic system does not give rise to any competence on the part of the EU to promote the regulatory prerequisites for a further deepening of the democratic system. Admittedly, this deepen-

290 BVerfGE 89, 155 (184); translation available at https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf, p. 18.

291 BVerfGE 89, 155 (184 et seq.); translation available at https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf, p. 18.

ing requires a more intensive engagement of the media in the Member States in communicating democratic decision-making processes and their outcomes in relation to the EU's integration program. This is because a European public sphere as a driving force and amplifier for strengthening the EU as a bearer of genuine, democratically legitimized sovereignty also requires openness and transparency supported by the media with regard to the way in which, on the one hand, the Member States internally and between each other and, on the other hand, the EU institutions internally and between each other deal with the competences available to the EU from the European Treaties. However, the constitutional structure of the EU is not designed to enable the Union to draw competences under integration law from integration policy desiderata.

Accordingly, the EU's potential for harmonizing media regulation, which, if anything, can be derived from the principle of democracy, exists in essence to the extent that democratic desiderata, such as the defense against disinformation campaigns from the perspective of the internal market in order to avoid obstacles to the free movement of goods and services, are accompanied by different concepts of well-fortified democracy in a primarily business-oriented regulation.

VIII. Conclusions for the competence for media regulation

The principle of conferral also applies to media regulation by the EU. It is not possible to make conclusive statements about the EU's scope for action in media regulation, since the competence rules of the European Treaties are open to a dynamic understanding that addresses digital challenges.

The European Treaties, in their competence rules providing for regulatory options for the EU, do not contain any exceptions for the media; the EU's "functional" competences, not least in the area of creating a (also digital) single market and a competition regime (in the future also aimed at Europe's digital sovereignty), do not extend to the cultural and diversity-securing function of media, but they do extend to all areas of their economically significant activities.

Neither does the EU have any comprehensive authority to regulate the media. There is no explicit reference to media regulation in the EU competence catalogs; the medias' cultural and educational dimension is only open to regulation by the EU below the level of legal harmonization, supporting the actions of the Member States.

In particular, the inclusion of pluralism in the EU's value system under Art. 2 TEU does not give rise to any regulatory competence on the part of

the EU in this regard. The EU's value system provides guidelines for the exercise of the EU's competences provided for elsewhere in the Treaties. Due to the principle of conferral, the imperative of pluralism cannot be considered as a legal basis for genuine regulation of media diversity, not even in the form of an annex competence.

The influence of EU law on media regulation in the Member States to date – and to be expected in the future within the framework of the European Digital Decade proclaimed by Commission President von der Leyen -, whether in the way of active-positive integration through EU legal acts with reference to the media and not least to media diversity, or in the way of negative integration through the review of media regulation in the Member States against the standards of primary EU law (not least fundamental freedoms and competition law), cannot be regarded either as *ultra vires* in principle or even generally, nor as generally permissible. The question of whether an act of media regulation by the EU is outside the EU's integration program remains, at the outset, a question of case-by-case consideration.

However, an overall view of the structural principles of the European Treaties with their rules and restrictions on the exercise of competences, in particular the principles of subsidiarity and proportionality, argues for a continuing primacy at least of culture- and diversity-related media regulation on the part of the Member States. Ultimately, two guidelines for the EU's media regulation in this regard correspond to this: As little interference in Member States' regulatory competence through negative integration as possible, as little harmonization and positive integration as necessary.