C. On the significance and enshrinement in law of media diversity at EU level

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I. Introduction

> *"The concept of pluralism can be defined both in terms of its function and in terms of its objective: it is a legal concept whose purpose is to limit in certain cases the scope of the principle of freedom of expression with a view to guaranteeing diversity of information for the public."*

It is with these words that in 1992, the European Commission attempted in its Green paper on Pluralism and media concentration in the internal market[292] to establish a definition of pluralism in the media and thus a starting point for what is needed to protect and preserve media diversity. Less than two years later, the Council of Europe defined media pluralism in much more concrete and media-related terms, referring to internal and external pluralistic structures of the media themselves as either

> *"internal in nature, with a wide range of social, political and cultural values, opinions, information and interests finding expression within one media organization, or external in nature, through a number of such organizations, each expressing a particular point of view".*[293]

Over the decades since, new definitional approaches have been sought repeatedly at both the scientific and political levels.[294] However, there is still no uniform and supranationally valid definition of what is to be understood by media pluralism. In fact, against the background of the necessity

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292 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, p. 18.

293 Council of Europe's Committee of Experts on Media Concentrations and Pluralism (1994), 'The Activity Report of the Committee of Experts on Media Concentrations and Pluralism', submitted to the 4th European Ministerial Conference on Mass Media Policy, Prague, 7–8 December 1994.

294 Cf. in detail on the development of the term *Costache*, De-Regulation of European Media Policy 2000–2014, p. 15 et seq.

of conceptual openness, which must not permit a definitional narrowing and is therefore immanent to media pluralism, there can be no such definition at all. Rather, it also depends on the starting point from which the observation is made. This can, for example, be just as much a media concentration law perspective as an information law one, which asks what significance media pluralism has for the acquisition of information by citizens and thus for the democratic process of developing an informed opinion and mustering a political will.

As outlined in the previous chapter against the background of competence rules, safeguarding media diversity – even though it is not one of the EU's genuine competences – finds such diverse links in Union law also, for example within the EU's value system. Against the background of this study's focus more significant are, however, media diversity's roots in the substantive content of fundamental rights at the level of the ECHR and the CFR as well as in primary law, especially within the EU competition regime and its fundamental freedoms. As will be shown below, safeguarding media diversity in this context is not a direct starting point for legislative measures, but rather a value or objective of general public interest which the EU and its Member States must take into account and uphold in other regulatory areas and which can therefore have justifying or restrictive effects. This chapter will only provide an overview of the enshrinement in secondary law. An in-depth look at the framework of media law at the level of EU secondary law, with a particular focus on aspects of safeguarding diversity, will be taken in the following chapter.

II. Art. 10 ECHR and the case law of the ECtHR

Art. 10 ECHR guarantees that everyone has the right to freedom of expression, including the freedom to hold opinions and to receive and impart information. Freedom of expression, opinion and information constitute rights that are also of crucial importance against the backdrop of media pluralism, since safeguarding and preserving diversity must fulfill their functions with a view to the democratic process of developing an informed opinion and mustering a political will. The accession of the EU to the ECHR has been on the European agenda for half a century, but has not yet taken place, probably also due to the complexity of the accession of a supranational organization with an autonomous legal order to a human

rights protection system under public international law.[295] However, the 27 Member States of the EU are bound by the ECHR and remain so in principle even when sovereign rights are transferred to supranational bodies.[296] Moreover, the EU applies its own fundamental rights protection vis-à-vis the ECHR, guaranteed through the CFR, even more widely than many legal orders of EU Member States do[297], in that Art. 52(3) CFR provides that, to the extent that the CFR contains rights equivalent to those guaranteed by the ECHR, they shall have the same meaning and scope as given to them in the said Convention. This provision does not preclude Union law from providing more extensive protection.

Based on the ECtHR's broad understanding of the term as already mentioned in Section B.VI.1., Art. 10(1) ECHR also protects the mass media dissemination of information, in particular the freedom of public and private broadcasters to broadcast[298], whereby advertising[299] is also part of the protected communication process. In this context, the scope of protection extends to the communication process on the Internet also.[300] Just as little as the distribution channel does the professionalism of media offerings play a role for the application of the scope of protection. In a more recent decision, the ECtHR argues that, for example, so-called citizen journalism (such as e.g. in the form of offerings and channels by users on video-sharing platforms (VSP) like YouTube) can also be an important additional means of exercising freedom of expression and to receive and impart information and ideas, especially against the background that and when political information is ignored by the traditional media.[301]

Broadly defined is also the notion of interference, which covers both preventive measures and repressive prohibitions and sanctions, ranging from the prevention or impediment of the reception/accessibility of media services or individual contents to mere flagging.[302] In this context, the intensity of the interference, i.e., the severity of the impairment of the fundamental right due to the interference, is weighted only at the level of justifi-

295 Cf. on this in detail *Obwexer* in: EuR 2012, 115, 115 et seq.
296 *Ress*, Menschenrechte, Gemeinschaftsrechte und Verfassungsrecht, p. 920 et seq.
297 Cf. on this *Krämer* in: Stern/Sachs, Art. 52 CFR, para. 65; *Lock* in: Kellerbauer/Klamert/Tomkin, Art. 52 CFR, para. 25.
298 ECtHR, No. 50084/06, *RTBF / Belgium*, para. 5, 94.
299 ECtHR, No. 33629/06, *Vajnai / Hungary*; No. 15450/89, *Casado Coca / Spain*.
300 ECtHR, No. 36769/08, *Ashby Donald u.a. / France*, para. 34.
301 Cf. ECtHR, No. 48226/10 and 14027/11, *Cengiz and others / Turkey*.
302 Cf. for instance ECtHR, No. 26935/05 and 13353/05, *Hachette Filipacchi Presse Automobile and Dupuy and Société de Conception de Presse et d'Edition and Ponson / France*.

cation, because the ECHR does not guarantee freedom of expression and of the media without restriction, but accepts that freedom of expression also entails a certain responsibility and therefore permits restrictions based on higher-ranking legal interests. The ECtHR grants the Convention States a margin of discretion, within which, however, they must establish an appropriate balance between the restriction of freedom of expression and the legitimate objective pursued.[303]

Media diversity[304] has always been of particular importance in the context of Art. 10 ECHR. Even though this does not follow directly from the text of the Convention, it does so from the established case law of the ECtHR. It has repeatedly emphasized the fundamental role of freedom of expression for a democratic society, especially insofar as it serves to disseminate information and ideas of general interest, which the public has a right to receive.[305] The media act here in their function as "public watchdog"[306] and make an important contribution to the public debate – as mediator of information and forum for public discourse. Such an effort, the ECtHR emphasizes, could only be successful if it was based on the principle of pluralism, of which the state is the guarantor.[307] In this context, the Court even goes so far as to observe that there could be no democracy without pluralism[308], democracy being characterized by the protection of cultural or intellectual heritage as well as artistic, literary and socio-economic ideas

303 ECtHR, No. 39954/08, *Axel Springer AG / Germany*.

304 Recommendation No. R (94) 13 of the Committee of Ministers to member states on measures to promote media transparency (1994); Recommendation No. R (99) 1 of the Committee of Ministers to member states on measures to promote media pluralism (1999); Recommendation Rec (2003) 9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting (2003); Recommendation CM/Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content (2007); Recommendation CM/Rec(2012)1 of the Committee of Ministers to member states on public service media governance (2012). For an overview of the Council of Europe's recommendations in the area of media and the information society, see also Recommendations and declarations of the Committee of Ministers of the Council of Europe in the field of media and information society, 2016, https://rm.coe.int/1680645b44.

305 ECtHR, No. 13585/88, *Observer and Guardian / United Kingdom*; No. 17207/90, *Informationsverein Lentia and others / Austria*.

306 Cf. for a concretization of the role as public watchdog e.g. ECtHR, No. 21980/93, *Bladet Tromsø / Norway*.

307 ECtHR, No. 17207/90, *Informationsverein Lentia and others / Austria*, para. 38.

308 ECtHR, No. 13936/02, *Manole and others / Moldova*, para. 95.

and concepts.[309] Not least because of this outstanding importance, the ECtHR does not assign a purely defensive dimension to Art. 10(1) ECHR with regard to securing media pluralism, but considers the state to be – in the last instance – the guarantor of the principle of pluralism.[310] However, the question of whether the ECHR states from this are subject to an obligation to create equivalent diversity in European communication spaces, or merely to the obligation to protect and promote media diversity, has not yet been conclusively clarified.[311] The ECtHR's understanding in this respect is at least that if pluralism leads to tensions, the state's action must not be directed against pluralism, but rather must ensure that the groups involved tolerate each other.[312] Moreover, a purely defensive conception is not compatible with the Convention in general, especially against the background of its Art. 1, according to which states shall secure the rights and freedoms under the Convention. In the audiovisual sector, pluralism must be guaranteed at least in an effective way by providing an appropriate framework – in legal and administrative terms.[313]

Irrespective of whether and to what extent positive obligations to act on the part of the Convention States are to be derived from Art. 10(1) ECHR, the enshrinement of the obligation to protect media pluralism in the ECHR and its classification as an objective of general interest is significant with regard to the justification of the interference with fundamental freedoms.[314] Interference with fundamental rights, such as freedom of the media itself or freedom of property under Art. 1 of the First Additional Protocol to the ECHR, for instance, can be justified by diversity safeguarding measures adopted by the Convention States, since fundamental rights in turn are subject to restrictions in order to realize public interest objectives, provided that these are necessary (i.e. proportionate) in a democratic society.

309 ECtHR, No. 44158/98, *Gorzelik and others / Poland*, para. 92.

310 ECtHR, No. 17207/90, *Informationsverein Lentia and others / Austria*, para. 38; No. 24699/94, *VgT Verein gegen Tierfabriken / Switzerland*, para. 73.

311 Cf. for instance *Gersdorf* in: AöR 1994, 400, 414; *Daiber* in: Meyer-Ladewig/Nettesheim/von Raumer, Art. 11, para. 60.

312 ECtHR, No. 74651/01, *Association of Citizens Radko & Paunkovski / Former Yugoslav Republic of Macedonia*; cf. on this and the following also *Ukrow/Cole*, Aktive Sicherung lokaler und regionaler Medienvielfalt, p. 83 et seq.

313 ECtHR, No. 48876/08, *Animal Defenders International / United Kingdom*, para. 134. On this supra, chapter B.VI.1.

314 Cf. ECtHR, No. 38433/09, *Centro Europa 7 S.R.L. and di Stefano / Italy*, para. 214 et seq.

Consequently, the aforementioned comments on the aspects of safeguarding diversity to be derived from Art. 10(1) ECHR also apply in parallel with the broad understanding of the scope of protection. The ECtHR does particularly emphasize the importance of diversity in certain media sectors, especially in the audiovisual sector because of its traditionally more pervasive ("very widely") effect than, for example, the press.[315] However, the imperative to maintain pluralism in the sense of a threat-oriented interpretation of fundamental rights protection applies wherever a medium acquires significance for the transmission of information. Thus, the ECtHR also emphasizes the particular significance of the Internet for the democratic process of developing an informed opinion and mustering a political will[316] – which is not least important for the distribution channels of traditional media –, without diminishing the important role of traditional media alongside new players such as social media or other platforms. Rather, the ECtHR seems to assume that an interplay of different means of reception constitutes pluralism. This may lead to a situation where, in the event of a (sufficiently serious) uneven shift of influence on the formation of public opinion, specific countermeasures would have to be taken by the Convention States.[317]

However, the ECtHR does not specify how the Convention States are to design measures to safeguard diversity – apart from general statements on the necessity of measures in a democratic society or the weighting of differing interests protected by fundamental rights. Within the framework of its jurisdiction, however, it increasingly refers to recommendations of the Council of Europe, in particular the Recommendation of the Committee of Ministers to member states on media pluralism and diversity of media

315 ECtHR, No. 37374/05, *Társaság a Szabadságjogokért / Hungary*, para. 26; No. 17207/90, *Informationsverein Lentia and others / Austria*, para. 38; No. 24699/94, *VgT Verein gegen Tierfabriken / Switzerland*, para. 73.

316 ECtHR, No. 3002/03 and 23676/03, *Times Newspapers Ltd (No. 1 and 2) / United Kingdom*, para. 27.

317 This option was considered by the ECtHR in its judgment of 22.04.2013 (No. 48876/08, *Animal Defenders International / United Kingdom*, para. 119: "*Notwithstanding therefore the significant development of the internet and social media in recent years, there is no evidence of a sufficiently serious shift in the respective influences of the new and of the broadcast media in the respondent State to undermine the need for special measures for the latter*"), but was ultimately rejected in light of the circumstances of the digital transformation in the media landscape at that time.

content[318], which equally affirms that pluralistic expression should be protected and actively promoted.[319] The Council of Europe itself bases its recommendations for Member States' options for action on Art. 10 ECHR and the resulting obligations imposed on its Member States. In particular, they are to adapt the existing regulatory framework, especially with regard to media ownership, and take all necessary regulatory and financial measures to ensure media transparency and structural pluralism as well as diversity. In this context, the Council of Europe's sector-specific recommendations also contain more concrete proposals for measures to safeguard diversity based on an analysis of potential threats, such as the introduction of transparency obligations or must-carry/must-offer rules. However, due to the non-binding nature of such recommendations, whether and how they are "implemented" is in any case left to the Member States.[320]

III. Art. 11(2) CFR and CJEU jurisprudence

At EU level, the counterpart to Art. 10(1) ECHR is found in Art. 11(1) CFR, according to which everyone has the right to freedom of expression, which shall include freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers. As under the ECHR, the scope of protection (in conjunction with Art. 11(2), which also explicitly addresses freedom of the media) covers traditional media such as the press, radio and film, as well as any other form of mass communication that already exists or will come into existence in the future, provided that it is addressed to the general public.[321] Art. 11 CFR was introduced into the Charter in close accordance with Art. 10 ECHR or, as far as the degree of protection is concerned, in direct incorporation. Only the specific limitations of Art. 10(2) ECHR were not explicitly reproduced,

318 Recommendation CM/Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content, adopted on 31 January 2007, available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d6be3.

319 ECtHR, No. 48876/08, *Animal Defenders International / United Kingdom*,, para. 135.

320 Cf. on this *Tichy* in: ZaöRV 2016, p. 415, 415 et seq.

321 *Von Coelln* in: Stern/Sachs, Art. 11 CFR, para. 30; *Lock* in: Kellerbauer/Klamert/Tomkin, Art. 11 CFR, para. 3.

as the CFR contains an autonomous and horizontally applicable limitation provision in its Art. 52(1).[322]

In contrast to a very comprehensive jurisprudence of the ECtHR, the CJEU's jurisprudence on communication freedoms is less developed. This is also due to the fact that media regulation, and thus also restrictions on communications freedoms, are the responsibility of the Member States due to the limited powers of the EU in this respect and therefore play a lesser role in, e.g., preliminary ruling procedures.[323] In this context, however, it should be noted that, in line with the growing importance of invoking the CFR in the case law of the CJEU and in the requests for referral of the Member States as a whole[324], the emphasis on Art. 11 CFR has also increased[325], even though the decisions in question were mainly based on the relevant secondary law and Art. 11 CFR was regularly used only to emphasize the importance of the rights and freedoms laid down therein. However, the case law of the ECtHR on Art. 10 ECHR and thus the previous remarks can be referred to with regard to Art. 11(1) CFR, which results both from the corresponding explanations of the preamble to Art. 11 CFR[326] and from the equivalence clause of Art. 52(3) CFR and, moreover, also corresponds to CJEU practice, following the interpretation of the ECtHR.[327]

The fundamental right under Art. 11(1) CFR is also subject to potential restrictions. According to the uniform limitation rule of Art. 52(1) CFR, however, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence

322 *Cornils* in: Sedelmeier/Burkhardt, § 1, para. 88; *von Coelln* in: Stern/Sachs, Art. 11 CFR, para. 7 et seq.

323 *Cornils* in: Sedelmeier/Burkhardt, § 1, para. 1, 46, 86.

324 In 2018, the CJEU referred to the CFR in 356 cases (up from 27 in 2010). When national courts address requests for preliminary rulings to the CJEU, they increasingly refer to the CFR (84 times in 2018 compared to 19 times in 2010). European Commission, 2018 report on the application of the EU Charter of Fundamental Rights, https://op.europa.eu/de/publication-detail/-/publication/784b02a4-a1f2-11e9-9d01-01aa75ed71a1/language-en, p. 15.

325 In 29 judgments, Art. 11 CFR was referred to by the CJEU (although not always in a way relevant to the decision), 8 of which date from 2019, 3 already from 2020. Source: CJEU case law database, http://curia.europa.eu/juris/recherche.jsf?language=en.

326 Explanations relating to the Charter of Fundamental Rights, OJ C 303 of 14.12.2007, p. 17–35, available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32007X1214(01)&from=EN.

327 Cf. CJEU, case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH / Heinrich Bauer Verlag*.

of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Yet, against the background of questions concerning the establishment of diversity safeguarding measures under competence rules, Art. 11(2) CFR is more interesting, as it stipulates that the freedom of the media *and their pluralism* shall be respected. Due to the weaker wording compared to the draft version[328], the question of whether and to what extent this should result in objective legal obligations for safeguarding diversity on the part of the EU or its Member States, for example in the sense of preventive concentration control[329], has still not been conclusively clarified.[330] While a positive regulatory mandate to the Union legislature must already be ruled out for competence reasons, diversity protection thus remains a competence of the Member States alone[331], and the interpretation of Art. 11(2) CFR in the sense of a serving fundamental right such as Art. 5(1) sentence 2 Basic Law is likely to go too far[332], the regulation cannot be denied a certain objective legal component.[333] An interpretation in this sense is also consistent with the considerations regarding the enshrinement of freedom of the media and pluralism in Art. 10 ECHR, the meaning of which the rules of the CFR, in accordance with its Art. 53, must not fall short of. According to the CFR's explanations[334], to which – in line with the preamble to the CFR – due regard has to be taken by the the courts of the Union and

328 The first draft version still contained the wording "shall be guaranteed". Cf. on this also *Schmittmann/Luedtke* in: AfP 2000, 533, 534.

329 *Stock,* AfP 2001, 289, 301.

330 Cf. on this in detail and with further references *Ukrow/Cole*, Aktive Sicherung lokaler und regionaler Medienvielfalt, p. 87 et seq.; as well as *Institut für Europäisches Medienrecht*, Nizza, die Grundrechte-Charta und ihre Bedeutung für die Medien in Europa; cf. further *Lock* in: Kellerbauer/Klamert/Tomkin, Art. 11 CFR, para. 17.

331 Cf. supra, chapter B.VI.1. Same as here *Ukrow/Cole*, Aktive Sicherung lokaler und regionaler Medienvielfalt, p. 89 et seq.; *Valcke*, Challenges of Regulating Media Pluralism in the European Union, p. 27; *Craufurd Smith*, Culture and European Union Law, p. 626 et seq.

332 Same as here *von Coelln* in: Stern/Sachs, Art. 11 CFR, para. 40 fn. 108 with further references; *Streinz* in: id., Art. 11 CFR, para. 17.

333 Same as here *von Coelln* in: Stern/Sachs, Art. 11 CFR, para. 40; *Thiele* in: Pechstein et al., Art. 11 CFR, para. 17.

334 Explanations relating to the Charter of Fundamental Rights, OJ C 303 of 14.12.2007, p. 17–35, https://eur-lex.europa.eu/legal-content/de/ALL/?uri=CELEX%3A32007X1214%2801%29.

the Member States when interpreting the Charter, Art. 11(2) is based in particular on CJEU case-law regarding television[335], on the Protocol on the system of public broadcasting in the Member States[336] – which states 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" –, and on the Television Broadcasting Directive 89/552/EEC (in force when the Charter was drafted), in particular its recital 17, which in turn emphasizes that "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".

However, Art. 11(2) CFR has to date only in a few decisions been explicitly[337] referred to by the CJEU (with regard to the media pluralism to be respected under this provision).[338] While the CJEU in the *Sky Italia* case did not address in detail the question referred for a preliminary ruling on a national competition law provision based on Art. 11(2) CFR due to the incompleteness of the reference decision on the legal and factual basis for assessment, it particularly emphasized the significance of Art. 11(2) in its recent *Vivendi* ruling, which concerned an Italian threshold rule on shareholdings in media undertakings and electronic communications undertakings. Citing its previous case law, the CJEU emphasized the importance of media pluralism and the resulting possibilities for restricting fundamental freedoms as follows:

> "*The Court has held that the safeguarding of the freedoms protected under Article 11 of the Charter of Fundamental Rights, which in paragraph 2*

335 Particularly in CJEU, case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others / Commissariaat voor de Media*.

336 Protocol (No 29) on the system of public broadcasting in the Member States, OJ C 326 of 26.10.2012, p. 312–312.

337 The CJEU also refers more frequently to the importance of media pluralism without resorting to Art. 11(2) CFR in this context, cf. for instance CJEU, case C-250/06, *United Pan-Europe Communications Belgium SA and Others / Belgian State*, para. 41; CJEU, case C-336/07, *Kabel Deutschland Vertrieb und Service GmbH & Co. KG / Niedersächsische Landesmedienanstalt für privaten Rundfunk*, para. 37.

338 CJEU, case C-283/11, *Sky Österreich GmbH / Österreichischer Rundfunk*; CJEU, case C-234/12, *Sky Italia srl / Autorità per le Garanzie nelle Comunicazioni*; CJEU, case C-719/18, *Vivendi SA / Autorità per le Garanzie nelle Comunicazioni*; CJEU, case C-87/19, *TV Play Baltic AS / Lietuvos radijo ir televizijos komisija*.

> *thereof refers to the freedom and pluralism of the media, unquestionably constitutes a legitimate aim in the general interest, the importance of which in a democratic and pluralistic society must be stressed in particular, capable of justifying a restriction on freedom of establishment […].*
> *Protocol No 29 on the system of public broadcasting in the Member States, annexed to the EU and FEU Treaties, also refers to media pluralism, stating 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'."*[339]

This fundamental significance of pluralism could justify interference with fundamental freedoms (for more details see section C.IV.1.) by Member States' rules.

In the *TV Play Baltic AS* case, the CJEU fleshed this out with regard to the freedom to provide services against the maintenance of a pluralistic broadcasting system, referring to Art. 11 CFR and Art. 10 ECHR. The enormous importance of pluralism for the democratic system had, however, already been established by the CJEU in its judgment *Sky Österreich*, which dealt with the broadcasting of major events, and in particular with the compatibility of Art. 15 AVMSD with higher-ranking law. Art. 15 AVMSD or rather its national transposition, which grants television broadcasters access to events of high interest to the public in which third parties hold exclusive rights, was challenged at the time by a private television broadcaster as the exclusive rights holder vis-à-vis a public broadcaster as the beneficiary of the regulation. The CJEU held that the pursuit of the objective of safeguarding pluralism, derived from Art. 11(2) CFR, can also justify interference with other fundamental rights, as in this case with the right to freedom to conduct a business under Art. 16 CFR. More interestingly, the CJEU also attributed to Art. 15 AVMSD itself the objective of counteracting the increasingly exclusive marketing of events of high interest to the public, thereby safeguarding society's fundamental right to information (Art. 11(1) CFR) and promoting the pluralism protected by Art. 11(2) CFR through the diversity of news production and programming. Therefore, the CJEU concluded, against the background of Art. 11(2) CFR, the EU legislature was entitled to adopt "rules such as those laid down in Article 15 of Directive 2010/13/EU, which limit the freedom to conduct a business, and to give priority, in the necessary bal-

339 CJEU, case C-719/18, *Vivendi SA / Autorità per le Garanzie nelle Comunicazioni*, para. 57, 58.

ancing of the rights and interests at issue, to public access to information over contractual freedom"[340].

It can be deduced from this that both the Member States and the Union legislature cannot invoke Art. 11(2) CFR in the sense of a competence title, but that they can make use of the provision with regard to the pursuit of public interest objectives as a justification for interference with other fundamental freedoms and rights. However, this also means that Art. 11(2) CFR, due to the distribution of competences in interaction with Art. 51(1) CFR, prohibits Union action which runs counter to the objective of securing media pluralism in the Member States.[341]

There is one more aspect that can be concluded from the enshrinement of media pluralism at the level of fundamental rights within the EU: at least comparable to the "interplay" between the Council of Europe's action, the ECtHR's jurisprudence and the legal basis of Art. 10 ECHR outlined in the previous section, the existence of Art. 11 at EU level equally gives the Commission more freedom to include provisions on media pluralism in its recommendations and guidelines, although these then regularly leave the details of safeguarding freedom and pluralism in the media to the Member States.[342] It is discussed whether it also follows that the EU institutions in principle have the power, if they deem it necessary, to set out rules requiring Member States to take appropriate measures to safeguard media diversity.[343] Thus, the Commission considers not only Union legislation in the area relevant to media law as "application of the CFR" and thus of relevance to fundamental rights, but also recommendations in the area relevant to media (such as the Recommendation on measures to effectively tackle illegal content online[344]), communications (such as the com-

340 CJEU, case C-283/11, *Sky Österreich GmbH / Österreichischer Rundfunk*, para. 66. In his Opinion of 15.10.2020 in CJEU, case C-555/19, *Fussl Modestraße Mayr*, para. 63, Advocate General *Szpunar* emphasizes the broad discretionary power of the national legislature in introducing measures to safeguard pluralism, including in the regional and local media sector. The CJEU in its judgment of 03.02.2021 has followed a more narrow approach, cf. *Ukrow*, Sicherung regionaler Vielfalt – Außer Mode?.

341 *Cole*, Zum Gestaltungsspielraum der EU-Mitgliedstaaten bei Einschränkungen der Dienstleistungsfreiheit, p. 20.

342 *Costache*, De-Regulation of European Media Policy (2000–2014), p. 26.

343 So e.g. *EU Network of independent experts on fundamental rights*, Report on the situation of fundamental rights in the European Union in 2003, p. 73.

344 Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, C/2018/1177, OJ L 63 of 06.03.2018, p. 50–61.

munication "Tackling online disinformation: a European Approach"[345]), action plans and accompanying initiatives, funding initiatives (such as the MEDIA program), and the funding of projects (also oriented toward pluralistic goals) such as the European Centre for Press and Media Freedom (ECPMF)[346] and the Media Pluralism Monitor of the Centre for Media Pluralism and Media Freedom[347].[348] In any case, however, it could not be deduced from this consideration that the EU institutions could also instruct the Member States as to which concrete measures are to be taken to safeguard media diversity.

IV. Aspects of primary law

In addition to the connections in the EU competence framework, in particular within the cultural horizontal clause of Art. 167 TFEU, and in the EU's value system, which have already been described in detail in Chapter B, there are also media-relevant links within the substantive primary law of the EU. In particular, this applies to the fundamental freedoms as individual rights enshrined in primary law, as well as to the competition regime's references to safeguarding diversity in the media. Although both areas are significantly geared towards protecting and guaranteeing a free and fair internal market in the EU, which concerns the media as participants in economic dealings and commerce, they also contain exceptions and limits with regard to the consideration of, as well, cultural aspects. These will be presented hereafter, as far as relevant for the present study.

1. Fundamental freedoms

In the media sector, the freedom of establishment and the freedom to provide services are particularly relevant, and media undertakings can invoke

345 Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee Of The Regions, Tackling online disinformation: a European Approach (COM/2018/236 final of 26.04.2018).

346 For further information cf. https://www.ecpmf.eu/about/.

347 For further information cf. https://cmpf.eui.eu/media-pluralism-monitor/.

348 European Commission, 2018 report on the application of the EU Charter of Fundamental Rights.

them within the EU.[349] Whereas the freedom of establishment under Art. 49 et seq. TFEU refers to the right to take up and pursue an activity as a self-employed person or to establish and manage undertakings in another Member State in accordance with the conditions laid down by the law of that state, the freedom to provide services refers to the provision of services by persons that are regularly self-employed, in the course of economic activity, as listed by way of example in Art. 57 TFEU.[350] Both fundamental freedoms require economic activity with a cross-border dimension, whereby these characteristics are to be interpreted broadly.[351] The free movement of goods (Art. 34–36 TFEU), on the other hand, protects the right to market, acquire, offer, put on display or sale, keep, prepare, transport, sell, dispose of for valuable consideration or free of charge, import or use goods.[352] For the media sector, the free movement of goods in contrast to the freedom to provide services is of importance particularly when it comes to the dissemination and distribution of tangible products, especially, for instance, in case of restrictions on import and export of press[353] or film products[354], or when the area of advertising within the media is affected at large (possibly reflexively).[355] The distinction from the freedom to provide services, which the CJEU draws according to the focal point of the overall transaction, is of significance primarily for the justification in the context of the distinction between product-related and distribution-related requirements of CJEU case law[356], the detailled discussion of which is not relevant in the context of the present study.

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349 Cf. on this chapter in detail and with special reference to and analysis of the relevant case law of the CJEU: *Cole*, Zum Gestaltungsspielraum der EU-Mitgliedstaaten bei Einschränkungen der Dienstleistungsfreiheit.

350 *Randelzhofer/Forsthoff* in: Grabitz/Hilf/Nettesheim, Art. 49, 50 TFEU, para. 80; *Tomkin* in: Kellerbauer/Klamert/id., Art. 49 TFEU, para. 19.

351 CJEU, case 36/74, *B.N.O. Walrave, L.J.N. Koch / Association Union cycliste international and Others*, para. 4; CJEU, case 196/87, *Udo Steymann / Staatssecretaris van Justitie*, para. 9.

352 CJEU, case C-293/94, *Brandsma*, para. 6.

353 On this *Müssle/Schmittmann* in: AfP 2002, 145, 145 et seq.

354 Cf. CJEU, joined cases 60/84 and 61/84, *Cinéthèque SA and others / Fédération nationale des cinémas français*.

355 On the significance of the free movement of goods for the media cf. for instance *Cole* in: Fink/id./Keber, Europäisches Medienrecht, chapter 2, para. 32 et seq.

356 This is particularly relevant in the field of advertising. On the area of advertising outside of media-relevant aspects cf. for instance *Kingreen* in: Calliess/Ruffert, Art. 34–36, para. 179 et seq. With regard to the distribution of goods cf. also CJEU, case C-244/06, *Dynamic Medien Vertriebs GmbH / Avides Media AG*.

According to Art. 57 TFEU, the freedom to provide services, which is enshrined in Art. 56 et seq. TFEU, refers to services that are normally provided for remuneration, insofar as they are not subject to the other fundamental freedoms, to which the freedom to provide services is subsidiary. Although the media are (also) cultural assets, as the CJEU has recognized, the Court classifies them as services – both vis-à-vis recipients and potentially vis-à-vis advertisers in the media – within the meaning of the TFEU due to their (also) economic nature.[357] But also the distributors, intermediaries who play a role in the web of content distribution and marketing, whether in the digital or analog domain, and relevant third parties can invoke this fundamental freedom.[358] Therefore, the freedom to provide services will be the focus of the present analysis – however, due to the CJEU's uniform doctrine on limitations, the observations also apply to the freedom of establishment[359] and the free movement of goods.

The freedom to provide services comprises an absolute prohibition of discrimination, i.e., the prohibition of treating domestic and foreign providers differently, and a relative prohibition of restrictions[360], i.e., the general prohibition of measures that prevent, hinder or make less attractive the exercise of this freedom. The freedom to provide services is therefore closely linked to one of the most important objectives of the Union (Art. 3(2), (3) TEU), which is to establish a competitive internal market free of frontiers, and it is also reflected in the country of origin principle, which is enshrined in many acts of secondary law (also relevant in the media sector), such as the AVMSD and the ECD (see Chapter D. for more details). The country of origin principle means that a Member State applies

357 Fundamental: CJEU, case 155/73, *Giuseppe Sacchi*. Cf. on the freedom to provide services against the background of the references to media law at the EU level also *Böttcher/Castendyk* in: Castendyk/Dommering/Scheuer, p. 85 et seq.

358 For cable networks cf. e.g. CJEU, case 352/85, *Bond van Adverteerders and others / The Netherlands State*, para. 14; on Google for instance CJEU, case C-482/18, *Google Ireland Limited / Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vámigazgatósága*.

359 The considerations outlined in the area of justification of interference with the freedom to provide services also apply to the freedom of establishment. In particular, aspects of safeguarding media diversity would also have to be taken into account here in the same approach. Cf. on this *Cole* in: Fink/id./Keber, chapter 2, para. 29 et seq.; in more detail *Dörr*, Das Zulassungsregime im Hörfunk: Spannungsverhältnis zwischen europarechtlicher Niederlassungsfreiheit und nationaler Pluralismussicherung, 71, 71 et seq.

360 Established case law since CJEU, case C-33/74, *Van Binsbergen / Bedrijfsvereniging voor de Metaalnijverheid*.

its regulatory framework only to providers under its jurisdiction and otherwise ensures the free movement of services to providers under the jurisdiction of another EU Member State.[361] This does not mean, however, that the freedom to provide services, by virtue of its binding effect, imperatively obliges the EU or the Member States to enshrine the country of origin principle in their legislation, i.e. preventing them from resorting to the lex loci solutionis, or a market location principle, or from linking aspects of the country of origin and lex loci solutionis principles.[362] Rather, the freedom to provide services only stipulates the removal of barriers to market entry – irrespective of any specific requirements as to how this equivalence for service providers is to be established by the EU or its Member States.[363]

However, restrictions on the movement of services – in the sense of a broadly understood concept applied by the CJEU[364] – by the Member States can be justified. In addition to the limitations expressly provided for in the TFEU, this is primarily the case where the respective measure pursues a legitimate general interest objective and equally complies with the principle of proportionality, i.e. it is necessary and appropriate, in particular it does not go beyond what is necessary to achieve this objective.[365] It is precisely here that the Member States have the scope to act within the framework of their cultural policies.

Even before the entry into force of the CFR, which explicitly enshrined the importance of pluralism in its Art. 11(2), the CJEU had recognized media diversity as an essential feature of freedom of expression, drawing on Art. 10 ECHR, and in this context had not only fundamentally established that the maintenance of a pluralistic broadcasting system is related to the freedom of expression guaranteed by Art. 10 ECHR, but also that a cultural policy pursuing this objective may constitute an overriding reason in the general interest justifying restrictions on the movement of services.[366] In

361 In detail on the country of origin principle: *Cole*, The Country of Origin Principle, 113, 113 et seq.

362 In detail and further on this question: *Waldheim*, Dienstleistungsfreiheit und Herkunftslandprinzip; *Albath/Giesel* in: EuZW 2006, 38, 39 et seq.; *Hörnle* in: International and Comparative Law Quarterly 1–2005, 89, 89 et seq.

363 Cf. on this e.g. CJEU, case C-55/94, *Reinhard Gebhard / Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*.

364 CJEU, case C-76/90, *Manfred Säger / Dennemeyer & Co. Ltd*., para. 12.

365 CJEU, case C-19/92, *Dieter Kraus / Land Baden-Württemberg*, para. 32; CJEU, case C-272/94, *Criminal proceedings against Michel Guiot and Climatec SA*, para. 11.

366 CJEU, case C-353/89, *Commission / Netherlands*, para. 30; CJEU, case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others / Commissariaat voor de Media*, para. 23.

this context, the CJEU also recognizes the Member States' objective of seeking to protect different social, cultural, religious and spiritual needs[367], which also allows for different regulatory approaches by the Member States[368].

Particularly noteworthy in this context is the CJEU decision *Dynamic Medien*, which addressed the question of whether and to what extent national rules that make the distribution of image storage media (DVDs, videos) by mail order dependent on them being labelled as having been examined as to the availability to young persons by national bodies are compatible with fundamental freedoms (in that case the free movement of goods). In the underlying legal dispute, *Dynamic Medien Vertriebs GmbH* demanded an injunction against the sale of Japanese animated films imported from the United Kingdom, which – although they had already been tested in the UK as regards their suitability for young persons and provided with a corresponding label (15+) – had not undergone the testing procedure provided for under the German Law on the protection of young persons (as regards i.a. harmful media) with the participation of the Voluntary Self-Regulation Body of the Film Industry (FSK).[369] Hence, at the heart of the decision was a national regulation to protect children from media harmful for their development – like safeguarding diversity, a matter with a cultural policy focus. The CJEU stated here that the Member States must be allowed broad discretion, as views on the degree to be granted when it comes to the protection of minors (even if there is agreement amongst Member States that a certain adequate degree of protection must be ensured) may differ from one Member State to another depending on considerations of a moral or cultural nature in particular. In the absence of harmonization at Union level of the protection of young persons from harmful media, it is for the Member States to decide, at their discretion, to which degree they wish to ensure the protection of the interest at issue, al-

367 CJEU, case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others / Commissariaat voor de Media*, para. 31.

368 On this CJEU, case C-244/06, *Dynamic Medien Vertriebs GmbH / Avides Media AG*, para. 49. So already CJEU, case C-124/97, *Markku Juhani Läärä and Others / Finland*, para. 36; CJEU, case C-36/02, *Omega Spielhallen- und Automatenaufstellungs GmbH / Oberbürgermeisterin der Bundesstadt Bonn*, para. 38. Most recently, in his opinion of 15 October 2020 in CJEU, case C-555/19, *Fussl Modestraße Mayr*, Advocate General *Szpunar* emphasized that the difference in national regulatory approaches does not lead to an incompatibility of the stricter regulation with EU law, para. 70.

369 CJEU, case C-244/06, *Dynamic Medien Vertriebs GmbH / Avides Media AG*, para. 44, 45, 49.

though they must do so in compliance with the principles of EU law. These considerations cannot only be transferred to the area of diversity safeguarding measures, but show that the CJEU respects cultural policy priorities at the national level and regards them as justification for different rules and does not attempt to place uniform assessment standards before discretionary considerations of the Member States via internal market connections.

This case law has been developed by the Court already before in numerous rulings.[370] In the pursuit of objectives of public interest – which also include the protection of linguistic diversity as well as access to local information[371] – the Member States have a degree of freedom, which is all the greater where the restrictive measure does not aim towards regulation of economic nature, such as trade or services, but instead focuses on cultural policy objectives. In these cases, the CJEU's power of review, which the Court undisputedly possesses in particular with regard to compliance with the principle of proportionality, is also limited[372]. The Court's scope of assessment is whether the restriction does not completely and permanently preclude the practical effectiveness of the fundamental freedom[373] and whether it actually meets the aim of achieving the objective in a coherent and systematic manner[374]. In this context, market effects of the restrictive measure play a role, the investigation and assessment of which, however, the CJEU places with the national courts.[375] Incidentally, this also and especially applies to restrictions on the free movement of goods: In the *Familiapress* case, which concerned the prohibition of selling magazines that allow participation in promotional contests, the CJEU fundamentally held that the maintenance of media diversity may constitute an overriding re-

370 CJEU, case C-148/91, *Vereniging Veronica Omroep Organisatie / Commissariaat voor de Media*, para. 9; CJEU, case C-23/93, *TV10 SA / Commissariaat voor de Media*, para. 18; CJEU, case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH / Heinrich Bauer Verlag*, para. 19.

371 CJEU, case C-250/06, *United Pan-Europe Communications Belgium SA and Others / Belgian State*, para. 43.

372 In detail and on the scope of the Member States' discretionary powers cf. *Cole*, Zum Gestaltungsspielraum der EU-Mitgliedstaaten bei Einschränkungen der Dienstleistungsfreiheit, p. 26 et seq.

373 CJEU, case C-250/06, *United Pan-Europe Communications Belgium SA and Others / Belgian State*, para. 45.

374 CJEU, case C-137/09, *Josemans*, para. 70 with further references; equally e.g. recently in CJEU, case C-235/17, *European Commission / Hungary*, para. 61.

375 CJEU, case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH / Heinrich Bauer Verlag*, para. 29.

quirement that also justifies a restriction on the free movement of goods. This diversity contributed to the preservation of the right to freedom of expression, which is protected by Art. 10 ECHR and fundamental freedoms and was one of the fundamental rights protected by the Community legal order.[376] In this context, it is up to the Member States to determine how they will strive to achieve this diversity goal, giving them a wide margin of discretion. Similar restrictions on the freedom to provide services can be far-reaching, as Advocate General *Szpunar* recently stated in his opinion in the *Fussl Modestraße Mayr* case.[377]

Thus, the regulatory competence of the Member States in the area of safeguarding pluralism is also taken into account at the level of fundamental freedoms.

2. *The EU competition regime*

The primary objective of the EU competition regime is to enable the proper functioning of the internal market as a crucial factor in the well-being of the European economy and society. The competition regime is therefore initially purely economic and sector-neutral, which has its basis in competence rules also (on this point, see already chapter B.III.2.). It therefore also affects the media in their capacity as participants in economic transactions, in the context of which they compete with other undertakings on many different levels – whether for the attention and purchasing power of recipients or potential advertising or business customers. Against the background of safeguarding diversity, however, it is all the more important that fair conditions prevail on the "media market", that market power does not become opinion power, and that smaller undertakings (i.e., for example, local, regional, industry-specific or other information which society in the internal market as a whole does not have an interest in receiving) are enabled to enter the market. Although the competition regime leaves little

376 CJEU, case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH / Heinrich Bauer Verlag*, para. 18. Cf. also CJEU, case C-244/06, *Dynamic Medien Vertriebs GmbH / Avides Media AG*.

377 CJEU, case C-555/19, *Fussl Modestraße Mayr*, opinion of 15 October 2020. Cf. in particular para. 53, 69 et seq., 63, 67. The assessment of fundamental rights also takes place within a broad scope of discretion, para. 83. The national court's review of whether there might be less restrictive measures must be limited to measures that could actually be taken by the national legislature; purely theoretical measures must be disregarded, para. 74.

room for taking non-economic aspects into account, it is therefore nevertheless generally acknowledged that it indirectly also contributes to safeguarding media diversity, as it keeps markets open and competitive by counteracting concentration developments, limiting state influence and preventing market abuse.[378]

a. Control of market power and abuse of power

With the instruments of market power control (prohibition of cartels under Art. 101 TFEU, prohibition of abuse of a dominant market position under Art. 102 TFEU and merger control under the Merger Regulation[379]), the European Commission can to a certain extent exert (a limiting) influence on the market power of undertakings if they occupy or would occupy a dominant position on a given market. In the area of media, however, influencing the market also regularly means potentially influencing the power of undertakings, linked to their market power, to influence opinion.

Without going into the details of market power and abuse control, reference here shall only be made to the fact that a number of antitrust decisions have already been issued in relation to undertakings in the media sector and its environment.[380] In this context, especially in the media sector, the definition and delimitation of the relevant market is essential and characterized by several peculiarities.

On the one hand, the media operate in a two-sided market consisting of the recipient market and the advertising market, in which they each compete with one another for attention and advertising revenues. Both markets are also important in terms of ensuring diversity of opinion, since diversity only exists where content reaches an audience and the ability to (re)finance content also directly determines the existence of media providers.

On the other hand, the media sector is characterized by the (increasing) convergence of media, which is leading to a blurring of the boundaries between different forms of transmission, forms of offering and of providers and has resulted in a considerable influence of gatekeepers such as search

378 Cf. on this *Valcke*, Challenges of Regulating Media Pluralism in the EU, p. 27, with further references.

379 On this see D.II.4.

380 Cf. on this in detail *Cole/Hans* in: Cappello, Medieneigentum – Marktrealitäten und Regulierungsmaßnahmen, p. 20 et seq.; *Bania*, The Role of Media Pluralism in the Enforcement of EU Competition Law.

engines and other platforms. In its decision-making practice, however, the Commission makes a decisive distinction between the markets for free TV, pay TV, other markets and the purchase of broadcasting rights, and separates the online and offline markets.[381] This assessment of the market already shows the economically oriented approach of the Commission, in which only economic assessment criteria are taken into account, but not cultural policy aspects.

Accordingly, market-driven is also the investigation of the abusive nature of a conduct, which is considered in all conduct of an undertaking that may affect the structure of a market where competition is already weakened precisely because of the presence of an undertaking, and which impedes the maintenance or development of existing competition through measures that deviate from the means of normal product and service competition on the basis of performance.[382] This can be illustrated, for example, by the Commission's investigations and decisions on Google search, in which the importance of the search engine, also for the searchability of media content (and thus the recipient's horizon), has so far played no role, but only economic aspects of the placement of advertisements or the preference for undertaking-owned services.[383] It is about products and services that are judged according to objective and economic criteria and therefore leave no room for considering the quality of certain products or services compared to other similar products and services (read: content), which would be relevant in the field of safeguarding diversity.

Safeguarding diversity can therefore only have knee-jerk concern in the area of antitrust measures at EU level, which rather aim at establishing fair conditions with regard to economic aspects and in particular do not aim at the existence of a diverse offering. In particular, the Commission is not seeking to exert a controlling influence on the basis of imbalances that

381 Cf. for instance the more recent decisions on *Walt Disney / Century Fox* (M.8785) of 06.11.2018, in which the Commission maintains the separation between digital distribution forms of films and physical distribution, cf. para. 50, https://ec.europa.eu/competition/mergers/cases/decisions/m8785_2197_3.pdf; as well as in the Sky / Fox (M.8354) case of 07.04.2017 on the distinction between the production of television content on behalf of and the licensing of broadcasting rights for pre-produced television content, cf. para. 62, https://ec.europa.eu/competition/mergers/cases/decisions/m8354_920_8.pdf.

382 CJEU, case 85/76, *Hoffmann-La Roche / Commission*; Commission Decision of 14 December 1985 relating to a proceeding under Article 86 of the EEC Treaty (IV/30.698 – ECS/AKZO), OJ L 374 of 31.12.1985, p. 1–27.

383 Cf. on this e.g. cases No. 39740 (Google Search (Shopping)) and No. 40411 (Google Search (AdSense)).

may have been identified in the area of diversity of opinion and information.[384] Therefore, while market power and abuse control at the EU level is not a suitable instrument for safeguarding pluralism in this context, it also does not run counter to corresponding efforts by Member States.

b. State aid law

State aid is generally prohibited in the EU under Art. 107(1) TFEU, as it favors certain undertakings, economic sectors or industries over competitors and thus (may) distort free competition in the European internal market to the extent that it affects trade between Member States as a result. The economic orientation of EU state aid law is already obvious from the wording of the provision. Although this does not fall within the competences of the EU, discussions at both national and European level on the system of dual broadcasting and the associated financing of public broadcasting by means of license fee, for example in Germany,[385] but also in other countries,[386] have, however, illustrated the particular relevance of state aid law also for the media and cultural policies of the Member States.

On the one hand, state aid law contains a fundamental prohibition of state influence (albeit in economic/financial terms) on the media, which is also suitable for strengthening pluralism by preventing individual undertakings from gaining a stronger position on the market (of opinions) through state support or at least taking into account the subliminal risk that exists in this regard. On the other hand, however, state aid law also contains exceptions to this fundamental prohibition in the area of cultural policy, which allow Member States to align their media regulations with national characteristics and thus equally underline the regulatory sovereignty of the Member States, although a review by the Commission

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

385 Cf. as to that e.g. Commission Decision 2006/513/EC of 9 November 2005 on the State Aid which the Federal Republic of Germany has implemented for the introduction of digital terrestrial television (DVB-T) in Berlin-Brandenburg, OJ L 200 of 22.07.2006, p. 14–34.

386 State funding measures relating to broadcasting and monitored by the European Commission can also be found in the legal systems of other EU Member States such as Austria, Finland, Sweden, the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Malta, Poland, Slovenia, Slovakia, Bulgaria, and Romania.

when certain limits are exceeded is ensured by the requirement of notification[387]. The focus of this study will be on the latter aspect.[388]

State aid, which, based on a broad understanding of the term in the media sector, may take the form of subsidies or grants for media undertakings, tax relief for the production of content or advertising measures, sales subsidies for the press, etc., may be considered compatible with the internal market and thus permitted in general (Art. 107(2) TFEU) or, after an investigation by the European Commission[389], in individual cases (Art. 107(3) TFEU). In the opinion of the European Commission[390], Art. 106(2) TFEU also conceives a derogation from the prohibition of state aid. Against the background of measures for safeguarding diversity at the Member State level, Art. 106(2), 107(3)(d) (and, if applicable, (c)) TFEU are particularly relevant in this context. Against the background of the current Corona pandemic, which has had a severe and probably lasting impact on the media sector and may thus also have a multiplier effect, attention should also be drawn to Art. 107(2)(b), which allows aid to make good the damage caused by natural disasters.[391]

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387 The European Commission must be notified of any intended introduction or alteration of aid (Art. 108(3) TFEU) and may initiate proceedings under Art. 108(2) TFEU if it has doubts about the compatibility of the project with the internal market. However, this only applies in the case of the factual existence of aid, which is based in particular on the existence of certain thresholds against the background of the possibility of influencing trade within the EU.

388 For a consideration in detail with respect to regional and local media cf. *Ukrow/Cole*, Aktive Sicherung lokaler und regionaler Medienvielfalt, p. 65 et seq.; see also *Martini* in: EuZW 2015, 821, 821 et seq.

389 According to the apparently prevailing opinion, the EU Commission has discretionary powers with regard to compatibility with the internal market within the framework of Art. 107(3) TFEU, in contrast to (2); cf. in detail *Cremer* in: Calliess/Ruffert, Art. 107 TFEU, para. 31, 38 et seq.

390 In the Commission's view, Art. 106(2) TFEU is designed as a derogation; cf. Communication from the Commission on the application of State aid rules to public service broadcasting, OJ C 257 of 27.10.2009, p. 1–14, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52009XC1027(01), para. 37.

391 Cf. on this as to media support opportunities against the backdrop of the pandemic *Ukrow*, Schutz der Medienvielfalt und medienbezogene Solidaritätspflichten in Corona-Zeiten.
Many Member States have already taken support measures for the media sector against the pandemic background. Denmark's "COVID-19 compensation plan", which provides for aid to the media sector (print, electronic media, broadcasting, etc.) amounting to the equivalent of around EUR 32 million, has already gone through the notification procedure, in which the Commission accepted rescue aid under Art. 107(2)(b) TFEU. While the Commission focused primarily

For undertakings entrusted with the operation of services of general economic interest, Art. 106(2) TFEU provides Member States with a possibility of derogation which, in particular, also allows for the state financing of public service broadcasting. Accordingly, state aid is possible for such undertakings entrusted with the operation of services of general economic interest. As early as in its *Altmark* ruling of 2003, the CJEU set out specific parameters in this regard that must be observed in the context of the financing of public service broadcasting against the background of its social role and task.[392] These have been further developed over the years in the Commission's case practice – also in proceedings against Germany[393] – and have now been laid down in a Commission communication.[394]

At the Union level, it is assumed that despite the function of public broadcasting being in the general interest, state funding cannot be possible without restrictions. Although the importance of public service broadcasting for the promotion of cultural diversity and the possibility for Member States to take diversity-enhancing measures is emphasized[395], the Commission calls above all for independent control, transparency and measures against overcompensation with regard to the establishment of financing systems. In contrast, the reason for funding, i.e. in the case of public service broadcasting the definition of the public service remit, is subject to only limited review, leaving the Member States room for maneuver in setting cultural priorities, which may be shaped by national peculiarities. In designing the models, it requires consideration of the competitive relationship with commercial broadcasters and print media, which could potentially be negatively affected by state funding of public broadcasting with

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on economic factors in this context, the Danish government emphasized in the proceedings in particular the need for state funding against the background of the importance of cultural diversity as an essential value in a democratic society, which demands the existence of private media as a balance in addition to publicly funded media.

392 CJEU, case C-280/00, *Altmark Trans GmbH und Regierungspräsidium Magdeburg / Nahverkehrsgesellschaft Altmark GmbH*.

393 European Commission decision of 24 April 2007, K(2007) 1761 FINAL, available at https://ec.europa.eu/competition/state_aid/cases/198395/198395_678609_35_1.pdf.

394 In particular through the Communication from the Commission on the application of State aid rules to public service broadcasting, OJ C 257 of 27.10.2009, p. 1–14, as well as through case-by-case decisions (see list at http://ec.europa.eu/competition/sectors/media/decisions_psb.pdf).

395 Communication from the Commission on the application of State aid rules to public service broadcasting, OJ C 257 of 27.10.2009, p. 1–14, para. 13.

regard to the development of new business models. Since these providers also enrich the cultural and political debate and increase the choice of content, their protection must also be considered.[396] This shows that – in contrast to the market control mentioned in the previous chapter – under state aid law not only the Member States are free to exercise their competence to regulate cultural policy, but that the Commission also includes certain aspects that safeguard diversity in its respective investigation.

In the area of commercial media, too, there are – against the background of safeguarding diversity – opportunities for the Member States for support[397], in particular under Art. 107(3)(d) TFEU, which permits aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest. The definition of culture is made in parallel with Art. 167 TFEU and thus also covers, in particular, the promotion of artistic and literary creation, including journalistic and editorial activity, especially in the audiovisual sector.[398] In past investigations, the Commission has sometimes reviewed media subsidies under Art. 107(3)(d) TFEU, with a restrictive interpretation leading to the fact that the content and nature of the "product" is what matters in the review, but not the medium or its mode of dissemination per se.[399] The measure of support must have a cultural focus. Conditions and limits (in particular transparency requirements and cap limits) specifically for the film industry and other audiovisual works are provided in a corresponding Commission Communication.[400] In this framework, the promotion of audiovisual production is also and precisely understood as a suitable means of promoting the diversity

396 Communication from the Commission on the application of State aid rules to public service broadcasting, OJ C 257 of 27.10.2009, p. 1–14, para. 16.

397 For the area of funding opportunities for private broadcasting and, in particular, the investigation of the compatibility of state-initiated funding with European state aid rules cf. *Cole/Oster*, Zur Frage der Beteiligung privater Rundfunkveranstalter in Deutschland an einer staatlich veranlassten Finanzierung, p. 26 et seq.

398 On this in detail and leading further: *Ress/Ukrow* in: Grabitz/Hilf/Nettesheim, Art. 167 TFEU, para. 128 et seq.

399 Decision of 1 August 2016, C(2016) 4865 final, State aid SA.45512 (2016/N). The case concerned the promotion of print and digital media in minority languages.

400 Communication from the Commission on State aid for films and other audiovisual works, OJ C 332 of 15.11.2013, p. 1–11, https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:52013XC1115(01), as amended by the Communication from the Commission amending the Communications from the Commission on EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, on Guidelines on regional State aid

and richness of European culture.[401] In this context, it is even emphasized that the goal of cultural diversity justifies the special nature of national aid for film and television and that these precisely contribute decisively to the shaping of the European audiovisual market.

V. Reference to the objective in secondary law and other texts

Due to a lack of legislative powers, there can be no secondary law in the area of safeguarding diversity that directly pursues this objective.[402] Nevertheless, there is a certain framework of media law at the EU level within which links can be found with regard to safeguarding pluralism. These various legal acts and, beyond them, legally non-binding but nevertheless relevant measures as well as current EU initiatives are presented comprehensively in Section D. below.

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for 2014–2020, on State aid for films and other audiovisual works, on Guidelines on State aid to promote risk finance investments and on Guidelines on State aid to airports and airlines, 2014/C 198/02, OJ C 198, 27.06.2014, p. 30–34, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0627(02).

401 Communication from the Commission on State aid for films and other audiovisual works, OJ C 332 of 15.11.2013, p. 1–11, as amended by the Communication from the Commission 2014/C 198/02, OJ C 198, 27.06.2014, p. 30–34, para. 4.

402 Cf. supra, chapter B.