

Annex

Decision of the Bundesrat on the announced European Media Freedom Act

Safeguarding the independence and pluralism of the media

1. The Bundesrat welcomes the fact that the Commission has raised the question of how media freedom in Europe can be safeguarded and expanded, and that it has started a public consultation procedure on this issue that is being conducted without any preconceived views as to its outcome. Answering this question is central to the future of Europe because the EU is not only a single market for goods and services, but also an area of democracy and freedom. But democracy is inconceivable without a functioning, free and pluralistic media landscape.
2. Media freedom and media diversity are among the rights and principles set out in the EU Charter of Fundamental Rights (Article 11) and the European Convention for Human Rights (Article 10). Free and diverse media are indispensable for democracy and are one of the fundamental values of the EU. However, in its 2020 and 2021 Rule of Law Reports, the Commission noted a number of deteriorations in this field, including regarding the working conditions of journalists, a lack of transparency on ownership structures in the media sector and a lack of independence of media regulators in some EU Member States. The European Parliament, too, identified these problems in a resolution back in 2017 (2017/2209) and repeated them only last year (2021/2036), in particular with regard to the deteriorating working conditions of media players in the EU. The increasing threat to journalists due to hatred, harassment and physical attacks is an acute threat to media freedom.

3. The Bundesrat shares the Commission's fundamental thinking that the independence and diversity of the media are a substantial value. This relates in particular to journalistic freedoms, editorial independence, citizens' access to media offerings, the transparent allocation of state resources and non-governmental appointments to senior roles within public-service media providers.
4. The Bundesrat agrees with the Commission that free and pluralist media are fundamental pillars of democracy and that the media therefore play a special role. Against this background, the Bundesrat once again emphasises that sector-specific media regulation is still a matter of priority – including and especially in a digital single market – both for the media itself and for their dissemination. This is especially true in today's world in which the internet has become the central media and communication space. The Commission evidently also sees this need, which is why it explicitly regards the proposed European Media Freedom Act as a complement to its proposals for a Digital Services Act and a Regulation on Transparency and Targeting of Political Advertising. This Act, if structured accordingly, could be an opportunity to carry out the media-specific adaptations already required by the Bundesrat with regard to the proposals for a Digital Services Act and a Digital Markets Act (BR Official Document 642/20 (decision), 96/21 (decision)).
5. The Bundesrat draws attention to the State of the Union speech delivered by the President of the Commission, Ursula von der Leyen, on 15 September 2021, in which she stressed that media companies cannot be treated the same as other commercial enterprises. Media companies do not merely provide services in the sense of an "economic asset" that may require harmonisation. Rather, they create and disseminate content that helps shape opinion and that is an expression of social community in the Member States and that in turn directly influences it. The Bundesrat is of the view that legal acts that are based on Article 114 TFEU and (primarily) market-oriented can support this particular role of the media and its dissemination. However, horizontal market rules – such as the Digital Services Act – are not suitable to protect the freedom and diversity of the media comprehensively and effectively. The federal states (Länder) therefore wish to play a constructive part in resolving the question of how legal

acts based on Article 114 TFEU are able to address the particular role played by the media and how they can be effectively integrated with measures of media regulation. In this respect, there is an interest in an exchange with the Commission.

6. The Bundesrat stresses that the EU's strength lies in its cultural diversity based on common rules and values. The EU has always seen the cultural sovereignty of its Member States and the diversity of the media as an opportunity. The fact that this results in differentiated regulation and market and supervisory structures has always been accepted – also as an expression of the principle of subsidiarity and the distribution of competences between the Member States and the EU (cf. the Council's conclusions on safeguarding a free and pluralistic media system (2020/C 422/08)). This diversity must be maintained and promoted – not put at risk in the pursuit of harmonisation and centralisation.
7. In the view of the Bundesrat, the desire to safeguard European values and democratic principles throughout Europe is understandable. However, it warns against damaging existing national pluralistic media systems such as those in Germany, which the Commission (SWD(2021) 706 final) also considers to be “working well”, by putting aside measures to safeguard media freedom, independence and diversity at the national level. Looking at a European market must not narrow the perspective on the media in its role as an economic asset, nor must it neglect the fact that increasingly powerful large economic regions can make it more difficult to maintain diversity, particularly in regional areas.

Transparent and independent media markets

8. The Bundesrat recognises that transparency rules regarding ownership in the media sector allow the public and media players to assess the economic interests and the sources of the information distributed by the media. Such regulations must not, however, lead to a disproportionate administrative burden and should not themselves be the objective, but a means of achieving higher-level regulatory objectives, in particular to ensure the freedom of opinion.
9. Insofar as the Commission refers to “a patchwork of national audit procedures/rules” in the existing provisions in the Member States for the examination of mergers and acquisitions and other transactions and their effects on the control of media/media pluralism, the Bundesrat points out that, in view of the special role of the media for democracy, which the Commission also recognises, such purely competition-related view is off the mark: the law on media concentrations is strictly aimed at ensuring diversity of opinion and is tailored to the different national media structures. In the view of the Bundesrat, a differentiated regulation is appropriate in this regard, which also allows media plurality and thus diversity of opinions to be safeguarded at local and regional level.
10. It notes that, as an instrument for strengthening the EU’s internal market for media with regard to the transparent determination of market power, the Commission also significantly relies on (EU-wide) procedures and standards for measuring the “reach” of media content. In fact, objective standards are needed to ensure the determination and comparability of the market power and power over opinions of the various media offerings. However, the Bundesrat points out that, when looking at a reform of the German law on media concentrations and after consulting experts, the Länder have found that the criterion of “reach” is only one of many in this regard.

The Bundesrat is of the opinion that measures to ensure diversity of opinion must be possible in all media sectors involved in shaping public opinion in Germany. Independent national supervisory bodies must be able to obtain the necessary instruments, where necessary, to take measures beyond cartel and competition law to ensure or restore the freedom of opinion in accordance with the principle of proportionality. It seems necessary in that regard for the dynamics of media markets to be taken into account both in determining the

media sectors relevant to the freedom of opinion and in assessing potential threats to public and individual freedom of opinion. The structuring of an appropriate model that is open for future development is currently being discussed at national level.

Conditions for healthy media markets

11. The Bundesrat is of the view that measures to highlight content of general interest are useful, even if the scope of application is extended beyond audiovisual content. In Germany, the Media State Treaty (Medienstaatsvertrag) has created rules on easy location in user interfaces in this respect, which serve the implementation of Article 7a of the Audiovisual Media Services Directive (AVMS Directive), but which go beyond the Directive in scope and regulatory content. In this context, the Bundesrat considers that a provision aimed at complete harmonisation is not an adequate means of giving sufficient expression to the cultural sovereignty of the individual Member States.

Fair allocation of funds in the media markets

12. It agrees with the Commission that the independence of public-service media providers in the Member States must be ensured. The Bundesrat also considers that regulations on the absence of conflicts of interest at management level, independence guarantees for appointment and dismissal procedures as well as regulations for a fair and diverse social representation in the self-governing bodies of public-service media providers are prerequisites for an independent public-sector media and as such part of their mandate which affords them certain privileges. These requirements are already fully guaranteed in the media law of the German Länder; these provisions can serve as a model in this respect.
13. The Bundesrat notes that the Commission assumes that state advertising can lead to an influence on the editorial independence of media companies. On 25 November 2021, the Commission presented the proposal for a Regulation on Transparency and Targeting of Political Advertising. The Bundesrat therefore asks the Commission to clearly indicate the relationship between any provisions to be included in a European Media Freedom Act and this proposed Regulation.

Governance options

14. In its view, it is essential that the supervision of the media and its dissemination be independent, at arm's length from the state and decentralised. In Germany and Europe there are already well-working structures in this regard. The EU has always recognised these structures and requirements in the AVMS Directive and has demanded them itself. In the view of the Bundesrat, there is no need for these principles and structures to be superimposed by way of supervisory structures at European level – for example, in the form of a media regulatory authority at EU level – beyond meaningful and necessary cooperation between national regulatory bodies, particularly in view of the procedural regulations imposed by the members of the European Regulators Group for Audiovisual Media Services (ERGA) in terms of voluntary commitment. The possible addition of an independent secretariat to the ERGA is welcomed in order to strengthen its independence provided that it does not lead to a further institutionalisation of the ERGA or to an extension of its powers. In this respect, the Bundesrat draws attention to the role, as defined by the AVMS Directive, of the national regulatory bodies which have joined forces in the ERGA and thus to their perspective on audiovisual media services and video-sharing services.

Procedural concerns

15. This opinion must be taken into account by the Federal Government in accordance with Article 23(5) sentence 2 of the German constitution (Basic Law) and section 5(2) of the Act on Cooperation between the Federation and the Federal States in European Union Affairs (EUZBLG) given that the proposed European Media Freedom Act focuses on the powers of the Länder to legislate with regard to the structuring of broadcasting law in and for Germany. In accordance with established constitutional law, the Federal Government has no right to legislate in this area. Rather, the Länder have legislative power in accordance with Article 30 and 70 of the Basic Law. The Bundesrat also calls on the Federal Government to transfer the conduct of negotiations to the Länder in accordance with Article 23(6) of the Basic Law and section 6(2) EUZBLG during the subsequent deliberations of the Council Working Groups and the Council of Ministers in this area.

16. The Bundesrat will transmit this Opinion directly to the Commission.