25.11.22

Decision
of the Bundesrat

Proposal for a regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and to amend Regulation 2010/13/EU

COM(2022) 457 final; Council doc. 12413/22

In its 1028th session held on 25 November 2022, the Bundesrat adopted the following Opinion pursuant to Article 12(b) TEU:

1. The Bundesrat shares the objective of guaranteeing and preserving diverse and independent media in Europe. In this respect, it refers to its decision of 11 March 2022 (cf. BR Official Document 52/22 (Decision)). However, a legitimate objective does not mean that the EU is authorised to act in that regard. The main objective of the proposed regulation is to remove "obstacles to the functioning of the internal media market", which is said to cover all media providers. At the same time, the regulatory approach is aimed at promoting pluralism and independence in this market, combat disinformation and improve the protection of journalists. Based solely on Article 114 TFEU, the proposed regulation claims to regulate significant parts of the media in Europe, including the press, private and public broadcasters as well as digital online media with regard to their content, organisational structure and monitoring across the EU.

2. The Bundesrat criticises that the proposed regulation, especially in the form of a regulation, does not have a sufficient legal basis, interferes with national sovereign rights and is not compatible with the principles of subsidiarity and proportionality.

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3. It is of the view that the proposed regulation, as it stands, lacks a legal basis authorising the EU to take action. The reference to Article 114 TFEU, which is the only provision referred to in the proposed regulation, does not constitute a suitable legal basis.

4. The proposed legislation includes provisions that are specifically aimed at guaranteeing diversity of content and editorial freedom including, in particular, within media companies (e.g. Articles 3, 4(2) second sentence (a), 5, 6(2)). Furthermore, an approach covering all media (cf. Article 1(1) in conjunction with Article 2(1) of the proposed regulation) includes media sectors – such as the press and radio – that are primarily local or regional and therefore do not have a cross-border dimension. In the view of the Bundesrat, they lack relevance to the internal market, which can and would be the basis on which to allow and justify measures under Article 114 TFEU. The explanatory memorandum to the proposed regulation does not explain to what extent these types of media, namely text and audio media that go beyond the scope of the AVMSD Directive, are relevant to the EU internal market and to what extent, in particular measures on the internal organisation of media companies and the quality of their offerings, promote the internal market. The EU already lacks a sufficient legal basis authorising it to enact the corresponding provisions of the proposed regulation which, as an EU measure, is subject to the obligation to state reasons.

5. It is clear from the proposed regulation that Member States' competences (cf. recital 5 of the proposed regulation), or at least the measures derived from them to safeguard diversity, are regarded as obstacles to the internal market for media services, which the proposed regulation aims to eliminate. The proposed regulation thereby fundamentally fails to recognise that the competences to safeguard diversity are laid down as a right of the Member States in Article 167 TFEU and that the market conditions are the result of the media regulations of the Member States. They are not, therefore, comparable with other markets. According to the European Treaties, cultural sovereignty and thus competence for media regulation lies with the Member States. The EU must respect the diversity of cultures and in this area, which is protected by Article 167 in conjunction with Article 6(c) TFEU, only has a competence to supplement and support, excluding any harmonisation (Article 4(2) first sentence TEU, Article 167(4) TFEU). In this respect, the principle of conferral remains applicable

(Articles 4(1), 5(1) first sentence, 5(2) TEU). The proposed regulation disregards this clear competence provision. The proposal constitutes an encroachment on the core area of the Member States' right to regulate their media landscape themselves in the exercise of their cultural sovereignty, by providing for measures to safeguard media diversity and, for this purpose, by setting out a framework which, according to Article 1(3) in conjunction with Article 4(1) of the proposed regulation, not only applies generally but is conclusive in this respect. This applies, in particular, to the structure and organisation of private broadcasters, but above all also to public service broadcasters, which are particularly protected by the Amsterdam Protocol on the system of public broadcasting in the Member States (Protocol (No 29), OJ C 202/311, 2016). The proposed regulation is therefore not in compliance with the TEU.

6. Provisions on the assessment of media market concentrations in Articles 21 and 22 of the proposed regulation are explicitly aimed at safeguarding media pluralism and editorial independence and shall be distinct from competition law assessments. Particularly also in light of the case-law of the CJEU (cf. CJEU judgment of 12 December 2006 – C-380/03 – Germany v Parliament and Council, paragraphs 36 et seq., 92 et seq.), the Bundesrat does not regard Article 114 TFEU as a suitable legal basis to authorise the EU to adopt regulations with this content in a lawful manner and to this extent. The law on media concentrations is aimed at ensuring the plurality of opinions. It is not aimed at criteria of market economy (which can be subsumed under Article 114 TFEU), but it instead recognises the effects of media concentrations on society as a whole in terms of formation of public and individual opinions. The safeguarding of media pluralism through the instrument of the law on media concentrations therefore also falls under the cultural sovereignty of the Member States, which is protected in Article 167 TFEU (see para. 2 above).

7. The Bundesrat is convinced that a violation of the provisions on competence constitutes sufficient grounds for a complaint that the principle of subsidiarity has not been complied with (cf., for example, BR-Official Document 390/07 (Decision), para. 5; BR-Official Document 43/10 (Decision), para. 2; BR-Official Document 646/11 (Decision), para. 2; BR-Official Document 608/13 (Decision), para. 7; BR-Official Document 45/17 (Decision), para. 2; BR-Official Document 186/17 (Decision), para. 2). The principle of subsidiarity is a

principle regarding the exercise of competence. Assessing subsidiarity therefore necessarily includes an examination of the competence of the EU. It would be unacceptable if national parliaments could complain about violations of the principle of subsidiarity but not about the even more serious encroachment on their rights if the EU enacted legal provisions without being competent to do so. The Federal Constitutional Court also sees the extension of legal action on the principle of subsidiarity to the preliminary question of whether the EU is competent as a question that concerns the effectiveness of the subsidiarity early warning mechanism as a whole (BVerfGE 123, 267, para. 305).

8. In the view of the Bundesrat, the proposed regulation also violates the principle of subsidiarity in other respects. According to Article 5(3) TEU, the EU may take action in areas which do not fall within its exclusive competence only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at EU level. In the view of the Bundesrat, the proposed regulation does not in essence show any clear advantages in comparison with measures taken by Member States and thus shows no added value.

9. Member States not only have the right but are specifically bound by fundamental rights (compare ECtHR (Grand Chamber), Judgment of 7 June 2012, Case of Centro Europa 7 S.R.L. and Di Stefano v. Italy, Application no. 38433/09), to safeguard the diversity of opinions and the media and thus to shape their media regulations. In exercising their cultural sovereignty, they are also obliged to respect the fundamental freedoms of the internal market. Accordingly, as the Commission itself states, the vast majority of Member States already have effective regulations in place for a diverse media landscape with independent media that are in line with European values, standards and objectives. There are no signs of “excessive demands” being placed on Member States in the performance of their responsibilities, nor are such signs mentioned in the proposed regulation. Insofar as there are deficits in individual Member States or areas, it is not apparent from the proposed regulation to what extent such a comprehensive threat is feared across the Union, which would have to be countered by implementing harmonising EU legislation, especially in the form of a directly applicable regulation. Systemic deficits in the media regulations of individual Member States can, in the view of the Bundesrat, be countered in a

targeted manner by means of suitable existing instruments without affecting the media regulations of other Member States, most of which are beyond reproach.

10. Notwithstanding the lack of, or at least insufficient, legal basis, which already constitutes a violation of the subsidiarity principle, compliance with the principle of proportionality pursuant to Article 5(4) TEU requires that EU measures do not go beyond what is necessary to achieve the objectives of the Treaties both in terms of content and form.

11. With regard to some of the key measures provided for in the proposed regulation, it is not apparent to what extent they are suitable to achieve the objective. In the view of the Bundesrat, the proposed regulation does not explain to what extent the activities of regional and local media, including public broadcasters that, by their nature, operate at national level and in Germany are also decentralised at the level of the Länder, can pose a threat to the "internal media market" in terms of their scope or impact (cf. para. 4). Even if this were the case, it is not clear how specific provisions regarding their internal organisation (Article 4(2) sentence 2(a) and Article 5 of the proposed regulation) are meant to prevent this. The proposed regulation is not sufficiently justified in terms of this crucial point, which constitutes a serious encroachment on the legislative powers of Member States.

12. The creation of purportedly good competitive conditions alone cannot be sufficient to ensure the broadest possible range of topics and opinions in the media as well as their accessibility for users. In Germany, Article 5(1) sentence 2 of the constitution (Basic Law) obliges the national legislator to legislate in a way that ensures diversity because journalistic and economic competition does not automatically lead to "media broadcasts reflecting the diversity of information, experiences and behavioural patterns available in wider society" (established case-law of the German constitutional court; BVerfGE 149, 222 (260)). This call to ensure diversity also applies to digital media because the digitisation of the media and the accompanying "tendencies towards concentration and monopolisation" if market forces are allowed to operate freely endanger the diversity of opinion in a manner that is relevant in terms of constitutional law (BVerfGE 149, 222 (261 et seq.); confirmed by BVerfGE 158, 389 para. 80). While regulating all genres of media in a way that is purely geared towards a functioning internal market superficially promotes

competition, this does not in turn produce the diversity of opinion required by the constitution. The competences of the EU under Article 114 TFEU are therefore not suitable to achieve the goal of ensuring diversity and independence of the media and, in any event, are no better suited to do so. Rather, the safeguarding of diversity, especially at regional and local level, would actually be jeopardised by taking an internal market view as expressed, for instance, in Article 21 of the proposed regulation.

13. The Bundesrat considers the proposed measures to harmonise national provisions on media diversity, including on a purely national (cf. recital 40 of the proposed regulation) and presumably regional level (cf. recital 50 sentence 2 of the proposed regulation), unsuitable to promote internal market conditions, let alone to guarantee media pluralism. It has not been demonstrated that diverging national rules to prevent media concentrations and to ensure diversity of opinion at the regional level are likely to create obstacles to the internal market for media services (or that purely regional developments could have “a significant impact on media pluralism and independence” in the internal media market according to Article 21(1) first sentence of the proposed regulation), which could be better prevented and countered at European level. Insofar as, according to the proposed regulation, media companies require a minimum size in order to remain competitive (in the internal market) (cf. recital 3, Article 21(2)(c) of the proposed regulation), the Bundesrat fears that, at the expense of national and regional structures, the strengthening of larger European media groups is to be given preference over large third-party providers. This conflicts with the German understanding of the law on media concentrations, which is also aimed at safeguarding media diversity at the regional to local level, including through smaller media providers. There is therefore a risk that such a uniform EU standard would even (indirectly) endanger regional and local media diversity due to sole reliance on the internal market competence according to Article 114 TFEU as well as on a purely economic consideration of the media and its players. The proposed regulation therefore not only goes beyond what is necessary to achieve the objective (notwithstanding the fact that the Bundesrat does not consider the legal basis to be applicable in the first place), it also proves to be unsuitable, if not actually harmful, to achieving the objective.

14. By choosing the legal form of a regulation, which, unlike a directive under Article 288(3) TFEU, does not leave the choice of form and means of implementation to the national authorities, the proposed regulation violates – with regard to the provisions that affect the freedom and diversity of the media – the duty of the EU to take sufficient account of the general cultural policy clause in accordance with Article 167 TFEU, which is also aimed at protecting the sovereignty of the Member States in terms of media policy. The argument put forward in the explanatory memorandum to the regulation that it will result in problems being tackled more quickly, the reference to an otherwise lengthy transposition process and the avoidance of potential divergences or distortions during this process appear to be sweeping and unjustified insofar as the transposition process is immanent to the fundamental character of directives under European law and avoiding them would fundamentally call into question the instrument of the directive as a legislative instrument of the EU.

15. The Bundesrat points out that, according to the European Treaties and German constitutional law, in cases where media regulation which falls within the cultural sovereignty of the Member States is affected, it is imperative to grant the Member States sufficient leeway, taking into account the rationale of Article 167 TFEU, to realise fundamentally shared objectives independently within the framework of the respective competences and the structures developed in Member States over time. The unilateral designation of the competent national authorities by EU legislation (Article 7(1) of the proposed regulation) as well as detailed European requirements, for example on procedural arrangements, including timeframes (Article 20(2) of the proposed regulation), or the establishment of further independent appeal bodies independent of the legal process against media-related regulatory measures taken by independent national regulatory authorities or bodies pursuant to Article 7 of the proposed regulation (Article 20(3) of the proposed regulation), do not do justice to this but encroach severely upon the competence of the Member States, especially on federal states such as Germany, to organise their own administrative proceedings.

16. A de facto centralisation of media supervision at European level via the comprehensive powers of participation by a Board assigned to the Commission and directly by the Commission itself as well as corresponding detailed (prior) consultation obligations of the Member State authorities or bodies in cases of

review (in particular Article 16(2), Article 20(4) and (5), Article 21(4) to (6), Article 22(1) and (2) of the proposed regulation) is not permissible under German constitutional law and is also disproportionate under EU law (Article 5(4), first subparagraph TEU). In the view of the Bundesrat, the Commission itself, which according to the proposed regulation ultimately assumes a key role, does not meet the requirements under German constitutional law (Article 5(1) sentence 2 of the Basic Law) for a media regulatory authority to be independent and at arm's length from the state (BVerfGE 12, 205 (262); 83, 238 (322 et seq.); 90, 60 (88 et seq., 102)), nor does it meet the requirements of EU law itself pursuant to Article 30 of Directive 2010/13/EU as well as Article 7(2) and Article 9 of the proposed regulation.