E. Core problems of public international law regarding the regulation of the "media sector" with respect to possible tensions with EU law

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I. Introduction

In the age of digitization and globalization, media regulation is not exclusively a regulatory system in the area of conflict between regulatory options and requirements under Member States' and EU law. Member States' and the EU's regulatory efforts must also comply with the (in particular human rights) standards set for the respective actors by international treaties. In terms of content, these standards can originate in treaties under public international law with a claim of universal validity – such as the International Covenants on Human Rights[680] –, with a claim of regional validity – such as the ECHR – or with a regional starting point but a global opening in terms of the possibility of participation – as in the case of the Council of Europe's Cybercrime Convention[681]. In the context of this study, however, questions of competences arise first and foremost: under what conditions may the EU or its Member States include in their regulation media actors who cannot be assigned to the EU's legal sphere qua affiliation, as established, e.g., by the nationality or domicile of an actor?

The worldwide expansion of transmission and dissemination possibilities for media establishes global impact risks of the behavior of media content providers as well as of infrastructure actors who influence the aggregation, selection, presentation and perceptibility of media content. Such risks

679 The following Chapter E ties in with earlier considerations in an unpublished expert opinion as well as the study by *Ukrow/Cole*, Aktive Sicherung lokaler und regionaler Medienvielfalt – Rechtliche Möglichkeiten und Grenzen der Förderung inhaltlicher Qualität in Presse-, Rundfunk- und Online-Angeboten.

680 Cf. Art. 19 and 20 International Covenant on Civil and Political Rights of 19 December 1966 (BGBl. 1973 II, p. 1553); Art. 15 International Covenant on Economic, Social and Cultural Rights of 19 December 1966 (BGBl. 1973 II, p. 1569).

681 Convention on Cybercrime of 23.11.2001, SEV-no. 185, entry into force in Germany on 01.07.2009 (BGBl. 2008 II, p. 1242); on this *Fink* in: ZaöRV 2014, 505, 506 et seq.

arise in a particular way in a situation in which concentration tendencies can be observed both among receivers for audiovisual media content and among media intermediaries, be they search engines or social networks – in the latter case in particular as a result of the network effects of digital platform economies.[682] As the international media market is increasingly characterized by an oligopoly of globally operating, structurally connected corporations, the question arises for both the EU and its Member States as to how to design media regulation in conformity with public international law, which also wants to include such transnationally operating players with globally oriented business models in regulation.

II. Addressees of regulation

1. Introduction

When considering the personal scope of regulation of the "media sector", in addition to the limits imposed by EU law on access to persons and undertakings not resident or domiciled in the regulating EU Member State on the basis of the principle of country-of-origin control, the limits imposed by public international law on regulation *ratione personae* must also be taken into account.[683]

In connection with the question of whether media regulation by Member States or the EU may also have access to (EU) foreign providers, the question also arises as to the extent to which such regulatory acts of a legislative, executive or judicial nature, depending on the legal personality of

682 Cf. on this e.g. *KEK*, Sicherung der Meinungsvielfalt im digitalen Zeitalter, p. 429 et seq.; *Lobigs/Neuberger*, Meinungsmacht im Internet und die Digitalstrategien von Medienunternehmen, p. 34 et seq.; *Neuberger/Lobigs*, Die Bedeutung des Internets im Rahmen der Vielfaltssicherung, p. 27 et seq.

683 The question of whether the German regulatory authorities (i.e., the body acting on behalf of the competent state media authorities in accordance with the provisions of the MStV and the JMStV) are competent to also take action against foreign providers for infringement of the substantive provisions of the MStV and/or the JMStV must be answered by interpretation of the MStV and the JMStV in accordance with the classical methods of semantic, systematic, teleological and historical interpretation (cf. on this e.g. *Larenz/Canaris*, Methodenlehre der Rechtswissenschaft, p. 133 et seq.; *Lodzig*, Grundriss einer verantwortlichen Interpretationstheorie des Rechts, p. 25 et seq.; *Potacs*, Rechtstheorie, p. 153 et seq.). The result reached thereby must then be tested against the standards of an interpretation in conformity with European and public international law.

the provider, are also bound by fundamental rights – whether of the Basic Law, in particular the constitutional freedom of broadcasting of Art. 5(1) sentence 2 Basic Law, or of the European fundamental rights regime.[684]

2. *Public international law framework for addressing foreign providers*

a. Addressing foreign providers from the perspective of the imperative of interpreting national and EU law in a manner open to public international law

The Basic Law has programmatically committed German state authority to international cooperation (Art. 24) and to European integration (Art. 23). It has given the general rules of public international law precedence over ordinary statutory law (Art. 25 sentence 2) and, through Art. 59(2), has placed international treaty law within the system of separation of powers. It has also opened the possibility of integration into systems of mutual collective security (Art. 24(2)), mandated the peaceful settlement of interstate disputes through arbitration (Art. 24(3)), and declared the disturbance of the peace, in particular war of aggression, unconstitutional (Art. 26).

With this set of norms, the German constitution aims, also according to its preamble, to integrate the Federal Republic of Germany as a peaceful and equal member of an international legal order, committed to peace, into the community of states. All this is an expression of the fact that the Basic Law is open to public international law, which promotes the exercise of state sovereignty through international treaty law and international cooperation as well as the incorporation of the general rules of public international law. It is therefore to be interpreted as far as possible in such a way that a conflict with obligations of the Federal Republic of Germany under public international law does not arise.[685]

The Basic Law, however, has not gone the furthest in opening up to public international law commitments. International treaty law is not to be treated directly, i.e. without an approving act under Art. 59(2) Basic Law, as applicable law and – like international customary law (cf. Art. 25

684 The question of the competence of the EU and/or its Member States to take regulatory actions, dealt with in this chapter, must be clearly distinguished from the question of a possible obligation to take action, which could follow not least from state obligations to protect. This obligation dimension of the question of action against foreign providers is discussed in chapter E.IV.

685 BVerfGE 63, 343 (370); 111, 307 (317 et seq.).

Basic Law) – is not endowed with the status of constitutional law. The Basic Law is clearly based on the classical notion that the relationship between public international law and national law is one between two different legal spheres and that the nature of this relationship from the perspective of national law can only be determined by national law itself. This is shown by the existence and wording of Art. 25 and 59(2) Basic Law. Openness to public international law unfolds its effect only within the framework of the democratic and constitutional system of the Basic Law.[686]

The Basic Law does neither order the subjection of the German legal order to the international one nor the unconditional primacy of public international law over constitutional law. It does, however, seek to "increase respect for international organisations that preserve peace and freedom, and for public international law, without giving up the final responsibility for respect for human dignity and for the observance of fundamental rights by German state authority". This corresponds to a "duty to respect public international law, a duty that arises from the fact that the Basic Law is open to public international law".[687]

However, not only the German constitutional legal order, but also the legal order of the EU as a *sui generis* entity[688] is characterized by an openness to public international law.[689] Since this system of integration has its starting point, as well as its further development under primary law, in a series of founding acts under public international law, a certain openness to public international law is inherent in the EU from its very roots. In the TEU, this openness to public international law is confirmed not least in Art. 3(5) sentence 2 and Art. 21(1). In the TFEU, openness to public international law is reinforced by its Art. 216(2).

- According to Art. 3(5) sentence 2 TEU, the EU "shall contribute […] to the strict observance and the development of international law, including respect for the principles of the United Nations Charter"".
- According to Art. 21(1) TEU, the EU's action on the international scene shall be guided by "the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the

686 BVerfGE 111, 307 (318).
687 BVerfGE 112, 1 (25 et seq.).
688 Cf. on this BVerfGE 22, 293 (296).
689 Cf. on this also *Schriewer*, Zur Theorie der internationalen Offenheit und der Völkerrechtsfreundlichkeit einer Rechtsordnung und ihrer Erprobung am Beispiel der EU-Rechtsordnung, p. 127 et seq.

wider world", including "respect for the principles of the United Nations Charter and international law".
- According to Art. 216(2) TFEU, "[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States".

The "openness of the state"[690] and the "openness to international law" of the Basic Law, i.e. the opening of the German legal order to public international law, can be derived not least from the preamble and Art. 23 to 26 of the Basic Law. In this respect, particular significance is attached to Art. 25, which reads:

> *"The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory."*

Art. 25 sentence 1 Basic Law issues a general command to apply the law. This provision has the consequence that "the general rules of international law find their way into the German legal order without a transformation law, i.e. directly, and take precedence over German domestic law".[691] The "general rules of international law" within the meaning of Art. 25 Basic Law include customary international law, including *ius cogens*, as well as the recognized general principles of law within the meaning of Art. 38(1)(c) ICJ Statute.[692]

These general rules of public international law also include the principle of the sovereign equality of states, described in the following, which today has found an enshrinement in international treaties (and an interpretation in the Friendly Relations Declaration[693]), in particular in Art. 2 No. 1

690 Cf. on this e.g. *di Fabio*, Das Recht offener Staaten; *Fassbender*, Der offene Bundesstaat; *Giegerich*, Der „offene Verfassungsstaat" des Grundgesetzes nach 60 Jahren; *Häberle*, Der kooperative Verfassungsstaat, 141, 141 et seq.; *Hobe*, Der offene Verfassungsstaat zwischen Souveränität und Interdependenz; *Schorkopf*, Grundgesetz und Überstaatlichkeit; *Sommermann*, Offene Staatlichkeit: Deutschland, 3, 3 et seq.; *Vogel*, Die Verfassungsentscheidung des Grundgesetzes für die internationale Zusammenarbeit, p. 42.

691 BVerfGE 6, 309 (363).

692 Cf. e.g. *Talmon* in: JZ 2013, 12, 13.

693 UN Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States of 24.10.1970, International Legal Materials, 9 (1970), p. 1292 (also available at http://www.un-documents.net/a25r2625.htm).

UN Charter.[694] The traditionally cited contents of the principle of sovereign equality are that no state should be subject to international legal obligations against its will and that no state is to be judged by the courts of other states (*par in parem non habet iudicium*).[695] The territorial and personal sovereignty of states[696] are direct manifestations of their sovereignty, the prohibition of intervention serves to protect sovereignty by prohibiting other states from interfering in their internal affairs.[697]

The obligation to strictly comply with public international law pursuant to Art. 3(5) sentence 2 TEU also includes the preservation of limitations of jurisdiction under customary international law – in this case of the EU. This also follows from CJEU case law, according to which the EU must exercise its regulatory powers, in particular also its legislative powers, in compliance with public international law, including the rules of customary international law.[698] However, this limitation applies not only to legislative but also to executive action of the EU, which may also be significant, for example, with regard to obligations under international law to protect cultural diversity, such as those arising from the UNESCO Convention in this regard.[699]

It is indisputable that enforcement measures taken by state media authorities on the basis of the MStV and/or the JMStV constitute sovereign acts from a public international law perspective, just as, for example, the EU Commission's competition supervision. For the corresponding qualification, it is not relevant whether the action in question has a coercive character.[700] Independent of such a coercive character is also the qualification of the measure with regard to the question of an infringement of the territorial sovereignty of a state. For a possible infringement of this territorial sovereignty by acts of a state or the EU on foreign territory or by measures

694 Cf. on this e.g. *Dombrowski*, Extraterritoriale Strafrechtsanwendung im Internet, p. 5; *Epping* in: Ipsen, § 5, para. 254 et seq.; *Kau* in: *Graf Vitzthum/Proelß*, Dritter Abschnitt, para. 87 et seq.

695 Cf. *Baker*, The Doctrine of Legal Equality of States, 1, 11 et seq.; *Kokott* in: ZaöRV 2004, 517, 519.

696 Cf. on this e.g. *Bertele*, Souveränität und Verfahrensrecht, p. 65 et seq.

697 Cf. e.g. *Stein/Buttlar/Kotzur*, Völkerrecht, p. 194 et seq.

698 Cf. CJEU, case C-162/96, *Racke / Hauptzollamt Mainz*, para. 45 et seq.

699 On 18 December 2006, the EU ratified the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which was also ratified in Germany. One of the main reasons for the EU's involvement is that the areas covered by the Convention relate in part to EU and in part to Member State competences. Cf. on this *Klamert* in: ZöR 2009, 217, 217 et seq.

700 Cf. also BVerfGE 63, 343 (372).

with extraterritorial effect cannot legally cease to exist by the fact that a coercive character of the act or measure is eliminated by the consent of the private party concerned. This is because imperatives of public international law, such as respect for territorial sovereignty, are not at the disposition of private parties.[701]

However, immanent limitations on the scope of Art. 25 Basic Law and Art. 3(5) sentence 2 TEU also arise from public international law itself with regard to the requirement of respect for the territorial sovereignty of a third state.[702] Insofar as public international law sets limits on the validity or application of customary international law, this also limits its domestic application. In this respect, the FCC has held that a general rule of public international law becomes part of federal law only "with its respective scope under international law".[703] As will be shown in detail below, the applicable public international law does not (any longer) contain any principle that national or EU administrative law, be it media law such as the law on the protection of minors from harmful media or media consumer protection law of Member States, be it competition supervision law of the EU, may not also be applied to foreign-related content.[704]

In this respect, it is also significant from a constitutional and EU law perspective that public international law also recognizes the jurisdiction of the state or community of states on whose territory the impact of conduct carried out in a third state occurs. This objective territoriality principle, which has clear parallels to the effects doctrine in antitrust law,[705] will also be examined below in terms of its significance for extraterritorially effective German media regulation.

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701 Cf. *Dombrowski*, Extraterritoriale Strafrechtsanwendung im Internet, p. 10 et seq.; *Geck* in: Strupp/Schlochauer p. 795 et seq.; *Germann*, Gefahrenabwehr und Strafverfolgung im Internet, p. 642; *Okresek* in: ÖZöRV 1985, 325, 339 et seq.; *Schmidt,* Die Rechtmäßigkeit staatlicher Gefahrenabwehrmaßnahmen im Internet, p. 264; *Valerius,* Ermittlungen der Strafverfolgungsbehörden in den Kommunikationsdiensten des Internet, p. 147.

702 Cf. BVerfGE 15, 25 (34 et seq.); 23, 288 (317); 94, 315 (328); 95, 96 (129); 96, 68 (86); 112, 1 (25, 27 et seq.) as well as e.g. *Talmon* in: JZ 2013, 12, 12.

703 BVerfGE 46, 342 (403) (own translation). Cf. also BVerfGE 18, 441 (448); 23, 288 (316 et seq.).

704 Cf. on this e.g. *Schmidt*, Die Rechtmäßigkeit staatlicher Gefahrenabwehrmaßnahmen, p. 257.

705 Cf. *Fox* in: JILP 2009/2010, 159, 160, 167, 174; *Staker* in: Evans, International Law, p. 309 (316 et seq.); *Oxman* in: MPEPIL, 546, 550; *Uerpmann-Wittzack* in: GLJ 2010, 1245, 1254.

b. Public international law limitations on a state's power to legislate and enforce with respect to foreign providers

An important component of state sovereignty in the sense of public international law[706] is the control, understood as territorial sovereignty, over all sovereign powers exercised on the territory of the state. The own territory literally remains the fundamental element of a state. The division and legal order of the world under public international law is to date based on territoriality.[707] However, this territorial sovereignty is accompanied by a responsibility recognized under customary international law, prohibiting a state from allowing its territory to be used to cause harm on the territory of another state.[708] From this, at least in individual cases, a duty of the state to extraterritorially respect and protect human rights is derived in public international law doctrine.[709] This indicates a changing concept of sovereignty in public international law, which is not limited to a negative defensive side, but also understands sovereignty as responsibility. Understood in this way, sovereignty requires the assumption of duties for the protection of central common goods, even where it is a matter of defending against violations of protected goods by private parties.[710]

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706 Sovereignty in the sense of public international law is the state's legal capacity to act internally and externally, which is not derived from or dependent on anyone and is only limited in certain respects by restrictions arising from the basic order of public international law (minimum requirements for minimal human rights protection, prohibition of slavery, etc.), but is otherwise unrestricted. Sovereignty includes in particular the right and legal power to freely choose and shape the political, economic and social order, as well as the free choice and implementation – and responsibility – of one's own solutions to all factual problems arising for the political community and, finally, the free choice and exercise – or, if necessary, restriction – of contacts with other states and international and supranational organizations; cf. on the concept of sovereignty under public international law e.g. *von Arnauld*, Völkerrecht, para. 89 et seq., 312 et seq.

707 The territorial competences of the state are expressed in its territorial sovereignty, i.e. the (regulatory) authority in the territory, and in its territorial sovereignty, i.e. the (dispositive) authority over the territory. In state practice, the two can diverge when it comes to the exercise of sovereignty on foreign territory; cf. *Gornig/Horn*, Territoriale Souveränität und Gebietshoheit, p. 21 et seq., 35 et seq.

708 Cf. Trail Smelter Case (U.S. / Canada), in: Reports of International Arbitral Awards, 16 April 1938 and 11 March 1941, 1905 (1941), https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf.

709 Cf. *de Schutter et al.* in: Human Rights Quarterly 2012, 1084, 1169, 1095 et seq.

710 Cf. *Seibert-Fohr* in: ZaöRV 2013, 37, 59 et seq.

With regard to protected interests such as human dignity and the protection of minors, the prohibition of intervention under public international law has proved to be similarly open to development and increasingly characterized by a shift, still in the process of development, from a classic, purely state-centered dogmatics of defense to a dogmatics of responsibility. This prohibition of interference by states in the internal affairs of other states is one of the principles constituting the international legal order. Although it is not explicitly enshrined in the UN Charter,[711] it is indisputably recognized – also beyond regional codifications – as a provision of customary international law.

For the understanding of this provision, the so-called *Friendly Relations Declaration* of the UN is of particular significance. It goes back to the *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and on their Independence and Sovereignty* of 21.12.1965.[712] Accordingly, the principle implies the duty not to interfere, in accordance with the Charter, in matters which are within the internal competence of a State:

> *"No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.*
> *No State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. […]*
> *Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.*
> *Nothing in the foregoing paragraphs shall be construed as reflecting the relevant provisions of the Charter relating to the maintenance of international peace and security."*[713]

The object of protection of the prohibition of intervention is the internal affairs of a state. This includes all those matters which have not been removed from the exclusive competence of the state by agreements under public international law. In principle, it can be assumed that the constitu-

711 Which, in Art. 2 No. 7, merely regulates the prohibition of intervention on the part of the UN in the affairs of its members.

712 Cf. *Seibert-Fohr* in: ZaöRV 2013, 37, 59 et seq.

713 Annex 2625 (XXV), adopted on 24 October 1970, p. 123, https://treaties.un.org/doc/source/docs/A_RES_2625-Eng.pdf.

tional order, the political, economic, social and cultural system of a state are part of its internal affairs. However, these internal affairs also include administrative access by sovereign authority to the nationals and citizens of a third country. However, the scope of internal affairs is decreasing more and more, as increasing internationalization has subjected numerous issues to regulation under public international law. This applies in particular to the area of human rights, which has also become an international issue in terms of the protection of human dignity and the protection of minors from harmful media, at least in some areas.[714]

However, the prohibition of intervention does not only set limitations to the legislative and executive powers of a state or a community of states with regard to foreign providers. It can also be activated with a view to protecting domestic citizens from foreign influence through Internet offerings. This duty to refrain from harmful interference, which is derived from the prohibition of intervention, found a particularly striking expression in the 2011 Council of Europe Ministerial Declaration on Internet governance principles.[715]

c. The "genuine link" doctrine and action against foreign providers on the basis of the MStV and JMStV

The concept of jurisdiction of states under public international law describes the power of the state to comprehensively regulate the legal and living conditions of natural and legal persons. In accordance with the principle of sovereign equality of states enshrined in Art. 2(1) of the UN Charter and as a result of the prohibition of intervention, the jurisdiction of one state finds its boundaries in the jurisdiction of other states. The main feature of this approach is that a state may (in principle only) exercise territorial sovereignty over its territory and personal sovereignty over its citizens. An extension of this jurisdiction requires a regulation under international treaty law or recognition in customary international law. In this context, the exercise of such jurisdiction beyond territorial and personnel

714 Cf. for instance *Ukrow* in: RdJB 2017, 278, 278 et seq.

715 The 3. principle of this declaration indicates that states, in the exercise of their sovereignty rights, should "refrain from any action that would directly or indirectly harm persons or entities outside of their territorial jurisdiction". Cf. CoE, Declaration by the Committee of Ministers on Internet governance principles, at the 1121st meeting of the Ministers' Deputies on 21.09.2011.

sovereignty requires a so-called genuine link.[716] Under public international law, a state may only regulate matters to which it has a sufficiently close connection after balancing its interests against the sovereignty interests of other states[717]. This is not least an expression of the prohibition of arbitrary action: a state may only regulate matters with a foreign connection if this is not done arbitrarily.[718]

Based on the principle of territorial sovereignty, the territoriality principle and the associated effects doctrine are recognized as linking elements in the sense of the genuine link criterion. In addition, nationality (principle of active personality) and the protection of certain state interests (principle of passive personality and protection principle) are accepted as such links under public international law.[719]

According to the principle of territoriality, states have jurisdiction over property and persons located on their own territory.[720] However, this territorial jurisdiction includes not only acts that take place on the territory of the state, but also, according to the effects doctrine – which is recognized as a further development of the principle of territoriality – such acts whose success is realized on the territory of the state. This doctrine complements the objective principle of territoriality insofar as the territorial sovereignty of states also suggests a potential for regulation of all influences on the territory of the state.[721]

However, an unrestricted application of the effects doctrine would lead to undesirable results from a public international law perspective when it comes to the question of whether a state may take sovereign measures against the provider of Internet content that can be accessed on its territory. This is because such an approach would lead to potentially universal conflicts of jurisdiction, since content on the Internet can regularly be per-

716 Cf. on this e.g. *Ziegenhain*, Exterritoriale Rechtsanwendung und die Bedeutung des Genuine link Erfordernisses, p. 47 with further references.

717 Cf. *Ziegenhain*, Exterritoriale Rechtsanwendung und die Bedeutung des Genuine link Erfordernisses, p. 47 et seq.

718 Cf. *Dombrowski*, Extraterritoriale Strafrechtsanwendung im Internet, p. 53.

719 Cf. *Tietje/Bering/Zuber*, Völker- und europarechtliche Zulässigkeit extraterritorialer Anknüpfung einer Finanztransaktionssteuer, p. 9.

720 Cf. *Hobe*, Einführung in das Völkerrecht, p. 99; *Stein/von Buttlar/Kotzur*, Völkerrecht, para. 611 et seq.

721 Cf. *Burmester*, Grundlagen internationaler Regelungskumulation und -kollision unter besonderer Berücksichtigung des Steuerrechts, p. 95 et seq., 104 et seq.; *Hobe*, Einführung in das Völkerrecht, p. 99; *Stein/von Buttlar/Kotzur*, Völkerrecht, para. 613; *Tietje/Bering/Zuber*, Völker- und europarechtliche Zulässigkeit extraterritorialer Anknüpfung einer Finanztransaktionssteuer, p. 9.

ceived from almost any state in the world. Without limiting the effects doctrine, an offer on the Internet would have to comply with the legal orders of over 200 states in order to guarantee legal certainty for the provider. This would recognizably exceed the possibilities of an ordinary online provider in the long term. Such unworkable and inappropriate outcomes are recognizably not desired under public international law.[722]

A design of a German language offering can at least be classified as being directed at Germany if no elements are added which indicate that the offering was only intended to address the public in a German-speaking third country.[723]

Moreover, a targeted provision for retrievability in or an impact on Germany is given in particular if an offer specifically focuses on or exclusively deals with the political, economic, social, scientific or cultural situation of Germany in the present or in the past. In particular, there is a genuine link with regard to the reference to the constitutional identity of the Federal Republic of Germany and the counter-image identity-shaping significance of National Socialism for the German legal order in the case of infringements of § 4(1) sentence 1 nos. 1, 2, 3, 4 and 7 JMStV. This is because it is in these provisions that the "counter-image identity-shaping significance of National Socialism for the Basic Law"[724] finds its counterpart in the law on the protection of minors from harmful media. The inhuman and arbitrary tyranny of National Socialism was and is of essential importance for the shaping of the constitutional order, so that the Basic Law can virtually be regarded as a counter-draft to the totalitarianism of the National Socialist regime.[725] Those provisions of the JMStV that declare offerings to be inadmissible in order to distance from the tyranny of National Socialism have such a strong connection to Germany's constitutional identity in view of

722 Incidentally, the ICJ already recognized this in the pre-digital era in the *Barcelona Traction* Case (ICJ Reports 1970, p. 3, para. 70, 101) and, in the case of competing links, balanced them against each other and based the justification of a state's competence on the narrower link. Cf. on this e.g. also *Dombrowski*, Extraterritoriale Strafrechtsanwendung im Internet, p. 60 et seq.

723 A respective orientation towards a third country is e.g. if the prices for the perception of an offer are exclusively given in Swiss Francs; cf. OLG München, judgment of 08.10.2009, 29 U 2636/09.

724 BVerfGE 124, 300 (327 et seq.); FCC, Judgment of the Second Senate of 17 January 2017, 2 BvB 1/13, para. 591, 596 (own translation).

725 BVerfGE 124, 300 (328); FCC, Judgment of the Second Senate of 17 January 2017, 2 BvB 1/13, para. 596.

this counter-image identity-shaping significance that a genuine link can be assumed.[726]

A foreign provider also aims to make his offer available in Germany when he has his own offer included in a platform of a provider who is based in Germany and/or makes his offer available exclusively or at least also in Germany. It thus endeavors to make his offering relevant to the process of individual and public opinion-forming in Germany, which is sufficient to justify a genuine link. The same also applies to a foreign provider who aims to ensure that his offering is given priority in search queries in Germany. If the offering of a foreign provider is advertised in Germany in general or by means of an individualized approach to residents of Germany, this indicates, irrespective of the language of the offering itself, that it is intended to have a conscious and deliberate impact at least in Germany as well. Commercial communication taking place in Germany for a foreign offer thus also establishes a genuine link to this offer. Finally, membership in a recognized institution of voluntary self-regulation also establishes a genuine link to the German system of regulated self-regulation and, via this, to the Federal Republic of Germany.

The MStV operates in this context of public international law when it states in § 1(8) sentence 1 that it applies to media intermediaries, media platforms and user interfaces, insofar as they are intended for use in Germany, and in this context regulates in sentence 2 that this is the case if they are aimed in the overall picture, in particular through the language used, the content or marketing activities, at users in Germany or or if they aim to refinance a substantial part of their refinancing in Germany. The same applies to the JMStV in the version of the State Treaty on the Modernization of the Media Order in Germany, if this now regulates in § 2(1) sentence 2 that the rules of this State Treaty also apply to providers who do not have their registered office in Germany according to the provisions of

726 This link may be doubtful in view of the opening of the Völkerstrafgesetzbuch (International Criminal Code) for a large number of the offenses addressed in Section 4(1) sentence 1 no. 4 JMStV to third countries in addition to Germany, since in this respect the objective of limiting the effects doctrine related to the genuine link could be jeopardized. However, not least the genesis of international criminal law in roots of Nazi injustice as well as the continuing special editorial treatment of Germany via the Enemy States Clause of the UN Charter show Germany's special responsibility, which finds an expedient counterpart in the authority under public international law to take defensive action also against foreign threats to the free democratic basic order and the anti-Nazi heritage according to the principle of "no freedom for the enemies of freedom". Cf. on this also *Ukrow*, Wehrhafte Demokratie 4.0.

the Telemediengesetz and the MStV, insofar as the offerings are intended for use in Germany and in compliance with the requirements of Art. 3 and 4 AVMSD, as well as Art. 3 ECD. When to assume this intention for use in Germany, is regulated by § 2(1) sentence 3 JMStV, as amended by the Modernization Treaty, in parallel to § 1(8) sentence 2 MStV.

The principle of active personality, which is linked to the personal sovereignty of a state, grants a state comprehensive sovereignty over the rights and obligations of its nationals, irrespective of whether they are in Germany or abroad.[727] The principle of active personality also covers commercial audiovisual activities of any kind – from broadcasting and offering telemedia to the selection, aggregation and presentation of content. Consequently, the principle of (active) personality also offers an approach for taking enforcement measures against foreign providers due to a violation of the MStV or the JMStV, insofar as these providers are own nationals residing abroad.

In contrast to the principle of active personality, the principle of passive personality is not based on a state's sovereignty over its own nationals, but on the state's interest in preventing or prosecuting acts against its own nationals. Although it cannot (yet) be assumed that this principle has found recognition in customary international law, state practice at least indicates toleration in the case of certain offenses.[728] Moreover, the principle of protection, which is related to the principle of passive personality, allows for an extraterritorial link in cases that endanger state interests of particular significance.[729]

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727 Cf. *Burmester*, Grundlagen internationaler Regelungskumulation und -kollision unter besonderer Berücksichtigung des Steuerrechts, p. 103 et seq.; *Crawford*, Brownlie's Principles of Public International Law, p. 459 et seq.; *Kment*, Grenzüberschreitendes Verwaltungshandeln, p. 114 et seq.; *Stein/von Buttlar/Kotzur*, Völkerrecht, para. 617; *Tietje/Bering/Zuber*, Völker- und europarechtliche Zulässigkeit extraterritorialer Anknüpfung einer Finanztransaktionssteuer, p. 9.

728 Cf. *Burmester*, Grundlagen internationaler Regelungskumulation und -kollision unter besonderer Berücksichtigung des Steuerrechts, p. 107 et seq.; *Stein/von Buttlar/Kotzur*, Völkerrecht, para. 620 et seq.; *Tietje/Bering/Zuber*, Völker- und europarechtliche Zulässigkeit extraterritorialer Anknüpfung einer Finanztransaktionssteuer, p. 9 et seq.

729 Cf. *Burmester*, Grundlagen internationaler Regelungskumulation und -kollision unter besonderer Berücksichtigung des Steuerrechts, p. 98 et seq.; *Dahm/Delbrück/Wolfrum*, Völkerrecht, vol. I/1, p. 321; *Kment*, Grenzüberschreitendes Verwaltungshandeln, p. 123 et seq.; *Stein/von Buttlar/Kotzur*, Völkerrecht, para. 622; *Tietje/Bering/Zuber*, Völker- und europarechtliche Zulässigkeit extraterritorialer Anknüpfung einer Finanztransaktionssteuer, p. 10.

d. Links and limitations of a state's jurisdiction to prescribe and jurisdiction to enforce under public international law

As a result of the so-called *Lotus* jurisprudence, the established distinction between the jurisdiction to prescribe, jurisdiction to enforce and jurisdiction to adjudicate has developed in public international law[730] with regard to the authority of jurisdiction of a state or other subject of public international law, such as the EU. This distinction is indispensable for a precise understanding of jurisdiction problems.

In order to assess the admissibility of extraterritorial factual links under public international law, a distinction must first be made between the *territorial scope* and the *substantive scope* of a provision.[731] The territorial scope determines in which territorial area a provision claims validity. In the case of a provision under administrative law, the territorial scope thus regulates the area in which the provision binds authorities and courts in their administrative or judicial activities. The substantive scope, on the other hand, determines the circumstances to which a provision applies. This may also include situations outside the territory of the state whose authority has taken sovereign action on the basis of a provision of administrative law. Public international law does not per se prevent a distinction between territorial and substantive scope.[732]

In line with the observations of the League of Nations' Permanent Court of International Justice (PCIJ) in its 1927 *Lotus* decision[733], which re-

730 Cf. on this e.g., Brownlie's Principles of Public International Law, p. 456; *Epping/Gloria* in: Ipsen, Völkerrecht, § 23, para. 86; *Schweisfurth*, Völkerrecht, chapter 9, para. 177.

731 Cf. *Epping/Gloria* in: Ipsen, Völkerrecht, § 23, para. 87; *Tietje/Bering/Zuber*, Völker- und europarechtliche Zulässigkeit extraterritorialer Anknüpfung einer Finanztransaktionssteuer, p. 6.

732 Cf. on this e.g. *Koch*, Die grenzüberschreitende Wirkung von nationalen Genehmigungen für umweltbeeinträchtigende industrielle Anlagen, p. 32 et seq.; *Linke*, Europäisches Internationales Verwaltungsrecht, p. 28 et seq.; *Ohler* in: DVBl. 2007, 1083, 1088.

733 "Not the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if inter-

flect the state of public international law dogmatics, the territorial scope of the exercise of jurisdiction is, as a rule, limited to a state's own territory. At the same time, however, it follows from the ruling that states are free to factually link to events abroad.[734] The imperative of respecting foreign sovereign rights is therefore not already interfered with by the sovereign regulation of a state A if a state B permits the performance of an act taking place on its territory, but state A prohibits such an act under administrative law, irrespective of where it takes place, and its sovereign authority declares this administrative law to be applicable also in the case of facts relating to third states and sanctions precisely this conduct due to its impact on its own territory.[735]

According to the *Lotus* decision, states are largely free to decide how far they wish to extend the substantive scope of their legal order. In this respect, legislative power is not exclusive under public international law, but always competing.[736] In contrast, due to the limited territorial sovereignty, the enforcement power is subject to far-reaching restrictions insofar as the enforcement of legal provisions outside the territory of the enforcing state authority is concerned.[737] However, the cautious attitude of the judiciary with regard to questions of administrative conduct by regulatory authorities with extraterritorial effect and the only rudimentary normative material on such conduct extending beyond national borders available under in-

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national law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable". The Case of the S.S. Lotus, Judgment No. 9, P.C.I.J., Series A, No. 10 (1927), 18 et seq.

734 Cf. *Tietje/Bering/Zuber*, Völker- und europarechtliche Zulässigkeit extraterritorialer Anknüpfung einer Finanztransaktionssteuer, p. 7.

735 So in the approach *Dombrowski*, Extraterritoriale Strafrechtsanwendung im Internet, p. 51.

736 *Dahm/Delbrück/Wolfrum*, Völkerrecht, vol. I/1, p. 319.

737 Cf. *Dahm/Delbrück/Wolfrum*, Völkerrecht, vol. I/1, p. 318 et seq.; *Tietje/Bering/Zuber*, Völker- und europarechtliche Zulässigkeit extraterritorialer Anknüpfung einer Finanztransaktionssteuer, p. 7.

ternational treaty law to date does not per se stand in the way of the permissibility of such conduct under public international law.

According to all this, public international law does not require that the territorial scope of national regulations must end at the national border. In contrast, it is generally illegal under public international law for a German authority to exercise sovereignty independently on foreign territory, because in this case the subject of public international law, Germany, regularly interferes with the sovereignty of the third country concerned.[738]

This classification is also significant in the distinction between jurisdiction to prescribe and jurisdiction to enforce. While the substantive scope of the MStV and JMStV, towards which the jurisdiction to prescribe is directed, can also be opened up beyond the Federal Republic of Germany, the territorial scope of the two State Treaties, towards which the jurisdiction to enforce is directed, is limited to the territory of the sixteen states of the Federal Republic of Germany. Jurisdiction to enforce outside the Federal Republic would only be opened up if, on the one hand, this were provided for domestically and, on the other hand, this domestic regulation were secured under international treaty law.

3. *The cross-border application of German media regulation – Relevant elements of the MStV and JMStV and their interpretation*

The JMStV itself does not contain the terms "foreign country", "foreigner" or comparable terminology at any point. In this respect, when interpreted semantically, it appears at first glance to be neutral with regard to the question of whether the state media authorities or the KJM can access foreign providers. However, § 2(1) sentence 2 JMStV, in the version created by Art. 3 No. 2(a) of the State Treaty on the Modernization of the Media Order in Germany, expressly states that the rules of the JMStV also apply to providers who do not have their registered office in Germany according to the provisions of the Telemediengesetz and the MStV, insofar as the offerings are intended for use in Germany and in compliance with the requirements of Art. 3 and 4 AVMSD, as well as Art. 3 ECD. This argues semantically for the cross-border openness of the JMStV.

738 Cf. also *Bertele*, Souveränität und Verfahrensrecht, p. 78 et seq., 89, 93; *Dombrowski*, Extraterritoriale Strafrechtsanwendung im Internet, p. 52; *Ziegenhain*, Exterritoriale Rechtsanwendung und die Bedeutung des Genuine-link-Erfordernisses, p. 2 et seq.

For the MStV, conversely, the wording of § 106(1) sentence 2 of the MStV already indicates an opening towards cross-border application of its provisions: for nationwide offerings, where the broadcaster or provider is based abroad, the state media authority which first dealt with the matter has power to issue supervisory decisions. In this respect, it is irrelevant who initiated a referral; action on own initiative ex officio is also possible.

This semantic result, which can also not be relativized by the title of the State Treaty on the Modernization of the Media Order "in Germany", which links the MStV and the JMStV, is confirmed by teleological considerations: e.g., the purpose of the JMStV according to its § 1 is "consistent protection of children and adolescents against content in electronic information and communication media which impairs or harms their development or education, and for the protection against content in electronic information and communication media which violates human dignity or other legal goods protected under the German Criminal Code". This purpose is also not explicitly territorially contained. § 1, according to its wording, neither takes into account only children and young people who are resident in or nationals of Germany, nor does it refer exclusively to offers in electronic information and communication media that can be attributed to the Federal Republic via a criterion such as the provider's registered office. Rather, the purpose of § 1 JMStV is formulated in a twofold territorially open manner in relation to the addressees – both with regard to the beneficiaries or protected persons and with regard to the perpetrators.

Historical aspects also reinforce the result of openness toward regulation with cross-border impact. The official explanatory memorandum to the JMStV[739] does not explicitly consider the question of whether the KJM is competent to deal with offerings that are distributed from abroad and can be received in Germany. However, it contains a passage on § 13 JMStV that is of considerable importance with regard to the answer to this question:

> *"§ 13 concerns the scope of the rules on procedure as well as enforcement for providers other than public broadcasters. §§ 14 – 21 and 24(4) sentence 6 shall therefore apply only to cross-border offerings. In this context, cross-border offerings include offerings that are distributed or made accessible nationwide as well as offerings that are only distributed or made accessible in the*

739 Available only in German at https://www.kjm-online.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/JMStV_Genese/Amtliche_Begru__ndung_zum_JMStV.pdf (all excerpts here: own translation).

territory of several federal states. All offerings on the Internet are cross-border anyway."

The last sentence is significant in several respects for the present contexts:

- First, the legislature takes note that "all offerings on the Internet" are cross-border. In this regard, "all" clearly means not only such offerings that originate in Germany.
- Secondly, for Internet offerings, the legislature assumes – as evidenced by the label "anyway" – an obvious competence of the KJM via the factual linking criterion "cross-border".
- Thirdly, the legislature refrains from differentiating regarding the competence of the KJM depending on whether an Internet offering originates in Germany or a third country. Such a differentiation would have been obvious, however, in view of the potentially global problem, recognized by the legislature, of content that is questionable under the law on the protection of minors from harmful media, if the legislature had intended to limit the competence of the KJM from the outset exclusively to matters that have only domestic links.

Such a differentiation to limit the competence of the KJM with regard to the recognition of the international impact possibilities on the Internet would only have been unnecessary if already, for reasons of public international law, the competence of the KJM for cases in which the violation of the substantive provisions of the JMStV originates abroad is out of the question.

For the question of whether the legislature also has foreign offerings in view, the official explanatory memorandum of § 5(3) JMStV is also significant. It reads:

"As an alternative for broadcasting and telemedia, the JMStV provides that due to the time of distribution or making available, the provider can assume that children or young people do not perceive these offerings. This provision, adopted from previous law, also applies to telemedia. Here, too, it has emerged that, with appropriate software, the cross-time zone offering can be blocked for individual time zones and thus designed differently over the course of a day. However, this is only one option for a provider, which otherwise leaves it free to make other arrangements, by technical or other means […]."

Such a passage on the treatment of cross-time zone offerings would be superfluous if the legislature had assumed that only domestic offerings could be the subject of any regulatory access based on the JMStV at all.

Accordingly, the state media authorities are authorized to take enforcement measures against foreign providers for violating substantive provisions of the MStV and/or the JMStV, based on a semantic, teleological and historical interpretation of the MStV and JMStV.

4. *The possibility of reaching foreign providers under the MStV and the JMStV from the perspective of EU law – an initial consideration*

a. Introduction

The question of the relationship between national media law and EU law is no longer about the problem of whether Art. 5(1) sentence 2 Basic Law has a suspensory effect on provisions of secondary EU law.[740] This question has been clarified in principle, at the latest since the FCC's decision on the then EEC's TwF Directive[741], in the direction of a recognition by the FCC of the EU's regulatory competence with regard to audiovisual media from an internal market perspective. Rather, the question is whether EU law imposes a priori limitations on an approach that basically recognizes regulatory competences of domestic authorities vis-à-vis (EU) foreign providers.

The goal of the Federal Republic of Germany to promote world peace as an equal partner in a united Europe, as enshrined in the Preamble and Art. 23 Basic Law, is constitutionally bound, as the FCC emphasized in its decision on the Treaty of Lisbon[742]; the constitution, however, is itself open to Europe and, beyond that, also oriented toward international cooperation.[743] This leads to the conclusion that the Basic Law does not assume a mere coexistence of national, European and international legal systems,[744] but in particular also requires an intertwining and inclusion of the European common good in the interpretation and application of funda-

740 Skeptical in this respect early on e.g. *Ossenbühl,* Rundfunk zwischen nationalem Verfassungsrecht und europäischem Gemeinschaftsrecht, p. 58 et seq.
741 BVerfGE 92, 203.
742 BVerfGE 123, 267 (345 et seq.); critical to the decision with regard to the integration limits shown, e.g. *Ukrow* in: ZEuS 2009, 717, 720 ff.
743 On the choice for an openness of statehood cf. *Vogel,* Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit; as well as e.g. *Kment*, Grenzüberschreitendes Verwaltungshandeln, p. 165 et seq.
744 Cf. im Ansatz *Kirchhof* in: JZ 1989, 453, 454.

mental rights, i.e. a specific interpretation of fundamental rights based on European law.[745]

Conversely, the above-mentioned rules and limitations on the exercise of competences, as well as the horizontal cultural and media policy clause of Art. 167(4) TFEU and the EU's obligation to respect media pluralism, call for an application and interpretation of EU law that is directed toward upholding EU Member States' instruments to safeguarding diversity.

This is also recognized in principle by the European Commission in its communication of 27 April 2020 to the Federal Republic of Germany as part of the notification procedure on the State Treaty on the Modernization of the Media Order in Germany.[746]

In the notification details, the German authorities justified the draft measure and the requirements imposed on online service providers of media content (so-called "gatekeepers") with the need to safeguard media pluralism on the Internet.[747] They point to the fundamental changes in the media landscape, in particular the increasing importance of certain online services ("gatekeepers") for the discoverability of media offerings and reaching them. The goal of the draft treaty was to preserve pluralism and promote diversity. To this, the European Commission responded with "general comments"[748]:

> *"Media pluralism is a fundamental value of the European Union, as enshrined in Article 11(2) [CFR]. In this respect, the Commission recognizes and shares the objective of initiatives to promote media pluralism. At the Union level, the Commission promotes this pluralism by, among other things, funding the Media Pluralism Monitor, which is currently studying the impact of digitization on media pluralism across the EU.*
> *The Commission is also committed to preserving and promoting media diversity and media pluralism in the online environment. In this context, the*

745 Cf. on this BVerfGE 73, 339 (386). Cf. on this *Ress* in: VVDStRL 1990, 56, 81; *Streinz,* Bundesverfassungsgerichtlicher Grundrechtsschutz und Europäisches Gemeinschaftsrecht, p. 260 et seq.

746 In this context, Art. 1 §§ 1, 2, 18, 19, 22, 74, 78 to 96, 117(1) sentence 2 no. 2, 16, 21 to 44 (as provisions of the MStV) and Art. 2 of the draft State Treaty on the Modernization of the Media Order in Germany (as a repeal of the Interstate Broadcasting Treaty) were notified in accordance with Directive (EU) 2015/1535.

747 In addition, the German authorities describe the notified draft as a partial transposition of Directive (EU) 2018/1808 of 14 November 2018 amending the AVMSD.

748 European Commission, Notifizierung 2020/26/D, C(2020) 2823 final of 27.04.2020, p. 2 (own translation).

> *Commission has announced its intention to regulate the responsibility of online platforms with regard to content at EU level in the announced "Digital Services Act". It shall also be examined whether the role of online platforms as online 'gatekeepers' should lead to new ex ante rules at EU level.*
> *However, having examined the notified draft and taking into account the responses of the German authorities to the Commission services' request for additional information, the Commission has certain concerns as to whether some of the measures contained in the notified draft may disproportionately restrict the free movement of information society services protected in the internal market."*

As will be shown below, however, the recognition of Member States' initiatives to promote media pluralism does not sufficiently take into account the at least primary, if not exclusive, legislative competence of the Member States to respond to new threats to media diversity.

b. The possibility of reaching foreign providers under the MStV and the JMStV from the perspective of primary EU law

From the Basic Law's commitment to European integration, an approach could be derived in view of the attribution of conduct of the Member States' authorities responsible for safeguarding audiovisual protection of human dignity and the protection of minors from harmful media that German enforcement authorities are per se prevented from taking enforcement measures against EU foreign providers in the sense of a comprehensive obligation to respect the conduct of third EU countries. In such a view, European integration would result in a limitation of the options for action by Member State administrative authorities in EU-internal cross-border cases.

Such a view would take full account of the principle of home country control, one of the fundamental principles shaping the internal market concept of the TFEU. At the same time, the risk of conflicting administrative decisions in the EU judicial area would be sustainably curbed – but possibly at the price of insufficient preservation of protected interests.

However, such a restrictive view would at the same time fail to recognize that the home country control system applies only as a principle. E.g., the CJEU has expressly ruled in the area of regulation of gambling and games of chance that a Member State does not have to recognize the validity of gambling licenses issued by other Member States, but may make the offering of gambling products or services on its territory dependent on the

possession of a license issued by its own authorities.[749] What applies in view of an initial situation of active state action by an EU third state – in this case the granting of a license – must apply a fortiori in the event that a third state has not at all dealt with the conduct of a person attributable to it yet. Informal toleration of certain private conduct by an EU third state cannot therefore have a general and comprehensive suspensory effect with regard to own sovereign actions.[750] A Member State on whose territory a service is used that infringes in particular that state's protection of minors, human dignity or diversity-safeguarding provisions is therefore entitled to control and take actions against the service – but with regard to the country of origin principle as an exception to this only if there is a justification for restricting the freedom to provide services and this has been applied proportionately.[751]

This approach is easily transferable in the area of protection of minors from harmful media, of human dignity and safeguarding pluralism, also through e.g. findability regulation, in view of enforcement measures against providers outside the area of EU integration. This is already because the freedom to provide services – unlike the freedom of capital and payment[752] – does not have an *erga omnes* effect. Accordingly, providers from outside the EU cannot invoke a possible violation of the freedom to provide services due to supervisory measures relating to the protection of minors, human dignity or safeguarding diversity.

c. The possibility of reaching foreign providers under the MStV and the JMStV from the perspective of the AVMSD

The fact that foreign EU providers can also be the subject of Member States' legislative acts transposing the AVMSD already follows directly

749 Cf. e.g. CJEU, joined cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, *Stoß*, para. 108 et seq.

750 There is also in any case the possibility of a complaint to the Commission, which may initiate infringement proceedings against the other Member State; under certain circumstances, the initiative for such proceedings may even be taken by the Member State affected by this failure to act.

751 Cf. on this also supra, chapter C.IV.1.

752 On the *erga omnes* effect of the freedom of capital and payments as a deviation from the dogmatics of the other fundamental freedoms cf. e.g. *Ukrow/Ress* in: Grabitz/Hilf/Nettesheim, Art. 63 TFEU (forthcoming).

from the continuing openness of this Directive to departure from the principle of home country control.

This is also confirmed in principle by the European Commission in its communication of 27 April 2020 to Germany as part of the notification procedure for the State Treaty on the Modernization of the Media Order in Germany. The concerns expressed by the Commission do not relate to the "whether" of this legislative regulatory possibility of reach, but to the "how" of its transposition, in particular with regard to (a) the so-called derogation procedure pursuant to Art. 3(2) of the amended AVMSD and (b) the so-called anti-circumvention procedure pursuant to its Art. 4. The Commission expresses "doubts in particular as to the compatibility of §§ 104[753] and 52 of the draft MStV with the amended AVMSD and thus with the applicable internal market rules"[754].

Insofar as the Commission complains in that regard that the principle of free reception and free retransmission was only partially implemented, this does not affect the question of the possibility of reaching foreign providers. However, it can still be pointed out on this occasion that the freedom of reception – in contrast to the Commission's view – did not require any State Treaty or other simple law regulation in addition to the regulation of the permissibility of retransmission, as this freedom is already directly enshrined in Art. 5(1) Basic Law as a fundamental right applicable to all. It is also to be found – confirming this constitutional starting point, but without having any genuine constitutive effect in terms of the freedom – in a number of state media laws. It is a further expression of a lack of sensitivity to the coexistence of State Treaty provisions and such of autonomous state media law when the Commission also criticizes that "the national transposition laws must allow retransmission or reception not only nationwide, but also in part of the German territory". This is because such retransmission regulations relating to offerings that cannot be received nationwide can be found in the individual states' media laws, which are as suitable for the transposition of the requirements of the AVMSD as the MStV and JMStV.

That the German states, by explicitly referring to Art. 3 AVMSD in § 104(1) sentence 2 MStV and to Art. 4(3) AVMSD in § 104(4) MStV, "do not ensure the necessary clarity and accessibility of the rules applicable at national level in order to guarantee legal certainty in the application of the

753 Now: § 103 MStV.

754 European Commission, Notifizierung 2020/26/D, C(2020) 2823 final of 27.04.2020, p. 6.

Directive" is an accusation made by the Commission which is not confirmed beyond doubt by the case law to date on the transposition requirements in relation to EU directives.[755]

Even insofar as the Commission expresses doubts as to the compatibility of the procedure for refusal of a license in connection with circumvention facts, as regulated in § 52(2) MStV, with Art. 4 of the amended AVMSD, these doubts do not affect the possibility of access by a Member State to foreign providers. Under the regulatory model of § 52(2) MStV, the country of establishment would refuse to grant a license to a provider who has established itself in the territory of a Member State in order to circumvent the regulations of the country of destination, without activating the procedure under Art. 4 of the amended AVMSD. Whether this mechanism would be compatible with EU law in light of the requirements of the freedom of establishment and the free movement of services even if the provider is not from a third country outside the CoE's Television Convention is rightly doubted by the Commission. Therefore, it is understandable to some degree that the Commission asked Germany to "clarify that § 52 does not apply to providers established in Germany if their programs are directed in whole or in part at the population of another Member State". However, this request is excessive, at least to the extent that the licensing requirement set forth in § 51(1) MStV may also apply to providers established in Germany, in conformity with EU law, if their programs are directed in whole or in part at the population of another Member State.

The level of legislative regulation must be distinguished from regulation by enforcement. The fact that the state media authorities are not generally prevented by Union law from also reaching foreign providers due to a violation of the requirements of the MStV and JMStV results from the system of exceptions to the principles of control by the broadcasting state and free retransmission regulated in the AVMSD. As already explained, these principles do not apply without restriction. Rather, in certain, albeit very narrowly defined, exceptional cases (for example, for reasons of protection of minors and human dignity), another Member State may suspend the (further) distribution of audiovisual media services on its territory, subject to compliance with the procedure regulated in the AVMSD.

This means that foreign providers can be made the subject of enforcement measures under the system of the AVMSD, which essentially sup-

755 It is undisputed that a literal adoption of the requirements of the AVMSD, as can be found e.g. in § 1(3) sentence 2 MStV, fulfills the implementation requirement beyond doubt.

ports the interpretation found above of a possibility of reaching to foreign providers in the interest of safeguarding the protective purposes of the MStV and the JMStV.

d. The possibility of reaching foreign providers under the MStV and the JMStV from the perspective of the ECD

With respect to the applicability of the ECD, the Commission, in its notification of 27 April 2020, considers at the outset that based on the information made available to it

> *"Directive 2000/31/EC ('Directive on electronic commerce') which constitutes the horizontal framework for information society services, applies to the relevant provisions of the notified draft".*

In contrast, the German authorities argued in the notification procedure that the notified draft fell under Article 1(6) of the ECD, according to which

> *"[t]his Directive does not affect measures taken at Community or national level, in the respect of Community law, in order to promote cultural and linguistic diversity and to ensure the defence of pluralism".*

In this respect, the Commission considered that:

> *"In order to invoke such a provision, the measures must actually and objectively serve to protect media pluralism and be proportionate to the objectives of the measure. In similar, relevant cases, the [CJEU] has recalled the conditions that Member States must meet when taking measures to safeguard pluralism that could constitute a restriction on the freedom to provide services. In addition, under Article 1(6), even where the [ECD] does not affect Member States' measures to promote pluralism, Member States must comply with wider EU law, including the provisions of the [ECD], when adopting such measures.*
> *Therefore, Article 1(6) does not exclude the provisions of the Directive (as opposed to Article 1(5)), but rather emphasizes the importance that the EU attaches to the protection of pluralism as a factor that Member States may take into account when regulating the provision of information society services (cf. recital 63 of the Directive)."*

This line of argumentation of the Commission is not convincing:

It is true that Member States' measures based on Art. 1(6) ECD must actually and objectively serve to protect media pluralism. The Commission

fails, however, to demonstrate that the MStV regulations criticized by it do not actually and objectively serve to protect media pluralism – and in view of the threats to diversity of opinion, which provided the impetus for the corresponding regulation on the part of the states, this cannot even be demonstrated.

Similarly, the Commission has not demonstrated that the measures taken in the MStV are disproportionate to the objectives of the measure. Moreover, this disproportionality cannot be demonstrated either. In particular, the measures taken are suitable for the protection of media pluralism and necessary for the timely prevention of undesirable developments, to which the FCC refers in its settled case law on prevention of risks to diversity.

The Commission fundamentally fails to recognize the prerogative as granted to Member States by the CJEU to assess and evaluate measures that restrict fundamental freedoms and are justified by overriding considerations of general interest, such as safeguarding media pluralism.[756] Its review program exceeds the limits of the supervisory competence on the part of the EU institutions recognized in the case law:

- It is true that the CJEU considers a restriction of a fundamental freedom to be justified by an overriding reason in the general interest only if the principle of proportionality is observed: the measures taken by the Member States must therefore be suitable for ensuring that the objective pursued is achieve[757] and must not go beyond what is necessary to achieve that objective.
- In this context, a national provision in terms of a Union law coherence criterion is only suitable to ensure the realization of the cited objective if it actually meets the requirement to achieve this in a coherent and systematic manner. There is no sufficient evidence that the regulation of the MStV does not satisfy this coherence criterion.
- It is equally not apparent that the restriction of fundamental freedoms associated with regulation by the MStV is being applied in a discriminatory manner.

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756 Cf. on this and the following supra chapter C.IV.1; in detail also *Cole*, Zum Gestaltungsspielraum der EU-Mitgliedstaaten bei Einschränkungen der Dienstleistungsfreiheit, p. 27 et seq.

757 As regards suitability, the CJEU limits itself to an evidence control as to whether a measure is ex ante obviously unsuitable to achieve the intended objective; cf. *Cole*, Zum Gestaltungsspielraum der EU-Mitgliedstaaten bei Einschränkungen der Dienstleistungsfreiheit, p. 30 et seq.

- A Member State must provide, in addition to the (written or unwritten) justifications for a restriction of a fundamental freedom that it may invoke, appropriate evidence or an inquiry into the appropriateness and proportionality of the restrictive measure it has adopted, as well as precise information in support of its claim. With this objective verifiability as well as the legal certainty of the limitations of the unwritten exception clauses, there is also a procedural effectuation of the protection of the fundamental freedom with regard to the imperative considerations of the general interest.[758] In the event of a dispute, however, the states can easily satisfy this requirement as well, in view of the large number of expert opinions on media and constitutional law that have triggered and substantiated their readjustments to German media law through the MStV.
- In the event of a dispute, the CJEU carries out its own review of restrictions of a fundamental freedom by a Member State measured against the principle of proportionality – but only in the sense of a plausibility test with regard to the suitability and necessity of the restrictions for achieving the objective.[759] The regulations of the MStV examined in the notification procedure can recognizably be subjected to this plausibility test, without the lack of plausibility being verifiable.

The Commission's review program in the notification procedure exceeds this already ambitious program according to CJEU case law by substituting its own assessments of suitability and necessity for those of a Member State. This is no longer covered by the Commission's supervisory competence with regard to unwritten justifications.

Moreover, the Commission erodes the meaning of Art. 1(6) ECD when it acknowledges the non-affection content of this provision, but at the same time emphasizes the continued binding nature of this very Directive. The fact that certain subject matters are excluded from its scope in Art. 1(5) ECD and that the protection of pluralism is not covered by it, is, when interpreted systematically, teleologically and historically, not to be understood in the sense of a deliberate inclusion of measures for the protection of pluralism in the scope of the Directive, but is an expression of

758 Cf. on this Ukrow/Ress in: Grabitz/Hilf/Nettesheim, Das Recht der EU, Art. 63 TFEU, para. 228 (forthcoming).

759 Cf. on this *Ukrow/Ress* in: Grabitz/Hilf/Nettesheim, Das Recht der EU, Art. 63 TFEU, para. 229 (forthcoming). Cf. on this also *Cole*, Zum Gestaltungsspielraum der EU-Mitgliedstaaten bei Einschränkungen der Dienstleistungsfreiheit, p. 30 et seq.

the principle that the EU, at least in case of doubt, lacks competence for regulations whose main purpose is the protection of pluralism. The fact that the protection of pluralism is not explicitly referred to in recital 63 ECD mentioned by the Commission speaks in favor of this interpretation, which is aimed at recognizing and preserving the regulatory competence of Member States to safeguard pluralism.

In this context, there is also much to suggest that the new services covered by the MStV, insofar as the application of the ECD to them is not already denied via its Art. 1(6), are not easily subject to the provisions of the Directive as "information society services": this is because, unlike the broadcasting services covered by Annex I of Directive (EU) 2015/1535[760], they cannot be readily excluded from the category of services provided "at the individual request of a recipient" covered by the ECD on the basis of the situation of use. In terms of their importance for the process of formation of individual and public opinion, however, they are increasingly comparable with these broadcasting services in functional terms. Moreover, they are clearly more important for this process, which is subject to the regulatory competence of the Member States, than traditional telemedia, to which the Commission refers. This is already evident from the qualifying characteristics listed in the MStV for the definition of services beyond the mere characteristic as telemedia. However, the general approach of a narrow interpretation of exceptions to obligations under primary or secondary law suggests that, in the absence of an explicit amendment of Directive (EU) 2015/1535, the Commission will assume in the course of its supervisory activities that the services newly covered by the MStV are covered by this Directive.

Also in the context of ECD, regulation qua enforcement must be separated from the level of legislative regulation. Even when reaching foreign providers, the restrictions on liability triggered by the ECD, transposed into German national law by the Telemedia Act (TMG)[761], must be ob-

760 Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241 of 17.09.2015, p. 1–15, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015L1535&from=DE.

761 Telemedia Act (Telemediengesetz) of 26 February 2007 (BGBl. I, p. 179), as last amended by Art. 11 of the Act of 11 July 2019 (BGBl. I, p. 1066).

served. In particular, foreign access and host providers[762] are generally not liable for data transmitted or stored by users, but can only be held liable from a certain degree of involvement. For access providers, this is, e.g., an actual initiation of the transmission or a modifying intervention in the information to be transmitted. A host provider is liable for data stored by users only if it has knowledge of an illegal activity and does not take immediate action to remove the data or block access to it.

However, the liability rules explicitly allow EU Member States to enable their courts and administrative authorities to require the service provider to stop or prevent the infringement. Therefore, the ECD does not have a general suspensory effect on any enforcement measures taken by the state media authorities against foreign providers on the basis of the MStV or JMStV.

III. Binding effect of fundamental rights in the case of enforcement measures against foreign providers

1. Binding effect of European fundamental rights protection

a. Introduction

The obligation of public authorities to respect fundamental rights on the basis of European and public international law is undoubted in cases where they act within German territory and the sovereignty has domestic effects. What validity European and international fundamental and human rights have, in contrast, for the actions of German public authorities extraterritorially, requires an in-depth discussion.

Not only the FCC has developed principles of extraterritorial application of the Basic Law's fundamental rights in its case law. The ECtHR has also shed light on the extraterritorial application of the ECHR in a number of decisions. Finally, questions of extraterritorial validity may also arise in view of the fundamental rights enshrined in the CFR and in the International Covenant on Civil and Political Rights (ICCPR)[763].

762 These are service providers that either provide users with access to the Internet (so-called access providers) or enable them to use the content of the Internet by providing storage space (so-called host providers); cf. *die medienanstalten/Institut für Europäisches Medienrecht*, Europäische Medien- und Netzpolitik, p. 61.

763 Cf. for Germany Gesetz zu dem Internationalen Pakt vom 19. Dezember 1966 über bürgerliche und politische Rechte, BGBl. no. 60 of 20.11.1973, p. 1533.

This extraterritorial application is important in the present context in view of enforcement measures directed against foreign providers, in particular due to the protection of freedom of broadcasting and media in Art. 10 ECHR, Art. 11 CFR and (if the provision is understood in a way that assumes its practical relevance to a greater extent than suggested by the wording, the limits and the system of control) Art. 19(2) ICCPR.

A distinction must be made between this extraterritorial application of fundamental rights standards under European and public international law and the question of the extent to which a Member State's media regulation is bound by CFR.

b. Extraterritorial validity of application of the ECHR and the International Covenant on Civil and Political Rights in their significance for media regulation

According to Art. 1 ECHR, Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in the Convention.[764] With regard to the question of an extraterritorial effect of the ECHR, the case law of the ECtHR[765] follows the guidelines of general public international law on the jurisdiction of states[766]: the Court emphasizes that Art. 1 ECHR limits the application of the Convention territorially. According to the ECtHR, extraterritorial action establishes the jurisdiction of a state in a manner that opens the applicability of the ECHR if the state (1.) exercises all or some of the sovereign powers normally exercised by the government of the territory on the basis of effective territorial control as a consequence of an occupation by war or on the basis of the invitation or the express or tacit consent of the government of the territory or (2.) exercises sovereignty extraterritorially on the basis of other links recognized by international treaty law or customary international law – as is the case, e.g., with the diplomatic or consular corps of a State. A more far-reaching liability was not intended by the ECHR. It was not the purpose of Art. 1 ECHR

764 The authentic English and French versions of the ECHR use the terms "jurisdiction" and "juridiction" respectively, for sovereignty. These terms are amenable to a highly different German semantic conceptual understanding.

765 Cf. ECtHR, No. 11755/85, *Stocké / Germany*, para. 166; No. 12747/87, *Drozd and Janousek / France and Spain*, para. 91; No. 40/1993/435/514, *Loizidou / Turkey*, para. 62; No. 25781/94, *Cyprus / Turkey*, para. 77; No. 20652/92, *Dijavit An / Cyprus*, para. 18–23.

766 Cf. on this supra, chapter B.VI.

to subject to the protection of the Convention everyone whose rights guaranteed by it were affected by an extraterritorial act of the Contracting Parties. Such an interpretation would place the question of whether a person was subject to the jurisdiction of states on an equal footing with the question of whether a person's rights guaranteed by the Convention had been violated.[767]

According to the ECtHR, extraterritorial action must therefore establish a situation in which the state authorities control persons or property in such a way that the extraterritorial exercise of sovereignty is comparable to the domestic one. This can be achieved through effective territorial control or the consent of the government of the territory concerned. Accordingly, the Court focuses on the forms of regular exercise of state authority. Since the Contracting Party must actually be in a position to ensure that the Convention rights are respected, the jurisdiction to enforce is decisive. Normally, a state is not in a position to guarantee the rights and freedoms of the Convention even to its own citizens residing abroad, since it has only the limited means of diplomatic protection at its disposal due to a lack of executive power.[768]

According to its Art. 2(1), the protection of the ICCPR extends to all individuals within the territory of a State Party and subject to its jurisdiction. The monitoring body responsible under the Covenant, the Human Rights Committee, assumes extraterritorial protection under the Covenant in this context.[769] In 1981 already, the Committee stated in view of Art. 2(1) ICESCR[770] which is identical in text in this respect, that for the necessary establishment of authority, it is not the place of the state action that is relevant, but whether a human rights violation results from the relationship between the state and the individual.[771] The Committee reaffirmed this approach in 2004 in its General Comment No. 31, focusing solely on

767 Cf. ECtHR, No. 52207/99, *Bankovic and others / Belgium and others*, para. 66, 71, 73, printed in: ILM 2002, 517–531.

768 Cf. *Fischer-Lescano/Kreck*, Piraterie und Menschenrechte, p. 6 et seq.; *Krieger* in: ZaöRV 2002, 669, 672.

769 On this and the following *Fischer-Lescano/Kreck*, Piraterie und Menschenrechte, p. 12.

770 International Covenant on Economic, Social and Cultural Rights (ICESCR). For its wording cf. http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx; a German version is available at http://www.sozialpakt.info/.

771 Human Rights Committee, *Delia Saldias de Lopez / Uruguay*, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1 (29.07.1981), §§ 12.1.-12.3.; equally Human Rights Committee, Communication No. 106/1981: Uruguay, UN Doc. CCPR/C/18/D/ 106/1981 (31.03.1983), § 5.

whether the person within the power or effective control of the State, regardless of the location of the event.[772]

According to the categorical classification of the ECtHR, a foreign provider who is affected by the exercise of German sovereignty in such a way that it is accessed from the perspective of diversity or minor media protection law due to a violation of the substantive provisions of the MStV or the JMStV can rely on Convention rights insofar as the relevant administrative acts of the competent state media authorities are concerned. If, in contrast, the provider's state of residence were to take enforcement measures on the basis of relevant agreements under public international law between Germany and that state, the ECHR could not be invoked before the courts of the state of residence, at least if that state is not itself an EU Member State and/or a party to the ECHR.

c. The scope of Member States' compliance with the CFR in the context of media regulation measures

According to Art. 51(1), sentence 1, clause 2 CFR, the Member States are bound by the Charter "only when they are implementing Union law". In this context, EU law is primary as well as secondary law, such as the AVMSD and the ECD. Union law also includes legislation adopted on authorization in secondary law, i.e. so-called tertiary law – such as the Commission's guidelines on the application of individual provisions of the AVMSD referred to in that Directive.

The "implementation" of EU law is, on the one hand, undoubtedly concerned with the administrative enforcement of EU law that is directly applicable – such as, in particular, parts of primary law and secondary law in the form of regulations – and with the interpretation and application of EU and implementation law by national courts.[773]

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772 Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/ Add.13 (26.05.2004), § 10: "States Parties are required by article 2, para. 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.".

773 Cf. *Jarass* in: NVwZ 2012, 457, 459 et seq.; *Tamblé*, Der Anwendungsbereich der EU-Grundrechtecharta (GRC) gem. Art. 51 I 1 GRC, p. 15.

It remains controversial whether the Member States are also bound by the Charter fundamental rights in cases where they exploit leeway granted under EU law – for example, when transposing directives. In that regard, this is about the parts of national transposition law that are not mandatory under EU law, which are also referred to as not determined under EU law.[774] There are strong arguments in favor of an interpretation that the obligation of the Member States is (also) far-reaching in this area, but not infinite: there is no binding effect at least where the national rule does not make use of any leeway granted by the Union and the issue is thus outside the scope of EU law. Such a leeway granted unionally is one granted to transpose directives equally as the leeway granted to restrict fundamental freedoms. That the Union has competence in an area of law is not sufficient in view of "implementation" if it has not yet exercised the competence.[775] There is therefore no link to the CFR in particular with regard to the regulations on user interfaces and intermediaries in the MStV, even if the EU may have competence in this area to harmonize the law in relation to the digital single market.

However, CJEU case law points to a more far-reaching superseding effect of European over national fundamental rights protection, even if the Court seems to take a different path in its 2013 *Melloni* ruling: there, the CJEU had left national courts free to measure national implementation law also against domestic fundamental rights "provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised".[776] It must be doubted whether this decision implies a restriction of the application order, as found in the preceding CJEU judgment in the *Åkerberg Fransson* case in 2013. There, the CJEU had ruled that the Member States' obligation to the Charter extended to "all situations governed by European Union law" and thus to all regulations that fell within the "scope of European Union law".[777] In view of the shown requirements, it is not easily possible to speak of a true cooperative relationship as regards

774 Cf. *Kingreen* in Calliess/Ruffert, Art. 51 CFR, para. 10; *Tamblé*, Der Anwendungsbereich der EU-Grundrechtecharta (GRC) gem. Art. 51 I 1 GRC, p. 16.

775 Cf. *Jarass* in: NVwZ 2012, 457, 460; *Tamblé*, Der Anwendungsbereich der EU-Grundrechtecharta (GRC) gem. Art. 51 I 1 GRC, p. 20.

776 CJEU, case C-399/11, *Melloni / Ministerio Fiscal*, para. 60.

777 CJEU, case C-617/10, *Åklagaren / Åkerberg Fransson*, para. 19; cf. on this *Gstrein/Zeitzmann*, in: ZEuS 2013, 239, 239 et seq.

fundamental rights protection.[778] However, the FCC clearly opposed the expansion of the scope in its *Antiterrordatei* ruling.[779]

2. *Binding effect of fundamental rights protection under German Basic Law – Extraterritorial validity of fundamental rights protection*

a. Introduction

If state media authorities take action against foreign providers, the question arises as to the extent to which these providers may rely on fundamental rights, in particular the freedom of broadcasting under Art. 5(1) sentence 2 Basic Law, against corresponding enforcement measures.

The traditional scope of fundamental rights in the run-up to globalization and Europeanization was the domestic sphere in the relations of German state authority to Germans and to foreigners living in Germany, although for the latter the scope was limited to the "everyone" fundamental rights. However, the scope of fundamental rights in Germany, which is particularly dependent on foreign relations, can no longer be exhaustively defined by a domestic focus.[780]

In the "post-national age" of the "fragmentation" of statehood[781], state authority (also of Germany) is embedded into a complex political, economic, cultural, civil-societal as well as individual-related network of international relations. This also legally connects national (constitutional) law in particular with international and European (not least EU) law, as well as, i.a., international administrative[782] and international criminal

778 Critical e.g. *Tamblé*, Der Anwendungsbereich der EU-Grundrechtecharta (GRC) gem. Art. 51 I 1 GRC, p. 22 et seq.

779 FCC, 1 BvR 1215/07, NJW 2013, 1499, para. 88–91 – *Antiterrordatei*.

780 Cf. on the leveling of status differences between nationals and foreigners by international and European law *Gundel* in: Isensee/Kirchhof, vol. IX, § 198, para. 11 et seq.

781 *Giegerich*, Internationale Standards – aus völkerrechtlicher Perspektive, 101, 176.

782 Cf. on this e.g. *Breining-Kaufmann in:* ZSR 2006, 5, 5 et seq.; *Glaser*, Internationale Verwaltungsbeziehungen; *Kingsbury/Donaldson* in: MPEPIL, para. 4 et seq.; *Kingsbury et al.* in: Law & Contemporary Problems 2005/3–4, 1, 1 et seq.; *Kment*, Grenzüberschreitendes Verwaltungshandeln; *Ohler*, Die Kollisionsordnung des Allgemeinen Verwaltungsrechts; *Tietje*, Internationalisiertes Verwaltungshandeln; *id.*, Die Internationalität des Verwaltungsstaates; *id.*, Die Exekutive. Verwaltungshandeln im Kontext von Globalisierung und Internationalisierung, 53, 53 et seq.

law[783] and, based on these areas of law, with foreign law. Domestic state authority thus comes into contact with foreign legal subjects and their legal sphere in many ways. This multiple European and international connection and integration results in German state authority having effects not only domestically but also abroad, i.e. extraterritorially.[784]

Against this background, fundamental rights have generally binding effect on German state authority, in particular in the exercise of sovereign power, even "insofar as the effects of its activities occur abroad".[785]

However, the fact that Art. 1(3) Basic Law provides for a comprehensive binding effect of fundamental rights on legislature, executive authority and jurisdiction does not yet result in a conclusive determination of the territorial scope of fundamental rights.

> *"The Basic Law does not content itself with defining the internal order of the German state but also determines the essential features of the German state's relationship to the community of states. In this respect, the Basic Law assumes that a delimitation between states and legal systems is necessary, and that co-ordination between states and legal systems is also necessary. On the one hand, the scope of competence and responsibility of organs of the German state must be taken into account when determining the scope of application of the fundamental rights.*[786] *On the other hand, constitutional law must be co-ordinated with international law. International law, however, does not, in principle, preclude the validity of fundamental rights in matters that bear on relations with foreign countries. The territorial scope of the fundamental rights, however, must be drawn from the Basic Law itself, taking into account Article 25 of the Basic Law."*[787]

Moreover, "by its very nature, a fundamental right may presuppose a specific relationship to the order of life within the constitution's area of application, so that unrestricted enforcement in circumstances wholly or predominantly related to foreign countries would miss the point of fundamental rights protection."[788]

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783 Cf. on this e.g. *Ambos/Rackow/Miller*, Internationales Strafrecht; *Gless*, Internationales Strafrecht; *Safferling*, Internationales Strafrecht.

784 Cf. *Stern*, Das Staatsrecht der Bundesrepublik Deutschland, vol. III/1, p. 1224 et seq.

785 BVerfGE 6, 290 (295) (own translation); 57, 1 (23). Cf. on this also *Hofmann*, Grundrechte und grenzüberschreitende Sachverhalte, p. 31 et seq.

786 Cf. on this BVerfGE 66, 39 (57 et seq.); 92, 26 (47).

787 BVerfGE 100, 313 (362 et seq.).

788 BVerfGE 31, 58 (77).

In the case of the Basic Law's freedom of broadcasting, at the latest in the age of (also information-related) globalization, it is not apparent that a complete waiver of the fundamental rights obligation in matters with a foreign connection would represent an appropriate balancing of the fundamental rights position and the protection of sovereignty.

That the impact of domestic acts of sovereignty on foreign territory predominantly raises problems of international[789] does not exclude constitutional relevance of the issue with regard to the binding effect of fundamental rights. In this context, Art. 1(2) Basic Law could be seen as a first relevant constitutional link. The commitment there to "inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world" does not, however, provide a universal guarantee of German fundamental rights for all natural and legal persons, without there being a link from the perspective of the Basic Law or a "genuine link" from the perspective of public international law. A universal claim to validity of German fundamental rights would recognizably overstretch Germany's competence under public international law. Such an imperial claim to fundamental rights[790] in the sense of a fundamental rights octroi would clearly contradict the openness of the Basic Law to public international law and the fundamental respect for foreign legal orders[791].[792] The boundaries of the permissible exercise of German sovereignty under public international law by virtue of competence therefore also mark the outermost boundary of the possible scope of fundamental rights.[793]

On the basis of this delimitation, which is open to public international law and respects the sovereign equality of legal orders, three approaches to defining the scope of fundamental rights in view of situations with a foreign connection are generally conceivable:

- The most restrictive delimitation with regard to the application of fundamental rights outside purely internal circumstances, but at the same time the one that most strongly emphasizes sovereign equality, would

789 Cf. on this *Beitzke* in: Strupp/Schlochauer p. 504 et seq.; *Geck* in: Strupp/Schlochauer p. 55; *Schlochauer*, Die extraterritoriale Wirkung von Hoheitsakten nach dem öffentlichen Recht der Bundesrepublik Deutschland und nach internationalem Recht.

790 Cf. on this *Isensee* in: VVDStRL 1974, 49, 63.

791 Cf. on this BVerfGE 18, 112 (120 et seq.).

792 Cf. also *Schröder*, Zur Wirkkraft der Grundrechte bei Sachverhalten mit grenzüberschreitenden Elementen, 137, 141; *Stern*, Das Staatsrecht der Bundesrepublik Deutschland, vol. III/1, p. 1228.

793 Cf. *Isensee* in: id./Kirchhof, § 190, para. 33 et seq., 58.

be to generally restrict the validity of fundamental rights in the sense of the territoriality principle to the territory of the German state.[794] In an age of open statehood, however, this strict alignment with territorial sovereignty is no longer convincing.[795]

- Conversely, it would be the most far-reaching delimitation with regard to the application of fundamental rights outside of purely internal circumstances, but at the same time also the most burdensome for sovereign equality, if one were to assume the validity of fundamental rights in the sense of the principle of effects everywhere where Germany exercises state power or where this has effects.[796]
- An approach that mediates between these two poles, albeit with stronger links to the principle of effects, is in the sense of a principle of status generally based on the *status passivus* of the holder of the fundamental right, who must be subject either to Germany's territorial or to its personal sovereignty.[797]

Such a mediating approach in the sense of a moderately understood binding effect of fundamental rights deserves approval in principle. For "an unrestricted enforcement [of the binding effect of fundamental rights] in wholly or predominantly foreign-related circumstances would miss the point of fundamental rights protection". It must be determined "in each case by interpreting the relevant constitutional norm whether, based on its wording, meaning and purpose, it claims validity for every conceivable application of sovereign authority within the Federal Republic or whether it permits or requires a differentiation in the case of situations with a more or less intensive foreign connection".[798]

Following the latter approach ensures that the binding effect of fundamental rights under Art. 1(3) Basic Law is also territorially sufficiently effective. Not only is all state authority bound, but all German state authori-

794 Cf. on this e.g. *Heintzen,* Auswärtige Beziehungen privater Verbände, p. 100 et seq., 123 et seq.; *Oppermann*, Transnationale Ausstrahlungen deutscher Grundrechte?, 521, 523, 526.

795 Cf. on this also *Schröder,* Zur Wirkkraft der Grundrechte bei Sachverhalten mit grenzüberschreitenden Elementen, 137, 140 et seq.

796 Cf. on this e.g. *Stern*, Das Staatsrecht der Bundesrepublik Deutschland, vol. III/1, p. 1230.

797 Cf. on this e.g. *Heintzen*, Auswärtige Beziehungen privater Verbände, p. 127 et seq.; *Isensee* in: VVDStRL 1974, 49, 61 et seq.

798 BVerfGE 31, 58 (77) (own translation).

ty is generally bound wherever it acts or has an impact.[799] Accordingly, anyone who is subject to German state authority enjoys the protection of fundamental rights. Who in contrast is not exposed to it, cannot be considered as a holder of fundamental rights.[800] This means that, in principle, foreign providers facing enforcement measures by the state media authorities on the basis of the MStV or JMStV can also invoke the protection of fundamental rights under the Basic Law.[801]

b. The FCC's judgment on the extraterritorial application of fundamental rights of 19 May 2020

In its so-called BND judgment of 19 May 2020, the FCC emphasized that the binding of German state authority to fundamental rights under Art. 1(3) Basic Law was not limited to German territory. However, the protection of individual fundamental rights could differ at home and abroad. In any case, the protection of Art. 10(1) and Art. 5(1) sentence 2 Basic Law as rights of defense against a telecommunications surveillance also extended to foreigners abroad. In the view of the FCC, Art. 1(3) Basic Law "provides that German state authority is comprehensively bound by the fundamental rights of the Basic Law. No restrictive requirements that make the binding effect of fundamental rights dependent on a territorial connection with Germany or on the exercise of specific sovereign powers can be inferred from the provision." This applied in any case to fundamental rights as rights of defense against surveillance measures such as those at issue here.[802]

In the FCC's view, fundamental rights bind state authority "comprehensively and universally by the fundamental rights, irrespective of the specific functions, the types of action or the respective object of the exercise of state functions. State authority must be understood broadly, covering not only orders and prohibitions or measures based on sovereign powers. Fundamental rights are binding in relation to any decision that can claim to be made on behalf of all citizens at the relevant level of decision-making with-

799 Cf. on this also *Stern*, Das Staatsrecht der Bundesrepublik Deutschland, vol. III/1, p. 1230.

800 Cf. *Rüfner* in: *Isensee/Kirchhof*, vol. IX, § 196, para. 34 et seq.

801 On the particularities of the extraterritorial effect of fundamental rights in the case of cross-border broadcasting cf. *Stern*, Das Staatsrecht der Bundesrepublik Deutschland, vol. III/1, p. 1233 with further references.

802 FCC, Judgment of the First Senate of 19 May 2020, 1 BvR 2835/17, para. 88.

in the state. This includes both sovereign and non-sovereign measures, statements and actions. Thus, any action of state organs or organisations constitutes an exercise of state authority that is bound by fundamental rights within the meaning of Art. 1(3) [Basic Law] because such actions are performed in the exercise of their mandate to serve the common good." Notwithstanding the state media authorities' own fundamental rights, this also includes sovereign acts taken by them in application of the MStV or JMStV.[803]

In this context, the binding effect of fundamental rights on German state authority is also abroad not limited to a mere objective law obligation. Rather, it corresponds with a fundamental right entitlement of those who are identified as protected fundamental rights holders by the respective fundamental rights guarantees: "[t]he Basic Law does not provide for fundamental rights that bind the state vis-à-vis individual fundamental rights holders without also providing the individual with a corresponding subjective right. It is a key part of fundamental rights protection under the Basic Law that fundamental rights are rights of the individual".[804]

As the FCC points out, the binding effect of fundamental rights on German state authority, even when acting vis-à-vis foreigners abroad, also corresponds to the integration of the Federal Republic into the international community of states.[805]

c. Extraterritorial validity also of the freedom of broadcasting for foreign legal persons

However, the BND judgment does not provide an answer to the question of whether foreign providers, be they broadcasters, telemedia providers or intermediaries, can rely on the fundamental right of freedom of broadcasting *ratione personae* against enforcement measures based on the MStV or JMStV. In this respect, a distinction must be made between foreign providers who are natural persons and providers in the form of legal persons (also) in view of freedom of broadcasting which may be impaired by such enforcement measures.

803 FCC, Judgment of the First Senate of 19 May 2020, 1 BvR 2835/17, para. 91.
804 FCC, Judgment of the First Senate of 19 May 2020, 1 BvR 2835/17, para. 92.
805 FCC, Judgment of the First Senate of 19 May 2020, 1 BvR 2835/17, para. 93 et seq.

The freedom of broadcasting under Art. 5(1) sentence 2 Basic Law is conceived as an "everyone" fundamental right. Consequently, not only Germans but also third-country nationals can invoke this freedom. Against this background, it is initially clear that foreign providers in the form of natural persons affected by enforcement measures of the state media authorities on the basis of the JMStV can invoke Art. 5(1) sentence 2 Basic Law on the grounds of an alleged violation of fundamental rights.

The legal situation is more difficult where foreign legal persons act as providers. In this respect, as a starting point, Art. 19(3) Basic Law deserves consideration. Accordingly, "basic rights shall also apply to domestic legal persons to the extent that the nature of such rights permits".

It is evident that the freedom of broadcasting under Art. 5(1) sentence 2 Basic Law is, by its very nature, also applicable from the outset to legal persons – regardless of whether domestic or foreign. This is confirmed by a large number of judgments in which domestic undertakings, as legal persons under private law, have successfully invoked a violation of this fundamental right.[806]

However, the FCC has ruled until recently that foreign legal persons cannot invoke substantive fundamental rights such as freedom of broadcasting – unlike procedural fundamental rights such as Art. 101(1) sentence 2 and Art. 103(1) Basic Law[807]. In justifying its decision, the FCC referred to the wording and meaning of Art. 19(3) Basic Law, which prohibited a respective expansive interpretation.[808]

In a judgment of 19 July 2011, the FCC had to deal for the first time with the more specific question of whether foreign legal persons that have their registered office in the EU can be holders of substantive fundamental rights under the Basic Law. This question was prior controversial in the literature.[809]

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806 BVerfGE 95, 220 (234).

807 Cf. BVerfGE 12, 6 (8); 18, 441 (447); 21, 362 (373); 64, 1 (11).

808 Cf. BVerfGE 21, 207 (208 et seq.); 23, 229 (236); 100, 313 (364). In other decisions, the FCC has expressly left the fundamental rights entitlement of foreign legal persons in doubt (cf. in general BVerfGE 12, 6 (8); 34, 338 (340); 64, 1 (11) as well as BVerfGE 18, 441 (447) in view of Art. 14(1) Basic Law.

809 Cf. in favor *Drathen*, Deutschengrundrechte im Lichte des Gemeinschaftsrechts; *Dreier* in: id., Art. 19(3) GG, para. 20 et seq., 83 et seq.; *Kotzur* in: DÖV 2001, 192, 195 et seq.; disapproving *Bethge*, Die Grundrechtsberechtigung juristischer Personen nach Art. 19 Abs. 3 Grundgesetz, p. 46 et seq.; *Quaritsch* in: Isensee/Kirchhof, vol. V, § 120, para. 36 et seq.; *Weinzierl*, Europäisierung des deutschen Grundrechtsschutzes?.

According to the wording of Art. 19(3) Basic Law, fundamental rights apply only "to domestic legal persons". Due to the restriction to domestic legal persons, an extension of application cannot be justified on the basis of the wording of Art. 19(3) Basic Law. It would exceed the boundaries of wording if one wanted to interpret in conformity with EU law by understanding the characteristic "domestic" as "German including European" legal persons.[810] Also, while EU third countries are no longer "classic" foreign countries, they are not "domestic" in the sense of territorial sovereignty either.[811]

However, Art. 19(3) Basic Law was also not based on the express intention of the constitutional legislature to permanently exclude the invocation of fundamental rights also by legal persons from EU Member States. The EU has meanwhile developed into a highly integrated "Staatenverbund"[812] in which Germany participates in accordance with Art. 23(1) Basic Law. The extension of the application of Art. 19(3) Basic Law reflects this development.[813] An extension of the application of fundamental rights protection to legal persons from the EU corresponds to the treaty obligations assumed by Germany through TEU and TFEU, as expressed in particular in the European fundamental freedoms and – subsidiarily – the general prohibition of discrimination in Art. 18 TFEU. "The fundamental freedoms and the general ban on discrimination prohibit the unequal treatment of domestic and foreign enterprises from the European Union in the sphere of application of Union law, and in this regard override the limitation of protection of fundamental rights to domestic legal persons provided for in Article 19.3 of the Basic Law."[814]

As a result of the extension of the application of Art. 19(3) Basic Law, legal persons with a registered office in another EU state are treated equally to domestic legal persons. Conversely, however, this also means that the same constitutional provisions (including the limitations on freedom of broadcasting under Art. 5(2) Basic Law) can be invoked against EU foreigners as against domestic legal persons.[815]

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810 BVerfGE 129, 78 (96).
811 Cf. BVerfGE 123, 267 (402 et seq.).
812 BVerfGE 123, 267 (348).
813 Cf. BVerfGE 129, 78 (96 et seq.).
814 BVerfGE 129, 78 (97).
815 Cf. BVerfGE 129, 78 (97 et seq.). The control of EU law assigned to the FCC with regard to the preservation of constitutional identity, compliance with the competences conferred according to the principle of conferral, and the guarantee of a level of protection essentially equivalent to that of German fundamental

One could, at the outset, consider making this dogmatic derivation of the extension of the application of Art. 19(3) Basic Law, particularly via the prohibition of discrimination in Art. 18 TFEU, fruitful not only in view of the scope of protection of fundamental rights and their limits, but also in view of an obligation to protect derived from fundamental rights, in such a way that the corresponding obligation exists not only vis-à-vis domestic natural and legal persons, but also vis-à-vis foreign natural and legal persons. However, such a dogmatic approach would fail to recognize that the prohibition of discrimination only applies within the scope of the TFEU. In particular the fundamental freedoms of the TFEU do not generally give rise to any obligation to protect private third parties.

d. Interim conclusion

Based on a teleological and historical interpretation of the JMStV, the state media authorities are authorized to take enforcement measures against foreign providers for violating substantive provisions of the JMStV. This authority is confirmed to some degree by an interpretation of the JMStV in conformity with EU law, at least in the case of situations involving providers with their registered office in an EU Member State. An interpretation of the JMStV in conformity with public international law does not per se preclude such an authority: this is because the applicable public international law does not (any longer) contain a principle that national administrative law may not also be applied to foreign-related content.

Insofar as the state media authorities take action against foreign providers, they are bound by the fundamental rights provisions of the Basic Law with regard to the freedom of broadcasting in Art. 5(1) sentence 2 at least if the provider is either a natural person or a legal person based in the EU.

rights protection is maintained. The constitutional identity (cf. BVerfGE 123, 267 (354, 398 et seq.); 126, 286 (302 et seq.) is obviously not affected by the extension of the application of Art. 19(3) Basic Law; cf. BVerfGE 129, 78 (100).

IV. Obligation to regulate the media as an expression of State obligations to protect

1. Introduction

According to by now prevailing constitutional doctrine, the fundamental rights of the Basic Law are not only rights of defense against disproportionate state interference in the freedom they guarantee. Rather, the state is also categorically obligated to legal regulations that protect the fundamental rights of its citizens. A state fulfills this obligation to protect not only by providing performance, but also by taking measures to avert threats to fundamental rights posed by third parties.[816]

The starting point of this constitutional dogmatic approach is that threats to the legal interests protected by fundamental rights do not only emanate from the state, but can also be triggered by nature (in particular in the form of natural disasters or other extraordinary emergencies, especially epidemic situations), but also by third parties, be they individuals or legal persons. The constitutional approach to dealing with such threats is a balance between the lack of third-party effect of fundamental rights on the one hand and the state's monopoly on the use of force on the other. The former leads to the risk of impairment of fundamental rights in the absence of a respective obligation on the part of private parties, while the latter sets limits to the self-protection of those entitled to fundamental rights.[817]

Against this background, the dogmatics of the obligation to protect ties in with the understanding of fundamental rights as an objective value system, whereby the state is transformed from an opponent to a guarantor of fundamental rights.[818]

2. Obligations to protect in FCC case law

The FCC has developed the dual function of fundamental rights as rights of defense and protection particularly in view of the fundamental right to

816 Cf. *Würtenberger*, Schranken der Forschungsfreiheit und staatliche Schutzpflichten, p. 12.

817 Cf. on this also *Moritz*, Staatliche Schutzpflichten gegenüber pflegebedürftigen Menschen, p. 95 et seq.

818 Cf. BVerfGE 39, 1 (41 et seq.).

life and physical integrity.[819] However, it also has dogmatic significance in view of other fundamental rights. With regard to the protection of minors from harmful media, however, the state's obligation to protect physical integrity is already evident. With regard to the goal of safeguarding diversity, the state's, in the guise of the Länder, positive obligation to order and the obligation to protect run parallel under constitutional law.

The obligations to protect are directed in particular, but not exclusively, to the legislature. The obligation to protect may also include risk prevention related to threats to fundamental rights.[820] The constitutional obligation to protect may require the exercise of sovereign authority in such a way that the danger of violations of fundamental rights also remains contained; whether, when and with what content such exercise is constitutionally required depends on the nature, proximity and extent of possible dangers, the nature and rank of the constitutionally protected legal interest and the regulatory safeguards already in place.[821] In view of the preservation of media pluralism, this dynamic understanding of obligations to protect is of particular significance, not least in view of the role of media intermediaries in the digital media ecosystem.

If the legislature has made a decision the basis of which is decisively called into question by new developments that were not yet foreseeable at the time the law was enacted, then, according to the FCC's case law, it may be required by the constitution to review whether the original decision is to be upheld even under the changed circumstances.[822] This obligation to evaluate, monitor and, if necessary, make improvements is recognized in principle, also in view of changed media usage behavior with regard to the previous television-centered State Treaty law to ensure diversity in the media sector, by cipher 5 of the protocol declaration of all states to the State Treaty on the Modernization of the Media Order in Germany[823]. It applies in the same way in cases in which the enforcement of existing legislation

819 Cf. BVerfGE 39, 1 (42); 46, 160 (164); 56, 54 (78); 90, 145 (195); 115, 320 (346); 121, 317 (356).

820 Cf. BVerfGE 49, 89 (140 et seq.); 52, 214 (220); 53, 30 (57).

821 Cf. with respect to the legislative dimension of obligations to protect BVerfGE 56, 54 (78).

822 Cf. BVerfGE 49, 89 (143 et seq.); 56, 54 (79).

823 With an introductory reference to the fact that the federal states agree "that the adaptation of the legal framework to the digital transformation is not completed with the present State Treaty", they declare that they "work on further reform proposals" on, i.a., media concentration law, whereby they consider on this in the protocol declaration: "[t]he federal states are committed to a sustainable media concentration law. This must be able to effectively counteract the actual

serving the protection of interests based on fundamental rights is carried out on the basis of an enforcement concept, the effectiveness of which is decisively called into question as a result of new developments not yet foreseeable at the time the concept was drafted.

In settled case law, the FCC[824] emphasizes that the state bodies were primarily and in own responsibility in charge for decisions on how the obligation to protect derived from the respective fundamental right was to be fulfilled; they decided which measures were appropriate and imperative in order to ensure effective protection. This corresponds to a limitation of the FCC's constitutional review to whether the state bodies can be found to have evidently violated the basic decisions embodied in the fundamental rights.[825]

> *"This limitation of constitutional review appears imperative because it is regularly a highly complex question how a positive state obligation to protect and act, which is only derived by way of constitutional interpretation from the basic decisions embodied in fundamental rights, is to be realized by active legislative measures. Various solutions are possible depending on the assessment of the actual circumstances, the specific objectives and their priority, and the suitability of the conceivable ways and means. According to the principle of separation of powers and the democratic principle, the decision, which often requires compromises, belongs to the responsibility of the legislature, which is directly legitimized by the people, and can generally be reviewed by the [FCC] only to a limited extent, unless legal interests of the highest importance are at stake. These considerations are more important when the question is not only whether the legislature has violated an obligation to protect that can be derived from fundamental rights, but when also the further question is controversial whether it has committed this violation by failing to remedy the situation. The [FCC] can only find a violation of the Constitution of this kind if it is evident that an originally lawful regulation has become unconstitutional due to a change in circumstances in the meantime, and if the legislature has nevertheless continued to remain inactive or has taken obviously erroneous remedial measures."*[826]

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threats to diversity of opinion. In the last few years, the media markets have experienced an opening that has brought other media genres besides television, the possible consequences of cross-media mergers and also those on upstream and downstream markets increasingly into focus. A reformed media concentration law must therefore take all media-relevant markets into view." (own translation).

824 BVerfGE 39, 1 (44); 46, 160 (164).

825 Cf. BVerfGE 4, 7 (18); 27, 253 (283); 33, 303 (333); 36, 321 (330 et seq.).

826 BVerfGE 56, 54 (81) (own translation, emphasis in the original).

This restriction of judicial review in the FCC's *Fluglärm* decision, which is based on legislative manifestations of the obligation to protect fundamental rights, also applies accordingly in view of the exercise of fundamental rights obligations to protect by other organs of state authority.

Accordingly, fundamental rights obligations to protect do not in principle give rise to any concrete obligations to act on the part of the sovereign authority. "The Constitution specifies protection as an objective, but not its detailed form. Courts are precluded from substituting their own assessment of how the obligation to protect should be expediently discharged for that of the relevant acting institution. This reduction in the density of judicial control follows in particular from the principle of separation of powers. The doctrine of the obligation to protect – as a further performance dimension of fundamental rights – in any case means an extension of judicial review of legislative or executive actions and omissions. If the courts were to substitute their assessment of the appropriateness of a protective measure for that of the authority acting in each case, the review of legality by the courts provided for in the Basic Law would become a comprehensive review of appropriateness incompatible with the principle of separation of powers and, as a result, the judiciary would have ultimate decision-making authority."[827]

In fulfilling the obligations to protect under fundamental rights, not only the legislature[828] but all state authorities therefore have a broad scope for assessment, evaluation and design. This broad scope for decision exists in particular when the obligations to protect are related to the foreign policy sphere.[829]

In deciding how the state fulfills its obligation to protect within its broad discretion, several factors must be considered. The objective need for protection of fundamental rights, as well as the subjective need for protection of the individual fundamental rights holder, depend on the sensitivity of the protected interest concerned, on the type, scope and intensity of the (potential and actual) encroachment, as well as on the possibility of legitimate and reasonable remedial action by the fundamental rights holder

827 VG Köln, judgment of 27.05.2015, 3 K 5625/14, para. 58, 60 (own translation).

828 Cf. on this BVerfGE 46, 160 (164).

829 VG Köln, judgment of 27.05.2015, 3 K 5625/14, para. 71, 73 with reference to FCC, 2 BvR 1720/03, BVerfGK 14, 192; *von Arnauld*, Freiheit und Regulierung in der Cyberwelt: Transnationaler Schutz der Privatsphäre aus Sicht des Völkerrechts, 27, 28.

himself. The obligation of the state is subject to what is factually[830] and constitutionally possible.

However, the broad scope for assessment, evaluation and design is undercut if it is obvious that the protective measures taken are completely inadequate or unsuitable. In this regard, the scope for design is limited in narrowly defined exceptional cases by the prohibition of undercutting.[831] The state may not secure the fundamental rights of its citizens below the required degree.[832] The FCC can only find a breach of such an obligation to protect in this respect if protective measures are either not taken at all, if the regulations and measures taken are obviously unsuitable or completely inadequate to achieve the required objective of protection, or if they fall considerably short of that objective.[833]

These requirements also apply with regard to obligations to protect under the law on the protection of minors from harmful media: indeed, the protection of minors is expressly defined as a state task in the Constitutions of the State of Baden-Württemberg (Art. 13), the Free State of Bavaria (Art. 126(3)), the Free Hanseatic City of Bremen (Art. 25(1), (2)), the State of Mecklenburg-Western Pomerania (Art. 14(3)), the State of North Rhine-Westphalia (Art. 6(2)), Rhineland-Palatinate (Art. 25(2) sentence 1), Saarland (Art. 25 sentence 1), the Free State of Saxony (Art. 9 (2)), the State of Saxony-Anhalt (Art. 24(4)), and the State of Schleswig-Holstein (Art. 6 a) only.[834] However, the constitutional dimension of the protection of minors is not limited exclusively to its quality as a protective purpose justifying restrictions on fundamental rights, also outside these particularities of state constitutional law. Rather, the protection of minors in the Federal Republic of Germany as a whole is a legal asset with constitutional status.[835] Accordingly, it is equivalent to fundamental rights and the other legal rights with constitutional rank – with the exception of human dignity, which is superior to all of them.[836]

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830 Cf. on this also *Moritz*, Staatliche Schutzpflichten gegenüber pflegebedürftigen Menschen, p. 120.

831 Cf. BVerfGE 88, 203 (251 et seq.); 98, 265 (356).

832 Cf. on this also *Moritz,* Staatliche Schutzpflichten gegenüber pflegebedürftigen Menschen, p. 115.

833 Cf. BVerfGE 56, 54 (80); 77, 170 (215); 92, 26 (46); 125, 39 (78 et seq.) as well as on this e.g. *Würtenberger*, Schranken der Forschungsfreiheit und staatliche Schutzpflichten, p. 12 et seq.

834 Cf. *Ukrow*, Jugendschutzrecht, para. 12.

835 Cf. BVerfGE 30, 336 (347 et seq.); 47, 109 (117); 77, 345 (356); 83, 130 (139 et seq.); BVerwGE 39, 197 (208); 77, 75 (82); 91, 223 (224 et seq.).

836 Cf. *Ukrow*, Jugendschutzrecht, para. 12.

The right of children and adolescents to "become a person"[837] is guaranteed by the right to free development of personality in Art. 2(1) Basic Law and the guarantee of human dignity in Art. 1(1) Basic Law.[838] This right to "become a person" beyond its defensive side also has a content of objective law.[839] Accordingly, the state is assigned the task of protecting this right of minors or creating the conditions for it to be realized. Influences that could lead to considerable undesirable developments that are difficult or impossible to correct must be kept away from minors by the state.[840] It must "ensure, as far as possible, the external conditions for the spiritual and mental development of children and adolescents in accordance with the Basic Law's conception of human being".[841]

The question of whether the state has an obligation to protect minors with regard to the effective protection of minors from harmful media has not yet been addressed by the highest courts. A corresponding extension of the doctrine of the obligation to protect to minors requires a separate dogmatic justification. Only where a comparison of the position of minors in situations of audiovisual confrontation with content harmful to them or their development with the constellations from the previous case law on the obligation to protect results in a comparable need for protection, does an extension seem constitutionally required. It is not evident that the federal states would not comply with such an obligation to protect, assuming its existence, via legislative measures under the requirements of the JMStV as amended by Art. 3 of the State Treaty on the Modernization of the Media Order in Germany. In addition, at the latest since the media supervisory authority began intervening directly against foreign providers, it is not apparent that there is a violation of the duty to protect at the level of enforcement which, based on the dogmatic approach of the FCC, amounts to a violation of fundamental rights.

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837 Cf. *Ditzen* in: NJW 1989, 2519, 2519 ("Right to become human"); *Engels* in: AöR 1997, 212, 219 et seq., 226 et seq.

838 Cf. on this e.g. also *Nikles* in: id./Roll/Spürck/Erdemir/Gutknecht, Teil I, para. 5.

839 Cf. also *Langenfeld* in: MMR 2003, 303, 305.

840 Cf. BVerfGE 30, 336 (347 et seq.); BVerwGE 77, 75 (82); *Dörr/Cole*, Jugendschutz in den elektronischen Medien, p. 20; *Engels* in: AöR 1997, 212, 219 et seq., 226 et seq.; *Isensee/Axer*, Jugendschutz im Fernsehen, p. 69.

841 *BVerwG* NJW 1987, 1429 (1430) (own translation); *Schulz* in: MMR 1998, 182, 183; *Ukrow*, Jugendschutzrecht, para. 13.

3. *European references of the doctrine of the obligation to protect based on fundamental rights*

a. Doctrine of the obligation to protect and the ECHR

With regard to the ECHR, the fundamental existence of obligations to protect ("*positive obligations*" / "*obligations positives*") – derived from obligations to act – can be established by interpreting a number of judgments.[842] At the same time, however, there is (also) on the basis of the ECHR a leeway for implementation by the states in the exercise of such obligations, so that it is not necessarily a legal regulation that has to follow; also duties to investigate or information requirements come into consideration.[843] However, obligations to act may also give rise to obligations to protect in relations between private parties.[844]

b. Doctrine of the obligation to protect in light of EU law

Within the framework of EU law there is not yet any doctrine of the obligation to protect on the basis of the CFR that is comparable to the situation under constitutional law.[845] Such an approach to obligation to protect would, however, in the current state of integration, in any case collide with Art. 51(2) CFR, according to which the Charter "does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties".

However, it is also not evident that TEU or TFEU impose limitations under EU law on the constitutional doctrine of the obligation to protect. One argument against this is that it is now recognized that the prohibitions of fundamental freedoms apply not only to direct state conduct, but

842 Cf. in particular ECtHR, No. 23144/93, *Özgür Gundem / Turkey*, para. 42 as well as e.g. *Dröge*, Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention, p. 1 et seq., 71 et seq., 179 et seq.; *Jaeckel*, Schutzpflichten im deutschen und europäischen Recht, p. 128 et seq.; *Klatt* in: ZaöRV 2011, 691, 692 et seq.; *Koenen*, Wirtschaft und Menschenrechte, p. 58; *Ress* in: ZaöRV 2004, 621, 628.

843 Cf. *Koenen*, Wirtschaft und Menschenrechte, p. 59 et seq.

844 Cf. *Koenen*, Wirtschaft und Menschenrechte, p. 66 et seq.

845 Cf. *Jarass*, Charta der Grundrechte der Europäischen Union, Art. 51, para. 39; *Kingreen* in: Calliess/Ruffert Art. 51 CFR, para. 25 et seq.

also to private conduct attributable to a Member State. In this respect, the considerations of the CJEU in *Commission / France* from 1997[846], which relate to the scope of the free movement of goods, also deserve consideration *mutatis mutandis* for the delimitation of the scope of the other fundamental freedoms. The fundamental freedoms thus not only prohibit measures that are attributable to a Member State and themselves create restrictions on trade between Member States, but "also appl[y] where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods (or other fundamental freedoms; author's addition) which are not caused by the State".[847] Indeed, fundamental freedoms may be interfered with, equally to an act by a Member State, by a Member State's inaction or failure to take sufficient measures to remove obstacles to a fundamental freedom created, in particular, by acts of private persons on its territory that are directed against the activity protected by the fundamental freedom.[848] Thus, Art. 34 and 63 TFEU "require[…] the Member States not merely themselves to abstain from adopting measures or engaging in conduct liable to constitute an obstacle to trade (or other obstacles to a fundamental freedom, author's addition), but also, when read with [Art. 5 TEC, now: Art. 4(3) TEU], to take all necessary and appropriate measures to ensure that that fundamental freedom(s) [are] respected on their territory".[849]

The measures taken by a Member State in the event of interference by private parties with a fundamental freedom of the TFEU must be sufficient – taking into account the frequency and seriousness of such interference – to guarantee that fundamental freedom by "preventing and effectively dissuading the perpetrators of the offences in question from committing and repeating them".[850] The Member State concerned must, "unless it can show that action on its part would have consequences for public order with which it could not cope by using the means at its disposal, […] adopt all appropriate measures to guarantee the full scope and effect of [Union]

846 CJEU, case C-265/95, *Commission / France*.
847 CJEU, case C-265/95, *Commission / France*, para. 30; cf. also *Pache* in: Schulze/Zuleeg/Kadelbach, § 10, para. 214.
848 Cf. on the approach of the CJEU in its trade in goods jurisprudence CJEU, case C-265/95, *Commission / France*, para. 31.
849 CJEU, case C-265/95, *Commission / France*, para. 32.
850 CJEU, case C-265/95, *Commission / France*, para. 52; zur gebotenen Abschreckung cf. furthermore *Meier,* Anmerkung, EuZW 1998, 87, 87.

law so as to ensure its proper implementation in the interests of all economic operators".[851]

In this context, the Member States have considerable discretion as to which measures are most appropriate in a given situation to eliminate interference with fundamental freedoms by private parties. Accordingly, the EU institutions are not competent to substitute themselves for the Member States and to prescribe to them which measures to adopt and actually apply in order to ensure the fundamental freedoms from, into and through their territory.[852] This prerogative of evaluation recognized in the relationship between the Member States and the EU level shows recognizable structural parallels to the prerogative of evaluation of state bodies in relation to a domestic judicial supervisory authority such as the FCC with regard to the question of how an obligation to protect is satisfied.

However, the CJEU has competence to examine, taking into account the aforementioned discretion in the cases submitted to it, whether the Member State concerned has taken appropriate measures to ensure the fundamental freedoms. In view of the Member State's prerogative of evaluation, a breach of the obligation to protect fundamental freedoms can only be assumed if the interference with the fundamental freedom proves to be so serious that the conduct of the Member State no longer appears acceptable, even taking into account the prerogative of evaluation to which it is entitled.[853] The parallelism of this limit to said prerogative with the prohibition of undercutting in the FCC's case law is also evident.

c. Obligations to protect in the network of regulatory systems

Based on the FCC's Solange jurisprudence[854], it can also be argued that the obligations to protect under the Basic Law do not have to be exercised as long as and to the extent that a roughly comparable level of protection exists through the activities of third countries. Such an approach, based on cooperation between regulatory authorities in the interest of the protection of human dignity and of minors from harmful media, takes into account the openness to integration and to public international law of the

851 CJEU, case C-265/95, *Commission / France*, para. 56.
852 CJEU, case C-265/95, *Commission / France*, para. 33 et seq.
853 Cf. CJEU, case C-112/00, *Schmidberger / Austria*, para. 80 et seq.; cf. also *Jeck/Langner*, Die Europäische Dimension des Sports, p. 25 et seq.; *Lengauer*, Drittwirkung von Grundfreiheiten, p. 218 et seq., 227 et seq.
854 Cf. on this in detail already supra, chapter B.VI.2.

Basic Law. It adds an executive facet to the existing justice-oriented process of reciprocal reception of Member State, European and international fundamental rights guarantees with a view to the protective aspects, and at the same time relieves the regulatory authorities of unnecessary duplication of work. However, such a comparable level of protection based on obligations under public international law is lacking in view of the protection of human dignity and, to a large extent, also of minors from harmful media. In particular, the constitutional obligations to protect extend beyond mere protection against child pornography, which is now recognized under international treaty law.

V. Substantive law aspects

In terms of substantive law, some regulations in current German legal acts that are relevant to the media sector take on shapes that not only raise questions – which do not need to be discussed further in the present context – about the coherence of regulation at the domestic level, but also do not appear to rule out a certain potential for conflict with the European legal framework, to say the least. In particular, the Network Enforcement Act (NetzDG) has triggered controversial debates about its legal conformity since its inception – not only with regard to questions of its (primarily formal) constitutionality,[855] which will not be discussed in detail here,[856]

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855 Critical of the legislative competence of the Bund e.g. *Feldmann* in: K&R 2017, 292, 294; *Gersdorf* in: MMR 2017, 439, 441; *Hain/Ferreau/Brings-Wiesen* in: K&R 2017, 433, 434; *Kalscheuer/Hornung* NVwZ 2017, 1721, 1721 et seq.; *Müller-Franken* in: AfP 2018, 1, 2 et seq.; *Nolte* in: ZUM 2017, 552, 561; diff. op. e.g. *Bautze* in: KJ 2019, 203, 208; *Peifer* in: AfP 2018, 14, 21 et seq. Incidentally, the FCC considers constitutional complaints directly directed against provisions of the NetzDG to be inadmissible (cf. Order of 23.04.2019 – 1 BvR 2314/18, para. 6 et seq.), as there is no exhaustion of the specialized courts' legal remedies if no action is taken against the enforcement act (such as blocking or deletion of content by the network providers), in which case the constitutionality of the rules of the NetzDG can also be reviewed incidentally.

856 The constitutionality of the amendment to the NetzDG by the Act to Combat Right-Wing Extremism and Hate Crime (BT-Drs. 19/17741 and 19/20163) is also controversial. In the wake of, i.a., an expert opinion by the Scientific Service of the German Bundestag (available at https://cdn.netzpolitik.org/wp-upload/2020/09/WD-10-030-20-Gesetz-Hasskriminalitaet.pdf), according to media reports (https://netzpolitik.org/2020/gutachten-zum-netzdg-gesetz-gegen-hasskriminalitaet-verfassungswidrig/#vorschaltbanner), the Federal President is hesitating to sign the amendment passed by the Bundestag and Bundesrat because of con-

but also with regard to its compatibility with EU law, which is doubted in parts of the literature.[857]

1. The scope of certain national legal acts

a. Country of origin principle and NetzDG

Pursuant to Art. 3(1) ECD, the state in which a service provider is established must ensure that its offering complies with domestic provisions. According to Art. 3(2) ECD, Member States may not restrict the freedom to provide information society services from another Member State for reasons falling within the so-called "coordinated field". This country of origin principle, already described above, is intended to ensure the smooth movement of services in the internal market for this sector. This means that Member States may not, in principle, impose regulations on providers from other EU States that differ from those of their country of origin. The newly introduced Art. 28a(1), (5) AVMSD reiterates this principle for VSP, which may include social networks.[858]

The scope of the NetzDG, which came into force in Germany in 2017, applies to telemedia service providers who operate platforms on the Internet with the intention of making a profit, which are intended for users to share any content with other users or make it accessible to the public (social networks), and thus generally also covers service providers established in (EU) countries outside Germany. The regulations define the scope of the law in accordance with the objective of more effectively combating hate crime as well as other punishable content, specified in the law, on social networks platforms in order to avert the related threats to peaceful coexistence and to a free, open and democratic society.[859] The NetzDG is thus in tension with the country of origin principle, insofar as it lays down

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stitutional concerns. Cf. also tagesschau.de, Verfassungsrechtliche Bedenken – Scheitert das Anti-Hass-Gesetz?, https://www.tagesschau.de/investigativ/ndr-wdr/hasskriminalitaet-gesetz-101.html.

857 So e.g. *Spindler* in: ZUM 2017, 473, 473 et seq.; *Hoeren*, Netzwerkdurchsetzungsgesetz europarechtswidrig.

858 *Nölscher* in: ZUM 2020, 301, 306. Cf. on this in detail and with further references supra, chapter D.II.2.d(5).

859 Cf. on this the explanatory memorandum to the then draft law of the CDU/CSU and SPD parliamentary groups of the German Bundestag, BT-Drs. 18/12356 of 16.05.2017, p. 18.

stricter rules than the respective (EU) country of origin of a network within the meaning of the law and with a certain significance in Germany, as regards the scope of the catalog of obligations for the deletion of illegal content, the administrative offenses that are subject to fines, or the requirement of domestic authorised agents.[860]

However, Art. 3(4) ECD provides exceptions to the country of origin principle. Thus, according to Art. 3(4)(a) ECD, Member States may, by way of derogation from the country of origin principle, take measures if they are necessary for the protection of public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons, and concern a particular information society service which prejudices one of these objectives or at least poses a serious and grave risk to them. In this context, the measure must be proportionate to the objective pursued.

In particular the characteristics of a "given information society service"[861] as well as the appropriateness[862] are seen as worthy of discussion in the context of the NetzDG. What is meant by a "given […] service" affected is that the exception set forth in Art. 3(3) ECD does not represent a derogation. Thus, it is at least questionable whether the abstract-general obligations of the NetzDG, for example with regard to reporting obligations affecting an entire group of information society services, can fall within this exception.[863] The appropriateness of the regulation is also viewed very critically by individual authors with regard to the blanket rule on response times and presumed negative impacts on freedom of expression on the Internet.[864]

In part, this fundamental problem of compatibility with the country of origin principle is addressed in the current draft of a law amending the Network Enforcement Act (NetzDGÄndG-E)[865] with regard to VSP. The explanation to the NetzDGÄndG-E emphasizes that Art. 28a(5) AVMSD

860 *Hoeren*, Netzwerkdurchsetzungsgesetz europarechtswidrig.
861 In more detail on this *Nölscher* in: ZUM 2020, 301, 307.
862 Critical on this *Hoeren*, Netzwerkdurchsetzungsgesetz europarechtswidrig.
863 *Nölscher* concludes that much speaks in favor of an extensive interpretation of the exception, ZUM 2020, 301, 310; critical with regard to the reference to a "given […] service" *Spindler* in: ZUM 2017, 473, 476.
864 *Hoeren*, Netzwerkdurchsetzungsgesetz europarechtswidrig.
865 Deutscher Bundestag, Entwurf eines Gesetzes zur Änderung des Netzwerkdurchsetzungsgesetzes. BT-Drs. 19/18792 of 27.04.2020.

referred to the application of the ECD for providers of VSP services. For such services that are not located or deemed to be located in Germany, the NetzDG should therefore generally not apply. However, the authority responsible under § 4 NetzDG (the Federal Office of Justice) is to be able to determine the general applicability of the NetzDG and its scope with regard to the obligations under §§ 2, 3 and 3 b (of the then amended) NetzDG on a case-by-case basis (for providers specified then), subject to the requirements of § 3(5) TMG. This is intended to take account of the country of origin principle enshrined in the ECD, on which the AVMSD is also based.[866]

Although the legality under EU law of the law in its current version is not clear and there are in particular constitutional concerns about a supervisory function of an authority that is not independent of the state, such as the Federal Office of Justice, within the scope of the amended AVMSD[867], the question nevertheless arises as to how adequate fundamental rights protection is to be achieved at all in the context of a very restrictive interpretation of the country of origin principle in light of greatly changed communications.[868] Risk situations are addressed differently in the Member States, and regulatory approaches follow different frameworks and balancing of interests. With the definition of certain standards for VSP within the framework of Art. 28 b AVMSD, the European legislature has addressed this issue in part. Other initiatives both at EU level[869] and in other Member States[870] show that digital mass phenomena such as social networks, which have become an integral part of communication in democratic societies, have a special responsibility for which also a regulatory framework must be found. A clearer regulation on how, while maintaining the country of origin principle for certain enforcement issues, a market location principle or elements of such can also be applied is to be made at EU level.

866 So the Scientific Service of the German Bundestag, WD 10 – 3000 – 023/20, available at https://www.bundestag.de/resource/blob/691846/cb11c99d9a39b6e73151549e22d76b73/WD-10-023-20-pdf-data.pdf.

867 Cf. on the requirement of independent regulatory bodies under the 2018 AVMSD reform in detail supra, chapter D.II.2.d(4).

868 On this also *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content, p. 221 et seq.

869 Cf. in detail supra, chapter D.III.1.

870 E.g. France with the *Loi visant à lutter contre les contenus haineux sur internet*, Loi n° 2020–766.

b. Country of origin principle and MStV

In the notification procedure[871], the European Commission commented on the draft State Treaty on the Modernization of the Media Order in Germany, as repeatedly described above. It concludes therein that the MStV is in principle compatible with EU law, but expresses concerns about possible conflicts with the ECD.

The notification procedure under the Directive laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Directive (EU) 2015/1535) provides for various ways for the Commission to respond to notified rules, including the submission of comments (Art. 5(2)) and the delivery of a detailed opinion (Art. 6(2)). The submission of a detailed opinion may trigger an extension of the so-called standstill period. In contrast, comments made as in the present case do not hinder the national legislative procedure. However, according to Art. 5(2) they must be observed as far as possible in the further procedure.[872]

From a substantive law perspective, the Commission is critical in particular of the provision in § 1(8) MStV on the territorial scope for media intermediaries, media platforms and user interfaces in its current form due to a possible infringement of the ECD. In principle, § 1(7) MStV provides that the State Treaty applies only to providers of telemedia if they are established in Germany in accordance with the provisions of the TMG. In deviation from this, § 1(8) MStV stipulates that the State Treaty nevertheless applies to media intermediaries, media platforms and user interfaces, insofar as they are intended for use in Germany. This is assumed to be the case "if they are aimed at users in […] Germany, in particular through the language used, the content or marketing activities offered, or if they aim to refinance a substantial part of such in […] Germany" (§ 1(8) sentence 2 MStV). In this context, the aforementioned categories of services constitute information society services; the substantive obligations also relate to the taking up or pursuit of activities within the scope of the ECD. For example, additional obligations are imposed on the services under the trans-

871 European Commission, Notifizierung 2020/26/D, C(2020) 2823 final of 27.04.2020.

872 In details on the significance and course of the information procedure *Cole* in: HK-MStV, § 61, para. 1 et seq., v.a. 4 et seq.

parency and nondiscrimination rules applicable to them.[873] The explanation to the MStV[874] considers the following in this regard:

> *"For these special telemedia, the so-called market location principle is thus enshrined in deviation from the general rule of (7). The enshrinement of the market location principle is also necessary in the absence of corresponding European rules and due to the lack of regulatory competence of the European Union in order to ensure media pluralism as well as communicative equality of opportunity in Germany."*

The federal states also invoke Art. 1(6) ECD. It provides that the Directive does not affect measures taken at Community or national level, in the respect of Community law, in order to promote cultural and linguistic diversity and to ensure the defence of pluralism. In this regard, the Commission considers that measures must actually and objectively serve to protect media pluralism and must be proportionate to the objectives of the measure. In addition, Member States would have to comply with other EU law when adopting such measures, which includes the provisions of the ECD.[875]

However, these concerns on the part of the Commission did not lead to a detailed opinion This result of the notification procedure by means of mere comments does not have any blocking or binding effect with regard to a possible subsequent review of conformity with EU law by the Commission by way of initiation of infringement proceedings before the CJEU.[876] However, it is apparent from the reasoning that the concerns were not considered sufficient to justify a broader response to the draft. This is in line with the conclusion, as detailed above, that the Commission's line of reasoning is not convincing insofar as a possible infringement of the ECD is implied.[877]

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873 The Commission assumes this in particular for the notification obligation in § 79 MStV as well as the transparency of systems for the selection and organization of content in §§ 85 and 93 MStV.

874 Begründung zum Staatsvertrag zur Modernisierung der Medienordnung in Deutschland, on § 1, available at https://www.rlp.de/index.php?id=32764.

875 Cf. on the background of deviation possibilities already the explanations on the ECD in chapter D.II.1. and on the requirements under fundamental freedoms in chapter C.IV.1.

876 See also *Holznagel*, Stellungnahme zur schriftlichen Anhörung des Ausschusses für Kultur und Medien des Landtags Nordrhein-Westfalen, 17/2858, available at https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMST17-2858.pdf.

877 See above chapter E.II.4.d.

2. Other substantive considerations

a. NetzDG and questions of liability

Another potential tension in media sector regulation issues relates to ECD liability rules. In this respect, too, some argue that the NetzDG leads to an inadmissible deviation from the ECD's liability privilege (Art. 14(1)(b) for hosting services).[878]

Art. 14 ECD regulates the liabilities of information society services consisting in the storage of information entered by a user. This also includes social networks mentioned in § 1 NetzDG. According to Art. 14 ECD, such service providers are not liable for the information stored at the request of a user, provided they do not have actual knowledge of illegal activity or information and, as regards claims for damages, are not aware of facts or circumstances from which the illegal activity or information is apparent. However, the providers upon obtaining such knowledge or awareness, must act expeditiously to remove or to disable access to the information.[879]

In this context, the rigid deadlines for removing or blocking illegal content pursuant to § 3 NetzDG could contradict the characteristic of "immediacy".[880] As a legal concept of Union law, this criterion is subject to interpretation by the CJEU, which is guided by the relevant recitals.[881] Recitals 10 (relating to the general objective of the ECD) and 46 (relating to the liability privileges) explain that the graduated responsibility and the need to immediately react to illegal content that has come to light are intended to safeguard a high level of legal protection on the one hand and freedom of expression on the other.

The organizational obligations of § 3 NetzDG for providers of social networks provide for a procedure for dealing with complaints, according to which it must be ensured that notice is taken of the complaint without delay and that it is examined whether the content reported in the complaint is illegal. Accordingly, obviously illegal content is to be removed or blocked within 24 hours of receipt of the complaint, § 3(2) no. 2 NetzDG. Other illegal content must be removed or blocked without delay, as a rule within seven days of receipt of the complaint, in accordance with § 3(2)

878 *Spindler* in: ZUM 2017, 473, 479 et seq.; *Wimmers/Heymann* in: AfP 2017, 93, 95.
879 In detail on the meaning of Art. 14 ECD and its interpretation by the CJEU *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content, p. 183 et seq.
880 *Liesching* in Spindler/Schmitz, § 1 NetzDG, para. 20.
881 *Cole/Etteldorf/Ullrich*, Cross-border Dissemination of Online Content, p. 188 et seq.; *Nölscher* in: ZUM 2020, 301 (302).

no. 3 NetzDG. With regard to the expiration of the time limit, the NetzDG therefore already links to the receipt of the complaint and thus possibly even before the knowledge of the illegality provided for by the ECD, which presupposes an evaluation of the complaint – if the possible illegality was only indicated in this way. Partly, it is assumed in that regard that Art. 14 ECD authorizes the Member States to develop an effective procedure. Member States' regulations on the time period between receipt and notification of complaints, as explicitly set out in the NetzDG, are therefore in conformity with European law.[882] However, the processing time from receipt of the complaint is criticized by some. This could result in regulatory liability of the service provider in the form of fines under § 4(1) no. 3 NetzDG if a complaint has been received but no concrete knowledge of the illegality has yet been reached. Since Art. 14 ECD is linked to awareness, this could be a limitation of regulatory liability for the preceding period.

Also, the short deadline for reaction of service providers in the case of "apparently illegal content" is seen as stricter than the European requirement.[883] However, it is countered that the 24-hour processing period for such content where illegality is immediately apparent is appropriately long and thus the conflicting objectives of the ECD are thereby reconciled and protection of the conflicting legal interests is made possible when using modern communication channels. Thus, the issue of the early start of the deadline was also to be brought in line with EU law by means of an interpretation within the context of the sanction order in conformity with European law. It is argued that the NetzDG speeded up the processing of complaints, but did not eliminate the liability set out in the ECD.[884]

The tension between such regulations concerning the liability of service providers such as social networks is thus at least considered resolvable in the literature.

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882 *Nölscher* in: ZUM 2020, 301, 302. Not discussing the questions of constitutionality or conformity with European law, but outlining and assessing the NetzDG also against a background of European law cf. in particular *Eifert et al.*, Evaluation des NetzDG.

883 *Spindler* in: ZUM 2017, 473, 479.

884 In this direction argues *Nölscher* in: ZUM 2020, 301, 304. Cf. on the state of discussion in particular *Eifert et al.*, Evaluation des NetzDG, p. 9, with further references. *Eifert et al.* point out in particular that the question of a possible deviation from Art. 14 ECD also strongly depends on the requirements to be placed on the complaint under the NetzDG.

b. Excursus: frictions with similar regulations in other states

A comparable potential for conflict between competing interests is evident not only in the NetzDG, but also in regulatory approaches with a comparable thrust in other states.[885]

In a decision dated 18 June 2020, the French Constitutional Council[886] classified as unconstitutional certain passages of Law No. 2020–766 of 24 June 2020, subsequently promulgated, on tackling hate content on the Internet[887]. The envisaged Art. 1(I) of the Law, which has clear parallels with the NetzDG, was one of them. The law authorizes administrative authorities to require hosts or publishers of an online communications service to remove certain terrorist or child pornography content. In case of non-compliance with this obligation, the application of a penalty of one year of imprisonment and a fine of 250,000 euros is foreseen. The Constitutional Council based its decision on the fact that the determination of the unlawfulness of the content in question was not based on its manifest character, but was entirely subject to the assessment of the administration. In addition, there would be insufficient legal protection against removal orders.[888]

The Constitutional Council further declared unconstitutional Art. 1(II) of the Law, which was intended to oblige certain operators of online platforms, under threat of criminal sanctions, to remove or make inaccessible within 24 hours obviously illegal content because of its hateful or sexual nature. The commitment would not have been subject to prior judicial intervention or other conditions. It was therefore up to the operator to check all content reported to him, even if it was on a large scale, in order to avoid the risk of criminal sanctions. Moreover, the obligation of the operators of online platforms to comply with the request for deletion or blocking within 24 hours was particularly short in view of the difficulties in assessing the obvious illegality of the reported content and the risk of numerous, possibly unfounded reports.

In an overall view, the Constitutional Council concludes that, given the difficulties in assessing the obvious illegality of the reported content, the penalty imposed as of the first infringement, and the lack of a concrete rea-

885 In addition to the states briefly examined here, Austria's regulatory approach can be cited as another example, cf. on this supra, chapter B.I.5.g and fn. 93.

886 Decision n° 2020–801 DC of 18.06.2020, available in French at: https://www.conseil-constitutionnel.fr/decision/2020/2020801DC.htm.

887 *Loi visant à lutter contre les contenus haineux sur internet*, Loi n° 2020–766.

888 *Ukrow*, Frankreich: Verfassungsgericht zum „französischen NetzDG", MMR Aktuell, issue 14/2020 of 25.08.2020.

son for exemption from liability, the contested provisions of the Law could encourage operators of online platforms to delete or block the content reported to them, regardless of whether it is actually obviously illegal or not.[889] In the view of the Constitutional Council, this provision therefore interfered with the pursuit of freedom of expression and communication in a manner that was not appropriate, necessary and proportionate to the objective pursued.

Similar legislative projects are also to be considered outside the EU, although in the example presented here due to its design the tension and difficult balancing of freedom of expression and effective protection of legal interests becomes even clearer. In a fast-track procedure without stakeholder consultation, the Turkish Parliament passed a law on social media control on 29 July 2020[890], the regulations of which came into force on 1 October 2020. According to its explanation, the purpose of the law is to combat hate speech and harassment on the Internet. According to the law, during the creation of which supposed references to the NetzDG were pointed out, all social networks with more than two million daily users must appoint a local representative in Turkey. These local representatives are required to respond to government requests to block or remove content.[891] If there is a court order and "personality rights" or "privacy" are violated, they must remove the content within 48 hours. Networks in infringement of this may be subject to advertising bans and fines. Judges can also order Internet providers to reduce the bandwidth of social networks by up to 90 percent, which would effectively block access to these sites. The law also contains provisions that require social networks to store users' data locally. Providers may be required to forward this data to Turkish authorities.[892]

This law has been criticized in particular for initiating possible blocking and monitoring by government agencies, and there are fears of a chilling effect on the exercise of communication freedoms by Turkish social media users. In recent years, traditional print and broadcast media in Turkey had

889 For an assessment of the risks of the NetzDG for so-called over-blocking cf. *Eifert et al.*, Evaluation des NetzDG, p. 51 et seq.

890 İnternet Ortamında Yapılan Yayınların Düzenlenmesi ve Bu Yayınlar Yoluyla İşlenen Suçlarla Mücadele Edilmesi Hakkında Kanun, Kanun No. 7253, Kabul Tarihi: 29/7/2020, available in Turkish language at https://www.resmigazete.gov.tr/eskiler/2020/07/20200731-1.htm.

891 Cf. on previous regulatory approaches in Turkey regarding content available online *Keser* in: Cappello, Medienrechtsdurchsetzung ohne Grenzen, p. 91, 100 et seq.

892 *Ukrow*, Türkei: Gesetz zur Kontrolle sozialer Medien verabschiedet, MMR Aktuell, issue 15/2020 of 09.09.2020.

already come under increasing state pressure.[893] As a result, social media and smaller online news portals are used more often for independent news.[894] The extent to which the law will stand up to judicial review remains to be seen.

c. Copyright free use under § 24 UrhG and exhaustive harmonization

A further example of potential tensions between media sector regulation and EU law emerged in 2019 in the area of copyright. There, the question arose as to the extent to which certain legal figures recognized in national law fall within exhaustively harmonized areas of the European legal framework on copyright.

In its "Sampling Judgment" of 29 July 2019[895], the CJEU had ruled that § 24 of the German Copyright Act (UrhG) is contrary to EU law. The rule permitted the exploitation and publication of another work by an independent work created in free use of that other work.[896] The legal concept of free use was established in German copyright law with the objective – quasi like a general clause limiting the subject matter of protection – of reconciling the exclusive rights and interests of authors to only decide themselves on the use of their work with the cultural interests of the general public.[897] The Court assumed, however, that the effectiveness of the harmonization of copyright and related rights brought about by the Copyright Directive 2001/29/EC, as well as the objective of legal certainty pursued by it, would be jeopardized if, notwithstanding the express intention of the EU legislature, every Member State was allowed to provide for dero-

893 Cf. *Keser* in: Cappello, Medienrechtsdurchsetzung ohne Grenzen, p. 91 et seq.

894 See also netzpolitik.org, Türkisches Internet-Gesetz – Die bislang schlimmste Kopie des deutschen Netzwerkdurchsetzungsgesetzes (05.08.2020), available at https://netzpolitik.org/2020/tuerkisches-internet-gesetz-die-bislang-schlimmste-kopie-des-deutschen-netzwerkdurchsetzungsgesetzes/#vorschaltbanner.

895 CJEU, case C-476/17, *Pelham GmbH and Others / Ralf Hütter and Florian Schneider-Esleben*.

896 Cf. on the judgment *Frenz* in: DVBl. 2019, 1471, 1471 et seq.; *Hieber* in: ZUM 2019, 738, 738 et seq., in particular 747 et seq. with regard to § 24 UrhG. Addressing the right to edit against the backdrop of the CJEU (case C-476/17) and BGH (Az. I ZR 115/16) rulings also *Döhl* in: UFITA 2020, 236, 236 et seq.

897 *Schulze* in: Dreier/id., § 24 UrhG, para. 1.

gations from the author's exclusive rights under Art. 2 to 4 of the Directive, outside the exceptions and limitations provided for in its Art. 5.[898]

§ 24 UrhG, which in its practical application goes beyond the use of works for the purpose of caricatures, parodies or pastiches, which are listed in EU law but not implemented in the German system of limitations[899], was thus understood by the CJEU as a statutory limitation not provided for in the exhaustive catalog of Art. 5 Copyright Directive. From the German view, however, free use was previously close to the right to edit (systematically based on § 23 UrhG), which, in contrast to the catalog of limitations of EU copyright law, has not yet undergone comprehensive harmonization.[900] Thus, a legal copyright figure existing solely at Member State level could have existed in the system of minimum and maximum harmonization of the EU legal framework.[901] In the meantime, the German legislature has conceded the dual function of § 24 UrhG, according to which it limits the scope of protection for existing works on the one hand, but also acts as a limitation to copyright on the other. With the insertion of the limitation of the scope of protection in the area of § 23 UrhG as well as the future explicit inclusion of the exceptions mentioned in Art. 5 Copyright Directive in the German catalog of exceptions, this double function is to be solved.[902]

The aforementioned problem is interesting in particular with regard to the planned German rules on the liability of upload platforms under the draft Copyright Service Provider Act (UrhDaG-E)[903], which provides for statutory permission for non-commercial petty uses. Criticism has already been voiced against this as well, claiming that the fuly harmonizing char-

898 CJEU, case C-476/17, *Pelham GmbH and Others / Ralf Hütter and Florian Schneider-Esleben*, para. 66.

899 The draft of a second law for the adaptation of copyright law to the requirements of the digital single market, as of 24 June 2020, provides for an explicit regulation of the limitations for caricatures, parodies and pastiches in § 51 a UrhG-E, available at https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_II_Anpassung%20Urheberrecht_digitaler_Binnenmarkt.pdf?__blob=publicationFile&v=2.

900 *Schulze* in: Dreier/id., § 24 UrhG, para. 1.

901 On this see also Summaries of EU Legislation, European Union directives, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l14527&from=DE.

902 Explanation to the draft of a second law for the adaptation of copyright law to the requirements of the digital single market, as of 24 June 2020, p. 44.

903 Draft of a second law for the adaptation of copyright law to the requirements of the digital single market.

acter of EU copyright law would prevent such a solution.[904] The Federal Ministry of Justice, however, believes that Art. 17 DSM Directive establishes a new type of liability system that goes beyond the existing EU copyright law. Therefore, it was lawful to formulate new legal permissions in this limited area of the use of works on upload platforms.[905]

904 Cf. e.g., Bertelsmann's opinion as part of the public consultation on the transposition of the EU directives in copyright law (DSM Directive and Online SatCab Directive), available at https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Stellungnahmen/2019/Downloads/090619_Stellungnahme_Bertelsmann_EU-Richtlinien_Urheberrecht.pdf?__blob=publicationFile&v=2.

905 FAQ on the discussion draft for the transposition of the copyright directives (EU) 789/2019 ("Online-SatCab-Directive") and (EU) 790/2019 ("DSM-Directive"), 24.06.2020, p. 3, available at https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_II_Anpassung%20Urheberrecht_digitaler_Binnenmarkt_FAQ.pdf?__blob=publicationFile&v=1.