

Mark D. Cole | Jörg Ukrow | Christina Etteldorf

On the Allocation of Competences between the European Union and its Member States in the Media Sector

An Analysis with particular Consideration of Measures
concerning Media Pluralism

Zur Kompetenzverteilung zwischen der Europäischen Union und den Mitgliedstaaten im Mediensektor

Eine Untersuchung unter besonderer Berücksichtigung
medienvielfaltsbezogener Maßnahmen



Nomos

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About this publication

This book compiles an English and German version of the study “On the Allocation of Competences between the European Union and its Member States in the Media Sector” which was prepared by the Institute of European Media Law (EMR) on behalf of the German Länder. Each language version is preceded by a Preface of Heike Raab, State Secretary, Plenipotentiary for Federal and European Affairs, for Media and Digital Affairs of the Land of Rhineland-Palatinate.

Readers can first find a summary table of contents, followed by the preface, a detailed table of contents and the study itself, each of them first in the English, then in the German language version.

The publication of the bilingual version of the study as a print and e-book was supported by the Mainzer Medieninstitut e.V. (Mainz Media Institute) which co-organizes the annual “Brüsseler Mediengespräch” together with and in the premises of the representation of the Land Rhineland-Palatinate, the venue originally foreseen for the presentation of the study to the public. The authors are very grateful for this support.

Since the study was completed, the European Commission has put forward the two proposals for a Digital Services Act and a Digital Markets Act.¹ A more detailed assessment by the EMR of the actual proposals in addition to the general analysis based on the (then) forthcoming proposals hereinafter, is available online.²

The “Rundfunkkommission der Länder” as initiator, the EMR as provider and the Mainzer Medieninstitut as supporting institution for the publication of the study are briefly introduced together with the authors (Cole; Ukrow; Etteldorf) at the end of the study. The authors would like to thank Sebastian Zeitmann, research associate at EMR, who assumed the overall responsibility for the English translation of the study.

-
- 1 Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final, CELEX: 52020PC0825; Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final, CELEX: 52020PC0842.
 - 2 *Ukrow*, Die Vorschläge der EU-Kommission für einen Digital Services Act und einen Digital Markets Act, Impulse aus dem EMR; *Cole/Etteldorf/Ullrich*, Updating the Rules for Online Content Dissemination, Nomos 2021; <https://www.nomos-eliary.de/10.5771/9783748925934>.

Über diese Veröffentlichung

Dieses Buch stellt eine englische und deutsche Version der Studie „Zur Kompetenzverteilung zwischen der Europäischen Union und den Mitgliedstaaten im Mediensektor“ zusammen, die vom Institut für Europäisches Medienrecht (EMR) im Auftrag der deutschen Länder erstellt wurde. Jeder Sprachversion ist ein Vorwort von Heike Raab, Staatssekretärin in der Staatskanzlei Rheinland-Pfalz und Bevollmächtigte des Landes Rheinland-Pfalz beim Bund und für Europa, Medien und Digitales, vorangestellt.

Der Leser findet zunächst ein zusammenfassendes Inhaltsverzeichnis des Buches, gefolgt vom Vorwort, einem ausführlichen Inhaltsverzeichnis und der Studie selbst, jeweils zunächst in der englischen, dann in der deutschen Sprachversion.

Die Veröffentlichung der zweisprachigen Version der Studie als Print und E-Book wurde vom Mainzer Medieninstitut e.V. unterstützt, das das jährliche „Brüsseler Mediengespräch“ gemeinsam mit und in den Räumen der Landesvertretung Rheinland-Pfalz, dem ursprünglich vorgesehenen Veranstaltungsort für die öffentliche Präsentation der Studie, organisiert. Die Autoren sind dem Mainzer Medieninstitut für die Unterstützung sehr dankbar.

Seit der Fertigstellung der Studie hat die Europäische Kommission die beiden Vorschläge für einen Digital Services Act und einen Digital Markets Act vorgelegt.¹ Eine detailliertere Bewertung der aktuellen Vorschläge durch die Autoren dieser Studie, zusätzlich zu der allgemeinen Analyse, die auf den (zu diesem Zeitpunkt noch) bevorstehenden Vorschlägen im Folgenden basiert, ist online verfügbar.²

1 Vorschlag für eine Verordnung über einen Binnenmarkt für digitale Dienste (Gesetz über digitale Dienste) und zur Änderung der Richtlinie 2000/31/EG, COM/2020/825 final, CELEX: 52020PC0825; Vorschlag für eine Verordnung über bestreitbare und faire Märkte im digitalen Sektor (Gesetz über digitale Märkte), COM/2020/842 final, CELEX: 52020PC0842.

2 *Uknow*, Die Vorschläge der EU-Kommission für einen Digital Services Act und einen Digital Markets Act, Impulse aus dem EMR; *Cole/Etteldorf/Ullrich*, Updating the Rules for Online Content Dissemination, Nomos 2021; <https://www.nomos-eliary.de/10.5771/9783748925934>.

Über diese Veröffentlichung

Die Rundfunkkommission der Länder als Initiator, das EMR als Ersteller und das Mainzer Medieninstitut als unterstützende Institution für die Veröffentlichung der Studie werden zusammen mit den Autoren (Cole; Ukrow; Etteldorf) am Ende der Studie kurz vorgestellt. Die Autoren bedanken sich bei Sebastian Zeitmann, wissenschaftlicher Mitarbeiter am EMR, der die Gesamtverantwortung für die englische Übersetzung der Studie übernommen hat.

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**On the Allocation of Competences between the European
Union and its Member States in the Media Sector**

Preface

The year 2020 was a year of setting the course of media politics in Germany and Europe with very important milestones: An up-to-date media regulation of television, radio and the press may not remain stuck in the “old world”. On the contrary, the digital environment calls for new answers – for the ‘online media world’. In 2020, the German federal states, the Länder, as media legislators adopted the State Media Treaty and simultaneously transposed the Audiovisual Media Services Directive with it. At the end of the very same year, the European Commission outlined in its proposals for a Digital Services Act and a Digital Markets Act the shape that central rules of a digital society could take from its own perspective.

As the coordinator of the Broadcasting Commission of the German Länder I am proud to say that the State Media Treaty entered into force on 7 November 2020. This major achievement in media politics is the result of a long process, started several years ago by the German Länder, which have the competence of regulating the media in Germany. It is one of the most important initiatives in media politics in recent years and provides answers to very relevant questions of a digitized media world. It creates a legal framework, which fosters diversity of opinion and equal opportunities in communication, especially online, increases the visibility of quality journalism and strengthens the accountability of the internet community. For the first time, major media platforms and intermediaries such as Google, Facebook, Twitter or Amazon are subjected to media-specific and pluralism-based regulation. The coronavirus pandemic illustrated the importance of these large platforms for the distribution of media information very clearly.

The discussions during the making of and the solutions found in the State Media Treaty show clearly: Rules for big platforms on how to deal with illegal content are important – after the German legislator implemented the Network Enforcement Act, now the European Commission rightly urges platforms to take more responsibility as well. However, we as media regulators are convinced that rules for dealing with illegal, harmful or otherwise problematic content alone are not enough to safeguard media pluralism and diversity of opinions. More is needed: When we refer to non-discriminatory findability of journalistic content in the State Media Treaty, we are not talking about liability or responsibility for illegal content. It is about how we promote equal opportunities for communication

Preface

online and how we make quality journalism visible – not only during times of crisis. This requires a media-specific framework for the challenges of the digital platform economy.

The EU Member States agree that such media-specific and diversity-related regulation of media platforms and intermediaries is a necessity and that safeguarding media pluralism is primarily the responsibility of the Member States. The Member States explicitly confirmed and underlined this in the Council conclusions on safeguarding a free and pluralistic media system, which were adopted end of last year during the German Council Presidency. The Council conclusions therefore provide an important impulse for future and up-to-date, national as well as European legislation in a digital age. The German Länder are happy to take on this responsibility.

A coherent legal framework for the digital environment is not only necessary with regard to media regulation in its original meaning, but also in many other sectors on regional, national and European level. The media are indispensable for our democracies in Europe. It is our task and responsibility to maintain a free and functioning media system. Therefore, we need to consider the impact on the media that new rules in other sectors may have. The numerous laws of different legislators have to interact well with each other. This issue was also addressed by the Member States in the Council conclusions.

All of these are by no means trivial tasks, and they require every actor in the legislative process – whether at regional, national or European level – to address these issues. Regulating the online world is a shared responsibility. The goal of coherence and consistency raises difficult questions in this regard, in particular how regulation by the EU of a digital single market can be reconciled with the competence of the Member States in order to ensure media pluralism and take into account the specifics of the media sector.

In June 2020, the Broadcasting Commission commissioned the present study “On the Allocation of Competences between the European Union and its Member States in the Media Sector” by the Institute of European Media Law (EMR) to make a lasting contribution to the discussion. Prof. Dr. Mark D. Cole, Dr. Jörg Ukrow and Christina Etteldorf give important answers, which will be groundbreaking for the upcoming and future discussions on national and European level. Originally, the study should have been presented at the annual “Brüsseler Mediengespräch” in the representation of Rhineland-Palatinate in Brussels, combined with a discussion of representatives from politics, academia and the media sector. Unfortunately, the event could not yet take place due to the coronavirus pandemic. I

deliberately say "not yet", because postponed is not abandoned. In the meantime, I recommend the podcast about the study, which was produced with our cooperation partners Mainzer Medieninstitut and Westdeutscher Rundfunk in December 2020.

On the web address www.rundfunkkommission.rlp.de you can listen to the podcast, which includes an introduction of the study by Prof. Cole and statements of representatives from politics, science and the media industry about the (at the time of recording yet to be presented) Digital Services Act Package.

With the proposals of the European Commission on the table, the study of the EMR has its first use case. I hope and wish that not only the German Länder will avail themselves of the study to evaluate the proposals of the European Commission, but the other players in this and the coming legislative processes will use it as well.

Heike Raab

State Secretary, Plenipotentiary for Federal and European Affairs, for Media and Digital Affairs of the Land of Rhineland-Palatinate,

9 February 2021

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List of abbreviations

ACT	Association of Commercial Television in Europe
AfP	Zeitschrift für das gesamte Medienrecht / Archiv für Presserecht (journal)
AG	Advocate General
AÖR	Archiv des öffentlichen Rechts (journal)
API	Application programming interfaces
Art.	Article
AVMSD	Audiovisual Media Services Directive
BayVBl.	Bayerische Verwaltungsblätter (journal)
BEREC	Body of European Regulators for Electronic Communications
BFH	Bundesfinanzhof (German Federal Fiscal Court)
BFHE	Sammlung der Entscheidungen des Bundesfinanzhofs (collection of decisions of the German Federal Fiscal Court)
BGBI.	Bundesgesetzblatt (German Federal Law Gazette)
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen (decisions of the German Federal Court of Justice in civil cases)
BND	Bundesnachrichtendienst (German Federal Intelligence Service)
BT-Drs.	Bundestags-Drucksache (publication of the German Bundestag)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (decisions of the German Federal Constitutional Court)
BVerfGG	Bundesverfassungsgerichtsgesetz (Act on the German Federal Constitutional Court)
BVerfGK	Sammlung der Kammerentscheidungen des Bundesverfassungsgerichts (collection of Chamber Decisions of the German Federal Constitutional Court)
BVerfSchG	Bundesverfassungsschutzgesetz (act on the German domestic intelligence service)
BVerwG	Bundesverwaltungsgericht (Federal Administrative Court)
BVerwGE	Entscheidungen des Bundesverwaltungsgerichts (Decisions of the Federal Administrative Court)
ca.	circa

List of abbreviations

CDE	Cahiers de droit européen (journal)
cf.	confer
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CMLRev.	Common Market Law Review (journal)
CoE	Council of Europe
CPD	Code of Practice on Disinformation
DB	Der Betrieb (journal)
DG	Directorate-General (EU Commission)
diff. op.	different opinion
Doc.	Document
DÖV	Die Öffentliche Verwaltung (journal)
DSA	Digital Services Act
DSM-Directive	Directive on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC
DVBl.	Deutsches Verwaltungsblatt (journal)
e.g.	for example
EAO	European Audiovisual Observatory
EBU	European Broadcasting Union
EC	European Community
ECB	European Central Bank
ECD	e-Commerce-Directive
ECHR	European Convention on Human Rights
ECPMF	European Centre for Press and Media Freedom
ECtHR	European Court of Human Rights
EDPD	European Data Protection Days
eds.	editor(s)
EEA	European Economic Area
EEC	European Economic Community
EECC	European Electronic Communications Code
EPG	Electronic program guide(s)
ERGA	European Regulators Group for Audiovisual Media Services
ESCB	European System of Central Banks
et al.	and others
et seq.	and the following
etc.	et cetera
EU	European Union
EuGRZ	Europäische GRUNDRECHTE-Zeitschrift (journal)
EUMR	EU Merger Regulation (EC) 139/2004

List of abbreviations

EuR	Europarecht (journal)
EuZw	Europäische Zeitschrift für Wirtschaftsrecht (journal)
EWS	Europäisches Wirtschafts- und Steuerrecht (journal)
FAZ	Frankfurter Allgemeine Zeitung (newspaper)
FCC	German Federal Constitutional Court
fn.	footnote
FSK	Freiwillige Selbstkontrolle der Filmwirtschaft (Voluntary Self-Regulation Body of the Film Industry in Germany)
GATS	General Agreement on Trade in Services
GCEU	General Court of the European Union
GDPR	General Data Protection Regulation
GLJ	German Law Journal
GlüStV	Staatsvertrag zum Glücksspielwesen in Deutschland (State Treaty on Games of Chance in Germany)
GRUR Int	Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil (journal)
HRLR	Human Rights Law Review
i.e.	that means
ibid.	in the same place
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
id.	the same
incl.	inclusive / including
IntVG	Integrationsverantwortungsgesetz (German Responsibility for Integration Act)
JILP	New York University Journal of Internal Law and Politics
JMStV	Jugendmedienschutz-Staatsvertrag (German Interstate Treaty on the protection of minors)
JURA	Juristische Ausbildung (journal)
JuS	Juristische Schulung (journal)
JZ	JuristenZeitung (journal)
K&R	Kommunikation und Recht (journal)
KEK	Kommission zur Ermittlung der Konzentration im Medienbereich (German Commission for Determining Concentration in the Media Sector)
KJ	Kritische Justiz (journal)
KJM	Kommission für Jugendmedienschutz (German Commission for the Protection of Minors in the Media)
KKZ	Kommunal-Kassen-Zeitschrift (journal)

List of abbreviations

MMR	Zeitschrift für IT-Recht und Recht der Digitalisierung (journal)
MPEPIL	Max Planck Encyclopedia of Public International Law
MStv	Medienstaatsvertrag (German State Media Treaty)
NetzDG	Netzwerkdurchsetzungsgesetz (German Network Enforcement Act)
NJW	Neue Juristische Wochenschrift (journal)
No.	Number
NVwZ	Neue Zeitschrift für Verwaltungsrecht (journal)
OJ	Official Journal of the European Union
OLG	Oberlandesgericht (Higher Regional Court (Germany))
ÖZöRV	Österreichische Zeitung für öffentliches Recht und Völkerrecht (journal)
p.	page
P2B	Platform-to-Business
para.	paragraph(s)
PCIJ	Permanent Court of International Justice
PSPP	Public Sector Purchase Programme
RBSStV	Rundfunkbeitragsstaatsvertrag (German State Treaty of the Länder on Public Broadcasting fee)
RdDI	Rivista di Diritto Industriale (journal)
RdJB	Recht der Jugend und des Bildungswesens (journal)
rec.	recital(s)
Ref.	Reference
RStV	Rundfunkstaatsvertrag (State Broadcasting Treaty)
SAR	Self-Assessment Reports
SME	Small and medium enterprises
TEC	Treaty establishing the European Community
TERREG	Regulation on preventing the dissemination of terrorist content online
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
ThürVwZVG	Thüringer Verwaltungszustellungs- und Vollstreckungsgesetz (Thuringia Administrative Service and Enforcement Act)
TKG	Telekommunikationsgesetz (German Telecommunications Act)
TMG	Telemediengesetz (German Telemedia Act)
TwF	Television without Frontiers (directive)
UFITA	Archiv für Medienrecht und Medienwissenschaft (journal)

List of abbreviations

UN/UNO	United Nations Organization
UrhG	Urheberrechtsgesetz (German Act on Copyright and Related Rights)
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume
VSP(s)	video-sharing platform(s)
VVDStRL	Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (publication)
VwVfG	Verwaltungsverfahrensgesetz (German Administrative Procedures Act)
VwVG Bbg	Verwaltungsvollstreckungsgesetz für das Land Brandenburg (Brandenburg Administrative Enforcement Act)
VwZG	Verwaltungszustellungsgesetz des Bundes (German federal act on service in administrative procedure)
VwZVG	Bayrisches Verwaltungszustellungs- und Vollstreckungsgesetz (Bavarian service in administrative procedure and administrative enforcement act)
WTO	World Trade Organization
ZAK	Kommission für Zulassung und Aufsicht (Commission for approval and supervision in Germany)
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (journal)
ZEuS	Zeitschrift für Europarechtliche Studien (journal)
ZfWG	Zeitschrift für Wett- und Glücksspielrecht (journal)
ZSR	Zeitschrift für Schweizerisches Recht (journal)
ZUM	Zeitschrift für Urheber- und Medienrecht (journal)

