

German Bundestag

20th electoral term

Decision

At its 73rd sitting, held on 1 December 2022, the German Bundestag decided, on the basis of Bundestag printed paper 20/4682:

on the Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU (COM(2022) 457 final; Council document 12413/22)

here: Opinion delivered to the Federal Government in accordance with Article 23 (3) of the Basic Law

and in awareness of the Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU (COM(2022) 457 final; Council document 12413/22), to adopt the following opinion in accordance with Article 23 (3) of the Basic Law:

I. The German Bundestag notes:

The European Commission's European Media Freedom Act aims to establish a new legal framework to protect media independence and pluralism in the EU. The regulation, which is based on Article 114 of the Treaty on the Functioning of the European Union (TFEU), focuses on media independence and funding, as well as transparency regarding shareholdings. The associated media concentration issues are also meant to be resolved via a new independent European Board for Media Services.

The German Bundestag explicitly supports the objectives that the European Commission is pursuing, particularly that of strengthening media independence and pluralism. In the past, a wide variety of cases of state interference, control and intimidation of media professionals have come to light. That is one reason why Reporters Without Borders has warned of a steady deterioration of press freedom in Europe. The European Commission is right and justified in its desire to take action against this critical development and anti-democratic trend by means of a diverse and free media.

In some respects, however, the proposal for a regulation goes beyond what seems necessary to tackle these failings in some Member States. It is also questionable whether a regulation is really needed to achieve the objectives being pursued. The Audiovisual Media Services Directive is an example of how a directive can also be used to strengthen the internal market for media services at European level. A directive is also

a far more proportionate instrument, given the existence of what are already highly sophisticated systems of media regulation, such as Germany's system based on the Interstate Agreement on Media.

The German Bundestag is therefore critical of some aspects of the measures envisaged by the European Commission to achieve its objectives. However, it is unclear how a consistent level of media freedom in the EU internal market, and thus the ability of media companies to operate EU-wide with legal certainty, can be achieved just as well or better without EU regulation. This is particularly evident when it comes to cross-border cooperation between regulators, for example, or the regulation of large online platforms. In other words, while there is a clear need for the European Commission's draft to be revised, this does not, per se, rule out the approach of EU regulation. The issue is more the choice of legal form and its design.

The Court of Justice of the European Union (CJEU) has made clear that the pursuit of additional objectives, such as safeguarding media freedom in this case, does not preclude the applicability of the EU's competence for the internal market, for example in the Court's ruling on the question of a ban on tobacco advertising (CJEU, Case C-491/01, judgment of 10 December 2002). Germany's Federal Constitutional Court reached a similar ruling regarding the relationship between federal competences (responsibility for the law relating to economic matters) and the competences of the *Länder* or federal states (responsibility for cultural affairs) when, in its judgment of 28 January 2014, it confirmed that the federal Film Funding Act was constitutional and found that the fact that the legislation also pursued cultural objectives did not preclude the federal level having legislative competence arising from its responsibility for the law relating to economic matters (Federal Constitutional Court Decision 135, p. 155 et seqq.).

To look at the media landscape solely through an economic lens would be to ignore the media's dual nature as an economic and cultural asset. In any case, the German Bundestag believes it is essential to ensure that existing, well-functioning systems of media regulation in the Member States are not damaged by this regulatory proposal.

The German Bundestag also draws attention to the fact that culture and the media are a matter for the Member States, and in Germany responsibility rests with the *Länder*. It is precisely this decentralised approach which strengthens and fosters Europe's cultural diversity on the basis of common rules and values. In addition, the principle of media independence from the state is particularly valued and scrutinised in Germany, given the country's Nazi past and the regime's instrumentalisation of state media. Germany's existing system, in which private broadcasters are subject to decentralised, non-governmental and independent media supervision by fourteen *Land* supervisory authorities, is an effective and proven form of supervision. Public service broadcasting is overseen by pluralist supervisory bodies, whose members reflect German society in all its breadth and diversity.

In further negotiations on this regulatory proposal, it is essential to ensure that all of this is preserved and is not called into question by a European centralisation of media supervision.

For these and other reasons, the German Bundesrat registered a subsidiarity objection on 25 November 2022 and set out 16 points in support of its position.

- II. The German Bundestag also calls on the Federal Government, in awareness of the Bundesrat's 16 points and in relation to the negotiations with the European Commission,
- a) to take into account the subsidiarity objection registered by the German Bundesrat on 25 November 2022 and the legal and media-policy arguments set out in the associated Bundesrat printed paper 514/22 (B) in subsequent stages of the process, and to seek to ensure that the act is designed in a way which takes them into consideration;
 - b) to critically question, with regard to further negotiations, whether the act's objectives could not also be achieved by a directive;
 - c) to continue to facilitate decentralised, non-governmental and independent media supervision, and in particular to forgo the involvement of non-independent bodies in any European media supervision;
 - d) to seek to protect the freedom of the press and reverse potential interference in publishers' editorial freedom as a result of Article 6 in conjunction with recitals 20 and 21 of the draft, or at least shift them into the flanking recommendations;
 - e) to ensure that the requirements relating to the funding of public service broadcasting remain within the bounds of the Amsterdam Protocol, and that no additional review takes place of the funding requirements for public service broadcasting that are determined by the Member States in an independent process;
 - f) to place more stringent obligations on online platforms, by means of concrete procedural requirements, to consider media freedom and pluralism when taking moderation decisions and develop clear criteria for ensuring editorial independence;
 - g) to entrust the *Länder*, in coordination with the Federal Government, with conducting the negotiations on the European Media Freedom Act at European level, given that the federal system allocates responsibility for media and cultural policy to the *Länder*;
 - h) to breathe life into the following passage in the coalition agreement between the SPD, Alliance 90/The Greens and the FDP – “At European level, we will seek to ensure that the Digital Services Act (DSA), Digital Markets Act (DMA) and Media Freedom Act also reflect pluralism and diversity and guarantee independent media supervision and regulation.” – and to use the available means to press for pluralism, an independent media, and independent media supervision and regulation in Germany and Europe;
 - i) to support the arguments and concerns set out by the German Bundesrat in printed paper 514/22(B), and actively advocate them in the dialogue with the European Commission.
- III. The German Bundestag reserves the right to deliver an opinion again in due course.