



# The proposal for a European Media Freedom Act

**NOTE**

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Francisco Javier Cabrera Blázquez



# Foreword

In the 22 years since the start of the 21<sup>st</sup> Century, the media sector has undergone a massive transformation. We have discovered pay TV, set up social media accounts, and discovered a whole new realm of news outlets accessible with just a few clicks.

In recent years, the explosion of social media and video-on-demand services has brought both good and bad things: platforms where people can express themselves and connect with countless other people, but also disinformation and hate speech; more choice of content but also risks for the financing of European works and therefore for cultural diversity.

Over these decades, we have observed how the EU has reacted to these developments: the Audiovisual Media Services Directive (AVMSD) with its numerous revisions, the Media Pluralism Monitor and the Rule of Law Reports, and more recently the Digital Services Act (DSA) and the Digital Markets Act (DMA).

But in this decade, two developments have served as accelerators of history: the COVID pandemic and the war in Ukraine. The pandemic has accentuated already existing vulnerabilities and structural challenges of the European media sector, which faces increased competition with large platforms in a fragmented market. And the war in Ukraine has accentuated the disinformation conundrum.

The European Commission considers that there is a need for more EU legislation in the media field, and has therefore proposed an EU Regulation, the so-called European Media Freedom Act (EMFA). This publication presents the main lines of the EMFA proposal. The first part offers as a prelude the different steps leading to the adoption of the EMFA, the second part takes an in-depth look at the EMFA, and the third part provides an overview of views from regulators, industry stakeholders and academia. A final part lists the reservations put forward by several member state delegations at the Council of the EU's Audiovisual and Media Working Party (meetings of 13 and 25 October and 8 and 16 November 2022).

Strasbourg, December 2022

**Maja Cappello**

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# 1 Prelude

## 1.1 The announcement

In a speech delivered to the European Parliament's Committee on Culture and Education on 19 April 2021,<sup>1</sup> Commissioner Thierry Breton expressed his belief that the EU should "prepare a European Media Freedom Act to complement our legislative arsenal in order to ensure that media freedom and pluralism are the pillars of our democracies".

While the pandemic has accentuated the vulnerabilities and structural challenges of this sector, which faces increased competition with large platforms in a fragmented market, Mr. Breton also saw a multitude of opportunities, particularly with regard to digital transformation. After describing EU support measures for the sector and the state of play with regard to the adoption process of the Digital Services Act package, he addressed "the central issue" of media freedom and pluralism in Europe and the Commission's "Democracy" and "Media" action plans adopted last December. He declared himself "very vigilant" about respecting EU rules on the independence of media regulators, and expressed the need for a complementary tool to intervene in the area of media freedom, as the Commission's current toolbox is limited.

In Mr Breton's view, the EU needs a mechanism to increase transparency, independence and accountability around actions affecting control and freedom of the press. This would also be an opportunity to look at the resilience of small actors, and their innovative funding models. Furthermore, he proposed reflection on how best to strengthen the governance of public media around a common framework, to better counter the risks of politicisation and to better ensure diversity and pluralism. And finally, he suggested reflecting on the funding supporting pluralism and media freedom, and on the structures that carry this funding.

On 15 September 2021, President of the European Commission Ursula von der Leyen delivered her State of the Union address,<sup>2</sup> in which she outlined flagship initiatives which the Commission plans to undertake in the coming year. She announced two measures:

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<sup>1</sup> "For a « European Media Freedom Act », speech delivered to the European Parliament's Committee on Culture and Education on 19 April 2021 by Commissioner Thierry Breton, [https://ec.europa.eu/commission/commissioners/2019-2024/breton/announcements/european-media-freedom-act\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/breton/announcements/european-media-freedom-act_en).

<sup>2</sup> President of the European Commission Ursula von der Leyen, State of the Union 2021, 15 September 2021, [https://ec.europa.eu/info/strategy/strategic-planning/state-union-addresses/state-union-2021\\_en](https://ec.europa.eu/info/strategy/strategic-planning/state-union-addresses/state-union-2021_en).



- a recommendation to give journalists better protection
- a Media Freedom Act to stop those who threaten media freedom and safeguard the independence of media companies

## 1.2 The preparatory consultations

### 1.2.1 The call for evidence

On 21 December 2021, the European Commission started consultations on its upcoming European Media Freedom Act (EMFA) with a call for evidence<sup>3</sup> for an impact assessment.<sup>4</sup> Input could be provided until 25 March 2022.

The accompanying document explained i.a. issues to be considered (political context, problem definition, subsidiarity check), objectives and policy options.

#### 1.2.1.1 Political context, problem definition and subsidiarity check

The objective of the EMFA, included in the 2022 Commission Work Programme, is to establish a common framework for advancing the internal market in the media sector, thereby safeguarding media freedom and pluralism in that market. It would be aligned with the EU's efforts to nurture, protect and strengthen our democracy, which are at the heart of the Commission's priorities set out in President von der Leyen's political guidelines.

The EMFA would aim to tackle the following problems:

- different national rules on media pluralism,
- insufficient structures for cooperation between independent media regulators,
- instances of public and private interference in the ownership, management or operation of media outlets,

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<sup>3</sup> The Commission uses Call for evidence to define the scope of:

- a politically sensitive and/or important new law or policy
- an evaluation of an existing law or policy
- a fitness check of a bundle of related existing laws and/or policies.

A Call for evidence describes the problem to be tackled and objectives to be met, explains why EU action is needed, outlines policy options and describes the main features of the consultation strategy, including whether a public consultation with a questionnaire is needed. The Call for evidence combines two steps that were previously sequential: the roadmap/inception impact assessment and the questionnaire (where relevant). See [https://commission.europa.eu/law/law-making-process/planning-and-proposing-law\\_en#how-their-scope-is-defined](https://commission.europa.eu/law/law-making-process/planning-and-proposing-law_en#how-their-scope-is-defined).

<sup>4</sup> Press release of the European Commission, "European Media Freedom Act: Commission starts consultations with call for evidence", 21 December 2021, <https://digital-strategy.ec.europa.eu/en/news/european-media-freedom-act-commission-starts-consultations-call-evidence>.

- lack of media pluralism safeguards, including online.

As regards its legal basis, the EMFA would be based on the competence to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in member states, which have as their objective the establishment and functioning of the internal market under Article 114 of the Treaty on the Functioning of the European Union (TFEU).<sup>5</sup> It would build upon the revised Audiovisual Media Services Directive (AVMSD)<sup>6</sup> and would complement competition rules. It would also be complementary to the Digital Services Act package<sup>7</sup> and be fully aligned with the provisions of the Protocol on the system of public broadcasting in the member states (the “Amsterdam Protocol”).<sup>8</sup> And it would only focus on the areas where EU action appears necessary for the proper functioning of the internal media market and to ensure a level playing field and independent operation of media players across the EU.

### 1.2.1.2 Objectives and policy options

The key objectives of the legislative initiative would be to:

- ensure that media companies can operate in the internal market subject to consistent regulatory standards, including as regards media freedom and pluralism,
- ensure that EU citizens have access to a wide and varied media offering both offline and online,
- safeguard the editorial independence and independent management of the media, which is a precondition of media freedom and of the integrity of the internal market,
- foster undistorted competition between media companies by ensuring a transparent and fair allocation of state resources.

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<sup>5</sup> Consolidated version of the Treaty on the Functioning of the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.

<sup>6</sup> Consolidated text: Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version) (Text with EEA relevance), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02010L0013-20181218>.

<sup>7</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R2065>.

Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (Text with EEA relevance), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022R1925>.

<sup>8</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Protocol annexed to the Treaty of the European Community - Protocol on the system of public broadcasting in the Member States, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11997D%2FPRO%2F09>.





Three options were considered:

- Baseline scenario: the Commission would not propose any changes to the current legislative framework and would continue monitoring national developments through the annual Rule of Law Reports.
- Recommendation addressed to member states: It would encourage member states to implement a number of actions and could envisage a monitoring mechanism for the Commission in order to encourage its application by the member states. The European Regulators Group for Audiovisual Media Services (ERGA)<sup>9</sup> could serve as a forum for exchange of best practices.
- Legislative instrument + reinforced ERGA: EU legislation would:
  - establish common principles for national scrutiny procedures of media market transactions and other restrictions to market entry and operation of the media,
  - envisage measures to enhance transparency of media markets,
  - set out principles for the protection of editorial independence of the media, and the transparent allocation of state resources in the media sector,
  - aim to foster consistent regulatory and self-regulatory standards relevant for media pluralism, offline and online,
  - aim to create an enabling framework for media companies to foster innovation and cooperation across borders, in view of contributing to the sector's financial independence and long-term sustainability,
  - constitute an instrument underpinned by an effective and independent monitoring mechanism at the EU level and a structured cooperation framework for media regulators; it could build on the existing EU network of independent media regulators (ERGA), potentially reinforced with necessary powers and resources.

Stakeholders<sup>10</sup> were invited to express their views on the Commission's description of the initiative and explanation of why it is necessary and what it aims to achieve. In particular, the Commission aimed to gather:

- stakeholders' views on the current and emerging problems related to media freedom and pluralism, with a specific focus on obstacles/issues affecting the operation of the media in the EU internal market,
- evidence and concrete data underpinning the problems identified,
- stakeholders' views on the potential policy approach, options and impacts.

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<sup>9</sup> <https://erga-online.eu/>.

<sup>10</sup> Citizens, relevant member state authorities and bodies, academics, media actors (both private and public service media) and umbrella organisations representing any of the interested stakeholders.



## 1.2.2 The public consultation

This call for evidence was followed by an open public consultation in the form of a detailed survey initiated on 10 January 2022<sup>11</sup> and open until 25 March 2022.<sup>12</sup> The consultation aimed to gather views, evidence and data from citizens, in particular journalists, media (both private and public service media), academics, civil society, public authorities, businesses and all interested parties to help the Commission to shape these new rules.

The Commission summarised the 917 replies around the following issues:

- safeguarding the EU internal media market, media independence and pluralism,
- transparent and independent media markets,
- conditions for healthy media markets,
- fair allocation of state resources in the media markets,
- governance options.

### 1.2.2.1 Safeguarding the EU internal media market, media independence and pluralism

- 81% found the safeguards for media independence and pluralism in their member states unsatisfactory.
- 76% identified insufficient transparency on media ownership as the main difficulty encountered.
- The second biggest overall difficulty mentioned by 68% was diverging national scrutiny procedures over media market operations.
- 81% identified as the preferred EU-level action, enhancing transparency of media ownership and 71% enhancing transparency and fairness in the allocation of state advertising.
- Preferences over the most important area of EU-level action varied across stakeholder categories:
- Over half of companies and business organisations (16 out of 29) identified audience measurement methods.
- NGOs (30 out of 42) identified the independence of public service media governance.
- Public authorities (14 out of 19) and citizens (668 out of 776) identified transparency of media ownership as the most important area of action.

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<sup>11</sup> Press release of the European Commission, “European Media Freedom Act: Commission launches public consultation”, 10 January 2022, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_85](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_85).

<sup>12</sup> The questionnaire is no longer available. The consultation outcome, including a summary report and all contributions to the consultation, are available at: [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13206-Safeguarding-media-freedom-in-the-EU-new-rules/public-consultation\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13206-Safeguarding-media-freedom-in-the-EU-new-rules/public-consultation_en).



### 1.2.2.2 Transparent and independent media markets

The second set of questions related to the transparency and independence of media markets, with three subsections respectively on transparency of media ownership, media market scrutiny procedures and restrictions on media market entry and operation, and on audience measurement.

#### Transparency of media ownership:

- 94% agreed that it was important to have access to information on who owns or controls media companies.
- 81% claimed that this data was currently only available to a limited extent or not at all. Nearly half of companies (12 out of 29) and a third of business associations (10 out of 28) considered that the information is accessible to a large extent.
- 80% were in favour of the introduction of EU obligations on the part of all media companies in the EU to disclose their ownership structure, including beneficial owners with vast support particularly from citizens and NGOs.

#### Media market scrutiny procedures:

- more than 50% identified the best EU-level action as a requirement that member states justify any national measure that has the effect of restricting/limiting entry into or operation in the media market.

#### Transparency of audience measurement:

- Only 6-8% of citizens fully or somewhat agreed with the statement that audience measurement is carried out in a transparent, objective and inclusive way.
- Companies and business associations tend to consider audience measurement to be more transparent, objective and inclusive than citizens (68%, 51%, 47%, 47% and 40% fully agreeing or somewhat agreeing with the statement, respectively).
- However, only 5% of companies and associations fully or somewhat agreed with the statement that audience measurement for online platforms is transparent, objective and inclusive (3 out of 57).
- More than 50% claimed that EU action would be useful to ensure independent auditing of audience measurement.

### 1.2.2.3 Conditions for healthy media markets

- Balanced and impartial media coverage:
  - Over two thirds of EU citizens reported having encountered issues in accessing or being exposed to a diverse media offering.
  - 25 out of 29 companies and business organisations thought that the EU should not consider actions to ensure balanced and impartial media coverage and exposure to plurality of views.
- Regulatory convergence and cooperation: academic institutions, companies and business associations, citizens, NGOs, public authorities and trade unions all



identified common guidance or best practices exchange by independent media regulators on key areas of media regulation as the best action to ensure more regulatory convergence in the EU media market.

- Media self-regulation: more than 50% of citizens, 14% of companies and business associations and 12% of NGOs were unaware of media self-regulatory bodies.
- More respondents fully or somewhat agreed (355 out of 917) than fully or somewhat disagreed (302 out of 917) with the need for EU action to foster independence of media self-regulatory bodies.
- More than 50% claimed to be aware of problems regarding the application of journalistic standards and ethics in the EU. This was particularly the case among citizens (526 out of 776), trade unions (7 out of 9) and NGOs (24 out of 42).
- Technologies and processes relevant for media innovation:
  - 71% identified data spaces and analytics.
  - 339 of them identified artificial intelligence.
  - More than 50% of the business associations and companies considered that the editorial media's financial health has weakened in the last five years.
  - Around 33% of company and business association respondents (20 out of 57) claimed that improved access to finance for editorial media, including through guarantees for debt financing and equity investments, would help enhance the economic sustainability of media outlets.

#### 1.2.2.4 Fair allocation of state resources in the media markets

In this set of questions, respondents replied to sub-questions on the functioning of public service media and state advertising.

- Functioning of public service media:
  - 79% were aware of some instances of state interference in editorial decisions or management of public service media in some EU member states.
  - 70% claimed that this interference affected competition in the EU media market to a large or very large extent.
- State advertising:
  - Around 75% assessed the level of transparency of state advertising in their member state and the EU as a whole as insufficient.
  - A majority agreed, to a large or very large extent, that the main practices related to state advertising that create distortion in the internal market are:
    - The discrimination in the allocation of state advertising (612 respondents),
    - The absence of clear criteria for allocation (596),
    - The heavy reliance of media companies on state advertising to finance their operations (530),
- In this regard, just over 50% (486 out of 917) identified the introduction of reporting obligations for member states as the preferred EU-level action to improve transparency and fairness in the allocation.



#### 1.2.2.5 Governance options

- 12 out of 13 public authorities considered that the current institutional set-up of ERGA is not sufficient to enable national media regulators to effectively contribute to the proper functioning of the internal media market and safeguard media pluralism.
- 143 out of 917 respondents fully or somewhat agreed with ERGA being an independent European regulatory body, assisted by an independent secretariat.
- 105 out of 917 would retain the current ERGA status, a position receiving more support from companies and business associations (16 out of 57).

## 2 The EMFA proposal

### 2.1 The announcement

On 16 September 2022, the European Commission released its Proposal for a Regulation establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU.<sup>13</sup> In support, the Commission also published an Impact Assessment,<sup>14</sup> a Study supporting the impact assessment of the European Media Freedom Act,<sup>15</sup> and a Study on media plurality and diversity online.<sup>16</sup> Furthermore, the EMFA Proposal was accompanied by a Commission Recommendation on internal safeguards for editorial independence and ownership transparency in the media sector.<sup>17</sup>

According to the Commission, the European Media Freedom Act (EMFA) will ensure that media can operate more easily across borders in the EU internal market, without undue pressure and taking into account the digital transformation of the media space. The main issues dealt with by the EMFA are the following:<sup>18</sup>

- **Editorial independence:** member states will have to respect the effective editorial freedom of media service providers (MSPs) and improve the protection of journalistic sources. MSPs will have to ensure transparency of ownership by publicly disclosing such information and take measures with a view to guaranteeing the independence of individual editorial decisions.
- **Spyware against media:** the EMFA includes safeguards against the use of spyware against media, journalists and their families.
- **Public service media:** funding of public media should be adequate and stable, in order to ensure editorial independence. Heads and governing boards will have to be appointed in a transparent, open and non-discriminatory manner. Public

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<sup>13</sup> 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 (Text with EEA relevance), 16 September 2022, COM(2022) 457 final 2022/0277 (COD), <https://ec.europa.eu/newsroom/dae/redirection/document/89593>.

<sup>14</sup> European Media Freedom Act Impact Assessment, 16 September 2022, <https://digital-strategy.ec.europa.eu/en/library/european-media-freedom-act-impact-assessment>.

<sup>15</sup> Support for preparation of an impact assessment to accompany an EU initiative on the European Media Freedom Act – VIGIE 2021-644, 16 September 2022, <https://op.europa.eu/en/publication-detail/-/publication/66fe831e-34a4-11ed-8b77-01aa75ed71a1/language-en/format-PDF/source-266738737>.

<sup>16</sup> Study on media plurality and diversity online, 16 September 2022, <https://digital-strategy.ec.europa.eu/en/library/study-media-plurality-and-diversity-online>.

<sup>17</sup> Commission Recommendation of 16 September 2022 on internal safeguards for editorial independence and ownership transparency in the media sector, 16 September 2022, C(2022) 6536 final, <https://ec.europa.eu/newsroom/dae/redirection/document/89592>.

<sup>18</sup> See press release of the European Commission, “European Media Freedom Act: Commission proposes rules to protect media pluralism and independence in the EU”, 16 September 2022, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_5504](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5504).



service media providers shall provide a plurality of information and opinions, in an impartial manner, in accordance with their public service mission.

- Media pluralism: member states will have to assess the impact of media market concentrations on media pluralism and editorial independence. Any legislative, regulatory or administrative measure taken by a member state that could affect the media will have to be duly justified and proportionate.
- State advertising: the EMFA will establish new requirements for the allocation of state advertising to media, so that it is transparent and non-discriminatory. It will also enhance the transparency and objectivity of audience measurement systems, which have an impact on media advertising revenues, in particular online.
- Protection of media content online: The EMFA will build on the Digital Services Act and include safeguards against the unjustified removal of media content produced according to professional standards. In cases not involving systemic risks such as disinformation, very large online platforms (VLOPs) that intend to take down certain legal media content in application of the platform's policies will have to inform the MSPs before such takedowns take effect. Any complaints lodged by MSPs will have to be processed with priority by those platforms.
- User right to customise media offers: the EMFA will introduce a right of customisation of the media offer on devices and interfaces enabling users to change the default settings to reflect their own preferences.

Furthermore, the EMFA will set up a new independent European Board for Media Services comprised of national media authorities with the following missions:

- promoting the effective and consistent application of the EU media law framework, in particular by assisting the Commission in preparing guidelines on media regulatory matters,
- issuing opinions on national measures and decisions affecting media markets and media market concentrations,
- coordinating national regulatory measures regarding non-EU media that present a risk to public security to ensure that those media do not circumvent the applicable rules in the EU,
- organising a structured dialogue between VLOPs and the media sector to promote access to diverse media offers and to monitor platforms' compliance with self-regulatory initiatives, such as the EU Code of Practice on Disinformation.

The EMFA will now follow the ordinary legislative procedure and, if adopted, it will be directly applicable across the European Union. The Commission has announced that it will encourage discussions, notably as part of the European News Media Forum, on voluntary practices by media companies linked to the accompanying Recommendation.



## 2.2 The proposal in detail

### 2.2.1 Legal basis

#### 2.2.1.1 Rationale

According to the Preamble to the EMFA, its legal basis is Article 114 of the Treaty on the Functioning of the European Union (TFEU). The EMFA recitals explain in detail the rationale for this legal basis:

- Different approaches to the protection of editorial independence, growing interference with editorial decisions of MSPs in several member states, different laws aimed at regulating the provision of media content, and varied approaches taken by MSPs to guarantee editorial independence have a negative impact on the conditions for the exercise of economic activities by MSPs and, ultimately, the quality of media services received by citizens and businesses in the internal market. This has led the Commission to propose effective safeguards enabling the exercise of editorial freedom across the EU so that MSPs can independently produce and distribute their content across borders and service recipients can receive such content (Recital 15 EMFA).
- MSPs and journalists (including freelancers) should be able to rely on a robust protection of journalistic sources and communications, including against deployment of surveillance technologies, since without such protection sources may be deterred from assisting the media in informing the public on matters of public interest, thus affecting negatively access to quality media services (Recital 16). Given that the protection of journalistic sources is currently regulated heterogeneously in the member states,<sup>19</sup> journalists, who are increasingly working on cross-border projects and provide their services to cross-border audiences, and by extension providers of media services, are likely to face barriers, legal uncertainty and uneven conditions of competition. Therefore, the protection of journalistic sources and communications needs harmonisation and further strengthening at Union level (Recital 17).
- Interference in the mission of public service media providers (PSM) may lead to biased or partial media coverage, distort competition in the internal media market and negatively affect access to independent and impartial media services. It is also necessary to guarantee that, without prejudice to the application of the Union's State aid rules, public service media providers, in order to be able to fulfil their mission, benefit from sufficient and stable funding that enables predictability in their planning. (Recital 18 EMFA).

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<sup>19</sup> Some member states provide an absolute protection against coercing journalists to disclose information that identifies their source in criminal and administrative proceedings. Other member states provide a qualified protection confined to judicial proceedings based on certain criminal charges, while others provide protection in the form of a general principle.





- Ownership transparency is crucial for the recipients of media services so that they can identify and understand potential conflicts of interest – a prerequisite for forming well-informed opinions and consequently actively participating in a democracy. Such transparency is also an effective tool to limit the risks of interference with editorial independence (Recital 19 EMFA).
- Shielding editors from undue interference in their decisions contributes to ensuring a level playing field in the internal market for media services and the quality of such services. In view of these considerations, media service providers should also ensure transparency of actual or potential conflicts of interest to their service recipients (Recital 20 EMFA). Micro enterprises, however, should be exempted from the requirements related to information and internal safeguards, and media service providers should be free to tailor the internal safeguards to their needs, in particular if they are small and medium-sized enterprises. The EMFA does not deprive the owners of private media service providers of their prerogative to set strategic or general goals and to foster the growth and financial viability of their undertakings. The goal of fostering editorial independence needs to be reconciled with the legitimate rights and interests of private media owners (Recital 21).
- In order to ensure a consistent application of the EMFA and other EU media law, it is necessary to set up an independent advisory body at Union level comprising independent national regulatory authorities or bodies (NRAs) and coordinating their actions (Recital 22 EMFA). There has been an ever-increasing need for close cooperation among NRAs, in particular to resolve cross-border cases. Such a need is also justified in view of the need to respond to new challenges in the EU media environment, including by entrusting NRAs with new tasks (Recital 25 EMFA). Furthermore, it is essential to provide for a clear, legally binding framework for NRAs to cooperate effectively and efficiently so as to ensure the effective enforcement of Union media law, to prevent the possible circumvention of the applicable media rules by rogue media service providers and to avoid the raising of additional barriers in the internal market for media services (Recital 26 EMFA). Due to the pan-European nature of video-sharing platform services (VSPs), NRAs need a dedicated tool to protect viewers of VSPs from certain illegal and harmful content, including commercial communications (Recital 27 EMFA). The Commission may issue guidelines on matters covered by both the EMFA and the AVMSD in order to ensure a consistent regulatory practice regarding this Regulation. When deciding to issue guidelines, the Commission should consider in particular regulatory issues affecting a significant number of member states or those with a cross-border element. This is the case in particular for national measures taken under Article 7a of Directive 2010/13/EU on the appropriate prominence of audiovisual media services of general interest. In view of the abundance of information and the increasing use of digital means to access the media, it is important to ensure prominence for content of general interest, in order to help achieve a level playing field in the internal market and compliance with the fundamental right to receive information under Article 11 of the Charter of Fundamental Rights of the Union. Given the possible impact of the national measures taken under Article 7a on the functioning of the internal media market,



guidelines by the Commission would be important to achieve legal certainty in this field. It would also be useful to provide guidance on national measures taken under Article 5(2) AVMSD with a view to ensuring the public availability of accessible, accurate and up-to-date information related to media ownership (Recital 28 EMFA).

- It is necessary to find common technical prescriptions for devices controlling or managing access to and use of audiovisual media services or carrying digital signals conveying the audiovisual content from source to destination in order to ensure a level playing field in the provision of diverse audiovisual media services in the face of technological developments in the internal market (Recital 29 EMFA).
- The coordination between NRAs to face together possible public security and defence threats stemming from such media services needs to be strengthened and given a legal framework to ensure the effectiveness and possible coordination of the national measures adopted in line with Union media legislation (Recital 30 EMFA).

### 2.2.1.2 Article 114 TFEU

Article 114 TFEU provides in paragraph 1 the following:

*Article 114 (ex Article 95 TEC)*

*1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26.<sup>20</sup> The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.*

The EMFA aims at tackling the following issues hindering the provision of media services in the internal market:

- national restrictions related to sources and communications of journalists as service providers, affecting the production and provision of media services,
- interference in the operation of MSPs, including their editorial decisions, and diverging approaches to protection of editorial independence,
- the risk of state interference in public service media, to the detriment of a level playing field in the single market and quality of public service media,

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<sup>20</sup> Article 26 (formerly Article 14 TEC)

*1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.*

*2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.*

*3. The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.*



- the market operations of rogue operators (including MSPs that are state-controlled, be it financially or editorially, by certain third countries) that create tensions in the application of the free movement rules within the Union.
- given the increasing digitalisation of media service distribution, the risks to free provision of media services on VLOPs, to the detriment of a level playing field in the internal market,
- national media market measures affecting the operation of MSPs restricting free movement in the Union, thereby fragmenting the internal market and leading to legal uncertainty; the same applies to national rules and procedures for the assessment of the impact of media market concentrations on media pluralism and editorial independence,
- opacity and possible biases in audience measurement systems and methodologies, leading to market distortion, to the detriment of the level playing field in the internal market,
- unfair and non-transparent allocation of state advertising expenditure to MSPs, to the detriment of other MSPs, including those established in other member states.

Moreover, Article 114 TFEU is, according to the Commission, an appropriate legal basis for the creation of new structures under EU law such as the proposed EU-level Board, which would be tasked with promoting the effective and consistent application of EU media rules.

### 2.2.1.3 Subsidiarity and proportionality

According to Recital 52 EMFA, the objectives of the EMFA can be better achieved at the Union level because of the increasingly digital and cross-border production, distribution and consumption of media content as well as the unique role of media services. Therefore, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU).<sup>21</sup> In accordance with the principle of

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<sup>21</sup> Consolidated version of the Treaty on European Union,  
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT>

#### Article 5

1. *The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.*

2. *Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the member states in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.*

3. *Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*

*The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.*

4. *Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.*



proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

#### 2.2.1.4 Public-service broadcasting

The EMFA takes into account the Amsterdam Protocol<sup>22</sup> and Article 4(2) TEU.<sup>23</sup> According to the Commission, it will not interfere with member states' competence to provide funding to public service media so that they can fulfil their public service remit, as conferred, defined and organised at national level, nor will it interfere with national identities or regulatory traditions in the media field.

#### 2.2.1.5 Choice of legal form

The EMFA takes the form of a regulation of the European Parliament and of the Council since, in the Commission's view, a regulation is more suitable than a directive to ensure a consistent level of protection throughout the EU, allowing for a quick application of the new EU rules, avoiding a lengthy transposition process, and preventing potential divergences or distortions during the transposition process. A regulation is also preferable given the initiative's institutional component (the establishment of the Board) and due to the increasing digitalisation and cross-border provision of media services, which calls for a swift, consistent approach across the internal market. Directly applicable provisions will further ensure effective and efficient cooperation among national media regulatory authorities and bodies of the member states.

## 2.2.2 Subject matter, scope and definitions

### 2.2.2.1 Subject matter and scope (Article 1 EMFA)

The EMFA lays down common rules for the proper functioning of the internal market for media services, including the establishment of the European Board for Media Services, while preserving the quality of media services. It does not affect rules laid down by the e-commerce Directive, the Directive on Copyright in the Digital Single Market, the Regulation on promoting fairness and transparency for business users of online intermediation

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*The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.*

<sup>22</sup> See Recital 18 EMFA.

<sup>23</sup> Article 4(2) TEU:

*2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.*



services, the Digital Services Act, the Digital Markets Act, and the Regulation on the transparency and targeting of political advertising. Furthermore, it will not affect the possibility for member states to adopt more detailed rules in the fields covered by Chapter II (Rights and duties of MSPs and recipients) and Section 5 of Chapter III (Requirements for well-functioning media market measures and procedures), provided that those rules comply with Union law.

### 2.2.2.2 Definitions (Article 2 EMFA)

Article 2 EMFA provides a series of definitions based on previous EU legislation, in particular the AVMSD but also the Copyright Directive and the DSA. “Media service” means a service as defined by Articles 56 and 57 of the Treaty, where the principal purpose of the service or a dissociable section thereof consists in providing programmes (as defined in the AVMSD<sup>24</sup> but including audio programmes as well) or press publications (as defined in the Copyright Directive<sup>25</sup>) to the general public, by any means, in order to inform, entertain or educate, under the editorial responsibility of an MSP. As such, this definition covers in particular (Recital 7 EMFA):

- television or radio broadcasts,
- on-demand audiovisual media services,
- audio podcasts,
- press publications.

Accordingly, the definition excludes:

- user-generated content uploaded to an online platform unless it constitutes a professional activity normally provided for consideration (be it of financial or of other nature),
- purely private correspondence, such as e-mails,
- all services that do not have the provision of audiovisual or audio programmes or press publications as their principal purpose, such as advertisements or information related to a product or a service provided by websites that do not offer media services,
- corporate communication and distribution of informational or promotional materials for public or private entities.

According to Recital 8 EMFA, providers of video-sharing platforms<sup>26</sup> or VLOPs<sup>27</sup> may fall under the definition of MSP when they exercise editorial control over a section or sections of their services. In such a case, such providers could be qualified both as a VLOP and as a MSP.

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<sup>24</sup> See Article 1(1), point (a), of Directive 2010/13/EU.

<sup>25</sup> See Article 2(4) of Directive 2019/790/EU.

<sup>26</sup> See Article 1(1), point (aa), of Directive 2010/13/EU.

<sup>27</sup> See Article 25(4) DSA.



The concepts of “editorial responsibility” and “editorial decision” reproduce *mutatis mutandis* those of the AVMSD, including the definition of “editor” as a natural person or a number of natural persons possibly grouped in a body, regardless of its legal form, status and composition, that takes or supervises editorial decisions within an MSP.

Other definitions included in Article 2 EMFA:

- “National regulatory authority or body” means the authority or body designated by member states pursuant to Article 30 of Directive 2010/13/EU.
- “Media market concentration” means a concentration as defined in Article 3 of Regulation (EC) No 139/2004<sup>28</sup> involving at least one MSP.
- “Audience measurement” means the activity of collecting, interpreting or otherwise processing data about the number and characteristics of users of media services for the purposes of decisions regarding advertising allocation or prices or the related planning, production or distribution of content. This definition covers both measurement systems developed as agreed by industry standards within self-regulatory organisations, like the Joint Industry Committees, and measurement systems developed outside such self-regulatory approaches (Recital 9 EMFA).
- “State advertising” means the placement, publication or dissemination, in any media service, of a promotional or self-promotional message, normally in return for payment or for any other consideration, by, for or on behalf of any national or regional public authority, such as national, federal or regional governments, regulatory authorities or bodies as well as state-owned enterprises or other state-controlled entities at the national or regional level, or any local government of a territorial entity of more than one million inhabitants. According to Recital 10 EMFA, state advertising should be understood broadly as covering promotional or self-promotional activities undertaken by, for or on behalf of a wide range of public authorities or entities, including governments, regulatory authorities or bodies as well as state-owned enterprises or other state-controlled entities in different sectors, at national or regional level, or local governments of territorial entities of more than one million inhabitants. However, the definition of state advertising should not include emergency messages by public authorities which are necessary, for example, in cases of natural or sanitary disasters, accidents or other sudden incidents that can cause harm to individuals.
- “Spyware” means any product with digital elements specially designed to exploit vulnerabilities in other products with digital elements that enables the covert surveillance of natural or legal persons by monitoring, extracting, collecting or analysing data from such products or from the natural or legal persons using such products, in particular by secretly recording calls or otherwise using the microphone of an end-user device, filming natural persons, machines or their surroundings, copying messages, photographing, tracking browsing activity, tracking geolocation, collecting other sensor data or tracking activities across

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<sup>28</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004R0139>.



multiple end-user devices, without the natural or legal person concerned being made aware in a specific manner and having given their express specific consent in that regard.

- “Serious crime” means any of the following criminal offences listed in Article 2(2) of the Council Framework Decision 2002/584/JHA 58:
- terrorism,
- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in weapons, munitions and explosives,
- murder, grievous bodily injury,
- illicit trade in human organs and tissues,
- kidnapping, illegal restraint and hostage-taking,
- organised or armed robbery,
- rape,
- crimes within the jurisdiction of the International Criminal Court.

## 2.2.3 Rights and duties of MSPs and recipients

### 2.2.3.1 General right to content plurality (Article 3 EMFA)

Article 3 EMFA introduces a right for recipients of media services in the Union to receive a plurality of news and current affairs content, produced with respect for editorial freedom of MSPs, to the benefit of the public discourse. But such a right, according to Recital 11 EMFA, does not entail any correspondent obligation on any given MSP to adhere to standards not set out explicitly by law. Moreover, the EMFA does not affect the freedom of expression guaranteed to individuals under the Charter of Fundamental Rights of the European Union<sup>29</sup> (Recital 12 EMFA).

### 2.2.3.2 Rights of MSPs (Article 4 EMFA)

According to Recital 13 EMFA, the provision of media services should not be subject to any restrictions contrary to the EMFA or other EU legislation (such as the AVMSD). Restrictions may derive from measures applied by national public authorities in compliance with EU law.

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<sup>29</sup> Charter of Fundamental Rights of the European Union,  
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>

Article 52 of the Charter

Scope of guaranteed rights

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.





Article 4 EMFA lists the rights of MSPs:

- MSPs shall have the right to exercise their economic activities in the internal market without restrictions other than those allowed under Union law.
- Member states shall respect the effective editorial freedom of MSPs. This means that member states, including their national regulatory authorities and bodies, must not:
  - Interfere in or try to influence in any way, directly or indirectly, editorial policies and decisions by MSPs
  - Detain, sanction, intercept, subject to surveillance or search and seizure, or inspect MSPs or, if applicable, their family members, their employees or their family members, or their corporate and private premises, on the ground that they refuse to disclose information on their sources, unless this is justified by an overriding requirement in the public interest, in accordance with Article 52(1) of the Charter and in compliance with other Union law
  - Deploy spyware in any device or machine used by MSPs or, if applicable, their family members, or their employees or their family members, unless the deployment is justified, on a case-by-case basis, on grounds of national security and is in compliance with Article 52(1) of the Charter and other Union law or the deployment occurs in serious crimes investigations of one of the aforementioned persons, it is provided for under national law and is in compliance with Article 52(1) of the Charter and other Union law, and measures adopted pursuant to sub-paragraph (b) would be inadequate and insufficient to obtain the information sought.
- Member states must designate, without prejudice and in addition to the right to effective judicial protection guaranteed to each natural and legal person, an independent authority or body to handle complaints lodged by MSPs or, if applicable, their family members, their employees or their family members, regarding breaches of the rules on disclosure of information and spyware deployment mentioned *supra*. MSPs shall have the right to request that authority or body to issue, within three months of the request, an opinion regarding compliance with the said rules.

### 2.2.3.3 Rights and duties of public service media providers (Article 5 EMFA)

Regarding public service media, Article 5 EMFA requires that public service media providers (PSM) provide in an impartial manner a plurality of information and opinions to their audiences, in accordance with their public service mission. It lists a number of principles that apply to the governance of PSMs:<sup>30</sup>

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<sup>30</sup> For an in-depth look at the various aspects of governance of public service media and its role in safeguarding the independence of PSM see Cabrera Blázquez F.J., Cappello M., Talavera Milla J., Valais S., *Governance and independence of public service media*, IRIS Plus, European Audiovisual Observatory, Strasbourg, February 2022, <https://rm.coe.int/iris-plus-2022en1-governance-and-independence-of-public-service-media/1680a59a76>.





- PSM heads of management and members of governing boards must be appointed through a transparent, open and non-discriminatory procedure and on the basis of transparent, objective, non-discriminatory and proportionate criteria laid down in advance by national law.
- The duration of their term of office shall be established by national law and be adequate and sufficient to ensure effective independence of the public MSP.
- Their dismissal may happen before the end of their term of office only exceptionally where they no longer fulfil the legally predefined conditions required for the performance of their duties laid down in advance by national law or for specific reasons of illegal conduct or serious misconduct as defined in advance by national law. Such dismissal decisions shall be duly justified, subject to prior notification to the person concerned, and include the possibility for judicial review. The grounds for dismissal shall be made available to the public.

Member states shall ensure that public service media providers have adequate and stable financial resources for the fulfilment of their public service mission. Those resources shall be such that editorial independence is safeguarded. According to Recital 18 EMFA, such funding should be preferably decided and appropriated on a multi-year basis, in line with the public service mission of public service media providers, to avoid potential for undue influence from yearly budget negotiations. These do not affect, however, the competence of member states to provide for the funding of public service media as enshrined in the Amsterdam Protocol (Recital 18 EMFA).

Member states must designate one or more independent authorities or bodies in order to monitor compliance with the abovementioned rights and duties of PSMs.

#### 2.2.3.4 Duties of MSPs providing news and current affairs content (Article 6 EMFA)

Article 6 provides that MSPs providing news and current affairs content<sup>31</sup> shall make easily and directly accessible to the recipients of their services the following information:

- their legal name and contact details,
- the name(s) of their direct or indirect owner(s) with shareholdings enabling them to exercise influence on the operation and strategic decision-making,
- the name(s) of their beneficial owners within the meaning of Article 3, point 6 of the Anti-Money Laundering Directive.<sup>32</sup>

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<sup>31</sup> These obligations do not apply to MSPs that are micro enterprises within the meaning of Article 3 of Directive 2013/34/EU.

<sup>32</sup> Consolidated text: Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Text with EEA relevance), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02015L0849-20210630>.



Without prejudice to national constitutional laws consistent with the Charter, MSPs providing news and current affairs content shall take measures that they deem appropriate with a view to guaranteeing the independence of individual editorial decisions. In particular, such measures shall aim to:

- guarantee that editors are free to take individual editorial decisions in the exercise of their professional activity,
- ensure disclosure of any actual or potential conflict of interest by any party having a stake in MSPs that may affect the provision of news and current affairs content.

## 2.2.4 Framework for regulatory cooperation and a well-functioning internal market for media services

### 2.2.4.1 Independent media authorities (Article 7 EMFA)

According to Article 30(1) AVMSD, each member state

*shall designate one or more national regulatory authorities, bodies, or both. Member States shall ensure that they are legally distinct from the government and functionally independent of their respective governments and of any other public or private body. This shall be without prejudice to the possibility for Member States to set up regulators having oversight over different sectors.*

These NRAs will be responsible for the application of the framework for regulatory cooperation and a well-functioning internal market for media services and shall be subject to the requirements set out in Article 30 AVMSD in relation to the exercise of the tasks assigned to them by the EMFA.

Member states must ensure that the national regulatory authorities or bodies have adequate financial, human and technical resources to carry out their tasks under this Regulation. They must also have appropriate powers of investigation, in particular the power to request regulatees to provide, within a reasonable time period, information that is proportionate and necessary for carrying out the tasks under Chapter III concerning the framework for regulatory cooperation and a well-functioning internal market for media services; the request can also be addressed to any other person that, for purposes related to their trade, business or profession, may reasonably be in possession of the information needed.

### 2.2.4.2 European Board for Media Services (Articles 8-12 EMFA)

The EMFA will establish an independent European Board for Media Services (“the Board”) to replace and succeed ERGA. The Board will promote the effective and consistent application of the EMFA and of national rules implementing the AVMSD throughout the Union. The Board shall:



- support the Commission, through technical expertise, in ensuring the correct application of the EMFA and the consistent implementation of the AVMSD across all member states, without prejudice to the tasks of national regulatory authorities or bodies,
- promote cooperation and the effective exchange of information, experience and best practices between the national regulatory authorities or bodies on the application of the Union and national rules applicable to media services, including the EMFA and the AVMSD, in particular as regards Articles 3 (freedom of reception and retransmission), 4 (more detailed or stricter rules) and 7 (accessibility to persons with disabilities) of the AVMSD,
- advise the Commission, where requested by it, on regulatory, technical or practical aspects pertinent to the consistent application of the EMFA and implementation of the AVMSD as well as on all other matters related to media services within its competence; where the Commission requests advice or opinions from the Board, it may indicate a time limit, taking into account the urgency of the matter,
- when requested by the Commission, provide opinions on the technical and factual issues that arise with regard to Article 2(5c) (jurisdiction disputes regarding AVMS), Article 3(2) and (3) (derogation from freedom of reception and retransmission), Article 4(4), point (c) (compatibility of national measures taken by member states) and Article 28a(7) (jurisdiction disputes regarding VSPs) of the AVMSD,
- in agreement with the Commission, draw up opinions with respect to:
  - requests for cooperation and mutual assistance between national regulatory authorities or bodies, in accordance with Article 13(7) EMFA,
  - requests for enforcement measures in case of disagreement between the requesting authority or body and the requested authority or body regarding the actions recommended pursuant to Article 14(4) EMFA,
  - national measures concerning MSPs established outside of the Union, in accordance with Article 16(2) EMFA,
- upon request of the Commission, draw up opinions with respect to:
  - national measures which are likely to affect the functioning of the internal market for media services, in accordance with Article 20(4) EMFA,
  - media market concentrations which are likely to affect the functioning of the internal market for media services, in accordance with Article 22(1) EMFA,
- draw up opinions on draft national opinions or decisions assessing the impact on media pluralism and editorial independence of a notifiable media market concentration where such a concentration may affect the functioning of the internal market, in accordance with Article 21(5) EMFA,
- assist the Commission in drawing up guidelines with respect to:
  - the application of the EMFA and of the national rules implementing the AVMSD, in accordance with Article 15(2) EMFA,
  - factors to be taken into account when applying the criteria for assessing the impact of media market concentrations, in accordance with Article 21(3) EMFA,



- the application of Articles 23(1), (2) and (3) pursuant to Article 23(4) EMFA,
- upon request of at least one of the concerned authorities, mediate in the case of disagreements between national regulatory authorities or bodies, in accordance with Article 14(3) EMFA,
- foster cooperation on technical standards related to digital signals and the design of devices or user interfaces, in accordance with Article 15(4) EMFA,
- coordinate national measures related to the dissemination of or access to content of MSPs established outside of the Union that target audiences in the Union, where their activities prejudice or present a serious and grave risk of prejudice to public security and defence, in accordance with Article 16(1) EMFA,
- organise a structured dialogue between VLOPs, representatives of MSPs and of civil society, and report on its results to the Commission, in accordance with Article 18 EMFA,
- foster the exchange of best practices related to the deployment of audience measurement systems, in accordance with Article 23(5) EMFA.

The Board will be composed of representatives of NRAs referred to in Article 30 AVMSD, and each member of the Board shall have one vote. In the case that a member state has more than one national regulatory authority or body, those regulatory authorities or bodies shall coordinate with each other as necessary and appoint a joint representative which shall exercise the right to vote.

The Chair of the Board will be elected from amongst its members by a two-thirds majority of its members with voting rights for a term of office of two years. All other decisions will also be taken by a two-thirds majority.

The Commission will participate in all activities and meetings of the Board (without voting rights) through its representative. The Commission will be informed about the ongoing and planned activities of the Board and will be consulted in preparation of the Board's work programme and main deliverables.

The Board, in agreement with the Commission, may invite experts and observers to attend its meetings.

The Board's secretariat will be provided by the Commission. The main task of the secretariat shall be to contribute to the execution of the tasks of the Board laid down in both the EMFA and the AVMSD. It will provide administrative and organisational support to the activities of the Board. The secretariat shall also assist the Board in carrying out its tasks.

#### 2.2.4.3 Regulatory cooperation and convergence (Articles 13-16 EMFA)

According to Recital 30 EMFA, NRAs have specific practical expertise useful when it comes to protecting the internal market from activities of MSPs established outside the Union that may prejudice or pose risks of prejudice to public security and defence. A mechanism of accelerated mutual cooperation and assistance should be available to guarantee the *effet utile* of relevant national measures. Additionally, it is necessary to coordinate the national



measures that may be adopted to counter public security and defence threats by media services established outside of the Union and targeting audiences in the Union, including via Board opinions. Risks to public security and defence need to be assessed with a view to all relevant factual and legal elements, at national and European level. This is without prejudice to the competence of the Union under Article 215 TFEU concerning EU restrictive measures.<sup>33</sup>

#### 2.2.4.3.1 Structured cooperation

The EMFA introduces a system of regulatory cooperation whereby an NRA may request (“requesting NRA”) cooperation or mutual assistance at any time from one or more NRAs (“requested NRAs”) for the purposes of exchange of information or taking measures relevant for the consistent and effective application of the EMFA or the national measures implementing the AVMSD. The requested NRA shall do its utmost to address and reply to the request without undue delay. The requested NRA shall provide intermediary results within the period of 14 calendar days from the receipt of the request, with subsequent regular updates on the progress of execution of the request.

Moreover, an NRA may request other NRAs to provide accelerated cooperation or mutual assistance, while ensuring compliance with fundamental rights (in particular freedom of expression), in cases of serious and grave risk of prejudice to the functioning of the internal market for media services or a serious and grave risk of prejudice to public security and defence. The requested NRA shall address and reply to the request within 14 calendar days.

The requested NRA must inform the requesting NRA of the results achieved or of the progress of the measures taken in response to the request.

If the requesting NRA does not consider the measures taken by the requested NRA to be sufficient to address and reply to its request, it shall inform the requested NRA without undue delay, explaining the reasons for its position. In case of disagreement or if the requested NRA’s reaction is missing, either NRA may refer the matter to the Board. Within 14 calendar days from the receipt of that referral, the Board shall issue, in agreement with the Commission, an opinion on the matter, including recommended actions. The requested NRA must “do its utmost” to take into account the opinion of the Board.

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<sup>33</sup> Article 215 TFEU

1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.

2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.

3. The acts referred to in this Article shall include necessary provisions on legal safeguards.

<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E215:EN:HTML>.



The requested NRA may refuse to address the request, providing reasons for such a refusal, only if:

- it is not competent for the subject matter of the request or for the measures it is requested to take,
- execution of the request would infringe the EMFA, the AVMSD or other Union legislation or member state law compliant with Union law to which the requested NRA is subject.

#### 2.2.4.3.2 Requests for enforcement of obligations by video-sharing platforms

An NRA may request that another NRA take necessary and proportionate actions for the effective enforcement of the obligations imposed on video-sharing platforms under Article 28b of the AVMSD. The requested NRA must, without undue delay and within 30 calendar days, inform the requesting NRA about the actions taken or planned. In the event of a disagreement between the requesting and requested NRAs, either NRA may refer the matter to the Board for mediation in view of finding an amicable solution. If no amicable solution has been found following mediation by the Board, the requesting NRA or the requested NRA may request the Board to issue an opinion on the matter. In its opinion the Board must assess whether the requested NRA has complied with the request. If it is not the case, the Board shall recommend actions to comply with the request. The Board shall issue its opinion, in agreement with the Commission, “without undue delay”. The requested NRA shall inform the Board, the Commission and the requesting authority or body of the actions taken or planned in relation to the opinion of the Board without undue delay and within 30 calendar days at the latest from the receipt of the opinion.

#### 2.2.4.3.3 Guidance on media regulation matters

The Board shall foster the exchange of best practices among the NRAs on regulatory, technical or practical aspects pertinent to the consistent and effective application of the EMFA and of the national rules implementing the AVMSD. This will be done in consultation with stakeholders, where appropriate, and in close cooperation with the Commission.

The Board shall assist the Commission’s issuing of guidelines related to the application of the EMFA or the national rules implementing the AVMSD, by providing expertise on regulatory, technical or practical aspects. This will concern in particular:

- the appropriate prominence of audiovisual media services of general interest under Article 7a of Directive 2010/13/EU,
- making information accessible on the ownership structure of MSPs, as provided under Article 5(2) of Directive 2010/13/EU.

The Board shall assist the Commission, where requested, in issuing opinions on any matter related to the application of the EMFA and of the national rules implementing the AVMSD.

The Board shall foster cooperation between MSPs, standardisation bodies or any other relevant stakeholders in order to facilitate the development of technical standards



related to digital signals or design of devices or user interfaces controlling or managing access to and use of audiovisual media services.

#### 2.2.4.3.4 Coordination of measures concerning MSPs established outside the Union

The Board will coordinate measures by NRAs related to the dissemination of or access to media services provided by MSPs established outside the Union that target audiences in the Union where such media services prejudice or present a serious and grave risk of prejudice to public security and defence. This is the case especially in view of the control that may be exercised by third countries over them. In such cases, the Board may issue opinions on appropriate national measures “in agreement” with the Commission. All competent national authorities, including NRAs, must do “their utmost” to take into account the opinions of the Board.<sup>34</sup>

#### 2.2.4.4 Provision of media services in a digital environment (Articles 17-19 EMFA)

##### 2.2.4.4.1 Content of MSPs on very large online platforms

According to Recital 31 EMFA, MSPs that exercise editorial responsibility over their content play an important role in the distribution of information and in the exercise of freedom of information online. Therefore, the EMFA introduces an obligation for VLOPs to “duly consider freedom and pluralism of media” when dealing with the content of such MSPs.

VLOPs shall provide a functionality allowing recipients of their services to declare that they are:

- an MSP within the meaning of Article 2(2),
- editorially independent from member states and third countries,
- subject to regulatory requirements for the exercise of editorial responsibility in one or more member states, or adhering to a co-regulatory or self-regulatory mechanism governing editorial standards, widely recognised and accepted in the relevant media sector in one or more member states.

According to Recital 33 EMFA, VLOPs may rely on information regarding adherence to these requirements, such as the machine-readable standard of the Journalism Trust Initiative or other relevant codes of conduct. Guidelines by the Commission may be useful to facilitate an effective implementation of such functionality.

If a VLOP decides to suspend the provision of its online intermediation services with regard to content provided by an MSP that has submitted the above-mentioned declaration,

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<sup>34</sup> For more information on recent issues regarding the war in Ukraine see Cabrera Blázquez F.J., *The implementation of EU sanctions against RT and Sputnik*, European Audiovisual Observatory, Strasbourg, 2022, <https://rm.coe.int/note-rt-sputnik/1680a5dd5d> and Richter A., *Sanction law against Russian and Belarusian audiovisual media*, Strasbourg, November 2022, <https://rm.coe.int/iris-extra-2022-sanction-law-against-russian-and-belarusian-audiovisua/1680a8ff9f>.





on the grounds that such content is incompatible with its terms and conditions, without that content contributing to a systemic risk referred to in Article 26 DSA, it must take all possible measures, to the extent consistent with its obligations under Union law, including the DSA, to communicate to the MSP concerned the statement of reasons accompanying that decision, as required by Article 4(1) of Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services,<sup>35</sup> prior to the suspension taking effect.

VLOPs shall take all the necessary technical and organisational measures to ensure that complaints<sup>36</sup> by MSPs that have submitted a declaration are processed and decided upon with priority and without undue delay.

Where an MSP that has submitted a declaration pursuant to paragraph 1 considers that a VLOP frequently restricts or suspends the provision of its services in relation to content provided by the MSP without sufficient grounds, the VLOP shall engage in a “meaningful and effective” dialogue with the MSP, upon its request, in good faith with a view to finding an amicable solution for terminating unjustified restrictions or suspensions and avoiding them in the future. The MSP may notify the outcome of such exchanges to the Board.

VLOPs shall make publicly available on an annual basis information on:

- the number of instances where they imposed any restriction or suspension on the grounds that the content provided by an MSP that submitted a declaration in accordance with paragraph 1 of this Article was incompatible with their terms and conditions,
- the grounds for imposing such restrictions.

The Commission may issue guidelines to establish the form and details of the declaration with a view to facilitating the consistent and effective implementation of these rules.

#### 2.2.4.4.2 Structured dialogue

The Board shall regularly organise a structured dialogue between VLOPs, representatives of MSPs and representatives of civil society to discuss experience and best practices in the application of Article 17 of this Regulation, to foster access to diverse offers of independent media on VLOPs and to monitor adherence to self-regulatory initiatives aimed at protecting society from harmful content, including disinformation and foreign information manipulation and interference. The Board shall report on the results of the dialogue to the Commission.

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<sup>35</sup> Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (Text with EEA relevance), <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32019R1150>.

<sup>36</sup> See Article 11 of Regulation (EU) 2019/1150.





#### 2.2.4.4.3 Right of customisation of audiovisual media offer

The EMFA introduces a right for users to easily change the default settings of any device or user interface controlling or managing access to and use of audiovisual media services in order to customise the audiovisual media offer according to their interests or preferences in compliance with the law. This provision shall not affect national measures implementing Article 7a of the AVMSD concerning measures to ensure the appropriate prominence of audiovisual media services of general interest. Manufacturers and developers shall ensure that they include a functionality enabling users to freely and easily change the default settings controlling or managing access to and use of the audiovisual media services offered.

#### 2.2.4.5 Requirements for well-functioning media market measures and procedures (Articles 20-22 EMFA)

##### 2.2.4.5.1 National measures affecting the operation of MSPs

Measures taken by a member state that are liable to affect the operation of MSPs in the internal market shall be duly justified and proportionate. Such measures shall be reasoned, transparent, objective and non-discriminatory. National procedures used for the purposes of the preparation or the adoption of regulatory or administrative measures shall be subject to clear timeframes set out in advance.

MSPs subject to such administrative or regulatory measures will have the right to appeal against that measure to an appellate body. That body shall be independent of the parties involved and of any external intervention or political pressure liable to jeopardise its independent assessment of matters coming before it. It shall have the appropriate expertise to enable it to carry out its functions effectively.

The Board, upon request of the Commission, shall draw up an opinion where a national legislative, regulatory or administrative measure is likely to affect the functioning of the internal market for media services. Following the opinion of the Board, and without prejudice to its powers under the Treaties, the Commission may issue its own opinion on the matter. Opinions by the Board and, where applicable, by the Commission shall be made publicly available.

Where an NRA adopts a measure that affects individually and directly an MSP and is likely to affect the functioning of the internal market for media services, it shall communicate, at the request of the Board, and where applicable, of the Commission, without undue delay and by electronic means, any relevant information, including the summary of the facts, its measure, the grounds on which the national authority or body has based its measure, and, where applicable, the views of other authorities concerned.



#### 2.2.4.5.2 Assessment of media market concentrations

Member states must provide substantive and procedural rules which ensure an assessment of media market concentrations that could have a significant impact on media pluralism and editorial independence. These rules must:

- be transparent, objective, proportionate and non-discriminatory,
- require the parties to a media market concentration that could have a significant impact on media pluralism and editorial independence to notify that concentration in advance to the relevant NRAs,
- designate the NRA as responsible for the assessment of the impact of a notifiable concentration on media pluralism and editorial independence or ensure the involvement of the NRA in such an assessment,
- set out in advance objective, non-discriminatory and proportionate criteria for notifying media market concentrations that could have a significant impact on media pluralism and editorial independence and for assessing the impact of media market concentrations on media pluralism and editorial independence.

This assessment shall be distinct from the competition law assessments including those provided for under merger control rules. It shall be without prejudice to Article 21(4) of Regulation (EC) No 139/2004, where applicable.

The following elements shall be taken into account:

- the impact of the concentration on media pluralism, including its effects on the formation of public opinion and on the diversity of media players on the market, taking into account the online environment and the parties' interests, links or activities in other media or non-media businesses,
- the safeguards for editorial independence, including the impact of the concentration on the functioning of the editorial teams and the existence of measures by MSPs taken with a view to guaranteeing the independence of individual editorial decisions,
- whether, in the absence of the concentration, the acquiring and acquired entity would remain economically sustainable, and whether there are any possible alternatives to ensure its economic sustainability; according to Recital 44 EMFA, this sustainability means that the entities would be able in the medium term to continue to provide and further develop financially viable, adequately resourced and technologically adapted quality media services in the market.

The Commission, assisted by the Board, may issue guidelines on the factors to be taken into account when applying the criteria for assessing the impact of media market concentrations on media pluralism and editorial independence by the national regulatory authorities or bodies.

The NRA shall consult the Board in advance on any opinion or decision it aims to adopt assessing the impact on media pluralism and editorial independence of a notifiable media market concentration where such concentrations may affect the functioning of the internal market. This would be the case, according to Recital 43 EMFA, where such



concentrations involve at least one undertaking established in another member state or operating in more than one member state or result in media service providers having a significant influence on formation of public opinion in a given media market.

Within 14 calendar days from the receipt of the consultation, the Board shall draw up an opinion on the draft national opinion or decision referred to it, taking account of the elements referred to *supra* and transmit that opinion to the consulting authority and the Commission.

The NRA shall take utmost account of the Board's opinion. Where that NRA does not follow the opinion, fully or partially, it shall provide the Board and the Commission with a reasoned justification explaining its position within 30 calendar days from the receipt of that opinion. Without prejudice to its powers under the Treaties, the Commission may issue its own opinion on the matter.

#### 2.2.4.5.3 Opinions on media market concentrations

In the absence of an assessment or a consultation pursuant to Article 21 EMFA, the Board, upon request of the Commission, shall draw up an opinion on the impact of a media market concentration on media pluralism and editorial independence, where a media market concentration is likely to affect the functioning of the internal market for media services. The Board shall base its opinion on the elements set out in Article 21(2) EMFA. The Board may bring media market concentrations likely to affect the functioning of the internal market for media services to the attention of the Commission.

Following the opinion of the Board, and without prejudice to its powers under the Treaties, the Commission may issue its own opinion on the matter.

Opinions by the Board and, where applicable, by the Commission shall be made publicly available.

#### 2.2.4.6 Transparent and fair allocation of economic resources (Articles 23-24)

##### 2.2.4.6.1 Audience measurement

Audience measurement systems and methodologies shall comply with principles of transparency, impartiality, inclusiveness, proportionality, non-discrimination and verifiability.

Without prejudice to the protection of undertakings' business secrets, providers of proprietary audience measurement systems shall provide, without undue delay and free of costs, to MSPs and advertisers, as well as to third parties authorised by MSPs and advertisers, accurate, detailed, comprehensive, intelligible and up-to-date information on the methodology used by their audience measurement systems. According to Recital 46 EMFA, such information could consist in providing elements such as the size of the sample measured, the definition of the indicators that are measured, the metrics, the measurement



methods and the margin of error as well as the measurement period. This provision shall not affect the Union's data protection and privacy rules.

NRAs shall encourage the drawing up of codes of conduct by providers of audience measurement systems, together with MSPs, their representative organisations and any other interested parties, that are intended to contribute to compliance with the principles referred *supra*, including by promoting independent and transparent audits.

The Commission, assisted by the Board, may issue guidelines on the practical application of the said rules.

The Board shall foster the exchange of best practices related to the deployment of audience measurement systems through a regular dialogue between representatives of the NRAs, representatives of providers of audience measurement systems and other interested parties.

#### 2.2.4.6.2 Allocation of state advertising

Public funds or any other consideration or advantage granted by public authorities to MSPs for the purposes of advertising shall be awarded according to transparent, objective, proportionate and non-discriminatory criteria and through open, proportionate and non-discriminatory procedures.<sup>37</sup>

Public authorities, NRAs, as well as state-owned enterprises or other state-controlled entities at the national or regional level, or local governments of territorial entities of more than 1 million inhabitants, shall make publicly available accurate, comprehensive, intelligible, detailed and yearly information about their advertising expenditure allocated to MSPs, which shall include at least the following details:

- the legal names of MSPs from which advertising services were purchased,
- the total annual amount spent as well as the amounts spent per MSP.

NRAs shall monitor the allocation of state advertising in media markets. In order to assess the accuracy of the information on state advertising, NRAs may request from the entities mentioned *supra* further information, including information on the application of criteria referred to *supra*.

The allocation of state resources to MSPs for the purpose of purchasing goods or services from them other than state advertising shall be subject to the requirements set out *supra*.<sup>38</sup>

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<sup>37</sup> This Article does not affect public procurement rules.

<sup>38</sup> This Article does not affect the application of the State aid rules.

## 2.2.5 Monitoring, evaluation and reporting

### 2.2.5.1 Monitoring exercise

The Commission shall ensure independent monitoring of the internal market for media services, including risks to and progress in its functioning and resilience. The findings of the monitoring exercise shall be subject to consultation with the Board.

The Commission shall define key performance indicators to be used for this monitoring, in consultation with the Board.

The monitoring exercise shall include:

- a detailed analysis of the resilience of the media markets of all member states, including as regards the level of media concentration and risks of foreign information manipulation and interference; according to Recital 50 EMFA, this monitoring should cover the level of cross-border activity and investment, regulatory cooperation and convergence in media regulation, obstacles to the provision of media services, including in a digital environment, as well as transparency and fairness of allocation of economic resources in the internal media market,
- an overview and forward-looking assessment of the resilience of the internal market for media services as a whole,
- an overview of measures taken by MSPs with a view to guaranteeing the independence of individual editorial decisions.

The monitoring shall be carried out annually, and its results shall be made publicly available.

### 2.2.5.2 Evaluation and reporting

Four years after the entry into force of the EMFA at the latest, and every four years thereafter, the Commission shall evaluate the EMFA and report to the European Parliament, the Council and the European Economic and Social Committee.

Upon the Commission's request, member states and the Board shall send relevant information. The Commission shall take into account:

- the positions and findings of the European Parliament, the Council and other relevant bodies or sources,
- outcomes of the relevant discussions carried out in relevant fora,
- relevant documents issued by the Board,
- findings of the monitoring exercise referred to in Article 25.



### 2.2.5.3 Amendments to the AVMSD

The EMFA will introduce the following amendments to the AVMSD:

- Article 30b of Directive 2010/13/EU is deleted,
- References to Article 30b of Directive 2010/13/EU shall be read as references to Article 12 EMF,
- References in Union law to ERGA shall be read as references to the European Board for Media Services.

### 2.2.5.4 Entry into force and application

The EMFA shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union and will apply from six months after the entry into force. However, Articles 7 to 12 and 27 shall apply from three months after the entry into force and Article 19(2) shall apply from 48 months after the entry into force. It will be binding in its entirety and directly applicable in all member states.



## 3 First reactions

The discussion around the EMFA has just started and will involve all EU institutions and stakeholders in the months to come. Certain aspects of the EMFA have already raised some concerns. For example:

- the inclusion of the press in the scope of the regulation, and the non-inclusion of tech companies,
- the limited threshold for transparency obligations regarding state advertising,
- the focus only on news media with regard to media transparency obligations on ownership and financing,
- the lack of media-specific general transparency rules (limited to algorithmic transparency),
- the practical functioning of the so-called “media privilege”,
- the powers of the European Board for Media Services,
- the effective outcome of cooperation between national competition authorities (NCAs) and NRAs in assessing mergers,
- the link between national mergers and Community mergers as to the pluralism test.

This chapter presents first reactions from regulators and industry representatives regarding the EMFA. It also presents some comments and criticisms from academia.

### 3.1 Regulators

On 4 October 2022, ERGA welcomed the objectives of the EMFA and highlighted the importance of securing effective independence and adequate resources for its implementation.<sup>39</sup> ERGA declared sharing the objectives of the Commission particularly with regard to the harmonisation of certain elements of the national media pluralism framework (which should follow, to the extent possible, a principle-based approach), increased regulatory cooperation and convergence, facilitation of the provision of quality media services free from editorial interference, as well as a transparent and fair allocation of financial resources. Furthermore, ERGA welcomed its transformation into the European Board for Media Services.

ERGA also recalled some fundamental elements highlighted in its contribution to the European Commission public consultation.<sup>40</sup> Guaranteeing the Board’s independence is essential for achieving the objectives of EMFA. It is also crucial that the future Board and

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<sup>39</sup> ERGA press release, “ERGA welcomes the objectives of the EMFA and highlights the importance to secure an effective independence and adequate resources for its implementation”, 4 October 2022, <https://erga-online.eu/?p=1243>.

<sup>40</sup> ERGA, “ERGA submits its contribution to the Commission’s public consultation on the European Media Freedom Act (EMFA)”, 07 April 2022, <https://erga-online.eu/?p=1182>.



all its members be equipped with adequate human and financial resources to effectively carry out all new tasks and implement the new rules.

ERGA will analyse the proposal and adopt a common position, with the aim of contributing to the discussions of the co-legislators during the legislative process.

## 3.2 Industry

### 3.2.1 EBU

On 16 September 2022, the European Broadcasting Union (EBU) declared that it was “pleased that the EMFA recognizes, in principle, this vital role of public service media in Europe”.<sup>41</sup> It noted that it will be important during the legislative process to ensure the right balance between single market objectives and national competencies to shape media pluralism and independence, social and cultural issues. Furthermore, the EBU advocated for the following actions:

- ensuring that general interest content is visible and findable online,
- offering clear brand attribution,
- securing an effective recourse in the face of takedowns and suspension of media content by online platforms.

### 3.2.2 ACT

On 16 September 2022, the Association of Commercial Television and Video on Demand Services in Europe (ACT) stated that it supported “the European Commission’s desire to uphold EU media pluralism, independence, and sustainability”.<sup>42</sup>

In its press release, ACT made the following points:

- Undue procedures, applied solely to media companies, are likely to fall short as they ignore the impact of VSPs and more generally VLOPs on media pluralism.
- There is a risk of impacting existing competition frameworks, thereby preventing legitimate consolidation in order to better compete with tech giants.
- Specifying in detailed law new additional procedures on how media companies should operate is not necessary for commercial broadcasters. This should be left

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<sup>41</sup> EBU press release, “European Media Freedom Act: striking the right balance”, 16 September 2022, <https://www.ebu.ch/news/2022/09/european-media-freedom-act>.

<sup>42</sup> ACT press release, “ACT looks to the European Media Freedom Act as a means to balance rights and responsibilities”, 16 September 2022, <https://www.acte.be/publication/act-looks-to-the-european-media-freedom-act-as-a-means-to-balance-rights-responsibilities/>.





to media companies themselves, or independent regulators, but definitely not delegated to legislators in an ambiguous manner.

- Provisions on issues such as audience measurement will need to be properly scoped. All that is really needed in this space is transparency on VSPs and VLOPs.

The ACT asked for a commitment from the European Union to “a liberalisation agenda rather than yet another layer of rules for an already highly regulated sector”. It added that the EMFA should strive to limit regulatory asymmetries and outdated regulatory constraints and bring about a more coherent and balanced media space. The ACT members urged caution with regards to restrictions that impede a well-functioning market for commercial broadcasting, which above all should be further encouraged.

### 3.2.3 Group of journalist, media freedom, and human rights organisations

On 16 September 2022, a group of journalist, media freedom, and human rights organisations<sup>43</sup> welcomed “the European Commission’s initiative to strengthen the free and pluralistic media system and the commitment to protect journalists and editorial independence within the European Union”, while stressing the need for improvements.<sup>44</sup>

According to this group, the EMFA requires the following improvements:

- strengthen efforts to increase transparency in media ownership with clear rules instead of soft-law Recommendations,
- introduce rules governing all financial relations between the state and media and remove the limit on state advertising transparency for over one million inhabitants,
- guarantee the independence of national regulators as well as the independence of the European Board for Media Services,
- expand measures against surveillance of journalists and ensure a general guarantee for the protection of sources.

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<sup>43</sup> Association of European Journalists (AEJ), Civil Liberties Union for Europe (Liberties), Coalition for Creativity (C4C), Committee to Protect Journalists (CPJ), European Centre for Press and Media Freedom (ECPMF), European Federation of Journalists (EFJ), Free Press Unlimited (FPU), Global Forum for Media Development (GFMD), Index on Censorship, International Press Institute (IPI), Media Diversity Institute, Belgium (MDI), OBC Transeuropa (OBCT), Ossigeno.info, Reporters Without Borders (RSF), Society of Journalists, Warsaw, South East Europe Media Organisation (SEEMO), The Daphne Caruana Galizia Foundation, Transparency International EU, World Association Community Radio Broadcasters (AMARC Europe).

<sup>44</sup> EFJ press release, “EFJ welcomes European Media Freedom Act but calls for strengthening”, 16 September 2022, <https://europeanjournalists.org/blog/2022/09/16/efj-welcomes-european-media-act-but-calls-for-strengthening/>.



### 3.2.4 Article 19

On 16 September 2022, the human rights NGO Article 19 declared that the EFMA is “an important step in safeguarding media plurality”,<sup>45</sup> welcoming the EMFA as “a significant step in addressing the growing threats to media freedom in the European Union and promoting media independence and pluralism across member states”.

ARTICLE 19 made the following comments:

- Safeguards introduced via impact assessment of media mergers on media plurality are welcome, but the advisory nature of those provisions (relying on peer pressure from national regulatory authorities, the Board and the Commission) risks creating a toothless mechanism which will not achieve its goals.
- The introduction of basic criteria for the allocation of state advertising is also welcome, but ARTICLE 19 objects to the safeguards only applying to public funds granted by public administrations of territorial entities with more than 1 million inhabitants. Those provisions will cut out a huge percentage of the EU territory. In various countries, only the public administrations of the capital might reach that threshold, leaving out the majority of regional and local territories, and risking making the rule useless in practice.
- ARTICLE 19 welcomes references to “structured” and “regular” dialogue among stakeholders but it remains to be seen how the dialogue will function in practice.
- The scope of protection of journalistic sources and communications is too narrow, there is no reference to proportionality and subsidiarity principles, nor a system for *ex ante* judicial authorisation of surveillance measures.
- Regarding the suspension or restriction of content from “media service providers” on VLOPs, ARTICLE 19 believes that, as a matter of principle, media actors should not be granted special treatment when it comes to content moderation and welcomes the fact that an attempt to exempt the media from the content moderation rules in the Digital Services Act was rejected.
- With regard to the European Board for Media Services’ tackling of disinformation on online media platforms, in line with the EU Code of Practice on Disinformation, ARTICLE 19 considers that the Code’s definition of “disinformation” is overly broad and does not guarantee sufficient protections for free expression. The focus instead should be on providing guidance on how to increase digital media literacy and address the business model of big platforms, among others.
- Provisions around the transparency requirements of media ownership should be strengthened.

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<sup>45</sup> ARTICLE 19 press release, “EU: Media Freedom Act is an important step in safeguarding media plurality”, 16 September 2022, <https://www.article19.org/resources/eu-media-freedom-act/>



## 3.3 Academia

### 3.3.1 Media pluralism

The EMFA has been widely praised by media pluralism researchers as a step forward with certain shortcomings. Elda Brogi regrets the absence of sanctions provided in the document, considers that the scope of measures is at times inadequately designed (for example, the threshold of 1 million inhabitants when assessing the placement of advertisements by local authorities, or providing definitions for “spyware”), and criticises that many key issues (such as the transparency of media ownership) are mostly addressed in the recommendations, not in the regulation itself.<sup>46</sup>

Danielle Borges and Roberta Carlini note the absence of some important items in the EMFA: it does not specifically address “economic threats that have increased in the online ecosystem of the media, in which the resources that are used to finance the media content providers – advertising – are increasingly gathered by the digital intermediaries”. Moreover, it does not deal with public subsidies to the media, “neither calling for them nor addressing the related risks of political interference”. The authors acknowledge that these issues are outside the scope of the EMFA and are the target of other interventions, but they consider nevertheless that “the EMFA provides an opportunity to coordinate legislative and regulatory tools that should not be wasted”.<sup>47</sup>

### 3.3.2 Protection of journalists

According to Dirk Voorhoof, there is “room for improvement and for strengthening the enforcement of the guarantees in order to promote and protect media pluralism, to protect journalists’ rights and to ensure editorial independence from the impact of vested commercial and political interests”.<sup>48</sup> The formulation of Article 4 risks being “a step backwards in the protection of journalistic sources” because it does “not guarantee the level of protection that all EU member states should already respect with regard to the protection of journalists’ sources in application of Article 10 ECHR as developed and applied in the well-established case law of the European Court of Human Rights (ECtHR) on this topic”.<sup>49</sup>

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<sup>46</sup> Brogi E., “Cascading risks to media pluralism and a European approach to tackle them”, 10 October 2022, <https://www.boell.de/en/2022/10/10/cascading-risks-media-pluralism-and-european-approach-tackle-them>.

<sup>47</sup> Borges D., Carlini R., “Media ownership matters. The proposals of the European Media Freedom Act”, 21 October 2022, <https://euidas.eui.eu/2022/10/21/media-ownership-matters-the-proposals-of-the-european-media-freedom-act/>.

<sup>48</sup> Voorhoof D., “European Media Freedom Act and the protection of journalistic sources: still some way to go”, 18 November 2022, <https://inform.org/2022/11/18/european-media-freedom-act-and-the-protection-of-journalistic-sources-still-some-way-to-go-dirk-voorhoof/>.

<sup>49</sup> See also Voorhoof D., “Robust protection of journalistic sources remains a basic condition for press freedom”, 10 October 2002, <https://strasbourgobservers.com/2017/10/10/robust-protection-of-journalistic-sources-remains-a-basic-condition-for-press-freedom/>.



The EMFA's rules regarding spyware do not secure "the guarantees of source protection that should also be upheld in application of Article 10 ECHR in this context (ex ante judicial review, subsidiarity and proportionality)". The EMFA "should create a level of protection against spyware which is an equivalent with the same guarantees as source protection in the light of searches, seizure and (bulk) surveillance. On top of this, the EMFA should, as a minimum, formulate explicitly the specific conditions regarding the protection of journalistic sources under Article 10 ECHR, preferably in Article 4 itself, if not in the Recitals of the EMFA Regulation". Furthermore, the EMFA should also contain such "specific procedures or safeguards to address the examination of electronic data carriers containing (potential) protected information about journalists' sources" and "guarantee a right for journalists and MSPs to use encryption in order to protect their sources and a prohibition for others to create access or circumvent the protection of the encrypted communication of journalists and MSPs".

### 3.3.3 Online services

Joan Barata states that the EMFA's provisions targeting online services and establishing additional obligations and regulatory powers in this field "not only create serious problems of interpretation, and force online service providers to engage in extremely complex assessments, but also establish arbitrary and unjustified differentiations between protected categories of speech".<sup>50</sup> The EMFA "unjustifiably" embraces a limited definition of media services which is in fact neither aligned with applicable international and regional human rights standards nor justified from a communication or a journalistic perspective. This definition could moreover be considered discriminatory, as it has the consequence of "excluding certain forms of media and journalistic activity from important protections contemplated in the draft". Moreover, the EMFA seems to attempt to connect the exercise of editorial responsibility by media content providers with the enjoyment of specific conditions for online content moderation from the side of online platforms. However, this option appears, in Barata's view, "poorly justified so far and based on very vague and problematic criteria". Regarding the editorial independence of media services, this requirement is "almost impossible to assess in a proper and consistent manner by VLOPs when implementing the provisions included in Article 17" because "the editorial independence of both public and private media companies will always be relative" and "it remains unanswered what degree of independence is sufficient for the purposes of the EMFA". Regarding the so-called "media exemption", this proposal mixes editorial responsibility and the role of online platforms in the establishment and enforcement content policies to avoid harm, promote civility and protect users when engaging in conversations and mutual interactions, on the other. Compliance with one aspect does not necessarily guarantee alignment with the other. Barata concludes that the EMFA "must be improved in order to become an instrument fully aligned and consistent with existing

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<sup>50</sup> Barata J., "Protecting Media Content on Social Media Platforms: The European Media Freedom Act's Biased Approach", 25 November 2022, <https://verfassungsblog.de/emfa-dsa/>.



international and regional human rights instruments”. He adds: “In addition, the EMFA must also adapt the regime governing the treatment of media actors and content by VLOPs.”



## 4 Next steps

### 4.1 Council of the EU

The Council of the EU's Audiovisual and Media Working Party<sup>51</sup> examined in detail all the substantive provisions of the EMFA at the meetings on 13 and 25 October and on 8 and 16 November 2022. A Progress report on the EMFA<sup>52</sup> summarises general and specific scrutiny reservations in respect of the EMFA by several delegations. Their reactions are grouped around the following main issues:

- **Legal basis:** While the question of the legal basis has not yet been specifically examined by the Audiovisual and Media Working Party, several member states have expressed interest in understanding the use of Article 114 TFEU as the legal basis for the EMFA, especially the link between the proposal and the internal market, as well as the competence for the Union to legislate on all issues that are covered by the EMFA. A view of the Council Legal Service (CLS) was requested on these issues. The CLS is currently examining the proposed legal basis for the EMFA.
- **Scope and definitions:**
  - **Relation to other legal instruments:** Several member states asked questions about the exact relationship between the relevant provisions of the AVMSD and the EMFA, particularly in the context of Article 1(2) EMFA, where the AVMSD is not mentioned in the list of legislative acts not affected by the EMFA. The EMFA does affect the AVMSD, notably by amending its Article 30b relating to the establishment, composition and tasks of ERGA. The CLS explained that apart from amending Article 30b AVMSD, the EMFA also has an impact on other provisions of the AVMSD in relation to the responsibilities of national regulatory authorities or bodies referred to in Article 30 AVMSD (see notably Articles 7(1), 7(2), 13(1), 13(4) and 14(1) EMFA).
  - **Minimum level of harmonization:** Some member states would prefer not to limit this possibility to the fields mentioned in Article 1(3), but would like member states to be able to adopt more detailed rules in other policy areas addressed by the EMFA, for example state advertising. Some member states also suggested adding “stricter” to “more detailed rules”, since they are of the opinion that detailed rules might not necessarily mean stricter rules.

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<sup>51</sup> <https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/audiovisual-working-party/>.

<sup>52</sup> Regulation establishing the European Media Freedom Act – Progress report, [https://www.consilium.europa.eu/en/documents-publications/public-register/public-register-search/results/?WordsInSubject=&WordsInText=&DocumentNumber=14440%2F22&InterinstitutionalFiles=&DocumentDateFrom=&DocumentDateTo=&MeetingDateFrom=&MeetingDateTo=&DocumentLanguage=EN&OrderBy=DOCUMENT\\_DATE+DESC&ctl00%24ctl00%24cpMain%24cpMain%24btnSubmit=](https://www.consilium.europa.eu/en/documents-publications/public-register/public-register-search/results/?WordsInSubject=&WordsInText=&DocumentNumber=14440%2F22&InterinstitutionalFiles=&DocumentDateFrom=&DocumentDateTo=&MeetingDateFrom=&MeetingDateTo=&DocumentLanguage=EN&OrderBy=DOCUMENT_DATE+DESC&ctl00%24ctl00%24cpMain%24cpMain%24btnSubmit=)



- Editor, editorial decision, editorial responsibility: Several member states asked for clarification about who is covered by the definition of “editor” and whether this concerns only editors-in-chief or also other editors. In the proposal, the definition of “editorial responsibility” refers to the “exercise of effective control both over the selection of the programmes or press publications and over their organisation for the purposes of the provision of a media service”.
- Serious crime: Whereas some member states asked about the selection of criminal offences listed in the definition and considered that it could be expanded, several other member states have raised the issue of subsidiarity given the interaction with national criminal procedure.
- Rights of MSPs: Some member states raised questions about the potential conflict between Article 4(2)(c) EMFA and their respective national criminal law, thereby indicating the need for further internal examination at national level. Several member states emphasised that it is necessary to further clarify the scope of “employees” and “family members” in Article 4(2)(b) and (c) and 4(3) EMFA, because not all of these people are involved in activities related to media content.
- Duties of MSPs providing news and current affairs content: Several member states mentioned the fact that only those MSPs that provide news and current affairs content are covered in particular by Article 6 EMFA, and also sought clarification about which entities qualify as MSPs providing news and current affairs content. With regard to Article 6(3) EMFA member states considered the pros and cons of having an exemption for micro enterprises within the meaning of Article 3 of Directive 2013/34/EU. On the one hand, such an exemption can reduce the administrative burden for micro enterprises but, on the other hand, not having an exemption for micro enterprises would raise the level of transparency regarding ownership, as well as the level of editorial independence, of all MSPs providing news and current affairs content.
- European Board for Media Services: Several member states raised questions about the independence of the Board, in particular in relation to the Commission, in the light of the proposed level of involvement of the Commission in certain cases, including where the decision or opinion of the Board will be taken “in agreement with the Commission”. As regards Article 12 EMFA, several member states suggested that the text should explicitly state that the Board can act on its own initiative.
- Coordination of measures concerning MSPs established outside the Union: member states discussed the practicalities of the coordinated actions among national regulatory authorities and the relationship between Article 16 EMFA and the recent media sanctions imposed by the Council on a different legal basis. Some member states requested further clarifications on the coordinating procedures and the scope of the measures that can be taken. The term “risk of public security and defence” also raised questions and requests for clarifications from some member states.
- Allocation of state advertising: A discussion was held about the administrative burden resulting from this threshold. Several member states expressed the

opinion that, for the sake of increased transparency, the threshold of 1 million inhabitants should be removed altogether or lowered.

## 4.2 European Parliament

At the time of writing (December 2022), the EFMA was in a preparatory phase in the European Parliament. The European Parliament's Committee on Culture and Education has been pre-designated as the committee responsible, with the Committees on Civil Liberties, Justice and Home Affairs (LIBE) and Internal Market and Consumer Protection (IMCO) to give an opinion.<sup>53</sup>

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<sup>53</sup> <https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-european-media-freedom-act>.



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