BRIEFING

Requested by the CULT Committee

European Parliament

Research for CULT Committee -

European Media Freedom Act: Policy Recommendations

Concomitant expertise for legislative report

KEY FINDINGS

Invoking the single market clause as sole legal basis for the EMFA needs to be reflected in detailed explanations how the provisions address actual hindrances to the market and how the new rules would overcome them. Content and details of the provisions should be designed in consideration of Member States' cultural sovereignty. Extracting certain parts of the Proposal into a Directive or revising some of the provisions are possible solutions.

A stricter delineation with other legal acts supplementing the general "without prejudice"-rule is key for legal certainty considering the existing complex legal framework the EMFA is situated in. In particular, relation to the AVMSD should be clarified with a clear priority rule of the latter, as currently the Proposal only addresses the amendment to the AVMSD.

Since definitions are key elements deciding on scope and impact of the rules, these need to be precise and complete. In that regard, additional core notions such as "news and current affairs" or "editorial independence" should be addressed in order to be more exact about the distinction line between providers covered by the EMFA and other content providers.

As the EMFA Proposal is based on the importance of fundamental rights and freedoms, it is important to underline whether the EMFA creates new "rights" or they only reiterate existing guarantees. Equally important is clarity about the legal consequences attached to the provisions in order to avoid substantive rules without practical impact. For the supervision in this area, independence is of utmost importance, which calls for a review of the construction of the cooperation structures between the European Board for Media Services, its members and the European Commission. For newly inserted powers of the Board or the regulatory authorities concerning cross-border issues it should be considered to lay down more details on which types of coordination measures are to be realised.

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PE 733.130 - May 2023

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The following policy recommendations supplement the background analysis that was prepared for the European Parliament's Committee on Culture and Education (CULT committee) on the "European Media Freedom Act (EMFA) – Background Analysis"[1]. The Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU ('EMFA')[2] was published on 16 September 2022 and accompanied by the Commission Recommendation (EU) 2022/1634 on internal safeguards for editorial independence and ownership transparency in the media sector[3]. It is now being debated by the co-legislators in the legislative procedure. The Proposal covers a wide spectrum of rules in very different areas relating to the media sector, addressing a number of different risks to media freedom and media pluralism in the EU's single market. It may therefore not only have a significant impact on the media sector, but also concerns an issue that is strongly rooted in its cultural dimension, as addressed in Art. 167 TFEU[4], and in view of Member States' cultural sovereignty has thus so far been subject of national rules only. Irrespective of the wide scope of the Proposal, it is in its core linked to the competences of the CULT Committee which is, amongst others, responsible for "information and media policy" and "audiovisual policy". The approach taken so far by the CULT Committee in discussing the EMFA Proposal accordingly emphasises cultural policy aspects and the question of limited powers of the EU in this area. The recently published draft report of the Rapporteur[5] is to be welcomed in that regard as it underlines the need for a cautious and precise approach to regulating the media sector because of its importance for the rule of law and democracy, whereby freedom of the media, freedom of opinion and freedom of information are not only significant objectives to aim for, but also fundamental rights that can only be limited in a proportionate manner.

1. Clarifying the legal basis and choice of instrument

The Background Analysis has shown that invoking the single market harmonization clause of Art. 114 TFEU as sole legal basis leads to consequences for the text. As Art. 114 TFEU is an unspecific harmonization provision – in contrast e.g. to the services-specific provision used for the Audiovisual Media Services Directive (AVMSD)[6] which limits the choice of instrument to Directives – it is important to clearly demonstrate the need for harmonization. Therefore, the aim of the Proposal needs to be the removal of obstacles to the single market resulting from diverging national frameworks and not the removal of the diverging rules per se. As the Proposal does not only address the economic aspects of providing media services, but also the cultural dimension to a significant extent, each of the sections of the Proposal needs to be reconsidered in light of the need to have a single market relevance overall.

Parts of the Proposal are not clear in the objective they pursue or the impact the provisions would have (see also below, point 4.), others focus only on safeguarding media pluralism and media

[1] Cole, M. D., Etteldorf, C., 2023, *Research for CULT Committee – European Media Freedom Act (EMFA)*, European Parliament, Policy Department for Structural and Cohesion Policies, Brussels, 60 p.

[2] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU (COM/2022/457).

[3] Commission Recommendation (EU) 2022/1634 of 16 September 2022 on internal safeguards for editorial independence and ownership transparency in the media sector (C/2022/6536), OJ L 245, 22.9.2022, p. 56–65.

[4] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2016/C202/1), OJ C 202, 7.6.2016, p. 47-200.

[5] Committee on Culture and Education, Draft Report on the proposal for a regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU (COM(2022)0457 – C9-0309/2022 – 2022/0277(COD)), 31.3.2023.

[6] 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), OJ L 95, 15.4.2010, p. 1–24, as last amended by Directive (EU) 2018/1808 (OJ L 303, 28.11.2018, p. 69–92).

freedom while not demonstrating that differing rules on this have a negative impact for the single market. This applies, for example, to the substantive rules, in particular Articles 4(2), 5, 6, 19, 21, 23(2), 24(2), which in their current scope and wording potentially also have a harmonising effect for purely domestic affairs such as concerning media at local or regional level or, contrary to the intention of the Amsterdam Protocol, core structures of public service media. In addition, there is a lack of clarifying the relationship to existing national systems (even where they are already well-functioning in view of the aims of the Proposal) or the regulatory framework of the EU itself. Moreover, the impact on the cultural dimension is to be expected from the competences given to the Commission to further specify certain elements that are not fully developed in the EMFA itself, such as by guidelines or opinions despite their legally non-binding character. Such powers would even concern the scope of application of the AVMSD.

In using the instrument of a Regulation there is certain expectancy that a higher level of harmonization on EU level needs to be achieved in contrast to the choice of only a Directive. However, the EMFA is in actual fact limited to a very basic minimum harmonization level of certain aspects. In other aspects, the Member States' margin of manoeuvre is conversely restricted although those provisions have a clear cultural policy dimension. In order to better address this tension between harmonisation and Member States' diversity, the AVMSD, for example, is construed as a Directive to leave a margin to the Member States. Where the Member States are limited in the way they would implement the EMFA rules, the rules should be carefully considered with regard to their compatibility with Art. 167(4) TFEU.

To address this tension, for some of the provisions, their scope could be reduced if not moved out completely from the Proposal for a Regulation. An alternative way to proceed would be to identify those provisions that are critical in this regard and anyway are only aiming to set a basic standard to be filled by the Member States. These could accordingly be extracted to a Directive by splitting the original Proposal into a Regulation, retaining the majority of the provisions closely linked to the economic dimension of the single market, and a Directive with the other provisions for which there is the same binding effect except that they require a transposition by the Member States thereby enabling an alignment with their national media laws. Despite the instrument(s) finally chosen, the provisions have to be made more precise in order to allow a clear determination of their scope of application and the leeway remaining for the Member States. Equally important is to give legal certainty concerning the (potential) consequences of the provisions including the enforcement dimension for both Member States and their existing national legislation as well as the addressees of the EMFA.

2. Stricter delineation with other legal acts

The need for clarification of the Proposal concerns also the interplay between the EMFA and other legal acts and regulatory frameworks, taking into account the twofold nature of media as a cultural and economic asset. The EMFA is one of many initiatives created in the context of the European Democracy Action Plan, but it is embedded in an already complex legislative network as it touches on areas of consumer protection, competition, antitrust, data protection, platform and (audiovisual) media law. The mere "without prejudice"-rule as currently envisaged needs to be supplemented by clear(er) priority rules in or for those sections of the Proposal for which tensions with existing rules on EU or national level are foreseeable. One of these examples is the open question how Art. 21 on media concentration assessments relates to media pluralism safeguarding instruments of the Member States (adopted on the basis of Art. 21(4) of the Merger Regulation[7]), because of the

[7] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p. 1–22.

possibly differing scope to which type of mergers existing or mandatory future rules would apply. Since the EMFA also refers to platforms in its scope of application, in particular in Art. 17, the relationship to the Digital Services Act (DSA)[8], which itself is not yet fully applicable and also partly dependent on national implementing rules, is essential. Besides not developing sufficiently the position of the (very large online) platforms addressed by the provision and the media service providers affected by decisions of these platforms in contentious cases, Art. 17 does not expand on whether the different approach to moderating (or not) content of protected providers impacts the liability privileges under the DSA. Therefore, the "without prejudice"-rule would need additional explanations for this concrete setting to create more legal certainty.

Importantly, a clarification of the relationship between EMFA and the AVMSD – as core of European media law - is needed. Although the AVMSD is not only addressed but actually amended by the EMFA in regard to institutional structures and therefore a general "without prejudice"-rule would be misplaced, there are connections in other sections of the EMFA that necessitate an explanation how the relationship is to be understood in terms of priority. In several places, the mechanisms in the EMFA concern provisions that are established by the AVMSD such as, for example, the powers of the Commission to issue guidelines by Art. 15(2) which relate to the rules of Art. 5(2) and 7a AVMSD. Other parts have a *de facto* interplay with the AVMSD, e.g. Art. 4(2) lit. a) instructing regulatory authorities which in turn have assigned powers under the AVMSD that should certainly not be regarded as a collision with the prohibition to indirectly interfere with editorial policies or decisions. If the aim of these sections is to change or impact the rules of the AVMSD – even if the goal is to address possibly lacking implementation or enforcement by the Member States in an effective way –, this should be addressed by an amendment or further revision of the AVMSD. In that way, at the current stage, the results of the agreement reached in the last revision of the AVMSD 2018 would be preserved. Therefore, the EMFA should at least clearly state that the AVMSD remains unaffected in the non-amended parts, and, in case of conflict, takes precedence over the EMFA in order to avoid the impression that a more recently adopted Regulation has priority before an earlier passed Directive and its national implementations.

In order not to add further layers of complexity, the EMFA should ensure that either there are no overlaps with other legal acts in practical application or that there are clearly-cut distinctions for the application of each of the "neighbouring" legal acts. Recital-based clarifications are an alternative, but they should be linked to priority rules foreseen in the text of the Regulation. Potentially, also an interpretative statement in guidelines of the Commission on the interplay of the different legal acts could be helpful but would not be legally binding. Another issue is that Recommendation (EU) 2022/1634 accompanying the EMFA Proposal contains (legally non-binding) concretisations of rules which are envisaged by the EMFA. According to the Recommendation its "rules" shall cease to apply after entry into force of the EMFA in case of overlap, but the actual detail of the Recommendation provisions are not reflected in the (then legally binding) EMFA.

3. Reviewing the definitions for further precision

The aforementioned lack of precision of the EMFA should already be addressed within the definitions as they are key elements deciding on scope and impact of the rules.

The Proposal includes an important list of definitions, partly these are new and partly they refer to existing definitions in other legal acts. However, the list of definitions as well as their formulations should be reviewed in order to make sure that there is either a unified use – where this is intended – without ambiguity, or – if a divergence is intended – an explicit mention of a narrower, broader or

[8] 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, OJ L 277, 27.10.2022, p. 1–102.

different understanding. The basic definitions have significant impact on the scope and impact of the substantive rules of the EMFA and should therefore allow for a clear application oriented towards a clear objective. There are examples for key terms that are not defined in the catalogue of Art. 2 such as "recipients of media services" or "editorial independence". Other terms are used that are defined elsewhere without an explicit reference being made to the other legislative act, such as "online intermediation service". Also, the notion of "news and current affairs", due to its relevance in the context of some core provisions of the EMFA could be either included with a definition or with some further explanation what such type of content entails and whether it can only be content coming from certain categories of providers of editorial content.

One problem of the EMFA provisions – that is due to the objective of the Proposal – is that they address in many ways the traditional concept of media entities, with the novelty for an EU secondary legislative act that this applies for different categories of media. Therefore, the definition of media service provider is detailed and addresses the professional context of media as covered by the Proposal. However, because this definition is at the centre of the Proposal and because it takes a narrower approach than addressing any type of content provider contributing to or being relevant for opinion forming in democratic systems, it should be examined further whether it can be made more exact where the distinction line is between providers covered by the EMFA and other content providers.

When reviewing the definitions and notions in order to reach more precision, one example to consider is the term "editorial decision", which is used in a differing context in Art. 4 and Art. 6. Such review should be combined with another reflection on the material scope of application of individual provisions, especially these two provisions of Art. 4 and Art. 6, but also, for another example, Art. 17, for each of which not only the addressees should be clear but also their legal obligations and the consequence(s) in case of non-compliance.

4. Being mindful of practical effects and effectiveness of substantive provisions

As highlighted in detail in the background analysis, the EMFA Proposal is based on the importance of fundamental rights and freedoms in the context of providing media services. Therefore, some provisions explicitly address elements that already derive directly from the level of protection that is guaranteed by the jurisprudence of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) in relation to the freedom of expression and freedom(s) of the media. In order to avoid a potential lowering of the level of protection by addressing some of the guarantees in the wording of a secondary legislative act (Recital 12 explicitly addresses this by acknowledging that none of the provisions should affect this protection), it is important to ensure that the way e.g. Art. 4(2) addresses the protection of journalistic work is in line with the case law. In addition, the inclusion of Art. 3 should be reconsidered if it is not clarified what additional benefit is to be provided by the norm in addition to the fundamental rights guarantees already existing. Since Art. 3 is formulated as a "right" of recipients of media services to have access to a certain type of media and diversity, it could be misunderstood as providing additional legal claims to individuals, even though the Recitals emphasise that there is no obligations on the side of the media service providers as a counterpart to this "right". The legal quality of the right should be clarified or – if it is only a restatement of the objective pursued with the EMFA overall – its positioning in connection with the objectives mentioned in Art. 1 should be reconsidered.

Art. 5(1) is also unclear when it comes to the practical effects. In view of the allocation of competences between EU and Member States in regard to public service media, as spelt out also in the Amsterdam Protocol, the EU cannot interfere in the design of the public service remit, so it is

questionable from the outset whether the first paragraph of Art. 5 should have a place in a Regulation at all. At least it would be necessary to consider who would be addressed by the provision, whether the providers themselves – although their obligations stem from what the Member States' framework has imposed – or rather the Member States as an orientation to what should be included in a public service remit. In contrast to the first paragraph, the other elements of Art. 5 include concrete rules on structural safeguards for public service media providers, some of which (reflexively) affect the structural decisions on how these providers are designed. This, again, has remained so far on national level not least because of the (typically) Member State-internal dimension of these providers. If Art. 5 is retained in the Regulation, the margin of manoeuvre for the Member States in view of the guarantees provided by the Amsterdam Protocol and the open question of impact on the single market needs to be reinforced. At the same time the oversight question and what legal consequences are attached to Art. 5 would have to be addressed if the provision is included as a framework for the Member States (and, as mentioned, not the providers directly). When it comes to creating basic standards which characterize public service media, this would be another example of a provision that would typically be rather placed in a Directive that automatically allows Member States in the transposition to consider specificities in their national frameworks which in this case can even derive from constitutional obligations.

Striving for a clarification of the position of reliable media service providers in relation to very large online platforms is a welcome and necessary point that was left open in the final compromise of the DSA. However, the way Art. 17 deals with the question on how content by media services providers has to be treated by the platforms, does not avoid the risk that the position of the former is not enhanced significantly in comparison to the status quo. Therefore, the legal consequence of Art. 17 should be stated and the provision made more robust. In addition, beyond the possibility to detail the formal aspects of the procedure in Commission guidelines, further clarifying the category of providers that are to be protected should be considered in order to avoid a potentially negative consequence of the provision. As a mere self-declaration of being a provider suffices to obtain protection, there is a possibility that harmful content could be placed under a protective umbrella if non-diligent providers or media service providers acting in bad faith disseminate such material. For the moment, Art. 17 relies on the self-regulation by the platforms which contrasts with other much more detailed and concrete obligations in the EMFA as well as in other Regulations such as the DSA.

5. Rethinking the details of supervision and enforcement

The background analysis explains extensively what has been previously highlighted with regard to challenges under the revised AVMSD[9]: strengthening enforcement and cooperation between competent regulatory authorities of the Member States is an important concern especially in the cross-border landscape of the single market for media services and content. Since the regulation of media services as such and in the EMFA specifically is concerned, the sensitivity and the particularities of this sector have to be duly ensured. This relates especially to guaranteeing that supervision is conducted by independent actors. The independent Board proposed by the EMFA, made up of national regulatory authorities and bodies empowered with different powers to address cross-border issues in a cooperative manner, is an important step forward. Detailing the need of this cooperation in a binding legal act and thereby furthering the level achieved by the cooperation under the Memorandum of Understanding that the current cooperation body, ERGA, has already created, will stabilize the more effective enforcement in this cooperation. However, the independence of this Board needs to retain the independence of each of its members that has to be

[9] Cole, M. D., Etteldorf, C., 2022Cole/Etteldorf, *Research for CULT Committee - Implementation of the revised Audiovisual Media Services Directive - Background Analysis*, p. 45 et seq.

guaranteed on national level and should, therefore, also be extended vis-à-vis the Commission. The enhanced powers and relevance of the Board question whether the construction with a secretariat provided by the Commission, and more importantly whether the dependency of certain of its activities on Commission support is appropriate in this regard.

In addition, it should be reconsidered whether the powers of the Board and the competent national regulatory authorities are sufficient to achieve the objectives of the EMFA. In view of the reliance on the national regulatory authorities as set up by the Member States laws, it seems obvious on first view that the EMFA does not assign specific enforcement powers to the authorities or the Board. This allows for a careful consideration in national frameworks depending on the differing national traditions which bodies should be given powers in relation to the different types of media service providers. On second view, however, the need for a link of the substantive obligations of the providers with the enforcement powers is important, especially where the legal consequence of specific provisions would otherwise be unclear.

The most important example of this is Art. 16. Although it specifically addresses for good reasons the problems that have been identified in the enforcement of rights against non-EU offers in the recent past, the solution is only partly satisfactory because of the lack of enforcement guarantees. Consequently, the need for addressing this issue in regard to audiovisual media services providers should be done in the context of the AVMSD where monitoring and enforcement powers are more clearly spelt out. Alternatively, as Art. 16 introduces a new field of activity for cooperation between regulatory authorities of the Member States in a cross-border setting concerning providers not established in the Union - and it does so because the dimension of the potential risks and dangers stemming from such providers span across the Member States or are even EU-wide -, the enforcement requirement should also be more explicit. At least a further clarification of the kind of coordination measures that have to be taken should be laid down in a binding manner in order to reach a more satisfactory practical effectiveness.

Further information

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IP/B/CULT/IC/2023-004
Print ISBN 978-92-848-0584-6 | doi:10.2861/ 88276 | QA-04-23-486-EN-C
PDF ISBN 978-92-848-0583-9 | doi:10.2861/ 69760 | QA-04-23-486-EN-N